

No. 25-1413

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Trudy B. Grant, Sarah Krawcheck, Nashonda Hunter, Max Milliken, and Caleb Clark,

Plaintiffs-Appellants,

and

Jordan Mapp,

Plaintiff,

v.

Howard Knapp, as the Executive Director of the South Carolina Election Commission, Joanne Day, as a Member of the South Carolina Election Commission, Clifford J. Edler, as a Member of the South Carolina Election Commission, Linda McCall, as a Member of the South Carolina Election Commission, Scott Moseley, as a Member of the South Carolina Election Commission, Charleston County Board of Elections and Voter Registration, Dennis Shedd, Chairman of the South Carolina State Election Commission,

Defendants-Appellees.

On Appeal from the United States District Court for the District of South Carolina,
Charleston Division.

APPELLANTS' REPLY BRIEF

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APPELLANTS' REPLY BRIEF

Appellees (hereafter sometimes “the State”) concede that appellants “do not have the same access to non-excuse absentee voting as do voters aged 65 and over.” State Br. 8. That concession should dispose of this case because the Twenty-Sixth Amendment prohibits states from abridging the right of any citizen to vote “on account of age,” yet that is precisely what South Carolina has done in S.C. Code Ann. § 7-15-320(B)(2) (2022).

The State tries to escape the clear command of the Twenty-Sixth Amendment with four arguments. First, it claims that absentee voting is nothing more than a “manner” of voting, over which the U.S. Constitution’s Elections Clause (Art. I, § 4) gives the states virtually plenary control. *See* State Br. 13-14, 17, 19. Second, it claims that the legislative history of the Twenty-Sixth Amendment shows that it was intended to extend the franchise to eighteen-year-olds and nothing more. *See* State Br. 17-24. Third, it suggests that the Twenty-Sixth Amendment should *not* be read in accord with the Fifteenth, Nineteenth, and Twenty-Fourth Amendments whose language it copied. *See* State Br. 39-43. Finally, the State argues that the age discrimination in its statute serves a “compelling state interest” in fraud-free elections that far outweighs the burden imposed on voters under age 65. *See* State Br. 13.

None of these arguments is persuasive. Nor is the State’s insistence that the restriction of no-excuse absentee voting comports with the Fourteenth Amendment because it satisfies rationality review.

I. S.C. CODE ANN. § 7-15-320(B)(2) VIOLATES THE TWENTY-SIXTH AMENDMENT

A. The Twenty-Sixth Amendment applies to a state's decisions about the manner of voting.

i. The State's contrary position is inconsistent with basic principles.

The State's entire brief rests on the proposition that there is a distinction between the "right to vote," which is protected by a suite of constitutional amendments, including the Twenty-Sixth, and "the manner of voting, such as by absentee ballot," over which the states "retain" an unconstrained authority. State Br. 43 (citing U.S. Const. Art. I, § 4).

The State is wrong. Any manner in which votes are cast is an integral part of the right to vote. This includes not only absentee voting, but also, for example, voting on Election Day or earlier, at a polling place in one's neighborhood or elsewhere, on a machine, paper ballot, or other medium, in the morning, afternoon or evening, etc., etc. The fact that states are empowered to adopt *reasonable* regulations on all these "manners" of voting does not mean that these regulations do not implicate the "right to vote."

Indeed, in all its discussion of the meaning of words, the State does not cite a single authority, judicial or otherwise, holding that the "right to vote" does not include the manner of voting.

The South Carolina Constitution itself tells us that absentee voting is an integral part of the right to vote, along with such other election features as candidate nominations and secret ballots. In Article II, which involves the "Right of Suffrage"—that is, the right to vote—the Constitution directs the General Assembly to "provide for the administration of elections and for absentee voting" as part of ensuring "the fulfillment and integrity of the election process." S.C. Const. Art.

