No. 23-___

IN THE

Supreme Court of the United States

JOSEPH DANIEL CASCINO ET AL.,

Petitioners,

v.

JANE NELSON, TEXAS SECRETARY OF STATE,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does Texas's restriction of no-excuse mail-in voting to individuals aged "65 years or older on election day," as provided in Texas Election Code § 82.003, violate the Twenty-Sixth Amendment's mandate that the right to vote "shall not be denied or abridged by the United States or any State on account of age"?

PARTIES TO THE PROCEEDINGS

Joseph Daniel Cascino, Shanda Marie Sansing, and Brenda Li Garcia, plaintiffs below, are petitioners here. Jane Nelson, the current Texas Secretary of State, is respondent here and was the appellee in the court of appeals. Her predecessor in office, John B. Scott, was the defendant before the district court. *See* Pet. App. 13a n.1.

RELATED PROCEEDINGS

Cascino v. Nelson, No. 22-50748 (5th Cir. Sept. 6, 2023)

Texas Democratic Party v. Scott, Civ. Act. No. SA-20-CA-438-FB (W.D. Tex. July 25, 2022)

Texas Democratic Party v. Abbott, No. 19-1389 (Supreme Court Jan. 11, 2021)

Texas Democratic Party v. Abbott, No. 19A1055 (Supreme Court June 26, 2020)

Texas Democratic Party v. Abbott, No. 20-50407 (5th Cir. May 20, 2020, June 4, 2020, and Oct. 14, 2020)

Texas Democratic Party v. Abbott, Civ. Act. No. SA-20-CA-438-FB (W.D. Tex. May 19, 2020)

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Joseph Daniel Cascino, Shanda Marie Sansing, and Brenda Li Garcia respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit (Pet. App. 1a-12a) is unpublished but is available at 2023 WL 5769414.

The district court's opinion granting the defendant's motion to dismiss (Pet. App. 13a-57a) is published at 617 F. Supp. 3d 598.

The court of appeals' earlier opinion vacating the grant of a preliminary injunction (Pet. App. 58a-118a) is published at 978 F.3d 168.

The district court's earlier opinion granting a preliminary injunction with respect to petitioners' Twenty-Sixth Amendment as-applied claim (Pet. App. 119a-206a) is published at 461 F. Supp. 3d 406.

JURISDICTION

The judgment of the court of appeals was entered on September 6, 2023. Pet. App. 1a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

Section One of the Twenty-Sixth Amendment provides that: "The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age."

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

INTRODUCTION

The Twenty-Sixth Amendment to the Constitution forbids any state from denying or abridging the voting rights of citizens over the age of eighteen "on account of age." In the face of this constitutional command, Texas gives voters the right to cast mail-in ballots only if the voter is "65 years of age or older on election day." Texas Elec. Code § 82.003.

The Fifth Circuit has forthrightly acknowledged that Texas "facially discriminates on the basis of age." *Tex. Dem. Party v. Abbott*, 961 F.3d 389, 402 (2020). But it nonetheless held that the State's "exclusion of younger voters," Pet. App. 7a, is constitutional. The court of appeals reasoned 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," *id.* at 10a (quoting Pet. App. 96a). According to the Fifth Circuit, abridgment occurs only if the challenged law "makes voting *more difficult* for [a] person than it was before the law was enacted or enforced." *Id.* (quoting Pet. App. 95a). And because Texas had not allowed anyone to vote by mail without an excuse before Section 82.003 was enacted, Texas's age-based restriction on no-excuse mail-in voting did not run afoul of this test.

The Fifth Circuit's cramped construction of the Twenty-Sixth Amendment warrants this Court's intervention.

STATEMENT OF THE CASE

A. Statutory background

Voting by mail has become commonplace in the United States. Currently, eight states—California, Colorado, Hawaii, Nevada, Oregon, Utah, Vermont, and Washington—send every registered voter a mail-in ballot, which that voter can return via mail or deposit at designated sites. Twenty-seven other states and the District of Columbia allow for no-excuse absentee voting, meaning anyone can request and then cast a mail-in ballot.[1]

Texas takes a different approach. Two categories of voters are eligible for mail-in voting.

First, voters who can substantiate a specific excuse, such as being physically absent from the jurisdiction or having a physical condition that impairs a voter's ability to cast an in-person vote, may vote by mail. Tex. Elec. Code §§ 82.001-.004. That provision is not at issue in this petition.

