No. 14-1845

IN THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT

Louis Duke, *et al.*,

Plaintiffs-Appellants,

v.

State of North Carolina, *et al.*,

Defendants-Appellees.

On Appeal from the United States District Court
For the Middle District of North Carolina
Case Nos. 13-CV-660, 13-CV-658, 13-CV-861
The Honorable Thomas D. Schroeder

BRIEF OF *AMICUS CURIAE* THE BRENNAN CENTER FOR JUSTICE AT N.Y.U. SCHOOL OF LAW, IN SUPPORT OF APPELLANTS

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FED. R. APP. P. AND CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

The undersigned, counsel of record for *Amicus Curiae*, the Brennan Center for Justice at N.Y.U. School of Law (the "Brennan Center"), hereby furnishes the following information in accordance with Rule 26.1 of the Federal Rules of Appellate Procedure and Rule 26.1 of the Circuit Rules of the United States Court of Appeals for the Fourth Circuit. The Brennan Center is a non-profit entity, has no corporate parent and otherwise has nothing to disclose pursuant to these Rules.

This brief is filed with the consent of all parties.

INTEREST OF THE AMICUS CURIAE[1]

The Brennan Center for Justice at N.Y.U. School of Law is a not-for-profit, non-partisan public policy and law institute that focuses on issues of democracy and justice. Through its Democracy Program, the Brennan Center seeks to bring the idea of representative self-government closer to reality, to eliminate and defend against barriers to full political participation, and to ensure that public policy institutions reflect the diverse voices and interests that make for a rich and energetic democracy. The Center litigates voting rights cases, advocates for election administration reforms, and conducts empirical and qualitative research on issues related to election law and administration. This case could affect ongoing and future litigation in which the Center is involved.

[1] No counsel for a party authored this brief in whole or in part, and no party or its counsel made a monetary contribution intended to fund its preparation or submission. No one other than *amicus,* its members, and its counsel made a monetary contribution that was intended to fund the preparation or submission of this brief. This brief does not purport to convey the position of N.Y.U. School of Law.

SUMMARY OF ARGUMENT

In rejecting Appellants' request to enjoin North Carolina's sweeping election law, the district court committed reversible error in two ways. First, in failing to find irreparable harm, it disregarded the fact that it can offer no remedy for a lost vote after an election ends. Once an election occurs, the right to vote in that election is lost forever—the very definition of irreparable harm. Second, it erred when it concluded the Appellants were unlikely to succeed on the merits based on a deeply flawed interpretation of Section 2 of the Voting Rights Act that constrains the ability of courts to police situations where veiled discriminatory animus is at play. Instead, the district court's superficial interpretation of Section 2 would prohibit courts from using Section 2 unless a practice would be found discriminatory on a nationwide basis. That is not what the text, history, or purpose of Section 2 mandates. For both these reasons, the decision of the district court should be reversed.

ARGUMENT

I. The District Court Applied an Incorrect Preliminary Injunction Standard

Preliminary injunctions exist to preserve the status quo when an injustice could result from a change. *Pashby v. Delia*, 709 F.3d 307, 319 (4th Cir. 2013) (citing *In re Microsoft Antitrust Litigation*, 333 F.3d 517, 525 (4th Cir. 2003)), *abrogated as to other matters*. When the right to vote is denied and an election has passed, there is no retrieving that vote or restoring that status quo. That is why once a party shows that an eligible voter will be unable to vote in an election under new rules, it has established irreparable harm. The district court abused its discretion[2] when it required Appellants to show that a voter would find it impossible to vote under any hypothetical circumstance, and when it conflated the irreparable harm analysis with the likelihood of success on the merits, creating an irreparable harm standard that invites legislatures to manipulate election rules for political advantage with impunity.

[2] The district court both "appl[ied] an incorrect preliminary injunction standard" and "misapprehend[ed] the law with respect to underlying issues in litigation." *Centro Tepeyac v. Montgomery Cnty.*, 722 F.3d 184, 188 (4th Cir. 2013) (citing *Quince Orchard Valley Citizens Ass'n, Inc. v. Hodel*, 872 F.2d 75, 78 (4th Cir. 1989)).

