No. 14-780

In the Supreme Court of the United States

THE STATE OF NORTH CAROLINA, *ET AL.*,

Petitioners,

v.

LEAGUE OF WOMEN VOTERS OF NORTH CAROLINA, *ET AL.*,

Respondents.

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

BRIEF *AMICUS CURIAE* OF EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND, INC., IN SUPPORT OF PETITIONERS

LAWRENCE J. JOSEPH
1250 CONNECTICUT AVE. NW
SUITE 200
WASHINGTON, DC 20036
(202) 202-355-9452
lj@larryjoseph.com

Counsel for Amicus Curiae

QUESTIONS PRESENTED

Did the Court of Appeals err by effectively incorporating into §2 of the Voting Rights Act the retrogression standard applicable only to §5 of the Voting Rights Act?

Has the preliminary injunction ordered by the Fourth Circuit subjected North Carolina to a *de facto* preclearance standard in derogation of North Carolina's constitutional prerogative to enact laws governing the time, place, and manner of holding elections?

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INTEREST OF *AMICUS CURIAE*

Amicus curiae Eagle Forum Education & Legal Defense Fund, Inc. ("Eagle Forum")[1] is a nonprofit corporation headquartered in Saint Louis, Missouri. Since its founding, Eagle Forum has consistently defended not only the Constitution's federalist structure, but also its limits on both State and federal power. In the context of the integrity of the elections on which the Nation has based its political

[1] *Amicus* files this brief with consent by all parties, with 10 days' prior written notice; *amicus* has lodged with the Clerk the parties' written consent to the filing of this *amicus* brief. Pursuant to Rule 37.6, counsel for *amicus* authored this brief in whole, no party's counsel authored this brief in whole or in part, and no person or entity – other than *amicus* and its counsel – contributed monetarily to preparing or submitting the brief.

community, Eagle Forum has supported efforts both to reduce voter fraud and to maximize voter confidence in the electoral process. For all the foregoing reasons, Eagle Forum has a direct and vital interest in the issues before this Court.

STATEMENT OF THE CASE

In consolidated cases in district court, various private individual and entity plaintiffs ("Plaintiffs") and the United States have challenged N.C. Sess. Law 2013-381 (hereinafter, "HB589"); the defendants are the State of North Carolina, its Governor, and the members its State Board of Elections (collectively, "North Carolina"). In pertinent part, HB589 made the following contested changes to the election laws in North Carolina:

- Eliminated same-day registration ("SDR");
- Eliminated out-of-district voting ("ODV");
- Reduced early voting;
- Increased at-large observers at the polls and the deputizing of any resident to challenge ballots at the polls;
- Eliminated the discretion of county boards of elections to extend poll hours under extraordinary circumstances; and
- Provided a soft roll-out in 2014 of voter identification requirements to go into effect in 2016.

The district court denied interim relief and set a trial on the merits for 2015. Plaintiffs, but not the United States, appealed the denial of interim relief to the Fourth Circuit, which reversed by granting interim relief for SDR and ODV. For the other issues covered by HB589, the Fourth Circuit denied relief

on the lack of irreparable harm, rather than on the unlikelihood of Plaintiffs' prevailing on the merits. As such, the merits holdings of the appellate decision will benefit Plaintiffs on the merits at trial for issues other than SDR and ODV, even though the Fourth Circuit granted relief only for SDR and ODV.

SUMMARY OF ARGUMENT

The ballot-integrity reforms in HB589 represent legitimate efforts to combat not only voter fraud but also attempts by ineligible voters to vote in the mistaken belief in their eligibility.

