No. 19-1389

IN THE

Supreme Court of the United States

BRENDA LI GARCIA, ET AL.,
Petitioners,

v.

GREG ABBOTT, GOVERNOR OF TEXAS, ET AL.
Respondents.

On Petition Writ of Certiorari Before Judgment to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR *AMICUS CURIAE* THE ANDREW GOODMAN FOUNDATION, EQUAL CITIZENS, AND COMMON CAUSE IN SUPPORT OF PETITIONERS.

YAEL BROMBERG
BROMBERG LAW LLC
43 West 43rd St., Suite 32
New York, NY 10036

PETER K. STRIS
MICHAEL N. DONOFRIO
STRIS & MAHER LLP
777 S. Figueroa St., Suite 3850
Los Angeles, CA 90017

JASON HARROW
Counsel of Record
EQUAL CITIZENS
3423B S. La Cienega Blvd.
Los Angeles, CA 90016
(610) 357-9614
jason.harrow@gmail.com

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INTEREST OF THE AMICUS CURIAE[1]

Amici and their counsel have substantial experience with the rarely-litigated Twenty-Sixth Amendment. They also recently sponsored research using a novel data set, described in Part II below, that illuminates the impact of the discriminatory law at issue in this case. That data underscores the need for this Court to grant certiorari and resolve this question of law as quickly as possible.

The **Andrew Goodman Foundation** works to make young voices and votes a powerful force in democracy. The Foundation supports youth leadership development, voting accessibility, and social justice initiatives on campuses across the country. Its Chief Counsel for Voting Rights, Yael Bromberg—also co-counsel on this brief—has litigated and supported litigation for Twenty-Sixth Amendment cases, including *League of Women Voters of Fla., Inc. v. Detzner*, 314 F. Supp. 3d 1205 (N.D. Fla. 2018). She is also the author of the leading recent article on the Amendment, *Youth Voting Rights and the Unfulfilled Promise of the Twenty-Sixth Amendment*, 21 U. Pa. J. Const. L. 1105 (2019), which was (misleadingly) cited by the Fifth Circuit in the opinion granting a stay pending appeal of the district court's injunction. Pet. App. 42a n.46.

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[1] As required by Supreme Court Rule 37, counsel of record for all parties consented to the filing of this brief by written notice after counsel of record for *amici* provided timely notice of intent to file. Further, no counsel for any party authored this brief in whole or in part and no person or entity other than *amici* and their counsel funded its preparation or submission.

Equal Citizens was founded by Harvard Law Professor Lawrence Lessig to vindicate the principle that all votes should count equally. Equal Citizens brought a Twenty-Sixth Amendment challenge, that remains ongoing, to Alaska election officials' decision to mail absentee ballots only to voters 65 years of age or older. They were a co-sponsor, along with the Andrew Goodman Foundation and others, of the recent report "Age Discrimination In Voting At Home released on June 4, 2020 and available at https://voteathome26.us

Founded fifty years ago in 1970, **Common Cause** was organized on the core principle that as more eligible Americans participate, democracy in the United States becomes stronger. In 1971, Common Cause spearheaded coordinated state efforts to ratify the Twenty-Sixth Amendment, thereby extending the right to vote to 18-year old citizens and outlawing age discrimination in access to the franchise. Common Cause engages in grassroots advocacy to increase voter participation, reduce partisan gerrymandering, reform campaign financing, overcome obstacles to lawful voting, and make elections more fair, secure, and accessible. Today, Common Cause has more than 1.2 million members and supporters nationwide, and a network of affiliates in 25 states including Texas.

ARGUMENT

The Twenty-Sixth Amendment could not be clearer: "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. Texas law violates that unequivocal command by

providing that "[a] qualified voter is eligible for early voting by mail if the voter is 65 years of age or older on election day," Tex. Elec. Code § 82.003, while requiring voters younger than 65 to provide a statutorily-mandated reason to become eligible. *Id.* § 82.001–82.002, 82.004. Seven other states have similar unconstitutional laws. *See* Report, "Age Discrimination In Voting At Home," available at https://voteathome26.us.

As current events and experience painfully demonstrate, unforeseen events like the COVID-19 pandemic put extra pressure on voting rights and the laws and systems in place to protect them. The Twenty-Sixth Amendment is a critical part of that infrastructure, especially as more voters, and more *younger* voters, participate via absentee ballots and vote-by-mail. Unfortunately, a series of necessarily rushed decisions from Courts of Appeals, issued during an election season unlike any other, have nearly written the Twenty-Sixth Amendment out of the Constitution. This Court should therefore grant review immediately to restore the text of the Amendment—no less a part of the Constitution than any other part—to its rightful place.