The record in this case more than clearly shows that a substantial number of North Carolina voters would be impeded by North Carolina's Voter Information Verification Act, Session Law 2013-381 (hereinafter "Law 2013-381"). In 2008, 706,445 North Carolina voters voted in the first week of early voting; in 2010, 208,051 did so. Pls.' Mot. for Prelim. Inj. at JA1543. Although North Carolina has not yet conducted an election with drastically reduced early voting hours, evidence from Florida is highly probative. When, in 2012, that state ended early voting on the last Sunday before Election Day, 18.3% of the people who voted on the last Sunday of early voting in 2008 did not vote at all in 2012. Paul Gronke & Charles Stewart III, Early Voting in Florida, 24 (Mass. Inst. of Tech., Political Sci. Dep't, Working Paper No. 2013-12, 2013), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2247144. There is no question that at least some North Carolina voters would be similarly adversely affected in 2014. Whether that number is 50 or 500 or 50,000, that is more than enough harm for a preliminary injunction— "it is not so much the magnitude but the *irreparability* that counts for purposes of a preliminary injunction." *Dennis Melancon, Inc. v. City of New*

Orleans, 703 F.3d 262, 279 (5th Cir. 2012) (regarding regulation of taxi industry); *see also Simula, Inc. v. Autoliv, Inc.*, 175 F.3d 716, 725 (9th Cir. 1999) (noting that irreparability is central to the preliminary injunction evaluation, "irrespective of the magnitude of the injury.").

In this case, the district court ignored the harm and imposed an additional impossibility requirement under which the Appellants were required to affirmatively show that voters could not have voted under any circumstance. Not only does that requirement require speculation, it ignores the special nature of elections. With an election, there is simply no opportunity for a do-over.[3] For those unable to vote in North Carolina under Law 2013-381 – whether because of cuts to early voting or the elimination of same-day registration or changes to rules for counting ballots cast in the wrong precinct – their loss is not only likely, as required under the preliminary injunction standard,[4] it is definite. An analysis from this year's primary election shows that over 400 citizens cast ballots that went uncounted in this year's primary election

[3] Hypothetically, a court could "take the extraordinary step of invalidating [its] results." Koppell v. N.Y. State Bd. of Elections, 8 F. Supp. 2d 382, 384 (S.D.N.Y. 1988) (finding irreparable harm in a case concerning candidates' ballot placement). *See also Democratic-Republican Org. of N.J. v. Guadagno*, 900 F. Supp. 2d 447, 453 (D.N.J. 2012) ("should a general election go forward, any infringement on Plaintiffs' constitutional rights would be irreparable.")

[4] *See Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 20 (2008) (establishing the requirements for a preliminary injunction); *Real Truth About Obama, Inc. v. Federal Election Comm'n*, 575 F.3d 342, 346 (4th Cir. 2009), *vacated as to other matters by* 555 U.S. 1089 (2010) (providing that the requirements of *Winter* "must be satisfied as articulated").

because of the elimination of same day registration and out-of-precinct voting. Democracy North Carolina, Be Prepared: Hundreds of Voters Lost Their Votes in 2014 Primary Due to New Election Rules (September 10, 2014); *see Obama for Am. v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012) ("a restriction on the fundamental right to vote [ ] constitutes irreparable injury"); *Williams v. Salerno*, 792 F.2d 323, 326 (2d Cir. 1986) (litigants "would certainly suffer irreparable harm if their right to vote were impinged upon"); *Ohio State NAACP Conference v. Husted*, 2014 WL 4377869 (S.D. Ohio 2014) (enjoining reduced early voting period in Ohio); *U.S. v. Georgia*, 952 F. Supp. 2d 1318, 1331-32 (N.D. Ga. 2013) (finding irreparable harm where a state procedure barred certain absentee voters of a "sufficient [ ] ballot.").

