

Nos. 16-1468(L), 16-1469, 16-1474, 16-1529

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

NORTH CAROLINA STATE CONFERENCE OF THE NAACP, *et al.*,

Plaintiffs—Appellants,

JOHN DOE 1, *et al.*,

Plaintiffs,

v.

PATRICK L. MCCRORY, in his official capacity as Governor of the state
of North Carolina, *et al.*,

Defendants—Appellees.

(See inside cover for continuation of caption)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

**BRIEF OF LAWYERS DEMOCRACY FUND AS *AMICUS CURIAE*
IN SUPPORT OF APPELLEES AND AFFIRMING DISMISSAL**

Of Counsel:

E. Mark Braden
Richard B. Raile
Baker & Hostetler LLP
Washington Square, Suite 1100
1050 Connecticut Ave., N.W.
Washington, D.C. 20036

Maya M. Noronha
Trevor M. Stanley
Baker & Hostetler LLP
Washington Square, Suite 1100
1050 Connecticut Ave., N.W.
Washington, D.C. 20036
202-861-1742 (phone)
202-861-1783 (fax)

Counsel for *Amicus Curiae*

(Continuation of caption)

LEAGUE OF WOMEN VOTERS OF NORTH CAROLINA, *et al.*,
Plaintiff—Appellants

CHARLES M. GRAY,
Intervenors/Plaintiffs

LOUIS M. DUKE, *et al.*,
Plaintiffs-Intervenors—Appellants

v.

THE STATE OF NORTH CAROLINA, *et al.*,
Defendants—Appellees

LEAGUE OF WOMEN VOTERS OF NORTH CAROLINA, *et al.*,
Plaintiffs—Appellants

LOUIS M. DUKE, *et al.*,
Plaintiffs—Intervenors—Appellants

v.

THE STATE OF NORTH CAROLINA, *et al.*,
Defendants—Appellees

UNITED STATES OF AMERICA,
Plaintiff—Appellant

v.

THE STATE OF NORTH CAROLINA, *et al.*,
Defendants—Appellees

and

CHRISTINA KELLEY GALLEGOS-MERRILL, *et al.*,
Intervenor/Defendants

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Local Rule 26.1, *Amicus Curiae* Lawyers Democracy Fund herein states that it is not a publicly held corporation or other publicly held entity, that it does not issue shares to the public and has no parent companies, subsidiaries, or affiliates that have issued shares to the public in the United States or abroad, that no publicly held corporation or other publicly held entity has a direct financial interest in the outcome of the litigation, and that the case does not arise out of a bankruptcy proceeding.

TABLE OF CONTENTS

INTEREST OF THE <i>AMICUS</i>	1
INTRODUCTION AND SUMMARY OF ARGUMENT	2
ARGUMENT	4
A. THE SMALL PERCENTAGE OF VOTERS WITHOUT IDENTIFICATION IS NOT SIGNIFICANTLY BURDENED BY THE VOTER ID REQUIREMENT.	7
1. Any Disenfranchisement by the North Carolina Voter ID Law Is Purely Speculative	7
2. North Carolina’s Requirement to Obtain Photo Identification Does Not Present Burdens Substantially Greater than Ordinary Burdens on Voters	8
3. The Reasonable Impediment Exception Is an Easily Navigable Fail-Safe that Broadly Protects the Rights of Eligible Voters	10
4. Unfounded Challenges to Citizens’ Eligibility Are Unlikely to Disenfranchise Voters	12
5. North Carolina Has Adequately Prepared Citizens for the Voter ID Law’s Implementation	13
B. COMBATING FRAUD, ENSURING PUBLIC CONFIDENCE, COUNTING ELIGIBLE VOTES, AND KEEPING ACCURATE RECORDS IN ELECTIONS JUSTIFY IMPLEMENTATION OF THE VOTER ID REQUIREMENT	14
1. North Carolina Has a Valid Interest in the Promotion of Public Confidence in the Electoral Process	15
2. Voter Identification Laws Deter, Prevent, and Assist in the Prosecution of Fraud	17
a. Non-Citizen Voting	18
b. Voter Impersonation, Double Voting and Fictitious Voting	20

3.	North Carolina Has a Valid Interest in Counting Only the Votes of Eligible Voters	22
4.	North Carolina Has a Valid Interest in Orderly Administration of Elections and Accurate Recordkeeping of Elections	22
	CONCLUSION.....	24

