No. COA 19-762 TENTH DISTRICT

NORTH CAROLINA COURT OF APPEALS

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JABARI HOLMES, FRED CULP, DANIEL E. SMITH, BRENDON JADEN PEAY, SHAKOYA CARRIE BROWN, *and* PAUL KEARNEY, SR.,	)	
Plaintiffs-Appellants,	)	
v.	)	
TIMOTHY K. MOORE *in his official capacity as Speaker of the North Carolina House of Representatives*; PHILIP E. BERGER *in his official capacity as President Pro Tempore of the North Carolina Senate*; DAVID R. LEWIS, *in his official capacity as Chairman of the House Select Committee on Elections for the 2018 Third Extra Session*; RALPH E. HISE, *in his official capacity as Chairman of the Senate Select Committee on Elections for the 2018 Third Extra Session*; THE STATE OF NORTH CAROLINA; *and* THE NORTH CAROLINA STATE BOARD OF ELECTIONS,	)	From Wake County
Defendants-Appellees.	)	

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LEGISLATIVE DEFENDANTS-APPELLEES' MOTION TO RECUSE JUDGE BROOK

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Defendants-Appellees Timothy K. Moore, Phillip E. Berger, David R. Lewis, and Ralph E. Hise, in their official capacities ("Legislative Defendants"), respectfully move Judge Christopher Brook to recuse himself from participating in this case, or, in the alternative, to refer this motion to the en banc Court for consideration and for the en banc Court to order Judge Brook to recuse from this case.

INTRODUCTION

Plaintiffs allege that North Carolina's voter ID law, Senate Bill 824 ("S.B. 824"), violates the Equal Protection Clause of the North Carolina Constitution. The bulk of their argument relies on a "guilt-by-association" theory: that S.B. 824 is discriminatory because another court found a different North Carolina voter ID law racially discriminatory. In 2013, more than five years before the General Assembly enacted S.B. 824, the General Assembly passed House Bill 589 ("H.B. 589"), a voting regulation law that included a voter ID provision. The Fourth Circuit later invalidated H.B. 589 under the federal Equal Protection Clause because, in the Fourth Circuit's view, it was enacted with discriminatory intent. *See N.C. State Conference of the NAACP v. McCrory*, 831 F.3d 204, 219 (4th Cir. 2016). North Carolina courts follow precedents from the United States Supreme Court when analyzing challenges to election regulations brought under the North Carolina Constitution's Equal Protection Clause. *See Libertarian Party of N. C. v. State*, 365 N.C. 41, 42, 707 S.E.2d 199, 200–01 (2011). And the gravamen of Plaintiffs' argument challenging S.B. 824 is that "similarities between S.B. 824 and H.B. 589 indicate

S.B. 824 was passed with discriminatory intent." Br. of Pls-Appellants at 16 (Oct. 7, 2019).

Legislative Defendants strongly dispute the premise that H.B. 589 was enacted with discriminatory intent and, more importantly, the argument that S.B. 824 is in any way tainted with whatever discriminatory intent the Fourth Circuit found behind H.B. 589. But a three-judge panel of this Court disagreed. *See Holmes v. Moore*, No. COA19-762, slip op. at 24, 28–29, 32–33 (N.C. Ct. App. Feb. 18, 2020) ("Slip Op."). As Legislative Defendants explain in their petition for en banc rehearing, that conclusion was erroneous. Nevertheless, Plaintiffs have placed front and center in this case the issue of whether the evidence presented and the rulings in the litigation over H.B. 589 demand a holding that S.B. 824 is unconstitutional.

As the legal director for the American Civil Liberties Union ("ACLU") of North Carolina—a position he held from 2012 until his appointment to this Court in April 2019—Judge Brook was a leader in the effort to invalidate H.B. 589. During his time with the ACLU, Judge Brook represented a group of voters in the *McCrory* litigation, who challenged various provisions of H.B. 589 as violating the federal Equal Protection Clause because the law was allegedly "enacted with the intent to discriminate against African-American voters." Compl. ¶ 82, *League of Women Voters of N.C. v. North Carolina*, No. 13-660, Doc. 1 (M.D.N.C. Aug. 12, 2013), attached as Exhibit A. Under Judge Brook's leadership, the ACLU of North Carolina helped lay the factual foundation for this case by creating the record from which Plaintiffs invite the Court to infer Legislative Defendants' discriminatory intent. These and other

facts laid out below raise a reasonable question of impartiality and thus form a firm ground for Judge Brook's disqualification.

The question here is not whether Judge Brook can keep an open mind on the issues and parties involved in this case. The question is whether it will *appear to the public* that Judge Brook's decisions in this case are impartial. Whatever one's position on voter ID laws, all should agree that "the future of" elections in North Carolina is "too important to be decided under a cloud." *United States v. Alabama*, 828 F.2d 1532, 1546 (11th Cir. 1987). "[A]n impartial judge in *all* cases [is a] prime requisit[e] of due process." *Ponder v. Davis*, 233 N.C. 699, 704, 65 S.E.2d 356, 359 (1951) (emphasis added). "Next in importance to the duty of rendering a righteous judgment," however, "is that of doing it in such a manner as will beget no suspicion of the fairness and integrity" of the courts. *Id.* at 705–06 (quotation marks omitted). "In a decision such as this one, a decision which will affect millions of [citizens], public confidence in the judicial system demands a judge free from personal knowledge or [apparent] biases about the issues before the court." *Alabama*, 828 F.2d at 1546.

In light of this governing principle and under the Canon 3C of the North Carolina Code of Judicial Conduct, Judge Brook must be disqualified for two reasons. First, because Plaintiffs have premised the validity of S.B. 824 on the litigation over H.B. 589, that litigation is part and parcel of this case and Judge Brook served as a lawyer in the matter in controversy. And second, given his involvement in the *McCrory* litigation and his outspoken opposition to voter ID laws, his impartiality may be reasonably questioned.

PROCEDURAL HISTORY

On December 19, 2018, the North Carolina General Assembly enacted S.B. 824, which implemented the State's constitutional requirement that "[v]oters offering to vote in person shall present photographic identification before voting." N.C. CONST. art. VI, § 2(4). Plaintiffs filed this suit in Wake County Superior Court on the same day, naming as defendants the State, the North Carolina State Board of Elections, and Legislative Defendants, and alleging that S.B. 824 violates several provisions in the North Carolina Constitution. (R p 12). On March 19, 2019, the Chief Justice of the Supreme Court assigned the case to a three-judge trial court panel. (R p 123).

On July 19, the trial court panel unanimously dismissed all of Plaintiffs' claims except their claim that S.B. 824 intentionally discriminates on the basis of race. The trial court panel then denied Plaintiffs' motion for a preliminary injunction because Plaintiffs had failed to demonstrate a likelihood of success on the merits of that claim. (R pp 249–50).

Plaintiffs noticed their appeal to this Court on July 24. (R p 254). On August 30, Plaintiffs filed a petition in the Supreme Court of North Carolina seeking discretionary and interlocutory review of the preliminary injunction order, which that Court denied on September 25. *Holmes v. Moore*, 832 S.E.2d 708, 709 (N.C. 2019).

On February 18, 2020, a three-judge panel of this Court reversed the trial court's decision, finding that Plaintiffs are likely to succeed on the merits of their racial-discrimination claim and that the remaining preliminary injunction factors cut

in favor of temporary relief. The panel thus ordered that S.B. 824's voter ID provisions be enjoined in their entirety until this case is decided on the merits. Slip Op. at 45. Legislative Defendants filed a petition for en banc rehearing on February 25.

STATEMENT OF FACTS

I. Judge Brook Challenges North Carolina's Previous Voter ID Law As Racially Discriminatory.

In 2012, Judge Brook was named the legal director of the ACLU of North Carolina, having previously worked as a staff attorney for the Southern Coalition for Social Justice ("SCSJ")—the organization representing Plaintiffs here. *See Christopher Brook Joins ACLU-NCLF As Our Next Legal Director*, 45 LIBERTY: THE NEWSLETTER OF THE ACLU OF N.C. 2, 2 (Spring 2012), https://bit.ly/2VybP4S. While Judge Brook was legal director of the ACLU of North Carolina, the ACLU maintained that "[v]oter identification laws are a part of an ongoing strategy to roll back decades of progress on voting rights" and that they "[a]re [d]iscriminatory." *Fact Sheet on Voter ID Laws* 1, 2, ACLU (May 2017), https://bit.ly/3cn1sqP.

Shortly after H.B. 589's enactment, Judge Brook and the ACLU of North Carolina, along with other attorneys employed by the ACLU and SCSJ, challenged H.B. 589 on behalf of the League of Women Voters, along with several other groups and individuals. In the *League of Women's Voters* case, the plaintiffs asserted that "[a] motivating purpose behind [H.B. 589] was to suppress the turnout and electoral participation of African-American voters," Ex. A ¶ 79, in part because the General Assembly allegedly knew that the changes wrought by H.B. 589 "would [adversely] affect African-American voters at substantially higher rates than white voters," *id.*

¶ 80. The plaintiffs also alleged that H.B. 589's legislative history supported this conclusion because "[t]he legislature enacted HB 589 with minimal public debate on an extremely compressed legislative schedule, with the bill passing both houses of the legislature after only two days of debate on its full contents." *Id.*

Unlike other suits in the *McCrory* litigation, Judge Brook's *League of Women Voters* case did not formally challenge H.B. 589's voter ID provisions. But Judge Brook nevertheless consistently and persistently argued that those provisions, along with the others being challenged, were racially discriminatory.

In a motion to preliminarily enjoin H.B. 589—on which Judge Brook was listed as counsel—the *McCrory* plaintiffs argued that H.B. 589's

> disproportionate burdens on African Americans, the highly unusual and expedited manner in which HB 589 was enacted, the evidence that was before the legislature at the time, and the absence of any credible legislative rationale all show that the legislature enacted the statute (at least in part) to depress minority voter turnout, in violation of the Fourteenth . . . Amendment[].

Pls' Br. in Support of Mot. for Prelim. Inj. at 3, *League of Women Voters*, Doc. 114-1 (May 19, 2014), attached as Exhibit B. H.B. 589's requirement that "voters who cast an in-person [ballot must] show one of a few specific forms of unexpired photo identification for all voting in person" was among the provisions that Judge Brook's motion asserted was "relevant to [the plaintiffs'] current motion." *Id.* at 10, 11. And Judge Brook's motion sought to discredit voter impersonation fraud in North Carolina as a justification for voter ID requirements. *See id.* at 45 ("[A]s the General Assembly knew at the time it enacted HB 589—and as Speaker Tillis subsequently

acknowledged—in-person voter fraud is simply not a problem in North Carolina."); *id.* at 49 ("No evidence exists that North Carolina's electoral process is (or has been) tainted by voter fraud or has otherwise been compromised.").

Judge Brook's motion proceeded to argue that H.B. 589 was enacted with discriminatory intent and violated the Fourteenth Amendment to the United States Constitution. The motion discussed the historical background of the law, the sequence of events leading to its passage, and its legislative history. *See id.* at 7–10, 53–55. And the motion asserted that the General Assembly had "clear knowledge" of H.B. 589's disparate burdens on African Americans when the statute was enacted. *Id.* at 55. Because of "the [alleged] lack of any credible, non-discriminatory basis for the law, and the highly unusual manner in which HB 589 was enacted," Judge Brook's motion argued "that at least one motivating purpose behind the law was to make voting more burdensome for African Americans." *Id.* at 55.

The federal district court held a fifteen-day trial in July 2015 considering the plaintiffs' challenge to the provisions of H.B. 589 relating to early voting, out-of-precinct provisional voting, and the elimination of same-day voting registration. The district court then held another six-day trial in January and February 2016 reviewing the validity of H.B. 589's voter ID provisions. (In 2015, the General Assembly had passed House Bill 836 ("H.B. 836") which expanded the category of acceptable IDs and permitted voters without an acceptable ID to cast a provisional ballot if they completed a "reasonable impediment" declaration explaining why they were unable to acquire a qualifying ID; the federal district court also considered this provision at

trial.) At the conclusion of these trials, the district court issued a 485-page memorandum opinion and order holding that the plaintiffs had failed to prove that H.B. 589 violated the Fourteenth Amendment or the Voting Rights Act. *See N.C. State Conference of the NAACP v. McCrory*, 182 F. Supp. 3d 320, 530–31 (M.D.N.C. 2016).

The plaintiffs appealed the district court's ruling to the United States Court of Appeals for the Fourth Circuit. All the plaintiffs—excluding the United States—filed a joint brief before the Fourth Circuit that listed Judge Brook as counsel. *See* Joint Br. of Pls-Appellants at 80, *N.C. State Conference of the NAACP v. McCrory*, Nos. 16-1468, et al., Doc. 87 (4th Cir. May 19, 2016), attached as Exhibit C. Judge Brook's brief argued that various provisions of H.B. 589—including those related to voter ID—were "enacted with racially discriminatory intent." *Id.* at 43. Regarding the voter ID provisions, Judge Brook's brief argued that (1) when enacting H.B. 589 members of the General Assembly knew that African Americans were disproportionately less likely to have qualifying forms of ID, *see id.* at 44–45; (2) the General Assembly's "rush to pass" H.B. 589 was indicative of discriminatory intent, *see id.* at 46; and (3) the General Assembly's rationale for voter ID was pretextual because of a purported lack of evidence of voter impersonation fraud in North Carolina, *see id.* at 47–50. Judge Brook's brief also "fully incorporate[d] the arguments in the United States' brief," *id.* at 44, which addressed the question of discriminatory intent at length, *see* Br. for the United States as Appellant at 11–31, *N.C. State Conference of the NAACP*

v. McCrory, Nos. 16-1468, et al., Doc. 88 (4th Cir. May 19, 2016), attached as Exhibit D.

The Fourth Circuit ultimately agreed with Judge Brook's arguments on behalf of the plaintiffs and held that "the North Carolina General Assembly enacted the challenged provisions of the law with discriminatory intent." *N.C. State Conference of NAACP v. McCrory*, 831 F.3d 204, 215 (4th Cir. 2016). The State then filed an emergency application with the Supreme Court of the United States to recall and stay the Fourth Circuit's mandate. The plaintiffs filed a joint response to the State's application—again with Judge Brook listed as counsel—and continued to press that H.B. 589 was enacted with discriminatory intent. *See* Resp. to Applicants' Emergency Mot. For Recall & Stay of Mandate at 25–33, No. 16A168, *North Carolina v. N.C. State Conference of the NAACP* (U.S. Aug. 25, 2016), attached as Exhibit E. Judge Brook's response reiterated the plaintiffs' belief that combating voter fraud was pretextual basis for the photo ID provisions because "the 'voter fraud' the law seeks to address does not exist." *Id.* at 30.

Importantly, the plaintiffs also addressed the effect of H.B. 836 on H.B. 589's photo ID requirement. In its application for recalling and staying the Fourth Circuit's mandate, the State had suggested that H.B. 836 had a curative effect on whatever discriminatory intent motivated H.B. 589. In Judge Brook's response, the plaintiffs strongly objected to the idea that H.B. 836 "somehow washes away the stain of discrimination that taints the 2013 bill." *Id.* at 33. Four Justices of the then-eight-member Supreme Court voted to stay the *McCrory* decision in large part, including

its invalidation of North Carolina's voter ID requirements. *North Carolina v. N.C. State Conference of the NAACP*, 137 S. Ct. 27, 28 (2016).

When it came to opposing the petition for certiorari, the plaintiffs—again represented by Judge Brook—repeated their arguments regarding the alleged discriminatory intent behind H.B. 589, including the voter ID provisions. *See* Br. in Opp'n at 10–18, *North Carolina v. N.C. State Conference of the NAACP*, No. 16-833 (Jan. 30. 2017), attached as Exhibit F. When the North Carolina Attorney General moved to dismiss the State's petition for certiorari following an administration change in North Carolina—resulting in a "blizzard of filings over who is and who is not authorized to seek review in this Court under North Carolina law"—the Court denied certiorari with a reminder from Chief Justice Roberts that the denial was not an endorsement of the *McCrory* decision. *North Carolina v. N.C. State Conference of the NAACP*, 137 S. Ct. 1399, 1400 (2017) (Roberts, C.J., respecting the denial of certiorari).

II. Judge Brook Publicly Denigrates Voter ID In General And H.B. 589 In Particular.

Throughout the litigation challenging H.B. 589, Judge Brook routinely spoke publicly and broadly against voter ID laws. In fact, shortly before H.B. 589 was enacted, Judge Brook penned an opinion editorial in which he flagged the General Assembly's consideration of legislation that would "require voters to present forms of ID that many North Carolinians lack and cannot easily obtain." Chris Brook, *In North Carolina and Across the Nation, The Voting Rights Act Is Still Necessary*, ACLU (Jun. 27, 2013), https://bit.ly/37FWOjP. Judge Brook further asserted that any such

ID requirement "would disproportionately impact African-Americans and Latinos in our state, making it more difficult for them to vote or have their vote count in a meaningful fashion." *Id.*

Shortly after then-Governor Pat McCrory signed H.B. 589 into law, Judge Brook accused H.B. 589 of being a "blatant attempt to make it harder for and dissuade many North Carolinians from registering and casting a ballot." David Zucchino, *North Carolina Faces ACLU, NAACP Lawsuits Over New Voter ID Law*, L.A. TIMES (Aug. 13, 2013), https://lat.ms/38aEXSk. And Judge Brook claimed that the law "unconstitutionally limit[ed] citizens right to vote, where they can vote, how they can vote," Press Release, *New NC Voting Law Facing Legal Battle*, SCSJ (Aug. 12, 2013), https://bit.ly/2HFvszR. *See also* Press Release, *ACLU of North Carolina, ACLU and Southern Coalition for Social Justice File Challenge to North Carolina's Voter Suppression Law*, ACLU (Aug. 12, 2013), https://bit.ly/2vTGAGx ("This law is a blatant attempt to make it harder for and dissuade many North Carolinians from registering and casting a ballot."); Katie O'Reilly, *Civil Rights Groups Sue in Response to NC Voter ID Bill's Changes to Early Voting*, WHQR PUBLIC MEDIA (Aug. 16, 2013), https://bit.ly/3acwWOk (quoting Judge Brook saying that North Carolinians "need to view with great skepticism measures that make it more difficult to exercise the right to vote, and require our government to bring forth compelling reasons why measures making it more difficult to vote are necessary"); Chris Brook (@ChrisBrookACLU), TWITTER (Nov. 4, 2016 5:23 PM), https://bit.ly/3cjRp5z

(approvingly quoting his co-counsel's opinion that "[u]nnecessary barriers to ballot & calls to racially profile voters are real threats. *Voter fraud is not.*" (emphasis added)).

And although the ACLU's legal challenge to H.B. 589 did not attack its voter ID provisions directly, Judge Brook clarified in a radio interview:

> The litigation that we filed two days ago now . . . as you were noting targets three provisions in the law. . . . Our partners in that litigation, the Southern Coalition for Social Justice, filed state litigation challenging the photo ID component. We completely support that litigation . . . . and we talk a great deal about the legislature, about how the photo ID requirement was not necessary and how even compared to other states this photo ID requirement that the Governor signed off on was very, very restrictive, for example not accepting public university photo IDs for students at the polls.

Chris Brook of ACLU-NC on Voter ID Lawsuit 0:19–1:20, NewsRadio680 (Aug. 14, 2013), https://bit.ly/37DPCVy.

Judge Brook continued to make critical comments about H.B. 589 throughout discovery and the resulting trial. *See, e.g.*, Press Release, *ACLU, Southern Coalition for Social Justice Ask Federal Court to Put N.C. Voter Suppression Law on Hold for Midterm Election* (May 20, 2014), https://bit.ly/2V6KDdm ("North Carolinians should be able to vote in the November election without having to navigate the barriers imposed by this discriminatory law."); Michael Hewlett, *Hearing on N.C. Voter ID Law Draws National Attention*, WINSTON-SALEM JOURNAL (Jul. 5, 2014), https://bit.ly/38Ks2b7 (stating that "[t]his is really the mother of all voter suppression measures" and calling the measures, "unnecessary restrictions that cut right to the core of democracy and serve to exclude marginalized North Carolinians at the ballot box"); *N.C. Trial Outcome Could Sway National Voting Rights Measures*, NPR

(Jul. 13, 2015), https://n.pr/2T2rs1B ("The measures that were passed here in North Carolina are among the most restrictive, if not the most restrictive in the nation. This case will go a long way to deciding whether measures along these lines are going to be upheld in other portions of the nation.").

III. Plaintiffs Challenge S.B. 824 As A Continuation Of H.B. 589.

On the same day that S.B. 824 became law, Plaintiffs filed their complaint and moved for a preliminary injunction. As in the state and federal challenges to H.B. 589, Plaintiffs allege that S.B. 824 "was enacted with discriminatory intent." (Doc. Ex. 27); (*see also* R p 14). And Plaintiffs allege that

> Senate Bill 824[] retains many of the harmful provisions of the State's previous invalidated requirement. Through this enactment, the General Assembly has simply reproduced the court-identified racially discriminatory intent it manifested a mere five years ago when it enacted a very similar voter ID requirement.

(R p 14); *see also id.* ("The fact that SB 824 was passed pursuant to a constitutional amendment does not immunize the law or sever it from the State's 'shameful' history of discriminatory voter ID laws, including HB 589."); Doc. Ex. 1053.

As in the previous challenge, Plaintiffs question voters' ability to obtain qualifying ID due to a lack of supporting documentation or transportation. (Doc. Ex. 15–19). And Plaintiffs dispute the efficacy of the reasonable impediment process—which they claim to be "nearly identical" to the one created by H.B. 589 (R p 49)—by pointing to alleged implementation errors in 2016. (Doc. Ex. 19–22).

To demonstrate discriminatory intent, Plaintiffs also point to the fact that "[s]ixty-one of the legislators who voted in favor of SB 824—including Legislative

Defendants—previously voted to enact" H.B. 589, and that they did so without conducting a new data analysis of the racial impact of the proposed law. (*See, e.g.*, Doc. Ex. 11, 31–32). H.B. 589 also plays a starring role in the history of official discrimination that Plaintiffs claim supports an inference of discrimination in this case. (*See, e.g.*, Doc. Ex. 4–9, 30). Finally, Plaintiffs rely heavily on purported similarities between S.B. 824 and H.B. 589 to support their case for discriminatory intent: for example, the omission of public assistance ID, the rejection of ameliorative amendments, the occurrence of purported procedural irregularities, and the adoption of supposedly less restrictive requirements for absentee ballots. *See, e.g.*, (R p 14; Doc. Ex. 10–13, 31–32).

