No. 23-612

# In the Supreme Court of the United States

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

*v.*

JANE NELSON, TEXAS SECRETARY OF STATE

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*



## BRIEF IN OPPOSITION

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## QUESTION PRESENTED

In 1969, this Court held that the "right to vote" does not include a right to vote by mail. *McDonald v. Bd. of Election Comm'rs of Chi.*, 394 U.S. 802, 807-08 (1969). Within just two years, Congress proposed, and the States ratified, the Twenty-Sixth Amendment, which provides that 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.

In the intervening decades, some States have chosen to extend the privilege of voting by mail to all registered voters. Others have chosen to retain a presumption that voting should be done in person but facilitated the exercise of the franchise among older, often less-mobile voters by making it easier for them to vote by mail. Texas has chosen the latter, permitting all eligible voters 65 or over to vote by mail. Tex. Elec. Code § 82.003.

As part of a larger, nationwide strategy to force so-called no-excuse mail-in ballots, Plaintiffs challenged Section 82.003, arguing (among other things) that the statute facially violates the Twenty Sixty Amendment. Over two appellate proceedings, three separate Fifth Circuit panels rejected Plaintiffs' self-described novel interpretation of the Twenty-Sixth Amendment. *See Tex. Democratic Party v. Abbott*, 140 S. Ct. 2015 (2020) (Sotomayor, J. respecting the denial of application to vacate stay).

The question presented is whether Section 82.003 unconstitutionally abridges the right to vote of those under the age of 65 by permitting those 65 and over to vote by mail.

## RELATED PROCEEDINGS

In addition to the proceedings identified in the petition per Supreme Court Rule 14.1(b)(iii), the following cases should be considered related proceedings as they involve the same parties and arise out of the same common nucleus of operative fact.

*Texas Democratic Party v. Debeauvoir*, No. D-1-GN-20-001610, 201st Judicial District (Travis County). Voluntarily dismissed with prejudice on June 9, 2020, following *In re State of Texas*, No. 20-0394.

*State of Texas v. Texas Democratic Party*, No. 14-20-00358-CV (Tex. App.—Houston [14th Dist.] June 9, 2020). Dismissed on July 16, 2020, in light of the dismissal of *Debeauvoir*.

*In re State of Texas*, No. 20-0401, Supreme Court of Texas. Dismissed on July 24, 2020, in light of the dismissal of *Debeauvoir*.

Moreover, although the applicability of Rule 14.1(b)(iii) is less clear, *In re State of Texas*, No. 20-0394, likely should also be considered related because certain of the parties overlap and the case arose out of a common nucleus of operative fact as claims pursued in Plaintiffs' original state-court petition that have since been dropped. Writ conditionally declined.

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## INTRODUCTION

Section 82.003 of the Texas Election Code is an exercise of the Texas Legislature's "broad powers to determine the conditions under which the right of suffrage may be exercised." *McDonald v. Bd. of Election Comm'rs of Chi.*, 394 U.S. 802, 807 (1969) (quoting *Lassiter v. Northampton Cty. Bd. of Elections*, 360 U.S. 45, 50 (1959)). Some States endorse no-excuse absentee voting; others require in-person voting with narrow exceptions. This diversity of approaches reflects a healthy federalism and accords with the uncontroversial notion that "government must play an active role in structuring elections." *Burdick v. Takushi*, 504 U.S. 428, 433 (1992).

Plaintiffs challenge Texas's nearly 50-year-old statutory scheme through an aggressive interpretation of the Twenty-Sixth Amendment that no appellate court has ever endorsed. On their view, Texas cannot allow older citizens to vote by mail without allowing all citizens that privilege. In the proceedings below, the Fifth Circuit concluded that the Twenty-Sixth Amendment does not compel that counterintuitive outcome. Plaintiffs have already twice sought this Court's review. *Tex. Democratic Party v. Abbott*, 141 S. Ct. 1124 (2021); *Tex. Democratic Party v. Abbott*, 140 S. Ct. 2015 (2020). Both times, the Court declined to hear their claim. The Court likewise denied certiorari after the Seventh Circuit came to the same conclusion as the Fifth Circuit in addressing a virtually identical legal challenge. *See Tully v. Okeson*, 977 F.3d 608, 613 (7th Cir. 2020) (*Tully I*), *cert. denied*, 141 S. Ct. 2798 (2021).

Plaintiffs offer no reason for the Court to shift course. The lower courts' analysis is consistent with the text and

history of the Twenty-Sixth Amendment. Many of the arguments that they raise now, including a purported split among various state and federal courts, featured prominently in their already-rejected requests for this Court's intervention. And in any event, two independent bars to relief—sovereign immunity and res judicata—make this the wrong vehicle to address the merits because the Texas Secretary of State does not enforce Section 82.003 and because Plaintiffs deliberately split their Twenty-Sixth Amendment claims from their state-court litigation, which was dismissed with prejudice nearly four years ago.

The petition should be denied.

## JURISDICTION

Plaintiffs have invoked this Court's jurisdiction under 28 U.S.C. §§ 1254(1), 2101(e). As set out below, *infra* Part III.A, federal courts lack jurisdiction to enter the relief requested because Plaintiffs' claims are barred by sovereign immunity.

## STATEMENT

### I. Voting by Mail in Texas

Texas law has long required most voters to cast their ballots in person either on Election Day, Tex. Elec. Code ch. 64, or during an early-voting period prescribed by the Texas Legislature, *id.* §§ 82.005, 85.001. It has, however, recognized that certain voters face unique hardships in going to the polls. During World War I, the Legislature passed its first absentee voting law to allow voters who expect to be away from their jurisdictions on Election Day to vote. Act of May 26, 1917, 35th Leg., 1st C.S., ch. 40, 1917 Tex. Gen. Laws 62, 63-64. In 1935, the Legislature extended absentee voting to the ill and physically

disabled. Act of Oct. 30, 1935, 44th Leg., 2d C.S., ch. 437, § 1, 1935 Tex. Gen. Laws 1700, 1700-01.

