Legal Theories to Compel Vote-by-Mail in Federal Court

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INTRODUCTION

In addition to a public health threat, the COVID-19 pandemic is turning out to be a severe threat to our nation's commitment to democracy. Many state and local leaders are taking advantage of these times to disenfranchise racial and

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ethnic minorities at the ballot box.[1] Regulations imposed to mitigate the worst effects of the virus could keep thousands of voters from the polls in the November 2020 presidential election.[2] Vote-by-mail has emerged as the top policy solution to guarantee that voters can still cast their ballots, provided proper safeguards are in place to maximize voting security and prevent discarding of valid ballots.[3] Crowded in-person voting is a potential health threat amidst a highly contagious pandemic with no known vaccine or treatment. However, nationwide access to mail ballots will be a legal fight. There are 17 states that currently require voters to provide an excuse to vote absentee,[4] and states that have no-excuse absentee voting may still require that voters conducts some processes in person, like ballot notarization.[5] These states are unlikely to implement necessary vote-by-mail measures on their own accord.

The Texas Democratic Party recently filed a first-of-its-kind lawsuit to compel the state to provide its voters with relatively unrestricted vote-by-mail during this pandemic.[6] Plaintiffs seeking access to vote-by-mail face legal uncertainty as to the claims that might enable their access to mail voting during this pandemic. To provide a roadmap for federal vote-by-mail lawsuits related to COVID-19, this Article outlines many of the possible claims that advocates can bring in federal court to challenge states' failure to provide mail ballots to voters. Where clear tests and guidelines for necessary evidence are absent from the case law, we propose our own.[7]

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1. *See, e.g.,* Mienah Z. Sharif et al., *Voter Disenfranchisement and COVID-19 are Connected — Here's Why*, SALON (April 13, 2020), https://www.salon.com/2020/04/13/voter-disenfranchisement-and-covid-19-are-connected-heres-why.

2. *See* UCLA VOTING RIGHTS PROJECT, PROTECTING DEMOCRACY: IMPLEMENTING EQUAL AND SAFE ACCESS TO THE BALLOT BOX DURING A GLOBAL PANDEMIC 2 (March 23, 2020), https://latino.ucla.edu/wp-content/uploads/2020/03/VRP-VBM-red..pdf.

3. The policy has been the subject of numerous articles and op-eds, and both the latest COVID-19 House response bill and Senator Kamala Harris's Vote Safe Act include lengthy mandates pertaining to vote-by-mail measures. *See,e.g.,* Lily Hay Newman, *Vote by Mail Isn't Perfect. But It's Essential in a Pandemic*, WIRED (April 9, 2020), https://www.wired.com/story/vote-by-mail-absentee-coronvirus-covid-19-pandemic; Jacob Pramuk, *Politicians are already calling for a 4th coronavirus relief plan. Here's what could be in it* (April 1, 2020), CNBC, https://www.cnbc.com/2020/04/01/coronavirus-update-phase-4-relief-bill-could-include-these-measures.html; H.R.2722, 116th Congress (2019-2020).

4. ABSENTEE BALLOT RULES, VOTE, https://www.vote.org/absentee-voting-rules.

5. For example, Missouri requires that absentee ballots be notarized prior to submission. HOW TO VOTE, MISSOURI SECRETARY OF STATE, https://www.sos.mo.gov/elections/goVoteMissouri/howtovote (last visited May 5, 2020).

6. Tex. Democratic Party v. Abbott, 5:20-CV-00438-FB (W.D. Tex. 2020).

7. It is essential that future plaintiffs recognize that access to absentee ballots is only one part of the problem. It is just as important to ensure that jurisdictions are in full compliance with the language access requirements of Voting Rights Act Section 203, as voters must be able to comprehend election materials to have a meaningful opportunity to vote. Further, it is critical that absentee ballots be appropriately tallied and allocated to the voting precinct in which they are cast. Administration of vote by mail must not be in a racially or politically discriminatory fashion. Determining if a redistricting plan complies with Section 2 of the Voting Rights Act requires a racial bloc voting analysis which depends on data about precinct returns, as well as other data. This measure ensures that statistical data on voting patterns are available for future use. While most jurisdictions meet these demands, plaintiffs should not overlook these less visible features of vote-by-mail schemes.

