IN THE SUPREME COURT OF THE UNITED STATES

No. 16A168

NORTH CAROLINA, ET AL., APPLICANTS

v.

NORTH CAROLINA STATE CONFERENCE OF THE NAACP, ET AL.

ON EMERGENCY APPLICATION TO RECALL AND STAY THE MANDATE OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT PENDING THE RESOLUTION OF A PETITION FOR A WRIT OF CERTIORARI

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The Solicitor General, on behalf of the United States, respectfully files this memorandum in opposition to the emergency application to recall and stay the mandate of the Fourth Circuit pending the filing and disposition of a petition for a writ of certiorari.

INTRODUCTION

This is a case about the use of race to achieve partisan ends. In 2013, as "African American registration and turnout rates * * * finally reached near-parity with white registration and turnout rates," Appl. App. 10a, the North Carolina

legislature adopted a series of measures restricting access to the right to vote. Those new measures "target[ed] African Americans with almost surgical precision." Id. at 11a. That was no accident. Indeed, "in what comes as close to a smoking gun as we are likely to see in modern times, the State's very justification for [the] challenged statute hinge[d] explicitly on race -- specifically its concern that African Americans, who had overwhelmingly voted for Democrats, had too much access to the franchise." Id. at 40a. Based largely on the district court's own subsidiary findings and undisputed evidence, the court of appeals determined that North Carolina had intentionally adopted its new restrictions in order to inhibit voting by African-Americans, and that the district court's contrary finding was clearly erroneous.

Now, seventeen days after the court of appeals' ruling, a full eleven days after the court rejected applicants' motion for a stay, applicants have asked this Court for an "emergency" order to stay the court of appeals' remedial order. But once an electoral law has been found to be racially discriminatory, and injunctive relief has been found to be necessary to remedy that discrimination, the normal rule is that the operation of the law must be suspended. Failing to follow that general rule here would inflict irreparable injury on minority voters.

Applicants claim that emergency relief is necessary to avoid "mistakes and confusion." Appl. 29-30. But applicants fail to explain why, if there was a genuine "emergency," they waited so long to seek relief. Worse still, applicants fail even to acknowledge that they previously made representations, on which the court of appeals expressly relied, that the State "would be able to comply with any order [the court] issued by late July." Appl. App. 101a. In fact, the State is well on its way to implementing the court's order. And even now, applicants do not identify any reason they will be unable to fully and effectively implement the court's remedial order in time for the next election. Staying that order now would dramatically increase, not reduce, the risk of mistakes and confusion.

Applicants also raise no issue that warrants review. The court of appeals correctly concluded that the evidence overwhelmingly establishes discriminatory intent, and that fact-bound conclusion does not merit review. Every premise of applicants' attack on the court's decision is wrong.

Applicants' oft-repeated assertion that the law has been "judicially established to be free of any discriminatory effect," Appl. 18, is incorrect. The court of appeals in fact found that each of the challenged practices had a discriminatory effect, and that cumulatively the restrictions result in greater

disenfranchisement than any of the law's provisions individually. See, e.g., Appl. App. 49a-55a.

Applicants' other arguments fare no better. Applicants assert that the invalidation of North Carolina's law "renders every voter-ID law vulnerable to invalidation as purposefully discriminatory." Appl. 19 (capitalization altered). But the court of appeals' decision does no such thing. The decision rests on a careful appraisal of overwhelming evidence specific to North Carolina, which demonstrates that its voter ID law was expressly fashioned to disadvantage minority voters as a means of achieving partisan ends. The only voter ID laws that the decision endangers are those proven through overwhelming evidence to have been adopted with racially discriminatory intent.

Applicants also accuse the court of appeals of "sub silentio importation of retrogression principles" that were invalidated in Shelby County v. Holder, 133 S. Ct. 2612 (2013). Appl. 24. Applicants' use of the phrase sub silentio speaks volumes: It indicates that there is nothing actually in the court's decision to support their reading of it. And, far from importing Section 5 retrogression standards, the court of appeals faithfully followed this Court's decision in Arlington Heights, finding first that plaintiffs had proven that race was a motivating factor in the enactment of the challenged voting

restrictions, and second that the State had failed to show that it would have enacted the same legislation had race not been a factor.

Applicants attempt to take refuge in the district court's finding that the North Carolina legislature did not act with racially discriminatory intent. But as the court of appeals explained, the district court's own subsidiary findings and the undisputed evidence unmistakably revealed that the legislature acted with racially discriminatory intent. The district court's contrary finding was therefore clearly erroneous.

For those reasons, the application for emergency relief should be denied so that North Carolina's upcoming election can be conducted under procedures, which the State has already begun implementing, that are free from the taint of racial discrimination.

STATEMENT

Section 2 of the Voting Rights Act of 1965 effects a "permanent, nationwide ban on racial discrimination in voting." Shelby Cnty. v. Holder, 133 S. Ct. 2612, 2631 (2013). It prohibits any "voting qualification or prerequisite to voting or standard, practice, or procedure" that "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 of Section 2 is established when members of a minority

group "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).

In 2013, North Carolina enacted an omnibus elections bill, called HB 589, that restricted opportunities for citizens to register, vote, and have their ballots counted. The court of appeals invalidated HB 589 under Section 2 and the Equal Protection Clause based on its conclusion that the law was adopted with the purpose of abridging the electoral opportunities of African-American voters. The court also denied a request to recall and stay its mandate.

