No. 20-1244

IN THE

Supreme Court of the United States

BARBARA TULLY ET AL.,

Petitioners,

v.

PAUL OKESON, S. ANTHONY LONG, SUZANNAH WILSON OVERHOLT, ZACHARY E. KLUTZ, AND CONNIE LAWSON,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF CONSTITUTIONAL ACCOUNTABILITY CENTER AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

Constitutional Accountability Center (CAC) is a think tank, public interest law firm, and action center dedicated to fulfilling the progressive promise of the Constitution's text and history. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and preserve the rights and freedoms it guarantees. CAC accordingly has a strong interest in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

Indiana law allocates voting opportunities on account of age, giving voters aged 65 years or older the right to vote by mail, while generally requiring younger voters to cast their ballots in person. This explicit age-based voting classification violates the plain text of the Twenty-Sixth Amendment, which provides that "[t]he 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," U.S. Const. amend. XXVI, § 1. The court below, however, upheld Indiana's age-based restriction on mail-in voting, holding that the Twenty-Sixth Amendment does not protect younger voters from facially discriminatory absentee voting laws, such as Indiana's. According to the court below, voting

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[1] Counsel for all parties received notice at least 10 days prior to the due date of *amicus*'s intention to file this brief; all parties have consented to the filing of this brief. Under Rule 37.6 of the Rules of this Court, *amicus* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus* or its counsel made a monetary contribution to its preparation or submission.

by mail is a privilege, and states may therefore give elderly voters more opportunities than younger voters to vote by mail, subject only to the limitations imposed by the Fourteenth Amendment's Equal Protection Clause.

Petitioner demonstrates that the decision below aggravates a split of authority over the meaning of the Twenty-Sixth Amendment, Pet. 15-20, and that is reason enough to grant the Petition. But the Petition should also be granted to clarify that the Twenty-Sixth Amendment means what it says: the first-time voter who has just turned eighteen must be treated on equal terms as the octogenarian voter who has cast a ballot for many decades. In holding otherwise, the decision below cannot be squared with the text and history of the Twenty-Sixth Amendment, which added to the Constitution the explicit rule that the right to vote may not be denied or abridged to adult voters based on age, or the long-established understanding that prohibitions on abridging the right to vote forbid laws that offer lesser opportunities to voters on the basis of certain specified characteristics, such as race, sex, or age.

The immediate impetus for the Twenty-Sixth Amendment's adoption was the desire to enfranchise eighteen- to twenty-one-year-old U.S. citizens. But the "words on the page" adopted by Congress and ratified by the states sweep more broadly, promising voting equality for adult citizens regardless of age. *See Bostock v. Clayton Cty.*, 140 S. Ct. 1731, 1738 (2020). The Amendment, like others protecting the right to vote free from discrimination, "is cast in fundamental terms, terms transcending the particular controversy which was the immediate impetus for its enactment." *Rice v. Cayetano*, 528 U.S. 495, 512 (2000). Indeed, in writing the Twenty-Sixth Amendment, its Framers consciously chose this sweeping language, modeled

specifically on the Fifteenth Amendment's prohibition on racial discrimination in voting and the Nineteenth Amendment's prohibition on sex discrimination in voting. In all three amendments, the Constitution strictly forbids voting discrimination on account of the protected characteristic—race, sex, or age. In each context, by prohibiting both denial and abridgement of the right to vote, the Constitution outlaws state efforts "to fence out whole classes of its citizens from decisionmaking in critical state affairs." *Id.* at 522.

If a state enacted a law limiting the right to vote by mail to white persons, men, or those financially able to pay a tax, there is no doubt that it would be a plain affront to the commands of the Fifteenth, Nineteenth, and Twenty-Fourth Amendments. *See id.* at 512 ("'[B]y the inherent power of the Amendment the word white disappeared' from our voting laws, bringing those who had been excluded by reason of race within 'the generic grant of suffrage made by the State.'" (quoting *Guinn v. United States*, 238 U.S. 347, 363 (1915))); *Gray v. Sanders*, 372 U.S. 368, 379 (1963) ("If a State in a statewide election weighted the male vote more heavily than the female vote or the white vote more heavily than the Negro vote, none could successfully contend that that discrimination was allowable."); *Harman v. Forssenius*, 380 U.S. 528, 542 (1965) ("For federal elections, the poll tax is abolished absolutely as a prerequisite to voting, and no equivalent or milder substitute may be imposed."). The same is true here. Age, like race, sex, and wealth, "cannot qualify some and disqualify others from full participation in our democracy." *Rice*, 528 U.S. at 523.