I. This Court Should Clarify That The Twenty-Sixth Amendment Prohibits Age-Based Discrimination In Absentee Voting.

The Twenty-Sixth Amendment is at a crossroads. It was adopted as a civil rights amendment designed to level the voting-rights playing field by age, just as much as the Fifteenth was for race and the Nineteenth was for sex. Like those Amendments, its plain language precludes laws and state action that stratify

voters' opportunities to exercise the franchise based on age for all voters eighteen years old or older.

For a decade after ratification, courts deployed it consistent with that purpose—even applying strict scrutiny to invalidate restrictions—and then, starting in the 1980s, litigation under the Amendment went quiet. Yael Bromberg, *Youth Voting Rights and the Unfulfilled Promise of the Twenty-Sixth Amendment*, 21 U. Pa. J. Const. L. 1105, 1119, 1134–37 (2019). But it remained, and remains, part of the constitutional foundation that supports every voter's right to vote, regardless of how frequently it was invoked in litigation over time. Put differently, the fact that it was infrequently invoked in litigation for a period of time did not and does not permit states to violate its text by facially discriminating on the basis of age.

Two recent decisions of the Courts of Appeals in the midst of the 2020 election cycle—the Fifth Circuit's under review here,[2] along with *Tully v. Okeson*, 2020 U.S. App. LEXIS 31723 (Sept. 30, 2020)—threaten the Amendment's plain language, history, and intent. Their analysis and conclusions are also at odds with recent Twenty-Sixth Amendment jurisprudence that predates the 2020 election cycle, and the abundant Twenty-Sixth Amendment litigation that arose in the decade following its ratification. *See, e.g.*, *Symm v. United States*, 439 U.S. 1105 (1979), *aff'g United States v. Texas*, 445 F. Supp. 1245 (S.D. Tex. 1978); *Walgren v. Bd. Of Selectmen of Town of Amherst*, 519 F.2d 1364 (1st Cir. 1975); *League of Detzner*, 314 F.

[2] This brief treats the September 10, 2020 merits panel decision as that under review, per the September 18, 2020 letter of Petitioners' counsel.

Supp. 3d at 1205; *Worden v. Mercer County Bd. Of Elections*, 294 A.2d 233 (N.J. 1972).

The Court should grant the petition and provide a much-needed course correction.

A. The Twenty-Sixth Amendment Is Unequivocally A Civil Rights Amendment.

Nearly fifty years ago, the nation united across partisan lines to ratify the Twenty-Sixth Amendment in record-time. That historic process is a powerful reflection of the fact that Congress and the ratifying states saw the Amendment as a constitutional guarantee providing all voters the same opportunity to exercise the franchise regardless of age. As explained below, the Amendment and its animating principles are in the midst of a renewal. The recent decisions by the Fifth and Seventh Circuits are radical and dangerous departures from the historical arc of the Amendment and threaten to render it meaningless on the eve of its Fiftieth Anniversary, and at a time when youth voting rates are on the rise.

In 1971, the Twenty-Sixth Amendment was sent to the states with bipartisan supermajorities in Congress, where the Senate voted 94-0 and the House voted 401-19. It then rounded the requisite 38 states, all in less than 100 days. That made it the quickest amendment to be ratified in this nation's history. *See* Bromberg at 1107. When it was ceremoniously added to the Constitution by President Richard Nixon, the President emphasized the critical role that young people serve in infusing the democratic process with "some idealism, some courage, some stamina, some high moral purpose that this Nation always needs, because a country, throughout history, we find, goes

through ebbs and flows of idealism." Richard Nixon, U.S. President, Remarks at the Ceremony Marking the Certification of the 26th Amendment to the Constitution (July 5, 1971).

A variety of reasons were advanced to support ratification, not the least of which was a general recognition of the nation's expansion towards a more inclusive suffrage. Additional themes included how voices of hope and idealism are central to the functioning of a healthy democracy; that increased educational attainment and awareness readied youth voices for the franchise more than generations past; and that young people increasingly assumed adult responsibilities such as fighting in war, taking on debt, and living independently. *See* Bromberg at 1131–32 (citing legislative record).