1. Between 2000 and 2012, voter registration in North Carolina soared, driven disproportionately by growth in African-American registration. Appl. App. 13a (African-American registration increased more than three times faster than white registration). As a result, by 2008, the percentage of African-Americans who were registered to vote surpassed the percentage of whites for the first time since Reconstruction. C.A. App. 807. Turnout increases followed, Appl. App. 13a, and African-Americans voted at rates higher than whites in both the 2008 and 2012 presidential elections, C.A. App. 1193-1197, 1268-1269. "Not coincidentally, during this period North Carolina emerged as a swing state in national elections," Appl. App. 13a, in large part due to the fact that "in North Carolina, African-

American race is a better predictor for voting Democratic than party registration," id. at 37a-38a (citation omitted).

2. As initially passed by the North Carolina House of Representatives, HB 589 was a short bill focused primarily on adopting a photo ID requirement for voting. Appl. App. 41a. It permitted a wide variety of government-issued IDs, allowing any photo ID that was currently valid or had expired within the past ten years and had been "issued by a branch, department, agency, or entity of the United States, this State, or any other state." C.A. App. 2115. The bill provided specific examples of approved IDs, including government employee IDs, public university student IDs, and public assistance IDs. Ibid. The bill did not address the other voting practices at issue here, such as same-day registration, early voting, out-of-precinct provisional ballots, or the preregistration of 16- and 17-year-olds.

Within a day of this Court's decision in Shelby County, the chairman of the Senate Rules Committee announced that there would be an "omnibus bill coming out" and that the Senate would move forward with the "full bill." Appl. App. 14a (citation omitted). The new HB 589 included multiple provisions that restricted voting and registration, including a far more stringent photo ID requirement. As the bill was being considered, "the legislature requested and received racial data as to usage of the practices changed by the proposed law."

Ibid. The data included a breakdown of ownership of DMV-issued IDs by white and African-American North Carolinians. Id. at 15a.

3. Passed strictly along party lines, HB 589 "restricted voting and registration in five different ways, all of which disproportionately affected African-Americans." Appl. App. 10a.

(1) Voter ID. "[T]he new ID provision retained only those types of photo ID disproportionately held by whites and excluded those disproportionately held by African Americans." Appl. App. 43a. Government employee IDs, student IDs, most expired DMV-issued IDs, and public assistance IDs were all eliminated from the list of approved IDs. Id. at 14a-15a; see C.A. App. 24,001-24,003.

(2) Early voting. North Carolina had previously permitted seventeen days of early voting. Racial data showed that "African Americans disproportionately used the first seven days of early voting" in particular. Appl. App. 16a. "After receipt of this racial data, the General Assembly amended the bill to eliminate the first week of early voting." Ibid. That amendment had the consequence of "eliminat[ing] one of the two 'souls-to-the-polls' Sundays in which African American churches provided transportation to voters." Ibid. (citation omitted).

(3) Same-day registration. Prior law had permitted voters to register in person at an early voting site and cast their

ballots the same day. Racial data showed that "African American voters disproportionately used same-day registration." Appl. App. 16a-17a (brackets and citation omitted). African-American voters were also more likely to be in the "incomplete registration queue"; "more likely to move between counties" and thus "to need to re-register"; and more likely to benefit from "in-person assistance" in registering, which same-day registration makes available. Id. at 17a (citation omitted). HB 589 eliminated same-day registration. Ibid.

(4) Out-of-precinct voting. Prior law had "required the Board of Elections in each county to count the provisional ballot of an Election Day voter who appeared at the wrong precinct, but in the correct county, for all of the ballot items for which the voter was eligible to vote." Appl. App. 17a. Racial data showed that "African Americans disproportionately used * * * out-of-precinct voting." Id. at 48a. HB 589 eliminated provisional out-of-precinct voting. Id. at 18a.

(5) Preregistration. Prior law had permitted 16- and 17-year-olds to preregister, which "allowed County Boards of Elections to verify eligibility and automatically register eligible citizens once they reached eighteen." Appl. App. 18a. Racial data showed that "African Americans also disproportionately used preregistration." Ibid. HB 589 eliminated preregistration. Ibid.

4. Following HB 589's enactment in August 2013, private plaintiffs and the United States filed suit against the law. The district court denied motions for preliminary relief. North Carolina State Conference of the NAACP v. McCrory, 997 F. Supp. 2d 322, 334 (M.D.N.C. 2014). On appeal, the Fourth Circuit found "numerous grave errors of law" in the district court's Section 2 analysis, League of Women Voters of N.C. v. North Carolina, 769 F.3d 224, 241 (2014), cert. denied, 135 S. Ct. 1735 (2015), and remanded with instructions to reinstitute same-day registration and out-of-precinct voting, id. at 248-249. The court of appeals' decision was issued on October 1, 2014.

This Court recalled and stayed the mandate. North Carolina v. League of Women Voters of N.C., 135 S. Ct. 6 (2014). As a result, HB 589's changes to early voting, same-day registration, and out-of-precinct voting were put in place for the midterm election. (Under HB 589, the voter ID provision would not go into effect until after the election.) Many fewer North Carolinians voted in the 2014 midterm than typically vote during a presidential election year. Nevertheless, "11,993 people registered to vote during the ten-day early-voting period" -- that is, the time period when same-day registration would otherwise have been available but for HB 589 -- and thus were unable to vote in the election. N.C. State Conference of the NAACP v. McCrory, No. 13-cv-658 2016 U.S. Dist. LEXIS 55712, at

*223 (M.D.N.C. Apr. 25, 2016) (NCNAACP). African-Americans made up a disproportionate percentage of that group. Id. at *224-*225. In addition, 1387 provisional ballots were not counted during the election because they were out-of-precinct ballots. Id. at *239. "African American voters disproportionately cast [those] ballots" that were not counted. Ibid.

