No. 19A-_____

IN THE
SUPREME COURT OF THE UNITED STATES

Brenda Li Garcia; Joseph Daniel Cascino; Shanda Marie Sansing; Texas Democratic Party; and Gilbert Hinojosa, Chair of the Texas Democratic Party,

Applicants,

v.

Greg Abbott, Governor of Texas; Ruth Hughs, Texas Secretary of State; and Ken Paxton, Attorney General of Texas,

Respondents.

APPLICATION TO VACATE THE FIFTH CIRCUIT'S STAY OF THE ORDER ISSUED BY THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

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PARTIES TO THE PROCEEDING

In addition to the parties listed in the caption, Dana DeBeauvoir, the Travis County Clerk, and Jacquelyn F. Callanen, the Bexar County Elections Administrator, were defendants in the district court proceedings. They were not, however, parties to the stay proceedings in the court of appeals and are not parties in this Court.

RULE 29.6 STATEMENT

Applicant Texas Democratic Party does not have a parent corporation, and no publicly held corporation holds ten percent or more of the Texas Democratic Party's stock.

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APPLICATION TO VACATE THE FIFTH CIRCUIT'S STAY OF THE ORDER ISSUED BY THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

TO: The Honorable Samuel A. Alito, Circuit Justice for the Fifth Circuit:

Pursuant to Rules 22 and 23 of the Rules of this Court, applicants Brenda Li Garcia, Joseph Daniel Cascino, Shanda Marie Sansing, Gilberto Hinojosa, and the Texas Democratic Party, plaintiffs-appellees in the courts below, respectfully apply for an order vacating the order issued on June 4, 2020, by a panel of the United States Court of Appeals for the Fifth Circuit, a copy of which is appended to this application. The Fifth Circuit's order stayed a preliminary injunction issued on May 19, 2020, by the United States District Court for the Western District of Texas, *Texas Democratic Party v. Abbott*, 2020 WL 2541971 (W.D. Tex. May 19, 2020).

INTRODUCTION AND PROCEEDINGS BELOW

This application concerns applicants' right to vote, and whether they and millions of other Texas voters will be able to exercise that fundamental right in the midst of a global pandemic which grows worse by the day in Texas, without risk to their health and—without hyperbole—to their lives.

1. 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." U.S. Const. amend. XXVI § 1. In the courts below, applicants brought a Twenty-Sixth Amendment challenge to a provision of Texas's Election Code that provides a right to vote by mail without any additional excuse—but only to voters who will be "65 years of age or older on election day." Tex. Elec. Code § 82.003.

On May 19, 2020, after submission of evidence and briefing and a hearing, the district court determined that applicants were likely to succeed on their as-applied claim that Section 82.003 "violates the clear text of the Twenty-Sixth Amendment." *Texas Democratic Party v. Abbott, 2020 WL 2541971* at *5 (W.D. Tex. May 19, 2020). It found that, in the face of the COVID-19 pandemic, Texas's restriction of no-excuse vote-by-mail only to voters over the age of 65 forced younger citizens, but not older ones, to expose themselves to a serious threat to their health by voting in person. *Id.* at *26-27. It therefore entered a preliminary injunction on May, 19, 2020, providing that "[a]ny eligible Texas voter who seeks to vote by mail in order to avoid transmission of COVID-19 can apply for, receive, and cast an absentee ballot in upcoming elections during the pendency of pandemic circumstances." *Id.* at *6.

Given the current state of the pandemic, that preliminary injunction would have applied to at least two elections.

First, the preliminary injunction would have governed the primary runoff election now scheduled for July 14, 2020. That election was originally

scheduled for May 26, 2020, but Governor Greg Abbott postponed it through a proclamation that declared that the election "would cause the congregation of large gatherings of people in confined spaces and force numerous election workers to come into close proximity with others, thereby threatening the health and safety of many Texans and literally exposing them to risk of death due to COVID-19." Tex. Proclamation (Mar. 20, 2020), https://perma.cc/TN2S-KUR7. The deadline for applications for vote-by-mail ballots to be received by election officials is July 2.

