No. 18-10151

IN THE

United States Court of Appeals for the Eleventh Circuit

GREATER BIRMINGHAM MINISTRIES, ET AL.,

Plaintiffs-Appellants,

v.

JOHN MERRILL, *IN HIS OFFICIAL CAPACITY AS SECRETARY OF STATE*

Defendant-Appellee.

On Appeal from the United States District Court
for the Northern District of Alabama (No. 2:15-CV-02193-LSC)
District Judge L. Scott Coogler

BRIEF OF *AMICI CURIAE* AMERICAN CIVIL LIBERTIES UNION, AMERICAN CIVIL LIBERTIES UNION OF ALABAMA, CAMPAIGN LEGAL CENTER, AND LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW IN SUPPORT OF APPELLANTS

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 and this Court's Local Rule 26.1-1, the American Civil Liberties Union, the American Civil Liberties Union of Alabama, Campaign Legal Center, and Lawyers' Committee For Civil Rights Under Law states that it has no parent corporations, nor has it issued shared or debt securities to the public. The organizations are not a subsidiary or affiliate of any publicly owned corporation, and no publicly held corporation holds ten percent of its stock. Undersigned counsel for *amici curiae* make the following disclosure of interested parties:

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INTEREST OF *AMICI CURIAE*

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with approximately 1.75 million members, dedicated to protecting the fundamental liberties and basic civil rights guaranteed by the U.S. Constitution and our nation's civil rights laws. The ACLU of Alabama is a statewide affiliate of the national ACLU, with thousands of members throughout

the state. The ACLU Voting Rights Project has litigated more than 300 voting rights cases since 1965, including several voting rights cases before this Court in which the ACLU served as party's counsel or as an amicus, including *Wright v. Sumter Cty. Bd. of Elections and Registration*, 657 Fed. Appx. 871 (11th Cir. 2016); *Georgia State Conference of the NAACP v. Fayette Cty. Bd. of Comm'r*, 775 F.3d 1336 (11th Cir. 2015) and *Common Cause/Georgia v. Billups*, 554 F.3d 1340 (11th Cir. 2009). Amici have a significant interest in the outcome of this case and in other cases concerning laws that require voters to present certain forms of photo identification in order to exercise their fundamental right to vote. The ACLU and its affiliates have litigated challenges to voter ID laws throughout the country, including in North Carolina, Wisconsin, and Indiana. *See NAACP v. McCrory*, 831 F.3d 204 (4th Cir. 2016); *Frank v. Walker*, 819 F.3d 384 (7th Cir. 2016); *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181 (2008).

The Campaign Legal Center (CLC) is a nonpartisan nonprofit organization that has been working for fifteen years to advance democracy through law. CLC is dedicated to fighting for a political process that is accessible to all citizens, resulting in a representative, responsive and accountable government. The challenged law in this case impedes that mission because it discriminates against minority voters and visits disparate and unnecessary burdens on their access to the ballot box. CLC has litigated many voting rights cases in federal courts

nationwide, including as arguing counsel for the plaintiffs in the recent United States Supreme Court case, *Gill v. Whitford*, No. 16-1161 (2017), as counsel for plaintiffs in *Veasey v. Abbott*, 830 F.3d 216 (5th Cir. 2016) (challenging Texas's Photo ID Law), and as counsel for plaintiffs in *LULAC v. Reagan*, No. 2:17-cv-04102 (D. Ariz. 2017) (challenging Arizona's dual registration system). CLC has filed *amicus curiae* briefs in every major voting rights case before the Supreme Court in recent years, including *Cooper v. Harris*, 137 S. Ct. 1455 (2017), *Evenwel v. Abbott*, 136 S. Ct. 1120 (2016), and *Shelby Cty. v. Holder*, 570 U.S. 529 (2013).

The Lawyers' Committee for Civil Rights Under Law (Lawyers' Committee) is a nonpartisan, nonprofit organization that was formed in 1963 at the request of President John F. Kennedy to enlist the private bar's leadership and resources in combating racial discrimination. The principal mission of the Lawyers' Committee is to secure equal justice for all through the rule of law. To that end, the Lawyers' Committee has participated in hundreds of impact lawsuits challenging race discrimination prohibited by the Constitution and federal statutes. *See, e.g., Arizona v. Inter Tribal Council of Arizona, Inc.* 570 U.S. 1 (2013); *Shelby Cty. v. Holder*, 133 S. Ct. 2612 (2013); *MHANY Mgmt., Inc. v. Cty. of Nassau*, 819 F.3d 581 (2d Cir. 2016); *Coal. for Equity & Excellence in Maryland Higher Educ. v. Maryland Higher Educ. Comm'n*, 977 F. Supp. 2d 507 (D. Md. 2013); *Veasey v.*

Abbott, 830 F.3d 216 (5th Cir. 2016). The Lawyers' Committee has an interest in the instant appeal because it raises important issues that are central to its mission.

