No. 19-1389

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,

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 to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF FOR PETITIONERS

Jeffrey L. Fisher
Brian H. Fletcher
Pamela S. Karlan
STANFORD LAW SCHOOL
SUPREME COURT
LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305

Richard Alan Grigg
LAW OFFICES OF DICKY
GRIGG, P.C.
4407 Bee Caves Road
Building 1, Suite 111
Austin, TX 78746

Chad W. Dunn
Counsel of Record
K. Scott Brazil
BRAZIL & DUNN, LLP
4407 Bee Caves Road
Suite 111
Austin, TX 78746
Telephone: (512) 717-9822
chad@brazilanddunn.com

Armand Derfner
DERFNER & ALTMAN
575 King Street
Suite B
Charleston, SC 29403

Additional Counsel listed on following page

Additional Counsel

Robert Leslie Meyerhoff
TEXAS DEMOCRATIC PARTY
314 E. Highland Mall
Boulevard, #508
Austin, TX 78752

Martin Golando
THE LAW OFFICE OF
MARTIN GOLANDO PLLC
405 N. St. Marys Street
San Antonio, TX 78205
Austin, TX 78746

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Constitutional Provisions

Statutes and Rules

Other Authorities

REPLY BRIEF FOR PETITIONERS

In this case, the Fifth Circuit held that a law can abridge the right to vote "*only* if it makes voting *more difficult* for [a] person than it was before the law was enacted or enforced." BIO App. 38a (first emphasis added). The court thus sustained a Texas statute—Tex. Elec. Code § 82.003—that gives citizens over the age of sixty-five a categorical right to vote by mail, while denying that right to younger voters. But the Fifth Circuit's holding would compel the opposite result if Texas had adopted exactly the same legal regime by first conferring a right to vote by mail on all voters, then withdrawing it from those under sixty-five.

This holding is indefensible. As respondents concede (BIO 23-24), it is also far-reaching: It applies not just to the Twenty-Sixth Amendment, but to the identically worded prohibitions on discriminatory voting rules in three other constitutional amendments. And despite respondents' arguments, the Fifth Circuit's holding warrants immediate review by this Court, before another election cycle goes by.

First, contrary to respondents' suggestion (BIO 32-33), petitioners' claims are not barred by sovereign immunity. For decades, this Court has adjudicated voting rights-related cases brought against secretaries of state who are their states' chief election officers. *See, e.g.*, *Baker v. Carr*, 369 U.S. 186 (1962). The Fifth Circuit correctly held that the Texas Secretary of State was a proper defendant here. BIO App. 14a-16a.

Second, respondents are wrong that this case is in an "interlocutory posture" that makes it "unripe for review at this time." BIO 11. The Fifth Circuit's

decision after the filing of the initial petition for certiorari before judgment (BIO App. 2a-60a) finally resolves the legal question presented by the petition. Not only are further proceedings unnecessary, but both the nature of voting-rights litigation in general and a recent series of cases construing the term "deny or abridge" reinforce the reasons to take this case *now*, when the Court can settle this important question free from the complications posed by a looming election.

Finally, on the merits, the Fifth Circuit's decision here flies in the face of both the text and structure of the Twenty-Sixth Amendment. That Amendment requires courts to compare the treatment of voters of one age to voters of a different age *today*—not to compare the scope of a person's right to vote yesterday with its current scope. Under the correct framework, Tex. Elec. Code § 82.003 is flatly unconstitutional.

I. Respondents' sovereign-immunity argument is meritless.

The Fifth Circuit held that respondent Secretary of State was amenable to suit given this Court's decisions in *Ex Parte Young*, 209 U.S. 123 (1908), and *Virginia Office for Prot. & Advocacy v. Stewart*, 563 U.S. 247, 254-55 (2011). The court found that, at a minimum, the Secretary's "statutory duties" with regard to "design[ing] the application form for mail-in ballots," *see* Tex. Elec. Code § 31.002(a), and "compel[ling] or constrain[ing] local officials" with respect to issuing absentee ballots demonstrated "a sufficient connection between the official sued and the statute challenged." BIO App. 14a. As the court explained, if Section 82.003's restriction of no-excuse vote by mail to voters over the age of sixty-five is

unconstitutional, then the Secretary could be enjoined from designing "an application form that express[es] an unconstitutional absentee-voting option." *Id.* 15a.[1]

The Secretary of State's central role in Texas's election system reinforces the conclusion that the secretary is a proper defendant under *Ex Parte Young*. In *OCA-Greater Houston v. Texas*, 867 F.3d 604 (5th Cir. 2017), the Fifth Circuit declared that the "invalidity of a Texas election statute is, without question, fairly traceable to and redressable by . . . its Secretary of State, who serves as the 'chief election officer of the state.'" *Id.* at 613 (quoting Tex. Elec. Code § 31.001(a)). This Court has repeatedly adjudicated voting rights cases where the appropriate defendant was a state's chief election officer. *See, e.g., Burdick v. Takushi,* 504 U.S. 428 (1992) (Takushi was Hawaii Director of Elections). This includes cases from Texas. *See American Party of Texas v. White,* 415 U.S. 767 (1974) (White was Texas Secretary of State).[2]

---

[1] Given its holding, the Fifth Circuit found it unnecessary to address petitioners' additional bases for holding that the Secretary was amenable to suit. BIO App. 16a.