5. After the petition for a writ of certiorari was denied, the court of appeals' injunction went back into effect. During North Carolina's 2015 elections, same-day registration and out-of-precinct provisional voting were permitted in accordance with North Carolina's pre-HB 589 law. Shortly before trial on the merits, the North Carolina General Assembly passed House Bill 836 (HB 836), which modified HB 589's photo ID requirements. See N.C. Gen. Stat. §§ 163-166.13(c)(2), 163-166.15 (2015). This modification allowed in-person voters without an acceptable photo ID to cast a provisional ballot, so long as they completed a declaration explaining that they have a reasonable impediment to obtaining a qualifying photo ID.

Trial on the merits was bifurcated: The district court addressed all claims except those challenging the voter ID provision in July 2015; it addressed the voter ID claims in January 2016. Following amendment of the voter ID requirements by HB 836, defendants' counsel asserted that they were "not arguing [HB] 836 cured any alleged intent from [HB] 589."

1/28/16 Tr. at 77 (P. Strach); see Tr. at 74 (P. Strach) ("I am not aware of anywhere we've argued that [HB] 836 was curative of any alleged discriminatory intent in [HB] 589."). The court took note of that concession, stating that "Defendants have just admitted that they are not arguing somehow the passage of [HB] 836 purges any discriminatory intent as to [HB] 589." Tr. at 79 (Court). After trial, on April 25, 2016, the court entered an opinion and final judgment rejecting all of plaintiffs' claims. NCNAACP, 2016 U.S. Dist. LEXIS 55712.

6. On July 29, 2016, the court of appeals reversed. Appl. App. 1a-83a. The court moved step-by-step through the factors articulated in Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977), for identifying governmental action motivated by race. Based in substantial part on "undisputed" facts, Appl. App. 41a, 55a, the court determined that HB 589 was "enacted with racially discriminatory intent," id. at 23a. Among other things, the court found:

- "Unquestionably, North Carolina has a long history of race discrimination generally and race-based vote suppression in particular." Id. at 31a. "The record is replete with evidence of instances since the 1980s in which the North Carolina legislature has attempted to suppress and dilute the voting rights of African Americans." Id. at 33a. "Only the robust protections of Section 5 and suits by private plaintiffs under Section 2 of the Voting Rights Act prevented those efforts from succeeding." Id. at 37a.

- "[R]acially polarized voting between African Americans and whites remains prevalent in North Carolina," such that, "[a]s one of the State's experts conceded, 'in North Carolina, African-American race is a better predictor for voting Democratic than party registration.'" Id. at 37a-38a (quoting C.A. App. 21,400).

- The legislature "knew that, in recent years, African Americans had begun registering and voting in unprecedented numbers," and that "much of the recent success of Democratic candidates in North Carolina resulted from African American voters overcoming historical barriers and making their voices heard to a degree unmatched in modern history." Id. at 38a.

- "[I]mmediately after Shelby County, the General Assembly * * * rushed through the legislative process the most restrictive voting legislation seen in North Carolina since enactment of the Voting Rights Act of 1965." Id. at 41a. "[U]ndisputed" evidence shows that the legislature departed from normal legislative procedures in ways that "are devastating" in their "obvious" implications. Ibid. (brackets omitted).

- "[P]rior to and during the limited debate on the expanded omnibus bill, members of the General Assembly requested and received a breakdown by race of" voting practices and forms of government-issued ID. Id. at 48a.

- HB 589 "target[ed] African Americans with almost surgical precision," id. at 11a, by eliminating each of the mechanisms used "disproportionately" by African Americans, id. at 51a. For example, "[t]he district court specifically found that 'the removal of public assistance IDs' in particular was 'suspect.'" Id. at 53a (quoting NCNAACP, 2016 WL 1650774, at *142).

- Unlike the challenged practices, the legislature knew that "African Americans did not disproportionately use absentee voting; whites did." Id. at 48a. Whereas HB 589 required photo ID for early and regular in-person voting, it "exempted absentee voting from the photo ID requirement." Ibid.

- To justify why it eliminated one of the two early-voting Sundays, the State explained that "'counties with Sunday voting in 2014 were disproportionately black' and 'disproportionately Democratic.'" Id. at 39a (brackets omitted) (quoting C.A. App. 22,348-22,349) (brackets omitted). "Thus, in what comes as close to a smoking gun as we are

likely to see in modern times, the State's very justification for a challenged statute hinge[d] explicitly on race -- specifically its concern that African Americans, who had overwhelming voted for Democrats, had too much access to the franchise." Id. at 40a.

- "[R]ecord evidence provides abundant support" for the conclusion that HB 589 had a "disproportionate impact" on African-American voters. Id. at 51a. "[C]umulatively, the panoply of restrictions results in greater disenfranchisement than any of the law's provisions individually." Id. at 52a.

- In the 2014 midterm election, in which HB 589 was in effect, "many African American votes went uncounted." Id. at 54a. "African Americans disproportionately cast provisional out-of-precinct ballots, which would have been counted absent [HB 589]. And thousands of African Americans were disenfranchised because they registered during what would have been the same-day registration period but because of [HB 589] could not then vote." Ibid. (internal citations omitted).

- A focus solely on turnout percentages from the 2014 midterm election -- i.e., the voting rates of white and African-American voters in that election -- would be misleading. "[F]ewer citizens vote in midterm elections, and those that do are more likely to be better educated, repeat voters with greater economic resources." Ibid. In any event, the 2014 election involved "a significant decrease in the rate of change" for African-American turnout. Id. at 54a-55a.

