No. 19A1055

IN THE
SUPREME COURT OF THE UNITED STATES

Texas Democratic Party; Brenda Li Garcia; Joseph Daniel Cascino; Shanda Marie Sansing; and Gilbert Hinojosa, Chair of the Texas Democratic Party,

Applicants,

v.

Greg Abbott, Governor of Texas; Ruth Hughs, Texas Secretary of State; and Ken Paxton, Attorney General of Texas,

Respondents.

REPLY TO RESPONDENTS' OPPOSITION TO THE APPLICATION TO VACATE THE FIFTH CIRCUIT'S STAY

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INTRODUCTION

Respondents (hereafter collectively "the State") acknowledge that Texas is scrambling in the face of COVID-19 to figure out how to enable citizens to cast their ballots safely in the upcoming primary and general elections, and that it has not succeeded as of now in doing so. Resp. Opp. 4-6. And the State does not seriously contest that voting by mail would provide such a mechanism. Indeed, Texas unconditionally allows *some* voters to do so already, but it restricts this form of voting to citizens who are over the age of sixty-five on election day. *See* Tex. Elec. Code § 82.003. Senior citizens in Texas do not face the burden of going to a polling place in person and risking their health or the health of their loved ones in order to exercise their right to vote. Younger citizens do. Indeed, the State went out of its way to obtain a ruling from the state supreme court compelling precisely that result.

In Texas, a citizen's age, standing alone, determines whether he or she has an unconditional right to vote by mail. This differentiation among voters violates the plain text of Twenty-Sixth Amendment, which provides in pertinent part that "[t]he right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied *or abridged* by the United States or by any State on account of age." U.S. Const., amend. XXVI, § 1 (emphasis added). The district court, recognizing this constitutional flaw in Texas's vote-by-mail regime, issued a preliminary injunction requiring that, during the pendency of the COVID-19 pandemic, the state extend vote-by-mail to all citizens, regardless of age. The court of appeals, however, stayed that injunction on the unsupportable theory that as long as Texas does not

take away a voter's "only shot at exercising the franchise," Application App. 15, the State's decision to treat voters differently on account of age somehow does not "implicate" the Twenty-Sixth Amendment, *id.* 20.

The application explains in detail why it is likely that this case could and very likely will be reviewed here upon final disposition in the court of appeals, why the court of appeals was demonstrably wrong in deciding to issue the stay, and why applicants are likely to be seriously and irreparably injured by the stay.

The flurry of arguments in the State's opposition ultimately boils down to two propositions. First, the State asserts that because "[t]here is no constitutional right to vote by mail," Resp. Opp. 2, the Twenty-Sixth Amendment has nothing to say about Section 82.003's age-based restriction of mail-in ballots. Second, the State argues that this Court should not reinstate the district court's preliminary injunction because it somehow came both too soon and too late: too soon, because applicants and the district court should have waited during the pendency of state-court litigation involving a different provision of Texas law, and too late, because the district court granted its injunction on "the eve of an election," Resp. Opp. 1 (quoting *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1207 (2020))—if by "eve," one means two months before one of the elections it affects and nearly *six* months before the other.

Both of those propositions are meritless.

I. The State's Arguments About the Twenty-Sixth Amendment Are Meritless.

1. The linchpin of the State's merits-related arguments is its mistaken assumption (shared by the Fifth Circuit) that "the right to vote is not at issue" in this case because there is no constitutional right to "'receive [and cast] absentee ballots,'" Resp. Opp. 16-17 (quoting *McDonald v. Bd. of Election Comm'rs*, 394 U.S. 802, 807 (1969) (bracketed material supplied by respondents).

The State misperceives the nature of the constitutional claim. Applicants have never asserted an abstract constitutional right to vote absentee. Applicants freely acknowledge that if Texas had required *all* voters to vote in person at the polls, the federal Constitution would be silent.

Rather, applicants claim only that once Texas sets up its election system, the Twenty-Sixth Amendment forbids the state from treating voters differently "on account of age" in a way that favors some voters over others. Indeed, the State seems to recognize this when it observes that "[p]etitioners do not claim a constitutional right to a mail-in ballot, only equality based on age." Resp. Opp. 23.

