No. 22-50748

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE FIFTH CIRCUIT**

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

*Plaintiffs-Appellants,*

v.

JANE NELSON, TEXAS SECRETARY OF STATE,

*Defendant-Appellee.*

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

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# REPLY BRIEF OF APPELLANT JOSEPH CASCINO, BRENDA GARCIA, AND SHANDA SANSING

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## SUMMARY OF THE ARGUMENT

Section 82.003 facially violates the Twenty-Sixth Amendment and neither the rule of orderliness nor the law-of-the-case doctrine bar this Court from issuing that holding. In *Texas Democratic Party v. Abbott*, 978 F.3d 168, 177 (5th Cir. 2020) (*TDP II*) the Court explicitly declined to rule on the facial claim. Anyway, the rule of orderliness is not binding where a prior panel's decision cannot "be squared with prior Supreme Court precedent." *Thompson v. Dallas City Attorney's Off.*, 913 F.3d 464, 468 (5th Cir. 2019). The *TDP* panel defied the precedent set by *American Party,* as well as precedent set out in several other cases within the voting rights amendments. *Am. Party of Tex. v. White*, 415 U.S. 767 (1974) (*American Party*). *American Party* declared that granting the right to vote absentee to one class of voters and not another is "arbitrarily discriminatory" and in violation of the Constitution. *Id.* at 795. The *TDP II* panel however held the opposite, ignoring numerous Supreme Court precedents. *TDP II*, 978 F.3d at 177. As such, this Court is not bound by the holding in *TDP II*.



Next, neither the district court nor this Court is bound by the law-of-the-case doctrine because the *TDP II* ruling was clearly erroneous and would work a manifest injustice. *See United States v. Lee*, 358 F.3d 315, 320 (5th Cir. 2004). Plaintiffs did not waive this argument. Plaintiffs had no incentive to bring such an argument at the district court, because the prior panel disclaimed ruling on the facial challenge. *TDP*

*II*, 978 F.3d at 182. Plaintiffs requested the district court to act within its discretion to reverse existing law if that was deemed necessary; such discretion necessarily entails invoking an exception to the law-of-the-case doctrine. ROA. 2463-2480.

Further, Plaintiffs elaborated in the Second Amended Complaint and their Opening Brief on the harmful effects of allowing Section 82.003 to remain in place, specifically the deprivation of voters under 65 of their constitutional right to equality in voting. Such harm clearly constitutes a manifest injustice. Plaintiffs also explained to both the district court and this Court that the prior panel's holding was clearly erroneous. Interpretation of the constitutional term "abridge" is not a novel endeavor, and the prior panel parted from longstanding precedent on the meaning of "abridge" in its holding. That the Seventh Circuit came to this same mistaken conclusion by citing the *TDP II* panel by no means renders the decision correct.



To avoid the manifest injustice of the prior panel's ruling, this Court should correctly find that Section 82.003 violates the Twenty-Sixth Amendment. Section 82.003 directly abridges the right to vote for voters under 65 by narrowing the scope of their right compared to voters over 65. Such a finding is supported by the history of the Fifteenth, Nineteenth, and Twenty-Fourth Amendments, as well as precedent. *See American Party*, 415 U.S. at 795. ( "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.")

Lastly, Section 82.003 is discriminatory on its face and in practice, and thus should be analyzed under strict scrutiny. *See Burdick*, 504 U.S. 428, 434 (*quoting Norman v. Reed,* 502 U.S. 279, 289 (1992)). Section 82.003 facially operates by granting some rights to voters of a certain age while denying those rights to qualified voters of other ages. Even if the Twenty-Sixth Amendment is not read as a literal prohibition for the use of age in granting voting benefits, 82.003 is not narrowly tailored to serve any of the state's proffered interests and fails to withstand strict scrutiny. Not only is voter fraud extremely rare and primarily targeting elderly voters, Texas has other statutes allowing absentee voting for disabled voters. *See* TEX. ELEC. CODE § 82.002. Defendants offer no persuasive evidence that expanding already-established absentee voting systems would be so logistically burdensome as to justify a violation of the Twenty-Sixth Amendment. Defendants further offer no explanation why it cannot "level-down" should its policy makers elect to do so in response to this Court's ruling properly striking down Section 82.003. *See e.g., Texas Democratic Party v. Abbott*, 961 F.3d 389, 417 (5th Cir. 2020) (*TDP I*).



