

No. 19-1389

IN THE
SUPREME COURT OF THE UNITED STATES

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

v.

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

**MOTION TO EXPEDITE THE PETITION FOR WRIT OF CERTIORARI
BEFORE JUDGMENT**

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INTRODUCTION

Pursuant to this Court's Rule 21, petitioners move for expedited consideration of this petition for writ of certiorari before judgment, filed on June 16, 2020, to review the decision of the United States District Court for the Western District of Texas on May 19, 2020. In that decision, the district court held that Texas's limitation of no-excuse vote-by-mail to citizens over the age of sixty-five likely violated the Twenty-Sixth Amendment and issued a preliminary injunction ordering Texas to permit voters under the age of sixty-five to cast mail-in ballots during the pendency of the COVID-19 pandemic. Petitioners simultaneously filed an application for an order from this Court vacating the Fifth Circuit's order staying the district court's injunction. *See* 19A1055. Because of the importance of the question presented for review, the urgent need for its prompt resolution, and the fact that judicial economy would be best served without further proceedings in the courts below, petitioners request that, if this Court does not grant the application, the Court consider the petition on an expedited schedule.

First, petitioners request that respondents be directed to file a response to the petition on or before July 1, 2020. Petitioners waive the 14-day waiting period for reply briefs under Rule 15.5 and ask that the petition be distributed to the Court immediately upon respondents filing their brief. (Petitioners may file a reply to respondents' brief in opposition but do not want to delay distribution of the petition.)

Second, if the Court grants the petition, petitioners also request that the Court set an expedited briefing schedule and either resolve the case on the briefs or schedule a special argument session so that the Court can issue its decision by October 5, 2020.

Petitioners have conferred with counsel for respondents and asked for their positions on the relief requested in this motion. Counsel for respondents stated that they were opposed to all of the relief requested.

STATEMENT

1. The Fifth Circuit acknowledged, and respondents have never disputed, that the Texas Election Code “facially discriminates on the basis of age,” Pet. App. 20a, with respect to the right to cast a vote-by-mail ballot. Voters age sixty-five and older can request a vote-by-mail ballot without any excuse, Tex. Elec. Code § 82.003, while voters below the age of sixty-five have the right to vote by mail only if they qualify for one of three excuses: (1) “absence from county of residence,” *id.* § 82.001; (2) “disability,” *id.* § 82.002; or (3) “confinement in jail,” *id.* § 82.004. Further, Texas law criminalizes causing “any intentionally misleading statement, representation, or information to be provided . . . on an application for ballot by mail.” *Id.* § 276.013(a)(3). The Texas Supreme Court has held, in a definitive construction of Texas law, that the lack of immunity to the COVID-19 virus does not qualify as a “disability” within the meaning of Section 82.002. *In re State of Texas*, 2020 WL 2759629, at *9-10 (Tex. May 27, 2020).

2. As is relevant here, this lawsuit challenges Section 82.003's age restriction as a violation of the Twenty-Sixth Amendment. Petitioners filed suit on April 7, 2020, less than a month after Governor Greg Abbott declared a state of disaster due to COVID-19. They subsequently filed a motion for a preliminary injunction.

On May 19, after submission of written evidence and briefing and a hearing, the district court granted petitioners' motion for a preliminary injunction. Pet. App. 71a. Among other things, the district court held that Section 82.003 "violates the clear text of the Twenty-Sixth Amendment." *Id.* at 69a.

Respondents appealed to the Fifth Circuit and sought an emergency stay of the district court's preliminary injunction pending appeal emphasizing that "time is of the essence." Defendant-Appellants' Emergency Motion for Stay Pending Appeal and Temporary Administrative Stay 2, *Texas Democratic Party v. Abbott*, No. 20-50407 (5th Cir. May 20, 2019), BL-8.

On June 4, the Fifth Circuit panel granted respondents' motion for a stay. Pet. App. 2a. In that precedential opinion, the panel also found that *McDonald v. Bd. of Elec. Comm'rs*, 394 U.S. 802 (1969), a case construing the Fourteenth Amendment's Equal Protection Clause, should govern petitioners' Twenty-Sixth Amendment claim. *Id.* at 21a. The panel then held that the state had a rational basis for treating voters differently on the basis of age. *Id.* at 28a.

