Case No. 20-50407

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

TEXAS DEMOCRATIC PARTY; GILBERTO HINOJOSA, CHAIR OF THE TEXAS DEMOCRATIC PARTY; 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

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

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Counsel for Amici Veterans

Introduction

The amici identified below are veterans – former officers and enlisted men – who support the right of veterans under age 65 to vote by mail on the same terms as veterans 65 and older and service members on active duty overseas. In accordance with Fed. R. App. P. 29(a)(2), the amici request leave to file a brief of amicus curiae. This motion is filed pursuant to this Court's order of May 22, 2020 providing that "[e]xcept for new developments or extenuating circumstances, any further submissions by the parties or potential amici curiae, regarding the motion for stay pending appeal, are to be filed by May 27." Ex. A.

Counsel for the amici conferred with counsel for the parties and were advised that the Defendants-Appellants do not consent to the filing of this brief because the Defendants-Appellants already have filed their reply brief on the stay issue. Ex. B. The amici observe, however, that the referenced reply brief was filed on May 22—the same day this Court issued its order granting the motions of Dana DeBeauvoir and Harris County for leave to file amicus briefs and instructing other potential amicus curiae to file "by May 27." Accordingly, amici understand that the timing of this filing is not a barrier to their motion for leave.

In accordance with Fed. R. App. P. 29(a)(3), the amici set forth their interest and the reasons their views are desirable and relevant to the disposition of the case. The proposed brief accompanies this motion as an attachment.

Identity and Interest of Amici

As noted, the amici are veterans who support the right of their fellow veterans under age 65 to vote by mail on the same terms as veterans age 65 and older. According to the Department of Veterans Affairs, by the date of the 2020 election there will be 1,552,000 Texas veterans and 926,000 of them will be under age 65.[1] Accordingly, the rights of nearly 1 million Texas veterans are affected by the preliminary injunction at issue in this appeal. Amici file this brief out of respect for those veterans and to protect their right to vote.

Admiral Charles S. Abbot, retired 4-star, was Deputy Commander, European Command (1998-2000) and Commander, U. S. 6th Fleet (1996-98).

William J. Boatman served as a Combat Corpsman (medic) with the Marines in Vietnam. Classified by the VA as 100% disabled due to Post-Traumatic Stress Disorder and Agent Orange exposure, he is Texas Chair for PTSD Education and Outreach for the Vietnam Veterans of America.

General Wesley K. Clark, retired 4-star, was wounded in action leading an infantry company in Vietnam. He served as Supreme Allied Commander, Europe (1997-2000) and Commander-in-Chief, U. S. Pacific Fleet (1996-1999).

[1] Dep't of Veterans Affairs, National Center for Veterans Analysis and Statistics, State Summary Texas, (as of September 30, 2017), https://www.va.gov/vetdata/docs/SpecialReports/State_Summaries_Texas.pdf

Donald P. Dorsey of Port Neches, Texas enlisted at 22 in the Marine Corps and served as a squad leader running assassination and reconnaissance missions in Vietnam. Classified by the VA as 100% disabled due to PTSD, he is President of the Texas Association of Vietnam Veterans and an advocate who helped achieve national settlement for veterans suffering the debilitating effects of Agent Orange.

Hon. Joe R. Reeder graduated from West Point in 1970 and was a Ranger in the U.S. Army's 82nd Airborne Division. He later served as the 14th Undersecretary of the Army from 1993 to 1997, in which capacity he was responsible for long range planning, material requirements, readiness, acquisition reform, infrastructure reduction and financial management of the Army. A graduate of the University of Texas School of Law, on a pro bono basis he helps veterans inform courts on issues affecting military institutions and active duty and retired personnel.

Veterans are afflicted by a unique array of physical and mental challenges that may prevent them from voting in person or may expose them to risks if they do so. Whether these veterans under age 65 will be permitted to vote by mail, avoiding the risks to their health and well-being that would inescapably follow from congregating in large groups to vote in person, is a matter of substantial importance to every man and woman who has served in our nation's armed forces. The proposed amicus brief is confined to this one salient point: there is no constitutionally defensible basis to distinguish among these veterans (or any Texas voter) on the basis of age.

