No.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Indiana's absentee voting laws expressly distinguish between voters based on age by giving all voters age 65 or older an entitlement to cast an absentee ballot by mail. Indiana chose to allow all voters to vote by mail for the June 2020 primary election but subsequently enforced its age-based rules in the November 2020 general election.

The questions presented are:

1. Whether Indiana violates the Twenty-Sixth Amendment to the U.S. Constitution by giving voters age 65 and older the right to cast an absentee ballot by mail while requiring otherwise identical voters age 18 to 64 to cast their ballots in-person; and

2. Whether, in circumstances where in-person voting presents special dangers, Indiana's absentee voting scheme violates the Fourteenth Amendment to the U.S. Constitution by burdening the right to vote of voters age 18 to 64.

PARTIES TO THE PROCEEDINGS

Petitioners, plaintiffs-appellants below, are Barbara Tully, Katharine Black, Marc Black, David Carter, Rebecca Gaines, Elizabeth Kmieciak, Chaquitta McCleary, David Slivka, Dominic Tumminello, and Indiana Vote By Mail, Inc. The nine individual petitioners are Indiana voters who are all under 65 years of age. Indiana Vote By Mail, Inc. is a nonprofit, non-partisan 501(c)(3) organization that advocates for measures that increase the availability of mail-in voting and safe and secure elections.

Respondents, defendants-appellees below, are Paul Okeson, S. Anthony Long, Suzannah Wilson Overholt, and Zachary E. Klutz, all members of the Indiana Election Commission; and Connie Lawson, the Indiana Secretary of State. Respondents are named in their official capacity.

CORPORATE DISCLOSURE STATEMENT

Indiana Vote By Mail, Inc. has no corporate parent, and no publicly held corporation owns 10 percent or more of its stock.

RELATED PROCEEDINGS

United States District Court (S.D. Ind.):

- *Tully* v. *Okeson*, No. 1:20-cv-01271 (Aug. 21, 2020) (order denying motion for a preliminary injunction)

United States Court of Appeals (7th Cir.):

- *Tully* v. *Okeson*, No. 20-2605 (Oct. 6, 2020) (affirming denial of preliminary injunction)

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Barbara Tully, Katharine Black, Marc Black, David Carter, Rebecca Gaines, Elizabeth Kmieciak, Chaquitta McCleary, David Slivka, Dominic Tumminello, and Indiana Vote By Mail, Inc. respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-21a) is reported at 977 F.3d 608. The opinion of the district court (Pet. App. 24a-40a) is reported at 481 F. Supp. 3d 816.

JURISDICTION

The court of appeals entered judgment on October 6, 2020. Pet. App. 22a-23a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 1 of the Fourteenth Amendment provides that "[n]o State shall * * * deny to any person within its jurisdiction the equal protection of the laws."

Section 1 of the Twenty-Sixth Amendment provides that "[t]he 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."

Sections 3-5-2-16.5 and 3-11-10-24(a)(5) of the Indiana Code provide that a voter who "is an elderly voter"—that is, "a voter who is at least sixty-five (65) years of age"—is "entitled to vote by mail."

STATEMENT

The State of Indiana permits all voters 65 years of age or older to vote absentee by mail on account of their age, while requiring voters age 18 to 64 to satisfy some other requirement. In the decision below, the Seventh Circuit held that this disparate treatment of older and younger voters does not violate either the Fourteenth or the Twenty-Sixth Amendment to the U.S. Constitution. Relying principally on *McDonald* v. *Board of Election Commissioners of Chicago*, 394 U.S. 802 (1969)—a Fourteenth Amendment case decided before the adoption of the Twenty-Sixth Amendment in 1971—the court concluded that the "privilege" of mail-in voting is not part of the constitutional "right to vote." As the court put it, both the Fourteenth Amendment and the Twenty-Sixth Amendment are concerned only with "the ability to cast a ballot," not "the right to do so in a voter's preferred manner." Pet. App. 6a-7a.

The decision below deepens two existing splits among state high and federal appellate courts over the application of this Court's voting rights precedents, and the Seventh Circuit's interpretation of the Twenty-Sixth Amendment finds no support in that Amendment's text, history, or structure. Particularly as dozens of states consider revisions to their voting laws in advance of the 2022 election cycle, the decision threatens to create significant uncertainty and disruption for voters, legislators, and election officials. This Court should review, and set aside, the Seventh Circuit's decision.

A. Indiana's absentee voting rules

The State of Indiana allows registered voters to cast ballots in several ways. First, a registered voter

may vote in person on election day, typically in his or her precinct of residence, Ind. Code § 3-11-8-2, or in some cases at county vote centers. Ind. Code § 3-11-18.1. Second, a registered voter may vote by absentee ballot. Absentee ballots may be returned in person to the county clerk or (if approved) satellite voting sites. Ind. Code §§ 3-11-10-1, 3-11-10-26, 3-11-10-26.3.

Certain categories of voters are permitted to return absentee ballots by mail. Among these are "elderly voter[s]." Ind. Code § 3-11-10-24(a)(5); see also Ind. Code § 3-5-2-16.5 (defining "[e]lderly" to mean "a voter who is at least sixty-five (65) years of age"). Other categories of voters entitled to vote by mail include disabled voters, members of the military, and voters who will be absent from their precinct on election day. See generally Ind. Code § 3-11-10-24(a).[1]

In addition to mail-in voting, a smaller set of voters may—and certain voters with disabilities must—

[1] Currently, seven states besides Indiana offer elderly voters (typically defined to mean persons age 65 or older) some type of entitlement to vote absentee by mail: Kentucky, Ky. Rev. Stat. § 117.085(1)(a)(8); Louisiana, La. Stat. § 18:1303(J); Mississippi, Miss. Code Ann. § 23-15-715(b); South Carolina, S.C. Code § 7-15-320(B)(8); Tennessee, Tenn. Code Ann. § 2-6-201(5)(A); Texas, Tex. Elec. Code § 82.003; and West Virginia, W.V. Code § 3-3-1(b)(1)(B). The remaining states do not treat age as a relevant criterion for mail-in voting, either because those states conduct all-mail elections or offer "no-excuse" absentee voting to all voters regardless of age (34 states and D.C.), or because those states require all voters to have an "excuse" to vote absentee but do not treat age as an "excuse" (8 states). See generally Nat'l Conf. of State Legislatures, *Voting Outside the Polling Place: Absentee, All-Mail and Other Voting at Home Options* tbl. 1–tbl. 3 (Sept. 24, 2020), https://bit.ly/3dh59ks (this website, and all others cited in this petition, were last visited Mar. 2, 2021).

vote before a traveling absentee voter board. Ind. Code §§ 3-11-10-24(b), 3-11-10-25(b).

