No. 22-50748

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

JOSEPH DANIEL CASCINO, SHANDA MARIE SANSING, BRENDA LI GARCIA,

Plaintiffs-Appellants,

v.

JOHN B. SCOTT, TEXAS SECRETARY OF STATE,

Defendant-Appellee.

On Appeal from the United States District Court
for the Western District of Texas, San Antonio Division
5:20-cv-00438-FB

BRIEF OF APPELLANTS JOSEPH CASCINO, BRENDA GARCIA, AND SHANDA SANSING

Chad W. Dunn
K. Scott Brazil
Brazil & Dunn, LLP
4407 Bee Caves Rd., Ste. 111
Austin, Texas 78746
Telephone: (512) 717-9822
chad@brazilanddunn.com

Bernadette Reyes
Sonni Waknin
UCLA Voting Rights Project
3250 Public Affairs Building
Los Angeles California 90095
Telephone: 310-400-6019
sonni@uclavrp.org
bernadette@uclavrp.org

Dicky Grigg
Law Office of Dicky Grigg, P.C.
4407 Bee Caves Rd., Ste. 111
Austin, Texas 78746
Telephone: 512-474-6061
Facsimile: 512-582-8560
dicky@grigg-law.com

Martin Golando
The Law Office of Martin Golando, PLLC
N. Saint Mary's, Ste. 700
San Antonio, Texas 78205
Telephone: 210-892-8543
martin.golando@gmail.com

Counsel for Appellants

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of 5th CIR Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Appellee:

John Scott

Counsel for Appellees:

Michael Abrams
Courtney Corbello
Office of the Attorney General for
the State of Texas – Solicitor General Division
P.O. Box 12548 (MC-059)
Austin, TX 78711
Telephone: (512) 936-6407
michael.abrams@oag.texas.gov
courtney.corbello@oag.texas.gov

Appellants:

Joseph Cascino
Brenda Garcia
Shanda Sansing

Counsel for Appellants:

Chad W. Dunn
K. Scott Brazil
Brazil & Dunn, LLP
4407 Bee Caves Rd., Ste. 111
Austin, Texas 78746
Telephone: (512) 717-9822
chad@brazilanddunn.com

Dicky Grigg
Law Office of Dicky Grigg, P.C.
4407 Bee Caves Rd., Ste. 111
Austin, Texas 78746
Telephone: 512-474-6061
Facsimile: 512-582-8560
dicky@grigg-law.com

Martin Golando
The Law Office of Martin Golando
N. Saint Mary's, Ste. 700
San Antonio, Texas 78205
Telephone: 210-892-8543
martin.golando@gmail.com

Bernadette Reyes
Sonni Waknin
UCLA Voting Rights Project
3250 Public Affairs Building
Los Angeles California 90095
Telephone: 310-400-6019
sonni@uclavrp.org
bernadette@uclavrp.org

/s/ Chad W. Dunn
Chad W. Dunn

STATEMENT REGARDING ORAL ARGUMENT

While oral argument would ordinarily be warranted given the weighty constitutional issue presented, the Court may determine that it is bound by the prior panel decision on preliminary injunction even though that decision disclaimed it was ruling on the facial constitutional challenge presented by this appeal. Should this panel determine it is bound by the earlier panel decision, argument at this stage is unnecessary. Should this panel determine that it is not bound by the earlier panel decision, then Appellants respectfully request oral argument.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions, Statutes and Rules

Other Authorities

JURISDICTIONAL STATEMENT

Plaintiffs invoked the district court's jurisdiction under 28 U.S.C. § 1331. The Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether the Plaintiffs claims were properly dismissed pursuant to Rule 12(b)(1) due to Plaintiffs lacking standing to bring their claims, the ripeness of Plaintiffs claims, and whether Plaintiffs claims are barred by sovereign immunity?
2. Whether a state can provide additional voting methods to only some eligible voters by facially discriminating based on age and not run afoul of the Twenty-Sixth amendment to the U.S. Constitution?
3. Whether the prior appellate decision on preliminary injunction which disclaimed it was ruling on Plaintiffs facial challenge is nevertheless binding on this panel regarding Plaintiff's Twenty-Sixth amendment claim? And, if so, whether the prior panel decision was clearly erroneous and adhering to this prior decision would constitute a manifest injustice?

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

Texas has instituted limited voting by mail practices. The statute permits those who are absent from the county, suffering from a disability, or those confined to jail to vote by mail. This is sensible enough, however, the statute goes further by also extending the opportunity to voting by mail to a voter who "is 65 years of age or older on election day." TEX. ELEC. CODE § 82.001-.004. All younger voters without a statutorily specified excuse must cast his or her ballot in person. Only a handful of states permit an additional opportunity to vote that a voter can qualify for solely on the basis of their age.

The Twenty-Sixth Amendment contains an unambiguous command: the right to vote may not be "denied or abridged" on "account of age." This amendment was the most recent of four similar voting rights amendments that together protect all voters from differential treatment based on race (15th), gender (19th), payment of poll taxes (24th), and age (26th). The Constitution and Supreme Court precedent support Plaintiff's argument that Section 82.003 constitutes a denial or abridgment of the right to vote. The Twenty Sixth Amendment is not an anomaly amongst the other voting rights amendments warranting a different interpretation and application.

Texas's current law granting the unrestricted right to vote by mail to people on over the age of 65 violates the Constitution and harms these plaintiffs. Voters

under the age of 65 still face challenges in reaching the polls in person. Meanwhile, voters over the age of 65 enjoy membership in an elevated class of voters with access to additional voting methods. Texas may choose whether or not to permit voting by mail at all or it may even limit it to persons with disabilities or those out of the county, but it cannot offer the option to only citizens of a certain race, gender or age.

