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

AMICUS CURIAE BRIEF OF THE AMERICAN CIVIL RIGHTS UNION IN SUPPORT OF PETITIONERS

PETER J. FERRARA
Counsel of Record
20594 Woodmere Court
Sterling, VA 20165
(703) 582-8466
peterferrara@msn.com

Counsel for Amicus Curiae American Civil Rights Union

February 4, 2015

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

TABLE OF CONTENTS

TABLE OF AUTHORITIES

INTEREST OF THE *AMICUS CURIAE*[1]

The American Civil Rights Union is a non-partisan, non-profit, 501(c)(3), legal/educational policy organization dedicated to defending all of our constitutional rights, not just those that might be politically correct or fit a particular ideology. It was founded in 1998 by long time policy advisor to President Reagan, and the architect of modern welfare reform, Robert B. Carleson. Carleson served as President Reagan's chief domestic policy advisor on federalism, and originated the concept of ending the federal entitlement to welfare by giving the responsibility for those programs to the states through finite block grants. Since its founding, the ACRU has filed *amicus curiae* briefs on constitutional law issues in cases nationwide.

Those setting the organization's policy as members of the Policy Board are former U.S. Attorney General, Edwin Meese III; former Assistant Attorney General for Civil Rights, William Bradford Reynolds; former Assistant Attorney General for the Office of Legal Counsel, Charles J. Cooper; John M. Olin Distinguished Professor of Economics at George Mason University, Walter E. Williams; former Ambassador Curtin Winsor, Jr.; former Ohio Secretary of State J. Kenneth Blackwell, J. Christian

---

[1] Peter J. Ferrara authored this brief for the American Civil Rights Union (ACRU). No counsel for either party authored the brief in whole or in part and no one apart from the ACRU made a monetary contribution to the preparation or submission of this brief. All parties were timely notified and have consented to the filing of this brief.

Adams, former prosecutor, Civil Rights Division, Department of Justice, and Hans von Spakovsky, former member of the Federal Election Commission.

This case is of interest to the ACRU because it is concerned to protect the integrity of legal voting.

STATEMENT OF THE CASE

In 2013, the North Carolina General Assembly enacted North Carolina Session Law 2013-381 ("S.L. 2013-381"), which eliminated same day voter registration during a one-stop, absentee voting period. The legislation also eliminated the practice of "out-of-precinct provisional balloting," which allowed ballots cast on Election Day by registered voters in the incorrect precinct within their county to be counted in certain races.

Plaintiffs sued to challenge S.L. 2013-381 in federal district court, moving for a preliminary injunction to enjoin enforcement of the challenged sections of S.L. 2013-381 for the 2014 General Election, and to order the State to reinstate the repealed election practices used by North Carolina before enactment of S.L. 2013-381.

After a four day evidentiary hearing, the district court issued a Memorandum Opinion and Order denying Plaintiffs' motion on August 8, 2014. Plaintiffs excepting the United States appealed from the district court's ruling.

On October 1, 2014, the Fourth Circuit reversed the district court's ruling in a 2-1 decision, ordering

the State to reinstitute the same day registration and voting, and the out-of-precinct voting. On October 1, 2014, this Court granted Petitioners' Emergency Application for a stay of the Fourth Circuit's ruling pending disposition of a Petition for a Writ of Certiorari.

SUMMARY OF ARGUMENT

The bald truth is that the suit by the Plaintiffs in this matter involves a carefully planned, open revolt against the decision of this Court in *Shelby Cnty., Ala. v. Holder*, 133 S. Ct. 2612 (2013). And these Plaintiffs have now convinced the Fourth Circuit to join that revolt.

A statute that provides "less opportunity" than a repealed practice might violate Section 5, but it does not violate Section 2 if it provides equal opportunity.

But the actual results under the new statute show that it did not provide for "less opportunity" than the repealed practice, and did not violate Section 5 or Section 2 even under the pre-*Shelby County* standards. That is because under the new statute African-American voting participation *increased* in the 2014 elections, as compared to the results under comparable prior elections.

African-American votes in North Carolina soared to 629,179 in 2014, from 540,307 in the last mid-term election in 2010 under the prior, repealed practices, an increase of *16.45%*. Consequently, in 2014, African-American votes constituted 21.42% of the total number of votes, up from only 20.11% in 2010.

