No. 20-1244

IN THE
Supreme Court of the United States

BARBARA TULLY, ET AL.,
Petitioners,
v.

PAUL OKESON, ET AL.,
Respondents.

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

BRIEF OF TWENTY-SIXTH AMENDMENT SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTERESTS OF AMICI[1]

Amici are professors of law and history who have written and published on the meaning of the Twenty-Sixth Amendment. They have an interest in ensuring that courts interpret the Twenty-Sixth Amendment in accordance with its text and history.

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[1] All parties received notice of and consented to this filing. No party or party's counsel wholly or partially authored this brief. Only *amici* and counsel for *amici* funded its preparation and submission.

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SUMMARY OF ARGUMENT

This Court has never before interpreted the Twenty-Sixth Amendment. Without this Court's guidance, lower courts have interpreted the Amendment in divergent—and often incorrect—ways. The Seventh Circuit has gone further than other courts, reading absentee voting out of the "right to vote" the Amendment protects. Read in light of its text and history, however, the Twenty-Sixth Amendment provides robust protection to all adults against even subtle forms of age discrimination in voting. This Court should grant certiorari.

I. Some courts and commentators have dismissed the Twenty-Sixth Amendment as a vestige of constitutional history—an amendment designed solely to lower the voting age to eighteen, which, having served its purpose, now lies inert. Such readings ignore the Amendment's text, which speaks in the language of antidiscrimination law.

A. By prohibiting governments from denying or abridging adults' right to vote "on account of age," the Amendment outlaws age discrimination in voting among those eighteen and older. Congress consciously modeled the Amendment's text on that of the Fifteenth, Nineteenth, and Twenty-Fourth Amendments, each of which prohibit discrimination in voting "on account of" a particular characteristic. Like the amendments on which Congress patterned it, the Twenty-Sixth Amendment's text extends beyond the immediate impetus for its

passage, to encompass all manner of age discrimination in elections.

B. The Amendment prohibits not merely denials of the right to vote based on age, but also abridgements of that right. This language again parallels that of prior enfranchisement amendments. It is also broader than the statutory age-lowering provision Congress had previously enacted as Title III of the Voting Rights Act ("VRA"). Title III had prohibited only policies that "denied" the right to vote on account of age. After this Court struck down that provision as applied to state elections, Congress responded with a constitutional amendment that prohibited abridgement, as well. Other sections of the VRA that also prohibited abridgement had already been applied to a variety of practices. Such breadth would not be necessary merely to lower the voting age, as Title III itself confirms; it signals, instead, an antidiscrimination mandate.

C. The Twenty-Sixth Amendment also contains an enforcement clause, which likewise was patterned on those in the Reconstruction Amendments and other enfranchisement amendments. In the years before the Amendment's passage, this Court had expounded its broadest-ever reading of these enforcement clauses. Congress relied on the Court's deference in passing Title III. And even though the Court then held that the Fourteenth Amendment's enforcement clause did not extend to policing age discrimination in voting, the Court retained its relaxed, rational-basis standard for federal legislation under such clauses, which Congress incorporated into Section Two of the Twenty-Sixth Amendment. Again, Congress had little need for such

broad powers if it merely sought to lower the voting age, as opposed to banning age discrimination in elections.

II. Close examination of the Amendment's history puts the lie to two alternative stories of the Amendment's purpose, which artificially restrict views of its meaning.

A. To many, the tale of the Twenty-Sixth Amendment is tangled up with the Vietnam War, as exemplified by the slogan "old enough to fight, old enough to vote." But the very attributes for which advocates praised younger soldiers—their loyalty and obedience—conflicted with the argument that those same eighteen-year olds had the independent judgment to be trusted with the vote. Tying the franchise to military eligibility also left a gaping logical hole: women, who were not subject to the draft but who could not constitutionally be denied voting rights if men their age gained them. It was not until advocates and lawmakers alike began comparing the youth voting rights movement to past movements for minorities' and women's enfranchisement that they won the rhetorical war. In the process, they reinforced the Twenty-Sixth Amendment's connection to the Fifteenth and Nineteenth Amendments.

