No. 23-612

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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONERS

Respondent does not deny that the sole reason petitioners are ineligible to cast their votes by mail is "on account of [their] age." U.S. Const. amend. XXVI, § 1. But she argues that the plain language of the Twenty-Sixth Amendment does not matter because "under deferential rational-basis review," BIO 19—the standard for Fourteenth Amendment claims—a state can limit the right to vote by mail to whichever categories of individuals it chooses, *id.* 22.

Respondent is mistaken. The Twenty-Sixth Amendment—like the Fifteenth, Nineteenth, and Twenty-Fourth Amendments on which it was modeled—imposes a categorical prohibition on specific forms of discrimination with respect to voting. Thus, this Court has denied that "compliance" with "the Fourteenth Amendment somehow excuses compliance with the Fifteenth Amendment." *Rice v. Cayetano*, 528 U.S. 495, 522 (2000). The Court should reach the same conclusion here.

Respondent offers a set of meritless vehicle arguments and suggests that this Court should wait for another two circuits to weigh in on the question presented. But it is long past time for this Court to clarify that the Twenty-Sixth Amendment means what it says: The State should no longer be allowed to treat millions of voters less favorably than their compatriots solely "on account of age."

I. This case is the right vehicle for resolving the question presented.

Respondent argues that this case is a bad vehicle because res judicata and sovereign immunity would

ultimately bar petitioners from receiving relief. Those attempts to deflect the Court from the question presented are meritless.

1. Respondent argues the dismissal of a state-court suit raising state-law claims in 2020 bars the present case under the doctrine of res judicata (also known as claim preclusion). BIO 16. But respondent never made that argument in her brief on the merits to the Fifth Circuit, and she has not yet filed an answer raising that affirmative defense. A nonjurisdictional argument neither raised nor addressed below cannot constitute a vehicle problem.

In any event, if she were to make the res judicata argument in the future, she would lose. One of the indispensable elements for res judicata—that "the parties are identical or in privity," *Hous. Pro. Towing Ass'n v. City of Houston*, 812 F.3d 443, 447 (5th Cir. 2016) (citation omitted)—is absent here.

First, the parties in this case are *not* identical to the parties in the state-law case. Buried in a footnote, respondent admits that petitioner Brenda Li Garcia was not a party in the state-court action. BIO 4 n.2. Thus, even if respondent were ultimately to raise, and succeed on, a preclusion defense with respect to the other two petitioners, Ms. Garcia's claim could proceed.

Second, respondent's barebones suggestion that Ms. Garcia was "in privity" with the Texas Democratic Party (which was a plaintiff in the state court proceedings), BIO 4 n.2, cannot withstand scrutiny. Privity requires much more than a voter's being a "member" of a political party—a phrase that may indicate nothing more than some "support[]" for the

party's general "Principles," Tex. Dem. Party Rules Art. III.A., https://tinyurl.com/2aw8fsu2. *See Perez-Guzman v. Gracia,* 346 F.3d 229, 234-35 (1st Cir. 2003) (refusing to find privity between a political party and rank-and-file members).

Lest there be any doubt, this Court has "long held" that "extreme applications of the doctrine of res judicata may be inconsistent with a federal right that is 'fundamental in character.'" *Richards v. Jefferson County*, 517 U.S. 793, 797 (1996) (citation omitted). And this Court has consistently recognized that the right to vote is a "fundamental" right, *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886), that is "individual and personal in nature," *Gill v. Whitford*, 138 S. Ct. 1916, 1929 (2018) (quoting *Reynolds v. Sims*, 377 U.S. 533, 561 (1964)). It therefore beggars belief that a political party's tactical decision to advance state-law claims in state-court litigation would foreclose individual citizens' federal constitutional claims. Indeed, such "[b]ogus findings of privity" are precisely why nonmutual claim preclusion is "generally disfavored" in the Fifth Circuit. *New York Pizzeria, Inc. v. Syal*, 53 F. Supp. 3d 962, 969 (S.D. Tex. 2014) (citations omitted).

In any event, this Court regularly grants certiorari in the face of arguments that res judicata presents an obstacle. In *Culley v. Marshall*, No. 22-585, for example, this Court granted review despite the Alabama Attorney General's argument that the plaintiff's claim for injunctive relief might raise issues of claim preclusion. *See* BIO at 25-28, *Culley v. Marshall*, No. 22-585 (Mar. 1, 2023).