Indeed, the district court's impossibility test incentivizes governments to manipulate election rules without fear of injunction. Under an irreparable harm standard by which litigants would have to prove that voting is categorically impossible, a state can impose a regulation denying the right to vote before an election knowing that the contest will go forward before a court assesses the regulation's legality. That state could defend such a decision with any number of sensible-

sounding justifications. For instance, a state could disproportionately close early voting locations in African-American neighborhoods and justify it on an administrative pretext of cost savings. Under the district court's preliminary injunction standard, there would be no irreparable harm because voters could theoretically choose another place to go vote— even if that policy would, in practice, almost certainly diminish African Americans' ability to participate equally in the political process. Even if a court subsequently rules against the state, the election will have passed, the votes will have been denied, and there will be no remedy.

II. The District Court Misapplied Section 2 of the Voting Rights Act

In holding that Appellants failed to demonstrate a likelihood of success on their claims under Section 2 of the Voting Rights Act, the district court adopted a constrictive and troubling reading of Section 2 that misconstrues both the text and purpose of the statute and undermines the carefully considered goals of the Act.[5] If allowed to stand, the district court's reading would sharply curtail the ability of injured parties to seek redress for discrimination unless they somehow

[5] Amicus curiae adopts Appellants' Section 2 reasoning in full. This brief responds to a particularly worrisome flaw in the district court's Section 2 doctrinal analysis.

could show that a practice was discriminatory throughout the nation. This is not what the text, history, or purpose of Section 2 requires.

A. Section 2's Results Test and the Goal of Unmasking Racial Discrimination

As the history of the results test makes clear, one of the primary goals[6] of Section 2 is to provide a remedy in situations where discriminatory animus may be at play but is veiled by non-racial pretext or otherwise impossible to prove. This is an especially important tool where, as in North Carolina, jurisdictions make hurried changes to the status quo that, though facially neutral, have large and disparate racial impacts—impacts that are well-known to legislators and the public. This test, moreover, has always been understood to be a case-by-case factual inquiry. The fact that a jurisdiction never had a practice (e.g., North Carolina's lack of early voting prior to 2006) does not mean that there cannot be a problem with repeal or reduction of the practice.

[6] Although this brief highlights the results test as "a source of circumstantial evidence regarding discriminatory intent," *U.S. v. Brown*, 561 F.3d 420, 433 (5th Cir. 2009), it is clear that the results test serves many other equally important purposes. *See U.S. v. Charleston Cnty.*, 365 F.3d 341, 345 (4th Cir. 2004) ("Section 2 condemns not only voting practices borne of a discriminatory intent, but also voting practices that operate, designedly or otherwise, to deny equal access to any phase of the electoral process for minority group members."); *Hall v. Virginia*, 385 F.3d 421, 431 (4th Cir. 2004) ("Congress enacted § 2 of the Voting Rights Act . . . to help effectuate the Fifteenth Amendment's guarantee that no citizen's right to vote shall be denied or abridged . . . on account of race, color, or previous condition of servitude."); *Lewis v. Alamance Cnty.*, 99 F.3d 600, 606 (4th Cir. 1996) ("Section 2 prohibits any election procedure which operates to deny to minorities an equal opportunity to elect those candidates whom they prefer[.]").

Likewise, contrary to the district court's novel interpretation, the fact that a practice may fail in one jurisdiction in no way means that it would fail elsewhere—or affirmatively requiring a practice in one state mean that it would have to be required everywhere.

When Congress amended Section 2 of the Voting Rights Act to add what has become commonly known as the "results test,"[7] it explained that the results test was needed in part because "the difficulties faced by plaintiffs forced to prove discriminatory intent through case-by-case adjudication create a substantial risk that intentional discrimination barred by the Fourteenth and Fifteenth Amendments will go undetected, uncorrected and undeterred." Sen. Rep. No. 97-417, at 40 (1982), *as reprinted in* 1982 U.S.C.C.A.N 177, 207 (hereinafter "Sen. Rep."); *id.* at 36 (gathering evidence to meet the intent test "will be an inordinately difficult burden for plaintiffs in most cases"). *Cf.* Elena Kagan, Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine, 63 U. Chi. L. Rev. 413, 441-42 (1996) (positing that, in the First Amendment context,

[7] "No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State . . . in a manner which results in a denial or abridgement of the right . . . to vote on account of race or color[.]" 52 U.S.C.A. § 10301(a). Prior to the 1982 amendments, Section 2 merely tracked the language of Fifteenth Amendment.

courts "use objective criteria . . . as an arbiter of motive" because courts can so rarely "determine [legislative] motive directly").