H.B. 589 continues to play an outsized role in this litigation. Despite obvious differences between that legislation and S.B. 824, *see* Legislative Def's Response in Opp'n to Pet. For Discretionary Review (Sept. 9, 2019), H.B. 589 dominated Plaintiffs' briefing before the three-judge panel of this Court, *see, e.g.*, Br. of Pls.-Appellants at 16 ("[S]imilarities between SB 824 and HB 589 indicate SB 824 was passed with discriminatory intent.").

ARGUMENT

Canon 3C of the North Carolina Code of Judicial Conduct provides that "[o]n motion of any party, a judge should disqualify [himself] in a proceeding in which the judge's impartiality may reasonably be questioned . . . ." Canon 3C obligates a judge to disqualify himself even if he is in fact impartial and capable of presiding fairly over the matter before him. *See State v. Fie*, 320 N.C. 626, 628, 359 S.E. 2d 774, 776 (1987).

The question is whether a reasonable person, fully informed of the circumstances, would have reasonable grounds to question his objectivity. *Id.*; *see also State v. Kennedy*, 110 N.C. App. 302, 305, 429 S.E.2d 449, 451 (1993).

Canon 3C also enumerates specific "instances" in which a "judge's impartiality may reasonably be questioned." These include cases in which the "judge has a personal bias or prejudice concerning a party," the judge has "personal knowledge of disputed evidentiary facts concerning the proceedings," or the judge "served as [a] lawyer in the matter in controversy." Canon 3C(1)(a)–(b). But the list is not exhaustive, and "[a] judge may be disqualified for reasons other than those stated in the statute." *Fie*, 320 N.C. at 628.

Under these Rules, Judge Brook is disqualified from considering this case both because he served as a lawyer in the matter in controversy and because his impartiality may be reasonably questioned.

I. Judge Brook Should Be Disqualified From This Appeal Because He Served As A Lawyer In The Matter In Controversy.

Canon 3C requires a judge to disqualify himself if he "served as [a] lawyer in the matter in controversy." Canon 3C(1)(b). Neither the rule nor the opinions interpreting it provide a definition of the term "matter in controversy." But when interpreting a nearly identical provision of federal law,[1] the Fourth Circuit cast doubt

[1] Like Canon 3C(1)(b), a federal statute requires a judge to disqualify himself when he "served as [a] lawyer in the matter in controversy." 28 U.S.C. § 455(b)(2). The statute and cases interpreting it are therefore persuasive authority. *See, e.g.*, *State v. Hatfield*, 165 N.C. App. 545, 600 S.E.2d 898 (tbl.) (2004) (relying on the federal statute and cases interpreting it to hold that a judge had no obligation to recuse himself from criminal trial when he "had no role in the prosecution").

on the notion that the "matter in controversy" is limited to "the actual case before the court." *In re Rodgers*, 537 F.2d 1196, 1198 (4th Cir. 1976). The Fourth Circuit has held that "the matter in controversy" includes all matters implicated by a claim or defense in the case before the court. *Id* (citation omitted). Thus, a judge whose former law partner represented a company in lobbying for a piece of legislation was required to recuse himself in a criminal trial in which the company's competitor was charged with using improper means to secure the passage of the bill in question because the competitor's defense put in issue the company's own lobbying efforts. *Id.* at 1197–98; *see also Murray v. Scott*, 253 F.3d 1308, 1313 (11th Cir. 2001) (judge must recuse himself when he represented a party in prior litigation that "concerns (that is, might affect) this proceeding").

Consistent with the Fourth Circuit's decision in *Rodgers*, the term "matter in controversy" in Canon 3C also encompasses more than the judicial proceedings arising from a given complaint. Canon 3C (like its federal counterpart) uses "matter in controversy" in contradistinction to the narrower phrase "proceeding(s)" elsewhere in the rule. *Cf.* 28 U.S.C. § 455(d)(1) (defining "proceeding" to include "pretrial, trial, appellate review, or other stages of litigation"). The "matter in controversy" thus involves the investigation that occurs prior to the filing of the complaint. *See, e.g.*, Formal Advisory Opinion 2009-02, N.C. Judicial Standards Comm'n (June 11, 2009). And most important, the "matter in controversy" includes separate cases that are closely related, even if they involve different parties or different factual and legal issues. For example, the Judicial Standards Commission of North Carolina has held

that an attorney who represented a criminal defendant in a murder trial that ended with a death sentence must disqualify himself in an appeal from a separate petition by his former client challenging the legality of the execution protocol, even though "the issues involved in the [two actions] are not precisely the same." Formal Advisory Opinion 2009-07, N.C. Judicial Standards Comm'n (Sept. 24, 2009) (relying "particularly" on Canon 3C(1)(b)). The Commission further held that the severance of the former clients' appeal from that of his co-petitioners "would have no effect on the judge's disqualification"—meaning that the identity of the "matter[s] in controversy" did not depend upon the prior client's formal participation in the matter. *Id.*

Justice Brook's work in the *McCrory* litigation constitutes "serv[ice] as [a] lawyer in the matter in controversy" and thus requires his disqualification here. *See* Canon 3C(1). To begin, Judge Brook was the Legal Director of the ACLU of North Carolina when it litigated the federal challenge to H.B. 589, and he was actively involved in the case, signing pleadings and briefs and speaking publicly about the case's progress throughout. *See supra* Statement of Facts Part I. According to Plaintiffs, the "linchpin" of the current case is that H.B. 589's allegedly discriminatory purpose has not been cleansed by S.B. 824 and S.B. 824 is thus invalid. *See United States v. Herrera–Valdez*, 826 F.3d 912, 919 (7th Cir. 2016) (finding that the judge who oversaw prosecution of defendants' removal case could not preside over his prosecution for illegal reentry, especially when the "linchpin" of the defendant's defense was a collateral attack on the removal). Put another way, Plaintiffs' claim that S.B. 824 is unconstitutional is predicated on the *McCrory* litigation—so the

evidence that came out in that litigation, the legal arguments and holdings it involved, and the details surrounding the litigation all form a part of Plaintiffs' claim in this case.

Although Legislative Defendants contest the relevance of H.B. 589, Plaintiffs have put the question of H.B. 589's relevance at the center of this controversy—attempting to inextricably bind the two proceedings. Plaintiffs do not merely argue that S.B. 824 is unconstitutional for the same reasons that H.B. 589 was unconstitutional; instead they argue that S.B. 824 is unconstitutional *because* H.B. 589 was unconstitutional, which means that *McCrory* and this case are the same "matter in controversy." This is so because Plaintiffs' case for S.B. 824's unconstitutionality depends on (1) the fact that Legislative Defendants were involved in enacting both laws, (R p 32); (Doc. Ex. 11); (2) the allegation that the General Assembly relied on the same data that was available during the enactment or defense of H.B. 589, (R p 33); (Doc Ex. 11); and (3) a history of discrimination in North Carolina in which H.B. 589 is purportedly the most recent and most pertinent chapter, (R pp 13–14); (Doc. Ex. 4–9). "It [would be] reasonable to perceive that a judge may consciously or unconsciously credit [Plaintiffs'] arguments" that S.B. 824 is unconstitutional, when those arguments *depend on* the very arguments that Judge Brook made and the evidence that he introduced in the *McCrory* litigation. *Herrera–Valdez*, 826 F.3d at 919.

II. Judge Brook Should Recuse Himself Because His Impartiality May Reasonably Be Questioned.

Although the Code of Judicial Conduct lists certain specific instances in which a judge should disqualify himself from a proceeding, that list is not exhaustive. *See* Canon 3C(1) (noting that disqualification is appropriate "including but not limited to" the instances enumerated). More generally, Canon 3C(1) requires disqualification whenever "the judge's impartiality may reasonably be questioned." *Id.* Even if Judge Brook's participation in the *McCrory* litigation does not satisfy the enumerated cause for disqualification laid out above, his conduct falls under the general rule for disqualification.

Reasonable people, fully informed of Judge Brook's activities with the ACLU of North Carolina, could easily question Judge Brook's impartiality. To be clear, even if Judge Brook carries the subjective belief that he will act impartially, the ethical requirements for North Carolina judges

> go further and say that it is also important that every man should know that he has had a fair and impartial trial, or, at least, that he should have no just ground for the suspicion that he has not had such a trial.

Ponder v. Davis, 233 N.C. 699, 706, 65 S.E.2d 356, 361 (1951) (quotation omitted). As the Fourth Circuit explained when interpreting the federal analogue to Canon 3C(1), "[t]he question is not whether the judge is impartial in fact. It is simply whether another, not knowing whether or not the judge is actually impartial, might reasonably question his impartiality on the basis of all of the circumstances." *Rice v. McKenzie*, 581 F.2d 1114, 1116 (4th Cir. 1978); *see also United States v. DeTemple*, 162 F.3d 279, 286 (4th Cir. 1998).

Moreover, the objective standard described above requires a judge "keep in mind that the hypothetical reasonable observer is not the judge himself or a judicial colleague but a person outside the judicial system." *DeTemple*, 162 F.3d at 287. This nuance is important because "[j]udges, accustomed to the process of dispassionate decision making and keenly aware of their Constitutional and ethical obligations to decide matters solely on the merits, may regard asserted conflicts to be more innocuous than an outsider would." *Id.*

A reasonable outside observer would likely view this case as a follow-up to *McCrory*. And, at a superficial, non-legal level, that view is entirely reasonable: both cases involve an equal protection challenge to a North Carolina law requiring photo ID for voting and many of the same arguments against S.B. 824 resemble those leveled against H.B. 589. While Legislative Defendants strongly disagree that S.B. 824 is similar to H.B. 589 in any legally relevant sense, it would be *unreasonable* to see these cases as entirely unrelated from the perspective of an informed, but not legally trained, individual, especially in light of the arguments advanced by Plaintiffs.

Because of the similarities between this case and the prior federal litigation—and especially those similarities surrounding the substance of the plaintiffs' claims—one cannot say *no* reasonable person could question Judge Brook's impartiality. A reasonable observer could surely wonder whether Judge Brook can maintain impartiality in light of his years-long experience litigating against H.B. 589 and the substantive legal arguments he has previously endorsed. This conclusion is

buttressed by Judge Brook's extrajudicial writings before and during the pendency of the federal litigation over H.B. 589, *see* Statement of Facts Part II, all of which raise reasonable questions about whether he can truly come to this case with an open mind.

At the very least, if Judge Brook will not recuse himself, he should at least refer this recusal motion to the en banc Court for resolution. *Cf. In re Faircloth*, 153 N.C. App. 565, 570, 571 S.E.2d 65, 69 (2002) (noting in the context of trial judges that "if a reasonable man knowing all of the circumstances would have doubts about the judge's ability to rule on the motion to recuse in an impartial manner, the trial judge should either recuse himself or refer the recusal motion to another judge"). And, for the same reasons discussed above, the en banc Court should order Judge Brook's recusal.

CONCLUSION

For the foregoing reasons, Legislative Defendants respectfully request that Judge Christopher Brook recuse himself from participating in this case, or, in the alternative, refer this motion to the en banc Court for consideration. If Judge Brook refers the motion, Legislative Defendants respectfully request that the en banc Court order Judge Brook to recuse from this case.

Dated: March 5, 2020

Respectfully submitted,

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N.C. R. App. P. 33(b) Certification: I certify that all of the attorneys listed below have authorized me to list their names on this document as if they had personally signed it.

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CERTIFICATE OF SERVICE

I do hereby certify that I have on this 5th day of March, 2020, served a copy of the foregoing Legislative Defendants-Appellees' Motion to Recuse Judge Brook, by electronic email and by United States mail, postage prepaid, to counsel for Plaintiffs and Defendants at the following addresses:

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EXHIBIT A

IN THE UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

CIVIL ACTION NO. _____

LEAGUE OF WOMEN VOTERS OF NORTH CAROLINA, A. PHILIP RANDOLPH INSTITUTE, UNIFOUR ONESTOP COLLABORATIVE, COMMON CAUSE NORTH CAROLINA, GOLDIE WELLS, KAY BRANDON, OCTAVIA RAINEY, SARA STOHLER, and HUGH STOHLER, *Plaintiffs,* *vs.* THE STATE OF NORTH CAROLINA, JOSHUA B. HOWARD in his official capacity as a member of the State Board of Elections, RHONDA K. AMOROSO in her official capacity as a member of the State Board of Elections, JOSHUA D. MALCOLM in his official capacity as a member of the State Board of Elections, PAUL J. FOLEY in his official capacity as a member of the State Board of Elections, MAJA KRICKER in her official capacity as a member of the State Board of Elections, and PATRICK L. MCCRORY in his official capacity as Governor of the state of North Carolina, *Defendants.*	COMPLAINT EQUITABLE RELIEF SOUGHT

Plaintiffs, complaining of Defendants, allege and say:

1. This is an action pursuant to 42 U.S.C. § 1983 and the Voting Rights Act of 1965, 42 U.S.C. § 1973, to secure equitable relief for the unlawful deprivation of rights, privileges, and immunities secured by the Constitution and laws of the United States. Plaintiffs are citizens and residents of North Carolina who will be harmed by the discriminatory and unduly burdensome

changes to North Carolina election laws encoded in the newly-enacted Voter Information Verification ACT (VIVA), including reductions in early voting, the elimination of same-day registration, and a prohibition on the counting of "out of precinct" provisional ballots. The organizational Plaintiffs are nonprofit, non-partisan groups who actively work to increase voter participation in North Carolina, and whose interests and resources will be directly harmed by these provisions. VIVA makes changes to North Carolina's election laws that will eliminate registration and voting opportunities relied on by hundreds of thousands of North Carolinians in recent elections, directly denying the franchise or otherwise unreasonably making it harder for many North Carolinians to vote. Moreover, these changes to North Carolina's election laws will result in longer lines throughout the remaining early voting period and on Election Day itself, further unduly burdening and denying the right to vote throughout North Carolina. As a result, Plaintiffs will be denied equal protection of the law and denied the equal right to vote, in violation of the equal protection clause of the United States Constitution. In particular, the effects of VIVA will be felt most keenly among African-American voters, causing them to have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The result will be the denial or abridgement of the right of African Americans in North Carolina to vote in contravention of Section 2 of the Voting Rights Act. Plaintiffs request that this Honorable Court grant relief in the form of, *inter alia*, a declaratory judgment and preliminary and permanent injunctions preventing Defendants from implementing the challenged provisions of the statute.

JURISDICTION AND VENUE

2. This Court has jurisdiction over this action pursuant to 28 U.S.C. §§ 1331, 1343(a)(3), and 1357; and 42 U.S.C. §§ 1983 and 1988.

3. This Court has authority to issue declaratory and injunctive relief pursuant to 28 U.S.C. §§ 2201 and 2202.

4. Venue in this district is proper pursuant to 28 U.S.C. § 1391(b).

PARTIES

5. Plaintiff LEAGUE OF WOMEN VOTERS OF NORTH CAROLINA (LWVNC) is a nonpartisan community-based organization, formed in 1920, immediately after the enactment of the Nineteenth Amendment to the U.S. Constitution granting women's suffrage. The LWVNC is dedicated to encouraging its members and the people of North Carolina to exercise their right to vote as protected by the U.S. Constitution and the Voting Rights Act of 1965. The mission of LWVNC is to promote political responsibility through informed and active participation in government and to act on selected governmental issues. The LWVNC impacts public policies, promotes citizen education, and makes democracy work by, among other things, removing unnecessary barriers to full participation in the electoral process. Currently LWVNC has 16 local leagues and over 972 members, each of whom, on information and belief, is a registered voter in North Carolina. LWVNC is affiliated with the League of Women Voters of the United States, which was also founded in 1920. LWVNC began as an organization focused on the needs of women and the training of women voters; it has evolved into an organization concerned with educating, advocating for, and empowering all North Carolinians. With members in almost every county in the state, the LWVNC's local leagues are engaged in numerous activities, including hosting public forums and open discussions on issues of importance to the community. Individual league members invest substantial time and effort in voter training and civic engagement activities, including voter registration and get-out-the-vote (GOTV) efforts, including during the early voting period. LWVNC has developed a First Time

Voter Engagement Program that partners with local election boards and schools to encourage young voters to register to vote. LWVNC also devotes substantial time and effort to ensuring that government at every level works as effectively and fairly as possible. This work involves continual attention to and advocacy concerning issues of transparency, a strong and diverse judiciary, and appropriate government oversight.

6. Plaintiff NORTH CAROLINA A. PHILIP RANDOLPH INSTITUTE (NC APRI) is the North Carolina division of the national A. Philip Randolph Institute, the senior constituency group of the AFL-CIO dedicated to advancing racial equality and economic justice. APRI grew out of the legacy of African-American trade unionists' advocacy for civil rights and the passage of the federal Voting Rights Act and continues to advocate for social, political and economic justice for all working Americans. NC APRI is a statewide organization with local chapters across the state. Its chapters are located in Durham, Greensboro, the Piedmont, Raleigh, Roanoke Rapids and Fayetteville. NC APRI has members who are registered voters across North Carolina. NC APRI works to increase access to the polls, voter registration and voter education, particularly among working class African Americans. It distributes nonpartisan voter guides and hosts phone banks to encourage voter participation. APRI also organizes transportation to the polls throughout the early voting period, concentrating its efforts in predominantly African-American neighborhoods, and encourages first-time registration during the early voting period using same-day registration. NC APRI engaged in these efforts in 36 North Carolina counties in 2012. In addition to its civic engagement efforts, NC APRI is involved in many other activities as well: the organization engages in significant labor and workers' rights organizing and support efforts across the state; works on community services programs such as closing the health disparity gaps between white and African-American

communities; and runs a Feeding the Hungry initiative, which now feeds over 800 people per month, among other projects.

7. Plaintiff UNIFOUR ONESTOP COLLABORATIVE is a nonprofit, nonpartisan, advocacy and education organization headquartered in Conover, NC. Unifour OneStop Collaborative's mission is to promote educational achievement, social equality, and economic self-sufficiency among the underserved people of the Unifour Region and throughout North Carolina. Unifour OneStop Collaborative works to 1) increase voter participation; 2) increase understanding of best practices in voter participation field work; and 3) help politically marginalized citizens increase their civic engagement, hold their elected officials accountable to their communities, and achieve state-level reforms that benefit workers and disadvantaged communities. Unifour OneStop Collaborative works in 31 counties in North Carolina.

8. Plaintiff COMMON CAUSE NORTH CAROLINA (COMMON CAUSE NC) is a nonpartisan, nonprofit citizen's lobbying organization promoting open, honest and accountable government. Common Cause NC is a grassroots organization dedicated to restoring the core values of American democracy, reinventing an open, honest and accountable government that serves the public interest, and empowering ordinary people to make their voices heard in the political process. Common Cause NC is an affiliate of the national Common Cause organization, which was founded in 1970, and shares the same missions as the national Common Cause organization. In addition to lobbying for laws at the state level that would further its mission, Common Cause NC promotes civic engagement by devoting substantial time and effort to registration and GOTV efforts. In particular, in 2006, Common Cause NC started the Campus Outreach Project, which is designed to bolster civic engagement and awareness about important issues among students—especially problems caused by big money interests in politics—and then

converting that interest into action. Common Cause NC lobbied the North Carolina General Assembly for expanded early voting opportunities and the introduction of same-day registration.

9. The organizational Plaintiffs have standing to challenge VIVA, which eliminates registration and voting opportunities that have been used by hundreds of thousands of North Carolinians in recent elections and will thereby directly impair the organizational plaintiffs' mission of civic engagement. The law, which reduces early voting and ends same-day registration, will also make it substantially more difficult for the organizational Plaintiffs to engage in the GOTV and voter registration work that they perform in support of their civic engagement missions. The plaintiff organizations will be forced to expend even more attention and resources on voter registration and GOTV efforts in order to counteract the injuries inflicted by the law on the organizations' missions and their constituents. For example, the prohibition on same-day registration will force the organizational Plaintiffs to devote more resources to independent voter registration efforts before the close of voter registration 25 days prior to an election. The shorter early voting period will force the organizational Plaintiffs to devote more resources to GOTV efforts on the fewer remaining days of early voting and on Election Day itself. The result will be a drain on the organizational Plaintiffs' time and resources, which they will be forced to divert from their many other activities.

10. The organizational Plaintiffs also have associational standing because their members have standing to challenge the law. Several of the organizational Plaintiffs are membership organizations, and their members will be harmed by the restrictions on early voting, and the elimination of same-day registration and "out of precinct" provisional voting. These new laws will unduly burden the organizational Plaintiffs' members' ability to participate freely and equally in the political process and, in some cases, will deny the right to vote altogether.

11. Plaintiff GOLDIE WELLS is an African-American registered voter in Guilford County. She resides at 4203 Belfield Drive, Greensboro, NC 27405. She is a former member of the Greensboro City Council. She is active in civic engagement efforts in her community, the predominantly African-American community of Northeast Greensboro, including being a founding leader of the Greensboro Voter Alliance, whose mission is to register voters and encourage them to vote.

12. Plaintiff KAY BRANDON is an African-American registered voter in Guilford County. She resides at 1437 Old Hickory Drive, Greensboro, NC 27405. She is active in civic engagement efforts in her community, the predominantly African-American community of Northeast Greensboro, including participating in voter registration and GOTV work.

13. Plaintiff OCTAVIA RAINEY is an African-American registered voter in Wake County. She resides at 1516 E. Lane Street, Raleigh, NC 27610. She is an officer of Southeast Raleigh Community Association and active in voter registration and GOTV efforts.

14. Plaintiffs SARA STOHLER and HUGH STOHLER are white registered voters and residents of Wake County. They reside at 528 N. Bloodworth Street, Raleigh, NC 27604. They are active in their precinct and frequently use early voting because they work at the polls on Election Day.

15. The individual Plaintiffs have standing to bring this action because they are personally aggrieved in that they will have their rights burdened and infringed by the change in the early voting and registration laws in the state of North Carolina. The individual Plaintiffs have utilized in-person early voting and same-day registration, and have expended substantial efforts to encourage other voters to do the same. The challenged provisions of VIVA will eliminate modes of registration and voting relied on by the individual Plaintiffs in the past and

will unduly burden the right to vote, causing substantial hardship to the individual Plaintiffs in both exercising their own right to vote and in their efforts to promote voter participation in future elections.

16. This action is brought timely, in that VIVA was signed on August 12, 2013. The provisions that are challenged in this complaint go into effect starting January 1, 2014, and will first affect early voting (beginning in April) for the primary election in May of 2014.

17. Defendant STATE OF NORTH CAROLINA is a sovereign state in the United States.

18. Defendant JOSHUA B. HOWARD is the chairman of the North Carolina State Board of Elections and is being sued in his official capacity as a member of the State Board of Elections, which is charged with administering the election laws of the state of North Carolina.