## 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 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 Only Claim in this Appeal is Plaintiffs' Facial Twenty-Sixth Amendment Claim Which this Court has Never Ruled On

Plaintiffs assert in this appeal only their claim that Section 82.003 facially violates the Twenty-Sixth Amendment because it provides differential treatment to voters on the basis of age. The prior decision of this Court stated, "We need not resolve whether the plaintiffs indeed are now trying to have us consider the facial challenge [under the Twenty-Sixth Amendment] even though that was not considered by the district court." *TDP II,* 978 F. 3d at 177. Therefore, the Court has explicitly not yet ruled on the claim presented in appeal.



### II. The Analysis of the As-Applied Claim in *TDP II* Was Erroneous and Does Not Bind This Court

Defendants note that "the claim is ripe and that *TDP II* establishes plaintiffs have standing to bring this claim and that it is not barred by the Secretary's sovereign immunity," thus the only ground on which defendants dispute is the applicability of the as-applied precedent, which itself disclaims ruling on the facial claim. Br. For Appellees at 13. Neither the rule of orderliness nor prior holdings in *TDP II* foreclose

this Court from ruling in favor of the Plaintiffs, nor does any subsequent caselaw suggest this case is barred by sovereign immunity.

**a. This Court is not bound by the rule of orderliness because the *TDP II* panel's decision is irreconcilable with Supreme Court precedent**

Under the rule of orderliness, one panel of the court "may not overrule a prior panel decision absent an intervening change in the law, such as a statutory amendment or a decision from either the Supreme Court or our en banc court." *Thompson,* 913 F.3d at 467. The rule of orderliness has its limits, however, and it clearly cannot apply when the prior decision directly and clearly disclaims ruling on a claim that forms a basis of a later appeal. Also, when a panel decision defies Supreme Court precedent, a subsequent panel is not bound to make the same mistake. *Id*. at 467-468.



Significantly, the panel in *TDP II* held that "the Texas Legislature's conferring a privilege to those at least age 65 to vote absentee did not deny or abridge younger voters' rights who were not extended the same privilege." *TDP II*, 978 F.3d at 192. This contradicts the Supreme Court's decision in *American Party* which found 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." *Am. Party of Texas v. White*, 415 U.S. at 795. Notably, in-person voting was not deemed an "comparable"

alternative means to absentee voting in *American Party.* In *TDP II* by contrast, the panel held that the availability of in-person voting foreclosed abridgement where an absentee restriction merely made it easier for some voters to vote. *TDP II*, 978 F.3d at 192. The *TDP II* panel ignored the precedent set in *American Party* and thus its holding is "irreconcilable, and thus inoperative" notwithstanding the rule of orderliness. *Thompson*, 913 F.3d at 468.

Further, the reasoning in *TDP II* is also irreconcilable with other Supreme Court precedent, specifically cases that define the term "abridge" as a comparison between groups of voters and note that an "abridgment" can occur even if the voter can still technically cast a ballot. *See Lane v. Wilson*, 307 U.S. 268, 275 (1939) (holding that the Fifteenth Amendment bars procedural requirements which "handicap" exercise of the franchise, even if the "abstract right to vote" remains unrestricted); *Reno v. Bossier Par. Sch. Bd.*, 528 U.S. 320, 334 (2000) (stating that the concept of abridgment "necessarily entails a comparison"); *Harman v. Forssenius*, 380 U.S. 528, 532-33 (1965) (holding that logistical burdens on voters who declined to pay a poll tax was "repugnant to the Twenty-Fourth Amendment"). Due to this, this Court is not bound by the prior decision under the rule of orderliness. *See Thompson*, 913 F.3d at 470 ("disregarding on-point precedent in favor of an aberrational decision flouting that precedent is the antithesis of orderliness."). Indeed, to uphold *TDP II* on rule of orderliness grounds would "undermine[], rather

than underscore[], the Rule of Law's foremost virtues: clarity, certainty, and consistency." *Id*. at 470.

**b. The circumstances of this case fall squarely within the exception to the law-of-the-case doctrine**

Defendants additionally assert that the "law of the case" rule insulates the district court's decision. Not true. Contrary to Defendants' assertions, the "law of the case" doctrine is "an exercise of judicial discretion" and "not a limit on judicial power." *United States v. Lee*, 358 F.3d 315, 320 (5th Cir. 2004). The doctrine "is not inviolate" and "permits an appellate court or a district court on remand to deviate from a ruling made by a court of appeal in an earlier stage of the same case in certain exceptional circumstances." *Id*.