In 2014, 42.17% of registered African-Americans voted, compared to only 40.3% in 2010.

The Elections Clause of the United States Constitution provides that the States hold the power to determine the time, place and manner of holding elections.

The decision of the Fourth Circuit below deprives the people of North Carolina of their express Constitutional rights to make that decision. The people of that state are now looking to this Court to uphold their Constitutional rights on this issue.

The Fourth Circuit majority below interpreted Section 2 without regard to whether the challenged election laws apply equally to all voters regardless of race, and to whether those laws actually cause any decline in African-American or other minority participation in the state's elections. This is in direct conflict with the Seventh Circuit as reflected in the decision in *Frank v. Walker*, 768 F.3d 744, 753 (7th Cir. 2014), and with the Ninth Circuit as reflected in the decision in *Gonzalez v. Arizona*, 677 F.3d 383, 405 (9th Cir. 2012) (en banc), *aff'd*, *Arizona v. Inter Tribal Council of Arizona, Inc.*, 133 S. Ct. 2247 (2013).

REASONS FOR GRANTING THE PETITION

I. THE DECISION OF THE COURT BELOW INVOLVES IMPORTANT QUESTIONS OF FEDERAL LAW, AND CONFLICTS WITH ESTABLISHED PRECEDENTS OF THIS COURT.

The bald truth is that the suit by the Plaintiffs in this matter involves a carefully planned, open revolt against the decision of this Court in *Shelby Cnty., Ala. v. Holder*, *133* S. Ct. 2612 (2013). And these Plaintiffs have now convinced the Fourth Circuit to join that revolt.

Indeed, the Fourth Circuit majority quoted the *dissenting opinion* of Justice Ginsburg in *Shelby County* characterizing the *Shelby County* majority as "casting aside" the Voting Rights Act. 769 F.3d at 242. The Fourth Circuit majority mocked the decision of the district court in this case as "parroting" the "Supreme Court's proclamation that 'history did not end in 1965'" and that "past discrimination cannot in the manner of original sin condemn government action." *Id.* at 242 (quoting *McCrory*, 997 F. Supp. 2d at 349 (quoting *Shelby Cnty.*, 133 S. Ct. at 2628)).

The Fourth Circuit majority stated further that "[t]he facts of this case attest to the prophylactic success of § 5's preclearance requirements," *Id.* at 239, arguing that North Carolina's legislative leadership knew that S.L. 2013-381 would not have been precleared, and that is why the General Assembly waited to "go with the full bill" until after *Shelby County*. *Id.* at 231. The Fourth Circuit majority means to say by that such "retrogressive" actions by the North Carolina General Assembly became possible only because this Court in *Shelby County* "cast aside" the Voting Rights Act.

The Fourth Circuit majority then effectively proceeded to apply the preclearance retrogression analysis that would have applied before *Shelby*

County. The Fourth Circuit majority proclaimed that North Carolina could not eliminate "its more generous registration provisions [SDR] without *ensuring* that, in doing so, it is not violating § 2," *Id.* at 243 (emphasis added), wisely recognizing that it could not cite any precedent for that proposition without blatantly giving away its revolt against this this Court in *Shelby County*.

The Fourth Circuit majority only incorrectly cited *Gingles*, 478 U.S. at 45 n. 10, as stating that § 2 "'prohibits all forms of voting discrimination' that *lessen opportunity* for minority voters." 769 F.3d at 238 (emphasis added). But *Gingles* did not say that.

A statute that provides "less opportunity" than a repealed practice might violate Section 5, but it does not violate Section 2 if it provides equal opportunity. *Bartlett v. Strickland*, 556 U.S. 1, 23-35 (2009) (plaintiffs not entitled to the election practices they prefer or practices that benefit them and their political allies); *League of United Latin Am. Citizens ("LULAC") v. Perry*, 548 U.S. 399, 446 (2006) ("The inquiry under §2, however, concerns the opportunity 'to elect representatives of their choice,' 42 U.S.C. § 1973(b), not whether a change has the purpose or effect of 'denying or abridging the right to vote,' § 1973c."). Denial of preclearance for a new statute under Section 5 does not prove a violation under Section 2. *Holder v. Hall*, 512 U.S. 874, 883-85 (1994) (stating that change that is subject to the preclearance requirements of § 5 is not necessarily subject to a claim under § 2).

