No. 20-1244

IN THE
Supreme Court of the United States

BARBARA TULLY, *et al.*,
Petitioners,
v.

PAUL OKESON, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the Twenty-Sixth Amendment permits Indiana to limit mail-in absentee voting to thirteen circumstances, one of which is when a voter is at least 65 years old.

II. Whether, in the context of the COVID-19 pandemic, the Fourteenth Amendment permits Indiana to limit mail-in absentee voting to thirteen circumstances, which include when voters are at least 65 years old, are disabled, are confined to their home or healthcare facility due to illness, or expect to be away from their home counties on Election Day.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CASES [CONT'D]

CASES [CONT'D]

CASES [CONT'D]

CASES [CONT'D]

STATUTES

STATUTES [CONT'D]

STATUTES [CONT'D]

CONSTITUTIONAL PROVISIONS

OTHER AUTHORITIES

INTRODUCTION

Under this Court's precedents, "States have long been held to have broad powers to determine the conditions under which the right of suffrage may be exercised." *McDonald v. Bd. of Election Comm'rs of Chi.*, 394 U.S. 802, 807 (1969) (quoting *Lassiter v. Northampton Cty. Bd. of Elections*, 360 U.S. 45, 50 (1959)). And these powers include the authority to make in-person voting the *exclusive* means of casting a ballot, for the Court has held that "the right to vote" does not entail a "right to receive absentee ballots." *Id.*

Indiana has thus acted well within its authority in making in-person voting its principal mode of voting: All voters may vote in-person either at their polling place on Election Day or at various early-voting locations over the prior 28 days. Ind. Code §§ 3-11-8-2, 3-11-4-1, 3-11-10-26. And because in-person voting may be especially difficult in some situations, the State also permits mail-in absentee voting in thirteen separate circumstances—including when voters are elderly, disabled, or confined to a home or healthcare facility due to illness. *Id.* § 3-11-10-24(a).

Petitioners, however, argue "that the Constitution requires [the State] to go farther." *Griffin v. Roupas*, 385 F.3d 1128, 1131 (7th Cir. 2004). They initially premised their suit on the theory that, under the Court's Fourteenth Amendment decisions in *Burdick v. Takushi*, 504 U.S. 428 (1992), and *Anderson v. Celebrezze*, 460 U.S. 780 (1983), the interests underlying the State's voting laws are "outweighed by the burdens placed on Plaintiffs' right to vote during the pandemic." ECF 1 at 17. Yet they have since shifted their

focus to a different theory: Because Indiana permits elderly Hoosiers to vote absentee-by-mail, Petitioners argue, the Twenty-Sixth Amendment obligates the State to extend mail-in voting to everyone. *See* ECF 6 at 17–20. Relying on these theories, in June 2020 they filed a motion seeking a preliminary injunction requiring Indiana to "extend the privilege of voting by mail to . . . all Indiana voters in the November 3, 2020 general election." ECF 13 at 1.

The district court denied this motion, recognizing that it ignores "a host of serious objections to judicially legislating so radical a reform in the name of the Constitution." App. 38a (quoting *Griffin*, 385 F.3d at 1130). The Seventh Circuit affirmed, concluding that (1) Petitioners failed to make a "strong" showing of a likelihood of success on the merits, *id.* at 5a, and (2) in light of "'the imminence of the election,'" an injunction "would only risk exacerbating 'voter confusion,'" and that the election should therefore "'proceed without an injunction'" in any event, *id.* at 15a–16a (quoting *Purcell v. Gonzalez*, 549 U.S. 1, 4–6 (2006)).

Rather than seek relief from this Court before the election, Petitioners waited five months to ask the Court to review the Seventh Circuit's decision. The Court should decline to do so.

First and most importantly, the Court lacks jurisdiction to consider the case at this juncture. It is well settled that "[o]nce the opportunity for a preliminary injunction has passed, . . . the preliminary injunction issue may be moot even though the case remains alive on the merits." 13C Charles Alan Wright *et al.*, *Federal Practice & Procedure* § 3533.3.1 & n.43 (3d ed.)

(collecting cases). That is precisely the situation here. The *case* is not moot because Petitioners have at least one live claim for relief—their request for a declaration that the Indiana law allowing elderly voters to cast mail-in absentee ballots is facially invalid under the Twenty-Sixth Amendment. *See* ECF 6 at 21. But because Petitioners' preliminary injunction motion sought relief *only* as to the November 2020 election, *see* ECF 13 at 1, the completion of the election makes *this appeal* of the denial of that motion moot. As the Court explained four decades ago, "when the injunctive aspects of a case become moot on appeal of a preliminary injunction," the appeal should be dismissed and the case remanded for further proceedings. *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 396 (1981).

Second, even aside from this insuperable jurisdictional obstacle, this appeal is a poor vehicle for addressing the questions presented, for any answers the Court might give would not alter the appeal's outcome. The Seventh Circuit concluded that under *Purcell* the short time remaining until the election was reason enough to deny the motion—and Petitioners have not asked the Court to review that conclusion.

Finally, there is no lower-court dispute for the Court to resolve in any event. The two circuits to have considered the question have rejected the notion that the Twenty-Sixth Amendment bars States from giving elderly voters the option to vote by mail. *See* App. 8a–9a; *Tex. Democratic Party v. Abbott (TDP I)*, 961 F.3d 389, 409 (5th Cir. 2020); *Tex. Democratic Party v. Abbott (TDP II)*, 978 F.3d 168, 191 (5th Cir. 2020).

Accordingly, the Court should deny the Petition.