Here, Plaintiffs do not seek to undermine the intentions of the "law of the case" doctrine, but rather to adhere to the principles underpinning the doctrine. Specifically, Plaintiffs invoke one of the doctrine's narrow exceptions as the instant case represents the very "exceptional circumstances" justifying deviation from the rule. Plaintiffs assert that the district court was not bound by the "law of the case" doctrine in making its decision because prior panel decision 1) disclaimed ruling on the facial claim and therefore invited later de novo review[1] and 2) was "clearly erroneous and would work a manifest injustice." *Id*. at 320 n.3 (citation omitted).

[1] Indeed, in *TDP II,* this Court stated that, "a facial challenge would be a legal issue subject to our *de novo* review had the district court decided it, but that court did not do so." *TDP II,* 978 F.3d 168, 177.

Both the nature of the rights at issue in this case and the significant departure from well-established constitutional law by the prior panel warrant exception to the "law of the case" doctrine.

Defendants assert four "fatal flaws" with Plaintiffs' argument that exception under the "law of the case" was warranted, however, none of these arguments have merit. Response at 18. ***First***, Plaintiffs did not waive their argument regarding the inapplicability of the "law of the case" doctrine. The *TDP II* panel said it was not ruling on the facial challenge forcing plaintiffs to reassert the case in the District Court. *Id.* Plaintiffs reserved their right to a review of the issue in their Second Amended Complaint stating that "Plaintiffs are entitled to review of this claim on the merits, after final trial and full appellate review thereafter." ROA. 2478. Plaintiffs proceeded on the understanding that the facial challenge on the merits remained available for review and indeed that is what this Court held. Because the prior panel disclaimed ruling on the facial challenge, the issue remained available for the district court. Plaintiffs raised the issue to the extent necessary under the circumstances. *See U.S. v. Haas*, 199 F.3d 749, 753 (stating the principle that "whether a defendant waived an issue for consideration at resentencing is determined by whether the defendant had an incentive to raise that issue in the prior proceedings.").

Further, Plaintiffs included in their Second Amended Complaint that they were arguing for "extending, modifying, or reversing existing law or for establishing new law," encouraging the district court to act within its discretion to reverse existing law an example of which is to invoke exceptions to the "law of the case" doctrine. ROA. 2478. Plaintiffs effectively covered their bases in light of this Court disclaiming a facial ruling and under the precedential rules by asking the district court to reverse existing law. *Id.* ("All voters under the age of 65 face an unconstitutional burden, because of their age, to their fundamental right to vote."). To hold otherwise deprives these Plaintiffs of an appeal, on the merits, of a claim they asserted in the case. The earlier panel said it did not rule on the facial claim and the Defendants would have this Court decline again to rule on the facial claim. It cannot be the case that Plaintiffs *never* receive appellate review of the facial claim. *See e.g., Fairley v. Andrews*, 578 F.3d 518, 522 (7th Cir. 2009) ("a party who asks for a final judgment in order to appeal an antecedent ruling is entitled to contest the merits of that issue on appeal.")



***Second***, considering the myriad of cases interpreting the Fifteenth, Nineteenth, and Twenty-Fourth Amendments, the *TDP II* decision was clearly erroneous. While the panel was tasked with addressing the "seemingly novel questions regarding the Twenty-Sixth Amendment," the language at issue was far from novel. *Tex. Democratic Party*, 140 S. Ct. at 2015 (Sotomayor, J., respecting

the denial of application to vacate stay). While the Twenty-Sixth amendment has not been heavily litigated, the Supreme Court has on many occasions considered the prohibition on the denial or abridgement of the right to vote. Each of those decisions support Plaintiffs' argument that Section 82.003 constitutes an unconstitutional abridgement for voters under 65. *See infra* Part III. It is immaterial that the Seventh Circuit subsequently came to the same conclusion about the scope of the Twenty-Sixth Amendment particularly where that court relied on *TDP II* and its erroneous reasoning to support its holding. *See Tully v. Okeson*, 977 F.3d 608, 613 (7th Cir., 2020) (citing *TDP II* for its historical analysis of the Twenty-Sixth Amendment's meaning). Both decisions reach a result contrary to the text, history and precedent on a long-settled issue.