Evaluating claims under the Voting Rights Act, 52 U.S.C. §§10301-10314 ("VRA") (formerly codified at 42 U.S.C. §§1973-1973q), requires federal courts to consider the full context of the law, including the canon of statutory construction that Congress would not overturn the federal-state balance without expressly stating the extent of the change, even under the Elections Clause, U.S. CONST. art. I, §4, cl. 2. Under that interpretive rubric and this Court's *Reno v. Bossier Parish Sch. Bd.,* 528 U.S. 320, 334 (2000), decision, claims under VRA §2, 52 U.S.C. §10302 (formerly codified at 42 U.S.C. §1973a), involve comparing an objective comparison of state law versus what the law ought to be, with a prohibited "abridgment" occurring only if the state laws fall below that objective measure. By contrast, the Fourth Circuit used the anti-retrogression analysis from VRA §5, 52 U.S.C. §10305 (formerly codified at 42 U.S.C. §1973c), which does not apply to North Carolina in the wake of *Shelby County v. Holder,* 133 S.Ct. 2612 (2013). With respect to justiciability of VRA claims, the question of

Plaintiffs' standing to challenge minor slights – which may not occur at all – in an election two years away requires this Court's review. Similarly, the use of VRA §5 retrogression analysis against a non-§5 state raises the question of North Carolina's sovereign immunity because it is unclear that there is an ongoing violation of any federal law needed to support haling the state-officer defendants into federal court.

Finally, the VRA issues that the Fourth Circuit decided are sufficiently dispositive for the final result in this litigation – which is now proceeding on the merits in district court – that this Court's review *now* would ensure a fair 2016 election in the several swing states – including Ohio, North Carolina, and Wisconsin – with ongoing litigation. By contrast, if this Court ducks review now, the pending cases may not return here in time for deliberate review and a decision in advance of the 2016 elections.

ARGUMENT

I. NORTH CAROLINA'S VOTING LAWS ARE REASONABLE MEASURES DESIGNED TO COMBAT SERIOUS BALLOT-INTEGRITY CONCERNS

This litigation pits voting access against ballot integrity. Especially at the extremes shown in North Carolina's pre-HB589 voting laws, the two unfortunately conflict. Although those who oppose ballot-integrity measures describe them as solutions in search of a problem, this Court has recognized that ballot integrity is a fundamental concern, and it should allow North Carolina to wind back some of the more dubious of its voting-access experiments.

Although Plaintiffs' side of the debate typically does not recognize the value of the competing side of the issue, access and integrity are both important. "[T]he political franchise of voting … is regarded as a fundamental political right, because preservative of all rights." *Yick Wo v. Hopkins,* 118 U.S. 356, 370 (1886). On the other hand, "[v]oter fraud drives honest citizens out of the democratic process and breeds distrust of our government." *Purcell v. Gonzalez,* 549 U.S. 1, 4 (2006). Voter fraud "'debase[s] or dilute[es] … the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.'" *Id.* (*quoting Reynolds v. Sims,* 377 U.S. 533, 555 (1964)); *see Crawford v. Marion County Election Bd.,* 553 U.S. 181, 189 (2008) (States have an interest in preventing voter fraud and ensuring voter confidence). At some level, therefore, ensuring ballot integrity can expand the electorate.

While the Fourth Circuit's interim relief extends only to SDR and ODV, the underlying litigation also concerns early voting and voter identification. North Carolina had ample reason to adopt all of its reforms, and this Court should not allow the litigious to attack the states' elections laws without first laying down the framework along which such challenges must proceed.

Allowing voters to register when they vote and to vote outside their district obviously heightens the possibility for intentional voter fraud, while at the same time lessening the ability of the system to flag ineligible voters who may believe themselves eligible to vote. Responding to claims that thousands of

fraudulent ballots were cast in the 2004 election in Milwaukee, a police investigation found that "more ballots [were] cast than voters recorded." SPECIAL INVESTIGATIONS UNIT, MILWAUKEE POLICE DEP'T, REPORT ON THE INVESTIGATION INTO THE NOV. 2, 2004 GENERAL ELECTION IN THE CITY OF MILWAUKEE, at 5 (2008). The Milwaukee report concluded that "the one thing that could eliminate a large percentage of fraud or the appearance of fraudulent voting in any given election is the elimination of the on-site or same-day voter registration system." *Id.* at 7. Similarly, allowing voting without proper identification enables voter fraud. For example, City investigators in New York were able to vote successfully 61 times out of 63 attempts when identifying themselves as an ineligible voter on the rolls. *See* ROSE GILL HEARN, COMMISSIONER, NEW YORK CITY DEP'T OF INVESTIGATION, REPORT ON THE NEW YORK CITY BOARD OF ELECTIONS' EMPLOYMENT PRACTICES, OPERATIONS, AND ELECTION ADMINISTRATION, at 13 (December 2013).[2]

