No. 19-___

IN THE

Supreme Court of the United States

BRENDA LI GARCIA; JOSEPH DANIEL CASCINO; SHANDA MARIE SANSING; TEXAS DEMOCRATIC PARTY; AND GILBERT HINOJOSA, CHAIR OF THE TEXAS DEMOCRATIC PARTY,

Petitioners,

v.

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

Respondents.

On Petition for a Writ of Certiorari Before Judgment to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI BEFORE JUDGMENT

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QUESTION PRESENTED

Does Texas's limitation of the right to cast a no-excuse mail-in ballot to only voters who are "65 years of age or older on election day," Tex. Election Code § 82.003, violate the Twenty-Sixth Amendment's directive that the right to vote "shall not be denied or abridged by the United States or by any State on account of age"?

PARTIES TO THE PROCEEDING

In addition to the parties listed in the caption, Dana DeBeauvoir, the Travis County Clerk, and Jacquelyn F. Callanen, the Bexar County Elections Administrator, were defendants in the district court. They were not, however, parties to the stay proceedings in the court of appeals, and are not parties in this Court.

RULE 29.6 STATEMENT

Petitioner Texas Democratic Party does not have a parent corporation, and no publicly held corporation holds ten percent or more of the Texas Democratic Party's stock.

RELATED PROCEEDINGS

Texas Democratic Party, Gilberto Hinojosa, Chair of the Texas Democratic Party, Joseph Daniel Cascino, Shanda Marie Sansing, and Brenda Li Garcia, Plaintiffs, v. Greg Abbott, Governor of Texas, Ken Paxton, Texas Attorney General, Ruth Hughs, Texas Secretary of State, Dana DeBeauvoir, Travis County Clerk, and Jacquelyn F. Callanen, Bexar County Elections Administrator, Defendants, Civ. Act. No. SA-20-CA-438-FB (W.D. Tex. May 19, 2020).

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, No. 20-50407 (5th Cir. June 4, 2020).

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Brenda Li Garcia, Joseph Daniel Cascino, Shanda Marie Sansing, Texas Democratic Party, and Gilberto Hinojosa respectfully petition for a writ of certiorari before judgment to review the decision of the United States District Court for the Western District of Texas. The decision of the district court is currently pending in the United States Court of Appeals for the Fifth Circuit, which has stayed the preliminary injunction issued by the district court.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit granting a stay of the preliminary injunction pending appeal (Pet. App. 1a) has not yet been published but is available at 2020 WL 2982937. The order of the United States District Court for the Western District of Texas granting the plaintiffs' motion for a preliminary injunction (Pet. App. 59a) has not yet been published but is available at 2020 WL 2541971.

JURISDICTION

The District Court entered its injunction on May 19, 2020. Pet. App. 71a-72a. Respondents filed their Notice of Appeal on May 19, 2020. *Id.* 149a. The Court of Appeals entered its stay on June 4, 2020. *Id.* 1a-2a. The case is docketed in the Court of Appeals for the Fifth Circuit as No. 20-50407. This Court has jurisdiction pursuant to 28 U.S.C. §§ 1254(1), 2101(e).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

Section 1 of the Twenty-Sixth Amendment provides that: "The right of citizens of the United

States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age."

Section 82.003 of the Texas Election Code provides that: "A qualified voter is eligible for early voting by mail if the voter is 65 years of age or older on election day."

INTRODUCTION

Texas law provides voters over the age of 65 with a categorical right to cast their votes by mail, while voters under the age of 65 can cast a vote by mail only if they can swear they qualify under one of three statutorily specified excuses. In the face of the unprecedented COVID-19 pandemic, a federal district court held that this differential treatment likely violated the Twenty-Sixth Amendment and entered a preliminary injunction, ordering Texas to permit all voters to "apply for, receive, and cast an absentee ballot in upcoming elections during the pendency of pandemic circumstances." Pet. App. 71a. The Fifth Circuit acknowledged that Texas law "facially discriminates on the basis of age." *Id.* 20a. But, in conflict with decisions of the Supreme Court of California, the Colorado Supreme Court, and the First Circuit, and in tension with decisions by this Court construing parallel language in the Fifteenth and Twenty-Fourth Amendments, it stayed the district court's preliminary injunction, *id.* 41a, because it believed petitioners were unlikely to succeed on their Twenty-Sixth Amendment claim, *id.* 31a.

Petitioners have today also filed an application with this Court to vacate the Fifth Circuit's stay, and to allow the district court's preliminary injunction to

go into effect for the 2020 election cycle. But if this Court does not grant that application, it should grant the petition and set this case for expedited review. Otherwise, millions of Texas voters will face the agonizing choice of either risking their health (and the health of others) to vote in person or relinquishing their right to cast a ballot in two critical elections. Certiorari before judgment and an expedited schedule for determining the merits are appropriate given the unprecedented nature of the COVID-19 pandemic and the Fifth Circuit's erroneous construction of the Twenty-Sixth Amendment.

STATEMENT OF THE CASE

1. Voting by mail (often referred to as "absentee voting" because it was an option first offered to voters who would be absent from the jurisdiction on election day) has become an increasingly prevalent way for U.S. citizens to vote. In 2020, five states will conduct the November general election entirely by mail: Colorado, Hawaii, Oregon, Utah, and Washington. Nat'l Conf. of State Legislatures, *All-Mail Elections: (aka Vote By Mail)* (Mar. 24, 2020), https://perma.cc/ZNH5-CE2R. Thirty other states permit every eligible voter to vote by mail—in some jurisdictions by sending each voter a ballot he or she can return either by mail or at a polling place; in others by enabling voters to request permanent vote-by-mail status; and in still others by providing a process for requesting an absentee ballot for a particular election. *See* National Vote at Home Institute, *Applying for a Mailed-out Ballot: A State-by-State Guide* 4 (updated March 2020) (NVAHI Guide), https://perma.cc/L9X8-SVC8.