Conclusion

The proposed amici request that this Court grant leave to file their brief of amici curiae and direct the clerk to file the brief.

Respectfully submitted,

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Attorneys for Amicus Curiae, Veterans Adm. Charles S. Abbot, William J. Boatman, Gen. Wesley K. Clark, Donald P. Dorsey, And Hon. Joe R. Reeder

CERTIFICATE OF ELECTRONIC COMPLIANCE

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

/s/ *Richard Warren Mithoff*
RICHARD WARREN MITHOFF

CERTIFICATE OF COMPLIANCE

I certify that this document complies with (1) the type-volume limitation set forth in Federal Rule of Appellate Procedure 27(d)(2)(A) because it contains 761 words, excluding the parts exempted by rule; (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 for Mac (the same program used to calculate the word count).

/s/ *Richard Warren Mithoff*
RICHARD WARREN MITHOFF

CERTIFICATE OF CONFERENCE

I certify that I conferred with counsel for Defendants-Appellants and Defendants-Appellants oppose this motion.

/s/ *Richard Warren Mithoff*
RICHARD WARREN MITHOFF

CERTIFICATE OF SERVICE

I hereby certify that on May 27, 2020, a copy of the foregoing motion was filed electronically with the Clerk of the Court using the Court's ECF System. Notice of this filing will be sent electronically by operation of the Court's electronic filing system to all counsel of record as follows:

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Exhibit A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 20-50407

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

Plaintiffs–Appellees,

versus

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

O R D E R :

IT IS ORDERED that the motion of Dana Debeauvoir, the Travis County Clerk, for leave to file a brief as *amicus curiae* in support of the appellees' opposition to the appellants' motion for stay pending appeal is GRANTED.

IT IS FURTHER ORDERED that the motion of Harris County for leave to file a brief as *amicus curiae* in support of the appellees' opposition to the

appellants' motion for stay pending appeal is GRANTED.

Except for new developments or extenuating circumstances, any further submissions by the parties or potential *amici curiae*, regarding the motion for stay pending appeal, are to be filed by May 27.

/s/ Jerry E. Smith
JERRY E. SMITH
United States Circuit Judge

Exhibit B

From: "Hawkins, Kyle" <Kyle.Hawkins@oag.texas.gov>
Date: May 27, 2020 at 10:59:37 AM CDT
To: Richard Mithoff <RMithoff@mithofflaw.com>
Cc: "Pettit, Lanora" <Lanora.Pettit@oag.texas.gov>
Subject: RE: Case No. 20-50407

Because we have already filed our reply brief and therefore would have no opportunity to respond to any arguments you raise, we oppose as untimely any further amicus briefing by private parties.

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Solicitor General of Texas
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-----Original Message-----
From: Richard Mithoff <RMithoff@mithofflaw.com>
Sent: Wednesday, May 27, 2020 10:29 AM
To: Hawkins, Kyle <Kyle.Hawkins@oag.texas.gov>
Subject: Case No. 20-50407

Kyle, I am representing a group of veterans who wish to file an amicus brief in the above-referenced matter. They are:
Adm. Charles S. Abbot
William J. Boatman
Gen. Wesley K. Clark
Donald P. Dorsey
Hon. Joe R. Reeder

Please advise if you oppose our filing of an amicus brief in their behalf.

Thanks very much.

Richard Warren Mithoff

Sent from my iPhone

Case No. 20-50407

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

TEXAS DEMOCRATIC PARTY; GILBERTO HINOJOSA, CHAIR OF THE TEXAS DEMOCRATIC PARTY; 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 VETERANS ADM. CHARLES S. ABBOT, WILLIAM J. BOATMAN, GEN. WESLEY K. CLARK, DONALD P. DORSEY, AND HON. JOE R. REEDER SUPPORTING DENIAL OF STAY

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IDENTITY AND INTERESTS OF AMICI CURIAE VETERANS

Amici are veterans—former officers and enlisted men—who strongly support the right of all veterans, including those under age 65, to vote by mail on the same terms as veterans 65 and older and service members on active duty overseas. Amici view this as a non-partisan issue. Every man and woman who serves our nation deserves the right to be treated equally in exercising the constitutional right to vote.

