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, [1] and Charleston County Board of Elections and Voter Registration,

Defendants.

No.: 2:23-cv-06838-BHH

STATE ELECTION COMMISSION DEFENDANTS' REPLY TO PLAINTIFFS RESPONSE IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT

The SEC Defendants[2] submit this reply to Plaintiffs' response opposing SEC Defendants' Motion for Summary Judgment and Memorandum in Support (Motion).

ARGUMENT

Twenty-Sixth Amendment

Plaintiffs' Opposition to Defendants' Motion for Summary Judgment rely, in part, on the arguments presented in their Rule 12(c) Motion for Judgment on the Pleadings (ECF No. 36) and their Reply in Support of Plaintiffs' Rule 12(c) Motion (ECF No 44). Plaintiffs' additional arguments mischaracterize or ignore SEC Defendants arguments in support of their Motion.

[1] S.C. Code Ann. § 7-3-10 created the "State Election Commission." (SEC)—the proper name of the SEC. There is no South Carolina government agency known as the South Carolina Election Commission.

[2] Unless stated to the contrary, SEC Defendants adopt the definitions used in their Motion.

The fact that the Supreme Court determined in *McDonald*[3] that the right to vote does not encompass the manner of voting as set forth in the "Elections Clause", art. I, sec. 4, of the Constitution of the United States (Constitution) is only part of SEC Defendants' argument as to why S.C. Code Ann. § 7-13-320(b)(2) does not violate the 26th Amendment. The Court's holding that the right to vote did not include the manner of voting supported its application of the rational relationship test as the appropriate level of scrutiny to apply to the Illinois absentee voting statute. SEC Defendants still maintain that the rational relationship test is applicable to the 26th Amendment cause of action.

However, Plaintiffs neither address nor recognize the fact that the SEC Defendants argue that even assuming that the right to vote includes the manner of voting and the rational relationship test is not the proper standard of scrutiny, S.C. Code Ann. § 7-13-320(B)(2) passes muster under the *Anderson/Burdick* test.[4] *See* ECF No. 39, p. 14, ftnt. 26 and pp. 20-26.

Voting in person is the norm in South Carolina, unless a Voter meets one of the exceptions set forth in § 7-15-320. In *Burdick v. Takushi, 540 U.S. 428, 433 (1992)* the Supreme Court acknowledged the right to vote is fundamental but recognized that the right is not absolute and state laws will invariably impose some restrictions on that right through voting laws. *Id* at 433-34. "Common sense, as well as constitutional law, compels the conclusion that government must play

[3] The Supreme Court has had a number of opportunities to overturn *McDonald.* It has not done so but instead has distinguished it. *See: Kramer v. Union Free School Dist. No. 15, 395 U.S. 621 (1969)* (absolute denial of the franchise, as opposed to *McDonald); Goosby v. Osser*, 409 U.S. 512 (1973) (absolute denial of the franchise, as opposed to *McDonald)*; *O'Brien v. Skinner*, 414 U.S. 524 (1974) (absolute denial of the right to exercise the franchise, as opposed to *McDonald*)*;* (a State's system creates barriers to voting does not itself compel close scrutiny);

[4] Plaintiffs appear to use the *Anderson/Burdick* approach in determining the level of scrutiny. *See* ECF 46 (stating that"*every* state law regulating voting is subject to federal constitutional scrutiny *of some degree* …" see also discussion on pages 4-5.

an active role in structuring elections: 'as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes.'" *Id.* at 433 (internal citation omitted).

As Justice Scalia determined in *Crawford v. Marion County Election Bd.*, 553 U.S. 181, 190 (2008): "That the State accommodates some voters by *permitting (not requiring)* the casting of absentee or provisional ballots, is an indulgence—not a constitutional imperative that falls short of what is required." *Id.* at 209. (Emphasis added.) S.C. Code Ann. § 7-15-320(B)(2) simply permits an optional method of voting for Elderly Voters. It does not at all burden or restrict, much less severely so, non-Elderly Voters.

