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

Plaintiffs' Memorandum on Rule 12(c) Motion for Judgment on the Pleadings

Table of Contents

Table of Authorities

CASES

STATUTES

Federal Statutes

State Statutes

OTHER

STATEMENT OF FACTS

The history of constitutional progress in America is largely the history of advancing democracy. Since the end of slavery, we have amended the Constitution 14 times, and fully half of those were amendments expanding the right to vote, including four amendments which specifically banned discrimination against categories of voters -- discrimination based on race (15th), sex (19th), payment of poll taxes (24th) and age (26th).[1] This case involves the most recent of those, the 26th Amendment's ban on age discrimination against any voters who are over 18 years old.

The 26th Amendment

The ban on age discrimination originated in the Voting Rights Act Amendments of 1970. Section 302 of that law provided that no citizen "shall be denied the right to vote in any such primary or election on account of age if such citizen is eighteen years of age or older."[2] When the Supreme Court held that section partly unconstitutional,[3] Congress and the states quickly followed with a constitutional amendment, the 26th Amendment.

The amendment, however, was broader than the statute had been. The statute said no one over 18 could be "denied" the right to vote on account of age, but the constitutional amendment said such a voter's right to vote could not be "denied or abridged:"

> "The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or any State on account of age."

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[1] The other three voting-related amendments are the 14th (penalizing states for excluding voters), 17th (direct election of Senators) and 23d (D.C. vote for President).

[2] Sec. 302. "Except as required by the Constitution, no citizen of the United States who is otherwise qualified to vote in any State or political subdivision in any primary or in any election shall be denied the right to vote in any such primary or election on account of age if such citizen is eighteen years of age or older." [Voting Rights Act Amendments of 1970, 91 P.L. 285, 84 Stat. 314.]

[3] *Oregon v. Mitchell*, 400 U.S. 112 (1970). The law was held valid for federal elections but not state elections.

The 26th Amendment thus mirrors the language of other monumental voting guarantees of our Constitution, the 15th, 19th and 24th Amendments. These amendments outlawed different forms of voting discrimination and put people in the single category of "voters," regardless of race, sex or poll tax payment. The 26th Amendment does the same, putting voters of all ages in a single category and outlawing any discrimination between them based on age.

The word that achieved these goals – "abridge" – is one of the strongest words in our Constitution. It is the word that protects 1st Amendment freedoms of speech, press and assembly, and protects our 14th Amendment privileges and immunities. And for 150 years now, the Supreme Court has made it clear that the words "abridge or deny" in the voting amendments of the Constitution mean *no discrimination* .

Framed against this long background, the question in this case is whether S.C. Code § 7-15-320, which gives voters over age 65 a blanket right to vote absentee while denying that same right to voters under age 65, "denies or abridges" the right to vote on account of age in violation of the 26th Amendment of the Constitution of the United States of America.

S.C. Code § 7-15-320

South Carolina law today allows two methods of voting. One is in-person (either in the voter's assigned precinct on Election Day or at a central location during a specified "Early Voting" period), S.C. Code § 7-13-25. The second method is voting "absentee" by mail ballot. S.C. Code § 7-15-320. Notably, South Carolina law explicitly states that the absentee registration and voting laws "shall be liberally construed in order to effectuate their purposes." S.C. Code § 7-15-20.

Voting in-person is available to all voters, but under S.C. Code § 7-15-320, voting by mail is open only to voters in one of eight defined categories .[4] Seven of the eight eligible categories are defined by circumstance, *i.e.*, a circumstance that could hinder or prevent in-person voting (such as an emergency hospital admission or being out of the county), but one is not. This eighth category, § 7-15-320(B)(2), involves no circumstance but allows for absentee voting by voters defined solely by age: "persons sixty-five years of age or older."

The present form of the State's absentee voting law dates only from 2022, but the previous history is important background in evaluating the law.