Second, Texas Election Code § 82.003—the provision challenged in this petition—allows any voter aged sixty-five or older to vote by mail, with no requirement that he or she substantiate a specific excuse. Voters who can neither substantiate a specific excuse nor meet the age qualification must cast their ballots in person.

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[1] Nat'l Conf. of State Legislatures, *Voting Outside the Polling Place: Absentee, All-Mail and Other Voting at Home Options*, tbl. 1 (States with No Excuse Absentee Voting) (July 12, 2022), available at https://perma.cc/YG8N-R8FL(NCSL, Voting Outside the Polling Place).

B. Proceedings below

1. Petitioners, along with several other parties, filed this lawsuit in the U.S. District Court for the Western District of Texas. Petitioners are Texas registered voters under the age of sixty-five who wish to cast mail-in ballots. They sued respondent, the Texas Secretary of State, in the Secretary's official capacity.

As is relevant here, petitioners alleged that Texas's restriction of no-excuse mail-in voting to voters over the age of sixty-five was both "unconstitutional as applied to these plaintiffs during these pandemic circumstances" (the lawsuit having been filed at the height of the COVID-19 pandemic) and "facially unconstitutional." First Amended Complaint ¶¶ 101, 102, *Tex. Dem. Party v. Abbott*, Civ. Act. No. 5:20-CV-00438-FB (W.D. Tex. Apr. 29, 2020), ECF 9.

2. Following review of extensive evidence, the district court granted petitioners' motion for a preliminary injunction. Pet. App. 131a-133a. The court held that petitioners were likely to succeed on their as-applied Twenty-Sixth Amendment claim. In its ruling, the court held that Section 82.003 "violate[s] the clear text of the Twenty-Sixth Amendment," because Section 82.003 entitles Texas voters over the age of sixty-five to vote by mail "on the account of their age alone," while voters "younger than 65 face a burden of not being able to access mail ballots on account of their age alone." Pet. App. 129a, 187a.

The district court further found that petitioners had met each of the other criteria for obtaining a preliminary injunction. *See* Pet. App. 131a, 201a-

203a. It then issued an injunction permitting "[a]ny eligible Texas voter who seeks to vote by mail in order to avoid transmission of COVID-19" to obtain and cast a mail-in ballot "during the pendency of pandemic circumstances." *Id.* 131a.

3. Defendants appealed. A motions panel of the Fifth Circuit stayed the preliminary injunction, holding, among other things, that petitioners were unlikely to succeed on their Twenty-Sixth Amendment claim. *Tex. Dem. Party v. Abbott*, 961 F.3d 389, 409 (5th Cir. 2020). This Court denied a motion to vacate the Fifth Circuit's stay. *Tex. Dem. Party v. Abbott*, 140 S. Ct. 2015 (2020). Justice Sotomayor issued a statement recognizing that the application raised "weighty but seemingly novel questions regarding the Twenty-Sixth Amendment" and expressing the hope that "the Court of Appeals [would] consider the merits of the legal issues in this case well in advance of the November election." *Id.*[2]

Subsequently, the Fifth Circuit vacated the preliminary injunction and remanded the case to the district court for further proceedings. Pet. App. 59a, 103a. The panel acknowledged that the Twenty-Sixth Amendment "confers an individual right to be free from denial or abridgment of the right to vote on account of age," *Id.* 81a. But it believed that Section 82.003's age-based restriction on no-excuse mail-in voting did not violate that right. It rejected the proposition that the Amendment requires that "voting rights must be identical for all age groups." Pet. App.

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[2] This Court also subsequently denied a petition for writ of certiorari before judgment. *Tex. Dem. Party v. Abbott*, 141 S. Ct. 1124 (2021).

91a. Instead, it saw the amendment solely as "a prohibition against adopting rules based on age that deny or abridge the rights voters already have." *Id.* It therefore held "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." *Id.* 95a. "On the other hand, 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." *Id.* 96a. "[C]onferring a privilege on one category of voters" because of their age "while denying that privilege to other voters" because of their age was therefore permissible. *Id.* 98a.