STATEMENT OF THE CASE

1. Elections in the United States have "always been a decentralized activity," with elections administered by local officials and their rules set by state legislators. John C. Fortier & Norman J. Ornstein, *The Absentee Ballot and the Secret Ballot: Challenges for Election Reform*, 36 U. Mich. J.L. Reform 483, 486 (2003); *c.f.* U.S. Const. art. I, § 2, cl. 1. These voting rules inevitably must balance competing interests, such as "promoting voter access to ballots on the one hand and preventing voter impersonation fraud on the other." *Fla. State Conf. of NAACP v. Browning*, 522 F.3d 1153, 1168 (11th Cir. 2008); *see also Russell v. Lundergan-Grimes*, 784 F.3d 1037, 1051 (6th Cir. 2015) (noting that election laws "balance the tension between the two compelling interests of facilitating the franchise while preserving ballot-box integrity").

For most of American history, policymakers struck this balance by requiring the vast majority of voters to cast their ballots in-person on Election Day: The first laws authorizing *absentee* voting were limited to soldiers fighting in the Civil War, and as late as 1913 only two States—Vermont and Kansas—generally permitted civilians to vote via absentee ballot. *See* Paul G. Steinbicker, *Absentee Voting in the United States*, 32 Am. Pol. Sci. Rev. 898, 898 (1938). And even today, while all States permit some form of absentee voting in at least some circumstances, States continue to balance the interests in promoting voting and preventing fraud in a variety of ways, with different States adopting different rules governing when, how, and where voters may vote absentee.

In Indiana, lawmakers have chosen to balance these competing interests by providing Hoosiers with a variety of ways to cast a ballot. Consistent with longstanding American practice, in-person voting continues to be the primary method of casting a ballot: All registered voters in Indiana may either vote in-person at their precinct polling place on Election Day, Ind. Code § 3-11-8-2, or—using a procedure sometimes called "absentee in-person voting"—may vote in-person at various locations for the 28 days prior to Election Day, *id.* §§ 3-11-4-1, 3-11-10-26. Alternatively, Hoosiers suffering from an illness or injury, or those caring for someone at a private residence, may vote via a travelling voter board, which will bring a ballot to the voter's house and return it to election officials to be counted. *Id.* § 3-11-10-25.

Beyond these in-person voting opportunities, Indiana law sets out thirteen separate circumstances in which voters may instead vote via mail-in absentee ballot. *Id.* § 3-11-10-24. For example, a voter may cast a mail-in absentee ballot if the voter has "a specific, reasonable expectation of being absent from the county" while the polls are open on Election Day, is scheduled to work while the polls are open, is prevented from voting due to the unavailability of transportation to the polls, is confined to a home or health care facility "because of an illness or injury" while the polls are open, or is disabled. *Id.* In addition, and most relevant here, Indiana permits voting via mail-in absentee ballot when the voter is "elderly," *id.*—that is, at least 65 years old, *id.* § 3-5-2-16.5.

Indiana provides elderly voters the option of casting a mail-in absentee ballot because it recognizes, as

members of this Court have recently recognized, that in-person voting can be especially difficult for elderly voters. *See Democratic Nat'l Comm. v. Wis. State Legislature*, 141 S. Ct. 28, 38 (2020) (mem.) (Kavanaugh, J., concurring) (observing "that the in-person voting option can pose a health risk to elderly and ill voters"); *id.* at 45 (Kagan, J., dissenting) (concluding that "the elderly and ill put themselves in peril if they go to the polls"); *see also* App. 18a (Ripple, J., concurring) (noting that elderly voters may "be deterred in coming to the polls on a November day because of the physical and social conditions that invariably afflict senior citizens").

Many other States, as well as the federal government, share Indiana's commonsense concern for elderly voters. At least ten other States, for example, have laws that either specifically permit elderly voters to vote absentee-by-mail or make it easier for them to do so.[1] And at least seven additional States

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[1] Ky. Rev. Stat. § 117.085(1)(a)(8) (providing that "a qualified voter may apply to cast his or her vote by mail-in absentee ballot . . . if the voter is . . . [n]ot able to appear at the polls on election day on the account of age"); La. Rev. Stat. § 18:1303(J) ("A person who has attained the age of sixty-five years or more may vote absentee by mail . . . ."); Miss. Code § 23-15-715(b) (providing that "persons who are sixty-five (65) years of age or older . . . may make application for an absentee ballot"); S.C. Code § 7-15-320(B)(8) (providing that "persons sixty-five years of age or older" "must be permitted to vote by absentee ballot in all elections"); Tenn. Code § 2-6-201(5)(A) (allowing persons age 60 and older to "vote absentee by mail"); Tex. Elec. Code § 82.003 ("A qualified voter is eligible for early voting by mail if the voter is 65 years of age or older on election day."); W. Va. Code § 3-3-1(b)(1)(B) (providing that voters may vote absentee by mail on

have special provisions that make it easier for elderly voters to comply with state voter-ID laws.[2]

Similarly, Congress has long required States to assist older voters in obtaining mail-in ballots as part of

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account of "[p]hysical disability or immobility due to extreme advanced age"); Fla. Stat. § 101.6923 (providing that first-time voters "65 years of age or older" are not required to include a copy of their identification cards when returning mail-in ballots); Ga. Code § 21-2-381(a)(1)(G) (authorizing "[a]ny elector meeting criteria of advanced age" to permanently register for mail-in ballots and thereby avoid the requirement to file a new application for each election); Va. Code § 24.2-416.1 (providing that the requirement to vote in-person when voting in a county or city for the first time "shall not apply to . . . any voter age 65 or older").