This suit, though initially started to enable all Texas voters to have the equal access to absentee voting during the pandemic, remains equally important today. Although the rollout of vaccines improved pandemic conditions, one thing remains the same: Texas continues to discriminate against voters under 65 solely due to age.

II. PROCEDURAL BACKGROUND

In March 2020, Plaintiffs and several others brought suit in state court seeking a declaration that, as a matter of Texas law, any voters who considered themselves at risk of contracting COVID-19 could vote by mail using Texas Election Code § 82.003(a). That statute provides that a voter is eligible for a mail-in ballot if the voter has a sickness or physical condition which would make voting in person likely injurious to the voter's health. *See In re State of Texas*, 602 S.W.3d 549, 556-57 (Tex. 2020) (recounting the state-court litigation). Ultimately however, the Texas Supreme Court held that "a lack of immunity to COVID-19 is not itself a 'physical condition' which would make a voter eligible to vote by mail within the meaning of § 82.002(a)." *Id*. at 563 n.2.

In the interim, Plaintiffs filed this lawsuit in the U.S. District Court for the Western District of Texas raising claims under federal law and seeking preliminary injunction of the vote by mail limitations. Plaintiffs include individual voters ranging from ages 20 to 60 who wish to cast mail-in ballots. The defendant is the Texas Secretary of State.[1] The Plaintiffs alleged that Texas's restriction of no-excuse mail-in voting to voters over the age of 65 was "unconstitutional as applied to these plaintiffs during these pandemic circumstances" and "facially unconstitutional." ROA.103-104.

Following review of extensive evidence, the District Court granted plaintiffs' motion for a preliminary injunction. ROA.2066-2067. The District Court held that plaintiffs were likely to succeed on their as-applied Twenty-Sixth Amendment claim. In its ruling, the court found that Section 82.003 "violate[s] the clear text of the Twenty-Sixth Amendment," as Section 82.003 entitles Texas voters over the age of 65 to vote by mail "on the account of their age alone," while voters "younger than 65 face a burden of not being able to access mail ballots on account of their age alone." *Id*. at 2064, 2112. This burden was exacerbated by the COVID-19 pandemic. *Id*. at 2113.

[1] As will be discussed in more detail later in this brief, a prior panel of this Court found to have sufficient connection to the enforcement of Texas voting laws so as to preclude the Secretary from a sovereign immunity defense.

The District Court found, relying on circuit precedent, that denial of the right to vote by mail would inflict irreparable injury on plaintiffs. ROA.2125. The court found that expanding mail-in voting would impose "no undue burden" on election administrators and that it was in the public interest to prevent the State from violating the requirements of federal law and finding that the balance of equities and public interest prongs of the preliminary injunction standard weighed in plaintiffs' favor. *Id*. at 2126-2127.

To avoid the unconstitutional discrimination on the basis of age, rather than prohibit any voting by mail, the District Court declared 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 2066. The court enjoined Defendants from refusing to provide, accept, or tabulate such ballots. *Id*. at 2067.

Defendants appealed, and a motions panel of this Court stayed the preliminary injunction "pending further order of th[e] court." *Texas Democratic Party v. Abbott*, 961 F.3d 389, 412 (5th Cir. 2020). The panel rejected Defendants' arguments that Plaintiffs lacked standing and that their constitutional claims were either nonjusticiable or barred by sovereign immunity. *Id*. at 397-402. The panel ultimately held that plaintiffs were not entitled to preliminary relief as they were unlikely to succeed on their Twenty-Sixth Amendment claim. *Id*. at 409.

On June 16, plaintiffs filed an application to the U.S. Supreme Court to vacate the motions panel's stay, as well as a petition for a writ of certiorari before judgment. Appl. To Vacate the Fifth Circuit's Stay of the Order Issued by the United States District Court for the Western District of Texas, No. 19A1055; Pet. For Writ of Cert. before Judgment, No. 19-1939. Plaintiffs narrowed their arguments to a single one: that Section 82.003, which provides a right to vote by mail without excuse for voters who will be "65 years of age or older on election day," violates the Twenty-Sixth Amendment's prohibition on the denial or abridgement of the right to vote based on age.

On June 26, the Supreme Court denied Plaintiffs' application to vacate the stay. *Texas Democratic Party v. Abbott*, 207 L. Ed. 2d 1094, 140 S. Ct. 2015 (2020). Justice Sotomayor issued a statement noting that the application raised "weighty but seemingly novel questions regarding the Twenty-Sixth Amendment," and expressing the hope that "the Court of Appeals will consider the merits of the legal issues in this case well in advance of the November election." *Id*. at 1. The Supreme Court subsequently denied the motion to expedite consideration of the petition for a writ of certiorari before judgment. *Texas Democratic Party v. Abbott*, 208 L. Ed. 2d 562, 141 S. Ct. 1124 (2021).

Following denial of the writ of certiorari, another panel of this Court ultimately vacated the preliminary injunction and remanded the case to the District

Court. *Tex. Democratic Party v. Abbott*, 978 F.3d 168, 194 (5th Cir. 2020). Plaintiffs defended the injunction on the grounds of the Twenty-Sixth Amendment claims. The panel rejected defendants' charges that plaintiffs lacked standing to bring their claims and found that sovereign immunity did not bar suit against the Secretary of State. *Id.* at 178. The panel further stated that plaintiffs' claims not were barred by the political question doctrine. *Id*. at 182.