The parties have consented to the filing of this Amicus brief. [1]

SUMMARY OF ARGUMENT

This case—and the pivotal question of whether House Bill 19 ("HB 19"), Alabama's Photo ID Law, was passed with discriminatory intent—must be resolved at trial. Before HB 19 was passed, one of the framers of what would become that law cited the absence of a photo ID law in Alabama as "beneficial to the Black power structure." *Greater Birmingham Ministries v. Merrill*, No. 2:15-cv-02193-LSC, slip. op. at 10, 43 (N.D. Ala. Jan. 10, 2018) ("Op."). Other legislators who ultimately voted for HB 19 had referred to Black voters as "illiterates" and "aborigines." Op. 10, 42. And in the same session, the Alabama legislature passed a redistricting plan already held unconstitutional by a three-judge court because it was predominantly motivated by race. *Id.* at 11. Nevertheless, the District Court failed to weigh this evidence of discriminatory intent, explaining instead that because it viewed the impact of the law on voters as a mere "inconvenience," albeit one disproportionately visited on African

[1] Pursuant to Federal Rule of Appellate Procedure 29(c)(5), *amici* certify that this brief was not authored in whole in or part by either party's counsel; that neither party nor their counsel contributed money to fund preparing or submitting this brief; and that no person other than *amici* contributed money to fund preparing or submitting this brief.

Americans, there was no need for a full-scale intent analysis. Op. 49. The District Court's approach constitutes legal error because it ignores settled and controlling precedent, embodied in the leading case of *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, that claims of intentional discrimination require a complete analysis of all of the direct and circumstantial evidence of intentional discrimination on the basis of race. 429 U.S. 252, 266 (1977).

The District Court compounded its error by treating a "substantial burden" showing, *see Anderson v. Celebrezze*, 460 U.S. 780, 788–89 (1983); *Burdick v. Takushi*, 504 U.S. 428, 443–44 (1992), as a prerequisite for intentional discrimination claims, and equating an *Anderson-Burdick* violation with an unsupportable "prevented from voting" standard, Op. 48. This is not the law. The express language of the Fifteenth Amendment states that the right to vote shall neither be denied nor "abridged" on account of race.

The *Anderson-Burdick* balancing test is applicable *only* in assessing voting burdens where there is *no* intentional discrimination claim, and permits reasonable, nondiscriminatory laws so long as the government's justification for the law is "sufficiently weighty" to justify the burden imposed on voters. *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 191 (2008) (Stevens, J., plurality op.) (internal quotation marks and citation omitted) (emphasis added). Under this

sliding scale standard, laws that a court deems "reasonable *non*-discriminatory restrictions" on voting will often pass muster as long as they are supported by "relevant and legitimate state interests." *Id.* at 190–91 (internal quotation marks and citation omitted) (emphasis added). Strict scrutiny of *non*-discriminatory laws are reserved for those laws that severely restrict the right to vote. *See id.* at 189–90 (citing *Burdick*, 504 U.S. at 433–34).

On the other hand, the standard of review for laws that are motivated by *discriminatory* intent is much more stringent. Burdens on the right to vote that might otherwise be acceptable if motivated by legitimate state regulatory interests are nevertheless unconstitutional if imposed for *discriminatory* purposes. All intentionally discriminatory barriers placed between voters and the ballot box—even if perceived by a court as slight—offend our Constitution.

By shunting aside the issue of discriminatory intent and applying instead the inapposite *Anderson-Burdick* test, the District Court effectively transformed Plaintiffs' claim from a racial discrimination claim into a non-racial claim. The District Court's upending of the *Arlington Heights* standard requires a clear and unwavering correction.

ARGUMENT

I. THE DISTRICT COURT APPLIED INCORRECT LEGAL STANDARDS IN ADJUDICATING PLAINTIFFS' DISCRIMINATORY INTENT CLAIM

When ruling on a claim that a facially neutral law was passed with racially discriminatory intent, courts must conduct a fact-heavy, "sensitive inquiry" to determine if "invidious discriminatory purpose was a motivating factor." *Arlington Heights*, 429 U.S. at 266; *see also Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 484–85 (1982) ("[I]nquiry into intent is necessary" to determine if a facially neutral law was passed on the basis of racial considerations). Here, although the District Court paid lip-service to the *Arlington Heights* guidelines, it declined to perform the "highly fact-sensitive" intent inquiry that *Arlington Heights* demands. Op. 45, 54. The Court ruled instead that because it found the Photo ID Law did not "prevent anyone from voting," Op. 54, or otherwise impose a "substantial burden" on African Americans, it was not unconstitutional. Op. 49. According to the District Court, if the law does not impose a substantial burden on voters, it has "no discriminatory impact," and it would serve no purpose to "further consider the other *Arlington Heights* factors." Op. 54.[2]

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[2] *Amici* focus this brief on the legal errors in the District Court's application of the wrong legal standards to Plaintiffs' intentional discrimination claim. However, as described in detail in Appellants' brief, the district court also erred in its factual findings at the summary judgment stage regarding the burden imposed

The District Court's approach is fatally flawed for at least two related reasons. First, controlling precedent mandates that the trial court undertake a complete analysis of the totality of the direct and circumstantial evidence of discriminatory purpose. The court cannot stop the inquiry into discriminatory intent simply because it views a burden on voters as slight.