I.
COMPELLING VOTE-BY-MAIL IN FEDERAL COURT: SEVEN POSSIBILITIES

There are at least seven possible federal claims that plaintiffs could allege in a case seeking to compel a jurisdiction to provide all its voters with access to mail voting. These range from claims based on statutes and constitutional Amendments familiar to voting rights attorneys, such as Section 2 of the Voting Rights Act and the Fourteenth Amendment, to relatively untested legal theories based on the rarely litigated Twenty-Sixth Amendment. Courts implement different tests to evaluate many of these claims.[8] Correspondingly, plaintiffs must be prepared to present a diversity of quantitative and qualitative evidence depending on the claims upon which they rely. The following analysis lays bare these claims, the tests implemented by courts in their adjudication, and the evidence plaintiffs must present to satisfy those tests. Where clear tests and requirements for evidence are absent from the case law, we propose our own. Specifically, we argue that courts should apply strict scrutiny to Twenty-Sixth Amendment age discrimination claims in accordance with the Court's conception of voting as a fundamental right.

A. Race and Language Minority Discrimination: Section 2 of the Voting Rights Act

Voting Rights Act Section 2 claims are common in the vote dilution context, where one group's vote is made to have greater electoral weight than another group's. Such is the case in redistricting matters, where plaintiffs are seeking redress for the "cracking" and "packing" of minority communities in legislative maps. Lately, the claim has re-emerged in vote denial cases.[9] In a series of legal challenges to voter identification laws for registration or election-day voting, plaintiffs have alleged that election rules and procedures are tantamount to vote denial that disproportionately impacts blacks and Latinos. In Texas, North Dakota, North Carolina, and elsewhere, plaintiffs have offered expert testimony that these facially colorblind election rules have disproportionate negative impact on non-whites, who have lower rates of possession of valid state ID and of the documents required to obtain even a free ID.[10] Courts have been persuaded by this evidence and have cited this disproportionate impact on minorities as violations of Section 2 of the Voting Rights Act.[11] As in a voter ID vote denial claim, expert testimony and evidence from demographers, sociologists, and political scientists can be used to assess

8. *See infra* subsection 7.

9. *See, e.g.,* Veasey v. Abbott, 830 F.3d 216 (5th Cir. 2016) (en banc), cert. denied, 137 S. Ct. 612 (2017); North Carolina State Conference of the NAACP v. McCrory 831 F.3d 204 (4th Cir. 2016).

10. *See, e.g.,* Veasey v. Perry, 71 F. Supp. 3d 627 (S.D. Tex. 2014); Brakebill v. Jaeger, 2016 WL 7118548 (N.D. 2016); McCrory, *supra* note 5.

11. *See, e.g.,* Veasey, *supra* note 6; Brakebill, *supra* note 6.

whether or not whites and non-whites have differential access to various voting methods, such as absentee mail ballots.

Lately, a consensus on how to pursue a Section 2 "racially discriminatory effect" claim of vote denial seems to be emerging among the circuits. In *Ohio State Conference of NAACP. v. Husted*, the Sixth Circuit read Section 2's application to vote denial claims as requiring two inquiries: (1) whether the challenged practice imposes a discriminatory burden on members of a protected class, causing this class to have less of an opportunity to participate in the political process and elect representatives of their choice; and (2) whether this burden is caused by or linked to social and historical conditions that have produced or currently produce discrimination against members of the protected class.[12] In assessing both elements, courts consider "the totality of circumstances," informed by a congressional committee report listing a series of factors referred to as the "Senate factors."[13] The Fourth Circuit adopted this test in *League of Women Voters of North Carolina v. North Carolina*[14] and affirmed the use of the Senate factors by courts to determine whether the two elements for vote dilution under Section 2 are met.[15] In *Veasey v. Abbott*,[16] the circuit hearing the case *en banc* adopted the two-part framework.

The first element of this two-part inquiry concerns the nature of the burden imposed, requiring plaintiffs to show that the practice being challenged creates the disparate effect that is required under Section 2. The second element draws on both the Senate factors and the preconditions for a vote dilution claim originally articulated in *Thornburg v. Gingles*.[17] The Fifth, Fourth, and Sixth

12. Ohio State Conference of N.A.A.C.P. v. Husted, 768 F.3d 524, 554 (6th Cir. 2014), vacated sub nom. Ohio State Conference of The Nat. Ass'n For The Advancement of Colored People v. Husted, No. 14-3877, 2014 WL 10384647 (6th Cir. Oct. 1, 2014).