Second, the preliminary injunction would have governed the general election scheduled for November 3, 2020. COVID-19 infections continue to spread at alarming rates across Texas. *See* Sarah R. Champagne, *Texas Reports Largest Single-Day Increase in Coronavirus Cases*, Tex. Trib., June 11, 2020, https://perma.cc/7PY8-ATXB. In light of the continued contagion, that election will almost certainly also occur under "pandemic circumstances." The deadline for applications for vote-by-mail ballots to be received by election officials for the general election is October 23.

2. Respondents appealed that order and sought an emergency stay "pending appeal." *See* App. 5. On June 4, 2020, the Fifth Circuit stayed that injunction "in all its particulars . . . pending further order of the court." App. 25. The Fifth Circuit took no action to expedite consideration of that appeal. But in a precedential opinion, it held that age-based restrictions on voting practices and procedures are subject to only rationality review, and that

Texas could rationally restrict absentee voting to citizens over the age of 65 because they are "more likely to face everyday barriers to movement" and getting to the polls than their younger neighbors. App. 17.

There are millions of voters in Texas under the age of sixty-five who would be eligible to obtain a no-excuse vote-by-mail ballot if this application is granted. If the Fifth Circuit's stay is not vacated, however, many of those voters will be forced to either risk contracting COVID-19 during in-person voting or relinquish their right to vote at all.

STANDARD OF REVIEW

"A Circuit Justice has jurisdiction to vacate a stay where it appears that the rights of the parties to a case pending in the court of appeals, which case could and very likely would be reviewed here upon final disposition in the court of appeals, may be seriously and irreparably injured by the stay, and the Circuit Justice is of the opinion that the court of appeals is demonstrably wrong in its application of accepted standards in deciding to issue the stay." *W. Airlines, Inc. v. Int'l Bhd. of Teamsters*, 480 U.S. 1301, 1305 (1987) (O'Connor, J., in chambers) (quoting *Coleman v. Paccar Inc.*, 424 U.S. 1301, 1304 (1976) (Rehnquist, J., in chambers)); *see also Hollingsworth v. Perry*, 558 U.S.183, 189 (2010).

ARGUMENT

The Fifth Circuit's stay should be vacated because this case meets all three prongs of the test for vacating a stay. First, this is a case which would

very likely be reviewed here upon final disposition in the Fifth Circuit. Second, the Fifth Circuit is demonstrably wrong in issuing the stay because its decision rests on legal error regarding applicants' likelihood of success on the merits of their Twenty-Sixth Amendment claim. Third, the rights of applicants will be seriously and irreparably injured by the stay.

I. The Court is Very Likely to Grant Review of Applicants' Twenty-Sixth Amendment Claim

This case could, and in all likelihood will, be reviewed by this Court. Indeed, this is the rare case that should be reviewed even *before* "final disposition in the court of appeals." That is why, along with making this Application, applicants have today filed a Petition for Writ of Certiorari Before Judgment, and will move to expedite consideration of the case.

"[T]here is no controlling caselaw" from this Court "regarding the proper interpretation of the Twenty-Sixth Amendment or the standard to be used in deciding claims for Twenty-Sixth Amendment violations based on an alleged abridgment or denial of the right to vote." *Nashville Student Org. Comm. v. Hargett*, 155 F.Supp.3d 749, 757 (M.D. Tenn. 2015). In the absence of that guidance, there is disarray in the lower courts on an important question of law and the Fifth Circuit's decision here sharply conflicts with decisions of the Supreme Court of California, the Colorado Supreme Court, and the First Circuit.