19. Defendant RHONDA K. AMOROSO is being sued in her official capacity as a member and secretary of the State Board of Elections, which is charged with administering the election laws of the state of North Carolina.

20. Defendant JOSHUA D. MALCOLM is being sued in his official capacity as a member of the State Board of Elections, which is charged with administering the election laws of the state of North Carolina.

21. Defendant PAUL J. FOLEY is being sued in his official capacity as a member of the State Board of Elections, which is charged with administering the election laws of the state of North Carolina.

22. Defendant MAJA KRICKER is being sued in her official capacity as a member of the State Board of Elections, which is charged with administering the election laws of the state of North Carolina.

23. Defendant PATRICK L. MCCRORY is being sued in his official capacity as Governor of the state of North Carolina.

FACTUAL ALLEGATIONS

Early Voting in North Carolina 2000-2012

24. Legislation that would enable counties to offer early voting opportunities to their residents was first enacted in 1999 and first utilized in the presidential general election of 2000.

25. The authority to determine the extent of early voting opportunities during the days allowed under the statute was delegated to the counties. Counties are required to have at least one early voting site but may have more. Since 2000, the number of early voting sites open on each day of early voting, across the state, has increased exponentially.

26. Prior to the enactment of VIVA, North Carolina election laws provided for seventeen (17) days of early voting—starting on the third Thursday before an election and ending on the Saturday before the election—and that had been the law since 2001.

27. North Carolinians utilize early voting opportunities to an overwhelming extent. In the November 2012 elections, more than 2.5 million ballots were cast during early voting—more than half of all of the ballots cast in the election. In the November 2008 elections, approximately 2.4 million ballots were cast during early voting. North Carolinians have come to rely heavily on the opportunities the State used to provide for access to the ballot box.

28. Across the state, 366 sites accommodated early voting in the 2012 presidential general election. In the 2008 election, there were 368 early voting sites across the state.

29. Despite a 17-day early voting period and 366 early voting sites, North Carolina, on average, witnessed the tenth longest waiting times to vote out of all 50 states on Election Day in 2012.

30. Part 25 of VIVA cuts a full week off of the early voting period, including the first Sunday of early voting. This reduction in the early voting period will unduly burden the right to vote in at least two ways. First, it will eliminate early voting days during which 899,083 North Carolinians cast their ballots in the 2012 November general elections (or 19.96% of the entire electorate), directly depriving hundreds of thousands of voters an opportunity to vote .

31. Second, the inevitable result of eliminating seven days of early voting will be even longer lines and waiting times for all voters throughout the early voting period and on Election Day itself, unduly burdening the right to vote throughout the electorate and effectively denying the franchise to thousands of voters who are prevented or deterred from casting ballots. Part 33 of House Bill 589, however, eliminates the discretion of county boards of elections to direct polls to remain open an additional hour on Election Day.

32. Evidence from the 2012 presidential general election in Florida—where the state eliminated six days of the early voting period—demonstrates that reductions in the number of early voting days will result in dramatically longer lines on Election Day. With fewer opportunities to vote early, the number of individuals who voted early in Florida during the 2012 general election dropped by 10.7% in comparison to 2008. But even with fewer early voters, Florida experienced significantly more congestion during the early voting period. Because early voters were compressed into a shorter time frame, crowds were 50-100% greater during the 2012 general election early voting period in Florida, when compared to corresponding days during the 2008 general election. And, on Election Day itself, Florida experienced the longest average wait

times to vote of any state, with many voters casting ballots after midnight, and the last ballot cast nearly 8 hours after the polls closed. Waits were longest in predominantly minority communities. These undue burdens on the right to vote effectively deprived the franchise from hundreds of thousands of voters, with one study estimating that at least 201,000 voters gave up in frustration in the face of such long lines.

33. As was the case in Florida, the effects of reducing the number of early voting days will be felt disproportionately by minority voters and in precincts that serve predominantly minority voters. African-American voters disproportionately utilize early voting opportunities in North Carolina. In the 2012 general election, African-American voters made up 22.45% of registered voters and 23.08% of the actual (turned out) voters in that election, but cast at least 28.9% of ballots cast during the early voting period.

34. Moreover, at least 70.49% of African-American voters cast their ballot during early voting in the 2012 general election, as compared with 51.87% of white voters who cast their ballot during early voting for that election.

35. In the 2008 general election, African-American voters made up 21.69% of registered voters in the state and 22.32% of the actual (turned out) voters in that election but cast at least 28.52% of ballots cast during the early voting period.

36. Moreover, at least 70.92% of African-American voters cast their ballot during early voting in the 2008 general election, as compared with 50.95% of white voters who cast their ballots during early voting for that election.

37. During the first seven days of early voting in the 2012 November general elections, 296,093 African-American North Carolinians cast their ballots. At least 36.44% of all

the North Carolinians who voted during the first seven days of early voting that year were African American.

38. In early voting in the 2012 November general election, African-American voters demonstrated a pronounced peak in participation on the weekend, with white voters demonstrating a pronounced decline in participation on the weekends.

39. On the first Sunday of early voting in the 2012 November general election, African Americans cast 43.44% of all ballots cast, even though African-American voters constituted only 22.45% of the registered voters and 23.08% of the actual (turned out) voters in that election.

40. Many voters have a limited window of opportunity to go to the polls. For voters experiencing poverty, early voting significantly eases the burden of arranging transportation to the voting site, as well as providing flexibility in finding time to vote. Voters living in poverty often have limited access to transportation so a trip to a voting site may require time for a detour from their daily routes on public transportation or arranging a ride from a friend or relative. These voters are also more likely to have one or more hourly-wage jobs that do not allow workers enough time to go to the polls on Election Day or during common work hours generally. Those voters are frequently employed in jobs that do not allow any flexibility for stepping away to vote. Work, combined with childcare responsibilities, places great demands on voters living in poverty. Many such voters must vote early if they are to vote at all. The previous, seventeen-day early voting period allowed significant flexibility for these voters to arrange transportation and time to vote.

41. Poverty in North Carolina is higher amongst African Americans due in part to discrimination in areas such as education, employment, housing, and health. Because of such

inequalities, the reduction in early voting opportunities will have a disproportionate impact on African-American voters. In North Carolina, 28% of African Americans live in poverty according to the American Community Survey collected by the Census Bureau. Poverty is defined by the American Community Survey as income below a certain threshold based on the number of members of the household. In comparison, only 12.9% of whites live in poverty.

42. According to the 2010 American Community Survey data (5-year set), African Americans in North Carolina are 3.5 times more likely than whites to not own a vehicle. According to the survey, 4.14% of whites do not own a vehicle, but 14.35% of African Americans do not own a vehicle.

Same-Day Registration in North Carolina

43. Legislation allowing for voters to register to vote during the early voting period, rather than only allowing them to vote if they were registered 25 days prior to the election, so-called "same-day registration" or "one-stop voting," was first introduced in 2003. It was enacted in 2007 and went into effect in the 2007 municipal elections. In 2008, same-day registration was first offered in statewide elections. Before that, voters had to be registered 25 days prior to election. The 2007 legislation had bipartisan support. At least five different safety features were incorporated into the 2007 legislation to ensure that the integrity of elections would be preserved while simultaneously making it easier for North Carolinians to exercise their constitutional right to vote.

44. Turnout in North Carolina elections has substantially and impressively increased since the implementation of same-day registration. In the 2004 November general election, prior to the introduction of same-day registration, only 64.26% of registered voters actually cast a ballot, and only 54.78% of voters eligible by age cast a ballot. In the 2008 November general

election, the first presidential election in which same-day registration was offered, 69.53% of registered voters cast a ballot, and 60.91% of all voters eligible by age cast a ballot. That trend held in 2012. In the 2012 November general election, 68.42% of all registered voters cast a ballot, and 60.71% of all voters eligible by age cast a ballot.

45. North Carolinians extensively utilize same-day registration to register to vote for the first time and to make changes to their registrations while voting. In the 2012 general election, 97,357 voters registered to vote using same-day registration, and 152,565 voters used same-day registration to update their registrations at a one-stop early voting site.

46. During early voting in the 2008 Presidential election, 104,966 voters registered to vote using same-day registration, and 148,018 voters used same-day registration to update their registrations at a one-stop early voting site.

47. Part 16 of VIVA prohibits same-day Voter Registration, eliminating a means of voting utilized by approximately 100,000 voters during each of the last two presidential general elections.

48. The effect of prohibiting same-day registration will be felt most keenly by African-American voters, who disproportionately utilize same-day registration to register to vote or to update their registration. During early voting before the 2012 presidential general election, at least 34.01% of all new registrations using same-day registration were made by African-American voters, despite the fact that African Americans constituted only 22.45% of the registered voters and 23.08% of the actual (turned out) voters for that election. During that same period, at least 44.99% of all changed registrations using same-day registration were made by African-American voters. During early voting before the 2008 presidential general election, at least 35.32% of all new registrations using same-day registration were made by African-

American voters, despite the fact that African Americans constituted only 21.69% of the registered voters and 22.32% of the actual (turned out) voters for that election. During that same period, at least 36.21% of all changed registrations using same-day registration were made by African-American voters.

49. One reason that African-American voters are more likely to use same-day registration is that they are more likely to move than their white counterparts. According to the 2010 5-year Selected Population Tables from the 2006-2010 American Community Survey, in North Carolina, 20% of African Americans lived in a different house in 2010 than in 2009, compared to 14.3% of whites. 17.1% of African Americans had moved within the state, while 2.9% moved from out-of-state, compared to 10.9% of whites moving within the state and 3.4% moving from out-of-state.

50. Poverty also contributes to the disproportionately high usage of same-day registration by African Americans. As noted above, African Americans in North Carolina suffer from poverty at a substantially higher rate than do whites. In general, individuals living in poverty tend to have lower voter registration rates and move more frequently than other voters.

"Out of Precinct" Voting in North Carolina

51. Prior to the enactment of VIVA, North Carolina election law allowed for a voter who went to vote in a precinct to which he or she was not assigned, or an incorrect precinct, to cast a provisional ballot. The county board of elections would count that voter's provisional ballot for all ballot items on which it determined the individual was eligible under state or federal law to vote. This ensured that a voter who went to or was directed to the wrong precinct would not be disenfranchised with respect to his vote for upper-ticket races such as President,

Governor, U.S. Senate, and other offices for which the voter was eligible to cast a ballot. This had been the law since 2001.

52. In legislation enacted in 2005, the General Assembly made the following findings:

> (4) When it enacted G.S. 163-166.11, it was then and is now the intent of the General Assembly that any individual who is a registered voter in a county but whose name does not appear on the official list of registered voters at the voting place at which that voter appears be allowed to cast a provisional official ballot.
> (5) When it enacted G.S. 163-166.11, it was then and is now the intent of the General Assembly that all provisional ballots be counted for those ballot items for which a voter was eligible to vote. In enacting G.S. 163-166.11 in 2003, the General Assembly was fully mindful of and intended to reinforce the fact that prior statutory enactments in 2001 had already recognized the right of a voter to cast a provisional ballot and to have that ballot counted for all items for which that voter was eligible to vote….
> (9) The General Assembly takes note of the fact that of those registered voters who happened to vote provisional ballots outside their resident precincts on the day of the November 2004 General Election, a disproportionately high percentage were African-American….
> (11) It would be fundamentally unfair to discount the provisional official ballots cast by properly registered and duly qualified voters…"

S.L. 2005-2, § 1.

53. The State Board of Elections keeps data on the reasons for the casting of provisional ballots. For provisional ballots that are cast because the voter was in the wrong precinct, the provisional ballot is categorized as an "out of precinct" provisional ballot.

54. In the 2012 presidential general election, 7,486 "out of precinct" provisional ballots were cast, and 89.6% of those were either accepted or partially accepted.

55. Part 49.3 of VIVA provides that provisional ballots "shall not be counted if the voter did not vote in the proper precinct," even when the voter casting the provisional ballot is eligible under state or federal law to vote on certain items on that ballot.

56. As with the other challenged provisions, the prohibition on counting "out of precinct" provisional ballots will have a disparate impact on African Americans, who are disproportionately likely to cast "out of precinct" provisional ballots. In the 2012 presidential general election, African Americans cast at least 30.8% of all "out of precinct" provisional ballots, despite constituting only 22.45% of the registered voters and 23.08% of the actual (turned out) voters in that election. Of those "out of precinct" ballots cast by African-American voters, 93.4% were accepted or partially accepted.

57. Black voters disproportionately live in low-income neighborhoods without access to transportation or flexible work schedules that might allow them to get to their home precincts.

The History and Current Pattern of Racial Discrimination in North Carolina

58. North Carolina has a long and sad history of official discrimination against African Americans, including official discrimination in voting that has touched upon the right of African Americans and other people of color to register, vote, or otherwise participate in the democratic process. Over the past 30 years in North Carolina, there have been over thirty (30) successful cases brought under Section 2 of the Voting Rights Act and forty (40) objections to discriminatory changes to voting laws lodged by the Department of Justice under Section 5 of the Voting Rights Act, 42 U.S.C. § 1973b, many of which were based in whole or in part on findings of discriminatory purpose. Based on concerns about intimidation at the polling place, the United States Justice Department sent federal observers to North Carolina to help enforce federal voting rights laws that protect ballot access in the November 2012 general election.

59. Up through recent history, political campaigns in North Carolina have been characterized by overt or subtle racial appeals, including discriminatory campaign tactics and racial appeals in elections deliberately and demonstrably designed to keep African Americans

from registering and turning out to vote. Such tactics continue to affect the ability of African Americans to participate in the political process.

60. Elected officials in North Carolina demonstrate a lack of responsiveness to the interests of minority communities.

61. The present effects of current and past discrimination affect the ability of African-American voters to participate effectively in the political process.

62. There is a significant history and ongoing pattern of discrimination in education, housing, employment and health services in North Carolina which causes African Americans as a group to have less access to transportation and health care, and to be less well-educated, less well-housed, lower-paid, and more likely to live in poverty than their white counterparts. Past and ongoing discrimination in these areas causes higher rates of poverty amongst African Americans. This hinders the ability of African Americans to participate effectively in the political process, causing African Americans to be more likely to rely on the very modes of participation (such as early voting and same-day registration) that are reduced or eliminated by the challenged provisions.

Legislative History of House Bill 589 (VIVA)

63. During the last week of the 2013 legislative session, the North Carolina General Assembly enacted sweeping changes to North Carolina's election laws, undoing many of the improvements made to access to the ballot in the last fourteen years.

64. House Bill 589 was first introduced in the House on April 4, 2013, and proposed changes to the State's requirements for proving identity when voting in person and some changes to how absentee ballots are requested and submitted. It contained no provisions that affected early voting, same-day registration, or "out of precinct" voting.

65. On April 24, 2013, the bill passed Third Reading in the House and was referred to the Committee on Rules and Operation of the Senate. The bill at that point still contained no provisions that affected early voting, same-day registration, or "out of precinct" voting.

66. The Senate took no action on House Bill 589 for three months, until July 23, 2013, at which point an amendment was offered that dramatically increased the scope of the bill. In addition to even stricter government-issued photo ID requirements for in-person voters, the amended House Bill 589 at that point included: reductions in early voting; the elimination of same-day registration; a provision that explicitly prevented county boards of election from counting "out of precinct" voting; the elimination of discretion for county boards of elections to direct that polls remain open for an additional hour on Election Day; the elimination of pre-registration for 16- and 17-year-olds; the elimination in flexibility for the county boards of election to open early voting sites at different hours within a county; the elimination of straight party ticket voting; the authorization of rogue poll observers to challenge voters with an expanded range of authority; added regulations that make it more difficult to add satellite polling sites for the elderly or voters with disabilities; and many more changes.

67. These drastic changes were introduced only one day before the Senate passed the amended bill and only two days before the House passed the bill.

68. Specifically, Part 16 of the bill prohibits same-day voter registration, repealing G.S. 163-82.6A (except for subsection (e)).

69. Part 25 of the bill amends G.S. 163-227.2 to cut a full week off of the early voting period. Early voting now may only begin the second Thursday before an election, rather than the third Thursday before an election. Part 25 also amends G.S. 163-227.2 to end early voting on the last Saturday before an election at 1:00 P.M., where counties had previously been authorized to

conduct voting on that day until 5:00 P.M. Although, as a practical matter, early voting sites and hours are not interchangeable to voters, Part 25 of the bill treats them as fungible. It permits each county to reduce the total number of early voting hours offered, so long as the county offsets a reduction in early voting hours by operating additional early voting sites. The ability of this provision to mitigate for the loss of a week of early voting is further undermined by another provision of law, Part 25.1(g), which requires that all early voting sites within each county be open uniformly for the same days of operation and same number of hours of operation on each day. This deprives County Boards of Elections of the flexibility to keep certain early sites open later, depending on community needs. Moreover, despite the fact that a reduction in early voting days will translate to longer lines to vote on Election Day, Part 33 of the bill amends G.S. 163-166.01 to eliminate the discretion of county boards of elections to direct polls to remain open an additional hour on Election Day under extraordinary circumstances.

70. Part 49.3 of the bill amends G.S. 163-166.11(5) to note that provisional ballots "shall not be counted if the voter did not vote in the proper precinct" even when the individual casting the provisional ballot is eligible under state or federal law to vote on certain ballot items on the provisional ballot.

71. During the Senate Committee hearing, the Senate floor debate, and the House floor debate, all conducted within the last 48 hours of the legislative session, members of the General Assembly were made aware of the burdens that these changes would place on the exercise of the franchise of all North Carolinians. The members were also made aware of the disparate negative impact that the reduction in early voting, the elimination of same-day registration, and the prohibition on the counting of "out of precinct" provisional ballots would have on African Americans.

72. The reduction in early voting, the elimination of same-day registration, and the prohibition on the counting of "out of precinct" ballots are not supported by any plausible rationales or benefits to the State, even cost. Indeed, a former Executive Director of the State Board of Elections, has publicly opined that reducing the early voting period would cause more congestion on the remaining voting days and would require more staff training and recruitment for polling stations, resulting in more expenses to the State and to counties.

73. Not a single African-American member of the House or the Senate voted in favor of House Bill 589.

74. VIVA is only one of many measures the General Assembly has passed with full knowledge of the resulting negative effects on African Americans. For example, the General Assembly repealed the landmark Racial Justice Act, which allowed judges to reduce the sentence of a death-row inmate to life in prison without parole if the inmate could prove that racial bias was a factor in their sentence.

FIRST CLAIM FOR RELIEF

(Denial of Equal Protection under the 14th Amendment to the U.S. Constitution Pursuant to 42 U.S.C. § 1983)

75. Plaintiffs rely herein upon all of the paragraphs of this Complaint. The equal protection clause of the Fourteenth Amendment prohibits the states from "deny[ing] to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. This provision also prohibits states from imposing severe burdens upon the fundamental right to vote unless they are narrowly tailored to advance a compelling state interest. It requires that any

state election law that imposes reasonable and non-discriminatory restrictions on the right to vote be justified by an important state regulatory interest. The court:

> must weigh "the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate" against "the precise interests put forward by the State as justifications for the burden imposed by its rule," taking into consideration "the extent to which those interests make it necessary to burden the plaintiff's rights."

Burdick v. Takushi, 504 U.S. 428, 434 (1992) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983)).

76. Here, Plaintiffs' right to vote is burdened by the arbitrary and unjustified reduction in early voting days, and the loss of same-day registration and "out of precinct" provisional voting opportunities. Hundreds of thousands of voters relied on these methods of participation in recent elections and will now be denied an opportunity to do so. Voters who cannot adjust to the truncated early voting period, who fail to register in time, or who go to or are directed to vote in the incorrect precinct will be disfranchised. Other voters will encounter longer lines, undue delay, and in many cases, be prevented from voting altogether due to increased congestion during the remaining early voting period and on Election Day. In contrast, there are no plausible benefits to the State.

SECOND CLAIM FOR RELIEF

(Denial of Equal Protection under the 14th Amendment to the U.S. Constitution Pursuant to 42 U.S.C. § 1983)

77. Plaintiffs rely herein upon all of the paragraphs of this Complaint.

78. The equal protection clause of the Fourteenth Amendment prohibits the states from "deny[ing] to any person within its jurisdiction the equal protection of the laws." U.S.

Const. amend. XIV, § 1. This provision prevents a state and its officials from discriminatorily or arbitrarily treating qualified voters differently on account of their race or skin color.

79. A motivating purpose behind VIVA was to suppress the turnout and electoral participation of African-American voters, who disproportionately vote early and use same-day registration and "out of precinct" voting.

80. At the time of the law's enactment, the General Assembly had before it evidence that African-American voters use early voting, same day registration, and "out of precinct" voting at higher rates than white voters. The General Assembly eliminated or reduced these ballot access opportunities with knowledge that such action would affect African-American voters at substantially higher rates than white voters. The legislature enacted HB 589 with minimal public debate on an extremely compressed legislative schedule, with the bill passing both houses of the legislature after only two days of debate on its full contents.

81. Both the discriminatory effect of a statute and its legislative history are relevant factors in analyzing a statute for discriminatory intent. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp*, 429 U.S. 252 (1977).

82. Evidence in the record before the General Assembly shows that VIVA was enacted with the intent to discriminate against African-American voters.

THIRD CLAIM FOR RELIEF

(Section 2 of Voting Rights Act of 1965, 42 U.S.C. § 1973)

83. Plaintiffs rely herein upon all of the paragraphs of this Complaint.

84. Section 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973(a) provides:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial of

abridgment of the right of any citizen of the United States to vote on account of race or color.

85. African-American citizens in North Carolina, as a group, disproportionately participate in early in-person voting, utilize same-day registration opportunities during early voting, and utilize "out of precinct" voting opportunities on Election Day. They do so in part because, as a group, African Americans' ability to participate effectively in the political process has been hindered by discrimination and resulting socio-economic inequalities.

86. The changes in G.S. 163-227 that reduce the number of days in which early voting is allowed, from 17 days to 10 days, and reduce the number of hours offered on early voting the last Saturday before an election, were enacted with the intention of suppressing the votes of African-American voters in violation of Section 2 of the Voting Rights Act, 42 U.S.C. § 1973.

87. The changes in G.S. 163-227 that reduce the number of days in which early voting is allowed, from 17 days to 10 days, and reduce the number of hours offered on early voting the last Saturday before an election, will result in the denial or abridgment of the right to vote of the individual Plaintiffs and others on account of race or color in violation of Section 2 of the Voting Rights Act, 42 U.S.C. § 1973.

88. The reduction in early voting will interact with social and historical conditions—which are themselves largely due to discrimination in areas such as education, employment, housing, health services, and voting—to cause an inequality in the opportunities enjoyed by African-American and white voters to elect their preferred representatives.

