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Texas Democratic Party v. Abbott: Fifth Circuit Narrowly Interprets Twenty-Sixth Amendment, Putting Life and Liberty on the Ballot for Young Texas Voters

I. OVERVIEW

To vote, or not to vote, that is the question. Throughout the 2020 election cycle, many voters in Texas had to choose between potentially exposing themselves to COVID-19 at the polls and voting in the 2020 election.[1] This is because in the midst of the COVID-19 pandemic, Texas voting law steadfastly declared that "in-person voting is the rule" and granted the privilege of voting absentee only to certain classes of voters.[2] Notably, Texas only provides "no-excuse" absentee ballots to

1. *See* Tex. Democratic Party v. Abbott (*Abbott III*), 978 F.3d 168, 175 (5th Cir. 2020) (noting Texas does not recognize fear of exposure to COVID-19 as a statutory disability allowing voters under the age of sixty-five to avoid the polls by voting absentee), *cert. denied*, 141 S. Ct. 1124 (2021) (mem.).

2. *Id.* at 174; *see* TEX. ELEC. CODE ANN. §§ 82.001-82.004 (West 2021).

voters age sixty-five and older, requiring younger voters to meet narrow statutory criteria.[3] These younger voters have only three pathways to absentee eligibility—absence from the county, disability, or confinement to jail—even during a pandemic.[4]

In early 2020, the "contagious respiratory virus" known as COVID-19 began spreading throughout Texas, prompting Texas Governor Greg Abbott to declare a state of disaster.[5] Texas officials subsequently adopted several emergency measures to bolster the safety and efficiency of the election process; however, these measures did not include extending "no-excuse" absentee ballots to all voters.[6] On the contrary, Texas Attorney General Ken Paxton announced that fear of COVID-19 exposure at the polls alone would not qualify a voter for an absentee ballot, a stance affirmed by the Texas Supreme Court.[7] Thus, voters under sixty-five who were not otherwise eligible were forced to vote in-person, while voters sixty-five and older could avoid the polls altogether by voting absentee. Meanwhile, COVID-19 cases continued to rise in the United States, with "Texas demonstrat[ing] higher than expected infection rates in younger persons."[8] Because of the health risks associated with in-person voting and the unequal access to absentee ballots, plaintiffs brought suit in federal court against the Governor, Secretary of State, and Attorney General of Texas, asserting in part that Texas Election Code section 82.003 violates the Twenty-Sixth Amendment as applied during the pandemic by denying or abridging the right to vote of voters under sixty-five.[9]

The United States District Court for the Western District of Texas heard the case and sided with the plaintiffs, issuing a preliminary injunction allowing all Texas voters to vote absentee during the

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3. *See Abbott III*, 978 F.3d at 174 (citing §§ 82.001-82.004).

4. *Id.*

5. 45 Tex. Reg. 2094 (Mar. 27, 2020).

6. *See Abbott III*, 978 F.3d at 174-75.

7. *Id.* Prior to the noted federal case, plaintiffs brought suit in state court seeking declaration that all voters are eligible for absentee ballots under the election code's disability provision "in order to hinder the . . . spread of a virus or disease." *Id.* at 174 (citing *In Re* State, 602 S.W.3d 549, 552 (Tex. 2020)). On review, the Texas Supreme Court held "lack of immunity to COVID-19" is *not* a qualifying disability under section 82.002 and subsequently dismissed the case. *Id.* at 175 (quoting *In Re* State, 602 S.W.3d at 560-61).

8. *Id.* at 194 (Stewart, J., concurring in part and dissenting in part) (quoting Tex. Democratic Party v. Abbott (*Abbott I*), 461 F. Supp. 3d 406, 436 (W.D. Tex. 2020), *vacated*, *Abbott III*, 978 F.3d 168 (5th Cir. 2020), *cert. denied*, 141 S. Ct. 1124 (2021) (mem.)).

9. *See Abbott I*, 461 F. Supp. 3d at 414. The complaint listed seven grounds for relief, but on appeal, plaintiffs narrowed the scope to its Twenty-Sixth Amendment claim. *Abbott III*, 978 F.3d at 174. This Note is confined to an evaluation of that claim.

pandemic and prohibiting defendants from taking "any actions inconsistent with th[e] Order."[10] The court, finding mail-in voting safer than in-person voting in light of the pandemic,[11] concluded section 82.003 disproportionately burdened younger voters' right to vote solely on the basis of age by forcing voters under sixty-five to "risk[] their health by voting in-person" while simultaneously allowing voters sixty-five and older to vote from home.[12] By burdening the right to vote on the basis of age, the court held that section 82.003 violated the Twenty-Sixth Amendment as applied during the pandemic.[13] Consequently, defendants filed an emergency appeal and temporary stay of the district court's injunction, which a motions panel of the United States Court of Appeals for the Fifth Circuit granted.[14] In its analysis of the plaintiffs' Twenty-Sixth Amendment claim, the motions panel relied heavily on a United States Supreme Court case predating the Twenty-Sixth Amendment, *McDonald v. Board of Election Commissioners*.[15] The panel analogized the plaintiffs' case to *McDonald* and, concluding the logic of *McDonald* "applies equally" to a Twenty-Sixth Amendment claim, held that section 82.003 does not deny or abridge the right to vote in violation of the Twenty-Sixth Amendment because plaintiffs were not "absolutely prohibited" from voting.[16] Accordingly, the panel held defendants were substantially likely to prove error and stayed the lower court's preliminary injunction.[17]

On appeal, the Fifth Circuit held that section 82.003 as applied during the pandemic does not "abridge the right to vote" on the basis of age under the Twenty-Sixth Amendment because the statute does not take away or reduce a voting privilege enjoyed by younger voters prior

10. *Abbott I*, 461 F. Supp. 3d at 420.

11. *Id.* at 436 (finding that people of all ages are susceptible to COVID-19 and that polling places increase transmission of the virus, even while employing the most reasonable preventative measures).

12. *Id.* at 446.

13. *Id.* at 445-47 (asserting the amendment "forbids the abridgement or denial of the right to vote of young voters by singling them out for disparate treatment").

14. Tex. Democratic Party v. Abbott (*Abbott II*), 961 F.3d 389, 412 (5th Cir. 2020) (finding defendants were likely to succeed on merits of the claim).

15. *Id.* at 408-09 (citing McDonald v. Bd. of Election Comm'rs, 394 U.S. 802 (1969)). In *McDonald*, application of state election law did not violate the Fourteenth Amendment's Equal Protection Clause because it did not "absolutely prohibit[]" plaintiffs from voting, but instead merely prevented plaintiffs from voting *absentee*. *McDonald*, 394 U.S. at 809.