1. Shortly after 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, a person under the age of 21—"will normally be his parents' home' regardless of where the minor's present or intended future habitation might be." *Jolicoeur v. Mihaly*, 488 P.2d 1, 3 (Cal. 1971) (quoting Op. No. 70/213, 54 Adv. Ops. Cal. Atty. Gen. 7, 12 (1971)). As a result of this guidance, registrars told six of the individual plaintiffs in *Jolicoeur* to register in the California jurisdictions where their parents lived, which were "up to 700 miles away from their claimed permanent residences," and told other individuals (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. The court pointed to the way the Twenty-Sixth Amendment mirrors the language of the "Twenty-Fourth, Nineteenth, and Fifteenth before it." *Id.* at 4. The court identified *Gray v. Johnson*, 234 F. Supp. 743 (S.D. Miss. 1964), as a case "significant for its interpretation of similar language in the Twenty-fourth Amendment." *Jolicoeur*, 488 P.2d at 4. *Gray* had held that the "burden" of obtaining a special receipt put on voters who chose not to pay the Mississippi poll tax "circumscribe[d], impair[ed], and impede[d] the right to vote" secured by the Twenty-Fourth Amendment. *Id.* The California court then explained that so too "[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.* That amendment, like its three predecessors, forbids "onerous procedural requirements which effectively handicap exercise of the franchise . . . although the abstract right to vote may remain unrestricted." *Id.* (quoting *Lane v. Wilson*, 307 U.S. 268, 275 (1939)). Thus, the California Supreme Court held 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." *Id.* at 12 (emphasis added). In a case involving age-based restrictions on participation in the initiative process, the Colorado Supreme Court similarly 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).

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 the local university was in the midst of its winter break. The court did not consider the "compelling interest test" to be applicable to the students' Fourteenth Amendment claim. *Id.* at 99. But when it came to their potential Twenty-Sixth Amendment claim, the First Circuit, like the California Supreme Court, pointed to *Lane v. Wilson*, which had found that a facially neutral statute was in fact designed to disenfranchise black voters and thus violated the Fifteenth Amendment. *See id.* at 101. The court suggested that "the

voting amendments would seem to have made the specially protected groups, at least for voting-related purposes, akin to a 'suspect class,'" entitled to heightened judicial scrutiny. *Id.* at 102.

The First Circuit further explained that if the burden on the right to vote were "of such a significant nature as to constitute an 'abridgement,'" a court "presumably would not take the additional step of considering the adequacy of governmental justification"; it would simply strike down the challenged practice. *Walgren*, 482 F.2d at 102. In subsequent proceedings, the First Circuit declared that it was "difficult to believe" that the Twenty-Sixth Amendment "contributes no added protection to that already offered by the Fourteenth Amendment," with respect to election practices, "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).

2. By contrast, in this case, the Fifth Circuit acknowledged that Section 82.003 "facially discriminates on the basis of age." App. 12. But it then held that when it comes to the manner of voting, the state's decision to deny younger voters the right to vote by mail that it provided to older voters was subject to mere "rational-basis review." *Id.* at 20. Relying on its prior discussion of why distinguishing among voters on the basis of age did not violate the Equal Protection Clause, *see id.* at 17-19, the Fifth Circuit stated

that there was "no evidence that *Texas* has denied or abridged" the right to vote by denying younger voters who wished to avoid COVID-19 the ability to vote by mail; "properly qualified voters may exercise the franchise" by voting in person. *Id.* at 20. "What 'is at stake here'" was only "'a claimed right to receive absentee ballots.'" *Id.* (quoting *McDonald v. Board of Election Comm'rs*, 394 U.S. 802, 807 (1969)).

There is no way to reconcile the Fifth Circuit's precedential decision here with the decisions of the California Supreme Court and the First Circuit.

3. The need for this Court's guidance is especially pressing today. COVID-19 has impelled many voters who were comfortable with in-person voting to seek an alternative way to cast their ballots this summer and fall. "[D]ue to the pandemic, voters fear going to public polling places. Their concerns are very real, and very well taken." App. 28. Thus, the Court should anticipate Twenty-Sixth Amendment-based litigation in every state that restricts no-excuse vote-by-mail to an age-based subset of the citizenry. Indeed, such litigation has already begun. *See, e.g.*, *Tully v. Okeson*, Case No. 1:20-cv-01271-JPH-DLP (S.D. Ind.) (amended complaint filed May 4, 2020) (challenging Ind. Code § 3-11-10-24(a)(5)'s limitation to "elderly" voters over the age of 65). As of now, it is unclear whether discrimination on the basis of age is per se unconstitutional, is presumptively unconstitutional but can be

justified if the state satisfies strict scrutiny, or, as the Fifth Circuit held, is subject only to rationality review. Only this Court can resolve that issue.

