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Bipartisan Panel of Fourth Circuit Judges Reaches the Right Result (for the Right Reasons) in Twenty-Sixth Amendment Case, *Grant v. Belangia*, Setting up Possible Supreme Court Review of a Circuit Split

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Last week the United States Court of Appeals for the Fourth Circuit decided an important case involving age

discrimination in voting, and in so doing created a clear circuit split on an issue that might be headed for the Supreme Court, as early as the October 2026 Term.

The case, *Grant v. Belangia*, involved a challenge (by voters under sixty-five years of age) to South Carolina's statutes that determine access to absentee vote-by-mail ballots. Under South Carolina law, voters who are: (1) "physically disabled"; (2) "members of the Armed Forces and Merchant Marines of the United States"; (3) "admitted to hospitals as emergency patients" on or shortly before Election Day; or (4) "sixty-five years of age or older" are automatically eligible for absentee voting. Anyone who falls outside these four categories is entitled to vote absentee only if he or she can meet one or more of four other excuse conditions, which are: (1) documented employment obligations that conflict with the ability to vote in person; (2) the need to attend to the sick or disabled; (3) imprisonment or pretrial detention; and (4) absence from the jurisdiction on Election Day. As the Fourth Circuit summarized South Carolina law:

So, as it relates to age, this statutory framework creates a two-tier absentee-by-mail voting system: voters age sixty-five and older may vote absentee by mail in any election for any reason, while voters

under age sixty-five may vote absentee by mail only if they qualify under one of the narrow enumerated excuse[] [conditions] . . . or other specified categories

The Fourth Circuit struck down this age-conscious differential access to absentee ballots, rightly reasoning that the straightforward terms of the Twenty-Sixth Amendment to the U.S. Constitution forbid unequal treatment in voting on the basis of age.

Several features of the ruling are worth highlighting:

FIRST, the ruling is an honest and compelling example of good originalism. Let's start, as all good originalists do, with the text of the Constitution itself. The words of the Twenty-Sixth Amendment provide that: "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 by any State on account of age."

As I have explained in law review articles (including [this one](#) that, I should disclose, the Fourth Circuit's *Grant* ruling cited to), "[t]wo aspects of this text cannot be overemphasized." One is the obvious parallelism between the Twenty-Sixth

Amendment and the Fifteenth and Nineteenth Amendments; the Twenty-Sixth Amendment self-consciously tracks the precise terminology of the Fifteenth and Nineteenth Amendments, with the only difference being that (in the Twenty-Sixth) “age” is the prohibited criterion, rather than (in the Fifteenth) “race” or (in the Nineteenth) “sex.” This parallel language creates an unavoidable and quite powerful presumption that the substantive meaning of the Twenty-Sixth was intended to track the meanings of the other two amendments.

This inference is amply buttressed by public dialogue about the scope and consequences of the Twenty-Sixth at the time it was being proposed for ratification (another key consideration in good originalism). As prominent House of Representatives member (and Twenty-Sixth Amendment proponent) Claude Pepper announced in an uncontested statement explaining the scope of the Amendment: “What we propose to do . . . is exactly what we did in . . . the 15th amendment and . . . the 19th Amendment. Therefore, it seems to me that this proposed amendment is perfectly in consonance with those precedents.” In the same vein, as to the sweep of the proposed Twenty-Sixth Amendment, hear the words of Representative Richard Poff: “What does the proposed constitutional amendment accomplish? . . . [I]t

guarantees that citizens who are 18 years of age or older shall not be discriminated against on account of age. Just as the 15th amendment prohibits racial discrimination in voting and just as the 19th Amendment prohibits sex discrimination in voting, the proposed amendment would prohibit age discrimination in voting”

These passages also illuminate the other (and related) central aspect of the constitutional text: as is true with the Fifteenth (and Nineteenth), the Twenty-Sixth Amendment does not merely extend the franchise to a particular group of people, but instead outlaws discriminatory treatment based on a particular criterion. Thus, the text of the Twenty-Sixth does not say simply that each state shall reduce its voting age to eighteen (just as the operative words of the Fifteenth do not say merely that adult black men shall enjoy the franchise) but instead provides that the right of persons eighteen or older to vote cannot be denied or abridged on account of age: textually, then, age cannot be used as a criterion for withholding core political rights. As Representative Poff would pointedly proclaim during public deliberation, the proposed Amendment, “would protect not only an 18-year-old, but also the 88-year-old,” just as, I might add, the Fifteenth Amendment forbids discriminatory abridgement of voting rights of whites and the Nineteenth prohibits

discriminatory abridgement of voting rights of men.

Moreover, as to the scope of the Twenty-Sixth Amendment, the reference to the “right to vote” was, as was true of the Fifteenth, a shorthand for a broad package of political-participation rights. For anyone who may not have been sure, Representative Poff was very explicit about the way in which the Amendment was meant to facilitate the fullest possible political participation. Addressing the House and quoting the committee report, he described the Amendment as “confer[ring] a plenary right on citizens 18 years of age or older to participate in the political process, free of discrimination on account of age.” He went on to say that “[t]he ‘right to vote’ is a constitutional phrase of art whose scope embraces the entire process by which the people make their political choices.” Thus, noted Poff, unlike certain congressional statutes, the Amendment was not limited to particular kinds of voting, but rather applied to nominating activities, and even to voting by which voters make law, as in the case of an initiative. Indeed, the only limitations he saw on the “plenary right” were those which were already built into the Constitution and which the Twenty-Sixth Amendment did not purport to amend—the age limitations for federal elective office.