B. Because this Court declared Title III constitutional as to federal but not state elections, some have suggested that the Twenty-Sixth Amendment was passed only to avoid the administrative nightmare of dual registration systems. But this administrative rationale merely provided the final push toward passage. It did not erase the preceding decades of advocacy, which had included an antidiscrimination

rationale for the Amendment. Nor did it take away from this Court's earlier decisions expansively reading the Reconstruction Amendments' enforcement clauses, which led to Title III and, ultimately, an amendment of even broader scope.

III. The Seventh Circuit's decision clashes with the Twenty-Sixth Amendment's text and original meaning. The court below held that voting by mail was not part of the Amendment's "right to vote," but was merely a privilege outside the Amendment's ambit. Its rationale for this holding would require vote denial to trigger Twenty-Sixth Amendment review, when the Amendment also reaches abridgements. The Seventh Circuit also ignored the Amendment's historical context. This Court had given the word "abridge" an expansive meaning. The VRA contained an equally expansive definition of the word "vote," to which Congress looked when including the same word in the Amendment. And the very soldiers who were all "old enough to fight" but not "old enough to vote" before the Amendment's passage would themselves vote by mail from Vietnam—hardly a voting method Congress would wish to leave outside the Amendment's bailiwick.

Once the Seventh Circuit's erroneous reading of the "right to vote" is cast aside, this becomes an easy case. Indiana's vote-by-mail statute facially discriminates between those over sixty-five, whose age alone warrants an absentee ballot, and those under sixty-five, who must meet one of the statute's other prerequisites to request a mail-in ballot. Any plausible reading of the Twenty-Sixth Amendment prohibits drawing such an age line. Because both the court below and other lower courts

have splintered in their interpretations of the Amendment, and the Seventh Circuit's decision is manifestly wrong, this Court should grant certiorari.

ARGUMENT

I. THE TWENTY-SIXTH AMENDMENT WAS PATTERNED AFTER THE FIFTEENTH AND NINETEENTH AMENDMENTS, AND SHOULD BE READ THE SAME WAY.

When interpreting the Constitution, "[w]e start with the text." *Gamble v. United States*, 139 S. Ct. 1960, 1965 (2019). And even a casual reading of the Twenty-Sixth Amendment makes clear that it acts not merely to lower the voting age, but also to prohibit age discrimination in voting. Several of the Amendment's features, including its prohibition on abridgements and its enforcement clause, would be superfluous otherwise.

A. The Twenty-Sixth Amendment Is An Antidiscrimination Law, Not Merely A Voting-Age-Lowering Provision.

Some commentators, and even some courts, have suggested that the Twenty-Sixth Amendment's "most immediate purpose was to lower the voting age from twenty-one to eighteen." *Tex. Democratic Party v. Abbott*, 961 F.3d 389, 408 (5th Cir. 2020); *accord* 1 Bruce Ackerman, *We the People: Foundations* 91 (1991). However, "the interpretation of any provision of the Constitution must begin with a consideration of the literal meaning of that particular provision," *Tenn. Wine & Spirits Retailers Ass'n v. Thomas*, 139 S. Ct. 2449, 2462 (2019), not with suppositions as to its intended purpose. And Congress worded the Twenty-Sixth

Amendment as an antidiscrimination law, not merely as an age-lowering device.

The Amendment reads:

> Section 1. 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.
>
> Section 2. The Congress shall have power to enforce this article by appropriate legislation.

U.S. Const. amend. XXVI.

The Amendment's plain text speaks of the "right … to vote," and states that this right cannot be "denied or abridged … on account of age." *Id.* This language intones an antidiscrimination command: Age may not be used as a basis for denying or abridging the right to vote. The remainder of Section One merely describes who holds this antidiscrimination right—all American citizens aged eighteen and over—and specifies that neither the federal government nor the states may violate that right. "Thus, a nineteen-year-old, a forty-year-old, and a ninety-year-old all have legitimate claims under Section 1 if their franchise rights are denied or abridged on account of age." Eric S. Fish, Note, *The Twenty-Sixth Amendment Enforcement Power*, 121 Yale L.J. 1168, 1175 (2012).