[2] Arizona (personal identification is required to obtain a ballot, *see* Ariz. Rev. Stat. § 16-579, but the Arizona Department of Transportation will provide a free identification card to those 65 and older, *see* Ariz. Dep't of Transp., https://azdot.gov/node/5115); Colorado (personal identification is required, *see* Colo. Rev. Stat. §1-7-110, but the State will provide a free identification card to individuals 60 and older, *see id.* §42-2-306); Kansas (the State generally requires that the form of identification "has not expired," but provides that" [e]xpired documents shall be valid if the bearer of the document is 65 years of age or older," Kan. Stat. 25-2908(h)(1)); Michigan (voters must present personal identification, *see* Mich. Comp. Laws § 168.523, but residents 65 and older may obtain free identification cards, *see id.* § 28.292(14)(a)); New Hampshire (voters over the age of 65 may use an expired form of identification no matter how long it has been expired, while other voters are subject to a 5-year limit on expiry, *see* N.H. Rev. Stat. 659:13); North Carolina (voters 65 and older may present "any expired form of identification . . . provided that the identification was unexpired on the registered voter's sixty-fifth birthday," N.C. Gen. Stat. § 163-166.16(a)(3); and Wisconsin (personal identification is required to vote, *see* Wis. Stat. § 6.79, but the State provides an identification card at no cost to individuals 65 and older, *see id.* § 343.50).

a national policy "to promote the fundamental right to vote by improving access for handicapped and elderly individuals." 52 U.S.C. § 20101; *see also id.* § 20102 (requiring States to "assure that all polling places for Federal elections are accessible to handicapped and elderly voters" and to provide any such voter assigned to an inaccessible polling place "with an alternative means for casting a ballot on the day of the election"); *id.* § 20104 (requiring States to "provide public notice, calculated to reach elderly and handicapped voters, of the availability of aids under this section . . . and the procedures for voting by absentee ballot").

Of course, while Indiana permits mail-in absentee voting in some situations, the State nevertheless recognizes the increased risk of fraud and coercion attendant to mail-in voting. *Cf. Republican Party of Pa. v. Degraffenreid*, 141 S. Ct. 732, 735 (2021) (Thomas, J., dissenting) (noting that "election administrators have long agreed [that] the risk of fraud is 'vastly more prevalent' for mail-in ballots" (quoting Adam Liptak, "Error and Fraud at Issue as Absentee Voting Rises," *N.Y. Times* (Oct. 6, 2012)). For this reason, Indiana law strictly regulates the mail-in voting process: It is a felony, for example, for anyone other than a select group of individuals to possess absentee ballots, *see* Ind. Code § 3-14-2-16(9)–(10), a rule the Indiana Legislature adopted in 2005, *see* 2005 Ind. Legis. Serv. P.L. 103-2005, shortly after the highly publicized East Chicago mayoral election scandal involving absentee-ballot fraud, *see Pabey v. Pastrick*, 816 N.E.2d 1138, 1145–47 (Ind. 2004).

2. On March 6, 2020, Indiana Governor Eric Holcomb declared a public health emergency in response

to the COVID-19 outbreak. ECF 53-5 at 1. Shortly thereafter, on March 20, 2020, he exercised his public-health-emergency authority and ordered the primary election "postponed to June 2, 2020" and requested the Secretary of State and the Indiana Election Commission to "take any and all necessary actions in connection with this Order." ECF 53-6 at 2. Three days later, Governor Holcomb issued his directive for Hoosiers to Stay at Home, ordering Indiana residents to "stay at home or their place of residency," leaving "only for essential activities, essential governmental functions, or to participate in essential businesses." ECF 53-7 at 2 (emphasis omitted).

Following these orders, on March 25, 2020, the Indiana Election Commission exercised its statutory authority to issue an emergency order providing that "[a]ll registered and qualified Indiana voters are afforded the opportunity to vote no-excuse absentee by mail" for the 2020 primary election. ECF 53-8 at 2; *see* Ind. Code § 3-11-4-1(c)–(d) (authorizing the Commission both to permit an otherwise-qualified voter to vote absentee if it "determines that an emergency prevents the person from voting in person at a polling place," and to decide whether the absentee ballot should be transmitted "by mail or personally delivered"). As a result of the Commission's order, all 92 counties in Indiana gave voters the option—in addition to the continued availability of in-person voting—to vote by mail for the June 2, 2020 primary election.

Notably, this experiment in universal no-excuse mail-in voting produced several significant problems. Many counties, for example, incurred additional, un-

expected expenses, including the costs to hire personnel to process and count the mail-in votes, to purchase postage to mail out the ballots, and to install safety measures to store the absentee ballots securely. *See* ECF 53-1 at ¶ 5; ECF 53-2 at ¶¶ 4–5, 10; ECF 53-3 at ¶¶ 7–8. In addition, numerous mail-in ballots went uncounted due to human error that could easily have been avoided in the in-person voting context: Sometimes election officials failed to initial the ballot before sending it to the voter, and many voters forgot to sign their ballots. *See id.* at ¶ 11. And the United State Postal Service's unpredictable processing caused many ballots to arrive late, both to the voter and, then, on return to the local election board—which meant that many mail-in ballots arrived after the deadline and could not be counted. *See* ECF 53-1 at ¶ 8; ECF 53-2 at ¶ 5; ECF 53-3 at ¶ 9.

3. Petitioners, dissatisfied with the Commission's decision not to authorize universal no-excuse mail-in voting for the November 2020 general election, filed this lawsuit on April 29, 2020: Their complaint alleged that, in the context of the COVID-19 pandemic, Indiana's limitations on who may vote via mail-in absentee ballot violate the Fourteenth Amendment of the U.S. Constitution and the Equal Privileges and Immunities Clause of the Indiana Constitution. ECF 1 at 16–18. The complaint thus requested relief only as applied to the November 2020 general election: It sought (1) "an order declaring that as applied during the pandemic, Ind. Code § 3-11-10-24(a), insofar as it grants to some voters, but not to Plaintiffs . . . the right to vote by mail in the November 3, 2020 [election], violates the Equal Protection Clause of the Fourteenth Amendment and the Equal Privileges and

Immunities Clause of the Indiana Constitution"; (2) an order "preliminarily enjoin[ing] Defendants to extend the privilege of voting by mail during the pandemic to . . . all Indiana voters in the November 3, 2020, general election"; and (3) an order "preliminarily enjoin[ing] Defendants to advise all county clerks in Indiana to permit no-excuse absentee voting by mail in the November 3, 2020 [election]." *Id.* at 18–19.

