Nos. 16-1468, 1469, 1474, 1529

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NORTH CAROLINA STATE CONFERENCE OF THE NAACP; ROSANELL EATON; EMMANUEL BAPTIST CHURCH; BETHEL A. BAPTIST CHURCH; COVENANT PRESBYTERIAN CHURCH; BARBEE'S CHAPEL MISSIONARY BAPTIST CHURCH, INC.; ARMENTA EATON; CAROLYN COLEMAN; JOCELYN FERGUSON-KELLY; FAITH JACKSON; MARY PERRY; MARIA TERESA UNGER PALMER,

Plaintiffs-Appellees,

JOHN DOE 1; JANE DOE 1; JOHN DOE 2; JANE DOE 2; JOHN DOE 3; JANE DOE 3; NEW OXLEY HILL BAPTIST CHURCH; CLINTON TABERNACLE AME ZION CHURCH; BAHEEYAH MADANY,

Intervenor Plaintiffs-Appellees,

v.

PATRICK L. MCCRORY, in his official capacity as Governor of the state of North Carolina; KIM WESTBROOK STRACH, in her official capacity as a member of the State Board of Elections; JOSHUA B. HOWARD, in his official capacity as a member of the State Board of Elections; RHONDA K. AMOROSO, in her official capacity as a member of the State Board of Elections; JOSHUA D. MALCOLM, in his official capacity as a member of the State Board of Elections; PAUL J. FOLEY, in his official capacity as a member of the State Board of Elections; MAJA KRICKER, in her official capacity as a member of the State Board of Elections; JAMES BAKER, in his official capacity as a member of the North Carolina State Board of Elections,

Defendants-Appellants.
(caption continued on inside cover)

On Appeal from the United States District Court
for the Middle District of North Carolina at Greensboro

AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF APPELLEES

Steven J. Lechner
MOUNTAIN STATES LEGAL FOUNDATION
2596 South Lewis Way
Lakewood, Colorado 80227
(303) 292-2021
lechner@mountainstateslegal.com

Attorney for Amicus Curiae

LEAGUE OF WOMEN VOTERS OF NORTH CAROLINA; NORTH CAROLINA A. PHILIP RANDOLPH INSTITUTE; UNIFOUR ONESTOP COLLABORATIVE; COMMON CAUSE NORTH CAROLINA; GOLDIE WELLS; KAY BRANDON; OCTAVIA RAINEY; SARA STOHLER; HUGH STOHLER,

Plaintiffs,

CHARLES M. GRAY; ASGOD BARRANTES; MARY-WREN RITCHIE,

Intervenors/Plaintiffs,
and

LOUIS M. DUKE; JOSUE E. BERDUO; NANCY J. LUND; BRIAN M. MILLER; BECKY HURLEY MOCK; LYNNE M. WALTER; EBONY N. WEST,

Intervenors/Plaintiffs – Appellants,
v.

STATE OF NORTH CAROLINA; JOSHUA B. HOWARD, in his official capacity as a member of the State Board of Elections; RHONDA K. AMOROSO, in her official capacity as a member of the State Board of Elections; JOSHUA D. MALCOLM, in his official capacity as a member of the State Board of Elections; PAUL J. FOLEY, in his official capacity as a member of the State Board of Elections; MAJA KRICKER, in her official capacity as a member of the State Board of Elections; PATRICK L. MCCRORY, in his official capacity as Governor of the state of North Carolina,

Defendants – Appellees.

UNITED STATES OF AMERICA,

Plaintiff – Appellant,

v.

STATE OF NORTH CAROLINA; NORTH CAROLINA STATE BOARD OF ELECTIONS; KIM WESTBROOK STRACH,

Defendants – Appellees.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, Fed. R. App. P. 29(c)(1), and Circuit Rule 26.1, the undersigned hereby certifies that Mountain States Legal Foundation ("MSLF") is a non-profit, public interest legal foundation incorporated under the laws of the State of Colorado. MSLF is not a publicly owned corporation, has issued no stock, and has no parent corporations, master limited partnerships, real estate investment trusts, or other legal entities whose shares are publicly held or traded. No publicly held corporation has a direct financial interest in the outcome of this litigation due to MSLF's participation. Finally, this case does not arise out of a bankruptcy proceeding.

DATED this 16th day of June 2016.

Respectfully submitted,

s/ Steven J. Lechner

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Constitutional Provisions

Statutes

Rules

Other Authorities

IDENTITY AND INTEREST OF AMICUS CURIAE[1]

MSLF is a non-profit, public interest legal foundation organized under the laws of the State of Colorado. MSLF is dedicated to bringing before the courts those issues vital to the defense and preservation of individual liberties, the right to own and use property, the free enterprise system, and limited and ethical government. MSLF has members who reside and work in every State. MSLF and its members strongly believe that the Founders created a federal republic, in which the federal government is one of limited, enumerated powers, and that separation of powers and federalism are at the heart of the U.S. Constitution. Since its creation in 1977, MSLF has been active in litigation opposing legislation in which the federal government acts beyond its constitutionally delegated powers, or in derogation of the principles of separation of powers and federalism.

Especially relevant to this case, MSLF attorneys have represented clients who have challenged Congress's authority to enact legislation under the Enforcement Clause of the Fifteenth Amendment, including Section 2 of the Voting Rights Act ("VRA"), 52 U.S.C. § 10301(a). *United States v. Blaine County, Mont.*, 363 F.3d 897 (9th Cir. 2004), *cert. denied*, 544 U.S. 992 (2005);

[1] Pursuant to Fed. R. App. P. 29(a), all parties consent to the filing of this amicus brief. Pursuant to Fed. R. App. P. 29(c)(5), the undersigned affirms that no counsel for a party authored this brief in whole or in part, and no person or entity other than MSLF, its members, or its counsel, made a monetary contribution specifically for the preparation or submission of this brief.

