No. 20-50407

In the United States Court of Appeals for the Fifth Circuit

TEXAS DEMOCRATIC PARTY; GILBERTO HINOJOSA; JOSEPH DANIEL CASCINO; SHANDA MARIE SANSING; BRENDA LI GARCIA,

Plaintiffs-Appellees,

v.

GREG ABBOTT, GOVERNOR OF THE STATE OF TEXAS; RUTH HUGHS, TEXAS SECRETARY OF STATE; KEN PAXTON, TEXAS ATTORNEY GENERAL,

Defendants-Appellants.

On Appeal from the United States District Court
for the Western District of Texas, San Antonio Division

REPLY BRIEF FOR DEFENDANTS-APPELLANTS

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INTRODUCTION

Plaintiffs' brief confirms that the preliminary injunction is unsupported by the record or legal theories before the district court. On appeal, plaintiffs abandon most of the claims on which the district court based its injunction, including (1) age-based discrimination under the Equal Protection Clause as applied, (2) violation of the First Amendment as applied, (3) unconstitutional vagueness, and (4) voter intimidation and suppression of political speech. ROA.117-22, 125-27. That leaves only plaintiffs' claim that the Texas Election Code violates the Twenty-Sixth Amendment as applied.

That claim cannot support the district court's injunction, which explains plaintiffs' minimal effort to defend it. Plaintiffs do not establish standing to bring their as-applied Twenty-Sixth Amendment claims because the underlying injury comes from the novel coronavirus, not any action by the State. And plaintiffs cannot overcome sovereign immunity because defendants do not enforce the statutes that plaintiffs challenge. Even if plaintiffs could establish jurisdiction, their as-applied claims fail because neither defendants nor the challenged state laws have abridged their right to vote. And even if their voting rights were implicated, plaintiffs offer no response to defendants' explanation that the State has an interest sufficient to uphold the challenged law.

Instead, plaintiffs now urge affirmance based on their facial Twenty-Sixth Amendment claim, but they expressly disavowed that claim as a basis for preliminary relief below. Even if the Court were to consider plaintiffs' facial Twenty-Sixth Amendment challenge to Texas's longstanding mail-in ballot rules, it fails for the

same reason that their as-applied claim did: Texas Election Code § 82.003 does not implicate—let alone abridge—individual plaintiffs' right to vote. Even if it did, the appropriate remedy would be to eliminate the exception for voters over age 65, not to allow everyone to vote by mail.

ARGUMENT

I. Plaintiffs Have Not Established Federal Jurisdiction.

The district court's preliminary injunction should be vacated because plaintiffs cannot overcome sovereign immunity or their own lack of standing. As a result, the district court lacked subject-matter jurisdiction over plaintiffs' claims.

A. Sovereign immunity bars plaintiffs' claims.

Plaintiffs acknowledge (at 41-42) that, to overcome immunity, they must show that defendants have both the power to enforce section 82.003 and a willingness to do so. Plaintiffs have failed to meet these elements.

First, plaintiffs have not pointed to any power that Texas's Governor has to enforce mail-in ballot rules. Plaintiffs instead point (at 43) to his power under unrelated sections of the Election Code. This Court has held that "the general duty to see that the laws of the States are implemented" does not satisfy *Ex parte Young*, 209 U.S. 123 (1908); instead, the defendant must have "the particular duty to enforce the statute in question." *Morris v. Livingston*, 739 F.3d 740, 746 (5th Cir. 2014); *see In re Abbott*, 956 F.3d 696, 709 (5th Cir. 2020).[1]

[1] *Fusilier v. Landry*, does not address Texas law, No. 19-30665, 963 F.3d 447 (5th Cir. 2020), and cannot hold otherwise under the rule of orderliness, *United States v.*

Second, plaintiffs point (at 42) to the Attorney General's power to prosecute election fraud. Again, this Court has held that mere power to enforce the law does not overcome sovereign immunity. *City of Austin v. Paxton*, 943 F.3d 993, 1002 (5th Cir. 2019) (rejecting theory adopted by plaintiffs' cases). As plaintiffs cite nothing showing the Attorney General is likely to enforce those laws against them, they cannot overcome immunity. *In re Abbott*, 956 F.3d at 709.

Third, plaintiffs assert (at 40-42) that jurisdiction exists over the Secretary based on her title and the standing discussion in *OCA-Greater Houston v. Texas*, 867 F.3d 604 (5th Cir. 2017). This argument fails for the reasons defendants have already explained (at 18).