Having created an unconditional right for *some* voters to vote by mail in Chapter 82 of its Election Code, Texas cannot restrict that right on bases forbidden by the Constitution. As the application explains, the Twenty-Sixth Amendment mirrors the Fifteenth, Nineteenth, and Twenty-Fourth Amendments. Application 10-16. There can be no doubt whatsoever that if a state that limited voting by mail to white voters, or to women, or to taxpayers, it would violate *those* amendments, regardless of whether black voters, or male voters, or voters who pay no taxes

remained free to vote in person. The same rule obtains when it comes to the Twenty-Sixth Amendment. Texas can no more limit vote-by-mail to voters over the age of sixty-five than it could limit its early voting period only to voters *under* the age of sixty-five (perhaps on the theory that older voters are less likely to face childcare or employment responsibilities that make it difficult to get to the polls on a Tuesday). Whatever right to vote a state creates—whether it involves polling hours, early voting, or vote-by-mail—must be extended to all voters without regard to their race, their sex, their payment of a tax . . . . or their age.

2. Once the Twenty-Sixth Amendment claim is properly understood, the State's argument that applicants "have not shown irreparable harm because no state action impacts their right to vote," Resp. Opp. 2, *see also id.* at 26, evaporates. Applicants' right to vote has been *abridged* relative to the right given to voters over the age of sixty-five. It is abridged in that younger voters, but not older ones, are required to choose either (1) to risk serious illness by voting in person at sites the State is still trying to "adapt," *id.* at 6, to the realities of COVID-19, or (2) to forgo voting in critical elections. If fear of COVID-19 "drives honest citizens out of the democratic process," this will undermine "our participatory democracy." *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (per curiam). The recent debacles in states across the country show that Texas's decision to restrict no-excuse voting by mail to older voters will have a strong, negative impact on voters under the age of sixty-five.[1]

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[1] The Fifth Circuit correctly rejected the State's arguments (which it tries to renew here) that none of the respondents are amenable to suit under *Ex parte Young*, 209 U.S. 123 (1908). *See* Application App. 11. The State offers no response to the Fifth

3. In a last-ditch effort to prevent applicants from voting by mail in the upcoming elections, the State argues that even if this Court were to hold that the Twenty-Sixth Amendment means what it says, "the district court ordered the wrong remedy." Resp. Opp. 23. The State suggests that the district court should have taken the right to vote by mail away from voters over the age of sixty-five, rather than extending it to voters under the age of sixty-five.

While it is true that a state *could* cure a Twenty-Sixth Amendment violation by leveling down, this Court recently "reiterated" that when courts impose a remedy, "'extension, rather than nullification'" is "[o]rdinarily," the "'proper course'" for a court to take. *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1699 (2017) (quoting *Califano v. Westcott*, 443 U.S.76, 89 (1979)).

Here, there are several reasons why the district court was correct to require leveling up, at least with respect to its preliminary injunction.

For Texas to cure the Twenty-Sixth Amendment violation by leveling down, the State would have to strip the ability to cast an absentee ballot from millions of voters. One in six Texas citizens of voting age (more than three million citizens all

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Circuit's reliance on *OCA-Greater Houston v. Texas*, 867 F.3d 604 (5th Cir. 2017), which had held that "[t]he facial invalidity of a Texas election statute is, without question, fairly traceable to and redressable by the State itself and its Secretary of State, who serves as the 'chief election officer of the state.'" *Id.* at 613; *see also* Tex. Elec. Code §§ 31.001(a), 31.003.

Moreover, while it is true that "the impact of COVID-19 on in-person voting," Resp. Opp. 13, stems from the nature of the virus, the injury applicants face *is* "traceable to respondents' actions," *id.*, in refusing to provide mail-in ballots to voters under the age of sixty-five, and would be redressed by an injunction striking the age-based limitation in Section 82.003.

told) is over the age of sixty-five. U.S. Census Bureau, Citizen-Voting Age Population: Texas (Nov. 15, 2016), https://perma.cc/AR2B-ERHB. It is entirely unclear that a majority of the state legislature would choose to take the right away from a bloc of voters that participate at a higher rate than their younger counterparts. And it seems quite doubtful that the legislature would do so during the pendency of a pandemic that is especially threatening to older individuals.