TABLE OF AUTHORITIES

CASES

<i>Anderson v. Celebrezze</i> , 460 U.S. 780 (1983)	5
<i>Burdick v. Takushi</i> , 504 U.S. 428 (1992)	6, 8, 23
<i>City of Memphis v. Hargett</i> , 414 S.W. 3d 88 (Tenn. 2013)	16
<i>Common Cause/Georgia v. Billups</i> , 554 F.3d 1340 (11th Cir. 2009).....	6, 7, 12, 14, 16
<i>Crawford v. Marion Cty. Election Bd.</i> , 553 U.S. 181 (2008)	passim
<i>Crawford v. Marion Cty. Election Bd.</i> , 472 F.3d 949 (7th Cir. 2007).....	21
<i>Easley v. Cromartie</i> , 532 U.S. 234 (2001)	6
<i>Frank v. Walker</i> , 768 F.3d 744 (7th Cir. 2014).....	passim
<i>James v. Bartlett</i> , 607 S.E.2d 638 (N.C. 2005)	17, 22
<i>Lee v. Virginia State Bd. of Elections</i> , 2016 WL 2946181 (4th Cir. May 27, 2016)	17
<i>NAACP v. Browning</i> , 569 F. Supp. 2d 1237 (N.D. Fla. 2008).....	16, 23
<i>N.C. State Conference of the NAACP v. McCrory</i> , 2016 WL 1650774 (M.D.N.C. Apr. 25, 2016).....	passim

<i>Purcell v. Gonzalez</i> , 549 U.S. 1 (2006)	5, 15, 17, 22
<i>South Carolina v. United States</i> , 898 F. Supp. 2d 30 (D.D.C. 2012)	9, 11, 22

STATUTES

52 U.S.C. § 10304 (2016)	11
Voter Identification Verification Act, 2013 N.C. Sess. Laws 381	5
Act of Jun. 2015, 2015 N.C. Sess. Laws 103	5
H.B. 589 § 5.3 (2013)	13
Ind. Code § 3-11-8-25 (2008)	13
N.C. G.S.A. § 163-166.13 (2013)	8
N.C. G.S.A. § 163-166.15 (2013)	10, 11
N.C. G.S.A. § 163-82.19 (2013)	20
Act of May 25, 2011, S.C. Acts 27 § 5 (2011)	11

OTHER AUTHORITIES

Colo. Dep't of State, <i>Comparison of Colorado's Voter Rolls with Department of Revenue Non-Citizen Records</i> (Mar. 8, 2011)	19
Comm'n on Fed. Election Reform, <i>Building Confidence in U.S. Elections</i> (Sept. 2005) (Carter-Baker Report)	15
Gov't Accountability Office, <i>Additional Data Could Help State and Local Elections Officials Maintain Accurate Voter Registration Lists</i> (June 2005), http://www.gao.gov/new.items/d05478.pdf	19

H.R. Rep. No. 105-416 (1998), https://www.congress.gov/105/crpt/hrpt416/CRPT-105hrpt416.pdf	19
Hans von Spakovsky, <i>The Threat of Non-Citizen Voting</i> , Heritage Foundation (July 2008), http://www.heritage.org/research/reports/2008/07/the-threat-of-non-citizen-voting	19
Hans von Spakovsky, <i>Voter Photo Identification: Protecting the Security of Elections</i> , Heritage Foundation (July 2011), http://www.heritage.org/research/reports/2011/07/voter-photo-identification-protecting-the-security-of-elections	21
Jesse T. Richman, Gulshan A. Chattha, and David C. Earnest, <i>Do non-citizens vote in U.S. elections?</i> , <i>Electoral Studies</i> Vol. 36, 149 (2014)	18
Kris Kobach, <i>Why Opponents Are Destined to Lose the Debate on Photo ID and Proof of Citizenship Laws: Simply Put – People Want Secure and Fair Elections</i> , 62 <i>Syracuse L. Rev.</i> 1 (2012)	22
Wendy Underhill, <i>Voter Identification Requirements</i> , National Conference of State Legislatures (Apr. 11, 2016), http://www.ncsl.org/research/elections-and-campaigns/voter-id.aspx	23

INTEREST OF THE *AMICUS*

Lawyers Democracy Fund is a social welfare organization that promotes the role of ethics and legal professionalism in the electoral process. Lawyers Democracy Fund seeks to ensure that all citizens are able to exercise their right to vote and that reasonable, common-sense anti-fraud protections are enacted to prevent the dilution of any citizen's vote. Lawyers Democracy Fund provides guidance to legislators interested in reforming their electoral systems, and it also conducts, funds, and publishes research regarding the effectiveness of current election systems and procedures.

This brief is properly before the Court pursuant to F.R.A.P. Rule 29(a) because all parties have consented to its filing.

INTRODUCTION AND SUMMARY OF ARGUMENT

Appellants in this case challenge routine voting procedures similar to those in widespread use across the United States. Among these is North Carolina's requirement that citizens wishing to cast a vote in an election present photo identification or, alternatively, certify that presenting photo identification would be unduly burdensome. Numerous states have enacted similar requirements, and most regimes in effect are *less flexible* for voters than the one adopted by the North Carolina General Assembly.

The appellants' constitutional challenge to voter ID is meritless. The Supreme Court resolved this question eight years ago in *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181 (2008), where a six-justice majority confirmed that a state's compelling interests in preventing voter fraud and promoting confidence in elections clearly outweighs the minimal burden of obtaining identification. This holding "means that [photo ID laws] are valid in every state—holding constant the burden each voter must bear to get a photo ID" *Frank v. Walker*, 768 F.3d 744, 750 (7th Cir. 2014). That burden is more than "constant" here: North Carolina's law is more flexible for voters than the Indiana law upheld in *Crawford*.