The panel fractured on the as-applied Twenty-Sixth Amendment claim, noting that it was "not ruling on a facial challenge" while still analyzing the requirements of a violation of the Twenty-Sixth amendment. *Id*. at 182. The panel concluded that while the Twenty-Sixth Amendment "confers an individual right to be free from denial or abridgment of the right to vote on account of age," *id*. at 184, Section 82.003 did not violate that right. Since "the right to vote in 1971 did not include a right to vote by mail" the right to vote under the Twenty-Sixth Amendment "is not abridged unless the challenged law creates a barrier to voting that makes it more difficult for the challenger to exercise her right to vote relative to the *status quo*, or unless the *status quo* itself is unconstitutional." *Id*. at 188,192. Thus "conferring a privilege on one category of voters does not alone violate the Twenty-Sixth Amendment." *Id*. The panel vacated the preliminary injunction and remanded the case back to the District Court. *Id*. at 194.

Following remand, Plaintiffs filed a second amended complaint. ROA.2463 Subsequently the District Court granted defendants' motions to dismiss this amended complaint pursuant to 12(b)(1) and 12(b)(6). *Tex. Democratic Party v. Scott*, No. CV SA-20-CA-438-FB, 2022 WL 3456915, at *16 (W.D. Tex. July 25, 2022). The court interpreted Plaintiffs' claims as based solely on potential legislative enactments and future pandemic conditions. Thus, pursuant to 12(b)(1), the court concluded Plaintiffs lacked standing, as the claims were unripe for adjudication, and that such claims were precluded by sovereign immunity. *Id*. at 4-5. The court also granted Defendant's 12(b)(6) motion to dismiss based on the prior panel of this Court ruling that Plaintiffs' as-applied challenge failed, citing any other result would be improper under the "law of the case" rule. *Id*. at 6.

SUMMARY OF THE ARGUMENT

This Court should reverse the district court's decision to grant Defendants' motions to dismiss. Plaintiffs' claims are not procedurally barred, and they have successfully demonstrated that Section 82.003 plainly violates the Twenty-Sixth Amendment. The district court erred in construing all of Plaintiffs' claims as rooted in "speculative future election policies and pandemic conditions," as the sole basis for the district court's conclusion as to standing, ripeness, and sovereign immunity, ignoring the existing and continuing harm to Plaintiffs that Section 82.003 causes whatever the pandemic conditions. *Id.* at 5. Plaintiffs' allegations about concrete

harms are not speculative. Rather such concerns exist so long as Texas's no-excuse absentee voting law is in place. Thus, the district court's decision to grant the 12(b)(1) motion to dismiss should be reversed.

The district court also erred in granting the 12(b)(6) motion to dismiss as to the Twenty-Sixth Amendment claims and finding that Plaintiffs failed to state a claim upon which relief could be granted based upon the "law of the case"[2] rule. For one, the prior panel ruling disclaimed that it was ruling on the facial challenge. Further, under the "law of the case" rule, district courts are not required to adhere to another court's ruling in a prior appeal when the earlier decision was clearly erroneous and would constitute a manifest injustice. *United States v. Lee,* 358 F.3d 315, 320 (5th Cir. 2004).

Here, the prior decision was clearly erroneous. The panel significantly departed from well-established law requiring a reading the Twenty-Sixth Amendment consistent with the Fifteenth, Nineteenth, and Twenty-Fourth

[2] Plaintiffs acknowledge that this Circuit does not allow for one panel to overturn the ruling of another panel. *In re Bonvillian Marine Serv., Inc.,* 19 F.4th 787, 792 (5th Cir. 2021) citing *Jacobs v. Nat'l Drug Intel. Ctr*., 548 F.3d 375, 378 (5th Cir. 2008) ("It is a well-settled Fifth Circuit rule of orderliness that one panel of our court may not overturn another panel's decision, absent an intervening change in the law, such as by a statutory amendment, or the Supreme Court, or our en banc court.") In this circumstance where the preliminary injunction review panel disclaimed ruling on the facial challenge presented in this appeal, it is unclear how this rule operates. Assuming without conceding that the prior as applied ruling is binding on a later panel considering the facial challenge, then Plaintiffs bring this appeal to permit the opportunity for this Court en banc and/or the Supreme Court to correct the erroneous interpretation of the Voting Amendments.

Amendments. This error results in a manifest injustice by allowing defendants to continue to discriminate against Plaintiffs on account of age in voting. Therefore, the District Court's dismissal of Plaintiffs claims should be reversed.

STANDARD OF REVIEW

This Court reviews questions implicating federal jurisdiction *de novo*, e.g., *In re Bass*, 171 F.3d 1016, 1021 (5th Cir. 1999). This Court also reviews the motions to dismiss pursuant to Rule 12(b)(1) and (6) *de novo*. *Martin K. Eby Constr. Co. v. Dallas Area Rapid Transit*, 369 F.3d 464, 467 (5th Cir.2004), *Randall D. Wolcott, M.D., P.A. v. Sebelius*, 635 F.3d 757, 762 (5th Cir. 2011).

ARGUMENT

I. The District Court Erred in Determining that Plaintiffs' Claims are Barred Due to Standing, Ripeness, and Sovereign Immunity and Dismissing Plaintiff's Claim Under Rule 12(b)(1).