In the 2016 general election, 33% of Indiana voters cast absentee ballots. In the 2020 general election, that proportion increased to 61% of all ballots cast (approximately 1.8 million votes). Roughly 30% of absentee votes cast in November 2020—approximately 506,000—reportedly were cast by mail.[2]

B. Procedural history

On March 25, 2020, in response to the COVID-19 pandemic, the Indiana Election Commission exercised its authority to implement no-excuse absentee voting by mail for all Indiana voters—regardless of age—for the state's upcoming primary election. See Ind. Election Comm'n Order No. 2020-37 (Pet. App. 41a-53a). Citing the Governor's declaration of a public health disaster emergency, the Commission's Order stated that "[a]ll registered and qualified Indiana voters are afforded the opportunity to vote no-excuse absentee by mail" and that "the qualifications set forth in IC 3-11-10-24(a) are expanded to include all otherwise registered and qualified Indiana voters." Pet. App. 43a.

The Commission refused to make similar accommodations for the November general election. Accordingly, petitioners filed suit on April 29.

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[2] See Ind. Sec'y of State, General Election Turnout and Registration (2020), https://bit.ly/3rftmM5; Ind. Sec'y of State, General Election Turnout and Registration (2016), https://bit.ly/3rjc3d6; Lazaro Gamio *et al.*, N.Y. TIMES, *Record-Setting Turnout: Tracking Early Voting in the 2020 Election* (updated Nov. 12, 2020), https://nyti.ms/3tZBtyn.

Petitioners' Amended Complaint brought two federal claims.[3] First, petitioners alleged that, as applied during the COVID-19 pandemic, Indiana's refusal to make mail-in voting generally available to voters under age 65 for the general election violated the Fourteenth Amendment, which prohibits unjustified burdens on the right to vote. Am. Compl. ¶¶ 65-82. In particular, petitioners alleged that, as applied during a pandemic, the state's absentee voting laws constituted a significant and non-trivial burden on the fundamental right to vote of younger voters, and that these burdens were not justified by any relevant governmental interest.

Second, petitioners alleged that Indiana violated the Twenty-Sixth Amendment by drawing an express distinction on the basis of age with respect to mail-in voting. Am. Compl. ¶¶ 83-94. Petitioners noted that the COVID-19 pandemic made application of these age-based voting rules "particularly burdensome" to voters under 65 years of age. *Id.* ¶ 94. But petitioners also alleged that Indiana Code § 3-11-10-24(a) "would be unconstitutional under any set of circumstances because it deni[ed] voters age 18-64 the same voting rights as those ages 65 and older." *Ibid.*

C. The district court's preliminary injunction ruling

Soon after filing the Amended Complaint, petitioners moved for a preliminary injunction. The district court denied that motion on August 21, 2020 on

[3] Petitioners also brought a state law claim not at issue in this petition.

the grounds that petitioners had not shown a reasonable likelihood of success on either federal claim. Pet. App. 39a.[4]

As to the Twenty-Sixth Amendment claim, the court held that mail-in voting restrictions do not "absolutely prohibit" voters under age 65 from casting a ballot, and therefore that the Amendment's prohibition on the denial or abridgment of the right to vote on account of age was not implicated by Indiana's absentee voting scheme. Pet. App. 38a. As to the Fourteenth Amendment claim, the district court held that petitioners did not establish a substantial burden on the right to vote, and that it was therefore appropriate to defer to the State's asserted interests. *Id*. at 33a.

On August 25, two business days after the district court's decision, petitioners filed their opening appeal brief in the Seventh Circuit. That court subsequently expedited the briefing and scheduled argument.

D. The decision below

On October 6, the Seventh Circuit affirmed the district court's denial of the request for a preliminary injunction. The court's decision turned on the merits of the claims, which it found foreclosed by this Court's

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[4] On August 14, 2020, the Commission met virtually to discuss whether to allow no-excuse voting by mail, regardless of age, for the general election. Chairman Okeson said that it would be "premature to take any action by voting today until the courts have a chance to hand down a ruling," and the Commission declined to expand mail-in voting by a 2-2 vote. The Commission did not meet publicly between August 14 and the general election. News articles discussing the August 14 meeting are in the record at ECF No. 66-1, 66-2, and 66-3 of the district court docket. A recording of the meeting previously was available at https://www.in.gov/sos/elections/2404.htm, although at the time of filing of this petition, the link to the video was not functional.

precedents—in particular, by this Court's decision in *McDonald*. Pet. App. 5a-6a.

As to the Twenty-Sixth Amendment claim, the majority determined that the core question was whether restrictions on the availability of absentee voting implicate the "right to vote" or "merely affect[] a privilege to vote by mail." Pet. App. 6a. The majority concluded that *McDonald* "answered" this question. *Ibid*. According to the Seventh Circuit, *McDonald* provided that "the fundamental right to vote means the ability to cast a ballot, but not the right to do so in a voter's preferred manner, such as by mail." *Id*. at 6a-7a.

The majority acknowledged that this logic would apply equally to the Constitution's other voting amendments—the Fifteenth, Nineteenth, and Twenty-Fourth Amendments—and that these Amendments similarly would provide no protection if a state sought to "restrict[] the ability of African Americans or women or the poor to vote by mail." Pet. App. 8a. But, the court said, concern over this limitation "b[ore] no weight" because such laws could be challenged separately under the Equal Protection Clause of the Fourteenth Amendment. *Id*. at 9a.

The majority's analysis of the Fourteenth Amendment claim proceeded similarly. In recent decades, this Court has explained that "[e]ach provision" of state election codes, ranging from "the registration and qualifications of voters" to "the selection and eligibility of candidates" to "the voting process itself," "inevitably affect[]—at least to some degree—the individual's right to vote"; challenges to such provisions are evaluated with a sliding-scale test. *Anderson* v.