16. *Abbott II*, 961 F.3d at 408.

17. *Id.* at 409.

to the statute's enactment.[18] But by narrowly interpreting "abridge the right to vote" to require regression, the Fifth Circuit subverted the text, purpose, and policy of the Twenty-Sixth Amendment and disregarded the pandemic's extraordinary circumstances. Thus, Part II of this Note begins by conceptualizing the right to vote and evaluating the climate leading up to the Twenty-Sixth Amendment and the historical effect on the Amendment's text. Part III explores how the Fifth Circuit arrived at its narrow interpretation of "abridge the right to vote" under the Twenty-Sixth Amendment. Additionally, Part IV addresses the Fifth Circuit's flawed reasoning and illustrates that the Twenty-Sixth Amendment demands a broad interpretation of "abridge the right to vote," prohibiting age discrimination in voting practices. Part V briefly concludes.

II. BACKGROUND

The Twenty-Sixth Amendment commands "[t]he 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."[19] Underpinned by a social push toward youth enfranchisement and political participation, the Twenty-Sixth Amendment was Congress's last-ditch effort to enfranchise voters ages eighteen to twenty-one following the Supreme Court's partial invalidation of relevant portions of the Voting Rights Act of 1970.[20] The Amendment was enacted in 1971 and has since been largely ignored by scholarship and courts alike.[21] However, the few courts having addressed the Twenty-Sixth Amendment have looked to its text and legislative history to read the Amendment *in pari materia*[22] with other

18. *Abbott III*, 978 F.3d 168, 189, 191-94 (5th Cir. 2020) (emphasis omitted), *cert. denied*, 141 S. Ct. 1124 (2021) (mem.).

19. U.S. CONST. amend. XXVI, § 1.

20. Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, sec. 6, § 302, 84 Stat. 314, 318, *invalidated in part by* Oregon v. Mitchell, 400 U.S. 112 (1970); *see also* discussion *infra* subpart II.B.1 (discussing how the desire for youth enfranchisement motivated the Twenty-Sixth Amendment).

21. *See* Yael Bromberg, *Youth Voting Rights and the Unfulfilled Promise of the Twenty-Sixth Amendment*, 21 U. PA. J. CONST. L. 1105, 1105, 1120-23, 1131-33 (2019) (noting that "the Amendment has remained largely untouched by the courts since the 1970s" and there exists "little scholarship" on the Amendment's evaluative framework (emphasis omitted)); *Abbott III*, 978 F.3d at 183 ("[The Amendment] has yet to be interpreted in any significant depth.").

22. "In case of doubt or uncertainty, statutes *in pari materia* are to be construed together." Francis J. McCaffrey, *The Rule in Pari Materia as an Aid to Statutory Construction*, 3 LAW. & L. NOTES 11, 11 (1949) (emphasis added); *see also* Jenny Diamond Cheng, *Voting*

voting rights Amendments.[23] Applying Fifteenth, Nineteenth, and Twenty-Fourth Amendment reasoning, courts have found the Twenty-Sixth Amendment does more than simply enfranchise voters ages eighteen to twenty-one; it broadly prohibits age discrimination in voting laws.[24]

A. The Right to Vote: Theory and Expansion

The right to vote is the right to "hav[e] a voice in the election of those who make the laws."[25] Protecting the right to vote is of particular public importance because it is "preservative of all rights."[26] Although essential to our democratic system, neither the Constitution nor the Amendments provide "an *affirmative* right to vote."[27] Thus, the constitutional text does not define the "right to vote" itself; however, courts have attempted to give meaning to this right.[28] While the importance of the right to vote has remained steadfast throughout our history, the mechanism for exercising that right has changed markedly, bouncing between various at-home and in-person voting systems.[29] As the voting mechanism evolved, so too did the understanding of who possessed the right. The ratification of the Fifteenth and Nineteenth Amendments changed the right to vote from a strictly white, male right toward a more inclusive democratic right.[30] The Twenty-Sixth Amendment further expanded enfranchisement, extending the right to citizens ages eighteen to twenty-one.[31]

Rights for Millennials: Breathing New Life into the Twenty-Sixth Amendment, 67 SYRACUSE L. REV. 653, 674 (2017) ("[S]imilar constitutional texts should be read similarly regardless of whether the drafters consciously intended the parallels."); Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 789 (1999) ("[S]trongly parallel language is a strong (presumptive) argument for parallel interpretation.").

23. *See* discussion *infra* subpart II.B.

24. *See* discussion *infra* subpart II.B.2.

25. Wesberry v. Sanders, 376 U.S. 1, 17 (1964) ("No right is more precious in a free country.").

26. *See* Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886).

27. DANIEL HAYS LOWENSTEIN ET AL., ELECTION LAW: CASES AND MATERIALS 50 (6th ed. 2017); *see* Bush v. Gore, 531 U.S. 98, 104 (2000).

28. *See, e.g.*, *Wesberry*, 376 U.S. at 17 (defining the right to vote as the right to "hav[e] a voice in the election of those who make the laws").

29. Burson v. Freeman, 504 U.S. 191, 200-05 (1992) (describing the history of various voting mechanisms, including voting through a physical show of hands, at-home ballots subsequently delivered to the poll, in-person ballots, etc.).

30. *See* Russell James Henderson, The Twenty-Sixth Amendment 9 (May 2016) (Ph.D. dissertation, University of Mississippi) (eGrove) (noting the historical voting conditions "free, white, and twenty-one"); U.S. CONST. amend. XV; U.S. CONST. amend. XIX.

31. U.S. CONST. amend. XXVI, § 1.

Over time, as America continued to evolve, so too did the right to vote. In the twentieth century, the Supreme Court and Congress redefined the right not simply as the right to a vote, but, for example, the right to a vote of equal weight, a vote free from poll tax and wealth requirements, and a vote free from "sophisticated as well as simple-minded modes of discrimination."[32] Although unclear from constitutional jurisprudence what voting mechanism "the right to vote" demands, the Supreme Court has made clear that "once the States grant the franchise, they must not do so in a discriminatory manner."[33]

B. Development of the Twenty-Sixth Amendment

1. Choice of Language and the Socio-Political Climate of the Drafting

"[O]ld enough to fight, old enough to vote" was a slogan touted by many proponents of youth enfranchisement leading up to the drafting and ratification of the Twenty-Sixth Amendment.[34] Although the climate surrounding youth participation and disenfranchisement in World War II and the wars in Vietnam and Korea acted as a catalyst for the Twenty-Sixth Amendment's promise of youth enfranchisement, it was but one motivating factor among many.[35] Some scholars assert that youth enfranchisement was a necessary and correlative result of the Second Reconstruction and youth-led socio-political activism.[36] Some argue youth education and unprecedented maturity earned them full

