IN THE UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

Trudy B. Grant, Sarah Krawcheck, Nashonda Hunter, Max Milliken, and Caleb Clark, Plaintiffs, v. Howard Knapp as the Executive Director of the South Carolina Election Commission, Dennis Shedd (Chair), JoAnne Day, Clifford J. Edler, Linda McCall and Scott Moseley, as Members of the South Carolina Election Commission, and Charleston County Board of Elections and Voter Registration, Defendants.	)	Case No.: 2:23-cv-06838-BHH

REPLY IN SUPPORT OF PLAINTIFF'S RULE 12 (C) MOTION[1]

I. NEW IMPORTANT DECISION

Fortuitously, almost as if the justices were watching this case, the Supreme Court just 18 days ago entered an order making it clear that (1) absentee voting cannot be treated differently from other elements of the right to vote, and (2) denying absentee ballots to some voters while allowing them for others voters is impermissible. See Exhibit 1, *Republican Natl. Comm. V. Mi Familia Vota*, No. 24A164 Order entered Aug. 22, 2024.

The case involved several restrictive Arizona voting laws, including a law which provided that one class of registered voters was entitled to vote by all prescribed methods including a mail ballot, but another class of registered voters could vote only by the prescribed methods except a

[1] As noted in Plaintiffs' Rule 12(d) Notice, filed this day, this may be treated as a Rule 56 reply.

mail ballot.[2] Lower courts granted injunctions against the "no mail ballot" law[3] and several other Arizona statutes.[4] On an application to stay all of the lower courts' orders against the various Arizona voting laws, the Supreme Court *stayed* the injunction as to Arizona's other laws, but *refused* to stay the injunction as to the "no mail ballot" law and the "no vote for President" law. Exhibit 1.

Of course, this is not a final determination of that case of this issue, but the lines were clearly drawn and the Supreme Court's Order is unmistakably in line with the arguments that plaintiffs have made here.

II. BASIC FLAWS IN THE DEFENDANTS' ARGUMENT

The Constitution is the fundamental law of the land. It is not a piece of Swiss cheese, full of holes, which the states can slice and dice at will.

That is especially so with regard to the right-to-vote amendments. For 150 years, it has been well understood that when the Constitution says the right to vote shall not be "denied" or "abridged" on account of some characteristic, that characteristic is simply off-limits. And when the people of the United States use the same language in 1971 that they used in 1870 and 1920 and

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[2] What the Arizona law did. The Arizona law said voters who provide proof of citizenship could vote in both state and federal elections and by any method, including a mail ballot. Voters presenting no proof of citizenship could not vote in state elections at all, and, while they could vote in federal elections (as decided by *Arizona v. Inter-Tribal Council*, 570 US 1 (2013), they could not vote in such elections by mail in ballot or for the office of President Ariz. Rev. Stat. Ann. §§ 16-121.01(E) and 16-127(A).

[3] What the district court decided. The district court granted summary judgment on the "no mail ballot" provision because it discriminated against certain voters in violation of the National Voter Registration Act. *Mi Familia Vota v. Fontes*, 691 F.Supp.3d 1077, 1090-92 (D. Ariz. 2023). On separate grounds, the district court also granted summary judgment against the "no voting for President" clause, *id.* At 1088-90, and, after a trial, also ruled against some of the other Arizona laws. *Mi Familia Vota v. Fontes, 2024 WL 2244338 (D. Ariz. May 2, 2024).*

[4] What the appellate court decided. In two rounds of motions, the 9th Circuit (with some dissent) kept all of the district court's orders in place. *Mi Familia Vota v. Fontes*, 2024 WL 3629418 (9th Cir. July 18, 2024), and *Id., 111 F.4th 976* (9th Cir. Aug. 1, 2024). (There was some disagreement over the Arizona laws, but no appellate judge ever disagreed with striking down the "no mail ballot" and "no vote for President" laws.

1964, those words mean the same now as they did then – that the laws shall be the same for one person as for another.