Second, in assessing the discriminatory impact of the law as part of the intent analysis, the court erred in applying the *Anderson-Burdick* standard, which applies to cases challenging *non*-discriminatory laws. Op. 49. The District Court's approach ignores the fundamental distinction between voting rights actions based on discrimination claims and those *not* based on discrimination claims.

The District Court's erroneous approach ultimately led it to give deference to the State's justification for HB 19, a deference that is impermissible if the law was enacted with discriminatory intent.

A. *Arlington Heights* Requires A Full Inquiry Into Discriminatory Intent

As this Court has explained: "official actions motivated by a discriminatory purpose 'have no legitimacy at all under our Constitution.'" *Stout v. Jefferson Cty. Bd. of Educ.*, No. 17-12338, 2018 WL 827855, at *19 (11th Cir. Feb. 13, 2018)

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by HB 19. Only by drawing inferences in favor of Defendants could the District Court reach its factual conclusions that the law does not impose substantial burdens on any voter or prevent any eligible citizen from voting.

(citing *City of Richmond v. United States*, 422 U.S. 358, 378 (1975)). Because "acts generally lawful may become unlawful when done to accomplish an unlawful end," it is essential for courts to consider carefully if a law was passed with a racially discriminatory purpose. *Stout*, 2018 WL 827855, at *19 (citing *City of Richmond*, 422 U.S. at 379).

The standard for analyzing discriminatory intent is well established and clear. Under *Arlington Heights*, trial courts assessing discriminatory purpose claims must consider all "circumstantial and direct evidence of intent as may be available." *Arlington Heights*, 429 U.S. at 266; *Wright v. Southland Corp.*, 187 F.3d 1287, 1301 (11th Cir. 1999) (same). The Supreme Court in *Arlington Heights* identified several non-exclusive factors potentially relevant to this inquiry: "[t]he historical background of the [challenged] decision"; "[t]he specific sequence of events leading up to the challenged decision"; "[d]epartures from normal procedural sequence"; the legislative history; and the disproportionate "impact of the official action—whether it bears more heavily on one race than another." *Id.* at 266-67. None of these factors, including impact, is dispositive. *See, e.g.*, *Washington v. Davis*, 426 U.S. 229, 242 (1976) (because disproportionate impact "is not the sole touchstone of invidious racial discrimination," courts should consider "the totality of relevant facts").

Significantly, the trial court's task is to first determine whether discriminatory purpose was "a motivating factor" in the enactment of the challenged law. *Arlington Heights*, 429 U.S. at 267; *United States v. City of Yonkers*, 96 F.3d 600, 612 (2d Cir. 2012) ("[T]he plaintiff need begin only by showing that race was a motivating factor." (quotation omitted)). If so, the burden shifts to the defendant, which must *then* meet a but-for test, showing that "the same decision would have resulted even had the impermissible purpose not been considered." *Arlington Heights*, 429 U.S. at 270 n.21.

B. The District Court, Based On Its Perception Of The Degree Of Disproportionate Impact, Erroneously Ignored All Other Evidence Of Discriminatory Intent And Contravened *Arlington Heights*

The District Court failed to follow the *Arlington Heights* framework. Although it said that it would "first turn[] to the task" of assessing discriminatory intent, Op. 41, and outlined the significant evidence of intent that raised a triable issue of fact, the District Court then did not assess the totality of the evidence, Op. 41–45. Instead, the District Court considered only *one* of the *Arlington Heights* factors—impact. Op. 45, 54. By truncating its analysis in this way and singling out disproportionate impact to the exclusion of all other applicable factors, the District Court improperly ignored the totality of the evidence relating to intent, imposed a new threshold impact requirement for intentional discrimination claims, and never even reached the ultimate question of the legislature's purpose. *Lodge v.*

Buxton, 639 F.2d 1358, 1375 (5th Cir. 1981) ("[T]he trial court must consider the totality of the circumstances and ultimately rule on the precise issue of discriminatory purpose.").

The court's novel and incorrect reframing of *Arlington Heights* to require a threshold level of burden before engaging in an intent analysis cannot be found anywhere in the law of this Court or the Supreme Court.[3] And *Arlington Heights* itself makes clear that impact is just one of the factors a court must consider in weighing all the circumstantial and direct evidence of discriminatory purpose. 429 U.S. at 266.