As Justice Scalia further stated in *Crawford*, in evaluating the constitutionality of laws respecting the right to vote, the Court uses the *Burdick* approach, which "calls for application of a deferential 'important regulatory interests' standard for nonsevere, nondiscriminatory restrictions, reserving strict scrutiny for laws that *severely restrict* the right to vote." *Crawford.* 553 U.S. at 204. (Emphasis added). "Thus, the first step is to decide whether a challenged law severely burdens the right to vote. Ordinary and widespread burdens, such as those requiring '*nominal effort' of everyone*, are not severe. … *Burdens are severe if they go beyond the merely inconvenient*." *Id.*at 205 (internal citations omitted). (Emphasis added). Plaintiffs affirmatively allege that they want the convenience of voting Absentee, not that § 7-15-320(B)(2) materially infringes on or burdens their right to vote. ECF No. 24, ¶ 6(b). In fact, nowhere in their Complaint[5] do they allege that § 7-15-320(B)(2) materially burdens their right to vote—because it does not.

[5] For that matter, there is neither an allegation nor a discussion of any such burden in Plaintiffs' Rule 12(c) Motion for Judgment on the Pleadings.

Applying the *Anderson/Burdick* test, the so-called burden Plaintiffs have identified is that not having an unfettered right to choose to vote Absentee is merely an inconvenience-at most.

The second prong of *Anderson/Burdick* is to weigh the effects of the claimed burden on the affected class versus the identified state interest. *Crawford*, 533 U.S. at 191 (reaffirming the requirement determining a constitutional challenge to a voting law required the court to weight the alleged injury against "the precise interests put forward by the state as justification for the burden imposed by its rule." Internal citation omitted.) As fully discussed in the SEC Defendants' Motion at pages 23 through 26 and adopted herein, the State's interest in preventing voter fraud and assuring election integrity, instills voter confidence in the election process and certainly outweigh any claimed inconvenience to non-Elderly Voters like Plaintiffs. *See Crawford*, 553 U.S. at 194-199.

Plaintiffs rely on *Republican Natl. Comm v. Mi Familia Vota*, No. 24A164, 2024 WL3893996, August 22, 2024)[6]—a matter before the Supreme Court on an application for stay of injunctions directed at certain Arizona voting statutes regarding voter registration and documentary proof of citizenship (DPOC)—in an apparent effort to support their contention that the manner (*e.g.* absentee) of voting is a part of the "right to vote." However, this case is inapposite and provides no guidance to the issues before this Court.

Mi Familia Vota involved challenges to the legality of H.B. 2243 (§ 16-121.01) and H.B. 2692 (§ 16-165) on grounds that the statutory requirements are preempted by the provisions of the National Voter Registration Act, 42 U.S.C. 1973gg (NVRA) and the Materiality Provision of the Civil Rights Act of 1964, 52 U.S.C. § 1010(as)(2) (Materiality Provision). There was no

[6] *See* Reply in Support of Plaintiff's Rule 12(C) Motion (ECF No. 44), incorporated into Plaintiffs' Opposition to Defendants' Motion for Summary Judgment. ECF No. 46 at 1.

constitutional challenge under the 26th, 14th and 1st Amendments to the Constitution in *Mi Familia*.

In *Mi Familia*, plaintiffs contended that § 6 of the NVRA prohibited Arizona from requiring voter registrants to show DPOC to vote in presidential elections and by mail.[7] Relying on *Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1 (2013), the District Court determined that §16-121.01(C) Arizona's requirement for DPOC is inconsistent with the NVRA requirement that a State accept and use the federal Election Assistance Commission (EAC) voter registration form. *Mi Familia Vota v. Fontes*, 691 F.Supp. 3rd 1077, 1091-92 (D. Az. 2023). The District Court enjoined the State from enforcing § 116.121.01(C).