13. Factors considered under the totality of the circumstances include: (1) the extent of any history of official discrimination in the jurisdiction at issue; (2) the extent to which voting in elections in the jurisdiction at issue is racially polarized; (3) if the jurisdiction has used malapportioned districts, majority vote requirements, anti-single shot provisions, or voting procedures that enhance discrimination; (4) existence of a candidate slating process; (5) if the protected class bear the effects of discrimination in areas such as education, employment, and health; (6) if there have been racial appeals (overt or subtle) used in political campaigns in the jurisdiction; and (7) the extent to which members of the protected class have been elected to office in the jurisdiction. *See* Voting Rights Act Extension: Report of the Committee on the Judiciary United States Senate on S. 1992 with Additional, Minority, and Supplemental Views, S Rep No 97-417 at 28–29 (cited in note 3) (listing the "[t]ypical factors" that a plaintiff could show to establish a violation).

14. 769 F. 3d 224, 240 (4th Cir. 2014).

15. League of Women Voters of N. Carolina v. North Carolina, 769 F.3d 224, 240 (4th Cir. 2014) ("[W]hile these factors "may be relevant" to a Section 2 analysis, "'there is no requirement that any particular number of factors be proved, or [even] that a majority of them point one way or the other.'").

16. 830 F.3d 216 (5th Cir. 2016).

17. 478 US 30, 56–63 (1986). Specifically, plaintiffs must show: "First, [that] the minority group . . . is sufficiently large and geographically compact to constitute a majority in a single-member district. . . . Second, [that] the minority group . . . is politically cohesive. . . . [And third,] that the white majority votes sufficiently as a bloc to enable it—in the absence of special circumstances, such as the

Circuits all concluded that the *Gingles* preconditions "may be used to examine causality under the second part of the two-part analysis."[18] Additionally, courts may consider all the Senate factors to determine whether the burden is caused by or linked to social and historical conditions.[19]

To successfully challenge a state's vote-by-mail law under Section 2, plaintiffs need to show that the law disproportionality burdens racial minorities either because of vote-by-mail's access or administration. For example, unless social distancing falls under the disability exception, Texas's vote-by-mail allowance scheme requires anyone under the age of 65 to have one of a limited list of excuses to access a mail ballot. Importantly, in Texas, the population aged 65 or older is 60% non-Hispanic white, 22% Hispanic, and 9% black.[20] The population aged 18 to 65 is only 30% non-Hispanic white, 44% Hispanic, and 12% black.[21] Since Texas's population over the age of 65 is disproportionately non-Hispanic white, a discriminatory effect can be easily shown insofar as white voters have better access to absentee mail ballots than do non-whites. Put differently, 24% of white adults in Texas are 65 or older and have access to unrestricted vote-by-mail, compared to only 11% of Latino adults and 13% of black adults. Additionally, there may be other jurisdictions that provide for universal vote-by-mail administered with a discriminatory effect. For instance, research in Florida has found that blacks and Hispanics see their absentee ballot signatures challenged and rejected at higher rates than whites.[22] The burden of proof in these cases is met with such statistical data and empirical evidence.

B. Race Discrimination: The Fourteenth and Fifteenth Amendments[23]

To win a challenge to state action under the Fourteenth Amendment's Equal Protection Clause and the Fifteenth Amendment, plaintiffs must show that racial discrimination was a motivating factor of the state action.[24] Unlike a Section 2 effects claim, plaintiffs must show discriminatory *intent* behind the law, beyond mere disparate *impact*. Racial motivation need only be one factor behind the policy choice; it need not be the only motivating factor.[25] Courts infer

minority candidate." *Id.* Only after these preconditions are met will a court evaluate the totality of the circumstances liability standard prescribed by the VRA.

18. *Id.* at 245.

19. *Id.*

20. *See* TEXAS DEMOGRAPHIC CENTER, DEMOGRAPHIC TRENDS, CHARACTERISTICS, AND POPULATION PROJECTIONS FOR TEXAS AND FORT WORTH (May 1, 2020), https://demographics.texas.gov/Resources/Presentations/OSD/2020/2020_05_01_RotaryClubofFortWorth.pdf

21. *Id.*

22. *See generally* Daniel A. Smith, American Civil Liberties Union Florida, Vote-By-Mail Ballots Cast in Florida (2018), https://www.aclufl.org/sites/default/files/aclufl_-_vote_by_mail_-_report.pdf.