In their motion to dismiss Defendants challenge Plaintiffs on the issues of standing, ripeness and sovereign immunity pursuant to Rule 12 (b)(1). This motion focuses solely on issues raised in Plaintiffs second amended complaint filed after remand from this Court. *Texas Democratic Party v. Scott*, No. CV SA-20-CA-438-FB, 2022 WL 3456915, at *4 (W.D. Tex. July 25, 2022). When considering a motion to dismiss pursuant to that rule, a court is "empowered to consider matters of fact which may be in dispute." *Ramming v. United States,* 281 F.3d 158, 161 (5th Cir. 2001) Such motion "should be granted only if it appears certain that the plaintiff

cannot prove any set of facts in support of his claim that would entitle plaintiff to relief." *Id.*

A. Plaintiffs Have Standing to Bring Their Claims

To establish Article III standing, a plaintiff must show (1) an "injury in fact" that is concrete, particularized, and actual or imminent; (2) that the injury is "fairly traceable" to the challenged conduct of the defendant; and (3) that it is likely that the injury can be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Because plaintiffs seek injunctive relief, only one-party need have Article III standing for the case to proceed. *See Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 52 n.2 (2006); *Texas v. United States*, 945 F.3d 355, 377–78 (5th Cir. 2019).

As a panel of this court found, Plaintiffs have actual, concrete, and particularized injuries from Texas's age-based eligibility requirement for absentee voting. *Tex. Democratic Party v. Abbott*, 978 F.3d at 178 ("We conclude that a voter under the age of 65 has clear standing to challenge Section 82.003). These harms exist irrespective of the pandemic. ROA.2477-2478 (noting that plaintiffs were bringing both an "as-applied" and "facial challenge" since "[a]ll voters under the age of 65 face an unconstitutional burden, because of their fundamental right to vote..") Section 82.003 causes harm by violating the mandate of the Twenty-Sixth Amendment. Although Plaintiffs' arguments that this harm will be multiplied

depending on future pandemic conditions and unenacted legislation, such conditions do not serve as the crux of Plaintiffs facial claim. Indeed, such conditions are not needed to show harm to Plaintiffs.

Aside from pandemic conditions, under-65 voters face obstacles to in-person voting just as those over 65 do. No matter their age, all persons face obstacles to in-person voting. Persons may be suffering from the flu but, due to their age, are still required to vote in person. Others may have inflexible work or personal obligations (such as an upcoming or unexpected baby due date or work trip) but cannot vote by mail solely due to their age. Younger voters must forego the right to vote when they face these hardships, while those over 65 do not. The uneven playing field between these groups is the exact type of discrimination the Twenty-Sixth Amendment seeks to prohibit — the law advantages older voters to young voters' detriment. The youth vote that the amendment was meant to protect, thus ends up diluted and more difficult to secure.

Further, the discrimination that results from Section 82.003 is traceable to defendant's conduct (*i.e.*, their enforcement of the unconstitutional statute), and the injury is likely to be redressed by a favorable decision (*i.e.*, an invalidation of Section 82.003, resulting in either elimination of no-excuse absentee voting or an extension of that privilege to all eligible voters).

This is injury and connection sufficient to satisfy the standing requirements. Thus, as the prior panel held, any voter under the age of 65 has standing to challenge this statute. *Tex. Democratic Party v. Abbott*, 978 F.3d at 178.

B. Plaintiffs' Claims are Ripe for Adjudication

Determining whether an issue is ripe for judicial review requires considering "[t]he fitness of the issues for judicial decision and . . . the hardship to the parties of withholding court consideration." *National Park Hosp. Ass'n v. Dep't of Interior*, 538 U.S. 803, 809 (2003). Plaintiffs alleged that they and their members will continue to be harmed in every subsequent election utilizing Texas's existing age-based eligibility requirement for absentee voting, regardless of pandemic circumstances. ROA.2477-2478; *see also*, *e.g.*, *Fish v. Kobach*, 840 F.3d 710, 752 (10th Cir. 2016) ("there can be no 'do-over' or redress of a denial of the right to vote after an election"); *Deerfield Med. Center v .City of Deerfield Beach*, 661 F. 2d 328, 338 (5th Cir. Unit B Nov. 1981) (finding that violations of fundamental rights are always irreparable) (citing *Elrod v. Burns*, 427 U.S. 347,373 (1976)); *see also DeLeon v. Perry*, 975 F. Supp. 2d 632, 663 (W.D. Tex. 2014), aff'd sub nom. *DeLeon v. Abbott*, 791 F.3d 619 (5th Cir. 2015) ("Federal courts at all levels have recognized that violation of constitutional rights constitutes irreparable harm as a matter of law."). Each of these voter plaintiffs are prohibited from utilizing a voting method solely because of how old they are.

Plaintiffs' references to continuing pandemic conditions and the Texas legislature's interest in enacting more restrictive absentee voting policies merely serve to demonstrate that the *existing* harms to Plaintiffs will not be resolved, absent court intervention. These existing harms are the very basis for Plaintiffs' claims and continue to exist with the law in effect. Plaintiffs do not ask the Court to consider potential future legislation or evaluate the potential impact of the pandemic in future elections. Plaintiffs only ask that the Court analyze Texas' current age-based restriction on absentee voting which implicates the Twenty-Sixth Amendment every day that it remains in place. As such, the District Court's finding that plaintiff's claims were not ripe was erroneous.

C. Plaintiffs' Claims are Not Barred by Sovereign Immunity

Plaintiffs' claims are not barred by sovereign immunity. *Ex parte Young* provides an exception to sovereign immunity when a defendant enforces the challenged statute "by virtue of his office." *City of Austin v. Paxton*, 943 F.3d 993, 997 (5th Cir. 2019). This exception requires two analyses: first, a "straightforward inquiry into whether the complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective," and second, consideration of whether the official in question "has a 'sufficient connection [to] the enforcement' of the challenged act." *Id*. Here, Plaintiffs allege violation of a federal law and

Defendants have sufficient connection to the enforcement of Section 82.003, thus *Ex Parte Young* applies.

