No. 14-780

IN THE
Supreme Court of the United States

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

v.

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

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

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

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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 raises important issues of federal election law which should be heard by this Court. In particular, *amici* are concerned that the Fourth Circuit's ruling, if allowed to stand, will undermine voter confidence in the integrity of elections, enshrine a new race-based standard in

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[1] Pursuant to Supreme Court Rules 37.2 and 37.6, *amici* state that all parties received timely notice of the intent to file this brief, and all parties granted consent. In addition, no counsel for a party 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.

Section 2 of the Voting Rights Act, and guarantee, as a practical matter, that no state will make changes to its electoral laws, whether to ensure electoral integrity or for any other reason, if those changes will in some way disproportionately affect minority voters. As this Court has explained, public confidence in the integrity of elections 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 undermines confidence in the system and discourages citizen participation in democracy.

For these and other reasons, *amici* urge the Court to grant the Petition for a Writ of Certiorari.

STATUTORY FRAMEWORK

Section 2 of the Voting Rights Act proscribes the "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. It provides that a violation

> is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected [against such denial or abridgement] 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); *see Chisom v. Roemer*, 501 U.S. 380, 397-8 (1991) (plaintiffs' burden is to show "that its members had less opportunity . . . to participate in the political processes *and* to elect legislators of their choice") (emphasis added in *Chisom*), citing *White v. Regester*, 412 U.S. 755, 766 (1973).

Section 2 proscribes both voting practices motivated by a discriminatory intent and those that lead to a discriminatory result. *Chisom*, 501 U.S. at 394. The cases discussing Section 2 "results" claims typically characterize those claims further as involving either "vote dilution" or "vote denial." Vote dilution refers to "'practices that diminish minorities' political influence,' such as at-large elections and redistricting plans" that weaken minority voting strength. *Simmons v. Galvin*, 575 F.3d 24, 29 (1st Cir. 2009) (citations omitted). Vote denial, alleged here against North Carolina, "refers to practices that prevent people from voting or having their votes counted." *Id*. (citations omitted).

This appeal involves claims that North Carolina engaged in "vote denial" in violation of Section 2's "results" standard when the state legislature passed a law repealing both same-day registration and out-of-precinct voting.

SUMMARY OF ARGUMENT

There is a major divide between federal courts of appeal over the proper application of Section 2 of the Voting Rights Act. In the ruling that is the subject of this petition, the Fourth Circuit applied a novel interpretation of Section 2 in assessing claims of "vote denial." Its approach contrasts with the traditional approach adopted by the U.S. Courts of Appeals for the Seventh and the Ninth Circuits.

The traditional view assigns meaning to Section 2's explicit requirement that a violation is established when members of a protected class "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." Under this approach, a practice alleged to violate Section 2 must have caused the particular harm set forth in the statute. This means that the harm must be sufficiently serious and intractable to justify a finding that it impairs the relevant opportunity to "participate" and to "elect representatives." Courts applying this interpretation warn that the racially disproportionate impact of a voting law is not enough, on its own, to prove a violation of Section 2.

The Fourth Circuit's ruling rejects this principle. To the contrary, the Court places "disproportionate impact" at the center of its analysis, concluding that North Carolina violated Section 2 by repealing electoral procedures that black voters prefer to use. By this reasoning, whether the challenged rule

actually deterred minority voters from registering or voting is beside the point.

This approach entails a number of consequences. Most notably, it makes it far more likely that plaintiffs will be able to prove that a particular state electoral procedure (or change in procedure) violates the Voting Rights Act. This approach implicitly restricts Section 2 to claims made by minority voters. And it ensures that, once it is determined that a relatively greater proportion of minority voters prefers an electoral procedure, that procedure can no longer be altered by a state legislature. In all, the practical effect of the Fourth Circuit's ruling is to incorporate a "retrogression" standard – formerly associated only with Section 5 of the Voting Rights Act – into the enforcement of Section 2.

The standards applied by the Fourth and the Seventh Circuit are not just different, they are opposite. One of these courts is looking at a critical legal issue through the wrong end of the telescope. The resolution of this conflict will affect several ongoing lawsuits and many more anticipated lawsuits.[2] This Court's guidance is needed to settle this controversy.

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[2] Indeed, the conflicting ruling issued by the U.S. Court of Appeals for the Seventh Circuit is also the subject of a pending petition for *certiorari*. *See Frank v. Walker*, No. 14-803 (docketed January 9, 2015).