In contrast to the earliest days of the Voting Rights Act – when racial hostility frequently was expressed with vivid candor – by the time of the 1982 amendments, Congress acknowledged the reality that, even as explicit racial discrimination at the ballot box was being curbed by the Act, state actors were adapting by disguising discrimination with non-racial pretexts. Section 2's results test stepped in to address this increasingly sophisticated form of vote denial by allowing courts to block practices based on substantial circumstantial evidence of discriminatory animus even absent a "smoking gun" email or racist floor statements. *See* Sen. Rep. at 37 (instituting a results test was necessary to prevent discrimination because state actors "can attempt to rebut that circumstantial evidence [of intent] by planting a false trail of direct evidence . . . eschewing any racial motive, and advancing other governmental objectives").

The need for a robust Section 2 is even greater today than it was thirty years ago. As many states face substantial demographic shifts in the twenty-first century, the past decade has seen more and more

jurisdictions radically changing or even abandoning long-standing electoral practices, frequently couching their actions in the language of electoral integrity. *See* Daniel P. Tokaji, The New Vote Denial: Where Election Reform Meets the Voting Rights Act, 57 S.C. L. Rev. 689, 719 (2006) ("Government actors nowadays are less likely to admit that intentional discrimination underlies their actions, even where it is part of the rationale for adopting or retaining a particular practice.").

The value of the results test as a tool to smoke out improper discriminatory motives is particularly apposite when a jurisdiction adopts a "procedure [that] markedly departs from past practices." S. Rep. at 29 n. 117. Such a marked departure from the status quo would raise a number of red flags about the motivation for the legislation. This is particularly so in circumstances where many believe that those changes, as in North Carolina and in selected other states,[8] are driven not by normal policy concerns but at least in material part by a desire to counteract the exercise of power by historically disadvantaged groups in our society. *See LULAC v. Perry*, 548 U.S. 399, 440 (2006) (noting that a

[8] In the wake of the 2010 election, the country saw an unprecedented wave of laws restricting the vote. Twenty-two states are anticipated to have new voting restrictions in place in November 2014, when compared to the last midterm elections in November 2010. Brennan Center for Justice, The State of Voting in 2014 (June 2014), *available at* http://www.brennancenter.org/sites/default/files/analysis/State_of_Voting_2014.pdf.

redistricting improperly "took away the Latinos' opportunity because Latinos were about to exercise it").

In the goal of unmasking discrimination, it is highly relevant that in North Carolina the changes in question were enacted in one omnibus bill under highly rushed and sharply polarized circumstances,[9] immediately after an election where early voting and same day registration were used heavily by African-American voters. This is in sharp contrast to a situation where a state like New Hampshire simply maintains the status quo of not offering same day registration or early voting, which does not insinuate the same improper motives. The point is not that Section 2 requires a showing of intentional discrimination—it emphatically does not—but rather that Section 2 should be interpreted in a way that would enable it to offer a remedy in circumstances that raise reasonable suspicions of intentional discrimination as well as where intentional discrimination is present, whether or not it can be proved.

[9] The district court opinion outlines this enlightening legislative history. *See* slip op. at 6-15. As originally introduced, the bill dealt with voter identification only. On June 26, 2014, one day after the Supreme Court issued its decision in *Shelby County v. Holder*, 133 S. Ct. 2612 (2013), striking down a portion of the Act aimed at protecting minority voters, a North Carolina legislator remarked that "now we can go with the full bill." Slip op. at 9. After being presented with the 57-page "full bill"—which was an omnibus bill covering much more than voter ID—on July 23, the new version was debated for only two days before it was passed along party lines. Slip op. at 12-15.