4. On remand, petitioners renewed their facial challenge under the Twenty-Sixth Amendment. The district court held, however, that the Fifth Circuit's opinion rejecting plaintiffs' as-applied challenge at the preliminary injunction stage "foreclose[d] plaintiffs' Twenty-Sixth Amendment claim" in its entirety. Pet. App. 25a. The district court treated that opinion as "law of the case." *Id.* 26a.

5. The Fifth Circuit affirmed. It recognized that the question before it was "whether the Twenty-Sixth Amendment prohibits the State from providing access to mail-in ballots for those 65 and older to the exclusion of younger voters." Pet. App. 7a. It then held that "even though the prior panel [had] not ultimately decide[d]" petitioners' "facial challenge to § 82.003," the prior decision had "answered the question" of Section 82.003's constitutionality, Pet. App. 8a, when it went "through the exact analysis that would apply to a facial challenge" in the course of resolving the COVID 19-related as-applied challenge, *id.* 9a.

REASONS FOR GRANTING THE WRIT

Section One of the Twenty-Sixth Amendment contains a simple command: "The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age." The Fifth Circuit's decision here, which limits impermissible abridgment only to situations in which a law "makes voting more difficult for that person than it was before the law was enacted or enforced," Pet. App. 10a (quoting Pet. App. 95a) (emphasis omitted), conflicts with decisions of both two federal courts of appeals and two state supreme courts.

The Fifth Circuit's decision is also untenable on the merits. It is impossible to square the straightforward language of the Twenty-Sixth Amendment with the Fifth Circuit's holding that giving the right "to those at least age 65 to vote absentee did not deny or abridge younger voters' rights who were not extended the same privilege." Pet. App. 26a (quoting Pet. App. 99a). The Fifth Circuit's cramped definition of abridgment, which limits the term to some form of retrogression or temporal backsliding, also cannot be squared with this Court's treatment of parallel language in other constitutional amendments.

This case raises an important question involving a fundamental constitutional right and provides an ideal vehicle for resolving that question. The Court should not leave lower courts with a "constitutional blank slate" when it comes to the Twenty-Sixth Amendment. *See Tully v. Okeson*, 78 F.4th 377, 382

(7th Cir. 2023). This Court's intervention is urgently needed.

I. Lower courts are divided over the scope of the Twenty-Sixth Amendment.

The Fifth Circuit held that Texas's limitation of no excuse mail-in voting to citizens over the age of sixty-five comports with the Twenty-Sixth Amendment because "an election law abridges a person's right to vote . . . only if it makes voting *more difficult* for that person than it was before the law was enacted or enforced." Pet. App. 10a (quoting Pet. App. 95a). That decision, which limits abridgment to temporal backsliding, conflicts with decisions of the supreme courts of California and Colorado as well as of the First Circuit, which have each held that the Amendment prohibits all age-based distinctions with respect to voting. Those courts treat the relevant comparison for Twenty-Sixth Amendment purposes as between voters of different ages and not between a voter's situation prior to and after enactment of the challenged statute. It also conflicts with a decision by the Seventh Circuit that rejects retrogression as the definition of abridgment for purposes of the Twenty-Sixth Amendment.

1. The Supreme Court of California has held that the Twenty-Sixth Amendment requires states "to treat all citizens 18 years of age or older alike for all purposes related to voting." *Jolicoeur v. Mihaly*, 488 P.2d 1, 12 (Cal. 1971).

Following ratification of the Twenty-Sixth Amendment, the California Attorney General issued an opinion that "for voting purposes the residence of an unmarried minor"—in California, then a person

under the age of twenty-one—"will normally be his parents' home' regardless of where the minor's present or intended future habitation might be." *Jolicoeur*, 488 P.2d at 3 (quoting 54 Adv. Ops. Cal. Att'y Gen. 7, 12 (1971)). Local registrars then told individual plaintiffs whose parents lived in California to register in the jurisdictions where their parents lived, which were "up to 700 miles away from their claimed permanent residences," and told individual plaintiffs whose parents lived in other states or abroad that they could not register in California at all. *Id.*

The California Supreme Court held that "treat[ing] minor citizens differently from adults for *any* purpose related to voting" violated the Twenty-Sixth Amendment. *Jolicoeur*, 488 P.2d at 2 (emphasis added). The court reasoned that "[c]ompelling young people who live apart from their parents to travel to their parents' district to register and vote or else to register and vote as absentees burdens their right to vote" as secured by the Twenty-Sixth Amendment. *Id.* at 4. That Amendment, like the "Twenty-Fourth, Nineteenth, and Fifteenth before it," forbids any rules that "'handicap exercise of the franchise,'" even if "'the abstract right to vote'" remains "'unrestricted.'" *Id.* (quoting *Lane v. Wilson*, 307 U.S. 268, 275 (1939)). Thus, requiring voters under the age of twenty-one, but not older aspiring voters, to register where their parents lived violated the Twenty-Sixth Amendment even though that requirement did not mark a retreat from a preexisting situation.