By moving in-person voting away from the "main event" of Election Day, in-person early voting works against the adversary system that has developed in our elections, including such protections as oversight of elections by poll watchers (or poll monitors) from the two major political parties. Poll watchers from the political parties are "prophylactic measures designed to prevent election fraud," *Harris v. Conradi,* 675 F.2d 1212, 1216 n.10 (11th Cir. 1982), and "to insure against tampering with the voting

[2] To avoid biasing the elections, the investigators wrote in the fictitious candidate John Test.

process." *Baer v. Meyer,* 728 F.2d 471, 476 (10th Cir. 1984). For example, poll monitors reported that 199 Chicago voters cast 300 party-line Democratic votes, as well as three party-line Republican votes in one election. *Barr v. Chatman,* 397 F.2d 515, 515-16 & n.3 (7th Cir. 1968). As the 2008 Milwaukee study of the 2004 elections shows, moreover, irregularities are not a relic of old-style machine politics of the last century and before. Even today, states rationally may believe that moving toward having elections in the open on Election Day would foster voter confidence and eliminate fraud. The Founders intended that elections bind this Nation together, *cf. Ex parte Yarbrough,* 110 U.S. 651, 661 (1884) (recognizing that "the election of members of congress occurring at different times in the different states" would give rise to "more than one evil"), and states plausibly may view limits on early in-person voting to foster that public goal.

As indicated above, the issues advanced by HB589 are important to North Carolina's democracy. As indicated in the next section, the legal framework under which the Fourth Circuit proceeded is dubious and require this Court's review.

II. THIS LITIGATION PRESENTS AN IDEAL VEHICLE TO RESOLVE THE QUESTIONS PRESENTED AND THE UNDERLYING LEGAL STANDARDS

In general, "the findings of fact and conclusions of law made by a court granting a preliminary injunction are not binding at trial on the merits." *Univ. of Texas v. Camenisch,* 451 U.S. 390, 395 (1981). Here, however, the Fourth Circuit's holding

that Plaintiffs are likely to succeed on the merits of two of their claims has effectively decided the merits of Plaintiffs' claims. Notwithstanding both that the general rule in *Camenisch* and that appellate courts review denials of interim injunctive relief for abuse of discretion, a "court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law." *Cooter & Gell v. Hartmarx Corp.,* 496 U.S. 384, 405 (1990). Here, the Fourth Circuit corrected the district court's legal analysis, Pet. App. 36a ("[a] close look at the district court's analysis … reveals numerous grave errors of law that constitute an abuse of discretion"), and that holding sets the law of the Fourth Circuit. Accordingly, there is no reason for this Court to defer its review until a decision on the merits. Indeed, as explained in Section III, *supra,* review *now* is required to ensure this Court has the time to hear and decide the case in advance of the 2016 elections.

A. This Court Should Clarify the Deference Due to State Law on Elections' Time, Place, and Manner

Before reaching the merits, this Court should clarify the deference due to state laws in evaluating congressional regulation of elections' time, place, and manner under the Elections Clause. In *Arizona v. Inter Tribal Council of Ariz., Inc.,* 133 S.Ct. 2247 (2013) ("*ITCA*"), this Court rejected the "presumption against preemption" in elections cases,[3] holding that

[3] When the "presumption against preemption" applies, courts do not assume preemption "unless that was the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218, 230 (1947); *ITCA,* 133 S.Ct. at 2256.

"[we] have never mentioned such a principle in our Elections Clause cases." *ITCA,* 133 S.Ct. at 2256 (*citing Ex parte Siebold,* 100 U.S. 371, 384 (1880)). Standing alone, this language from *ITCA* fails to adequately address the deference due to state laws under the Elections Clause.