Four decades later, the Legislature "extended absentee voting to voters 65 years of age or older." *In re State of Texas*, 602 S.W.3d 549, 558 & n.42 (Tex. 2020) (*Texas*) (citing Act of May 30, 1975, 64th Leg., R.S., ch. 682, § 5, 1975 Tex. Gen. Laws 2080, 2082). This was part of a significant revision of the Election Code passed after Texas ratified the Twenty-Sixth Amendment. *See generally* Tex. S. Con. Res. 65, 62d Leg., R.S., 1971 Tex. Gen. Laws 3867. One purpose of this law was "to bring the Texas Election Code into conformity with" that Amendment. House Comm. on Elections, Bill Analysis, Tex. S.B. 1047, 64th Leg., R.S. (1975), https://tinyurl.com/y5tm2pz3. The Legislature adopted this bill by overwhelming majorities in both chambers, which *both* lowered the voting age to 18 and allowed voters 65 or older to vote by mail.[1]

Texas's vote-by-mail allowances are currently codified in Chapter 82 of the Election Code, which provides, in relevant part, that a voter can vote by mail if he (1) anticipates being absent from his county of residence on Election Day; (2) "has a sickness or physical condition that prevents the voter from appearing at the polling place"; (3) is 65 years of age or older; (4) is either incarcerated or involuntarily committed but remains eligible to vote; or (5) is certified to participate in an address confidentiality program. Tex. Elec. Code §§ 82.001-.004, .007-.008. Texas also provides a generous early-voting



[1] H.J. of Tex., 64th Leg., R.S., 4204 (1975), https://tinyurl.com/y372s9of; S.J. of Tex., 64th Leg., R.S., 1932 (1975), https://tinyurl.com/y2hpwp3g.

period in which "any qualified voter is eligible for early voting by personal appearance." *Id.* § 82.005.

## II. Procedural History

### A. Plaintiffs' state-court proceedings

Beginning in late March 2020, the Texas Democratic Party (TDP) and several individuals under 65 (including petitioners here, Joseph Daniel Cascino and Shanda Marie Sansing) began a two-pronged effort to rewrite the Texas Election Code to permit no-excuse-mail-in ballots. They started in state court, where they asked for declaratory and injunctive relief allowing all voters to vote by mail due to COVID-19 based on the Election Code's definition of "disability." ROA.33.[2] The state trial court obliged, ROA.381-86, but its order was stayed by operation of state law when the State filed a notice of interlocutory appeal, *Texas*, 602 S.W.3d at 552.

Inaccurate representations by Plaintiffs and their counsel about the impact of the state-court appeal (and automatic stay) led to widespread confusion. *E.g.*, ROA.108-09. To prevent innocent voters from being misled about whether they could vote by mail, the Attorney General issued a guidance letter regarding the meaning of Section 82.003, and the status of the injunction while the state-court appeal was pending. ROA.866-68. When that proved insufficient, the State asked the Texas

[2] Petitioner Brenda Li Garcia was not a plaintiff in the state-court action, but that suit was on behalf of the TDP's members, ROA.316, and the TDP has acknowledged that Garcia is a member of the TDP, ROA.970. She was thus in privity with the plaintiffs in the state-court case because the TDP fully represented her interests. *See Amstadt v. U.S. Brass Corp.*, 919 S.W.2d 644, 653 (Tex. 1996).

Supreme Court to issue a writ of mandamus to five county clerks who were refusing to abide by the text of the Election Code. ROA.1839-68. On May 27, 2020, the Texas Supreme Court held that the Legislature had deliberately chosen to limit absentee ballots, and that "lack of immunity to COVID-19 is not itself a 'physical condition' that renders a voter eligible to vote by mail within the meaning" of the Election Code. *Texas*, 602 S.W.3d at 561. The state-court plaintiffs then voluntarily dismissed their state-court claims with prejudice. *See* Exhibit A, Appellee's Unopposed Joint Motion to Dismiss Appeal for Lack of Jurisdiction, *State of Texas v. Texas Democratic Party*, No. 14-20-00358-CV (Tex. App.—Houston [14th Dist.] June 9, 2020).

### B. Plaintiffs' federal-court proceedings

#### 1. Motion for preliminary injunction

This lawsuit served as a hedge against an unfavorable outcome in the state-court proceedings. In April 2020, the TDP, Gilberto Hinojosa (the TDP's Chair), and Cascino, Sansing, and Garcia filed suit in the Western District of Texas. ROA.28. Soon thereafter, they sought a preliminary injunction that would require Texas officials to allow all voters to vote by mail. ROA.108. Their motion rested on numerous and independent theories, including both as-applied and facial challenges under three constitutional amendments. ROA.121-37. But as has since become clear on appeal, their primary argument was that Section 82.003 cannot be squared with the plain text of the Twenty-Sixth Amendment. *See* ROA.122-23.

In examining their Twenty-Sixth Amendment claim, the district court applied strict scrutiny and concluded that Section 82.003 "is a government classification based

on age and discriminates against voters under the age of 65 based on age," and thus Section 82.003 "is prima facie discriminatory under all circumstances" but particularly during a global pandemic. Pet. App. 187a-188a. In its order granting a preliminary injunction on that and other bases, the court ordered 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." Pet. App. 131a.

**2. Plaintiffs' first appeal, their motion to vacate, and petition for a writ of certiorari**

The Secretary immediately appealed, and a Fifth Circuit motions panel stayed the injunction on multiple grounds. *Tex. Democratic Party v. Abbott*, 961 F.3d 389, 412 (5th Cir. 2020) (*TDP I*). Two judges on the panel wrote separately regarding the legal errors in the district court's order on issues ranging from abstention, *id.* at 417-18 (Costa, J., concurring in the judgment) to the merits, *id.* at 414-16 (Ho, J., concurring). The primary opinion concluded that the State was likely to prevail on the merits because "there is no evidence that *Texas* has denied or abridged" the right to vote under the Twenty-Sixth Amendment. *Id.* at 409. The opinion discussed *McDonald* at length and explained that because a "state's decision to give mail-in ballots only to some voters does not normally implicate an equal-protection right to vote, then neither does it implicate '[t]he right . . . to vote' of the Twenty-Sixth Amendment." *Id.* (citation omitted). "There is no reason," the court found, "to treat the latter differently." *Id.*

Plaintiffs then asked (in No. 19A1055) this Court to vacate the stay and grant certiorari before judgment so that the Court could issue a decision before the November 2020 general election. Unlike Plaintiffs' scattershot complaint, their petition focused entirely on their facial Twenty-Sixth Amendment claim. Pet. for a Writ of Cert. before J., 141 S. Ct. 1124 (No. 19-1389) (June 16, 2020). The Court denied the request to vacate with one brief, written concurrence, but without noted dissents. *Tex. Democratic Party v. Abbott*, 140 S. Ct. 2015 (2020).