Finally, plaintiffs assert (at 39-40 n.5) that even if defendants are correct, the injunction would still stand because the clerks of Travis and Bexar County have not appealed based on sovereign immunity. This ignores that state officials have a strong interest in ensuring local officials comply with state law, *Abbott v. Perez*, 138 S. Ct. 2305, 2324 n.17 (2018), and appellate standing to defend the constitutionality of state statutes, including when relief is directed against local officials, *Moore v. Morales*, 63 F.3d 358, 360-61 (5th Cir. 1995). They also "have standing to contest the preliminary injunction issued against" defendants "who have not appealed" because they are "aggrieved by the decision appealed," which would make state law effectively

Walker, 302 F.3d 322, 325 (5th Cir. 2002) (per curiam). Plaintiffs' assertion (at 44) that the Court may order a state officer to act affirmatively fails for similar reasons.

unenforceable in those counties. *Goldie's Bookstore, Inc. v. Superior Court of Cal.*, 739 F.2d 466, 468 n.2 (9th Cir. 1984).

But even if correct, this does not save the injunction as to the Travis County Clerk, who has actively supported the injunction. *See* Am. Br. Harris Cty. et al. As a result, the injunction against her must be vacated and the case dismissed for absence of an Article III case or controversy. *E.g.*, *United States v. Johnson*, 319 U.S. 302, 304-05 (1943) (per curiam).

B. Plaintiffs have not established standing.

For the reasons explained in defendants' opening brief (at 19-23), plaintiffs lack standing to assert the claims that underlie the preliminary injunction. The Supreme Court has "ma[d]e clear that standing is not dispensed in gross;" "a plaintiff must demonstrate standing for each claim he seeks to press and for each form of relief sought." *Town of Chester v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1650 (2017).

But individual plaintiffs have offered evidence of one injury: fear to vote in person during the pandemic because they "fear . . . contracting the virus . . . regardless of the precautions" taken by defendants. ROA.1614. As defendants explained (at 20), this testimony did not establish standing to pursue plaintiffs' as applied challenges in the district court. Rather than respond, plaintiffs pivot (at 46) and assert that their injury does not depend on COVID-19. But none of the plaintiffs have expressed a desire to vote by mail other than as a result of the pandemic. Thus they have not alleged a cognizable injury in fact. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 564 (1992).

The Texas Democratic Party (TDP)'s defense of its associational and organizational standing is also unavailing. To establish associational standing, TDP relies almost exclusively on *TDP v. Benkiser*, 459 F.3d 582 (5th Cir. 2006). *Benkiser* is, however, distinguishable because TDP alleged that defendants' specific conduct required it to spend additional resources to support its candidate. *Id.* at 587-88. Here, TDP has not even alleged that the supposed unconstitutionality of section 82.003 has caused it to spend additional resources—only the Attorney General's guidance regarding the meaning of a different provision of the Election Code. ROA.1610-11. Moreover, *Benkiser* is not good law because it depends on the notion that a "threatened loss of political power" creates a justiciable controversy. 459 F.3d at 587. *Rucho v. Common Cause*, rejected that premise. 139 S. Ct. 2484, 2499 (2019).

As backup, TDP asserts (at 48-49) that it can sue on behalf of the three individual voters. Even if these voters had standing, however, TDP cannot rely on that standing because it points to nothing showing that they are among those who "elect leadership, serve as the organization's leadership, and finance the organization's activities." *Funeral Consumers All., Inc. v. Serv. Corp. Int'l*, 695 F.3d 330, 334 n.9 (5th Cir. 2012). Because TDP must "identify members who have suffered the requisite harm," TDP has not shown associational standing. *Summers v. Earth Island Inst.*, 555 U.S. 488, 499 (2009).

TDP's claim to organizational standing (at 49-50) also fails. TDP relies entirely on the testimony of Glen Maxey to show that it has diverted resources to respond to the Attorney General's (entirely correct) interpretation of section 82.002, which makes voters with a "disability" eligible to request a mail-in ballot. *Id.* But this has

nothing to do with the current Twenty-Sixth Amendment challenge to section 82.003. Moreover, as defendants explain (at 23), diversion of resources can establish standing only if it prevents an organization from doing something it is legally entitled to do. *Elec. Privacy Info. Ctr. v. Presidential Advisory Comm'n on Election Integrity*, 878 F.3d 371, 379 (D.C. Cir. 2017). Maxey testified that the Attorney General's guidance prevented TDP from engaging in a "robust" campaign to encourage individuals who were ineligible to vote by mail to apply to do so. ROA.1610-11. Such a campaign would be a felony under Texas Election Code §§ 84.0041, 276.013. Because TDP has not identified any specific *legal* projects from which it was required to divert resources, it has not established organizational standing. *NAACP v. City of Kyle*, 626 F.3d 233, 28 (5th Cir. 2010).