Admiral Charles S. Abbot, retired 4-star, was Deputy Commander, European Command (1998-2000) and Commander, U. S. 6th Fleet (1996-1998). He served 16 years (2003-2019) under three Presidents as President and CEO of Navy-Marine Corps Relief Society, the Department of the Navy's Military Charity whose mission is the health and safety of sailors and Marines.

William J. Boatman served as a Combat Corpsman (medic) with the Marines in Vietnam. Classified by the Veterans Administration as 100% disabled due to Post-Traumatic Stress Disorder ("PTSD") and Agent Orange exposure, he is Texas Chair for PTSD Education and Outreach for the Vietnam Veterans of America.

General Wesley K. Clark, retired 4-star, was wounded in action leading an infantry company in Vietnam. He served as Supreme Allied Commander, Europe (1997-2000) and Commander-in-Chief, U. S. Southern Command (1996-1999).

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Hon. Joe R. Reeder graduated from West Point in 1970 and was a Ranger in the U.S. Army's 82nd Airborne Division. He later served as the 14th Undersecretary of the Army from 1993 to 1997. He worked closely with the Army Surgeon General and Assistant Secretary of Defense for Health Affairs on PTSD. As Chairman of the Panama Canal, he was deeply involved in protecting military and Canal employees from the Dengue virus, carried by the same mosquito species that killed tens of thousands with yellow fever in the building of the Canal. A University of Texas Law School graduate, as a public service he has helped veterans inform courts on issues affecting active duty and retired military and their families.

TEXAS VETERANS UNDER AGE 65

Amici file this brief out of respect for nearly 1 million Texas veterans who are affected by the preliminary injunction at issue in this appeal. The U.S. Department of Veterans Affairs projects that as of September 30, 2020, there will be 1,552,000

Texas veterans and 926,000 of them will be under age 65.[1] The vast majority of veterans under 65 served in "Gulf War I" (pre 9/11) or in "Gulf War II" (post 9/11).[2]

Younger veterans include many servicemen and servicewomen who suffered combat zone injuries and other exposures that compromise their immune systems, making in-person voting especially dangerous to their health.

Many Gulf War I veterans breathed air poisoned by the oil field fires set by Saddam Hussein's army as it retreated from Kuwait, and by the chemicals employed to suppress those fires.[3] These emissions have documented effects on the health and well-being of the exposed veterans.[4]

Likewise, many Gulf War II veterans breathed air poisoned from burn pits destroying ammunition containing depleted uranium and other toxic substances.[5] While research is ongoing, these emissions appear to have long-term effects on the health and well-being of the exposed veterans.[6]

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[1] DEP'T OF VETERANS AFFAIRS, NATIONAL CENTER FOR VETERAN ANALYSIS AND STATISTICS, STATE SUMMARY TEXAS (Sept. 30, 2017), https://www.va.gov/vetdata/docs/SpecialReports/State_Summaries_Texas.pdf.

[2] TEXAS WORKFORCE INVESTMENT COUNCIL, VETERANS IN TEXAS: A DEMOGRAPHIC STUDY 15 (rev. 2019), https://gov.texas.gov/uploads/files/organization/twic/ Veterans-in-Texas-2019.pdf.

[3] RESEARCH ADVISORY COMMITTEE ON GULF WAR VETERANS' ILLNESSES, GULF WAR ILLNESS AND THE HEALTH OF GULF WAR VETERANS: SCIENTIFIC FINDINGS AND RECOMMENDATIONS 75–76 (2008).

[4] *Id.* at 79–83.

[5] *Long-Term Health Consequences of Exposure to Burn Pits in Iraq and Afghanistan*, 80 MILITARY MEDICINE 601, 601 (2015), https://doi.org/10.7205/MILMED-D-15-00039.

[6] *Id.* at 601–603 (concluding data suggests broad exposure to burn pit emissions may be associated with long term health effects and recommending further study).