The following year, in *Colorado Project-Common Cause v. Anderson*, 495 P.2d 220 (Colo. 1972), the Supreme Court of Colorado addressed a state law that limited the right to sign initiative petitions to qualified

electors over the age of twenty-one. The Colorado high court held that the law was unconstitutional because the Twenty-Sixth Amendment's "prohibition against denying the right to vote to anyone eighteen years or older by reason of age applies to the entire process involving the exercise of the ballot and its concomitants." *Id.* at 223. Here, too, the unconstitutionality of the state provision did not turn on its being a change from a prior, less restrictive practice. Rather, it turned on the differential treatment of voters over and under the age of twenty-one.

Finally, in *Walgren v. Howes*, 482 F.2d 95 (1st Cir. 1973), the First Circuit addressed a college town's decision to hold municipal elections while students were away on winter break. In addressing the issue, the First Circuit declared that under the Twenty-Sixth Amendment an abridgment could occur whenever "a condition, not insignificant, disproportionately affects the voting rights of citizens specially protected." *Id.* at 102. In subsequent proceedings, the First Circuit continued, "[i]t is difficult to believe that [the Twenty-Sixth Amendment] contributes no added protection to that already offered by the Fourteenth Amendment, particularly if a significant burden were found to have been intentionally imposed solely or with marked disproportion on the exercise of the franchise by the benefactors of that amendment." *Walgren v. Bd. of Selectmen of Town of Amherst*, 519 F.2d 1364, 1367 (1st Cir. 1975). Here again, the relevant comparison was simply between younger and older voters.

2. In *Tully v. Okeson*, 78 F.4th 377 (7th Cir. 2023), the Seventh Circuit expressly rejected the test announced by the Fifth Circuit. It declared that

whether Indiana's aged-based restriction on absentee voting "has a retrogressive effect, *i.e.*, whether it renders the Plaintiffs 'worse off,' is *not* the equivalent of asking whether their right to vote has been abridged." *Id.* at 387; *see also id.* at 388 (opinion concurring in part and dissenting in part). To the contrary: The "starting point" does not depend on "the status quo of state law." *Id.* at 387 (opinion for the court). But the Seventh Circuit nonetheless upheld Indiana's restriction because it believed that, in light of the array of opportunities to cast a ballot offered by Indiana law, the denial of the right to vote by mail did not impose a "material" burden on the voting rights of younger voters. *Id.*

II. This case is an ideal vehicle for resolving an important question of constitutional law.

1. As the Fifth Circuit recognized "[t]he single merits question" before it on this appeal was "whether the Twenty-Sixth Amendment prohibits the State from providing access to mail-in ballots for those 65 and older to the exclusion of younger voters." Pet. App. 7a. The question presented was fully, indeed exhaustively, litigated over a period of several years.

2. The history of this litigation shows why it is imperative for the Court to grant review now. Petitioners sought to have the question resolved in time for the 2020 election. Since then, two federal election cycles have passed. As it stands, it is unlikely that the Court can resolve the scope of the Twenty-Sixth Amendment by the time of the 2024 election, unless it does so through a summary disposition. But at least granting review here will ensure that the

question presented is resolved before Texas conducts elections in 2025 and 2026.

3. The question whether the Twenty-Sixth Amendment requires extending the entitlement to vote by mail without regard to a citizen's age is an important one. This Court long ago recognized that voting is a "fundamental political right" because it is "preservative of all rights." *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886).