ARGUMENT

Expedited consideration of the petition for a writ of certiorari before judgment is appropriate and necessary because (a) the question presented must be resolved before the middle of October, (b) this case is of great national significance, and (c) judicial economy would be best served by granting review now, because there is no need for any further proceedings in the courts below.

1. The question whether the Texas Election Code's discriminatory provision of no-excuse vote-by-mail ballots to those sixty-five and over (and denial of no-excuse vote-by-mail ballots to those younger than sixty-five) violates the Twenty-Sixth Amendment must be resolved by October, or millions of Texas voters will be forced to choose between an increased risk of contracting COVID-19 or being unable to exercise their fundamental right to vote. In Texas, applications for vote-by-mail ballots must be received by election officials no later than the 11th day before the election, which this year is October 23. *See* Tex. Elec. Code § 86.0015.

There are millions of voters in Texas under the age of sixty-five who would be able to obtain a no-excuse vote-by-mail ballot in the upcoming general election if Section 82.003's age restriction is held unconstitutional. But in the normal course of affairs, a response to the petition would not be due until July 20, 2020, and the case would not be conferenced until September 29, 2020. If review were granted, the briefing would not be concluded until after the November 3, 2020, general election.

2. This case involves an issue of great national significance. Whether a state can restrict vote-by-mail based on age alone has import not only to the health and safety of voters and their families in Texas but may also impact the ultimate results of the presidential election and other federal elections, in Texas and beyond. As this Court has made clear, “in the context of a Presidential election, state-imposed restrictions implicate a uniquely important national interest.” *Anderson v. Celebrezze*, 460 U.S. 780, 794-95 (1983). There are several other states, including the two other states within the Fifth Circuit, that have age restrictions similar to Texas’s. *See* La. Stat. Ann. § 18:1303J (“A person who has attained the age of sixty-five years or more may vote absentee by mail”); Miss. Code. Ann. § 23-15-627 (West) (providing that a voter must indicate an “appropriate reason” to receive an absentee ballot and that one such reason is “I am sixty-five (65) years of age or older.”).

Moreover, COVID-19 has impelled many voters who were typically comfortable with in-person voting to seek an alternative way to cast their ballots this summer and fall. “[D]ue to the pandemic, voters fear going to public polling places. Their concerns are very real, and very well taken.” Pet. App. 46a. Thus, the Court should anticipate Twenty-Sixth Amendment-based litigation in every state that restricts no-excuse vote-by-mail to an age-based subset of the citizenry. Indeed, such litigation has already begun. *See, e.g., Tully v. Okeson*, No. 1:20-cv-01271-JPH-DLP (S.D. Ind. 2020) (amended complaint filed May 4, 2020) (challenging Ind. Code § 3-11-10-24(a)(5)’s

limitation to “elderly” voters over the age of sixty-five). Given the great national significance of the question presented by this case, expedited consideration is warranted.

3. Judicial economy would be best served by resolving this question without further proceedings in the courts below. Answering the question presented requires no additional proceedings in the Fifth Circuit or the district court, nor does it require any evidence beyond that presented in the district Court. The question presented is “a pure issue of law, appropriate for [this Court’s] immediate resolution,” *Nixon v. Fitzgerald*, 457 U.S. 731, 743 n.23 (1982); *see also Bostock v. Clayton Cty., Georgia*, 2020 WL 3146686, at *3 (U.S. June 15, 2020) (noting that when “the express terms” of the relevant federal law provide an answer, “[f]ew facts are needed to appreciate the legal question we face”). And given that the Fifth Circuit’s decision is precedential, there is nothing more for the district court or court of appeals to decide with respect to application of the Twenty-Sixth Amendment; all future proceedings in the courts below are likely to be controlled by the opinion already issued by the Fifth Circuit. As in *Nixon*, “[e]specially in light of the Court of Appeals’ now-binding decision of the issue presented, concerns of judicial economy fully warrant our decision of the important question presented.” 457 U.S. at 743 n.23.

CONCLUSION

For the reasons stated herein, petitioners respectfully request that if the Court does not grant the application to vacate the Fifth Circuit's stay presented in No. 19A1055, the Court order respondents to file their response to the petition by July 1, 2020, and expedite consideration of the petition for the writ of certiorari before judgment. And if the Court grants review, petitioners request that the Court expedite briefing and argument to enable a decision in time for the November general election.

Dated: June 22, 2020

Respectfully submitted,

By: /s/ Chad W. Dunn

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