II. Plaintiffs Are Not Likely to Succeed on the Merits of the Claims Underlying the Preliminary Injunction.

A. Plaintiffs are not likely to succeed on the merits of their as-applied Twenty-Sixth Amendment claim.

In the district court, plaintiffs sought preliminary relief on the grounds that the Texas Election Code (1) violates the Twenty-Sixth Amendment as applied, (2) discriminates based on age in violation of the Equal Protection Clause as applied, (3) violates the First Amendment as applied, and (4) is unconstitutionally vague in light of the Texas Attorney General's response to a request that he opine on the meaning of the term "disability" in section 82.002 of that Code. ROA.112-18, 122-25, 127-28, 2153-54. Plaintiffs also accused the Attorney General of voter intimidation and suppressing political speech when he provided that guidance. ROA.117-22, 125-27. The

district court found that these specific claims were likely to succeed. ROA.2111-13. Defendants have explained in detail how these claims fail as a matter of law. Appellants' Br. 25-40 (as-applied voting-rights claims); 45-46 (First Amendment); 40-42 (void for vagueness); 42-45 (voter intimidation).

On appeal, plaintiffs rely exclusively on their Twenty-Sixth Amendment claims. *See* Appellees' Br. 17. They do not respond to defendants' arguments that (1) plaintiffs' nonsuit of their state-court claims had claim-preclusive consequences here, (2) section 82.002 is not unconstitutionally vague, (3) the Attorney General cannot conspire with his own staff, (4) no private right of action exists under 52 U.S.C. § 10307(b), and (5) plaintiffs' free-speech rights were not implicated by the Attorney General's guidance regarding the meaning of state law because they have no constitutional right to advocate illegal activity. Under Federal Rule of Appellate Procedure 28, "[p]arties are required to brief their contentions to preserve them." *United States v. Guillen-Cruz*, 853 F.3d 768, 777 (5th Cir. 2017). Therefore, any argument to which plaintiffs do not respond should be deemed unopposed and any counterarguments forfeited. *Id.*

Having abandoned all other claims, plaintiffs concede (at 4-5 n.1) that "if the Court will not affirm the preliminary injunction on Twenty-Sixth Amendment grounds, it should vacate the injunction." But plaintiffs decline to defend the as-applied claim they pursued below. They do not respond to defendants' argument (at 30-32) that section 82.003 satisfies the rational-basis test. Nor do they engage defendants' explanation (at 37-40) that in light of the State's compelling interest in preventing voter fraud, section 82.003 meets the more stringent test announced in

Anderson v. Celebrezze, 460 U.S. 780 (1983), and *Burdick v. Takushi*, 504 U.S. 428 (1992). Plaintiffs do not mention the term "voter fraud" or the *Anderson/Burdick* test. Because plaintiffs have failed to respond, defendants' arguments should be deemed unopposed and grounds for dismissal of plaintiffs' as-applied claims. *Hernandez v. Garcia Peña*, 820 F.3d 782, 786 n.3 (5th Cir. 2016).

Even if they had attempted to defend their as-applied claim, plaintiffs could not show a likelihood of success for the reasons explained in defendants' opening brief. Plaintiffs' right to vote has not been abridged because they have no right to cast an absentee ballot. Appellants' Br. 25-27. Their claim would fail for want of state action in any event because their alleged injury traces directly to the COVID-19 pandemic. *Id.* at 34. To the extent they complain that defendants failed to respond adequately to the risk of COVID-19, they present a nonjusticiable political question. *Id.* at 35-37. And even if they alleged an injury traceable to defendants, section 82.003 is supported by a constitutionally sufficient state interest. The injunction should be vacated.

B. Plaintiffs cannot preserve the preliminary injunction through a facial Twenty-Sixth Amendment claim.

Plaintiffs cannot avoid vacatur by asserting a facial Twenty-Sixth Amendment challenge to section 82.003. Plaintiffs, represented by experienced counsel, expressly disclaimed any request for preliminary relief on this claim, ROA.112, so it is not before the Court. Moreover, their facial challenge suffers from the same defect as their as-applied claim: Section 82.003 does not "abridge" the "right to vote" guaranteed by the Twenty-Sixth Amendment.

1. Plaintiffs expressly disclaimed any request for preliminary relief based upon a facial Twenty-Sixth Amendment claim.

The Court may not affirm the preliminary injunction based on a facial Twenty-Sixth Amendment claim because plaintiffs did not seek an injunction on that ground. "The Court will not allow a party to raise an issue for the first time on appeal merely because a party believes that he might prevail . . . on a different theory." *Leverette v. Louisville Ladder Co.*, 183 F.3d 339, 342 (5th Cir. 1999). This rule applies with particular force where addressing the new issue "would require [the Court] to change the [plaintiffs'] cause of action and change the remedy" ordered by the district court. *In re Spencer*, 868 F.3d 748, 751 (8th Cir. 2017); *accord* Douglas Laycock, et al., Modern American Remedies: Cases and Materials 955 (4th ed. 2010).