23. If a plaintiff brings this claim, a Voting Rights Act Section 2 intent claim will also likely be pleaded and is analyzed under a similar framework.

24. N. Carolina State Conference of NAACP v. McCrory, 831 F.3d 204, 220 (4th Cir. 2016).

25. *Id.*

intent through the *Village of Arlington Heights v. Metropolitan Housing Development Corp.*[26] framework, in which courts consider whether, under the totality of the circumstances, invidious racial discrimination was a motivating factor in the design of the policy.[27] Strict scrutiny then applies where racial motivation is evident. Additionally, impact alone may be sufficient when the effect of the state action is "unexplainable on grounds other than race . . . even when the governing legislation appears neutral on its face."[28]

Factors relevant to showing discriminatory motivation include the historical background of the decision; the specific sequence of events leading up to the decision; departures from the normal procedural sequence; and legislative history, especially where there are contemporary statements by members of the decision-making body.[29] When challenging a vote-by-mail statute under either or both the Fourteenth and Fifteenth Amendments, plaintiffs may face an uphill battle in showing a record of evidence that lawmakers enacted restrictive excuse absentee ballot provisions because of intent to discriminate based on race. Of course, state actions taken during the pandemic could also be used to show that the administration of otherwise race-neutral vote-by-mail provisions stems at least in part from intentional racial discrimination.

C. Non-Racial Discrimination in Voting: The Fourteenth Amendment

In *Harper v. Virginia State Board of Elections,*[30] the Court held that voting is a fundamental right. As such, any class of plaintiffs, so long as they are eligible voters, can bring Fourteenth Amendment claims under the Due Process Clause for the violation of the fundamental right to vote. Challenges to a state election law that is found to disparately burden the right to vote are evaluated under the *Anderson-Burdick* test, in which a court weighs "the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate" against "the precise interests put forward by the State as justifications for the burden imposed by the rule."[31] If the burden on the right to vote is severe, a court will apply strict scrutiny. If the burden is minimal, a court will weigh the burden against the state's interest under rational basis review,[32] under which standard "[e]ven rational restrictions on the right to vote are invidious if they are unrelated to voter qualifications."

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26. 429 U.S. 252 (1977).

27. Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252 (1977).

28. *Id.*

29. *Id.*; *see also* Democratic Nat'l Comm. v. Hobbs, 948 F.3d 989, 1027 (9th Cir. 2020) (applying the *Arlington Heights* framework); *N. Carolina State Conference of NAACP v. McCrory*, 831 F. 3d 204, 226 (4th Cir. 2016).

30. 383 U.S. 663, 667.

31. Burdick v. Takushi, 504 U.S. 428, 434 (1992).

32. Burdick v. Takushi, 504 U.S. 428, 433 (1992); Anderson v. Celebrezze, 460 U.S. 780 (1983). See also Obama for Am. v. Husted, 697 F.3d 423, 428 (6th Cir. 2012) ("The precise character of the state's action and the nature of the burden on voters will determine the appropriate equal protection standard.").

To determine whether the burden is severe, courts view quantitative data on how many voters are actively disenfranchised by a law alongside qualitative evidence regarding enacting legislators' intent, including a history of discrimination against the relevant group, statements of legislators, the tenuousness of the policy, the historical background of the policy, departures from the normal policy-making procedure, and the extent to which the policy has a disparate impact.[33] This can be shown through expert reports, and plaintiffs should be mindful of case law in which courts were unwilling to find vote-by-mail-related constitutional injuries in the absence of evidence. In *McDonald v. Board of Election Commissioners of Chicago*,[34] the Court found that an Illinois statute that did not provide absentee ballots for inmates in the county jail violated neither the Equal Protection Clause nor the fundamental right to vote, basing its holding on the fact that there was no evidence that pretrial detainees were prohibited from exercising the right to vote.[35] Accordingly, plaintiffs should be sure to present ample evidence that they were unable to access this right.