Moreover, given the importance of the right to vote, it would be improper for a *federal court* to deprive a large group of citizens of a right they have enjoyed for decades, and on which they may be especially reliant in this election cycle. This Court's foundational decision in *Guinn v. United States*, 238 U.S. 347 (1915), construing the Fifteenth Amendment suggested that the appropriate "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 produce a leveling up and create, at least unless and until the Texas legislature provides otherwise, a right to vote by mail for any "eligible voter."

II. The State's Argument Regarding the Timing of this Application Are Meritless.

The State's arguments that applicants were both too hasty and too dilatory in seeking the preliminary relief they obtained in the district court and the intervention they seek from this Court are both self-contradictory and wrong.

1. Applicants were not too hasty in seeking relief in federal court. In making this argument, the State misstates the nature and the significance of the parallel state court litigation. That litigation has no bearing on the Twenty-Sixth Amendment claim at the core of this application. And contrary to the State's insinuations, the fact that some of the applicants here sought relief first in state court strengthens their argument for relief from this Court.[2]

The state-court litigation brought by and on behalf of voters, *Texas Democratic Party v. DeBeauvoir*, No. D-1-GN-20-001610 (Travis Cty. Dist. Ct. Mar. 20, 2020), did not concern Section 82.003 at all. Nor did it raise any federal claims, let alone claims under the Twenty-Sixth Amendment. Instead, it concerned only the proper interpretation of Tex. Elec. Code § 82.002, which permits an eligible voter to cast a mail-in ballot "if the voter has a sickness or physical condition that prevents the voter from appearing at the polling place on election day without a likelihood of . . . injuring the voter's health." The plaintiffs in the state-court litigation argued that a lack of immunity to COVID-19 was such a condition. Of course, they could not have brought that claim prior to the outbreak of COVID-19 in early spring.

Had the state-court litigation ultimately succeeded, there would have been no need for a preliminary injunction from a federal court on any of applicants' federal-law claims: the state-court decision would have enabled citizens to vote by mail using Section 82.002 during the pendency of the pandemic. In light of current conditions in

[2] Some of the challengers in the state-court proceedings are not plaintiffs in this case and, conversely, applicant Brenda Li Garcia was not a party to the state-court proceedings.

Texas, where COVID-19 cases are still rising, the practical effect would have been that most Texas voters would have been entitled, as a matter of state law, to cast mail-in ballots throughout the 2020 election cycle. Applicants could then have litigated their Twenty-Sixth Amendment claims (as well as their other federal claims) on a conventional schedule in federal court without the need for preliminary relief.

But the State vigorously, and ultimately successfully, resisted the claim that voters could use Section 82.002 to vote by mail during the pandemic. Indeed, the State went so far as to file a mandamus action to prohibit local election officials from advising voters that "fear of COVID-19" could justify using Section 82.002 to request an absentee ballot and to warn that "any 'third parties' who advised voters to apply for mail-in ballots due to a fear of COVID-19 could be prosecuted." *See In re State*, 2020 WL 2759629, at *6 (Tex. May 27, 2020). Once the Texas Supreme Court definitively held that "a voter's lack of immunity to COVID-19, without more, is not a 'disability' as defined by the Election Code," *id.* at *2, voters no longer had any basis for seeking relief from the state courts on their state-law claims.

Applicants filed their federal case in April 2020 in the face of continued uncertainty over how the state courts would ultimately construe Section 82.002. There is literally no respect in which their Twenty-Sixth Amendment claim regarding Section 82.003's discrimination on the basis of age is "duplicative," Resp. Opp. 7, of the state-law claims regarding Section 82.003. Nor is the relief they sought for their Twenty-Sixth Amendment claims "indistinguishable," *id.* at 8, from the relief sought in the state-court suit, since the Twenty-Sixth Amendment challenge is not

dependent on the COVID-19 pandemic in any way and would be meritorious even if COVID-19 had never existed.

With respect to the Twenty-Sixth Amendment claims, there was no reason for either applicants or the federal district court to wait for the state courts' decision. Nothing the state courts might do with respect to construing the disability provision could have any bearing on the constitutionality of Section 82.003's age restriction. And given the first paragraph of the State's opposition in this Court, had applicants waited to file their Twenty-Sixth Amendment claim until after the state supreme court finally ruled on May 27, this Court can be sure that the State would have doubled down on its argument that applicants waited too long to seek any relief for the upcoming elections.[3]

In short, applicants' federal complaint and request for preliminary injunctive relief and the district court's grant of such relief were timely, not premature.