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32. Reynolds v. Sims, 377 U.S. 533, 563 (1964) (quoting Lane v. Wilson, 307 U.S. 268, 275 (1939)); *see also* Rod Surratt, Note, *Constitutional Law—Reapportionment—The Equal Protection Clause of the Fourteenth Amendment Does Not Require a State to Apportion Its Judicial System According to Population.* New York State Ass'n of Trial Lawyers v. Rockefeller*, 267 F. Supp. 148 (S.D.N.Y. 1967).*, 46 TEX. L. REV. 546, 546 (1968) (noting the Court in *Reynolds* "formulated the one-man-one-vote principle of legislative reapportionment"); Harper v. Va. Bd. of Elections, 383 U.S. 663, 666 (1966) (prohibiting the right to vote's contingency on wealth or payment of poll tax); U.S. CONST. amend. XXIV (providing that the right to vote cannot be denied for failure to pay a poll tax); *Lane*, 307 U.S. at 275 (prohibiting "sophisticated" and "simple-minded modes of discrimination").

33. McDonald v. Bd. of Election Comm'rs, 394 U.S. 802, 807 (1969).

34. *See* Nancy Turner, *The Young and the Restless: How the Twenty-Sixth Amendment Could Play a Role in the Current Debate over Voting Laws*, 64 AM. U. L. REV. 1503, 1508-09 (2015) (quoting Hilary Parkinson, *Records of Rights Vote: "Old Enough to Fight, Old Enough to Vote"*, U.S. NAT'L ARCHIVES: PIECES OF HIST. (Nov. 13, 2013), https://prologue.blogs.archives.gov/2013/11/13/records-of-rights-vote-old-enough-to-fight-old-enough-to-vote/); Cheng, *supra* note 22, at 668 (noting "'old enough to fight, old enough to vote' . . . would be a rallying cry" for youth enfranchisement).

35. *See* Bromberg, *supra* note 21, at 1120-23; Cheng, *supra* note 22, at 669.

36. Bromberg, *supra* note 21, at 1120-23; *see* Cheng, *supra* note 22, at 669.

participation in the franchise.[37] As noted in the Senate Report accompanying the Twenty-Sixth Amendment, the proposed amendment was meant to give young people the opportunity "to influence . . . society in a peaceful and constructive manner," illustrating the contemporary understanding that "[e]xcluding 18-year-olds from the political process contributed to violent protests."[38] Although the exact motive behind the Twenty-Sixth Amendment is unclear, there nevertheless existed a significant push toward youth enfranchisement and away from historical age-based discrimination in political and electoral processes.[39] This societal pressure, which had been growing for almost thirty years, reached a peak in the late sixties, prompting congressional action.[40]

In 1970, Congress attempted youth enfranchisement by amending the Voting Rights Act of 1965 (VRA) under the power of the Fourteenth Amendment.[41] The attempt was unsuccessful, however, as the applicable provision was partially invalidated by the Supreme Court in *Oregon v. Mitchell*, which held the statute to be unconstitutional as it pertained to state elections.[42] The *Oregon* decision ultimately forced legislators to draft the Twenty-Sixth Amendment.[43] However, in drafting the Amendment, Congress did not simply recreate the language used in Title III of the VRA, which only prohibited "'denial' of the right to vote on account of age"; it adopted a broader,

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37. Cheng, *supra* note 22, at 669.

38. Jocelyn Benson & Michael T. Morley, *The Twenty-Sixth Amendment*, NAT'L CONST. CTR. (quoting S. REP. NO. 92-26, at 6 (1971)), https://constitutioncenter.org/interactive-constitution/interpretation/amendment-xxvi/interps/161 [https://perma.cc/5CDH-P2Q5] (last visited June 19, 2021).

39. *See* Henderson, *supra* note 30, at 24-25. Since the colonial era, efforts have been made to disenfranchise youths to prevent them from significantly affecting the status quo dictated by older governing bodies. *Id.* at 35 ("When lawmakers sensed that youths might threaten the adultocratic status quo, colonial assemblies responded by codifying enfranchisement ages.").

40. Bromberg, *supra* note 21, at 1123-28; *see also* Jennifer Frost & Eric S. Fish, *The Youth Vote Is Being Suppressed. The 26th Amendment Is the Solution,* WASH. POST (Aug. 14, 2020, 5:00 AM), https://www.washingtonpost.com/outlook/2020/08/14/youth-vote-is-being-suppressed-26th-amendment-is-solution/ (describing the thirty-year period in which a youth voting rights movement was built).

41. *See* Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. §§ 10101-10702).

42. 400 U.S. 112, 126 (1970) ("Above all else, the framers of the Civil War Amendments intended to deny to the States the power to discriminate against persons on account of their race."); *id.* at 130 (declining to extend Fourteenth Amendment protections to age in voting context).

43. *See* Bromberg, *supra* note 21, at 1131.

more sweeping prohibition that forbade both the "denial" and mere "abridgment" of the right to vote.[44]

As to construction, the language of the Twenty-Sixth Amendment mirrors that of the Fifteenth, Nineteenth, and Twenty-Fourth Amendments.[45] All four aforementioned voting rights amendments begin with the same general language—the right of citizens of the United States to vote shall not be denied or abridged by the United States or any State—and then continues with the target of the specific amendment's protections: the Twenty-Sixth Amendment continues with "on account of age"; the Fifteenth with "on account of race, color, or previous condition of servitude"; the Nineteenth with "on account of sex," and the Twenty-Fourth with "by reason of failure to pay any poll tax or other tax."[46] Hence, the Twenty-Sixth Amendment is almost textually identical to the Fifteenth, Nineteenth, and Twenty-Fourth, replacing race, sex, and failure to pay a poll tax with age. During ratification debates, congressman after congressman highlighted the Twenty-Sixth Amendment's purposeful imitation of the preceding voting rights amendments.[47]

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44. Turner, *supra* note 34, at 1524 (emphasis omitted); *see also* Henderson, *supra* note 30, at 13 (noting the Twenty-Sixth Amendment "forever bann[ed] age-based electoral discrimination against persons aged eighteen to twenty"); Sarah Fearon-Maradey, *Disenfranchising America's Youth: How Current Voting Laws Are Contrary to the Intent of the Twenty-Sixth Amendment*, 12 U.N.H. L. REV. 289, 296 (2014) (noting that "[t]he intent was not merely to enfranchise eighteen- to twenty-year-olds," but rather to grant them full access to the franchise).