Had Congress only meant to lower the voting age to eighteen, it could have used wording to accomplish that purpose and only that purpose. Such wording was readily available: Members had previously introduced

versions of the Amendment that would only have reduced the voting age to eighteen. *See, e.g.*, H.J. Res. 352, 77th Cong. (1942) ("In all [federal] elections … persons eighteen years of age having all other qualifications required by the State in which he or she resides shall be entitled to vote."). Instead, as one of the congressional floor leaders put it, the Amendment "guarantees that citizens who are 18 years of age or older shall not be discriminated against on account of age," thereby "prohibit[ing] age discrimination in voting." 117 Cong. Rec. 7534 (1971) (statement of Rep. Poff). Hence, even for those "21 years of age," who could already vote in each state, the Amendment "bestow[ed] an additional constitutional right upon such citizen—the right not to be discriminated against on account of his age." *Id.*

In this vein, it is telling that Congress chose not to model the Amendment after the Constitution's other provisions that set minimum age limits. *See* U.S. Const. art. I, §§ 2, 3; *id.* art. II, § 1. Instead, Congress patterned the Twenty-Sixth Amendment after the more sweeping antidiscrimination language in the Fifteenth, Nineteenth, and Twenty-Fourth Amendments. As the Fifth Circuit has recognized, "[t]he language and structure of the Twenty-Sixth Amendment mirror the Fifteenth, Nineteenth, and Twenty-Fourth Amendments." *Tex. Democratic Party v. Abbott*, 978 F.3d 168, 183 (5th Cir. 2020), *cert. denied*, 141 S. Ct. 1124 (2021).

All four of these amendments contain similar mandates: the right to vote, for those citizens they cover, may not be "denied or abridged by the United States or

by any State on account of" a particular characteristic. U.S. Const. amend. XV, § 1; *id.* amend. XIX; *id.* amend. XXIV, § 1; *id.* amend. XXVI, § 1. In the Fifteenth Amendment, that characteristic is race. In the Nineteenth Amendment, sex. In the Twenty-Fourth Amendment, failure to pay a tax—a proxy for wealth. And in the Twenty-Sixth Amendment, the relevant characteristic is age.

Congress intended this parallelism. *See Walgren v. Howes*, 482 F.2d 95, 101 (1st Cir. 1973) (noting that "both the Fifteenth and Nineteenth Amendments served as models for the Twenty-Sixth"). Senator Arthur Vandenberg first introduced a constitutional amendment to lower the voting age during World War II. *See* S.J. Res. 166, 77th Cong. (1942). Though many other amendments were proposed between then and 1971, "the exact wording of the Twenty-[S]ixth Amendment is unchanged from the core text that Senator Vandenberg first proposed in 1942." Jenny Diamond Cheng, *How Eighteen-Year Olds Got the Vote* 17 (Aug. 4, 2016) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2818730. Though there is little in the legislative record about the language's provenance, what contemporaneous evidence exists suggests that the text of the original 1940s proposal was modeled after the Fifteenth and Nineteenth Amendments. Cheng 17-18.

As the Amendment finally reached passage in 1971, Members of Congress continued to acknowledge its textual debt to its predecessors. The Senate report on the Amendment stated that Section One "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). Likewise, Congressman Emmanuel Celler—who sponsored the Twenty-Sixth Amendment and acted as floor leader in the House, *see* 117 Cong. Rec. 7532 (1971) (statement of Rep. Celler)—stated during the House's final debate that Section One "is modeled after similar provisions in the 15th amendment, which outlawed racial discrimination at the polls, and the 19th amendment, which enfranchised women," *id.* at 7533. Other Members reiterated the Amendment's roots in the Fifteenth and Nineteenth Amendments. *See id.* at 7534 (statement of Rep. Poff); *id.* at 7539 (statement of Rep. Pepper).

This connection to the earlier enfranchisement amendments underscores that the Twenty-Sixth Amendment's language reaches beyond its contemporaneous purpose. After all, the Fifteenth Amendment's "immediate concern … was to guarantee to the emancipated slaves the right to vote." *Rice v. Cayetano*, 528 U.S. 495, 512 (2000). Yet that amendment "grants protection to all persons, not just members of a particular race." *Id.* Likewise, the Nineteenth Amendment was designed to extend existing voting rights to women. But the amendment's antidiscrimination mandate "applies to men and women alike." *Breedlove v. Suttles*, 302 U.S. 277, 283 (1937), *overruled on other grounds by Harper v. Va. State Bd. of Elections*, 383 U.S. 663 (1966).