REASONS FOR GRANTING THE PETITION

I. THE FOURTH CIRCUIT HAS DECIDED A SIGNIFICANT ISSUE OF FEDERAL VOTING LAW IN A MANNER THAT CONFLICTS WITH RULINGS FROM THE SEVENTH AND NINTH CIRCUITS.

A. The Seventh and the Ninth Circuits Have Interpreted Section 2 of the Voting Rights Act To Require Causation of a Significant Injury.

In *Frank v. Walker,* 768 F.3d 744 (7th Cir. 2014), the U.S. Court of Appeals for the Seventh Circuit reversed a lower court ruling and held that a Wisconsin law requiring voters to present photographic identification (photo ID) at the polls did not violate Section 2. The Seventh Circuit 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 the principle that Section 2 "does not condemn a voting practice just because it has a disparate impact on minorities." *Id.* at 753.

The Court observed that "when the validity of the state's voting laws depends on disparate impact . . . it is essential to look at everything (the 'totality of circumstances,' §2(b) says) to determine whether there has been such an impact. Otherwise §2 will dismantle every state's voting apparatus." *Id.* at 754. The Court noted, for example, that the

percentages of voters registering, voting in person, and registering while obtaining drivers' licenses were all affected by racial disparities. *Id.* "Yet it would be implausible to read §2 as sweeping away almost all registration and voting rules." *Id.*

Accordingly, the Seventh Circuit proceeded by looking "not at [the challenged act] in isolation but to the entire voting and registration system," and concluded that black voters "do not seem to be disadvantaged by Wisconsin's electoral system as a whole." *Id.* at 753. Minority turnout and registration in the State were high. *Id.* at 753-54. There was no finding "that photo ID laws measurably depress turnout in the states that have been using them." *Id.* at 751.

Further, the law at issue simply did "not qualify as a substantial burden on the right to vote." *Id.* at 748, citing *Crawford*, 553 U.S. at 198. The ability of each citizen to vote remained entirely within that citizen's control. The "district judge did not find that blacks or Latinos have less 'opportunity' than whites to get photo IDs. Instead the judge found that, because they have lower income, these groups are less likely to *use* that opportunity. And that does not violate §2." 768 F.3d at 753.

The Ninth Circuit utilized similar reasoning to reach a similar result in *Gonzalez v. Arizona*, 677 F.3d 383 (9th Cir. 2012) (en banc), *aff'd*, *Arizona v. Inter Tribal Council of Arizona, Inc.*, 133 S. Ct. 2247 (2013). The Court noted the principle 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, 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.

The Ninth Circuit still rejected the Section 2 claim, however, because the requisite causation had not been proved. 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.

B. According To the Fourth Circuit, Section 2 Is Violated If a Change in Voting Rules Has Any Racially Disproportionate Impact That Is Partly Due To "Social and Historical Conditions."

The Fourth Circuit adopted a very different approach when it enjoined North Carolina's repeal of laws allowing voters to register and vote on the same day ("same-day registration") and to vote in precincts

where they do not live ("out-of-precinct voting").[3] *League of Women Voters of North Carolina v. North Carolina*, 769 F.3d 224, 246 (4th Cir. 2014). Central to its decision was the fact that "African American voters disproportionately used those electoral mechanisms" and so were "disproportionately impact[ed]" by their repeal. *Id.* at 246.

The district court had considered the changes to North Carolina's same-day registration procedures within the larger context of all other registration methods offered under the law, including registration by mail, at state agencies, in officially sanctioned get-out-the-vote efforts, and during early voting. *NAACP v. McCrory*, 997 F. Supp. 2d 322, 350-51 (M.D.N.C. 2014). In its view, the fact that black "voters *preferred* to use SDR [same-day registration] over these methods does not mean that without SDR voters lack equal opportunity." *Id.* at 350. It conducted a similarly broad inquiry regarding out-of-precinct voting, noting its "minimal" use and the "ready availability of other methods of voting," and concluding that its repeal did not violate Section 2. *Id.* at 368. Its approach thus anticipated that of the Seventh Circuit, considering challenged statutes not "in isolation" but in relation "to the entire voting and registration system." *See Frank*, 768 F.3d at 753.

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[3] At the same time, the Court upheld the denial of a motion to enjoin laws shortening the early voting period and implementing a "soft rollout" of North Carolina's photo ID requirement. *Id.* at 236-37.