45. *See, e.g.*, Eric S. Fish, *The Twenty-Sixth Amendment Enforcement Power*, 121 YALE L.J. 1168, 1175 (2012); *see also* Caitlin Foley, *A Twenty-Sixth Amendment Challenge to State Voter Id Laws*, 2015 U. CHI. LEGAL F. 585, 600–01 ("Congress modeled the Twenty-Sixth Amendment after the Fifteenth, signaling a belief that they would be interpreted and enforced in a similar manner."); *Abbott III*, 978 F.3d 168, 183 (5th Cir. 2020) (noting the view that the Twenty-Sixth Amendment contains a sweeping prohibition on age-based denial is consistent with the Fifteenth, Nineteenth, and Twenty-Fourth Amendments), *cert. denied*, 141 S. Ct. 1124 (2021) (mem.); AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 445 (2005) (noting the Twenty-Sixth Amendment "echoed the language of the Black Suffrage and Woman Suffrage Amendments"); Cheng, *supra* note 22, at 674 ("The Twenty-Sixth Amendment is well suited to an intratextual reading because it shares nearly identical wording with the Fifteenth Amendment—as well as with the Nineteenth and Twenty-Fourth Amendments.").

46. U.S. CONST. amend. XXVI, § 1; *id.* amend. XV, § 1; *id.* amend. XIX, cl. 1; *id.* amend. XXIV, § 1.

47. *See, e.g.*, 117 CONG. REC. 7533 (1971) (statement of Rep. Emanuel Celler) ("[The Twenty-Sixth Amendment] is modeled after similar provisions in the 15th amendment, which outlawed racial discrimination at the polls, and the 19th amendment, which enfranchised women.").

2. Twenty-Sixth Amendment Cases: Foundation and Development

When it comes to interpreting the Twenty-Sixth Amendment, there has been just "one Supreme Court case and a handful of state and lower federal court cases."[48] However, in the lone Supreme Court case, *Symm v. United States*, the Court summarily affirmed, without opinion, a district court's decision that a voter-registration system that made it more difficult for students to register to vote was unconstitutional.[49] As the Fifth Circuit noted, this was a summary affirmance, not a summary endorsement, and thus the decision left lower courts with no method by which to analyze Twenty-Sixth Amendment issues.[50]

Still, a handful of state and federal courts having reviewed Twenty-Sixth Amendment claims have reached a consensus that such claims should be treated like claims brought under the other voting rights amendments, working broadly to prohibit discrimination in voting practices.[51] For example, the United States Court of Appeals for the Seventh Circuit in *Luft v. Evers* recognized that lower courts having addressed Twenty-Sixth Amendment issues have "treated arguments under the Twenty-Sixth Amendment (for age) the same as those under the Fifteenth Amendment (for race)," and the Seventh Circuit "agre[ed] with that assessment."[52] The California Supreme Court in *Jolicoeur v. Mihaly* concluded the Twenty-Sixth Amendment mirrors the language of the "Twenty-Fourth, Nineteenth, and Fifteenth [Amendments] before it" and should be analyzed accordingly.[53] Noting that the Twenty-Sixth Amendment, like its preceding amendments, forbids

48. Fish, *supra* note 45, at 1170 (footnote omitted).

49. 439 U.S. 1105, 1105 (1979), *aff'g* United States v. Texas, 445 F. Supp. 1245 (S.D. Tex. 1978).

50. *Abbott III*, 978 F.3d at 192; *see also* Bromberg, *supra* note 21, at 1134 (noting *Symm* was without opinion).

51. *See, e.g.*, Ownby v. Dies, 337 F. Supp. 38, 39 (E.D. Tex. 1971) (holding that the Texas Election Code violated the Fourteenth and Twenty-Sixth Amendments); Luft v. Evers, 963 F.3d 665, 673 (7th Cir. 2020) (agreeing with the lower court's treatment of arguments under the Twenty-Sixth Amendment the same as those under the Fifteenth Amendment); League of Women Voters of Fla., Inc. v. Detzner, 314 F. Supp. 3d 1205, 1221 (N.D. Fla. 2018) (applying a framework intended for interpreting the Fifteenth Amendment to the Twenty-Sixth Amendment); Jolicoeur v. Mihaly, 488 P.2d 1, 12 (Cal. 1971) (broadly applying the Twenty-Sixth Amendment to require treatment by California of all citizens ages eighteen or older alike for voting purposes). However, this was consensus was not absolute. *See* Walgren v. Bd. of Selectmen, 373 F. Supp. 624, 633–34 (D. Mass. 1974) ("[W]e view the protection afforded . . . under the Twenty-sixth Amendment as fundamentally different than the protection afforded under the . . . Fifteenth Amendment[]."), *aff'd*, 519 F.2d 1364 (1st Cir. 1975).

52. *Luft*, 963 F.3d at 673.

53. *See Jolicoeur*, 488 P.2d at 4.

"onerous procedural requirements which effectively handicap exercise of the franchise . . . although the abstract right to vote may remain unrestricted," the court in *Jolicoeur* drew largely on Twenty-Fourth Amendment jurisprudence to hold "the Twenty-Sixth Amendment to the United States Constitution . . . require[s] [election officials] to treat all citizens 18 years of age or older alike for all purposes related to voting."[54] Similarly, the United States District Court for the Northern District of Florida recognized in *League of Women Voters of Florida, Inc. v. Detzner* "[a] consensus" among courts that have considered Twenty-Sixth Amendment claims that such claims should be evaluated similarly to Fifteenth Amendment claims.[55]

In the noted case, the Fifth Circuit critically relied on two Supreme Court decisions, neither addressing the Twenty-Sixth Amendment, to interpret "abridge" and "right to vote."[56] First, the majority considered *Reno v. Bossier Parish School Board*, where Bossier Parish sought judicial preclearance for its redistricting plan under section 5 of the VRA.[57] There, the Court construed "abridge the right to vote" in the context of preclearance proceedings to necessitate a comparison to a baseline, which it held to be a comparison between the proposed changes and the "status quo."[58] However, as courts have noted, the *Reno* Court indicated that in Fifteenth Amendment proceedings, the appropriate comparison "is a hypothetical one—one between the status quo and what the hypothetical right to vote 'ought to be.'"[59] Distinguishing from preclearance proceedings, the Court elaborated that under the Fifteenth Amendment, "[i]f the status quo 'results in [an] abridgement of the right to vote' or 'abridge[s] [the right to vote]' relative to what the right to vote *ought to be*, the status quo itself must be changed."[60] The Court further explained that its reading

54. *Id.* at 4, 12 (quoting Lane v. Wilson, 307 U.S. 268, 275 (1939)) (citing Gray v. Johnson, 234 F. Supp. 743 (S.D. Miss. 1964)).