***Third***, Defendants assert that simply maintaining the status quo of Section 82.003 is not a manifest injustice as the statute has applied for almost half a century and Plaintiffs have other options for exercising the right to vote. The fact that a condition has existed for years by no means renders that condition constitutional. The pandemic represented but one example of why Section 82.003 is unjust in the modern era. While the effect of Section 82.003's differential treatment is perhaps felt now more than ever, it always violated the plain language of the Twenty-Sixth Amendment. Section 82.003 abridges the right to vote for voters under 65 and it works a manifest injustice to those voters by shrinking the robustness of their right

to vote in comparison to voters over 65. Plaintiffs do not ask, and the Twenty-Sixth Amendment does not require the "right to cast a ballot by the method of his choice" but rather equal voting conditions for voters of all ages. Response at 19.

***Fourth***, Plaintiffs' take seriously the principles of and exceptions to the law of the case doctrine. Far from a "loose reading," Plaintiffs recognize the narrowness of the exceptions to the law-of-the-case doctrine and only invoke exception to prevent manifest injustice where the prior panel's decision was clearly erroneous and under the particular facts of this case where the prior panel decision explicitly and directly disclaimed ruling on the facial claim. Plaintiffs do not argue that the *TDP II* panel's reasoning on the as-applied challenged was merely unwise or wrong as a matter of policy. Rather, Plaintiffs assert that the manifest injustice of allowing Texas to perpetually divvy up voters on the bases of age in violation of the constitution's text.



**c. Subsequent Caselaw Only Further Supports That This Suit is Not Barred by Sovereign Immunity**

While this Court has already held that the Secretary of State has sufficient connection to the application, and thus injuries caused by, Section 82.003 to overcome sovereign immunity, Defendants assert that new caselaw would override the Court's prior reasoning in this case. Defendants cite *Tex. Alliance for Retired Ams. V. Scott*, 28 F.4th 669 (5th Cir. 2022) (*TARA*) for this proposition. Defendants

fail to note that the Court's reasoning in *TARA* relied on distinguishing the claim in that case specifically from this one.

In *TARA*, the Court laid out several criteria helpful for establishing how much of a connection with the enforcement of a challenged act is enough to meet the *Ex Parte Young* standard. First, an official must have more than "the general duty to see that laws of the state are implemented." *Id*. at 672 (citing *City of Austin*, 943 F.3d at 999-1000). Second, the official must have "the particular duty to enforce the statute in question and a demonstrated willingness to exercise that duty." *Id*. (citing *TDP II*, 978 F.3d at 179). Third, "enforcement" means "compulsion or constraint." *Id*. (citing *City of Austin*, 943 F.3d at 1000). The Court's analysis of these criteria in *TARA* not only implicitly support that sovereign immunity is not a bar in this case, but explicitly does so by distinguishing the facts from *TARA* from the facts of this case.



In *TARA*, the Court considered a challenge to an election law eliminating straight-ticket voting, a law distinct from Section 82.003. As the Court stated in *TDP II*, the Secretary "has the specific and relevant duty to design the application form for mail-in ballots" and to "provide that form to local authorities and others who request it." *Id.* at 179-80 (citing TEX. ELEC. CODE §31.002(a),(b)). This is distinct from the issue in *TARA* because "The [Texas] Secretary [of State] is not responsible for printing ... ballots." *Mi Familia Vota* v. *Abbott*, 977 F.3d 461, 468. Here, Plaintiffs' arguments do not hinge on the generalized duties of the Secretary, but

rather the Secretary's very specific role as it relates to requesting and allocating mail-in ballots.

While Defendants assert that because only local early-voting clerks "review each application for a ballot to be voted by mail," the Secretary's authority is minimized enough to evade suit here, they omit that early voting clerks also must mail out the "appropriate official application form" that come from the Secretary of State. Response at 23, *TDP II*, 978 F.3d at 180 (citing TEX. ELEC. CODE §86.001). Indeed, the duties of local clerks for absentee ballots hinges on the form provided by the Secretary so that while "there is a division of responsibilities, the Secretary has the needed connection." *TDP II,* 978 F.3d at 180 (citing TEX. ELEC. CODE §86.001)



Defendants also erroneously claim that the Secretary lacks any ability to constrain Plaintiffs from voting by mail because local early-voting clerks make the decision to accept or reject applications to vote by mail. *See* Response at 23. The authority of early-voting clerks, however, does not undermine the role that the Secretary plays. Specifically, the Secretary provides the form which clerks are obligated to use. *See* TEX. ELEC. CODE § 31.002(a). Any decision by a local clerk to reject an application to vote by mail will be because the Secretary included that box on the form to begin with. Contrary to Defendants' assertions, this falls in line with the reasoning of *TARA* where the Court noted the distinction between *TARA* and this case: "Plaintiffs miss a key distinction between that case and this one. In *TDP*, local

election officials were required to use the Secretary's form, so an injunction ordering the Secretary to revise the form would have constrained those officials." *TARA*, 28 F.4th at 673.