II, § 10.¹

Federal law likewise recognizes this fact. In a series of statutes enacted in the decade leading up to the Twenty-Sixth Amendment, Congress declared that “[t]he terms ‘vote’ or ‘voting’ shall include all action necessary to make a vote effective” and specifically included “casting a ballot” within this definition. 52 U.S.C. § 10310(c)(1). *See also* Appellants’ Opening Br. 20-21. Without the ability to cast a ballot, the right to vote would be illusory.

More fundamentally, while states possess broad authority to regulate the manner in which their elections are conducted, that authority is constrained by the Constitution, including the various voting rights-related amendments. That means the way a state structures its elections cannot discriminate against voters on the basis of race (due to the Fifteenth Amendment), sex (due to the Nineteenth Amendment), failure to pay a tax (due to the Twenty-Fourth Amendment), or age (due to the Twenty-Sixth Amendment). Thus, while a state has wide discretion to choose the manner in which eligible voters cast their ballots—for example, it might choose to use paper ballots or touchscreen machines, or it might choose to conduct elections entirely by mail or at designated polling places—once it has made those choices, it cannot treat citizens differently on the basis of race, sex, failure to pay a tax, or age. So, for example, if a state provides a “manner of voting” to white voters—for example, giving them the choice whether to cast their ballots in person or by mail—it cannot refuse Black voters that same choice; such a refusal would “abridge[]” Black citizens’ right to vote “on account of race.” The same logic applies here: South Carolina has given

¹ S.C. Const. Art. II, § 10, a section of the article dealing with the “Right of Suffrage” provides: “The General Assembly shall provide for the nomination of candidates, regulate the time, place and manner of elections, provide for the administration of elections and for absentee voting, insure secrecy of voting, establish procedures for contested elections, and enact other provisions necessary to the fulfillment and integrity of the election process.”

voters who are 65 a choice in the manner of casting their ballots that it refuses to give voters of a younger age. That discrimination violates the Twenty-Sixth Amendment.

ii. **The State's contrary position is unsupported by precedent.**

The district court and the State believe that decisions by the Supreme Court, Fifth Circuit, and Seventh Circuit support the proposition that “age-based distinctions in the manner of voting” do not implicate the right to vote protected by the Twenty-Sixth Amendment. State Br. 30; *see id.* at 32; J.A. 109 (citing *McDonald v. Board of Election Commissioners*, 394 U.S. 802 (1969), *Texas Democratic Party v. Abbott*, 961 F.3d 389 (5th Cir. 2020), and 978 F.3d 168 (5th Cir. 2020), and *Tully v. Okeson*, 977 F.3d 608 (7th Cir. 2020), and 78 F.4th 377 (7th Cir. 2023)(the district court did not cite this decision).

They do no such thing. In fact, far from “heavily rel[ying] on *McDonald*” to hold that absentee voting rules cannot implicate the “right to vote,” State Br. 32, both circuits soon rejected that argument.² The Fifth Circuit recognized that *McDonald* “seemed to analyze only whether the challenged action ‘den[ied] appellants the exercise of the franchise,’” while “[t]he Twenty-Sixth Amendment prohibits age-based denials but also abridgments of the right to vote.” *Texas Democratic Party* 978 F.3d at 193 (5th Cir. 2020) (quoting *McDonald*, 394 U.S. at 807-08). As for the Seventh Circuit, it recognized that rules involving the “physical casting of ballots” implicate the “right to vote.” *Tully*, 78 F.4th at 384, 385. To be sure, both courts then erroneously held that age-based restrictions on absentee voting do not constitute abridgment. But appellants have already

² By making this argument that is based on the Fifth and Seventh Circuit’s *initial* decisions, even though both initial decisions were subsequently abandoned by those Circuits, the State is now seeking to persuade this Court of the same error that unfortunately but materially misled the district court.

explained why their constructions of “abridgment” are erroneous. See Appellants’ Opening Br. 22-26. And the State offers no contrary argument on that point.³

B. The State’s argument that the Twenty-Sixth Amendment did nothing more than extend the right to cast a ballot to 18-year-olds is completely meritless.