On May 4, 2020, Petitioners amended their complaint to add a new claim—that for decades Indiana has been violating the Twenty-Sixth Amendment by giving elderly voters the option to vote by mail-in absentee ballot. ECF 6 at 18–20. And the new complaint's prayer for relief was largely identical to the original complaint's, with the only change the addition of a request for "an order declaring that Ind. Code § 3-11-10-24(a) on its face violates the Twenty-Sixth Amendment." *Id.* at 21.

About five weeks later, on June 8, 2020, Petitioners filed the preliminary injunction motion that is the subject of this appeal. ECF 13. Notably, that motion sought relief *only* as to the November 2020 general election: It asked the district court to "preliminarily enjoin Defendants to (1) extend the privilege of voting by mail to . . . all Indiana voters *in the November 3, 2020 general election*; and (2) advise all county clerks in Indiana to permit no-excuse absentee voting by mail *in the November 3, 2020 general election*." *Id.* at 1 (emphasis added); *see also* ECF 14 at 26 (asking the district court to "enjoin Defendants from enforcing the requirements of I.C. § 3-11-10-24(a) in connection with the November 3, 2020, general election, and order that Defendants instruct all county elections

boards that all voters . . . be permitted to vote by mail, in the November 3, 2020, general election").

The district court denied the preliminary injunction motion on August 21, 2020. App. 24a. It observed that in *McDonald* this Court held that the right to vote does not include the right to vote via mail-in absentee ballot. *See id.* at 29a ("[U]nless a restriction on absentee voting 'absolutely prohibit[s]' someone from voting, the right to vote is not at stake." (quoting *McDonald v. Bd. of Election Comm'rs of Chi.*, 394 U.S. 802, 807 (1969)). It thus concluded that Petitioners' demand for no-excuse mail-in voting did not implicate the right to vote and that Petitioners therefore failed to show a likelihood of success as to each of their claims. *See id.* at 31a, 38a.

Beyond the merits of Petitioners' claims, the district court also found that it is in the State's and the public's interest "that the manner of voting in the general election promote the accurate and timely counting and reporting of results," and that "[e]xpanding voting by mail again for the general election may jeopardize that interest." *Id.* at 37a. It further found that greatly expanding Indiana's voting rules to permit universal mail-in voting "could easily strain Indiana's voting systems because those systems are instead equipped for in-person voting," resulting in a "greater risk of delayed results and the disqualification of voters for late or defective ballots." *Id.*

On October 6, 2020, the Seventh Circuit panel affirmed the denial of the preliminary injunction. *Id.* at 1a. The panel majority concluded that Petitioners had not made the requisite "'strong' showing as to either

of their claims because 'the right to vote' does not include [Petitioners'] 'claimed right to receive absentee ballots.'" *Id.* at 5a–6a (quoting *McDonald*, 394 U.S. at 807). It explained that "[i]f Indiana's law granting absentee ballots to elderly voters . . . disappeared tomorrow, all Hoosiers could vote in person this November, or during Indiana's twenty-eight-day early voting window, just the same." *Id.* at 8a. Accordingly, under *McDonald*—which this Court "cite[d] . . . favorably," *id.* at 10a, in *Burdick v. Takushi*, 504 U.S. 428, 434 (1992)—Indiana's law does not implicate the right to vote and thus Petitioners' "claim under the Twenty-Sixth Amendment, which only protects the right to vote, is unlikely to succeed," *id.* at 8a.

McDonald undermined the Fourteenth Amendment claim for the same reason, *id.* at 9a, and the panel majority added it "would arrive at the same result" even "using the *Anderson/Burdick* balancing approach": The "modest impact" of Indiana's voting scheme—which "allows for early in-person voting for twenty-eight days leading up to the election, one of the longer early-voting periods across all states"—was sufficiently outweighed by "Indiana's legitimate interests in ensuring safe and accurate voting procedures," *id.* at 13a–15a.

The panel majority further concluded that this Court's "*Purcell* principle" made a preliminary injunction improper even apart from the merits: "Given that voting is already underway in Indiana, we have crossed *Purcell*'s warning threshold and are wary of turning the State in a new direction at this late stage." *Id.* at 3a. It thus held that "intervention now would only risk exacerbating 'voter confusion,' and we

should therefore 'allow the election to proceed without an injunction.'" *Id.* at 16a (quoting *Purcell v. Gonzalez*, 549 U.S. 1, 4–6 (2006)).

Finally, Judge Ripple agreed that the denial of the preliminary injunction should be affirmed, but wrote separately to offer a slightly different analysis of the Twenty-Sixth Amendment claim: In his view, Petitioners "made a weak case" on this claim because they failed to show that Indiana has adopted "an invidious classification based on age." *Id.* at 18a–19a. Instead, "[t]he legislature simply employed a reasonable methodology to identify those who, in its judgment, needed a special accommodation to get to the polls." *Id. at* 19a. Judge Ripple thus concluded that Indiana's law is consistent with the Twenty-Sixth Amendment because it merely uses age as a "definitional shorthand" to relieve the State "of the insurmountable task of adjudicating, on an individual basis, which of its older citizens would be deterred in coming to the polls on a November day because of the physical and social conditions that invariably afflict senior citizens." *Id. at* 18a.