- In justifying the voter ID requirement, the State "failed to identify even a single individual who has ever been charged with committing in-person voter fraud in North Carolina." Id. at 61a. By contrast, "the General Assembly did have evidence of alleged cases of mail-in absentee voter fraud." Ibid. "The General Assembly then exempted absentee voting from the photo ID requirement." Id. at 62a.

- The photo ID requirement contains "seemingly irrational restrictions unrelated to the goal of combatting fraud," which is "most stark in the General Assembly's decision to exclude as acceptable identification all forms of state-issued ID disproportionately held by African Americans." Ibid.

- The State sought to justify the reduction in early voting days as necessary to "eliminate inconsistencies between counties," yet "the challenged provision actually promotes inconsistency

in the availability of early voting across North Carolina." Id. at 64a (emphasis altered).

- The State argued that it eliminated same-day registration "as a means to avoid administrative burdens," but the supposed remedy failed "to accomplish its purpose." Id. at 66a. The State Board of Elections announced that same-day registration "'was a success'" and "'does not result in the registration of voters who are any less qualified or eligible to vote than' traditional registrants." Ibid. (quoting C.A. App. 1529, 6827).

- "Recognizing the weakness of [its] justification" for eliminating out-of-precinct voting, the State offered "post hoc rationalizations during litigation." Id. at 67a.

- The State's justification for eliminating preregistration was "to offer clarity and some certainty as to when a young person is eligible to vote." Id. at 68a (citation and internal quotation marks omitted). Yet even the district court acknowledged that "that explanation does not hold water," since "pre-registration's removal made registration more complex and prone to confusion." Ibid. (brackets, citation, and internal quotation marks omitted).

Based on those and other findings, the court of appeals concluded that "the totality of circumstances * * * cumulatively and unmistakably reveal that the General Assembly used [HB 589] to entrench itself * * * by targeting voters who, based on race, were unlikely to vote for the majority party." Id. at 56a.

The court of appeals acknowledged the district court's contrary finding, but found it to be clearly erroneous. The court of appeals explained that the district court had "missed the forest in carefully surveying the many trees," Appl. App. 9a; had "ignore[d] the critical link between race and politics in North Carolina," ibid.; and had "considere[d] each piece of

evidence in a vacuum, rather than engaging in the totality of the circumstances inquiry required by Arlington Heights," id. at 56a.

The court of appeals determined that invalidation of HB 589's challenged provisions was necessary to "completely cure the harm wrought by" those provisions. Appl. App. 73a. The court further held that HB 836, which had permitted voters to cast a provisional ballot without voter ID based on a "reasonable impediment" declaration, was insufficient to "fully cure[] the harm from the photo ID provision." Ibid.; see ibid. (noting the "lingering burden on African American voters"). The court issued its mandate on July 29, 2016. Later that day, the district court entered a permanent injunction in accordance with the court of appeals' ruling. Id. at 91a-94a.

7. On August 3, 2016, applicants moved the court of appeals to recall and stay the mandate pending disposition of a timely petition for a writ of certiorari. The court denied the motion the next day, explaining that its opinion had been issued in accordance with the timeline provided by the State itself during oral argument, at which the State had assured the court that "it would be able to comply with any order we issued by late July." Appl. App. 101a. The court pointed to representations the State had made that proofs for its "voter guide were not due until August 5, and that its election

official training would not begin until August 8." Ibid. The court further noted that the State had already issued a press release "notif[ying] its voters that it will not ask them to show ID and that early voting will begin on October 20." Ibid. The court concluded that recalling or staying the mandate "would only undermine the integrity and efficiency of the upcoming election." Ibid.

ARGUMENT

"Denial of * * * in-chambers stay applications is the norm; relief is granted only in extraordinary cases." Conkright v. Frommert, 556 U.S. 1401, 1402 (2009) (Ginsburg, J., in chambers) (internal quotation marks omitted). Applicants have not made the demanding showing required to obtain that extraordinary relief. Applicants' own admissions show that "recalling or staying the mandate now would only undermine the integrity and efficiency of the upcoming election." Appl. App. 101a. And on the merits, applicants simply ignore the actual basis for the court of appeals' decision, attacking instead a ruling that does not exist. The application should be denied.

A. Extraordinary Intervention By This Court Would Inflict Irreparable Injury On Minority Voters, Upend The Status Quo, And Cause Confusion

Laws motivated by racial discrimination have "no legitimacy at all," City of Richmond v. United States, 422 U.S. 358, 378 (1975), and must be "eliminated root and branch," Green v.

County Sch. Bd., 391 U.S. 430, 438 (1968). Once an election law has been found to be tainted by discriminatory intent, and injunctive relief found to be necessary to "fully eliminate the burden imposed by" that law, Appl. App. 75a, the normal rule is that operation of the law must be suspended. Allowing the use of racially discriminatory barriers to voting in any election would inflict irreparable injury on minority voters; doing so in a presidential election year would impose even greater harm.

This Court has recognized that "[c]ourt orders affecting elections, especially conflicting orders, can themselves result in voter confusion." Purcell v. Gonzalez, 549 U.S. 1, 4-5 (2006) (per curiam). Thus, in limited circumstances, it may be appropriate to postpone injunctive relief until after an upcoming election upon a showing that failure to do so would seriously interfere with orderly election processes.

Here, however, applicants' own representations demonstrate that this Court's intervention would upend expectations and sow confusion among voters and poll workers. This Court should not take the extraordinary step of overturning election preparations that already are well underway -- particularly since applicants themselves are very much to blame for any time constraints on effective intervention by the Court.