United States v. Alamosa County, Colo., 306 F. Supp. 2d 1016 (D. Colo. 2004); *Large v. Fremont County, Wyo.*, 709 F. Supp. 2d 1176 (D. Wyo. 2010). MSLF has also filed amicus briefs with the Supreme Court of the United States demonstrating the limited nature of Congress's Fifteenth Amendment enforcement power. *Nw. Austin Mun. Util. Dist. No. 1 v. Holder*, 557 U.S. 193 (2009); *Shelby Cnty. v. Holder*, 133 S. Ct. 2612 (2013). Finally, MSLF has filed amicus curiae briefs supporting a state's authority to regulate elections to ensure electoral integrity. *Crawford v. Marion County*, 553 U.S. 181 (2008); *Gonzalez v. Arizona*, 677 F.3d 383 (9th Cir. 2012), *aff'd sub nom. Arizona v. Inter Tribal Council of Arizona, Inc.*, 133 S. Ct. 2247 (2013); *Veasey v. Abbot*, 815 F.3d 958 (5th Cir. 2016).

INTRODUCTION

In 2013, the North Carolina Legislature passed North Carolina Session Law ("SL") 2013-381, which modified various state laws regulating elections. *N. Carolina State Conference of the NAACP v. McCrory*, No. 1:13CV658, ___ F.Supp.3d ___, 2016 WL 1650774, at *3 (M.D.N.C. Apr. 25, 2016) ("*McCrory II*"). Specifically, SL 2013-381 added a requirement that in-person voters have qualifying identification, reduced the length of early voting by one week, set the time to register to vote at 25 days prior to election day, eliminated provisional out-of-precinct voting, and eliminated the policy of allowing citizens at least sixteen years old to pre-register to vote. *Id.* at 14–16.

Under SL 2013-381, a voter must present one of eight forms of photo identification before he or she can vote. N.C. Gen. Stat. § 163–166.13(e). Those who do not have identification and who can list a reasonable impediment to getting one, can vote in person without photo identification so long as they provide alternative identification and complete a reasonable impediment declaration. *Id.* at §§ 163–166.13(c)(2), 163–166.15. In addition, voters with disabilities, those that have a reasonable impediment to voting, those with religious objections to being photographed, certain victims of natural disasters, and absentee mail voters are exempt from the photo identification requirement. *Id.* at § 163–166.13(a). Free voter IDs are made available at various DMV offices around the state. *McCrory II,* 2016 WL 1650774, at *26.

In 2013, Plaintiffs filed this suit alleging that SL 2013-381 violates the Fourteenth Amendment, Fifteenth Amendment, and Section 2 of the Voting Rights Act ("VRA"), 52 U.S.C. § 10301. *McCrory II,* 2016 WL 1650774, at *16. On August 8, 2014, the District Court denied Plaintiffs' motions for preliminary injunction, but also refused to dismiss any claims. *Id.* at *17 (citing *N. Carolina State Conference of the NAACP v. McCrory,* 997 F. Supp. 2d 322 (M.D.N.C. 2014) ("*McCrory I*")).

On appeal, this Court affirmed the order in part and reversed in part. *League of Women Voters of N. Carolina v. N. Carolina*, 769 F.3d 224, 249 (4th Cir. 2014),

cert. denied, 135 S. Ct. 1735 (2015). With respect to the photo identification claim, this Court held that the plaintiffs were unable to demonstrate irreparable harm because North Carolina planned a "soft roll-out" of the requirement. *Id.* at 237. The Supreme Court stayed the Fourth Circuit's mandate pending the disposition of the Petition for Writ of Certiorari. *N. Carolina v. League of Women Voters of N. Carolina*, 135 S. Ct. 6 (2014). North Carolina held its 2014 election under the requirements of SL 2013-381. *McCrory II,* 2016 WL 1650774, at *18. On April 16, 2015, the Supreme Court denied the Petition. 135 S. Ct. 1735.

On remand, after holding a bench trial, the District Court entered judgment for North Carolina. *McCrory II,* 2016 WL 1650774, at *170. The court held that no aspect of SL 2013-381 violated Section 2 or the Constitution. *Id.* These appeals followed.

SUMMARY OF ARGUMENT

This court should affirm the judgment of the District Court with respect to North Carolina's photo identification requirement. First, the requirement does not unconstitutionally burden the right to vote. In *Crawford v. Marion County*, 553 U.S. 181 (2008), six justices of the Supreme Court held that an Indiana photo identification law, nearly identical to the requirements of SL 2013-381, did not unduly burden the right to vote. The Court ruled that the photo identification law creates only a minimal burden, not significantly greater than the burden of voting

itself. *Crawford*, 553 U.S. at 198 (opinion of Stevens, J.); *id.* at 209 (Scalia, J., concurring). Significantly, the Court recognized the important state interest in preventing voter fraud, even though there was little evidence before the Court that voting fraud in Indiana was a significant problem. *Id.* at 194 (opinion of Stevens, J.).

Secondly, this Court should affirm the judgment of the District Court that North Carolina's photo identification law does not violate Section 2 of the VRA. Plaintiffs ask this Court to expand the scope of Section 2 beyond what is authorized by the Enforcement Clause of the Fifteenth Amendment. Congress's enforcement power under the Fifteenth Amendment is not unlimited and this Court should refuse to adopt Plaintiffs' interpretation. In fact, adoption of Plaintiffs' interpretation, would raise the issue of whether Section 2 of the VRA could be constitutionally applied in this case.

Instead, this Court should give Section 2 of the VRA its natural interpretation and hold that SL 2013-381 is lawful. SL 2013-381 treats all potential voters equally, regardless of race or color, and its minimal requirements do not interfere with one's right to vote. Therefore, the photo identification requirement does not "deny" or "abridge" the right to vote based on race. Accordingly, the District Court correctly ruled that SL 2013-381 does not violate Section 2 of the VRA.