Texas is one of a handful of jurisdictions that take a different approach. These jurisdictions limit voting by mail to voters with a specified excuse (most often, physical absence from the jurisdiction or a physical condition that impairs the voter's ability to vote in person), but then provide an age-based exception—that is, they permit no-excuse absentee voting for voters older than a specified age, but not for voters below that age. *See* NVAHI Guide at 4. In Texas, no-excuse vote-by-mail is available only to a voter who "is 65 years of age or older on election day." Tex. Elec. Code § 82.003. Otherwise, a voter without a statutorily specified excuse must cast his or her ballot in person.[1]

2. "The United States is mired in a pandemic involving a virus"—COVID-19—"that can cause serious illness and sometimes death." Pet. App. 1a. At least so far, "the highest number of reported cases of COVID-19 in Texas are among 50 to 59-year-olds and 40 to 49-year-olds." *Id.* 106a. It is unclear when the pandemic will abate, and whether there will be a second wave of COVID-19 cases this coming autumn, during the period leading up to and containing Election Day.

In March, the federal Centers for Disease Control and Prevention issued "Recommendations for Election Polling Locations" designed "to prevent spread of coronavirus disease 2019 (COVID-19)." https://perma.cc/A9G4-ATZ7. It advised states to "[e]ncourage voters to use voting methods that minimize direct contact with other people and reduce

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[1] There remain a few other jurisdictions that restrict voting by mail to voters with a specified excuse, whatever their age. *See* NVAHI Guide at 4.

crowd size at polling stations." *Id.* In particular, its first specific recommendation encouraged "mail-in methods of voting if allowed in the jurisdiction." *Id.*

Also in March, Texas Governor Greg Abbott issued a proclamation declaring that holding a statewide runoff primary then set for May 26, 2020, "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-19." Tex. Proclamation (Mar. 20, 2020), https://perma.cc/TN2S-KUR7. He therefore postponed that primary until July 14, 2020.

That risk has not disappeared: As of the first week in June, the "trend line show[ed] new infections in Texas [had] risen about 71% in the past two weeks." Carla Astudillo, Jolie McCullough & Mandi Cai, *In Texas, COVID-19 Case Totals and Hospitalizations Are Rising*, Tex. Trib., June 8, 2020, https://perma.cc/4QGJ-RVZ7.

As the spring election season has progressed, voters across the country have sought to vote by mail to avoid exposing themselves to COVID-19. In Wisconsin, for example, the number of voters who requested absentee ballots for the April 2020 primary was five times the number who had requested absentee ballots for the spring 2016 election. *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1207 (2020) (per curiam). In Pennsylvania, the shift was even more dramatic: more than eighteen times as many voters sought to vote by mail as had done so four years earlier. Rick Corasaniti, *What Pennsylvania's 'Dry Run' Election Could Reveal*

About November, N.Y. Times, June 3, 2020, https://perma.cc/EVB8-8PB7.

As for voters who went to the polls to cast ballots in person, a National Bureau of Economic Research working paper found that in Wisconsin, "counties which had more in-person voting per voting location (all else equal) had a higher rate of positive COVID-19 tests" several weeks later "than counties with relatively fewer in-person voters." Chad D. Cotti *et al.*, *The Relationship Between In-Person Voting, Consolidated Polling Locations, and Absentee Voting on Covid-19: Evidence From the Wisconsin Primary* 13 (May 2020), http://www.nber.org/papers/w27187. By contrast, the researchers found "a negative relationship between absentee voting and the rate of positive COVID-19 tests." *Id.*

3. In March 2020, several plaintiffs, including some of the petitioners in this case, brought suit in state court, seeking a declaration that, as a matter of Texas law, any voters who considered themselves at risk of contracting COVID-19 could vote by mail using Tex. Elec. Code § 82.002(a). That statute provides that a voter is eligible for a mail-in ballot "if the voter has a sickness or physical condition" that creates "a likelihood" that voting in person would "injur[e] the voter's health." *See In re State of Texas*, 2020 WL 2759629, at *2 (Tex. Sup. Ct. May 27, 2020) (recounting the state-court litigation).

In mid-April, the state trial court granted a preliminary injunction, finding that the plaintiffs were "reasonable to conclude that voting in person while the virus that causes COVID-19 is still in general circulation presents a likelihood of injuring [their] health, and any voters without established immunity

meet the plain language definition of disability thereby entitling them to a mailed ballot under Tex. Elec. Code § 82.002." *In re State of Texas*, 2020 WL 2759629, at *2 (quoting the state trial court opinion). The State appealed, and in response to the attorney general's announcement that the trial court's order was stayed automatically "by virtue of the appeal," the state court of appeals "reinstated the temporary injunction." *Id.* at *3.

The state supreme court in turn stayed the court of appeals' reinstatement order, pending review of an original mandamus petition filed by the attorney general. *In re State of Texas*, 2020 WL 2759629 at *3. That petition sought an order forbidding election officials in five of Texas's most populous counties from informing the public that lack of immunity to COVID-19 made a voter eligible to vote by mail or from approving applications for mail-in ballots submitted by such individuals. *In re State of Texas*, 2020 WL 2759629 at *1.

Ultimately, the state supreme court agreed with the attorney general that "a lack of immunity to COVID-19 is not itself a 'physical condition' for being eligible to vote by mail within the meaning of § 82.002(a)." *In re State of Texas*, 2020 WL 2759629 at *10. But "[c]onfident that election officials would comply" with its interpretation of state law, the court "decline[d] to issue the writ of mandamus." *Id.* at *11.

4. In the face of continuing ambiguity over whether Section 82.002 would permit voters who feared the health effects voting in person during the pandemic to cast their votes by mail, petitioners filed this lawsuit in the United States District Court for the Western District of Texas raising claims only under

federal law. Petitioners include three individual voters ranging in age from 20 to 60 who wish to cast mail-in ballots to avoid the health risks both to themselves and to others stemming from COVID-19, as well as the Texas Democratic Party and its chairman. The defendants include several state officials and two county-level officials responsible for administering elections in the counties where the individual petitioners live.