Defendants argue about what "standard of review" should apply in this case – "rational basis," or " *Anderson-Burdick*," or whatever -- but the Constitution settles that question. If a standard must be selected, it is obviously the "compelling interest" standard. As the Supreme Court made clear in *San Antonio Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973), whenever a right is enshrined in the Constitution, the rule is strict scrutiny: "the searching judicial scrutiny reserved for laws that create suspect classifications or impinge upon constitutionally protected rights." 411 U.S. at 40.

To avoid the obvious conclusion that the 26th amendment makes all voters over 18 equal, defendants seek to diminish specific words of the amendment, "abridge" and "right to vote."

1. "Abridge"

Defendants' first target is the word "abridge." They argue that "abridging" the right to vote means only limiting or pitting a burden on a disfavored voter, whereas simply giving an advantage to a favored voter – as the South Carolina law plainly does – is perfectly in line with the constitutional amendment. This notion is inimical to our Democracy and certainly to the right-to-vote amendments. Elections are competitions between voters, with no built-in advantage in the law to any one voter over another. If favoritism is to be allowed in the law, why not give some voters longer hours than other voters, or more polling places?

2. "Right to Vote"

Defendants' other main target is the phase "right to vote." They say this is a limited right, which, conveniently, does not happen to include absentee voting. If this balloon could ever have floated, it is surely punctured by the new Supreme Court decision described above.

More fundamentally, it is in conflict with the way the Constitution is to be read, especially words used again and again in specific amendments to the Constitution.[5] When the people of the United States put a right into the Constitution, it is too late for a state to argue that "it is not much of a right" or that the words mean something different today."[6]

III. OTHER DEFECTS IN DEFENDANTS' ARGUMENTS

Finally, there are a few other points worth making about defendants' arguments:

1. Defendants say "states must [and are entitled to] substantially regulate elections," Opp., pp. 3-4. Of course that is true, but obviously such regulation is valid only if it is in compliance with the Constitution, including the 26th amendment. Moreover, the South Carolina law violates the premise of the cases cited in this section, which require that any regulation must be "non-discriminatory"[7], "generally applicable and evenhanded"[8], "operated equitably"[9], and be "fair."[10]

2. Defendants say this case is not like *Reno v. Bossier Par. Sch. Bd*, 520 U.S. 320 (2000). Plaintiffs' reference was not to the subject matter of that case, but to the opinion's interpretation of the 15th amendment's "deny or abridge" language as contrasted with the Voting Rights Act.

3. As to relief, defendants correctly say that courts must be sparing in their remedies, but they misunderstand what that means when the constitutional flaw to be remedied is one of discrimination – specifically, *under-inclusion*.

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[5] Defendants rely heavily on some ambiguous words in *McDonald v. Board of Election Comm'rs*, 394 U.S. 802 (1969), but that was a case under the 14th amendment, not one of the specific voting rights amendments.
[6] Defendants argue for some mythical kind of "original understanding." But, for example, secret ballots were generally unknown when the 15th amendment was ratified in 1870. Does that mean that South Carolina could provide secret ballots for white voters and not black voters.
[7] *Anderson v. Celebrezze*, 360 U.S. 780, 788 (19683). Also *Burdick v. Takushi*, 504 U.S. 428, 435 (1992).
[8] *Id.* at n. 9 (footnote citing seven Supreme Court cases).
[9] *Id.* at 434.
[10] *Ibid.*

When the Constitutional flaw is under-inclusion, the remedy can be either extension or cancellation – extension of the benefit to the unconstitutionally excluded class or cancellation of the benefit entirely. In *Califano v. Westcott*, 443 U.S. 76, 90 (1979), the Supreme Court extended an underinclusive statute and cited other cases where this was done. A partially dissenting opinion agreed that courts can choose, but simply argued that the legislative history of that statute should have dictated cancellation. See *Walsh v. United States*, 398 U.S. 333, 361 ((1970)(Harlem, J.), concurring).

Plaintiffs here have acknowledged that the Court – if called on to decide the remedy – should certainly take South Carolina's legislative history into account. The plaintiffs' only point is that there is no general rule that would require, or even prefer, cancelling all no-excuse absentee voting rather than extending that right to all voters.

IV. CONCLUSION

For the reasons in plaintiffs' original Memorandum and in this Reply, plaintiffs request that the Court grant judgment in plaintiffs' favor.

Date: September 9, 2024

s/Armand Derfner

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