

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

RECORD NO. 16-1468(L),
NORTH CAROLINA STATE CONFERENCE OF THE NAACP, *et al.*,
Plaintiffs-Appellants,
v.
PATRICK LLOYD MCCRORY, *et al.*,
Defendants-Appellees.

RECORD NO. 16-1469,
LEAGUE OF WOMEN VOTERS OF NORTH CAROLINA, *et al.*,
Plaintiffs,
CHARLES M. GRAY, *et al.*, *Intervenors/Plaintiffs*
and LOUIS M. DUKE, *et al.*, *Intervenors/Plaintiffs-Appellants,*
v.
STATE OF NORTH CAROLINA, *et al.*,
Defendants-Appellees.

RECORD NO. 16-1474,
LEAGUE OF WOMEN VOTERS OF NORTH CAROLINA, *et al.*,
Plaintiffs-Appellants,
and LOUIS M. DUKE, *et al.*, *Intervenors/Plaintiffs,*
v.
STATE OF NORTH CAROLINA, *et al.*,
Defendants-Appellees

RECORD NO. 16-1529,
UNITED STATES OF AMERICA, *Plaintiff-Appellant,*
v.
STATE OF NORTH CAROLINA, *et al.*, *Defendants-Appellees*
and CHRISTINA KELLEY GALLEG0-MERRILL, *et al.*,
Intervenors/Defendants.

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

**MOTION OF DEFENDANTS-APPELLEES FOR RECALL AND STAY OF
MANDATE PENDING FILING AND DISPOSITION OF PETITION FOR A
WRIT OF CERTIORARI**

Pursuant to Federal Rule of Appellate Procedure 41(d)(2) and Fourth Circuit Local Rule 41, Defendants-Appellees respectfully move the Court to recall and to stay the mandate in the above-captioned cases pending the filing and disposition of a petition for writ of certiorari with the United States Supreme Court.

INTRODUCTION AND BACKGROUND

This Court entered its opinion, judgment, and mandate in these matters on Friday, July 29, 2016. (Docs. 150, 152-1, 154).¹ Because the Court entered the mandate the same day that it entered its opinion and judgment, Defendants-Appellees did not have an opportunity to file a motion to stay the mandate before it was issued. *See* Fed. R. App. P. 41(b). Defendants-Appellees intend to file a petition for a writ of certiorari with the United States Supreme Court within the ninety days permitted. *See* Sup. Ct. R. 13.1. Defendants-Appellees therefore request a stay that does not exceed the date on which their petition for a writ of certiorari must be filed (October 27, 2016) with a continuance of the stay following official notification to this Court that the petition has been filed. Fed. R. App. P. 41(d)(2)(B).

¹ All docket entries referenced in the Fourth Circuit proceedings in these matters are to the document numbers as they appear in the lead case, Record No. 16-1468.

In its April 25, 2016 Memorandum Opinion, the District Court extended the preliminary injunction entered by this Court on October 1, 2014 prohibiting enforcement of provisions found in Parts 16 and 49 of Session Law 2013-381 that repealed same-day registration and out-of-precinct voting, respectively, until June 8, 2016, due to primary elections for the U.S. House of Representatives scheduled for June 7, 2016. (D.E. 439, pp. 472-73) (citing *Purcell v. Gonzalez*, 549 U.S. 1, 5 (2006)).² On June 7, 2016, this Court entered an Order extending the District Court's stay "until further order of this Court" and instructed the parties at oral argument to "be prepared to inform the Court of the timeline of implementing or dismantling electoral procedures and the rationale for that timeline, i.e., the time required to either implement or dismantle each voting mechanism." (Doc. 122, p. 3) (citing *Purcell*).

In accordance with the Court's June 7, 2016 Order, on June 21, 2016, at oral argument, counsel for Defendants-Appellees advised the Court:

- That the SEIMS database which must be used to administer same-day registration, out-of-precinct voting, pre-registration, and photo ID requirement is already being tested and all data must be loaded and finalized before absentee voting begins in September.

² All citations to the District Court docket contained herein will reference the docket entry numbers in District Court Case No. 1:13-cv-658.

- That it was too late for the State to implement pre-registration for the 2016 election but that 17 years old who will be 18 years old by Election Day will have the ability to register and vote as was the case before and after 2013-381 was enacted.