ARGUMENT

I. THE PHOTO IDENTIFICATION REQUIREMENT IN SL 2013-381 DOES NOT BURDEN THE RIGHT TO VOTE IN VIOLATION OF THE FOURTEENTH AMENDMENT.

This Court should affirm the judgment of the District Court because it correctly determined that the photo identification requirement in SL 2013-381 does not place an undue burden on North Carolina voters. *McCrory II,* 2016 WL 1650774, at *18. Plaintiffs attempt to argue that the photo identification requirement violates the Fourteenth Amendment by exaggerating SL 2013-381's burdens on North Carolina voters and incorrectly ignoring the North Carolina Legislature's determination that a photo identification requirement would promote public confidence in elections. *See* N. Carolina State Conference of the NAACP Brief at 64–65. The District Court correctly rejected Plaintiffs' arguments and this Court should as well.

Although the right to vote is a fundamental right, the Supreme Court has recognized that "as a practical matter, there must be substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic process." *Storer v. Brown*, 415 U.S. 724, 730 (1974); *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997) ("States may, and inevitably must, enact reasonable regulations of parties, elections, and ballots to reduce election- and campaign-related disorder."); *Griffin*

v. Roupas, 385 F.3d 1128, 1130 (7th Cir. 2004) (The Constitution "confers on the states broad authority to regulate the conduct of elections, including federal ones."). When a court reviews a voting regulation, it must weigh "the character and magnitude of the asserted injury" to the right to vote against "the precise interests put forward by the State as justifications for the burden imposed by its rule," taking into consideration "the extent to which those interests make it necessary to burden the plaintiff's rights." *Anderson v. Celebrezze*, 460 U.S. 780, 788–89 (1983); *accord Burdick v. Takushi,* 504 U.S. 428, 434 (1992). The burdens imposed by a regulation "must be justified by relevant and legitimate state interests 'sufficiently weighty to justify the limitation.'" *Crawford v. Marion County*, 553 U.S. 181, 191 (2008) (opinion of Stevens, J.) (quoting *Norman v. Reed,* 502 U.S. 279, 288–89 (1992)).

In *Crawford*, six justices of the Supreme Court agreed that the inconveniences associated with obtaining photo identification are no greater than the usual burdens of voting. In announcing the judgment of the Court, Justice Stevens stated that:

> [T]he inconvenience of making a trip to the [motor vehicle office], gathering the required documents, and posing for a photograph surely does not qualify as a substantial burden on the right to vote, or even represent a significant increase over the usual burdens of voting.

Crawford, 553 U.S. at 198 (opinion of Stevens, J.); *id.* at 209 (Scalia, J., concurring) ("The burden of acquiring, possessing, and showing a free photo

identification is simply not severe, because it does not even represent a significant increase over the usual burdens of voting. And the State's interests are sufficient to sustain that minimal burden.") (internal quotations omitted).[2] Because the Court has recognized that the burden of obtaining photo identification to vote is minimal, nearly any legitimate state interest can justify a photo identification requirement. *Id.* at 204 (opinion of Stevens, J.) ("The application of the statute to the vast majority of Indiana voters is amply justified by the valid interest in protecting the integrity and reliability of the electoral process." (internal quotation omitted)); *id.* at 209 (Scalia, J., concurring) ("And the State's interests [in protecting the integrity of the electoral process] are sufficient to sustain that minimal burden.").

The photo identification requirement in SL 2013-381 is nearly identical to the Indiana photo identification law challenged in *Crawford*. The Indiana law upheld in *Crawford* applies to in-person voting and not to absentee ballots submitted by mail.[3] *Crawford*, 553 U.S. at 185; Ind. Code § 3–11–8–25.1. It provides an exception for persons living and voting in a state-licensed facility, such as a nursing home. *Crawford,* 553 U.S. at 186; Ind. Code § 3–11–8–25.1. A voter

[2] Justice Stevens announced the judgment of the Court and was joined by Chief Justice Roberts and Justice Kennedy. Justice Scalia's concurrence was joined by Justices Thomas and Alito.

[3]Generally, Indiana does not allow absentee votes by mail. A voter voting by absentee ballot must vote in the office of the circuit court clerk or at a satellite office unless a county election board or the state election commission unanimously vote that circumstances prevent a voter from voting at a polling place. Ind. Code § 3-11-4-1.

who is indigent or has a religious objection to being photographed may cast a provisional ballot that will be counted if he or she executes an appropriate affidavit before the circuit court clerk within 10 days following the election. *Id.*; Ind. Code §§ 3–11.7–5–1, 3–11.7–5–2.5(c). A voter who has photo identification but is unable to present that identification on election day may file a provisional ballot that will be counted if she brings her photo identification to the circuit court clerk's office within 10 days. *Id.*; Ind. Code § 3–11.7–5–2.5(b). Finally, Indiana offers free photo identifications to qualified voters able to establish their residence and identity. *Id.*; Ind. Code § 9–24–16–10(b).

Similarly, SL 2013-381 provides exceptions to the photo identification requirement for: religious objectors, people lacking sufficient identification due to natural disaster, and the disabled. N.C. Gen. Stat. §§ 163–166.13(a). In-person voters who do not present required photo identification can cast a provisional ballot that will count if they present acceptable identification within nine days of the election. *Id.* at §§ 163–166.13, 163–182.1A. Individuals who lack photo identification can apply for free identification. *See McCrory II,* 2016 WL 1650774, at *19. Therefore, SL 2013-381, like the Indiana law in *Crawford*, mitigates any inconveniences by offering photo identification free of charge to registered voters who lack photo identification and allowing voters to cast provisional ballots if they appear at the polls without photo ID.

