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## Age Discrimination In Voting At Home

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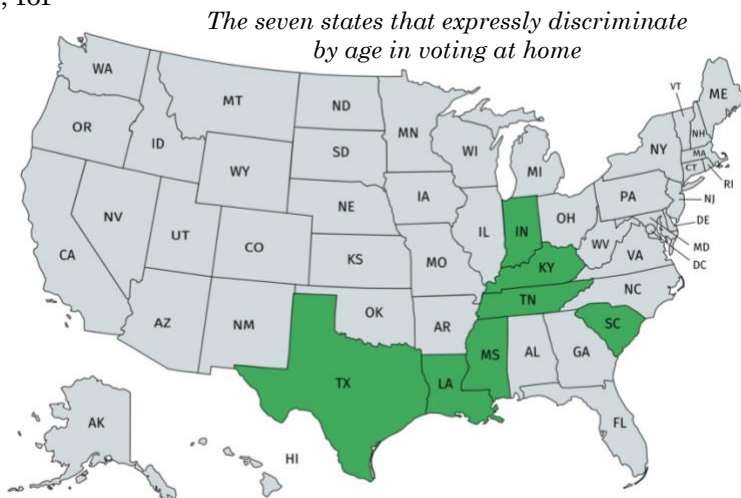
## REPORT: Age Discrimination In Voting At Home

*Some states forbid younger voters from voting at home while allowing older voters to do so. Courts will likely find these laws unconstitutional.*

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In sixteen states, voters must, by law, provide an excuse to vote at home (voting from home is also known as voting “by mail” or “absentee”). In these states, voters may vote at home only if they are away from the jurisdiction, are physically disabled, or have another specific excuse.<sup>1</sup>

In seven of these states, being a certain age is a permissible predicate to voting at home. This violates the Twenty-Sixth Amendment’s protection of the right to vote for anyone aged 18 or older. Texas, for instance, lets any voter over 65 request a ballot to vote at home.<sup>2</sup> So does Indiana.<sup>3</sup> Louisiana, Mississippi, and South Carolina have similar provisions; Tennessee lets those 60 and older vote at home without an additional excuse; and Kentucky also has more generous rules for voters of an “advanced age,” without defining that age specifically.<sup>4</sup> Missouri has



<sup>1</sup> These states are Alabama, Arkansas, Connecticut, Delaware, Indiana, Kentucky, Louisiana, Massachusetts, Mississippi, Missouri, New Hampshire, New York, South Carolina, Tennessee, Texas, and West Virginia. See <https://www.ncsl.org/research/elections-and-campaigns/absentee-and-early-voting.aspx>. In several of these states, state election officials have said they will temporarily expand vote-by-mail options given the current coronavirus crisis. It is not entirely clear how all of these states will implement those exceptions or whether they provide sufficient certainty that no-excuse vote-by-mail will be available to all, although several states have declared that any voter may use the “medical” excuse because of COVID-19. See <https://act.represent.us/sign/vote-home-coronavirus/>.

<sup>2</sup> Texas Elec. Code § 82.003 (“A qualified voter is eligible for early voting by mail if the voter is 65 years of age or older on election day.”).

<sup>3</sup> Ind. Code Ann. § 3-11-10-24(a)(5).

<sup>4</sup> See generally “Absentee Voting Rules,” <https://www.vote.org/absentee-voting-rules/>. Michigan and Virginia require those who register by mail and will be voting for the first time to vote in-person, but they make an exception for older voters.

also passed a bill that expands voting options in 2020 but explicitly makes it easier for those over 65 to vote at home than other voters; that bill awaits the signature of the governor.<sup>5</sup>

Those laws are likely unconstitutional, especially in light of the COVID-19 pandemic. In particular, as this report explains, those laws likely violate the Twenty-Sixth Amendment, which says that the right to vote “shall not be denied or abridged . . . on account of age”—pandemic or not.

So far, we know of lawsuits in Texas, Indiana, and South Carolina that have made this claim.<sup>6</sup> The Texas plaintiffs succeeded on May 19, 2020 in obtaining a preliminary injunction in federal court in *Texas Democratic Party v. Abbott*, though that injunction has been stayed for the moment by a federal appeals court.<sup>7</sup>

In this report, we explain why that Texas decision is correct, and we encourage others to bring this claim in Louisiana, Mississippi, Tennessee, Kentucky, South Carolina, and, if the relevant bill is passed, Missouri. We also provide novel data to show that this sort of discrimination has noticeable impacts on voting rates by age.

### The Twenty-Sixth Amendment: A Civil Rights Amendment To Bar All Age Discrimination In Voting

The Twenty-Sixth Amendment was ratified in 1971, and its operative provision says:

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.

Congress and the states ratified this Amendment as America was sending 18-year-olds to fight in the Vietnam War while not allowing them to vote. It is thus often associated with Vietnam War-related activism, but the Amendment was a long time in the making and resulted from a much deeper struggle for civil rights. It must be read as a civil rights amendment, and not a mere instruction to lower the voting age to eighteen.