Moreover, the Court need not reach petitioners' argument that the Governor and Attorney General are also appropriate parties. In many of this Court's pathmarking voting-rights cases, these officers were defendants. *See, e.g.*, *Dunn v. Blumstein*, 405 U.S. 330 (1972) (Tennessee Governor); *Thornburg v. Gingles*, 478 U.S. 30 (1986) (North Carolina Attorney General).

[2] Petitioners sued the relevant local officials in the counties where they are registered to vote—the county clerk of Travis County and the Bexar County Elections Administrator. *See* Pet. ii. *Cf.* BIO 33 (suggesting local officials are the proper defendants even in a challenge to a state statute like Section 82.003). Those

II. This case should be reviewed now.

Respondents claim that the Court should deny review because this case is in an interlocutory posture and might need further proceedings on petitioners' other claims. BIO 12-18. But this case is not interlocutory in any way that matters. And there are strong reasons to resolve an election case like this one before the next election cycle is well underway.

1. This Court regularly grants review in cases raising constitutional questions that arise in the context of preliminary-injunction proceedings. *See, e.g.*, *Fulton v. City of Philadelphia*, No. 19-123 (argued Nov. 4, 2020) (free exercise clause challenge to city contracting rules); *Trump v. Hawaii*, 138 S. Ct. 2392, 2406-07 (2018) (various challenges to travel ban); *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2370 (2018) (First Amendment challenge to regulation of pregnancy crisis centers); *Glossip v. Gross*, 576 U.S. 863, 867 (2015) (Eighth Amendment challenge to methods of execution); *Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 212 (2013) (First Amendment challenge to denials of federal funding); *Nat'l Aeronautics & Space Admin. v. Nelson*, 562 U.S. 134, 142-44 (2011) (privacy-based challenge to questions on a government background check). As the leading treatise on this Court explains,

---

officials declined to appeal the district court's injunction. In the Fifth Circuit, the Travis County clerk "agree[d] that the Twenty-Sixth Amendment's prohibition on age-based voting restrictions require that all qualified voters be afforded the opportunity to [vote by mail] under the same conditions imposed on those 65 years of age or older." C.A. Br. of Amici Curiae Chris Hollins et al. 5, 2020 WL 4228511.

"the interlocutory status of [a] case may be no impediment to certiorari where the opinion of the court below has decided an important issue, otherwise worthy of review, and Supreme Court intervention may serve to hasten or finally resolve the litigation." Eugene Gressman et al., *Supreme Court Practice*, § 4.18 (Bloomberg edition 2020).

This case involves precisely such a situation. As Justice Sotomayor recognized, this case raises "weighty but seemingly novel questions regarding the Twenty-Sixth Amendment." *Texas Democratic Party v. Abbott,* 140 S. Ct. 2015, 2015 (2020) (per curiam) (statement of Justice Sotomayor respecting the denial of application to vacate stay). The Fifth Circuit's decision finally resolves those questions, holding that Section 82.003's age-based restriction of no-excuse vote by mail is consistent with the Amendment. There is nothing left to decide with respect to that question, given the panel majority's categorical holding that "by definition no denial or abridgement has occurred." BIO App. 24a.

And contrary to respondents' argument (BIO 12-14), this case is utterly dissimilar to *Abbott v. Veasey*, 137 S. Ct. 612 (2017). That case involved a challenge to Texas's 2011 photo voter identification law and, at the point Texas sought this Court's review, the Fifth Circuit had remanded the case to reweigh evidence presented at trial, including evidence that the state acted with discriminatory intent. In this case, by contrast, there is nothing more to do on remand. Respondents identify no factual evidence relevant to determining whether Section 82.003 violates the Twenty-Sixth Amendment. And there is none. That

the provision might also be unconstitutional for other reasons is irrelevant.

2. Because this case involves an election-related rule, it provides a particularly strong basis for resolving the question presented now.

"This Court has repeatedly emphasized 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). *See, e.g.*, *Purcell v. Gonzalez*, 549 U.S. 1 (2006) (per curiam); *Frank v. Walker*, 574 U.S. 929 (2014); *Veasey v. Perry,* 135 S. Ct. 9 (2014); *Democratic Nat'l Comm. v. Wisconsin State Legislature*, 2020 WL 6275871 (U.S. Oct. 26, 2020) (No. 20A66).