First, the period before the present century. Strangely enough, age discrimination in South Carolina absentee voting law is a recent development, not a relic of pre-26th Amendment days. When the 26th Amendment was ratified, South Carolina law already allowed absentee voting by certain categories of voters, but the categories were all defined by circumstance, none by age.[5] It was only in the 1990s that South Carolina added "age" as a category of voters eligible to vote absentee. This was done in two legislative steps – first, allowing absentee voting by those over age 72 and then lowering that absentee-eligible age to 65.[6]

[4] "(A) Qualified electors in the following categories who are unable to vote during early voting hours for the duration of the early voting period, and during the hours the polls are open on election day, must be permitted to vote by absentee ballot in an election:
(1) persons with employment obligations who present written certification of the obligations to the county board of voter registration and elections;
(2) persons who will be attending sick or physically disabled persons;
(3) persons confined to a jail or pretrial facility pending disposition of arrest or trial; or
(4) persons who are going to be absent from their county of residence.
(B) Qualified electors in the following categories must be permitted to vote by absentee ballot in an election, regardless of whether the elector is able to vote during early voting hours for the duration of the early voting period, and during the hours the polls are open on election day:
(1) physically disabled persons;
(2) persons sixty-five years of age or older;
(3) members of the Armed Forces and Merchant Marines of the United States, their spouses, and dependents residing with them; or
(4) persons admitted to hospitals as emergency patients on the day of an election or within a four-day period before the election, as provided in Section 7-15-330." S.C. Code Ann. § 7-15-320 (2024).

[5] 1962 Code § 23-442.

[6] 1992 S.C. Act No. 489 (age 72); 1996 Act No. 80 (Age 65).

Second, two decades of "in-person absentee voting." From 2001 through 2022, South Carolina law allowed "in-person absentee voting" at a central county location on designated days before Election Day. Although this form of voting was essentially the same as what is now called "Early Voting," it was categorized as a form of "absentee voting" in the state statute and was therefore available only to categories of voters listed in the absentee statute – one of which was voters 65 years of age or older. [7]

In other words, from 2001 through 2022, when long lines of voters came to Election Commission headquarters in each county to cast votes in person before Election Day, they were defined as "absentee" voters and eligible only if they met the criteria of § 7-15-320. In those years, hundreds of thousands of voters over 65 could and did vote early with no other qualification, while voters under 65 were excluded from that right (unless they were "circumstance-qualified").

Third, the "no-discrimination" election. In 2020, the General Assembly amended the absentee voting law to allow every voter to vote absentee (whether by mail or in-person), without regard to age or circumstance. This legislative change was a response to a lawsuit[8] and the Covid-19 epidemic. By its terms, it applied only to the year 2020, though only for the primary elections of 2020, not to the general election.[9]

Fourth, current law. In 2022, the General Assembly adopted a full-fledged Early Voting law, not called absentee voting but open to all voters.[10] At the same time, it amended the absentee voting law to its present form, which was essentially the form that prevailed from 1996-2001 --

[7] This system was created by 2001 SC Act No. 88, which enacted S.C. Code § 7-15-470 (titled "Absentee ballots other than paper ballots"). That section was repealed by the statute that created the current law, 2022 SC Act No. 150.
[8] In *Middleton v.* Andino, 488 F.Supp.3d 261 (D.S.C. 2020), the district court denied the State's motion to dismiss the 26th Amendment challenge to the age-65 provision. Because the statute was promptly amended, as cited in the next footnote, this issue was not involved in later appellate stages of this case.
[9] 2020 SC Act No. 133, Section 2A. The Act took effect on the Governor's signature (which was May 13, 2020), and expired by its terms on July 1, 2020. See *Bailey v. South Carolina Election Commission*, 430 S.C. 268, 844 S.E.2d 390 (2020)
[10] 2022 SC Act No. 150, § 1, enacting S.C. Code §7-13-25.

voters over age 65 are eligible without excuse, along with voters in the specified "circumstance" categories.[11]

LEGAL ARGUMENT

Plaintiffs Have Standing to Sue

Plaintiffs are five registered voters, ranging in age from 18 upward, but all under age 65. Each one has voted regularly and wishes to continue doing so: They allege as follows in the Second Amended Complaint:

> "6(b) Each plaintiff wishes to vote by absentee ballot in any election where that method is particularly convenient, and especially in any election where such plaintiff may be unable to vote at all except by absentee ballot."
>
> "6(c). However, Section 7-15-320 bars each plaintiff from voting by absentee ballot because they do not meet the statute's requirements (unless events take a plaintiff out of the country 'for the duration of the early voting period, and during the hours the polls are open on election day')."
>
> "6(d). Further, Section 7-15-320 may completely disfranchise a plaintiff in a particular election, if, for example, such plaintiff leaves the country after the early voting period begins and does not return by Election Day."