The National Republican Party and others sought a stay of the injunctions before the Ninth (9th) Circuit. After a three-judge panel stayed the District Court's order as to § 16-121.01(C)[8], the 9th Circuit vacated the motions panel order staying the judgment of the district court. *Mi Familia Vota v. Fontes*, 111 F.4th 976, 985 (9th Cir. 2024). The Supreme Court stayed the injunction as to § 16-121.01(C), thereby allowing Arizona to enforce its statute regarding DPOC requirements for registration as to the State's registration form.

Plaintiffs also complain that the SEC Defendants "do not really say what the words [the right to vote] *do* mean, only that the words *don't* include absentee voting." ECF No. 46 at 2. To the extent SEC Defendants understand what Plaintiffs are trying to say, that statement is inaccurate. SEC Defendants specifically state that the right to vote "is the right to exercise the franchise, not the manner in which that right is exercised." ECF No. 39 at 13. In other words, the

[7] Section 16-121.01(C)'s required that voters registering using Arizona's registration form had to provide DPOC but that persons using the federal Election Assistance Commission's (EAC) form did not require DPOC violated Sec. 6 of the NVRA.

[8] *Mi Familia Vota v. Fontes*, 2024 WL 3629418 (9th Cir. July 18, 2024).

right to vote is the right to cast your ballot and have the ballot count, not some specific manner of voting. Faithfully applying *Crawford* demonstrates that Plaintiffs have no Constitutional right to the non-burdensome convenience they are seeking.

Fourteenth and First Amendments

State laws regulating voting are subject to both State and federal constitutional scrutiny. The level of scrutiny for Plaintiffs' Fourteenth (14th) and First (1st) Amendment challenges to State law is the *Anderson/Burdick* balancing test, as the Supreme Court articulated in *Crawford*. *Crawford, 533 U.S.* at 208 ("It is for the state legislatures to weigh the costs and benefits of possible changes to their election codes, and their judgment must prevail unless it imposes a severe and unjustified overall burden upon the right to vote or is intended to disadvantage a particular class.") *see also id* at 189-91 and 204-08. As Plaintiffs point out, the *Crawford* Court decided that "evenhanded *restrictions"* and "reasonable, nondiscriminatory *restriction"*' are not invidious or subject to strict scrutiny. ECF No. 46, p. 3. (Emphasis added). S.C. Code Ann. § 7-15-320(B)(2) is not a *restriction* on the right to vote of non-Elderly Voters but a grant of a privilege to Elderly Voters. As Justice Scalia held in *Crawford*, "[t]hat the State accommodates some voters by permitting (not requiring) the casting of absentee or provisional ballots, is an indulgence—not a constitutional imperative that falls short of what is required." *Crawford*, 533 U.S. at 209.

Plaintiffs state that the *Andersons/Burdick* balancing test "applies only to *restrictions* that are 'evenhanded,' 'nondiscriminatory' and 'operated equitably.'" ECF No. 46 at 4. (Emphasis added). But Plaintiffs admit that § 7-15-320(B)(2) is not a "restriction" but an accommodation to Elderly Voters when they state: "South Carolina's law *giving* an automatic right to vote absentee to some voters … ." *Id.* (Emphasis added). The State's accommodation for Elderly Voters does not abridge or restrict the right of Plaintiffs or any other Voter under age 65 to vote.

"Abridge" is defined as "to reduce in scope: diminish." https://www.merriam-webster.com/dictionary/abridge (last visited September 18, 2024). "Restrict" is defined as "to confine within bounds: restrain." https://www.merriam-webster.com/dictionary/restrict (last visited September 18, 2024). "Abridge" and "restrict" are synonyms. https://www.thesaurus.com/browse/abridge (last visited September 18, 2024). Neither of those definitions applies here. Section 7-15-320(B)(2) imposes no burden, much less a severe burden, on Plaintiffs right to vote.

CONCLUSION

For the above reasons, SEC Defendants' Motion for Summary Judgment should be granted and the case dismissed.

Signature Page Follows

Respectfully Submitted,

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