Representative Jennings Randolph of West Virginia first introduced the Amendment in 1942, and Members of Congress proposed it, in identical form, at least once every session between then and the Amendment’s ultimate ratification in 1971.<sup>8</sup>

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<sup>5</sup> See Missouri S.B. 631 (passed May 15, 2020).

<sup>6</sup> For the Texas complaint in *Gloria v. Hughs*, see [here](#). For the Indiana complaint in *Tully v. Okeson*, see [here](#). For the South Carolina complaint in *Middleton v. Andino*, see [here](#).

<sup>7</sup> See *Texas Democratic Party v. Abbott*, W.D. Tex. No. 20-ca-438 (Order of May 19, 2020), available [here](#).

<sup>8</sup> See Yael Bromberg, *Youth Voting Rights and the Unfulfilled Promise of the Twenty-Sixth Amendment*, 21 U. Penn J. Const. Law, 1105, 1117 (“Bromberg”) (comparing S.J. Res.

But the Amendment failed to gain steam until the end of the Civil Rights Era. At that point, it was “the upswell of 1960s activism that manifested as the nation’s Second Reconstruction that ultimately expanded the vote to youth.”<sup>9</sup> Jennings Randolph, now in the Senate, finally saw his idea come to fruition.

The text of the Twenty-Sixth Amendment was “modeled after similar provisions in the [Fifteenth A]mendment, which outlawed racial discrimination at the polls, and the [Nineteenth A]mendment, which enfranchised women.”<sup>10</sup> According to one Congressperson, the Amendment “guarantees that citizens who are 18 years of age or older shall not be discriminated against on account of age.”<sup>11</sup> The legislative history also demonstrates “an overwhelming influence of Fourteenth Amendment principles embedded in the push for ratification.”<sup>12</sup> As the Senate Report accompanying the Twenty-Sixth Amendment recognized:

[F]orcing young voters to undertake special burdens—obtaining absentee ballots, or traveling to one centralized location in each city, for example—in order to exercise their right to vote might well serve to dissuade them from participating in the election. This result, and the election procedures that create it, are at least inconsistent with the purpose of the Voting Rights Act, which sought to encourage greater political participation on the part of the young; such segregation might even amount to a denial of their 14th Amendment right to equal protection of the laws in the exercise of the franchise.<sup>13</sup>

In 1971, supermajorities in Congress ratified the Amendment, and 38 states followed suit in less than 100 days. The time period represents the quickest ratification of an amendment in our history, reflecting its overwhelming popularity across party lines.<sup>14</sup> Thus, when Congress and the states ratified the Amendment in 1971, it became an “integral part and natural extension of the Second Reconstruction.”<sup>15</sup>

The Twenty-Sixth Amendment lowered the voting age to 18 for all elections, but its text has far greater impact. The Amendment bans age discrimination among eligible voters by explicitly guaranteeing that the right to vote “shall not be *denied or abridged* by the United States or by any State on account of age.” (Emphasis added.)

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166, 77th Cong. (1942), with U.S. Const. am. XXVI, and referencing Jenny Diamond Cheng, *Voting Rights for Millennials: Breathing New Life into the Twenty-Sixth Amendment*, 67 *Syracuse L. Rev.* 653, 674–75 n.186 (2017).

<sup>9</sup> Bromberg at 1121.

<sup>10</sup> See 117 Cong. Rec. 7532, 7533 (1971) (statement of Rep. Celler).

<sup>11</sup> *Id.* at 7534 (remarks of Rep. Poff).

<sup>12</sup> Bromberg at 1161; see also *id.* at 1124–27, 1132–34.

<sup>13</sup> S. Rep. No. 92-26, at 14 (1971) (quoted in Bromberg at 1133).

<sup>14</sup> Bromberg at 1133.

<sup>15</sup> *Id.* at 1120.

To “abridge” means to “curtail, lessen, or diminish (a right, privilege, etc.); to reduce the extent or scope of.”<sup>16</sup> Therefore, the inclusion of the language “or abridged” shows the drafters’ intent that the Amendment “do more than just police states’ voting ages.”<sup>17</sup>

The text of the Amendment thus prohibits laws that abridge—or diminish—the ability of someone to vote based on their age. Meanwhile, state laws like § 82.003 of the Texas Election Code grant more lenient voting processes for older voters but not younger voters. As explained in more detail in the following section, this practice unconstitutionally “abridges” the voting rights of citizens younger than the arbitrary statutory cut-off age by lessening their voting rights relative to those of voters over the cut-off age.