Indeed, the very notion that a photo ID requirement would impose a "severe" burden on the right to vote is facially implausible "in a world in

which photo ID is essential to board an airplane, enter Canada or any other foreign nation, drive a car . . . , buy a beer, purchase pseudoephedrine for a stuffy nose or pick up a prescription at a pharmacy, open a bank account or cash a check at a currency exchange, buy a gun, or enter a courthouse to serve as a juror or watch the argument of this appeal.” *Id.* at 748. It should come as no surprise that photo ID requirements, other than in exceptional circumstances, have passed scrutiny under both the United States Constitution and Section 2 of the Voting Rights Act, and they have even obtained preclearance under the pre-*Shelby County* Section 5 regime—which placed the burden on *states* to justify photo ID requirements.

A state’s multiple interests in enacting voter ID are among the most compelling bases for regulating the voting process that exist. They include promoting confidence in elections, preventing fraud, and protecting the integrity of the votes cast by honest citizens. Moreover, although the state’s interest in promoting public confidence in this manner is “a ‘legislative fact’—a proposition about the state of the world” confirmed in *Crawford* and thus extant in *every* instance, *Frank*, 768 F.3d at 750—North Carolina had good cause for its concerns, based on real-world data and research, about vote dilution resulting from illegal voting. Against these overwhelming governmental interests, the Court must weigh the pure

speculation that someone, somewhere *might* not be able to (1) present a photo ID or (2) certify a plausible basis for the failure to do so. Even in those instances, the *opportunity* to obtain an ID—which is provided by North Carolina free of charge—is equally open to all, and thus a citizen’s non-compliance with the requirement says nothing more than “that he was unwilling to invest the necessary time.” *Id.* at 748. Not surprisingly, Appellants failed to identify a *single person* prevented from voting because of North Carolina’s photo ID requirement. This balancing hardly presents a contest.

The analysis is simple as a matter of law and reason. The burden is minimal, and the interest is compelling. The requirement is therefore constitutional.

ARGUMENT

A growing number of states have implemented common-sense voter ID laws to confirm that each person casting a ballot is in fact a legal voter, is who he or she claims to be, and is provided with the appropriate ballot for his or her residence. In 2013, North Carolina joined them. In relevant part, the reform it enacted requires voters to present photo ID, such as a state driver’s license or nonoperator’s card, which can be obtained at the Department of Motor Vehicles (“DMV”), unless (1) the voter cites a

reasonable impediment to presenting photo ID or (2) some other exception applies. Voter Identification Verification Act, 2013 N.C. Sess. Laws 381; Act of Jun. 2015, 2015 N.C. Sess. Laws 103.

This is standard fare. Photographic identification is a gateway condition for participation in a host of everyday activities, and the act of presenting ID is one that the overwhelming majority of Americans consider routine. Implementing a photo requirement—which “is widely accepted outside the field of voting” to “promote confidence,” *Frank*, 768 F.3d at 751—in the voting context is sound policy. “Voter fraud drives honest citizens out of the democratic process and breeds distrust of our government.” *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006). Photo ID laws thus combat the reasonable fear of law-abiding voters that “their legitimate votes will be outweighed by fraudulent ones.” *Id.* “If the public thinks that photo ID makes elections cleaner, then people are more likely to vote or, if they stay home, to place more confidence in the outcomes. These are substantial benefits.” *Frank*, 768 F.3d at 751. Laws that expand the availability of photo IDs certainly benefit the interests of citizens who lack this fundamental element of twenty-first-century life.

The controlling constitutional rules of decision to evaluate North Carolina’s law are stated in *Anderson v. Celebrezze*, 460 U.S. 780 (1983),

and *Burdick v. Takushi*, 504 U.S. 428 (1992). These cases prescribe a balancing of the “character and magnitude of the asserted injury” against legitimate state interests. Under this test, “the rigorousness of [the court’s] inquiry” depends “upon the extent to which a challenged regulation burdens” the right to vote. *Burdick*, 504 U.S. at 434. If the degree of restriction is “reasonable,” the state’s “regulatory interests are generally sufficient to justify the restrictions.” *Id.* (quotation marks omitted).

Applying that analysis, the Supreme Court upheld Indiana’s voter ID law in *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181 (2008). In doing so, it effectively resolved this case as well. The state interests were less compelling, and the burdens were greater in *Crawford* than they are here. North Carolina’s voter ID law must therefore be upheld as constitutional.¹

¹ Appellants contend that North Carolina’s voter ID law was enacted with a partisan intent to harm Democratic Party election prospects, but the Supreme Court has rejected the notion that partisan motives can defeat a facially neutral election law. *Crawford*, 553 U.S. at 204; *see also Common Cause/Georgia v. Billups*, 554 F.3d 1340, 1355 (11th Cir. 2009) (“the Supreme Court dismissed the relevance of partisan interests”). Appellants seek to circumvent that holding by characterizing a motive to advantage Republican candidates over Democratic candidates as *racial* discrimination because of the correlation between race and politics in North Carolina. But, where race and partisanship correlate, plaintiffs challenging legislative motive must prove that race “*rather than politics*” was the actual motive, and therefore partisan intent does not on its own amount to racial discrimination. *See, e.g., Easley v. Cromartie*, 532 U.S. 234, 243 (2001) (emphasis in original). Appellants’ theory to the contrary would turn the Equal Protection Clause into a one-sided tool for partisan advantage.

