Home > Supreme Court Continues to Allow Absentee Voting in Texas Only for Those 65 and Older

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The Supreme Court turned down a request by the Texas Democratic Party to reinstate a federal district court preliminary injunction ordering Texas to permit all voters to “apply for, receive, and cast an absentee ballot in upcoming elections during the pendency of pandemic circumstances.”

The Fifth Circuit stayed the injunction and the Texas Democratic party asked the Supreme Court to vacate the Fifth Circuit’s stay allowing the district court injunction to go back into effect.

While no Supreme Court Justice dissented from the denial of the application to vacate the stay or otherwise explained the Court’s reasoning, Justice Sotomayor issued a brief statement encouraging the Fifth Circuit to “consider the merits of the legal issues in this case well in advance of the November election.”

Texas law allows all voters over the age of 65 to vote by mail. Voters under the age of 65 can vote by mail only if they qualify under one of three statutorily specified excuses.

The Texas Democratic Party argued, and the district court agreed, that Texas’ law would likely violate the Constitution’s Twenty Sixth Amendment which says that the right to vote of citizens 18 and older “shall not be denied or abridged by . . . any State on account of age.”

The Fifth Circuit disagreed with the district court and prevented its injunction from going into effect, concluding that the law would likely pass rational basis review because “[a]s the state notes, ‘[e]ven outside the context of [the Virus], individuals aged 65 and over . . . face unique challenges in attending the polls,’ so ‘[t]he State’s decision to allow older Texans to vote by mail without extending that ability to everyone is a rational way to facilitate exercise of the franchise for Texans who are more likely to face everyday barriers to movement.’”

The Texas Democratic Party argued the Supreme Court should vacate the Fifth Circuit’s stay of the district court decision because the Fifth Circuit’s decision “forces millions of Texas voters to either risk their health at the polls, twice, or relinquish their right to vote in the upcoming election season.” The Texas Democratic Party also noted that the Fifth Circuit’s decision conflicts with decisions of the Supreme Court of California, the Colorado Supreme Court, and the First Circuit.

Texas Governor Abbot asked the Court to deny the application to vacate the stay. “The Fifth Circuit faithfully applied that instruction to stay a sweeping district court order that would rewrite a provision of the Texas Election Code that has been in effect since 1975. The Fifth Circuit correctly explained that petitioners’ ineligibility to vote by mail does not implicate ‘the right to vote’ protected by the Twenty-Sixth Amendment—or any other constitutional provision. There is no constitutional right to vote by mail, and each petitioner acknowledges that he or she has the option to vote by personal appearance on election day or during the extended early-voting period Texas is offering before the July primary.”

In her statement mentioned above, Justice Sotomayor additionally wrote: “This application raises
weighty but seemingly novel questions regarding the Twenty-Sixth Amendment. I do not disagree with the decision to refrain from addressing them for the first time here, in the context of an emergency application to vacate a stay of an injunction.”

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