No. 20-1244

In the Supreme Court of the United States

BARBARA TULLY ET AL.,

Petitioners,

v.

PAUL OKESON, S. ANTHONY LONG, SUZANNAH WILSON OVERHOLT, ZACHARY E. KLUTZ, AND CONNIE LAWSON,

Respondents.

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

REPLY BRIEF FOR PETITIONERS

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, petitioners incorporate by reference the corporate disclosure statement that appears in the petition for a writ of certiorari. No amendments are needed to make that statement current.

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REPLY BRIEF FOR PETITIONERS

As the Seventh Circuit recognized, the claims in this case "hinge" on one basic question: "what is the 'right to vote'"? Pet. App. 2a.

Respondents do not offer a serious defense of the Seventh Circuit's answer to this question, which conflicts with the plain text and history of the Twenty-Sixth Amendment and this Court's precedents, and which exacerbates persistent disagreement in the lower courts over the applicable legal standard. Indeed, respondents largely disregard one side of this conflict. Nor do they deny that this case would have come out differently if decided in a different circuit.

With little to say about substance, respondents turn to distraction. Principally, they argue that this Court lacks jurisdiction because the 2020 election has passed. But that argument rests on inapposite authority. Both sides agree that this case is not moot, and that this petition presents dispositive questions of law. See Pet. i; Brief in Opposition ("BIO") i. This Court has long recognized its power to reach the merits of a directly presented legal question on an appeal from an order granting or denying a preliminary injunction. *Thornburgh* v. *Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 756-757 (1986) (citing *Bailey* v. *Patterson*, 369 U.S. 31 (1962), *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579 (1952), and other cases).

If anything, the fact that there is no longer an election looming is a reason to *grant* certiorari, not deny it. The Court will need to address the issues presented by this petition at some point, and the timing now is ideal. If the Court takes the petition, it can resolve the issues well in advance of the 2022 elections.

In sum, there is no jurisdictional obstacle and no reason to wait. The Court can—and should—grant the petition for certiorari.

I. The lower courts are intractably split over both questions presented

As we have shown, the lower courts are hopelessly divided over the proper way to analyze absentee voting claims under the Twenty-Sixth and Fourteenth Amendments, with many courts noting the lack of guiding authority on the Twenty-Sixth Amendment in particular. Pet. 15-16. This Court's guidance is badly needed.

Respondents attempt to reduce this division to the two Fifth Circuit decisions in *Texas Democratic Party* and the Seventh Circuit decision in this case, claiming that there are at most "minor variations" between the opinions that provide "mutually reinforcing reasons" for the same result. But even this blinkered view of the situation in the lower courts drastically understates the split.

Under the Fifth Circuit's rule, age-based restrictions on absentee voting *may* violate the Twenty-Sixth Amendment, but only if they make it harder for the disfavored group to cast a ballot than previously. See *Texas Democratic Party* v. *Abbott*, 978 F.3d 168, 191 (5th Cir. 2020) ("*TDP II*") ("We agree with *Jolicoeur* [v. *Mihaly*, 488 P.2d 1 (Cal. 1971)] to the extent it means that a voting scheme that adds barriers primarily for younger voters constitutes an abridgement due to age"). Under the Seventh Circuit's reasoning, in contrast, age-based restrictions on absentee voting *cannot* violate the Twenty-Sixth Amendment. The differences between these formulations are far from

minor. As petitioners pointed out, under the Fifth Circuit's anti-retrogression approach, the outcome of the decision below would have been different in this very case. Pet. 19-20.[1]

Respondents also largely ignore the third strain of Twenty-Sixth Amendment decisions discussed in the petition, exemplified by cases like *Jolicoeur* and *Walgren* v. *Howes*, 482 F.2d 95 (1st Cir. 1973). Pet. 16-17. Relegating these cases to a footnote, respondents assert that these decisions "all involved state actions that entirely prevented young people from voting because of their age." BIO 25 n.6. Yet the decisions themselves explicitly state otherwise.[2]

More importantly, the rule of law that these decisions articulate—that "the Twenty-Sixth Amendment to the United States Constitution" requires the state "to treat all citizens 18 years of age or older alike for all purposes related to voting" (*Jolicoeur*, 488 P.2d at

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[1] Respondents note that the *TDP II* majority stated elliptically that "we see no basis to hold that Texas's absentee-voting rules as a whole are something that ought not to be." BIO 27 (quoting 978 F.3d at 189). But it is unclear what this means, and the statement played no role in the court's express "hold[ing]": "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." 978 F.3d at 190-191.