If any plaintiff seeks to vote by absentee ballot without being legally entitled to do so, such plaintiff would face penalties, including possible criminal prosecution.

Thus, as alleged in the Complaint, Plaintiffs wish to have the same opportunity to vote by mail as voters over 65, but are denied this right by South Carolina's absentee voting law.

Many Supreme Court cases have made it clear that a statutory restriction on the right to vote gives voters who could be affected by that restriction standing to sue without having to show more. In *Harman v. Forsenius*, 380 U.S. 528, 533 n. 6 (1965), the Supreme Court held that a voter seeking to challenge a statutory voting restriction need not allege that the statute had prevented him from voting. The Court's footnote 6 cited earlier voting cases supporting this broad view of

[11] 2022 SC Act No. 150, § 4, amending S.C. Code §7-15-320.

standing for voters: *Gray v. Sanders*, 372 U.S. 368, 374-76 (1964); *Baker v. Carr*, 369 U.S. 186, 204-08 (1962). Those earlier cases cited other Supreme Court precedent with a similarly broad view of standing in voting cases:

> "We hold that the appellants do have standing to maintain this suit. Our decisions plainly support this conclusion. Many of the cases have assumed rather than articulated the premise in deciding the merits of similar claims.26 And *Colegrove v. Green, supra*, squarely held that voters who allege facts showing disadvantage to themselves as individuals have standing to sue.27 A number of cases decided after *Colegrove* recognized the standing of the voters there involved to bring those actions.28" [*Baker v. Carr, supra*, at 206-07 (with footnotes citing numerous cases)].[12]

To be sure, in some of the cases, a voter had tried to vote and been rejected, *e.g.*, *Nixon v. Herndon*, 273 U.S. 536 (1927)(white primary), or had simply told officials that he would like to vote in a certain way, *Burdick v. Takushi*, 504 U.S. 428 (1992)(absentee ballot), but these empty gestures are hardly necessary to show an actual case and controversy when the statute itself makes plain that the voter's attempt will be rejected.

The Supreme Court made this plain just a year ago in a case which, like this case and other voting cases,[13] involved the 1st Amendment. *303 Creative, LLC v. Elenis*, 600 U.S. 570 (2023). In that case, a website designer alleged that she wants to expand to provide wedding services for heterosexual weddings but has not done so because she "worries" that Colorado anti-discrimination law will force her to include non-heterosexual weddings in violation of her claimed free speech rights. Recognizing that a plaintiff must establish standing as the starting point of a

[12] This rule of broad standing in voting cases is not contradicted by *Gill v. Whitford*, 585 U.S. 48 (2018). In *Gill*, some Wisconsin voters were not allowed to challenge the drawing of legislative districts in which they did not live. *Gill* reaffirmed the *Baker v. Carr* standing rules but simply made the obvious ruling that voters have standing only as to the elections they vote in or could vote in. The fact that *Gill* does not narrow standing rules is confirmed by *303 Creative LLC v. Elenis*, discussed below.

[13] The Supreme Court has said repeatedly that voting is protected by the 1st Amendment rights of free speech and free association. *E.g., Anderson v. Celebrezze*, 450 U.S. 780 (1983); *Crawford v. Marion County Election Bd.*, 553 U.S. 181 (2008).

case, the Supreme Court held that to do so, 303 Creative LLC must show (1) plaintiff's actual or desired activity, and (2) a "credible threat" of adverse state enforcement.[14]

In the *303 Creative* case, the Court focused mostly on the second element, and found that the state law and enforcement history established a "credible threat" if plaintiff indeed seeks to offer wedding services. As to the first element —plaintiff's activity—the Court was satisfied by the plaintiff's simple assertion that "recently, she decided to expand her offerings," and by her description of how she "envisions" her plans, "which she has yet to carry out."