Finally, many veterans, young and old, suffer from post-traumatic stress disorder brought on or aggravated by the tension of living under unremitting threat of ambush and improvised explosive devices as well as being under fire.[7] PTSD is associated with adverse physical health conditions, including known risk factors for COVID-19 like cardiovascular disease.[8]

The question Amici focus on is whether veterans under age 65 will be permitted to vote by mail, avoiding the inevitable risks to their health and well-being that would result from being forced to congregate to vote in person. This is a matter of substantial importance to every man and woman who has served in our nation's armed forces.

No party's counsel authored any part of this brief or contributed any money to fund this brief, nor has any person (aside from the undersigned counsel) funded the preparation and submission of this brief. *See* Fed. R. App. P. 29(a)(4)(E).

[7] RAND CENTER FOR MILITARY HEALTH POLICY RESEARCH, INVISIBLE WOUNDS OF WAR: PSYCHOLOGICAL AND COGNITIVE INJURIES, THEIR CONSEQUENCES, AND SERVICES TO ASSIST RECOVERY 36. 42–43 (Terri Tanielian & Lisa H. Jaycox eds., 2008), https://www.rand.org/pubs/monographs/MG720.html.

[8] A.L. Ryder et al., *PTSD and Physical Health*, 20 CURR. PSYCHIATRY REP. 116 (2018), https://doi.org/10.1007/s11920-018-0977-9.

INTRODUCTION

The district court's preliminary injunction authorizes veterans (and all other Texas voters) under age 65 to vote by mail on the same terms as all Texas voters 65 and older. It rests on the conclusion that, under the extraordinary circumstances of the pandemic, refusing to allow voters under age 65 to vote by mail on the same terms as older voters unreasonably burdens their right to vote.

That conclusion is amply supported. As the frontline medical professionals' brief explains in detail, forcing a voter to vote in person or not at all in the July run-off and November general election imposes serious health burdens on the right to vote. Amici are especially concerned about the burden imposed on their fellow veterans under age 65 whose service to our country has placed them in high-risk categories, making voting in person especially perilous. As discussed in the preceding section, there are nearly 1 million Texas veterans under 65. Like veterans age 65 and older, many suffer from PTSD and from combat zone exposures that have damaged their immune systems.

Established principles of constitutional law prohibit forcing them to choose between risking their health or losing their right to vote when older veterans are not required to make that same choice. Accordingly, the preliminary injunction should not be disturbed and the administrative stay should be dissolved.

ARGUMENT

I. There is no constitutionally acceptable reason veterans under 65 must risk their health to vote, while veterans 65 and over can vote by mail.

The Veterans Amici do not wish to duplicate the arguments set forth in the briefs of the litigants. We hope our unique perspective brings into sharper focus the constitutional infirmity of the State's attempt to discriminate between voters over and under 65.

Veterans 65 and over may elect to vote by mail, whether based on service injury or condition or lack of immunity to COVID-19 or for any other reason. Texas law affords them that right without any second-guessing by the State.

In contrast, veterans under 65 must request a ballot based on their judgment that they have a sickness or physical condition that prevents them from voting in person without a likelihood of injury to their health. State law provides no clear answer as to which veterans do, and which do not, have such conditions.

Specifically, the Texas Supreme Court has just this evening issued opinions that make one thing clear: county clerks are not empowered to deny any vote by mail requests that check the disability box. But those opinions leave unclear, and dependent on each individual's own facts and circumstances, which voters do, and which do not, have sicknesses or conditions or combinations of sicknesses and conditions that comply with the statute.

Thus, veterans under 65 cannot know for sure whether or not they are entitled to vote by mail. That means every younger veteran faces a dilemma no older veteran faces. Each younger veteran must choose whether to risk health by voting in person, or risk legal consequences by requesting a mail ballot.

A. The State is unlikely to prevail on the merits of its appeal defending the disparate treatment of voters based on age.

To demonstrate that it is likely to prevail on the merits of its appeal from the preliminary injunction, the State must show that such statutory discrimination against voters under 65 as to voting by mail is "narrowly drawn to advance a state interest of compelling importance."[9]

The State suggests that the state interest of compelling importance is greater potential for fraud in voting by mail instead of in person. The litigants, noting that most states allow all voters to vote by mail without having to give any excuse, urge that the State's stated concern is a pretext.