Before the Fifth Circuit merits panel, Plaintiffs again defended the preliminary injunction "only on Twenty-Sixth Amendment grounds." Pet. App. 65a. They asserted that "it is not the State's tragic inability to contain the COVID-19 epidemic that compels affirmance of the District Court's order—it is the Twenty-Sixth Amendment's unambiguous text that does." Pet. App. 65a.

Though its exact reasoning differed from the stay panel, the panel majority agreed that Section 82.003 does not transgress the Twenty-Sixth Amendment and therefore vacated the injunction. Pet. App. 103a. The panel expressly declined to decide whether Plaintiffs met their burden of showing that Section 82.003 lacks a rational basis. Pet. App. 102a. The court nonetheless concluded that Plaintiffs failed to meet their burden to show that their right to vote—if implicated—had been "abridged" within the meaning of the Twenty-Sixth Amendment because Section 82.003 does not "create[] a barrier to voting that makes it more difficult for the challenger to exercise her right to vote relative to the *status quo*." Pet. App. 98a.

Judge Stewart dissented. In his view, *McDonald* is no longer good law following *American Party of Texas*

*v. White*, 415 U.S. 767 (1974), because "the options granted to voters to cast their vote are [now] part of 'the right to vote' under the Twenty-Sixth Amendment." Pet. App. 114a-15a. He opinioned that Section 82.003 has a "severe" impact on the right to vote because "in the context of the pandemic," it "leads to dramatically different outcomes for different age groups." Pet. App. 106a, 115a.

Plaintiffs then asked that this Court "consider the pending petition for a writ of certiorari [before judgment] as a conventional petition for writ of certiorari," Petrs' Letter, *Tex. Democratic Party v. Abbott*, 141 S. Ct. 1124 (2021) (No. 19-1389) (Sept. 18, 2020), asserting that there "is nothing more to do on remand" in light of the panel's "holding that Section 82.003's age-based restriction of no-excuse vote by mail is consistent with the [Twenty-Sixth] Amendment." Petrs' Reply at 5, *Tex. Democratic Party v. Abbott*, 141 S. Ct. 1124 (2021) (No. 19-1389). This Court denied review without noted dissent. *Tex. Democratic Party v. Abbott*, 141 S. Ct. 1124 (2021).



**3. Post-remand district-court proceedings**

Proceedings in the district court, which had been stayed, began again following the Court's denial of certiorari. Plaintiffs filed a second amended complaint, ROA.2463, which contained six counts, including allegations of racial discrimination and violations of the Voting Rights Act. ROA.2474-78. As they did the first time around, Plaintiffs abandoned those claims when they appealed to the Fifth Circuit. Pet. App. 7a-8a. Because they do not attempt to raise those claims here either, their only relevant claim is that Texas's age-based eligibility requirement for voting by mail discriminates based on

age in violation of the Twenty-Sixth Amendment. ROA.2477.

This time, the district court dismissed the Twenty-Sixth Amendment claim, finding that the Fifth Circuit had already "announced the standard for adjudicating [such] claims" and determined that Plaintiffs "had failed to show that Texas's age limitation on absentee voting made it 'more difficult' for them to vote than it was before the law was enacted in 1971." Pet. App. 25a-26a.

**4. The second appeal**

The Fifth Circuit affirmed. Like the district court, the court of appeals reasoned that at the preliminary injunction stage, the merits panel "established the scope of the Amendment's protection by distinguishing a right to vote from the right to an absentee ballot." Pet. App. 9a-10a. The court concluded that "the scope of the mandate . . . prevents this panel from departing from" the court's earlier holding and granting Plaintiffs' relief on their facial challenge to Section 82.003. Pet. App. 10a. And the court observed that Plaintiffs pointed to "no evidence that strikes us as a clearly erroneous application of law" to warrant revisiting the earlier decision under the law-of-the-case doctrine. Pet. App. 12a. The district court "therefore did not err . . . in dismissing Plaintiffs' Twenty-Sixth Amendment challenge to Texas' age-based election law." Pet. App. 12a.

This, Plaintiffs' second petition and third request for the Court's intervention followed.

## REASONS FOR DENYING THE PETITION

### I. The Fifth Circuit's Decision Does Not Implicate a Circuit Split.

There is no circuit spilt warranting this Court's intervention. *Contra* Pet. 8-11. Four panels of two courts of appeals have independently considered the precise question presented in this petition, and all four have issued comprehensive opinions finding that a law that makes voting by mail easier for elderly citizens does not violate the Twenty-Sixth Amendment. *TDP I*, 961 F.3d at 412; Pet. App. 103a; *Tully I*, 977 F.3d at 613; *Tully v. Okeson*, 78 F.4th 377, 388 (7th Cir. 2023) (*Tully II*).[3] The fact that those panels took "alternate analytical path[s]" to reach that outcome is not a reason to grant review; it instead reflects that courts have been thoughtfully grappling with these issues. *Tully II*, 78 F.4th at 387 n.8. Slight variations of approaches among judges on constitutional questions is unsurprising and perhaps even expected. Nothing in those decisions, however, represents the kind of entrenched disagreement that typically prompts this Court's review. *See* Sup. Ct. R. 10(a) (requiring a conflict of decisions on "the same important matter"). Moreover, none of the state or federal cases that Plaintiffs refer to



[3] The Fifth Circuit merits panel at the preliminary-injunction stage expressly concluded that it was not bound by the prior stay panel's analysis, Pet. App. 64a, and *Tully II* determined that "it would not be 'sound policy' to invoke the law of the case doctrine" with respect to *Tully I*. 78 F.4th at 381. By contrast, in the latest appeal from the grant of the Secretary's motion to dismiss, the Fifth Circuit concluded that it *was* bound by its earlier merits decision, Pet. App. 10a, while noting that there was no "clearly erroneous application of law" in that court's analysis, Pet. App. 12a.

conflict with anything the Fifth Circuit said or even address whether the "right to vote" protected by the Twenty-Sixth Amendment includes a right to vote by mail.