2. Respondent's sovereign immunity argument fares no better. Respondent admits that the Fifth

Circuit has rejected it. BIO 18; *see* Pet. App. 69a-73a. And in the most recent round of proceedings, respondent even "concede[d]" that petitioners' claim "is not barred by the Secretary's sovereign immunity." Pet. App. 7a. But respondent nevertheless speculates that perhaps the Fifth Circuit has changed its mind and would apply a different rule on remand. BIO 18.

Not so. To the contrary, the intervening case on which she relies, *Tex. All. for Retired Ams. v. Scott*, 28 F.4th 669, 673 (5th Cir. 2022), *rejected* that argument. *Scott* held that the Texas Secretary of State was not an appropriate party there because she lacked enforcement power over whether ballots were "printed" with a straight-ticket option. *Id.* at 672. But *Scott* found a "key distinction" between that case and this one. *Id.* at 673. Here, the Secretary "has the authority to compel or constrain local officials based on actions she takes" with respect to the "absentee-ballot form." Pet. App. 71a. The Fifth Circuit has, if anything, reaffirmed the Secretary's amenability to suit here.[1]

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[1] And as with assertions about preclusion, this Court regularly grants certiorari in the face of sovereign immunity-based vehicle arguments. This Term, this Court granted review in both *Devillier v. Texas*, No. 22-913, and in *Reed v. Goertz*, No. 21-442, over Texas officials' assertions of sovereign immunity. *See* BIO at 11-13, *Devillier v. Texas*, No. 22-913 (June 9, 2023) (asserting sovereign immunity from liability); BIO at 22-24, *Reed v. Goertz*, No. 21-442 (Jan. 19, 2022) (asserting sovereign immunity from suit).

II. There is no reason for this Court to wait for additional courts of appeals to weigh in on the question presented.

Respondent points out that there are two other circuits—the Fourth and the Sixth—in which the question presented might arise. BIO 15. But she provides no argument as to why this Court should await additional challenges "grappling with these issues," *id.* 10. This is not a situation in which percolation could provide the Court with additional information.

Indeed, even if Texas were the only jurisdiction to impose age-based limits on the right to vote by mail, this case would warrant review, given the "weighty" question Texas's restriction raises concerning the Twenty-Sixth Amendment, *Tex. Dem. Party v. Abbott*, 140 S. Ct. 2015, 2015 (2020) (statement of Justice Sotomayor respecting denial of application to vacate stay), and the millions of voters affected. This Court granted certiorari in *Rice v. Cayetano*, 528 U.S. 495 (2000), for example, to review a Fifteenth Amendment-based challenge to an ancestry-based voting restriction imposed only in Hawaii affecting far fewer voters.

In any event, respondent's attempt to downplay the split fails. There is already sufficient disagreement among the lower courts about how to analyze Twenty-Sixth Amendment claims to warrant this Court's intervention.

To begin, the California and Colorado high courts have struck down facially age-based voting-related laws. Respondent claims that neither *Jolicoeur v. Mihaly*, 488 P.2d 1 (Cal. 1971), nor *Colorado Project-*

Common Cause v. Anderson, 495 P.2d 220, 221 (Colo. 1972), "holds that the Twenty-Sixth Amendment prohibits all age-based distinctions with respect to voting." BIO 14. But it is plain from both decisions that those courts would not permit the age-based distinction at issue here. *Jolicoeur* declared that the Twenty-Sixth Amendment requires state officials "to treat all citizens 18 years of age or older alike for *all* purposes *related to* voting." 488 P.2d at 12 (emphasis added). That rule would foreclose a practice like Texas's which treats citizens differently on account of age with respect to a central method of casting ballots. And *Colorado Project-Common Cause* declared that the Twenty-Sixth Amendment "applies to the entire process involving the exercise of the ballot and its concomitants." 495 P.2d at 223. That rule would similarly foreclose different rules for younger and older voters with respect to the available methods for casting their votes.