### The (Limited) History Of Twenty-Sixth Amendment Litigation

In the immediate wake of the Amendment’s ratification, a few states persisted in making it much harder for younger voters, especially students and military voters, to vote than others. Plaintiffs challenged several such state and local laws, and courts applied strict scrutiny to those claims. In other words, the laws could survive only if states could demonstrate (1) a compelling state interest for the age discrimination, and (2) that the law was narrowly tailored to meet that interest. In many cases, courts struck down the laws. *See Ownby v. Dies*, 337 F. Supp. 38, 39 (E.D. Tex. 1971) (invalidating, under the Twenty-Sixth and Fourteenth Amendments, a state statute providing different criteria for determining voting residency for voters age 18–21 than for voters over the age of 21); *cf. Dunn v. Blumstein*, 405 U.S. 330 (1972) (applying strict scrutiny to Tennessee durational residency requirement for voter registration because the law forced voters to choose between the right to vote and the right to travel); *Worden v. Mercer County Bd. Of Elections*, 61 N.J. 325 (1972) (reviewing Twenty-Sixth Amendment legislative history and jurisprudence, applying strict scrutiny to invalidate a county policy of refusing voter registration to students domiciled on campus).<sup>18</sup>

The Supreme Court’s lone ruling on a case directly involving a Twenty-Sixth Amendment claim occurred in 1979, towards the end of the initial wave of post-ratification litigation. In that case, the Court summarily affirmed a three-judge district court’s decision to overturn voter registration restrictions in Waller County, Texas, because the registrar had been imposing unconstitutional burdens on students

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<sup>16</sup> *Oxford English Dictionary* (3d ed. 2009); *see also* 52 U.S.C. § 10301(b) (Voting Rights Act defining “denial or abridgement” as a practice such that “the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of [protected] citizens in that its members *have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice*”) (emphasis added).

<sup>17</sup> Eric S. Fish, *The Twenty-Sixth Amendment Enforcement Power*, 121 Yale L.J. 1168, 1181 (2012).

<sup>18</sup> *See also* Bromberg at 1135-36 n.125, 126 (collecting cases).

wishing to vote. *Symm v. United States*, 439 U.S. 1105 (1979) (reviewing the legislative history and bevy of litigation brought following ratification, finding consistency with the right to vote doctrine’s application of strict scrutiny), *aff’g United States v. Texas*, 445 F. Supp. 1245 (S.D. Tex. 1978). That summary affirmance has precedential weight.<sup>19</sup>

After *Symm*, however, few cases challenged laws that discriminate against voters based on age. Thus, Twenty-Sixth Amendment jurisprudence largely froze in the decade following its ratification. Meanwhile, courts have considered numerous voting rights cases invoking the Fourteenth Amendment’s due process and equal protection clauses.<sup>20</sup> Recently, litigants have turned back to the Twenty-Sixth Amendment in cases where politicians are discriminating against young voters or student voters. Enforcing the Twenty-Sixth Amendment’s guarantee in the context of laws that allow only older voters to vote at home—especially during a pandemic when in-person voting is fraught with health concerns—is particularly appropriate.

For instance, one court recently noted that the Twenty-Sixth Amendment contributes “added protection to that already offered by the Fourteenth Amendment.” *League of Women Voters of Fla., Inc. v. Detzner*, 314 F. Supp. 3d 1205, 1221 (N.D. Fla. 2018). Given the Twenty-Sixth Amendment’s express identification of age as an impermissible axis of discrimination in voting, the more state-friendly balancing test that the Supreme Court uses under the Equal Protection Clause would be “unfitting” in a case alleging direct age discrimination in voting. *Id.* (citing *One Wisconsin Inst., Inc. v. Thomsen*, 198 F. Supp. 3d 896, 926 (W.D. Wis. 2016)). This heightened scrutiny is consistent with courts’ use of strict scrutiny in the decade following ratification of the Twenty-Sixth Amendment, as well as with the reality that courts should interpret the Twenty-Sixth Amendment as prohibiting states from discriminating against any otherwise-eligible voter on the basis of age.

### Courts Would Likely Invalidate Age-Based Preferences, Which Are Especially Unfair Given The Current Pandemic

According to our research, no appellate court has yet definitively addressed whether any of the existing laws that allow only older voters to use age as a reason to vote at home violate the Twenty-Sixth Amendment. Hopefully courts will do so in the cases mentioned in Texas, Indiana, and potentially elsewhere.

On the merits of that question, the Amendment’s history and Congress’s intent show that courts will likely find these laws unconstitutional, particularly in light of new challenges presented amid the COVID-19 pandemic. The conclusion is the same

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<sup>19</sup> See Bromberg at 1134-35 n.121 and supportive text (explaining *Symm*’s reasoning and the precedential effect of summary affirmances); Joshua A. Douglas and Michael E. Solimine, *Precedent, Three-Judge District Courts, and the Law of Democracy*, 107 Georgetown L.J. 413 (2018) (explaining precedential value of Supreme Court summary affirmance of a decision by a three-judge district court).

<sup>20</sup> Bromberg at 1150–61.

regardless of whether courts employ strict scrutiny, as they should, or apply a lower-level balancing test. These laws use age to create two classes of voters—one with easier access to the ballot box than the other—and functionally abridge the voting rights of younger voters. That practice is impermissible under the Twenty-Sixth Amendment.

The statutes here explicitly discriminate on the basis of age—i.e., they are *prima facie* discriminatory. A law that is discriminatory “on its face is subject to strict scrutiny regardless of the government’s benign motive.” *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2228 (2015); *see also Lynch v. Donnelly*, 465 U.S. 668, 687 n.13 (1984) (the Supreme Court “require[s] strict scrutiny of a statute or practice patently discriminatory on its face”); *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003) (explicit “racial classifications imposed by government must be analyzed by a reviewing court under strict scrutiny”) (quotation marks omitted). Laws analyzed under this standard are “constitutional only if they are narrowly tailored to further compelling governmental interests.” *Id.* Under this strict standard, laws that facially discriminate based on a protected class are presumptively invalid.