Plaintiffs argue about the purported inconveniences in obtaining photo identification, citing to individual testimony about the purported time it takes to obtain such identification. *See* N. Carolina State Conference of the NAACP Brief at 58–59. Plaintiffs, however, have failed to identify a single voter who was unable to get qualifying identification. *See McCrory II,* 2016 WL 1650774, at *34. Therefore, the absence of proof in this case is similar to that in *Crawford.* As stated by Justice Stevens, statements by individual voters did not provide "any concrete evidence of the burden imposed on voters who currently lack photo identification." *Crawford*, 553 U.S. at 201. Likewise, Justice Scalia stated that, when evaluating the burdens of a voting regulation, a court should only look at the reasonably foreseeable effects on voters generally, not the effects on a certain class of voters. *Id.* at 206 (Scalia, J., concurring).

Evaluating what little evidence was offered by Plaintiffs, it is clear that there is no unconstitutional burden on the right to vote. Although the burden on those unable to obtain photo identification may be different from those who already have identification, the burden is still insignificant. "[T]he inconvenience of making a trip to the [Bureau of Motor Vehicles], gathering the required documents, and posing for a photograph surely does not qualify as a substantial burden on the right to vote, or even represent a significant increase over the usual burdens of voting." *Crawford*, 553 U.S. at 198 (Opinion of Stevens, J.). Accordingly, the District

Court correctly ruled that the photo identification requirement of SL 2013-381 does not unduly burden the right to vote.

Plaintiffs' arguments that North Carolina has not demonstrated a need for photo identification laws are also unpersuasive. N. Carolina State Conference of the NAACP Brief at 64–65. According to Plaintiffs, the District Court should have applied some form of heightened scrutiny to North Carolina's reasons for requiring photo identification to vote. *Id.* In *Crawford*, however, the Court did not require Indiana to prove that voter impersonation was an issue in order for the government to have an interest in preventing voter fraud. 553 U.S. at 194–96 (opinion of Stevens, J.). In fact, Justice Stevens found that "[t]he record contains no evidence of any such fraud actually occurring in Indiana at any time in its history." *Id.* at 194. Despite the lack of evidence that voter fraud was an issue in Indiana, Justice Stevens concluded that:

> There is no question about the legitimacy or importance of the State's interest in counting only the votes of eligible voters. Moreover, the interest in orderly administration and accurate recordkeeping provides a sufficient justification for carefully identifying all voters participating in the election process.

Id. at 196 (opinion of Stevens, J.); *id.* at 209 (Scalia, J., concurring) ("the State's interests … are sufficient to sustain that minimal burden" of requiring identification). Furthermore, Justice Stevens also noted that the State's interest in promoting public confidence in the integrity of the electoral process is closely

related to the State's interest in preventing voter fraud but "has independent significance, because it encourages citizen participation in the democratic process." *Id.* at 197 (opinion of Stevens, J.).

Therefore, the Court's decision in *Crawford* did not rely on facts specific to Indiana. Instead, the Court relied on a Report from the Commission on Federal Election Reform applicable to elections across the country. *Id.* at 193; *id.* at 195 ("[i]t remains true, however, that flagrant examples of such fraud in other parts of the country have been documented throughout this Nation's history by respected historians and journalists"). As a result, North Carolina did not have to present evidence of actual voter fraud to justify its photo identification requirement.

Other courts have recognized that a state does not need to prove actual voter fraud in that state in order to justify a photo identification law. In *Am. Civil Liberties Union of New Mexico v. Santillanes*, the Tenth Circuit ruled that the district court "imposed too high a burden on the City" by requiring it to prove that actual voter fraud occurred within the city. 546 F.3d 1313, 1323 (10th Cir. 2008). In so doing, the Tenth Circuit recognized that "[p]revention of voter fraud and voting impersonation as urged by the City are sufficient justifications for a photo identification requirement for local elections." *Id.* As a result, the Tenth Circuit upheld the photo identification law in that case. *Id.* at 1525 ("*Crawford* clearly

guides this court in concluding that the Albuquerque photo identification law is a valid method of preventing voter fraud.").

In *Common Cause/Georgia v. Billups*, the Eleventh Circuit also correctly recognized that Georgia did not have the burden of proving, as the plaintiffs alleged, "that in-person voter fraud existed and that requiring photo identification is an effective remedy ...." 554 F.3d 1340, 1353 (11th Cir. 2009). Similarly, in *Frank v. Walker*, the Seventh Circuit stated that *Crawford* "concluded that photo identification requirements promote confidence" and "a single district judge cannot say as a 'fact' that they do not ...." 768 F.3d 744, 750 (7th Cir. 2014). As a result, the Seventh Circuit upheld Wisconsin's photo identification law, which is very similar to the requirements of SL 2013-381, as constitutional. *Id.* at 751. Accordingly, *Crawford* and decisions from the other circuits confirm that the District Court properly held that North Carolina's photo identification requirement does not violate the Fourteenth Amendment.

II. NORTH CAROLINA'S PHOTO IDENTIFICATION REQUIREMENT DOES NOT VIOLATE SECTION 2 OF THE VRA BECAUSE IT DOES NOT DENY OR ABRIDGE THE RIGHT TO VOTE BASED ON RACE OR COLOR.

This Court should also affirm the judgment of the District Court because the photo identification requirement in SL 2013-381 does not violate Section 2 of the VRA. *McCrory II,* 2016 WL 1650774, at *122. SL 2013-381's minimal burdens apply equally to all voters in North Carolina, and the photo identification

requirement does not deny or abridge the right to vote of any North Carolina resident. Section 2 of the VRA prohibits only a "voting qualification or prerequisite to voting or standard, practice, or procedure ... which 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). Section 2 further provides that a plaintiff can establish a violation if "based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not *equally open* to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 52 U.S.C. § 10301(b) (emphasis added). Thus, the plain language of Section 2 shows that it is a simple equal-treatment statute. *Frank*, 768 F.3d at 754. Moreover, when Section 2 is interpreted within the context of the Fifteenth Amendment, it is clear that the requirements of SL 2013-381, which apply equally to all residents, do not violate Section 2 of the VRA.