In this context, the District Court's heavy reliance on *Palmer v. Thompson*, 403 U.S. 217 (1971), to support its refusal to engage in a full intent analysis itself

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[3] Although the issue is not ripe in this case because the District Court here did not undertake a full intent analysis, common sense dictates that a finding of any discriminatory impact is sufficient to support an actionable intentional discrimination claim if other evidence proves discriminatory intent. The case law clearly supports the proposition that a government cannot intentionally discriminate in any way on account of race, even if the impact of that discrimination is "slight." It is settled that in order to remedy the constitutional injury in an intentional discrimination case, there must be *no* remaining impact on the victims of discrimination. *See Stout*, 2018 WL 827855, at *19 (11th Cir. 2018) ("The district court failed to abide by the mandate to 'restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct.'") (citing *Missouri v. Jenkins*, 515 U.S. 70, 88 (1995)); *McCrory*, 831 F.3d at 240–41 (holding that a purposefully discriminatory Photo ID Law was not remedied by a reasonable impediment declaration process because it still required voters to "take affirmative steps to justify to the state why they failed to comply with a[n intentionally discriminatory] provision").

mandates reversal. In *Washington v. Davis*, the Court specifically limited *Palmer*'s applicability. 426 U.S. at 242 (distinguishing *Palmer* because there the Court "[a]ccept[ed] the finding that the pools were closed to avoid violence and economic loss"). The District Court's analysis relied upon *Palmer*'s reasoning that a law without an independently unconstitutional discriminatory impact is not unlawful because of unlawful motives. Op. 40, 45, 46 n.4. But this Court has specifically criticized *Palmer*'s ruling that it would be "futil[e] . . . to invalidate a law because of the bad motives of its supporters," 403 U.S. at 225, as not having "withstood the test of time, even in the Fourteenth Amendment equal protection context." *Church of Scientology Flag Serv. Org., Inc. v. City of Clearwater*, 2 F.3d 1514, 1529 (11th Cir. 1993). The District Court's analysis ignores that "[a]cts generally lawful may become unlawful when done to accomplish an unlawful end." *Stout*, 2018 WL 827855, at *19 (citing *City of Richmond*, 422 U.S. at 379). For that reason, the District Court's short-circuiting of its intent analysis requires reversal.

C. The District Court's Disproportionate Impact Analysis Used Improper Standards To Weigh The Law's Burden On Voters

The District Court's error in treating the level of discriminatory impact on voters as a threshold issue eliminating the need for a discriminatory intent analysis was magnified by its application of the wrong standards to its impact analysis. First, it applied standards applicable only to constitutional claims of *non-*

discriminatory unconstitutional burdens on the right to vote and second, it held Plaintiffs to proof of absolute vote denial, instead of the vote abridgement standard. Ultimately, as described more fully in Section I.D, *infra*, this led to the District Court's application of a near-rational basis test without first determining whether the State discriminated intentionally, which would warrant strict scrutiny and require the State to meet the "but-for" test required by *Arlington Heights*.

1. The Court Erred By Applying *Anderson-Burdick* To Analyze The Burdens Associated With Plaintiffs' Intentional Discrimination Claims

The Equal Protection Clause prohibits both intentional discrimination in voting regulation and non-discriminatory encumbrances on the right to vote that are not adequately justified by the State's asserted interests. *See Anderson*, 460 U.S. at 788–89; *Burdick*, 504 U.S. 428 at 332–34. The standards applicable to these two categories, however, are quite different, and for good reason: "racial discrimination is not just another competing consideration." *Arlington Heights*, 429 U.S. at 265–67; *see McCrory*, 831 F.3d at 221. Rather than applying the proper lens to analyze discriminatory impact in intent cases, the District Court conflated the *Arlington Heights* assessment with the very different *Anderson-Burdick* standard governing non-discriminatory burdens on the right to vote.

In contrast to the standard applicable to discrimination claims, a court reviewing an *Anderson-Burdick* claim must apply a balancing test that weighs the severity of the burden imposed on the franchise (its "character and magnitude") against the state's "precise interests" proffered as justifications for the law. *Burdick*, 504 U.S. at 434 (quoting *Anderson*, 460 U.S. at 789). This balancing test is a "flexible" sliding scale standard, where the "rigorousness of [the] inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens [voting] rights." *Id.* at 434. When a law imposes "reasonable, *non*-discriminatory restrictions" with "only a limited burden on voters' rights," courts apply a more deferential standard and the law may be justified by relevant and legitimate state interests. *Crawford*, 553 U.S. at 190, 203 (quoting *Burdick*, 504 U.S. at 434) (emphasis added). Strict scrutiny of *non*-discriminatory laws are reserved for those laws that severely restrict the right to vote. *See id.* at 189–90 (citing *Burdick*, 504 U.S. at 433–34).