REASONS TO DENY THE PETITION

I. Because It Is an Appeal of an Order Denying a Preliminary Injunction Concerning a Past Election, This Appeal Is Moot

Following the Seventh Circuit's early-October decision, Petitioners could have immediately filed a cert. petition and asked for injunctive relief as to the November 2020 election pending resolution of that petition. *See, e.g., Moore v. Circosta*, 141 S. Ct. 46 (2020)

(mem.) (denying application for injunctive relief that sought to enjoin a state board of elections' extension of the absentee-ballot receipt deadline for the November 2020 election); *Merrill v. People First of Ala.*, 141 S. Ct. 190 (2020) (mem.) (granting stay of preliminary injunction that had enjoined curbside-voting law as applied to November 2020 election).

Petitioners chose not to do so, however, and instead waited five months after the Seventh Circuit's decision—and four months after Election Day—to file their cert. petition. The Court should deny that petition. Now that the election is over, the appeal is moot and the Court lacks jurisdiction to hear the case at this stage.

Critically, the order on appeal here is the district court's denial of Petitioners' preliminary injunction motion, which means the sole issue for appellate consideration is whether the district court erred in denying the request for an injunction. *See Brown v. Chote*, 411 U.S. 452, 456 (1973). And Petitioners' motion sought to require Indiana to permit no-excuse mail-in absentee voting *only* as to the November 2020 election. *See* ECF 13 at 1; ECF 14 at 26. The November 2020 election has long since concluded, which means Petitioners' preliminary injunction motion—the sole subject of this appeal—could not possibly be granted now. The law is well settled that in such situations the appeal must be dismissed as moot.

1. As this Court explained more than 125 years ago, "[t]he duty of this court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect." *Mills v. Green*,

159 U.S. 651, 653 (1895). And it "necessarily follows" that when "an event occurs which renders it impossible for this court" to grant the appellant "any effectual relief whatever, the court will not proceed to a formal judgment, but will dismiss the appeal." *Id.*

In *University of Texas v. Camenisch*, 451 U.S. 390 (1981), the Court applied this principle to hold that federal courts lack jurisdiction over preliminary-injunction appeals where subsequent events moot the preliminary-injunction issue. There the district court granted a preliminary injunction requiring a university to pay for a sign-language interpreter. *Id.* at 392. The Fifth Circuit largely affirmed, but, crucially, "[b]y the time the Court of Appeals had acted, the University had obeyed the injunction by paying for [the] interpreter, and [the plaintiff] had been graduated." *Id.* at 393. This Court held that events had mooted the appeal and thereby deprived the Fifth Circuit of jurisdiction, explaining that the *sole* "issue before the Court of Appeals was . . . whether the District Court had abused its discretion in issuing a preliminary injunction requiring the University to pay for him." *Id.* (citing *Chote*, 411 U.S. at 457; *Alabama v. United States*, 279 U.S. 229 (1929)). And "whether a preliminary injunction should have been issued here is moot, because the terms of the injunction . . . have been fully and irrevocably carried out." *Id.* at 398.

Notably, the Court observed that "the *case as a whole* is not moot, since . . . it remains to be decided who should ultimately bear the cost of the interpreter"—an issue preserved by an injunction bond also ordered by the district court. *Id.* at 393 (emphasis

added). But that issue, which "depends on a final resolution of the merits of [the] case," *id.*, did not save the *appeal* from being moot, since "the only issue presently before us—the correctness of the decision to grant a preliminary injunction—is moot," *id.* at 394. The Court thus held that the Fifth Circuit lacked jurisdiction and that its judgment "must be vacated and the case must be remanded to the District Court for trial on the merits." *Id.*

Accordingly, the Court has repeatedly dismissed preliminary-injunction appeals that have become moot, including appeals that would otherwise fall within the Court's mandatory appellate jurisdiction. In *Christian Civic League of Maine, Inc. v. FEC*, No. 05-1447 (U.S.), for example, the Court dismissed an appeal of a three-judge district court's order denying a preliminary injunction motion—which sought to permit the plaintiff to run an advertisement in the thirty days leading up to a June 2006 election—because, as here, the election to which the motion pertained had already occurred. *See Christian Civic League of Maine, Inc. v. FEC*, 433 F. Supp. 2d 81, 84 n.1 (D.D.C. 2006). After its motion was denied, the plaintiff appealed to this Court, but the Court declined to expedite the appeal, and by the time it considered case the election was over. *Christian Civic League of Maine, Inc. v. FEC*, No. 05-1447 (U.S.). The Court thus simply dismissed the appeal as moot. *Id.*; *see also Nelson v. Quick Bear Quiver*, 546 U.S. 1085 (2006) (mem.) (dismissing as moot appeal from the order of a three-judge district court preliminarily enjoining a state redistricting law absent federal preclearance, after the law had been precleared).

This appeal is moot for precisely the same reason. The election for which Petitioners' preliminary injunction motion sought relief has already taken place, the order denying their motion cannot be undone, and so the appeal of that order is moot. As the leading federal courts treatise explains, where a "preliminary injunction is denied, the conduct against which the party is seeking relief may take place," and in such a situation "the question whether temporary relief should have been granted by the district court would be moot." 11A Charles Alan Wright *et al.*, *Federal Practice & Procedure* § 2962 (3d ed.). That principle is sufficient to foreclose Petitioners' continued litigation of this appeal.