**1.** In 2020, on appeal from the denial of a preliminary injunction, the Seventh Circuit considered "whether Indiana's age-based absentee-voting law abridges 'the right … to vote' protected by the Twenty[-]Sixth Amendment or merely affects a privilege to vote by mail." *Tully I*, 977 F.3d at 613. And, like the Fifth Circuit, the Seventh Circuit concluded that Indiana's law does *not* violate the Twenty-Sixth Amendment. *Id.* at 614. The court reasoned that under *McDonald*, Indiana's law "merely affects a privilege to vote by mail" rather than the right to vote protected by the Twenty-Sixth Amendment. *Id.* at 613.

In *McDonald*, the plaintiffs were incarcerated persons who claimed a right to vote by mail because they could not "readily appear at the polls." 394 U.S. at 803. Illinois "made absentee balloting available to [only] four classes of persons," including (among others) those absent from their precincts and the disabled. *Id.* at 803-04. Although the *McDonald* plaintiffs' claims sounded in equal protection, the Court examined whether the right to vote was implicated to determine the relevant level of scrutiny. *Cf. San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 38 (1973). The Court applied rational basis review because it concluded that Illinois's law did *not* implicate the right to vote. *See McDonald*, 394 U.S. at 807. The Court explained that "absentee statutes, which are designed to make voting more available to some groups who cannot easily get to the polls, do not themselves deny [plaintiffs] the exercise of the franchise." *Id.* at 807-

08. Absent evidence "that Illinois ha[d] in fact precluded [plaintiffs] from voting," it was irrelevant that it might have been easier for an inmate to vote by mail. *Id.* at 808. Based on *McDonald*, the Seventh Circuit concluded that "at issue is not a claimed right to vote" but a "claimed right to an absentee ballot," and for that reason, "Plaintiffs' claim under the Twenty-Sixth Amendment, which only protects the right to vote, is unlikely to succeed." *Tully I*, 977 F.3d at 614.

Then, pointing to *White*, the Seventh Circuit also specifically rejected an argument that "hypothetical laws similarly restricting the ability of African Americans or women or the poor to vote by mail would violate the Fifteenth, Nineteenth, and Twenty-Fourth Amendments." *Id.* In *White*, the plaintiffs challenged several aspects of Texas's voting laws as they applied to minor political parties. *See generally* 415 U.S. at 771-72. For example, the plaintiffs challenged the requirement that to obtain access to the ballot, they must "demonstrate support from electors equal in number to 1% of the vote for governor at the last general election." *Id.* at 782. This Court held that some of the challenged laws abridged the right to vote or equal protection and thus were subject to strict scrutiny. *Id.* at 780 & n.11. Texas's restriction that absentee ballots would include only two names was not among them. *Id.* at 770-71, 795. Instead, the Court remanded for the lower courts to consider whether the State had engaged in "arbitrary discrimination" against minor political parties that "violat[es] the Equal Protection Clause"—that is, whether they fail rational-basis review. *Id.* at 795. Based on that equal protection reasoning, the Seventh Circuit correctly concluded that the plaintiffs' hypothetical laws would indeed be subject to

heightened scrutiny, but it "would come from the Fourteenth Amendment's Equal Protection Clause." *Tully I*, 977 F.3d at 614 (citing *White*, 415 U.S. at 795).

Plaintiffs say (at 10) that "the Seventh Circuit expressly rejected the test announced by the Fifth Circuit." To the contrary, the Seventh Circuit reaffirmed its "similar[] conclu[sion]" just last year when the *Tully* litigation reached summary judgment; it just did so by way of an "alternate analytical path." *Tully II*, 78 F.4th at 387 n.8. Specifically, the Seventh Circuit held that an "'abridgement' must involve the imposition of a 'material requirement.'" *Id.* at 386. Because "[e]ven a cursory reading of Indiana's voting laws reveals full protections of the right to vote for all registered voters," the plaintiffs' claims that Indiana's law violated the Twenty-Sixth Amendment because they distinguished between older and younger voters failed. *Id.* at 387. Such minor analytical differences do not a certworthy issue make. Sup. Ct. R. 10(a).

**2.** Plaintiffs are also wrong to insist (at 8) that the Fifth Circuit's decision "conflicts with decisions of the supreme courts of California and Colorado as well as of the First Circuit," which Plaintiffs read to "have each held that the Amendment prohibits all age-based distinctions with respect to voting." But unlike the laws at issue here and in *Tully*, those cases involved state actions that entirely prevented voters from voting in local elections based on their age or a close proxy to it. In *Jolicoeur v. Mihaly*, 488 P.2d 1 (Cal. 1971), for instance, California's requirement that college students register at their parents' homes prevented college students from voting in local elections at their places of residence. Recognizing that all politics is local, the California Supreme Court

held that a State may not deny "voters the right to help determine the resolution of issues which vitally affect them." *Id.* at 7. Likewise, *Colorado Project-Common Cause v. Anderson*, 495 P.2d 220, 221 (Colo. 1972) (en banc), invalidated a rule limiting the initiative process to those 21 or older on similar grounds. And *Walgren v. Board of Selectmen of Town of Amherst*, 519 F.2d 1364, 1365 (1st Cir. 1975), applied the same principle to invalidate a deliberate effort by election officials to schedule a local election in such a way as to prevent college students from voting.

