No. 18-10151

**IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT**

Greater Birmingham Ministries, Alabama State Conference of the National Association for the Advancement of Colored People, Giovana Ambrosio, Elizabeth Ware, Shameka Harris,

*Plaintiffs-Appellants*,

v.

Secretary of State for the State of Alabama,

*Defendant-Appellee*.

On Appeal from the United States District Court of the North District of Alabama in Case No. 2:15-CV-02193-LSC (L. Scott Coogler, U.S. District Judge)

# BRIEF OF *AMICI CURIAE* JUDICIAL WATCH, INC. AND ALLIED EDUCATIONAL FOUNDATION IN SUPPORT OF APPELLEE AND AFFIRMANCE

H. Christopher Coates
LAW OFFICE OF H. CHRISTOPHER COATES
934 Compass Point
Charleston, S.C. 29412
(843) 609-7080

Paul J. Orfanedes
JUDICIAL WATCH, INC.
425 Third Street SW
Suite 800
Washington, D.C. 20024
(202) 646-5172

*Counsel for Amici Curiae*

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# TABLE OF CONTENTS

# TABLE OF AUTHORITIES

**CASES** **PAGE**

**FEDERAL STATUTES**



**FEDERAL RULES**

**CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT**

Pursuant to Federal Rules of Appellate Procedure 26.1(a) and 29(a)(4)(A) and 11th Cir. R. 26.1-1(a), *amici* Judicial Watch, Inc. and Allied Educational Foundation hereby submit they are registered 501(c)(3) educational non-profit organizations, that they are private non-publicly held corporations, and that they have no parent corporations. No publicly held corporation or parent corporation owns ten percent (10%) or more of *amici* stock. *Amici* further certify that, in addition to the persons and entities identified in the briefs of Plaintiffs-Appellants and Defendants-Appellee, the following persons may have interest in the outcome of this case:

Allied Educational Foundation (*amicus curiae*)

Judicial Watch, Inc. (*amicus curiae*)

Orfanedes, Paul J. (*counsel for amici curiae*)

Coates, H. Christopher (*counsel for amici curiae*)

Dated: April 6, 2018

Respectfully submitted,

*s/ Paul J. Orfanedes*

Paul J. Orfanedes
JUDICIAL WATCH, INC.
425 Third Street SW
Suite 800
Washington, D.C. 20024

## IDENTITY, INTERESTS, AND AUTHORITY OF *AMICI CURIAE*[1]

Allied Educational Foundation and Judicial Watch, Inc. (collectively "*amici*") file this *amici curiae* brief pursuant to FED. R. APP. P. 29(a)(2) in support of Appellee, Alabama Secretary of State, and urge this Court to affirm the judgment of the District Court. ***Amici* have received prior consent from all parties to the filing of this brief.**

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 many 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 many occasions.

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[1] Pursuant to FED. R. APP. P. 29(a)(4)(E), 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.

*Amici* believe that the standard of proof suggested by Appellants as a way to establish a "results" claim under Section 2 of the Voting Rights Act fundamentally misconstrues the nature of that statute. It is contrary to this Court's precedent and contrary to the governing law in almost every circuit to consider the issue. If accepted by this Court, it would do great harm. *Amici* submit this brief for the sole purpose of explicating the correct standard of proof under Section 2.

For these and the reasons set forth below, *amici* urge the Court to affirm the District Court's grant of summary judgment in favor of Appellee.

## STATEMENT OF THE ISSUE

Whether a "results" claim brought under Section 2 of the Voting Rights Act, 52 U.S.C. § 10301, requires a claimant to show that a challenged practice or procedure caused a discriminatory result significant enough to have diminished the opportunity of the members of a protected group to participate in the political process and to elect representatives of their choice.

## SUMMARY OF THE ARGUMENT

A claimant proceeding under Section 2 of the Voting Rights Act need not allege and prove discriminatory intent. Such a claimant also may succeed by alleging a "results" claim, meaning that a voting procedure inflicted a racially discriminatory result on the claimant as a member of a protected class.