A. In Order To Maintain The Separation Of Powers, Section 2 Of The VRA Must be Interepreted Within The Context Of The Fifteenth Amendment And Congress's Limited Power To Enforce That Amendment.

In deciding whether the photo identification requirement of SL 2013-381 violates Section 2 of the VRA, this Court must interpret Section 2 of the VRA

within the context of the Fifteenth Amendment and ensure that it does not expand the scope of Section 2 beyond the authority granted to Congress by the Fifteenth Amendment. The VRA was passed pursuant to the Enforcement Clause of the Fifteenth Amendment and, thus, is limited by the rights protected by that Amendment. *Johnson v. Governor of State of Florida*, 405 F.3d 1214, 1230 (11th Cir. 2005) (Congress's power under the Enforcement Clauses of the Fourteenth and Fifteenth Amendments "is not absolute"); *Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2629 (2013) ("The Fifteenth Amendment commands that the right to vote shall not be denied or abridged on account of race or color, and it gives Congress the power to enforce that command."); *United States v. Uvalde Consol. Indep. Sch. Dist.*, 625 F.2d 547, 553 (5th Cir. 1980) ("Congress's [F]ifteenth [A]mendment enforcement authority reaches only legislation directed against racial or color discrimination"). The Fifteenth Amendment provides that "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude" and it authorizes Congress "to enforce this article by appropriate legislation." U.S. Const. amend. XV, §§ 1, 2.

The Enforcement Clause of Fifteenth Amendment is similar to the language of the Enforcement Clauses of the Thirteenth and Fourteenth Amendments, which gives Congress the limited "power to enforce," each amendment "by appropriate

legislation." U.S. Const. amend. XIII, § 2; U.S. Const. amend. XIV, § 5; U.S. Const. amend. XV, § 2. These three amendments were ratified between 1865 and 1870 following the end of the Civil War and were meant to address unequal treatment of United States citizens by the States. United States Senate, *Landmark Legislation: Thirteenth, Fourteenth, & Fifteenth Amendments*, http://www.senate.gov/artandhistory/history/common/generic/CivilWarAmendments.htm (last visited June 16, 2016). Because these three amendments were ratified contemporaneously, and the enforcement clauses use the same language, the clauses must be interpreted as having the same meaning. *See City of Boerne v. Flores*, 521 U.S. 507, 518–19 (1997) ("In assessing the breadth of [the Fourteenth Amendment's] enforcement power, we begin with its text. Congress has been given the power 'to enforce' the 'provisions of this article.'"); *id.* at 518 (describing the enforcement power under the Fourteenth Amendment as a "parallel power" to the enforcement power under the Fifteenth Amendment); *District of Columbia v. Heller*, 554 U.S. 570, 579 (2008) (looking at language of the First and Fourth Amendments to interpret identical language in the Second Amendment); *cf. Atl. Cleaners & Dyers v. United States*, 286 U.S. 427, 433 (1932) ("Undoubtedly, there is a natural presumption that identical words used in different parts of the same act are intended to have the same meaning.").

The Supreme Court has described Congress's enforcement power under both the Fourteenth and Fifteenth Amendments as "'remedial.'" *Boerne*, 521 U.S. at 519 (quoting *South Carolina v. Katzenbach*, 383 U.S. 301, 326 (1966) ("*South Carolina*")). Congress "has been given the power 'to enforce' a constitutional right, not the power to determine what constitutes a constitutional violation." *Id.*; *see also id.* at 525 (The Enforcement Clause, does not authorize Congress to pass "'general legislation upon the rights of the citizen ....'" (quoting *Civil Rights Cases*, 109 U.S. 3, 13–14 (1883))). In the context of the Fourteenth Amendment, the Court recognized that "if Congress could define its own powers by altering the Fourteenth Amendment's meaning, no longer would the Constitution be the superior paramount law, unchangeable by ordinary means." *Id*. at 529. The same is true of the enforcement power under the Fifteenth Amendment. *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966) ("*Morgan*") (comparing "similar power" to enforce provisions of the Fourteenth and Fifteenth Amendments).

Accordingly, an expansive interpretation of the Enforcement Clause would grant Congress nearly limitless power. *Boerne*, 521 U.S. at 529 ("If Congress could define its own powers by altering the Fourteenth Amendment's meaning ... it is difficult to conceive of a principle that would limit congressional power…. Shifting legislative majorities could change the Constitution and effectively circumvent the difficult and detailed amendment process contained in Article V.").

Instead, a correct interpretation of Congress's limited enforcement powers recognizes that the design of the Thirteenth, Fourteenth, and Fifteenth Amendments "has proved significant ... in maintaining the traditional separation of powers between Congress and the Judiciary." *Boerne*, 521 U.S. at 523–24.