None of these cases holds that the Twenty-Sixth Amendment prohibits all age-based distinctions with respect to voting. Indeed, the First Circuit expressly rejected that the scheduling decision at issue in *Walgren* was per-se subject to strict scrutiny in an earlier iteration of the same lawsuit precisely because the scheduling decision may have impeded one option to vote (in-person voting), but students retained another (absentee voting). *Walgren v. Howes*, 482 F.2d 95, 99 (1st Cir. 1973). The Second Circuit has similarly rejected a facial challenge to a law that creates a "presumption that students are not residents of their college communities," even though such a rule makes it "somewhat more difficult" for those aged 18 to 20 to vote, so long as that presumption is rebuttable. *Auerbach v. Rettaliata*, 765 F.2d 350, 352, 354 (2d Cir. 1985); *see also Williams v. Salerno*, 792 F.2d 323, 328 (2d Cir. 1986) (applying *Auerbach*). Those cases, like *McDonald*, turned on some state action or statute that "impact[ed] Plaintiffs' ability to exercise the fundamental right to vote or absolutely prohibit[ed] Plaintiffs from voting." *Tully I*, 977 F.3d at 614 (cleaned up) (quoting *McDonald*).

Moreover, none of these courts addressed the questions at the heart of this case: whether the "right to vote" protected by the Twenty-Sixth Amendment necessarily includes a right to vote by mail, or whether extending that privilege to older voters abridges the right to vote of younger voters. The two circuits to address those questions have answered in the negative.[4]

**3.** Plaintiffs are correct to point out (at 13), that five other States have laws like Texas's and Indiana's.[5] But that cuts *against* review at the present time: Three of those States (Kentucky, Tennessee, and South Carolina) are in two additional Circuits (the Fourth and Sixth), that have not yet had the opportunity to analyze the question presented. Should one of those courts adopt Plaintiffs' preferred reading of the Twenty-Sixth Amendment, *then* there might be an issue that merits the investment of this Court's resources. Until then, however, the unanimity in the courts below counsels against review.



[4] Although the petition cites (at 12-13) extra-record material for the proposition that "[a]ge-based restrictions on mail-in voting have a significant impact," those assertions are not properly before the Court. Moreover, the Court should not presume these extra-record assertions to be true because, historically, mail-in voting has been considered the more cumbersome option. *Veasey v. Abbott*, 830 F.3d 216, 255 (5th Cir. 2016) (en banc).

[5] Ky. Rev. Stat. § 117.085(a)(8); La. Stat. § 18:1303(J); Miss. Code § 23-15-715(b); S.C. Code § 7-15-320(B)(2); Tenn. Code § 2-6-201(5)(A); *cf.* R.I. Gen. Laws § 17-20-2 (1), (2) ("serious impairment of mobility" or confinement in nursing home); W. Va. Code § 3-3-1(b)(1)(B) ("immobility due to extreme advanced age").

## II. The Petition Presents a Poor Vehicle to Address the Question Presented.

Not only is review unnecessary at the present time, two independent barriers make this a poor vehicle for the Court to resolve Plaintiffs' claim on the merits: res judicata and sovereign immunity. Each would be fatal to Plaintiffs' ultimate claim for review, and the Court does not typically grant review of a petition that will not afford any ultimate relief.

### A. Plaintiffs' claims are barred by res judicata.

Before they filed this suit, Plaintiffs followed an unusual playbook. They first brought a state-court lawsuit that sought an order allowing all voters to vote by mail due to the COVID-19 pandemic. ROA.33. When Texas's highest court rejected the state-law theory undergirding that suit, they dismissed it with prejudice. *Supra* pp. 4-5. That dismissal has preclusive effect that is fatal to their claim in federal court.

In deciding the preclusive effect of a state court judgment in a federal suit, federal courts apply the law of the State from which the judgment was entered. *Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 81 (1984). Under Texas law, "orders dismissing cases with prejudice have full res judicata and collateral estoppel effect." *Williams v. Tex. Dep't of Crim. Just.–Inst. Div.*, 176 S.W.3d 590, 594 (Tex. App.—Tyler 2005, pet. denied) (citing *Barr v. Resolution Tr. Corp.*, 837 S.W.2d 627, 630-31 (Tex. 1992)). In turn, claim preclusion (also known as res judicata) "prevents the relitigation of a claim or cause of action that has been finally adjudicated, as well as related matters that, with the use of diligence, *should have been litigated* in the prior suit." *Barr*, 837 S.W.2d at 628

(emphasis added). The animating purpose of claim preclusion is to "prevent[] splitting a cause of action" like Plaintiffs did here. *Id.* at 629.

Because this case was dismissed for failure to state a claim, the effect of this state-court litigation has never been litigated. On remand, however, the Secretary would assert—and be able to establish—that Plaintiffs could have brought a Twenty-Sixth Amendment claim in their failed state-court action. *See Taylor v. Sturgell*, 553 U.S. 880, 907 (2008) (claim preclusion is affirmative defense). Plaintiffs were represented by the same counsel in both suits and brought their federal suit while the state-court suit was pending. *Supra* pp. 4-5. Thus, there was "no valid reason to subject" the State to two different lawsuits. *Barr*, 837 S.W.2d at 631. Plaintiffs could instead have simply filed an amended pleading in state court asserting a Twenty-Sixth Amendment violation. Accordingly, the claim-preclusive effect of the earlier state-court action would prohibit any ultimate relief even if the Court were to reverse the district court's decision to dismiss for failure to state a claim (which it should not). *See id.*



### B. Plaintiffs' claims are barred by sovereign immunity.

Moreover, Plaintiffs' claims are also barred by sovereign immunity. As this Court has emphasized since last this case was here, *Ex parte Young*, 209 U.S. 123 (1908), created a "narrow exception" to a State's sovereign immunity for suits to prevent state officials from enforcing unconstitutional laws. *Whole Woman's Health v. Jackson*, 595 U.S. 30, 39 (2021). Because the theory underlying this exception is that the enforcement of an

unconstitutional law is "without the authority of" the State and "does not affect[] the state in its sovereign or governmental capacity," the named defendant must have some actual enforcement connection to the challenged law. *Ex parte Young*, 209 U.S. at 159. That connection can come from the challenged statute itself or from general law, but that connection must exist. *Id.* at 157.