So, too, the Twenty-Sixth Amendment's text transcends any supposed original intent merely to lower the voting age. Its text is clear: While the federal or

state governments may prohibit or restrict voting among minors, they may not discriminate among voters aged eighteen and older based on age.

B. The Twenty-Sixth Amendment Prohibits The Right To Vote From Being "Denied *Or Abridged*" On Account Of Age.

The text of Section One also supports an antidiscrimination reading of the Twenty-Sixth Amendment through the acts it prohibits. The Amendment provides that the right to vote "shall not be denied or abridged" on account of age. U.S. Const. amend. XXVI, § 1. Had Congress wished merely to lower the voting age—or even to prohibit only the denial of the right to vote based on age—Congress would have had no need to prohibit abridgement. That it followed the Fifteenth, Nineteenth, and Twenty-Fourth Amendments in extending to abridgements confirms that the Twenty-Sixth Amendment "nullifies sophisticated as well as simple-minded modes of discrimination." *Lane v. Wilson*, 307 U.S. 268, 275 (1939).

In this respect, the Twenty-Sixth Amendment reaches beyond Title III of the VRA of 1970, which had already attempted to expand voting rights to those eighteen and older. Title III provided that no citizen "shall be denied the right to vote … 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, tit. III, § 302, 84 Stat. 314, 318. Critically, Title III lacked the word "abridged"; it only protected people from having their right to vote "denied." After this Court upheld Title III as to federal elections but struck it down as to state elections in *Oregon v. Mitchell*, 400 U.S. 112

(1970), Congress responded with a constitutional amendment that prohibited the right to vote from being either "denied" or "abridged" based on age. U.S. Const. amend. XXVI, § 1. This difference in language reveals that Congress chose to extend the Twenty-Sixth Amendment not only to outright denials of the right to vote, but also to more minor abridgements.

Several provisions of the VRA itself illustrate how much power the word "abridged" confers on Congress and the courts to protect voting rights. Since 1965, Section 2 and Section 5 of the VRA have prohibited actions that deny *or* abridge the right to vote. Voting Rights Act of 1965, Pub. L. No. 89-110, §§ 2, 5, 79 Stat. 437, 437, 439. By the time Congress passed the Twenty-Sixth Amendment, this Court had already held that these VRA provisions applied to many state electoral policies beyond formal voting qualifications. *See, e.g.*, *Perkins v. Matthews*, 400 U.S. 379, 387-88 (1971) ("location of polling places," "[c]hanging boundary lines by annexations"); *Allen v. State Bd. of Elections*, 393 U.S. 544, 550-52, 563-66 (1969) (at-large elections, change from elected to appointed positions, new requirements for independent candidates).

As Title III itself indicated, Congress could have employed narrower terminology had it sought only to lower the voting age. It could have explicitly prohibited states from setting a higher minimum age than eighteen. Or it could have merely prohibited age-based vote *denial*, as Congress had done only a year before. Congress's "use of the word 'abridged' clearly shows that this is not the path [it] chose." Fish 1202.

C. The Twenty-Sixth Amendment's Enforcement Clause Confirms That It Protects Broadly Against Age Discrimination in Voting.

Section Two of the Twenty-Sixth Amendment reinforces its relationship to the prior enfranchisement amendments, and underlines its breadth as an antidiscrimination mandate. For Congress would have had little cause to include the same broad enforcement provision as in its earlier antidiscrimination amendments if the Twenty-Sixth Amendment only lowered the voting age.

"[P]rovisions of the Constitution, each must be considered in the light of the other." *Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 109 (1980). When passing the three Reconstruction Amendments, Congress for the first time included enforcement clauses. They provided that "Congress shall have power to enforce this article by appropriate legislation." U.S. Const. amend. XIII, § 2; *id.* amend. XV, § 2; *see id.* amend. XIV, § 5 (similar). Congress added identical enforcement clauses to the Nineteenth and Twenty-Fourth Amendments. U.S. Const. amend. XIX; *id.* amend. XXIV, § 2. Thus, when Congress added yet another, identical, enforcement clause to the Twenty-Sixth Amendment, using language that is "obviously transplanted from another legal source, it br[ought] the old soil with it." *Taggart v. Lorenzen*, 139 S. Ct. 1795, 1801 (2019).