[2] See *Jolicoeur*, 488 P.2d at 4 (plaintiffs could "travel to their parents' district to register and vote" or "register and vote as absentees"); *Walgren*, 482 F.2d at 99-100 & n.9 (plaintiffs stated a claim even though the voters had not been "totally denied the electoral franchise"); see also *Walgren* v. *Board of Selectmen of Amherst*, 519 F.2d 1364, 1367 (1st Cir. 1975) (rejecting conclusion that "the burdens themselves—of returning during recess to vote in person or of going through the application and notarial execution process of absentee voting—are insignificant").

12)—is directly contrary to the rules in the Fifth and Seventh Circuits.

Finally, with respect to the Fourteenth Amendment claim, respondents note (at 26-27) that the motions panel in *Texas Democratic Party* v. *Abbott*, 961 F.3d 389 (5th Cir. 2020) ("*TDP I*"), and the Seventh Circuit in this case agreed that Fourteenth Amendment challenges failed because absentee voting provisions automatically receive rational-basis view under *McDonald* v. *Board of Election Commissioners of Chicago*, 394 U.S. 802 (1969). But that is because those courts fall on one side of a circuit split. The analysis in *TDP I* and this case is incompatible with the analysis applied by the Second Circuit, Sixth Circuit, and other courts. Pet. 20-23. And even the Fifth Circuit has been unable to make up its own mind on how to apply *McDonald* in this context. *Ibid.*

II. *Purcell* is not an obstacle

Respondents contend that *Purcell* v. *Gonzalez*, 549 U.S. 1 (2006), provides "independently sufficient" grounds for denying a preliminary injunction in this case. BIO 22-24. The argument can be easily dispatched. The Seventh Circuit invoked *Purcell* merely as one of several principles that "guide[d]" its reasoning. Pet. App. 3a. *Purcell* did not figure in the court's Twenty-Sixth Amendment analysis, and barely figured (and then only in a supporting role) in the court's discussion of the Fourteenth Amendment claim. Specifically, the court discussed *Purcell* in the context of the COVID-19 pandemic, which "reinforce[d]" its conclusion, on the Fourteenth Amendment claim only, that Indiana's asserted interests were "sufficient to outweigh any limited burden" placed on the right to vote. *Id.* at 15a-16a.

Accordingly, *Purcell*'s remedial principle was not an independent basis for the holding below—and certainly not an independent basis for the two substantive legal determinations that petitioners ask this Court to address. In fact, as we explain in the next part, *Purcell* strongly supports review of these threshold legal questions now.

III. The Court's jurisdiction is secure, and the time for review is now

Respondents also argue that this appeal is moot, supposedly because the "[t]he election for which Petitioners' preliminary injunction motion sought relief has already taken place." BIO 3, 15-18. That is wrong legally and prudentially, and sharply at odds with respondents' professed desire to avoid unnecessary judicial interference with state election systems during election season.

1. To begin, respondents concede that the passage of the election does not moot this case. BIO 3. Petitioners will continue to face facially disparate treatment on account of age in Indiana's next election, and their as-applied claims under the Twenty-Sixth and Fourteenth Amendments are likely to recur.

In *Storer* v. *Brown*, independent candidates and their supporters filed claims before the election, but by the time they reached this Court the election was "long over." 415 U.S. 724, 737 n.8 (1974). The Court acknowledged that, as a result, "no effective relief can be provided to the candidates or voters." *Ibid*. Nevertheless, the Court held,

> this case is not moot, since the issues properly presented, and their effects on independent candidacies, will persist as the California statutes are applied in future elections. This is,

> therefore, a case where the controversy is "capable of repetition, yet evading review."

Ibid.; see also Pet. 31-32.[3]

The clear potential for recurring claims distinguishes this case from respondents' principal authority, *University of Texas* v. *Camenisch*, in which the plaintiff (a college student) had graduated and faced no prospect of a recurring Rehabilitation Act claim by the time the case reached the appellate court. The Court expressly contrasted that scenario with one in which the preliminary injunction appeal became moot with a prospect that the underlying claim would recur. 451 U.S. 390, 397 n.3 (1981) (citing *Kinnett Dairies* v. *Farrow*, 580 F.2d 1260 (5th Cir. 1978)).