Under the Election Code, only local early-voting clerks "review each application for a ballot to be voted by mail" and either "provide" a ballot or "reject the application." Tex. Elec. Code § 86.001; *see also Texas*, 602 S.W.3d at 561 (discussing role of early-voting clerks). The Secretary cannot compel local officials to review mail-in-ballot applications. *In re Stalder*, 540 S.W.3d 215, 218 n.9 (Tex. App.—Houston [1st Dist.] 2018, no pet.); *Ballas v. Symm*, 351 F. Supp. 876, 888 (S.D. Tex. 1972), *aff'd*, 494 F.2d 1167 (5th Cir. 1974) ("Plaintiff admits that the Secretary's opinions are unenforceable at law and are not binding."). Indeed, it was the Secretary's inability to compel clerks to act that necessitated the State's petition for a writ of mandamus in the Texas Supreme Court against five county election officials, which led to the dismissal of Plaintiffs' state-court action with prejudice.



True, the Fifth Circuit rejected the Secretary's immunity argument at the pleading stage based on her alleged "duty to design the application form for mail-in ballots." Pet. App. 71a. The Fifth Circuit's more recent sovereign-immunity precedent, *e.g.*, *Tex. Alliance for Retired Ams. v. Scott*, 28 F.4th 669, 674 (5th Cir. 2022), suggests that the court would likely reconsider that holding, which fails to show how the Secretary is compelling local election officials to act merely by providing a form. In

other words, even if Plaintiffs have pleaded a viable claim (the most they ask this Court to find in the case's procedural posture), that does not mean they have sued the right party to obtain relief.

Plaintiffs have not sought and will not likely succeed in asking this Court to reexamine the Fifth Circuit's approach to *Ex parte Young* should this case be raised for a fourth time once the Fifth Circuit has a chance to apply its more recent precedent to this case. After all, this Court reaffirmed the requirement of an enforcement connection between the named defendant and the challenged law just a few years ago in a case arising from the Fifth Circuit. *Whole Woman's Health*, 595 U.S. at 51. Because sovereign immunity (like res judicata) will likely preclude any ultimate relief on the merits, this is a poor vehicle to determine what standard should apply to that merits determination.



## III. The Fifth Circuit's Decision Was Correct.

Even if the Court were inclined to reach the merits and willing to overlook these procedural defects, review is unnecessary because the Fifth and Seventh Circuits were entirely right. The language of the Twenty-Sixth Amendment, its history, and this Court's jurisprudence all confirm that a State does not abridge the "right to vote" of younger voters by allowing older voters the privilege to vote by mail. Because Section 82.003 does not target a suspect class or infringe on the "right to vote" as that term was understood when the Twenty-Sixth Amendment was ratified, Section 82.003 must be evaluated under deferential rational-basis review. Plaintiffs' arguments to the contrary hinge on inapposite caselaw

and do not account for *McDonald*'s categorical holding that there is no constitutional right to an absentee ballot.

### A. Section 82.003 does not abridge the right to vote.

The Twenty-Sixth Amendment prohibits laws that deny or abridge the right to vote based on age. U.S. Const. amend. XXVI § 1. Plaintiffs do not dispute the Fifth Circuit's conclusion that "there has been no denial here." Pet. App. 90a. As a result, they are not entitled to proceed to the merit of their claim unless they have plausibly alleged that (1) their "right to vote" has (2) been "abridged." They have done neither.

**1.** Because the Twenty-Sixth Amendment does not define "right to vote," that term "must be interpreted by reference to historical practices and understandings" at the time of ratification, *Town of Greece v. Galloway*, 572 U.S. 565, 576 (2014) (quotation marks omitted). As the "right to vote" is referenced elsewhere in the Constitution, "the effect attributed to" those other uses of the term "before the amendment was adopted" may be particularly instructive. *Eisner v. Macomber*, 252 U.S. 189, 205 (1920); *Brushaber v. Union Pac. R.R.*, 240 U.S. 1, 18 (1916); *accord Dep't of Homeland Sec. v. Thuraissigiam*, 140 S. Ct. 1959, 1968-69 (2020) (applying the Suspension Clause as understood by courts at the time of ratification).

Applying these principles, the Fifth Circuit rightly concluded that "the right to vote in 1971 did not include a right to vote by mail," Pet. App. 89a. To "vote" is the "expression of one's preference or opinion . . . by ballot, show of hands, or other type of communication." *Vote*, BLACK'S LAW DICTIONARY (11th ed. 2019); *accord*

BLACK'S LAW DICTIONARY 274, 1748 (4th ed. 1957). The right to vote does not guarantee the right to vote "in any manner" the voter might prefer. *Burdick*, 504 U.S. at 433. And, as discussed above, *supra* pp. 11-12, this Court held *before* the Twenty-Sixth Amendment was ratified that the "right to vote" does not include a "claimed right to receive [and cast] absentee ballots." *McDonald*, 394 U.S. at 807. Although some judges have questions regarding *McDonald*, *e.g.*, Pet. App. 101, this Court cited it with approval in *Burdick*, 504 U.S. at 434, one of the two cases establishing the modern test for when a law abridges the right to vote. *See also Crawford v. Marion Cnty. Elec. Bd.*, 553 U.S. 181, 209 (2008) (opinion of Scalia, J.) (noting that the ability to cast absentee or provisional ballots "is an indulgence—not a constitutional imperative that falls short of what is required").

Applying *McDonald*, this Court has held that a State may not "affirmatively exclude[]" a class of voters from mail-in ballots if doing so—when combined with other state action—entirely prevents them from casting their ballots. *Goosby v. Osser*, 409 U.S. 512, 521-22 (1973). For example, in *Goosby*, the Court found that "*McDonald* [did] not 'foreclose'" the plaintiffs' challenge because there was a question whether, as a whole, "the Pennsylvania statutory scheme" "absolutely prohibit[ed]" incarcerated persons from voting. *Id.* They could not obtain absentee ballots, and requests for access to polling places or for transportation to the polls "had been denied." *Id.* That is, far from departing from or undercutting *McDonald*, the Court concluded that the plaintiffs had "allege[d] a situation that *McDonald* itself suggested might make a different case." *Id.* at 522. Even then, *Goosby* merely remanded for reconsideration; it

expressed no view as to whether the plaintiffs were "entitled to the relief sought." *Id.* The Court came to a similar conclusion in *O'Brien v. Skinner*, 414 U.S. 524, 530 (1974).