55. *League of Women Voters*, 314 F. Supp. at 1221.

56. *See generally* McDonald v. Bd. of Election Comm'rs, 394 U.S. 802 (1969) (addressing the Equal Protection Clause of the Fourteenth Amendment); Reno v. Bossier Par. Sch. Bd., 528 U.S. 320 (2000) (addressing the Fifteenth Amendment).

57. *Abbott III*, 978 F.3d 168, 188 (5th Cir. 2020) (quoting *Reno*, 528 U.S. at 324), *cert. denied*, 141 S. Ct. 1124 (2021) (mem.).

58. *Reno*, 528 U.S. at 334 (emphasis omitted).

59. *Abbott III*, 978 F.3d at 196 (quoting *Reno*, 528 U.S. at 334).

60. *Reno*, 528 U.S. at 334 (all alterations but the first in original).

of "abridging" refers generally to discrimination under the Fifteenth Amendment.[61]

Additionally, the majority in the noted case relied on *McDonald* to interpret the scope of "the right to vote."[62] There, the Court held a state's refusal to provide judicially incapacitated inmates with absentee ballots under the state's "physical incapacitat[ion]" statute did not violate the Fourteenth Amendment.[63] The Court's Equal Protection analysis focused exclusively on whether the statute completely disenfranchised the plaintiffs, and, finding "nothing in the record to indicate that the [State's] statutory scheme ha[d] an impact on appellants' ability to exercise the fundamental right to vote," the Court denied relief.[64] It distinguished the right to vote from the "claimed right to receive absentee ballots" in the Fourteenth Amendment context.[65] Critically, the Court limited its holding due to lack of evidence on record and further noted "once the States grant the franchise [of voting], they must not do so in a discriminatory manner."[66] The Supreme Court has since limited the *McDonald* holding on several occasions.[67]

III. COURT'S DECISION

In the noted case, the Fifth Circuit articulated a new interpretation of "abridge the right to vote" under the Twenty-Sixth Amendment.[68] In coming to its conclusion, the court first evaluated the scope of the right conferred, reviewing the Amendment's text and historical context to find that the Twenty-Sixth Amendment does not anticipate or provide the right to vote by mail.[69] Second, employing a baseline comparison to the voters' "status quo," the court determined there is no abridgment of the right to vote unless a statute denies or reduces the "[voting] rights

61. *Id.*; *see also id.* at 362 (Souter, J., concurring in part and dissenting in part) ("[T]he baseline in a Fifteenth Amendment challenge . . . is a nondiscriminatory regime.").

62. *Abbott III*, 978 F.3d at 188 (quoting McDonald v. Bd. of Election Comm'rs, 394 U.S. 802, 807-08 (1969)).

63. *McDonald*, 394 U.S. at 804, 808-09.

64. *Id.* at 807, 808 n.6.

65. *Id.* at 807.

66. *Id.* at 807-08.

67. *Abbott III*, 978 F.3d at 199 (citing cases).

68. *Id.* at 188-91.

69. *Id.* at 183-88. Initially, the Fifth Circuit first compared the Twenty-Sixth Amendment's language and structure to that of the Fifteenth, Nineteenth, and Twenty-Fourth Amendments to conclude the Twenty-Sixth Amendment confers an individual right. *Id.* at 183.

voters already have" on the basis of age.[70] Consequently, the court held section 82.003 does not abridge younger voters' right to vote, even in light of the pandemic, because it does not take away or reduce the voting privileges younger voters previously enjoyed.[71]

Initially, the Fifth Circuit evaluated the scope of the right conferred by the Twenty-Sixth Amendment.[72] Although noting that courts typically look to the meaning of constitutional phrases in other parts of the constitutional text to derive meaning, the Fifth Circuit declined to employ this analysis on the basis that too much time had passed between the drafting of the Twenty-Sixth Amendment and other constitutional provisions.[73] Instead, the court reviewed case law along with congressional and historical sources to conclude that at the time of drafting, absentee voting was the exception to the general rule of in-person voting.[74] Thus, the court determined the right to vote did not anticipate the right to vote absentee at the time the Twenty-Sixth Amendment was drafted and ratified.[75] Notably, the court relied heavily on *McDonald*, concluding *McDonald* should control the understanding of the right to vote at the time the Twenty-Sixth Amendment was drafted.[76] Because *McDonald* differentiated, albeit under an equal protection analysis, the right to vote from the right to vote absentee, the court concluded the right to vote absentee was not encapsulated in the Twenty-Sixth Amendment's right to vote.[77]

Next, the court analyzed the meaning of "deny or abridge the right to vote" under the Twenty-Sixth Amendment.[78] Focusing largely on its analysis of "abridge," the court first determined there must be a comparison to a baseline.[79] Reviewing the Supreme Court's reasoning in *Reno*, the court concluded the baseline must be the "status quo,"

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70. *Id.* at 188-89, 192 (emphasis omitted).

71. *Id.* at 189. Before remanding, the court briefly addressed the issue of levels of scrutiny and declined to extend the logic of *McDonald*, applied by the motions panel, to a Twenty-Sixth Amendment analysis. *Id.* at 193-94.

72. *Id.* at 184-88.

73. *Id.* at 184-85.

74. *Id.* at 185-88 (reviewing historical voting data, legislative history, and Supreme Court cases). Of note, the court declined to address statements of individual legislators, finding "no utility" in the statements. *Id.* at 185.

75. *Id.*

76. *Id.* However, in a later part of the opinion, the court recognized *McDonald* as distinguishable from a Twenty-Sixth Amendment claim because it predated the Amendment and did not involve age discrimination. *Id.* at 193.

77. *Id.* at 185-88.

78. *Id.* at 188-92.

79. *Id.* at 188-89.

which the majority equated to the rights the voter "already ha[s]" before adoption of the age-based rule.[80] Thus, the majority held the Twenty-Sixth Amendment right to vote is only abridged when a statute takes away a voting privilege previously enjoyed by a voter.[81]

Having settled its definition of abridgement, the court evaluated several cases urged by the plaintiffs in their arguments, ultimately dismissing the cases as either inapplicable or not contrary to the court's holding.[82] Applying its new interpretation of "abridge" within the context of the pandemic, the court found that the extraordinary circumstances imposed by the pandemic did not affect the court's ultimate decision because younger voters did not enjoy the unconditional right to vote absentee prior to the pandemic.[83] Accordingly, the majority held section 82.003 does not abridge the right to vote under the Twenty-Sixth Amendment as applied during the pandemic.