Plaintiffs listed a facial challenge to section 82.003 in their complaint. ROA.92. But "[r]ealizing [they] could not satisfy the standards for issuance of a preliminary injunction in the district court" on that ground, they "sought an order" on a different theory. *Abish v. Nw. Nat'l Ins. Co. of Milwaukee, Wis.*, 924 F.2d 448, 452 (2d Cir. 1991). Specifically, plaintiffs sought preliminary relief "[t]o the extent that the state is purporting, in these pandemic circumstances, to apply different voting burdens based on the voter's age." ROA.112. Plaintiffs "preserved" their facial claim "for a final trial on the merits." ROA.112. But now, plaintiffs assert that a facial challenge—based on "the Twenty-Sixth Amendment's unambiguous text" (Appellees' Br. 4)—is the only theory on which the Court should affirm.

A facial challenge is a distinct claim with a different burden of proof leading to a different remedy. To prevail, plaintiffs must "establish[] that no set of

circumstances exist under which the Act would be valid." *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 (2008) (cleaned up). If successful, a facial challenge also leads to a broader remedy than does an as-applied challenge. *See United States v. Nat'l Treasury Emps. Union*, 513 U.S. 454, 478 (1995). Plaintiffs made the strategic choice not to shoulder that burden at the preliminary-injunction stage. They may not press a theory they "strategically rejected below." *Abish*, 924 F.2d at 452. At the very least, remand would be necessary to allow the district court to weigh the equities in the first instance. *eBay, Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 394 (2006).

The district court's suggestion (ROA.2067) that section 82.003 might be facially invalid does not change this analysis. The Supreme Court has repeatedly stated that courts must "rely on the parties to frame the issues for decision," and act only as "neutral arbiter of matters the parties present." *United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1579 (2020) (quoting *Greenlaw v. United States*, 554 U.S. 237, 243 (2008)). "[A]s a general rule," our system assumes parties "know what is best for them, and are responsible for advancing the facts and arguments entitling them to relief." *Id.* Plaintiffs chose to defer adjudication of their facial Twenty-Sixth Amendment challenge. ROA.112. They are bound by that choice as much as they are bound by their choice to abandon their other challenges here. *Leverette*, 183 F.3d at 342. The federal courts may not transform the case on plaintiffs' behalf. *Sineneng-Smith*, 140 S. Ct. at 1581-82.

2. Plaintiffs' facial challenge lacks merit.

Even if the Court could consider their facial challenge, plaintiffs are not likely to show that section 82.003 is facially unconstitutional. Plaintiffs' facial challenge proceeds in three steps. First, they maintain that any rule making voting more difficult abridges the right to vote. Appellees' Br. at 26-27. From there, plaintiffs extrapolate (at 23), the Twenty-Sixth Amendment forbids any rule making voting more difficult based on a voter's age. And they argue that because section 82.003 makes voting more difficult for voters under 65, it must be unconstitutional. *Id.* at 28. This syllogism fails for at least three reasons.

1. To begin with, plaintiffs' analysis skips a step by not identifying what the "right to vote" entailed when the Twenty-Sixth Amendment was ratified. Plaintiffs allege (at 8) that the current trend is toward greater mail-in or convenience voting. But when asking whether a law infringes or abridges an individual right, courts must determine how the right was understood at the time of ratification. *E.g.*, *Dist. of Columbia v. Heller*, 554 U.S. 570, 580-81 (2008).

For example, the First Amendment forbids any law "abridging the freedom of speech." The Court has long recognized, however, that this freedom does not "include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words." *Chaplinksy v. New Hampshire*, 315 U.S. 568, 571-72 (1942). Laws regulating such activities might limit speech in some sense, but they do not "abridge" the "freedom of speech" because the limitations were "well established in the common law when the First Amendment was adopted." *Herbert v. Lando*, 441 U.S. 153, 158 (1979).

Applying this analysis to the Twenty-Sixth Amendment, the Court must determine what the "right to vote" meant in 1971. As defendants have explained—and plaintiffs nowhere refute—the "right to vote" was *not* understood to include a right to vote by mail. *McDonald v. Bd. of Elec. Comm'rs of Chi.*, 394 U.S. 802, 807-08 (1969). Instead, the right to vote itself is implicated only when the challenged law—either alone or in combination with other laws—leaves a voter entirely unable to cast a ballot. *O'Brien v. Skinner*, 414 U.S. 524, 530 (1974); *Goosby v. Osser*, 409 U.S. 512, 521-22 (1973); *accord Am. Party of Texas v. White*, 415 U.S. 767, 795 (1974) (remanding for determination of whether State arbitrarily denied "alternative means to vote"). It does not entitle any voter to a mail-in ballot, so a law that limits that voting method based on age does not "abridge[]" the right protected by the Twenty-Sixth Amendment. *Cf. Herbert*, 441 U.S. at 158.