If anyone thought that a claim so dependent on uncertain future plans might be too speculative to create standing, this case makes clear how strongly the Supreme Court views threats against the 1st Amendment – which of course includes this voting case.

Indeed, the right that these plaintiffs seek is more concrete than 303 Creative's interest in a possible new business; plaintiffs here seek to exercise a choice that arises with certainty twice in every even-numbered year and at various times in odd numbered years - a choice that voters over 65 automatically enjoy and exercise.

The South Carolina Law is Unconstitutional

Voting procedures in this country constantly evolve. Once upon a time, secret ballots, voting booths and voting machines were unknown. Absentee or mail balloting has likewise evolved. Once rare, its use has spread to the point where mail balloting is now the dominant or even the exclusive method of voting in some states. In South Carolina, even after the advent of full-scale Early Voting, mail ballots were cast by more than 50,000 voters in 2022.[15]

Constitutional amendments like the 26th Amendment are part of the fundamental law of the

[14] The "credible threat" standard comes from *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 159 (2014), cited in *303 Creative*, at 580

[15] Absentee voting figures are on the State Election Commission's website. www.scvote.org

land, and should be interpreted with full value, not hedged. That is especially true of amendments protecting the right to vote, a right that the Supreme Court has called "preservative of all rights." *Yick Wo. v. Hopkins*, 118 U.S. 356, 370 (1886).

The original goal of the 1970 Voting Rights Act amendments was to lower the voting age from 21 to 18, but the 26th Amendment expressed a loftier goal – to ban all age discrimination in voting. The amendment did so by changing the crucial language from "deny" to "deny or abridge." That was classic constitutional language, like Amendments 15, 19 and 24.

Like those amendments, it was designed to extend the right to vote, not just part of it.

The Supreme Court has Consistently Interpreted "Deny or Abridge" to Guarantee a Fully Equal Right to Vote

The Supreme Court long ago interpreted the words "deny or abridge" and said squarely that they mean "no discrimination." In its first interpretation of the 15th Amendment, the Supreme Court said, "Previous to this amendment, there was no constitutional guaranty against this discrimination: now there is." *United States v. Reese*, 92 U.S. 214, 218 (1876)." Just four years later, addressing the 14th Amendment's Equal Protection clause, the Court was even more blunt: "What is this but declaring that the law in the States shall be the same for the black as for the white." *Strauder v. West Virginia*, 100 U.S. 3030, 307 (1880). Most recently, at the dawn of our own century, Justice Scalia, widely known as a strict constructionist, said the words "deny or abridge" mean no discrimination. *Reno v. Bossier Par. Sch. Bd.*, 528 U.S. 320, 334 (2000). Or, as young people today like to say: What is it about "No" that you don't understand?

In another 15th Amendment case, the Supreme Court said those words prohibit measures which "effectively handicap exercise of the franchise" even though "the abstract right to vote may remain unrestricted." *Lane v. Wilson*, 307 U.S. 268, 275 (1939). And a Supreme Court case involving the "abridge or deny" words in the 24th Amendment (poll tax) struck down a Virginia

paperwork rule because it "subverts the effectiveness of the 24th Amendment and must fall under its ban." *Harman v. Forsenius*, 380 U.S. at 542.

Notably, the foregoing cases involved schemes that were indirect, even more or less inventive, and they were still struck down. This South Carolina law is not remotely in that category; it is an out-and-out case of words on the printed page that accept one group of people and reject their counterparts. Undersigned counsel are hard put to think of any Supreme Court case that has ever upheld such a government-imposed discrimination. Even in the darkest days of segregation, states at least used the fig-leaf of "separate but equal."[16]

State Supreme Courts Have Enforced Full 26th Amendment Equality in Every Voting Related Activity

The Supreme Court has not directly addressed the 26th Amendment,[17] but soon after the Amendment's ratification two state supreme courts did so – California and Colorado. The Supreme Court of California held that the 26th Amendment requires states "to treat all citizens 18 years of age or older alike for all purposes related to voting." *Jolicoeur v. Mihaly*, 488 P.2d 1, 12 (Cal. 1971).

