No. 16-3561

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

OHIO DEMOCRATIC PARTY, *et al.*,
Plaintiffs – Appellees,

v.

JON HUSTED, *et al.*,
Defendants – Appellants.

On Appeal from the U.S. District Court for the Southern District of Ohio Eastern Division, Case No. 2:15-cv-1802.

AMICUS CURIAE BRIEF OF JUDICIAL WATCH, INC. AND ALLIED EDUCATIONAL FOUNDATION IN SUPPORT OF DEFENDANTS-APPELLANTS

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Date: July 1, 2016

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 16-3561 Case Name: Ohio Democratic Party v. Jon Husted

Name of counsel: Paul J. Orfanedes

Pursuant to 6th Cir. R. 26.1, Judicial Watch, Inc.
Name of Party

makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No.

CERTIFICATE OF SERVICE

I certify that on July 1, 2016 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/ Paul J. Orfanedes
Judicial Watch, Inc.
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This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 16-3561 Case Name: Ohio Democratic Party v. Jon Husted

Name of counsel: Paul J. Orfanedes

Pursuant to 6th Cir. R. 26.1, Allied Educational Foundation
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No.

CERTIFICATE OF SERVICE

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

CASES **PAGE**

STATUTES

OTHER AUTHORITIES

IDENTITY AND INTERESTS OF THE *AMICI*[1]

Judicial Watch is a non-partisan, public interest organization headquartered in Washington, DC. Founded in 1994, Judicial Watch seeks to promote accountability, transparency and integrity in government and fidelity to the rule of law. In furtherance of these goals, Judicial Watch regularly files *amicus curiae* briefs and prosecutes lawsuits relating to election integrity and voting. Judicial Watch has developed knowledge, expertise, and insight regarding the balance election laws must strike between ballot access and election integrity.

Judicial Watch is engaged in a multi-year legal effort to ensure states and counties are conducting elections with integrity and as required by federal law, an effort Judicial Watch commenced in 2012 and continues through the present. During this time, Judicial Watch has litigated election law cases against the states of Indiana, Ohio, Hawaii, Maryland, and North Carolina.

The Allied Educational Foundation ("AEF") is a nonprofit charitable and educational foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, including electoral

[1] Undersigned counsel contacted all parties for their consent to this *amici curiae* brief, and all parties have given their consent.

law. AEF regularly files *amicus curiae* briefs as a means to advance its purposes. AEF regularly participates in election law matters before federal courts.

This brief is submitted pursuant to Rule 29(b) of the Federal Rules of Appellate Procedure.[2]

Amici's interest in this case is to ensure that Ohio's elections are conducted with integrity and to ensure that all citizens have confidence in the legitimacy of election results. *Amici* are concerned that the relief requested by Plaintiffs in this case, if granted, would have a chilling effect on voter confidence in the integrity of elections, both in Ohio and nationwide. If Ohio is prohibited from reducing the early voting period for federal elections, Ohio's ability to maintain an orderly elections process that limits opportunities for voter fraud will be hindered. Furthermore, Plaintiffs' requested relief will undermine the confidence in integrity of elections among citizens. As the Supreme Court has noted, public confidence in the integrity of the electoral process encourages citizen participation in the democratic process. *Crawford, et al. v. Marion County Election Board*, 553 US

[2] No party's counsel authored the brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and no person other than the amici curiae or their counsel contributed money that was intended to fund preparing or submitting the brief.

181, 197 (2008). Conversely, a lack of integrity undermines confidence in the electoral system and discourages citizen participation in democracy.

AUTHORITY TO FILE

Courts have recognized that they have broad discretion to permit a non-party to participate as *amicus curiae*. As explained by then-Judge Alito, "[e]ven when a party is well represented, an amicus may provide important assistance to the court." *Neonatology Assocs., P.A. v. Commissioner of Internal Revenue*, 293 F.3d 128, 132 (3rd Cir. 2002). Indeed, the federal courts regularly permit parties with various interests to appear as *amici*, reasoning that a "restrictive policy with respect to granting leave to file may [] create at least the perception of viewpoint discrimination." *Id.* at 133. Furthermore, in this case, *amici* are raising issues about which they have particular knowledge and which may be helpful to the Court's evaluation of the appeal.