"[T]he principle of separation of powers ... underlies our tripartite system of Government." *Mistretta v. United States*, 488 U.S. 361, 371 (1989). "The ultimate purpose of ... separation of powers is to protect the liberty and security of the governed." *Metro. Wash. Airports Auth. v. Citizens for Abatement of Aircraft Noise*, 501 U.S. 252, 272 (1991). In short, the "essence of the separation of powers concept ... is that each branch, in different ways, within the sphere of its defined powers and subject to the distinct institutional responsibilities of the others, is essential to the liberty and security of the people." *Id.* (internal quotations omitted); *Public Citizens v. U.S. Dept. of Justice*, 491 U.S. 440, 468 (1989) (Kennedy, J., concurring) ("Framers of our Government knew that the most precious liberties could remain secure only if they created a structure of Government based on a permanent separation of powers."); *Bond v. United States*, 131 S. Ct. 2355, 2365 (2011) ("[T]he dynamic between and among the branches is not the only object of the Constitution's concern. The structural principles secured by the separation of powers protect the individual as well."). Therefore, to protect individual liberty, a court must ensure that it does not expand the meaning of

Section 2 of the VRA beyond Congress's constitutionally defined powers. *Clinton v. City of New York*, 524 U.S. 417, 450 (1998) (Kennedy, J., concurring) ("Liberty is always at stake when one or more of the branches seek to transgress the separation of powers."); *Mistretta*, 488 U.S. 380 ("[T]he central judgment of the Framers of the Constitution" was that "the separation of governmental powers into three coordinate Branches is essential to the preservation of liberty."); The Federalist No. 51, at 318 (James Madison) (C. Rossiter ed., 2003) (the "separate and distinct exercise of the different powers of government ... is ... essential to the preservation of liberty").

Assuming Section 2 of the VRA is constitutional, a law can only violate that statute if it "denie[s] or abridge[s]" the right to vote "on account of race, color, or previous condition of servitude." U.S. Const. amend. XV, § 1. As demonstrated above, Congress did not have the power to expand the scope of the rights protected by the Fifteenth Amendment when it passed the VRA. *Shelby Cnty.*, 133 S. Ct. at 2631 (holding the reauthorization of Section 4(b) of the VRA unconstitutional because it was not an appropriate application of Congress's Fifteenth Amendment enforcement power). Any broader interpretation of the VRA alters the balance and separation of powers between the three co-equal branches of government by allowing Congress to expand its powers under the auspices of interpreting the Constitution. *But see Marbury v. Madison*, 5 U.S. 137, 177 (1803) ("It is

emphatically the province and duty of the judicial department to say what the law is.").

In order to ensure that Congress's enforcement powers under the Civil Rights Amendments remain properly limited, the Supreme Court in *Boerne* established the congruency and proportionality standard of review. 521 U.S. at 520. When passing legislation seeking to enforce the rights protected by the Thirteenth, Fourteenth, and Fifteenth Amendments:

> There must be a congruence and proportionality between the injury to be prevented or remedied and the means adapted to that end. Lacking such a connection, legislation may become substantive in operation and effect.

Id. at 519–20. In other words:

> While preventive rules are sometimes appropriate remedial measures, there must be congruence between the means used and the ends to be achieved. The *appropriateness of remedial measures must be considered in light of the [degree of] evil presented*. Strong measures appropriate to address one harm may be an unwarranted response to another, lesser one.

Id. at 530 (emphasis added). This congruent and proportionality standard restrains Congress from unconstitutionally defining the substance of the Fourteenth and Fifteenth Amendments, when it was granted only the authority to enforce them.[4] *Id.* at 529.

[4] Although *Boerne* involved Congress's enforcement power under the Fourteenth Amendment, its reasoning is applicable to Congress's enforcement power under the Fifteenth Amendment. In support of the congruent and proportionality test, the

B. North Carolina's Photo Identification Requirement Does Not Have The Effect Of Denying Or Abridging The Right To Vote On Account Of Race Or Color.

The photo identification requirement of SL 2013-381 does not "result[] 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, because it applies equally to all voters and, as demonstrated above, photo identification requirements do not abridge anyone's right to vote. Assuming that Section 2 of the VRA is constitutional, "[i]t is better to understand § 2(b) as an equal-treatment requirement

---

Court relied on the "suspension of literacy tests and similar voting requirements [such as Section 5 of the VRA, 52 U.S.C. § 10304]" enacted pursuant to "Congress' *parallel power* to enforce the provisions of the *Fifteenth Amendment*[.]" *Boerne*, 521 U.S. at 518 (citing *South Carolina*, 383 U.S. at 308) (all emphasis added). *Boerne* also relied on the fact that the Court had "also concluded that the other measures protecting voting rights are within Congress' power to enforce the Fourteenth *and* Fifteenth Amendments[.]" *Id*. (citing *South Carolina*, 383 U.S. at 326) (Fifteenth Amendment) (emphasis added); *see also Morgan*, 384 U.S. 641 at 651 (Thirteenth and Fourteenth Amendments); *Oregon v. Mitchell*, 400 U.S. 112, 131–34 (1970) ("*Mitchell*") (Fourteenth *and* Fifteenth Amendments) (Black, J., announcing the judgment of the Court); *City of Rome v. United States*, 400 U.S. 156, 161 (1980) (Fifteenth Amendment). Thus, *Boerne*, clearly viewed the powers conferred on Congress by any of the Enforcement Clauses to be identical and reviewable only under the congruency and proportionality standard. *See, e.g.*, *Morgan*, 384 U.S. at 651 ("Section 2 of the Fifteenth Amendment grants Congress a similar power to [that of Section 5 of the Fourteenth Amendment]."); *Lopez v. Monterey County*, 525 U.S. 266, 294 n.6 (1999) ("[W]e have always treated the nature of the enforcement powers conferred by the Fourteenth and Fifteenth Amendments as co-extensive."); *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 373 n.8 (2001) ("*Garrett*") ("Section 2 of the Fifteenth Amendment is virtually identical to § 5 of the Fourteenth Amendment."); *see also*, *City of Rome*, 44 U.S. at 207 n.1 (Rehnquist, J., dissenting) ("[T]he nature of the enforcement powers conferred by the Fourteenth and Fifteenth Amendments has always been treated as co-extensive.").

(which is how it reads) than as an equal-outcome command (which is how the [plaintiffs read] it)." *Frank*, 768 F.3d at 754.