A. THE SMALL PERCENTAGE OF VOTERS WITHOUT IDENTIFICATION IS NOT SIGNIFICANTLY BURDENED BY THE VOTER ID REQUIREMENT.

1. Any Disenfranchisement by the North Carolina Voter ID Law Is Purely Speculative.

Appellants failed to identify a single person disenfranchised by the North Carolina voter ID law. Which plaintiff could not obtain an ID and could not vote? Similar failures of proof doomed the challenges to voter ID laws in Indiana and Georgia. *Crawford*, 553 U.S. at 201; *Common Cause/Georgia v. Billups*, 554 F.3d 1340, 1354 (11th Cir. 2009) (“The [plaintiffs], despite their best efforts, failed to identify a single individual who would be unable to vote because of the Georgia statute or who would face an undue burden to obtain a free voter identification card.”).

Appellants’ failure in this respect should come as no surprise, given the broad protections for the right to vote codified in the statute. For those without photo identification, North Carolina offers identification free of charge. As of January 2016, 2,139 voters had taken advantage of the program to receive free identification. *N.C. State Conference of the NAACP v. McCrory*, No. 1:13CV658, 2016 WL 1650774, at *27 (M.D.N.C. Apr. 25, 2016) (“*McCrory*”).

Additional safeguards ensure that eligible citizens will not be disenfranchised. These include provisional voting, satellite polling locations,

absentee ballot procedures, and exceptions for religious objectors and similarly situated individuals. Those excepted from the ID mandate also include victims of natural disasters and curbside voters. N.C. G.S.A. § 163-166.13(a)(3) (2013); N.C. G.S.A. § 163-166.13(a)(1) (2013). Additionally, North Carolina allows elderly voters to provide identification that does not contain a printed expiration date if issued not more than eight years ago. N.C. G.S.A. § 163-166.13(e) (2013).

2. North Carolina’s Requirement to Obtain Photo Identification Does Not Present Burdens Substantially Greater than Ordinary Burdens on Voters.

The record did show some minor inconveniences that some voters encountered in obtaining birth certificates or matching identification on underlying documents necessary to get a photo ID. *McCrorry*, 2016 WL 1650774, at *27–29. But these burdens are not sufficient to invalidate the voter ID law. Because there is no “right to vote in any manner” and because “government must play an active role in structuring elections,” there must “as a practical matter” be “a substantial regulation of elections.” *Burdick*, 504 U.S. at 433 (quotation marks omitted). This regulatory role by definition means that “[e]lection laws will invariably impose some burden upon individual voters.” *Id.* The record in *Crawford*, for instance, contained evidence of difficulties for elderly, out-of-state, and poor voters in obtaining

identification. 553 U.S. at 199–203. That was insufficient to trigger strict scrutiny, *see id.*, and similar evidence should fail for identical reasons here. *See Frank*, 768 F.3d at 746–47 (rejecting photo ID challenge where evidence failed to show meaningful difference in burden from that identified in *Crawford*). Moreover, voters who do face challenges may cast a ballot under the reasonable impediment exception. *Cf. South Carolina v. United States*, 898 F. Supp. 2d 30, 38–43 (D.D.C. 2012) (granting Section 5 preclearance to voter ID law with similar impediment exception).

The inconvenience of traveling to the DMV for an ID is nothing more than “the usual burdens of voting.” *See Crawford*, 553 U.S. 181, 198; *see also Frank*, 768 F.3d at 748 (“if photo ID is available to people willing to scrounge up a birth certificate and stand in line at the office that issues drivers’ licenses, then all we know from the fact that a particular person lacks a photo ID is that he was unwilling to invest the necessary time.”). The DMV already offers the opportunity to register to vote; therefore, connecting the acquisition of photo identification to the DMV is reasonable. Given that the average voter in North Carolina needs to wait fewer than twenty minutes at a DMV for an ID, the burden is far from serious. *McCrary*, 2016 WL 1650774, at *30.

There are 114 brick-and-mortar DMV locations in North Carolina, and the DMV has taken extra efforts to increase accessibility by offering online license renewal, extended hours, customer-facing computer screen stations, and DMV mobile “footlocker” units. *McCrary*, 2016 WL 1650774, at *30.

3. The Reasonable Impediment Exception Is an Easily Navigable Fail-Safe that Broadly Protects the Rights of Eligible Voters.

The reasonable impediment exception confirms that North Carolina’s photo ID requirement imposes no severe burdens. The reasonable impediment form provides citizens with a non-exhaustive list of various legitimate reasons a photo ID cannot be presented at the polls. *McCrary*, 2016 WL 1650774, at *120. The excuses—transportation difficulties, disability or illness, lack of birth certificate, work schedule challenges, family responsibilities, lost or stolen photo identification, or unreceived photo identification—encompass a vast range of possibilities. *Id.* Beyond that, citizens have the option to write in other impediments not enumerated in that extensive list. N.C. G.S.A. § 163-166.15 (2015).

