No. 16A168

IN THE
Supreme Court of the United States

STATE OF NORTH CAROLINA, *ET AL.*,
Applicants,
v.
NORTH CAROLINA STATE CONFERENCE OF THE NAACP, *ET AL.*,
Respondents.

Emergency Application to Recall and Stay Mandate of the United States Court of Appeals for the Fourth Circuit Pending Disposition of a Petition for Writ of Certiorari

MOTION FOR LEAVE TO FILE *AMICUS* BRIEF AND BRIEF OF *AMICI CURIAE* JUDICIAL WATCH, INC. AND ALLIED EDUCATIONAL FOUNDATION IN SUPPORT OF APPLICANTS

H. Christopher Coates
LAW OFFICE OF
H. CHRISTOPHER COATES
934 Compass Point
Charleston, SC 29412

Chris Fedeli
Lauren M. Burke
Counsel of Record
JUDICIAL WATCH, INC.
425 Third Street SW
Washington, DC 20024
(202) 646-5172
lburke@judicialwatch.org

Dated: August 25, 2016

TO THE HONORABLE JOHN G. ROBERTS, JR., CHIEF JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE FOURTH CIRCUIT:

MOTION FOR LEAVE TO FILE *AMICUS* BRIEF

Amici Curiae Judicial Watch, Inc. and the Allied Educational Foundation respectfully request leave to file an *amicus* brief in support of Appellants' Application for relief under Supreme Court Rule 22 in *North Carolina State Conference of the NAACP, et al., v. McCrory, et al.*, C.A. No. 16-1468 (4th Cir.). On August 17, 2016, *amici* notified counsel and requested consent from all parties to the lower court proceeding, and all parties have given their consent.

The issues in this case are important to the nation and to *amici*. *Amici* are principally concerned that the Fourth Circuit's decision will have a disruptive effect on the upcoming general election in North Carolina, and also that it will harm voters' confidence, both within the State and nationwide, in the legitimacy of any election results. For these reasons, *amici* respectfully request that this Court grant leave to file this brief.

Respectfully submitted,

H. Christopher Coates
LAW OFFICE OF
H. CHRISTOPHER COATES
934 Compass Point
Charleston, SC 29412

Chris Fedeli
Lauren M. Burke
Counsel of Record
JUDICIAL WATCH, INC.
425 Third Street SW
Washington, DC 20024
(202) 646-5172
lburke@judicialwatch.org

Counsel for Amici Curiae

August 25, 2016

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

INTERESTS OF THE *AMICI CURIAE* [1]

Judicial Watch, Inc. ("Judicial Watch") is a non-partisan educational foundation that seeks to promote transparency, integrity, and accountability in government and fidelity to the rule of law. Judicial Watch regularly files *amicus curiae* briefs as a means to advance its public interest mission and has appeared as *amicus curiae* in this Court on a number of occasions.

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. AEF regularly files *amicus curiae* briefs as a means to advance its purpose and has appeared as an *amicus curiae* in this Court on a number of occasions.

Amici believe that the decision by the U.S. Court of Appeals for the Fourth Circuit should immediately be stayed to preserve the status quo and to permit a full hearing and a final resolution by this Court of important issues of federal election law. In particular, *amici* are concerned that the Fourth Circuit's ruling, if allowed to stand, will undermine voter confidence in the integrity of elections, create confusion among the electorate in North Carolina in November, and enshrine a new standard for

---

[1] *Amici* state that no counsel for a party to this case authored this brief in whole or in part; and no person or entity, other than *amici* and their counsel, made a monetary contribution intended to fund the preparation and submission of this brief.

discriminatory intent which – contrary to this Court's precedents – does not require an adequate showing of discriminatory effect.

For these and other reasons, *amici* urge the Court to grant the Application for an Injunction Pending Petition for Certiorari.