When challenging a state's refusal to provide all voters with access to vote-by-mail during a pandemic, plaintiffs should argue that the right to vote is severely burdened by restrictive vote-by-mail measures. Having to risk one's life and the lives of others to vote in person, and violate stay-at-home orders to do so, is a significant burden on the right to vote, especially as the COVID-19 death toll continues to climb. Courts should apply strict scrutiny on account of the severity of this burden. Second, plaintiffs must assert that the state's interest in not extending absentee ballots to all voters during a deadly pandemic falls far short of compelling. Every state allows at least some vote-by-mail given that federal law requires it for military and overseas voters.[36] Clearly, the voting method can be securely administered and states have the basic administrative functions in place to provide access to it. What measures a state must take to ramp up these capacities will need to be explored in discovery, but the vote denial burden on the named plaintiffs should be able to overcome any interests a state uses to justify vote-by-mail restrictions.

Even if a court declines to extend strict scrutiny, such laws should fail even under rational basis review. Courts should have no trouble concluding that limiting access to absentee ballots during a contagious pandemic cannot be rationally related to any legitimate governmental interest. Maintaining the status quo of predominantly in-person voting would not only endanger public health but could depress turnout and leave voters with the belief that elections are

33. Obama for Am. v. Husted, 697 F.3d 423, 431-32 (6th Cir. 2012).

34. 394 U.S. 802 (1969).

35. *Id.* at 810.

36. The Military and Overseas Voter Empowerment Act (or MOVE Act), Subtitle H of the National Defense Authorization Act for Fiscal Year 2010 (H.R. 2647, Pub. L. 111–84, 123 Stat. 2190).

insecure and unsafe. Further, all available evidence indicates that voter fraud in vote-by-mail schemes is nearly nonexistent.[37]

D. Denial of Free Speech: The First Amendment

Political speech, from political pamphlets to campaign finance, is strongly protected as a "core First Amendment activity."[38] The Court's analysis in First Amendment cases seeks to answer two questions: (1) what sort of speech is at issue and (2) the severity of the burden placed upon it.[39] Just as in the Fourteenth Amendment context, courts engage in a balancing test, taking into consideration the extent to which a state's stated interests justify the burden on the plaintiff's rights.[40] If the act at issue "places a severe burden on fully protected speech and associational freedoms," the court must apply strict scrutiny.[41] But if the act "places only a minimal burden on fully protected speech and associational freedoms, or if the speech and associational freedoms are not fully protected under the First Amendment, [courts] apply a lower level of constitutional scrutiny."[42]

Casting a vote is speech that constitutes the highest form of public expression a citizen can make.[43] There is no question that restricted access to vote-by-mail under these circumstances heavily burdens the right to vote. Because "[v]oting is of the most fundamental significance under our constitutional structure," a court should apply strict scrutiny to laws limiting access to vote-by-mail.[44] Importantly, while the Supreme Court has applied rational basis review to state laws prohibiting write-in voting,[45] the burden at issue in the present case is tantamount to denying the ability to cast a ballot at all. Nevertheless, the availability of in-person voting, despite its dangers, may compel a court to apply rational basis review. Plaintiffs should be prepared to

37. UCLA VOTING RIGHTS PROJECT, DEBUNKING THE MYTH OF VOTER FRAUD IN MAIL BALLOTS (April 14, 2020), https://latino.ucla.edu/wp-content/uploads/2020/04/LPPI-VRP-Voter-Fraud-res.pdf.

38. League of Women Voters of Florida, 863 F. Supp. 2d 1155, 1158 (2012); *see also* Lincoln Club of Orange County v. City of Irvine, 292 F.3d 934 (2002).

39. *See* Lincoln Club, *supra* note 39 at 938 ("the level of constitutional scrutiny that we apply to a statutory restriction on political speech and associational freedoms is dictated by both the intrinsic strength of, and the magnitude of the burden placed on, the speech and associational freedoms at issue.").

40. Burdick v. Takushi, 504 U.S. 428, 433 (1992); Anderson v. Celebrezze, 460 U.S. 780 (1983). See also Obama for Am. v. Husted, 697 F.3d 423, 428 (6th Cir. 2012) ("The precise character of the state's action and the nature of the burden on voters will determine the appropriate equal protection standard.")

