No. 18-10151

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

GREATER BIRMINGHAM MINISTRIES, et al.,

Appellants

v.

JOHN MERRILL, in his official capacity as the Secretary of State of Alabama,

Appellee

Appeal from the United States District Court
for the Northern District of Alabama,
Southern Division

Case No. 2:15-cv-02193-LSC

BRIEF FOR *AMICUS CURIAE* AMERICAN CIVIL RIGHTS UNION IN SUPPORT OF DEFENDANT-APPELLEE AND AFFIRMANCE

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

In accordance with Federal Rule of Appellate Procedure 26.1 and related Eleventh Circuit Local Rules, the undersigned hereby certifies that, in addition to the Certificates of Interested Persons and Corporate Disclosure Statements submitted by Plaintiffs-Appellants Greater Birmingham Ministries and Defendant-Appellee John Merrill, in his official capacity as Secretary of State of Alabama, the following persons or entities have an interest in the outcome of this case:

A. Interested Persons

American Civil Rights Union

John J. Park, Jr.

Strickland Brockington Lewis LLP

B. Corporate Disclosure Statement

Counsel for amicus further certifies that no publicly traded company or corporation has an interest in the outcome of this case or appeal.

s/ John J. Park, Jr.
John J. Park, Jr.

INTEREST OF *AMICUS CURIAE*[1]

The American Civil Rights Union (ACRU) is a nonpartisan 501(c)(3) nonprofit public-policy organization dedicated to protecting constitutional liberty. The ACRU Policy Board sets the policy priorities of the organization, and includes some of the most distinguished statesmen in the Nation on matters of free speech and election law. Current Policy Board members include: the 75th Attorney General of the United States, Edwin Meese III; Charles J. Cooper, the former Assistant Attorney General for the Office of Legal Counsel, William Bradford Reynolds, the former Assistant Attorney General for the Civil Rights Division, former Federal Election Commissioner Hans von Spakovsky, and J. Kenneth Blackwell, the former U.S. Ambassador to the United Nations Human Rights Commission and Ohio Secretary of State.

The ACRU has participated as *amicus curiae* in numerous free speech cases in the context of elections, including *Citizens United v. FEC*, 558 U.S. 310 (2010), and *Minnesota Voters Alliance v. Mansky*, No. 16-1435, in the Supreme Court of the United States (argued Feb. 28, 2018). The ACRU also litigates a number of

[1] All parties have consented to the filing of this brief. Pursuant to Fed. R. App. P. 29(c)(5), amicus curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel for any party or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus curiae or its counsel made a monetary contribution to the brief's preparation or submission.

election law cases, including *American Civil Rights Union v. Philadelphia City Commissioners*, 872 F.3d 175 (3d Cir. 2017). This Court would benefit from the ACRU's perspective and expertise in this case.

SUMMARY OF THE ARGUMENT

As the Supreme Court has noted, "There is no question about the legitimacy or importance of the State's interest in counting only the votes of eligible voters." *Crawford v. Marion Cty. Elections Bd.*, 553 U.S. 181 (2008) (opinion of Stevens, J.). Alabama has chosen to vindicate that and other important state interests, including its constitutionally grounded interest in determining the qualifications of voters, by adopting a voter ID law. The State demonstrates that its law provides an equal opportunity to all voters to participate in elections and the number of identifiable individuals who can claim an injury is infinitesimally small.

ARGUMENT

I. INTRODUCTION

Any interpretation of Section 2 of the Voting Rights Act should begin with its text. As Justice Scalia remarked, Section 2 is not "some all-purpose weapon for well-intentioned judges to wield as they please in the battle against discrimination. It is a statute." *Chisom v. Roemer*, 501 U.S. 380, 404 (1991) (Scalia, J., dissenting),

Indeed, as Justice Kagan has noted, "We're all textualists now."[2] Proceeding in that fashion, this Court should require that any showing of disparate results have a close connection to disparate treatment. The need to connect disparate results to disparate treatment has the distinct advantage of being constitutionally well grounded in a way that any alternative reading does not.

ACRU will first explain why the statutory text cannot be read expansively as the Plaintiffs and their *amici* do. Second, ACRU will show how that reading avoids constitutional problems. Third, ACRU will demonstrate the flaws in the competing approach. Finally, ACRU will respond to the contrary views of the statutory text and precedent expressed in the brief of the Plaintiffs-Appellees and the *amicus* brief of the Four Professors. *See* Br. of *Amici Curiae* Professors of Law.