SUMMARY OF THE ARGUMENT

"[P]ublic 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 181, 197 (2008). Conversely, a lack of faith in electoral integrity discourages citizen participation in democracy, because the "electoral system cannot inspire public confidence if no safeguards exist to deter or detect fraud or to confirm the identity of voters." *Id.* (citation omitted). In addition, "[c]ourt orders affecting elections . . . can themselves result in voter confusion" and be an "incentive to remain away from the polls," particularly as "an election draws closer." *Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006). Unless a stay is issued by this Court, the Fourth Circuit's opinion will undermine voter confidence in electoral integrity and create unnecessary voter confusion in the critical period before the general election.

As this Court has held, a party seeking to prove intentional discrimination must also show that a challenged action has "an actual discriminatory effect" on a protected group. *Davis v. Bandemer*, 478

U.S. 109, 127 (1986). Among the grounds for concluding that the Fourth Circuit's ruling was erroneous is the fact that it failed to make an adequate finding of discriminatory effect when it concluded that North Carolina's electoral laws had been enacted with a discriminatory intent. In particular, the ruling discounted turnout data showing that minority participation in North Carolina's elections actually *increased* after the implementation of the challenged laws.

A stay will preserve the status quo while allowing this Court to issue a final order determining the appropriate legal standard for intentional discrimination challenges without throwing the upcoming elections into confusion. The Court should grant the application.

ARGUMENT

I. THE FOURTH CIRCUIT'S DECISION COULD RESULT IN IRREPARABLE HARM BEFORE AND DURING THE NORTH CAROLINA GENERAL ELECTION.

A. North Carolina Has a Legitimate Interest in Preventing Fraud by Means of a Voter ID Requirement.

North Carolina's voter ID requirement in Session Law ("SL") 2013-381 is a legitimate method to prevent impersonation voter fraud. This Court has found that "state[s] indisputably have a compelling

interest in preserving the integrity of [their] election process[es]" and "may enact laws that interfere with a party's internal affairs when necessary to ensure that elections are fair and honest." *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 231 (1989); *Crawford,* 553 U.S. at 196 ("There is no question about the legitimacy or importance of the State's interest in counting only the votes of eligible voters."). The "universal requirements" of voter identification to achieve this interest are "eminently reasonable." *Crawford* (Scalia, J., concurring), 553 U.S. at 209.

There is no doubt that voter fraud occurs. Although such fraud is hard to detect, the Heritage Foundation recently compiled a list of over 300 voter fraud convictions across the nation – including several convictions for impersonation fraud at the polls, which is preventable with voter ID laws. See Heritage Foundation, A SAMPLING OF ELECTION FRAUD CASES FROM ACROSS THE COUNTRY, Aug. 7, 2015, available at http://thf_media.s3.amazonaws.com/2015/pdf/VoterFraudCases-8-7-15-Merged.pdf; *see also* REPORT OF THE COMMISSION ON FEDERAL ELECTION REFORM, Jimmy Carter and James A. Baker, III (Co-Chairs), "Building Confidence in U.S. Elections," American University's Center for Democracy and Election Management, p. 18 (Sept. 2005) ("While the Commission is divided on the magnitude of voter fraud . . . there is no doubt that it occurs").[2] As the Carter-Baker Report found, "[i]n

[2] The Carter-Baker Report is available at: http://www.eac.gov/assets/1/AssetManager/Exhibit%20M.PDF.

close or disputed elections, and there are many, a small amount of fraud could make the margin of difference." *Id.*

Indeed, numerous elections in North Carolina have been decided by *one* vote.[3] Thus, even a few instances of voter fraud could change the outcome of an election. North Carolina has a legitimate interest in protecting the integrity of its elections. This interest will be compromised if the Fourth Circuit's decision is allowed to stand.

