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' Opposition to Defendants' Motion for Summary Judgment

The State Election Defendants move for summary judgment on Plaintiffs' 26th Amendment claim, Plaintiffs' 14th/1st Amendment claim, and on jurisdiction and standing. For reasons that follow, Defendants' motion should be denied in full.

Twenty-Sixth Amendment

As to the 26th Amendment, Plaintiffs refer the Court to the arguments presented in Plaintiffs' Rule 12(c) Motion for Judgment on the Pleadings (Doc. 36) and in Reply in Support of Plaintiffs' Rule 12(c) Motion (Doc. 44). Plaintiffs add the following:

First, the linchpin of Defendants' argument is stated at p. 10: "The 'right to vote' does not include the manner of voting." Plaintiffs believe this broad statement is contradicted by many

authorities, most recently the Supreme Court's new Order in *Republican Natl. Comm. v. Mi Familia Vota*, No. 24A164 (Order of Aug. 22, 2024).

As another example, Justice Scalia, renowned for his careful use of words, described the "right to vote" in the broadest terms, as including "voter qualifications, candidate selection, or the voting process." *Crawford v. Marion Co. Election Bd.*,553 U.S. 181, 205 (2008).[1] Congress has likewise used the broadest terms to describe the right to vote, as in the Voting Rights Act of 1965, where it used the words "any voting qualification or prerequisite to voting, or standard, practice or procedure with respect to voting." 42 U.S.C. § 1973c. See *Allen v. State Bd. of Elections,* 393 U.S. 544 (1969).

Second, Defendants say the words of the Constitution in 1971 don't mean what those same words meant in three earlier suffrage amendments adopted over the previous hundred years. Defendants do not really say what they think the words *do* mean, only that the words *don't* include absentee voting. Apart from the fact that Congress and the 43 states that ratified the 26th Amendment (5 more than needed) were not law professors poring over a single murky case (*McDonald)* that the Supreme Court itself kept re-interpreting in later cases, this notion of a floating "original understanding" is no way to interpret a Constitution. [2]

When the 15th Amendment was ratified in 1870, secret ballots were unknown and direct election of Senators was far off in the future. Are those not part of the right to vote under the 15th

[1] Justice Scalia's opinion was one of two "majority" opinions in that case, since both his opinion and Justice Stevens's opinion commanded three votes each.

[2] On page 16, Defendants present a quote from a research paper: " as a matter of history, there is no particular reason' to analogize this amendment to other voting amendments." Unfortunately, Defendants leave out the key first half of the quoted sentence, which reads: "it may nevertheless be valid as a matter of interpretation to analogize the Twenty-sixth Amendment to the other suffrage amendments that it resembles." The sentence in question is on page 87 of Jenny Diamond Cheng, *How Eighteen-Year-Olds Got the Vote* (Aug. 4, 2016) (unpublished manuscript), http://papers.ssrn.com/so13/papers.cfm?abstract_id=2818730.

Amendment? In fact, absentee voting has a longer pedigree than many other voting procedures – in 1864, it was absentee votes by Union soldiers that re-elected Abraham Lincoln.

Fourteenth and First Amendments

Although Plaintiffs' Complaint pleaded the Equal Protection clause and 1st Amendment as separate causes of action, they really belong together as a unified body of law protecting the right to vote.

Today, *every* state law regulating voting is subject to federal constitutional scrutiny *of some degree* under the combined aegis of the Equal Protection clause and the 1st Amendment. The most recent, comprehensive description of the modern rule is in *Crawford v. Marion Co. Election Bd.*, *supra*, at 189-91. There, the Court said "evenhanded restrictions that protect the integrity and reliability of the electoral process itself" are not invidious. Therefore, "reasonable, nondiscriminatory restrictions" are not subject to strict scrutiny, but to a balancing test that weighs the asserted injury to the right to vote against the "precise interests put forward by the State as justifications for the burden imposed by its rule."