For instance, a law that makes distinctions on the basis of race or ancestry are presumptively invalid under the Fifteenth Amendment, which prohibits racial discrimination in voting. *Rice v. Cayetano*, 528 U.S. 495, 512 (2000) (explaining that the Constitution “prohibits all provisions denying or abridging the voting franchise of any citizen or class of citizens on the basis of race”); *see also Smith v. Allwright*, 321 U.S. 649, 664 (1944) (striking down facially discriminatory policy that prevented African-Americans from voting in a primary election). Similarly, the Supreme Court has upheld a lower court’s application of strict scrutiny under the Twenty-Sixth Amendment where a policy facially discriminates on the basis of age in voting. *See Symm*, 439 U.S. at 1105. The analysis for age under the Twenty-Sixth Amendment is the same as it is for race under the Fourteenth and Fifteenth Amendments, or religion under the First Amendment: where laws explicitly and intentionally divide Americans into groups on the basis of race, religion, or age, those laws are invalid unless the government can satisfy the highest level of scrutiny.

A federal court recently recognized that a Florida law preventing early voting on campuses targeted students and thus amounted to improper age discrimination. *Detzner*, 314 F. Supp. 3d at 1223 (noting that the restriction was “unexplainable on grounds other than age”). The court reasoned that:

If a unanimous Senate, near-unanimous House of Representatives, and 38 ratifying states intended the Twenty-Sixth Amendment to have any teeth, the Amendment must protect those blatant and “unnecessary burdens and barriers” on young voters’ rights.

*Id.* (citing *Worden v. Mercer Cty. Bd. Of Elections*, 61 N.J. 325, 345 (1972)).

To be sure, as noted above, the Supreme Court has not passed on this issue explicitly (beyond a summary affirmance without further analysis), and it has also said that there is no fundamental right to vote via an absentee ballot if a law does *not* have an “impact on [voters’] ability to exercise the fundamental right to vote.” *McDonald v. Bd. of Election Comm’rs*, 394 U.S. 802, 807 (1969). That case—with a factual predicate that arose in 1967, four years before the ratification of the Twenty-Sixth Amendment and in the absence of any public health threat posed by in-person voting—emphasizes the need for heightened scrutiny in this context. *McDonald* upheld an Illinois law that permitted those who were “medically incapacitated” to vote absentee but prevented absentee voting by those “judicially incapacitated” (that is, arrested). The Court applied only the lowest standard of review to the distinction because it was not “drawn on the basis of wealth or race” so did not require an “exacting approach.” *Id.* at 807. The Court’s logic implies that an absentee balloting distinction that rests on age—a suspect axis of discrimination based on the Twenty-Sixth Amendment—would require courts to apply an “exacting approach” that would likely make the law unconstitutional. The Court also emphasized that Illinois’s statutes “do not themselves deny [the plaintiffs] the exercise of the franchise.” *Id.* at 807–08. But forbidding voters below the age of 65 or 60—and only those younger voters—the ability to vote via a ballot completed at home during a pandemic does effectively deny them the exercise of the franchise. At a minimum, it lessens their ability to vote relative to voters above the age cut-off. Either way, it is blatant discrimination that the Twenty-Sixth Amendment forbids.

Indeed, the laws here cannot meet the strict scrutiny test. First, there is no compelling state interest in imposing obstacles to voters on account of age. Though absentee balloting fraud is exceedingly rare, the few times it has occurred do not suggest that younger voters’ ballots are more likely to be fraudulent. States have no compelling interest that lines up precisely to justify the arbitrary starting age for the class of preferred voters. And even if there were some valid fraud-related state interest that could support laws that discriminate on who can vote at home, then the state would have to prove that whatever security measures they take are somehow adequate for older voters but inadequate for younger voters. This is impossible: states process all similar ballots in the same way. And states cannot currently justify these laws on the theory that only older voters have a harder time voting in person: during a pandemic involving a highly-contagious disease, *all* voters and their families are at risk. All of this means that laws prohibiting only younger voters from voting at home are not narrowly tailored to serve any compelling state interest.

The May 19, 2020 order in *Texas Democratic Party v. Abbott* granting a preliminary injunction in the Texas case agreed with this reasoning. There, the court squarely held that courts “presented with claims arising under the Twenty-Sixth Amendment must apply strict scrutiny.” Order at 54.<sup>21</sup> The court explained that the

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<sup>21</sup> See *Texas Democratic Party v. Abbott*, W.D. Tex. No. 20-ca-438 (Order of May 19, 2020), available [here](#). As of this writing, the Fifth Circuit has granted a brief stay of the



law creates two classes of persons based on age, but “the right of people below the age of 65 to vote is uniquely threatened and burdened solely based on their age.” *Id.* at 55. And the court noted that the state provided “no evidence” to show a compelling interest in the discrimination, but “instead provided confusing and conflicting reasoning behind why the state would bar younger voters from accessing mail ballots during a global, deadly pandemic.” *Id.* at 56. Finally, the court observed that the law would be invalid under the Twenty-Sixth Amendment even applying a lower level of scrutiny. *Id.* at 57–59.