Petitioners invoked the Twenty-Sixth Amendment, and alleged that Texas's restriction of no-excuse mail-in voting to voters over the age of 65 was "unconstitutional as applied to these Plaintiffs during these pandemic circumstances" and "also facially unconstitutional." First Amended Complaint ¶¶ 101, 102, *Texas Dem. Party v. Abbott*, Civ. Act. No. 5: 20-CV-00438-FB (W.D. Tex. Apr. 29, 2020), ECF 9.[2]

5. After reviewing extensive evidence and holding a hearing, the district court granted petitioners' motion for a preliminary injunction. The court held that petitioners were likely to succeed on their as-applied Twenty-Sixth Amendment claim. First, Section 82.003 "violate[s] the clear text of the Twenty-Sixth Amendment." Pet. App. 69a. The court found that Section 82.003 entitles Texas voters over the age of 65 to vote by mail "on the account of their age alone," while voters "younger than 65 face a burden of not being able to access mail ballots on account of their age alone." *Id.* 128a. The court then explained the special burden this imposed "during the COVID-19

[2] Petitioners also raised claims under the First, Fourteenth, and Fifteenth Amendments, Section 2 of the Voting Rights Act of 1965, and 42 U.S.C. § 1985. Those claims are not at issue here.

pandemic." *Id.* 131a. Voters like petitioners "are forced" to "risk[] their health by voting in person." *Id.* 129a. By contrast, "[v]oters age 65 and older will not face the same burden on the right to vote because they are able to access mail ballots and vote from the safety of their home, away from potential COVID-19 carriers and spreaders." *Id.* 131a.

The district court further found, relying on circuit precedent, that denial of the right to vote by mail would inflict irreparable injury on petitioners. Pet. App. 143a. It emphasized that forcing younger voters "to unnecessarily risk their lives in order to practice their constitutional rights while allowing other [older] voters a preferred status so that they do not have to face this same burden" magnified the irreparable injury. *Id.* As for the other two prongs of the standard for preliminary relief—the balance of the equities and the public interest—the court explained that "[n]o harm occurs when the State permits all registered, legal voters the right to vote by utilizing the existing, safe method that the State already allows for voters over the age of 65;" that expanding mail-in voting would impose "no undue burden" on election administrators; and that it is "in the public interest" to prevent the State from violating the requirements of federal law. *Id.* 144a.

To avoid the unconstitutional discrimination on the basis of age, the district court declared that "[a]ny eligible Texas voter who seeks to vote by mail in order to avoid transmission of COVID-19 can apply for, receive, and cast an absentee ballot in upcoming elections during the pendency of pandemic circumstances." Pet. App. 71a. And it enjoined the defendants from refusing to provide, accept, or

tabulate such ballots. *Id.* 71a-72a.

6. The state defendants appealed. They sought an emergency stay of the district court's preliminary injunction pending appeal emphasizing that "time is of the essence." Defendant-Appellants' Emergency Motion for Stay Pending Appeal and Temporary Administrative Stay 2, *Texas Democratic Party v. Abbott*, No. 20-50407 (5th Cir. May 20, 2019), BL-8.

Without acting to expedite the appeal in any way, the Fifth Circuit stayed the preliminary injunction "pending further order of th[e] court." Pet. App. 41a. Although styled as a stay pending appeal, the court's precedential opinion rested on a lengthy analysis of the merits.

The court of appeals rejected respondents' arguments that petitioners lacked standing and that their constitutional claims were either nonjusticiable or barred by sovereign immunity. *See* Pet. App. 9a-19a. But it held that petitioners were not entitled to preliminary relief because they were unlikely to succeed on their Twenty-Sixth Amendment claim. *Id.* 31a.

The Fifth Circuit's analysis relied entirely on this Court's decision in *McDonald v. Board of Election Commissioners of Chicago*, 394 U.S. 802 (1969). *See* Pet. App. 31a-34a. That case concerned a Fourteenth Amendment Equal Protection Clause challenge to Illinois's refusal to provide absentee ballots to Cook County voters who could not appear at the polls because they were in the county jail awaiting trial. The Court held that "the distinctions made by Illinois' absentee provisions"—which permitted physically (but not "judicially") incapacitated voters and

detainees incarcerated outside the county to receive absentee ballots—were subject to only rational basis review because they were "not drawn on the basis of" a factor like race that "demand[s] a more exacting judicial scrutiny." *Id.* at 807. And the decision to limit absentee voting to a few categories of individuals survived that deferential level of scrutiny.

Dismissing the Twenty-Sixth Amendment as "not a major player in federal litigation," Pet. App. 31a, the Fifth Circuit declared that "[i]f a state's decision to give mail-in ballots only to some voters does not normally implicate an equal-protection right to vote, then neither does it implicate '[t]he right . . . to vote' of the Twenty-Sixth Amendment. There is no reason to treat the latter differently." *Id.*33a (internal citation of *McDonald* omitted). Because "age is not a suspect class" under the Equal Protection Clause, *id.* 26a, it was permissible for Texas to treat older voters more favorably. "The Constitution is not 'offended simply because some' groups 'find voting more convenient than' do the plaintiffs because of a state's mail-in ballot rules. That is true even where voting in person 'may be extremely difficult, if not practically impossible,' because of circumstances beyond the state's control, such as the presence of the Virus." *Id.* 25a (quoting *McDonald*, 394 U.S. at 810).

Judge Ho filed a concurring opinion. He recognized that the text of the Twenty-Sixth Amendment, which "forbids discrimination in voting" because of a citizen's age (once the citizen turns eighteen) "closely tracks the text" of the Fifteenth Amendment. Pet. App. 49a. And he acknowledged that it "would presumably run afoul of the Constitution to allow only voters of a particular race to vote by mail."