89. Under the totality of the circumstances, the reduction in early voting will result in the dilution of African-American voting strength.

90. The change in G.S. 163-82.6A that prohibits same-day registration was enacted with the intention of suppressing the votes of African-American voters in violation of Section 2 of the Voting Rights Act, 42 U.S.C. § 1973.

91. The change in G.S. 163-82.6A that prohibits same-day registration will result in the denial or abridgment of the right to vote of the individual Plaintiffs and others on account of race or color in violation of Section 2 of the Voting Rights Act, 42 U.S.C. § 1973.

92. The prohibition on same-day registration will interact with social and historical conditions—which are themselves largely due to discrimination in areas such as education, employment, housing, health services, and voting—to cause an inequality in the opportunities enjoyed by African-American and white voters to elect their preferred representatives.

93. Under the totality of the circumstances, the prohibition on same-day registration will result in the dilution of African-American voting strength.

94. The change in G.S. 163-166.11(5) that prohibits the acceptance or partial acceptance of "out of precinct" provisional ballots was enacted with the intention of suppressing the votes of African-American voters in violation of Section 2 of the Voting Rights Act, 42 U.S.C. § 1973.

95. The change in G.S. 163-166.11(5) that prohibits the acceptance or partial acceptance of "out of precinct" provisional ballots will result in the denial or abridgment of the right to vote of the individual Plaintiffs and others on account of race or color in violation of Section 2 of the Voting Rights Act, 42 U.S.C. § 1973.

96. The prohibition on counting "out of precinct" provisional ballots will interact with social and historical conditions—which are themselves largely due to discrimination in areas such as education, employment, housing, health services, and voting—to cause an inequality in

the opportunities enjoyed by African-American and white voters to elect their preferred representatives.

97. Under the totality of circumstances, the prohibition on the counting of "out of precinct" provisional ballots will result in the dilution of African-American voting strength.

FOURTH CLAIM FOR RELIEF

(Section 3(c) of Voting Rights Act of 1965, 42 U.S.C. § 1973)

98. Plaintiffs rely herein upon all of the paragraphs of this Complaint.

99. Section 3(c) of the Voting Rights Act provides as follows:

> If in any proceeding instituted by the Attorney General or an aggrieved person under any statute to enforce the voting guarantees of the fourteenth or fifteenth amendment in any state or political subdivision the court finds that violations of the fourteenth or fifteenth amendment justifying equitable relief have occurred within the territory of such a state or political subdivision, the court, in addition to such relief as it may grant, shall retain jurisdiction for such a period as it may deem appropriate and during such period no voting qualification or prerequisite to voting or standard, practice, or procedure with respect to voting different from that in force or effect at the time the proceeding was commenced shall be enforced unless and until the court finds that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the voting guarantees set forth in section 1973b(f)(2) of this title: Provided, that such qualification, prerequisite, standard, practice, or procedure may be enforced if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, except that neither the court's finding nor the Attorney General's failure to object shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice or procedure.

42 U.S.C. § 1973a(c).

100. Section 3(c) requires that a court, after finding that a jurisdiction has committed constitutional violations, in addition to any equitable remedy imposed, retain jurisdiction for a time it deems appropriate and require that the jurisdiction obtain preclearance from the court or the Attorney General for any changes to designated voting practices or procedures. This is known as "bail-in" or "pocket trigger."

101. Here, the General Assembly has discriminated against African Americans and other voters of color in violation of the Fourteenth Amendment, and thus coverage under Section 3(c) is mandated under the Voting Rights Act.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs ask that the Court:

1. Declare that the challenged provisions of VIVA violate the equal protection clause of the Fourteenth Amendment to the United States Constitution and the Voting Rights Act of 1965; and

2. Declare that the rights and privileges of Plaintiffs will be irreparably harmed without the intervention of this Court to secure those rights for the exercise thereof in a timely and meaningful manner; and

3. Enjoin preliminarily and permanently the Defendants, their agents, officers and employees, from enforcing or giving any effect to the provisions of VIVA that relate to early voting or one-stop voting (same-day registration) in any election, "out of precinct" voting, and the discretion of county boards of elections to direct polls to remain open an additional hour on Election Day; and

4. Retain jurisdiction for such a period as it may deem appropriate, and during such period, no voting qualification or prerequisite to voting or standard, practice, or procedure with

respect to voting different from that in force or effect at the time the proceeding was commenced shall be enforced unless and until the Court finds that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the voting guarantees set forth in section 1973b(f)(2) of the Voting Rights Act.

5. Make all further orders as are just, necessary, and proper to preserve Plaintiffs' constitutional rights to participate equally in elections; and

6. Award Plaintiffs their costs, disbursements and reasonable attorneys' fees incurred in bringing this action pursuant to 42 U.S.C. §§ 1988, 1973*l*(e); and

7. Grant such other relief as the Court deems just and proper.

Dated this 12th day of August, 2013.

/s/ Allison J. Riggs

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EXHIBIT B

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

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

Plaintiffs,

v.

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

Defendants.

PLAINTIFFS' BRIEF IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

Case No.: 1:13-CV-658

LEAGUE OF WOMEN VOTERS OF NORTH CAROLINA, et al.,

Plaintiffs,

v.

THE STATE OF NORTH CAROLINA, et al.,

Defendants.

Case No.: 1:13-CV-660

UNITED STATES OF AMERICA,

Plaintiffs,

v.

THE STATE OF NORTH CAROLINA, et al,

Defendants.

Case No.: 1:13-CV-861

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INTRODUCTION

These cases seek to protect the voting rights of North Carolina citizens. "There is no right more basic in our democracy than the right to participate in electing our political leaders." *McCutcheon v. Fed. Election Comm'n*, 134 S. Ct. 1434, 1440-41 (2014). Because voting is the fundamental building block of political power, "[o]ther rights, even the most basic, are illusory if the right to vote is undermined." *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964). Restrictions on voting rights thus "strike at the heart of representative government" and warrant the closest attention from courts and lawmakers alike. *Reynolds v. Sims*, 377 U.S. 533, 555 (1964).

Congress enacted Section 2 of the Voting Rights Act ("VRA") to provide added protection to the fundamental right to vote. Section 2 announces a straightforward rule: regardless of the reasons why a state chooses to change a voting practice, that change is unlawful if it "results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color." 42 U.S.C. § 1973(a). By the plain terms of the statute, such an abridgement occurs if a voting practice imposes electoral burdens that result in racial minorities having "less opportunity than other members of the electorate to participate in the political process." *Id.* § 1973(b).

Section 2 has proved to be a powerful and necessary tool for blocking restrictions on racial minorities' access to the franchise. Plaintiffs in North Carolina alone have brought more than 50 successful challenges to voting practices under Section 2. *See* JA1259-60 (Lawson Rpt. ¶ 16). And although the North Carolina General Assembly

proceeded in the wake of *Shelby County v. Holder*, 133 S. Ct. 2612, 2619 (2013), as if the entire VRA had been nullified, the Supreme Court reiterated in that case that Section 2 continues to protect the right to vote for citizens of color. Indeed, another federal court just recently applied Section 2 to enjoin less burdensome voter restrictions than those at issue here. *See Frank v. Walker*, 2014 WL 1775432 (E.D. Wis. Apr. 29, 2014).

Applying Section 2 in this case—just as it has been applied by federal courts for decades—requires the issuance of a preliminary injunction. During the waning hours of the 2013 legislative session, the General Assembly enacted House Bill 589 ("HB 589"), which severely impairs access to the franchise of all North Carolinians—but especially African-American and young voters. Among other things, HB 589 imposes onerous and strict voter ID requirements; sharply reduces the availability of in-person early voting; eliminates same-day registration ("SDR"); eliminates out-of-precinct provisional voting; eliminates the discretion previously given to localities to keep polls open for an extra hour on Election Day; expands poll observers and challengers; and eliminates the State's civic engagement programs that allowed 16- and 17-year-olds to pre-register to vote.

A straightforward application of Section 2 requires that those provisions be enjoined. Defendants do not (because they cannot) dispute that HB 589 imposes disproportionate burdens on African Americans. Indeed, at the time it enacted HB 589, the General Assembly had before it (or previously had been told) that African Americans used early voting, SDR, and out-of-precinct voting at far higher rates than whites. The evidence shows, moreover, that the elimination of these practices will interact with

existing socioeconomic conditions to impose material burdens on African Americans' ability to vote. North Carolina has an unfortunate and judicially recognized history of racial discrimination, and the effects of that discrimination persist to this day: poverty rates for African Americans are far higher than poverty rates for whites; unemployment rates for African Americans are two times higher than those for whites; and educational attainment is significantly lower for African Americans than it is for whites. Under the statute and governing case law, these facts are enough to establish a Section 2 violation, and the Court should enjoin the challenged provisions on that statutory basis alone.

HB 589 also suffers from several constitutional defects that further justify preliminary injunctive relief. The law's disproportionate burdens on African Americans, the highly unusual and expedited manner in which HB 589 was enacted, the evidence that was before the legislature at the time, and the absence of any credible legislative rationale all show that the legislature enacted the statute (at least in part) to depress minority voter turnout, in violation of the Fourteenth and Fifteenth Amendments. Even if the legislature had lacked discriminatory intent, HB 589 would nonetheless be unlawful because it imposes substantial burdens on the right to vote that are not outweighed by any substantial state purpose. Finally, the legislative history and the unjustified burdens that HB 589 places on young voters reveal that the law was enacted with the purpose of discriminating against young voters, in violation of the 26th Amendment.

The evidence developed to date and presented below is more than enough to justify enjoining the challenged provisions during the pendency of this litigation.

Plaintiffs ask simply that the 2014 general election be carried out under the same voting practices that were utilized in the 2010 and 2012 elections. Absent such relief, thousands of North Carolina citizens will be irreparably harmed by having their right to vote unconstitutionally abridged, and in many cases denied outright, in the 2014 elections.

BACKGROUND

A. The History of Racial Discrimination in North Carolina

The sweeping effects of HB 589 can be fully understood only when set in historical context. North Carolina has a long and lamentable history of racial discrimination. *See* JA1359-67, JA1372-73 (Leloudis Rpt.). Even after emancipation from centuries of slavery, African Americans in North Carolina were subjected to a regime of racial discrimination that permeated every aspect of social and political life. *Id*. Restrictions on African-American political power were long a prominent feature of that regime, with North Carolina lawmakers using an array of voting restrictions—including literacy tests, poll taxes, and racial gerrymandering—that were specifically calculated to disenfranchise African Americans. *Id*.

The VRA was enacted to address such entrenched racial discrimination in the electoral system. In addition to outlawing any "tests or devices" that suppressed minority voting strength, 42 U.S.C. § 1973, the law required certain jurisdictions to obtain federal "preclearance" from either the Department of Justice ("DOJ") or a three-judge panel before they implemented any change in voting procedures. In light of their history of voting-related discrimination, 40 counties in North Carolina were designated as covered

jurisdictions under the VRA, and between 1971 and 2012, DOJ objected to 65 changes in voting practices that would have resulted in increased electoral burdens on minorities. *See* JA1259-60 (Lawson Rpt. ¶ 16).

Although the VRA eliminated the most pernicious practices used to suppress minority voting, African-American voting rates continued for decades to lag behind those of whites. *See* JA1189-92, JA1225 (Kousser Rpt.). To this day, the effects of centuries of racial discrimination continue to be felt by African Americans in North Carolina in areas such as employment, wealth, transportation, education, health, criminal justice, and housing. *See* JA1150-59 (Duncan Rpt.). The consequences of discrimination are thus a present reality, not a distant memory, for millions of North Carolina citizens.

B. North Carolina Expands Access to the Franchise

For much of the past decade, North Carolina lawmakers took steps to make the franchise more accessible for African-American voters. In 2001, the General Assembly passed legislation permitting 17 days of no-excuse early voting, a practice that was meant to facilitate access to the electoral process for an increased number of voters. N.C.S.L. 2001-319. The following year, the legislature authorized the counting of "out-of-precinct ballots"—provisional ballots cast by registered voters outside of their assigned precincts for elections in which the voters were entitled to vote in their assigned precincts. That practice, the legislature later reaffirmed, was particularly important for African-American voters, a "disproportionately high percentage" of whom had cast out-of-precinct ballots in then-recent elections. JA2633-36 (N.C.S.L. 2005-2 § 1). In 2007, the General Assembly

enacted legislation allowing for SDR, whereby an individual could both register and cast an in-person ballot on the same day. JA2645 (N.C.S.L. 2007-253). That practice too was enacted after the General Assembly had been presented with evidence that similar legislation in other states had increased minority turnout. JA239 (Adams Decl. ¶ 14); JA398 (Martin Decl. ¶ 10). Finally, in 2009, the General Assembly approved legislation that allowed 16- and 17-year olds to pre-register to vote and automatically be registered when they turned eighteen. *See* N.C.S.L. 2009-541; JA1436 (Levine Rpt.).

These efforts to provide access to voting in North Carolina worked. In 1992, North Carolina ranked 46th in the country in voter participation, and that number had crawled to 37th by the 2000 election. *See* JA1196 (Kousser Rpt.). By 2012—after the measures described above had been enacted—North Carolina had jumped to 11th in voter participation, a remarkable increase in such a short period of time. *See id*. Voter participation among African Americans in North Carolina skyrocketed from 41.9% in 2000 to 68.5% in 2012. *See id*. JA1197. Indeed, the turnout rate among African-American voters in North Carolina surpassed that of white voters in the 2008 and 2012 general elections. *See id*. Similarly, youth (18-24 year olds) voter registration in North Carolina improved from 50.7% in 2000 (a national ranking of 43rd) to 63.7% in 2012 (a ranking of 8th), and youth voter turnout climbed from 30.7% in 2000 (a ranking of 31st) to 50.0% in 2012 (a ranking of 10th). *See* JA1432, JA1435 (Levine Rpt.).

The increased turnout among African-American voters was made possible by the voting measures described above, which those groups used at much higher rates than

whites. Over 70% of African-American voters utilized early voting during the two most-recent presidential elections—a rate that is more than 140% higher than the rate at which whites used early voting. *See* JA617 (Gronke Rpt. ¶ 27). Similarly, in 5 of the last 6 federal elections, African Americans used SDR at far higher rates than whites. JA243 (Adams Decl. ¶ 33). And black voters cast out-of-precinct provisional ballots at a rate of more than 1.8 times that of white voters in 2012. JA733 (Lichtman Rpt.).

North Carolina's increase in young voter registration and turnout was also due in part to the voting measures described above. *See* JA1436 (Levine Rpt.). From 2010-2013, over 160,000 young people pre-registered to vote. *Id.* JA1433. In addition, over 50,000 young voters utilized SDR in the 2012 presidential election, *id.* JA1439, and there is compelling evidence that SDR increases turnout among young voters, both in absolute terms and relative to older voters, *id.* JA1440-43. In both the 2008 and 2012 presidential elections, over 200,000 young North Carolinians used early voting. *Id.* JA1444.

C. The Legislative History of HB 589

HB 589 was introduced in early April 2013. Initially, HB 589 proposed only to institute a voter ID requirement, and did not include any provisions relating to early voting, SDR, or out-of-precinct voting. *See* JA1214 (Kousser Rpt.). After four weeks of consideration—including testimony and public hearings before the House Elections Committee and the opportunity for debate and amendment in three committees—the House passed HB 589 on April 24, 2013. *Id*. Although HB 589 was received in the

Senate the next day and promptly referred to the Rules and Operations of the Senate Committee ("Rules Committee"), the measure sat dormant for several months. *Id*.

On June 25, the Supreme Court decided *Shelby County*, which invalidated the formula for determining which jurisdictions were subject to the VRA's preclearance requirement. The result was that the General Assembly, which previously had been constrained by the preclearance requirement that applied to 40 North Carolina counties, was now free to enact any and all restrictions on voting without first obtaining approval from DOJ. The implications of this change were not lost on the members of the General Assembly: on the day *Shelby County* was issued, Senator Tom Apodaca, the Chairman of the Rules Committee, told the press, "Now we can go with the full bill." *See* JA182-83 (Stein Decl. ¶ 13); JA357 (McKissick Decl. ¶ 17); JA166 (H. Michaux Decl. ¶ 21).

Yet the Senate took no action on HB 589 in the immediate wake of *Shelby County* and provided no information publicly about the contents of the "full bill." Rather, members of the Senate waited until July 23, 2013—just days before the end of the legislative session—to introduce the "full-bill" version of HB 589. That bill converted what had been a 16-page bill imposing a voter ID requirement into a 57-page bill that included not only a much more onerous voter ID provision, but also a number of other restrictions on the franchise, including the elimination of SDR, out-of-precinct voting, straight-ticket voting, and pre-registration, and a sharp reduction in the number of early voting days. JA165-66 (H. Michaux Decl. ¶¶ 20-24); JA183-84 (Stein Decl. ¶ 15); JA68-JA85 (NAACP Decl. ¶ 53).

Notwithstanding the dramatic expansion in the scope of HB 589, the full bill passed both chambers on July 25—just two days after the full bill was first introduced. JA166-67 (H. Michaux Decl. ¶¶ 24-25). In the Senate, the Rules Committee was the only committee even superficially to consider the bill, and its members did not receive a draft of the 57-page full bill until 10 p.m. on July 22—the night before the committee discussed the bill. JA183-84 (Stein Decl. ¶¶ 14-15); JA378 (Kinnaird Decl. ¶ 23); JA254-55 (Blue Decl. ¶¶ 19, 21). There was no testimony before the Rules Committee from subject-matter experts or representatives from the State Board of Elections ("SBOE") or any county boards of elections ("CBOEs") about the impact of HB 589's new voting restrictions. *See* JA186-87 (Stein Decl. ¶ 20); JA278-79 (Parmon Decl. ¶ 26).

The proceedings in the House—which passed the full bill on the day it was received from the Senate, *see* JA166-67 (H. Michaux Decl. ¶ 25); JA405 (Martin Decl. ¶ 30)—were even more unusual. There was no testimony of any kind regarding the consequences of the full bill. *See* JA2505 (7/25/14 N.C. House Sess. Tr.); JA403 (Martin Decl. ¶ 25); JA166-67 (H. Michaux Decl. ¶ 25); JA306-08 (Glazier Decl. ¶¶ 28-33). The full bill did not go through any House committees, and a motion to go into the Committee of the Whole, which "would have given all members of the House the opportunity to openly discuss the changes [to the bill], to offer amendments to the legislation, or to call witnesses" was dismissed as a "waste of time." JA167 (H. Michaux Decl. ¶ 27). "It is extremely unusual for a bill of this magnitude and with this many new provisions to [have] be[en] adopted without the opportunity for any meaningful vetting through a

committee, committees, or testimony from the public." JA402-03 (Martin Decl. ¶ 23). "[I]n many instances, the House has appointed a Conference Committee to review significantly amended and controversial bills like the full version of H.B. 589." JA266 (Hall Decl. ¶ 19). And yet, members of the House were not afforded the opportunity to propose or debate amendments and were given less than two hours in total to speak in opposition to the bill, contrary to normal House rules that permit each legislator to offer two comments totaling fifteen minutes. JA402-03, JA404-05 (Martin Decl. ¶¶ 23, 27-28); JA404-405 (H. Michaux Decl. ¶¶ 26-27). And perhaps most conspicuously, in the debate regarding the full bill in the House, *only one* legislator argued for the bill, *see* JA2516, 2610 (7/25/13 N.C. House Session Tr. at 12:5-27:5, 116:11-20:13).

In sum, the legislative process employed in enacting HB 589 was highly irregular—particularly for a bill with drastic effects on voting rights. *See* JA399 (Martin Decl. ¶ 14); JA304 (Glazier Decl. ¶ 18); JA278-79 (Parmon Decl. ¶¶ 28-29); JA179 (Stein Decl. ¶ 3); JA239 (Adams Decl. ¶ 16). Indeed, Representative John Blust, a *supporter* of the bill, acknowledged the flawed nature of the legislative process. *See* JA1887-88 ("[HB 589] was received by the House only at 6:11 p.m. on the last night of the session for concurrence only. I readily admit that is not good practice. That is something we can be justly criticized for doing.").

D. The Challenged Provisions Of HB 589

As enacted, HB 589 includes a number of provisions (hereinafter, the "challenged provisions") that are relevant to Plaintiffs' current motion:

- ***Elimination of SDR.*** Through SDR, qualified voters could register *and* vote in one visit to a "one-stop" early voting polling place. HB 589 eliminated SDR altogether. *See* JA2268 (HB 589, Part 16). Now, voters appearing at early voting sites can only update an existing registration with address or name changes.
- ***Prohibition on Counting Out-of-Precinct Ballots.*** Before HB 589, a voter who attempted to vote in a precinct other than the one to which he was assigned (but that was located in his county of residence) was allowed to cast a provisional ballot, which was counted for all of the elections that would have appeared on the voter's ballot if he had gone to his assigned precinct—such as county-wide, statewide, and presidential elections. Under HB 589, votes cast outside the voter's assigned precinct will simply not be counted. *See* JA2286 (HB 589, Part 49).
- ***Shortening the Early Voting Period.*** HB 589 shortened the early voting timeframe by a full week—from 17 to 10 days—and eliminated the discretion of county boards of elections to permit early voting from 1:00 p.m. to 5:00 p.m. on the Saturday before an election. *See* JA2273 (HB 589, Part 25).
- ***Elimination of Pre-Registration.*** Prior to HB 589, sixteen and seventeen year olds could "pre-register" so that they were automatically registered to vote when they turned eighteen. HB 589 eliminated pre-registration. *See* JA2265 (HB 589, Part 12).
- ***Removal of Discretion to Keep Polls Open*.** HB 589 removed discretion from county boards of elections to keep polling locations open an extra hour in extraordinary circumstances. *See* JA2280 (HB 589, Part 33).
- ***Expansion of poll observers and voter challenges.*** H.B. 589 expands the number of poll observers ballot challengers. H.B. 589 allows any registered voter to challenge another voter anywhere in the state before Election Day and any registered voter to challenge another voter from the same county on Election Day. *See* JA2264-71 (HB 589, Parts 11 & 20.2).
- ***Photo ID Requirement.*** With very limited exceptions, HB 589 requires voters who cast an in-person ballot to show one of a few specific forms of unexpired photo identification for all voting in person. *See* JA2242 (HB 589, Part 2). This provision does not go into effect until the 2016 general election, the law mandates a soft rollout in 2014 requiring that voters be asked if they have acceptable ID and if not, sign an acknowledgment form, which will be a public record.