In his dissent, Judge Stewart contended that this Court abandoned *McDonald* in *American Party of Texas v. White*. Pet. App. 114a-115a. But at the time *White* was decided, absentee voting in Texas was limited to those who *could not vote in person* due to absence from the jurisdiction or physical disability. *Supra* pp. 2-3. Thus, exclusion of a party from the absentee-ballot process raised a question whether Texas had entirely denied some voters the franchise or whether the State had provided a "comparable alternative means to vote." *White*, 415 U.S. at 795. *McDonald*'s statement that the "right to vote" does not extend to the privilege of voting by mail thus remains good law.

Because the "right to vote" guaranteed by the Twenty-Sixth Amendment does *not* include a right to vote by mail, mail-in ballot regulations have often differentiated based on age. Many States either include age as one reason that a voter may vote by mail, *supra* n. 5, or did so until they permitted no-excuse-mail-in voting.[6] Even States that do not determine eligibility based on age have made it easier for older voters to obtain mail-in ballots—for example, by allowing them to permanently register for mail-in ballots, rather than requiring periodic re-



[6] Ariz. Rev. Stat. § 16-541(B)(3) (1980); Mich. Comp. Laws § 168.758(1)(d) (1996); N.M. Stat. § 1-6-3(5) (1989); Ohio Rev. Code § 3509.02(A) (1990); Wis. Stat. § 6.87(2) (1986); *cf.* Haw. Rev. Stat. § 15-2 (1984); Me. Rev. Stat. tit. 21A, § 751(7) (1992); Wash. Rev. Code § 29.36.013 (1987).

enrollment.[7] Indeed, for over thirty-five years, Congress has required States to assist older voters in obtaining mail-in ballots as part of a national policy "to promote the fundamental right to vote by improving access for handicapped and elderly individuals." 52 U.S.C. §§ 20101, 20104. That these laws have existed since the Twenty-Sixth Amendment's ratification is strong evidence that they are consistent with that Amendment. *E.g.*, *Galloway*, 572 U.S. at 576; *Marsh v. Chambers*, 463 U.S. 783, 788-90 (1983).

**2.** Even assuming Section 82.003 implicates the right to vote (and it does not, *supra* pp. 19-21), Texas law does not abridge that right because it does not erect an obstacle to anyone trying to cast a ballot. Since before the Twenty-Sixth Amendment, the term "abridge" has meant "[t]o reduce or contract." BLACK'S LAW DICTIONARY 21 (4th ed. 1957). And "abridgment" in this context has not been understood to refer to "options" for voting—that is, the manner by which people vote. Instead, that term has most often been understood to include practices like cracking and packing of racial blocs, which dilute but do not eliminate the value of certain votes. *Thornburg v. Gingles*, 478 U.S. 30, 43 (1986); *see also, e.g.*, *Luft v. Evers*, 963 F.3d 665, 672-73 (7th Cir. 2020).

The Fifth Circuit correctly held that Section 82.003 does not abridge the right to vote because it does not "place a barrier or prerequisite to voting" for individuals under 65 that would not otherwise exist. Pet. App. 98a.

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[7] *E.g.*, Ga. Code § 21-2-381(a)(1); Jessica A. Fay, Note, *Elderly Electors Go Postal: Ensuring Absentee Ballot Integrity for Older Voters*, 13 ELDER L.J. 453, 471-76 (2005) (collecting laws facilitating voting among the elderly).

This Court's precedent has distinguished "a statute which ma[kes] casting a ballot easier for some who were unable to come to the polls" from a "statute absolutely prohibit[ing]" someone else "from exercising the franchise." *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 626 n.6 (1969). Minor inconveniences do not "abridge" the right to vote. *Crawford*, 553 U.S. at 198 (plurality op.). And a procedural rule "abridge[s]" the right to vote only if it "erects a real obstacle" to the individual's right to cast a ballot. *Harman v. Forssenius*, 380 U.S. 528, 540-41 (1965) (applying *Lane v. Wilson*, 307 U.S. 268, 275 (1939)). Section 82.003 does no such thing. "Under Texas law, in-person voting is the rule, and mail-in voting is the exception." *TDP I*, 961 F.3d at 417 (Ho, J., concurring); *Texas*, 602 S.W.3d at 558 ("The history of absentee voting legislation in Texas shows that the Legislature has been both engaged and cautious in allowing voting by mail."). Plaintiffs cite no authority holding that a refusal to expand a narrow exception that makes voting more convenient is a "real obstacle" to the exercise of the franchise. *Harman*, 380 U.S. at 540-41.



**B. Section 82.003 is subject to, and survives, rational basis review.**

Because Section 82.003 does not implicate—let alone abridge—the right to vote, it survives constitutional muster so long as it is "rationally related to legitimate government interests." *Washington v. Glucksberg*, 521 U.S. 702, 728 (1997). "[R]ational basis review . . . is not a license for courts to judge the wisdom, fairness, or logic of legislative choices." *Heller v. Doe ex rel. Doe*, 509 U.S. 312, 319 (1993) (internal quotation marks omitted). Instead, a court applying "[t]his standard of review [must

be] a paradigm of judicial restraint": the factual record doesn't matter; a law "must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *F.C.C. v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313-14 (1993). Moreover, the burden is not on Texas to prove the law valid but the challengers, who are "the one[s] attacking the legislative arrangement[,] to negative every conceivable basis which might support it." *Armour v. City of Indianapolis*, 566 U.S. 673, 685 (2012). Plaintiffs have not met this formidable burden.

The Election Code's distinction between voters aged under and over 65 is rational. The statute also advances significant state interests by, among other things, facilitating the franchise for individuals who (as a group) face greater challenges in attending the polls. For example, many individuals over 65 reside in nursing homes and have limited mobility.[8] Though others may also have difficulties reaching the polls, the line drawn by a State need not be "perfectly tailored to that end," so long as the distinction is not arbitrary. *Box v. Planned Parenthood of Ind. & Ky., Inc.*, 139 S. Ct. 1780, 1782 (2019) (per curiam). Texas's Legislature may "take one step at a time, addressing itself to the phase of the problem which seems most acute." *Beach Commc'ns Inc.*, 508 U.S. at 316; *see also Fitzgerald v. Racing Ass'n of Cent. Iowa*, 539 U.S. 103, 108 (2003).