This Court has already held that the injuries caused by Texas's no-excuse mail-in voting law are traceable to the Secretary's enforcement of the age-based eligibility requirement for absentee voting. *Tex. Democratic Party v. Abbott*, 978 F.3d at 178-80. A panel of this Court held that the Secretary of State has a sufficient connection to the challenged age-based eligibility requirements such that "[s]overeign immunity does not bar suit against the Secretary in this case." *Id*. at 180. This is consistent with prior findings of this Court. *See OCA-Greater Houston v. Texas*, 867 F. 3d 604, 613 (5th Cir. 2017) ("[t]he facial invalidity of a Texas election statute is, without question, fairly traceable to and redressable by the State itself and its Secretary of State, who serves as the 'chief election officer of the state.") This is unaffected by Plaintiffs' claims in their Second Amended Complaint, seeking to enjoin Texas election conditions. Such "election conditions" are not merely undefined future conditions, but rather the clear conditions imposed by the Secretary's enforcement of Section 82.003. As this Court previously held, the Secretary's duties related to absentee-ballot applications are sufficient connection under *Ex Parte Young*. *Tex. Democratic Party v. Abbott*, 978 F.3d at 180. Thus, Plaintiffs challenge to "election conditions" caused by Section 82.003, are

sufficiently connected to the Secretary of State, thus sovereign immunity cannot apply.

II. Texas Election Code Section 82.003 Violates the Twenty-Sixth Amendment thus the District Court Erred in Granting Defendants Motion to Dismiss Pursuant to Rule 12(b)(6).

To overcome a motion to dismiss based on Rule 12(b)(6), a complaint must "contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal,* 556 U.S. 662, 678, (2009) citing *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, at 570 (2007). A complaint need not set out "detailed factual allegations" but rather simply contain "more than labels and conclusions, and a formulaic recitation of the elements." *Bell Atl. Corp.,* 550 U.S. at 555 A claim is satisfactory when a "plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft*, 556 U.S. at 678.

A. The Twenty-Sixth Amendment's Prohibits Differing Treatment in Voting on Account of Age.

Section 82.003 violates the Twenty-Sixth Amendment's prohibition on differing treatment in voting on account of age. Section 1 of the Twenty-Sixth Amendment states: "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. This amendment outlines a clear prohibition on differential treatment of voters based on age.

The Constitution guides interpretation of the Twenty-Sixth Amendment. *Arizona State Legislature v. Arizona Indep. Redistricting Comm'n*, 576 U.S. 787, 829 (2015) ("When seeking to discern the meaning of a word in the Constitution, there is no better dictionary than the rest of the Constitution itself.") (Roberts, C.J., dissenting). The Twenty-Sixth Amendment's command that the right to vote shall not be "denied or abridged" on account of age mirrors[3] the language of Fifteenth, Nineteenth, and Twenty-Fourth Amendments. These amendments similarly command that the right to vote not be "denied or abridged" based on race, sex, or failure to pay a poll tax. A state would plainly violate the Constitution if it offered no-excuse mail voting only to whites (which would violate the Fifteenth Amendment), only to men (which would violate the Nineteenth), or only to voters who pay a tax (which would violate the Twenty-Fourth).[4] Thus, it is equally plain that Texas has violated the Twenty-Sixth Amendment by offering the option of no-excuse vote by mail only to voters over 65.

[3] Indeed, the prior panel of this Court found that because "the language and structure of the Twenty-Sixth Amendment mirror the Fifteenth, Nineteenth, and Twenty-Fourth Amendments," it clearly confers an individual right, just as those amendments do. *Tex. Democratic Party v. Abbott*, 978 F.3d at 183-84.

[4] In his concurrence on the motions panel's decision to stay the injunction, Judge Ho recognized that the text of the Twenty-Sixth Amendment, which "forbids discrimination in voting" because of a citizen's age (once the citizen turns eighteen), "closely tracks the text" of the Fifteenth Amendment. *Tex. Democratic Party v. Abbott*, 961 F.3d 389, 416 (5th Cir. 2020) (J. Ho, concurrence). He acknowledged that it "would presumably run afoul of the Constitution to allow only voters of a particular race to vote by mail." *Id*.

This reading of the Twenty-Sixth Amendment aligns with several court decisions. In California, shortly after the ratification of the Twenty-Sixth Amendment, the Attorney General issued guidance that unmarried persons under 21 residences, for the purpose of voting, would be their parents' home. "*Jolicoeur*[5] *v. Mihaly*, 488 P.2d 1, 3 (1971) (quoting 54 Adv. Ops. Cal. Atty Gen. 7, 12 (1971)). Registrars instructed plaintiffs to register in the jurisdictions where their parents lived, which were distances "up to 700 miles away from their claimed permanent residents." *Id*. Others, whose parents lived in other states or abroad, were informed they could not register in California. *Id*. The California Supreme Court ultimately held that "treat[ing] minor citizens differently from adults for any purpose related to voting" violated the Twenty-Sixth Amendment. *Id*. at 2. Rather, the Twenty-Sixth Amendment required state officials "to treat all citizens 18 years of age or older alike for *all* purposes related to voting." *Id*. at 12 (emphasis added).

Similarly, 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. With respect to the Twenty-Sixth

[5] While the prior panel found *Joliceour,* a case decided the same year the Twenty-Sixth Amendment was ratified*,* supportive of the concept that "a voting scheme that adds barriers primarily for younger voters constitutes an abridgement due to age," it reasoned that Texas's extension of no-excuse mail-in voting to only that over-65 was not analogous. Specifically, Texas did not create a barrier for younger voters. The *Joliceour* court, however, compared barriers for older voters and barriers for younger voters.