Further, the Court's reasoning in *TARA* undermines Defendants' argument that any action by the Secretary stemming from this case would constitute affirmative action, and thus could not be ordered by a federal court in contravention of the principles outlined in *Ex Parte Young*. *See* Response at 24. Defendants supposed distinction between affirmative action and stopping violations of the law is hollow. As this Court previously stated, "a finding that the age-based option denies or abridges younger voters' right to vote might lead to prohibiting the Secretary from using an application form that expressed an unconstitutional absentee-voting option." *TDP II*, 978 F.3d at 180. In other words, a finding by this Court that Section 82.003 violates the Twenty-Sixth Amendment would cause the Secretary to *stop* using the current absentee application form.



### III. Section 82.003 Plainly Violates the Twenty-Sixth Amendment

The Court should reverse the district court's holding and find that Section 82.003 violates the Twenty-Sixth Amendment. Section 82.003 treats voters differently on the basis of age in contravention of the Twenty-Sixth Amendment. Defendants' framing of Section 82.003 as merely "an additional option to vote by mail for those 65 or older" misconstrues the issue, and allowing provisions which

are deemed to be group-based privileges creates a loophole to the clear command of the Twenty-Sixth Amendment and other voting rights amendments. *See* Response at 25. The voting rights amendments stand on their own and are not superfluous to the Fourteenth Amendment. As such, because Section 82.003 is discriminatory on its face, it must be subjected to strict.

**a. Section 82.003 abridges the rights of voters younger than 65**

Defendants invoke selective history to explain what the term "right to vote" meant at the passage of the Twenty-Sixth Amendment to avoid the substantial amount of caselaw under the Fifteenth, Nineteenth, and Twenty-Fourth Amendments supporting Plaintiffs' interpretation of the Twenty-Sixth Amendment. This selective history sidesteps the heart of the issue which is whether Section 82.003 *abridges* the right to vote for voters under 65.



First, Defendants advocate a narrow reading of the Twenty-Sixth Amendment claiming that the right to vote is only implicated when the challenged law "leaves a voter entirely unable to cast a ballot." Response at 26. Such construction renders the word "abridge" meaningless. Defendants further assert that only the Fourteenth Amendment would be implicated if a state offered no-excuse mail voting only to whites, only to men, or only to voters who pay a tax. *Id*. This reading would render "abridge" meaningless in not one, but four constitutional amendments. Defendants reading would violate the principle that 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.)

Further, even if a primary purpose of the Twenty-Sixth Amendment was to lower the voting age to 18, it still follows that the term "abridge" was included to ensure that young voters would enjoy a right to vote *equal* to those voters above 21. Had the amendment only prohibited the denial of the right to vote for voters over 18, it would have omitted the term "abridge" allowing for election laws and practices which unduly burden younger voters, thus rendering the newly appropriated franchise as little more than lip service. The authors of the amendment would have also not given Congress enforcement power to ensure that the right to vote is not hindered on the basis of age if the amendment had as narrow of a scope as Defendants incorrectly suggest. The term "abridge" therefore serves as a means for prohibiting "sophisticated as well as simple-minded modes of discrimination." *Lane v. Wilson*, 307 U.S. 268, 275 (1939). This is precisely why the Supreme Court in *Lane v. Wilson* recognized that the Fifteenth Amendment bars procedural requirements which "effectively handicap exercise of the franchise" even if "the abstract right to vote may remain unrestricted as to race." *Id*.