Plaintiffs' claim (at 20) that the "Twenty-Sixth Amendment must be read *in pari materia*" with other voting amendments misunderstands the Constitution's varying tiers of scrutiny. It does not account for how these Amendments interact with the Fourteenth Amendment to raise the level of scrutiny applied to *all* regulations based on suspect classifications, regardless of whether they implicate the right to vote. *See, e.g.*, *Plyler v. Doe*, 457 U.S. 202, 216 & n.14 (1982). Age, however, is not a suspect classification. *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 83-84 (2000). Thus, election regulations that do not implicate the right to vote are not subject to heightened scrutiny. *Cf. Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997).

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[2] or did so until they permitted no-excuse-mail-in voting.[3] Even States that do not determine eligibility based on age have made it easier for older voters to obtain mail-in ballots—*e.g.*, by allowing them to permanently register for mail-in ballots, rather than requiring periodic re-enrollment.[4] Indeed, Congress has long 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. *Town of Greece v. Galloway*, 572 U.S. 565, 576 (2014).

2. Plaintiffs are also incorrect to assert (at 26-28) that section 82.003 "abridges" the right to vote by making it more "cumbersome" to vote during a pandemic. Since before the Twenty-Sixth Amendment was adopted, the term "abridge" has meant "[t]o reduce or contract." Black's Law Dictionary 2-3 (4th ed. 1968). As plaintiffs'

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[2] Ind. Code § 3-11-10-24(a)(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)(8); Tenn. Code § 26-201(5)(A); Tex. Elec. Code § 82.003; W. Va. Code § 3-3-1(b)(1)(B); *cf.* 17 R.I. Gen. Laws § 17-20-2.

[3] Ariz. Rev. Stat. § 16-541(B)(3) (1980); Colo Rev. Stat. § 1-8-102 (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).

[4] *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).

own authority acknowledges, "[m]uch" abridgment "jurisprudence involves gerrymandering." *Luft v. Evers*, No. 16-3003, 2020 WL 3496860, at *3-4 (7th Cir. June 29, 2020). These cases involve "practices like packing and fracturing of racial blocs" that do not eliminate the right to vote but do allegedly "dilute the value" of certain votes. *Id.*

Procedural rules, by contrast, rarely amount to "abridgment." To the contrary, the Supreme Court has squarely 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[ting]" someone else "from exercising the franchise." *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 626 n.6 (1969). A procedural rule "abridges" the right to vote only if it is so cumbersome that it functionally deprives—or severely impairs—the 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)). Ordinary procedural rules and minor inconveniences do not abridge that right. *E.g.*, *Crawford v. Marion Cty. Elec. Bd.*, 553 U.S. 181, 198 (2008). Indeed, that is the entire premise behind the *Anderson/Burdick* test that plaintiffs so conspicuously ignore.

For example, plaintiffs point (at 36) to *Williams v. Salerno*, 792 F.2d 323 (2d Cir. 1986). But *Williams* is the second of two cases addressing the same New York law creating a "rebuttable presumption that students are not residents of their college communities." *Auerbach v. Rettaliata*, 765 F.2d 350, 352, 354 (2d Cir. 1985). In the first case, the Second Circuit *rejected* a facial challenge to the provision even though it made it "somewhat more difficult" for those aged 18 to 21—the target demographic of the Twenty-Sixth Amendment—to vote. *Id.* In *Williams*, the court applied

Auerbach and upheld an as-applied challenge to the rule where local administrators effectively made that presumption irrebuttable. 792 F.2d at 328.

Plaintiffs' remaining cases, like *Williams*, involve rules that prevent voters from participating in an election or class of elections. In *Jolicoeur v. Mihaly*, California's registration rules prevented young voters from voting in local elections at their place of residence. 488 P.2d 1, 7 (Cal. 1971). Recognizing that all politics is local, the California Supreme Court held that the State may not deny "to those voters the right to help determine the resolution of issues which vitally affect them." *Id. Colorado Project-Common Cause v. Anderson* similarly held that a State may not prohibit those under 21 from participating in an initiative process. 495 P.2d 220, 221 (Colo. 1972). *Walgren v. Board of Selectmen of the Town of Amherst* did not address a broadly applicable rule, but it applied the same principle to invalidate a deliberate effort by local authorities to schedule an election to prevent college students from voting. 519 F.2d 1364, 1365 (1st Cir. 1975) (*Walgren II*).

None of these cases hold that strict scrutiny applies to any voting regulation that differentiates based on age. To the contrary, *Walgren II*, like *Williams*, is the second of two cases addressing the same action. In *Walgren v. Howes*, the First Circuit held that the officials' scheduling decision was *not* subject to strict scrutiny even though it may have limited students' ability to vote in person because students could still vote in the local election by mail. 482 F.2d 95, 99 (1st Cir. 1973). By contrast, the ability to vote by mail did not satisfy the Twenty-Sixth Amendment in *Jolicouer* because their votes would have been counted at their *parents'* home, depriving the students of a vote in local elections where *they* lived. 488 P.2d at 7.