At the time of the Amendment's passage, both Congress and this Court had recently expounded broad interpretations of prior congressional enforcement clauses. Fish 1190-91. In *Katzenbach v. Morgan*, 384

U.S. 641 (1966), for instance, this Court had just endorsed a broad grant of power to Congress under Section 5 of the Fourteenth Amendment. The Court had previously ruled that the proper test to apply under Section 2 of the Fifteenth Amendment, which "grants Congress a similar power to enforce by 'appropriate legislation' the provisions of that amendment," is "the [test] formulated in *McCulloch v. Maryland*." *Id.* at 651. The *Morgan* Court applied the same test to the Fourteenth Amendment. *Id.* Under the *McCulloch* standard, "[w]hatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, … if not prohibited, is brought within the domain of congressional power." *Id.* at 650. *Morgan* therefore set out a rational basis standard for Fourteenth Amendment legislation.[2]

Congress displayed a clear understanding of this broad enforcement mandate when passing Title III of the VRA of 1970, *see* S. Rep. No. 92-26, at 8-9; Cheng 64-67, as well as during the 1970-71 debate over the Equal Rights Amendment, *see* Fish 1213-15. Thus, when Congress drafted the Twenty-Sixth Amendment, it understood the Amendment's enforcement clause, identically worded to the Fourteenth and Fifteenth Amendments', to have similarly broad powers as applied to age discrimination. *See, e.g.*, S. Rep. No. 92-26, at 2 ("The power conferred upon Congress by this section parallels the reserve power granted to the Congress by numerous amendments to the Constitution."); 117 Cong.

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[2] This Court's later qualification of *Morgan* in *City of Boerne v. Flores*, 521 U.S. 507 (1997), does not change what those in 1971 would have understood this enforcement language to mean.

Rec. 7533 (statement of Rep. Celler) (same); *cf. Lorillard v. Pons*, 434 U.S. 575, 581 (1978).

Notably, Congress had passed the VRA of 1970 with the expectation that the Fourteenth Amendment enforcement clause was already broad enough to encompass age-based voter discrimination. *See* Pub. L. No. 91-285, tit. III, § 301(a)(2), 84 Stat. at 318; Cheng 64-67. This Court's decision in *Oregon v. Mitchell* disabused Congress of this notion, but spurred it to pass an enforcement clause specific to age discrimination.

Mitchell held that Congress could lower the voting age as to federal but not state elections. Four Justices said that the Fourteenth Amendment allowed Congress to set a minimum voting age in both federal and state elections. *See Mitchell*, 400 U.S. at 141-42 (opinion of Douglas, J.); *id.* at 240 (Brennan, White, and Marshall, JJ., concurring in part and dissenting in part). Another four Justices said that the Amendment could *not* reach voter qualifications in either state or federal elections. *Id.* at 154 (Harlan, J., concurring in part and dissenting in part); *id.* at 293-94 (Stewart, J., concurring in part and dissenting in part). Justice Black split the difference. He agreed that the Fourteenth Amendment could not justify Title III, reading the Reconstruction Amendments as being peculiarly concerned with racial discrimination. *Id.* at 129-30 (opinion of Black, J.). But he determined that the Elections Clause was broad enough to encompass the VRA's attempt to lower the voting age in federal elections. *Id.* at 123-24.

This meant that five Justices had held Title III unconstitutional as applied to state elections, while a different five Justices had held it constitutional as to

federal elections. *Id.* at 117-18. And five Justices had held that the Fourteenth Amendment's enforcement clause was not broad enough to encompass age discrimination in voting. However, Justice Black provided a fifth vote for the proposition that the Fourteenth Amendment could support voting rights legislation, and that—at least where race was concerned—Congress had the power to define and rationally prohibit equal protection violations under *McCulloch*. Fish 1192-93.

Congress passed the Twenty-Sixth Amendment to ensure that its enforcement power extended to state elections based on age, with the knowledge that the *McCulloch* standard still governed the scope of the language it borrowed. Yet there would be little need for such broad enforcement authority if the Amendment were limited to lowering the voting age to eighteen. It is, instead, an antidiscrimination law.