LEGAL STANDARD

The purpose of a preliminary injunction is to "protect the status quo and to prevent irreparable harm during the pendency of a lawsuit ultimately to preserve the court's

ability to render a meaningful judgment on the merits." *United States v. South Carolina*, 720 F.3d 518, 524 (4th Cir. 2013) (quotations omitted). A Court may enter a preliminary injunction if a plaintiff shows "[1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

ARGUMENT

All four factors of the *Winter* test strongly favor issuing a preliminary injunction. Because the final three factors of the *Winter* test are readily satisfied in this case, Plaintiffs first address these factors, explaining why they are likely to suffer irreparable harm, why the balance of equities factors an injunction, and why an injunction would be in the public interest. Plaintiffs then discuss why their statutory and constitutional claims are likely to succeed on the merits.

I. THE NATURE OF THE INJURY, BALANCE OF HARDSHIPS, AND PUBLIC INTEREST ALL FAVOR A PRELIMINARY INJUNCTION

The latter three factors of the *Winter* test strongly favor enjoining the challenged provisions until these cases are resolved. *First*, Plaintiffs and thousands of other North Carolina citizens will suffer irreparable injury absent a preliminary injunction from this Court. The deprivation of a constitutional right, even for a brief period of time, amounts to irreparable injury. *See Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."). Courts thus recognize that the denial or

abridgement of the right to vote constitutes irreparable harm. *See, e.g.*, *Williams v. Salerno*, 792 F.2d 323, 326 (2d Cir. 1986) (denial of right to vote is "irreparable harm"). Of particular note in this case, North Carolina district courts have found irreparable harm and enjoined redistricting schemes found likely to violate Section 2 of the VRA and state laws requiring unduly burdensome election methods. *See, e.g.*, *NAACP-Greensboro Branch v. Guilford Cnty. Bd. of Elections*, 858 F. Supp. 2d 516, 517 (M.D.N.C. 2012) (granting preliminary injunction because, *inter alia*, plaintiffs would be irreparably harmed if redistricting law were allowed to go into effect); *Republican Party of N.C. v. Hunt*, 841 F. Supp. 722, 727-28 (E.D.N.C. 1994) (granting preliminary injunction because, *inter alia*, plaintiffs would be irreparably harmed if existing method for electing superior court judges was followed).

Second, the balance of equities strongly favors a preliminary injunction. While Defendants might incur some administrative or financial costs if the Court enjoins the challenged provisions, the burden to Defendants of administering the upcoming elections under the pre-HB 589 regime—in the same manner and according to the same rules that Defendants used in recent elections—cannot be considered substantial. And even if it were, this burden would be far outweighed by the injury that Plaintiffs and others in North Carolina will suffer—the abridgement or denial of their right to vote—absent an injunction. *See Taylor v. Louisiana*, 419 U.S. 522, 535 (1975) ("administrative convenience" cannot justify practice that impinges upon fundamental right); *Johnson v. Halifax Cnty.*, 594 F. Supp 161, 171 (E.D.N.C. 1984) ("administrative and financial

burdens on the defendant … are not … undue in view of the otherwise irreparable harm to be incurred by plaintiffs"); *Pashby v. Delia*, 709 F.3d 307, 329 (4th Cir. 2013). The balance of equities therefore also weighs in favor of a preliminary injunction.

Third, enjoining the challenged provisions will serve the public interest. There is extraordinary public interest in preventing the right to vote from being denied or abridged. *See NAACP-Greensboro Branch*, 858 F. Supp. 2d at 529 ("[T]he public interest in an election … that complies with the constitutional requirements of the Equal Protection Clause is served by granting a preliminary injunction."); *see generally McCutcheon*, 134 S. Ct. at 1440-41; *Wesberry*, 376 U.S. at 17. In contrast, the purported benefits from implementation of the challenged provisions—the prevention of in-person voter fraud and increased electoral confidence—are nonexistent. *See infra* at Section II.A.4. The public interest therefore weighs heavily in favor of the issuance of an injunction. *See U.S. Student Ass'n Found. v. Land*, 546 F.3d 373, 388-89 (6th Cir. 2008) ("Because the risk of actual voter fraud is miniscule when compared with the concrete risk that [the State's] policies will disenfranchise eligible voters, we must conclude that the public interest weighs in favor of [preliminary injunctive relief].").

II. PLAINTIFFS' CLAIMS ARE LIKELY TO SUCCEED ON THE MERITS

The challenged provisions are unlawful, and Plaintiffs are likely to succeed on the merits, for four independent reasons. *First*, the challenged provisions violate Section 2 of the VRA because they deny or abridge North Carolinians' voting rights on account of race. *Second*, they violate the 14th and 15th Amendments because they were enacted with

the purpose of suppressing minority voting. *Third*, they violate the 14th Amendment because they place a substantial burden on the right to vote that is not justified by any significant state interest. *Fourth*, the challenged provisions unlawfully deny or abridge the right to vote on the basis of age in violation of the 26th Amendment.

A. HB 589 Violates Section 2 Of The Voting Rights Act

Section 2 of the VRA prohibits a state from "impos[ing] or appl[ying]" any electoral practice which "results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color." 42 U.S.C. § 1973(a) . It is a simple and straightforward directive. A showing of discriminatory intent is not required; "Congress [has] made clear that a violation of § 2 c[an] be established by proof of discriminatory results alone." *Chisom v. Roemer*, 501 U.S. 380, 404 (1991). As a U.S. District Court recently explained, "the meaning of this language is clear: Section 2 requires an electoral process equally open to all, not a process that favors one group over another." *Frank*, 2014 WL 1775432 at *25.

The standard for proving prohibited "discriminatory results" is set out in 42 U.S.C. § 1973(b), which provides:

> A violation of [Section 2] is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a [protected class] in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.

Courts applying that language have distilled two requirements for proving a Section 2 violation. *First*, a plaintiff must show that a challenged electoral practice "creates a

barrier to voting that is more likely to appear in the path of a voter if that voter is a member of a minority group." *Frank*, 2014 WL 1775432 at *25. *Second*, a plaintiff must show that a challenged electoral practice interacts with historical and social conditions to cause an inequality in the opportunities of minorities to participate in the political process. *See Thornburg v. Gingles*, 478 U.S. 30, 35-36, 44, 47 (1986) (courts must "assess the impact of the contested structure or practice on minority electoral opportunities" and determine whether a law "interacts with social and historical conditions to cause an inequality in the [voting] opportunities enjoyed by" minorities).

Plaintiffs bringing a Section 2 claim need not show that a challenged practice makes voting ***impossible*** for minorities—only that it makes voting disproportionately more ***burdensome***. *See id*.; *see also Holder v. Hall*, 512 U.S. 874, 922 (1994) (Thomas, J. concurring in the judgment). Section 2 thus prohibits not only the outright "denial," but also the "abridgement" of the right to vote.[1] 42 U.S.C. § 1973. Courts have therefore found that plaintiffs could state a claim under Section 2 when challenging barriers such as: restrictions on registration, *Operation Push v. Allain*, 674 F. Supp. 1245, 1262-68 (N.D. Miss. 1987); limits on early voting, *Brooks v. Gant*, 2012 WL 4482984, at *7 (D.S.D. Sept. 27, 2012); closure or relocation of polling places, *Spirit Lake Tribe v. Benson Cnty*., 2010 WL 4226614, at *3 (D.N.D. Oct. 21, 2010), *Brown v. Dean*, 555 F. Supp. 502, 504-05 (D.R.I. 1982); and the frequent use of old voting technology in

[1] Abridge is defined as "[t]o reduce or diminish." Black's Law Dictionary 7 (9th ed. 2009); *Gray v. Johnson*, 234 F. Supp. 743, 746 (S.D. Miss. 1964) ("When the word is used in connection with … the word deny, it means to circumscribe or burden.") (quotation omitted).

predominantly minority communities, *Stewart v. Blackwell*, 444 F.3d 843, 877-79 (6th Cir. 2006), *Sw. Voter Registration Educ. Project v. Shelley*, 344 F.3d 914, 918 (9th Cir. 2003) (per curiam). "There is nothing in these cases indicating that a Section 2 plaintiff must show that the challenged voting practice makes it impossible for minorities to vote." *Frank*, 2014 WL 1775432, at *29.

1. The Challenged Provisions Of HB 589 Disparately Impact African Americans In North Carolina

The challenged provisions fall more heavily on African Americans in North Carolina than on whites. Drs. Paul Gronke, Allen Lichtman, and Charles Stewart conducted a comprehensive analysis of the impact HB 589 would have on voters in North Carolina. Relying on data obtained from the SBOE, and applying well-accepted methods, those experts concluded—and explain in detail in their expert reports—that HB 589's elimination of SDR, prohibition on out-of-precinct balloting, and reduction in early voting will have a substantial disparate impact on African Americans. JA624-25 (Gronke Rpt.); JA687 (Lichtman Rpt.); JA788-89 (Stewart Rpt. ¶¶ 17-18).

a. African American Voters Rely Disproportionately on SDR

The elimination of SDR will disproportionately burden African-American voters in North Carolina. African Americans used SDR at higher rates than white voters in 5 of the last 6 federal elections, including all of the last 3 general elections. *See* JA628, JA630, JA631 (Gronke Rpt. ¶¶ 46, 48, Ex. 15). In 3 of the last 6 elections, African Americans used SDR at approximately *double* the rate of white voters. *See id.* JA628, JA630, JA629, JA631¶¶ 46, 48, Ex. 14, Ex. 15; *see also* JA642-714 (Lichtman Rpt.).

The adoption of SDR was followed by increased registration rates, *see* JA818-20 (Stewart Rpt. ¶¶ 90-93), with over 30,000 African Americans registering for the first time using SDR during the last two presidential elections. JA631 (Gronke Rpt. Ex. 15). Significantly, Defendants' experts do not deny that African-American voters in North Carolina disproportionately rely on SDR, or that these trends would continue into the future but for HB 589. *See id.* JA633 ¶ 53.

b. African-American Voters Rely Disproportionately on Out-Of-Precinct Voting

Defendants' experts also do not deny that "blacks are more likely to have their vote count because of out-of-precinct provisional ballot practices than are whites." JA878-79 (Stewart Rpt. ¶ 244). In 2005, the General Assembly found that "of those … who happened to vote provisional ballots outside their resident precincts on the day of the November 2004 General Election, a disproportionately high percentage were African-American." JA2635 (S.L. 2005-2 §1(9)). What was true in 2004 remains true a decade later: "African Americans are twice as likely to vote an out-of-precinct provisional ballot in North Carolina as are whites." JA868 (Stewart Rpt. ¶ 217); *see also id.* JA878 ¶¶ 241-42; JA728-34 (Lichtman Rpt.) (African Americans cast 30.1%, 56.5%, and 35% of out-of-precinct ballots in 2008, 2010, and 2012 and only 20-23% of all other ballots).

c. African-American Voters Rely Disproportionately on Early Voting

As explained by Dr. Gronke, African Americans in North Carolina have used early voting at higher rates than whites in all of the last three general elections, and in two of

the last three primaries. JA615-16 (Gronke Rpt. ¶ 26, Ex. 10). Other expert reports, as well as testimony by North Carolina elections officials, confirm disproportionate reliance by African Americans on early voting. *See* JA715-27 (Lichtman Rpt.); JA834-35, JA845-50 (Stewart Rpt. ¶¶ 131, 157-67); JA143 (Bartlett Decl. ¶ 23). These racial disparities persist even when controlling for factors such as age and partisanship. *See* JA617, JA618 (Gronke Rpt. ¶ 28, Ex. 10-B). African Americans have also relied more heavily than white voters on "*early* early in-person voting," *i.e.*, the specific days that have been eliminated by HB 589. *See id.* JA622-25 ¶¶ 38-41, Exs. 12-13; *see also* JA718-19, JA726-27 (Lichtman Rpt.); JA846-47 (Stewart Rpt. ¶ 160-161). *Cf. Florida v. United States*, 885 F. Supp. 2d 299, 323-24 (D.D.C. 2012) (finding it relevant that "African-American voters disproportionately used the [days that] will now be eliminated").

These disparate usage rates are not a one-time or temporary occurrence; rather, over the past decade, African-American voters in North Carolina have become habituated to the early voting period, such that these trends are likely to continue in the future. JA630 (Gronke Rpt. ¶ 50). Over 70% of African-American voters in North Carolina (totaling approximately 700,000 voters) utilized early voting during the two most recent presidential elections, approximately 140% the rate of white voters. *See* JA615-17, JA616 (Gronke Rpt. ¶¶ 26-27, Ex. 10). African-American early voting usage also increased markedly in the 2010 midterm elections (as compared to the prior midterm), from 13.06% in 2006, to 35.99% in 2010, an increase of 176%. *See id.*; JA833, JA835-36 (Stewart Rpt. ¶¶ 130, 133). This indicates that racial disparities in early voting are likely

to continue in midterms as well as presidential elections, because, "when assessing future usage rates of early voting, comparisons are best made between 'like' elections, and … the most recent analogous election is the best predictor of what will happen in the future." *Florida*, 885 F. Supp. 2d at 326. Thus, eliminating seven days of early voting—or over 40% of the early voting period—will significantly burden African-American voters.

2. Historical And Social Conditions In North Carolina Disfavor Racial Minorities

Because the challenged provisions have a disproportionate impact on African Americans, Section 2 requires the Court to identify the relevant historical and social conditions in North Carolina and then determine whether HB 589 interacts with those conditions to impose a disproportionate burden on the ability of African Americans to vote. *See supra* at Section A. In evaluating the social and historical conditions relevant to a Section 2 claim, courts have looked to a nonexclusive list of factors found in the Senate Report that accompanied the 1982 amendments to the VRA:

(1) the history of voting-related discrimination in the State or political subdivision;

(2) the extent to which voting in the elections of the State or political subdivision is racially polarized;

(3) the extent to which the State or political subdivision has used voting practices or procedures that tend to enhance the opportunity for discrimination against the minority group;

(4) the exclusion of members of the minority group from candidate slating processes;

(5) the extent to which minority group members bear the effects of past discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process;

(6) the use of overt or subtle racial appeals in political campaigns;

(7) the extent to which members of the minority group have been elected to public office in the jurisdiction;

(8) whether elected officials are unresponsive to the particularized needs of the members of the minority group; and

(9) whether the policy underlying the State's or the political subdivision's use of the contested practice or structure is tenuous.

Gingles, 478 U.S. at 44-45 (citing S. Rpt. No. 97-417, at 28-29 (1982)). "'[T]here is no requirement that any particular number of factors be proved, or that a majority of them point one way or the other.'" *Id.* at 45 (quoting S. Rpt. No. 97-417, at 29). Indeed, depending on the nature of the challenged practice, some factors may not be relevant at all. *See Frank*, 2014 WL 1775432 at *24 (explaining that the Senate Factors "are not necessarily relevant" in vote denial and abridgement cases).

a. Factors 1 And 3: North Carolina Has A Long And Substantial History Of Voting-Related Discrimination

The first and third Senate Factors are closely related: both focus on whether the jurisdiction has a history of voting-related discrimination or practices that enhance the opportunity for such discrimination. As numerous judicial decisions, scholars, and experts have recognized, North Carolina has a long and regretful history of both.

The Supreme Court has recognized North Carolina's history of official discrimination against African Americans in voting-related matters. In *Gingles*, the Court affirmed the district court's finding that "North Carolina had officially discriminated against its black citizens with respect to their exercise of the voting franchise from approximately 1900 to 1970 by employing at different times a poll tax, a literacy test, a

prohibition against bullet (single-shot) voting, and designated seat plans for multimember districts." 478 U.S. at 38-39. The district court in *Gingles* further explained that "[t]he history of black citizens' attempts since the Reconstruction era to participate effectively in the political process and the white majority's resistance to those efforts is a bitter one, fraught with racial animosities that linger in diminished but still evident form to the present and that remain centered upon the voting strength of black citizens as an identified group." *Gingles v. Edminsten*, 590 F. Supp. 345, 359 (E.D.N.C. 1984), *aff'd in part, rev'd in part sub nom.*, 478 U.S. 30; *see also Johnson v. Halifax Cnty.*, 594 F. Supp. 161, 164 (E.D.N.C. 1984) (finding history of voting discrimination in North Carolina).

Drs. Barry C. Burden, James L. Leloudis, and Morgan Kousser similarly recount North Carolina's long history of voting-related discrimination. *See* JA1100-03 (Burden Rpt.); JA1184-89, JA1224-25 (Kousser Rpt.) ; JA1351-73 (Leloudis Rpt.). At the turn of the 20th Century, North Carolina adopted a literacy test for registration and a poll tax for voting, both of which were specifically designed to exclude African Americans from the polls. *See* JA1102 (Burden Rpt.); JA1187-88 (Kousser Rpt.); JA1355-56 (Leloudis Rpt.). The literacy test in particular was used selectively by vote registrars to discriminate against African Americans. JA1102 (Burden Rpt.). As a result of these discriminatory tactics, African-American voter participation fell to nearly 0% in elections held during the early part of the 20th century. *Id*.

Although the poll tax lasted only until 1920, the official literacy test continued to be freely applied for decades in North Carolina in a variety of forms that effectively

disenfranchised most African Americans. *Id*. JA1102-03 . "At least until around 1970, the practice of requiring black citizens to read and write the Constitution in order to vote was continued in some areas of the state." *Gingles*, 590 F. Supp. at 360. One of the plaintiffs, Rosa Nell Eaton, had to take a literacy test before being allowed to register in North Carolina. JA32 (R. Eaton Decl. ¶ 5). And even when African-American enfranchisement finally began to increase in the 1970s, "other electoral rules—racial gerrymandering and at-large elections—intentionally kept them from attaining power proportionate to their numbers in the electorate." JA1180 (Kousser Rpt.).

Nor have discriminatory voting practices in North Carolina ceased in recent decades. From 1971 to 2012, DOJ objected to 64 changes in North Carolina voting practices in the 40 North Carolina counties that were previously subject to the preclearance requirements of Section 5 of the VRA. JA1259-60 (Lawson Rpt. ¶ 16). Similarly, plaintiffs litigated 55 successful challenges to voting practices under Section 2—with 10 cases ending in a judgment and 45 settled favorably out of court. *Id*.

b. Factor 5: African Americans In North Carolina Continue To Bear The Effects Of Discrimination

African Americans in North Carolina also continue to bear the effects of racial discrimination. *See* JA1342-94 (Leloudis Rpt.); JA1184-89 (Kousser Rpt.). Following centuries of slavery, African Americans during Reconstruction were subject to vigilante violence at the hands of the Ku Klux Klan and the crippling system of sharecropping, which ensured racial economic subjugation. JA1345-47 (Leloudis Rpt.). Near the turn of the century, legislators enacted a series of laws that officially sanctioned discrimination

and came to be known as the Jim Crow system. *Id*. JA1357-63. Those laws required, among other things, separate seating for blacks on public transportation; the segregation of drinking fountains, toilets, and other public facilities; and bans on miscegenation. *Id*.

These and other measures—which persisted in North Carolina for more than 60 years—"relegated the majority of black North Carolinians to the countryside and created, in effect, a bound agricultural labor force." *Id*. JA1358. African Americans' earnings were kept to near-subsistence levels, their children were denied quality education, and they suffered greater health problems and higher mortality rates than whites. *Id*. JA1358-59. Elections in North Carolina were characterized by overt and implicit racial appeals, with white candidates routinely stoking racial fears and arguing that certain candidates and policies posed a threat to white privilege. *Id*. JA1361-63. And, in jurisdictions across the State, white lawmakers gerrymandered wards and precincts to isolate black voters, and employed other mechanisms designed to dilute black political power. *Id*. JA1361-68.

African Americans in North Carolina today continue to bear the effects of discrimination and economic and political subjugation. *See* JA1103-07 (Burden Rpt.); JA1143-66 (Duncan Rpt.). These disadvantages, which are pervasive and enduring, impact all aspects of social, economic, and political life in North Carolina, and include the following:

- ***Poverty***. Poverty rates for African Americans and in North Carolina are two to three times higher than poverty rates for whites. *See* JA1104 (Burden Rpt.) (34% of African Americans and only 13% of whites in North Carolina live below the federal poverty level); *see also* JA1146 (Duncan Rpt.). Living in poverty for these North Carolina citizens means "the lack of resources necessary to permit

participation in the activities, customs, and diets commonly approved by society." JA1146 (Duncan Rpt.) (quotations omitted).

- ***Employment***. As of the fourth quarter of 2012, the State unemployment rates were 6.7% for whites and 17.3% for African Americans. JA1104 (Burden Rpt.). Those racial disparities continued in 2013, with preliminary annual unemployment rates showing that whereas only 6.5% of whites were unemployed, 12.6% of African Americans were unemployed. *See id*.; JA1153 (Duncan Rpt.). Even when employed, minorities are more likely to be trapped in poverty, as 12.7% of employed African Americans live below the poverty line, as compared to 6.2% of employed whites. *See* JA1154 (Duncan Rpt.).

- ***Education***. Educational attainment is significantly lower for African Americans in North Carolina than it is for whites—including lower standardized testing scores, higher high-school dropout rates, longer average school-suspension times, and lower rates of college degrees. *See* JA1104-05 (Burden Rpt.). 15.7% of African Americans over the age of 24 have less than high school degree, compared with just 10.1% of whites. *See* JA1151 (Duncan Rpt.). And even when minorities achieve educational parity with whites, they fare worse, as African Americans with a high school degree are more than twice as likely as their white counterparts to be poor. *See id.* JA1151-53. These educational disparities are particularly significant here because "[n]umerous studies have shown that educational attainment is often the single best predictor of whether an individual votes." JA1105 (Burden Rpt.).

- ***Transportation***. Poor African Americans in North Carolina are far more likely than poor whites to lack access to a vehicle. *See* JA1143 (Duncan Rpt.). Indeed, 27% of poor African Americans in the state do not have a vehicle available to them, as compared to 8.8% of poor whites. *Id*.

- ***Residential Transiency***. While 75.1% of whites live in owned homes, only 49.8% of African Americans do. *See* JA1158 (Duncan Rpt.). As a result, racial minorities experience much higher rates of residential instability, with over 18% of African Americans in North Carolina having moved within the last year, as compared to only 13.6% of whites. *See id*.

- ***Health***. There are "widespread disparities" between whites and African Americans in terms of health metrics. JA1105 (Burden Rpt.). "On an array of official state health indicators that include such diverse measures as infant deaths, heart disease, and homicides, African Americans routinely fare worse than whites." *Id*. For example, the North Carolina Department of Health and Human Services found in 2010 that 24% of African Americans (as compared with just 16% of whites) are rated as having "fair" or "poor" overall health. *Id*. Moreover, poor non-whites in

North Carolina are "more likely to be disabled," than are poor whites. JA1143 (Duncan Rpt.). And whereas only 12.2 % of whites lack access to health insurance coverage, that is true for 18.8 % of African Americans. *Id*. JA1157.