On the previous appeal, this Court stated that a Section 2 vote-denial claim consists of two elements:

> First, "the challenged 'standard, practice, or procedure' must impose a discriminatory burden on members of a protected class, meaning that members of the protected class 'have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.'" [*Ohio State Conference of the NAACP v. Husted,* 768 F.3d 524, 553 (6th Cir. 2014)] …
>
> Second, that burden "must in part be caused by or linked to 'social and historical conditions' that have or currently produce discrimination against members of the protected class." *Id.* (quoting [*Thornburg v. Gingles,* 478 U.S. 30, 47 (1986)]).

League of Women Voters of N. Carolina, 769 F.3d at 240. In *Frank*, the Seventh Circuit disagreed with this test, but noted that "if we were to adopt this approach for the sake of argument, our plaintiffs would fail at the first step, because in Wisconsin everyone has the same opportunity to get a qualifying photo ID."[5] *Frank*, 768 F.3d at 755. The same is true in North Carolina, as everyone has the same opportunity to get a qualifying ID. *McCrory II*, 2016 WL 1650774, at *120.

SL 2013-381 does not violate the Fifteenth Amendment because it does not deny or abridge the right to vote on account of race, color, or previous condition of

[5] In *Frank*, the Seventh Circuit rejected this test because the test "does not distinguish discrimination by the defendants from other persons' discrimination." *Frank*, 768 F.3d at 755. This Court should reconsider its test in light of *Frank* to ensure a proper and consistent interpretation of Section 2.

servitude. U.S. Const. amend. XV. Accordingly, SL 2013-381 does not violate Section 2 of the VRA, which can only "enforce" the provision of the Fifteenth Amendment. *Id.* SL 2013-381's photo identification requirement applies equally to people of all races and colors. N.C. Gen. Stat. § 163–166.13(e). All citizens, regardless of race or color, must present photo identification when voting. *Id.* Any purported difficulties with obtaining identification are the same for anyone who lacks identification, regardless of race or color. *See Crawford*, 553 U.S. at 198 (opinion of Stevens, J.). As a result, SL 2013-381 does not "den[y]" the right to vote based on race or color because the photo identification requirement does not apply different voting regulations to voters of different races or colors.

Furthermore, SL 2013-381's minimal burdens do not rise to the level of denying or abridging the right to vote for any North Carolina resident of voting age. According to *Crawford*, a photo identification requirement "does not qualify as a substantial burden on the right to vote, or even represent a significant increase over the usual burdens of voting." 553 U.S. at 198 (opinion of Stevens, J.); *Id.* at 209 (Scalia, J. concurring) ("The universally applicable requirements of Indiana's voter-identification law are eminently reasonable."). If SL 2013-381 does not deny or abridge the right to vote of any individual citizen, then SL 2013-381, which applies equally to every citizen, does not deny or abridge the right to vote based on race or color. Even if Plaintiffs had demonstrated a disparate impact, that would

not demonstrate a denial of the right to vote. *Frank*, 768 F.3d at 758 ("[U]nless Wisconsin makes it *needlessly* hard to get photo ID, it has not denied anything to any voter.") (emphasis in original). As demonstrated above, the burdens imposed by SL 2013-381 are minimal and, thus, no one's right to vote has been denied nor abridged, much less denied or abridged as a result of one's race. Accordingly, North Carolina's photo identification requirement does not violate Section 2.

C. Affirming The District Court's Ruling That North Carolina's Photo Identification Requirement Does Not Violate Section 2 Of The VRA Avoids Serious Issues About The Constitutionality Of Section 2 As Applied In This Case.

As demonstrated above, this Court's previously stated test can be applied consistently with the Enforcement Clause of the Fifteenth Amendment. This Court must resist Plaintiffs' calls to broaden its test because a broader interpretation of Section 2 would raise serious constitutional concerns. In essence, Plaintiffs ask this Court to interpret Section 2 as prohibiting a law that does not abridge the right to vote and treats everyone of all races equally. N. Carolina State Conference of the NAACP Brief at 13–41. As demonstrated above, the plain language of Section 2 does not bar such a law. *Frank*, 768 F.3d at 754. Instead, Section 2 is best understood as requiring equal treatment among voters.

Plaintiffs argue that this Court should invalidate any election law that might make it minimally harder for some minority residents to vote. N. Carolina State Conference of the NAACP Brief at 13–41. Plaintiffs also ask this Court to treat all

election laws in North Carolina with extreme skepticism. *Id.* at 43-51; *cf. Kansas v. Hendricks,* 521 U.S. 346, 361 (1997) ("[W]e ordinarily defer to the legislature's stated intent."). Yet there is nothing in the record to indicate that such skepticism of SL 2013-381 is justified. Plaintiffs are unable to demonstrate that the new laws affected voting behavior or that anyone was unable to vote because of the photo identification requirement. *McCrory II,* 2016 WL 1650774, at *18 (African-American turnout increased in 2014 election over previous midterm election). Furthermore, there is no evidence that SL 2013-381 was passed for a discriminatory purpose. *Id.* at 11–33.

Plaintiffs also impermissibly ask this Court to consider decades old discrimination within North Carolina. A court, however, cannot interpret the requirements of the VRA based on outdated circumstances. *Shelby Cty.,* 133 S. Ct. at 2619 (The VRA "'imposes current burdens and must be justified by current needs.'" (quoting *Nw. Austin Municipal Util. Dist. No. One v. Holder*, 557 U.S. 193, 203 (2009))). Similarly, a court cannot require the present-day North Carolina Legislature to remedy the effects of other persons' past discrimination. *Frank*, 768 F.3d at 753 ("[U]nits of government are responsible for their own discrimination but not for rectifying the effects of other persons' discrimination." (citing *Milliken v. Bradley*, 418 U.S. 717 (1974))). In fact, this Court previously stated that a court must "undertake 'a searching practical evaluation of the 'past

and present reality,'' [with] a 'functional' view of the political process ….'". *League of Women Voters of N. Carolina*, 769 F.3d at 241 (quoting *Gingles,* 478 U.S. at 45). In applying that principle, this Court must ensure that it does not ignore North Carolina's present reality, because doing so would threaten to impermissibly expand Section 2. *Shelby Cnty.,* 133 S. Ct. at 2619.