This case shows that even when plaintiffs bring suit many months before an election—in this case, petitioners filed their complaint in April—it is not possible for this Court to resolve the constitutionality of an election statute in time for the next election.

If the constitutionality of Texas's restriction on vote by mail is to be resolved in time for the upcoming elections in 2021, the Court needs to grant review immediately. As for even the 2022 election cycle, the Court will need to grant review no later than this coming fall. But if the Court denies certiorari now, it is quite likely that it will miss that window too. Should the case proceed on remand as the Fifth Circuit ordered, respondents will certainly invoke the Fifth Circuit's ruling here as a basis to dismiss the Twenty-Sixth Amendment claim. But, unless and until all the other claims in the case are *also* finally resolved by the district court, there will be no final judgment. Even

once that final judgment issues, there will need to be briefing in the Fifth Circuit. At that point, it is virtually certain that either petitioners or respondents will seek this Court's review, and the case will be back before this Court on the eve of another election. Once again, the *Purcell* principle is likely to come into play. In short, there is no time like the present.

This Court's grant of review in *Husted v. A. Philip Randolph Institute*, 138 S. Ct. 1833 (2018), provides an instructive example. That case arose from a suit filed in the run up to the 2016 election. This Court granted Ohio's petition for certiorari shortly after the election, apparently with the understanding that the need to provide guidance before the 2018 election justified immediate review—despite the interlocutory posture and the absence of a circuit split. *See* Cert. Reply Br. 2-3, 12, *Husted*, *supra* (No. 16-980). There is even more reason to follow the *Husted* example here where there is division among the lower courts.

3. Recent decisions in the courts of appeals further reinforce the need for review now. As the petition explained, lower federal and state courts had adopted divergent positions on how to construe the Twenty-Sixth Amendment. Pet. 13-17. That disarray has deepened while this petition has been pending, making review even more compelling.

After the decision here, the Seventh Circuit upheld Indiana's law imposing an age-based restriction on the right to vote by mail. *Tully v. Okeson*, 977 F.3d 608 (7th Cir. 2020). But the Seventh Circuit did not embrace the Fifth Circuit's temporal-baseline approach. Instead, it adopted an even more crabbed reading of the Twenty-Sixth Amendment: In response to the plaintiffs' argument that "hypothetical

laws similarly restricting the ability of African Americans or women" to vote would violate the Fifteenth and Nineteenth Amendments, respectively, the panel responded that any scrutiny of such laws would come only "from the Fourteenth Amendment's Equal Protection Clause," which would require "heightened scrutiny" because a generally suspect class was at issue. *Id.* at 614. "It would *not* come from the Fifteenth [or] Nineteenth" amendments because such a law would somehow "not implicate the right to vote." *Id.*

Tully relied on *Luft v. Evers*, 963 F.3d 665 (7th Cir. 2020), a challenge to Wisconsin voter ID provisions decided a few months previously. There, the court had approved treating Twenty-Sixth Amendment claims as "just different ways of presenting contentions under *Anderson* [*v. Celebrezze*, 460 U.S. 780 (1983)] and *Burdick* [*v. Takushi*, 504 U.S. 428 (1992)]." *Luft*, 963 F.3d at 673. In other words, the Seventh Circuit believes that the Twenty-Sixth Amendment adds nothing to the Fourteenth Amendment-based flexible standard for assessing restrictions on the right to vote.

By contrast, the Eleventh Circuit rejects the *Anderson-Burdick* balancing test as the appropriate test under the voting-specific amendments. Earlier this year, that court explained that under the Fifteenth, Nineteenth, and Twenty-Sixth Amendments, the Constitution "establishe[s] a powerful baseline: States must set voter qualifications without any regard to" the prohibited factor. *Jones v. Governor of Fla.*, 975 F.3d 1016, 1043 (11th Cir. 2020) (en banc). "[S]trict scrutiny" is not even enough: Such restrictions "are per se unconstitutional." *Id.* And

unlike the Fifth Circuit, which held here that "a law that makes it *easier* for others to vote does not abridge any person's right to vote for the purposes of the Twenty-Sixth Amendment," BIO App. 38a, the Eleventh Circuit declared that a law that restores voting rights on the basis of age *would* violate the Twenty-Sixth Amendment even if it left "younger felons" no worse off than before. *See Jones*, 975 F.3d at 1040.

There is no way to reconcile the divergent approach courts of appeals are taking to allegations of unconstitutional vote "abridgement." The last six months only further solidify the preexisting dissension among lower courts. This Court's intervention is urgently needed.