For example, in the *Siebold* decision that *ITCA* cites, the Court "presume[d] that Congress has [exercised its authority] in a judicious manner" and "that it has endeavored to guard as far as possible against any unnecessary interference with State laws." *Siebold,* 100 U.S. at 393. Similarly, in another Elections-Clause case, the Court required Congress to "have expressed a clear purpose to establish some further or definite regulation" before supplanting State authority over elections and "consider[ed] the policy of Congress not to interfere with elections within a state except by clear and specific provisions." *U.S. v. Bathgate,* 246 U.S. 220, 225-26 (1918). The point is not to quibble with *ITCA* with respect to the presumption against preemption, but rather to recognize the deference to state law is a tool of statutory construction, even without relying on the presumption against preemption: "Unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance." *U.S. v. Bass*, 404 U.S. 336, 349 (1971); *accord Gonzales v. Oregon*, 546 U.S. 243, 275 (2006) (same). *Siebold* and *Bathgate* make clear that this strand of statutory interpretation applies in the Elections-Clause context, even if the presumption against preemption does not.

This litigation presents the opportunity for this Court to clarify *ITCA* on the question of interpreting Elections-Clauses laws such as the VRA. The Fourth Circuit interprets VRA §2 as a protean action that federal judges can expand when this Court and the Constitution narrow the availability of VRA §5. That type of "freewheeling judicial inquiry … undercut[s] the principle that it is Congress rather than the courts that preempts state law." *Chamber of Commerce of U.S. v. Whiting,* 131 S.Ct. 1968, 1985 (2011) (interior quotations omitted). This Court has long recognized – outside of the presumption against preemption – that congressional action must be read sensitively in the context of federalism. Consistent with this Court's decisions, Congress should be able to expect federal courts to read federal laws in that way.

B. The Fourth Circuit's Legal Analysis Impermissibly Imports Section 5's Anti-Retrogression Requirements into a Section 2 Action

Unlike the Fourteenth Amendment, VRA §2 includes a type of "effects" test, but Plaintiffs cannot satisfy that test because North Carolina's voting laws remain far superior to what the VRA requires. A state law that makes superior voting laws less superior, but still superior, is not actionable under VRA §2. Instead, such claims were formerly actionable under the retrogression provisions of VRA §5, for "covered jurisdictions," but *Shelby County v. Holder,* 133 S.Ct. 2612 (2013), made §5 inapplicable here.

Unlike the retrogression (*i.e.,* "no backsliding") provisions of VRA §5, the VRA §2 effects test compares the status quo to what the law ought to be:

> In § 5 preclearance proceedings – which uniquely deal only and specifically with *changes* in voting procedures – the baseline is the status quo that is proposed to be changed: If the change "abridges the right to vote" relative to the status quo, preclearance is denied, and the status quo (however discriminatory *it* may be) remains in effect. In § 2 or Fifteenth Amendment proceedings, by contrast, which involve not only changes but (much more commonly) the status quo itself, the comparison must be made with a hypothetical alternative: If the *status quo* "results in [an] abridgement of the right to vote" or "abridges [the right to vote]" relative to what the right to vote *ought to be*, the status quo itself must be changed. Our reading of "abridging" as referring only to retrogression in § 5, but to discrimination more generally in § 2 and the Fifteenth Amendment is faithful to the differing contexts in which the term is used.

Reno v. Bossier Parish Sch. Bd., 528 U.S. 320, 334 (2000) (alterations and emphasis in original), *superseded in part on other grounds,* Pub. L. No. 109-246, §5, 120 Stat. 577, 580-81 (2006). Here, a finding that current North Carolina law violates VRA §2 would compel the conclusion that *any* state that fails

to allow same-day registration and out-of-precinct voting also violates the VRA.