The ability to vote by mail may be particularly important for younger voters. Young people can face substantial barriers to voting in person, including lack of transportation, long lines, inability to find or access their polling place, and limited time off from work. *See* Amelia Thomson-DeVeaux et al., *Why Younger Americans Don't Vote More Often (*No, It's Not Apathy)*, FiveThirtyEight (Oct. 30, 2020), available at https://perma.cc/FA78-3UDW. Based on Current Population Survey (CPS) data, people under the age of 40 are disproportionately likely to cite time constraints as a reason for not voting, with 38% of non-voters in this population citing time constraints, compared with just 7% of those sixty-five or older. *See* Adam Bonica et al., *All-mail voting in Colorado increases turnout and reduces turnout inequality*, 72 Electoral Stud. 102363 (2021).[3]

Age-based restrictions on mail-in voting have a significant impact. A study analyzing data from federal elections in 2018 found that only 6.6% of voters

[3] Thus, the Seventh Circuit's assertion that older voters are distinctively likely to "encounter special barriers in exercising their right to vote," *Tully v. Okeson*, 78 F.4th 377, 387 (7th Cir. 2023), may reflect nothing more than speculation.

aged 18 to 24 voted by mail in states with age-based provisions, compared to 22.5% of younger voters nationally. *See* Jason Harrow et al., Age Discrimination in Voting at Home 12 (2020), available at https://perma.cc/3FK2-PALU.

There are seven states that limit no-excuse vote-by-mail on the basis of age: Indiana, Kentucky, Louisiana, Mississippi, South Carolina, and Texas limit it to citizens over the age of sixty-five, and Tennessee limits it to citizens over the age of sixty. NCSL, Voting Outside the Polling Place, *supra*, at 3 n.1, tbl. 2. Thus, the answer to the question presented affects voting opportunities for millions of citizens.

This Court should not allow several more election cycles to occur before it resolves this important question of constitutional law.

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

The words of the Twenty-Sixth Amendment are straightforward: "The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age." The Fifth Circuit's construction of the Amendment, which holds that only laws that take away an entitlement a voter previously had can constitute "abridgment," cannot be squared with this Court's decisions construing that term elsewhere in the Constitution.

As the Fifth Circuit conceded, "[t]he language and structure of the Twenty-Sixth Amendment mirror the Fifteenth, Nineteenth, and Twenty-Fourth Amendments." Pet. App. 79a-80a. Those amendments

provide, respectively, that the right to vote shall not be "denied or abridged" based on race, sex, or failure to pay a poll tax "or other tax." A state would plainly violate those amendments if it offered no-excuse mail voting only to whites, only to men, or only to taxpayers. This is so even though the challenged law would not "make[] it more difficult for" Black citizens, women, or voters who could not afford the tax "relative to the status quo," *id.* 98a. It is equally plain that Texas has violated the Twenty-Sixth Amendment by offering an unrestricted option to vote by mail only to voters over the age of sixty-five. The Fifth Circuit held otherwise because it failed to take the Amendment's text seriously.

1. "When seeking to discern the meaning of a word in the Constitution, there is no better dictionary than the rest of the Constitution itself." *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 829 (2015) (Roberts, C.J., dissenting). The language of the Twenty-Sixth Amendment is nearly identical to that of its three predecessor voting rights amendments and "embodies the language and formulation of the 19th amendment, which enfranchised women, and that of the 15th amendment, which forbade racial discrimination at the polls." S. Rep. No. 92-26 at 2 (1971), as well as the Twenty-Fourth Amendment, which "clearly and literally bars any State from imposing a poll tax on the right to vote," *Williams v. Rhodes*, 393 U.S. 23, 29 (1968). Thus, the Twenty-Sixth Amendment must be read *in pari materia* with these virtually identical constitutional provisions.

To be sure, age is unlike race or sex in that it does not receive heightened scrutiny under the Fourteenth

Amendment, which applies to all state action. But what the Fifth Circuit failed to recognize is that after ratification of the Twenty-Sixth Amendment, the Constitution *does* treat age (once a citizen has turned eighteen) identically with race and sex as an impermissible basis for making distinctions when it comes to *voting*.