Celebrezze, 460 U.S. 780, 788-789 (1983); *Burdick* v. *Takushi*, 504 U.S. 428, 433 (1992).

Citing this Court's 1969 decision in *McDonald*, however, the Seventh Circuit held that because petitioners' challenge was directed at Indiana's absentee voting scheme, their challenge did not implicate the right to vote and only rational-basis review applied. Pet. App. 12a. Despite earlier stating that the Fourteenth Amendment did protect voters' right to equal treatment with respect to absentee voting, *id*. at 9a, the court declared that the *Anderson-Burdick* test "cannot apply" to such restrictions, because that test turns on the injury to "the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate." *Id*. at 11a & n.6. The court also stated that it would reject petitioners' claim under the *Anderson-Burdick* test because Indiana's electoral scheme "as a whole" did not unduly burden the right to vote. *Id*. at 13a-14a.

Judge Ripple concurred in a separate opinion, rejecting the notion that *McDonald* "establishes a rigid rule that the fundamental right to vote does not include a right to cast an absentee ballot." Pet. App. 19a. As Judge Ripple explained, "*McDonald* antedates the ratification of [the Twenty-Sixth] Amendment" and "[w]e well may see someday a more direct attempt to manipulate the electoral process by altering the absentee ballot program to disfavor a specific age group." *Id*. at 19a-20a. Although he noted that "the State may well have created a category that is both over- and under-inclusive," Judge Ripple did not believe Indiana had used age as "an invidious irrebuttable presumption" in this case. *Ibid*. He saw no Twenty-Sixth

Amendment violation because Indiana employed age "only in a tangential way." *Id*. at 18a.

Judge Ripple found the Fourteenth Amendment claim "somewhat stronger" than the Twenty-Sixth Amendment claim and would have applied intermediate scrutiny under *Anderson-Burdick*. Pet. App. 20a. Nevertheless, he found that plaintiffs had not shown a "realistic jeopardy of losing the right to vote," and thought Indiana's interests in limiting the number of voters seeking to vote by mail were sufficient to defer to what he called the State's "careful weighing of the competing considerations." *Id*. at 20a-21a.

E. The *TDP* litigation

While petitioners' motion for a preliminary injunction in this case was pending before the district court in Indiana, a motions panel of the Fifth Circuit stayed an injunction in a Texas case bringing similar Fourteenth and Twenty-Sixth Amendment challenges to age-based restrictions on mail-in voting in that state. See *Texas Democratic Party* v. *Abbott*, 961 F.3d 389, 406 (5th Cir. 2020) ("*TDP I*"). Because the Fifth Circuit used different and inconsistent reasoning than the Seventh Circuit, petitioners discuss these decisions in some detail here.

The motions panel's decision to stay the Texas district court's injunction pending appeal was supported by three opinions. Similar to the majority opinion in *Tully*, the lead opinion, by Judge Smith, concluded that the "logic" of this Court's decision in *McDonald* precluded both Fourteenth Amendment and Twenty-Sixth Amendment claims based on the disparate availability of mail-in voting. *TDP I*, 961 F.3d at 406, 408.

Judge Ho concurred. He agreed that *McDonald* barred the Fourteenth Amendment claim, but observed that this Court "has said little to date about the Twenty-Sixth Amendment." 961 F.3d at 416-417. Although Judge Ho concluded that the "closest analogy available under current precedent is the *McDonald* approach to the Fourteenth Amendment," he ultimately rested his Twenty-Sixth Amendment conclusion on remedial grounds. *Ibid.* Unlike the majority in *Tully*, moreover, Judge Ho questioned the proposition that the voting amendments were not concerned with absentee voting. *Ibid.* ("The text of the Fifteenth Amendment closely tracks the text of the Twenty-Sixth Amendment. And it would presumably run afoul of the Constitution to allow only voters of a particular race to vote by mail.").

Judge Costa concurred in the judgment only. He would have applied *Pullman* abstention and not reached the merits of the constitutional claims. 961 F.3d at 419.

Following *TDP I*, the plaintiffs applied to this Court to vacate the stay. The Court denied the application. *Texas Democratic Party* v. *Abbott*, 140 S. Ct. 2015 (2020). As Justice Sotomayor noted, however, the challenge to the Texas law raised "weighty but seemingly novel questions regarding the Twenty-Sixth Amendment," and she urged the Fifth Circuit to "consider the merits of the legal issues in this case well in advance of the November election." *Ibid.* (statement of Sotomayor, J.).

The appeal in *TDP* then proceeded to a decision on the merits, where the plaintiffs defended the district court injunction solely on a Twenty-Sixth Amendment theory. *Texas Democratic Party* v. *Abbott*, 978 F.3d

168, 174 (5th Cir. 2020) ("*TDP II*") ("plaintiffs defend the injunction at this stage of the proceedings only on the basis that the vote-by-mail privilege for older voters is unconstitutional under the Twenty-Sixth Amendment[]"), *cert. denied*, — S. Ct. —, 2021 WL 78479 (Jan. 11, 2021). On September 10, 2020, a different Fifth Circuit panel reversed the district court's injunction. See *TDP II*, 978 F.3d at 174.[5]

Although the merits panel reached the same result as the motions panel on the Twenty-Sixth Amendment claim, the merits panel took a very different route to get there. Instead of hinging its decision on *McDonald*, the merits panel 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*. at 190-191. The court expressly "declare[d] that the holdings in the motions panel opinion as to *McDonald* are not precedent." *Id*. at 194.

Judge Stewart dissented in part. He agreed that *McDonald* did not control the Twenty-Sixth Amendment claim. 978 F.3d at 199. But he departed from the majority's interpretation of the Amendment. As Judge Stewart explained (*id*. at 196-197), an anti-retrogression standard was incompatible with *Reno* v. *Bossier Parish School*, 528 U.S. 320 (2000), and *South Carolina* v. *Katzenbach*, 383 U.S. 301 (1966)—and with Seventh Circuit precedent in *Luft* v. *Evers*, 963 F.3d

[5] The Fifth Circuit withdrew and reissued the *TDP II* opinion on October 14, following the Seventh Circuit's decision in this case. The Fifth Circuit's new opinion contains non-substantive changes, particularly with respect to threshold standing and immunity issues not at issue in this petition.