B. The Fourth Circuit's Decision Will Harm Voter Confidence, Discouraging Citizen Participation in Upcoming Elections.

---

[3] In 2015 alone, North Carolina had six municipal elections decided by *one* vote and another by a coin toss after a statistical *tie*. *See* North Carolina State Board of Elections website, http://www.ncsbe.gov/, Election Results for: Clarktown Commissioner (available at http://er.ncsbe.gov/contest_details.html?election_dt=11/03/2015&county_id=9&contest_id=90006); Town of Princeville Commissioner, Ward 2 (available at http://er.ncsbe.gov/contest_details.html?election_dt=11/03/2015&county_id=33&contest_id=330010); City of Lumberton Council, District 7 (available at http://er.ncsbe.gov/contest_details.html?election_dt=11/03/2015&county_id=78&contest_id=780006); City of Trinity Council, At-Large (available at http://er.ncsbe.gov/contest_details.html?election_dt=11/03/2015&county_id=76&contest_id=760012); Town of Biscoe Mayor (available at http://er.ncsbe.gov/contest_details.html?election_dt=11/03/2015&county_id=62&contest_id=620001); Town of Spruce Pine Mayor (available at http://er.ncsbe.gov/contest_details.html?election_dt=11/03/2015&county_id=61&contest_id=610002); Town of St. Pauls Mayor (available at http://er.ncsbe.gov/contest_details.html?election_dt=11/03/2015&county_id=78&contest_id=780029).

By enhancing electoral integrity, the provisions of SL 2013-381 also enhance citizens' *confidence* that elections are conducted fairly and honestly. Citizens' confidence in the electoral process is of "independent significance, because it encourages citizen participation in the democratic process." *Crawford*, 553 U.S. at 197 (2008); Carter-Baker Report at 18-19 ("the perception of possible fraud contributes to low confidence in the system").

It is necessary for North Carolina and other states to restore the American public's confidence in the basic honesty of elections by implementing integrity laws such as voter ID. Large segments of the American public have expressed their dismay with various aspects of our electoral system. A poll from August of 2013 reported that only 39% of Americans believe that elections are fair.[4] In August 2016, another poll reported that more than two-thirds of registered voters thought voter fraud was a problem.[5] In 2008, when a poll asked respondents around the world whether they had "confidence in

---

[4] Rasmussen Reports, "New Low: 39% Think U.S. Elections Are Fair" (Aug. 16, 2013), available at http://www.rasmussenreports.com/public_content/politics/general_politics/august_2013/new_low_39_think_u_s_elections_are_fair.

[5] Justin McCarthy, "More than a third view [voter fraud] as a major problem (36%), while nearly as many view it as . . . a minor problem (32%)," Gallup (Aug. 22, 2016), available at http://www.gallup.com/poll/194741/four-five-americans-support-voter-laws-early-voting.aspx?g_source=Politics&g_medium=lead&g_campaign=tiles.

the honesty of elections," 53% of Americans said that they did not.[6]

These surveys reveal a startling lack of confidence in our own electoral institutions. If the Fourth Circuit's ruling is not stayed, Americans' distrust of their government and their electoral institutions will grow.

C. The Fourth Circuit Ruling Will Create Electoral Confusion among Voters and Election Officials in North Carolina's General Elections.

"Court orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase." *Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006); *see Williams v. Rhoades*, 393 U.S. 23, 34-35 (1968) (despite the fact that a law imposed a burden on Ohio voters, "relief cannot be granted without serious disruption [to the] election process").

The Fourth Circuit's ruling was issued a little more than three months prior to the upcoming federal elections. This ruling threatens to sow doubt and confusion among both voters and state employees regarding the conduct of these elections. The provisions of SL 2013-381 have been in place for

---

[6] Magali Rheault and Brett Pelham, "Worldwide, Views Diverge About Honesty of Elections" (Nov. 3, 2008), available at http://www.gallup.com/poll/111691/worldwide-views-diverge-about-honesty-elections.aspx.

two general election cycles. Its voter ID requirement was utilized during the March and June 2016 primaries. Changes to these procedures at this point – after both voters and poll workers have learned them and recently used them – threatens significantly to impair the orderly conduct of North Carolina's elections.