There is a split between circuits as to how a "results" claim may be proved. Opinions in this Circuit and in five others rightly require that a challenged voting practice or procedure *cause* a particular, discriminatory result, which is significant enough to constitute a loss of an equal opportunity to participate in the political process. This standard derives from the plain language of Section 2, and properly restricts its use to actual instances of voting-relating discrimination. By contrast, the Fifth Circuit merely requires proof that a challenged procedure disproportionately impacts members of a protected class and that this impact is "linked to" or "interacts" with a history of discrimination against that class. The Fifth Circuit's standard does not distinguish between ordinary election laws and race-based discrimination, and so arbitrarily puts every voting law, and every proposed amendment to a voting law, at risk of being found to violate Section 2. This standard is fatally flawed, unworkable, and contrary to precedent.

Appellants ask this Court to adopt this defective standard. It should not do so. Indeed, the fact that Appellants did not adduce sufficient proof under the correct standard shows that summary judgment was properly granted against them.

## ARGUMENT AND CITATIONS OF AUTHORITY

## APPELLANTS FAILED TO ESTABLISH A SECTION 2 "RESULTS" CLAIM, WHICH REQUIRES A SHOWING, IN THIS CIRCUIT AND IN A CLEAR MAJORITY OF OTHER CIRCUITS, THAT A CHALLENGED LAW PARTICULARLY CAUSED A DISCRIMINATORY RESULT

Section 2 of the Voting Rights Act forbids a State from imposing or applying voting qualifications, practices, or procedures "in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color . . ." 52 U.S.C. § 10301(a). A violation is established when the

> political processes leading to nomination or election . . . are not equally open to participation by members of a [protected] class . . . 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. . . .

52 U.S.C. § 10301(b).

While Section 2 clearly prohibits intentional discrimination with respect to voting, a plaintiff also "could establish a violation without proving discriminatory intent," based upon a showing of discriminatory "results." *Johnson v. Governor of Fla.*, 405 F.3d 1214, 1227 (11th Cir. 2005) (citation omitted). Courts have had to define the parameters of what a "results" claim entails. Obviously, such a claim cannot be based solely on the fact that a voting practice or procedure has a different effect on different racial groups. Every voting statute – for that matter, every statute of any kind – will differentially impact members of different racial

groups, even if only slightly or accidentally. It cannot be the case that every voting statute that does or that could exist is subject to a challenge under Section 2.

The plain text of Section 2, however, limits its application in ways that make its enforcement manageable. Section 2 provides that states may not impose or apply practices "in a manner which results" in a proscribed outcome. This means, at a minimum, that a challenged practice must have *caused* the result prohibited by the statute. 52 U.S.C. § 10301(a); *see also Thornburg v. Gingles*, 478 U.S. 30, 47 (1986). Further, Section 2 provides that it only is violated where voters in a protected class have less opportunity than other voters "to participate in the political process and to elect representatives of their choice." 52 U.S.C. § 10301(b).

Courts applying Section 2 have recognized these features of the statute. In *Johnson*, 405 F.3d at 1228, this Court, in rejecting a Section 2 challenge to a felon-disenfranchisement statute, noted:

> Despite its broad language, Section 2 does not prohibit all voting restrictions that may have a racially disproportionate effect. *See Chisom* [*v. Roemer*], 501 U.S. [380,] 383 [(1991)] ("Congress amended § 2 of the Voting Rights Act to make clear that *certain* practices and procedures that result in the denial or abridgement of the right to vote are forbidden even though the absence of proof of discriminatory intent protects them from constitutional challenge.") (emphasis added).