The State devotes much of its brief to a summary of the legislative history of the Twenty-Sixth Amendment. *See* State Br. 17-27. The point of this discussion is to show that “Congress understood the amendment to do no more than extend the voting franchise to voters as young as 18 years old,” *id.* at 17. This remarkable assertion is repeated in the State’s brief at least three more times without qualification, *see id.* 23, 24, 27, and several times more in slightly varied form.

It could not be further off-base.

Of course, lowering the voting age was the immediate impetus for the 1970 Voting Rights Act amendments, and carried through into the Twenty-Sixth Amendment in 1971. But a law or constitutional provision can do—and *the framers can intend to do*—more than one thing, and the Twenty-Sixth Amendment is a prime example.

As the Supreme Court has frequently declared, “it is ‘the provisions of our laws rather than the principal concerns of our legislators by which we are governed.’” *Bostock v. Clayton County*, 590 U.S. 644, 664 (2020) (quoting *Oncale v. Sundowner Offshore Services*, 523 U.S. 75, 79 (1998)). So the fact that a constitutional provision’s application reaches “‘beyond the principal evil’ legislators may have intended or expected to address” cannot limit its application when the language is clear. *Id.* at 674 (quoting *Oncale*, 523 U.S. at 79). The text of the Twenty-Sixth Amendment goes beyond merely extending the franchise to young voters. It prohibits denying or

³ Moreover, the State’s argument that neither *McDonald* nor the Fifth or Seventh Circuit cases “held age to be a suspect class in the voting context or applied strict scrutiny,” State Br. 32, is beside the point. *McDonald* didn’t involve age at all and as Appellants’ Opening Brief explained, suspect classifications and tiers of scrutiny apply to Fourteenth Amendment claims; they have no relevance to the Twenty-Sixth Amendment’s categorical prohibition on age-based discrimination. *See* Appellants’ Opening Br. 16 & n.4.

abridging the right to vote “on account of age” regardless of the age of the citizen whose rights have been denied or abridged. So, for example, the Amendment would prohibit a state from denying or abridging the rights of *older* voters as well—for example, by striking the registration of voters over age 80 who surrender their driver licenses.

The case here is especially strong for applying the Twenty-Sixth Amendment to prohibit all age discrimination in voting. In the cases cited above, the Court applied a law (employment discrimination) to situations (involving sexual orientation or same-sex harassment) that were not at all within the contemplation of the enacting Congress. By contrast, in this case, Appellants’ opening brief explained that Congress in fact *did* have a broader ambition than just extending the franchise to younger voters. It sought to ensure “a plenary right” for citizens 18 and older “to participate in the political process free of discrimination on account of age.” Appellants’ Opening Br. 2-3 (quoting H. Rep. No. 92-37, at 7 (1971)). Section 7-15-320(B)(2) imposes a discrimination on voters on account of their age by according voters over the age of 65, but not voters under the age of 65, an unrestricted choice whether to cast their ballots by mail.

Moreover, the Twenty-Sixth Amendment’s language even went beyond the 1970 statute, adding the crucial word “abridged” and prohibiting discrimination generally rather than limiting coverage to voting in primary and general elections. *See* H. Rep. 92-37, at 7 (1971) (emphasizing the breadth of these changes).

And the State is also mistaken that concerns with the manner of voting were entirely absent from consideration of the Twenty-Sixth Amendment. As Appellants’ explained in our opening brief, one of the motives for amending the Constitution was the prospect (after the Supreme Court held that 18-21 year-olds could vote in federal but not state elections) that in some states, the 18-21-year-olds might be restricted to one method of voting (absentee ballot) while older voters would

have a choice of two methods of voting (in person or absentee). *See* Appellants' Opening Br. 19-20 (citing S. Rep. No. 92-26, at 14 (1971)). The State tries to downplay this reference, State Br. 24, but it is exactly on point since both the situation to which the Senate Report pointed and Section 7-15-320(B)(2) allow voters of one age group the choice of voting either at the polls or absentee, while restricting voters of the other age group to just one of those two methods.

C. The Twenty-Sixth Amendment must be read *in pari materia* with the Fifteenth, Nineteenth, and Twenty-Fourth Amendments.