Amendment claim, the court declared 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 court 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. *Id*.

Most recently, the Seventh Circuit agreed that "arguments under the Twenty-Sixth Amendment (for age)" must be treated "the same as those under the Fifteenth Amendment (for race)." *Luft v. Evers*, 963 F.3d 665, 673 (7th Cir. 2020). There, the court held that the challenged Wisconsin restrictions, which were facially neutral, were not adopted *because of* the plaintiffs' age or race. *Id*. at 671. Here, by contrast, the text of Section 82.003 makes clear that the Texas legislators who voted for it intended to draw a distinction based on age —it includes a facial classification utilizing race. Indeed, the Defendants in this case have admitted that Texas adopted Section 82.003 *because* it treats voters over the age of 65 differently. *See e.g.*, [original] Opening Brief at 1 (referring to "the Legislature's policy choice" to allow only voters 65 and older no-excuse vote by mail ballots).

These cases make clear: expressly discriminatory treatment in voting on the basis of age, similar to race, gender, payment of a poll tax, or age (*i.e.*, the distinctions

upon which discrimination in voting is expressly prohibited by the Constitution) are prohibited.

The prior panel of this Court ignored rules of statutory interpretation when examining the scope and purpose of the Twenty-Sixth Amendment. The panel surmised that since the Twenty-Sixth Amendment was the "most quickly ratified constitutional amendment in our history," the amendment was narrower in scope than earlier voting rights amendments. *Tex. Democratic Party v. Abbott,* 978 F.3d at 186. This simplifies Congressional knowledge and intent when drafting and passing law. As this Court noted, "the language and structure of the Twenty-Sixth Amendment mirror the Fifteenth, Nineteenth, and Twenty-Fourth Amendment." *Id*. at 183. The Supreme Court has held that there is a presumption that Congress is familiar with legal precedents and interpretation of the statutory language that they passed. *See Cannon v. Univ. of Chicago*, 441 U.S. 677, 694–99 (1979). By drafting the Twenty-Sixth Amendment using the same language in the other voting rights amendments, Congress intended the amendments to be interpreted similarly. Popular support that led to speedy passage does not undermine this.

Further, as will be discussed more below, such a narrow reading of the Twenty-Sixth Amendment violates the "cardinal principal of statutory construction that we must 'give effect, if possible, to every clause and word of a statute.'" *Williams v. Taylor*, 529 U.S. 362, 404 (2000) (citing *United States v. Menasche,* 348 U.S. 528,

538–539 (1995)((quoting *Inhabitants of Montclair Tp. v. Ramsdell,* 107 U.S. 147, 152 (1883).) Every word must be given meaning and construed so no word is "wholly superfluous." *Duncan v. Walker*, 533 U.S. 167, 174 (2001) citing. *Menasche*, 348 U.S. at 539. Here, the prior panel of this Court's limited interpretation of the Twenty-Sixth Amendment would essentially render the term "abridge" to only include those practices also prohibited as "den[ial]".

The notion that providing a "privilege" to one group of voters, while failing to apply such a benefit to other voters in a constitutionally protected class, is not an abridgment of a right to vote, is wrong. Such an interpretation allows state governments to shower their preferred groups with "privileges" in voting without restraint. Under this rule, states could allow men to vote by mail while requiring women to vote in-person, citing something as innocuous as data showing more men work outside the home as justification. States could send officials to personally collect votes of minority citizens to address historically low turnout, while other voters outside of the specific minority groups would be required to vote in-person. Such a result is unlikely what the panel intended.

B. Section 82.003's Restriction of No-Excuse Vote by Mail Ballots Only to Citizens Over 65 "Abridges" Plaintiffs' Right to Vote.

The prior panel of this court erred in finding that the history surrounding the enactment of the Twenty-Sixth Amendment warranted a narrow interpretation of its scope. History does not explain why the terms "abridge and deny" under the Twenty-

Sixth Amendment should be read differently than in the Fifteenth, Nineteenth, and Twenty-Fourth Amendments.

In the years leading up to the introduction of the Twenty-Sixth Amendment, the term "abridge" in the other voting rights amendments was interpreted to mean something more than creating "a barrier to voting that makes it more difficult for the challenger to exercise her right to vote relative to the *status quo*." *Tex. Democratic Party v. Abbott*, 978 F.3d at 192. Rather, case law, as detailed below, demonstrates that "abridge" was interpreted to mean laws which "circumscribe or impair or impede" the right to vote for one group with constitutional protections compared *to another group*, not just the status quo. *See, e.g. Gray v. Johnson,* 234 F. Supp. 743, 2 (S.D. Miss. 1964).

The Supreme Court similarly broadly interpreted the term "abridged." In *Lane v. Wilson*, 307 U.S. 268 (1939), the court emphasized that the Fifteenth Amendment barred "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. Although the Court gave insight into what may constitute an "abridgement," they declined to state that a finding of an "onerous procedural requirement" was required. *Id.* Instead, the Court recognized a broader mandate established by the Fifteenth Amendment which "nullifies sophisticated as well as simple-minded modes of discrimination." *Id*.