The Twenty-Sixth Amendment did not garner virtually unanimous support out of thin air. It gained support from its proposal in 1942 through President Eisenhower's reinforcement during his 1954 State of the Union, but it was not until the tail-end of the nation's Second Reconstruction (1954-1968) that support for the Amendment reached a tipping point. *Id.* at 1117–23. Expansion of the youth vote was an "integral part and natural extension of the Second Reconstruction." *Id.* at 1120.

Outside of Congress, "[i]t was the upswell of 1960s activism . . . that ultimately expanded the vote to youth." *Id.* at 1121. "Every movement at the time had a youth culture." *Id.* at 1121-22 & n.69. At the same time, "the military-franchise connection [that] had been a persistent theme" since colonial days came to the fore once again as the Vietnam War wore on. *Id.* at

1122 & nn.70–72. Within a matter of weeks in late 1968 and early 1969, the youth-voting organization Let Us Vote blossomed from a Stockton, California college campus to a national movement with 3,000 high schools and 300 college campuses across all 50 states, even landing the January 31, 1969 cover of Time Magazine. *Id.* at 1122. From there, the Youth Franchise Coalition brought together Let Us Vote and over thirty other "prominent civil rights, education, labor, and youth organizations" representing "millions of young people." *Id.* at 1123. The Coalition helped channel that energy into the lobbying efforts that resulted in the Twenty-Sixth Amendment. *Id.*

Those efforts echo throughout the Amendment's legislative history. As the Senate Report accompanying the Senate Joint Resolution which was later enacted as the Twenty-Sixth Amendment provides:

> [F]orcing young voters to undertake *special burdens*—obtaining absentee ballots, or traveling to one centralized location in each city, for example—in order to exercise their right to vote might well serve to dissuade them from participating in the election. This result, and the election procedures that create it, are at least inconsistent with the purpose of the Voting Rights Act, which sought to encourage greater political participation on the part of the young; such segregation might even amount to a denial of their 14th Amendment right to equal protection of the laws in the exercise of the franchise.

S. REP. NO. 92-26, at 14 (1971) (accompanying S.J. Res. 7, 92d Cong. (1971)) (emphasis added). As the novel data produced by *amici* reveals, *see* infra § 2, the lack of access to vote-by-mail imposes a "special burden" on account of age which serves to "dissuade [voters] from participating in the election." *Id.*

The parallel House Committee Report similarly emphasized the intended scope of the Amendment to remedy both discriminatory intent and effect, and the role of the "right to vote" doctrine as protected by other amendments in interpreting infringements of the Twenty-Sixth Amendment:

> [W]here a state law restricts [the right to vote] . . . on a basis other than age . . . and it is claimed that such law has either the purpose or effect of discriminating on account of age, resolution of the claim depends on decisional law concerning the right to vote as protected by other provisions of the Constitution.

H.R. REP. NO. 92-37, at 8 (1971).

In addition to its direct legislative history, the Amendment's contemporaneous historical context is replete with evidence of its Fourteenth Amendment influence. For example, in the Voting Rights Act Amendments of 1970, Congress declared that a twenty-one-year voting age requirement "has the effect of denying to citizens eighteen years of age but not twenty-one years of age the due process and equal protection of the laws that are guaranteed to them under the fourteenth amendment of the Constitution;" and "does not bear a reasonable relationship to any compelling State interest." Pub. L. No. 91-285, §§ 301-305. Similarly, *Katzenbach v. Morgan,* 384 U.S. 641

(1966), was premised on the Fourteenth Amendment and inspired the passage of the Voting Rights Act Amendments of 1970, *see* Bromberg at 1124–26, which is still good law with regard to access to the franchise free of age discrimination with respect to federal races, *see id.* at 1128–31.

In the decade following ratification, courts applied strict scrutiny to age-based infringements of the franchise. *See* Bromberg, at 1135–36, n.126 (collecting cases). The Amendment lay dormant until relatively recently. In the modern era, litigants and the judiciary have uniformly recognized the lack of guidance on which standard of review to apply, but have recognized that—*at a minimum*—the Amendment forbids prima facie and intentional discrimination on account of age. Bromberg at 1111, n. 21; 1164.