That the Twenty-Sixth Amendment's scope is limited to "the right to vote" does not undermine Plaintiff's claim. Section 82.003 does not address "related rights" such as the right to hold office, rather it applies squarely to "voting by mail"

and hence actual voting. TEX. ELEC. CODE § 82.003. Nor does this challenge to Section 82.003 deal with some alleged disparate impact on younger voters, like in *Nashville Student Organizing Committee v. Hargett*. 155 F. Supp. 3d 749 (M.D. Tenn. 2015). There, the plaintiffs alleged that a voter ID law imposed unique burdens on young voters who were less likely to have the appropriate ID. *Id*. at 751. Section 82.003 is distinct because it allows for differential treatment on its face. In *Nashville*, students could still obtain the appropriate identification, but here voters under 65 are categorically and explicitly barred from enjoying no-excuse absentee voting. Section 82.003 is also distinct from "excluding] measures that would make it easier" for people under 65 to vote. *Id.* at 757-58. Section 82.003 affirmatively makes it harder for people under 65 to vote than for people over 65.



The constitutional text disclaims that age can be a proper basis to offer voting benefits to one group and not another. Unlike an *Anderson-Burdick* claim under the Equal Protection Clause, the state has no interests sufficiently weighty to overrule the constitutional text. The state's interests and policy choices can never permit it to engage in facial voting discrimination on the classifications (race, gender, ability to pay and age) prohibited by plain language in the Constitution. The state's policy choices are applicable here only on the appropriate remedy to the constitutional violation. At that stage, the state can decide whether it extends voting-by-mail to all

citizens regardless of age or keep Section 82.003's limits to only disabled or traveling Texans.

Next, Defendants equate Plaintiffs' claim with a demand that every voter be entitled to vote in any manner the voter might prefer. *See* Response at 29. This is an inadequate generalization of Plaintiffs' claim which merely asserts that voters of all ages are entitled to the same right to vote. This "necessarily entails a comparison" which requires a baseline. *See Reno v. Bossier Par. Sch. Bd.*, 528 U.S. 320, 334 (2000). Defendants have chosen a baseline of the bare minimum—asserting that any cognizable abridgement is one that abridges the basic right to cast a ballot in person. This defies caselaw defining the term "abridge" in the voting context. Under Defendants' logic, the Court in *Harman v. Forssenius,* 380 U.S. 528, 542 (1965), would have reasoned that voters who do not pay the poll tax still have the right to cast a ballot, even if the alternative requirement is more onerous. Instead, the Court there held that such a requirement imposed "cumbersome" logistical burdens on those voters who did not pay the poll tax, constituting a violation of the Twenty-Fourth Amendment even if the provision was "no more onerous, or even somewhat less onerous" than the alternative. *See id.*



The Defendants reference vote dilution as the type of practice historically considered to be an abridgement of the right to vote. *See* Response at 29. Contrary to Defendants' assertion that dilution is entirely distinct in this context, vote dilution

is a helpful analogue for understanding the meaning of the term "abridge." In vote dilution cases, Plaintiffs still retain the ability to cast a ballot formally, as voters under 65 in Texas can here. Congress and the courts have long recognized, however, that diluting the value of a vote limits the power of the franchise for certain voters—rendering the robustness of the right to vote unequal along protected class lines. Section 82.003 is not so different. Section 82.003 functions to make the right to vote less robust for under-65 voters by making it more difficult for them to participate compared to their older counterparts.

Defendants continue to rely on *McDonald v. Bd. of Election Comm'rs of Chi.*, 394 U.S. 802, 807-08 (1969) for both the historical meaning of the right to vote and the meaning of the term abridge, ignoring more recent and relevant caselaw that casts doubt on the principles set forth in *McDonald*.[2] *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).



Defendants also fail to address or distinguish *American Party*. The Court in *American Party* held that "permitting absentee voting by some classes of voters and denying the privilege to other classes of otherwise qualified voters in similar

[2] It is also important to note that *McDonald* was decided in 1969, two years *prior* to the enactment of the Twenty-Sixth Amendment.

circumstances, without affording a comparable alternative means to vote, is an arbitrary discrimination violative of the Equal Protection Clause." *American Party,* 415 U.S. at 795. Neither Defendants nor the court in *Tully* reckon with this precedent. Rather, both presuppose that *American Party* merely supports that laws such as Section 82.003 would only implicate the Fourteenth Amendment. *Tully*, 977 F.3d at 614. The plaintiffs in *American Party* could only bring their case under the Equal Protection Clause as members of a minor political party, not of a protected group under one of the voting rights amendments. This does not undermine the import of the Court's reasoning that denial of absentee voting to one class of voters is plainly discriminatory, even when voters still have the option of in-person voting. *American Party*, 415 U.S. at 795. It cannot be that a prohibited classification in the constitutional text is afforded less protection than one gleamed from the Equal Protection Clause.