2. Petitioners' observation, *see* Pet. 30, that the Court generally has jurisdiction to review interlocutory orders—including orders granting or denying preliminary injunctions, *see* 28 U.S.C. §§ 1254, 2101(e)—does not alter this conclusion. The problem with this appeal is not that it is interlocutory; it is that it is *moot*. It is not unusual for the Court to review district court orders granting or denying preliminary injunctions, but—because Article III bars the Court from considering moot questions, *see DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006)—the Court does so only when the preliminary-injunction issue remains a live controversy, *see, e.g., Trump v. Vance*, 140 S. Ct. 2412, 2421 (2020) (reviewing denial of motion to preliminarily enjoin still-operative grand-jury subpoena); *Little Sisters of the Poor v. Pennsylvania*, 140 S. Ct. 2367, 2373 (2020) (reviewing preliminary injunction against religious exception to contraceptive mandate); *Roman Cath. Archdiocese of San Juan v. Acevedo Feliciano*, 140 S. Ct. 696, 697

(2020) (reviewing denial of a motion for a preliminary injunction requiring the payment of pension benefits); *Frisby v. Schultz*, 487 U.S. 474, 479 (1988) (reviewing a preliminary injunction that indefinitely barred a town from enforcing a picketing ordinance).[3]

Nor is it relevant that Petitioners' "claims are not limited to the 2020 election cycle." Pet. 14 n.6; *see also id.* at 31–32. Petitioners are correct that they have at least one live claim remaining—their claim for a declaration that the age distinction in Indiana law is facially invalid. *See* ECF 6 at 21. For that reason, the *case* is not moot. But this interlocutory *appeal* nevertheless *is moot*: The limited relief Petitioners' sought in their preliminary injunction motion has been "fully and irrevocably" denied. *Camenisch*, 451 U.S. at 398.

As the Court recognized in *Camenisch*, other live issues remaining in a case cannot save a preliminary-injunction appeal where the sole question on appeal—whether the preliminary injunction decision was an abuse of discretion—has become moot. *See id.* at 393–94. It is thus firmly established that "[o]nce the opportunity for a preliminary injunction has passed . . . the

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[3] Petitioners appear to cite *Husted v. A. Philip Randolph Institute*, 138 S. Ct. 1833 (2018), as an example of the Court's review of an interlocutory decision, *see* Pet. 30, but it appears that the district-court order on appeal in that case had directed final judgment to the defendant and terminated the case, *see A. Philip Randolph Inst. v. Husted*, 838 F.3d 699, 704 (6th Cir. 2016); *A. Philip Randolph Institute v. Husted*, No. 2:16-cv-00303-GCS-EPD, ECF 67 (S.D. Ohio Jun. 29, 2016). In any event, there the injunction issue clearly remained live because the plaintiffs had sought to enjoin *indefinitely* a state policy the State continued to enforce. *See Husted*, 138 S. Ct. at 1841.

preliminary injunction issue may be moot even though the case remains alive on the merits." 13C Charles Alan Wright *et al.*, *Federal Practice & Procedure* § 3533.3.1 & n.43 (3d ed.) (collecting cases). *Every* federal court of appeals has applied this rule to dismiss appeals of preliminary injunction decisions that have become moot—even where, as here, other issues in the case remain to be decided.[4]

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[4] *See, e.g., McLane v. Mercedes-Benz of N. Am., Inc.*, 3 F.3d 522, 524 (1st Cir. 1993) ("[B]ecause the events which [the plaintiff] sought to enjoin have in fact occurred, its appeal from the district court's order denying injunctive relief is moot."); *Trane Co. v. O'Connor Sec.*, 718 F.2d 26, 27 (2d Cir. 1983) (dismissing as moot appeal of denial of a preliminary injunction, because the defendants' "sale of their entire . . . holdings clearly moots any questions regarding the propriety of enjoining them from selling or voting their . . . stock"); *Clark v. K-Mart Corp.*, 979 F.2d 965, 969 (3d Cir. 1992) (dismissing as moot employer's appeal of a preliminary injunction requiring it to pay for an employee's medical treatment, "because [the employer] has complied and [the employee] will not receive the treatment again"); *Fleet Feet, Inc. v. NIKE, Inc.*, 986 F.3d 458, 462–63 (4th Cir. 2021) ("[T]he end of the [ad] campaign . . . render[s] moot [the defendant's] appeal of a preliminary injunction designed to interrupt that very campaign."); *Marilyn T., Inc. v. Evans*, 803 F.2d 1383, 1384 (5th Cir. 1986) (dismissing appeal of a district-court decision rejecting a due-process challenge to a license suspension and denying the preliminary injunction, explaining that the defendant "held a public hearing at which [the] license was permanently revoked," which meant that "whether the district court should have issued the preliminary injunction . . . is now moot"); *Radiant Glob. Logistics, Inc. v. Furstenau*, 951 F.3d 393, 396 (6th Cir. 2020) (dismissing as moot an appeal of a preliminary injunction that imposed noncompete restrictions, explaining that the "restrictions expired . . . [and the Court] cannot turn back the clock on the preliminary injunction and thus [has] no way to grant relief"); *Gjertsen v. Bd. of Election Comm'rs of Chi.*, 751 F.2d 199, 202

Indeed, that live issues remain in the case makes it clear that the "capable of repetition yet evading review" exception to mootness—to which Petitioners gesture without elaboration, *see* Pet. 31—is inapplicable. Because the case is not moot, the merits will not evade review: Like the appellant in *Camenisch*, Petitioners simply need to return to the district court, litigate the case to final judgment, and then proceed