For example, the United States District Court for the Northern District of Florida granted a preliminary injunction sought by the League of Women Voters of Florida and *amicus* here The Andrew Goodman Foundation and enjoined the state's ban on the placement of polling stations on college campuses during the early voting period. *Detzner*, 314 F. Supp. 3d at 1205. The court found that the ban was both intentionally and facially discriminatory. "In the Twenty-Sixth Amendment context, this Court is more willing to call out a pretextual rationale—or 'a banana [is] a banana' in Plaintiffs' counsel's words." *Id.* at 1221 n.17; *see also One Wis. Inst., Inc. v. Nichol*, 186 F. Supp. 3d 958 (W.D. Wis. 2016) (acknowledging the lack of clarity on what standard of review to apply to Twenty-Sixth Amendment claims, but applying a Fifteenth Amendment intentional discrimination analysis).

B. The Fifth Circuit's Rulings Cannot Be Squared With The Amendment's History And Text.

The Fifth Circuit's decisions staying and then reversing the district court's grant of an injunction improperly deviate from the Amendment's historical trajectory in two key respects: they rely on a flawed, overly narrow comparison in deciding what counts as an abridgment of the right to vote; and they incorrectly construe the right to vote as excluding absentee voting. Recently echoed by the Seventh Circuit, these errors require correction by this Court.

1. The motions panel misread the Amendment's history in concluding that "there is plenty of evidence that the Amendment's most immediate purpose was to lower the voting age." *Texas Democratic Party v. Abbott*, 961 F.3d 389, 408 (5th Cir. 2020).[3] As explained, that is not a fair reading of the history. The Amendment was intended to, and does, accomplish much more than a single change to the minimum voting age.

The merits panel, by contrast, at least identified the right starting point, holding that the Amendment "confers an individual right to be free from any denial or abridgment of the right to vote" on account of age,

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[3] The motions panel incorrectly cited Ms. Bromberg's article for this proposition. *Id.* at 408 n.46. That article repeatedly states the opposite conclusion, including through quotations from court decisions that have closely examined the text and history of the Amendment. *E.g.*, Bromberg at 1136 (The history "'clearly evidences the purpose not only of extending the voting right to young voters but also of encouraging their participation by the elimination of all unnecessary burdens and barriers.'") (quoting *Worden*, 294 A.2d at 237)).

because the "language and structure of the Twenty-Sixth Amendment mirror" that of the Fifteenth, Nineteenth, and Twenty-Fourth Amendments. 2020 WL 5422917 at *9. But the merits panel then wrenched the Amendment off of its historical footings in order to frame the plaintiffs' challenge as one focused on a "privilege" or "indulgence" vis-à-vis older voters. *See, e.g.*, 2020 WL 5422917, at *1, 11, 13–16. This sleight of hand rests on the court's unsupported assumption that the Twenty-Sixth Amendment "is a prohibition against adopting rules based on age that deny or abridge *the rights voters already have*." *Id.* at *13 (emphasis added). That proposition is nowhere in the Amendment. The plain text prohibits *all* laws that "deny or abridge" the "right to vote . . . on account of age." The Amendment has no grandfather clause.

To be sure, "'[i]t makes no sense'" to analyze an abridgment claim "'without some baseline with which to compare'" a challenged law or practice. *Id.* (quoting *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 334 (2000)). But it is not self-evident, as the Fifth Circuit assumed, that the baseline is always and necessarily "the rights voters already have." Indeed, that view cannot be squared with the text and history of the Amendment, as discussed above. As the dissent correctly points out, that "the panel majority does not cite any case that compels an understanding of 'abridge' in the context of a voting rights amendment that requires a plaintiff's position to be worsened." *Id.* at *21.

The dissent avoids the majority's analytical error by framing the abridgment comparison correctly. The question is whether the law or practice in question "depriv[es] individuals of the equal opportunity to vote

based on a protected status." *Id.* at *21. Viewed through that lens, the Texas law abridges the rights of younger voters on account of age by giving them "fewer options . . . in relation to older voters." *Id.* at *23. Relative voting opportunities is the comparator that squares best with the Twenty-Sixth Amendment's text, history, and rights-conferring status. It is also consistent with how courts have generally prohibited states from abridging individuals' ability to vote based on another protected status: race. *See id.* at *20 ("[*South Carolina v.*] *Katzenbach*, [383 U.S. 301 (1966)], does not cabin its language to the word 'deny' but rather interprets the phrase ['deny or abridge'] in total to prevent an array of discriminatory practices including facial classifications."). The Fifth Circuit ignored this clear law and logic and thereby impermissibly narrowed the scope of the Amendment. This Court should grant review in order to correct that error.