2. With respect to the Fifteenth Amendment, this Court squarely rejected the proposition that abridgment occurs only when a citizen is made worse off than he was before on account of race. The Court recognized that abridgment "necessarily entails a comparison." *Reno v. Bossier Par. Sch. Bd.*, 528 U.S. 320, 334 (2000). But while the "baseline with which to compare the [challenged practice]" in proceedings under Section 5 of the Voting Rights Act involves a temporal comparison between the new practice and the status quo ante, that is because the Act "uniquely deal[s] only and specifically with changes in voting procedures." *Id.*

By contrast, this Court explained that under the Fifteenth Amendment, "abridging" does *not* "refer[] only to retrogression"; rather, it should be read to refer "to discrimination more generally." *Bossier Par.*, 528 U.S. at 334. Thus, the comparison in a Fifteenth Amendment case should be between the right to vote enjoyed by white citizens and the right to vote enjoyed by citizens who are members of racial minorities (that is, to reach discrimination on account of race). For example, in *Louisiana v. United States*, 380 U.S. 145 (1965), this Court held that Louisiana's 1960 requirement that aspiring voters "'be able to understand' as well as 'give a reasonable interpretation' of any section of the State or Federal

Constitution," *id.* at 149, violated the Fifteenth Amendment simply because Black citizens were held to a stricter standard than their white counterparts. *Id.* at 153.

In borrowing language from the Fifteenth Amendment, Congress sought to accomplish in the Twenty-Sixth Amendment "exactly" what its predecessors had sought to accomplish "in enfranchising the [B]lack slaves with the 15th amendment" and "enfranchising women in the country with the 19th amendment." 117 Cong. Rec. H7539 (Mar. 23, 1971) (statement of Rep. Pepper). Because a plaintiff in a Fifteenth or Nineteenth Amendment case is not required to show retrogression, neither can a plaintiff in a Twenty-Sixth Amendment case be required to make such a showing.

To see why, recall that voting rules and procedures are in constant flux. It used to be that virtually all voters cast their votes in person at a local polling place on the first Tuesday after the first Monday in November. But the "right to vote" is not static. Today, a growing proportion of voters exercise their right to vote by casting a mail-in ballot, voting during an early voting period, or dropping off their ballot in some other way. And many jurisdictions have dramatically extended poll hours beyond normal business hours, so that polls open as early as 6 a.m. or stay open as late as 9 p.m. None of these practices was generally in use in 1870, when the Fifteenth Amendment was ratified (or in 1920, when the Nineteenth Amendment was ratified). So under the Fifth Circuit's reasoning, a state would be free to provide early voting to men but not to women, or longer polling place hours for white voters than for

Black ones. After all, the provision of early voting or longer polling hours to *other* voters in no way "makes it more difficult" for female or Black citizens "to exercise [their] right to vote relative to the status quo" and in neither case was "the status quo itself . . . unconstitutional," Pet. App. 98a. The Fifth Circuit's test therefore simply cannot be right.[4]

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

In anticipation of the ratification of the Twenty-Fourth Amendment, Virginia enacted a provision, Section 24-17.2, that required a voter who wished to vote in federal elections either to pay the usual poll tax or to "file a certificate of residence in each election year." *Harman*, 380 U.S. at 532. This Court held unanimously that that provision was "repugnant to the Twenty-fourth Amendment." *Id.* at 533. The Court acknowledged that Virginia could abolish its poll tax altogether and then require all voters to file the certificate of residence. *See id.* at 538. But requiring a voter who did not pay the poll tax to file the certificate nevertheless "constitute[d] an abridgment of the right to vote" for failure to pay the tax. *Id.*

The Court pointed out that Section 24-17.2 "impose[d] a material requirement solely upon those"

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[4] To be sure, these hypothetical laws would *also* almost certainly violate the Fourteenth Amendment. But that does not undercut the fact that they would violate the Fifteenth or Nineteenth as well.

citizens who did not pay the poll tax. *Harman*, 380 U.S. at 541. The Court then emphasized that Section 24-17.2 "would not be saved even if" the burden of filing a certificate of residence was "no more onerous, or even somewhat less onerous, than the poll tax." *Id.* at 542. Put another way, even if voters were *better off* after the enactment of Section 24-17.2, because the state had made it *easier* for them to vote, the provision would still have abridged the non-taxpayers' right to vote. "*Any* material requirement" based "solely" on declining to pay a poll tax "subverts the effectiveness of the Twenty-fourth Amendment and must fall under its ban." *Harman*, 380 U.S. at 542 (emphasis added).