Id. But he thought that "even if one were to assume that Texas law violates the Twenty-Sixth Amendment, the preliminary injunction is likely flawed" because it was plausible that Texas would prefer to "level down"—that is, strip voters over the age of 65 of their entitlement to vote by mail, rather than extend that right to voters under the age of 65. *Id.* 50a.

Judge Costa concurred in the judgment. He took the position that the district court should have abstained during the pendency of the state court proceedings involving Tex. Elec. Code § 82.002's authorization of voting by mail because of "sickness or physical condition." Those proceedings having been completed, the district court "should now evaluate the federal claims against [the Texas Supreme Court's] definite interpretation of state law" Pet. App. 56a.[3]

REASONS FOR GRANTING THE WRIT

Section 1 of the Twenty-Sixth Amendment contains a simple command: "The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age." But "there is no controlling caselaw" from this Court regarding the proper interpretation of the Twenty-

[3] Judge Costa's concurrence in the judgment was directed entirely at how the state court proceedings regarding Tex. Elec. Code § 82.002(a) might bear on petitioners' Fourteenth Amendment claims. *See* Pet. App. 55a-58a. It never mentions either Section 82.003 or petitioners' Twenty-Sixth Amendment claims. Nor does it suggest any way in which further proceedings in the district court would affect the Twenty-Sixth Amendment claims.

Sixth Amendment or the standard to be used in deciding claims for Twenty-Sixth Amendment violations based on an alleged abridgment or denial of the right to vote." *Nashville Student Org. Comm. v. Hargett*, 155 F. Supp. 3d 749, 757 (M.D. Tenn. 2015). This Court's intervention is needed because the Fifth Circuit's decision here conflicts with decisions of the Supreme Court of California, the Colorado Supreme Court, and the First Circuit. Moreover, the Fifth Circuit's decision is inconsistent with decisions of this Court interpreting analogous language in the Fifteenth and Twenty-Fourth Amendments. The Fifth Circuit's analysis defies the plain language of the constitutional command. And its decision to stay the district court's preliminary injunction forces millions of Texas voters to either risk their health at the polls, twice, or relinquish their right to vote in the upcoming election season. Under these circumstances, this Court should not only grant the petition for a writ of certiorari before judgment but it should expedite its consideration of this case.

I. This case involves an important and unsettled question of federal law over which the lower courts are divided.

The Fifth Circuit's decision to apply rational-basis review to Section 82.003's express age restriction on the right to vote by mail, and then to uphold that restriction, conflicts with the positions taken by the Supreme Court of California, the Supreme Court of Colorado, and the First Circuit.

1. Shortly after ratification of the Twenty-Sixth Amendment, the California Attorney General issued an opinion that "'for voting purposes the residence of

an unmarried minor'"—in California, then a person under the age of 21—"will normally be his parents' home' regardless of where the minor's present or intended future habitation might be." *Jolicoeur v. Mihaly*, 488 P.2d 1, 3 (Cal. 1971) (quoting 54 Adv. Ops. Cal. Atty Gen. 7, 12 (1971)). As a result of this guidance, registrars told six of the individual plaintiffs in *Jolicoeur* to register in the California jurisdictions where their parents lived, which were "up to 700 miles away from their claimed permanent residences," and told other individuals (whose parents lived in other states or abroad) that they could not register in California at all. *Id.*

The California Supreme Court held that "treat[ing] minor citizens differently from adults for any purpose related to voting" violated the Twenty-Sixth Amendment. *Jolicoeur*, 488 P.2d at 2. The court pointed to the way the Twenty-Sixth Amendment mirrored the language of the "Twenty-Fourth, Nineteenth, and Fifteenth before it." *Id.* at 4. The court identified *Gray v. Johnson*, 234 F. Supp. 743 (S.D. Miss. 1964), as a case "significant for its interpretation of similar language in the Twenty-fourth Amendment." *Jolicoeur*, 488 P.2d at 4. *Gray* had held that the "burden" of obtaining a special receipt put on voters who chose not to pay the Mississippi poll tax "circumscribe[d], impair[ed], and impede[d] the right to vote" secured by the Twenty-Fourth Amendment. *Id.* The California court then explained that so too "[c]ompelling young people who live apart from their parents to travel to their parents' district to register and vote or else to register and vote as absentees burdens their right to vote" as secured by the Twenty-Sixth Amendment. *Id.* That amendment, like its three

predecessors, forbids "onerous procedural requirements which effectively handicap exercise of the franchise," even if "the abstract right to vote" remains "unrestricted." *Id.* (quoting *Lane v. Wilson*, 307 U.S. 268, 275 (1939)). Thus, the California Supreme Court held that the Twenty-Sixth Amendment requires state officials "to treat all citizens 18 years of age or older alike for *all* purposes related to voting." *Id.* at 12 (emphasis added). In a case involving age-based restrictions on participation in the initiative process, the Colorado Supreme Court similarly held that "the prohibition against denying the right to vote to anyone eighteen years or older by reason of age applies to the entire process involving the exercise of the ballot and its concomitants." *Colorado Project-Common Cause v. Anderson*, 495 P.2d 220, 223 (Colo. 1972).

In *Walgren v. Howes*, 482 F.2d 95 (1st Cir. 1973), the First Circuit addressed a college town's decision to hold municipal elections while the local university was in the midst of its winter break. The court did not consider the "compelling interest test" to be applicable to the students' Fourteenth Amendment claim. *Id.* at 99. But when it came to their potential Twenty-Sixth Amendment claim, the First Circuit, like the California Supreme Court, pointed to *Lane v. Wilson*, which had found that a facially neutral statute was in fact designed to disenfranchise black voters and thus violated the Fifteenth Amendment. *See id.* at 101. The court suggested that "the voting amendments would seem to have made the specially protected groups, at least for voting-related purposes, akin to a 'suspect class,'" entitled to heightened judicial scrutiny. *Id.* at 102.