There is, of course, absolutely no evidence that Congress intended that result: "Unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance." *Bass*, 404 U.S. at 349; *accord Gonzales*, 546 U.S. at 275; *Bathgate,* 246 U.S. at 225-26. No court can credibly infer that intent. Even without resorting to a presumption against preemption, this Court can rely – as it already has in *Bossier Parish, supra* – on a reading that distinguishes VRA's strong remedial medicine in Section 5 from the anti-abridgment protections in Section 2. There is no evidence that Congress in enacting VRA §2 intended that result, and no evidence in the record of the VRA and its reauthorizations that – under *Shelby County* – would support supplanting state sovereignty in that manner *today*.

C. This Court Should Clarify the Justiciability of Plaintiffs' Claims

In addition to the significant merits issues raised by North Carolina and in Sections II.A-II.B, *supra,* this litigation also presents significant questions of justiciability under both Article III and North Carolina's sovereign immunity. These issues – which North Carolina can raise for the first time here – are another reason for this Court to hear this case.

With respect to Article III standing, it is not clear that any actual members of the private-plaintiff coalition suffer sufficient injury to satisfy Article III's case-or-controversy requirement. As to most (if not all) members of Plaintiffs' coalition, it is too early to

say whether they will need same-day registration or out-of-precinct voting in a future election:

> And the affiants' profession of an "inten[t]" to return to the places they had visited before – where they will presumably, this time, be deprived of the opportunity to observe animals of the endangered species – is simply not enough. Such "some day" intentions – without any description of concrete plans, or indeed even any specification of *when* the some day will be – do not support a finding of the "actual or imminent" injury that our cases require.

Lujan v. Defenders of Wildlife, 504 U.S. 555, 564 (1992) (emphasis in original). While "some day in the next couple years" is more concrete that just "some day," it remains too speculative and non-concrete to show actual or imminent injury. Moreover, the Court cannot satisfy Article III by looking out over the coalitions' many members and inferring that *some of them* – without knowing *which ones* – will suffer an acute enough injury for Article III. A collection of individuals without standing cannot aggregate to a group with standing, *Pub. Citizen, Inc. v. NHTSA,* 489 F.3d 1279, 1294 (D.C. Cir. 2007), because "[t]he law of averages is not a substitute for standing." *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.,* 454 U.S. 464, 489 (1982). Plaintiffs must show a "*substantial* probability that they would have been able to [vote] and that, if the court affords the relief requested, the asserted inability of petitioners will be removed,"

Warth v. Seldin, 422 U.S. 490, 504 (1975) (emphasis added), but Plaintiffs cannot show that.

Organizational Plaintiffs may attempt to rely on *Havens Realty Corp. v. Coleman,* 455 U.S. 363 (1982), to claim injury from increased expenditures:

> *Havens* held that an organization has standing to sue on its own behalf if the defendant's illegal acts impair its ability to engage in its projects by forcing the organization to divert resources to counteract those illegal acts.

Fla. State Conf. of the NAACP v. Browning, 522 F.3d 1153, 1165 (11th Cir. 2008) (*citing Havens Realty,* 455 U.S. at 379). Given that diverted resources are typically a "self-inflicted injury," which cannot manufacture an Article III case or controversy, *Pennsylvania v. New Jersey,* 426 U.S. 660, 664 (1976), that analysis overstates the standing found in *Havens Realty,* which depended on the fact that the *Havens Realty* statute not only provided organizational plaintiffs with a right of action but also – and more importantly – eliminated prudential limits on standing. Plaintiffs can cite no such limit here, which makes *Havens Realty* inapplicable to self-inflicted expenditure injuries.[4]

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[4] *Havens Realty* involved organizational plaintiffs' statutory standing to sue under a section of the Fair Housing Act ("FHA") that created a right – applicable to both individuals *and associations* – to truthful, non-discriminatory information about housing. *Havens Realty,* 455 U.S. at 373. Moreover, because FHA extends "standing under [that section] … to the full limits of Art. III," "courts accordingly lack the authority to create prudential barriers to standing [such as the zone-of-interest test] in suits brought under that section," *Havens Realty,* 455