**b. Section 82.003 does not survive the scrutiny analysis**

On its face, Section 82.003 is discriminatory and thus is subject to strict scrutiny. While it is true that not every piece of voting legislation is entitled to strict scrutiny, it is equally true that the *Anderson-Burdick* framework only applies to "nondiscriminatory restrictions" to the right to vote. *Burdick*, 504 U.S. 428, 434 quoting *Anderson*, 460 U.S. at 788. On its face Section 82.003 discriminates on the basis of age. Section 82.003 states plainly, "[a] qualified voter is eligible for early

voting by mail if the voter is 65 years of age or older on election day." The clear distinction on age, *those being 65,* in the statute is discriminatory. Thus, the Court should apply strict scrutiny.

If Texas's decision to restrict no-excuse absentee voting to only those over age 65 can remain in spite of the clear constitutional text at all, it must be justified by a compelling governmental interest to survive strict scrutiny. Defendants' proffered interests fail to meet this threshold. There are only seven other states besides Texas which restrict absentee voting by age.[3] Defendants offer that the distinction between voters over and under 65 is rational, see Response at 31, but this distinction is not rational enough to justify Section 82.003's discrimination. And, if all the state needs to overcome clear constitutional text is a rational basis, then the federal charter would effectively protect none of the rights it was crafted to secure.



To the extent that Defendants justify Section 82.003 because individuals over 65 face challenges such as limited mobility in attending the polls, this interest is already sufficiently served by Section 82.002. Section 82.002 allows a voter to vote early by mail if the voter "has a sickness or physical condition that prevents the voter from appearing at the polling place on election day without a likelihood of needing personal assistance or of injuring the voter's health." TEX. ELEC. CODE § 82.002.

[3] National Conference of State Legislatures, *Table 2: Excuses to Vote Absentee* (July 12, 2022), https://www.ncsl.org/elections-and-campaigns/table-2-excuses-to-vote-absentee.

Voters over 65 suffering from conditions limiting mobility or requiring them to have assistance to vote in person, can utilize Section 82.002 to receive an absentee ballot. Thus, the physical and health challenges faced by voters over 65 cannot justify using an age-based restriction because those persons will still enjoy the right to vote by mail after this Court extracts the facially unconstitutional age restriction. The point here is that whatever scrutiny the state makes of a voter's claim of health challenges is the same regardless of the age of the voter. Voters who are under 65 and over 65 can be affected by the same health related challenges—age is not a magical health safeguard. By relying on a facial age classification, the statute excuses voters over the age of 65 from the vote by mail restrictions faced by voters of a younger age. The Texas Supreme Court's decision *in In re State of Texas*, No. 20-0394, 2020 WL 2759629 (Tex. May 27, 2020) presents a real challenge to voters under the age of 65 and, just as if these additional restrictions were applied by race or gender of the voters, such classification is prohibited by the constitutional text.



Further, that argument that other states have implemented mechanisms to make voting easier for elderly voters fails to justify Section 82.003. Those laws do not simultaneously restrict access to an entire form of voting based on age. Rather, they lower other, minor procedural burdens. For instance, in Georgia (a state Defendants utilize as an example) all voters are entitled to no-excuse absentee voting but voters of "advanced age" may re-enroll less frequently. GA. CODE § 21-2-

381(a)(1). But, a state cannot allow White voters to enroll in mailing voting only once while requiring all citizens of other races to do so yearly. States cannot employ the prohibited classifications of race, gender, ability to pay or age, when crafting their election laws. The fact that Georgia has thus far been allowed to violate the constitutional text in another manner does not justify Texas doing so here. Constitutional rights do not temporally spoil.

The Defendants' argument concerning federal laws that Congress's aid elderly voters also fail because the law at issue does not implicate the right to vote for younger voters. The statute referenced by Defendants requires each state to make available "instructions, printed in large type, conspicuously displayed at each permanent registration facility and each polling place" and to notify elderly voters of the validity of this aid. 52 U.S.C. §§ 20101, 20104(a), (c). *See* Response at 32. This statute does little more than acknowledge that elderly voters may need larger print on ballots in the same way that the Americans with Disabilities Act may require ramps and handrails at polling locations. These requirements are available to benefit everybody. An analogous statute to Section 82.003 would be one that only permitted Latinos, men, or people over age 65 to utilize balloting materials "printed in large type" while excluding all other voters. Were that the case, the state would be correct, the federal law would violate the voting amendments to the Constitution.