II. 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." U.S. Const. amend. XXVI § 1. That text echoes the Fifteenth, Nineteenth, and Twenty-Fourth Amendments, which direct that the right to vote shall not be "denied or abridged" based on race, sex, or failure to pay a poll tax. A state would plainly violate those amendments if it offered no-excuse mail voting only to whites, only to men, or only to voters who pay a tax. It is equally plain that Texas has violated the Twenty-Sixth Amendment by offering that option only to voters over 65. The Fifth Circuit held otherwise only because it failed to take the amendment's text seriously. And the court compounded that error by injecting into the Twenty-Sixth Amendment standards of review developed by this Court to adjudicate Fourteenth Amendment challenges to voting restrictions that do *not* implicate discrimination on a basis expressly forbidden by the four parallel voting amendments.

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." *Arizona State Legislature v. Arizona Indep. Redistricting Comm'n*, 135 S. Ct. 2652,

2680 (2015) (Roberts, C.J., dissenting). The Twenty-Sixth Amendment "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, 92d Cong., 1st Sess. (1971). And the Twenty-Fourth Amendment, which "clearly and literally bars any State from imposing a poll tax on the right to vote" in federal elections, contains an equivalent "express constitutional command[] that specifically bar[s] States from passing certain kinds of laws" regarding 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.

While age is not a suspect or quasi-suspect classification under the Fourteenth Amendment, App. 16, the Fifth Circuit failed to recognize that the Constitution now gives a different answer with respect to voting. In that respect, a state can no more discriminate against a citizen over the age of 18 on the basis of "age" than it can discriminate against her on the basis of "race, color, or previous condition of servitude," on the basis of "sex," or on the basis of "failure to pay any poll tax or other tax."

Judge Ho recognized this point in his concurrence, conceding that "it would presumably run afoul of the Constitution to allow only voters of a particular race to vote by mail." App. 30. "Presumably" is an understatement. Black and Latino citizens in Texas are "less likely to own vehicles and are

therefore more likely to rely on public transportation" than their Anglo counterparts. *Veasey v. Abbott*, 830 F.3d 216, 251 (5th Cir. 2016) (en banc), *cert. denied*, 137 S. Ct. 612 (2017). But can there be any doubt that Texas would violate the Fifteenth Amendment if it decided to accord no-excuse vote-by-mail to minority voters but not to white ones as a "way to facilitate exercise of the franchise for Texans who are more likely to face everyday barriers to movement," App. 17? If granting the right to cast mail-in ballots on the basis of race violates the Fifteenth Amendment—and it does—then it follows inescapably that granting that right on the basis of age violates the Twenty-Sixth.

2. 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 so long as they have the right to vote in person, App. 20.

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. *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." *Id.*

The Court explained that it "need only be shown that Section 24-17.2 imposes a material requirement solely upon those who refuse to surrender their constitutional right to vote in federal elections without paying a poll tax." *Harman*, 380 U.S. at 541. The Court held that it did because Section 24-17.2 imposed "cumbersome" logistical burdens on voters who declined to pay the poll tax that poll tax-paying voters did not face. *See id.* at 541-42.

The Court also emphasized that Section 24-17.2's registration requirement "would not be saved even if it could be said that it is no more onerous, or even somewhat less onerous, than the poll tax." *Harman*, 380 U.S. at 542. "*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." *Id.* (emphasis added), So, too, in *Lane v. Wilson*, 307 U.S. 268 (1939), this Court emphasized that the Fifteenth Amendment bars "onerous procedural requirements which effectively handicap exercise of the franchise"—in that case, by black voters—"although the abstract right to vote may remain unrestricted as to race." *Id.* at 275.