Judge Tjoflat, elaborated on this point in his concurring opinion. Analyzing "the pre-*Bolden* application of section 2, along with the legislative history surrounding

the amendment and our own postamendment application of section 2 in the vote-denial context," he concluded "that something more than a mere showing of disparate effect is essential to a prima facie vote-denial case." *Id.* at 1238 (Tjoflat, J., concurring). In particular, the words of Section 2 "suggest a causation requirement." *Id.* In the vote-dilution context, this means "showing that racial bias in the relevant community *caused* the alleged vote denial or abridgment." *Id.* Vote-denial claims were more varied, and thus required courts to "be alert to unconventional factors indicating bias-caused vote denials." *Id.* But the causation requirement still applied. The felon-disenfranchisement claim before the Court failed because there were no "factors of causation, whether to be found in our precedent or in our wildest dreams," showing anything "other than that the causation of the denial of the right to vote to felons in Florida consists entirely of their conviction, not their race." *Id.* at 1238-39.

Other circuits have similarly required that Section 2 claimants show that the loss of an equal opportunity to participate in the political process was caused by a challenged procedure. In *Gonzalez v. Arizona*, 677 F.3d 383 (9th Cir. 2012) (en banc), *aff'd sub nom. Arizona v. Inter Tribal Council of Arizona, Inc.*, 133 S. Ct. 2247 (2013), the Ninth Circuit held that "a § 2 challenge 'based purely on a showing of some relevant statistical disparity between minorities and whites,' without any evidence that the challenged voting qualification *causes that disparity*,

will be rejected." *Id.* at 405 (emphasis added), citing *Smith v. Salt River Project Agric. Improvement & Power Dist.*, 109 F.3d 586, 595 (9th Cir. 1997). In the case before it, the Court acknowledged the district court's findings "that Latinos had suffered a history of discrimination" that "hindered their ability to participate in the political process fully, that there were socioeconomic disparities between Latinos and whites," and that "Arizona continues to have some degree of racially polarized voting." 677 F.3d at 406. Yet the Court still rejected the Section 2 claim, because the plaintiff had "adduced no evidence that Latinos' ability or inability to obtain or possess identification for voting purposes (whether or not interacting with the history of discrimination and racially polarized voting) resulted in Latinos having less opportunity to participate in the political process." *Id.* at 407; *see Salt River*, 109 F.3d at 595 (9th Cir. 1997) ("a bare statistical showing of disproportionate *impact* on a racial minority does not satisfy the § 2 'results' inquiry"), citing *Ortiz v. City of Phila. Office of the City Comm'rs*, 28 F.3d 306, 308 (3rd Cir.1994) (although "African-American and Latino voters are purged at disproportionately higher rates than their white counterparts," plaintiff's Section 2 challenge "failed to prove that the purge statute caused" this disparity).

In *Frank v. Walker*, 768 F.3d 744 (7th Cir. 2014), the Seventh Circuit reversed a lower court ruling and held that a Wisconsin law requiring voters to present photo ID at the polls did not violate Section 2. The Court acknowledged

disparities in the percentages of white, black, and Latino voters who possessed acceptable photo IDs or the documents necessary to obtain them. *Id.* at 752. But the Court also recognized that Section 2 "does not condemn a voting practice just because it has a disparate effect on minorities." *Id.* at 753. "Although these findings document a disparate outcome, they do not show a 'denial' of anything by Wisconsin, as §2(a) requires; unless Wisconsin makes it *needlessly* hard to get photo ID, it has not denied anything to any voter." *Id.* If racial disparities alone were the key to a "results" claim, Section 2 would "sweep[] away almost all registration and voting rules." *Id.* at 754. Nor did a generalized showing of societal discrimination establish a violation. Section 2 "forbids discrimination by 'race or color' but does not require states to overcome societal effects of private discrimination that affect the income or wealth of potential voters." *Id.* at 753. The "district judge did not find that blacks or Latinos have less 'opportunity' than whites to get photo IDs," but that, "because they have lower income, these groups are less likely to *use* that opportunity. And that does not violate §2." *Id.*