At the outset, though, ACRU notes that there is nothing unconstitutional about a voter ID law. *See Crawford*, 553 U.S. 181; *Common Cause/Georgia v. Billups*, 554 F. 3d 1340 (11th Cir. 2009). In *Crawford*, Justice Stevens rejected the notion that burdens "arising from life's vagaries" are sufficient to overturn a state law. *Crawford*, 553 U.S. at 197 (plurality opinion). This controlling opinion also noted that "the inconvenience of making a trip to the to the BMV, gathering the required documents, and posing for a photograph surely does not qualify as a

[2] Justice Elena Kagan, The Scalia Lecture: A Dialogue with Justice Kagan on the Reading of Statutes at 8:09 (Nov. 17, 2005), https://today.law.harvard.edu/in-scalia-lecture-kagan-discusses-statutory-interpretation/.

substantial burden on the right to vote, or even represent a significant increase over the usual burdens of voting." *Id*. at 198. For other, more burdened voters, the availability of provisional ballots "mitigated" that burden. *Id*. at 199. Claims of injury like those did not amount to the kind of "excessively burdensome requirements" sufficient to defeat the State's interests.

Those state interests included preventing voter fraud and safeguarding public confidence in the electoral system. "The electoral system cannot inspire public confidence if no safeguards exist to deter or detect fraud or to confirm the identity of voters. Photo identification cards are needed to board a plane, enter federal buildings, and cash a check. Voting is equally important." *Id.* at 194 (quoting Building Confidence in U.S. Elections § 2.5 (Sept. 2005), App. 136–37); *see also Frank v. Walker*, 768 F. 3d 744, 748 (7th Cir. 2014) (listing activities for which photo identification is required). The State's interest in protecting voter confidence may be "closely related to the State's interest in preventing voter fraud," but it also "has independent significance, because it encourages citizen participation in the democratic process." *Crawford*, 553 U.S. at 197 (Stevens, J.).

Justice Scalia, joined by Justices Thomas and Alito, concurred in the judgment in *Crawford*, reasoning that the burden of complying with Indiana's voter ID law was not one that should be analyzed on an individual basis. He explained, "Ordinary and widespread burdens, such as those requiring 'nominal

effort' of everyone, are not severe." *Crawford*, 553 U.S. at 205 (Scalia, J., concurring in the judgment). "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.'" *Id*. at 209 (quoting *Crawford*, 553 U.S. at 198 (Stevens, J.)).

II. SECTION 2 AND ITS TEXT

Section 2 of the Voting Rights Act begins by barring the imposition or application of any "voting qualification or prerequisite to voting or standard, practice, or procedure . . . 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. § 10301(a) (emphases added). It further provides that "[a] violation . . . is established if, *based on the totality of the circumstances*," citizens protected by the Act "have *less opportunity* than other members of the electorate to participate in the political process and to elect representatives of their choice." *Id.* 52 U.S.C. § 10301(b) (emphases added).

By including a "results" test, Section 2 goes further than the Constitution. Congress added that test to the statute in 1982 after the Supreme Court in *City of Mobile v. Bolden*, 446 U.S. 55 (1980), held that the prior language prohibited only intentional discrimination.

Nonetheless, the statutory text hedges "results in" by adding "on account of," the "totality of the circumstances," and "less opportunity." Taken together, those statutory elements "suggest that something other than a pure effects test—that is, a disparate impact test—is appropriate; surely Congress would not have used all this language had it intended *that*." Roger Clegg & Hans von Spakovsky, *"Disparate Impact" and Section 2 of the Voting Rights Act* at 7 (Heritage Foundation 2014), ("Clegg & von Spakovsky") (emphasis in original), *available at* http://report.heritage.org/lm119. Put differently, "[s]howing a disparate impact on poor and minority voters is a necessary but not sufficient condition to substantiate a Section 2 vote denial or abridgement claim." *Veasey v. Abbott*, 830 F. 3d 216, 310–11 (5th Cir. 2016) (en banc) (E. Jones, J., dissenting).