665, 672 (7th Cir. 2020). Judge Stewart concluded that "the options granted to voters to cast their vote are part of 'the right to vote' under the Twenty-Sixth Amendment" and that "[b]y giving younger voters fewer options, especially in the context of a dangerous pandemic where in-person voting is risky to public health and safety, their voting rights are abridged in relation to older voters who do not face this burden." 978 F.3d at 199.

REASONS FOR GRANTING THE PETITION

The Constitution's four voting amendments provide that no State shall "den[y]" or "abridge[]" the right of citizens to vote on account of certain criteria: race, color, or previous servitude (Fifteenth); sex (Nineteenth); ability to pay a poll tax (Twenty-Fourth); and age (Twenty-Sixth).

The last of these Amendments was enacted in the wake of this Court's decision in *Oregon* v. *Mitchell*, 400 U.S. 112 (1970), which invalidated Congress's attempt to lower the voting age to 18 for state and local elections in the Voting Rights Act Amendments of 1970. But the Twenty-Sixth Amendment is cast in the same "fundamental terms" as its predecessors—terms that "transcend[] the particular controversy which was the immediate impetus for [their] enactment." *Rice* v. *Cayetano*, 528 U.S. 495, 512 (2000); cf. *Bostock* v. *Clayton Cnty.*, 140 S. Ct. 1731, 1749 (2020) (a law's reach is determined by what "the text and our precedent indicate," not whether a particular application "reaches 'beyond the principal evil' legislators may have intended or expected to address").

Like the other voting amendments, the Twenty-Sixth Amendment speaks in "plain, unambiguous language." *United States* v. *Mississippi*, 380 U.S. 128, 140

(1965). "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." U.S. Const. amend. XXVI, § 1. But that is what Indiana has done by expressly providing that central aspects of the right to vote are expanded or contracted (*i.e.*, "denied or abridged") on account of age. Just as Indiana could not provide that only "white" voters or "female" voters are entitled to no-excuse absentee voting by mail under the Fifteenth and Nineteenth Amendments, so too is Indiana prohibited from providing that only voters age 65 and older are entitled to vote by mail without further excuse under the Twenty-Sixth Amendment.

With no textual or historical basis for doing so, the decision in this case significantly curtails the reach of the four voting amendments. It furthers existing confusion surrounding the Twenty-Sixth Amendment. And it threatens to create widespread confusion in upcoming election cycles.

The Seventh Circuit's decision also adds to growing disarray over the appropriate mode of analysis for challenges to state absentee voting procedures under the Fourteenth Amendment. Relying on this Court's decades-old decision in *McDonald*, which predated the emergence of the modern *Anderson-Burdick* framework, the Seventh Circuit held that absentee voting provisions are categorically subject to rational-basis review. That is contrary to decisions from many other courts and promises to create yet more confusion, especially because many state legislatures are currently considering ways to expand or restrict the availability of absentee voting in the wake of the recent election.

It is essential that these issues be resolved prior to the nation's next election cycle. This case offers an opportunity to do that, determining the meaning of *McDonald* and the Twenty-Sixth Amendment and ensuring the Constitution's guarantee of an equal right to vote regardless of age. There is no reason to delay resolution of these critical issues. Review is therefore warranted.[6]

I. The Seventh Circuit's decision conflicts with the holdings of other courts of appeals and state courts

The Seventh Circuit's decision in this case exacerbates two deep and related splits in state and lower federal courts. First, the Seventh Circuit's holding that the Twenty-Sixth Amendment is not concerned with laws that affect absentee voting is sharply at odds with the interpretation of that Amendment reached by other courts. Second, the Seventh Circuit's construction of *McDonald* (which did not just inform that court's Fourteenth Amendment analysis but also formed the predicate for its erroneous Twenty-Sixth Amendment conclusion) deepens a longstanding split on the meaning of the *McDonald* decision. This Court's intervention is urgently needed to resolve

[6] Petitioners' claims are not limited to the 2020 election cycle. The Twenty-Sixth Amendment claim includes a facial challenge to Indiana Code § 3-11-10-24(a). In addition, both the Fourteenth and Twenty-Sixth Amendment claims are based on the burdens placed on the right to vote by in-person voting during the coronavirus pandemic. Although petitioners hope that the pandemic will be fully controlled by the next election cycle, there is no guarantee that will be the case.

these conflicts, which turn on fundamental disagreements over the meaning of the Court's prior decisions and of constitutional text.

A. The decision below aggravates a split in authority over the meaning of the Twenty-Sixth Amendment

This Court has only once addressed a Twenty-Sixth Amendment claim, in a case addressing a county registrar's use of a questionnaire to determine whether college students living in the county intended to remain in the community after graduation. In that case, the United States alleged that the questionnaire—which did not itself deny any student the right to vote—was used to "abridge[] the right of Prairie View dormitory residents to vote in violation of their rights under the 14th, 15th and 26th Amendments to the Constitution of the United States." *United States* v. *Texas*, 445 F. Supp. 1245, 1247 (S.D. Tex. 1978). A three-judge court held that the registrar's actions were unconstitutional, *id*. at 1261-1262, and this Court summarily affirmed. *Symm* v. *United States*, 439 U.S. 1105 (1979).

Since *Symm*, lower courts have frequently observed the lack of "controlling caselaw * * * regarding the proper interpretation of the Twenty-Sixth Amendment or the standard to be used in deciding claims based on alleged abridgement or denial of the right to vote." *Nashville Student Org. Comm.* v. *Hargett*, 155 F. Supp. 3d 749, 757 (M.D. Tenn. 2015); see also, *e.g.*, Pet. App. 39a (observing that there are "very few cases" involving the Twenty-Sixth Amendment); *League of Women Voters of Fla., Inc.* v. *Detzner*, 314 F. Supp. 3d 1205, 1221 (N.D. Fla. 2018) (noting the "dearth of guidance on what test applies"); *TDP I*, 961

F.3d at 416 (Ho, J., concurring). The Seventh Circuit's decision greatly exacerbated this confusion.

1. There are now at least three different and largely incompatible approaches used by the lower courts to evaluate Twenty-Sixth Amendment claims related to absentee voting classifications.