2. The Fifth Circuit's reasoning also eviscerates the meaning of "the right to vote," the language used to describe the scope of the right to vote in not only the Twenty-Sixth but also the Fifteenth, Nineteenth, and Twenty-Fourth Amendments. By categorically removing all laws relating to voting by mail from the scope of that right, the Fifth Circuit creates an enormous hole in the heart of the voting rights amendments, which use the same text to describe their scope. Indeed, just weeks later, the Seventh Circuit reached the remarkable and untenable conclusion that there would be no relief available under the "Fifteenth, Nineteenth, or Twenty-Fourth Amendments" with respect to "hypothetical laws" discriminating on the

basis of race, sex, or tax status in mail voting. *Tully* at *98.

This is a reductio ad absurdum. There is no basis whatever in the text or history of the Twenty-Sixth or any voting rights amendment that limits the phrase "right to vote" to "right to vote in person on election day at a single polling place." And this atextual standard is certain to be unevenly applied, because, even before the pandemic,[4] nine states saw more than 50% of their votes cast by mail. Brennan Center, *Preparing For An Election Under Pandemic Conditions*.[5] Under the Fifth Circuit's reasoning, in Arizona, Oregon, or Utah, where voting by mail is the choice of a majority of voters and voting in person the second option, vote-by-mail restrictions could come within the Amendment. But not in Texas or Indiana.

In addition, both courts overplayed *McDonald v. Board of Election Commissioners of Chicago*, 394 U.S. 802, 807 (1969), in concluding that the right to vote does not include absentee voting. *See Texas Democratic Party*, 2020 WL 5422917 at *10, *12; *Tully*, 2020 WL 5905325 at *2–3. As Judge Stewart clarified in dissent, "*McDonald* is a limited holding on its own terms because it is based on a lack of evidence in the record."

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[4] Though not essential to *amici's* point, the pandemic underscores the need for review and correction of the Fifth and Seventh Circuits' flawed reading of the Twenty-Sixth Amendment. In the face of an extraordinary circumstance like COVID-19—which heightens the risk of in-person voting for *every* voter (and those with whom they come in contact)—the importance and utility of a level field of every voter's opportunity to exercise the franchise.

[5] Preparing Your State for an Election Under Pandemic Conditions, BRENNAN CENTER FOR JUSTICE (Oct. 14, 2020), https://www.brennancenter.org/our-work/research-reports/preparing-your-state-election-under-pandemic-conditions.

Texas Democratic Party, 2020 WL 5422917 at *22 (Stewart, J., dissenting). Indeed, the *McDonald* Court denied relief because it found "nothing in the record to indicate that the Illinois statutory scheme has an impact on appellants' ability to exercise the fundamental right to vote." *McDonald*, 394 U.S. at 807; *see id.* at 807 n.6. Critically, the *McDonald* Court found that "the distinctions made by Illinois' absentee provisions are not drawn on the basis of wealth or race," categories warranting "a more exacting judicial scrutiny." *Id.* at 807. The Twenty-Sixth Amendment did not identify age as a prohibited basis for abridging or denying the right to vote until 1971, two years *after* *McDonald*. It is simply too thin a reed to support the Fifth and Seventh Circuit's categorical exclusion of absentee voting from the right to vote protected by the four voting-rights amendments.

In sum, the legacy and power of the Twenty-Sixth Amendment stems from its adoption and ratification, when the nation came together unanimously and across partisan lines to restore hope for the future by investing in the future. From that perspective, the Fifth Circuit's treatment of the Twenty-Sixth Amendment is much more insidious than its endorsement of a law that unconstitutionally suppresses the vote in eight states. On the eve of the Amendment's fiftieth anniversary and during a pivotal election year when younger people are poised to vote at record rates, and with the pandemic continuing to threaten every voter's health, the Fifth and Seventh Circuit opinions ignore the fundamental democratic principle animating the Amendment: that young voters are critical to the health and resilience of our

democracy particularly as the nation "goes through ebbs and flows of idealism."

C. The Fifth Circuit Overlooked Two Federal Statutes That Make Clear That Absentee Balloting Is Part Of The "Right To Vote."

In addition to the court's errors of constitutional interpretation, two federal statutes—both passed after *McDonald*—directly contradict the Fifth Circuit's reasoning and make clear why Texas *cannot* limit access to absentee ballots for younger voters solely based on their age. As explained below, 52 U.S.C. §§ 10502 and 20302 make explicit that granting a voter the option of using an absentee ballot *furthers* the "right to vote." Thus, a state may not give two different voters different levels of access to absentee voting on account of age, without a compelling justification and narrow tailoring.