That case arose when the California Attorney General issued an opinion that "for voting purposes the residence of an unmarried minor [meaning anyone under 21] will normally be his parents' home' regardless of where the minor's present or intended future habitation might be." *Jolicoeur*, 488 P.2d at 3

[16] South Carolina age favoritism would likely fail even a minimum rationality test. If the supposed justification were that 65-year-olds are more likely to be physically impaired, that is not very plausible in today's world except for those who are disabled – which is an eligibility category of its own. If the supposed justification were general inconvenience, the reality is probably backwards -- 65-year-olds today (many of them retired) may well have more free time than a younger voter who is often trying to juggle school, work (multiple jobs), children and more. Even if one could conjure up a justification for South Carolina's age preference with regard to mail ballots, what on earth could justify the 20 years of age-based difference in "in-person absentee" voting?

[17] The Supreme Court did summarily affirm a three-judge court decision which found a 26th Amendment violation in a county's policies regarding student residency rules. *United States v. Texas*, 445 F. Supp. 1245 (S.D. Tax 1978), *aff'd*, *Symm v. United States*, 439 U.S. 1105 (1979).

The California Supreme Court was blunt: "We conclude that for state officials to treat minor citizens differently from adults for any purpose related to voting would violate the 26th Amendment to the United States Constitution." *Jolicoeur*, 488 P.2d at 2.

Three justices, usually regarded as the most conservative members of the California court, were even more forceful in a concurring opinion:

> I concur in the majority opinion insofar as it is concluded therein that the places of residence of minor citizens of voting age are to be fixed in a like manner with the places of residence of adults, for purposes of determining the jurisdiction in which they are to vote. This result is compelled by clear language of the 26th Amendment which provides in pertinent part that the 'right of citizens of the United States * * * to vote shall not be * * * abridged * * * by any State on account of age.'

Jolicoeur v. Mihaly, 488 P.2d at 12.

The following year, the Colorado Supreme Court likewise rejected any distinction based on a voter's age, and, in particular, rejected the argument that some parts of the voting process are too tangential to have 26th Amendment protection. *Colorado Project-Common Cause v. Anderson*, 495 P.2d 220 (Colo. 1972). The state law at issue limited the right to sign initiative petitions to registered voters over the age of 21. In striking the law down, the Colorado high court held that the 26 Amendment's prohibition "applies to the entire process involving the exercise of the ballot and its concomitants." *Id.* at 223.

Recent Restrictive Interpretations of the 26TH Amendment Are Unpersuasive

Although the 26th Amendment's clear language and obvious meaning might seem hard to water down, two federal courts have recently found ways to do so – issuing decisions upholding age-based absentee voting laws like South Carolina's: 5th Circuit (upholding a Texas law) and 7th

Circuit (upholding an Indiana law).[18]

With all due respect, those decisions– which are not binding on this Court (and which also contradicted each other) – are so defective that they show there is really no way to uphold the South Carolina statute.

Texas[19]

Texas's law, like South Carolina's, limits no-excuse absentee voting to voters over age 65. The Fifth Circuit upheld this law by interpreting the word "abridge" to mean only a change that makes the law worse for a particular voter, in other words, a "retrogression" that takes away an entitlement once possessed by that voter. That fanciful interpretation of "abridge" somehow overlooked a recent Supreme Court case holding 180 degrees opposite. In *Reno v. Bossier Par. Sch. Bd.*, 528 U.S. 320 (2000), as noted above, the Court held that the words "abridge or deny," when used to compare different persons (there referring to the 15th Amendment) do not mean retrogression but outlaw "discrimination more generally." 528 U.S. at 334.