In contrast, the Fifth Circuit applied a radically different notion of "causation," using the standard Appellants favor in this case. *See Veasey v. Abbott*, 830 F.3d 216 (5th Cir. 2016) (en banc), *cert. den. sub nom. Abbott v. Veasey*, 2017 U.S. LEXIS 789 (Jan. 23, 2017). In the context of a Section 2 challenge to a Texas photo ID law, that Court set forth a two-part framework for determining the

requisite discriminatory "result." First, a challenged procedure "must impose a discriminatory burden on members of a protected class"; and second, that burden "must in part be caused by or linked to historical conditions" that "produce discrimination" against that class. *Id.* at 244 (citations omitted). According to the Fifth Circuit, this second element is sufficient, without more, to establish "the requisite causal link between the burden on voting rights and the fact that this burden affects minorities disparately." *Id.* at 245 (citation omitted). Relying on statistical evidence of disparate access to voter ID (*id.* at 250) and an established history of discrimination in Texas, the Court found a violation of Section 2. *Id.* at 257, 264.

Two other circuits, the Fourth and the Sixth, initially adopted the relaxed interpretation of Section 2 causation espoused by the Fifth Circuit in *Veasey*, but more recently have come to require a showing of causation in line with other circuits. In *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 240 (4th Cir. 2014), the Fourth Circuit granted a preliminary injunction against a law eliminating same-day registration and prohibiting the counting of out-of-precinct ballots, expressly utilizing the two-part test later applied in *Veasey*. That case was later decided on the merits on other grounds. *N.C. State Conf. of the NAACP v. McCrory*, 831 F.3d 204, 215 (4th Cir. 2016), *cert. denied*, 137 S. Ct. 1399 (2017).

However, in *Lee v. Va. State Bd. of Elections*, 843 F.3d 592 (4th Cir. 2016), the Fourth Circuit upheld Virginia's photo ID law against a similar challenge. Virginia had contested the plaintiffs' argument that the challenged law *caused* voters not to vote:

> Virginia contends that there is no evidence that any eligible Virginia voter has been or will be denied an equal opportunity to vote. It asserts that the evidence of any person's failure to cast a ballot in this case was *not attributable to Virginia's ID law* but to that person's decision not to cure a provisional ballot.

*Id.* at 599-600 (emphasis added). The Fourth Circuit agreed, finding that the plaintiffs "failed to provide evidence that members of the protected class have less of an opportunity than others to participate in the political process," in part because a voter without identification can "cast a provisional ballot, which can be cured by later presenting a photo ID." Noting that the plaintiffs "assert[] categorically that as long as there is disparity in the rates at which different groups possess acceptable identification, § 2 is violated," the Court cited the Seventh Circuit's decision in *Frank* and responded in a manner consistent with that ruling:

> To make this assertion, however, the plaintiffs have to make an unjustified leap from *the disparate inconveniences* that voters face when voting to *the denial or abridgement of the right to vote*. Every decision that a State makes in regulating its elections will, inevitably, result in somewhat more inconvenience for some voters than for others. For example, every polling place will, by necessity, be located closer to some voters than to others. To interpret § 2 as prohibiting any regulation that imposes a disparate inconvenience would mean that every polling place would need to be precisely located such that no group had to spend more time traveling to vote than did any other.

> Similarly, motor-voter registration would be found to be invalid as members of the protected class were less likely to possess a driver's license. Yet, courts have also correctly rejected that hypothetical. *See Frank v. Walker*, 768 F.3d [at] 754 [].

*Id.* at 600-01; *see also Irby v. Virginia State Bd. of Elections*, 889 F.2d 1352, 1359 (4th Cir. 1989) (rejecting Section 2 challenge to appointive system of choosing school boards where "the evidence cast considerable doubt on the existence of a causal link between the appointive system and black underrepresentation").