The court below, however, reasoned that absentee voting laws that discriminate on the basis of race, sex, wealth, and age do not violate the fundamental right to vote free from discrimination because, in its view,

voting by mail is a mere privilege. Pet. App. 8a, 9a (reasoning that scrutiny in such cases would "come from the Fourteenth Amendment's Equal Protection Clause," "*not* . . . from the Fifteenth, Nineteenth, or Twenty-Fourth Amendments," because such laws "do not implicate the right to vote"). In other words, according to the court below, the Constitution's voting rights amendments do not, in fact, protect voters from facially discriminatory laws that make it harder for some voters to cast a ballot. The lower court's invocation of the right–privilege distinction would curtail the scope not only of the Twenty-Sixth Amendment, but of all of the Constitution's voting rights amendments. It would allow states to regulate mail-in voting in a discriminatory manner.

This reasoning ignores that the Constitution's voting rights amendments, including the Twenty-Sixth, were adopted to eradicate voting discrimination and bring our nation closer to our foundational promise of a democracy of, by, and for the people. Indeed, the very reason the Constitution contains four separate amendments that explicitly proscribe voting discrimination is that the Fourteenth Amendment does not guarantee equal voting rights. As this Court said of the Fifteenth Amendment's prohibition on racial discrimination in voting, "[p]revious to this amendment, there was no constitutional guaranty against this discrimination: now there is." *United States v. Reese*, 92 U.S. 214, 218 (1876).

The lower court's suggestion that younger voters should look to the Fourteenth Amendment's Equal Protection Clause to redress discriminatory voting laws would strip the Twenty-Sixth Amendment of independent force and meaning. The American people added the Twenty-Sixth Amendment to the Constitu-

tion after the Supreme Court held in *Oregon v. Mitchell*, 400 U.S. 112 (1970), that Congress's power to enforce the Fourteenth Amendment did not permit it to lower the voting age to eighteen in state elections. In other words, the Twenty-Sixth Amendment was necessary because the Fourteenth Amendment had been interpreted to permit states leeway to enact laws that treat older and younger persons differently on account of age. By placing controlling weight on this Court's permissive equal protection case law, the court below effectively rendered the Twenty-Sixth Amendment's broad prohibition on age discrimination in voting a dead letter.

The Petition should be granted to correct these grievous errors and clarify that the Twenty-Sixth Amendment prohibits states from enacting laws that make it harder for younger voters to exercise their fundamental right to vote.

ARGUMENT

I. The Text and History of the Twenty-Sixth Amendment Prohibit State Laws that Deny Equal Voting Opportunities on Account of Age.

The Twenty-Sixth Amendment provides that "[t]he 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." U.S. Const. amend. XXVI, § 1. This language was chosen by the Framers of the Twenty-Sixth Amendment to establish a broad constitutional prohibition on voting discrimination on account of age. Adults eighteen years or older—whether young or old—are entitled to basic equality when it comes to the right to vote, a right long recognized as "preservative of all rights," *Yick Wo v. Hopkins*, 118 U.S. 356, 370

(1886). States are not required to grant the vote to citizens who have not reached the age of eighteen, but once citizens reach adulthood, the Twenty-Sixth Amendment declares age constitutionally irrelevant. In short, the Amendment protects young and older voters alike and forbids the government from curtailing or diminishing the rights of some adult voters on account of age.

"When seeking to discern the meaning of a word in the Constitution, there is no better dictionary than the rest of the Constitution itself." *Arizona State Legislature v. Arizona Indep. Redistricting Comm'n*, 576 U.S. 787, 829 (2015) (Roberts, C.J., dissenting). This is particularly true of the Twenty-Sixth Amendment, which was modeled specifically on the Fifteenth and Nineteenth Amendments' prohibitions on voting discrimination. As the history of the Twenty-Sixth Amendment shows, its mandate of voting equality regardless of age "embodies the language and formulation of the 19th amendment, which enfranchised women, and that of the 15th amendment, which forbade racial discrimination at the polls." S. Rep. No. 92-26, at 2 (1971). During debates over the Amendment, speaker after speaker reiterated this basic point. *See* 117 Cong. Rec. H7539 (daily ed. Mar. 23, 1971) (statement of Rep. Claude Pepper) ("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."); *id.* at H7534 (daily ed. Mar. 23, 1971) (statement of Rep. Richard Poff) ("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 . . . ."); *id.* at H7533 (daily ed. Mar. 23, 1971) (statement of Rep.

Emanuel Celler) ("[Section 1 of the Twenty-Sixth Amendment] is modeled after similar provisions in the 15th amendment, which outlawed racial discrimination at the polls, and the 19th amendment, which enfranchised women.").