II. THE AMENDMENT'S HISTORY BOLSTERS THE TEXT'S ANTIDISCRIMINATION FOCUS.

Two common historical (mis)readings often overshadow the Twenty-Sixth Amendment's antidiscrimination focus, minimizing the Amendment's true importance. The first is that the Amendment merely lowered the voting age to eighteen to match the Vietnam-era conscription age. This interpretation not only ignores the text's plain meaning, but also misunderstands the Amendment's history. The second is that Congress passed the Amendment as an administrative correction to the administrative nightmare created by this Court's split decision in

Oregon v. Mitchell. This story is likewise based on an historical snapshot, rather than the full picture.

A. The History Confirms That The Amendment Does More Than Just Lower The Voting Age.

Though the Twenty-Sixth Amendment is often associated with the Vietnam War, the march toward the Amendment began decades before, during World War II. *See supra* at 9. Proposals to lower the voting age were often tied to conscription—indeed, this genesis is one reason why the discrimination prohibition begins at age eighteen. *See* S. Rep. 92-26, at 6; Cheng 16.

But while the military argument was part of the Twenty-Sixth Amendment's journey into law, it was always hamstrung by inconvenient facts. Cheng 26. For one, the logical nexus between voting age and conscription age was shaky. Advocates of lowering the conscription age emphasized, among other things, the obedience of the young—directly contradicting voting advocates' contention that the nations' eighteen-year olds could resist indoctrination and vote their own minds. *Id.* at 26-27; *see also* Rebecca de Schweinitz, "The Proper Age for Suffrage: Vote 18 and the Politics of Age from World War II to the Age of Aquarius," *in Age in America: The Colonial Era to the Present* 209, 213 (Corrine T. Field & Nicholas L. Syrett, eds. 2015). Furthermore, the male-only draft rendered the conscription argument logically at odds with the Nineteenth Amendment. Cheng 27-28. And finally, the broader movement for lowering the voting age disfavored the conscription argument. Those young activists pushing Congress from outside favored

"broader lines of reasoning about youth responsibility and legal status." De Schweinitz 213.

These contradictions always hampered the argument that "young enough to fight" equaled "young enough to vote." Only once advocates situated eighteen-year olds' right to vote within a greater trajectory of inclusion and antidiscrimination did it gain enough traction to become law. Cheng 80. In the critical period leading to passage, lawmakers picked up these arguments and packaged them into a constitutional framework. *Id.*

Analogies to the Fifteenth and Nineteenth Amendments were the "defining feature" of the movement to lower the voting age to eighteen during the 1960s. *Id.* at 33. Congressman Howard Robinson, for example, explicitly linked the Fifteenth and Twenty-Sixth Amendments, arguing that "[t]here are two groups in our Nation which are excluded from the elective process in significant numbers—black citizens and those young people under 21." *Id.* at 70. Others noted that arguments against the youth vote bore a striking similarity to arguments against women's suffrage—assertions the Nineteenth Amendment proved false. *Id.* at 68-69.

These arguments were not unique to the 1960s. Indeed, advocates had pointed out parallels to women's suffrage since the 1940s. Cheng 68-69. But in the 1960s they gained new resonance. Following the civil rights movement's success, groups representing women, Latinos, Native Americans, the disabled, and the elderly all advocated for federal antidiscrimination protections, a phenomenon historians have termed the "rights revolution." *Id.* at 71. Lawmakers likewise began

couching prohibitions against age discrimination in voting as part of a natural constitutional trajectory. *Id.* at 76-78. Youth discrimination was thus a powerful rallying cry. Though detractors argued that antidiscrimination language might reach too far, or that age might be a valid measure on which to discriminate in voting, the environment of the 1960s put those naysayers on the defensive for the first time. *Id.* at 71.

These arguments underline the textual link to the Fifteenth and Nineteenth Amendments. Congress at the time understood the Fifteenth Amendment in particular to contain broad enforcement powers to combat all manner of race-based voting discrimination. Fish 1199-1200. Advocates' rhetorical use of the Fifteenth Amendment to argue for the Twenty-Sixth, therefore, has particular resonance for the latter's meaning. At the time of the Amendment's passage, lawmakers understood Congress to have great power to bar discrimination based on a chosen category—here, age. *Id.* The concept of age discrimination was therefore critical to the Twenty-Sixth Amendment's passage, and provides the best lens for interpreting the Amendment today. Cheng 80.