SECOND, the Fourth Circuit did an admirable job of explaining why two other Circuits (the Fifth and the Seventh) that had upheld age discrimination in absentee-ballot eligibility simply erred as a matter of constitutional law and logic. According to the Fifth Circuit in *Texas Democratic Party v. Abbott*, a challenged law (in that case, the challenge was to a Texas law) runs afoul of the Twenty-Sixth Amendment “only if it makes voting *more difficult* for [a] person than it was before the law was enacted or enforced” (emphasis in original). But if the challenger never enjoyed a right to an absentee ballot, an absentee-eligibility law that “makes it *easier* for others to vote does not abridge any person’s right to vote for the purposes of the Twenty-Sixth Amendment” (emphasis in original). As I have argued on *Verdict* and elsewhere, this reasoning makes no sense because it conditions constitutional rights on historical accidents, encourages government to manipulate the system of voting regulation and, most importantly, ignores the equality (rather than temporal) baseline on which the Fifteenth, Nineteenth and Twenty-Sixth Amendments are premised. If a state had never permitted early voting by mail but then extended that option to whites but not blacks, or to men but not women, there would be no question in anyone’s mind that the state had in these events violated the Fifteenth or Nineteenth Amendments, respectively. It would be absurd

to say these laws did not “abridge” the freedom to vote within the meaning of the Fifteenth and Nineteenth Amendments simply because the laws weren’t taking anything away that blacks or women had previously enjoyed, but instead were simply giving something new to other groups. And there is no textual or historical evidence to suggest that “abridge” means something different in the Twenty-Sixth Amendment than it does in the Fifteenth and Nineteenth.

The Fourth Circuit saw things in this regard clearly:

[The Fifth Circuit uses] the wrong baseline against which to measure the challenged law. . . . Plaintiffs’ voting rights may be “abridged” even if South Carolina’s “accommodation of the elderly” does not make the Plaintiffs any worse off than [they were before or] they would be without that accommodation. Instead, the voting rights amendments prohibit “discrimination more generally,” preventing states “from giving preference [in voting] to one citizen . . . over another on account of” the protected characteristics—here, age. The Twenty-Sixth Amendment was passed to “reaffirm . . . equality” and impose a “mandate of neutrality” on rules that govern voting on the basis of age.

The Fourth Circuit's rejection of the Seventh Circuit's ruling in *Tully v. Okeson*, involving a challenge to an Indiana law, where the Seventh Circuit judges relied on the relatively small burden imposed by not being able to vote absentee, was also convincing, and based on the same basic ground—the Twenty-Sixth Amendment forbids discriminatory treatment based on age, so the extent of the age-based burden imposed is really beside the point. Consider an example I have invoked elsewhere (again, analogizing to the Fifteenth Amendment that served as the template for the Twenty-Sixth): “A law that changed the preexisting (uniform) closing time for the voting polls such that whites but not blacks were given two additional minutes to vote would undeniably abridge voting rights of blacks and blatantly violate the Fifteenth Amendment” notwithstanding the relatively minor advantage of a few extra minutes to vote. The Fourth Circuit also amply demonstrated that the Supreme Court cases on which the Seventh Circuit had relied were not merely unhelpful to Indiana and South Carolina; those prior Supreme Court results cut against the arguments Indiana and South Carolina advanced to defend their age-based discrimination.

THIRD, the ruling illustrates the absolute (or near absolute) prohibition of using certain criteria to regulate voting. South Carolina argued that it had good (perhaps compelling)

reasons for favoring persons sixty-five years of age or older, but (as is true in the Fifteenth Amendment’s prohibition of racial discrimination in voting, see *Rice v. Cayetano*) the words of the Twenty-Sixth Amendment make the state’s justifications (and the empirical basis for them) effectively irrelevant. The same would be true for sex-based discrimination. A state could not in 1950 permit men but not women to vote absentee on the ground (empirically overwhelming at the time) that men as a class were much more likely to have to be at a workplace on Election Day than women and that therefore men faced more logistical hurdles to voting in person. And what is true for race and sex is also true for age. Per the Fourth Circuit: “[T]he Twenty-Sixth Amendment unconditionally removes age-based allocation of voting opportunity from the set of permissible means without consideration of the state’s interests.”

FOURTH, *Grant* involves facial age discrimination, rather than disparate impact along age lines. Cases involving, e.g., decisions to limit the number of voting precincts in the part of town near a university—a policy that might in effect dampen turnout among younger voters—are harder because, at least as a general rule (and I acknowledge here that voting cases historically have reflected somewhat of an exception to the general rule) a policy that (on its face) does not discriminate

on the basis of prohibited criteria is not problematic absent proof of invidious motive by the lawmakers. But laws that on their face use race, sex or age as sorting tools are directly foreclosed by the voting equality amendments.

FIFTH, even as the Fourth Circuit rightly embraced the plaintiffs' Twenty-Sixth Amendment challenge, it also rightly rejected a challenge based on the Equal Protection Clause of the Fourteenth Amendment. This rejection made sense for two reasons: 1) age is not a suspect classification under Equal Protection Doctrine; and 2) at least as an originalist matter, Section One of the Fourteenth Amendment (including the Equal Protection Clause) had no application to so-called "political" rights such as voting, officeholding and jury service; that is why the Fifteenth Amendment itself was needed. But the fact that age discrimination is generally unproblematic under equal protection doctrine in no way undermines the importance of the age-neutral mandate embodied in the text and history of the Twenty-Sixth Amendment.

SIXTH, the Fourth Circuit panel was made up of judges appointed by presidents of both political parties. The author of the opinion, Judge Roger Gregory, was initially nominated to and placed on the Fourth Circuit by President Bill Clinton