North Carolina’s reasonable impediment provision mirrors a provision adopted in South Carolina at the time South Carolina was a “covered jurisdiction” under Section 4 of the Voting Rights Act and therefore subject

to Section 5's preclearance requirement. *See* 52 U.S.C. § 10304 (2016); *see also South Carolina*, 898 F. Supp. 2d at 44 (evaluating Act of May 25, 2011, S.C. Acts 27 § 5(D)(1)(a) (2011)). Section 5 imposes a far higher degree of scrutiny on state voting procedures than does the Equal Protection Clause, *see id.* at 33, yet the three-judge panel in *South Carolina* unanimously found that South Carolina's voter ID law passed because, among other things, "the expansive reasonable impediment provision . . . means that every South Carolina citizen who has [a] non-photo voter registration card that could be used under pre-existing South Carolina law may still use that card to vote," as long as "they state the reason for not having obtained a photo ID." *Id.* at 40. The reasonable impediment provision here is at least as, if not *more*, generous than South Carolina's version, given that *no* photo ID is required. Thus, notwithstanding the "rhetoric surrounding the law," *see id.* at 35, a meaningful inquiry into "how the law would work," *id.*, clarifies that it imposes the slightest of burdens on the franchise.

The statute lists only three grounds for denying a voter's invocation of the reasonable impediment provision: factually false allegations, efforts to denigrate the ID requirement, or obviously nonsensical statements. N.C. G.S.A. § 163-166.15 (2013). *Compare South Carolina*, 898 F. Supp. 2d at 35–38 (describing a similar regime). In other words, no citizen acting in

good faith will be prevented from voting using the reasonable impediment exception, unless he or she is committing fraud. *McCrary*, 2016 WL 1650774, at *45.

Finally, the reasonable impediment provision is not difficult to navigate. North Carolina's public education program informs voters about the presence of the reasonable impediment provision. *Id.* at 19–23. Then, at the polling places, trained election officials advise voters about the use of the reasonable impediment exception. *Id.* at 24–26.

Neither Indiana nor Georgia included a reasonable impediment provision in their voter ID laws, but burdens under both states' regimes were found not to be severe and not to outweigh state interests. *Crawford*, 553 U.S. at 202–03; *Billups*, 554 F.3d at 1354.

4. Unfounded Challenges to Citizens' Eligibility Are Unlikely to Disenfranchise Voters.

Appellants criticize certain limitations to the reasonable impediment exception. However, inclusion of a reasonable impediment provision is not necessary for a voter ID law; adding this generous provision provides protections for voters and minimizes the probability of disenfranchisement.

Challenges to voters' invocation of the reasonable impediment exception are unlikely to be discriminatory. *McCrary*, 2016 WL 1650774, at *45. When another registered voter from the county contests a voter's use of

the reasonable impediment exception, the challenge is strictly limited to the information on the reasonable impediment form and must be completed three days after the election. *Id.* at *42. When the county board of elections reviews the challenge, all facts must be viewed in the light most favorable to the voter. *Id.* at *43. Furthermore, any complaints about the challenge process would be addressed by seeking review by the state board of elections. *Id.* at *44. The Indiana law did not have analogous provisions but was still upheld by the Supreme Court. *Crawford*, 553 U.S. at 204; *see also* Ind. Code § 3-11-8-25 (2008).

5. North Carolina Has Adequately Prepared Citizens for the Voter ID Law's Implementation.

North Carolina's lengthy and "substantial" soft rollout informed citizens about the new voter ID requirement. *McCrary*, 2016 WL 1650774, at *19. North Carolina's efforts to inform citizens over the span of two years and at three separate elections—the November 2013 municipal elections, the May 2014 midterm primaries, and the November 2014 midterm general election—helped prepare citizens for the new procedures. *Id.*

The voter ID law outlines specific education and publicity requirements to give notice to the voting population ahead of the effective date of the voter ID requirement. H.B. 589 § 5.3 (2013). Materials were delivered to county boards and outreach groups, flyers and posters were

printed, television and radio ads were run, and billboards were displayed.

McCrary, 2016 WL 1650774, at *19–23. The General Assembly

appropriated approximately \$2 million for notice. *Id.* at *19.

Then, North Carolina’s election official trainings have instructed poll workers to assist citizens throughout the actual voting process. *Id.* at *24.

Greeters at polling places inform voters of the types of acceptable ID, and citizens without ID are directed to help stations where alternative voting options are presented. *Id.* at *35.

B. COMBATING FRAUD, ENSURING PUBLIC CONFIDENCE, COUNTING ELIGIBLE VOTES, AND KEEPING ACCURATE RECORDS IN ELECTIONS JUSTIFY IMPLEMENTATION OF THE VOTER ID REQUIREMENT.