The Sixth Circuit also applied the two-part *Veasey* test in affirming a preliminary injunction against enforcing an Ohio law reducing the 35-day early voting period in that state. Within a few weeks, however, the district court's injunction was stayed by the Supreme Court and the circuit's decision affirming it was vacated. *Ohio State Conf. of the NAACP v. Husted*, 768 F.3d 524, 532 (6th Cir. 2014) (finding a Section 2 violation), *vacated*, 2014 U.S. App. LEXIS 24472 (6th Cir. Oct. 1, 2014); *Husted v. Ohio State Conf. of the NAACP*, 135 S. Ct. 42 (2014) (granting stay of district court order).

In subsequent litigation, the Sixth Circuit reversed a district court ruling that had invalidated and enjoined Ohio's law reducing the early voting period. *Ohio Democratic Party v. Husted*, 834 F.3d 620 (6th Cir. 2016). In doing so, the Court modified the two-part *Veasey* test by importing an explicit causation requirement into *both* of its prongs. It first held that Section 2 plaintiffs must show "proof of a disparate impact – amounting to denial or abridgement of protected class members'

right to vote – that *results from the challenged standard or practice*." *Id.* at 637. In consequence, "the first element of the Section 2 claim requires proof that the challenged standard or practice *causally contributes* to the alleged discriminatory impact by affording protected group members less opportunity to participate in the political process." *Id.* at 637-38 (emphasis added). Only "[i]f this first element is met" does "the second step come[] into play." *Id.* at 638. But this step also requires a showing of causation. The second step "asks not just whether social and historical conditions 'result in' a disparate impact, but whether the challenged *voting standard or practice* causes the discriminatory impact as it interacts with social and historical conditions." *Id.* The Court concluded:

> The foregoing construction of Section 2 is . . . faithful to the statutory text and legislative history . . . [and] also makes practical sense. . . . [T]o apply Section 2 to invalidate . . . innocuous voting regulation[s] based solely on evidence that social and historical conditions resulted in a disparate impact would . . . punish a state for the effects of private discrimination. . . . We therefore clarify that [a challenged statute] is actionable as a Section 2 violation only if it is shown to causally contribute, as it interacts with social and historical conditions that have produced discrimination, to a disparate impact . . . .

Id. at 638-39.

In sum, the Ninth, Seventh, Third, Fourth, and Sixth Circuits all agree with Judge Tjoflat of this Circuit that Section 2 may only be used to challenge a voting practice or procedure that *particularly caused* a denial or abridgment of the right to vote on account of race or color. A racially disproportionate impact is not enough;

nor is a history of discrimination; nor are the two in combination. Quite simply, the challenged ID procedure must be shown by plaintiffs to cause discriminatory results in order to prove a Section 2 "results" claim.

By contrast, the standard for establishing a Section 2 violation in the Fifth Circuit is much less demanding. Under *Veasey*, a Section 2 claim can succeed whenever the racially disproportionate impact of a challenged practice or procedure "interacts," in any way, with an existing history of discrimination. It is this standard that Appellants urge this Court to adopt. *See* Op. Br. at 14 ("When facially neutral procedures 'interact[] with social and historical conditions' to disproportionately burden voters of color, then the 'result' is voting discrimination within the meaning of Section 2."); *id.* at ix (identifying *Veasey* as one of the primary cases on which Appellants rely); DE 255 at 122 (Section 2 requires "a discriminatory burden on members of a protected class" that is "caused by or linked to social and historical conditions that have produced discrimination").

The *Veasey* standard favored by Appellants is unworkable. Every single voting procedure has a differential effect by race, for every race we choose to consider. This is true of even the most mundane rules concerning clerks' office hours, the contents of mailings, written materials at the polls, the structure of ballots, translations, kinds of physical accommodations, registration and voting deadlines of every description, and allowable conduct in or near a polling place, let

alone the more commonly contested issues concerning forms of ID, same-day registration, absentee voting, and out-of-precinct voting. Furthermore, every legal rule – and every fact pertaining to our lives – "interacts" with the social and historical context in which we find ourselves. If every existing law, and every proposed amendment to existing law, were subject to legal challenge under Section 2 whenever a social scientist was willing to say that its impact differed by race and "interacted" with our history, the orderly administration of elections would become impossible. Congress never intended this outcome, and the problem of combatting true instances of racial discrimination in voting is hindered, not helped, by such a chaotic state of affairs.