Moreover, these cases do not hold that the Twenty-Sixth Amendment prohibits a rule that applies equally to those aged 19 and 64. In fact, the issue never arose because each case involved college students. But, as the stay panel noted, the history of the Amendment demonstrates that its "purpose was to lower the voting age from twenty-one to eighteen"—not to provide new protections to those over 21. *TDP v. Abbott*, 961 F.3d 389, 408 & n.46 (5th Cir. 2020) (citing Eric S. Fish, Note, *The Twenty-Sixth Amendment Enforcement Power*, 121 Yale L.J. 1168, 1170 (2012)). Though the history of a constitutional amendment cannot overcome its text, that history "form[s] part of the context" of the amendment and gives some indication as to its meaning. Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 256 (2012). That historical context, the construction of the "right to vote" in *McDonald*, and the long history of laws facilitating absentee voting by older voters, all point to the same legal conclusion: Section 82.003 is not facially unconstitutional.

3. Plaintiffs' interpretation of "abridgment" is also unsupported by the record, which contains absolutely no evidence that—outside the anomaly of the current pandemic—voting in person is any more cumbersome than voting by mail. And history suggests otherwise: The Twenty-Sixth Amendment was adopted in part to *avoid* the burdens associated with mail-in voting. S. Rep. No. 92-26 at 14 (1971). Mail-in ballots have become more prevalent since the 1970s, but they still "involve[] a complex procedure that cannot be done at the last minute" and "deprives voters of the help they

would normally receive in filling out ballots at the polls." *Veasey v. Abbott*, 830 F.3d 216, 255 (5th Cir. 2016); *cf. Walgren*, 482 F.2d at 99.[5]

Plaintiffs suggest (at 28) that the very existence of section 82.003 demonstrates that mail-in ballots are less cumbersome than voting in person. Not so. It simply recognizes that older voters, as a group, face unique challenges in physically going to the polls. Fay, *supra* n.4, at 476. That older voters are allowed to vote by mail says nothing about what method of voting is more difficult for any particular voter or group of voters.[6]

Plaintiffs' lack of evidence is particularly troubling as they have not explained why the burden of in-person voting outweighs the State's compelling need to prevent voter fraud. The Supreme Court has acknowledged that the threat of such fraud "is real," *Crawford*, 553 U.S. at 195-96, and "could affect the outcome of a close election," *id.* And this Court has recognized that it is particularly pressing for mail-in ballots. *Veasey v. Abbott*, 830 F.3d 216, 239 (5th Cir. 2016) (en banc); *cf. Crawford*,

[5] *See also* Katie Hall, *Voters who received mail-in ballots without runoff races now told to vote in person*, Austin American-Statesman, July 2, 2020, https://www.statesman.com/news/20200701/voters-who-received-mail-in-ballots-without-runoff-races-now-told-to-vote-in-person (discussing how voter errors in completing application can result their receiving wrong ballot).

[6] Plaintiffs mischaracterize Texas law by saying (at, *e.g.*, 3) that Texas provides no-excuse-mail-in voting to older voters. Texas does not have no-excuse-mail-in voting for *anyone*. *In re State of Texas*, No. 20-0394, 2020 WL 2759629, at *9 (Tex. May 27, 2020) (*Texas*). Because those over 65, as a group, face unique challenges in voting in person, advanced age is one of four "excuses" allowing a voter to vote by mail. Tex. Elec. Code §§ 82.001-.004.

553 U.S. at 225 (Souter, J., dissenting) ("absentee-ballot fraud . . . is a documented problem").

C. The district court ordered the wrong remedy.

Even if section 82.003 were unconstitutional, the injunction should be vacated because it imposes the wrong remedy. As the Supreme Court just reiterated, "[w]hen the constitutional violation is unequal treatment," a court "can cure that unequal treatment either by extending the benefits or burdens to the excepted class, or by nullifying the benefits or burdens for all." *Barr v. Am. Ass'n of Political Consultants, Inc.*, No. 19-631, 2020 WL 3633780, at *12 (U.S. July 6, 2020). The "preference" is to remove the unconstitutional exemption, not eliminate the general rule, particularly when (as plaintiffs allege here) a legislature has added an unconstitutional amendment to a prior law. *Id.* Nevertheless, the question remains: If asked, what would the political branches do? *Olsen v. DEA*, 878 F.2d 1458, 1464 (D.C. Cir. 1989).