As the court concluded in *Texas Democratic Party*, these laws will also fail under the more deferential test courts apply when they find that the law in question does not impose a “severe” burden on voting. Under this test, which comes from the Supreme Court’s decisions in *Anderson v. Celebrezze* and *Burdick v. Takushi*,<sup>22</sup> a court must balance any burdens the law does impose with the state’s valid justifications for regulating the election in the manner it wishes. *See, e.g., Mays v. LaRose*, 951 F.3d 775, 787 (6th Cir. 2020) (noting that a burden on absentee balloting was “between minimal and severe” because the plaintiffs were “not totally denied a chance to vote”); *see also Obama for Am. v. Husted*, 697 F.3d 423, 433 (6th Cir. 2012) (noting that an Ohio restriction that made it more difficult for non-military members to vote early than those in the military created a burden that was “not severe, but neither is it slight”).

To be clear, an *age-based* restriction on voting at home—especially during the current crisis—is not merely a “moderate” burden. As the Fourth Circuit noted in striking down several laws affecting early voting and out-of-precinct voting, certain voting procedures “may be a simple ‘preference’ for many white North Carolinians, but for many African Americans, they are a necessity.” *N.C. State Conference of the NAACP v. McCrory*, 831 F.3d 204, 233 (4th Cir. 2016). So too for voting at home, which is a necessity for voters of all ages who may not meet their state’s excuse standard but practically cannot vote if they cannot vote at home, especially, again, during a global pandemic.

Any claimed state interest in making it harder for younger voters to vote at home is illusory. Indeed, a simple hypothetical is sufficient to combat any rationale the state might offer. Just compare, on the one hand, a healthy 46-year-old with a healthy 66-year-old. If the state believes there is a valid state interest in having all healthy voters show up to the polls in person if they can do so, then both the healthy 46-year-old and the healthy 66-year-old should be required to vote in-person (unless another excuse applies). Moreover, in the context of a pandemic, where some voters may be COVID-19 positive, or may not have access to tests to confirm their status, and/or where otherwise healthy individuals live in close quarters with vulnerable

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injunction and is considering the State’s request for a longer stay pending appeal. *See* 5th Cir. No. 20-50407.

<sup>22</sup> *Anderson v. Celebrezze*, 460 U.S. 780 (1983); *Burdick v. Takushi*, 504 U.S. 428 (1992).

family members, the age cut-off is particularly arbitrary. And states of course must make accommodations for voters with disabilities regardless of whether they are old or young. The age-based discrimination thus adds nothing substantive.

Moreover, whatever justification for these laws that might have existed when states first passed them rings hollow in light of the public health risks posed by the pandemic. The debacle in Wisconsin effectively forced many voters to choose between casting a ballot in person and risking exposure to the disease during the April 7 election. Unfortunately, the state has linked more than 50 confirmed cases of COVID-19 directly to in-person voting.<sup>23</sup> Requests for vote-at-home ballots are expected to surge in 2020 because people of all ages are both fearful for their own health and are mindful of state and local mandates as well as guidance from the Center for Disease Control to stay away from crowded spaces if possible. Discriminatory restraints on account of age will force voters to choose between exercising the right to vote or bearing the dual risks of becoming infected themselves or spreading illness to their families and communities.

This reality makes Missouri’s proposed age discrimination for its coronavirus-specific expansion of voting at home irrational. In a bill awaiting signature by the governor as of this writing, the state legislature passed a law providing that voters “in an at-risk category for contracting or transmitting” the novel coronavirus may vote at home.<sup>24</sup> The state then put all voters 65 or older in that category. But, while older voters may be more likely to suffer from a severe case of COVID-19 if they contract the virus, they are no more or less likely to “contract” or “transmit” the virus than anyone else. Reducing transmission, however, is the expressed state interest the law supposedly furthers. The law thus could not withstand the strict scrutiny courts would apply to the age restriction; Missouri cannot even pass the lower standard given its irrational justification.

#### Many Young Voters Would Prefer To Vote At Home But Face Obstacles

Unfortunately, the laws at issue here are not the only ways that states discriminate against younger voters when it comes to voting at home. Even though many younger voters would prefer to vote at home—like so many other Americans—many states do not make it easy for them to do so.

Nationally, younger voters broadly support voting in this way. Indeed, perhaps because older voters already have an easier time obtaining at-home ballots than younger voters in many states, youth support for holding all elections by mail is 8 points higher than the support of those 65 and older in states that require excuses.<sup>25</sup>

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<sup>23</sup> Associated Press, *52 Positive Cases...*, <https://www.tmj4.com/news/coronavirus/52-positive-cases-tied-to-wisconsin-election>.

<sup>24</sup> See Missouri S.B. 631 (passed May 15, 2020).