Without wading into those partisan waters, Amici note that discrimination between voters under and over 65 is not narrowly drawn to prevent fraud in voting. The concern applies equally to voters over 65, but the State considers its electoral system secure enough to ensure election integrity as to those voters over 65 who

[9] *Burdick v. Takushi*, 504 U.S. 428, 434 (1992).

choose to vote by mail. If so, the State's electoral system is secure enough to ensure election integrity as to voters under 65.

There is no constitutional basis for the distinction. To bring the infirmity into sharper focus, consider veterans of different ages but with similar health conditions.

Why should every Vietnam War veteran be free to vote by mail once he has reached 65, but none the year before, unless he meets the disputed standard? How is that distinction narrowly drawn to prevent voter fraud?

Why should some Gulf War veterans be able to vote by mail, but comrades in arms may or may not be, given the vagaries of the state law interpretation dispute? How is that distinction narrowly drawn to prevent voter fraud?

Why should a veteran of the war in Afghanistan who is under 65 have to decide whether or not to risk prosecution if he files a vote by mail request, because he does not know whether or not his exposure to depleted uranium would satisfy the Attorney General? How is that distinction narrowly drawn to prevent voter fraud?

Amici respectfully submit that veterans who risked their lives in the Persian Gulf cannot be treated differently from those who fought in the European or Pacific theaters in World War II, on the Korean Peninsula, in Vietnam, or anywhere else our nation has sent its sons and daughters. Disparate treatment is abhorrent in every setting. Its consequences are especially stark in the context of men and women who have worn the same uniform at different times or with different health consequences.

The Veterans Amici respectfully suggest the following principle is "simple enough:"[10] Concerns about fraud in voting by mail must be applied on neutral bases to all voters regardless of whether they are over 65 or under 65. "If the system is secure enough to ensure the integrity of the former, then it ought to be secure enough to ensure the integrity of the latter."[11]

The constitutional principles are examined in the litigants' briefs. Veterans remind us that those cherished constitutional principles were not bought cheaply but at great price—and should be defended by the courts with equal vigor.

B. Voters, not the State, face irreparable injury.

Consider now those Texas veterans under 65 who are "unable to exercise their right to vote" in 2020 because they are (or may or may not be) unable to vote by mail and unwilling to risk their well-being by congregating at the polls. They will lose "a right they will *never* be able to recover."[12] That is true "irreparable injury."

By contrast, voter fraud can be addressed by prosecutions in the context of specific cases. The State suffers no irreparable injury by being required to exercise its police power in a handful of real cases after the fact rather than by deterring millions of voters from safely exercising their constitutional rights in the first place.

[10] *Stringer v. Whitley*, 942 F.3d 715, 726 (5th Cir. 2019) (Ho, J., concurring).
[11] *Id*.
[12] *Id*.

C. The public interest favors denial of the stay.

The public interest is especially important as to a preliminary injunction that protects the right to vote in response to well-documented public health concerns. That public interest is personified, in one of its dimensions, by a veteran who risked his or her life to preserve, protect, and defend the Constitution of the United States of America but is now chilled from exercising the most fundamental feature of that Constitution—the right to vote—to protect his or her personal health.

Combat veterans are men and women who have run great risks, and by the millions suffered grievous and lasting injuries to their health in doing so, to protect this country and the rights we hold most dear, notably including the right to vote.

They ran those risks and suffered those injuries because our elected leaders decided genuinely compelling interests made it necessary to do so. Requiring nearly a million Texas veterans under 65 to run additional risks by voting in person this July and November, risks that are wholly unnecessary and older veterans need not face, is neither constitutionally justified nor in the public interest.

CONCLUSION

Veteran Amici respectfully request that the administrative stay be lifted and the preliminary injunction remain in place pending appeal.

Respectfully submitted,

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/s/ Richard Warren Mithoff
Richard Warren Mithoff

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/s/ Richard Warren Mithoff
Richard Warren Mithoff

CERTIFICATE OF SERVICE

I hereby certify that on May 27, 2020, a copy of the foregoing Brief Amicus Curiae was filed electronically with the Clerk of the Court using the Court's ECF System. Notice of this filing will be sent electronically by operation of the Court's electronic filing system to all counsel of record as follows:

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