In its misapplication of Section 2, the district court ignored the result test's history as an instrument to gauge circumstantial evidence of discriminatory intent, and applied an unrecognizable test that effectively requires a showing of near-absolute denial of the right to vote to make out a Section 2 claim. Such a standard robs the results test of its ability to protect the right to vote from racial discrimination.

B. A Section 2 Violation in this Case Need Not Implicate Other Jurisdictions' Voting Practices

Nothing in Section 2 or its history supports the district court's conclusion that a practice cannot fail under the results test unless it would fail everywhere across the country. Slip op. at 46. Section 2 was crafted and has always been interpreted as a localized, fact-based inquiry; by its very nature, it is designed to prevent automatic application to dissimilar circumstances.

The legislative history of the 1982 amendments in fact shows that Congress rejected the district court's position at the time of the amendments. When Congress began debating the 1982 amendments, several members expressed concerns that the proposed results test would lead to wholesale invalidation of at-large elections as well as multimember districts. Sen. Rep. at 30-34. In response, the Senate

Report accompanying the 1982 amendments explained that the amendments merely sought to restore the standard used under *White v. Regester*, 412 U.S. 755 (1973). Sen. Rep. at 32. Under that test, the report explained "at large elections were not automatically invalidated" but rather the results test "distinguished between situations in which racial politics play an excessive role in the electoral process, and communities in which they do not." Sen. Rep at 34. Consistent with the Senate Report, courts have stressed for three decades that Section 2's results test was intended to be both "flexible" and "fact intensive," and anything but automatic:

> [E]lectoral devices, such as at large elections, may not be considered *per se* violative of § 2. Plaintiffs must demonstrate that, under the totality of circumstances, the devices result in unequal access to the electoral process . . . [Likewise,] the results test does not assume the existence of racial bloc voting; plaintiffs must prove it.

Collins v. City of Norfolk, 816 F.2d 932, 935 (4th Cir. 1987) (quoting *Thornburg v. Gingles*, 478 U.S. 30, 46 (1986)). Applying these strictures, courts have found that at-large elections no longer can be used in some jurisdictions, *see, e.g.*, *Cane v. Worcester Cnty.*, 35 F.3d 921 (4th Cir. 1994), while at-large elections continue to be an entirely permissible choice elsewhere, *see, e.g.*, *Lewis v. Alamance Cnty.*, 99 F.3d 600 (4th

Cir. 1996). It is no different with early voting, same day registration, or any of the other issues at stake in this litigation.[10]

When properly applied, Section 2's results test mandates that courts make "a *searching practical evaluation* of the past and present reality" in the state. *Gingles*, 478 U.S. at 45 (1986) (internal citations omitted) (emphasis added). This evaluation "is peculiarly dependent upon the facts of each case . . . and requires an intensely local appraisal of the design and impact of the contested electoral mechanisms." *Id.* at 79 (internal citations omitted); *see also U.S. v. Charleston Cnty.*, 365 F.3d 341, 349 (4th Cir. 2004). Despite these long-accepted characterizations of the Section 2 inquiry, the district court's opinion below expresses a misplaced worry that a decision in this case will compel action in other states. Such concern is unfounded.

CONCLUSION

For the foregoing reasons, the order of the district court denying Appellants' request for a preliminary injunction should be reversed.

[10] The District Court's reasoning that a holding that North Carolina's elimination of same day registration violates Section 2 would be at odds with the National Voter Registration Act is likewise incorrect, for the same reason. Having instituted same day registration, the state's administration of that system, including the choice to eliminate it, must not be tinged with discriminatory animus, or have the effect of denying or abridging the right to vote on account of race. The National Voter Registration Act sets a floor for state registration systems; the fact that North Carolina has exceeded that floor does not give it license to administer its registration system in a manner that violates Section 2.

Respectfully submitted,

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Dated: September 17, 2014

CERTIFICATE OF SERVICE

I hereby certify that on September 17th, 2014, I electronically filed the foregoing with the Clerk of the Court of the United States Court of Appeals for the Fourth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

By /s/ Samuel Brooke
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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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CERTIFICATE OF SERVICE

I certify that on Sept. 17, 2014 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:

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