Respondent's attempt to harmonize the Fifth Circuit decision with the First Circuit's decisions in *Walgren v. Howes*, 482 F.2d 95 (1st Cir. 1973), and *Walgren v. Bd. of Selectmen*, 519 F.2d 1364 (1st Cir. 1975), similarly fails. Citing nothing but Fourteenth Amendment cases, respondent argues that the Fifth Circuit correctly applied "rational basis review" to the age-based restriction here. BIO 24-26. But the First Circuit squarely held that strict scrutiny should apply to Twenty-Sixth Amendment claims because "the voting amendments would seem to have made the specially protected groups, at least for voting-related purposes, akin to a 'suspect class.'" *Walgren v. Howes*, 482 F.2d at 102. Under that standard, respondent has offered no real argument that age-based restrictions

are necessary or narrowly tailored to the achievement of a compelling government purpose—even if such balancing were permissible, and it is not.[2]

Finally, although the Seventh Circuit upheld the Indiana age-based restriction at issue in *Tully v. Okeson*, 78 F.4th 377 (7th Cir. 2023) (*Tully II*), it squarely rejected the Fifth Circuit's legal standard for assessing Twenty-Sixth Amendment claims: Whether a law "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* Pet. 10-11.[3]

In short, nothing would be gained by waiting for yet another court to weigh in. This Court has already allowed two full presidential election cycles to occur in the face of Twenty-Sixth Amendment challenges to age-based restrictions on voting by mail. Now is the

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[2] Respondent's reliance on two Second Circuit decisions—*Auerbach v. Rettaliata*, 765 F.2d 350 (2d Cir. 1985), and *Williams v. Salerno*, 792 F.2d 323 (2d Cir. 1986), BIO 14—is equally misplaced. Not only were those Fourteenth Amendment equal protection cases, not Twenty-Sixth Amendment cases, but they did not involve facial restrictions on account of age (as opposed to restrictions applied to college students without regard to age).

[3] Respondent's invocation of *Tully v. Okeson*, 977 F.3d 608 (7th Cir. 2020) (*Tully I*), BIO 11-13, is mistaken. The Seventh Circuit subsequently explained that *Tully I* created no binding precedent. *Tully II*, 78 F.4th at 381-82. Instead, the court derived the meaning of "abridge" from *Harman v. Forssenius*, 380 U.S. 528 (1965), and *Reno v. Bossier Parish School Board*, 528 U.S. 320 (2000)—neither of them Fourteenth Amendment cases and neither of them adopting a requirement of temporal retrogression. *Tully II*, 78 F.4th at 380-82, 387.

right time to resolve the question presented sufficiently in advance of the 2028 election cycle.

III. Texas's age-based restriction on voting by mail violates the Twenty-Sixth Amendment.

This Court has long construed the Fifteenth, Nineteenth, and Twenty-Fourth Amendments as antidiscrimination provisions. *See* Pet. 14-15. Together, they prohibit laws that would hand out voting rights differently on the basis of race, sex, or paying a poll tax. The Twenty-Sixth Amendment uses the same language to communicate the same meaning with regard to age. This Court should therefore reject respondent's attempt to read the Twenty-Sixth Amendment differently from the other voting rights amendments.

1. Respondent argues that the "right to vote" does not necessarily entail a right to an absentee ballot. BIO 19-23 (citing *McDonald v. Bd. of Election Comm'rs*, 394 U.S. 802 (1969)). Petitioners do not disagree. *See* Pet. 19-20. Texas is not required by the Constitution to allow any voters to vote by mail. But once it decides to afford that right to some of its voters, it cannot deny it to others on bases the Constitution expressly forbids.[4]

When the Constitution forbids a right's abridgment, courts look to how the right is being implemented *now*, rather than comparing the scope of the current right to the scope of the right at some time

[4] There is a narrow category of voters covered by the Uniformed and Overseas Citizens Absentee Voting Act, 52 U.S.C. § 20302, who are entitled, as a federal statutory matter, to vote by mail.

in the past. Pet. 15 (citing *Reno v. Bossier Par. Sch. Bd.*, 528 U.S. 320, 334 (2000)). Thus, a state is not permitted to offer an enhanced version of that right to some people but to withhold it from others on the basis of a forbidden criterion. Whatever voting rights a state grants to people aged 65-and-over, it must also grant to people under 65.