Though this inquiry can sometimes lead to "knotty questions about" legislative intent, the Court "need not tackle" that here because the Texas Supreme Court has already done so. *Barr*, 2020 WL 3633780, at *12. *Texas* traced the Texas Legislature's views on absentee and mail-in voting from 1917, when it passed the first absentee-ballot statute, to the present day. 2020 WL 2759629, at *8-9. Shortly before adopting what became section 82.003, the Legislature rejected a bill that would have allowed anyone to vote by mail based on "business necessity or personal convenience." H.B. 114, 59th Leg., R.S. Introduced Version §§ 2, 3, 5; H.B. 114, House Committee Report, Amendments 4-6; *see also* Act of May 29, 1965, 59th Leg., R.S.

Ch. 678, 1965 Tex. Gen. Laws 1552. And the court concluded that Texas's Legislature has been "cautious in allowing voting by mail," *Texas*, 2020 WL 2759629, at *8; and "has very deliberately" declined to extend mail-in ballots to all Texans. *Id.* at *9.

Plaintiffs make three arguments that Court should extend mail-in ballots to all Texans. None has merit.

First, plaintiffs assert (at 34) that defendants "did not present[] argument or evidence" in the district court that the Legislature would choose to level down in this circumstance due to "political blowback." Plaintiffs misapprehend the nature of the question and ignore the history of this case. Whether the Court should level up or level down is a question of severability. *Barr*, 2020 WL 3633780, at *12. Severability is a question of statutory interpretation and the will of the Legislature, *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1701 n.29 (2017), not evidence or the preference of the parties, *Levin v. Commerce Energy, Inc.*, 560 U.S. 413, 437 (2010). Moreover, defendants argued that the district court should abstain pending resolution of *Texas* under *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941).

Plaintiffs argue (at 50-53) that *Pullman* is inapplicable because *Texas* did not involve a Twenty-Sixth Amendment challenge. But *Pullman* applies whenever an unsettled question of state law may "moot or present in a different posture" the constitutional question. *Palmer v. Jackson*, 617 F.2d 424, 428 (5th Cir. 1980). As the stay panel recognized, *Texas* could have mooted plaintiffs' as-applied challenge, *TDP*, 961 F.3d at 397 n.13, and it did speak to the appropriate remedy on their facial one, *Texas*, 2020 WL 2759629, at *9.

Second, plaintiffs assert (at 35) that under *Guinn v. United States*, 238 U.S. 347 (1915), the Court should sever from section 82.003 only the language referring to voters over 65. The Court may, however, sever statutory language only if the remainder functions both independently of that which was removed, and "in a *manner* consistent with [the Legislature's] intent." *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684 (1987); *see also Horizon/CMS Healthcare Corp. v. Auld*, 34 S.W.3d 887, 902 (Tex. 2000). Plaintiffs ask this Court to remove the operative piece of section 82.003. The remainder is neither a complete law nor consistent with Texas's legislative scheme. Indeed, it would leave a statement that "[a] qualified voter is eligible for early voting by mail," Tex. Elec. Code § 82.003, which would render the remainder of the legislative scheme superfluous.

Third, plaintiffs argue (at 33) that the Court cannot level down because many older voters have already applied for mail-in ballots for November. They may have *applied*, but ballots have neither been sent, Tex. Elec. Code § 86.004(a), nor tabulated, *id.* § 87.0241. Voters who have applied for mail-in ballots under section 82.003 would need to be informed that they must vote in person, which may lead to confusion. But that is why the Supreme Court has "repeatedly emphasized that . . . federal courts should ordinarily not alter the election rules on the eve of an election." *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1207 (2020). Moreover, to the extent it is too late to implement the proper remedy, that cuts against plaintiffs who waited decades to seek equitable relief based on a facial

challenge to a statute. *Cf. Block v. North Dakota ex rel. Board of Univ. and School Lands*, 461 U.S. 273, 292 (1983).[7]

III. The Remaining Preliminary-Injunction Factors Favor Defendants.

In addition to not being likely to succeed on the merits, plaintiffs have not shown "irreparable injury" absent that relief, a "favorable balance of hardships," or that the injunction has "no adverse effect on the public interest." *Dennis Melancon, Inc. v. City of New Orleans*, 703 F.3d 262, 268 (5th Cir. 2012).

A. Plaintiffs have not shown irreparable harm absent an injunction.

Plaintiffs disclaim (at 35-36) any reliance on the impact of COVID-19 to show that they will be irreparably harmed absent an injunction. Instead, they claim that "the irreparable harm relevant to the District Court's injunction is the harm to plaintiffs' constitutional rights." *Id.* at 36. But the individual plaintiffs have not expressed any desire to vote by mail outside of "pandemic circumstances." ROA.89. Instead, the district court found, based on the only evidence before it, that they fear to vote in person due to the risk of contagion. ROA.2103; ROA.1613-15; ROA.1034-39. As defendants explained (at 47), this evidence is insufficient to support the preliminary injunction because plaintiffs do not show that they will suffer that harm "in the absence" of such relief. *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 22-23 (2008).