Plaintiffs' effort to repackage non-retrogression requirements under VRA §5 into a VRA §2 action also violates North Carolina's sovereign immunity. Unless waived or abrogated, sovereign immunity bars suits for both damages and injunctive relief. *Alden v. Maine,* 527 U.S. 706, 712-16 (1999). Where (as here) abrogation is not express, *see City of Rome v. U.S.,* 446 U.S. 156, 179-80 (1980), it must be "unmistakably clear in the language of the statute." *Nevada Dep't of Human Res. v. Hibbs,* 538 U.S. 721, 726 (2003). As signaled in Section II.B, Plaintiffs' theory is a VRA §5 retrogression claim dressed up as a VRA §2 claim, something Congress did not "unmistakably" allow. Although the *Ex parte Young* officer-suit doctrine provides an exception to sovereign immunity, that exception requires "an ongoing violation of federal law," *Verizon Md., Inc. v. Public Serv. Comm'n of Md.,* 535 U.S. 635, 645 (2002), which is absent here.

Without a clear violation of federal law, Plaintiffs in essence are complaining that the current North Carolina laws reduce favorable voting opportunities vis-à-vis North Carolina's *prior election laws.* At bottom, that seeks to enforce former state law against a state in federal court, which – in addition to discouraging innovation – trenches upon North

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U.S. at 372, thereby collapsing the standing inquiry into the question of whether the alleged injuries met the Article III minimum of injury in fact. *Id.* By contrast here, if spending alone could manufacture a case or controversy, any private advocacy or welfare organization could establish standing against any government action, which clearly is not the law. *Sierra Club v. Morton,* 405 U.S. 727, 739 (1972).

Carolina's sovereign immunity and falls outside the *Young* exception to sovereign immunity:

> This need to reconcile competing interests is wholly absent, however, when a plaintiff alleges that a state official has violated *state* law. In such a case the entire basis for the doctrine of *Young* … disappears. A federal court's grant of relief against state officials on the basis of state law, whether prospective or retroactive, does not vindicate the supreme authority of federal law. On the contrary, it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law.

Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 106 (1984). Such a case does not belong in federal court.

III. THIS NATION'S ELECTORAL SYSTEM NEEDS THIS COURT TO CLARIFY VRA'S SCOPE BEFORE THE 2016 ELECTIONS

As signaled in the prior section, this litigation – like litigation in states such as Texas, Ohio, and Wisconsin – will require this Court to respond to VRA suits that seek to evade *Shelby County* by expanding VRA §2. When these cases reached this Court just before the 2014 election, this Court stayed them – whichever side prevailed – not only because there was no time for this Court to review the merits, but also because there was no time for the states to implement the new voting regime suggested by the appellate courts' decisions without causing voter

confusion. *See Frank v. Walker,* 135 S.Ct. 7 (2014) (voter identification); *Husted v. Ohio State Conf. of the NAACP,* 135 S.Ct. 42 (2014) (early voting); *North Carolina v. League of Women Voters,* 135 S.Ct. 6 (2014) (SDR and ODV). With respect to the 2016 election, however, this Court should weigh in *now,* while there is time not only for full briefing in this Court and a decision in advance of the 2016 election, but also for the states – and, if necessary, the lower federal courts – to implement the changes, if any, compelled or allowed by this Court's guidance.

Without those reasoned deliberations now, these same issues will arrive in district courts, courts of appeals, and ultimately this Court too close to the election for the full and deliberate review required by, and appropriate for, these fundamental issues, to say nothing of the time required for the states to implement the resulting reforms or changes to state law. Under the circumstances, the Fourth Circuit's decision to expand VRA §2 presents an opportunity for this Court to resolve a vitally important issue now, and thereby to prevent that issue from destabilizing the 2016 elections.

CONCLUSION

The Court should grant the petition for a writ of *certiorari.*

February 4, 2015

Respectfully submitted,

Lawrence J. Joseph
1250 Connecticut Ave. NW
Suite 200
Washington, DC 20036
(202) 355-9452
lj@larryjoseph.com
Counsel for *Amicus Curiae*