Indeed, this Court would never tolerate laws like Texas's under the analogous amendments. If Texas were today to permit white but not Black residents to vote by mail, that law would clearly violate the Fifteenth Amendment. It would similarly violate the Nineteenth Amendment if Texas were today to permit men but not women to vote by mail. And it would violate the Twenty-Fourth Amendment if Texas were today to limit vote by mail to people who pay property taxes. The unconstitutionality of those restrictions would not depend in the slightest on the existence or scope of vote by mail in 1870, 1920, or 1964, when those amendments were ratified.

Respondent tries to deflect this Court's attention from these clearly unpalatable results by conceding these laws would violate the Fourteenth Amendment because they would involve "suspect classifications," BIO 27 (although she never explains why a wealth-based restriction would trigger strict scrutiny). But that is just a distraction; the question remains whether each of these laws *also* violates the Fifteenth,

Nineteenth, or Twenty-Fourth Amendments, respectively.[5]

Respondent is thus left to argue that the Fifteenth, Nineteenth, and Twenty-Fourth Amendments would not in fact prohibit discrimination in voting that does not categorically preclude voters from casting any ballot at all. BIO 24, 27-28. That is wrong. Respondent misreads *Harman v. Forssenius*, 380 U.S. 528 (1965), as saying that the imposition of a "material requirement" is the only way to "abridge[]" the right to vote, BIO 28, and then to limit materiality to only heavy burdens on the right to vote. But respondent ignores this Court's language two lines up, where the Court explains that the law at issue "would not be saved" if it were "no more onerous, or even somewhat less onerous, than the poll tax." *Harman*, 380 U.S. at 542; *see also* Pet. 17-19.

2. Respondent then opens a dictionary, arguing that "abridge" means to "reduce or contract." BIO 23. Petitioners agree. But when one age group's right to vote is reduced relative to the rights of another age

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[5] Respondent argues that Section 82.003 should survive under rational basis review. BIO 24-26. This is irrelevant. Levels of review would be material if petitioners were making a Fourteenth Amendment challenge. But petitioners argue that Texas's law violates the Twenty-Sixth Amendment. Whether the law is "rational" is beside the point. The Twenty-Sixth Amendment categorically prohibits discrimination in voting based on age. And this Court has squarely rejected the proposition that the "core protection" of an "enumerated constitutional right" can be "subjected to a freestanding 'interest-balancing' approach" like the one respondent invokes here, *District of Columbia v. Heller*, 554 U.S. 570, 634 (2008).

group, the reduction is an abridgement that violates the Twenty-Sixth Amendment.

To the extent there's any doubt, "[w]hen 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). And as petitioners have explained, "abridge" in the Twenty-Sixth Amendment should be read *in pari materia* with the identical language in the Fifteenth, Nineteenth, and Twenty-Fourth Amendments, all of which assess whether the right to vote has been "abridged" by comparing the voting options available to two different groups today, not by comparing the options available to a group today to the options available to that group at some point in the past. *See* Pet. 14. If a jurisdiction gives a protected group a right to vote that is reduced relative to the rights of other groups, that reduction violates the Constitution.

What's more, respondents don't contest that other parts of the Constitution also better accord with petitioners' interpretation of "abridge." Consider, for example, the First Amendment. Once the government has opened a public forum, it cannot then engage in viewpoint discrimination with respect to how individuals can participate in that forum. *See, e.g.*, *Shurtleff v. City of Boston*, 142 S. Ct. 1583, 1587 (2022). If a school board were to allow public comments at its meetings, it could not allow parents who support music education to speak for five minutes each without providing written remarks in advance while restricting parents who oppose music education to two minutes each and requiring them to submit their

remarks in writing. The First Amendment rights of the latter parents would have been "abridged" even though no parents had a right to speak in that forum before the forum was created. *See* Pet. 20.

3. The Twenty-Sixth Amendment's history also reinforces petitioners' position. "In surveying legislative history," this Court has "repeatedly stated that the authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill." *Garcia v. United States*, 469 U.S. 70, 76 (1984). As the petition explained, members of Congress stated again and again that the Twenty-Sixth Amendment was designed to prohibit age-based discrimination in voting. *See* Pet. 14, 16, 19. Respondent, by contrast, relies on the court below and a secondary source written two decades after the enactment of the Twenty-Sixth Amendment. BIO 29. Neither is an authoritative—or even indicative—source of the meaning of the Twenty-Sixth Amendment at the time of its enactment.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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