- ***Criminal Justice***. Several indicators show that African Americans "suffer from unequal treatment by the criminal justice system." JA1106 (Burden Rpt.). African Americans receive disproportionate sentences for drug-related offenses, are far more often searched and arrested during traffic stops, and are incarcerated at far higher rates than whites. *Id*. In 2011, DOJ calculated that African Americans accounted for 56% of the North Carolina prison population and are incarcerated at six times the rate for whites. *Id*.

These considerations are highly relevant to the Section 2 analysis, because "[d]emographic markers such as these are strongly associated with the likelihood of an individual being deterred from voting by a new and burdensome voting practice." JA1107 (Burden Rpt.). Indeed, "[d]ecades of political science research" shows that disparities in these areas mean that new barriers to voting—like those imposed by HB 589—are far more consequential for African-American voters than for white voters. *Id*. JA1106. Senate Factor Five thus strongly cuts in favor of finding that historical and social conditions in North Carolina will interact with voting restrictions to cause African-American voters to have less ability to participate in the political process. *Cf. Spirit Lake****Error! Bookmark not defined.***, 2010 WL 4226614 at *3 ("Native American citizens in Benson County continue to bear the effects of this past discrimination, reflected in their markedly lower socioeconomic status compared to the white population. These factors hinder Native Americans' present-day ability to participate effectively in the political process.").

c. Other Senate Factors

Although less relevant outside of the redistricting context, several other Senate Factors support the conclusion that North Carolina politics have been racialized in a manner that makes full participation difficult for African Americans. One such factor is racial polarization (Factor 2), which "refers to the situation where different races … vote in blocs for different candidates," *Gingles*, 478 U.S. at 62, thus "allow[ing] those elected to ignore [minority] interests without fear of political consequences." *Rogers v. Lodge*, 458 U.S. 613, 623 (1982). Defendants have acknowledged in another ongoing case that there is a "pervasive pattern" of racial polarization in North Carolina. *Dickson v. Rucho*, 2013 WL 3376658 at *18 (N.C. Super. Ct. July 8, 2013); *see also* JA1103 (Burden Rpt.); JA1225-26 (Kousser Rpt.).

Given this polarization, it is hardly surprising that there have been racial appeals in political campaigns (Factor 6), from blatant demagoguery in the 1950s through the notorious 1990 Gantt-Helms Senate race. *See* JA1189-92, JA1229 (Kousser Rpt.). Such appeals are not a thing of the past. *See* JA68-JA85 (NAACP Decl. ¶¶ 36-37,39). During the 2008 presidential race, voters at one early voting site in North Carolina were subjected to the sight of a casket with a picture of presidential candidate Barack Obama. *See* JA1526 (11/3/08 *Voting Rights Watch*). North Carolina elected officials have also been unresponsive to the needs of minority voters (Factor 8), including, for example: failing to accommodate minority concerns related to the racially disparate impacts of the provisions of HB 589 (which every African-American member of the General Assembly

voted against), *see* JA1111 (Burden Rpt.); the repeal of the Racial Justice Act (which prohibited capital sentences tainted by racial discrimination); and economic policies that disproportionately burdened African Americans, such as the rejection of federal Medicaid funds and the termination of unemployment benefits. *See* JA1371 (Leloudis Rpt.); JA1230-32 (Kousser Rpt.). In sum, the relevant historical and social conditions in North Carolina are such that voting restrictions interact with these conditions to impose a disproportionate burden on the ability of African Americans to vote.

3. The Challenged Provisions Interact With Existing Social And Historical Conditions To Cause Disproportionate Burdens On African-American Voters

Against that background, there is a "causal connection" between HB 589 and the abridgement of minority voters' "opportunity … to participate in the political process." *Gonzalez v. Arizona*, 677 F.3d 383, 404 (9th Cir. 2012); *see also Irby v. Va. State Bd. of Elections*, 889 F.2d 1352, 1358 (4th Cir. 1989). To prove causation, plaintiffs "need not show that the challenged voting practice caused disparate impact itself." *Gonzalez v. Arizona*, 624 F.3d 1162, 1193 (9th Cir. 2010), *on reh'g en banc*, 677 F.3d 383 (9th Cir. 2012), *aff'd sub nom. Arizona v. Inter Tribal Council of Arizona, Inc.*, 133 S. Ct. 2247 (U.S. 2013). Instead, "the plaintiff may prove causation by pointing to the interaction between the challenged practice[s] and external factors such as surrounding racial discrimination." *Id.*; *see also Gingles*, 478 U.S. at 47 ("The essence of a § 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities employed by black and white voters to elect

their preferred representatives."); *Frank*, 2014 WL 1775432 at *30 ("[P]laintiff must show that the disproportionate impact results from the interaction of the voting practice with the effects of past or present discrimination and is not merely a product of chance.").

a. Same-Day Registration

The social and historical factors described above establish a causal connection explaining why African Americans "will be substantially and negatively impacted" by the elimination of SDR. JA630 (Gronke Rpt. ¶ 50). Eliminating SDR will impose particular burdens on voters of lower socioeconomic status, who often find it challenging to make multiple trips to election offices to register to vote and cast a ballot, as well as voters who have recently moved from another county and who need to update their address when voting. *Id*. JA629 ¶ 49. This pool of burdened North Carolina voters is disproportionately comprised of African Americans who (as compared to whites) have lower rates of vehicle and home ownership, higher rates of residential mobility, and a higher likelihood of working hourly-wage jobs. Thus, SDR has been "critical to [get-out-the-vote] work" in African-American communities. JA7 (Brandon Decl. ¶ 15); *see also* JA256 (Blue Decl. ¶ 25); JA242 (Adams Decl. ¶ 27); JA68-JA85 (NAACP Decl. ¶ 15).

This conclusion is supported by the longstanding academic consensus that SDR—especially when coupled with early voting—boosts turnout, particularly among voters who are poorer, of lower educational attainment, and who have recently moved. *See* JA627-28 (Gronke Rpt. ¶ 43). Given the lower income and education rates (and higher residential mobility) of African Americans in North Carolina, *see supra* at Section

II.A.2.b, it is unsurprising that academic scholarship has found that SDR is associated with higher minority turnout. *See* JA627-28 (Gronke Rpt. ¶ 43). Notably, Defendants' experts do not deny this consensus, and, in fact, rely on academic work supporting the notion that SDR boosts turnout. *See* JA678 (Gronke Surrebuttal Rpt. ¶ 53).

Given these facts, eliminating SDR will "have a disparate impact on African-American voters." JA633 (Gronke Rpt. ¶ 54). This is an undeniable—and undenied—fact. This disparate impact is not the product of chance, but rather is due to the social and historical factors described above, including the effects of past and present discrimination. Under these circumstances, eliminating SDR violates Section 2. *See Chisom*, 501 U.S. at 408 (Section 2 is violated when a state "ma[kes] it more difficult for [minorities] to register") (Scalia, J., dissenting); *Operation Push*, 674 F. Supp. at 1255 (registration restrictions "have a disparate impact on the opportunities of black citizens … to vote because of their socio-economic and occupational status"); *id.* at 1256 (requiring voters to register separately for municipal and state elections violated Section 2).

b. Out-Of-Precinct Voting

HB 589's repeal of out-of-precinct voting will also interact with existing social and historical conditions in North Carolina to impose real and substantial burdens on the ability of African Americans to exercise political power. *First*, voters who move between elections will be burdened by the loss of out-of-precinct voting, because they face the task of accurately identifying their new polling place, and are less likely than those who have lived in a community for years to be familiar with their polling site, and thus more

likely to appear out of precinct. *See* JA410-11 (Martin Decl. ¶ 55); JA318 (Glazier Decl. ¶ 70). This group of voters is disproportionately comprised of African Americans who as a group are far more transient than whites.

Second, when voters arrive at a polling place other than the one to which they are assigned, they must now relocate to the correct polling site, which imposes a burden on voters of lower socioeconomic status in particular—and, again, such voters are disproportionately minorities. As compared to whites, African Americans are less likely to have access to a vehicle and more likely to rely on public transportation or other non-personal means (such as rides from friends, volunteers, or churches) to get to the polls. *See* JA1159 (Duncan Rpt.); *see also* JA332, JA333-34, JA335 (Harrison Decl. ¶¶ 37, 43, 48). Reliance on those modes of transportation makes it far more difficult for those voters to change polling locations on voting day. *See* JA244 (Adams Decl. ¶ 37); JA256 (Blue Decl. ¶ 27); JA411 (Martin Decl. ¶ 57); JA318 (Glazier Decl. ¶ 71); JA26 (Dorlouis Decl. ¶ 10). Similarly, because African Americans disproportionately hold working-class jobs that afford less flexibility to take time off to vote, JA410 (Martin Decl. ¶ 53), many will lack the time necessary to change voting locations on Election Day—a difficulty exacerbated by the fact that voters often stand in long lines before discovering that they are at the wrong precinct. JA282-83 (Parmon Decl. ¶ 39).

Third, the burdens imposed by the repeal of out-of-precinct voting will have even more severe effects on African Americans in North Carolina in light of the redistricting that occurred following the 2010 census, which "split" a record number of precincts. The

result is that voters in the same polling place can end up with different ballots and participating in elections for different offices. These changes disproportionately affect African Americans, thus compounding the disproportionate impact from the elimination of our-of-precinct voting. *See* JA410 (Martin Decl. ¶ 54); JA282 (Parmon Decl. ¶ 38); JA175 (H. Michaux Decl. ¶ 55). Some 26.8% of the state's African-American voting age population now lives in a split precinct, compared to 15.6% of the state's white population. JA2017. For Senate districts the figures are 19.4% for African Americans and 11.8.% for whites. *Id*. In sum, the repeal of out-of-precinct voting will interact with the factors described above to have a disparate impact on African-American voters.

c. Early Voting

i. Reductions in Early Voting Will Burden African Americans

"[E]liminating the first seven days of … early voting … will have a differential and negative impact on the ability of African Americans to cast a ballot in North Carolina." JA633 (Gronke Rpt. ¶ 52). *First*, lower socio-economic status voters will be uniquely burdened by the loss of one week of early voting. Such voters—who are disproportionately African Americans—frequently have jobs with hourly wages, inflexible hours, and/or transportation difficulties (including lower rates of vehicle ownership), which can effectively prohibit them from voting on Election Day. *See* JA1143 (Duncan Rpt.); JA364-65 (McKissick Decl. ¶ 42); JA93-94 (Palmer Decl. ¶ 21). Thus, there is a clear causal link between HB 589's early voting cuts and reduced opportunity for African Americans to participate in the political process.

Second, the early voting period offers an essential in-person participation opportunity for African Americans who have grown distrustful of the political process due to the legacy of racial discrimination in voting (Senate Factors 1 and 3) and the racialized context of North Carolina politics (Factors 2, 6, and 8). For these voters, the opportunity to participate in person at a polling place during early voting cannot be replaced by other methods such as absentee voting by mail. *See* JA364 (McKissick Decl. ¶ 41) ("[M]any African-American communities take special pride in being able to vote in person."); JA281 (Parmon Decl. ¶ 34) ("In the African-American community, and particularly among our seniors, in-person voting has a great deal of significance."); JA68-JA85 (NAACP Decl. ¶¶ 15, 24); *Accord Brooks*, 2012 WL 4482984 at *7 (sustaining challenge to early voting limits where "voting by mail is not a viable option for [minority voters] because past discrimination and hostilities cause them to distrust that their vote will be counted when sent by mail.").

Third, get-out-the vote (GOTV) efforts in African-American communities will be less effective with a shorter early voting period. *See* JA364-65 (McKissick Decl. ¶ 42) (African-American constituents disproportionately rely on "rides from community organizations such as their church to get to the polls," such that early voting cutbacks "make[] it more difficult for these individuals, such as the parishioners at Union Baptist Church who lack personal means of transportation, to access their right to vote."). *Accord Florida*, 885 F. Supp. 2d at 330 ("[T]hird-party groups would not be able to assist

minority voters as effectively. This, in turn, would likely make it more difficult for those minority voters who rely on such efforts to make it to the polls.") (quotations omitted).

Thus, reducing early voting constitutes a "materially increased burden on African–American voters' effective exercise of the electoral franchise. . . analogous to (although certainly not the same as) closing polling places in disproportionately African–American precincts." *Florida*, 885 F. Supp. 2d at 328-29. Indeed, in describing a smaller reduction of the early voting period in Florida, another district court observed that, although such a reduction "would not bar African–Americans from voting, it would impose a sufficiently material burden to cause some reasonable minority voters not to vote." *Id.* at 329. *Cf. Holder*, 512 U.S. at 922 (limitations on "the times polls are open" may violate Section 2) (Thomas, J., concurring in the judgment); *Brooks*, 2012 WL 4482984, at *8 (denying motion to dismiss claim challenging six-day limit on early voting).

ii. HB 589's Purported Requirement to Maintain the Same Number of Aggregate Early Voting Hours Will Not Compensate for Lost Voting Days

HB 589's requirement that counties maintain the same total number of early voting *hours*, notwithstanding its elimination of 7 early voting *days*, will not offset these burdens. To begin, early voting hours will *not* remain the same for many voters, as 32 counties sought waivers to reduce early voting hours in the primary election. *See* JA701 (Lichtman Rpt.); JA857 (Stewart Rpt. ¶¶ 186-188); JA479 (Strach Dep. Tr. at 105:4-7).

Moreover, expanding early voting hours cannot compensate for a loss of early voting days. *First*, as Gary Bartlett—who was Executive Director of North Carolina's

SBOE for 20 years—explains, "election hours are not fungible." JA143-44 (Bartlett Decl. ¶ 24). Most voters tend to vote during the lunch hour and immediately after the end of the work day, such that opening polls extremely early in the morning or keeping them open late into the evening, when voter traffic tends to be light, provides little benefit. *See* JA836, JA853-57 (Stewart Rpt. ¶¶ 135, 178-185); JA143-44 (Bartlett Decl. ¶ 24); JA440 (Sancho Decl. ¶ 16). Thus, reducing the range of early voting *days*, even while maintaining a particular level of *hours*, will damage GOTV activities in African-American communities. *See* JA132 (Wells Decl. ¶ 15) ("Losing a week of Early Voting will certainly mean fewer votes from minority communities."); JA56-57 (R. Michaux Decl. ¶ 14) (African-American GOTV efforts will be "significantly less effective with the shortened early voting schedule").

Second, "even if all of the voters who would have used the repealed days of early voting did attempt to adjust to a shortened early voting schedule … that shift would create problems of its own for minority voting," in the form of "substantially increased lines, overcrowding, and confusion at the polls, which would in turn discourage some reasonable minority voters from waiting to cast their ballots." *Florida*, 885 F. Supp. 2d at 330. Because voting is a middle-of-the day activity, many voters who would have voted during the eliminated 7-day period will now shift to voting at a similar time in the remaining 10-day period. *See* JA854 (Stewart Rpt. ¶179). Thus, unless counties open additional early voting sites, "the result will be to add even more people to a congested early voting environment." *Id*. JA855 ¶ 180. Many counties in North Carolina, however,

lack the resources necessary to open additional polling locations to meet the high early voting demand in North Carolina. *Id*. JA857-60 ¶¶ 189-195. This will be particularly problematic given that, according to internal SBOE documents, early voting locations in North Carolina have already experienced "extremely heavy voter turnout and long lines," JA1525 (10/30/08 SBOE Mem.), with the wait time[s] at some sites … as long as 2 hours," JA1545 (10/22/12 SBOE Mem.). These wait times will only get worse.

Florida's experience from the 2012 election confirms that reducing early voting days, even while maintaining roughly the same number of hours, will result in heavier burdens for African Americans. Prior to 2012, Florida reduced its early voting period from a discretionary range of 12-14 days to a maximum of 8 days, while maintaining the same aggregate number of early voting hours in counties holding 84% of Florida's population. *See* JA622 (Gronke Rpt. ¶ 37). The result was that waiting times to vote increased during the early voting period by 50-100%; and, because African Americans are disproportionately represented in the pool of early voters, the burdens of this increased congestion fell disproportionately on them. *See* JA615 (Gronke Rpt. ¶ 25); JA437 (Sancho Decl. ¶ 8). Moreover, overall early voting rates fell significantly, and, the decline in the African-American early voting rate was four times that of white voters. *See* JA620-22 (Gronke Rpt. ¶¶ 33-36). In essence, "after Florida cut back on early voting, its population of early voters became less black, and more white." *Id.* JA621-22 ¶ 36.

Accordingly, this Court should find that North Carolina's reductions to early voting—regardless of the requirement to maintain the same number of hours—will

interact with social conditions to cause African Americans to have less ability to participate in the political process.[2]

d. Challengers and Observers

By expanding the number of poll observers and weakening protections against challenges by private citizens, HB 589 will "encourage increased levels of voter challenge and intimidation," burdening African Americans' ability to participate in the political process. JA1372 (Leloudis Rpt. ¶ 34). When combined with the history of voting-related racial intimidation in North Carolina—and more recent discriminatory observer and challenger activity—these changes will produce a chilling effect on voters of color. *See* JA257 (Blue Decl. ¶ 28); JA281 (Parmon Decl. ¶ 34); JA72, JA79, JA80 (NAACP Decl. ¶¶ 11, 35, 38); JA1399 (Leloudis Sur-rebuttal Rpt.).

Before HB 589, each political party could have no more than two observers in the voting enclosure at any time, and both had to be registered in the same county; challenges before Election Day could be made only by citizens registered to vote in the same county; and Election-Day challenges could only be made by voters registered in the same precinct. Under HB 589, ten new "at-large observers" can now travel to any polling place in a county, and can be stationed at any time to join the two site-based observers within

[2] *Brown v. Detzner*, 895 F. Supp. 2d 1236, 1256 (M.D. Fla. 2012), does not support a contrary conclusion. *Brown* held that expanded early voting hours could, under some circumstances, effectively compensate for the elimination of early voting days, but the effects of Florida's reduction in early voting days were not and could not have been known at the time *Brown* was decided. The problems that plagued Florida during the 2012 election prompted that state to restore its original early voting period to allow for up to 14 days of early voting for up to 12 hours each day, essentially granting the relief sought by the *Brown* plaintiffs. *See* JA867 (Stewart Rpt. ¶ 214); JA438 (Sancho Decl. ¶ 9); JA433 (Sawyer Decl. ¶ 14).

the voting enclosure; any registered voter in the state can challenge any other person's right to register or vote before an election; and Election-Day challenges may be issued by any registered voter in the county. These changes give "challengers broader standing and scope of action than at any time since the historic white supremacy campaign of 1900." JA1399 (Leloudis Sur-rebuttal Rpt.).

North Carolina has a long history of poll watchers being used to intimidate and discourage African-American voters. *See* JA1353-54 (Leloudis Rpt.). Such intimidation, moreover, is not just a vestige of the past. In 2010, aggressive poll observers in Wake County prompted complaints from voters and from the North Carolina NAACP. *See* Poll Observers Upset Voters, News & Observer (10/27/2010), available at http://goo.gl/nbF0fJ; JA80 (NC NAACP Decl Rpt. ¶ 38). In 2012, the North Carolina Voter Integrity Project petitioned to have more than 500 voters, most of them people of color, removed from the registration rolls in Wake County based on unfounded claims that they were non-citizens. *See* Wake Elections Board Dismisses Most Voter Challenges, Raleigh Public Record (08/21/12), available at http://goo.gl/E0HEQG. In 2013, challenges were brought against dozens of students at the historically black Elizabeth City State University, while no challenges were brought at a predominantly white college in the same locality. *See* State Elections Board Reverses Pasquotank Decision, News & Observer (09/03/13), available at http://goo.gl/yC4h58. Nor are these challenges likely to stop: The Voter Integrity Project announced in March 2014 that its voter challenges

"should continue for quite some time." *See* Local Voter Registration Challenge Draws National Media Attention," The Tribune Papers (03/23/14), http://goo.gl/57n47Z.

HB 589's expansion of poll observers and ballot challengers has "opened the door to intimidation of voters of color." JA1398-99 (Leloudis Sur-rebuttal Rpt.). When considered in interaction with North Carolina's history of electoral racial discrimination, unless HB 589's provisions on observers and challenges are enjoined, African Americans' ability to participate in the political process will be reduced by "increased levels of voter challenge and intimidation" at the polls. JA1372 (Leloudis Rpt.).

e. Photo Identification Requirement

The NAACP Plaintiffs further move the Court to enjoin the planned "soft rollout" of HB 589's photo ID provisions during the 2014 general election. The soft rollout will confuse poll workers and voters, add additional time at the polls, contribute to longer lines, and disproportionately burden voting for African Americans. Under the "soft rollout," voters will be asked if they have qualifying ID, and if they do not, will be advised of the forms of ID required by HB 589 and asked to complete a form acknowledging they lack requisite ID. JA507, JA518 (Strach Dep. Tr. at 220, 262). The SBOE admits: that it has not promulgated implementation regulations, JA507, JA508 (Strach Dep. Tr. at 219, 222); that it has provided no guidance to CBOEs to train poll workers on the soft rollout protocols, *id.* JA507-08 at 220-21; and that is has not reviewed the rollout experiences of other states, *id.* JA508 at 221-222. The SBOE also admits that it has not considered the potential for voter confusion. *Id.* JA508 at 224.

Together, these admissions render it a near certainty that the soft rollout will result in longer lines, confusion, and wrongful disenfranchisement by poorly trained poll workers. Asking every voter whether they have acceptable ID, providing them with information, and requiring voters to complete an acknowledgement form, will add to the time it takes to get through the line. These added hurdles will cumulatively increase the "costs" associated with voting, JA1097-98 (Burden Rpt.), disenfranchising voters who lack the job or transportation flexibility to wait in such lines. Additionally, because the SBOE has undertaken almost no efforts to adequately educate CBOEs or the public as to how the soft rollout will operate, see JA507-08 (Strach Dep. Tr. at 220-223), there is a very high likelihood of voter confusion and inconsistent administration of the soft rollout from county to county. Indeed, many of these problems were observed first hand turning the May 2014 primary election, which had far lower turnout rates than will be true for the November general election. See JA43-45 (A. Eaton Decl. ¶¶ 18-19) (observing inconsistent and inaccurate implementation of the soft rollout by poll workers).

These harms will be disproportionately felt by North Carolina's African-American voters. The state's own data demonstrates that African Americans are disproportionately less likely to possess a state-issued Photo ID. See JA1672 (2013 DMV-ID Analysis) (finding that African Americans comprise 33% of North Carolina voters without a matching DMV-issued ID, even though they make up just 22% of the population). African Americans will thus disproportionately bear the additional steps at the polls (and the longer lines that result) due to the soft rollout's requirement that voters without ID be

questioned, be made to complete additional paperwork and be given information about acceptable forms of ID. Those disproportionate burdens will interact with existing financial, educational, and health-related disadvantages suffered by African Americans in North Carolina to afford them "less opportunity" to vote than whites.