The First Circuit further explained that if the burden on the right to vote were "of such a significant nature as to constitute an 'abridgement,'" a court "presumably would not take the additional step of considering the adequacy of governmental justification"; it would simply strike down the challenged practice. *Walgren*, 482 F.2d at 102. In subsequent proceedings, the First Circuit declared that it was "difficult to believe" that the Twenty-Sixth Amendment "contributes no added protection to that already offered by the Fourteenth Amendment," with respect to election practices, "particularly if a significant burden were found to have been intentionally imposed solely or with marked disproportion on the exercise of the franchise by the benefactors of that amendment." *Walgren v. Bd. of Selectmen of Town of Amherst*, 519 F.2d 1364, 1367 (1st Cir. 1975).

2. By contrast, in this case, the Fifth Circuit acknowledged that Section 82.003 "facially discriminates on the basis of age." Pet. App. 20a. But it then held that when it comes to the manner of voting, the state's decision to deny younger voters the right to vote by mail that it provided to older voters was subject to mere "rational-basis review." *Id.* 33a. Relying on its prior discussion of why distinguishing among voters on the basis of age did not violate the Equal Protection Clause, *see id.* 27a-31a, the Fifth Circuit stated that there was "no evidence that *Texas* has denied or abridged" the right to vote by denying younger voters who wished to avoid COVID-19 the ability to vote by mail; "properly qualified voters may exercise the franchise" by voting in person. *Id.* 34a. "What 'is at stake here'" was only "'a claimed right to

receive absentee ballots.'" *Id.* (quoting *McDonald*, 394 U.S. at 807).

There is no way to reconcile the Fifth Circuit's precedential decision here with the decisions of the California Supreme Court, the Colorado Supreme Court, and the First Circuit.

3. The need for this Court's guidance is especially pressing today. COVID-19 has impelled many voters who were comfortable with in-person voting to seek an alternative way to cast their ballots this summer and fall. "[D]ue to the pandemic, voters fear going to public polling places. Their concerns are very real, and very well taken." Pet. App. 46a. Thus, the Court should anticipate Twenty-Sixth Amendment-based litigation in every state that restricts no-excuses vote-by-mail to an age-based subset of the citizenry. Indeed, such litigation has already begun. *See, e.g.*, *Tully v. Okeson*, Case No. 1:20-cv-01271-JPH-DLP (S.D. Ind.) (amended complaint filed May 4, 2020) (challenging Ind. Code § 3-11-10-24(a)(5)'s limitation to "elderly" voters over the age of 65). As of now, it is unclear whether discrimination on the basis of age is per se unconstitutional, is presumptively unconstitutional but can be justified if the state satisfies strict scrutiny, or, as the Fifth Circuit held, is subject only to rationality review. Only this Court can resolve that issue.[4]

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[4] This Court's only Twenty-Sixth Amendment decision to date is *Symm v. United States*, 439 U.S. 1105 (1979) (per curiam), which summarily affirmed *United States v. Texas*, 445 F. Supp. 1245 (S.D. Tex. 1978) (three-judge court). That case involved how aspiring voters could prove their residence in Waller County. A

II. The Fifth Circuit's construction of the Twenty-Sixth Amendment is wrong.

The words of the Twenty-Sixth Amendment are straightforward: "The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age." That text echoes the Fifteenth, Nineteenth, and Twenty-Fourth Amendments, which direct that the right to vote shall not be "denied or abridged" based on race, sex, or failure to pay a poll tax. A state would plainly violate those amendments if it offered no-excuse mail voting only to whites, only to men, or only to voters who pay a tax. It is equally plain that Texas has violated the Twenty-Sixth Amendment by offering that option only to voters over 65. The Fifth Circuit held otherwise because it failed to take the amendment's text seriously. And the court compounded that error by injecting into the Twenty-Sixth Amendment a standard of review developed by this Court to

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county official imposed a more stringent proof-of-residency standard on university students (who, not coincidentally, attended predominantly black Prairie View A&M University) than on other individuals seeking to register.

The three-judge court held that the policy was "inconsistent" with the Twenty-Sixth Amendment, 445 F Supp. at 1257. In explaining the proper "philosophy" for interpreting the Twenty-Sixth Amendment, the three-judge court quoted at length from another student-voting case that had held that such restrictions "may only be held constitutional if a compelling state interest is thereby served." *Id.* at 1255 (quoting *Bright v. Baesler*, 336 F. Supp. 527, 533 (E.D. Ky. 1971)). Because this Court summarily affirmed the three-judge court's finding of a Twenty-Sixth Amendment violation, it had no occasion to announce the appropriate standard of scrutiny for such claims.

adjudicate challenges to voting restrictions that do *not* implicate discrimination on a basis expressly forbidden by the four parallel voting amendments.

1. "When seeking to discern the meaning of a word in the Constitution, there is no better dictionary than the rest of the Constitution itself." *Arizona State Legislature v. Arizona Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2680 (2015) (Roberts, C.J., dissenting). The Twenty-Sixth Amendment "embodies the language and formulation of the 19th amendment, which enfranchised women, and that of the 15th amendment, which forbade racial discrimination at the polls." S. Rep. No. 92-26, 92d Cong., 1st Sess. 2 (1971). And the Twenty-Fourth Amendment, which "clearly and literally bars any State from imposing a poll tax on the right to vote" in federal elections, contains an equivalent "express constitutional command[] that specifically bar[s] States from passing certain kinds of laws" regarding the right to vote. *Williams v. Rhodes*, 393 U.S. 23, 29 (1968). Thus, the Twenty-Sixth Amendment must be read *in pari materia* with these virtually identical constitutional provisions.

While age is not a suspect or quasi-suspect classification for most purposes, Pet. App. 26a, the Fifth Circuit failed to recognize that the Constitution now gives a different answer with respect to voting. In that respect, a state can no more discriminate against a citizen over the age of 18 on the basis of "age" than it can discriminate against her on the basis of "race, color, or previous condition of servitude," on the basis of "sex," or on the basis of "failure to pay any poll tax or other tax."