But the actual results under the new statute show that it did not provide for "less opportunity" than the repealed practice, and did not violate Section 5 or Section 2 even under the pre-*Shelby County* standards. That is because under the new statute African-American voting participation *increased* in the 2014 elections, as compared to the results under comparable prior elections.

African-American votes in North Carolina soared to 629,179 in 2014, from 540,307 in the last mid-term election in 2010 under the prior, repealed practices, an increase of *16.45%*. Consequently, in 2014, African-American votes constituted 21.42% of the total number of votes, up from only 20.11% in 2010. In 2014, 42.17% of registered African-Americans voted, compared to only 40.3% in 2010. ftp://alt.ncsbe.gov/data/Elections%20Summary/2014%20General%20Election%20Summary.pdf.

(Pet App. 258a.)

As the district court in this case correctly found, opportunities for African-Americans to register and vote in North Carolina are plenary and wide-open, without barrier, and reflect electoral practices of a majority of the other fifty states. *McCrory*, 997 F. Supp. 2d at 364, 367.

The Elections Clause of the United States Constitution provides that the States hold the power to determine the time, place and manner of holding elections. U.S. CONST. art. I, § 4, cl. 1. *See Burdick v. Takushi*, 504 U.S. 428, 433 (1992). The decision of the Fourth Circuit below deprives the people of North Carolina of their express Constitutional rights to

make that decision. The people of that state are now looking to this Court to uphold their Constitutional rights on this issue.

II. THE DECISION OF THE COURT BELOW CREATES A CONFLICT AMONG THE CIRCUITS.

The Fourth Circuit majority below interpreted Section 2 without regard to whether the challenged election laws apply equally to all voters regardless of race, and to whether those laws actually cause any decline in African-American or other minority participation in the state's elections. This is in direct conflict with the Seventh Circuit as reflected in the decision in *Frank v. Walker*, 768 F.3d 744, 753 (7th Cir. 2014), and with the Ninth Circuit as reflected in the decision in *Gonzalez v. Arizona*, 677 F.3d 383, 405 (9th Cir. 2012) (en banc), *aff'd*, *Arizona v. Inter Tribal Council of Arizona, Inc.*, 133 S. Ct. 2247 (2013).

In contrast to the Fourth Circuit in the present case, the Seventh Circuit upheld Wisconsin's voter ID law in *Frank*, stating that a violation of Section 2 is,

> "established only if, based upon the totality of the circumstances, it is shown that political processes . . . are *not equally open* to participation by members of a [protected] class . . . in that its members have *less opportunity* than other members of the electorate to participate in the political process."

768 F.3d at 753. The Seventh Circuit added that Wisconsin's voter ID law did "not draw any line by

race, and that the district judge did not find that [the minority groups] have 'less opportunity' than whites to get photo IDs." *Id.*

Moreover, the Ninth Circuit in *Gonzalez* upheld Arizona's voter ID law because Plaintiffs,

> "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 and to elect representatives of their choice."

677 F.3d at 407.

Definitive resolution of these issues by this Court is necessary not only for the Fourth, Seventh and Ninth Circuits, but also for the Fifth and Sixth where active litigation is also still pending, as well as in the states of North Carolina, Wisconsin, Texas and Ohio. Moreover, 37 states including North Carolina do not allow same day registration and voting, and a majority do not allow out of precinct voting. *McCrory*, 997 F. Supp. 2d at 351, 367. Taking up the present case involving those precise practices would provide essential guidance to all of those states.

CONCLUSION

For all of the foregoing reasons, *Amicus Curiae* American Civil Rights Union respectfully submits that this Court should grant the requested Writ of Certiorari, and reverse the Fourth Circuit opinion

below on the merits, or in the alternative vacate the decision by the Fourth Circuit below, and remand the case for further proceedings.

Respectfully Submitted,

Peter J. Ferrara
Counsel of Record
20594 Woodmere Court
Sterling, VA 20165
703-582-8466
peterferrara@msn.com

Counsel for Amicus Curiae
American Civil Rights Union