III. The Fifth Circuit's decision is wrong.

The error in the Fifth Circuit's reasoning was powerfully illustrated by the statement respondents' counsel made at oral argument: "[I]f a state were to pass a law saying that White people must vote by personal appearance but Black people can vote by personal appearance or by mail-in balloting, …. the Fifteenth Amendment would not prohibit that law because that law does not deny or abridge the right to vote within the meaning of the Fifteenth Amendment." Or. Arg. Rec. at 41:27-42:07. To state that position is to show its indefensibility.

1. The Fifth Circuit treated "abridge" as solely a temporal restriction: In its view, a state's law does not "abridge" the right to vote when it adds voting opportunities for some, so long as one manner of voting remains in place for those not given the new voting opportunity. *See* BIO App. 38a. That holding is

inconsistent with this Court's precedents that the concept of abridgement "necessarily entails a comparison" of "what the right to vote ought to be." *Reno v. Bossier Par. Sch. Bd.*, 528 U.S. 320, 334 (2000).

Contrary to the Fifth Circuit's arid resort to dictionary definitions of "abridgment," BIO App. 33a-34a, the proper baseline under the Fifteenth, Nineteenth, Twenty-Fourth, and Twenty-Sixth Amendments is given in the text of those amendments themselves. Those amendments provide that the right to vote shall not be abridged "on account of" or "by reason of" specific characteristics: "race," "sex," taxpaying status, or "age." By their plain terms, those amendments call for a comparison between the law's treatment of voters of different races, sexes, taxpaying statuses, or ages—not between the scope of the right a particular voter enjoyed yesterday and the scope of the right he or she enjoys today. It cannot be that the Fifteenth Amendment would have nothing to say if a jurisdiction gave white voters an early voting period, as long as it left untouched a preexisting ability for Black voters to cast a ballot in person on election day. But that perverse consequence is exactly what the Fifth Circuit's logic commands.

The reason why the voting amendments use the word "abridge" is not to create a temporal comparison, but to make clear that *any* race-, sex-, taxpaying-, or age-based suffrage rule, and not only categorical *denial* of the right to vote, is covered. The Voting Rights Act, which was enacted to enforce the Fifteenth Amendment, illustrates this point. While Section 5, the provision at issue in *Bossier Parish* involved a statute with language explicitly requiring a temporal comparison, Section 2 echoes the Fifteenth

Amendment text and requires an inter-voter comparison. Section 2(a) prohibits practices that result "in a denial or abridgement" of the right to vote on account of race or color or membership in a specified language minority. 52 U.S.C. § 10301(a). Section 2(b) declares that a violation of that prohibition occurs, among other things, when the plaintiff group has "less opportunity *than other members of the electorate* to participate in the political process and to elect representatives of their choice." 52 U.S.C. § 10301(b) (emphasis added). That understanding of abridgment is also, as the petition explains, more consistent with this Court's decision in *Harman v. Forssenius*, 380 U.S. 528 (1965). *See* Pet. 20-22.

2. For reasons the petition anticipated (Pet. 23-25), any reliance on *McDonald v. Board of Election Commissioners*, 394 U.S. 802 (1969), would be misguided. *Contra* BIO 8, 19-21. For one thing, "the Court's disposition of the claims in *McDonald* rested on failure of proof." *O'Brien v. Skinner*, 414 U.S. 524, 529 (1974). If *McDonald* rested on anything other than an absence of proof, this Court abandoned *McDonald's* reasoning with respect to claims involving constitutionally condemned criteria in *Goosby v. Osser*, 409 U.S. 512, 520 (1973), and as a general rule regarding absentee voting in *American Party of Texas v. White,* 415 U.S. 767 (1974). Indeed, in *American Party,* this Court held, in a case involving Texas, that "the unavailability of the absentee ballot is obviously discriminatory" when such ballots were made available for major party primaries and not those of the minor parties. *Id.* at 795. If that is true as a matter of the First and Fourteenth Amendments—the

constitutional provisions at issue there—it is equally true of the Twenty-Sixth.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Jeffrey L. Fisher
Brian H. Fletcher
Pamela S. Karlan
STANFORD LAW SCHOOL
SUPREME COURT
LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305

Robert Leslie Meyerhoff
TEXAS DEMOCRATIC PARTY
314 E. Highland Mall
Boulevard, #508
Austin, TX 78752

Martin Golando
THE LAW OFFICE OF
MARTIN GOLANDO PLLC
405 N. St. Marys Street
San Antonio, TX 78205

Chad W. Dunn
Counsel of Record
K. Scott Brazil
BRAZIL & DUNN, LLP
4407 Bee Caves Road
Suite 111
Austin, TX 78746
Telephone: (512) 717-9822
chad@brazilanddunn.com

Armand Derfner
DERFNER & ALTMAN
575 King Street
Suite B
Charleston, SC 29403

Richard Alan Grigg
LAW OFFICES OF DICKY
GRIGG, P.C.
4407 Bee Caves Road
Building 1, Suite 111
Austin, TX 78746

December 18, 2020