B. The Twenty-Sixth Amendment's Long History Further Belies Readings That Link It Only To *Oregon v. Mitchell*.

A second tale tells that Congress passed the Twenty-Sixth Amendment only as an administrative fix to the bifurcated voting system that *Oregon v. Mitchell*'s split holding created. *E.g.*, 1 Ackerman 91. True, these administrative concerns made the Amendment's need more immediate. *See* S. Rep. No. 92-26, at 12-18. But the

Amendment's long history counsels against rating such concerns too highly among the Amendment's guiding rationales. Indeed, even the Amendment's post-*Mitchell dénouement* was the product of Congress's and the Court's expansive views of the Fourteenth Amendment.

Title III of the VRA, which set in motion the Amendment's final act, was directly inspired by *Morgan*. Fish 1196-97. Since World War II, progress on what would become the Twenty-Sixth Amendment had stalled in Congress, primarily as the result of the control that Congressman Celler—not yet a convert to the Twenty-Sixth Amendment cause—exercised over the House Judiciary Committee. Cheng 21-22. *Morgan*, however, offered legislators a new route to passage: by statute, under *Morgan*'s understanding of the Fourteenth Amendment's expansive power. *See supra* Part I.C. This statutory route enabled proponents to maneuver around Congressman Celler's committee and force a vote on the eighteen-year-old voting age. Cheng 60.

This Court's subsequent decision in *Mitchell*, and the administrative headaches it threatened, were merely the final step that pushed Congress over the edge. Following *Mitchell*, the Twenty-Sixth Amendment—which had failed to pass out of committee in the Senate roughly 150 times, *see* S. Rep. No. 92-26, at 8—passed swiftly. But this passage owed as much to the long campaign comparing youth discrimination to race and sex discrimination in voting as it did to administrative difficulties. *See supra* Part II.A. This movement, supercharged by the Court's decision in *Morgan*, provided the needed constitutional rationale for Title

III. And ultimately, Congress crafted the Twenty-Sixth Amendment to mirror the Fifteenth and Nineteenth Amendments' expansive powers to counter discrimination based on age. *See supra* Part I.

The Amendment's swift passage in 1971 was merely the last step in a long journey. Ignoring this broader history and constitutional understanding in favor of a few-month period in the Amendment's legislative life makes for poor interpretation. Instead, the Amendment must be understood through the context of its text and full history.

III. THIS COURT SHOULD GRANT CERTIORARI TO CONFIRM THE TWENTY-SIXTH AMENDMENT'S PROPER MEANING AND REVERSE THE SEVENTH CIRCUIT.

Because the Seventh Circuit's decision is so clearly out of step with the Twenty-Sixth Amendment's original meaning, and because it conflicts with standards developed in other circuits, this case provides an excellent vehicle for the Court to finally provide authoritative guidance as to the Amendment's meaning.

The Seventh Circuit's crucial error was to say that the Twenty-Sixth Amendment does not apply because voting by mail is a "privilege" and not part of "the right … to vote." Pet. App. 6a. Both the Amendment's text and contemporaneous understanding confirm that methods of voting fall with the right to vote.

To start, the constitutional text speaks of denying *or abridging* the right to vote. U.S. Const. amend. XXVI, § 1. The Seventh Circuit reasoned, however, that the right to vote by a particular method is not part of the

"right to vote" under the Amendment if there is another means (however onerous) to vote. Pet. App. 6a-8a. This formulation would suggest that the Amendment is limited to vote denial, for anything short of a practical prohibition on voting would not trigger scrutiny.

The Seventh Circuit also ignored the historical era in which the Amendment passed. Just as the Twenty-Sixth Amendment incorporated the contemporary understanding of Congress's enforcement power, so too did it incorporate both this Court's and Congress's contemporary understanding of the word "abridge" and the phrase "right to vote."