The Fourth Circuit rejected this approach root and branch, focusing instead on the racially disparate impact of the challenged statutes. It found that the district court abused its discretion by "waiving off disproportionately high African American use" of the repealed procedures "as mere 'preferences' that do not absolutely preclude participation . . . ." *League of Women Voters*, 769 F.3d at 243.

According to the Fourth Circuit, proof of a Section 2 violation requires two basic elements. First, a challenged procedure "must impose a discriminatory burden on members of a protected class." *Id.* at 240 (citation omitted). As the Fourth Circuit's opinion demonstrates, this simply means that the procedure must have a racially disparate impact – or, stated differently, that a disparate impact *is* the loss of equal opportunity referred to by Section 2. Second, that burden "must in part be linked to 'social and historical conditions'" relating to discrimination. *Id.* (citations omitted). The Fourth Circuit did not elaborate this vague standard or explain what kinds of social or historical "links" will – or, perhaps more tellingly, will not – establish it.[4] In any event, North Carolina was found to have violated Section 2 on the grounds that "the disproportionate impacts of eliminating same-day registration and out-of-precinct voting" were "clearly

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[4] The Seventh Circuit made a point of criticizing the Fourth Circuit's standard as failing to distinguish discrimination by the government from discrimination by other persons. *Frank*, 768 F.3d at 755.

linked to relevant social and historical conditions." *Id.* at 245.

C. The Differences in These Approaches Are Significant and Lead To Vastly Different Outcomes.

Important consequences flow from the choice between the standards adopted by the Fourth Circuit on the one hand and by the Seventh and Ninth Circuits on the other. Most obviously, the Fourth Circuit's standard makes it far more likely that any particular state law will be found to violate Section 2. The Fourth Circuit does not require voters to show that they face a burden that is substantial or beyond their practical control. Instead, Section 2 claimants challenging an electoral practice need only establish a racially disproportionate impact – *and almost every statute will have such an impact* – plus a general history of discrimination, regardless of whether it can be tied to the loss of any particular electoral opportunity.[5]

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[5] Under this standard, the effect of a statute on turnout or registration in actual elections becomes largely irrelevant. *See, e.g., Ohio State Conference of N.A.A.C.P. v. Husted*, 768 F.3d 524, 551 (6th Cir. 2014), *stayed*, 135 S. Ct. 42 (2014), *vacated,* No. 14-3877 (6th Cir. Oct. 1, 2014) (using this standard to argue that Section 2 may be violated even if plaintiffs do not show that "voter turnout would necessarily be decreased overall"). By contrast, the Seventh Circuit treated evidence of turnout and registration as probative, if not dispositive, of the ultimate inquiry. *Frank*, 768 F.3d at 751, 753-54.

In practice, courts applying the Fourth Circuit's approach have enjoined state statutes that seemed to inflict minimal burdens on voters. For example, the Sixth Circuit found that a reduction of Ohio's early voting period from 35 to 28 days constituted a race-based burden sufficient to violate federal voting law. 768 F.3d at 539, 555. And in this case, the Fourth Circuit found that the elimination of same-day registration (which 36 states do not even offer[6]) and out-of-precinct voting (which a majority of states do not allow[7]) violated Section 2. The Court made these findings notwithstanding the fact that a citizen may "overcome" these "obstacles" simply by using another available method to register and by voting in that citizen's own precinct.[8]

A second consequence of the Fourth Circuit's ruling is that it imports a new, race-based element into the enforcement of Section 2. The only way to

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6 *See McCrory*, 997 F. Supp. 2d at 351.

7 *Id.* at 367.

8 The Court also ignored undisputed evidence showing that minority turnout and registration actually increased in the May 2014 primaries held after the challenged laws were passed. *McCrory*, 997 F. Supp. 2d at 375 n. 72. This fact was discounted as having little predictive power when it came to likely turnout in the general election. *See id.*; *North Carolina v. League of Women Voters of North Carolina*, 135 S. Ct. 6, 7 (2014) (Ginsburg, J., dissenting). As it happened, however, minority turnout and registration also increased in the November 2014 general election. *See* 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.

give meaning to the requirement that a racially disproportionate impact must be linked to "social and historical conditions" relating to discrimination is to assume that this refers to our lamentable national history of discrimination against African Americans and other racial minorities. If so, then a corollary of this requirement is that white voters can never successfully allege a claim of "vote denial" under Section 2. Yet no court has ever held that Section 2 is race-based in this way. To the contrary, successful vote denial claims have been brought on behalf of white voters. *See U.S. v. Brown*, 561 F.3d 420 (5th Cir. 2009).