Judge Ho recognized this point in his concurrence, conceding that "it would presumably run afoul of the Constitution to allow only voters of a particular race to vote by mail." Pet. App. 49a. "Presumably" is an understatement. Black and Latino citizens in Texas are "less likely to own vehicles and are therefore more likely to rely on public transportation" than their Anglo counterparts. *Veasey v. Abbott*, 830 F.3d 216, 251 (5th Cir. 2016) (en banc), *cert. denied*, 137 S. Ct. 612 (2017). But can there be any doubt that Texas would violate the Fifteenth Amendment if it decided to accord no-excuse vote-by-mail to minority voters but not to white ones as a "way to facilitate exercise of the franchise for Texans who are more likely to face everyday barriers to movement," Pet. App. 28a? If granting the right to cast mail-in ballots on the basis of race violates the Fifteenth Amendment—and of course it does—then it follows inescapably that granting that right on the basis of age violates the Twenty-Sixth.

2. This Court's construction of the Twenty-Fourth Amendment in *Harman v. Forssenius*, 380 U.S. 528 (1965), confirms that the Fifth Circuit erred in thinking that under-65 voters' right to vote is not "abridged" by their exclusion from no-excuse vote-by-mail so long as they have the right to vote in person, Pet. App. 34a.

In anticipation of the ratification of the Twenty-Fourth Amendment, Virginia enacted a provision, Section 24-17.2, that required a voter who wished to vote in federal elections either to pay the usual poll tax or to "file a certificate of residence in each election year." *Harman*, 380 U.S. at 532. This Court held unanimously that that provision was "repugnant to

the Twenty-fourth Amendment." *Id.* at 533. The Court acknowledged that Virginia could abolish its poll tax altogether and then require all voters to file the certificate of residence. *See id.* at 538. But requiring a voter who did not pay the poll tax to file the certificate nevertheless "constitute[d] an abridgment of the right to vote." *Id.*

The Court explained that it "need only be shown that Section 24-17.2 imposes a material requirement solely upon those who refuse to surrender their constitutional right to vote in federal elections without paying a poll tax." *Harman*, 380 U.S. at 541. The Court held that it did because Section 24-17.2 imposed "cumbersome" logistical burdens on voters who declined to pay the poll tax that poll tax-paying voters did not face. *See id.* at 541-42.

The Court also emphasized that Section 24-17.2 "would not be saved even if it could be said that it is no more onerous, or even somewhat less onerous, than the poll tax." *Harman*, 380 U.S. at 542. "*Any* material requirement" based "solely" on declining to pay a poll tax "subverts the effectiveness of the Twenty-fourth Amendment and must fall under its ban." *Id.* (emphasis added). So, too, in *Lane v. Wilson*, 307 U.S. 268 (1939), this Court emphasized that the Fifteenth Amendment bars "onerous procedural requirements which effectively handicap exercise of the franchise"—in that case, by black voters—"although the abstract right to vote may remain unrestricted as to race." *Id.* at 275.

As in *Harman* and *Lane*, requiring under-65 voters to show up at the polls in person, particularly during the COVID-19 pandemic, while allowing over-65 voters to cast ballots from the safety of their homes

imposes a "material requirement," *Harman*, 380 U.S. at 542, on younger voters that "effectively handicap[s]," *Lane*, 307 U.S. at 275, the exercise of the franchise. Even the Fifth Circuit did not deny that COVID-19 "increases the risks" citizens would face from in-person voting. Pet. App. 23a. Nor did it deny that it can be more "cumbersome," *Harman*, 380 U.S. at 541, to vote in person; that, after all, was precisely why the state extended no-excuse mail-in voting to seniors. Pet. App. 28a. But it wrongly thought that Texas's system was fine as long as it did not prevent younger voters "from voting by all other means." *Id.* 23a.

This belief also comes from the Fifth Circuit's ignoring the plain language of the Twenty-Sixth Amendment. That amendment, like the Fifteenth, Nineteenth, and Twenty-Fourth, does not prohibit states only from "absolutely prohibit[ing]" qualified citizens from voting, Pet. App. 24a. It prohibits *abridging* the right to vote as well. The concept of abridgement "necessarily entails a comparison." *Reno v. Bossier Par. Sch. Bd.*, 528 U.S. 320, 334 (2000). By comparison to the right to vote that Texas provides to citizens over the age of 65, the right it provides to younger voters is less robust. And it is less robust "solely," *Harman*, 380 U.S. at 542, because of the voters' age thereby subverting the effectiveness of the Twenty-Sixth Amendment. Any differential treatment of voters "on account of age" violates the plain language of the Twenty-Sixth Amendment.

The lesson for Texas's vote-by-mail scheme is straightforward. Texas could have decided not to extend no-excuse vote-by-mail to anyone, but it cannot grant that privilege based on age. The State cannot

"impose[] a material requirement" on voting—namely, showing up at a polling place—"solely" on the basis of an eligible voter's age," *Harman*, 380 U.S. at 541.[5]

3. The Fifth Circuit was flatly wrong to suppose that the "logic" of *McDonald v. Board of Election*

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[5] Although Texas could have opted not to offer no-excuse vote-by-mail to those over age 65 in the first place, Judge Ho erred in suggesting that the remedy for a Twenty-Sixth Amendment violation would be to "level down"—that is, to take no-excuse vote by mail away from eligible voters over the age of 65, *see* Pet. App. 50a-51a.

For one thing, it is not clear that Texas *can* level down—at least for the upcoming elections in 2020 that are covered by the district court order that the Fifth Circuit stayed. Voters over the age of 65 are entitled to file an "annual" application for mail-in ballots which provides them with such ballots for every election in a calendar year. *See* Application for Ballot by Mail, https://perma.cc/9CZD-G52E. Absent legislative action, those voters will automatically receive such ballots, which means that the *only* way to eliminate the age-based discrimination is to enable voters under 65 to obtain mail-in ballots as well.