ARGUMENT

The Plaintiffs' Failure to Establish the Impact of Early Voting on Turnout Precludes a Finding of a Voting Rights Violation

This Court, along with all other courts considering the practice of early voting, must properly address a growing body of evidence, including evidence offered at the trial in this matter and a meta-study recently released by the General Accounting Office, suggesting that early voting has a *negative* effect on voter turnout. Unless and until this is done, courts run a serious risk of issuing rulings that are not just wrong, but perverse, in that they will *diminish* minority voters' opportunities to participate in the electoral process.

Courts have differed regarding the relevance of existing or estimated turnout data when determining whether federal voting laws have been violated. In *Frank v. Walker*, 768 F.3d 744 (7th Cir. 2014), *cert. denied*, 135 S. Ct. 1551 (2015), the Court found turnout evidence to be relevant, reversing a lower court ruling and holding that a Wisconsin law requiring voters to present photographic identification (photo ID) when voting in person did not violate Section 2 of the Voting Rights Act, 52 U.S.C. § 10301. The Court noted that minority turnout and registration in the State were high. 768 F.3d at 753-54. The Court also found it to be significant that the district court

> did not make findings about what happened to voter turnout in Wisconsin during the February 2012 primary, when Act 23 was enforced (before two state judges enjoined it). Did the requirement of photo ID reduce the number of voters below what otherwise would have been expected? Did that effect differ by race or ethnicity? The record does not tell us. . . . The record also does not reveal what has happened to voter turnout in the other states (more than a dozen) that require photo IDs for voting. If as plaintiffs contend a photo ID requirement especially reduces turnout by minority groups, students, and elderly voters, it should be possible to demonstrate that effect. Actual results are more significant than litigants' predictions. But no such evidence has been offered.

Id. at 747. The Court added that a change in turnout would have changed the analysis of plaintiffs' Section 2 claim, because "a finding that a photo ID law has significantly reduced the turnout in a particular state would imply that the requirement's additional costs outweigh any benefit in improving confidence in electoral integrity." *Id.* at 751.

By contrast, in *Ohio State Conference of N.A.A.C.P. v. Husted*, 43 F. Supp. 3d 808 (6th Cir. 2014), *aff'd*, 768 F.3d 524 (6th Cir. 2014), *stayed*, 135 S. Ct. 42 (2014), *vacated*, No. 14-3877 (6th Cir. Oct. 1, 2014), both the district court and this Court took a different view of turnout data when granting a preliminary injunction concerning the same early voting changes that are at issue in this case. While noting that "Plaintiffs had not established that voter turnout would necessarily be decreased overall" by the challenged practices, this Court agreed

with the district court "that, 'by its plain terms, § 2 is not necessarily about voter turnout but about opportunity to participate in the political process compared to other groups.'" 768 F.3d at 551, citing 43 F. Supp. 3d at 851. In the Court's view, regardless of the effect on minority turnout, the plaintiffs could prevail because they had shown that "the combined effects of SB 238 and Directive 2014-17 result in fewer *opportunities* for African Americans to participate in the electoral process." *Id*. at 551, citing 43 F. Supp. at 851 (internal quotations omitted).

The district court here clearly took the same view, finding that a reduction in early voting "will disproportionately burden African Americans," because "expert and anecdotal evidence reflects that African Americans vote EIP [early in-person], and specifically EIP during Golden Week, at a significantly higher rate than other voters." ECF 117 at 36. The district court made this finding notwithstanding its expressed agnosticism regarding any effect the challenged law might have on minority registration or turnout. "[A]lthough the Court cannot predict how many African Americans will turn out in future elections, it is reasonable to conclude from this evidence that their right to vote will be modestly burdened by S.B. 238's reduction in the EIP voting period and elimination of SDR." *Id.* at 48.