Appellants' opening brief explained that both text and history show that the Twenty-Sixth Amendment copied the prior enfranchising amendments and incorporated their prohibition on any discrimination in any aspect of casting a ballot. Appellants' Opening Br. 11-16.

The State responds by arguing that the cases on which Appellants relied “post-date the legislative debate about and adoption of the Twenty-Sixth Amendment. Congress could not have intended to rely on the unknown.” State Br. 39. But that is simply not so. The Twenty-Sixth Amendment was proposed in 1971 and ratified in the same year. The cases on which Appellants' opening brief principally relied to show the categorical “no discrimination” rule of the Fifteenth and Twenty-Fourth Amendments all *antedate* the Twenty-Sixth Amendment, some of them by decades—*United States v. Reese*, 92 U.S. 214 (1876); *Guinn v. United States*, 238 U.S. 347 (1915); *Lane v. Wilson*, 307 U.S. 268 (1939); *Harman v. Forssenius*, 380 U.S. 528 (1965); and *Brown v. Post*, 279 F. Supp. 60 (W.D. La. 1968).

And it was 1971, years and decades later, when proponents made the repeated statements that the Twenty-Sixth Amendment should be “construed as comparable in scope to the Fifteenth Amendment and the Nineteenth Amendment which proscribed racial discrimination and sex discrimination, respectively, in the exercise of the franchise,” H. Rep.

No. 92-37, at 7 (1971); *see also* Appellants' Opening Br. 3, 12 (quoting equivalent statements). All these statements were of course contemporaneous with the Amendment.

The State makes a related argument that cannot be taken seriously: that the statute's explicitly discriminatory words do not violate the Twenty-Sixth Amendment because Appellants failed "to prove that the State intended to discriminate on the basis of age," State Br. 41.

It is elementary that separate proof of discriminatory intent is required only where explicit discrimination – of the sort present in the South Carolina statute — is absent. Section 7-15-320(B)(2) is *facially* discriminatory: It provides a right to vote absentee to voters chosen expressly on the basis of their age. With such facial discrimination, further proof of discriminatory intent or animus is unnecessary, indeed, legally irrelevant. As the Supreme Court long ago explained, "the absence of a malevolent motive does not convert a facially discriminatory policy into a neutral policy." *Int'l Union, United Auto., Aerospace & Agr. Implement Workers of Am., UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 199 (1991).

The State does not even try to argue that it could, consistent with the amendments on which the Twenty-Sixth was modeled, restrict no-excuse vote by mail to white or male citizens. This Court should apply the same rule to the State's attempt to restrict it to citizens over the age of 65. The Twenty-Sixth Amendment forbids that discrimination.

D. The State's desire to prevent vote fraud cannot justify discriminating on the basis of age with respect to no-excuse absentee voting.

The State argues that its age-based restriction on absentee voting serves "a compelling interest" in "fraud free elections" that "more than outweighs any de minimis impact on Appellants that may result from limiting absentee voting to persons aged 65 and older." State Br. 13. That argument rests on a fundamental misunderstanding of the Twenty-Sixth Amendment.

As Appellants explained in our opening brief, the Twenty-Sixth Amendment contains a prohibition on discrimination. Full stop. It “outright forbids denial or abridgment, without regard to any balancing test.” Appellants’ Opening Br. 16 n.4. Just as a state could not serve its compelling interest in fraud free elections by limiting the absentee voting options to one race or one sex based on the assertion that this restriction has only a de minimis impact, it cannot do so by denying that right to younger – or, indeed, older voters – voters. The state must pursue its interest in preventing fraud in a nondiscriminatory way. The degree of burden that a discriminatory restriction places on a protected class of voters is irrelevant as a matter of constitutional law.⁴

Nowhere does the State offer any explanation as to how an age-based restriction on absentee voting combats fraud. *See also* Appellants’ Opening Br. 32 (explaining why an age-based limit on unrestricted mail voting is not tailored to an interest in preventing fraud). This Court should reject the State’s attempt to balance away the right to nondiscrimination that the Twenty-Sixth Amendment guarantees.