The Twenty-Sixth Amendment was added to the Constitution in the wake of this Court's decision in *Oregon v. Mitchell*, 400 U.S. 112, which struck down a provision of the Voting Rights Act Amendments of 1970 that lowered the voting age from twenty-one to eighteen in state elections by prohibiting states from "den[ying] 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, Pub. L. No. 91-285, 84 Stat. 314, 318. There, the Court held that Congress could not use its power to enforce the Fourteenth Amendment to grant citizens aged eighteen to twenty-one years old the right to vote in state elections. *Mitchell*, 400 U.S. at 130 (opinion of Black, J.) (concluding that "Congress has attempted to invade an area preserved to the States by the Constitution without a foundation for enforcing the Civil War Amendments' ban on racial discrimination"); *id.* at 294 (Stewart, J., concurring in part and dissenting in part) ("[N]one of the opinions filed today suggest that the States have anything but a constitutionally unimpeachable interest in establishing some age qualification as such."). In other words, *Mitchell* allowed states to "discriminate on the basis of age without offending the Fourteenth Amendment if the age classification in question is rationally related to a legitimate state interest." *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 83 (2000).

In response, the Twenty-Sixth Amendment established a specific constitutional rule that guaranteed voting equality for young and older adults alike,

"echo[ing] the language of the Black Suffrage and Woman Suffrage Amendments" and extending them "along the *youth* axis." Akhil Reed Amar, *America's Constitution: A Biography* 445 (2005). Rather than simply lower the voting age from twenty-one to eighteen, the Framers of the Twenty-Sixth Amendment chose broad sweeping language, modeled on the Fifteenth and Nineteenth Amendments, mandating a rule of voting equality on account of age.

Significantly, while the statutory precursor to the Twenty-Sixth Amendment prohibited only vote denial, the Twenty-Sixth Amendment explicitly bars the government from either denying or abridging the right to vote of citizens aged eighteen years or older on account of age. This language, as the Supreme Court's Fifteenth Amendment precedents reflect, is both "explicit and comprehensive," requiring the government to respect "the equality" of young and older adult citizens "at the most basic level of the democratic process, the exercise of the voting franchise." *Rice*, 528 U.S. at 511-12. The Twenty-Sixth Amendment forbids laws that discriminate against younger voters on the basis of age and saddle them with burdens older voters need not bear. The Framers of the Twenty-Sixth Amendment were concerned that "forcing young voters to undertake special burdens" in order to "exercise their right to vote might well serve to dissuade them from participating in the election." S. Rep. No. 92-26, at 14. To guarantee equality for all adult voters regardless of age, the Twenty-Sixth Amendment prohibits both denial and abridgment of the right to vote of citizens eighteen years or older on account of age.

As precedents of the Supreme Court and other courts reflect, the "core meaning" of "'abridge'" is to "'shorten.'" *Reno v. Bossier Par. Sch. Bd.*, 528 U.S. 320, 333-34 (2000) (quoting *Webster's New International*

Dictionary 7 (2d ed. 1950)). This "necessarily entails a comparison" and "refer[s] . . . to discrimination." *Id.* at 334; *see Lane v. Wilson*, 307 U.S. 268, 275 (1939) (observing that the Fifteenth Amendment "nullifies sophisticated as well as simple-minded modes of discrimination" and "hits onerous procedural requirements which effectively handicap exercise of the franchise by the colored race although the abstract right to vote may remain unrestricted as to race"); *Harman*, 380 U.S. at 541-42 (holding that any "material requirement" imposed "solely" on voters who refused to pay a poll tax was an unconstitutional abridgement of the right to vote forbidden by the Twenty-Fourth Amendment); *Jolicoeur v. Mihaly*, 5 Cal. 3d 565, 571 (1971) (holding that the word "'abridge'" in the Twenty-Sixth Amendment "means diminish, curtail, deprive, cut off, reduce" (citing *Webster's New International Dictionary* 6 (3d ed. 1961))); *Texas Democratic Party v. Abbott*, 978 F.3d 168, 197 (5th Cir. 2020) (Stewart, J., concurring in part and dissenting in part) (arguing that "'denial or abridge'" language prohibits "states from depriving individuals of the equal opportunity to vote based on a protected status").