1. The court of appeals issued its ruling on July 29, 2016, and issued its mandate the same day. Also that same day,

the district court entered a permanent injunction in accordance with the court of appeals' ruling. Appl. App. 90a-94a. On August 3, applicants asked the court of appeals to recall and stay the mandate, contending that such action was necessary "to avoid disruptive changes to the election system." Resp. C.A. Mot. 10, N.C. State Conference of Branches of the NAACP v. McCrory, No. 16-1468.

The court of appeals denied applicants' request the next day, August 4, 2016, explaining that "recalling or staying the mandate now would only undermine the integrity and efficiency of the upcoming election." Appl. App. 101a. The court noted that "[t]he State has already notified its voters that it will not ask them to show ID and that early voting will begin on October 20," to allow seventeen days of early voting. Ibid. The court also pointed to "assur[ances]," offered by the State at oral argument, "that it would be able to comply with any order * * * issued by late July." Ibid. Applicants had told the court:

- The State was prepared to provide "voting locations and staffing" sufficient to accommodate seventeen days of early voting;
- the State could ensure compliance with an injunction against the photo ID requirement "by instructing its poll workers not to require photo ID";
- the State's election database "is already prepared to implement same-day registration and out-of-precinct voting"; and

- "proofs for [the State's] voter guide were not due until August 5, and * * * its election official training would not begin until August 8."

Ibid. "Because of these assurances," the court explained, it was "confident that North Carolina can conduct the 2016 election in compliance with [the court's] injunction." Ibid.

Following the court of appeals' denial of their motion, applicants took no further action for eleven days, until asking for this Court's "emergency" intervention on August 15, 2016. Although applicants assert that leaving the status quo in place "will confuse voters and precinct officials alike," Appl. 29, nowhere do they explain why that would be so. Even more remarkably, applicants fail even to acknowledge the representations they made to the court of appeals -- on which that court relied -- that the State "would be able to comply with any order * * * issued by late July." Appl. App. 101a. Finally, applicants say nothing whatsoever about the August 5 deadline for voter guide proofs or about the training of election officials that began August 8. Applicant's own prior representations confirm that "recalling or staying the mandate now would only undermine the integrity and efficiency of the upcoming election." Ibid.

2. Applicants' unsupported assertion that leaving in place the ruling below will "lead to mistakes and confusion," Appl. 29-30, also defies logic. Applicants ask this Court to

stay three aspects of the ruling, each of which reinstates a portion of North Carolina's election law as it existed for the 2012 presidential election: (a) preregistration for 16- and 17-year-olds; (b) the photo ID requirement; and (c) the requirement of seventeen days of early voting (rather than ten days). Yet applicants admit that the first aspect will have no effect on the upcoming election whether or not it is stayed; for the other two, preserving the status quo will substantially lower the risk of confusion and prejudicial mistakes.

(a) As to preregistration, applicants admit that the relief they request would not have any effect on the upcoming election. That is because "16-year-olds are not eligible to vote in that election anyway, and any 17-year-olds who are eligible may still register and vote regardless of the lack of preregistration." Appl. 30-31. Applicants thus invoke the upcoming election as a reason for this Court to grant emergency relief that, according to applicants, could not possibly affect that election.

(b) As to the photo ID requirement, as applicants themselves represented to the court of appeals, the State can simply "instruct[] its poll workers not to require photo ID," Appl. App. 101a, even assuming it has not yet done so, see ibid. (training for election officials began August 8). Indeed, even before the court of appeals denied applicants' stay motion,

"[t]he State ha[d] already notified its voters that it will not ask them to show ID." Ibid.; see N.C. State Board of Elections, Voter Registration FAQ ("Is photo ID required to vote now?")[1]; N.C. State Board of Elections, 2016 Judicial Voting Guide (Voting Guide) at 2 ("Voters will no longer be required to present photo identification at the polls.").[2]

Preserving the status quo is also far less likely than the alternative to cause harmful confusion. If the injunction is left in place, and a voter shows up with unnecessary photo ID, then no harm will result. But if the injunction were stayed, and a prospective voter shows up without the required ID, then his vote may not be counted. Applicants assert, without citation, that "[o]nly .008% of the 2.3 million votes cast [in the March 2016 primary] were not counted because a voter could not obtain photo ID or qualify for the reasonable impediment exception." Appl. 31. Yet applicants make no representation about how many other legally eligible voters stayed home because of those requirements. And even taking applicants' unsubstantiated statistic at face value, that means hundreds of North Carolinians -- "disproportionately" likely to be African-

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[1] http://www.ncsbe.gov/Voter-Information/VR-FAQ.

[2] http://www.ncsbe.gov/Portals/0/FilesP/PDF/2016_Voter_Judicial_Guide_Web.pdf.

American, Appl. App. 51a -- were denied the franchise in a low-turnout primary election, where voters "are more likely to be better educated, repeat voters with greater economic resources," id. at 54a. The number adversely affected in the 2016 presidential election is likely to be far higher.

(c) As to the week of early voting that HB 589 eliminated, the State is already implementing the court of appeals' ruling. On August 4, 2016, the State Board of Elections issued a memorandum to all county boards of elections outlining the procedures required to restore the full seventeen-day early voting period. NC SBOE, Numbered Memo 2016-11.[3] The memorandum instructed county boards to transmit early voting plans to the State by the close of business on August 19. The State Board of Elections has also been informing voters that early voting will take place "during a 17-day period, beginning October 20 and ending November 5." Voting Guide at 2. Thus, election officials are moving forward in compliance with the injunction, doing precisely what the court of appeals was assured would happen so long as it ruled "by late July." Appl. App. 101a.