The minimal burdens of either providing a photo ID or certifying a reasonable impediment bear little weight against North Carolina’s multiple compelling interests related to election administration. *See Billups*, 554 F.3d at 1352, 1354. These interests include addressing non-citizen voting and other election fraud, preventing votes from being canceled out, combating maladministration, and restoring public confidence in elections. These are “weighty interests” and easily justify the minimal burdens of photo ID. *Id.* at 1353.

1. North Carolina Has a Valid Interest in the Promotion of Public Confidence in the Electoral Process.

North Carolina legislators passed the voter ID law in response to the public perception that elections were not fair or honest. *McCrorry*, 2016 WL 1650774, at *11. The Supreme Court in *Crawford* recognized as compelling the state's interest in combating those perceptions. 553 U.S. at 197. The *Crawford* Court also cited approvingly a bipartisan commission's finding that the "electoral system cannot inspire public confidence if no safeguards exist to deter or detect fraud or to confirm the identity of voters." *Id.* (quoting Comm'n on Fed. Election Reform, *Building Confidence in U.S. Elections* 1618 (Sept. 2005) (Carter-Baker Report); *see also Purcell*, 549 U.S. at 4 ("[v]oter fraud drives honest citizens out of the democratic process and breeds distrust of our government.")).

In emphasizing that North Carolina has not proven widespread voter fraud in its elections, Appellants seek to place a burden on North Carolina where none exists. *McCrorry*, 2016 WL 1650774, at *97. Voter fraud in Indiana was "rare if not nonexistent," yet the Supreme Court accepted "as almost self-evidently true" that voter ID "promotes voter confidence." *Frank*, 768 F.3d at 749. That is "a 'legislative fact'—a proposition about the state of the world, as opposed to a proposition about these litigants or about a single state." *Id.* at 750. "This means that [photo ID laws] are valid in

every state . . . or they are valid in no state,” so long as “the burden each voter must bear to get a photo ID” is held “constant.” *Id.* Appellants’ efforts to re-litigate issues resolved in *Crawford* may “eventually persuade the Justices” of the Supreme Court, “but in our hierarchical judicial system a district court”—or a circuit court—“cannot declare a statute unconstitutional just because [it] thinks (with or without the support of a political scientist) that the dissent was right and the majority wrong.” *Id.*

Thus, the state of North Carolina has no need to prove the existence of widespread fraud in order to justify the voter ID law. *Billups*, 554 F.3d at 1353 (“Even absent specific evidence of in-person voter fraud, the general history of voter fraud and the ‘real’ risk that in-person voter fraud ‘could affect the outcome of a close election’ was sufficient to support the interest of Indiana in deterring voter fraud.”); *see also City of Memphis v. Hargett*, 414 S.W.3d 88, 104 (Tenn. 2013) (“[a] number of courts, including the United States Supreme Court, have rejected the notion that a state must present evidence that it has been afflicted by voter fraud in order to enact laws pursuant to its authority to protect the integrity of the election process.”); *NAACP v. Browning*, 569 F. Supp. 2d 1237, 1251 (N.D. Fla. 2008) (“It is well established that, in the election context, there is no need for an elaborate, empirical verification of the weightiness of the State’s

asserted justifications”) (quotation marks omitted). Instead, the relevant point is that “the public *feels* safer when everyone must show a photo ID.” *See Frank* at 751; *see also Lee v. Virginia State Bd. of Elections*, No. 3:15CV357, 2016 WL 2946181, at *27 (E.D. Va. May 27, 2016) (“irrespective of statistics, a large segment of Virginia voters thought a photo identification requirement for voting was a prudent safeguard measure”).

2. Voter Identification Laws Deter, Prevent, and Assist in the Prosecution of Fraud.

Aside and apart from their interest in promoting public confidence, states have a “compelling interest” in preventing actual fraud in voting. *Purcell*, 549 U.S. at 4; *see also Crawford*, 553 U.S. at 225. The legislators who crafted North Carolina’s voter ID law cited that interest in the legislative debate. *McCrary*, 2016 WL 1650774, at *11. North Carolina’s Supreme Court has recognized that interest as compelling. *See James v. Bartlett*, 607 S.E.2d 638, 644, 359 N.C. 260, 270 (2005) (holding that residency requirement provides “protection against election fraud and permits election officials to conduct elections in a timely and efficient manner”).

North Carolina’s fraud-prevention interest takes on several forms. First, North Carolina has an interest in preventing illegal voting by non-

citizens, which reliable studies indicate occurs in noticeable—even election-swaying—levels. Second, North Carolina has a compelling interest in preventing voter impersonation and similar forms of identity fraud. Third, North Carolina has a concomitant interest in counting and properly weighing the votes of citizens who *are* eligible to vote.

a. Non-Citizen Voting.

Voting by non-citizens is fraud. States have a “compelling interest” in combating it, including through voter ID laws.