Indeed, the text requires not just "results," but also that they be "on account of race or color" based on the "totality of the circumstances" and provide minorities with "less opportunity" to vote or participate in the political process than other non-minority voters. In *Thornburg v. Gingles*, 478 U.S. 30 (1986), the Court approved a non-exclusive list of nonstatutory "typical factors" that "might be probative of a § 2 violation" suggesting that showing only a disparate impact is not enough. Clegg & von Spakovsky, supra, at 3; *see also Veasey* at 306–07 (E. Jones,

J., dissenting).[3] Between the "totality of the circumstances" and the need for the injury to be "on account of race," Section 2 can, and should, be read to (1) require plaintiffs to show "a close nexus between the practice in question and actual disparate treatment" and (2) provide defendants with "a rebuttal opportunity to show that they have legitimate, nondiscriminatory reasons for the challenged practice." Clegg & von Spakovsky, *supra*, at 4.

This Court, sitting en banc, has endorsed a reading of Section 2 that gives meaning to all of its parts and rejected the contention that "disparate election results," standing alone, are enough to establish a violation. *Nipper v. Smith*, 39 F. 3d 1494, 1515 (11th Cir. 1994) (en banc). This Court specifically held, "The existence of some form of racial discrimination . . . remains the cornerstone of section 2 claims; to be actionable, a deprivation of the minority group's right to equal participation in the political process must be on account of a classification, decision, or practice that depends on race or color, not on account of some other racially neutral cause." *Id*. It emphasized that its "linguistic conclusion is supported

[3] Those factors are drawn from the majority report of the Senate Judiciary Committee related to the 1982 amendment to Section 2 of the Voting Rights Act. "The Senate Report cannot claim the same legal status, if any, as that of the enacted law." *Veasey*, 830 F. 3d at 306 (E. Jones, J., dissenting). Moreover, the Senate factors are meant "principally to guide redistricting cases" like *Gingles*. *Id*. As a result, "in transitioning from redistricting cases . . . to the new generation of 'vote abridgement' cases, courts have found it difficult to apply the Section 2 results test." *Id*. at 305.

by the fact that any other reading might well render section 2 outside the limits of Congress' legislative powers and therefore unconstitutional." *Id*.

The test proposed by Judge Jones in her *Veasey* dissent is consistent with that approach. She writes that "[a] textualist approach" would first "consider the total impact of the challenged regulation on the voting public." *Veasey*, 830 F. 3d at 311 (E. Jones, J., dissenting). "If the regulation disparately affects minority voters, proceed to determine whether the particular burden imposed by the regulation, examined under the totality of the circumstances, deprives them of an opportunity to participate in the electoral process." *Id*. Judge Jones observes that this test "requires a causal connection between the challenged regulation and the disparate impact." *Id*.

In proposing such a "causal connection," Judge Jones finds herself in good company. *Gingles* "offer[s] ample support for a requirement that they challenged law causes the prohibited voting results." *Id.* at 312. Six cases "clearly" require a causal link between the law and the injury. *Id*. Two of them, *Frank* and *Gonzalez v. Arizona*, 677 F. 3d 393 (9th Cir. 2012) (en banc), reject challenges to voter ID laws.

In *Gonzalez*, the Ninth Circuit held that "a § 2 challenge based purely on a showing of some relevant statistical disparity between minorities and whites,

without any evidence that *the challenged voting qualification* caused that disparity, will be rejected." 677 F. 3d at 404 (emphasis added). In the absence of "evidence that Latinos' ability or inability to obtain or possess identification for voting purposes . . . resulted in Latinos having less opportunity to participate in the electoral process," the claim failed. *Id*. at 407.

In addition, Judge Jones joins the Seventh Circuit in reading Section 2(b) as an "'equal-treatment requirement (which is how it reads)' rather than 'an equal-outcome command.'" *Veasey*, 830 F. 3d at 311 (E. Jones, J., dissenting) (quoting *Frank*, 768 F. 3d at 754). The Appellants complain that the district court erroneously applied an equal-treatment analysis. Br. for Plaintiffs-Appellants at 14.[4] In so doing, they overlook the statutory requirement that the challenged practice give "less opportunity" to minorities to participate and elect the candidates of their choice. Opportunity is not outcome, and demanding an equal outcome reads "opportunity" out of the statute.

III. A NARROWLY TAILORED READING OF THE "RESULTS" TEST IN SECTION 2 AVOIDS CONSTITUTIONAL PROBLEMS.

"[A]n Act of Congress ought not to be construed to violate the Constitution if any other possible construction remains available." *NLRB v. Catholic Bishop of*

[4] Plaintiffs-Appellants also contend that an equal treatment reading of Section 2 is barred by the law of this Circuit. ACRU disagrees and will address that contention below.

Chicago, 440 U.S. 490, 500 (1979). A free-wheeling application of disparate impact promises only serious constitutional questions that should be avoided. The problems stem from the limits of congressional power and from the intrusion on constitutionally grounded state interests.