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(7th Cir. 1984) (dismissing appeal of preliminary injunction that altered rules governing an election that had since been held, explaining that because "the only order before us—a preliminary injunction whose dissolution would lift no burden from the defendants' backs—is moot, the appeal must be dismissed"); *Bierman v. Dayton*, 817 F.3d 1070, 1073 (8th Cir. 2016) (dismissing as moot appeal of the denial of a preliminary injunction that would have prevented a union-certification election because the election had since occurred); *Shell Offshore Inc. v. Greenpeace, Inc.*, 815 F.3d 623, 628 (9th Cir. 2016) (dismissing preliminary-injunction appeal as moot "[b]ecause the only order on appeal has now expired"); *Fleming v. Gutierrez*, 785 F.3d 442, 445 (10th Cir. 2015) (dismissing as moot an appeal of a preliminary injunction that had altered election procedures "because the election has passed and we cannot grant any effective relief"); *Tropicana Prod. Sales, Inc. v. Phillips Brokerage Co.*, 874 F.2d 1581, 1582–83 (11th Cir. 1989) (holding that because the appeal was heard "more than five weeks after the end-date of the requested injunction," the plaintiff's "*appeal* from its motion for a preliminary injunction" would be "dismissed as moot" even though its "*claim on the merits* is not mooted"); *Metaullics Sys. Co. v. Cooper*, 100 F.3d 938, 939 (Fed. Cir. 1996) (dismissing as moot appeal of decision denying motion to preliminarily enjoin patent infringement because the patent had expired); *Olympic Fed. Sav. & Loan Ass'n v. Off. of Thrift Supervision*, 903 F.2d 837 (D.C. Cir. 1990) (per curiam) (dismissing as moot appeal of preliminary injunction barring agency action until an agency director was validly appointed because a valid appointment occurred while appeal was pending).

with any appeal. *See* 451 U.S. at 398; *see also, e.g., Radiant Glob. Logistics, Inc. v. Furstenau*, 951 F.3d 393, 396 (6th Cir. 2020) (holding that the "capable of repetition yet evading review" exception did not apply because the merits remained to be litigated in the district court); *Bierman v. Dayton*, 817 F.3d 1070, 1074 (8th Cir. 2016) (same); *Fleming v. Gutierrez*, 785 F.3d 442, 446 (10th Cir. 2015) (same); *Tropicana Prod. Sales, Inc. v. Phillips Brokerage Co.*, 874 F.2d 1581, 1583 (11th Cir. 1989) (same); *Marilyn T., Inc. v. Evans*, 803 F.2d 1383, 1385 (5th Cir. 1986) (same).

Accordingly, the Court lacks jurisdiction over this appeal, and it should deny the petition.[5]

II. Even If the Court Were to Consider the Questions Raised in the Petition, It Would Not Change the Outcome of This Appeal

Even beyond this appeal's mootness, the Court's *Purcell* principle—which holds that federal courts should ordinarily not alter election rules on the eve of an election, *see Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (per curiam); *Democratic Nat'l Comm. v. Wis.*

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[5] The Court need not vacate either of the decisions below because—unlike the Fifth Circuit's decision in *Camenisch*, 451 U.S. at 393—the district court and the Seventh Circuit had jurisdiction to issue these decisions, since both were issued before the November 2020 election. And vacatur is unnecessary to clear the path for future litigation here because, unlike final judgments, preliminary-injunction decisions have no preclusive effect on future proceedings in a single case. *See, e.g., supra*, n.4; 13C Charles Alan Wright *et al.*, *Federal Practice & Procedure* § 3533.10.3 & n.10 (3d ed.) ("[I]f the case remains alive in the district court, it is sufficient to dismiss the appeal without directing that the injunction order be vacated.") (collecting cases).

State Legislature, 141 S. Ct. 28, 31 (2020) (mem.) (Kavanaugh, J., concurring)—provides an independently sufficient, and now unchallenged, basis for denying the preliminary injunction. It thus provides further reason to deny the petition.

The Seventh Circuit recognized that the "*Purcell* principle" provided an "independent reason[]," *id.* at 30, to deny Petitioners' preliminary injunction motion, *see* App. 3a (observing that the "*Purcell* principle counsels federal courts to exercise caution and restraint before upending state election regulations on the eve of an election"). After explaining why Petitioners failed to show a strong likelihood of success on the merits of either of their claims, it observed that *Purcell* recognizes that courts are ill equipped to override elected officials' "rational policy judgments . . . 'on the eve of an election.'" *Id.* at 15a (quoting *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1207 (2020)). For this reason, it held that "our intervention now would only risk exacerbating 'voter confusion,' and we should therefore 'allow the election to proceed without an injunction.'" *Id.* at 16a (quoting *Purcell*, 549 U.S. at 4–6).

The Seventh Circuit thus correctly concluded that "the imminence of the election," *id.* at 15a–16a (quoting *Purcell*, 549 U.S. at 5), was reason enough to affirm the order on appeal—which, again, is simply the denial of Petitioners' motion for a preliminary injunction requiring Indiana to "extend the privilege of voting by mail to . . . all Indiana voters in the November 3, 2020 general election." ECF 13 at 1. Petitioners have not asked the Court to review that conclusion or even suggested that the Seventh Circuit misapplied

Purcell. Accordingly, the Court's resolution of the questions presented could not change the outcome of this appeal, as *Purcell* independently justified the decisions below. There is thus no reason for the Court to consider these questions now.

III. The Circuits Agree That the Constitution Allows States to Give Elderly Voters the Option to Cast Mail-In Absentee Ballots

Finally, no circuit-court split requires the Court's resolution. Both circuits to address the questions Petitioners ask the Court to answer, *see* Pet. i, agree that both of Petitioners' theories (that the Fourteenth Amendment requires no-excuse mail-in voting during the pandemic and that the Twenty-Sixth Amendment bars States from giving elderly voters the option of voting absentee-by-mail) likely fail.