As in *Harman* and *Lane*, requiring under-65 voters to show up at the polls in person, particularly during the COVID-19 pandemic, while allowing over-65 voters to cast ballots from the safety of their homes imposes a

"material requirement" on younger voters that "effectively handicap[s]" the exercise of the franchise. Even the Fifth Circuit did not deny that COVID-19 "increases the risks" citizens would face from in-person voting. App. 14. Nor did it deny that it can be more "cumbersome," *Harman*, 380 U.S. at 541, to vote in person; that, after all, was precisely why the state afforded no-excuse mail-in voting to seniors. App. 15. But it wrongly thought that Texas's system was fine as long as it did not prevent younger voters "from voting by all other means." *Id.* at 14.

This belief also comes from the Fifth Circuit's ignoring the plain language of the Twenty-Sixth Amendment. That amendment, like the Fifteenth, Nineteenth, and Twenty-Fourth, does not prohibit states only from "absolutely prohibit[ing]" qualified citizens from voting, App. 14. It prohibits *abridging* the right to vote as well. The concept of abridgement "necessarily entails a comparison." *Reno v. Bossier Par. Sch. Bd.*, 528 U.S. 320, 334 (2000). By comparison to the right to vote that Texas provides to citizens over the age of 65, the right it provides to younger voters is less robust. And it is less robust "solely," *Harman*, 380 U.S. at 542, because of the voters' age thereby subverting the Twenty-Sixth Amendment. Any differential treatment of voters "on account of age" violates the plain language of the Twenty-Sixth Amendment.

The lesson for Texas's vote by mail scheme is straightforward. Texas could have decided not to extend no-excuse vote-by-mail to anyone, but it

cannot grant that privilege based on age. The State cannot "impose[] a material requirement" on voting—namely, showing up at a polling place—"solely" on the basis of an eligible voter's age," *Harman*, 380 U.S. at 541.[1]

3. The Fifth Circuit was flatly wrong to suppose that the "logic" of *McDonald v. Board of Election Commissioners*, 394 U.S. 802 (1969), "applies equally to the Twenty-Sixth Amendment." App. 19.

For starters, the Fifth Circuit misunderstands the relationship between the Fourteenth and Twenty-Sixth Amendments. The Twenty-Sixth Amendment was in fact enacted precisely to deal with age-based discrimination that did not violate the Fourteenth Amendment. Using its enforcement power under Section 5 of the Fourteenth Amendment, Congress had tried in the Voting Rights Act of 1970 to extend the right to vote in all

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[1] Although Texas could have opted not to offer no-excuse vote-by-mail to those over age 65 in the first place, Judge Ho erred in suggesting that the remedy for a Twenty-Sixth Amendment violation would be to "level down"—that is, to take no-excuses vote by mail away from eligible voters over the age of 65, *see* App. 30-31.

For one thing, it is not clear that Texas *can* level down—at least for the upcoming elections in 2020 that are covered by the district court's order. Voters over the age of 65 are entitled to file an "annual" application for mail-in ballots which provides them with such ballots for every election in a calendar year. *See* Application for Ballot by Mail, https://perma.cc/9CZD-G52E. Absent legislative action, those voters will automatically receive such ballots, which means that the *only* way to eliminate the age-based discrimination is to enable voters under 65 to obtain mail-in ballots as well.

Moreover, Texas itself has never actually suggested that it wishes to level down. And for good reason: the political blowback elected officials could expect from a voting bloc that participates at a high rate is a powerful deterrent. And Texas could not, of course, eliminate absentee voting altogether because the Uniformed and Overseas Citizens Absentee Voting Act of 1986 as amended, 52 U.S.C. § 20301 *et seq.*, requires states to provide absentee ballots to certain voters for federal elections.

elections to all citizens over the age of 18. But in *Oregon v. Mitchell*, 400 U.S. 112 (1970), this Court held that Section 5 of the Fourteenth Amendment did not empower Congress to change a state's age limitations on the right to vote in state and municipal elections *Id.* at 130. Given that Congress's Section 5 enforcement powers enable it to prohibit at least some state regulation that "is not itself unconstitutional," *City of Boerne v. Flores*, 521 U.S. 507, 518, 520 (1997), it follows *a fortiori* that denying or abridging the right to vote on the basis of age would not necessarily violate the Equal Protection Clause. *See also* S. Rep. No. 92-26 at 8 (stating that an equal protection clause challenge to state age restrictions on voting would be rejected by this Court). So saying that a particular age-based election restriction does not violate the Fourteenth Amendment cannot determine whether it violates the Twenty-Sixth.