A. The powers of Congress are not unlimited.

The Supreme Court has made it clear that the Fourteenth Amendment prohibits only intentional discrimination. *Vill. of Arlington Heights v. Metro. Housing Dev. Corp*., 429 U.S. 252 (1977). There the Court noted, "Our decision last term in *Washington v. Davis*, 426 U.S. 229 (1976), made it clear that official action will not be held unconstitutional solely because it results in a racially disproportionate impact." *Id.* at 264–65. Likewise, a plurality of the Court later held that the Fifteenth Amendment "prohibits only purposefully discriminatory denial or abridgement by government of freedom to vote 'on account of race, color, or previous condition of servitude.'" *Bolden*, 446 U.S. at 65.

Section 5 of the Fourteenth Amendment and Section 2 of the Fifteenth Amendment empower Congress to enforce the amendments "by appropriate legislation." U.S. Const., amend. XIV § 5, amend. XV § 2. Those powers are not, however, "unlimited." *Oregon v. Mitchell*, 400 U.S. 112, 128 (1970). Rather, where those Fourteenth Amendment powers are exercised, "[t]here must be a

congruence and proportionality between the injury to be remedied and the means adopted to that end." *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997). The history of the Fourteenth Amendment and its own case law confirm "the remedial, rather than substantive, nature of the Enforcement Clause." *Id*.

City of Boerne addresses the powers of Congress under the Fourteenth Amendment, not the Fifteenth, but there is "no reason" to conclude that the powers of Congress would be different or greater under the Fifteenth Amendment. Clegg & von Spakovsky, *supra*, at 3. Clegg and von Spakovsky explain that "the two post-Civil War Amendments were ratified within 19 months of each other, have nearly identical enforcement clauses, were prompted by a desire to protect the rights of just-freed slaves, and have been used to ensure citizens' voting rights." *Id*. Congress could enact the results portion of Section 2(b) of the Voting Rights Act pursuant to its powers under the Enforcement Clauses. In so doing, however, it cannot not open the door to all kinds of claims. The language of the Sections of both Amendments authorizing congressional action should therefore be read *in pari materia*, such that a federal statute authorized by Section 2 of the Fifteenth Amendment must be a congruent and proportional remedy to the problem identified by Congress.

Even where disparate impact liability is allowed, the "scope of proper liability" can be limited by allowing the defendant to "state and explain the valid

interest served by their policies." *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc.*, 135 S. Ct. 2507, 2522–23 (2015). The Court noted that a "disparate impact claim that relies on a statistical disparity must fail if the plaintiff cannot point to a defendant's policy or policies causing that disparity." *Id.* at 2523. Indeed, "[a] robust causality requirement insures that '[r]acial imbalance . . . does not, without more, establish a prima facie case of disparate impact' and thus prevents defendants from being held liable for racial disparities they did not create." *Id*. Nothing less should be required from Section 2 of the Voting Rights Act.

B. A free-wheeling application of Section 2's results test intrudes on constitutionally protected state interests.

Cutting the results test of Section 2 loose from its statutory mooring threatens recognized state interests concerning the power to set the times, places, and manner of holding elections. The Elections Clause of the Constitution empowers the States to "prescribe[]" the "time, place, and manner of holding" federal elections, but subjects that power to the power of Congress to "make or alter" those State rules "at any time by law." U.S. Const. art. I, § 4.

The Constitution also reserves to the States the authority to determine the qualifications of voters in federal elections. *See* U.S. Const., art. I, § 2; amend. XVII. As the Seventeenth Amendment requires, "The electors in each State shall

have the qualifications requisite for electors of the most numerous branch of the State legislatures." *Id.*; *see also Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 16 (2013) (The "Elections Clause empowers Congress to regulate *how* federal elections are held, but not *who* may vote in them.") (emphasis in original)). The Constitution, however, nowhere gives the federal government authority over state elections. "That is why extending the franchise to black Americans, women, and 18-year-olds required constitutional amendments and could not be done by congressional legislation." Clegg & von Spakovsky, *supra*, at 5.

As a result, States have "broad powers to determine the conditions under which the right of suffrage may be exercised, absent of course the discrimination which the Constitution condemns." *Lassiter v. Northampton Cty. Bd. of Elections*, 360 U.S. 45, 50 (1959). Disparate impact does not violate the Constitution, and its proposed use in this case would interfere with those "broad powers."