Indiana[20]

The 7th Circuit has upheld the Indiana law twice, on different but equally defective theories. The first decision, *Tully v. Okeson* (I), issued in an emergency pre-election appeal, took the curious position that absentee voting is not really part of the "right to vote" and is therefore not covered by the 26th Amendment.[21] (This was reminiscent of the Supreme Court's disastrous 1935 decision -- soon overruled -- upholding white-only primaries partly on the theory that a primary is not really

[18] Such sparse litigation over this issue is not surprising because, apart from South Carolina, Texas, and Indiana, only five other states practice this age discrimination in their mail balloting; Louisiana, Mississippi, Tennessee, Kentucky, and West Virginia.

[19] *Texas Dem. Party v. Abbott*, 978 F.3d 168 (5th Cir. 2020), *cert. denied*, 141 S.Ct. 1124 (2021). A later challenge was rejected on "law of the case" grounds. *Cascino v. Nelson*, 2023 WL 5769414 (5th Cir. 2023), *cert. denied*, 144 S.Ct. 1391 (2024).

[20] *Tully v. Okeson*, 977 F3d 608 (7th Cir. 2020), *cert. denied*, 141 S.Ct. 2798 (2021), 78 F4th 377 (7th Cir. 2023).

[21] *Tully v. Okeson*, 977 F3d at 614.

part of an election.)[22] The 7th Circuit theory was plainly untenable, as shown by several Supreme Court cases upholding absentee voting claims under the Constitution,[23] so it was soon disavowed, in *Tully v. Okeson* (II).[24]

In *Tully v. Okeson* (II), the 7th Circuit first disavowed its earlier decision and then rejected the 5th Circuit's "retrogression" theory which the Supreme Court's *Reno v. Bossier Parish* decision obviously contradicted. Unfortunately, the 7th Circuit then found a new theory just as defective as the two it had just rejected. The 7th Circuit's new theory, all set out in the last three paragraphs of the opinion, was that the words "denied or abridged" outlaw only *burdens* on disfavored voters, not preferences for favored voters.

Specifically, the 7th Circuit's last three paragraphs simply said that Indiana provides many ways to vote, so giving older voters a blanket right to absentee voting (which the court called "a sound legislative judgment") "does not impose any unconstitutional burden on the right of those under sixty-five to exercise the franchise."

This rule of simple favoritism cannot be squared with the 26th Amendment, and the 7th Circuit really made no attempt to do so. Approving pure favoritism as long as it does not put a specific burden on the disfavored voters would, for example, justify giving older voters (or any other voters) longer voting hours or extra polling places.

These two courts of appeals have labored mightily and have come up with no plausible justification for age discrimination of the same type as South Carolina's. If they couldn't do it, that shows there is no plausible way of upholding S.C. Code § 7-15-320.[25]

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[22] *Grovey v. Townsend*, 295 U.S. 45 (1935), overruled, *Smith v. Allwright*, 321 U.S. 649 (1944).
[23] *Goosby v. Osser*, 409 U.S. 512 (1973); *O'Brien v. Skinner*, 411 U.S. 524 (1974); *American Party of Texas v. White*, 415 U.S. 767 (1974).
[24] 78 F4d at 382.
[25] The denial of certiorari in Texas and Indiana is not significant. In addition to the basic rule that denials of certiorari are not expressions of opinion, these cases were argued to have jurisdictional or procedural problems that could have made them inappropriate candidates for Supreme Court review.

RELIEF

When the Constitution is violated by a state's statutory scheme that facially discriminates in contravention of constitutional guarantees, there is a choice of remedy – remove the covered class or add the uncovered class – and that choice ordinarily belongs to the legislature. If plaintiffs prevail here on the constitutional issue, then, absent unusual circumstances, the General Assembly is empowered to choose whether to remove the over-65 eligibility or add an under-65 eligibility rule.