Moreover, Texas itself has never actually suggested that it wishes to level down. And for good reason: the political blowback elected officials could expect from a voting bloc that participates at a high rate is a powerful deterrent. And Texas could not, of course, eliminate absentee voting altogether because the Uniformed and Overseas Citizens Absentee Voting Act of 1986 as amended, 52 U.S.C. § 20301 *et seq.*, requires states to provide absentee ballots to certain voters for federal elections.

Finally, this Court's decision in *Guinn v. United States*, 238 U.S. 347 (1915), suggested that one "consequence of the striking down of a discrimination clause" is that "a right of suffrage would be enjoyed by reason of the generic character of the provision which would remain after the discrimination was stricken out." *Id.* at 363. Striking the words "if the voter is 65 years of age or older on election day" from Section 82.003 would level up and create a right to vote by mail for any "eligible voter."

Commissioners, 394 U.S. 802 (1969), "applies equally to the Twenty-Sixth Amendment." Pet. App. 31a.

For starters, the Fifth Circuit misunderstands the relationship between the Fourteenth and Twenty-Sixth Amendments. The Twenty-Sixth Amendment was in fact enacted precisely to strike down age-based discrimination that did not violate the Fourteenth Amendment. Using its enforcement power under Section 5 of the Fourteenth Amendment, Congress had tried in the Voting Rights Act of 1970 to extend the right to vote in all elections to all citizens over the age of 18. But in *Oregon v. Mitchell*, 400 U.S. 112 (1970), this Court held that Section 5 of the Fourteenth Amendment did not empower Congress to change a state's age limitations on the right to vote in state and municipal elections *Id.* at 130. Given that Congress's Section 5 enforcement powers enable it to prohibit at least some state regulation that "is not itself unconstitutional," *City of Boerne v. Flores*, 521 U.S. 507, 518, 520 (1997), it follows *a fortiori* that denying or abridging the right to vote on the basis of age would not violate the Equal Protection Clause. *See also* S. Rep. No. 92-26, 92d Cong., 1st Sess. 8 (1971) (stating that an equal protection clause challenge to state age restrictions on voting would be rejected by this Court). So saying that a particular age-based election restriction does not violate the Fourteenth Amendment cannot determine whether it violates the Twenty-Sixth.

Moreover, *McDonald* actually undermines the Fifth Circuit's assumption that age-based restrictions on vote-by-mail are constitutional.

The plaintiffs in *McDonald* were Cook County residents who were detained pending trial in the Cook

County jail. Illinois law made no provision for such "judicially incapacitated" individuals to obtain absentee ballots, even though it authorized the provision of absentee ballots to "medically incapacitated" individuals and individuals incarcerated outside the county. *McDonald*, 394 U.S. at 806.

The primary reason this Court presumed the constitutionality of the Illinois scheme and reviewed it under the deferential rational basis standard was that "the distinctions made by Illinois' absentee provisions are not drawn on the basis of wealth or race"—each of which "demand a more exacting judicial scrutiny." *McDonald*, 394 U.S. at 807. But as petitioners have already explained, the Twenty-Sixth Amendment borrowed verbatim the Fifteenth Amendment's formulation because what Congress sought to accomplish was "exactly" what its predecessors had sought to accomplish "in enfranchising the black slaves with the 15th amendment." 117 Cong. Rec. 7539 (Mar. 23, 1971) (statement of Rep. Claude Pepper). So the "logic" of *McDonald*, Pet. App. 31a, actually undercuts the Fifth Circuit's analysis. If distinctions with respect to absentee voting drawn along racial lines are presumptively invalid—as *McDonald* itself dictates—so too are such distinctions when drawn "on account of age," as Texas's are.[6]

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[6] The Court also rested its decision in *McDonald* on the conclusion that "nothing in the record" suggested that "the Illinois statutory scheme ha[d] an impact on appellants' ability to exercise the fundamental right to vote." 394 U.S. at 807. The Court emphasized that "the record is barren of any indication

Finally, the deferential balancing inquiry that generally governs non-race-based Fourteenth Amendment-based voting challenges cannot govern Twenty-Sixth Amendment challenges. In those cases, courts "weigh 'the character and magnitude'" of the burden imposed on a voter "against 'the precise interests put forward by the State as justifications for the burden.'" *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983)). In short, they engage in a form of balancing where any one of a number of state interests can outweigh the voter's.

But that form of balancing is impermissible here. The prohibition against age-based differential treatment with respect to voting is "explicitly set forth," *Coy v. Iowa*, 487 U.S. 1012, 1020 (1988), in the Constitution. Thus even "other important interests" must give way "to the irreducible literal meaning" of the constitutional provision. *Id.* at 1021. The Twenty-

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that the State might not, for instance, possibly furnish the jails with special polling booths or facilities on election day, or provide guarded transportation to the polls themselves for certain inmates, or entertain motions for temporary reductions in bail to allow some inmates to get to the polls on their own." *Id.* at 808 n.6.

But that rationale does not carry over to petitioners' case here. First, although the *extent* of the burden on voting may be relevant in an analysis under the Fourteenth Amendment, *Harman* and *Lane* make clear that the Fifteenth, Nineteenth, Twenty-Fourth, and Twenty-Sixth Amendments prohibit *any* burden based on race, sex, poll-tax payment, or age. Second, and in any event, the district court here reviewed the evidence and found that the combination of COVID-19 and Texas's limitation on mail-in ballots *would* have an impact on younger voters' ability to cast their ballots. *See* Pet. App. 131a

Sixth Amendment forbids states from acting on any age-based distinction with respect to voting—full stop.