In addition, Section 5 of the Voting Rights Act, "which authorizes federal intrusion into sensitive areas of state and local policymaking, imposes substantial federalism costs." *Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 202 (2009) (internal quotation omitted). Section 5 covered only jurisdictions that met certain specified criteria, in contrast to Section 2, which reaches nationwide. Even so, Section 2 also intrudes into sensitive areas of state policymaking. It is one thing for Section 2 to be interpreted to guide state and local redistricting efforts and quite

another for it to be used to upset racially neutral election laws that apply a voter ID procedure the Supreme Court has held to be constitutional.

Such a use would further encroach on "traditionally sensitive areas, such as legislation affecting the federal balance." *Gregory v. Ashcroft*, 501 U.S. 452 (1991). The Court determined that "a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front." *Id.* at 458. Congress has already encroached on state sovereignty through the Voting Rights Act, but each additional encroachment strains the normative balance of power in the federalist system. Even as Congress has the power to "legislate in areas traditionally regulated by the States," this Court should not "assume" that Congress "exercise[s]" that power "lightly." *Id.* at 460.

The two-part test for Section 2 results claims endorsed by the Plaintiffs-Appellants "runs a severe risk of unconstitutionality. So much for judicial restraint." *Veasey*, 830 F. 3d at 315 (E. Jones, J., dissenting). The result is "judicial mischief in micromanaging a facially neutral state law implementing a Supreme Court-approved purpose in order to eliminate disparate impact . . . not caused by the law itself." *Id*. This Court should decline the Plaintiffs-Appellants' invitation to engage in such "judicial mischief."

IV. THE ALTERNATIVE APPROACH TO SECTION 2 AND ITS RESULTS TEST IS FLAWED.

In *Veasey*, the Fifth Circuit adopted "a two-part *Gingles*-heavy framework" for analyzing vote abridgement cases. *See Veasey*, 830 F. 3d. at 305. That test, as noted above, started in the redistricting context, which the *Veasey* majority recognized: "Although courts have often applied the *Gingles* factors to analyze claims of vote dilution, perhaps because of past preclearance requirements, there is little authority on the proper test to determine whether the right to vote has been denied or abridged on account of race." *Id.* at 244 (majority opinon) (internal footnote omitted). Or, as the Sixth Circuit put it before embarking on the inquiry, "A clear test . . . has yet to emerge." *Ohio State Conference of NAACP v. Husted*, 768 F.3d 524, 554 (6th Cir. 2014), *vacated on other grounds*, No. 14-3877, 2014 WL 1038467, at *1; U.S. App. LEXIS 24472, at *1 (6th Cir. Oct. 1, 2014).

Notwithstanding the paucity of authority, the Fifth Circuit adopted a two-part framework developed by the Sixth Circuit in *Husted* and used by the Fourth Circuit in *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224 (4th Cir. 2014). *See Veasey*, 830 F. 3d at 244. That test considers whether:

> (1) The challenged standard, practice, or procedure imposes 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 electoral process and to elect candidates of their choice, and

> (2) The burden must be in part caused by or linked to social and historical conditions that have or currently produce discrimination against members of the protected class.

Id. (internal quotation marks and brackets omitted). As the Fifth Circuit acknowledged, the second part of the test "draws on" *Gingles*. *Id.* at 245.

In contrast, the approach of Judge Jones "dispenses with the *Gingles* factors." *Veasey*, 830 F. 3d at 311 (E. Jones, J., dissenting). She points to a number of good reasons for doing so. As noted above, the Senate Report, from which the Gingles factors come, is legislative history that lacks the "legal status . . . of the enacted law." *Id*. at 306. Moreover, that Senate Report "originated . . . principally to guide redistricting case," and, even in that context, they are "non-comprehensive and non-mandatory." *Id*.

ACRU notes that the Senate Factors are now more than 35 years old. They are approaching their wear-out date in that the causal link between conditions then and conditions now is seriously attenuated. As the Supreme Court noted, the "conditions that originally justified" the enactment and application of Section 5 of the Voting Rights Act "no longer characterize voting in the covered jurisdictions." *Shelby Cty. v. Holder*, 570 U.S. 529, 535 (2013); *cf. Knight v. Alabama*, 458 F. Supp. 2d 1273, 1312–13 (N. D. Ala. 2004) ("[A]lthough the ad valorem tax system in Alabama may be traceable to past discriminatory decisions, Defendants have

satisfied their burden to demonstrate that the challenged provisions of the Alabama constitution [*sic*] do not continue to have a segregative effect on student choice."). Any imposition of liability that "imposes current burdens . . . must be justified by current needs." *Id*.