41. *See* Lincoln Club, *supra* note 39 at 938; *see also* Citizens United v. Federal Election Comm'n, 558 U.S. 310, 340 (2010) ("Laws that burden political speech are 'subject to strict scrutiny[.]'")

42. *See supra* note 40.

43. *See generally* Armand Derfner & J. Gerald Hebert, *Voting is Speech*, 34 YALE L. & POL. REV. 471 (2016); *see also supra* note 39.

44. Illinois Bd. of Elections v. Socialist Workers Party, 440 U.S. 173, 184 (1979).

45. Burdick v. Takushi, 504 U.S. 428 (1992); Paul v. Indiana Election Bd., 743 F. Supp 616 (S.D. Ind. 1990).

show that laws limiting access to vote-by-mail fail under both levels of scrutiny.[46]

E. Disparate Treatment of Voters: A "Bush v. Gore" Claim

Today, states are permitting counties to develop their own practices around mail-in ballots, which include determinations regarding who receives a mail ballot and decisions about which cast ballots to accept and tabulate. These conditions promise to result in much the same arbitrary and disparate treatment which troubled the Court in *Bush v. Gore*. A determinative fact for the court in the unprecedented case *Bush v. Gore*[47] was the arbitrary and disparate treatment of voters' ballots from county to county, which was not governed by statewide, uniform standards by which county officials identified voter intent. A "*Bush v. Gore*" claim that a measure is invalid because it establishes disparate treatment of voters may apply in states where the vote-by-mail rules can be adjusted at the county level or more locally, as is the case in Texas. (A decree of the Texas Secretary of State actually suggested that counties seek out an "order to authorize exceptions to the voting procedures" for localized pandemic-related circumstances.[48]) Some counties in such a state may fund and provide for universal vote-by-mail access while other counties restrict access. Furthermore, some counties may apply one standard to verify ballots (signature matching, for example) while others administer a different, looser standard. Notably, the Court recognized in *Bush v. Gore* that election measures for presidential elections warrant special scrutiny for fair treatment of voters.[49] If plaintiffs can show that a lack of uniform guidance has resulted in arbitrary and disparate treatment of voters, they can establish the very harm the Court condemned in *Bush v. Gore*.[50]

F. Procedural Due Process for Vagueness

It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined.[51] Accordingly, courts have set an outer limit on how much vagueness they will tolerate in a statute. Specifically, a statute is unconstitutionally vague under the Fourteenth Amendment if its terms "(1)

46. League of Women Voters of Fla., Inc., v. Detzner, 314 F. Supp. 3d 1205, 1220 (N.D. Fla. 2018).

47. 531 U.S. 98 (2000).

48. Texas Secretary of State, Election Advisory No. 2020-14 (April 6, 2020), https://www.sos.state.tx.us/elections/laws/advisory2020-14.shtml.

49. *Id.* at 112 (Scalia concurring) ("[I]n the context of a Presidential election, state-imposed restrictions implicate a uniquely important national interest. For the President and the Vice President of the United States are the only elected officials who represent all the voters in the Nation.").

50. *Id.* at 110.

51. *See, e.g.,* Grayned v. City of Rockford, 408 U.S. 104, 108–09, 92 S. Ct. 2294, 2298–99, 33 L. Ed. 2d 222 (1972) (where a vague statute "'abut(s) upon sensitive areas of basic First Amendment freedoms,' it 'operates to inhibit the exercise of [those] freedoms.' Uncertain meanings inevitably lead citizens to '*steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas were clearly marked*.'")

'fail to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits' or (2) 'authorize or even encourage arbitrary and discriminatory enforcement.'"[52] Importantly, "a more stringent vagueness test should apply" to laws that abridge the freedom of speech."[53] (However, this standard can be "relaxed somewhat" if the law at issue "imposes civil rather than criminal penalties and includes an implicit scienter requirement."[54])

To establish that a measure is void for vagueness, plaintiffs must show that there are multiple meanings within the law or multiple possible interpretations of its application. This may be especially useful in jurisdictions that fail to clarify what is meant by certain conditions a voter must meet in order to receive an absentee ballot. Such is the case in Connecticut, where the law provides that a voter may receive an absentee ballot based on "his or her illness" or "his or her physical disability" without defining what qualifies as an illness or physical disability.[55] To demonstrate vagueness, plaintiffs may also show examples of arbitrary enforcement of a provision by governmental agencies, such as one county rejecting some forms of absentee ballot requests while another does not.

