No. 16-833

IN THE
Supreme Court of the United States

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

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

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

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

Dated: January 26, 2017

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.). *Amici* notified counsel and requested consent from counsel of record for all parties. Petitioners and League of Women Voters Respondents have given their consent. However, as of the date of this filing, the other Respondents have not answered *amici*'s request for consent. Accordingly, *amici* move for leave to file the attached brief.

The issues in this case are important to the nation and to *amici*. The Fourth Circuit erred by allowing the racially disproportionate use of particular electoral procedures to count as evidence of electoral harm whenever those procedures are in any way altered. At the same time, the Fourth Circuit dismissed evidence that was far more probative of true electoral advantage or disadvantage, namely, evidence concerning registration and turnout by African American voters under the challenged voting procedures.

Amici are principally concerned that the Fourth Circuit's decision will subject state laws regarding electoral procedures to unremitting attacks on the grounds that one or another statistical analyses shows a disproportionate racial use of such

procedures, even where this has no effect on the true electoral power of racial groups – indeed, perversely, even where this effect is positive. The consequences of this new electoral dynamic, to the extent that they can be foreseen, are all bad. As a practical matter, every change to state electoral law will be subject to a serious and viable challenge. State electoral law will become largely a federal matter, to be determined and approved in federal court. Even more disturbing, because this massive distortion of our political system relies on the wrong evidence of electoral harm, it ultimately may injure the minority voters it was meant to help.

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

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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.

Amici believe that the decision by the U.S. Court of Appeals for the Fourth Circuit, if allowed to stand, will enshrine a new standard of proof, which does not require an adequate showing of discriminatory effect, to establish a violation of Section 2 of the Voting Rights Act and of the Fourteenth Amendment. The Fourth Circuit's approach is contrary to the Court's precedents and threatens great harm.

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[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.

For these and other reasons set forth below, *amici* urge the Court to grant the pending petition for certiorari.

SUMMARY OF ARGUMENT

Plaintiffs claiming intentional discrimination in violation of the Fourteenth Amendment and Section 2 of the Voting Rights Act must allege and prove both a discriminatory purpose *and* a discriminatory effect. The Fourth Circuit erred by allowing the wrong kind of evidence to establish the necessary discriminatory effect. Its decision relied on the fact that particular electoral procedures were disproportionately used by African Americans to conclude that the alteration or repeal of those procedures injured African American voters. The Fourth Circuit compounded this error by giving no weight to evidence showing that African American registration and turnout, which ought to be the true measures of electoral participation and power, were not diminished by any of the challenged voting procedures.

If allowed to stand, the Fourth Circuit's decision will cause great harm. Every election law would be subject to a viable challenge. States would be well advised simply to avoid changing such laws, and electoral procedure would, in practice, become a matter for the federal courts. Even worse, using criteria that are only accidentally related to true electoral power to judge electoral procedures will lead to outcomes that are arbitrary, or even

perverse, insofar as they decrease minority participation in elections.

The Fourth Circuit's decision is not the first to address the issue of how to establish discriminatory effect. Several courts of appeal have considered the matter, and their decisions plainly conflict. The Court should grant the petition for certiorari in order to resolve a pronounced split between courts of appeal regarding this issue.

ARGUMENT

THE FOURTH CIRCUIT ERRED BECAUSE ITS FINDING OF DISCRIMINATORY INTENT WAS NOT ACCOMPANIED BY THE REQUIRED FINDING OF A TRUE DISCRIMINATORY EFFECT.

I. To Establish Intentional Discrimination Under Either the Equal Protection Clause or the Voting Rights Act, a 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 that violate the Equal Protection Clause, 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) (citation omitted) (applying this two-prong purpose and effect test to a Fourteenth Amendment intent claim

challenging Indiana's legislative reapportionment). In *Bandemer*, 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) ("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 to establish claims of intentional

discrimination 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*, 442 U.S. at 272); *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").

II. The Fourth Circuit Erred by Treating Statistical Disparities Regarding the Use of Electoral Procedures as Proof of a Discriminatory 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. *North Carolina State Conf. of the NAACP v. McCrory*, 831 F.3d 204, 216 (4th Cir. 2016). 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. *Id.* at 216-18, 230. 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 for an *Arlington Heights* analysis." *Id.* at 231.