Defendants also assert that Section 82.003 serves to prevent voter fraud but fail to elaborate on how. The risk of voter fraud is already low.[4] Any evidence that voter fraud is age related weighs against the validity of Section 82.003. For instance, "[c]ampaign workers tend to target people who are elderly [or] infirm' for coercive treatment, creating a 'psychology of almost fear and intimidation,' tainting the sanctity of the balloting process." Jessica A. Fay, *Elderly Electors Go Postal: Ensuring Absentee Ballot Integrity for Older Voters*, 13 Elder L.J. 453, 463 (2005) (detailing how elderly voters are more susceptible to voter fraud). Even under rational basis review, this fact would render Defendants proffered governmental interest insufficient to support Section 82.003.



Under strict scrutiny, restricting absentee voting to only those over 65 is not narrowly tailored to the goal of preventing voter fraud. Other than evidence that the elderly are more susceptible to fraud, particularly when they vote absentee from facilities like nursing homes, there is little other evidence to suggest that Section 82.003 will actually prevent any greater level of voter fraud. Other states that allow no-excuse absentee voting for all voters (which is the vast majority of them) have

[4] 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), https://www.khou.com/article/news/investigations/texas-received-few-voting-fraud-reports/285-deec7c9a-581b-42b1-b430-4cae7aef5f26. Anyway, the fraud issue is a red herring. Why are older voters' votes so much more valued by state law to permit the alleged election fraud the state asserts?

not seen concerning levels of voter fraud.[5] There are other methods for deterring mail-in ballot fraud, such as ballot verification methods and tracking ballots in transit.[6] Rather, Section 82.003 draws an arbitrary line based on age in violation of plain constitutional text.

Next, Defendants' assert that the logistical challenge of providing no-excuse absentee voting to all voters justifies the restriction of Section 82.003. *See* Response at 33. "Constitutional deprivations may not be justified by some remote administrative benefit to the State." *Harman*, 380 U.S. at 542. Texas already possesses the systems necessary for providing absentee ballots. These systems include measures for ensuring ballots are sent to the correct address and completed by the registered voter. The Defendants provide no reason why it would be uniquely onerous to expand these systems to produce more absentee ballots, or why it would produce more "risk." States that already expand absentee voting to all voters and the numerous mechanisms available for ensuring ballot security provide adequate evidence that any logistical issues of expanded absentee voting not so "pervasive" as to justify violation of the Twenty-Sixth Amendment. *See Harman*, 380 U.S. at



[5] In Colorado, which provides mail-in ballots to all voters, the Heritage Foundation has documented 16 cases of voter fraud in the entire state since 2005. The Heritage Foundation, *Election Fraud Cases (Colorado)*, https://www.heritage.org/voterfraud/search?combine=&state=CO&year=&case_type=All&fraud_type=All.

[6] Matthew Harwood, Why a Vote-By-Mail Option is Necessary, BRENNAN CENTER FOR JUSTICE (April 16, 2020), https://www.brennancenter.org/our-work/research-reports/why-vote-mail-option-necessary.

543 ("The forty-six States which do not require the payment of poll taxes have apparently found no great administrative burden" and "The availability of numerous devices to enforce valid residence requirements…demonstrates quite clearly the lack of necessity for imposing a requirement whereby persons desiring to vote in federal elections must either pay a poll tax or file a certificate of residence six months prior to the election."). The state can elect at the remedy stage to limit voting by mail to only disabled persons.

Defendants presume that "[S]ection 82.003 would survive even more stringent judicial evaluation" simply because preserving integrity is enough to justify a law under any level of scrutiny. Response at 34. This is not so when such a law is crafted utilizing a classification directly prohibited by constitutional text. If fraud is truly the concern, then allowing for absentee voting by only those over 65 is not the answer. All of Defendants' asserted state interests would be more adequately served by different types of laws, and none of which justify providing for preferencing voters over age 65.



## CONCLUSION

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

February 22, 2023

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## CERTIFICATE OF SERVICE

I certify that on February 22, 2023, the foregoing document was served via the Court's e-filing system on the below parties:

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## 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 6,479 words.

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