Derailing that process now, by removing the first week of early voting, would likely cause substantial confusion. Under

[3] https://s3.amazonaws.com/dl.ncsbe.gov/sboe/numbermemo/2016/Numbered%20Memo%202016-11.pdf.

the status quo, voters who show up during the seventeen-day period, including voters who mistakenly believe that they have only ten days to vote early, will simply be able to vote. But if the injunction were stayed, then voters who show up during the eliminated first week will be turned away. Some of those voters may have altered their schedules in reliance on the availability of voting during that first week; others, having attempted and failed to navigate the process, may simply not return.

Moreover, lifting the injunction would cause harm even apart from potential confusion. As the State Board of Elections told the General Assembly, in "high-turnout elections" such as a presidential election, cutting back on early voting "would mean that 'traffic will be increased on Election Day, increasing demands for personnel, voting equipment and other supplies, and resulting in likely increases to the cost of elections.'" Appl. App. 65a (quoting C.A. App. 1700); see id. at 65a-66a ("increased costs, longer lines, increased wait times, understaffed sites, staff burn-out leading to mistakes, and inadequate polling places; or, in a worst case scenario, all of these problems together") (citation omitted). Those problems will bear particularly heavily on African-American voters, who "disproportionately use[] the first seven days of early voting." Id. at 16a.

3. Finally, the balance of equities weighs strongly against applicants. The State assured the court of appeals that it would be able to comply with any order issued "by late July," and the court acted within that timeframe. Appl. App. 101a. Applicants then waited seventeen days to move this Court for emergency intervention -- eleven of them after the court of appeals rejected a stay motion that largely tracks the arguments in this one. That chronology weighs strongly against rewarding applicants with equitable relief.

The cases cited by applicants, Appl. 28, in which this Court has stayed appellate rulings issued in late September or October, provide no support for doing so here. See League of Women Voters v. North Carolina, 769 F.3d 224 (4th Cir. 2014) (decided Oct. 1, 2014); Ohio State Conference of the NAACP v. Husted, 768 F.3d 524 (6th Cir. 2014) (decided Sept. 24, 2014); Frank v. Walker, 766 F.3d 755 (7th Cir. 2014) (decided Sept. 12, 2014), reconsideration denied, 769 F.3d 494 (decided Sept. 26 and opinions issued Sept. 30, 2014). Those cases did not involve representations by applicants to the court of appeals that they would be able to comply with injunctive relief in time for the next election if the court issued its decision by a certain date. Nor did the applicants act as slowly in seeking relief in this Court; each filed an emergency application within one or two days after the court of appeals acted. See North

Carolina, No. 14A358 (filed Oct. 2, 2014) (one day); Husted, No. 14A336 (filed Sept. 25, 2014) (one day); Frank, No. 14A352 (filed Oct. 2, 2014) (two days). And in all of those cases, the lower courts had ordered relief in far closer proximity to the next election.

B. The Court Is Unlikely To Grant Certiorari Or Reverse The Decision Below, Which Was Context-Specific And Correct

After a careful analysis of the factors this Court set forth in Arlington Heights, the court of appeals determined that that the largely undisputed evidence in the record "cumulatively and unmistakably" revealed that the North Carolina legislature enacted HB 589 to entrench itself "by targeting voters who, based on race, were unlikely to vote for the majority party." Appl. App. 56a. The court's fact-bound conclusion is correct and does not warrant review.

Applicants offer four reasons that this Court will elect to hear, and decide in their favor, an anticipated petition for a writ of certiorari. All four take aim at a ruling that does not exist. A review of the actual decision below shows that the court of appeals correctly applied well-settled principles to reach a highly fact-bound decision based on circumstances applicable to North Carolina and to HB 589.

1. The "threat" to photo ID laws nationwide

Applicants contend that the court of appeals' decision "threaten[s] the continued existence" of "voter-ID laws throughout the country." Appl. 19. That is so because, applicants contend, the court "drew an inference of discriminatory intent from the bare fact that voter-ID laws as a general matter have the potential to disparately impact minorities," Appl. 20, and from the fact that legislators were aware of that disparity, Appl. 20-21. But applicants' characterization of the decision below bears no relationship to what the court actually held.

a. As detailed above, see pp. 12-15, supra, the court of appeals did not draw an inference of discriminatory intent solely based on the potential for disparate impact from a generic ID law or from the legislature's awareness thereof. The many findings that support the court's decision include:

- The State has a long history of race-based voter suppression, including many instances after the 1980s in which it sought to suppress minority voting. Appl. App. 37a.
- In North Carolina, race is a better predictor of voting than party affiliation. Id. at 37a-38a.
- African-American turnout in the State had recently achieved historically unprecedented levels. Id. at 38a.
- In "an attempt to avoid in-depth scrutiny," id. at 44a, the legislature resorted to unprecedented procedural tactics in order to enact HB 589. Id. at 41a-44a.

- Legislators requested and received a breakdown by race of ownership of DMV-issued IDs. Id. at 48a.

- Legislators also received a racial breakdown of each of the other challenged practices. Ibid.

- Every practice disproportionately used by African-Americans was eliminated, whereas absentee voting -- used more often by whites -- was retained without change. Ibid.

- The legislature chose to "target[] African Americans with almost surgical precision," id. at 11a, by "retain[ing] only the kinds of IDs that white North Carolinians were more likely to possess," while "amend[ing] the bill to exclude many of the alternative photo IDs used by African Americans," id. at 15a.

- At the same time that it required photo ID for in-person voting, for which there was no relevant evidence of voter fraud, the State exempted from that requirement absentee voting, for which there was significant evidence of voter fraud. Id. at 61a-62a.

- In justifying its cutback on early voting, the State "explicitly" relied on the disproportionate impact it would have on African-American voters. Id. at 40a ("smoking gun").