Moreover, *McDonald* actually undermines the Fifth Circuit's assumption that age-based restrictions on vote-by-mail are constitutional.

The plaintiffs in *McDonald* were Cook County residents who were detained pending trial in the Cook County jail. Illinois law made no provision for such "judicially incapacitated" individuals to obtain absentee ballots, even though it authorized the provision of absentee ballots to "medically incapacitated" individuals and individuals incarcerated outside the county. *McDonald*, 394 U.S. at 806.

The primary reason this Court presumed the constitutionality of the Illinois scheme and reviewed it under the deferential rational basis standard was that "the distinctions made by Illinois' absentee provisions are not drawn on the basis of wealth or race"—each of which "demand a more exacting judicial scrutiny." *McDonald*, 394 U.S. at 807. But as petitioners have already explained, the Twenty-Sixth Amendment borrowed verbatim the Fifteenth Amendment's formulation because what Congress sought to accomplish was "exactly" what its predecessors had sought to accomplish with "in enfranchising the black slaves with the 15th amendment." 117 Cong. Rec. 7539 (Mar. 23, 1971) (statement of Rep. Claude Pepper). So the "logic" of *McDonald*, App. 17, actually undercuts the Fifth Circuit's analysis. If distinctions with respect to absentee voting drawn along racial lines are presumptively invalid—as *McDonald* itself dictates—so too are such distinctions when drawn "on account of age," as are Texas's.[2]

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2 The Court also rested its decision on the conclusion that "nothing in the record" suggested that "the Illinois statutory scheme ha[d] an impact on appellants' ability to exercise the fundamental right to vote." *McDonald*, 394 U.S. at 807. The Court emphasized that "the record is barren of any indication that the State might not, for instance, possibly furnish the jails with special polling booths or facilities on election day, or provide guarded transportation to the polls themselves for certain inmates, or entertain motions for temporary reductions in bail to allow some inmates to get to the polls on their own." *Id.* at 808 n.6. But that rationale does not carry over to petitioners' case here. First, although the *extent* of the burden on voting may be relevant in an analysis under the Fourteenth Amendment, *Harman* and *Lane* make clear that the Fifteenth, Nineteenth, Twenty-Fourth, and Twenty-Sixth Amendments prohibit *any* burden based on race, sex, poll-tax payment, or age. Second, and in any event, the district court here reviewed the evidence and found that the combination of COVID-19 and Texas's limitation on mail-in ballots *would* have an impact on younger voters' ability to cast their ballots.

Finally, the balancing inquiry that generally governs non-race-based Fourteenth Amendment-based voting challenges cannot govern Twenty-Sixth Amendment challenges. In those cases, courts "weigh 'the character and magnitude'" of the burden imposed on a voter "against 'the precise interests put forward by the State as justifications for the burden.'" *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983)). In short, they engage in balancing where any one of a number of state interests can outweigh the voter's.

But that form of balancing is impermissible here. The prohibition against age-based differential treatment with respect to voting is "explicitly set forth," *see Coy v. Iowa*, 487 U.S. 1012, 1020 (1988), in the Constitution. Thus even "other important interests" must give way "to the irreducible literal meaning" of the constitutional provision. *Id.* at 1021. The Twenty-Sixth Amendment forbids states from acting on any age-based distinction with respect to voting—full stop.