However, if the General Assembly does not make a timely choice here, this Court has an obligation to decide the remedy. If so, there is no default rule requiring the Court simply to strike the "age 65" provision. Rather, the Court's task is to effectuate the likely legislative intent, as modified if necessary by principles of equity. This is shown most clearly by the case of *Orr v. Orr*, 440 U.S. 268 (1979). In that case, the U.S. Supreme Court struck down an Alabama "wife-only" alimony law but left the remedy open. On remand, the Alabama Court, acting because of the exigency of the situation, concluded that the legislature would likely choose to "neutrally extend" rather than abolish alimony. The court therefore adopted that remedy and extended alimony eligibility to males as well as females. *Orr v.* Orr, 374 So.2d 895 (1979).

Thus, the question is not whether the General Assembly is fully receptive to extending no-excuse absentee ballots to voters under age 65, but simply whether it is more receptive to that than to stripping 65-year-olds of their absentee ballots. On that, not just common sense, but the General Assembly's own history shows that it has not ever taken the absentee ballot right away from the older voters, but has been willing to extend that right to younger voters:

1. Since 1992, through many legislative changes, the General Assembly has never wavered in the slightest way in according 65-year-olds the right to vote by mail.

2. In 2020, the General Assembly did extend full absentee voting rights, including the right to vote by mail, to all voters, both over and under 65.[26]

3. The General Assembly itself has ordained that South Carolina's absentee voting laws "shall be liberally construed in order to effectuate their purposes." S.C. Code § 7-15-20.

4. It is also worth noting that the people at issue are all registered voters, qualified under the laws of the General Assembly; so this is not a question of unqualified voters.

If the General Assembly timely acts, it can choose whatever course will cure the 26th Amendment violation here, but until it does so, this Court's choice – if it has to make one – is clear: neutrally extend the right to vote by mail to all voters, under age 65 as well as over age 65. Plaintiffs suggest an appropriate date would be the end of the 2025 legislative session, traditionally the second Thursday in May.

SOME POSSIBLE SIDE EFFECTS OF THIS DECISION

This case is about treating all eligible voters alike, but it may also advance the state and national interest in having more of our eligible voters actually participate by casting ballots. The General Assembly deserves credit for adopting a full-fledged Early Voting law in 2022, and the State Election Commission and county election commissions deserve credit for efforts to encourage voting, including the excellent website "SCVOTES." But the state still lags behind many other states in voter participation.

Mail voting in South Carolina is very low. In 2022, without a pandemic to distort the figures, about 56,000 domestic mail ballots were cast in South Carolina about 3% of the 1.7 million total votes cast. In the same year, the nationwide figure for mail ballots was over 30%.[27] Even

[26] 2020 SC Act No. 133, section 2.A: "A qualified elector must be permitted to vote by absentee ballot in an election if the qualified elector's place of residence or polling place is located in an area subject to a state of emergency declared by the Governor and there are fewer than forty-six days remaining until the date of the election." This law applied to the 2020 primary elections for all local, state and federal offices. See note 9, *supra*.

[27] Voting by Mail and Absentee Voting, MIT Election Lab (February 2024), https://electionlab.mit.edu/research/voting-by-mail-and-absentee-voting. Please see the attached graph in Exhibit A.

recognizing that in some western states all or most balloting is by mail, that is large gap.

More voting by mail could give greater opportunity for all voters under 65, [28] but it could be especially meaningful for the youngest voters, who were the original focus of the 26th Amendment, Yael Bromberg, *Youth Voting Rights and the Unfulfilled Promise of the Twenty-Sixth Amendment*, 21 U. PA. J. CONST. L. 1105 (2019).

CONCLUSION

When Alice in Wonderland met Humpty Dumpty, he told her how words are defined in that world: "A word means what I want it to mean. Nothing more. nothing less."

We are not in Wonderland. The 26th Amendment has an obvious meaning of no discrimination and S.C. Code 7-15-320 does not comply with the Amendment.

This Court should hold the section unconstitutional.

[28] Extending mail voting eligibility to voters from 18-65 would not have partisan consequences, as shown by numerous studies as well as common sense. *E.g.*, Daniel M. Thompson et al., *Universal Vote-By-Mail Has No Impact on Partisan Turnout or Vote Share*, 117 PROC. OF THE NAT'L ACAD. OF SCIENCES 14042, 14055 (2020).

Date: August 1, 2024

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