First, as explained above, the Seventh Circuit has held that the Twenty-Sixth Amendment is simply inapplicable to laws governing the manner of casting a ballot, even those that—like Indiana's absentee voting laws—draw facial age-based distinctions. On this view, laws that merely affect a voter's "preferred manner" of casting a ballot do not affect the "right to vote," and the Twenty-Sixth Amendment (and the other voting amendments) have nothing to say about such restrictions. Pet. App. 7a-9a.

Second, and in square conflict with this holding, several federal and state courts have reasoned that the Twenty-Sixth Amendment is broadly concerned with unequal treatment of voters on account of age in all facets of the election process, and that the Amendment subjects such age-based classifications to heightened scrutiny.

In *Walgren* v. *Howes*, for example, the First Circuit held that the Town of Amherst's decision to schedule special elections during a period in which many college students would be required to vacate their residences raised a claim under the Twenty-Sixth Amendment. 482 F.2d 95, 98-99 (1st Cir. 1973) ("*Walgren I*"). That was so even though the students had not been "totally denied the electoral franchise," for there was "no allegation that the town has improperly denied absentee ballots to residents requesting

them." *Id.* at 99-100. Following trial, the court observed that it was "difficult to believe" that the Twenty-Sixth Amendment "contributes no added protection to that already offered by the Fourteenth Amendment." *Walgren* v. *Bd. of Selectmen of Town of Amherst*, 519 F.2d 1364, 1367 (1st Cir. 1975) ("*Walgren II*").

The California Supreme Court applied a similar rule in *Jolicoeur* v. *Mihaly*, 488 P.2d 1 (Cal. 1971), which addressed a law requiring college students to vote at their parents' residences. The court held that the Twenty-Sixth Amendment invalidates a voting restriction if "[t]he burden placed on youth would be different than that placed on other absentee voters." *Id.* at 4. That was so even if voters would not be precluded from voting. *Ibid.* (noting that young people could "travel to their parents' district to register and vote" or "register and vote as absentees"). The California Supreme Court thus reads "the Twenty-Sixth Amendment to the United States Constitution * * * [to] require respondent registrars to treat all citizens 18 years of age or older alike for *all purposes* related to voting." *Id.* at 12 (emphasis added).

The Colorado Supreme Court has also held that "the 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." *Colorado Project-Common Cause* v. *Anderson*, 495 P.2d 220, 223 (Colo. 1972) (en banc).[7]

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[7] Consistent with these cases, three members of the Eleventh Circuit recently concluded that the voting amendments do not permit a state to discriminate on the basis of a prohibited category merely because the state acts with regard to voting matters

Third, and again contrary to the Seventh Circuit's position, the Fifth Circuit holds that age-based restrictions on mail-in voting "abridge" the right to vote only if they make it *harder* for younger voters to cast a ballot than before the restrictions were implemented. *TDP II*, 978 F.3d at 190-191. The Fifth Circuit has expressly rejected reliance on *McDonald* to circumscribe the scope of the Twenty-Sixth Amendment. *Id*. at 194 (majority); *id*. at 199 (Stewart, J.).[8]

In addition to the three tests described above, Judge Ripple has said that laws affecting "absentee ballot privileges" might implicate the Twenty-Sixth Amendment, but only where the "values protected by that Amendment are clearly at stake." Pet. App. 19a-20a. And Judge Stewart would hold that "the options granted to voters to cast their vote are part of the

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that are an "act of grace." *Jones* v. *Governor of Fla.*, 975 F.3d 1016, 1040-1041 (11th Cir. 2020) (W. Pryor, Newsome, and Lagoa, JJ.). As these judges explained, the voting amendments "do[] not subject race-based [or sex- or age-based] voter qualifications to strict scrutiny" but rather deem such classifications to be "per se unconstitutional"; a state may not "act[] in *any* way to make race [or sex or age] relevant to voter qualifications." *Id*. at 1043 (emphasis added).

[8] The Fifth Circuit's test in effect applies the "anti-retrogression" standard from section 5 of the Voting Rights Act to the Twenty-Sixth Amendment. See *Bossier Parish*, 528 U.S. at 334 (explaining that "[i]n § 5 preclearance proceedings * * * the baseline is the status quo that is proposed to be changed"). That is inconsistent with the Seventh Circuit's decision in *Luft* v. *Evers*, which explains that similar "denial or abridgement" language in the Voting Rights Act implements an "equal-treatment requirement"—the question is not whether a group has retrogressed compared to the status quo, but whether the election system is "equally open to participation" by members of the protected class. *Luft*, 963 F.3d at 672; see also *TDP II*, 978 F.3d at 196-197 (Stewart, J.) (discussing this tension).

'right to vote' under the Twenty-Sixth Amendment," to which some form of heightened scrutiny should apply. *TDP II*, 978 F.3d at 199.

2. The different tests articulated by federal and state courts do not just reflect differences in rationale. They yield different outcomes. Under the Seventh Circuit's test, for example, petitioners are not permitted to show that disparity in the availability of absentee mail-in voting has abridged their right to vote. But under the California Supreme Court's test in *Jolicoeur*, Indiana's differential treatment of voters on the basis of age presents a clear, perhaps even per se Twenty-Sixth Amendment problem.

Even under the Fifth Circuit's anti-retrogression test, moreover, petitioners here would likely obtain relief. The State of Texas refused to expand mail-in voting for the 2020 primary, see *In re State*, 602 S.W.3d 549, 550 (Tex. 2020), so there was no retrogression in that state in November 2020 compared to the earlier "baseline." By contrast, here, respondents chose to exercise their authority under the Election Code to allow *all* voters to vote absentee by mail in Indiana's June 2020 primary, Pet. App. 43a, but then enforced age-based rules in the general election. That made it harder for younger voters to vote compared to the status quo. Cf. *Republican Nat'l Comm.* v. *Common Cause R.I.*, 141 S. Ct. 206 (2020) (Mem.) ("The status quo is one in which the challenged requirement has not been in effect, given the rules used in Rhode Island's last election."). In the event other states limit the availability of mail-in voting in the coming years, moreover, see *infra* p. 29, the Fifth Circuit's anti-retrogression standard is poised to drive an even larger

wedge between that court's approach and the Seventh Circuit's.