Altering voting procedures (particularly those that have been in place since 2014) so close to an election is a recipe for electoral chaos. Faced with this possibility, it is necessary for this Court to stay the Fourth Circuit's order, if only to provide consistency for voters and election officials in the 2016 general election.

II. THE FOURTH CIRCUIT ERRED BECAUSE ITS FINDING OF DISCRIMINATORY INTENT WAS NOT ACCOMPANIED BY AN ADEQUATE FINDING OF DISCRIMINATORY EFFECT.

A. In Discriminatory Intent Claims, the Plaintiff Must Prove Both Discriminatory Purpose and Discriminatory Effect.

In cases in which parties claim that they have been subjected to intentional acts of unlawful discrimination, plaintiffs must prove not only that the challenged action was taken with a discriminatory purpose, but also that the challenged action has "an actual discriminatory effect on that group." *Davis v. Bandemer*, 478 U.S. 109, 127 (1986) (applying this two-prong purpose and effect test to a Fourteenth Amendment intent claim challenging

Indiana's legislative reapportionment). In *Davis*, this Court emphasized that a constitutional intent claim requires *both* discriminatory purpose and a real and actual discriminatory effect. *Id.* at 133 ("an equal protection violation may be found only where the electoral system substantially disadvantages certain voters"). Further, this Court made clear that the evidence of discriminatory effect in intent claims had to be "a showing of more than a *de minimis* [adverse] effect." *Id.* at 134.

Both before and after the ruling in *Davis*, this Court has applied this two-prong test in discriminatory intent cases brought on constitutional grounds. *See e.g.*, *Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256, 272, 274 (1979) (both discriminatory purpose and effect must be shown to prove a claim under the Equal Protection Clause alleging gender discrimination); *Hunter v. Underwood*, 471 U.S. 222, 232 (1985) (in a Fourteenth Amendment challenge to a voting disenfranchisement statute "where both impermissible racial motivation and racially discriminatory impact are demonstrated," the constitutional intent standard was satisfied); and *Reno v. Bossier Parish School Board*, 528 U.S. 320, 337 (2000) (where this Court stated, "discriminatory purpose as well as discriminatory effect . . . [is] . . . necessary for a constitutional violation," citing *Washington v. Davis*, 426 U.S. 229, 238-245 (1976). In addition, courts of appeal have required both purpose and effect for intentional discrimination claims brought under Section 2 of the Voting Rights Act. *See e.g.*, *Johnson v. DeSoto County Board of*

Commissioners, 72 F.3d 1556, 1561 (11th Cir. 1996); and *Johnson v. DeSoto County Board of Commissioners,* 204 F.3d 1335, 1344 n.18, 1345-46 (11th Cir. 2000) (DeSoto County II) (in the context of an intent claim under the Constitution and Section 2 against at-large districts, "the government's discriminatory intent alone, without a causal connection between the intent and some cognizable injury to plaintiffs, cannot entitle plaintiffs to relief," citing *Feeney*); *Brooks v. Miller*, 158 F.3d 1230, 1237 (11th Cir. 1998) (discriminatory intent claim challenging majority vote requirement rejected because "the majority vote law does not have a discriminatory effect on black candidates").

B. In Reversing the District Court, the Fourth Circuit Misapplied the Case Law that Requires the Plaintiffs in Discriminatory Intent Claims to Prove Both Discriminatory Purpose and Effect.

Under both the Fourteenth Amendment and Section 2 of the Voting Rights Act, an intent claim requires a plaintiff to prove an actual discriminatory effect that is caused by the enforcement of the challenged provision. The Fourth Circuit implicitly acknowledged this requirement. But it erred both by discounting strong evidence showing that there was no discriminatory impact and by relying on the wrong kind of evidence to show such an impact.