1. 52 U.S.C. § 10502. One year after *McDonald* decided a narrow issue with respect to absentee balloting, Congress expressly placed absentee balloting within the "right to vote." In passing 52 U.S.C. 10502, Congress found

> that the imposition and application of the durational residency requirement as a precondition to voting for the offices of President and Vice President, and the lack of sufficient opportunities for absentee registration and absentee balloting in presidential elections—
>
> (1) denies or abridges the inherent constitutional right of citizens to vote for their President and Vice President;

52 U.S.C. § 10502(a) (added by Pub. L. No. 91-285 (June 22, 1970)).

Congress then went on to require that states provide absentee ballots for presidential elections to citizens "who may be absent from their election district or unit in such State on the day such election is held and who have applied therefor not later than seven days immediately prior to such election." *Id.* § 10502(d). Thus, since 1970, all states have been *required* to operate an absentee balloting regime in presidential elections, precisely because not having one "denies or abridges the inherent constitutional right of citizens to vote for their President and Vice President." *Id.* § 10502(a)(1).

Arizona Senator Barry Goldwater was a primary advocate of that legislation. Goldwater located Congressional power for this provision in the Fourteenth Amendment and noted the law was "designed to protect the *right to vote* for citizens who travel." United States Senate, Committee on the Judiciary, Subcommittee on Constitutional Rights, *Amendments to the Voting Rights Act of 1965: Hearings before the United States Senate Committee on the Judiciary*, 91st Cong., 2d Sess., at 285 (Feb. 19, 1970) (emphasis added). When this Court upheld the provision at issue against a constitutional challenge, it recognized that the "right to vote" was clearly at stake in provisions related to absentee balloting. *Oregon v. Mitchell*, 400 U.S. 112, 285 (1970) (noting that "[t]hose who take up a new residence less than 30 days before a presidential election are guaranteed the right to vote, either in person or by absentee ballot") (opinion of Stewart, J., joined by Burger, C.J., and Blackmun); *id.* at 134 (noting that absentee balloting requirement

"insure[s] a fully effective voice to all citizens in national elections") (controlling opinion of Black, J.).

Critically, this congressional enactment took place immediately prior to the Twenty-Sixth Amendment's ratification. This starkly contrasts with the Fifth Circuit's narrative that vote-by-mail was not contemplated within the right to vote framework considered by the framers of the Twenty-Sixth Amendment. Indeed, ratification of the Amendment "was a natural extension of the nation's arc towards democratic inclusion." Bromberg at 1123.

2. 52 U.S.C. § 20302. Fifteen years later, Congress again required states to expand absentee balloting, this time for a new class of voters: those in the military (and their families), and those living overseas. Once again, Congress recognized that absentee balloting is part of the right to vote.

In particular, 52 U.S.C. § 20302(a)(1) requires states to "permit absent uniformed services voters and overseas voters to use absentee registration procedures and to vote by absentee ballot in general, special, primary, and runoff elections for Federal office." In later amendments, Congress instructed election administrators to "be aware of the importance of the ability of each uniformed services voter to exercise the right to vote"—which would likely be by absentee ballot. Pub. L. No. 107–107, § 1601 (codified at 52 U.S.C. § 20301, note).

II. This Court Should Grant Review Now Because Texas's Discriminatory Law, And Others Like It, Have A Major Impact On How Different Age Cohorts Exercise The Right To Vote.

Evidence from recent elections, including those before the pandemic, show that more voters, and more younger voters, are using absentee ballots than ever before. In the face of that data, the impact of age-discriminatory laws like Texas's clearly and substantially impact a growing swath of the electorate's right to vote. Review is warranted.

A. Younger Voters Relied On Absentee Ballots Even Before The Pandemic.

The Texas law is unconstitutional regardless of whether anyone under 65 wished to vote by absentee ballot. But the abridgement of the right to vote is particularly impactful because, when the option to vote by mail is available, younger voters take advantage of it at high, and increasing, rates.