Texas also has a compelling and undisputed need to prevent the very "real" threat of voter fraud, which "could affect the outcome of a close election." *Crawford*,

[8] *See* Tex. Health and Human Servs., *Long Term Care*, https://tinyurl.com/4jehmdv3.

553 U.S. at 195-96 (plurality op.). As members of this Court have recognized, this concern is particularly pressing for mail-in ballots where "fraud . . . is a documented problem." *E.g.*, *id.* at 225 (Souter, J., dissenting). And, even if that were not the case, "[l]egislatures . . . should be permitted to respond to potential deficiencies in the electoral process with foresight rather than reactively." *Munro v. Socialist Workers Party*, 479 U.S. 189, 195 (1986). Accordingly, limiting mail-in ballots to those who likely need—as opposed to want—them is entirely rational because it limits that possibility to where the risks and costs associated with mail-in ballots are most justified.

### C. Plaintiffs' arguments to the contrary lack merit.

In arguing that the district court nonetheless should have allowed their claim past the pleadings, Plaintiffs insist that the Fifth Circuit did not "take the Amendment's text seriously," Pet. 14, and "impede[d] the purpose of the Twenty-Sixth Amendment," Pet. 19. Both contentions are incorrect. And neither rebuts the Fifth Circuit's discussion of *McDonald* or its conclusion that the original public meaning of the "right to vote" in 1971 did not include a right to an absentee ballot.

**1.** As an initial matter, Plaintiffs distort the Fifth Circuit's decision by insisting that it limited the term "abridgment" to "some form of retrogression or temporal backsliding." *Id.* at 7. The Fifth Circuit recognized that although to abridge the right to vote a law must typically "make[] voting more difficult" than an established baseline, Pet. App. 95a, it expressly recognized that there may be exceptions where the "status quo itself is

unconstitutional," Pet. App. 98a. It merely saw no reason to apply that exception because there was "no basis to hold that Texas's absentee-voting rules as a whole" were constitutionally problematic. Pet. App. 93a.

From the flawed premise that the Fifth Circuit created an unduly narrow interpretation of the word "abridge," Plaintiffs insist that under the Fifth Circuit's decision, States could determine who might vote by mail based on race, gender, or wealth in violation of the Fifteenth, Nineteenth, and Twenty-Fourth Amendments. Pet. 13-14. This fails to properly account for the Fourteenth Amendment, which raises the level of scrutiny applied to *all* regulations based on suspect classifications, regardless of whether they implicate the right to vote. *E.g.*, *Plyler v. Doe*, 457 U.S. 202, 216 & n.14 (1982); Pet. 17 n.4 (acknowledging the Fourteenth Amendment would likely bar these hypothetical laws). As Plaintiffs concede (at 14-15), the same is not true for laws distinguishing based on age because age is not a suspect classification. *E.g.*, *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 83-84 (2000).

Plaintiffs' two principal authorities—*Reno v. Bossier Parish School Board*, 528 U.S. 320 (2000), which construed the Fifteenth Amendment, and *Harman*, which interpreted the Twenty-Fourth—are not to the contrary. *Bossier Parish* explained that the Fifteenth Amendment refers "to discrimination more generally" than just retrogression. 528 U.S. at 334. But, as the Seventh Circuit noted, under *Bossier Parish*, "in order to determine whether the Fifteenth Amendment has been violated, the question is whether the right to vote—as it was intended to be exercised—has been abridged." *Tully II*, 78 F.4th at 387. Thus, even if *Bosier Parish* could be read

to adopt a broader view of "abridgment" (and it did not),[9] it does not control this case because it does not overturn *McDonald*'s ruling that the "right to vote" does not include a right to vote by mail. *Supra* pp. 11-12.

In *Harman*, the Court considered, and found unconstitutional under the Twenty-Fourth Amendment, a Virginia law that required qualified citizens to either pay a poll tax or file an annual certificate of residence to vote in federal elections. 380 U.S. at 529. Plaintiffs emphasize *Harman*'s language that the certificate requirement "would not be saved even if it could be said that it is no more onerous, or even somewhat less onerous, than the poll tax." *Id.* at 542. They read this statement out of context: This Court also explained that "*any material requirement* imposed upon the federal voter solely because of his refusal to waive the constitutional immunity" must fail. *Id.* at 542 (emphasis added). In other words, "an 'abridgement' must involve the imposition of a 'material requirement.'" *Tully II*, 78 F.4th at 386. But Texas "imposes no requirements, much less material requirements, on the exercise of the franchise through [an] accommodation of the elderly." *Id.* at 387.

**2.** Finally, Plaintiffs resort to legislative history (at 19) and posit that the Twenty-Sixth Amendment was designed to eliminate all age-based distinctions in any election-related regulations. Even looking past this Court's general reluctance to rely on legislative history, *e.g.*,

[9] Plaintiffs' remaining authority (at 20-21) for a broader meaning of "abridgement" comes from contexts unrelated to voting. It is thus hardly surprising that the Fifth and Seventh Circuits chose to rely on this Court's more on-point authority. *E.g.*, Pet. App. 95a-96a; *Tully II*, 78 F.4th at 386.

*Food Marketing Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2364 (2019), Plaintiffs get their history wrong. "[T]here is plenty of evidence that the Amendment's most immediate purpose was to lower the voting age from twenty-one to eighteen" in response to social unrest during the Vietnam War, *TDP I*, 961 F.3d at 408, and that "[n]obody looked upon it as something more," *id.* at 408 n.46 (citing 1 BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 91 (1991 (cleaned up)).

This history reflects that Plaintiffs are imposing a view of mail-in voting that is entirely anachronistic. That is, their entire theory for why Section 82.003 improperly burdens the right is their own subjective view that mail-in voting is *easier* than voting in person. Pet. 12-13. But in the 1970s, mail-in voting was considered to impose "special burdens" on voters that "might well serve to dissuade" young people from voting. S. Rep. No. 92-26 at 14 (1971). Read in this context, the Fifth Circuit correctly concluded that Texas's law allowing registered voters aged 65 or over to vote by mail does not violate the constitutional rights of registered voters under 65. As the only other appellate court to directly address the question has agreed, this Court's intervention is entirely unnecessary.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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