The Fourth Circuit pointed to the fact that African Americans in North Carolina "disproportionately lacked the most common kind of photo ID," which is a driver's license issued by the

DMV. App. 15a.[7] The Court also highlighted the district court's findings that the other challenged voting provisions (the reduction in the early-voting period, the abolition of same-day-registration, the ability to cast ballots out of a voter's precinct, and the use of pre-registration for 16 and 17-year-olds) were used by African American voters at a higher rate than they were used by white voters. App. 15-18a and 49a. The Fourth Circuit's opinion then went on to say that, "the district court's findings that African Americans disproportionately used each of the removed mechanisms, as well as disproportionately lacked the photo ID . . . establishes sufficient disproportionate impact . . . ." App.51a. The Fourth Circuit concluded that,

> Accordingly, the district court's findings that African Americans disproportionately used each of the removed mechanisms, as well as disproportionately lacked the photo ID required by SL 2013-381, . . . establishes sufficient disproportionate impact for an *Arlington Heights* analysis.

App. 51a.

There are several problems with this analysis. To begin with, in the portion of its opinion that purports to address the question of what impact the

---

[7] In referring to the Fourth Circuit's July 29, 2016 opinion, *Amicus* Judicial Watch, Inc. will cite to that opinion as it is set forth in the Appendix to the Applicants' Emergency Application to Recall and Stay Mandate, as follows: "App. [citing the appendix page number] a."

enforcement of SL 2013-381 has, the Fourth Circuit relies primarily for guidance on *Village of Arlington Heights v. Metropolitan Housing Development Corp*, 429 U.S. 252 (1977). App. 49a, 53a. But the portion of *Arlington Heights* cited by the Fourth Circuit is a discussion of the various kinds of circumstantial evidence from which a court might infer discriminatory purpose. App. 49a, citing 429 U.S. at 266 ("impact of the official action – whether it 'bears more heavily on one race than another.'") (citation omitted). This discussion in *Arlington Heights* is not one specifically directed to the analysis necessary in discriminatory intent cases where the court must look to see if enforcement of the challenged provision, in addition to having been enacted with an invidious purpose, actually has a racially discriminatory effect. *See Davis*, 478 U.S. at 127; *Feeney*, 442 U.S. at 272, 274; *Hunter*, 471 U.S. at 232.

More basically, the Court was looking in the wrong place for evidence relevant to discriminatory impact. It erred by failing to accord proper weight to two vital electoral effects: minority registration and turnout. To answer the question of whether there is a discriminatory effect, it is necessary to look at African Americans' voter participation rates in elections both before and after the challenged provisions of SL 2013-381 went into effect.

Statistical evidence of this kind was offered into evidence by Applicants to rebut claims by Respondents that enforcement of some of the

provisions[8] of SL 2013-381 has a discriminatory effect. That evidence showed, as noted by the Fourth Circuit, that black voter "aggregate turnout increased by 1.8% in the 2014 midterm election as compared to the 2010 midterm election." App. 53a.[9] Strangely, however, the Court of Appeals responded to this highly probative evidence concerning what, if any, racially discriminatory effect was caused by implementation of four of the challenged voting provisions by stating that

> The district court also erred in suggesting that Plaintiffs had to prove *that the*

---

[8] Unlike the four other challenged provisions in SL 2013-381 that were enforced in the 2014 midterms, the record does not contain evidence of what effect enforcement of the photo ID had upon African American voter participation, because the photo ID was not enforced until the March 2016 and June 2016 North Carolina primaries. App. 79a (Motz, Circuit Judge, dissenting). As Judge Motz noted, "[t]he record, however, contains no evidence as to how the amended voter ID requirement affected voting in North Carolina." *Id.* Since the burden of proof in this case is on the Respondents, this dearth of evidence on this essential element of the intent claim challenging the photo ID again demonstrates that the district court was correct in granting judgment to Applicant.

[9] This comparison took into account midterm elections in 2010 and 2014. In 2010, the period for early voting was 7 days longer than in 2014. In 2010, a person could register and vote on the same day where such a practice was not available in 2014. In 2010, a voter's ballot was counted in the races in which the voter was eligible to vote even if the ballot were cast in the wrong precinct, which was not the case in 2014. Further, in 2010 pre-registration activities were on-going where those activities had been discontinued by 2014. Notwithstanding these changes, the rate of the aggregate black voter turnout was higher in 2014 than in 2010.