Judge Tjoflat's approach rationalizes Section 2 in the context of a "results" claim by restricting the statute's reach to cases where a voting practice or procedure is actually shown to cause a particular, discriminatory result. The *Veasey* standard does no such thing. It offers no principled way to distinguish between voting requirements that have a disproportionate impact and voting requirements that cause discriminatory results. It also provides no guidance about what to do if more than one minority group is affected. This may be a common situation. There may be, for example, evidence of historical discrimination against black *and* Hispanic voters, and perhaps against Asian voters as well. In such cases, every single voting statute will provide an advantage to one minority group

*relative to* the others. These other groups then will have been disproportionately impacted by a voting practice or procedure, in a historical context in which they have suffered race-based discrimination. Do these groups have Section 2 claims? And in whose favor would such claims be decided?

For all of these reasons, *Veasey*'s standard does not make sense of Section 2, it makes a mess of it. The causation requirement favored by the clear majority of circuits to consider the issue, which requirement derives from the plain language of Section 2, is the only logical way to interpret the statute.

The District Court in this case properly focused on Appellants' failure to show a discriminatory "result" proscribed by Section 2 – let alone a discriminatory impact sufficient to rise to the level of a denial or abridgment of an equal opportunity "to participate in the political process and to elect representatives of [] choice." 52 U.S.C. § 10301(b). As the District Court powerfully summarized the relevant facts:

> Minorities do not have less opportunity to vote under Alabama's Photo ID law, because everyone has the same opportunity to obtain an ID. Black, Hispanic, and white voters are equally able to sign a voter registration form or registration form update. They have the same opportunity to get to a registrar's office, and to the extent there is a difference in convenience, they have the same opportunity to request a home visit. Insofar as it is less convenient for the poor to get an ID than it is for those who have greater means, that is as true for poor whites as it is for poor minority voters. A Black voter and a white voter of equal means who each lack ID and a birth certificate, and who each live an equal distance away from the registrar's office, are in the exact same position: They can each get a photo ID at no charge

> by signing a simple form, and if they have no transportation, the mobile unit will come to them. *In sum, there cannot be a discriminatory impact on voting when the law does not prevent anyone from voting*.

DE 267 at 63 (emphasis added).

For the reasons stated by the District Court, Appellants' showing of minor disparities in the possession of IDs and of historical facts and data concerning discrimination is not just insufficient. It is the wrong kind of evidence. What is missing here is evidence that the enforcement of Alabama's photo ID law has resulted in minority voters being denied an equal opportunity to participate in the electoral process. Because Appellants fundamentally misapprehended the proof required under Section 2, summary judgment was appropriately granted against them.

## CONCLUSION

For the foregoing reasons, *amici* Judicial Watch, Inc. and Allied Educational Foundation, Inc. respectfully request this Court to affirm the decision below and dismiss Appellants' claims.

Dated: April 6, 2018

Respectfully submitted,

*s/ Paul J. Orfanedes*
Paul J. Orfanedes
JUDICIAL WATCH, INC.
425 Third Street SW, Suite 800
Washington, DC 20024
(202) 646-5172
porfanedes@judicialwatch.org

*Attorneys for Amici Curiae*

## 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. Pursuant to Federal Rule of Appellate Procedure 29(a)(5) and per Microsoft Word count, the brief is within the *amicus* word limit at 3,987 words excluding tables and certificates, less than half of the 13,000 words allowed for the principal brief.

Dated: April 6, 2018 *s/ Paul J. Orfanedes*

**CERTIFICATE OF SERVICE**

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 Eleventh 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: April 6, 2018 *s/ Paul Orfanedes*