This understanding of the meaning of "abridge" is long-standing and deeply rooted in constitutional text and history. *See* Cong. Globe, 42d Cong., 1st Sess. app. 71 (1871) (prohibition against unconstitutional abridgement "secures equality toward all citizens on the face of the law" and means that "one man shall not have more rights upon the face of the laws than another man"); John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 Yale L.J. 1385, 1388 (1992) (arguing that a law "abridged" a right "when it took that right away from only one group of persons"); Steven G. Calabresi & Andrea Matthews, *Originalism and* Loving v. Virginia, 2012 BYU L. Rev. 1393, 1417-

18 (2012) (demonstrating that "[t]he word 'abridge' in 1868 meant . . . [t]o lessen" or "to diminish" and that laws that gave "African Americans a lesser and diminished" set of freedoms unconstitutionally abridged their rights); Travis Crum, *Reconstructing Racially Polarized Voting*, 70 Duke L.J. 261, 323 (2020) ("The Reconstruction Framers' use of the word 'abridged' militates in favor of broadly protecting the right to vote. At the time, dictionaries defined 'abridge' as 'to contract,' 'to diminish,' or '[t]o deprive of' . . . . And since the term 'denied' adequately captures the scenario where a voter is prevented from casting their ballot, the term 'abridge' presumably carries this broader meaning."); Richard L. Hasen & Leah M. Litman, *Thin and Thick Conceptions of the Nineteenth Amendment Right to Vote and Congress's Power to Enforce It*, 108 Geo. L.J. 27, 39 (2020) (arguing that, under the Nineteenth Amendment, "[a]bridgment occurs when a state 'diminishes' or 'shortens' a voting right on account of sex," such as when "a state passes a law that results in greater burdens on women being able to register and vote compared to men").

Under this settled meaning of "abridge," laws that impose obstacles on younger voters on account of their age and deny them voting opportunities available to older voters violate the promise of voting equality enshrined in the Twenty-Sixth Amendment. As the next Section shows, the Indiana law at issue here is such a law. The court below was wrong to uphold it.

II. The Indiana Law at Issue Here Violates the Twenty-Sixth Amendment.

The Constitution does not require states to establish a system of absentee voting, but having done so, Indiana may not discriminate against voters on the basis of constitutionally forbidden criteria, including age. Thus, Indiana may not provide elderly voters with one

set of voting opportunities but deny those same opportunities to younger voters. To do so violates the plain terms of the Twenty-Sixth Amendment. It "abridges" the "right of citizens of the United States, who are eighteen years of age or older, to vote . . . on account of age" by saddling voters aged eighteen to sixty-four with burdens voters aged sixty-five or older do not face. U.S. Const. amend. XXVI, § 1.

Even though "the abstract right to vote may remain unrestricted" as to age, *see Lane*, 307 U.S. at 275, the Indiana law at issue here provides diminished voting rights to citizens aged eighteen to sixty-four solely on account of their age, and this constitutes an unconstitutional age-based abridgment of the right to vote under the long-settled meaning of "abridge." The statute is based on a premise—that voters aged sixty-five or older deserve additional voting opportunities—that is fundamentally inconsistent with the Twenty-Sixth Amendment's prohibition on voting discrimination on account of age. The Twenty-Sixth Amendment demands that adult voters be treated equally regardless of age. Younger voters, no less than voters sixty-five or older, are entitled to vote from the safety of their home and without the inconvenience of waiting many hours at a crowded, overburdened polling place to exercise their constitutional right to vote. Indiana has written into law a form of voting discrimination explicitly forbidden by the Constitution.

The court below offered two justifications in support of its decision to sanction one set of voting opportunities for younger voters and another for older voters based solely on age. First, it held that discriminatory absentee-ballot laws do not implicate the Twenty-Sixth Amendment because, in its view, voting by mail is merely a privilege. This view ignores that the fundamental right to vote is fully protected, regardless of

how a voter chooses to exercise the right. As this Court's prior cases make clear, "any 'part of the machinery for choosing officials'" is "subject to the Constitution's restraints" against voting discrimination. *Terry v. Adams*, 345 U.S. 461, 481 (1953) (quoting *Smith v. Allwright*, 321 U.S. 649, 664 (1944)); *see Moore v. Oglivie*, 394 U.S. 814, 818 (1969) ("All procedures used by a State as an integral part of the election process must pass muster against the charges of discrimination or of abridgment of the right to vote.").