But this standard specifically does *not* address laws motivated by a racially discriminatory purpose. *Burdick*, 504 U.S. at 434 ("Important regulatory interests" may be sufficient to justify a law only if the law imposes a "reasonable, *nondiscriminatory* restriction[]" upon voters.). In the context of an intentional discrimination claim, it is insufficient for a court to find that legislative justifications are "plausible" and at least "not unreasonable," *McCrory*, 831 F.3d at

234, because "racial discrimination is not just another competing consideration." *Arlington Heights*, 429 U.S. at 265–66. Once plaintiffs have presented evidence of racially discriminatory intent, a court must do much more than review for "arbitrariness or irrationality." *Arlington Heights*, 429 U.S. at 265–66. Instead, once the court determines that a law "was motivated in part by a racially discriminatory purpose," *id.* at 270 n.21, the burden shifts to the state to show that the discriminatory purpose was not a but-for cause of the legislative action. *Hunter v. Underwood*, 471 U.S. 222, 228 (1985); *McCrory* 831 F.3d at 234. Notably, in the context of discriminatory purpose assessments under Section 2 of the Voting Rights Act, this Court applies a more protective standard than some Circuits, holding that "it is not a defense . . . that the same action would have been taken regardless of the racial motive." *Askew v. City of Rome*, 127 F.3d 1355, 1373 (11th Cir. 1997); *see also McCrory*, 831 F.3d at 233 n.10.

Here, in analyzing HB 19's burden on voters, the District Court erroneously applied the *Anderson-Burdick* standard as a threshold matter and concluded that the law did not impose a substantial burden on the right to vote under that standard. Op. 49 (finding that "inconveniences" of the type imposed by HB 19 are not a "substantial burden on the right to vote," and citing cases applying the *Anderson-Burdick* framework). Remarkably, although the District Court recognized that the cases it was citing were inapposite because they did not involve intentional

discrimination allegations, *see* Op. 49 n.7, it offered no explanation as to why it relied on them. The District Court committed reversible error.

2. The Court Improperly Set An Elevated Standard Of Impact By Ignoring The Fifteenth Amendment's Protections Against The Abridgement Of The Right To Vote

The District Court compounded its error in applying *Anderson-Burdick* to Plaintiffs' intentional discrimination claim by raising Plaintiffs' burden to proving that HB 19 "*denies* members of a minority group" the opportunity to obtain an ID, Op. 62, or that the burden of obtaining ID "prevent[s]" minority voters from voting entirely, Op. 48, 51, 54. (emphasis added). These variations on a requirement of complete denial of the right to vote contradict the plain text of the Fifteenth Amendment, which states the right to "vote shall not be denied or *abridged*" on the account of race. U.S. Const. amend. XV, § 1 (emphasis added).

Under the Fourteenth and Fifteenth Amendments, Plaintiffs must show only that the legislature's purposeful discrimination resulted in minority voters having less than an equal opportunity to participate in the political process. Plaintiffs are in no way required to show racial minorities were prohibited or prevented from voting. *See Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 481 (1997) (recognizing that the Fourteenth and Fifteenth Amendments extend beyond outright vote denial and prohibit race-based vote dilution if done with a "discriminatory purpose"); *Smith v. Meese*, 821 F.2d 1484, 1487 (11th Cir. 1987)

(holding that intentional actions taken to "discourage" racial minorities from voting violate the Fifteenth Amendment); *cf. Chisom v. Roemer*, 501 U.S. 380, 408 (1991) (Scalia, J., dissenting) ("If . . . [an election law] made it more difficult for blacks to register than whites, blacks would have less of an opportunity '*to participate* in the political process' than whites, and § 2 [of the Voting Rights Act] would therefore be violated.").

Indeed, the threshold for an actionable impact in the context of an intentional discrimination claim is less onerous than the showing required when proof of disproportionate result is "the sole touchstone" of a claim. *McCrory*, 831 F.3d at 231 (comparing the intentional discrimination requirements to the Section 2 standard for discriminatory results) (quoting *Davis*, 426 U.S. at 242); *Garza v. Cty. of Los Angeles*, 918 F.2d 763, 771 (9th Cir. 1990); *Patino v. City of Pasadena*, 230 F. Supp. 3d 667, 728 (S.D. Tex. 2017). Accordingly, as the Fourth Circuit recently held, "the district court's findings that African Americans . . . disproportionately lacked the photo ID required by [the challenged law], if supported by the evidence, establishes sufficient disproportionate impact for an *Arlington Heights* analysis." *McCrory*, 831 F.3d at 231–232; *see Stout*, 2018 WL 827855, at *9. The Fourth Circuit rejected the victim-blaming notion that any North Carolina voter who wanted an ID could get one and that African Americans disproportionate lack of ID was attributable to lack of desire to obtain an ID. *McCrory*, 831 F.3d at 232-33

(holding that socioeconomic disparities establish that "no mere preference" "lead African Americans to disproportionately lack acceptable photo ID").