Studies show that a significant numbers of non-citizens vote illegally, and their votes can change the outcomes of elections. Conservative estimates indicate that at least 38,000 non-citizens voted in the United States in 2008. Jesse T. Richman, Gulshan A. Chattha, and David C. Earnest, *Do non-citizens vote in U.S. elections?*, Electoral Studies, Vol. 36, 152 (2014). An estimated 6.4% of non-citizens in North Carolina voted in the 2008 election, but one presidential candidate only needed to get 5.1% of non-citizens in the state to vote for him in order to comprise the entire margin of his victory. Richman at 153. The numbers of non-citizens voting in 2008 in the United States Senate race in Minnesota and a Virginia House race may have also impacted the results of the elections. *Id.*

In other states, the prevalence of non-citizen voting illustrates the merits of state interests in deterring this type of voter fraud. In 1996 race for California's 46th Congressional district, one candidate won by a margin of just hundreds of votes, but a Congressional study found 624 non-citizens had voted illegally. H.R. Rep. No. 105-416, at 15 (1998).² The California voter fraud investigative unit opened investigations into 29 instances of non-citizen registration or voting between 2001 and 2004. Gov't Accountability Office, *Additional Data Could Help State and Local Elections Officials Maintain Accurate Voter Registration Lists* (June 2005) at 59.³ Texas and Arizona also referred cases of non-citizen voting to prosecutors. *Id.* at 60. Furthermore, a report by the Colorado Secretary of State found that 11,805 non-citizens appeared to be illegally registered to vote in that state. Colo. Dep't of State, *Comparison of Colorado's Voter Rolls with Department of Revenue Non-Citizen Records* (Mar. 8, 2011). Indeed, non-citizens have testified in court that they cast illegal ballots. Hans von Spakovsky, *The Threat of Non-Citizen Voting*, Heritage Foundation at 2 (July 2008).⁴

² Available at <https://www.congress.gov/105/crpt/hrpt416/CRPT-105hrpt416.pdf>.

³ Available at <http://www.gao.gov/new.items/d05478.pdf>.

⁴ Available at <http://www.heritage.org/research/reports/2008/07/the-threat-of-non-citizen-voting>.

North Carolina's photo ID requirement is a reasonable means to combat non-citizen voting. Most forms of eligible voter identification are provided by the DMV, and the DMV requires applicants to identify their citizenship, N.C. G.S.A. § 163-82.19(a) (2013), and that information is displayed on the face of the ID. DMV offices also are required to inform non-citizens that it is a felony for them to vote. *Id.*

b. Voter Impersonation, Double Voting, and Fictitious Voting.

Voter ID also discourages voter impersonation. In *Crawford*, the Supreme Court relied on evidence of voter impersonation fraud from other jurisdictions as evidence of Indiana's interest in combating fraud. *Crawford*, 553 U.S. at 194–195 (“flagrant examples of such fraud in other parts of the country have been documented throughout this Nation's history”). North Carolina has even a stronger interest than Indiana because North Carolina *does* have a history of voter impersonation fraud; two cases have been referred to district attorneys since 2000. *McCrorry*, 2016 WL 1650774, at *97.

In addition to preventing voter fraud *before* it occurs, voter identification laws allow jurisdictions to accumulate evidence of voter fraud to pursue election law prosecutions *after the fact*. Voter impersonation cases are difficult to prove. Prosecutors need evidence that another person used a

voter's identity, and without testimony from poll workers or an authoritative way to distinguish an impersonator, an otherwise meritorious case may fail for lack of evidence. Hans von Spakovsky, *Voter Photo Identification: Protecting the Security of Elections*, Heritage Foundation (July 2011) at 2,⁵ (citing *Crawford v. Marion Cty. Election Bd.*, 472 F.3d 949, 953 (7th Cir. 2007)). Photo ID provides an objective and compelling basis for poll workers to testify that a given individual who attempts to vote under someone else's identification does not in fact resemble that person and is committing fraud.

In addition to voter impersonation, voter ID laws combat voting under fictitious voter registrations and repeat voting by individuals registered in more than one state or locality. *Id.* Notably, the League of Women Voters' brief in the *Crawford* case claimed a woman was disenfranchised by the voter ID law; in actuality, she was a Florida resident attempting to vote illegally in Indiana with her Florida driver's license. *Id.* at 3. The voter ID requirement actually prevented illegal voting by an out-of-state voter. Furthermore, a photo ID requirement would virtually eliminate posing as a fictitious voter because voters must present photo identification matching a

⁵ Available at <http://www.heritage.org/research/reports/2011/07/voter-photo-identification-protecting-the-security-of-elections>.

registered voter. Kris Kobach, *Why Opponents Are Destined to Lose the Debate on Photo ID and Proof of Citizenship Laws: Simply Put – People Want Secure and Fair Elections*, 62 *Syracuse L. Rev.* 1, 11 (2012).

3. North Carolina Has a Valid Interest in Counting Only the Votes of Eligible Voters.

North Carolina passed its voter ID law out of the concern that illegal voting cancels out the ballots of legitimate voters. “There is no question about the legitimacy or importance . . . of counting only the votes of eligible voters.” *Crawford*, 553 U.S. 196. “Voters who fear their legitimate votes will be outweighed by fraudulent ones will feel disenfranchised.” *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006); *see also James*, 607 S.E.2d at 644, 359 N.C. at 270 (“To permit unlawful votes to be counted along with lawful ballots in contested elections effectively ‘disenfranchises’ those voters who cast legal ballots, at least where the counting of unlawful votes determines an election’s outcome.”).