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 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). *Id.* at 230, 232-33. 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. *Id.* 220-221, citing 429 U.S. at 266. This discussion in *Arlington Heights* is not 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 Petitioners to rebut claims by Respondents that enforcement of some of the provisions[2] of SL 2013-381 has a discriminatory effect. That evidence showed, as noted by the Fourth

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[2] 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. *Id*. at 242 (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 Petitioner.

Circuit, that black voter "aggregate turnout increased by 1.8% in the 2014 midterm election as compared to the 2010 midterm election." *Id.* at 232.[3] 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 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.

Id. (emphasis added). The Fourth Circuit added that 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." *Id.*[4]

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[3] 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.

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 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).[5] The fact that minority voters

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[4] The evidence comparing the black turnout in the 2010 and 2014 midterm elections was introduced by Petitioners 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." *Id*. (citations omitted). 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.

[5] 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

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 prove this. 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 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 in elections 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 demonstrably and predictably leads to lower minority participation in elections. The Fourth

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is still a statutory factor in assessing whether to terminate the use of federal observers. 52 U.S.C. § 10309.

Circuit's reasoning provides no principled way to decide which set of plaintiffs should prevail, those in the instant case, or those in this hypothetical.

This issue is 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.[6] Indeed, 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

[6] 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." 831 F.3d at 232. 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 *Respondents'* 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 Carolina State Conf. of the NAACP v. McCrory,* Case No. 1:13CV658 (M.D.N.C. 2016), ECF No. 184 at 41 & n.30.

> 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.[7]

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

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[7] *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.

[8] *Id.* at 97.

> This result is counterintuitive, and it certainly runs against the grain of conventional wisdom.[9]

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 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. . . . *Arlington Heights* requires nothing of the kind." *McCrory*, 831 F.3d at 230. But the phrase "options remaining" is clearly referring to what type of voting opportunities are available to minority voters after

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[9] 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).

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." *Id.* at 231. 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." *Id.* (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.

III. The Fourth Circuit's Error Highlights an Unresolved Split Between Circuits Regarding the Kind of Evidence Necessary to Show Discriminatory Effect.

As described above, the Fourth Circuit based its finding of discriminatory effect in part on the fact "that African Americans disproportionately used each of the removed mechanisms" (831 F.3d at 231), while discounting far more probative evidence concerning minority turnout and registration in actual elections. This ruling places it on one side of a major divide between federal courts of appeal over how to show a discriminatory effect under Section 2 of the Voting Rights Act.

The Fifth Circuit utilized a similar approach in *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 "results" claim, the Court applied a two-step framework to show the requisite discriminatory effect. 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.

A wholly contrary approach was adopted in *Frank v. Walker,* 768 F.3d 744 (7th Cir. 2014). In that case, 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 effect on minorities." *Id.* at 753. "[W]hen 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 v. Marion County Election Bd.*, 553 U.S. 181, 198 (2008). 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." *Id.* 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 sub nom. 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, 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.

The confusion engendered by the disagreement among the courts of appeal as to how to establish a discriminatory effect was reflected in *Ohio Democratic Party v. Husted*, 834 F.3d 620 (6th Cir. 2016). Praising the two-step framework utilized by the Fourth and Fifth Circuits as "helpful," the Sixth Circuit added a crucial qualification: 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. The Sixth Circuit emphasized that there must be "proof that the challenged standard or practice causally contributes to the alleged discriminatory impact." *Id.* at 638. Only "[i]f this first element is met" does "the second step come[] into play." *Id.* Thus, the

Sixth Circuit's standard resembles the Fourth and Fifth Circuits' standards in form, but follows the Seventh and Ninth Circuits' standards in substance.

There is, in sum, a pronounced circuit split as to how to establish the discriminatory effect necessary to show either an intentional or a "results" claim under Section 2. The Fourth and Fifth circuits espouse a relaxed standard, by which a general history of discrimination can turn almost any statistical disparity regarding the use of electoral procedures by different racial groups into an actionable, discriminatory "effect." Cleaving more closely to the language of Section 2, the Seventh and Ninth Circuits require that a challenged practice be a direct *cause* of a diminishment in a protected group's opportunity to participate in the electoral process. The Sixth Circuit requires the same showing of causation, although it confusingly couches its standard in terms borrowed from the Fourth Circuit. The guidance of the Court is necessary to resolve this impasse.

CONCLUSION

For the foregoing reasons, *amici* respectfully request that the Court grant the petition for a writ of certiorari.

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

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