The evolution of constitutional review of state voting regulations goes back many decades, to the 1960s. When *McDonald v. Board of Election Comm'rs* was decided in 1969, voting jurisprudence – except involving race -- was still in its infancy. The first Supreme Court cases to strike down a state voting law not involving race did not come until 1962 (the reapportionment cases) and the first non-racial disfranchisement case was not until 1965. *Carrington v. Rash*, 380 U.S. 89 (1965)(residents of military bases).

Thus, when *McDonald* was decided in 1969, and even as it was soon reinterpreted in three follow-up cases,[3] the Court was just beginning to struggle with standards of review. Even the

[3] *Goosby v. Osser*, 409 U.S. 512 (1973), *O'Brien v. Skinner*, 414 U.S. 524 (1974), and *Am. Party of Tex. v. White*, 415 U.S. 767 (1974).

seminal case on the fundamental right to vote was not decided until shortly after *McDonald*, *Kramer v. Union Free School District*, 395 U.S. 621 (1969)[4]

In those days, most of the Supreme Court's voting cases involved rules about who was eligible to vote, but in *Storer v. Brown*, 415 U.S. 724 (1974), the Court addressed other types of voting rules (in that case, candidate qualifications) and said strict scrutiny was not always required -- that states must have the ability to regulate voting to make sure elections are orderly and fair. Then, in 1983, the Court held that voting is a 1st Amendment right – free association and free speech. It held that every voting restriction *not* subject to strict scrutiny must still receive a new form of scrutiny. The 1st Amendment scrutiny under *Anderson* provided that the court must "identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule." *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983). The *Anderson* rule has been applied and restated many times, most notably in *Burdick v. Takushi*, 504 U.S. 428 (1992), and was summarized at length in *Crawford v. Marion Co. Election Bd, supra*.

Thus, whatever *McDonald* may have meant or required in 1969, federal constitutional review of all state voting rules has evolved to today's rules. Those rules have two particular features that are relevant to this case. First, the balancing test, while looser than strict scrutiny, applies only to restrictions that are "evenhanded, " "nondiscriminatory" and "operated equitably." *Anderson*, 386 U.S. at 788; *Burdick*, 504 U.S. at 434; *Crawford*, 553 U.S. at 189-91.

South Carolina's law giving an automatic right to vote absentee to some voters but not others is plainly discriminatory, not evenhanded, and not operated equitably. Under these cases, that law should therefore not be entitled to the more relaxed "balancing" test. Even if it were entitled to be judged under the balancing test, that test asks about the precise state interest. Does

[4] Likewise, the first constitutional case involving sex discrimination, which began development of a new constitutional standard of review for such cases, was not until 1971. *Reed v. Reed*, 404 U.S. 71 (1971).

the state have an interest – much less a weighty interest – in treating some voters better than other voters?[5]

Whatever standard is applied, the facial discrimination involved in S.C. Code § 7-15-320 cannot survive Equal Protection/1st Amendment scrutiny.

Jurisdictional Defenses

Standing. Plaintiffs' Rule 12(c) Motion (Doc. 36) citing many voting cases and the new *303 Creative, LLC v. Elenis*, 600 U.S. 570 (2023), plainly shows standing here.

Political question. *Rucho v. Common Cause*, 588 U.S. 684 (2019)(partisan districts) shows that voter discrimination cases are fully justiciable, as they have always been.

Plausibility. This doctrine, designed to weed out claims that are simply far-fetched, has no conceivable application where voters challenge discriminatory rules.

Conclusion

State Election Defendants' summary judgment motion should be denied.

(SIGNATURE PAGE TO FOLLOW)

[5] State's must not only show a state interest, but also how the particular measure advances that interest. Here, South Carolina mainly advances an interest in preventing fraud, but that interest would suggest excluding, rather than allowing, absentee voting by older persons because it is among older persons that the risk of absentee-ballot fraud is obviously greatest.

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s/Armand Derfner

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