4. North Carolina Has a Valid Interest in Orderly Administration of Elections and Accurate Recordkeeping of Elections.

In adopting voter ID, North Carolina joined a nationwide effort to improve the administration of elections. *See South Carolina v. United States*, 898 F. Supp. 2d 30, 44 (D.D.C. 2012) (“The Supreme Court’s affirmation of the general legitimacy of the purpose behind a voter ID law is consistent

with the fact that many States—particularly in the wake of the voting system problems exposed to during the 2000 elections—have enacted stronger voter ID laws . . . ”). The Supreme Court has indicated that “government must play an active role in structuring elections” *Burdick v. Takushi*, 504 U.S. 428, 433 (1992). A state therefore has a valid interest in following other states in the nationwide trend to have “orderly administration and accurate recordkeeping.” *Crawford*, 553 U.S. at 196. For instance, in a case considering Florida’s voter identification law, a federal district court held that the law “enhances the accuracy of Florida’s voter registration rolls and contributes to securing to lawful voters the exercise of the rights to which registration gives admittance.” *Browning*, 569 F. Supp. 2d at 1251. Nineteen states have voter identification laws, many of which were passed or tightened in advance of the 2016 election cycle. Wendy Underhill, *Voter Identification Requirements*, National Conference of State Legislatures, Apr. 11, 2016.⁶ With the voter ID law, North Carolina joins the other states in working to streamline the voting process.

⁶ Available at <http://www.ncsl.org/research/elections-and-campaigns/voter-id.aspx>.

CONCLUSION

For the foregoing reasons, the Lawyers' Democracy Fund urges the Court to affirm the judgment of the District Court.

Dated: June 16, 2016

Respectfully submitted,

Of Counsel:

E. Mark Braden
Richard B. Raile
Baker & Hostetler LLP
Washington Square, Suite 1100
1050 Connecticut Ave., N.W.
Washington, D.C. 20036

/s/ Maya M. Noronha
Maya M. Noronha
Trevor M. Stanley
Baker & Hostetler LLP
Washington Square, Suite 1100
1050 Connecticut Ave., N.W.
Washington, D.C. 20036
202-861-1551 (phone)
202-861-1783 (fax)

Counsel for *Amicus Curiae*

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 28.1(e)(2) or 32(a)(7)(B) because:

[X] this brief contains [4,901] 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 2010*] 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: June 16, 2016

Respectfully submitted,

/s/ Maya M. Noronha

Maya M. Noronha

Counsel for *Amicus Curiae*

CERTIFICATE OF SERVICE AND FILING

I certify that, on June 16, 2016, I caused this Brief for *Amicus Curiae* Lawyers Democracy Fund to be filed electronically with the Clerk of the Court 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.

I further certify that on June 16, 2016, I caused the required copies of the Brief of *Amicus Curiae* Lawyers Democracy Fund in Support of Appellees and Affirming Dismissal to be mailed to the Clerk of the Court for next-day delivery for filing.

By: /s/ Maya M. Noronha
Maya M. Noronha

Counsel for *Amicus Curiae*

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 as

[X] Retained [] Court-appointed(CJA) [] Court-assigned(non-CJA) [] Federal Defender [] Pro Bono [] Government

COUNSEL FOR: Lawyers Democracy Fund

as the (party name)

[] appellant(s) [] appellee(s) [] petitioner(s) [] respondent(s) [X] amicus curiae [] intervenor(s) [] movant(s)

/s/ Maya M. Noronha (signature)

Maya M. Noronha Name (printed or typed)

(202) 861-1742 Voice Phone

Baker & Hostetler LLP Firm Name (if applicable)

(202) 861-1783 Fax Number

Washington Square, Suite 1100

1050 Connecticut Avenue, N.W. Address

mnoronha@bakerlaw.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:

[Empty box for address]

[Empty box for address]

/s/ Maya M. Noronha Signature

June 16, 2016 Date

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 as

[X] Retained [] Court-appointed(CJA) [] Court-assigned(non-CJA) [] Federal Defender [] Pro Bono [] Government

COUNSEL FOR: Lawyers Democracy Fund

as the (party name)

[] appellant(s) [] appellee(s) [] petitioner(s) [] respondent(s) [X] amicus curiae [] intervenor(s) [] movant(s)

/s/ Trevor M. Stanley (signature)

Trevor M. Stanley Name (printed or typed)

(202) 861-1551 Voice Phone

Baker & Hostetler LLP Firm Name (if applicable)

(202) 861-1783 Fax Number

Washington Square, Suite 1100

1050 Connecticut Avenue, N.W. Address

tstanley@bakerlaw.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:

[Empty box for address]

[Empty box for address]

/s/ Trevor M. Stanley Signature

June 16, 2016 Date