<sup>25</sup> <https://electionupdates.caltech.edu/2020/03/20/some-demographics-on-voting-by-mail/>

And, as mentioned, recent elections have seen surges in interest in voting at home. In Wisconsin’s April 7 election, over 70% of all votes were cast via at-home ballots.<sup>26</sup>

To be sure, although voters of all ages avail themselves of vote-at-home opportunities when they have access to them, safeguards are still necessary to ensure equal treatment among these ballots. A recent study of at-home ballots cast in Florida (a no-excuse state) in the 2018 general election confirmed that voters across age rely on this method, and that about 50% of the total vote-by-mail ballots cast in that race were by voters under the age of 65.<sup>27</sup> Notably, the rejection rates across the age cohorts increased significantly for younger voters.

Safeguards to ensure fair and equitable access to vote-at-home include, but are not limited to: election modernization that allows voters to request applications through multiple methods such as online or by phone; free postage for all election materials; identity and signature verification that includes robust notice and cure opportunities; bar codes to keep track of ballot processing; ballot tracking through the U.S. Postal Service; secure drop-off locations and drop boxes; post-election audits; in-person polling sites as a fail-safe; and robust voter education.<sup>28</sup>

### Evidence Shows That Age-Discriminatory Laws Affect Voter Behavior

Laws that allow only older voters to vote at home without an additional excuse are unconstitutional on their face because they make it harder for younger cohorts to vote. They also impact voter access. Our team’s novel data analysis shows that these laws have a measurable impact on the ways that young people participate in our democracy. This only makes sense: making voting more difficult for younger voters than for older voters will make younger voters less likely to vote.

We ran a comparison of voter behavior based on the data contained in the Current Population Survey Voting and Registration Supplement Sample for the 2018 fall election, a high-quality dataset with over 55,000 relevant respondents from across the nation.

As shown in Figure 1 below, people under 65 make up a substantially larger proportion of the 2018 vote-at-home voters in the states that do not discriminate by age (61%) than in those that do (35%). Put differently, in states where voters under 65 cannot vote at home without an excuse, voters who are 65 and older comprise nearly 65% of *all* such ballots. But in states without these provisions, the use of at-home

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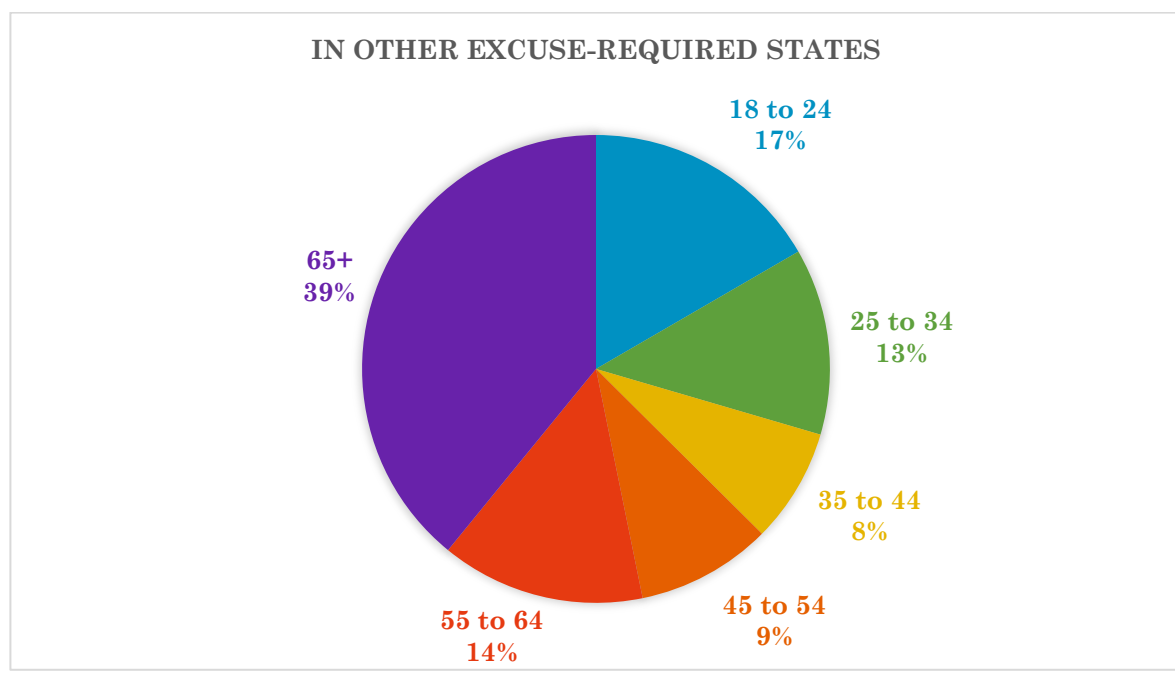
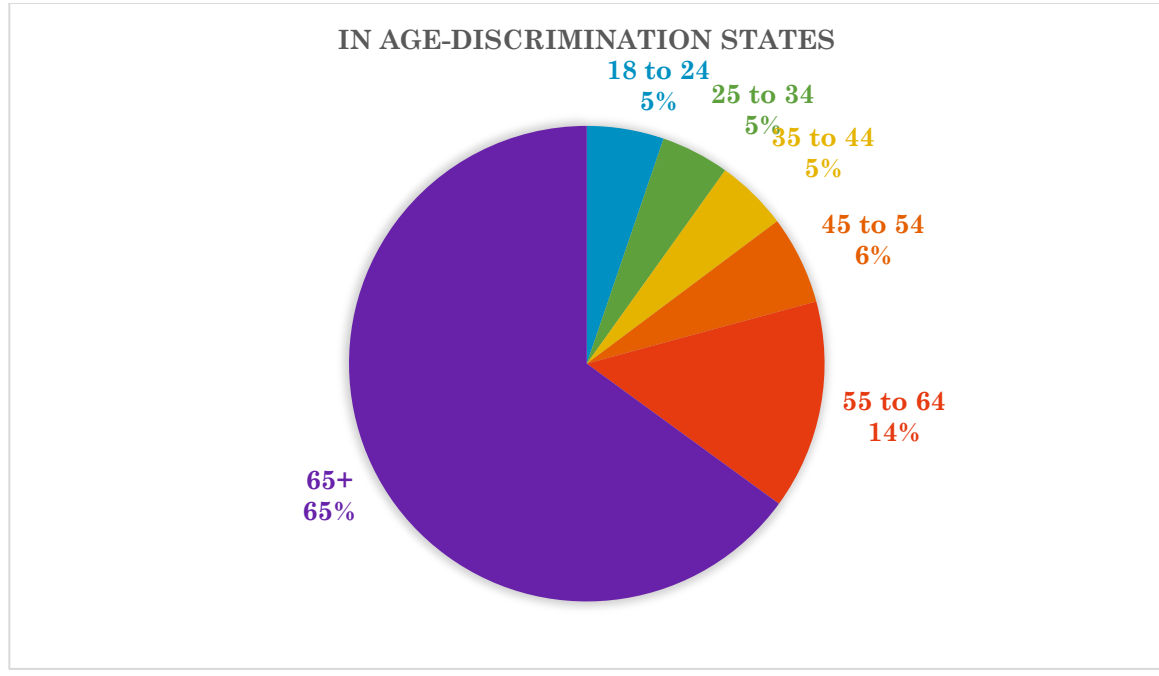
<sup>26</sup> Daniel Bush, *Record Absentee Ballots...*, PBS News Hour, <https://www.pbs.org/newshour/politics/record-absentee-ballots-sustain-turnout-in-wisconsin-primary>.