- That training for county poll workers will take place August 8-9, 2016, and station guides used by those poll workers have already been prepared. Current station guides contain instructions for administering same-day registration, out-of-precinct voting, and the photo ID requirement.

- The deadline for county boards of election to notify the operators of public buildings that they would like to use a building during the first seven days of a 17-day early voting expired July 22.

- Budgets for county board of elections were set in June or July which may make it difficult for counties to fund the additional poll workers needed to provide an additional seven days of early voting.

In light of *Purcell* and the above considerations, in requesting that the Court recall and stay its mandate in these cases, Defendants-Appellees' ask that the Court recall and stay its mandate only to the extent required to maintain the current status quo in North Carolina which is as follows:

1. The Court's injunction prohibiting enforcement of provisions found in Parts 16 and 49 of Session Law 2013-381 repealing same-day registration and out-

of-precinct voting would remain in effect and same-day registration would be offered during the early voting period and out-of-precinct voting would be permitted on Election Day.

2. The Court's injunction prohibiting enforcement of the photo ID requirement, with reasonable impediment exception, would be stayed and this requirement would remain in effect for the remainder of the 2016 election cycle as it has been for the two previous elections held during the 2016 cycle.

3. The Court's injunction requiring the State to offer 17 days of early voting rather than 10 days would be stayed due to the fact that counties have already set staffing, budgets, and early voting sites based upon the 10 days of early voting required by S.L. 2013-381.

4. The Court's injunction requiring pre-registration would be stayed since pre-registration is currently not in effect and, in any event, would not prevent any eligible voter from registering and voting in the 2016 election since any 17-year-old who will be 18 years old by Election Day will be eligible to register either 25 days before Election Day or through SDR and will be permitted to vote by mail-in absentee ballot, in person during the early voting period, or in person on Election Day.

Counsel for all Plaintiffs-Appellants have been notified of this Motion as required by Local Rule 27(a). Plaintiffs-Appellants have responded that they oppose the requested stay and intend to file a response in opposition to it.

**REASONS WHY THE COURT’S MANDATE SHOULD BE RECALLED
AND STAYED**

This Motion should be granted because the petition for a writ of certiorari will (1) present a “substantial question” and (2) because there is “good cause” for a stay. Fed R. App. P. 41(d)(2)(A); Local Rule 41.

1. A petition for a writ of certiorari will present a “substantial question.”

Defendants-Appellees’ petition for a writ of certiorari will present a “substantial question” because the injunctive relief ordered by the Court in this matter is unprecedented in multiple respects, including the following: First, the Fourth Circuit’s reversal of the District Court’s extensive findings of fact on the issue of intent is unprecedented and presents serious federalism concerns as it impairs the right of North Carolina to adopt reasonable rules governing the time, place, and manner of elections that reflect practices followed in a majority of states.

Second, for the first time, this Court has invalidated neutral laws enacted by a state governing the time, place, and manner of elections on the grounds that the laws were enacted with “discriminatory intent” to disenfranchise African-

American voters without evidence that these laws, in fact, negatively impacted the ability of African-Americans to vote. To the contrary, the evidence in the record shows that African-American voter turnout went up across the board when the challenged practices were in place and there was no evidence of any specific voter of any race who would be unable to cast a ballot as a result of the challenged photo ID requirement with the reasonable impediment exception.

Third, in reversing the District Court, this Court has taken the unprecedented position that North Carolina is forbidden from changing any voting law that is favored by or benefits the Democratic Party simply because most African-American voters have supported Democratic Party candidates in previous elections. This position is not only unprecedented but is contrary to U.S. Supreme Court precedent and raises serious constitutional concerns. *See, e.g., Bartlett v. Strickland*, 556 U.S. 1, 14-16 (2009) (finding that Section 2 of the VRA does not entitle minority groups to laws that maximize their voting strength); *League of Latin American Citizens v. Perry*, 548 U.S. 399, 445-46 (2006) (stating that if Section 2 were interpreted to require a minority group to be given political influence in the redistricting process, “it would unnecessarily infuse race into virtually every redistricting, raising serious constitutional questions.”).