Here, there is no dispute that when the Alabama legislature passed HB 19, African-Americans were (and are) less likely than whites to possess a form of qualifying voter ID. Op. 12. Indeed, the District Court's ultimate finding—that "no one is prevented from voting," Op. 48—ignored that at least 2,197 voters who cast provisional ballots that were not counted because of lack of ID *actually* were prevented from voting because of the law. Appellant Br. 27 (citations omitted). Black voters were 4.58 times more likely to have their ballots rejected. *Id.*

The Fourth Circuit's decision in *McCrory*, is particularly instructive. After determining that North Carolina's photo ID provision was passed with discriminatory intent, the Fourth Circuit held the law had an unlawful discriminatory effect despite its inclusion of a "reasonable impediment" option that allowed voters without the required ID to vote by signing a separate declaration. *See McCrory*, 831 F.3d at 240. First, the Fourth Circuit found an unlawful impact in part because the law "inevitably increase[d] the steps required to vote, and so slow[ed] the process." *Id.* at 231. More fundamentally, the Fourth Circuit explained that requiring targeted minority voters to take any affirmative steps to comply with an intentionally discriminatory law offends our Constitution's basic promise of equality: "if an in-person voter cannot present a qualifying form of

photo ID—which 'African Americans are more likely to lack'—the voter must undertake a multi-step process," including completing and signing a form, presenting an alternative ID and filling out a provisional ballot subject to challenge. *McCrory*, 831 F.3d at 240–41 (internal citation omitted). Thus, the Fourth Circuit concluded: "On its face, this amendment does not fully eliminate the burden imposed by the photo ID requirement. Rather, it requires voters to take affirmative steps to justify to the state why they failed to comply with a provision that we have declared was enacted with racially discriminatory intent and is unconstitutional." *Id.* at 241.

Here, however, the premise of the District Court's ruling was essentially that, because some voters were able to surmount Alabama's voter identification requirement, the law was not unconstitutional. That premise finds no support in either logic or law. A state may not enact a restriction on voting for the invidious purpose of making it *harder*, if not altogether impossible, for members of a racial minority group to vote. Under the District Court's novel vote denial prerequisite, however, states would be free to impose discriminatory burdens on voting so long as they do not prevent voting entirely. That is not the law.

D. The District Court's Improper Application Of *Anderson-Burdick* Led To An Erroneous Review Of Plaintiffs' Intentional Discrimination Claim Using A Rational Basis Standard

Although courts ordinarily refrain from closely "reviewing the merits" of a given law, this deferential posture is not only inappropriate but absolutely forbidden when a law was passed with a discriminatory motive. *Arlington Heights*, 429 U.S. at 266. If a law was passed with an invidious racial purpose, the typical "judicial deference is no longer justified" and the entire record must be examined in a more exacting light. *Arlington Heights*, 429 U.S. at 266; *see also Hunt v. Cromartie*, 526 U.S. 541, 546 (1999) ("A facially neutral law . . . warrants strict scrutiny . . . if it can be proved that the law was motivated by a racial purpose or object or if it is unexplainable on grounds other than race." (referencing *Arlington Heights*, 429 U.S. at 266) (other citations and quotations omitted)). Here, however, by conducting its analysis under the inapplicable framework for nondiscriminatory voting regulations, the District Court erroneously viewed Plaintiffs' intentional discrimination claims through "a rational-basis-like lens." *McCrory*, 831 F.3d at 234. The District Court improperly allowed the State to justify its law with *post hoc* rationalizations and unsupported justifications. But such *post hoc* and unsupported explanations are insufficient at both stages of the *Arlington Heights* framework. First, *post hoc* rationalizations are not probative of intent under *Arlington Heights*. *See, e.g.*, *Glenn v. Brumby*, 663 F.3d 1312, 1321

(11th Cir. 2011); *Underwood*, 730 F.2d at 620–21. Courts look to a legislature's *actual* motivations, not possible motivations or *post hoc* justifications. *See Bethune-Hill v. Virginia State Bd. of Elections*, 137 S. Ct. 788, 799 (2017) ("The racial predominance inquiry concerns the actual considerations that provided the essential basis for the lines drawn, not *post hoc* justifications the legislature in theory could have used but in reality did not."). Second, if a court determines that a law was motivated in part by discrimination, *post hoc* rationalizations certainly do not meet the "but-for" standard of *Arlington Heights*. Defendants' justifications for HB19—without any analysis of whether the law was passed to serve those purposes or actually does so—does not suffice to show the law would have been enacted had race "not been considered." *Arlington Heights*, 429 U.S. at 270 n.21.

In this regard, the District Court's heavy reliance on the Supreme Court's acknowledgement of legitimate purposes behind Indiana's voter ID law in *Crawford* was misplaced. *Crawford* does not immunize all voter identification requirements from claims of intentional discrimination. The case involved a facial challenge to Indiana's ID law under *Anderson-Burdick*, not an intentional discrimination claim. It does not follow from the Supreme Court's acknowledgement that Indiana had a legitimate interest in preventing voter fraud that, in this case, invidious discriminatory purpose was not *a* motivating factor behind Alabama's voter identification requirement. *See Veasey*, 830 F.3d at 248

n.39 ("While we acknowledge the State's legitimate interests in this case, *Crawford* did not deal with either discriminatory intent or effect under Section 2. . . . We likewise decline to read into *Crawford* the inapposite principle that the State may invidiously discriminate or impermissibly disparately burden minorities so long as it articulates 'preventing voter fraud' as one purpose of a restrictive law.").