- Each of the HB 589's voting restrictions disproportionately affected African-American voters; and "cumulatively," those restrictions "result[ed] in greater disenfranchisement than any of the law's provisions individually." Id. at 52a.

- Evidence from the 2014 midterm elections showed that HB 589 in fact disproportionately affected African-American voters and disenfranchised "thousands" of them. Id. at 54a.

- The State's purported justifications for HB 589 were self-contradictory, id. at 64a, demonstrably false, id. at 66a, 68a, and post-hoc, id. at 67a.

Those findings address the circumstances surrounding the enactment of North Carolina's election law, not the law of any other State; they overwhelmingly establish that North Carolina adopted HB 589, including the voter ID requirement, with a

racially discriminatory intent. Thus, far from threatening voter ID laws generally, the court of appeals' decision threatens only those ID laws for which the evidence overwhelmingly establishes that they were enacted with a racially discriminatory intent.

b. Applicants claim that North Carolina went to "unprecedented lengths" to ameliorate any burden that its voter ID law might impose. Appl. 21. Applicants point specifically to the State's decision to "add[] a robust reasonable impediment provision modeled after one used in" South Carolina. Ibid. But in making that argument, applicants conflate the 2013 passage of HB 589 with the passage of HB 836 in 2015, on the eve of trial. An after-the-fact amendment adopted in the midst of litigation hardly bears on the question whether HB 589 had been passed with discriminatory intent two years earlier. Moreover, applicants expressly waived the very argument they seek now to make for the first time: At trial, applicants disclaimed any suggestion that the 2015 legislation had removed the taint of discriminatory intent from HB 589. See 1/28/16 Tr. at 79 (Court) ("Defendants have just admitted that they are not arguing somehow the passage of [HB] 836 purges any discriminatory intent as to [HB] 589."); see also pp. 11-12, supra.

c. Applicants contend that the decision below conflicts with Crawford v. Marion County Election Board, 553 U.S. 181

(2008), but that decision has nothing to do with the claims in this case. The plaintiffs in Crawford brought a facial challenge to Indiana's voter ID requirement on the ground that it unduly burdened their right to vote under the balancing test set forth in Anderson v. Celebrezze, 460 U.S. 780 (1983), and Burdick v. Takushi, 504 U.S. 428 (1992). That test asks whether the "burden that a state law imposes" is "justified by relevant and legitimate state interests sufficiently weighty to justify the limitation." Crawford, 553 U.S. at 191 (plurality op.) (citation and internal quotation marks omitted). Emphasizing that the plaintiffs had brought a "preelection, facial attack" on the Indiana law, the Court concluded that "on the basis of the evidence in the record it [was] not possible to quantify * * * the magnitude of the burden on th[e] narrow class of voters" who lacked access to acceptable voting ID. Id. at 200.

Crawford has no bearing on the question at issue in this case: whether North Carolina's legislature acted with a racially discriminatory purpose in adopting HB 589. Crawford did not involve an allegation of racial discrimination, much less an allegation of intentional racial discrimination. Accordingly, Crawford did not involve any of the case-specific signifiers of discriminatory intent that the court of appeals relied upon in this case. See Appl. App. 60a (noting "fundamental differences between Crawford and this case"). And the lack of "any concrete

evidence of the burden imposed on voters" in Crawford, 553 U.S. at 201, stands in sharp contrast with the finding below of discriminatory impact on African-Americans, for which "record evidence provides abundant support," Appl. App. 51a.

In sum, the court below was asked to answer and did answer the question whether the North Carolina General Assembly "would have enacted [HB 589] if it had no disproportionate impact on African American voters. The record evidence establishes that it would not have." Appl. App. 61a.

2. Discriminatory impact

Applicants contend that the court of appeals erred in finding HB 589 to be "purposefully discriminatory even though it was judicially established to be free of any discriminatory effect." Appl. 18. Instead, applicants argue, "the very evidence that disproved discriminatory impact ought to have conclusively disproved discriminatory intent as well." Appl. 22. Applicants sound that theme early and often, see, e.g., Appl. 1, 3-4, 16, 18, 20-23, but it is based on factually and legally incorrect premises.

a. Applicants are demonstrably wrong in claiming that the court of appeals "did not disturb" the district court's findings as to discriminatory impact. Appl. 1. Instead, the court of appeals found "abundant support" for the conclusion that HB 589 bears more heavily on African-American voters, Appl. App. 51a, a

conclusion it drew almost entirely from "undisputed facts," id. at 55a. Such facts included "the district court's findings that African Americans disproportionately used each of the removed mechanisms, as well as disproportionately lacked the photo ID required by [HB 589]." Id. at 51a. The court of appeals also pointed to evidence regarding "the cumulative impact of the challenged provisions." Ibid.; see id. at 52a ("Together, these produce longer lines at the polls on Election Day, and absent out-of-precinct voting, prospective Election Day voters may wait in these longer lines only to discover that they have gone to the wrong precinct."). As the court explained, the district court "simply refused to acknowledge the[] import" of those undisputed facts. Id. at 55a.

b. Applicants argue that HB 589 could not have had a disproportionate effect on African-American voters because data from one post-enactment midterm election "revealed that minority turnout not only was not depressed, but actually increased under the new rules." Appl. 11. The court of appeals properly rejected the district court's reliance on that data as evidence of the absence of a discriminatory effect.

When, as here, a legislature intentionally erects racially discriminatory obstacles to voting that disproportionately affect minority voters, a Section 2 violation is established. A plaintiff can make the required showing by demonstrating that

the legislature, for racially discriminatory reasons, placed obstacles in the path of minority voters. There is no requirement that the plaintiff must further establish that turnout in the next election was depressed in comparison to the previous election. Under applicants' contrary view, a state could close every voting poll near a minority area for racially discriminatory reasons, and then successfully defend that egregious violation of Section 2 and the Fourteenth Amendment as long as minority turnout at the next election did not decrease. That is not the law.