In any event, this Court has long "rejected the concept that constitutional rights turn upon whether a governmental benefit is characterized as a 'right' or as a 'privilege.'" *Graham v. Richardson*, 403 U.S. 365, 374 (1971). It makes little sense to sharply distinguish between rights and privileges when the fundamental question is whether the government has engaged in a form of discrimination strictly prohibited by the Constitution. States, for example, do not have to provide aid to private schools, but this Court has held that the government may not discriminatorily deny the privilege of a state subsidy based on the school's religious character. *Trinity Lutheran Church v. Comer*, 137 S. Ct. 2012, 2022 (2017) (explaining that "'[i]t is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege'" (quoting *Sherbert v. Verner*, 374 U.S. 398, 404 (1963))); *cf. Wieman v. Updegraff*, 344 U.S. 183, 192 (1952) ("We need not pause to consider whether an abstract right to public employment exists. It is sufficient to say that constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory."). So too here. Although states have wide authority to choose to allow or restrict absentee voting, they may not, consistent with the

Twenty-Sixth Amendment, discriminate against adult voters because of their age. Whether it regulates voting at the polls or by mail, the Amendment "'nullifies sophisticated as well as simple-minded modes' of impairing the right guaranteed." *See Harman*, 380 U.S. at 540-41 (quoting *Lane*, 307 U.S. at 275). The lower court's invocation of the long-discredited right–privilege distinction sanctioned a facially discriminatory electoral regulation that gives lesser voting opportunities to younger voters. This is precisely what the Twenty-Sixth Amendment forbids.

Second, the court below relied heavily on this Court's 1969 decision in *McDonald v. Board of Election Commissioners*, 394 U.S. 802 (1969)—a decision preceding the ratification of the Twenty-Sixth Amendment—which rejected an equal protection challenge to an Illinois law that denied unsentenced inmates awaiting trial the opportunity to obtain an absentee ballot, while affording others unable to make it to the polls the right to vote by mail. *McDonald* stressed "the wide leeway" the Fourteenth Amendment "allow[s] the States . . . to enact legislation that appears to affect similarly situated people differently." *Id.* at 808. The court below was wrong to apply *McDonald*'s equal protection analysis to decide whether a challenged law abridged the right to vote on account of age in violation of the Twenty-Sixth Amendment.

McDonald dealt with the meaning of the Equal Protection Clause. Significantly, the text of that Clause does not use the term "abridge" at all, meaning that it is irrelevant to an equal protection claim whether a state law abridges the right to vote. *McDonald*, therefore, could not possibly answer the question whether a law that gives younger voter lesser voting opportunities than older voters abridges the right to vote on account of age. Indeed, as this Court's opinion

makes clear, nothing in *McDonald* allows the government to allocate voting opportunities based on constitutionally forbidden criteria, such as race, sex, age, or failure to pay a poll tax. Quite the contrary. *See id.* at 807 (finding that the Illinois law did not rest on "factors which would independently render a classification highly suspect and thereby demand a more exacting judicial scrutiny"). Having chosen to give voters the right to vote by mail and avoid the burdens of going to the polls on Election Day, Indiana cannot deny that opportunity to some voters solely on the basis of age. To do so abridges the right to vote based solely on age in violation of the Twenty-Sixth Amendment.

In looking to this Court's precedents interpreting the Fourteenth Amendment's Equal Protection Clause, the approach of the court below effectively strips the Twenty-Sixth Amendment of independent meaning and force. As the history recounted earlier shows, the Twenty-Sixth Amendment was necessary because the Fourteenth Amendment did not forbid age discrimination in voting. *Cf. Reese*, 92 U.S. at 218 ("Previous to this amendment, there was no constitutional guaranty against this discrimination: now there is."). When Congress attempted to enforce the Fourteenth Amendment by lowering the voting age to eighteen in state elections, this Court held that Congress had exceeded its enforcement power. In response, Congress adopted, and the states ratified, the Twenty-Sixth Amendment, mandating that adult voters be treated equally on the basis of age. The suggestion that the Twenty-Sixth Amendment "contributes no added protection to that already offered by the Fourteenth Amendment" ignores its text and history. *See Walgren v. Bd. of Selectmen of Town of Amherst*, 519 F.2d 1364, 1367 (1st Cir. 1975).

This Court's precedents have rejected the suggestion that compliance with the Fourteenth Amendment "somehow excuses compliance" with "the race neutrality command of the Fifteenth Amendment." *Rice*, 528 U.S. at 522. The same is true here. Regardless of the reach and scope of the Fourteenth Amendment, the government must respect the age-neutrality command of the Twenty-Sixth Amendment, which is an explicit constitutional prohibition on state laws that deny or abridge the right to vote of citizens aged eighteen years or older on account of age. Indiana's two-tiered voting system—which allows voters sixty-five or older to vote by mail freely, while younger voters must brave potentially long lines should they wish to vote—flouts the Amendment's promise of voting equality for young and older voters alike.

CONCLUSION

For the foregoing reasons, the Petition should be granted.

Respectfully submitted,

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