<sup>27</sup> Anna Baringer, Michael Herron, and Dan Smith, *Voting By Mail...*, [https://electionscience.clas.ufl.edu/files/2020/04/Baringer\\_Herron\\_Smith\\_VBM\\_FL.pdf](https://electionscience.clas.ufl.edu/files/2020/04/Baringer_Herron_Smith_VBM_FL.pdf).

<sup>28</sup> See, e.g., Brennan Center, *How to Protect the 2020 Vote from Coronavirus*, <https://www.brennancenter.org/our-work/policy-solutions/how-protect-2020-vote-coronavirus>; Brennan Center, *The False Narrative of Vote-by-Mail Fraud*, <https://www.brennancenter.org/our-work/analysis-opinion/false-narrative-vote-mail-fraud>

ballots is much more evenly distributed, as older voters make up only 39% of the votes from home in those states.

Figure 1: Percent of all at-home ballots, by age, in two groups of states, 2018



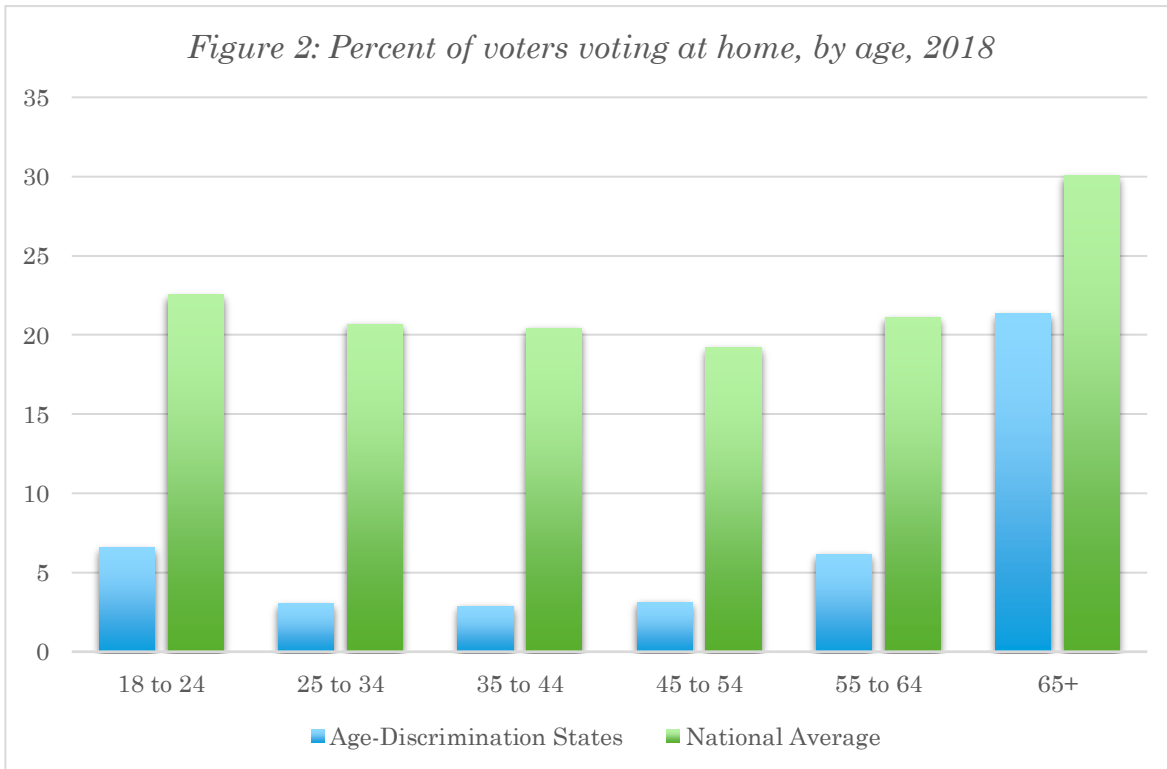
A second set of data shows that these discriminatory policies deny younger cohorts access to at-home ballots they would otherwise use. For instance, nationally, 22.5% of voters 18 to 24 and 20.7% of those aged 25 to 34 used at-home ballots in 2018. At the same time, 30% of voters over 65 voted at home nationally in 2018—a higher number, to be sure, but not overwhelmingly so.