2. Regardless, the basis of the ruling in *Camenisch* is that "it is *generally* inappropriate for a federal court at the preliminary-injunction stage to give a final judgment on the merits." 451 U.S. at 395 (emphasis added). This Court has since explained that this principle—that "a court of appeals ordinarily will limit its review in a case of this kind" solely to the decision to grant or deny preliminary injunctive relief—is "not inflexible" and does not limit the scope of the Court's review in appropriate circumstances. *Thornburgh*, 476 U.S. at 755-757. See also *Swint* v. *Chambers Cnty. Comm'n*, 514 U.S. 35, 50 (1995).

In particular, this Court has held that if "a district court's ruling rests solely on a premise as to the applicable rule of law, and the facts are established or of no

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[3] Respondents suggest that the mootness exception does not apply because proceedings can continue in the district court. BIO 21-22. But the same was true in *Storer*, where the candidates and their supporters could have brought new claims for the upcoming election.

controlling relevance, that ruling may be reviewed even though the appeal is from the entry of a preliminary injunction." *Thornburgh*, 476 U.S. at 757. The BIO's examples of decisions dismissing preliminary injunction appeals on mootness grounds (at 20 n.4) must be viewed alongside the equally well-settled rule that appellate courts have discretion to address a "pure question of law" that, as here, is "intimately related to the merits of the grant [or denial] of preliminary injunctive relief." *Office of the Comm'r of Baseball* v. *Markell*, 579 F.3d 293, 300 (3d Cir. 2009) (alteration in original).[4]

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[4] See also, *e.g.*, *U.S. Ass'n of Reptile Keepers, Inc.* v. *Zinke*, 852 F.3d 1131, 1134-1135 (D.C. Cir. 2017) ("the procedural context of this appeal does not prevent us from definitively deciding the merits"); *Cavel Int'l, Inc.* v. *Madigan*, 500 F.3d 551, 559 (7th Cir. 2007) ("Although the appeal is from the denial of a preliminary injunction, the merits of Cavel's challenge * * * have been fully briefed and argued and there are no unresolved factual issues [that] would alter the result."); *Solantic, LLC* v. *City of Neptune Beach*, 410 F.3d 1250, 1272-1273 (11th Cir. 2005) ("We have, on a number of occasions, reached the merits of cases before us on interlocutory appeal from the grant or denial of a preliminary injunction."); *Planned Parenthood of Blue Ridge* v. *Camblos*, 155 F.3d 352, 360-361 (4th Cir. 1998) ("rather than extend this litigation—which is plainly ripe for final adjudication, implicates fundamental constitutional rights as determined by the Supreme Court, and has already been pending for over a year—we proceed to the merits of plaintiffs' contention"); *Doe* v. *Sundquist*, 106 F.3d 702, 707-708 (6th Cir. 1997) ("The sort of judicial restraint that is normally warranted on interlocutory appeals does not prevent us from reaching clearly defined issues in the interest of judicial economy."); *Glick* v. *McKay*, 937 F.2d 434, 436 (9th Cir. 1991) ("although this appeal arises from a ruling on a motion for a preliminary injunction, important constitutional issues are at stake and the customary discretion accorded to a district court's ruling on a preliminary injunction yields to our plenary scope of review").

Respondents are simply wrong to say that the Court "lacks jurisdiction to consider the case at this stage." BIO 15. The general rule that appellate courts should limit their review to the preliminary injunction decision is one of "orderly judicial administration"—"*not* a limit on judicial power." *Thornburgh*, 476 U.S. at 757 (emphasis added).

3. As we have explained (Pet. 29-30), and as we reiterate below, considerations of orderly judicial administration overwhelmingly support reviewing the questions presented by this petition at this time.

First, resolving the constitutional limits on absentee-voting rules "will have the effect of simplifying future challenges" and "increasing the likelihood that timely filed cases can be adjudicated before an election is held." *Storer*, 415 U.S. at 737 n.8. By contrast, returning to the district court for cross-motions for summary judgment, another Seventh Circuit appeal, and ultimately another appeal of the same questions to this Court virtually guarantees that critical issues about the applicability of the Twenty-Sixth and Fourteenth Amendments to absentee voting will not be resolved until the next election cycle is already underway.