However, Judge Carl Stewart dissented from the majority's interpretation of "abridge the right to vote" and the *as applied* holding.[84] Judge Stewart urged "neither precedent nor legislative history compels a narrow definition of 'abridged.'"[85] Asserting the majority misread *Reno*, Judge Stewart reasoned that the correct baseline is not a comparison to a voter's existing privileges, but rather a hypothetical comparison to what the right to vote "ought to be": "an equal opportunity to participate."[86] Further, the dissent draws on Fifteenth Amendment principles to illustrate that the Twenty-Sixth

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80. *Id.* at 189, 192 (citing Reno v. Bossier Par. Sch. Bd., 528 U.S. 320, 334 (2000)). The court acknowledged that *Reno* also defines abridgment in relation to what the status quo "ought to be." *Id.* at 189 (emphasis omitted) (quoting *Reno*, 528 U.S. at 334). However, the court noted, "we see no basis to hold that Texas's absentee-voting rules as a whole are something that ought not to be." *Id.*

81. *Id.*

82. *Id.* at 189-92. In reviewing *Lane v. Wilson*, which held "onerous procedural requirements" that "handicap" the franchise are unconstitutional, the court synonymized the word "handicap" with "reduce[]" to conclude that granting a privilege to older voters does not handicap or *reduce* the privileges of younger voters. *Id.* at 190 (quoting Lane v. Wilson, 307 U.S. 268, 275 (1939)). Reviewing *Harman v. Forssenius*, the court found the case inapplicable because the relevant statute, which forced voters to choose between registration and a poll tax, "did not grant a privilege to one class of voters while leaving other classes untouched." *Id.* (citing Harman v. Forssenius, 380 U.S. 528, 541 (1965)).

83. *Id.* at 192 (asserting "at-risk" voters may utilize the disability provision of the Texas Election Code).

84. *Id.* at 195-96 (Stewart, J., concurring in part and dissenting in part).

85. *Id.* at 196.

86. *Id.* (quoting Reno v. Bossier Par. Sch. Bd., 528 U.S. 320, 334 (2000)) (citing Luft v. Evers, 963 F.3d 665, 672 (7th Cir. 2020)).

Amendment should invalidate voting qualifications and procedures, both "sophisticated . . . [and] simple-minded,"[87] that are facially discriminatory, such as section 82.003.[88] Attacking the majority's reliance on *McDonald*, which supported its holding that the right to vote is "the mere right to cast a ballot," the dissent emphasized the decision was based on a lack of evidence on record and has subsequently been limited on multiple occasions.[89] Ultimately, the dissent concluded that the right to vote encompasses the method of casting said vote, and "[b]y giving younger voters fewer options, especially in the context of a dangerous pandemic . . . their voting rights are abridged in relation to older voters who do not face this burden."[90]

IV. ANALYSIS

In upholding Texas Election Code section 82.003, the Fifth Circuit applied an unsuitably narrow interpretation of "abridge the right to vote" under the Twenty-Sixth Amendment, especially in light of the COVID-19 pandemic. In so holding, the majority "misreads" key cases[91] and employs flawed reasoning to ultimately construe "abridge" and "the right to vote" contrary to the text, purpose, and policy of the Twenty-Sixth Amendment, which all support a broad prohibition on age-based discrimination in voting practices. Interpreted appropriately, section 82.003 violates the Twenty-Sixth Amendment by discriminating on the basis of age and denying equal voting opportunities to voters under the age of sixty-five.

To begin, the majority misreads case law and relies on flawed reasoning to reach its narrow conclusion. First, as the dissent aptly points out, the majority misplaces its reliance on *McDonald* in determining the scope of the right to vote. Importantly, *McDonald* was decided before Congress expressly recognized a right to vote absentee and before mail-in voting became a key part of elections in many states.[92] Although *McDonald* seemingly differentiated the inherent

87. *Id.* at 197 (quoting *Lane*, 307 U.S. at 275).

88. *Id.* (citing South Carolina v. Katzenbach, 383 U.S. 301, 325 (1966)). The dissent further noted that the majority failed to "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.*

89. *Id.* at 199 (citing Am. Party of Tex. v. White, 415 U.S. 767, 794-95 (1974) (finding exclusion of class from absentee voting unconstitutional)).

90. *Id.*

91. *Id.* at 196.

92. *See* Uniformed and Overseas Citizens Absentee Voting Act, Pub. L. 99–410, § 103, 100 Stat. 924, 925 (1986); LOWENSTEIN ET AL., *supra* note 27, at 457 (noting the

right to vote from the right to receive an absentee ballot, Congress married the two with the Uniformed and Overseas Citizens Absentee Voting Act, requiring states and territories to allow certain citizens to exercise their right to vote via absentee ballots.[93] Moreover, relying on the *McDonald* decision to find that the right to vote only implicates the right to cast an in-person ballot ignores the history of the right to vote, which has seen the utilization of many voting mechanisms, and is contrary to expansion of enfranchisement, which has been augmented in meaning and method over the past two centuries.[94]

Moreover, the majority's reliance on *McDonald* was misplaced because that case was not decided within the context of a voting rights amendment but instead was a Fourteenth Amendment case predating the Twenty-Sixth Amendment entirely.[95] It is clear from the Supreme Court's decision in *Oregon v. Mitchell*, which partially invalided the VRA, that the Fourteenth Amendment did not protect against age discrimination in voting procedures, thus prompting the enactment of the Twenty-Sixth Amendment.[96] Put simply, the Twenty-Sixth Amendment was created to go where the Fourteenth could not. To effectively wholly imbue Fourteenth Amendment reasoning into the Twenty-Sixth Amendment robs the latter of its independent force.

Most critically, the Court in *McDonald* focused solely on whether the right to vote had been completely denied, whereas the entire argument in the noted case is not so much that the younger voters' ability to vote was completely denied, but rather that their right to vote had been *abridged*.[97] Further, *McDonald* makes a point seemingly glossed over by the Fifth Circuit: "[W]hile the 'States have long been held to have broad powers to determine the conditions under which the right of suffrage may be exercised' we have held that once the States grant the franchise, they must not do so in a discriminatory manner."[98] Thus, the key argument in the noted case is not that younger voters had an *inherent* right to an absentee ballot but that once Texas granted the franchise of absentee voting, it was prohibited from restricting access

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prevalence of absentee voting in recent elections).