Fourth, this Court and the District Court had vastly different views on how the U.S. Supreme Court’s holding in *Crawford v. Marion Cnty. Elections Bd.*, 553

U.S. 181 (2008) applied to the photo ID requirement and reasonable impediment provision contained in S.L. 2013-381 and 2015-103. This Court's decision is not only at odds with the holding in *Crawford* but conflicts with the view of other courts which have, in the last few weeks, held up North Carolina's photo ID requirement with its reasonable impediment exception as an example to be followed when enjoining portions of photo ID laws in other states. *See, e.g., Frank v. Walker*, Case No. 11-C-1128 (E.D. Wis. July 19, 2016) (D.E. 294) (granting preliminary injunction requiring use of a "reasonable impediment declaration" modeled on North Carolina's for November 8, 2016 election); *Veasey v. Abbott*, Civil Action No. 2:13-cv-193 (S.D. Tex. July 23, 2015) (D.E. 861, 861-2) (ordering use of reasonable impediment affidavit nearly identical to North Carolina's in August 2, 2016 special election).

In addition, a petition for a writ of certiorari in these actions will present a "substantial question" because many of the same issues raised in these actions regarding the application of the federal Voting Rights Act and United States Constitution to state voting laws are being litigated in and considered by courts across the country, including in the matters pending in Texas and Wisconsin listed above.

In the context of a motion for release pending appeal in a criminal matter, the Fourth Circuit has defined the term "substantial question" as a:

“close” question or one that very well could be decided the other way. Further, there are no blanket categories for what questions do or do not constitute “substantial” ones. Whether a question is “substantial” must be determined on a case-by-case basis.

United States v. Steinhorn, 927 F.2d 195, 196 (4th Cir. 1991) (per curium).

These cases present multiple questions “that very well could be decided the other way.” This is made clear by the fact that the District Court, which heard more than five weeks of trial testimony and oral argument and reviewed the evidence contained in a 25,000-page record, reached sharply different conclusions from this Court regarding the meaning and interpretation of the evidence and the application of the law to the evidence in this case. For the reasons stated in the District Court’s decision and those in Defendants-Appellees’ Brief (Doc. 124), Defendants-Appellees believe the District Court’s view of the evidence and application of the law in this matter was correct. Moreover, there is a difference of opinion among the members of the panel of this Court about the propriety of a permanent injunction with respect to S.L. 2013-381’s photo ID provisions in light of the reasonable impediment exception adopted in S.L. 2015-103. Accordingly, Defendants-Appellees’ petition for a writ of certiorari will present a “substantial question” that warrants a recall and stay of this Court’s mandate to the extent requested above.

II. There is “good cause” for the Court to issue a stay in this case.

The U.S. Supreme Court has recognized that “any time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury.” *Maryland v. King*, 133 S.Ct. 1, 3 (2012) (citing *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977)); *see also Strange v. Searcy*, 135 S.Ct. 940 (2015) (“When courts declare state laws unconstitutional and enjoin state officials from enforcing them, our ordinary practice is to suspend those injunctions from taking effect pending appellate review.”) (Thomas, J., dissenting) (citing *Herbert v. Kitchen*, 134 S.Ct. 893 (2014) and *San Diegans for Mt. Soledad Nat. War Memorial v. Paulson*, 548 U.S. 1301 (2006) (Kennedy, J., in chambers)). Here, because this Court has enjoined officials from the State of North Carolina from enforcing laws enacted by the North Carolina General Assembly that have already been used in previous elections, Defendants-Appellees will suffer irreparable injury absent a recall and stay of this Court’s mandate as requested herein.

Defendants-Appellees seek to balance this harm with the desire to avoid disruptive changes to the election system at this point in the process. Changes to the voting rules this close to the election, particularly the photo ID requirement that has been the subject of voter education efforts for two years, should not be changed at this late date. *See Purcell*, 549 U.S. at 5 (“Court orders affecting elections,

especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase.”). For these reasons, Defendants-Appellees request that the Court recall and stay its mandate to the extent needed to leave the current status quo for elections in North Carolina in place for the remainder of the 2016 election cycle.

CONCLUSION

For the foregoing reasons, this Court should recall the mandate issued on Friday, July 29, 2016, and stay it pending Defendants-Appellees’ timely filing of a petition for a writ of certiorari. Under Fed. R. App. P. 41(d)(2)(B), the stay should be extended upon the filing of the petition and should remain in place through final disposition of the petition by the United States Supreme Court.

This the 3rd day of August, 2016.

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CERTIFICATE OF SERVICE

I, Thomas A. Farr, hereby certify that I have this day electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will provide electronic notification of the same to the following:

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