> *challenged provisions prevented African Americans from voting at the same levels they had in the past.* No law implicated here – *neither the Fourteenth Amendment nor Section 2* – requires such an onerous showing. (Emphasis added).

App. 53a. Later in the opinion, the Fourth Circuit stated the district court's consideration of the turnout evidence before and after the implementation of SL 2013-381 was "beyond the scope of disproportionate impact analysis." App. 53a.[10]

The Fourth Circuit's slighting of crucial participation evidence such as turnout and registration, and its emphasis instead on whether minority voters used the four disputed voting

---

[10] The evidence comparing the black turnout in the 2010 and 2014 midterm elections was introduced by Applicants as a way to rebut Respondents' allegations that four provisions of SL 2013-381 constituted intentional racial discrimination. The Fourth Circuit criticized the use of data from those elections, stating that "courts should not place much evidentiary weight on any one election" (there were actually two elections involved in the comparison), and that "fewer citizens vote in midterm elections." App. 54a. But assuming all of that to be correct, it does not inure to the benefit of Respondents. It was the Respondents who had the burden of proving that enforcement of SL 2013-381's provisions are having actual discriminatory effect upon African American voters. If the only evidence on the discriminatory effect/turnout issue before the district court was not reliable, as the Fourth Circuit concluded, then that circumstance indicates that Respondents did not carry their burden of proving discriminatory effect in support of their discriminatory intent claim.

procedures at higher rates, is clearly wrong. Indeed, *amici* respectfully submit that the Fourth Circuit has it exactly backwards. The rate at which voters register and turn out to vote is the true measure of whether there is discriminatory effect. 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).[11] The fact that minority voters prefer a particular voting practice is only relevant *insofar as it affects the more important issue of whether those voters will actually register to vote and show up at the polls.*

A hypothetical will make this clear. First suppose, as the district court found here, that African American voters disproportionately prefer particular voting practices such as voting without an ID, early voting, same-day registration, and out-of-precinct voting. Now suppose that it were established beyond all doubt that one or more of the practices that minority voters prefer resulted in *lower* minority registration and turnout. (As will become clear this is not idle speculation.) In those circumstances, would the State's elimination of such practices still constitute a violation of the Equal Protection Clause or of Section 2 of the Voting Rights

---

[11] 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.

Act? According to the Fourth Circuit's logic, it would, because the Court is more concerned with minority voters' *preference* for an electoral practice than with the actual effect that such a practice has on electoral *outcomes*.

Yet this makes no sense. A federal voting law intended to ensure minority participation should not be applied in a way that lowers it. Indeed, to take the hypothetical a step further, suppose that minority plaintiffs sued to *enjoin* an electoral practice that minority voters admittedly preferred, on the stated ground that the practice actually leads to lower minority participation in elections. By the Fourth Circuit's reasoning, which set of plaintiffs should prevail, the plaintiffs in the instant case, or the plaintiffs in this hypothetical?

These issues are not just hypothetical. The evidence offered at trial showed that minority turnout and registration actually increased in North Carolina after the implementation of SL 2013-381.[12]

---

[12] The Fourth Circuit attempted to discount this evidence by arguing that the increase in minority turnout "actually represents a significant *decrease* in the *rate* of change." App. 54-55a. Aside from the fact that the law does not require perpetual increases in minority turnout, let alone in its *rate*, and that perpetual increases in such a rate are unlikely, and even become impossible as the limit of 100% is approached, the Fourth Circuit simply ignored the district court's finding, based on testimony from *plaintiffs'* experts, that African American registration in North Carolina has reached 95.3%, and that "[t]he registration rate of African Americans has surged in North Carolina since 2000, to the point that the registration rate of African Americans now exceeds that of whites." *North*

In addition, with respect to early voting in particular there is a growing body of evidence suggesting that it is associated with *lower* turnout. In June 2016, 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 regard to early voting, the report states:

> 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.[13]

The GAO observed 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."[14] Furthermore, an expert called by Respondents in this case, Barry C. Burden, co-authored a 2014

Carolina State Conf. of the NAACP v. McCrory, Case No. 1:13CV658 (M.D.N.C. 2016), ECF No. 184 at 41 & n.30.