93. Uniformed and Overseas Citizens Absentee Voting Act § 103.

94. *See* discussion *supra* subpart II.A.

95. McDonald v. Bd. of Election Comm'rs, 394 U.S. 802, 807 (1969) (interpreting the Fourteenth Amendment right to equal protection).

96. 400 U.S. 112, 126 (1970).

97. *Abbott III*, 978 F.3d 168, 196 (5th Cir. 2020), *cert. denied*, 141 S. Ct. 1124 (2021) (mem.).

98. *McDonald*, 394 U.S. at 807 (citation omitted).

on the basis of age alone. The Fifth Circuit neither addressed nor explained how its analysis can be reconciled with this proposition.

Finally, as the dissent highlights, *McDonald* "is a limited holding on its own terms because it is based on a lack of evidence in the record."[99] Indeed, the Supreme Court denied relief in *McDonald* because there existed "nothing in the record to indicate that the [State's] statutory scheme ha[d] an impact on appellants' ability to exercise the fundamental right to vote."[100]

Next, as noted by the dissent, the majority misread *Reno*, the key case used in its analysis of abridgment.[101] Although correctly finding that abridgment calls for a comparison to a baseline, the majority misread the case to hold the correct comparison is between the challenged voting rule and the "status quo," thus requiring regression in order to have abridgment.[102] In *Reno*, however, the Supreme Court explicitly differentiated its reading of abridgment in preclearance cases under the VRA, which require regression, from Fifteenth Amendment cases, which merely require discrimination.[103] As the dissent correctly asserts, the proper baseline for comparison in Twenty-Sixth Amendment cases is not by the privileges a younger voter had before, but rather by the privileges enjoyed under an equal opportunity to participate or what the status quo "ought to be."[104] The latter is the only interpretation that squares with the Twenty-Sixth Amendment's many legislative purposes, such as acknowledging youth political and social engagement, including military service, and recognizing the equality of their contributions to the political process and to society as a whole.[105] The majority's decision to construe the Twenty-Sixth Amendment to only protect against denials or abridgments of the right to vote *previously enjoyed* by younger voters is unsupported by precedent and the plain language of the Amendment, which prohibits all age-based denials and abridgments of the right to vote.[106] As highlighted by the

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99. *Abbott III*, 978 F.3d at 199 (Stewart, J., concurring in part and dissenting in part); *McDonald*, 394 U.S. at 807, 808 n.6.

100. *McDonald*, 394 U.S. at 807.

101. *Abbott III*, 978 F.3d at 196.

102. *Id.* at 189, 192 (Stewart, J., concurring in part and dissenting in part) (emphasis omitted).

103. Reno v. Bossier Par. Sch. Bd., 528 U.S. 320, 333 (2000).

104. *Abbott III*, 978 F.3d at 196 (quoting *Reno*, 528 U.S. at 334).

105. *See* discussion *supra* subpart II.B.

106. *See* Brief for *Amicus Curiae* the Andrew Goodman Foundation et al. in Support of Petitioners at 11, Tex. Democratic Party v. Abbott, 141 S. Ct. 1124 (2021) (No. 19-1389) ("[The Fifth Circuit's] proposition is nowhere in the Amendment. The plain text prohibits *all*

dissent, "[t]he 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."[107]

Furthermore, the text, purpose, and policy underpinning the Twenty-Sixth Amendment do not support the majority's narrow interpretation, but rather call for a broad interpretation of "abridge the right to vote" that would invalidate a facially age-discriminatory statute, such as section 82.003. Turning first to the text, the Twenty-Sixth Amendment was drafted using the exact language of the Fifteenth, Nineteenth, and Twenty-Fourth Amendments, indicating that the Amendment should be read *in pari materia* with said amendments.[108] These previous voting rights amendments have been interpreted to broadly prohibit discrimination in voting practices. For example, the Fifteenth Amendment protects against discrimination on the basis of race and has been construed by the Supreme Court to invalidate voting laws that are facially race-discriminatory.[109] Even Judge Ho, concurring with the Fifth Circuit motions panel's decision in the noted case, acknowledged that it "would presumably run afoul of the Constitution to allow only voters of a particular race to vote by mail."[110] Thus, the Twenty-Sixth Amendment, when read *in pari materia* with other voting rights amendments, prohibits age discrimination in voting practices.

Additionally, the language of the Twenty-Sixth Amendment was purposefully constructed to mimic the language of the other voting rights amendments, calling for a similar interpretation of terms.[111] Markedly, Congress had previously drafted laws aimed at enfranchising youth, including amendments to Title III of the VRA, which protected youth voters who had been "denied the right to

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laws that 'deny or abridge' the 'right to vote . . . on account of age.'"); Brief of *Amicus Curiae* Constitutional Accountability Center in Support of Plaintiffs-Appellees at 11, *Abbott III*, 978 F.3d 168 (No. 20-50407).

107. *Abbott III*, 978 F.3d at 197 (Stewart, J., concurring in part and dissenting in part).

108. *See* discussion *supra* note 45.

109. See *Abbott III*, 978 F.3d at 197 (citing South Carolina v. Katzenbach, 383 U.S. 301, 325 (1966)) ("*Katzenbach* interprets 'deny or abridge' as invalidating procedures that are facially discriminatory or applied in a discriminatory manner with regard to race.").

110. *Abbott II*, 961 F.3d 389, 416 (5th Cir. 2020) (Ho, J., concurring) (citing McDonald v. Bd. of Election Comm'rs, 394 U.S. 802, 807 (1969)); *see also* Richard H. Pildes & Bradley A. Smith, *The Fifteenth Amendment*, NAT'L CONST. CTR., https://constitutioncenter.org/interactive-constitution/interpretation/amendment-xv/interps/141 [https://perma.cc/ML36-2DTS] (last visited June 19, 2021) ("[T]here is little doubt the courts today would hold such a law to violate the Fifteenth Amendment.").