Moreover, the court of appeals explained at length why the district court's finding that aggregate African-American turnout increased by 1.8% in the 2014 midterm election (as compared to the 2010 midterm election) was particularly uninformative in this case. Appl. App. 53a-54a. First, as this "Court has explained, courts should not place much evidentiary weight on any one election." Id. at 54a (citing Thornburg v. Gingles, 478 U.S. 30, 74-77 (1986)). Second, it is especially inappropriate to draw conclusions about a law intended to target minority voters in all elections -- and in presidential elections in particular -- based on evidence from a midterm election. "[F]ewer citizens vote in midterm elections, and those that do are more likely to be better educated, repeat voters with greater economic resources." Ibid. Third, "although aggregate

African American turnout increased by 1.8% in 2014, many African American votes went uncounted." Ibid. "African Americans disproportionately cast provisional out-of-precinct ballots" that "would have been counted absent [HB 589]," and "thousands of African Americans were disenfranchised because they registered during what would have been the same-day registration period but because of [HB 589] could not then vote." Ibid. Fourth, although African-American turnout increased by 1.8%, that "actually represents a significant decrease in the rate of change. For example, in the prior four-year period, African American midterm voting had increased by 12.2%." Id. at 54a-55a.

Applicants are therefore wrong to claim that the turnout evidence "disproved discriminatory impact" and thus "conclusively disproved discriminatory intent as well." Appl. 22. The evidence conclusively established that the challenged provisions had a discriminatory effect on minority voters, which added to an inference of discriminatory intent.

3. Alleged "importation" of retrogression principles

Applicants also argue that the decision below "[g]uts" this Court's decision in Shelby County through "sub silentio importation of retrogression principles into the [test for] purposeful discrimination." Appl. 23-24. That is so, applicants contend, because the court of appeals held that the

challenged features of HB 589 "were presumptively animated by racial animus simply because some (but not all) of those practices are used more frequently by minority voters."[4] Appl. 23. As a consequence, applicants assert, the court's ruling "actually makes it harder to escape a charge of purposeful discrimination under Section 2 or the Fourteenth Amendment than it was to obtain preclearance under Section 5." Ibid.

Applicants take aim at a straw man. The court of appeals said nothing about retrogression and nothing about presumptions; neither word even appears in the decision. Instead, as outlined above, the court methodically analyzed each of the Arlington Heights factors, determining that all four factors point to "the conclusion that, at least in part, discriminatory racial intent motivated the enactment of the challenged provisions." Appl. App. 56a; see id. at 23a-56a. The court then provided applicants with an opportunity "to demonstrate that the law would have been enacted without" race-based intent, id. at 57a (quoting Hunter v. Underwood, 471 U.S. 222, 228 (1985)), but applicants failed to make that showing, see id. at 57a-69a.

[4] Applicants assert (without citation) that the court of appeals "accepted * * * that preregistration is actually not disproportionately used by minorities." Appl. 23 n.3. That is the opposite of what the court found. Appl. App. 18a ("African Americans also disproportionately used preregistration.").

That applicants now accuse the court of a "sub silentio" ruling, instead of addressing what the court actually said, is telling.

4. Standard of review

Finally, applicants claim that the decision below was an "unprecedented" reversal of a district court's finding of no intentional discrimination. Appl. 18. In fact, there is nothing remarkable about a court of appeals reversing such a finding. See, e.g., Taylor v. Howe, 225 F.3d 993, 996 (8th Cir. 2000); Adams v. Nolan, 962 F.2d 791, 796 (8th Cir. 1992); Sumner v. United States Postal Serv., 899 F.2d 203, 211 (2d Cir. 1990); Legrand v. Trustees of Univ. of Ark. at Pine Bluff, 821 F.2d 478, 481-482 (8th Cir. 1987), cert. denied, 485 U.S. 1034 (1988); Bishopp v. District of Columbia, 788 F.2d 781, 786 (D.C. Cir. 1986); Diaz v. San Jose Unified Sch. Dist., 733 F.2d 660, 664 (9th Cir. 1984) (en banc), cert. denied, 471 U.S. 1065 (1985). And indeed, this Court has previously affirmed such reversals, including in the voting rights context. See Hunter, 471 U.S. at 229 (affirming court of appeals' reversal of district court's finding of no discriminatory purpose as to state constitutional provision disfranchising persons convicted of crimes of moral turpitude); see also Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526, 542 (1979) (affirming court of appeals' reversal of district court's finding of no intentional discrimination).

On a more basic level, there is nothing that would exempt election-law cases from the normal application of appellate review, including the review of factual findings for clear error under Federal Rule of Civil Procedure 52(a). This Court in Hunter described the application of such appellate review to a state election law:

> [T]he District Court * * * found that the [challenged provision] was not enacted out of racial animus, only to have the Court of Appeals set aside this finding. In doing so, the Court of Appeals applied the clearly-erroneous standard of review required by Federal Rule of Civil Procedure 52(a), see Pullman-Standard v. Swint, 456 U.S. 273, 287 (1982), but was "left with a firm and definite impression of error . . . with respect to the issue of intent."

471 U.S. at 229 (citation omitted). Here, as there, "the Court of Appeals was correct." Id. at 227.

CONCLUSION

The application to stay the mandate of the court of appeals pending the filing and disposition of a petition for a writ of certiorari should be denied.

Respectfully submitted.

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