B. The decision below aggravates a related split over *McDonald*

The Seventh Circuit's decision did not just exacerbate confusion over the Twenty-Sixth Amendment. It also exacerbated a related split in the Fourteenth Amendment context. Petitioners argued that denying them the ability to vote absentee by mail during a pandemic unduly burdened their right to vote—a burden Indiana recognized when it chose to make mail-in voting available to all voters regardless of age in the June 2020 primary. The Seventh Circuit again relied principally on *McDonald* to reject this claim, Pet. App. 11a-12a, but to do so it read that case squarely contrary to other state and federal courts and in a manner incompatible with this Court's precedents.

In *McDonald*, pretrial detainees claimed that the State of Illinois violated their right to equal protection by denying them access to absentee voting while allowing the "medically incapacitated" to vote by mail. 394 U.S. at 805. The Court held, at summary judgment, that the detainees had shown "nothing in the record to indicate that the Illinois statutory scheme has an impact on appellants' ability to exercise the fundamental right to vote," and that "the absentee statutes * * * do not themselves deny appellants the exercise of the franchise." *Id*. at 807-808. Since issuing *McDonald*, this Court has interpreted its holding narrowly, declaring that it "[e]ssentially * * * rested on failure of proof." *O'Brien* v. *Skinner*, 414 U.S. 524, 529 (1974); see also, *e.g.*, *Hill* v. *Stone*, 421 U.S. 289, 300 n.9 (1975); *Goosby* v. *Osser*, 409 U.S. 512, 520-22 (1973).

In *American Party of Texas* v. *White*, this Court rejected an absolutist reading of *McDonald*, holding that "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." 415 U.S. 767, 795 (1974). And in *Burdick*, this Court cited *McDonald* as support for the "more flexible standard" that now applies to all "state election law[s]." 504 U.S. at 433-34; see also *Crawford* v. *Marion Cnty. Election Bd.*, 553 U.S. 181, 204 (2008) (Scalia, J., concurring) ("To evaluate a law respecting the right to vote—whether it governs voter qualifications, candidate selection, or the voting process—we use the approach set out in *Burdick* v. *Takushi* * * * ."). Under this sliding-scale test, "the rigorousness of [the] inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights," and "severe" restrictions on those rights may require strict scrutiny. *Burdick*, 504 U.S. at 434.

The Seventh Circuit's conclusion that *McDonald* precludes any heightened scrutiny of absentee voting provisions so long as a plaintiff is not totally denied "the ability to cast a ballot" (Pet. App. 7a) cannot be squared with the holdings of many other courts.

In *Obama for America* v. *Husted*, for example, voters challenged a provision of Ohio law precluding some voters from casting in-person early ballots in the November 2012 election. 697 F.3d 423 (6th Cir. 2012). The Sixth Circuit held that, although the challenged law merely governed one manner of voting, "Plaintiffs

[do] not need to show that they were legally prohibited from voting" in other ways to trigger heightened scrutiny, and it concluded that the plaintiffs were entitled to a preliminary injunction. *Id*. at 430-431, 437; see also *Ohio State Conference of NAACP* v. *Husted*, 768 F.3d 524, 541 (6th Cir. 2014) ("We did not read *McDonald* to require proof that there was no possibility that the plaintiffs would find a way to adjust and vote through the remaining options."), *vacated on other grounds*, 2014 WL 10384647 (6th Cir. Oct. 2, 2014).

Likewise, in *Price* v. *N.Y. State Board of Elections*, voters challenged a New York law prohibiting the use of absentee ballots in elections for political party county committees. 540 F.3d 101 (2d Cir. 2008). The district court concluded that, under *McDonald*, "restrictions on access to absentee ballots do not severely burden the right to vote, so long as the class of voters to whom absentee ballots are denied are not thereby deprived of their only method of voting." *Id*. at 106. But the Second Circuit held that such a showing was unnecessary. In concluding that the plaintiffs were entitled to summary judgment, the Second Circuit explained that it was sufficient that "there [was] at least some burden on the voter-plaintiffs' rights" that made it "difficult to vote in person." *Id*. at 109 & n.9; see also *Walgren I*, 482 F.2d at 99 n.9 (rejecting argument that students could not bring Fourteenth Amendment claim because "absentee ballots are made available to voters as a privilege").

The Tennessee Supreme Court, too, has held that reliance on *McDonald* to short-circuit challenges to absentee voting restrictions is "misplaced." *Fisher* v.

Hargett, 604 S.W.3d 381, 401 (Tenn. 2020). "Characterizing absentee voting by mail as a 'privilege' begs the question of whether, under some circumstances, limitations on this lawful method of voting can amount to a burden on the right to vote itself. The answer to that question must be yes." *Ibid.*

As indicated above, the Fifth Circuit's approach to *McDonald* has been all over the map. In *TDP I*, that court concluded that *McDonald* effectively precluded both Fourteenth Amendment claims and Twenty-Sixth Amendment claims based on absentee voting restrictions—although one judge ultimately would have resolved that issue on alternative grounds, and a third would not have reached the merits at all. After argument on the merits, the Fifth Circuit abrogated that holding, explaining in *TDP II* that *McDonald* should not be read so broadly. See *supra* pp. 9-12.

More recently, the Fifth Circuit has used conflicting analyses. One month after *TDP II*, a different Fifth Circuit panel called "persuasive" the argument that restrictions on absentee voting options "do[] not implicate the right to vote at all." *Tex. League of United Latin Am. Citizens* v. *Hughs*, 978 F.3d 136, 144 n.6 (5th Cir. 2020). Citing that decision, the Texas Supreme Court then signaled that it is inclined to agree that restrictions on absentee voting "may well" not implicate the right to vote. *Abbott* v. *Anti-Defamation League Austin, Sw., & Texoma Regions*, 610 S.W.3d 911, 919 n.9 (Tex. 2020) (per curiam).

II. The decision below is wrong on the merits

The Seventh Circuit's interpretation does more than add to growing divisions in the lower courts. It also is contrary to the text, history, and purpose of the voting amendments and to this Court's precedent.