III. Applicants' Rights Will Be Seriously and Irreparably Harmed If the Fifth Circuit's Stay Is Not Vacated.

Irreparable harm occurs where it "would be difficult—if not impossible—to reverse the harm," *Hollingsworth v. Perry*, 558 U.S. 183, 195 (2010), or where an applicant cannot "be afforded effective relief" even if she eventually prevails on the merits. *Nken v. Holder*, 556 U.S. 418, 435 (2009). In this case, unless the stay is vacated, the harm to applicants cannot be

reversed and they will not be afforded effective relief even if they later prevail on the merits.

1. For those applicants and other Texas voters who vote in person, the Fifth Circuit's stay denies them the ability to cast a mail-in ballot provided by the district court's order. The harm to their health, and potentially even their lives, cannot be reversed or later effectively relieved. *See Mozilla Corp. v. Fed. Commc'ns Comm'n*, 940 F.3d 1, 62 (D.C. Cir. 2019) (finding that the fact that "[p]eople could be injured or die" as a result of challenged government action constituted irreparable harm); *State of N.Y. v. Sullivan*, 906 F.2d 910, 918 (2d Cir. 1990) (holding that "a colorable claim of irreparable harm was presented" where the challenged government policy "potentially subjected claimants to deteriorating health, and possibly even to death").

2. Eligible voters who avoid those irreparable harms by forgoing the right to vote because of fear of contracting COVID-19 suffer a different irreparable injury. Eligible citizens have a "strong interest in exercising the 'fundamental political right' to vote," and there is no relief, monetary or otherwise, which can compensate them for the harm of not being able to select candidates in the primary process. *See Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (per curiam); *see also Fish v. Kobach*, 840 F.3d 710, 752 (10th Cir. 2016) ("Because there can be no 'do-over' or redress of a denial of the right to vote after an election, denial of that right weighs heavily in determining whether plaintiffs would be irreparably harmed absent an injunction.");

League of Women Voters of United States v. Newby, 838 F.3d 1, 9 (D.C. Cir. 2016) (finding irreparable harm because with regard to election deadlines, "there can be no do over and no redress"). And, as this Court has repeatedly recognized, the right to vote in a primary election, like the right to vote in the general election, is a fundamental one. *See, e.g., Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 229 (1986) (striking down Connecticut's closed primary statute because it "impermissibly burdens the rights of the Party and its members"); *Kusper v. Pontikes*, 414 U.S. 51, 57 (1973) (striking down an Illinois statute restricting who could vote in the primary because the "right to associate with the political party of one's choice is an integral part" of basic constitutional freedoms).

The upcoming primary runoff election will decide who the parties put forth in numerous federal, state, and local contests of great consequence in November. And the November general will elect a Senator who will serve for six years, and a President who will serve for at least four. There are no "do-overs" for applicants and other Texas voters who are unable to participate in these two momentous elections, nor can there be any redress, monetary or otherwise, for the loss of that opportunity.

3. The Fifth Circuit panel was demonstrably wrong in its application of accepted standards in deciding to issue the stay. As explained above, in issuing the stay, the panel got the merits question dead wrong. And because of this error, the Fifth Circuit both underweighed the harm to applicants and

overweighed the state's interests in continuing to restrict absentee voter on account of age. The Fifth Circuit acknowledged that "[t]here is no doubt that [COVID-19] poses risks of harm to all Americans, including Texas voters." App. 24. But it then disregarded that harm because it saw no harm from "temporarily staying the [district court] injunction pending a full appeal," *id.,* even as it did nothing to ensure that such an appeal would be expedited. And a moment's thought would reveal that a full appeal cannot possibly be decided in time to enable applicants and the millions of eligible voters like them the ability to cast mail-in ballots for the July primary runoff and quite likely for the November election. Thus, the Fifth Circuit erred twice over in concluding that "the balance of harms weighs in favor of the state officials." *Id.*

CONCLUSION

For the reasons stated herein, applicants respectfully request that the Court vacate the Fifth Circuit panel's June 4, 2020, stay and reinstate the District Court's preliminary injunction for the upcoming 2020 primary and general elections.

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Respectfully submitted,

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