[13] *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.

[14] *Id.* at 97.

report reaching the same, "unanticipated" conclusion, namely, that early voting was associated with lower turnout:

> 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.[15]

As the foregoing indicates, the Fourth Circuit's misplaced reliance on minority voter *preference* or *usage* risks enshrining a principle that is not only wrong, but perverse, in that it could lead to lower minority participation in elections. If that happens, federal voting law will have been sacrificed to the law of unintended consequences. All such potential inconsistencies may be simply avoided by requiring that the discriminatory effect of an electoral practice

---

[15] 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). This report was recently filed as a trial exhibit in *Ohio Dem. Party v. Husted*, Case No. 2:15-cv-01802 (S.D. Ohio) (Defendants' Trial Exh. 14-N, ECF No. 127-14 at 226 (PAGEID #: 6826)).

must be shown by its effect on voter *registration* or *turnout*. These commonsense metrics best reflect the priorities already embodied in federal voting law. *Amici* respectfully submit that the Fourth Circuit erred when it discounted this evidence.

A number of other statements in the Fourth Circuit opinion demonstrate that it did not correctly apply the applicable law. In explaining its reversal of the lower court, the Fourth Circuit stated that the "district court believed that the disproportionate impact of the new legislation 'depends on the options remaining' after enactment of the legislation. (citation omitted). *Arlington Heights* requires nothing of the kind." App. 49a. But the phrase "options remaining" is clearing referring to what type of voting opportunities are available to minority voters after the challenged provisions began being enforced. An example would be where a minority voter, who had frequently voted in the first seven days of the 17-day early voting period, decided, upon learning of the new early voting time period, to early vote within the 10-day period allotted under SL 2013-381. Another example would be a voter who had voted out of his or her precinct in the past, but who decided, upon learning of the new requirement to vote in one's assigned precinct, to simply begin voting in the correct precinct.

Likewise, in its opinion the Fourth Circuit stated that "the standard the district court used to measure impact required too much in the context of an intentional discrimination claim." App. 50a. The above-cited precedents of this Court specifically

require that in the context of such a claim an inquiry must be made to determine whether a challenged law is impacting a plaintiff's voting opportunities. Thus, it was actually the Fourth Circuit's analysis that did not ask enough.

Another telling statement in the Fourth Circuit's opinion is its observation that "cumulatively, the panoply of restrictions results in greater *disenfranchisement* than any of the law's provisions individually." App. 52a (emphasis added). Requiring voters to bring ID, to vote in a 10-day early voting period, to register in advance, and to vote in their own precincts, do not constitute voter "disenfranchisement" in the absence of a showing of a discriminatory effect. This is especially true where, as here, the party who had the burden of proof did not offer evidence showing a reduction in registration or voting by African American voters. Without such evidence, it was inappropriate to characterize the evidence in the case as involving "disenfranchisement." This mischaracterization again demonstrates the Fourth Circuit's misunderstanding of what the precedents of this Court require.

CONCLUSION

For the foregoing reasons, *amici* respectfully request that this Court grant the Emergency Application for Injunction.

Respectfully submitted,

H. Christopher Coates
LAW OFFICE OF
H. CHRISTOPHER COATES
934 Compass Point
Charleston, SC 29412

Chris Fedeli
Lauren M. Burke
Counsel of Record
JUDICIAL WATCH, INC.
425 Third Street SW
Washington, DC 20024
(202) 646-5172
lburke@judicialwatch.org

Counsel for Amici Curiae

August 25, 2016