G. Abridgment of the Right to Vote Based on Age: The Twenty-Sixth Amendment

While few claims based on the Twenty-Sixth Amendment have been litigated, voting rights activists should consider this important amendment when addressing the disparate impact of many absentee ballot laws on younger voters. The Twenty-Sixth Amendment prohibits governments from denying or abridging the right of citizens eighteen and up to vote on account of their age. As its legislative history demonstrates, the Twenty-Sixth Amendment exists not only to enfranchise younger voters but to remove barriers to their participation in elections.[56] Currently, there is no controlling case law on the amendment from the Supreme Court nor any of the circuits, leaving lower courts to remark upon the "dearth of guidance on what test applies." [57]

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52. *Id.* at 246 (6th Cir. 2018) (quoting Hill v. Colorado, 530 U.S. 703, 732, 120 S.Ct. 2480, 147 L.Ed.2d 597 (2000).

53. *Id.* (quoting Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 499, 102 S.Ct. 1186, 71 L.Ed.2d 362 (1982).

54. *Id.* (citing Hoffman Estates, 455 U.S. at 499, 102 S.Ct. 1186). 420 F.Supp.3d 683, 706.

55. CT Gen Stat § 9-135.

56. Worden v. Mercer Cty. Bd. of Elections, 61 N.J. 325, 333, 294 A.2d 233, 237 (1972). *See generally* Yael Bromberg, Youth Voting Rights and the Unfulfilled Promise of the Twenty-Sixth Amendment, 21 U. Pa. J. Const. L. 1105 (2019) for discussion of legislative history, burdens particular to young voters, and how the Twenty-Sixth Amendment was meant to provide protection beyond that provided by the Fourteenth.

57. N.C. State Conference of the NAACP v. McCrory, 182 F.Supp.3d 320, 522 (M.D.N.C. 2016), rev'd on other grounds, 831 F.3d 204 (4th Cir. 2016); see also Nashville Student Org. Comm. v. Hargett, 155 F.Supp.3d 749, 757 (M.D. Tenn. 2015) ("[T]here is no controlling caselaw . . . regarding the proper interpretation of the Twenty-Sixth Amendment or the standard to be used in deciding claims for Twenty-Sixth Amendment violations based on an alleged abridgment or denial of the right to vote.").

The most appropriate standard of review to evaluate a statute that classifies voters on the basis of age is strict scrutiny. This is because laws that grant privileges for voting on the basis of age create two classes of voters and are prima facie discriminatory. In *United States v. State of Texas*,[58] the court found that requiring students to answer questionnaires or submit affidavits in order to register to vote was an improper restriction of the right to vote under the Twenty-Sixth Amendment. The district court opined that "before that right [to vote] can be restricted, the purpose of the restriction and the assertedly overriding interests served by it must meet close constitutional scrutiny."[59] Further, precedent is clear that strict scrutiny applies to a statute or practice that is patently discriminatory on its face insofar as it limits fundamental rights for some and not others.[60]

Additionally, in *League of Women Voters of Florida. v. Detzner*,[61] the federal district court recognized that the full effect of the Twenty-Sixth Amendment means that laws that are blatantly discriminatory on the basis of age are invalid. The legislative history of the Twenty-Sixth Amendment gives little support to the notion that the Amendment's protections should apply only to those election regulations that were designed with the *purpose* to harm voters of a certain age. A unanimous Senate, near-unanimous House of Representatives, and 38 ratifying states intended the Twenty-Sixth Amendment to have teeth, which requires courts to recognize that the Amendment protects voters from all "unnecessary burdens and barriers" on their right to vote.[62] Only strict scrutiny can properly appraise whether a law or practice is an unnecessary burden on a fundamental right.

In the alternative, another appropriate test is one that determines whether a statute is discriminatory based on the results it produces. Results-based tests are already used in voting rights claims under Section 2 of the Voting Rights Act.[63] Under a results test based on the Twenty-Sixth Amendment, a court should inquire whether an election measure has a disparate effect on voters based on their age. If the answer is in the affirmative, the election measure is unconstitutional, and the court may fashion a remedy based on the severity and extent of the disparate treatment.