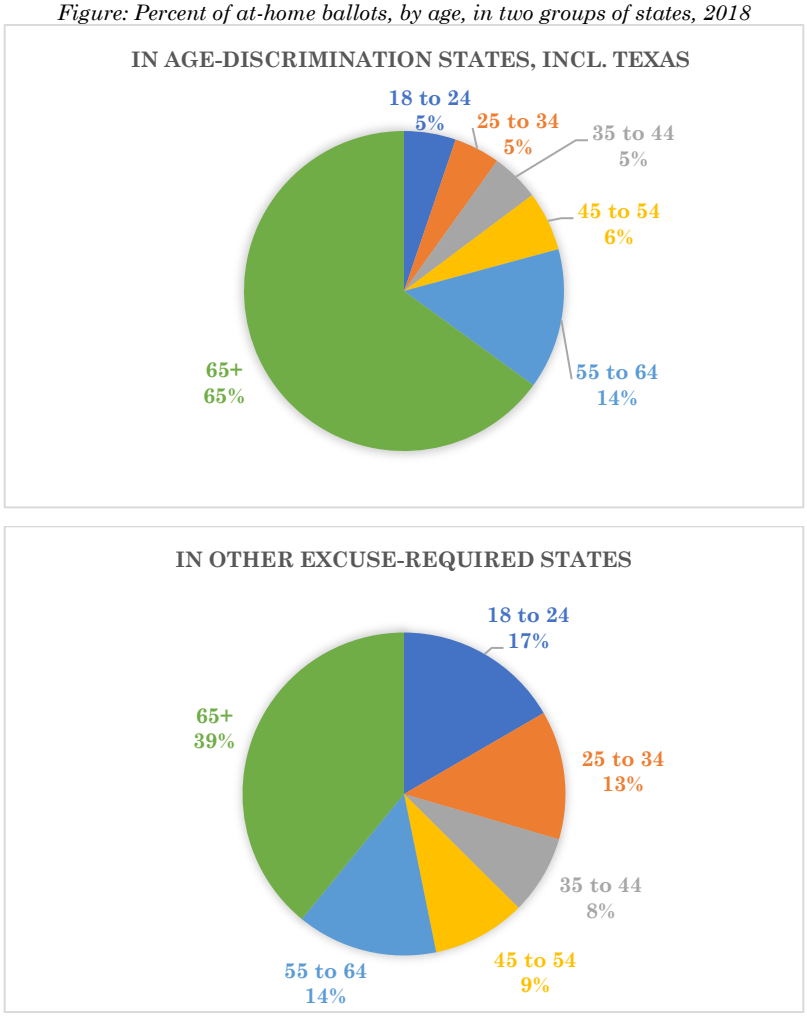
Amici ran a comparison of voter behavior based on the data contained in the Current Population Survey Voting and Registration Supplement Sample for the 2018 fall election. That is a high-quality dataset with over 55,000 relevant respondents from across the nation.[6]

As shown in the figures below, people under 65 make up a substantially larger proportion of the 2018 vote-at-home voters in the states that do not discriminate by age (61%) than in those that do (35%). Put differently, in states where voters under 65 cannot

[6] All underlying data can be found at http://voteathome26.us.

vote at home without an excuse, voters who are 65 and older comprise nearly 65% of all such ballots. But in states without these provisions, the use of at-home ballots is much more evenly distributed across all age cohorts, as older voters make up only 39% of the votes from home in those states.

Figure: Percent of at-home ballots, by age, in two groups of states, 2018



Additional data shows that these discriminatory policies requiring only younger voters to provide an excuse deny younger cohorts access to at-home ballots they would otherwise use. For instance, nationally, 22.5% of voters 18 to 24 and 20.7% of those aged 25 to 34 used at-home ballots in 2018. At the same time, 30% of voters over 65 voted at home nationally in 2018—a higher number, to be sure, but not overwhelmingly so.

But that gap ballooned in states that discriminate by age. In those states, 21.3% of adults over 65 voted at home, but only 6.6% of voters 18 to 24 and a meager 3% of voters aged 25 to 34 did so.

When vote-at-home is available to younger cohorts, they use it. Only 6.6% of voters 18 to 24 vote by mail in age-discrimination states, compared to 22.5% nationally—an increased factor of 3.4. The trend is revealed across age cohorts: a factor of 6.8 for ages 25 to 34; 7.18 for ages 35 to 44; 6.2 for ages 45 to 54; and 3.5 for ages 55 to 64. The factor drops to 1.5 for those age 65 or older, suggesting that, although other considerations may be at play when comparing reliance between age-discrimination states and national trends, there is nonetheless a strong correlation between the availability of the voting method and the use of it.