[7] Plaintiffs' reliance (at 34) on the Uniformed and Overseas Citizen Absentee Voting Act of 1986, 52 U.S.C. §§ 20301, *et seq.*, is misplaced. Texas voters living abroad may vote by mail under Texas Election Code § 82.001 regardless of section 82.003.

Specifically, the district court was required to consider whether that harm was likely "in light of," *id.*, the numerous steps the State has taken to reduce the risk of contagion at the polls. ROA.2125-26. As plaintiffs do not dispute, the district court did not. This failure was an abuse of discretion. *In re Volkswagen AG*, 371 F.3d 201, 203 (5th Cir. 2004) (orig. proceeding) (per curiam).

B. The equities favor defendants.

The district court further abused its discretion when it dismissed the harm that the injunction would cause to the State. Defendants have pointed to at least five such harms: (1) the risk of voter confusion associated with changes to the rules this close to the election, Appellants' Br. 35; (2) a corresponding decrease in voter confidence, *id.*; (3) the administrative difficulties that would arise with a sudden influx of mail-in ballots, *id.* 36-37; (4) the potential for increased voter fraud, *id.* 37-38; and (5) Texas's sovereign right to enforce its own law, *id.* at 47.

Plaintiffs respond (at 37-38) only to the last interest, quoting two out-of-circuit cases for the notion that sovereignty is insufficient to overcome individual rights. These quotes are taken out of context because the courts had already canvassed the States' other proffered justifications and found them either unsupported by the record or insufficient to justify the burden on plaintiffs' rights. *See Jones v. Governor of Fla.*, 950 F.3d 795, 810-13 (11th Cir. 2020) (per curiam) (en banc rehearing pending); *United States v. Georgia*, 892 F. Supp. 2d 1367, 1374-75, 1377 (N.D. Ga. 2012). By contrast, plaintiffs do not dispute—and therefore should be deemed to concede—that defendants' other interests justify section 82.003. *Guillen-Cruz*, 853 F.3d at 777.

This concession is well taken. The Supreme Court has repeatedly described the State's interests in preserving the integrity of its elections as "compelling." *Eu v. S.F. Cty. Democratic Cent. Comm.*, 489 U.S. 214, 231 (1989) (collecting cases); *see also*, *e.g.*, *Crawford*, 553 U.S. at 195-96 (discussing importance of controlling voter fraud). Indeed, it has held that preventing voter confusion and preserving voter confidence may alone defeat an injunction in the run-up to an election. *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (per curiam). The Court should hold the same here.

C. The public interest favors vacatur.

Finally, for similar reasons, the public interest would be harmed by affirming the injunction. This Court has held that "[b]ecause the state is the appealing party, its interest and harm merge with that of the public." *Veasey v. Abbott*, 870 F.3d 387, 391 (5th Cir. 2017) (per curiam). Plaintiffs counter (at 39) that other courts apply a different rule in election cases. Even if plaintiffs were correct, *Veasey* was an election case, so it governs here. Moreover, plaintiffs again misdescribe the cases they cite: These courts found that the public interest favored the plaintiffs because the State had offered no evidence that it would be harmed by the injunction. *Obama for Am. v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012); *Charles H. Wesley Educ. Found., Inc. v. Cox*, 408 F.3d 1349, 1355 (11th Cir. 2005). That is not so here. ROA.759-84. And plaintiffs do not contend otherwise.

In sum, plaintiffs are not entitled to a preliminary injunction unless they "clearly carried the burden of persuasion on all four requirements." *Dennis Melancon*, 703 F.3d at 268. For the reasons discussed in defendants' opening brief, plaintiffs did not meet those elements for the claims they pressed in the district court. Because

injunctive relief is discretionary, they cannot seek affirmance on a basis not considered by the district court. *eBay*, 547 U.S. at 394. But even if the Court considered plaintiffs' waived facial challenge, plaintiffs have not shown "that no set of circumstances exist under which the Act would be valid," *United States v. Salerno*, 481 U.S. 739, 745 (1987), or that the equities favor the extreme remedy the district court ordered.

Conclusion

The Court should vacate, reverse, and remand with instructions to dismiss plaintiffs' claims.

Respectfully submitted.

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Certificate of Service

On July 24, 2020, this brief was served via CM/ECF on all registered counsel and transmitted to the Clerk of the Court. Counsel further certifies that: (1) any required privacy redactions have been made in compliance with Fifth Circuit Rule 25.2.13; (2) the electronic submission is an exact copy of the paper document in compliance with Fifth Circuit Rule 25.2.1; and (3) the document has been scanned with the most recent version of Symantec Endpoint Protection and is free of viruses.

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Certificate of Compliance

This brief complies with: (1) the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 6,432 words, excluding the parts of the brief exempted by Rule 32(f); and (2) the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface (14-point Equity) using Microsoft Word (the same program used to calculate the word count).

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