III. This Court should grant review now.

This Court has jurisdiction to review "[c]ases in the courts of appeals" either "*before* or after rendition of judgment or decree." 28 U.S.C. 1254(1) (emphasis added). Certiorari before judgment is appropriate when "the case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court." Sup. Ct. R. 11. This case satisfies both the importance and the immediacy aspects of that standard.[7]

1. Like the question regarding the 2020 census form on which this Court granted certiorari before judgment last Term, this case involves "an issue of imperative public importance." *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2565 (2019). The ability of millions of Texas voters to participate in the 2020 election season under the unprecedented conditions caused by the COVID-19 pandemic without risking their own health and safety or the health and safety of others turns on whether Texas can exclude them from vote by mail solely "on account of age." The issue is of imperative importance not only to those voters who wish to vote by mail, but also to voters who plan to vote in person, since the more voters who choose to cast

[7] Even a party that prevailed in the district court may seek review in this Court on a petition for a writ of certiorari before judgment. *See United States v. Nixon,* 418 U.S. 683, 686, 690 (1974). In this case, although petitioners prevailed in the district court, the Fifth Circuit's stay of the preliminary injunction they obtained makes them an aggrieved party.

mail-in ballots, the lower the risk the remaining in-person voters will face.

For example, petitioner Joseph Cascino, who is twenty-years old, wants to vote by mail because has a mother who is immunocompromised and he is "in prime condition to be an asymptomatic carrier." Declaration of Joseph Cascino 2, *Texas Democratic Party v. Abbott*, No. 5:20-cv-00438 (W.D. Tex. May 14, 2020), ECF 64-1105. Petitioner Shanda Sansing is 60 years old. She similarly wants to vote by mail because she has a husband and a daughter who are asthmatics and she is being "very vigilant about self-containment" because of the fear of infecting herself or her loved ones. Declaration of Shanda Sansing 2, *Texas Democratic Party v. Abbott*, No. 5:20-cv-00438 (W.D. Tex. May 14, 2020), ECF 63-4.

After the Fifth Circuit's decision here, healthcare workers in Texas face an untenable choice as well. For example, petitioner Brenda Li Garcia works as a nurse, and believes that the best practices for avoiding infecting herself, and her then infecting others, include voting by mail rather than in person. Declaration of Brenda Li Garcia 2, *Texas Democratic Party v. Abbott*, No. 5:20-cv-00438 (W.D. Tex. May 14, 2020), ECF 72-3. *See also* Br. for Amici Curiae Healthcare Professionals and Institutions in Support of Plaintiffs-Appellees 19-21, *Texas Democratic Party v. Abbott*, No. 20-50407 (5th Cir. May 28, 2020), BL-65 (arguing that frontline healthcare workers should not be forced to choose between protecting the community and voting in person).

This Court also granted certiorari before judgment in *United States v. Fanfan*, 542 U.S. 956 (2004), in light of the fact that "thousands—or even

tens of thousands—of criminal sentencings" would be "thrown into doubt" until the Court resolved the constitutionality of the Federal Sentencing Guidelines, U.S. Pet. Cert. Before Judgment 9-10, *United States v. Fanfan*, 2004 WL 1638205 (No. 04-105). Similarly, in this case, the ability of hundreds of thousands—or even millions—of voters to participate in a critical set of elections without endangering themselves or others will be thrown into doubt until this Court resolves the question presented.

If under-65 voters in Texas are deterred from participating in the 2020 primary or general elections by fear of COVID-19, the right to vote—a right "preservative of all [other] rights," *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886)—will be lost forever. "[T]here can be no 'do-over' or redress of a denial of the right to vote after an election." *Fish v. Kobach*, 840 F.3d 710, 752 (10th Cir. 2016); *see also League of Women Voters of United States v. Newby*, 838 F.3d 1, 9 (D.C. Cir. 2016) (same).

2. Also, like the question regarding the 2020 census form, which "needed to be finalized for printing" within a few months," *Dep't of Commerce*, 139 S. Ct. at 2565, timing issues here support granting certiorari before judgment.

It would be impossible for the parties to obtain full review of petitioners' entitlement to preliminary relief—let alone permanent relief—in both the court of appeals and this Court before the election happens. The Fifth Circuit granted a stay of the district court's preliminary injunction, but did not set an expedited briefing schedule. Even on an expedited schedule, that court would be unlikely to render a decision before the middle of the summer, by which point timely review

by this Court might be close to impossible. As a practical matter, a writ of certiorari before judgment may be the only way to obtain timely review in this Court.

Moreover, this Court recently reiterated that "lower federal courts should ordinarily not alter the election rules on the eve of an election." *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S.Ct. 1205, 1207 (2020) (per curiam) (citing *Purcell v. Gonzalez*, 549 U.S. 1 (2006) (per curiam)). The only way to prevent those eleventh-hour alterations while still protecting citizens' fundamental right to vote is for this Court to grant review sufficiently in advance of the election. And when the constitutional claim arises in an election year, certiorari before judgment is the only way to achieve this. Right now, while the *Purcell* principle might have some bearing on whether the preliminary injunction should be reinstated for the July primary, the November general election is nearly five months away and *Purcell* poses no barrier to petitioners' obtaining relief.

The preliminary injunction petitioners sought and obtained from the district court rested on the theory that "in the circumstances of the pandemic now facing the state," Texas's age-based restriction of no-excuse vote-by-mail and its restriction on what counts as a "physical condition" entitling a citizen to vote by mail "subjects voters under the age of sixty-five to unconstitutional burdens not levied on voters age sixty-five or older." Pet. App. 82a. That claim could not have been brought before COVID-19, was filed with dispatch once the danger became clear, and merits this Court's intervention now.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari before judgment should be granted. This Court should then lift the stay imposed by the court of appeals, and set an expedited briefing schedule that will enable a decision in time for the 2020 general election.[8]

Respectfully submitted,

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[8] Seeking to provide the Court with alternative options for dealing with the Fifth Circuit's erroneous Twenty-Sixth Amendment ruling, petitioners have also filed a motion with this Court asking that the Court vacate the Fifth Circuit's stay of the district court's preliminary injunction. No. 19A-___. If the Court grants that motion, and orders that the preliminary injunction remain in place through the 2020 general election, that decision would obviate the need to grant plenary review at this time, and the underlying claims can then be adjudicated fully in the courts below without need for further intervention by the Court.

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