In 1965, this Court examined the same language in the Twenty-Fourth Amendment, and determined that Virginia's attempt to provide voters a choice between "pay[ing] the customary poll taxes as required for state elections or fil[ing] a certificate of residence" was "an abridgment of the right to vote in federal elections." *Harman v. Forssenius*, 380 U.S. 528, 538 (1965). The Court expressly noted that the Twenty-Fourth Amendment includes abridgement as well as denial of the right to vote, and concluded that it "'hits onerous procedural requirements which effectively handicap exercise of the franchise by those claiming the constitutional immunity.'" *Id.* at 540-41 (citation omitted). Refusing absentee ballots to one age group while making them freely available to another imposes unequal barriers based on age, abridging the first group's right to vote.

The VRA, which was the original home for the policy that became the Twenty-Sixth Amendment, also provides a sweeping definition of the word "vote," which

further shows that Congress understood the "right to vote" to sweep beyond merely the bare ability to vote. 52 U.S.C. § 10310(c)(1) ("The terms 'vote' or 'voting' shall include all action necessary to make a vote effective in any primary, special, or general election ….").

The VRA's formulation provides crucial context. The Seventh Circuit held that this Court's discussion of mail-in voting in *McDonald v. Board of Election Commissioners of Chicago*, 394 U.S. 802 (1969), controlled the scope of the Twenty-Sixth Amendment's "right to vote." Pet. App. 6a-7a. Yet Congress did not base the Amendment's "right to vote" on this Court's decision in *McDonald*. Rather, it sought to give the word "vote" the same expansive definition as in the VRA. *See* 117 Cong. Rec. 7533 (statement of Rep. Celler) ("The section contemplates that the term 'vote' includes all action necessary to make a vote effective in any primary, special or general election ….").

This Court's Twenty-Sixth Amendment jurisprudence, though minimal, likewise confirms that the Seventh Circuit's idea of the "right to vote" is too restricted. In *Symm v. United States*, 439 U.S. 1105 (1979), this Court summarily affirmed a lower-court decision striking down a requirement for college students to swear that they will remain in the community after graduation to vote in the place at which they attended college. *See United States v. Texas*, 445 F. Supp. 1245 (S.D. Tex. 1978), *aff'd*, 439 U.S. 1105 (1979). Those students could have taken the oath and voted, or else voted in the place where they lived outside of the school year, and still been able to vote. Yet despite these alternative options, this Court recognized that such an

oath placed a barrier in the way of voting for college students and thus abridged the right to vote on account of age.

Indeed, it would make little sense for the Twenty-Sixth Amendment not to reach voting by mail. While the Amendment's impetus ranged beyond granting the right to vote to fighting men and women, the "old enough to fight, old enough to vote" rationale always remained part of the Twenty-Sixth Amendment's reason for being. *See supra* Part II.A. And absentee voting itself developed largely to accommodate soldiers in wartime. *See* Alexander Keyssar, *The Right to Vote* 121 (2000). Congress had already recommended that states provide service-members with absentee ballots in the Federal Voting Assistance Act of 1955, Pub. L. No. 84-296, § 101, 69 Stat. 584, 584. Yet young soldiers would have continued to lack real protection under the Seventh Circuit's rationale. For unless they sought leave to return home, *all* those fighting in Vietnam had to vote absentee. If the Amendment did not protect the right to vote by that particular method, states could well have required soldiers to find a way to vote at home or else forfeit the very right the Twenty-Sixth Amendment had just granted them. Under the Seventh Circuit's logic, it would not be state absentee ballot laws that "'absolutely prohibit[ed] [soldiers] from voting; only the [war would be] potentially guilty of those charges." Pet. App. 7a-8a.

Once the Seventh Circuit's mistake regarding the scope of "the right to vote" is swept away, this becomes an easy case. Indiana's law facially discriminates based on age: those over sixty-five can vote by mail without excuse; those under sixty-five can vote by mail only after

meeting one of the State's other limited criteria. Pet. App. 3a. Such facial discrimination cannot stand under the Twenty-Sixth Amendment's text or original understanding.

However, despite the Amendment's clear language, the lower-court decisions in this and other cases demonstrate that the Amendment is ill-understood. *See* Pet. for Cert. 15-20. Therefore, this Court should grant certiorari and clarify that the Twenty-Sixth Amendment means what it says: the right to vote shall not be denied or abridged based on age.

CONCLUSION

The Court should grant certiorari and reverse.

Respectfully submitted,

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