A "soft rollout" of Pennsylvania's photo ID law during the 2012 elections proved to be a source of confusion and voter disenfranchisement. That soft rollout campaign was "confusing," according to Prof. Diana Mutz, an expert in litigation challenging the photo ID law. *See Applewhite v. Pennsylvania*, 2012 WL 4497211, *10 (Pa. Cmwlth. Aug. 15, 2012). Despite a more extensive budget and education plan, the effort was "ineffective and consistently confusing," engendering "unfairness." *See Applewhite*, 2012 WL 4497211, at *32-33. Election hotline reports show that voters were turned away or given inaccurate information about ID requirements.

f. Cumulative Impact

HB 589's full impact on African Americans can be understood only when the challenged provisions are considered collectively. Under the previous regime, an unregistered African American in North Carolina had 17 days in which to appear at the polls, at which time she could simultaneously register to vote and cast a ballot, with the assurance that if she had erroneously gone to the wrong precinct, she could cast a provisional ballot that would be counted for eligible elections. The post-HB 589 regime is much different. Now a voter must properly register to vote at least 25 days before the election, appear to vote within a 10-day window before the election, and ensure that she

has arrived at the correct polling location. Large numbers of observers may be inside her polling place, clogging the system and intimidating voters. JA68-JA85 (NAACP Decl. ¶ 38) (In 2012, "NC NAACP was made aware of reports of poll observers … harassing workers."). Private persons may challenge the legitimacy of her registration without even living in the county. If she indicates she lacks requisite ID, she will be made to complete additional paperwork. Any misstep along the way and the voter will be disenfranchised. The challenged provision thus combine to greatly increase the time, resources, and activity needed to cast a ballot successfully. "[U]nder the dominant framework used by scholars to study voter turnout, even small increases in the costs of voting can deter a person from voting." *Frank*, 2014 WL 1775432, at *17.

These costs are disproportionately borne by African Americans, who continue to suffer disproportionately high rates of poverty and low rates of educational attainment. In other words, the challenged provisions interact with existing social and historical conditions in North Carolina to impose costs that are "more acute" and "especially consequential" for African Americans, JA1097-98 (Burden Rpt.), thus imposing disproportionate burdens on their ability to exercise political power and elect candidates of their choice. That is the very definition of a Section 2 violation.

4. The State's Rationales For Enacting The Challenged Provisions Are Tenuous And Unsupported

Finally, the tenuous nature of the State's proffered reasons for enacting HB 589 constitutes an additional factor weighing strongly in favor of liability. One key factor in evaluating a Section 2 claim is "whether the policy underlying the [S]tate['s] … use of

[the contested] practice or procedure is tenuous." *Gingles*, 478 U.S. at 37; *see also Frank*, 2014 WL 1775432, at *32 (concluding that because Wisconsin's photo ID requirement "only weakly serves the state interests put forward by the defendants," those interests "are tenuous and do not justify the photo ID requirement's discriminatory result"); *Operation Push*, 674 F. Supp. at 1266-68 (Section 2 violation where registration restrictions lacked any "legitimate" or "compelling" basis). That is certainly true here. In enacting HB 589, the General Assembly relied on highly tenuous rationales that, when fairly evaluated, only confirm that the law violates Section 2 of the VRA.

Cost Savings. Without ever soliciting cost analysis from the SBOE or any CBOE, some legislators suggested that HB 589's early voting reductions was justified as a means of reducing costs to the State. *See, e.g.*, JA2472 (7/24/13 N.C. Senate Sess. Tr. at 11:2-13) (statement of Sen. Rucho); JA1221-22 (Kousser Rpt.). Precisely the opposite is true. Because counties must (absent a waiver) still offer the same number of early-voting hours as they have in past elections, *see supra* at Section II.A.3.c.ii, counties will be required to pay overtime salaries for poll workers, hire additional workers to handle the increased time that early voting sites will need to remain open, open additional polling sites, and/or purchase additional voter machines to handle more traffic. *See* JA141-43 (Bartlett Decl. ¶¶ 15-20); JA221-222 (Gilbert Decl. ¶ 11-13); JA441 (Sancho Decl. ¶ 18); JA432 (Sawyer Decl. ¶ 11). Indeed, the General Assembly knew as much when it enacted HB 589, given that 2011 and 2013 memos from the SBOE had explained that cutting a week from the early-voting period would actually increase election costs. *See* JA1700-02

(3/11/2013 SBOE Mem.); JA1541-42 (5/18/11 SBOE Mem.). In other words, the evidence before the legislature at the time it enacted HB 589 showed conclusively that the law would increase—not decrease—the cost of administering elections in the State.

Election Efficiency. Some supporters sought to justify HB 589 by arguing that it would "streamline" voting in the state and "make the system work smoothly as it was intended." JA2454 (7/23/13 N.C. Senate Sess. Tr. at 3:10-11) (statement of Sen. Rucho); *see also* JA2479 (7/24/13 N.C. Senate Sess. Tr. at 78:6-11) (statement of Sen. Tillman); JA1222-23 (Kousser Rpt.). That purported rationale makes little sense. Early voting sites were *already* highly congested even before HB 589 took away seven days of the early voting period. *See* JA851-53 (Stewart Rpt. ¶¶ 171-175) ("North Carolina early voting centers were among the most congested in the nation in 2012," with 27.2% of early voters in North Carolina spending more than 30 minutes in line (compared with only 15.8% nationwide)). By eliminating those seven days of early voting, HB 589 only exacerbates that problem. Early voters who previously voted in the eliminated 7-day period are likely to shift to voting at a similar time of day in the remaining 10-day period. *See id*. JA854 ¶179. The result is that early voting sites during the 2014 general election are likely to see even worse congestion than they saw in previous elections, and thus could replicate the experience of Florida when that State similarly reduced early voting days while allowing counties to maintain the total number of early voting hours.

Nor was the elimination of SDR needed to improve election efficiency. North Carolina election administrators found the implementation of SDR to be easy to manage.

See, e.g., JA226 (Gilbert Decl. ¶ 23) ("The same day registration system was well-designed, and we at the Guilford County Board of Elections experienced no impediments to implementing it effectively."); JA292 (Willingham Decl. ¶ 18) (" I do not ever recall receiving or reporting any major problems with administration of SDR."). For that reason, the SBOE explained to the General Assembly that SDR "was a key factor in why the 2008 post-election season was essentially 'uneventful.' There were no election challenges and voters for the most part were pleased with the process, irrespective of outcome of election contests. … SDR was a success."JA1529 (3/31/09 SBOE Mem.).

Voter Fraud. Proponents of HB 589 also sought to justify the law by pointing to allegations of voter fraud in North Carolina's elections, which purportedly would be addressed by the law's implementation of a photo ID requirement and the elimination of SDR (but notably, would not be addressed by the other challenged provisions). *See, e.g.*, JA2479 (7/24/13 N.C. Senate Sess. Tr. at 78:6-12) (statement of Sen. Tillman); JA2460 (7/23/13 N.C. Senate Sess. Tr. at 41:2-11) (statement of Sen. Rucho); *see also* JA1218-20 (Kousser Rpt.); JA1045-50 (Minnite Rpt.). But as the General Assembly knew at the time it enacted HB 589—and as Speaker Tillis subsequently acknowledged—in-person voter fraud is simply not a problem in North Carolina. *See* JA1875 (7/25/2013 *Widespread Voter Fraud Not and Issue in NC, Data Shows*).

The SBOE itself has concluded that in-person voter fraud is exceedingly rare. Of the approximately 21 million votes cast from 2000-2012, the SBOE found only *two* cases of in-person voter fraud. *See* JA1215-16 (Kousser Rpt.); JA1699 (3/11/13 SBOE Mem.).

Expert analysis confirms the SBOE's determination that in-person voter fraud does not exist in North Carolina. After reviewing all available state and federal records, Dr. Lorraine C. Minnite "found no evidence presented by or to lawmakers that would have suggested voter fraud is a problem in the State of North Carolina." JA1048 (Minnite Rpt.). Indeed, in her assessment, "fraud committed by voters either in registering to vote or at the polls on Election Day is exceedingly rare, both nationally and in North Carolina." *Id*. JA1038. There is "virtually no evidence" suggesting that voters are attempting to cast fraudulent ballots by impersonating voters at the polls. *Id*. JA1055.

Voter fraud is particularly unlikely in the context of SDR. SDR had numerous built-in safeguards to prevent voter impersonation, including requiring that a registrant provide ID and the last 4 digits of her social security number—both of which were verified on the spot through a central voter-registration system. JA225-26 (Gilbert Decl. ¶ 22). And even after the registrant was allowed to vote, the CBOE sent two verification mailings to ensure the accuracy of the address. *Id*. Indeed, studies performed in Guilford County and statewide indicated that registration applications submitted via SDR were *more* accurate than applications submitted via the traditional process. *Id*. JA226 ¶ 24.

The General Assembly's alleged concern with voter fraud is undermined by its failure to address fraud perpetrated through mail-in absentee balloting. Fraud perpetrated through mail-in absentee balloting is far more common than in-person voter fraud. *See* JA1242 (Kousser Rpt. n. 196). Nonetheless, the legislature rejected proposals to require a copy of a photo ID to be included with mail-in ballots or that such ballots be notarized.

Id. JA1242. When combined with the fact that whites use absentee voting at disproportionately higher rates than African Americans, *see* JA735-40 (Lichtman Rpt.), the legislature's failure to address absentee-ballot fraud strongly suggests that suppressing minority voting—not rooting out voter fraud—was the General Assembly's true motivation for enacting HB 589.

Public Confidence In Elections. When it became clear that allegations of in-person voter fraud lacked empirical or evidentiary support, the proponents of HB 589 shifted rationales and began to argue that the law was needed, not to combat actual incidents of voter fraud, but instead because the *perception* of fraud was undermining public confidence in elections. *See* JA1050 (Minnite Rpt.); JA1220-21 (Kousser Rpt.). The Fourth Circuit has made clear, however, that the rationale of "electoral 'integrity' does not operate as an all-purpose justification flexible enough to embrace any burden, malleable enough to fit any challenge and strong enough to support any restriction." *McLaughlin v. N. C. Bd. of Elections*, 65 F.3d 1215, 1228 (4th Cir. 1995). Instead, the "true state of affairs" must be evaluated to determine whether the challenged practice is actually needed to preserve public confidence in the integrity of elections. *Id*.

No evidence was presented to the General Assembly—and none exists now—that North Carolina citizens are experiencing a crisis of confidence in their electoral system. As Dr. Minnite explains: "There is no evidence I could find in the public record of legislative debates that in general, the people of North Carolina have low confidence in the electoral system because photo ID is not required to vote." JA1052 (Minnite Rpt.).

Indeed, if there were some kind of depressed confidence in the electoral process in North Carolina, one would expect to see sharply lower voter-turnout levels. *See id*. JA1051. Yet North Carolina has experienced record voter participation in recent elections. *See* JA1196 (Kousser Rpt.). That massive growth in voter participation is fundamentally inconsistent with the notion that North Carolina citizens have lost confidence in government. As put by Plaintiffs' expert Morgan Kousser:

> [T]here was never any testimony in the hearings or attempt to demonstrate in the debates that there was any lack of confidence in elections among the populace, or that any of the provisions of the bill would increase confidence. Nor were there any polling results on the issue of whether there was any crisis of confidence among the voters, even though there were plenty of polling results discussed in the legislature and the media on generic photo ID bills, early voting, and SDR. Nor was there any recent event that would have destroyed the confidence of voters in North Carolina government in general or the election process in particular.

JA1242-43 (Kousser Rpt.).

If anything, HB 589 will *undermine* public confidence in North Carolina's electoral process. If the challenged provisions of HB 589 are allowed to go into effect for the upcoming election, the result will be that an untold number of eligible North Carolina citizens will be unable to register, unable to vote, or required to vote provisionally and thus unsure whether their votes counted. Disenfranchisement of these eligible voters will surely do more to call into question the legitimacy of future elections than will vague and unfounded allegations of widespread voter fraud. *See Frank*, 2014 WL 1775432, at *9 ("Perhaps the reason why photo ID requirements have no effect on confidence or trust in the electoral process is that such laws undermine the public's confidence in the electoral

process as much as they promote it" by creating "the false perception that voter-impersonation fraud is widespread, thereby needlessly undermining the public's confidence in the electoral process.").

No evidence exists that North Carolina's electoral process is (or has been) tainted by voter fraud or has otherwise been compromised. Nor is there persuasive evidence that the public has lost confidence in North Carolina's elections. In light of the total absence of any evidence that would support the State's alleged electoral-integrity and public-confidence arguments, these theories cannot be used to support the sweeping restrictions imposed by HB 589. *See McLaughlin*, 65 F.3d at 1228; *see also Frank*, 2014 WL 1775432, at *32 (holding that state's interests in preventing voter impersonation and deterring other types of fraud, promoting public confidence in electoral process, and promoting election administration and recordkeeping "[we]re tenuous and do not justify the photo ID requirement's discriminatory result.").

Making it More Difficult To Vote. Finally, some members of the General Assembly freely admitted that the purpose of HB 589 was to make it more difficult for individuals to vote. *See* JA2479 (7/24/13 N.C. Senate Sess. Tr. at 78:6-15) (statement of Sen. Tillman) ("And one-day registration, you think it's such a great idea to have mobs and mobs of people up there that have never bothered to register in a huge election and they want to come in on election day and register to vote. … If you don't think enough about voting to make sure you're registered—it used to be 30 days in advance, Senators, until recently."); JA2495 (7/25/13 N.C. Senate Sess. Tr. at 45:18-23) (statement of Sen.

Tillman) ("[I]f you don't think enough about voting and wait to register until you get there on election day, folks, you've not thought very much about the election and it doesn't mean very much to you to say, oh, I didn't register."); JA2502 (7/25/13 N.C. Senate Sess. Tr. at 81:13-22) (statement of Sen. Rabin) ("[My perspective] comes from considerably earlier where folks are supposed to take the initiative to go after what they want. I do not want a system personally when it comes to my vote that models on what I think I've heard some people would like to have in here and that's the model of the American Idol where everybody can just dial it up on the phone and vote for whoever they want to vote for or however they want to vote and we can't count who's voting how many times."). Erecting burdens to the franchise, however, violates Section 2 of the VRA where (as here) those burdens fall disproportionately on racial minorities.

B. HB 589 Was Enacted With Discriminatory Intent, In Violation Of The 14th And 15th Amendments

Legislation enacted with the intent to discriminate on the basis of race in the voting context violates the Fourteenth and Fifteenth Amendments. *See, e.g.*, *City of Mobile v. Bolden*, 446 U.S. 55, 62, 66 (1980) (plurality opinion); *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977). To show such intentional discrimination, plaintiffs are not required "to prove that the challenged action rested *solely* on racially discriminatory purposes." *Arlington Heights*, 429 U.S. at 265 (emphasis added). "Rather, Plaintiffs need only establish that racial animus was one of several

factors that, taken together, moved [the decision-maker] to act as he did." *Orgain v. City of Salisbury*, 305 Fed. App'x 90, 98 (4th Cir. 2008).[3]

"Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Arlington Heights*, 429 U.S. at 266; *see also Washington v. Davis*, 426 U.S. 229, 242 (1976) ("[A]n invidious discriminatory purpose may often be inferred from the totality of the relevant facts."). Relevant factors include "[t]he historical background of the decision … particularly if it reveals a series of official actions taken for invidious purposes." *Arlington Heights*, 429 U.S. at 267. Courts should also take account of "[t]he specific sequence of events leading up the challenged decision," including any "[d]epartures from the normal procedural sequence" in the legislature's consideration of a bill. *Id*. In addition, "[t]he legislative or administrative history may be highly relevant, especially where there are contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports." *Id.* at 268. And "the fact, if it is true, that the law bears more heavily on one race than another" is relevant to the determination of whether there was an "invidious discriminatory purpose." *Davis*, 426 U.S. at 242; *see*

[3]The Court noted in *Village of Arlington Heights* that "rarely can it be said that a legislature or administrative body operating under a broad mandate made a decision motivated solely by a single concern, or even that a particular purpose was the 'dominant' or 'primary' one," and that "it is because legislators and administrators are properly concerned with balancing numerous competing considerations that courts refrain from reviewing the merits of their decisions, absent a showing of arbitrariness or irrationality." 429 U.S. at 265. "But," the Court wrote, "racial discrimination is not just another competing consideration," and judicial deference is not justified "[w]hen there is a proof that a discriminatory purpose has been a motivating factor in the decision." *Id.* at 265-66.

also Reno v. Bossier Parish Sch. Bd., 520 U.S. 471, 487 (1997) (disproportionate impact of legislation "is often probative of why the action was taken in the first place since people usually intend the natural consequences of their actions").

Although discovery is far from over—and although Defendants have sought to block discovery at every turn—the evidence of discriminatory intent that has already come to light is powerful and troubling to a society dedicated to racial equality. From the very conception of HB 589, the main sponsors of the bill had sought and obtained information from the SBOE indicating that the challenged provisions repealed practices used disproportionately by African Americans. Indeed, HB 589 specifically targets the very same practices that had been used successfully in the previous decade to drastically increase African-American voter participation. When combined with the rushed and unconventional manner in which HB 589 was enacted, the evidence shows that the law was enacted specifically to make voting harder for African Americans in North Carolina.

1. HB 589 Imposes Disproportionate Burdens on African Americans

The disparate impact that the challenged provisions have on African Americans is strong evidence that the law was enacted with a discriminatory purpose—particularly because the General Assembly was well aware of that disproportionate impact before it enacted the challenged provisions. During the abbreviated debate over HB 589, legislators were presented with substantial evidence—including evidence from the SBOE itself—showing that African Americans disproportionately used the challenged provisions. *See* JA1627 (March 2013 Emails from HB 589 Sponsors); JA1786 (4/1/13

Spreadsheet of Racial Data for Rep. Lewis); JA2492 (7/25/13 N.C. Senate Sess. Tr. at 33:12-35:16) (statement of Sen. Stein); JA1611 (2013 DMV-ID Matching Rpt.); JA1782 (3/13/13 Supplemental Tables to DMV-ID Matching Rpt.); JA1669 (1/7/13 DMV-ID Matching Rpt. and March Supplemental Rpt.); JA1543 (5/18/11 SBOE Mem.); JA1181-82 (Kousser Rpt.); JA188-90, JA193-200 (Stein Decl. ¶¶ 24-28, Ex. A); JA265 (Hall Decl. ¶ 16). The legislature therefore enacted HB 589 with full knowledge that the challenged provisions would impose disproportionate burdens on African-American voters—a fact that is highly "probative" of why the General Assembly decided to enacted the challenged provisions "in the first place." *Reno*, 520 U.S. at 487.

2. The Historical Background of HB 589, and Sequence of Events Prior to Its Passage, Suggest Intentional Discrimination

The historical background of, and sequence of events leading up to, HB 589's enactment strongly suggest intentional discrimination. Because of North Carolina's history of discrimination, African-American turnout lagged behind that of whites for many decades. *See supra* at Section II.A.2.a. Since 2000, however, the implementation of SDR, out-of-precinct voting, and early voting had succeeded in dramatically increasing overall voter turnout in North Carolina, and had increased African-American turnout in particular. JA1196-97 (Kousser Rpt.). This substantial increase in African-American voter participation was not lost on the members of the General Assembly, who were repeatedly made aware that (i) African-American voter participation had increased in the State and (ii) this increase was largely due to the very practices repealed (or sharply curtailed) by HB 589. JA184, JA188-91, JA193-200 (Stein Decl. ¶¶ 16, 23-31, Ex. A);

JA1179 (Kousser Rpt.). When combined with the legislature's lack of any credible, non-discriminatory basis for enacting HB 589, *see supra* at Section II.A.4, that sequence of events strongly suggests that suppressing African-American voter participation was at least one motivating factor for HB 589's enactment.

3. The Legislative History Suggests Intentional Discrimination

The legislative process by which HB 589 was enacted was highly expedited and unorthodox. *See, e.g.*, JA197 (Stein Decl. ¶ 3) (describing the events in the Senate as "irregular for a bill of this magnitude and was abusive of legislative process"); JA241 (Adams Decl. ¶ 22) ("To greatly limit debate and then pass a substantially dissimilar version of a bill on the same day is highly irregular."); JA304 (Glazier Decl. ¶ 18) (explaining that he "cannot overstate how much the legislative process leading to the July 25, 2013 House concurrence vote on the 'full bill' version of HB 589 deviated from standard legislative practice"); JA399 (Martin Decl. ¶ 14); JA271-72 (Parmon Decl. ¶ 4).

The "full version" of HB 589 was unveiled only after *Shelby County* dramatically changed the preclearance landscape for laws that burdened voting rights. *See* JA1234 (Kousser Rpt.) ("Many of the segments of HB 589 that were added to the bare-bones photo ID bill that had passed the House would surely have been deemed retrogressive by DOJ, because it could be easily shown, by the evidence presented above, that African Americans were more likely to vote early, more likely to register using SDR, and more likely to vote out of their precincts."). The law, moreover, was pushed through the General Assembly just two days after it was introduced, without any opportunity for

meaningful legislative debate, public comment, or expert analysis. *See supra* at Section C. That clear "[d]eparture[] from the normal procedural sequence," cuts strongly in favor of finding intentional discrimination. *Arlington*, 429 U.S. at 267.

4. Totality of the Circumstances

As explained, "an invidious discriminatory purpose may often be inferred from the totality of the relevant facts," *Davis*, 426 U.S. at 242, and "discriminatory intent need not be proved by direct evidence," *Rogers*, 458 U.S. at 618. Here, the disparate burdens that HB 589 inflicts on African Americans, the legislature's clear knowledge of those burdens at the time the statute was enacted, the lack of any credible, non-discriminatory basis for the law, and the highly unusual manner in which HB 589 was enacted all lead to the conclusion that at least one motivating purpose behind the law was to make voting more burdensome for African Americans. That analysis is only confirmed by the Senate Factors discussed above, many of which are circumstantial evidence of discriminatory intent. *See id*. at 623 (racially polarized voting patterns (Senate Factor 2) "bear heavily on the issue of purposeful discrimination"); *id*. at 613, 619–20 n.8, 623–24 (recognizing "unresponsiveness of elected officials to minority interests [Factor 8], a tenuous state policy underlying the [challenged practice] [Factor 9], and the existence of past discrimination [Factor 1]," to be "relevant to the issue of intentional discrimination").