A. The decision misconstrues the Twenty-Sixth Amendment

The Seventh Circuit's decision ignores the Twenty-Sixth Amendment's plain language. By its terms, that Amendment prohibits both the denial *and* abridgment of the right to vote. Unlike "denial," the concept of "abridgment" "necessarily entails a comparison." *Bossier Parish*, 528 U.S. at 333-334; see also *id.* at 359 (Souter, J., concurring in part) ("[A]bridgment necessarily means something more subtle and less drastic than the complete denial of the right to cast a ballot, denial being separately forbidden."); *TDP II*, 978 F.3d at 193 ("The Twenty-Sixth Amendment prohibits age-based denials but also abridgments of the right to vote."). The Amendment's guarantees thus extend beyond restrictions that completely prohibit voters from casting a ballot based on age.

As this Court held in 1965, an amendment which "expressly guarantees that the right to vote shall not be 'denied or abridged' * * * 'nullifies sophisticated as well as simple-minded modes' of impairing the right guaranteed." *Harman* v. *Forssenius*, 380 U.S. 528, 540-541 (1965). The voting amendments sweep broadly, "securing freedom from discrimination" not just in casting a ballot but in all "matters *affecting the franchise*." *Lane* v. *Wilson*, 307 U.S. 268, 274 (1939) (emphasis added).

The rights of minority voters would undeniably be "abridged" if a state gave all white voters an entitlement to vote absentee by mail while requiring other voters to provide a non-race-based excuse. Cf. *Brown* v. *Post*, 279 F. Supp. 60, 63-64 (W.D. La. 1968) (holding that defendants violated Voting Rights Act's prohibition of denial or abridgement of right to vote by

"making absentee ballots available" to white citizens on different terms than black citizens). And it is no answer that the Fourteenth Amendment might also address such discrimination, for that would make the Fifteenth Amendment—which specifically addresses voting rights—superfluous.

The Seventh Circuit's decision also is contrary to the Twenty-Sixth Amendment's history and purpose, which reflect "an increasing pressure for broader access to the ballot." *Lubin* v. *Panish*, 415 U.S. 709, 713 (1974); see also Eric S. Fish, *The Twenty-Sixth Amendment Enforcement Power*, 121 Yale L.J. 1168, 1201-1202 (2012).

First, the decision in *Mitchell*, which prompted Congress to enact the Twenty-Sixth Amendment, did not just address age limits for voting. In addition to striking down Title III of the Voting Rights Act of 1970 to the extent it sought to lower the voting age to 18 in state and local elections, *Mitchell* also addressed—and upheld—provisions in Title II of the same Act, which created "uniform national rules for absentee voting in presidential and vice-presidential elections" to "insure a fully effective voice to all citizens in national elections." 400 U.S. at 134 (Black, J.); *id*. at 236 (Brennan, J., concurring in part); see also *TDP II*, 978 F.3d at 187 (discussing absentee voting provisions of 1970 statute).

In amending the Voting Rights Act to add absentee voting provisions, Congress specifically found that "the lack of sufficient opportunities for absentee registration and absentee balloting in presidential elections * * * denies or abridges the inherent constitutional right of citizens to vote for their President and Vice President." Pub. L. No. 91-285, 84 Stat. 314, 316

(1970) (codified at 52 U.S.C. § 10502(a)(1)). There is no indication that, in constitutionalizing an age-neutrality principle in response to *Mitchell*, Congress intended to sever the link between the right to vote and absentee voting it had recognized one year earlier.[9]

Second, the Senate Report accompanying the Amendment recognized that requiring young voters to use different procedures than older voters could directly implicate the interests the Amendment sought to protect. *Symm*, 445 F. Supp. at 1254 (citing S. Rep. No. 92-26 (1971)), *aff'd*, 439 U.S. 1105 (1979).

In sum, the history of the Twenty-Sixth Amendment "clearly evidences the purpose not only of extending the voting right to younger voters but also of encouraging their participation by the elimination of *all* unnecessary burdens and barriers." *Worden* v. *Mercer Cnty. Bd. of Elections*, 294 A.2d 233, 237 (N.J. 1972) (emphasis added). The conclusion that burdens and barriers do not matter so long as younger voters are not "absolutely prohibited" from casting a ballot (Pet. App. 6a-8a) is incompatible with this purpose.

B. The decision misconstrues *McDonald*

The Seventh Circuit's decision also misapplies the Court's decision in *McDonald*. Properly read, that

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[9] Senator Barry Goldwater, who introduced what would become Section 202 of the Voting Rights Act of 1970 in the Senate, connected his absentee voting proposal with the goal of ensuring that all Americans 18 years or older could participate fully in the franchise regardless of age. His amendment sought to "spell[] out the right of all citizens . . . to register absentee and to vote by absentee ballot for President and Vice President," and one "important facet" of this change was that "once the voting age is reduced to 18, the benefits of my amendment will be immediately available to all our young Americans who are attending college away from their homes." 116 Cong. Rec. 6877, 6990 (1970).

case does not foreclose either petitioners' Fourteenth Amendment or Twenty-Sixth Amendment claim.

To begin, the Seventh Circuit's reading of *McDonald* as validating state laws that do not entirely abrogate the right to vote departs from this Court's instruction that election challenges are not subject to a "litmus-paper test." *Anderson*, 460 U.S. at 789. What matters for purposes of the Fourteenth Amendment is not the kind of election law at issue, but the burden the law has on voting and the state interests offered to support that restriction. *Ibid.*

McDonald is especially inapposite here because the challenged regulations did have an "impact" (394 U.S. at 807) on the exercise of petitioners' and other Indiana citizens' right to vote. Indiana's refusal to permit no-excuse mail-in voting in the general election forced voters to choose between risking their health and potentially their lives or the lives of their loved ones, and giving up their right to cast a ballot. For these voters, there were no alternatives that would adequately address their legitimate safety concerns. No pretrial detainee in *McDonald* could make such a showing.

In any event, whatever its implication for the Fourteenth Amendment, *McDonald* certainly does not foreclose petitioners' challenge under the Twenty-Sixth Amendment. *McDonald* did not concern abridgment. The opinion focused only on whether the challenged law "den[ied] appellants the exercise of the franchise" (394 U.S. at 807-808) and did not mention the Fifteenth, Nineteenth, or Twenty-Fourth Amendments—let alone the Twenty-Sixth, which was not adopted until two years after *McDonald* was decided.