The Court applied similar reasoning in *Harman v. Forssenius*, finding unconstitutional a Virginia provision requiring a voter to either to pay the usual poll tax or to "file a certificate of residence in each election year." 380 U.S. 528, 532-33 (1965) (describing the provision as "repugnant to the Twenty-fourth Amendment.") The Court explained that this provision imposed "cumbersome" logistical burdens on voters who declined to pay the poll tax. *See id*. at 541-42. The Court re-emphasized that even if the provision was "no more onerous, or even somewhat less onerous" than the alternative, it would remain unconstitutional. *Id*. at 542. Rather, they found "[a]ny material requirement" based "solely" on declining to pay a poll tax violates the Twenty-Fourth Amendment. *Id*. Only a year later the Supreme Court bolstered support for this understanding of the term "deny or abridge." In *South Carolina v. Katzenbach*, the Court held that § 1 of the Fifteenth Amendment[6] "has always been treated as self-executing and has repeatedly been construed, without further legislative specification, to invalidate state voting qualifications or procedures which are discriminatory on their face or in practice." 383 U.S. 301, 305, 325 (1966).

In more recent years, the Supreme Court noted that the concept of abridgement "necessarily entails a comparison." *Reno v. Bossier Par. Sch. Bd.*, 528

[6] U.S. Const. amend. XV § 1 ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.")

U.S. 320, 334 (2000). The Seventh Circuit similarly interpreted this in *Luft v. Evers* believing the "baseline for comparison" of what "ought to be" is an equal opportunity to participate.[7] 963 F.3d 665, 672 (7th Cir. 2020) (citing *Reno*, 528 U.S. at 334).

Together, these cases support the proposition that the term "deny or abridge" serves to bar laws that facially discriminate based on a protected characteristic, either on their face or in practice.[8] Thus, the main crux of the term "abridge" has consistently been interpreted to be a comparison of voting conditions between groups, not between the status quo access to voting versus the access after a law has passed.

Section 82.003 treats voters differently on its face. The law creates a less robust right to vote for those under the age of 65 than the right provided to those over the age of 65. As in *Harman* and *Lane*, requiring under-65 voters to attend the polls in person while allowing over-65 voters to cast ballots from home imposes a

[7] Indeed, Judge Stewart in his dissent to the panel of this Court noted, that comparison is one between the status quo and what the hypothetical right to vote "ought to be." *Tex. Democratic Party v. Abbott*, 978 F.3d at 189. Regardless of what the status quo is now or was during the enactment of an amendment, if it abridges the right to vote, "the status quo must be changed." *Id.* at 196-197.

[8] In his dissent to the Twenty-Sixth Amendment analysis from the prior panel's decision to vacate the preliminary injunction, Judge Stewart noted that, "*Katzenbach* interprets 'deny or abridge' as invalidating procedures that are facially discriminatory or applied in a discriminatory manner with regard to race." *Tex. Democratic Party v. Abbott*, 978 F.3d at 197. Because of *Katzenbach*'s construction of the term "deny or abridge," Judge Stewart went on to state that "*Katzenbach* supports a broad understanding of 'deny or abridge' that is inconsistent with the panel majority's holding." *Id*.

"material requirement," *Harman*, 380 U.S. at 542, on younger voters that "effectively handicap[s]," *Lane*, 307 U.S. at 275, the exercise of the franchise. The structure of this law, whether interpreted as an added privilege to one group or an imposed detriment on another, also constitutes the kind of facial discrimination in voting procedure which the Court in *Katzenbach* recognized as violative of the prohibition of denial or abridgement of voter rights. The attempt by Texas to alter the right to vote by age, whether categorized as an added privilege or imposed detriment, violates the plain language of the Twenty-Sixth Amendment. The Twenty-Sixth Amendment forbids discriminatory treatment itself, regardless of what form it takes.

C. McDonald is Irrelevant to Consideration of the Scope of the Twenty-Sixth Amendment.

Reliance on *McDonald* to interpret the Twenty-Sixth Amendment is error.[9] *McDonald* sheds little light on the amendment's reach and has been limited by recent Supreme Court decisions. *See*, *e.g.*, *Goosby v. Osser*, 409 U.S. 512, 521 (1973) (permitting claim by pretrial detainees denied the right to vote absentee to proceed); *O'Brien v. Skinner*, 414 U.S. 524, 529–31 (1974) (same); *see also Am. Party of Tex. v. White*, 415 U.S. 767, 794–95 (1974).

[9] Although the prior panel of this Court held that it was "hesitant to hold that *McDonald* applies" *Tex. Democratic Party v. Abbott*, 978 F.3d at 193, the panel still utilized *McDonald v. Bd. of Election Comm'rs of Chicago,* 394 U.S. 802 (1969), a case decided prior to the passage of the amendment, as historical precedent interpreting the Twenty-Sixth Amendment and determining that the "right to vote in 1971 did not include a right to vote by mail."

Significantly, in *American Party*, the Supreme Court reversed a district court decision relying on *McDonald*, stating that the unavailability of absentee ballots for minor party voters was "obviously discriminatory" and that the district court had "[p]lainly . . . employed an erroneous standard in judging the Texas absentee voting law." *Id.* at 795. The Court further explained 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." *Id*. Notably, the availability of in-person voting for minor party voters was not a comparable alternative means, and *McDonald's* proclamation that there is no right to vote absentee was rejected. *Id*.

American Party, a much clearer analogue to this case should provide guidance. Just as Texas may not only offer absentee ballots to those voting in major party primaries and require minor party primary voters to show up in-person on Election Day, it also may not offer absentee ballots to those over-65 voters while requiring under-65 voters to show up in-person on Election Day.