2. Applicants were not "dilatory," Resp. Opp. 26, either before the Fifth Circuit or in this Court. The Fifth Circuit proceedings consumed two weeks from the time the State filed its motion for a stay pending appeal on May 20 to the panel's opinion explaining the decision to grant that stay issued on June 4. The State is simply wrong

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[3] Respondents' laches argument cannot be taken seriously. The antiquity of the statute would of course provide no defense whatsoever to applicants' obtaining permanent declaratory and injunctive relief. Because they sought preliminary relief only on their as-applied claim, which turns on the discriminatory burden Section 82.003 imposes in light of the COVID-19 pandemic, that claim could not have been brought earlier. And in any event, applicant Cascino is twenty years old, and he would have lacked standing until he turned eighteen regardless of when Texas enacted Section 82.003.

to claim that "[t]he Fifth Circuit stayed the district court's injunction on May 20." *Id.* It did no such thing. The May 20 order was a "temporary administrative stay," App. App. 5, simply to enable the court of appeals to "consider[]the motion for stay pending appeal," Order of May 20, 2020, BL-10. Applicants had no basis for opposing that standard practice. Until the Fifth Circuit decided the State's motion and applicants saw its reasoning—events that did not occur until June 4—applicants could not have known whether they had a strong argument for this Court's intervention.

Within twelve days of the court of appeals' June 4 decision—which revealed that the Fifth Circuit simply misunderstood the Twenty-Sixth Amendment claim and that this misunderstanding tainted its decision to stay the district court's injunction—applicants filed both this application and a petition for writ of certiorari before judgment with this Court. No. 19-1389. That is not "nearly a month" later as the State disingenuously suggests, Resp. Opp. 1, and it is hardly dilatory.

Nor was there any point in seeking further relief from the Fifth Circuit once it issued the June 4 opinion. Even an expedited briefing schedule with a decision soon thereafter would not have protected applicants' interests in the upcoming election: If applicants ultimately prevailed, the State surely would have come to this Court arguing that it was too late to award any relief for the upcoming elections, since the State is arguing it is *already* too late now. And it was unlikely applicants *could* prevail in any further proceedings before the Fifth Circuit, given that the June 4 opinion is precedential.

3. Applicants recognize that we are fast approaching the point at which vacating the stay and reinstating the preliminary injunction with respect to the July primary runoff could raise concerns under this Court's *Purcell* doctrine. But there can be no argument from *Purcell* with respect to the November 3 general election, which is also covered by the preliminary injunction because it too will occur "during the pendency of pandemic circumstances," Pet. App. 71a. That election was close to six months away when the district court entered its injunction and is still nearly five months away today. To the best of counsel's knowledge, this Court has never applied *Purcell* to overturn relief for an election that is still months away.

Tellingly, the State makes no argument that its current election practices are fixed; indeed, it touts all the ways it is changing its system to respond to the COVID-19 emergency. Resp. Opp. 4-6. And it is worth noting that for a month this spring—between the state trial court's issuance of an injunction on April 17 allowing voters without COVID-19 immunity to vote by mail and the state supreme court's decision to stay that injunction on May 15—five of Texas's most populous counties were publicly informing citizens that they *could* vote by mail and urging them to do so, leading many individuals to apply for mail-in ballots. In this already fluid situation, *Purcell* does not require that federal courts refuse all relief for a clear constitutional violation.

Nor has the State offered any argument that it would face logistical difficulties in complying with the district court's preliminary injunction. Indeed, the experience between April 17 and May 15 shows that local officials are eminently capable of

complying with the district court's preliminary injunction. The State's most populous county filed an amicus brief in the Fifth Circuit stating exactly that. *See* Br. of Harris County in Support of Opposition To Defendants-Appellants' Emergency Motion For Stay Pending Appeal 3-4, 8-12, 20-21, BL-30. The only injury the State asserts is the boilerplate claim that any time a state cannot enforce its laws, it suffers an injury. Resp. Opp. 24. But when a state's law so clearly flouts a constitutional prohibition, that asserted injury rings hollow.

CONCLUSION

This Court should vacate the Fifth Circuit's panel June 4, 2020, stay and reinstate the District Court's preliminary injunction for the upcoming 2020 primary and general elections.

Dated: June 23, 2020

Respectfully submitted,

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