But that gap ballooned in states that discriminate by age. In those states, 21.3% of adults over 65 voted at home, but only 6.6% of voters 18 to 24 and a meager 3% of voters aged 25 to 34 did so.

Moreover, when vote-at-home is available to younger cohorts, they use it. Only 6.6% of voters 18 to 24 vote by mail in age-discrimination states, compared to 22.5% nationally—that’s an increased factor of 3.4. The trend is revealed across age cohorts: a factor of 6.8 for ages 25 to 34; 7.18 for ages 35 to 44; 6.2 for ages 45 to 54; and 3.5 for ages 55 to 64. The factor drops to 1.5 for those age 65 or older, suggesting that although other considerations may be at play when comparing reliance between age discrimination states and national trends, there is nonetheless a strong correlation between the availability of the voting method and the use of it.

Table 1: Comparison of age cohort by voting method, 2018

	Age	18 to 24	25 to 34	35 to 44	45 to 54	55 to 64	65+
Age Discrimination States	In-Person	93.225	96.254	96.919	96.651	93.592	78.334
	At-Home	6.556	3.021	2.844	3.088	6.107	21.327
	TOTAL	100%	100%	100%	100%	100%	100%
National Average	In-Person	76.468	78.665	79.156	80.426	78.491	69.508
	At-Home	22.531	20.671	20.427	19.194	21.083	30.037
	TOTAL	100%	100%	100%	100%	100%	100%



The conclusion is clear: younger voters across age cohorts would like to vote at home. They do so in high numbers where they can. But they are selectively prevented from doing so in some states by discriminatory laws. Those laws are unconstitutional.<sup>29</sup>

<sup>29</sup> These cross tabulations were computed by Tye Rush, Policy Fellow at the UCLA Voting Rights Project, and originally sourced by Kei Kawashima-Ginsberg, Director of the Tufts' Center for Information & Research on Civic Learning and Engagement. The full cross tabulations are available at <http://voteathome26.us>.

## The Value of Litigation

Cases presenting these claims stand a good chance of success. There is simply no good reason to allow voters above an arbitrary age cut-off—but not all voters—to vote at home. The concern is even more acute during a global pandemic. All voters should have an unobstructed path to the ballot box.

The only acceptable remedy in a lawsuit is an order that *all* voters may vote at home without an excuse. States must ratchet-up—by providing ballots to all voters—instead of limiting even further who can vote at home. Courts should strike out the unconstitutional discrimination by, for instance, interpreting a statute like Texas Election Code § 82.003 to say that “A qualified voter is eligible for early voting by mail if the voter is **18** [not 65] years of age or older on election day.” This remedy preserves the legislative intent to allow voting from home while curing the statute of its unconstitutional infirmity.<sup>30</sup>

Finally, the relief requested overlaps with suits that plaintiffs have filed already in some of the offending states. In Texas, plaintiffs have obtained a preliminary injunction in state court that forces the state to construe broadly the “physical disability” a voter may claim to vote at home to anyone concerned about COVID-19. These cases are enormously important, yet the remedy still requires voters to make an affirmative statement about their health concerns and may have differential implementation among local election officials. Only a remedy in a Twenty-Sixth Amendment context can fully repair the unconstitutional harm of sorting voters by age.

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<sup>30</sup> Congress has likewise recognized that absentee balloting is an important right that must be protected, and to eliminate it would be to “deny or abridge” voting rights. The Voting Rights Act thus requires all states to permit absentee balloting for presidential elections, at least for those who will be out of the state or district on election day. *See* 52 U.S.C. 10502.