Since *McDonald*, this Court has rejected the suggestion that compliance with the Fourteenth Amendment "somehow excuses compliance" with the Fifteenth Amendment's "race neutrality command"; the Constitution's voting amendments have "independent meaning and force." *Rice*, 528 U.S. at 522; see also *United States* v. *James Daniel Good Real Property*, 510 U.S. 43, 49 (1993) ("We have rejected the view that the applicability of one constitutional amendment preempts the guarantees of another."). It is "difficult to believe" that the Twenty-Sixth Amendment "contributes no added protection to that already offered by the Fourteenth Amendment." *Walgren II*, 519 F.2d at 1367. It thus makes no sense to cabin the Twenty-Sixth Amendment's specific age-neutrality command by importing general Fourteenth Amendment principles from *McDonald*.

Finally, *McDonald* itself acknowledged that absentee-ballot rules drawn on the basis of "suspect" classifications "demand a more exacting judicial scrutiny." 394 U.S. at 807. Age is not ordinarily a suspect classification for purposes of general Fourteenth Amendment analysis. For purposes of *voting*, however, age is treated analogously in the Constitution to classifications like race or sex. See *Walgren I*, 482 F.2d at 102 (the voting amendments "would seem to have made the specially protected groups, at least for voting-related purposes, akin to a 'suspect class'"). Accordingly, *McDonald* fully supports some form of heightened scrutiny for voting laws that, like Indiana's, discriminate on account of age.

III. This case presents an ideal vehicle to resolve the important questions presented

1. This Court's review is urgently needed because absentee voting laws are likely to become more salient, not less, in the near future. In the wake of the November 2020 election, legislators in at least nine states have introduced bills to restrict mail-in voting, either by eliminating "no-excuse" mail voting or narrowing the range of allowable "excuses." BRENNAN CENTER FOR JUSTICE, *Voting Laws Roundup: February 2021* (Feb. 8, 2021), https://bit.ly/37sAuNp. The number of election reform bills "vastly exceed[s] the number of voting bills introduced by roughly this time last year." *Ibid.*

These proposals, if enacted into law, may result in large numbers of voters losing their right to vote by mail—including losing that right on account of their age. A Georgia Senate subcommittee, for example, recently advanced a bill that would end at-will absentee mail-in voting in the state and make the procedure available only to those 75 years or older, with a doctor's note, or who will be out of town on election day. See Stanley Dunlap, GPB, *Ga. Senate Panel Advances Bill To End No-Excuse Absentee Voting, Require ID* (Feb. 17, 2021), https://bit.ly/37qPsDw.

Additional litigation in response to these types of restrictions will be a virtual certainty. But it remains completely unclear what constitutional standards would apply.

It is far better that the Court address the questions presented now than in the midst of an election season. Prompt resolution of these issues will give much-needed guidance to legislators, election officials, and voters before states have passed legislation

or begun to implement new rules and regulations. Whatever one's view of the pros and cons of absentee voting, it is essential that the governing rules be clearly determined and uniformly applied in advance of the next election cycle.

This Court has "repeatedly emphasized" concern with "alter[ing] election rules on the eve of an election." *Republican Nat'l Comm.* v. *Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1207 (2020) (citing *Purcell* v. *Gonzalez*, 549 U.S. 1 (2006) (per curiam)). No such concerns are present here. Indiana's next federal election is not scheduled until May 2022.

2. While this case arises from the denial of a preliminary injunction, that is no impediment to this Court's review. "[T]he interlocutory status of [a] case may be no impediment to certiorari where the opinion of the court below has decided an important issue, otherwise worthy of review, and Supreme Court intervention may serve to hasten or finally resolve the litigation." Steven M. Shapiro *et al.*, SUPREME COURT PRACTICE § 4.18 (11th ed. 2019).[10]

At this juncture, the outcome of petitioners' Twenty-Sixth Amendment claim turns entirely on pure questions of law, and if petitioners' Fourteenth Amendment claim is subject only to rational-basis review, as a practical matter there is nothing left to lit-

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[10] See, *e.g.*, *Husted* v. *A. Philip Randolph Inst.*, 138 S. Ct. 1833 (2018) (reviewing the reversal and remand of the district court's injunction decision); cf. *Frisby* v. *Schultz*, 487 U.S. 474, 479 (1988) ("Because the question presented is of substantial importance, and because further proceedings below would not likely aid our consideration of it, we choose to avoid the finality issue simply by granting certiorari.").

igate in the courts below. The Seventh Circuit has essentially said as much, stating that in that court's mind *Tully* and other recent cases "do not leave room for ongoing debate" about challenges to absentee voting laws. *Common Cause Indiana* v. *Lawson*, 977 F.3d 663, 666 (7th Cir. 2020). Remanding so the district court can enter a final judgment and the Seventh Circuit can reiterate its conclusions will merely waste judicial resources and delay resolution of the questions presented. It will do nothing to facilitate this Court's review.

3. Finally, petitioners' claims remain live after the 2020 election.

Petitioners' Twenty-Sixth Amendment claim is not moot because it is based on a facial age-based classification that remains on the books. Indeed, the state legislature recently rejected a proposed expansion of mail-in voting to all Indiana voters. See Dan Carden, NORTHWEST INDIANA TIMES, *Indiana House rejects call for no-excuse mail-in voting* (Feb. 4, 2021), https://bit.ly/3bcRCb5. Likewise, although "we may hope that by next spring the pandemic will no longer affect daily life," that outcome "is uncertain." *Republican Party of Pa.* v. *Degraffenreid*, 2021 WL 666401, at *6 (U.S. Feb. 22, 2021) (Alito, J., dissenting from denial of certiorari). It unfortunately is possible that petitioners' Fourteenth Amendment claim will recur in 2022. See *Storer* v. *Brown*, 415 U.S. 724, 737 n.8 (1974) ("The 'capable of repetition, yet evading review' doctrine, in the context of election cases, is appropriate when there are 'as applied' challenges as well as in the more typical case involving only facial attacks.").

Not only are the claims not moot, but establishing the constitutional limits on age-based absentee voting restrictions will "simplify[] future challenges" and "increas[e] the likelihood that timely filed cases can be adjudicated before [the next] election is held." *Storer*, 415 U.S. at 737 n.8. Accordingly, there is no reason for the Court to delay its review of these issues.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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