II. S.C. CODE ANN. § 7-15-320(B)(2) VIOLATES THE FOURTEENTH AMENDMENT

Appellants’ argument in support of their Fourteenth Amendment equal protection claim is straightforward. *See* Appellants’ Opening Br. 30-33. Appellees have left it essentially unanswered.

S.C. Code § 7-15-320(B)(2) draws an explicit distinction between persons of different ages with respect to casting a vote. Deciding whether this distinction violates the equal protection clause requires first determining what “level of scrutiny” applies. In addition to judicially recognized triggers for heightened scrutiny, most notably race- or sex-based classifications, heightened scrutiny applies in cases involving “suspect classifications” or “fundamental rights” that are

⁴ The concepts of “balancing” and “compelling interest” can be relevant in analyzing claims under the Equal Protection clause of the Fourteenth Amendment. They are discussed in the Fourteenth Amendment section of appellants’ Opening Brief, pp. 30-33, and again (briefly) below in this Reply Brief.

“explicitly or implicitly guaranteed in the Constitution.” *San Antonio Ind. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 33 (1973), quoted in Appellants’ Opening Br. 31.

In general, age is not a suspect class. But once the Twenty-Sixth Amendment was ratified in 1971, age became a suspect class with respect to voting, in the same way that race or sex is, because nondiscrimination on the basis of age with respect to voting is explicitly guaranteed in the Constitution. Therefore, South Carolina’s age-based restriction on absentee voting is subject to heightened scrutiny.

Heightened scrutiny requires the state law to be closely tailored to a weighty state interest. South Carolina describes its state interest as prevention of fraud. Appellants agree that preventing fraud in elections is a compelling state interest. But that is only the first step in a heightened scrutiny inquiry. The State still must show that dividing voters into two categories based on their age is a properly tailored way of pursuing that goal.

This is where Section 7-15-320(B)(2) fails. Drawing a dividing line based on age is not conceivably narrow tailoring. “Narrow tailoring” would require a showing that the classes included and excluded from the regulation are essentially proxies for the problem that is being targeted – in this case, voters who will attempt to vote fraudulently. In other words, the State would have to show here that younger voters, as a class, would commit fraud if they were allowed to vote absentee while older voters would not commit such fraud.

The State makes no attempt whatsoever to show that its age-based discrimination is tailored. Instead, it asserts with no evidence whatsoever that its law is “narrowly tailored to otherwise qualified voters 65 and older.” State Br. 13.

The State tries to escape this utter lack of any evidence of tailoring by arguing that heightened scrutiny applies only to historically disfavored classes of race and sex. State Br. 40. It

asserts that rational basis review applies (or perhaps *Anderson-Burdick* review) and claims that South Carolina's law therefore passes equal protection clause muster. To be sure, Section 7-15-320(B)(2) might survive "rational basis" review, although even then it is unclear why an age-based restriction is rationally connected to the prevention of fraud (as opposed, perhaps, to accounting for elderly voters' restricted mobility). But an age-based restriction would very likely fail *Anderson-Burdick* review, which applies if the challenged law "imposes only 'reasonable, nondiscriminatory restrictions'" *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (emphasis added) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983)). Section 7-15-320(B)(2), however, is the epitome of a discriminatory restriction.⁵ It cannot survive scrutiny under the Fourteenth Amendment.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed and the case remanded for further proceedings.

REQUEST FOR ORAL ARGUMENT

Appellants believe oral argument would be helpful in this case because it will be this Circuit's first direct interpretation of the Twenty-Sixth Amendment to the Constitution of the United States, an amendment addressing the fundamental right to vote.

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⁵ Appellants have already explained why the State is mistaken when it argues that they must show *Arlington Heights*-type proof of lawmakers' subjective intent to discriminate, State Br. 41-42: That form of proof is required only when discrimination does not appear on the face of the challenged policy. *Johnson v. California*, 543 U.S. 499 (2005). See also *supra* at 9.