As multiple members of this Court have urged, "the rules for the conduct of elections should be established well in advance of the day of an election." *Republican Party of Pa.* v. *Degraffenreid*, 141 S. Ct. 732, 739 (2021) (Alito & Gorsuch, JJ., dissenting from denial of certiorari); see also *Democratic Nat'l Comm.* v. *Wis. State Legislature*, 141 S. Ct. 28, 31 (2020) (Kavanaugh, J., concurring in denial of application to vacate stay) ("When an election is close at hand, the

rules of the road should be clear and settled."). To prevent possible voter confusion and burdens on election officials, and to "ensure[] that courts are not put in [an] untenable position," the Court "ought to use available cases outside [a] truncated context to address * * * important questions." *Degraffenreid*, 141 S. Ct. at 737 (Thomas, J., dissenting). Far from demonstrating that there is "no reason" (BIO 24) to hear this case at this time, the *Purcell* principle respondents invoke cuts strongly in favor of this Court's review.

Second, although respondents insist that this case must be remanded, they fail to identify anything actually left to do in the trial court.[5]

Respondents' silence is not surprising. Unlike *Camenisch*, where the case was "replete" with circumstances calling for a full trial and where even the parties' "legal theories * * * seem[ed] to change from one level of the proceeding to another," 451 U.S. at 397-398, petitioners' legal theories in this case have been entirely consistent. The Seventh Circuit squarely addressed those theories and held—as a matter of law—that *McDonald* excluded absentee voting restrictions from the scope of the Twenty-Sixth and Fourteenth Amendments. Pet. App. 6a, 12a. These rulings are ripe for review and do not require any further factual or legal development.

Were there any doubt, a different panel of the Seventh Circuit has made the point crystal clear. Citing the decision in this case, the court stated that "[a]s long as it is possible to vote in person, the rules for

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[5] On March 19, 2021, the district court granted petitioners' motion to stay pending the disposition of proceedings in this Court. No. 1:20-cv-01271 (S.D. Ind.), ECF No. 97. Respondents did not oppose the motion.

absentee ballots are constitutionally valid if they are supported by a rational basis and do not discriminate based on a forbidden characteristic such as race or sex." *Common Cause Indiana* v. *Lawson*, 977 F.3d 663, 664 (7th Cir. 2020). It then declared that Seventh Circuit case law "do[es] not leave room for ongoing debate." *Id*. at 666.

4. Finally, the Seventh Circuit's conclusion is not just debatable—it is wrong. As the petition showed, and *amici* confirm, the decision contravenes constitutional text, history, and precedent. Pet. 23-28; Br. of Twenty-Sixth Amendment Scholars 6-19; Br. of Constitutional Accountability Center 5-10. The importance of authoritatively construing the scope of the voting amendments likewise counsels in favor of this Court's review.

For their part, respondents say very little about the merits of the Seventh Circuit's decision, except to note that age-based voting laws are "fairly common" and have often gone unchallenged. BIO 24-25. But once again, these observations strengthen the case for certiorari rather than undermine it.

That there are multiple state laws that distinguish between voters based on age makes the need to clarify the constitutional standard even more pressing. And the amount of time a law has been on the books is not a basis for constitutionality. See, *e.g.*, *Bartnicki* v. *Vopper*, 532 U.S. 514, 517 (2001) (striking down unconstitutional restrictions on disclosure of illegally intercepted communications that had been part of federal law since 1934).[6]

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[6] Similarly, the observation (at 24-25) that Texas enacted its age-based absentee voting rules "as part of a package of provisions

In any event, it does courts, voters, and the election system no favors to defer a determination of the correctness of the Seventh Circuit's interpretation to another day. All relevant considerations point in the same direction: The Court should decide the important merits questions in this case now.

CONCLUSION

The petition for a writ of certiorari should be granted.

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meant in part 'to bring the Texas Election Code into conformity with' the Twenty-Sixth Amendment" cuts squarely against respondents, for it demonstrates that Texas did not understand the Amendment to draw a hard line between the "right to vote" and the "right to vote absentee."

Respectfully submitted.

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JUNE 2021