As in *Harman*, requiring under-65 voters to show up at the polls in person during specified hours while allowing over-65 voters to cast ballots from the comfort of their homes at whatever hour they choose imposes a "material requirement," *Harman*, 380 U.S. at 542, on younger voters solely on account of age. The Fifth Circuit did not deny that it can be more "cumbersome," *Harman*, 380 U.S. at 541, to vote in person; that, after all, is precisely why the state extended no-excuse mail-in voting to seniors.

Put another way, the Twenty-Sixth Amendment itself sets out the relevant comparison for determining abridgment: It compares voters of different ages, not voters during different eras. The Fifth Circuit therefore erred in holding that the appropriate comparison asks whether voting is now "*more difficult* for that person than it was before the [challenged] law was enacted or enforced." Pet. App. 10a (quoting Pet. App. 95a). To the contrary: The appropriate comparison here is between the right to vote that Texas provides to citizens over the age of sixty-five and

the right it provides to younger voters. The latter right is restricted in a way that the former is not. And it is restricted "solely," *Harman*, 380 U.S. at 542, because of the voters' age thereby subverting the effectiveness of the Twenty-Sixth Amendment.

4. The Fifth Circuit's decision also impedes the purpose of the Twenty-Sixth Amendment. The Amendment does more than merely establish the voting age; it is also designed to prohibit age-based discrimination in voting. *See, e.g.*, 117 Cong. Rec. H7534 (Mar. 23, 1971) (statement of Rep. Poff) (explaining that the Amendment "guarantees that citizens who are 18 years of age or older shall not be discriminated against on account of age. Just as the 15th amendment prohibits racial discrimination in voting and just as the 19th amendment prohibits sex discrimination in voting, the proposed amendment would prohibit age discrimination in voting.").

Properly understood, the Amendment sought to both enfranchise eighteen- to twenty-year-old voters and ensure equal voting access regardless of age. Indeed, Congress expressed concern that jurisdictions might engage in practices to depress young citizens' turnout. It worried that "forcing young voters to undertake special burdens—obtaining absentee ballots, or traveling to one centralized location in each city, for example—in order to exercise their right to vote might well serve to dissuade them from participating in the election." S. Rep. No. 92-26 at 14.

To be sure, nothing in federal constitutional law requires Texas to allow no-excuse mail-in voting. But once Texas does decide to allow such voting for some citizens, it cannot deny it to other citizens on the basis of an impermissible characteristic. As this Court

declared in *American Party of Texas v. White*, 415 U.S. 767 (1974), "it is plain that permitting absentee voting by some classes of voters and denying the privilege to other classes of otherwise qualified voters in similar circumstances, without affording a comparable alternative means to vote, is an arbitrary discrimination violative of the Equal Protection Clause." *Id.* at 795. The gravamen of the Twenty-Sixth Amendment is that all otherwise qualified voters are "in similar circumstances" with respect to age.

5. Nor can the Fifth Circuit's limitation of "abridge[ment]" to cases where the challenged law makes individuals worse off than they were before be squared with the Constitution's uses of the term outside the voting context.

The First Amendment prohibits the government from "abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const. amend. I. From time to time, governments "create" new public forums, when "government property that has not traditionally been regarded as a public forum is intentionally opened up for that purpose." *Pleasant Grove v. Summum*, 555 U.S. 460, 469 (2009). But once they have created a new forum, they cannot discriminate on the basis of a speaker's viewpoint in providing access to that forum. *Id.* at 470. A government could not defend that discrimination on the grounds that the excluded speakers were no worse off than before. So, too, when a government like Texas's creates a new way of voting that has not traditionally been offered, it cannot discriminate on the basis of age in making that new mechanism available.

In a similar vein, the Fourteenth Amendment provides that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." U.S. Const. amend. XIV, § 1. Thus, in *Saenz v. Roe*, 526 U.S. 489 (1999), this Court struck down California's policy of limiting welfare benefits paid to new residents, for the first year they lived in California, to the benefits they would have received in the State of their prior residence. The constitutional infirmity was that they were treated differently from other citizens, *id.* at 505; it did not matter that the amount of their benefits had neither decreased when they moved nor been unconstitutional to begin with.

* * * * *

The Fifth Circuit's decision flouts the text and purpose of the Twenty-Sixth Amendment: to guarantee equal access to voting regardless of age. This Court should reject that construction and hold that the Amendment means what it says.

CONCLUSION

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

Respectfully submitted,

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December 5, 2023