B. The Pandemic Highlights Why Equal Access To Voting By Mail Across Age Groups Is Protected By The Twenty-Sixth Amendment.

The numbers were revealing before the COVID-19 pandemic changed the nation. Since the onset of this deadly respiratory disease for which there is no known

vaccine or cure, the ability to vote absentee or by mail has become indispensable. It is the primary way Americans exercise their "right to vote": well over 50% of voters in most states are voting by mail, with some states' use of vote by mail approaching 100%—even where voters were not used to voting by mail before. Denying younger voters the opportunity thus will directly harm their right to vote.

In essentially every state to have held an election since the pandemic worsened, the trend toward voting by mail has been consistent. Recently, in the June 23, 2020 primary in Kentucky, 85% of voters voted by absentee ballot—up an astonishing 42.5 times (or 4,250%) from just 2% use of absentee ballots in the 2018 general election in that state. Paul Vasan, *Kentucky Secretary of State says absentee ballots account for 85% of vote*, WHAS11 (June 24, 2020), https://bit.ly/2ZqVnFh.[7] Similarly massive jumps have been seen across the Nation: Maryland went from 4% absentee in 2016 to 97% in 2020; Iowa from 19% to 80%; New Mexico from 7% to 64%; Rhode Island, from 3% to 83%; Washington, DC from 7% to 69%; Pennsylvania from 2% to 64%; and South Dakota from 14% to 58%. Nathaniel Rakich and Geoffrey Skelley, *What the June 2 primaries can tell us about November*, FiveThirtyEight (June 8, 2020), https://53eig.ht/32gTs86. And that excludes states like Idaho and Montana, that quickly switched to *all* mail elections for the primary. The trend continues for the upcoming general election.

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[7] For a comparison to 2018 totals, *see* Brennan Center, *supra* note 5.

A recent filing in Tennessee shows the massive harmful impact these laws will have in the time of the pandemic. In seeking to stay an injunction that had ordered Tennessee to provide absentee ballots to all voters who request them on the grounds that avoiding COVID-19 is a sufficient excuse to obtain such a ballot, the state's filings reveal the stunning fact that it was "prepared for all voters over age 60, or about 36% of registered voters, to vote absentee as they are permitted by statute to do"—while at the same time acknowledging that less than 3% of all voters typically vote by absentee ballot. Mot. to Stay in *Fisher v. Hargett*, 604 S.W.3d 381 (Tenn. 2020), at 20, 22 (emphasis added). In other words, the state was prepared to implement an undisputed voting-access disparity purely based on the age of the voter: 100% availability of a safe and preferred method for those 60 or older, compared to a historic mere 3% availability for younger voters. The Tennessee Supreme Court ultimately allowed all Tennessee voters to obtain absentee ballots based on their own determinations of whether they or someone they care for has "special vulnerability to COVID-19" without a "physician's statement." *Fisher*, 604 S.W.3d at 393–94 n.10. That means that younger voters will at least have *some* access to mail voting in Tennessee, though the Constitution prohibits this unequal access.

This Court's review is urgently needed.

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The Fifth Circuit rulings at issue here, echoed by the Seventh Circuit, threaten to set the Twenty-Sixth Amendment adrift. As explained above, the reasoning and results reflected in those decisions cannot be reconciled with the text and history of the Amendment, and they contradict Congress's express finding that "the lack of sufficient opportunities for absentee registration and absentee balloting in presidential elections . . . denies or abridges the inherent constitutional right of citizens to vote for their President and Vice President." 52 U.S.C. § 10502(a). In addition, recent election data confirms the need to maintain level access to absentee voting across all ages, and our collective experience with the pandemic only amplifies that concern.

For all of the reasons discussed above, this Court should step in to address the recent misapplications of the Twenty-Sixth Amendment and ensure its continued application remains true to its text and history as its fiftieth anniversary approaches.

CONCLUSION

This Court should grant certiorari and hold that the Twenty-Sixth Amendment prohibits age discrimination in voting.

Respectfully submitted,

YAEL BROMBERG
BROMBERG LAW LLC
43 West 43rd St., Suite 32
New York, NY 10036

PETER K. STRIS
MICHAEL N. DONOFRIO
STRIS & MAHER LLP
777 S. Figueroa St., Suite 3850
Los Angeles, CA 90017

JASON HARROW
Counsel of Record
EQUAL CITIZENS
3423B S. La Cienega Blvd.
Los Angeles, CA 90016
(610) 357-9614
jason.harrow@gmail.com

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