D. Section 82.003 Does Not Survive the Requisite Scrutiny Analysis

The prior panel of this court hesitated to state the appropriate level of scrutiny for Twenty-Sixth Amendment claims. *Tex. Democratic Party v. Abbott*, 978 F.3d at 194. That court noted that the framework created in *Anderson v. Celebrezee*, 460

U.S. 780 (1983) and *Burdick v. Takusi*, 504 U.S. 428 (1992) has been employed by other courts for election law claims for "noteworthy reasons." *Id*. This *Anderson-Burdick* framework "applies strict scrutiny to a state's law that severely burdens ballot access and intermediate scrutiny to a law that imposes lesser burdens." *Esshaki v. Whitmer*, 813 F. App'x 170, 171 (6th Cir. 2020). Here, however, the Anderson-Burdick framework is inapplicable. This framework only applies to "nondiscriminatory restrictions" to the right to vote. *Burdick*, 504 U.S. 428, 434 quoting *Anderson,* 460 U.S. at 788. Section 82.003 is facially age-based discrimination; the language and strict scrutiny of the Twenty-Sixth and other similar amendments apply.

Section 82.003 does not survive strict scrutiny. Defendants assert their interest as prevention of voter fraud to justify the no-excuse absentee voting scheme. They fail to provide evidence to support this. There is no indication that voter fraud is disproportionately age related. Indeed, the risk of any fraud is low.[10] From 2015 to 2020, the Texas Attorney General's office received only 197 election fraud complaints compared to the tens of millions of votes cast in those years. Jeremy Rogalski, *Despite National Outcry, Texas Received Relatively Few Voting Fraud Reports this Election* (Nov. 20, 2020),

[10] Indeed, "it is still more likely for an American to be struck by lightning than to commit mail voting fraud."). The Brennan Center, *The False Narrative of Vote-by-Mail* Fraud (April 10, 2020), https://www.brennancenter.org/our-work/analysis-opinion/false-narrative-vote-mail-fraud.

https://www.khou.com/article/news/investigations/texas-received-few-voting-fraud-reports/285-deec7c9a-581b-42b1-b430-4cae7aef5f26. These complaints to do not correlate to age causing any possible or alleged fraud. Indeed, Defendants could not point to evidence in the record that those under the age of 65 are more likely to commit voter fraud via mail ballots. Nevertheless, if fraud is a legitimate concern, it does not permit facial age discrimination but instead weighs on the issue on whether an injunction should permit all voters of every voting eligible age to vote by mail or whether the injunction should prohibit vote by mail for all voters except those who are out of the county, in jail or who have a disability.[11]

Texas has other, sufficient means of preventing election fraud. For example, passing stringent absentee ballot requirement and strong criminal sanctions meant to deter such fraud, which exist already in Texas law. TEX. ELEC. CODE § 84.002. *See*, *e.g.*, TEX. ELEC. CODE § 84.0041 (stating that a person is liable of a state jail felony for knowingly providing false information or intentionally causing false information to be provided on an application for ballot by mail).

Defendants have yet to provide a sufficiently weighty government interest in enforcing § 82.003's facial age discrimination, whether during a pandemic or

[11] In his concurrence, Judge Ho opined on possible remedies to Plaintiffs' preliminary injunction stating, "Do we 'level up'(everyone gets to vote by mail) or 'level down' (no one gets to)? To decide, courts must determine 'what the legislature would have willed had it been apprised of the constitutional infirmity.'" *Texas Democratic Party v. Abbott,* 961 F.3d 389, 417 (5th Cir. 2020) quoting *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1699 (2017).

otherwise. Permitting to Texas to permit an additional voting method for only certain races of voters because of vague and unproven charges of voter fraud would plainly violate the 15th Amendment. There is no government interest that could justify age discrimination in voting. The Framers determined that any age-based voting policies must mee the strictest of scrutiny. Texas has not met its burden.

CONCLUSION

For the reasons herein, the District Court's ruling should be overturned.

November 18, 2022

Submitted by:

/s/ Chad W. Dunn
Chad W. Dunn
K. Scott Brazil
Brazil & Dunn, LLP
4407 Bee Caves Rd., Ste. 111
Austin, Texas 78746
Telephone: (512) 717-9822
chad@brazilanddunn.com

Bernadette Reyes
Sonni Waknin
UCLA Voting Rights Project
3250 Public Affairs Building
Los Angeles California 90095
Telephone: 310-400-6019
sonni@uclavrp.org
bernadette@uclavrp.org

Dicky Grigg
Law Office of Dicky Grigg, P.C.
4407 Bee Caves Rd., Ste. 111
Austin, Texas 78746
Telephone: 512-474-6061

Facsimile: 512-582-8560
dicky@grigg-law.com

Martin Golando
The Law Office of Martin Golando
N. Saint Mary's, Ste. 700
San Antonio, Texas 78205
Telephone: 210-892-8543
martin.golando@gmail.com

CERTIFICATE OF SERVICE

I certify that on November 23, 2022, the foregoing document was served via the Court's e-filing system on the below parties:

Michael Abrams
Courtney Corbello
Office of the Attorney General for
the State of Texas – Solicitor General Division
P.O. Box 12548 (MC-059)
Austin, TX 78711
Telephone: (512) 936-6407
michael.abrams@oag.texas.gov
courtney.corbello@oag.texas.gov

/s/ Chad W. Dunn
Chad W. Dunn

CERTIFICATE OF COMPLIANCE

1. This document complies with the type-volume limit of FED. R. APP. P. 32(a)(7)(B) because, excluding the parts of the document exempted by FED. R. APP. P. 32(f) and 5th CIR. R. 32.1: this document contains 6,924 words.

2. This document complies with the typeface requirements of FED. R. APP. P. 32(a)(5), and 5th CIR. R. 32.1 and the type-style requirements of FED. R. APP. P. 32(a)(6). This document has been prepared in a proportionally spaced typeface using Microsoft Word in 14 pt. Times New Roman.

/s/ Chad W. Dunn
Chad W. Dunn