The Constitution permits States to give a mail-in voting option to elderly voters. After all, the Court has already held that the Fourteenth Amendment does not require States to "extend[] absentee voting privileges" to all citizens—even if the State permits some citizens to vote absentee, and even if there are other "citizens not covered by the absentee provisions, for whom voting may be extremely difficult, if not practically impossible." *McDonald v. Bd. of Election Comm'rs of Chi.*, 394 U.S. 802, 809–10 (1969). And such laws are fairly common, *see supra* n.1, and have gone unchallenged until recently. Indeed, Texas adopted such a law in 1975 as part of a package of provisions meant in part "to bring the Texas Election Code into *conformity* with" with the Twenty-Sixth

Amendment. House Comm. On Elections, Bill Analysis, S.B. 1047, 64th Leg., R.S. (1975) (emphasis added), https://lrl.texas.gov/LASDOCS/64R/SB1047/SB1047_64R.pdf#page=82.

For these reasons, the Seventh Circuit, as well as two separate panels of the Fifth Circuit, rejected the Fourteenth Amendment and Twenty-Sixth Amendment claims Petitioners press here. *See* App. 8a–9a; *Tex. Democratic Party v. Abbott (TDP I)*, 961 F.3d 389, 409 (5th Cir. 2020) (granting stay of preliminary injunction pending appeal); *Tex. Democratic Party v. Abbott (TDP II)*, 978 F.3d 168, 191 (5th Cir. 2020) (reversing preliminary injunction). Petitioners do not dispute that these courts reached the same bottom-line conclusion, nor do they contend that any appellate court has ever accepted either of their claims.[6]

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[6] The three other Twenty-Sixth Amendment decisions Petitioners cite, *see* Pet. 16–17, all involved state actions that entirely prevented young people from voting because of their age; none involved absentee or mail-in voting laws, *see Jolicoeur v. Mihaly*, 488 P.2d 1, 7 (Cal. 1971) (invalidating California requirement that college students register at their parents' homes, because it meant a student "may not have a voice in the community in which he lives, but must instead vote wherever his parents live or may move to"); *Colo. Project-Common Cause v. Anderson*, 495 P.2d 220, 221 (Colo. 1972) (invalidating a Colorado rule that categorically "prohibit[ted] qualified electors of ages eighteen through twenty from the initiative process"); *Walgren v. Board of Selectmen of Amherst*, 519 F.2d 1364, 1367 (1st Cir. 1975) (declining to invalidate a town election, even though it was held during a winter recess when many student voters were absent, because there was no reason to reject the district court's finding "as to the speculativeness of determining whether 18-20 year old voters were disproportionately burdened").

Instead, Petitioners attempt to construct a circuit split on the basis of minor variations in the explanations the Seventh and Fifth Circuits provided in reaching the same result. *See* Pet. 18–23. These slight differences, however, simply provide mutually reinforcing reasons to conclude that the Constitution permits the longstanding state laws that give elderly voters the option to vote via mail-in absentee ballot; they certainly do not justify the Court's review.

As noted, the Seventh Circuit concluded that Petitioners failed to make a strong showing on either of their claims because, under *McDonald*, Indiana's mail-in voting statute does not "absolutely prohibit Plaintiffs from voting" and therefore "does not 'impact Plaintiffs' ability to exercise the fundamental right to vote.'" App. 7a–8a (quoting *McDonald*, 394 U.S. at 807, 808 n.7; internal brackets omitted). It held that Petitioners' Twenty-Sixth Amendment claim is thus "unlikely to succeed," *id.* at 8a, because the Twenty-Sixth Amendment only protects the "right . . . to vote," Amend. XXVI. And it held that their "equal protection claim is not likely to succeed," *id.* at 9a, for the same reason: Indiana's mail-in absentee-ballot law easily passes rational-basis review, which applies because the law neither curtails the fundamental right to vote nor adopts a suspect classification, *id.* at 10a–13a; *see also id.* at 13a–15a (concluding that Indiana's law would also likely pass the *Anderson/Burdick* test).

The Fifth Circuit stay panel rejected the same claims for the same reasons. It concluded that the plaintiffs' Fourteenth Amendment claim was not likely to succeed because there was "no indication that they 'are in fact absolutely prohibited from voting

by the State,'" which meant "the right to vote is not 'at stake,' and rational-basis review follows." *TDP I*, 961 F.3d at 404 (quoting *McDonald*, 394 U.S. at 807–11). And, like the Seventh Circuit, it concluded that "employing *McDonald*'s logic leads inescapably to the conclusion that rational-basis review applies" to the Twenty-Sixth Amendment claim as well: "If 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." *Id.* at 409.

And the Fifth Circuit preliminary injunction panel similarly rejected the notion that the Twenty-Sixth Amendment demands that "voting rights must be identical for all age groups at all times," *TDP II*, 978 F.3d at 189—and did not even address the Fourteenth Amendment claim, since even the plaintiffs declined to press that claim at that stage, *see id.* at 176. And while, as Petitioners note, Pet. 18, it concluded "that an election law abridges a person's right to vote for the purposes of the Twenty-Sixth Amendment only if it makes voting *more difficult* for that person than it was before the law was enacted or enforced," *TDP II*, 978 F.3d at 190–91, that conclusion was not essential to its decision: It held that "[e]ven if . . . abridging goes beyond just looking at the change but also at the validity of the state's voting rules generally, we see no basis to hold that Texas's absentee-voting rules as a whole are something that ought not to be," *id.* at 189.

The preliminary injunction panel's reasoning was thus quite similar to Judge Ripple's concurrence below: A state law giving elderly voters the option of

casting a mail-in absentee ballot is not the sort of "invidious classification based on age" with which the Twenty-Sixth Amendment is concerned, for it simply removes for "senior citizens impediments not experienced by most other" voters. App. 19a.

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In sum, Petitioners ask the Court to take a moot appeal to decide a non-dispositive question on which the circuits are in agreement. The Court has neither jurisdiction nor reason to do so.

CONCLUSION

The Petition should be denied.

Respectfully submitted,

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