A consensus has been emerging, however, as recent courts have applied the *Arlington Heights* standard for Twenty-Sixth Amendment claims. One Wis. Inst., Inc. v. Thomsen, 198 F.Supp.3d 896, 926 (W.D. Wis. 2016); Lee v. Va. State Bd. of Elections, 188 F. Supp. 3d 577, 609 (E.D. Va. 2016), aff'd, Lee, 843 F.3d 592 (4th Cir. 2016). League of Women Voters of Fla., Inc., v. Detzner, 314 F. Supp. 3d 1205, 1221 (N.D. Fla. 2018).

58. 445 F. Supp. 1245,126 (S.D. Tex. 1978), *affirmed Symm v. United States,* 439 U.S. 1105 (1979).

59. *Id.* at 1261, quoting Evans v. Cornman, 398 U.S. 419, 423 (1970).

60. *See* Lynch v. Donnelly, 465 U.S. 668, 687 n. 13 (1984); Reed v. Town of Gilbert, 135 S. Ct. 2218, 2228 (2015).

61. 314 F. Supp. 3d 1205, 1223.

62. Worden v. Mercer Cty. Bd. Of Elections, 61 N.J. 325, 345 (1972) (recognizing the need to avoid "unnecessary burdens and barriers" on young voters' rights).

63. 52 USC § 10301.

This test should take into account both quantitative and qualitative evidence, evaluating, among other things: (1) how many of the targeted voters who are unable to access mail-in ballots are likely to have underlying health conditions that make them vulnerable to COVID-19; (2) the lack of reliable information that would allow voters to assess their own risk, such as age-stratified statistics on COVID-19's impact developed based on widespread testing; (3) the threat that in-person voting poses to other members of the households in which members of the age class reside, as well as to other members of their communities; (4) anecdotal evidence of a voter's age preventing in-person voting; and (5) whether members of the age class lack resources such that they already face a higher burden on their right to vote. For example, some may be less likely to have a driver's license and documentary proof of residence. Others may be more transient, and thus will likely face the burden of registration more often. Successful plaintiffs will prove the effects of discrimination using a variety of metrics to ensure their proof does not fall short.[64]

Recently, courts have opted to use the *Arlington Heights* framework for Twenty-Sixth Amendment claims.[65] This test is used for analysis of Fourteenth and Fifteenth Amendment discriminatory intent claims,[66] which rest on the notion that state actors deliberately discriminated against a group. As compared with a results-based test, the *Arlington Heights* test places a higher burden on plaintiffs and under-protects voters disenfranchised based on their age, as a law or practice that disenfranchises voters on account of age may nevertheless lack a legislative record demonstrating an intent to do so. This should not preclude injured plaintiffs from obtaining a judicial remedy. When addressing Twenty-Sixth Amendment claims, courts should instead use strict scrutiny or a results-based test. These tests better comport with the purpose of the Twenty-Sixth Amendment and ensure meaningful remedies for plaintiffs' age-related injuries.

CONCLUSION

The foregoing claims will prove to be critical for plaintiffs seeking to vindicate their right to vote in federal court before the general election. Plaintiffs' counsel should also pay careful attention to state constitutional and statutory protections that provide for applicable remedies. The authors welcome others to contact the UCLA Voting Rights Project with possible additional theories. The Project will continue to monitor the legal and political landscape as the viral

64. *C.f.* One Wisconsin Inst., Inc. v. Thomsen, 198 F. Supp. 3d 896, 926 (W.D. Wis. 2016), order enforced, 351 F. Supp. 3d 1160 (W.D. Wis. 2019).

65. *See* One Wis. Inst., Inc. v. Thomsen, 198 F.Supp.3d 896, 926 (W.D. Wis. 2016); Lee v. Va. State Bd. of Elections, 188 F.Supp.3d 577, 609 (E.D. Va. 2016), aff'd, Lee, 843 F.3d 592 (4th Cir. 2016); League of Women Voters of Fla., Inc. v. Detzner, 314 F. Supp. 3d 1205, 1221 (N.D. Fla. 2018).

66. *See, e.g., N.C. State Conf. of NAACP v. McCrory*, 831 F.3d 204, 220 (4th Cir. 2016) (Stating that the *Arlington Heights* framework applies "[w]hen considering whether discriminatory intent motivates a facially neutral law").

outbreak develops and will take every opportunity to help guarantee safe and fair access to the ballot.