The final result of the Fourth Circuit's ruling is evident from the foregoing considerations: it serves to prevent state legislatures from repealing any statute that is disproportionately utilized or favored by minority voters. For this reason, petitioners are correct to suggest that the Fourth Circuit's ruling effectively incorporates into Section 2 the retrogression standard applied in cases brought under Section 5 of the Voting Rights Act. *See* Petition For Writ Of Certiorari, No. 14-780 (Dec. 30, 2014) at 16 and cases cited therein. Petitioners are also correct that a long line of Supreme Court precedent makes clear that Sections 2 and 5 have different functions and that this is an improper application of Section 2. *Id.; see, e.g., League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 446 (2006) (discussing differences); 52 U.S.C. § 10304.

II. THIS CASE PRESENTS AN IMPORTANT AND RECURRING ISSUE AFFECTING HOW STATES CONDUCT THEIR ELECTIONS.

The choice of electoral rules is one of the central constitutive actions undertaken by a state government. Accordingly, the power to make such rules is, in most circumstances, reserved to the states. *See* U.S. CONST. art. I, § 4.

Section 2 of the Voting Rights Act is probably the most important federal statute regulating state elections. Where it is violated, a federal court ordinarily will enjoin the relevant state laws. Thus, a proceeding invoking Section 2 is not unlike a constitutional adjudication in its import and practical effect. The proper interpretation of Section 2 is always a matter of vital importance.

The issues presented in this case are certain to recur in the coming months and years. There are current, ongoing federal litigations concerning Section 2 "vote denial" claims in Wisconsin, Ohio, and Texas, as well as North Carolina. In addition, several other states are considering new election integrity measures involving a variety of issues, including the measures discussed in North Carolina.

The National Conference of State Legislatures (NCSL) reports that 14 state legislatures considered either new photo or voter ID laws or amendments to

existing laws in 2014.[9] Just since the start of 2015, New Mexico,[10] Nebraska,[11] and Nevada[12] have introduced plans to adopt new voter ID laws. Section 2 challenges to these measures are certain to arise. The NCSL also reports that state utilization of early voting and same-day registration procedures are in constant flux.[13] At present, every time one of those statutes is altered or repealed, a Section 2

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[9] The states were Illinois, Iowa, Maryland, Massachusetts, Minnesota, Nebraska, New York, West Virginia, Alaska, Colorado, Kentucky, Missouri, New Hampshire, and Oklahoma. National Conference of State Legislatures, *Voter Identification Requirements*, Oct. 31, 2014, available at http://www.ncsl.org/research/elections-and-campaigns/voter-id.aspx.

[10] Kayla Ayres, *NM Lawmaker Pushing For Voter ID Requirements*, KRQE NEWS, Jan. 5, 2015, available at http://krqe.com/2015/01/05/nm-lawmaker-pushing-for-voter-id-requirements/.

[11] Zach Pluhacek, *Group Threatens Litigation If Lawmakers Pass Voter ID Bill,* LINCOLN JOURNAL STAR, Jan. 10, 2015, available at http://columbustelegram.com/news/state-and-regional/group-threatens-litigation-if-lawmakers-pass-voter-id-bill/article_62c284fc-3634-5d12-898e-c0440a8f6047.html.

[12] Laura Myers, *Shift To GOP Control In Carson City Could Boost Voter ID Law,* LAS VEGAS REVIEW-JOURNAL, Jan.11, 2015, available at http://www.reviewjournal.com/news/nevada-legislature/shift-gop-control-carson-city-could-boost-voter-id-law.

[13] National Conference of State Legislatures, *Absentee and Early Voting*, Oct. 21, 2014; and *Same Day Voter Registration*, Jan. 20, 2015; available at http://www.ncsl.org/research/elections-and-campaigns/absentee-and-early-voting.aspx, and http://www.ncsl.org/research/elections-and-campaigns/same-day-registration.aspx.

lawsuit is possible given the Fourth Circuit's jurisprudence.

The issue of reconciling citizens' and states' legitimate interest in election integrity with the anti-discrimination provisions of the Voting Rights Act has broad public importance. Moreover, the time to clarify the appropriate standard is now, rather than in a rush in the few weeks before the next federal election. For all of these reasons, prompt consideration by this Court is warranted.

CONCLUSION

For the foregoing reasons, *amici* respectfully request that this Court grant the Petition for Writ of Certiorari to review the Fourth Circuit's ruling.

Respectfully submitted,

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