II. HAD THE COURT APPLIED PROPER STANDARDS, DEFENDANTS WOULD HAVE BEEN DENIED SUMMARY JUDGMENT

The "inherently flexible nature" of a totality of the circumstances standard makes the question of intent generally "unsuitable for summary disposition." *Moore v. GEICO Gen. Ins. Co.*, 633 Fed. Appx. 924, 928 (11th Cir. 2016); *see Hunt*, 526 U.S. at 549 ("The legislature's motivation is itself a factual question."). Moreover, when dealing with a multi-factored inquiry, courts must "view the totality of the circumstances in the light most favorable to the nonmoving party," without isolating any one single factor or factual dispute. *Davis v. Williams*, 451 F.3d 759, 763 (11th Cir. 2006). Had the District Court properly applied *Arlington Heights*, summary judgment could not have been entered for Defendants.

Although the District Court described the Fourth Circuit's decision invalidating North Carolina's Photo ID Law as "very different" from this case, Op. 56, it ignored many of the similarities between the laws that require further probing

at trial. HB 19, like the ID law at issue in North Carolina, includes irrational restrictions that do not serve fraud prevention. *See McCrory*, 831 F.3d at 235–36 (describing North Carolina's photo ID requirement as "at once too narrow and too broad" to effectively prevent voter fraud); *see also Romer v. Evans*, 517 U.S. 620, 633 (1996). For example, Alabama deems voters' registration, signed under penalty of perjury, insufficient to prove identity, *see* Ala. Code §§ 17-3-52 (registration requirements); 17-3-56 (registration required only once), but allows voters to obtain ID by re-submitting an identical registration form, Op. 50. It also requires voters to mail in a photocopy of a photo ID with their absentee ballot, Op. 12, despite election officials' inability to compare the photo on the ID to the voter. Neither effectively prevent fraud.

The Fourth Circuit's decision in *McCrory*, based on a firm application of *Arlington Heights*, presents an analogous road-map as to some of the factual issues relevant to intent, which should have precluded summary judgment here.

A. Historical Background And Sequence Of Events Leading Up To Legislation

The Fourth Circuit identified as highly relevant to its *Arlington Heights* analysis that a three-judge court had found that the same North Carolina legislature which passed the challenged photo ID law also impermissibly relied on race in drawing congressional districts, and noted that it "certainly provides relevant evidence as to whether race motivated other election legislation passed by the same

legislature." *McCrory*, 831 F.3d at 225 (citing *Harris v. McCrory*, 159 F. Supp. 3d 600, 603–04 (M.D.N.C. Feb. 5, 2016), *affirmed* 137 S. Ct. 1455 (2017)). The Fourth Circuit held that the North Carolina District Court erred in "inexplicably fail[ing] to grapple with that history [of discrimination since the 1980s] in its analysis of Plaintiffs' discriminatory intent claim," and "dismissing examples of more recent official discrimination." *McCrory*, 831 F.3d at 223.

Here, the District Court similarly acknowledged that a three-judge court struck down Alabama's redistricting plan, passed in the same legislative session as HB 19, as predominantly motivated by race, Op. 11 (citing *Ala. Legislative Black Caucus v. Alabama*, 231 F. Supp. 3d 1026, 1033 (M.D. Ala. 2017)), and that the same legislature also passed HB 56, a discriminatory anti-immigration bill supported by legislators who made "prejudiced comments conflating Latinos with illegal immigrants." Op. 10. *See City of Carrollton Branch of NAACP v. Stallings*, 829 F.2d 1547, 1552 (11th Cir. 1987) (reversing summary judgment and considering the sponsor of the challenged law's past racist speech about a different voting bill as circumstantial evidence of discriminatory intent). Yet the District Court erroneously dismissed that evidence as irrelevant. Op. 38 n.3, 43–44

B. Legislators Knowledge Of Racially Disparate Impact

Both the North Carolina and Alabama legislatures had information as to the probable adverse impact of their proposed Photo ID Laws on African American

voters. *See* Op. 7 ("Between 1995 and 2011, Black legislators and other individuals in Alabama argued at length about how requiring photo ID would disfranchise voters who lack access to vehicles and specifically about the anticipated effect of such requirements on Black voters."). Although the District Court here attempted to downplay that evidence (speculating that Alabama legislators supporting the law may not have believed this information, Op. 44–45.), for purposes of Defendants' motion for summary judgment, the inference should have been drawn in favor of—not against—plaintiffs. *See McCrory*, 831 F.3d at 227–28 (relying on the district court finding that "a reasonable legislator [would be] aware of the socioeconomic disparities endured by African Americans [and] could have surmised that African Americans would be more likely to possess this form of [public assistance] ID."); *see also Hunt*, 526 U.S. at 552 ("[I]n ruling on a motion for summary judgment, the nonmoving party's evidence 'is to be believed, and all justifiable inferences are to be drawn in [that party's] favor.'"); *Wright v. Sumter Cnty. Bd. of Elections & Registration*, 65 Fed. Appx. 871, 872 (11th Cir. 2016) (in a voting rights case "the District Court erred by improperly weighing the evidence and making credibility determinations at the summary-judgment stage").