111. *See* AMAR, *supra* note 45, at 445.

vote."[112] And yet, in creating the Twenty-Sixth Amendment, the drafters chose the expansive language "denied or abridged"[113] in articulating the amendment's protections, demonstrating the intent that the amendment's power go beyond merely lowering the voting age to additionally embody the broad anti-discrimination protections of the preceding voting rights amendments.[114]

Further, the Amendment's articulated legislative purpose supports the proposition that it was meant to protect youth enfranchisement and remove burdens to the franchise by widely prohibiting age discrimination in voting practices.[115] During ratification debates, speaker after speaker reiterated the intent that the Twenty-Sixth Amendment confer the type of broad protections against discrimination also conferred by the Fifteenth and Nineteenth Amendments.[116] Additionally, as the Senate Report accompanying the Senate Joint Resolution, later enacted as the Twenty-Sixth Amendment, notes, "forcing young voters to undertake special burdens . . . in order to exercise their right to vote might well serve to dissuade them from participating in the election."[117] This articulation demonstrates the legislators' intent that the Amendment do more than simply enfranchise voters ages eighteen to twenty-one years old but also actively prevent any "special burdens" discriminatorily inhibiting youth voting.[118]

Moreover, having established that the language of the Twenty-Sixth Amendment mirrors that of the Fifteenth and Nineteenth, it is

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112. Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, sec. 6, § 302, 84 Stat. 314, 318, *invalidated in part by* Oregon v. Mitchell, 400 U.S. 112 (1970).

113. U.S. CONST. amend. XXVI, § 1.

114. *See* discussion *supra* subpart II.B.2; Brief of *Amicus Curiae* Constitutional Accountability Center in Support of Plaintiffs-Appellees, *supra* note 106, at 11; Turner, *supra* note 34, at 1521 (comparing with language used in Article II, establishing the minimum age of the presidency).

115. *See* Worden v. Mercer Cnty. Bd. of Elections, 294 A.2d 233, 243 (N.J. 1972) (exemplifying the understanding around the time of ratification that the amendment was made to help young voters participate in the franchise).

116. *See, e.g.*, S. REP. NO. 92-26, at 2 (1971) (noting the Twenty-Sixth Amendment "embodies the language and formulation of the 19th amendment, which enfranchised women, and that of the 15th amendment, which forbade racial discrimination at the polls"); 117 CONG. REC. 7534 (1971) (statement of Rep. Richard Poff) ("Just as the 15th amendment prohibits racial discrimination in voting and just as the 19th amendment prohibits sex discrimination in voting, the proposed amendment would prohibit age discrimination in voting . . . ."); *id.* at 7533 (statement of Rep. Emanuel Celler) ("[Section 1 of the Twenty-Sixth Amendment] is modeled after similar provisions in the 15th amendment, which outlawed racial discrimination at the polls, and the 19th amendment . . . .").

117. S. REP. NO. 92-26, at 14 (accompanying S.J. Res. 7, 92d Cong. (1971)).

118. *Id.*

clear how seemingly misguided the majority's interpretation is when put in perspective with the other voting rights amendments. To say that a law does not abridge a right to vote simply because the voter did not previously have a voting privilege is contrary to the trajectory of enfranchisement.[119] The protected class under each amendment was historically unable to merely participate in the franchise, so any extension of privilege would not abridge a right that was nonexistent to begin with. Imagine Texas creates a new voting "privilege," such as the ability to vote from home on the computer. If Texas were to create a statute only extending the ability to vote by computer to white people, or only to men, there would be little doubt that such a rule offends the Fifteenth and Nineteenth Amendments respectively, even though that privilege was not previously enjoyed by any voter. Yet, under the logic of the Fifth Circuit, this statute would undisputedly survive.

Finally, the majority erred as a matter of policy in light of the extraordinary circumstances posed by the COVID-19 pandemic. In defining "abridge" to include only the taking away of a previously enjoyed voting privilege, the majority was unmoved by the dangers to life and limb posed by COVID-19.[120] Because younger voters never enjoyed the privilege of absentee voting to begin with, the court decided it was of little consequence that the circumstances posed by COVID-19 created a voting system entitling older voters to easier, safer methods of participating in the franchise, while younger voters had only one choice—show up at the polls and potentially expose themselves or give up their right to vote.[121] Thus, the dangers of the pandemic did not affect the majority's ultimate decision due to the majority's construction of abridgment under the Twenty-Sixth Amendment.[122] Interestingly enough, under the interpretation of abridgment urged by the dissent and supported by this Note, the COVID-19 pandemic is similarly not outcome-determinative—but for a different reason.[123] This is because under the abridgment framework urged by the dissent, which uses an equal opportunity to participate as

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119. *See* Reno v. Bossier Par. Sch. Bd., 528 U.S. 320, 360 (2000) (Souter, J., concurring) (considering abridgment as regression to be "outlandish," noting "newly emancipated citizens would have obtained practically nothing from a mere guarantee that their electoral power would not be further reduced").

120. *Abbott III*, 978 F.3d 168, 193 (5th Cir. 2020), *cert. denied*, 141 S. Ct. 1124 (2021) (mem.).

121. *Id.* at 192-93 (holding that, although there exist "quite reasonable concerns about voting in person" during the pandemic, those concerns did not affect the outcome of the case).

122. *Id.*

123. *Id.* at 196-99 (Stewart, J., concurring in part and dissenting in part).

the comparator as opposed to the privileges previously enjoyed, the mere fact that younger voters are given fewer methods by which to exercise the vote as compared to voters sixty-five and older is enough to violate the Twenty-Sixth Amendment.[124] Accordingly, under this framework, the extraordinary circumstances posed by COVID-19 serve only to intensify the magnitude of an already-existing constitutional violation by raising the stakes from mere inconvenience to potential exposure to COVID-19. However, the Fifth Circuit employed an interpretation of the Twenty-Sixth Amendment that left no room for consideration of the health hazards posed by COVID-19 at the polls.

V. CONCLUSION

This age-based inequity is a facial violation of the Twenty-Sixth Amendment, which is made even more egregious as applied during the pandemic. A violation that would normally implicate mere inconvenience, implicates serious illness and even death during a pandemic. By forcing younger voters to choose between their health and voting by employing an incredibly narrow interpretation of the Twenty-Sixth Amendment, the Fifth Circuit created binding precedent on the treatment of age discrimination pertaining to voting rights, creating a loophole that has the potential to result in serious voter disenfranchisement in its jurisdiction. Because the Twenty-Sixth Amendment mirrors the language of the Fifteenth, Nineteenth, and Twenty-Fourth Amendments, the majority's narrow interpretation of "abridge the right to vote" may have opened the door to voter suppression on the basis of race and sex-based lines in addition to age.

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124. *Id.*

* © 2021 Kristen Shaw. J.D. candidate 2022, Tulane University Law School; B.A. Music, 2018, Florida State University. Thank you to the *Tulane Law Review*, especially the Notes and Comments team and my fellow Junior Members, for your assistance in preparing this Recent Development for publication. Thank you also to my roommates, Jade Pemberton and Haley Gentry, for your unwavering love, patience, and support during the writing process and the entire COVID-19 pandemic. This Recent Development is dedicated to my parents and grandparents, who have always encouraged me and supported my dreams through their own hard work and sacrifice.