Under this analysis, the Section 2 violation *consists of* the fact that the State has eliminated an electoral practice that minority voters use or prefer; once this is

shown, no further evidence is necessary. This approach divorces minority *preference* for a particular electoral practice from the real-world *effect* of that practice on minority voting power.

Amici respectfully submit that this approach is wrong – in fact, that it is exactly backwards. The rate at which voters register and turn out to vote is the true measure of electoral power. Registration and voting ultimately determine the extent to which the voters are able "to participate in the political process and to elect representatives of their choice." 52 U.S.C. § 10301(b).[3] The fact that minority voters prefer a particular voting practice is only relevant or interesting insofar as it affects the more important issue of whether those voters will actually register to vote or show up at the polls.

A hypothetical will make this abundantly clear. First suppose – as the district court has found here – that African American voters prefer early voting. Now suppose that it were conceded by all parties that early voting has been proved to be associated with lower minority voter turnout. (This constellation of facts is

[3] The Voting Rights Act has always reflected the same practical approach to voting power. For example, minority voter registration was a key part of the Act's "trigger" for determining whether states were covered by its preclearance requirements. *See Shelby County v. Holder*, 133 S. Ct. 2612, 2619-20 (2013). And an improvement in minority registration is still a statutory factor in assessing whether to terminate the use of federal observers. 52 U.S.C. § 10309.

certainly possible.) In those circumstances, would the State's elimination of early voting constitute a violation of Section 2 of the Voting Rights Act, or an actionable burden under the *Anderson/Burdick* test? According to the district court's logic, it would, because minority voters who prefer early voting would have "fewer *opportunities* . . . to participate in the electoral process" (43 F. Supp. at 851), while any effect on registration or turnout could be ignored as irrelevant.

Yet this outcome makes no sense. The Voting Rights Act has never been applied in any manner that would lower minority turnout or registration. Indeed, *amici* respectfully submit that, in the circumstances of the hypothetical, it is all but certain that the State of Ohio would be sued by other plaintiffs seeking to *enjoin* the use of early voting on the ground that it violates Section 2. Given the district court's approach to federal voting law, it is interesting to speculate as to which set of plaintiffs would win.

All such potential inconsistencies may be simply avoided by making the sensible assumption that the effect of an electoral practice on voter registration or turnout is a critical part of determining whether it violates Section 2 of the Voting Rights Act or the *Anderson/Burdick* test under the Fourteenth Amendment. Proof of such an effect on turnout or registration should logically be viewed as part of a plaintiff's case in chief. In particular, the elimination of an electoral practice

preferred by minority voters should *not* constitute a violation of federal voting law unless a plaintiff *also* can show that it negatively affects minority turnout or registration.

This issue is squarely presented in the instant case by a statistical analysis, all but ignored by the district court, which suggests that early voting actually depresses voter turnout. As the authors of a 2013 study explain:

> It seems logical that making voting more convenient . . . will encourage more people to cast ballots. We challenge this notion and show that the most popular reform – early voting – actually *decreases* turnout when implemented by itself, an unanticipated consequence that has significant implications for policy and for theories of how state governments can influence turnout.
>
> This result is counterintuitive, and it certainly runs against the grain of conventional wisdom.

Barry C. Burden, David T. Canon, Kenneth R. Mayer & Donald P. Moynihan, *Election Laws, Mobilization, and Turnout: The Unanticipated Consequences of Election Reform*, 58 AM. J. POL. SCI. 95 (2014), Defendants' Trial Exh. 14-N, ECF 127-14 at 226 (PAGEID #: 6826). This article is particularly inconvenient for the plaintiffs because one of the authors, Barry C. Burden, was an expert for them in the original district court proceedings. 43 F. Supp. 3d at 836-37.

The plaintiffs hired another one of the authors, David T. Canon, as an expert, apparently in order to dispute the characterization of this article by the defendants'

experts. ECF 117 at 14. Yet Mr. Canon's attempts to walk back the conclusions in his own article do not amount to much. He ultimately testified at trial that it was his opinion "that there are cases in which the depressant effect" on voter turnout of the electoral practice of early voting "is fully offset" by the addition of same-day registration. ECF 101 at 18 (PAGEID #: 4711). Of course, this phrasing implies that "there are cases" where the "depressant effect" on turnout of early voting is *not* offset by other factors.