The Plaintiffs-Appellants' theory also promises that "a wide swath of racially neutral election measures will be subject to challenge." *Veasey*, 830 F.3d at 317 (E. Jones, J., dissenting). Nothing stops a claim that a registration system "top to bottom" or a requirement for in-person voting violates Section 2(b). *See Frank*, 768 F. 3d at 754 ("At oral argument, counsel for one of the two groups of plaintiffs made explicit what the [two-step framework] implies: that if whites are 2% more likely to register than are blacks, then the registration system top to bottom violates § 2; and if white turnout on election day is 2% higher, then the requirement of in-person voting violates § 2.") In the same way, "[m]otor-voter registration, which makes it simple for people to register by checking a box when they get drivers' licenses, would be invalid, because black and Latino citizens are less likely to own cars and therefore less likely to get drivers' licenses." *Id*.

V. THIS COURT'S PRIOR DECISIONS DO NOT DICTATE A CONTRARY RESULT.

Plaintiffs-Appellants point to two decisions of this Court from 1984, which they invoke for the proposition that equal treatment alone is not enough to save a

state or local standard, practice, or procedure. Br. of Plaintiffs-Appellants at 14–15.[5] The Four Professors' *amici* point to those two cases and to three decisions of the old Fifth Circuit, which they contend stand for the same proposition. Br. of *Amici Curiae* Professors of Law at 16–20.[6]

These cases predate this Court's en banc decision in *Nipper v. Smith*. That en banc decision is far more persuasive, if not controlling, than the decision on which Plaintiffs-Appellants and their *amici* rely. In *Nipper*, this Court held that the proper reading of Section 2 required that any injury be "on account of race or color, not on account of some other racially neutral cause." *Nipper*, 39 F. 3d at 1515. A showing of "disparate election results," standing alone, is not sufficient to establish a violation of Section 2. *Id*.

Significantly, these cases also all predate *Thornburg v. Gingles* and its endorsement of the Senate Factors in 1986. Likewise, they predate the judiciary's first attempts to apply those factors to vote denial or abridgement claims in 2014. *See Husted*; *League of Women Voters*. Accordingly, none stands for the proposition that the two-step framework drawn from *Gingles* and endorsed by the

[5] They cite *United States v. Marengo Cty Comm'n*, 731 F.2d 1546 (11th Cir. 1984), and *United States v. Dallas Cty. Comm'n*, 739 F.2d 1529 (11th Cir. 1984).

[6] The Four Professors cite *United States v. Palmer*, 356 F.2d 951 (5th Cir. 1966); *Gilmore v. Greene Cty. Democratic Exec. Comm.*, 435 F.2d 487 (5th Cir. 1970); *Lodge v. Buxton*, 639 F.2d 1358 (5th Cir. Unit B Mar. 1981).

Plaintiffs-Appellants is the proper way to apply Section 2's results test to claims of vote denial or abridgement.

In addition, the practices at issue in these cases made voter registration "needlessly hard" at a time when black voter registration significantly trailed that of whites. *Cf*. *Frank*, 768 F. 3d at 753 ("Unless Wisconsin has made it *needlessly* hard to get photo ID, it has not denied anything to any voter." (emphasis in original)). Likewise, none of these cases involve the broad form application of societal discrimination to block a racially neutral law.

Alabama has not made it needlessly hard to get an ID that complies with the law. This Court should affirm the judgment of the District Court.

CONCLUSION

Plaintiffs-Appellants ask this Court to require Alabama to jettison a constitutional practice on the basis of the questionable application of a statutory theory. This Court should decline their invitation. For the foregoing reasons, and the reasons stated in the Brief of the Defendant-Appellee Secretary Merrill, this Court should affirm the judgment of the court below.

Respectfully Submitted,

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April 6, 2018

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

Certificate of Compliance with Type-Volume Limitation, Typeface Requirements, and Type Style Requirements

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(d) and 32(a)(7)(B) because this brief contains 4,456 words, 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 this brief has been prepared in a proportionally spaced typeface using Microsoft 2010 in 14-point Times New Roman.

Dated: April 6, 2018

s/John J. Park, Jr.
John J. Park, Jr.

CERTIFICATE OF SERVICE

I certify that, on April 6, 2018, I electronically filed this document using the Court's CM/ECF system, which will serve notice of such filing on all counsel of record.

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