Based on the facts in this case, the potential for discrimination against minority voters in North Carolina is *de minimis*. *McCrory II*, 2016 WL 1650774, at *121 ("The challenge process is designed to place every burden on the challenger and give every benefit to the voter."); Brief of Appellees at 49–50. Therefore, the VRA, as an enforcement act of the Fifteenth Amendment, cannot be applied to strike down a facially neutral, minimally burdensome photo identification law that applies equally to everyone regardless of race. *City of Mobile, Ala. v. Bolden*, 446 U.S. 55, 62 (1980) (opinion of Stewart, J.) ("Our decisions, moreover, have made clear that action by a State that is racially neutral on its face violates the Fifteenth Amendment only if motivated by a discriminatory purpose."). Plaintiffs' interpretation of Section 2 of the VRA, if adopted, would impose an extraordinary and impossible burden on North Carolina. *Cf. Frank*, 768 F.3d at 754 ("[I]t would be implausible to read § 2 as sweeping away almost all registration and voting rules."). Such extraordinary burdens are neither congruent nor proportional to the harms sought to be remedied by the Fifteenth Amendment,

i.e., the denial or abridgment of the right to vote based on race.[6] *Boerne,* 521 U.S. at 519–20, 530. In order to avoid applying Section 2 in an unconstitutional manner, this Court should affirm the judgment of the District Court.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the District Court and hold that the photo identification requirements in SL 2013-381 do not violate either the Fourteenth Amendment or Section 2 of the VRA.

DATED this 16th day of June 2016.

Respectfully submitted,

s/ Steven J. Lechner
Steven J. Lechner
MOUNTAIN STATES LEGAL FOUNDATION
2596 South Lewis Way
Lakewood, Colorado 80227
(303) 292-2021
(303) 292-1980 (facsimile)
lechner@mountainstateslegal.com

[6] It is doubtful whether Congress has the authority under the Enforcement Clause of the Fifteenth Amendment to prohibit a photo identification requirement that applies equally to everyone and does not abridge the right to vote based on race. *Bolden*, 446 U.S. at 62 (opinion of Stewart, J.); *Frank*, 768 F.3d at 754. Assuming that Congress has the authority to strike down such a law, then Congress's action could only be justified under the most egregious circumstances. *See Nw. Austin*, 557 U.S. at 228–229 (2009) (Thomas, J., concurring in judgment in part, dissenting in part) ("extraordinary requirements" cannot be justified by "discrete and isolated incidents of interference with the right to vote"). Those egregious circumstances are clearly not present here, as there is no evidence of even isolated incidents of discrimination, much less systemic discrimination that might justify extraordinary remedial measures. Brief of Appellees at 49–50.

Attorney for Amicus Curiae
Mountain States Legal Foundation

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(d) because:

   [X] this brief contains [*6,798*] words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), *or*

   [ ] this brief uses a monospaced typeface and contains [*state the number of*] lines of text, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because:

   [X] this brief has been prepared in a proportionally spaced typeface using [*Microsoft Word 2013*] in [*14pt Times New Roman*]; *or*

   [ ] this brief has been prepared in a monospaced typeface using [*state name and version of word processing program*] with [*state number of characters per inch and name of type style*].

DATED this 16th day of June 2016.

/s/ Steven J. Lechner
Steven J. Lechner
MOUNTAIN STATES LEGAL FOUNDATION
2596 South Lewis Way
Lakewood, Colorado 80227
(303) 292-2021
(303) 292-1980 (facsimile)
lechner@mountainstateslegal.com

Attorney for Amicus Curiae
Mountain States Legal Foundation

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system on this 16th day of June 2016, which caused all counsel of record to be served electronically.

DATED this 16th day of June 2016.

s/ Steven J. Lechner
Steven J. Lechner
MOUNTAIN STATES LEGAL FOUNDATION
2596 South Lewis Way
Lakewood, Colorado 80227
(303) 292-2021
(303) 292-1980 (facsimile)
lechner@mountainstateslegal.com

Attorney for Amicus Curiae
Mountain States Legal Foundation

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

APPEARANCE OF COUNSEL FORM

BAR ADMISSION & ECF REGISTRATION: If you have not been admitted to practice before the Fourth Circuit, you must complete and return an Application for Admission before filing this form. If you were admitted to practice under a different name than you are now using, you must include your former name when completing this form so that we can locate you on the attorney roll. Electronic filing by counsel is required in all Fourth Circuit cases. If you have not registered as a Fourth Circuit ECF Filer, please complete the required steps at Register for eFiling.

THE CLERK WILL ENTER MY APPEARANCE IN APPEAL NO. 16-1468, 1469, 1474, 1529 as

☐ Retained ☐ Court-appointed(CJA) ☐ Court-assigned(non-CJA) ☐ Federal Defender ☐ Pro Bono ☐ Government

COUNSEL FOR: Mountain States Legal Foundation

_____ as the
(party name)

☐ appellant(s) ☐ appellee(s) ☐ petitioner(s) ☐ respondent(s) ☑ amicus curiae ☐ intervenor(s) ☐ movant(s)

/s/ Steven J. Lechner
(signature)

Steven J. Lechner
Name (printed or typed)

303-292-2021
Voice Phone

Mountain States Legal Foundation
Firm Name (if applicable)

303-292-1980
Fax Number

2596 South Lewis Way

Lakewood, CO 80227
Address

lechner@mountainstateslegal.com
E-mail address (print or type)

CERTIFICATE OF SERVICE

I certify that on June 16, 2016 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

/s/ Steven J. Lechner
Signature

June 16, 2016
Date