The authors' conclusions about the "depressant effect" of early voting, moreover, are fully supported by other studies. Only yesterday, the General Accounting Office (GAO) issued a report online in which it gathered and presented the conclusions of scores of studies concerning a number of different electoral reforms. With respect to early voting, the report states as follows:

> We reviewed 20 studies from 12 publications, and these studies had varied findings. Seven studies found no statistically significant effect, *another 8 studies found that the policy decreased turnout*, and 5 studies reported mixed evidence. Reported effects from these studies ranged from a 3.8 percentage point decrease in turnout to a 3.1 percentage point increase.

Elections: Issues Related to Registering Voters and Administering Elections, General Accounting Office, June 2016 at 97 (emphasis added), available at http://www.gao.gov/assets/680/678131.pdf. The GAO observes that one study

found some evidence that "early in-person voting decreased turnout among Latinos in states that offered this policy compared to states that did not." *Id.* at 97.

Viewing the question from the other side of the coin, the defendants presented extensive expert testimony to the effect that the elimination of early voting was accompanied either by stable or by *rising* minority turnout, in North Carolina, Georgia, and Florida. *See* Defendants' Trial Exh. 15, ECF 127-15 at 22 (PAGEID #: 7276) (North Carolina) and at 30 (PAGEID #: 7284) (Georgia); Defendants' Trial Exh. 127-14 at 92 (PAGEID #: 6692) and at 94 (PAGEID #: 6694); *see also* Robert D. Popper, *The Voter Suppression Myth Takes Another Hit*, Wall St. J., Dec. 28, 2014, available at http://www.wsj.com/articles/the-voter-suppression-myth-takes-another-hit-1419811042 (discussing North Carolina).

It is, then, a serious, open question as to whether the elimination of early voting will lead to *lower* voter turnout. Because the plaintiffs have failed to present persuasive evidence establishing the likely effect of early voting on voter turnout, they have not met their burden of establishing their claims by a preponderance of the evidence. *Amici* respectfully submit that judgment, therefore, should be entered for the defendants.

In the alternative, this case should be remanded to the district court for further findings on the specific issue of the probable effect of the requested

injunction on voter turnout in subsequent elections. In this context, it is worth noting that the district court expressly commented on the inadequacy of the evidence before it. Confronted with the fact that "the State of Ohio does not collect, and therefore does not have, information on the racial identity of its voters," the district court observed that "the inability to confirm voter race is a key deficiency in the experts' analyses of the impact of the challenged provisions on different racial groups" and concluded that it had been "forced to evaluate the challenged provisions' burdens on the fundamental right to vote based in part on somewhat speculative expert evidence." ECF 117 at 4.

Amici respectfully submit that this Court should not affirm the judgment of the district court. If it were to do so, this Court risks issuing a judgment that is not only wrong, but perverse, in that it might lead to lower voter turnout in direct contravention of one of the basic purposes of the Voting Rights Act. In that case, federal voting law will have been sacrificed to the law of unintended consequences. The Court should not take that risk.

CONCLUSION

For the foregoing reason, and for the reasons articulated in the Brief of Appellants in this case (Doc. 29), amici Judicial Watch and the Allied Educational Foundation respectfully request this Court reverse the lower court's decision.

Dated: July 1, 2016

Respectfully submitted,

/s/ Paul J. Orfanedes

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(B), I hereby certify that this brief is proportionally spaced, 14-point Times New Roman font. Per Microsoft Word count, the brief contains 2,748 words.

Dated: July 1, 2016 *s/ Paul J. Orfanedes*

CERTIFICATE OF SERVICE AND ELECTRONIC FILING

I hereby certify, pursuant to Fed. R. App. P. 25(d)(2), that I electronically filed the foregoing with the Clerk of the United States Court of Appeals for the Sixth Circuit using the appellate CM/ECF system. I certify that the parties in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF service.

Dated: July 1, 2016 *s/ Paul J. Orfanedes*