C. *Shelby County* And The Timing Of Alabama's Implementation Of The ID Regulations

Plaintiffs presented evidence that Secretary Bennett "did not issue administrative rules, educate the public, train election officials, issue photo ID

cards, or otherwise implement the Photo ID Law before June 25, 2013," because of concerns that implementation of the ID law "would have violated Section 5 of the Voting Rights Act." Op. 11. Those concerns dissipated on June 25, 2013, when the Supreme Court decided *Shelby County v. Holder*, effectively eliminating Section 5's preclearance protections by invalidating the law's coverage formula. 570 U.S. 529, 133 S. Ct. 2612 (2013). The Fourth Circuit addressed the hurried pace to pass voting restrictions immediately after the *Shelby County* decision, and held that "the district court erred in accepting the State's efforts to cast this suspicious narrative in an innocuous light." *McCrory*, 831 F.3d at 228. The District Court made the same error here.

D. HB 19 Has An Impact That Bears More Heavily On African Americans

The Fourth Circuit ruled that "the district court's findings that African Americans . . . disproportionately lacked the photo ID required by [the challenged law], if supported by the evidence, establishes sufficient disproportionate impact for an *Arlington Heights* analysis." *Id.* at 231–232. As described in Section I.C, *supra*, because there was no dispute that in Alabama, African Americans were (and are) less likely than whites to possess a qualifying form of ID, the District Court's findings here have met that standard.

Throughout its opinion, the District Court stressed the various ways that the Secretary of State perhaps attempted to mitigate some of the discriminatory harm

of the Photo ID Law through accommodations—MOUs with agencies to provide free IDs or underlying documents, home visits, mobile units, and personal intervention to ensure voters get the necessary ID or are able to use the positively identify provision. But the District Court missed the point. It is not Defendant Merrill's intent that is at issue here; it is the Legislature's discriminatory intent.

Moreover, the practical impact of these mitigation efforts must be tested at trial as many of the facts about these programs' effectiveness were in dispute. For example, Plaintiffs offered evidence that the State never publicized the opportunity for house visits and that the option was generally unavailable to the public. Pl.'s Opp'n to Def.'s Mot. for Summ. at ¶ 19, *Greater Birmingham Ministries v. Merrill*, No. 2:15-cv-02193, ECF No. 255. Home visits have been used only five times, including once by a plaintiff after filing this lawsuit, and once at the personal request of a legislator. Similarly, Plaintiffs' evidence also showed that, because the availability of free voter IDs was not publicized, voters believed they must pay for and present underlying documentation to acquire one. *Id.* at ¶ 20. Indeed, the District Court recognized that Defendant Merrill had not offered *any* public education materials on the Photo ID Law in Spanish, rendering the availability of other accommodations effectively useless to voters who could not

access information in their language. Op. 23.[4] It is clear that whether or not the Photo ID Law yields discriminatory results depends, in part, on how well the programs designed to provide voters with IDs are publicized and implemented, *Veasey*, 830 F.3d at 256 (holding that "the State's lackluster educational efforts resulted in additional burdens on Texas voters"), and there was substantial evidence that Defendants' education efforts were insufficient.

[4] The District Court's discussion of Secretary Merrill's chief of staff's Spanish language skills and his mother-in-law's willingness to translate some materials, Op. 23, demonstrates its failure to apply the appropriate summary judgment standard and its marshaling of every disputed fact in Defendants' favor. There was no evidence that Spanish-speaking voters were made aware of this extremely limited access.

CONCLUSION

For the foregoing reasons, *amici curiae* urge this Court to reverse, correct the District Court's fundamental errors in its intent analysis, and remand this matter for trial.

Respectfully submitted on February 28, 2018.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Fed. R. App. P. 29(a)(5) and Fed. R. App. P. 32(a)(7)(B) as the brief contains 6,392 words excluding those parts exempted by Fed. R. App. 32(7)(f) and 11th Cir. Local R. 32-4.

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) as this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point Times New Roman font.

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CERTIFICATE OF SERVICE

I hereby certify that on February 28, 2018, I filed the foregoing document electronically via the Court's CM/ECF system. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's CM/ECF System. On the same date, seven copies of the brief were dispatched for delivery to the Clerk's Office of the United States Court of Appeals for the Eleventh Circuit by third-party commercial carrier for overnight delivery at the following address:

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