C. The Challenged Provisions Unjustifiably Burden The Right To Vote In Violation of the Fourteenth Amendment

Plaintiffs are also likely to prevail on the merits of their claims that the challenged provisions (singularly and in concert) constitute substantial and unjustified burdens on

the right to vote in violation of the Fourteenth Amendment. The Supreme Court has long recognized that the right to vote is one of the most fundamental rights that this country's citizens hold. *McCutcheon*, 134 S.Ct. at 1440-41; *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 670 (1966). Moreover, "[t]he right to vote is protected in more than the initial allocation of the franchise. Equal protection applies as well to the manner of its exercise." *LWV v. Brunner*, 548 F.3d 463, 477 (6th Cir. 2008) (quotations omitted).

Recognizing the precious nature of this fundamental right, but also the need to establish reasonable rules for administering elections, the Supreme Court has developed a balancing test to determine whether rules governing elections violate the Fourteenth Amendment. *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983); *Burdick v. Takushi*, 504 U.S. 428, 434 (1992). In *Burdick*, the Court wrote:

> A court considering a challenge to a state election law must weigh the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate against the precise interests put forward by the State as justifications for the burden imposed by its rule, taking into consideration the extent to which those interests make it necessary to burden the plaintiff's rights.

504 U.S at 434 (quotations omitted). Especially where challenged provisions have a discriminatory effect, "applying heightened scrutiny helps to ensure that such limitations are truly justified and that the State's asserted interests are not merely a pretext for exclusionary or anticompetitive restrictions." *Clingman v. Beaver*, 544 U.S. 581, 603 (2005) (O'Connor, J., concurring in part).

Importantly, the *Burdick* balancing test does not look at the impact of the challenged provision in isolation, but within the context of the election scheme as a whole. *See Burdick*, 504 U.S. at 438-439. Individual provisions that may not be burdensome standing alone can create unconstitutional burdens when considered in light of other challenged provisions or the broader electoral context. *See Republican Party of Ark. v. Faulkner Cnty.*, 49 F.3d 1289, 1291 (8th Cir. 1995) (invalidating law requiring political parties to conduct and pay for primary elections because the combined effect of those requirements impermissibly burdened plaintiffs' rights); *Woods v. Meadows*, 207 F.3d 708, 713 (4th Cir. 2000) (considering other statutory provisions when analyzing constitutionality of filing deadline). Moreover, "an unjustified burden on some voters will be enough to invalidate a law," even if the law "burdens other voters only trivially." *Frank*, 2014 WL 1775432, at *5.

In the last presidential election cycle, the Sixth Circuit decided a case directly relevant to the restrictions imposed by HB 589. *Obama for Am. v. Husted*, 697 F.3d 423 (6th Cir. 2012). In *OFA*, the district court enjoined a 2012 Ohio law that eliminated the last three days of a 35-day early voting period for non-military voters. *Id*. at 426. The court found that plaintiffs were likely to succeed on the merits, not only because the restrictions created arbitrary distinctions between military and non-military voters, but because of the burden imposed by eliminating early voting opportunities, concluding that "the injury to Plaintiffs is significant and weighs heavily in their favor." *Obama for Am. v. Husted*, 888 F.Supp. 2d 897, 907 (S.D. Ohio 2012). The Sixth Circuit affirmed, finding

that "[p]laintiffs have demonstrated that their right to vote is unjustifiably burdened by the changes in Ohio's early voting regime." 697 F.3d at 430.

1. The Challenged Provisions Impose Material and Undue Burdens on Voters

a. Eliminating SDR Will Unduly Burden the Right to Vote

HB 589's repeal of SDR will completely disfranchise any voter not registered to vote by the close of books. Both the magnitude (*i.e.*, the number of voters affected) and the nature of the burden (*i.e.*, categorical disenfranchisement) render the elimination of SDR constitutionally unacceptable. During early voting in the 2008 presidential election, over 100,000 voters registered to vote using SDR; in the 2010 general election, over 21,000 voters registered via SDR; and in the 2012 general election, nearly 95,000 voters did so. *See* JA620-21, JA630 (Gronke Rpt. ¶¶ 34-35, 48). In every federal election since SDR became available in 2008, 6-10% of all early votes in North Carolina were cast by voters who had used SDR as their means of registration. *See id.* JA629 Ex. 14. With the elimination of SDR, there will be no failsafe for affected voters, who will no longer have the opportunity to correct their registration status during the early voting period. *Compare Crawford v. Marion Cnty. Elec. Bd.*, 553 U.S. 181, 199 (2008) (sustaining a voter identification requirement, in part because voters were afforded an opportunity to "mitigate" the burden on their right to vote by producing ID after the election).

Poverty in North Carolina will magnify the burdens created by eliminating SDR. Poverty rates are higher in North Carolina than in the country as a whole. *See* JA1145 (Duncan Rpt.) (16.8% poverty rate in North Carolina versus 14.7% poverty rate in the

United States). Over 15% of North Carolina's population lived in a different house in 2012 than they did in 2011. *See* JA1158 (Duncan Rpt.). Those living below the poverty line are nearly twice as likely to have moved in the last year, with 29.2% of those poor North Carolinians living in different places in 2012 than in 2011, as compared to 12.4% of non-poor. *Id.* Given that voters who move to a new county within North Carolina must newly register to vote, many of these voters will need to submit new voter registration applications in order to participate in the political process. As veteran community activists have confirmed, without SDR many will be unable to do so in time to register and vote. *See* JA121 (Stohler Decl. ¶ 10); JA7 (Brandon Decl. ¶ 15); JA65 (Montford Decl. ¶ 16); JA114-15 (Rainey Decl. ¶¶ 9-10); JA18-19 (Carrington Decl. ¶¶ 10, 12).

Election officials in North Carolina have opined "that same-day registration has enabled thousands, if not tens of thousands, of North Carolina voters to exercise their constitutional right to vote and has fostered greater interest and participation in North Carolina elections." JA147 (Bartlett Decl. ¶ 33). Repeal of SDR will keep "tens of thousands of otherwise eligible voters … from voting because they had not registered in time." JA228 (Gilbert Decl. ¶ 27); *see also* JA1533 (3/31/09 SBOE SDR Rpt.) ("[SDR] enfranchised eligible citizens to participate in the elections process.").

b. The Prohibition on Counting Out-of-Precinct Provisional Ballots Will Unduly Burden the Right to Vote

The prohibition on counting out-of-precinct provisional ballots similarly results in complete disenfranchisement of certain voters. The magnitude of the burden on voting from this change is significant. In the 2012 presidential election, 7,486 out-of-precinct

provisional ballots were cast; in the 2010 general election, 6,052 out-of-precinct provisional ballots were cast; and in the 2008 presidential election, 6,032 out-of-precinct provisional ballots were cast. JA873-74 (Stewart Rpt.). In those three elections, 92.6% of those out-of-precinct provisional ballots were either partially or completely counted. *Id*.

The General Assembly, when it clarified that state law demanded the counting of valid out-of-precinct provisional ballots, made detailed findings about how burdensome and irrational it would be not to count such ballots, given the number of voters who cast ballots out of precinct. *See* JA2635 (S.L. 2005-2 § 1). The magnitude of voters affected by an arbitrary decision to discount out-of-precinct provisional ballots, cast by duly-registered and qualified voters, has not lessened since 2005.

Throwing away out-of-precinct provisional ballots will have a significant impact on voters lacking access to vehicular transportation, who may have trouble traveling to the correct precinct on Election Day (or who discover that they are at the wrong precinct after arranging for transportation to what they thought was the correct precinct). Nearly 15% of North Carolinians live in a household without a car. *See* JA1155 (Duncan Rpt.). Poverty is not the only reason that voters may be unable to get to the correct polling place on Election Day. University students living on campus face similar challenges when they lack access to transportation on Election Day. *See* JA448 (Gould Decl. ¶¶ 4-5).

c. Eliminating 7 Days of Early Voting Will Unduly Burden the Right to Vote

In adopting early voting in 2001, North Carolina established a right to early in-person voting over a 17-day period, and voters have come to rely heavily on that means

of access. By eliminating a week of early voting, HB 589 directly disenfranchises the thousands of voters who would have voted during those eliminated days, and creates longer lines and waiting times to vote for everyone else. *Cf. OFA*, 888 F. Supp. 2d at 907 (establishment of 35 days of early voting in Ohio "granted the right to in-person early voting" throughout that period).

The magnitude of this change to early voting cannot be overstated. HB 589 eliminates early voting days on which a significant percentage of the electorate voted in 2008, 2010 and 2012. In the 2012 general election, 899,083 voters in the state cast their ballot during the seven days eliminated by the new law—over 35% of all the votes cast in the election. *See* JA262 (Gronke Rpt. Ex. 13). That number was over 700,000 in the 2008 general election (over 29% of all votes cast in the election), and over 200,000 in the 2010 general election. *See id*. The number of voters affected here (*i.e.*, the magnitude of the burden) far exceeds the 100,000 voters affected in the *OFA* case, where the elimination of only 3 out of 35 days of early voting was deemed a constitutional violation. *Compare with OFA*, 697 F.3d at 431.

The nature of the burden on the right to vote is also severe, in several respects. *First*, the habitual and sensitive nature of voting is such that disruptions to voting habits raise costs for voters and deter participation. *See* JA1097 (Burden Rpt.); *Frank*, 2014 WL 1775432, at *17 (finding, under a *Burdick* analysis, that Wisconsin's voter ID requirement violated the Fourteenth Amendment because increased costs associated with voting would deter eligible voters). As with the elimination of SDR, this is particularly

true for the 1.5 million North Carolinians living in poverty, who are more likely to have lower educational attainment levels; are less likely to own homes or have access to vehicles; are less likely to be able to arrange for transportation; are more likely to have inflexible work schedules; are generally more overwhelmed by the countless sources of stress that adequate financial resources would ease; and often lack resources necessary to participate in many basic societal activities. *See* JA1146-47 (Duncan Rpt.). Socioeconomic challenges such as those facing North Carolina's 1.5 million poor residents make having one less weekend on which early voting can be accomplished a severe burden, sufficient to establish a constitutional violation. *See OFA*, 697 F.3d at 431 ("Plaintiffs did not need to show that they were legally prohibited from voting, but only that burdened voters have few alternative means of access."); *Frank*, 2014 WL 1775432, at *5 (the Constitution "require[s] invalidation of a law when the state interests are insufficient to justify the burdens the law imposes on subgroups of voters").

Second, individuals with decades of experience in administering elections in North Carolina, including the former Executive Director of the North Carolina SBOE, attest that the loss of a week of early voting will burden voters in many ways, preventing thousands of voters from voting; unnecessarily lengthening lines to vote; overwhelming pollworkers (and rendering them more prone to making mistakes); and ultimately reducing turnout in comparison to comparable elections. *See* JA138, JA142, JA143, JA144 (Bartlett Decl. ¶¶ 6, 16, 22, 25); JA122-22, JA224-25 (Gilbert Decl. ¶¶ 11-12, 18-19). These problems will not be limited to the early voting period—they will spread to Election Day itself and

cause significant burdens for all voters. Indeed, the North Carolina SBOE conducted a 2011 study which "concluded that a cut to early voting would likely increase waiting times for voters during early voting and on Election Day." JA141, JA143 (Bartlett Decl. ¶¶ 15, 22); s*ee also* JA224-25 (Gilbert Decl. ¶ 19) ("Voters will experience longer lines during the shortened early voting period and on Election Day," which "will end up disenfranchising discouraged voters"); JA365-66 (McKissick Decl. ¶¶ 43-45).

This common-sense proposition—that encouraging voters to cast their ballots before Election Day reduces congestion on Election Day itself—is supported by academic work studying the effects of early voting. *See* JA619-20 (Gronke Rpt. ¶ 32); JA835, JA866, JA867 (Stewart Rpt. ¶¶ 132, 207-208, 213). As explained by Plaintiffs' expert witness Dr. Allen, queuing theory—a well-established scientific methodology routinely applied in fields involving operations and logistics—can quantify the increased waiting time that voters can expect with the reduction in early voting. *See* JA1405-18 (Allen Rpt. ¶¶ 12-31). According to Dr. Allen's analysis, if even 3.8% of the voters from the now-eliminated early voting days had attempted to vote on Election Day in 2012, the result would have been to more than double average waiting times to vote; in a worst-case scenario, average waiting times to vote could reach 3 hours. *See id.* JA1416-1418, JA1423-24 ¶¶ 29-31, 42-43. These excessive waiting times rise to the level of a constitutional violation, as "there can come a point when the burden of standing in a queue ceases to be an inconvenience or annoyance and becomes a constitutional violation because it, in effect, denies a person the right to exercise his or her franchise." *NAACP*

State Conference of Pa. v. Cortés, 591 F. Supp. 2d 757, 764 (E.D. Pa. 2008). Dr. Allen's analysis confirms that excessive waiting times in North Carolina have the potential to deter thousands of voters, with a low-end estimate of nearly 18,000 voters being deterred by longer lines. *See* JA1423-25 (Allen Rpt. ¶¶ 43-45); JA866-87 (Stewart Rpt. ¶ 210).

Florida's experience after reducing its early voting period for the 2012 election (while maintaining roughly the same aggregate number of hours) confirms that the early voting cut in North Carolina will significantly burden voters.[4] Election administrators and national news media reported longer lines during early voting and on Election Day (with the last ballot being cast nearly 7 hours after the polls closed) because of the increased volume in voters who could not vote during early voting. JA619-20 (Gronke Rpt. ¶ 32); JA437 (Sancho Decl. ¶¶ 6, 11); JA432 (Sawyer Decl. ¶ 12). According to one estimate, over 200,000 voters ultimately gave up in frustration. JA438 (Sancho Decl. ¶ 11).

d. The Elimination of Pre-Registration Substantially Burdens the Right to Vote

As set forth below, over 160,000 young citizens pre-registered to vote from 2010 to 2013. *See infra* at Section II.D.2. In light of HB 589, young citizens must now find a different way to register to vote, and some of these citizens will surely fail to register by the close of books and therefore be prevented from voting.

[4] As discussed above, the provision of H.B. 589 that purportedly mandates that counties offer the same aggregate number of early voting hours in 2014 as they did in 2010 does not significantly mitigate the burden on voters, in large part because nearly 1.4 million people of voting age reside in the nearly 40 counties that obtained an exemption from complying with that requirement in the May 2014 primary alone. JA1974 (Requests for Reduction of One-Stop Voting Spreadsheet).

e. Removing Discretion from CBOEs to Keep Polling Locations Open for an Extra Hour Also Burdens the Right to Vote

In light of HB 589's potential to create longer lines, the elimination of discretion from CBOEs to keep polling locations open for an extra hour in extraordinary circumstances further burdens the right to vote. This change will burden voters whose polling locations would have been kept open for an extra hour but for the change, as such voters will have a more limited time span in which to vote and will likely have to wait in longer lines (as the votes in the affected precincts will be spread over a shorter period of time). Former Executive Director of the SBOE Gary Bartlett explains that while the discretion to keep the polls open for an extra hour "was an allowance that was rarely needed, … it made a real difference when emergencies happened earlier in the day." JA144 (Bartlett Decl. ¶ 26); *see also* JA365 (McKissick Decl. ¶ 44) (Durham County "has historically had occasional problems with voting machines and, prior to the introduction of early voting, long lines on Election Day," and the removal of discretion to keep polling places open "takes away a means of addressing such Election Day problems"). The elimination of this discretion will therefore have a real, negative impact on voters when such emergencies occur, and will materially burden the right to vote.

f. The Lack of Adequate Public Education on HB 589 Heightens the Burdens Described Above

The burdens on the right to vote described above will be exacerbated because of the marked lack of voter education efforts undertaken by the state to inform voters about the number of ways in which their voting experience will be dramatically different after

HB 589. The July 25, 2013, fiscal note accompanying the full-bill version of HB 589 noted that "[t]here is no designated level of outreach and education required in this bill; therefore, it is assumed that much of it will be provided through the outreach workers and local boards of elections." JA2373 (Leg. Fiscal Note). No new money is appropriated to the CBOEs, which the General Assembly simply assumed would be providing outreach and education to voters. Inadequate voter education, particularly in the light of significant changes in the conduct of elections, will reduce participation. *See* JA294 (Willingham Decl. ¶ 25); JA417-18 (Taylor Decl. ¶ 11); JA125-26 (Stohler Decl. ¶¶ 13-14).

2. The State's Justifications Are Inadequate

Under *Burdick*, the Court must weigh these substantial burdens on the right to vote against the interests put forward by the state. 504 U.S. at 434. The Fourth Circuit has rigorously applied the *Burdick* examination of a state's purported interests, recognizing that "electoral integrity does not operate as an all-purpose justification flexible enough to embrace any burden, malleable enough to fit any challenge and strong enough to support any restriction." *McLaughlin*, 65 F.3d at 1228 (quotations omitted). Here, the state has utterly failed to demonstrate an adequate basis for the challenged restrictions, advancing rationales for these provisions that are tenuous at best. *See supra* at Section II.A.4. Under these circumstances, the challenged provisions, individually and collectively, constitute an undue burden on the right to vote in violation of the Fourteenth Amendment.

D. The Challenged Provisions Violate The 26th Amendment

In enacting HB 589, the General Assembly also intentionally discriminated against young North Carolinians. This intent is reflected in HB 589's elimination of pre-registration for 16 and 17 year olds and mandatory high school voter-registration drives—changes that make registering to vote materially more difficult for tens of thousands of young North Carolinians and that were made without any plausible non-discriminatory basis. This intent is also demonstrated by HB 589's inclusion of a voter ID law that permits military IDs, veterans' IDs, and certain types of tribal enrollment cards, *but not college or high schools IDs*, to be used for voter ID, in addition to other provisions in HB 589 that consistently result in disproportionate burdens on young voters. In light of this targeting of young voters, it is no surprise that, just months before HB 589 was enacted, a bill was introduced in the Senate that would have prevented a parent from claiming a tax exemption for a child registered to vote at an address other than the parent's address or that a primary sponsor of that bill stated in an interview that college students "don't pay squat in taxes" and "skew the results of elections in local areas." *See infra* at Section II.D.2. Taken together, these facts show that HB 589 was intended to burden young citizens, in violation of the 26th Amendment.

1. The 26th Amendment Bars Age-Based Discrimination in Voting

The 26th Amendment protects the right to vote of "citizens of the United States, who are eighteen years of age or older," from "deni[al] or abridge[ment] by … any State on account of age." That the text of this amendment tracks that of the 15th and 19th

Amendments, which prohibit the denial or abridgement of voting rights on account of race and sex, respectively, is no accident: "The authors of the [26th] Amendment consciously modeled it after the [15th] and [19th]." Note, Eric S. Fish, *The Twenty-Sixth Amendment Enforcement Power*, 121 Yale L.J. 1168, 1175 (2012).[5] Accordingly, consistent with the 15th and 19th Amendments, the 26th Amendment prohibits age-based discrimination in the voting context. *Accord Walgren v. Howes*, 482 F.2d 95, 101 (1st Cir. 1973) (noting that "the [15th] and [19th] Amendments served as models for the [26th]" and stating that "[m]ost relevant would seem to be the general admonitory teaching of" *Lane*, 307 U.S. 268, a 15th Amendment case).

Like the 15th Amendment, the 26th Amendment prohibits not just age-based denials of the right to vote but also age-based impediments to that right. "[T]he backers of the amendment argued … that the frustration of politically unemancipated young persons, which had manifested itself in serious mass disturbances, occurring for the most part on college campuses, would be alleviated and energies channeled constructively through the exercise of the right to vote." *Walgren*, 482 F.2d at 100-01; *see also Sloane v. Smith*, 351 F.Supp. 1299, 1304 (M.D. Pa. 1972); *Colo. Project-Common Cause v. Anderson*, 495 P.2d 220, 223 (Colo. 1972). Further, "[t]he goal was not merely to

[5]*See also* JA2722 (S. Rep. No. 92-26 at 2 (1971)) (stating the Amendment "embodies the language and formulation of the 19th amendment, which enfranchised women, and that of the 15th amendment, which forbade racial discrimination at the polls"); 117 Cong. Rec. 7533 (1971) (statement of Chairman of the House Judiciary Comm.) (same); *id*. at 7534 (statement of Rep. Richard Poff) (same); *id.* at 7539 (statement of Rep. Claude Pepper) ("What we propose to do in the Federal enfranchisement of those 18, 19, and 20 years of age is exactly what we did in enfranchising the black slaves with the 15th amendment and exactly what we did in enfranchising women in the country with the 19th amendment.").

empower voting by our youths but was affirmatively to encourage their voting, through the elimination of unnecessary burdens and barriers, so that their vigor and idealism could be brought within rather than remain outside lawfully constituted institutions." *Worden v. Mercer Cnty. Bd. of Elections*, 294 A.2d 233, 243 (N.J. 1972).

2. HB 589 Was Intended To Discriminate Against Young Voters

As previously discussed, unlawful discriminatory purpose may be shown by either direct or circumstantial evidence, including that the law places particular burdens on young voters as a group. *See supra* at Section II.B. Here, the evidence establishes that the challenged provisions, both individually and collectively, were motivated, at least in part, by an intent to discriminate against North Carolina's young citizens.

Pre-Registration and Mandatory Voter-Registration Drives. Perhaps most probative of the General Assembly's intent is its elimination of pre-registration for 16 and 17 year olds and mandatory voter-registration drives in high schools. These provisions pertain only to young citizens; the burden from their elimination will be borne entirely by those citizens. And that burden will be significant: over 160,000 citizens pre-registered to vote from 2010 to 2013. JA1433, JA1436 (Levine Rpt.).

Yet, apart from Senator Rucho pointing out that many other states do not offer pre-registration, *see* JA2478 (7 /24/13 N.C. Senate Sess. Tr. at 37:1-7), the sole basis provided for the elimination of pre-registration—which promoted the importance of voting and civic awareness among young citizens, *see* JA243 (Adams Decl. ¶ 29); JA268 (Hall Decl. ¶ 26); JA411 (Martin Decl. ¶ 59); JA174 (H. Michaux Decl. ¶ 51); JA190-91

(Stein Decl. ¶ 29); JA293 (Willingham Decl. ¶ 20)—was Senator Rucho's assertion[6] that there was confusion about it, as evidenced by the situation of his son, who pre-registered and thought he was supposed to vote in the prior election, even though he was not yet eighteen years old at the time of the election. *See also* JA1878 (7/29/13 *Widespread Voter Fruad Not an Issue in NC: Report*). And aside from a single reference to the provision that previously required high school voter-registration drives as "an old provision," Statement of Rep. Lewis, JA2525 (7/25/13 N.C. House Sess. Tr. at 21:13-15), no explanation was given for the elimination of these voter-registration drives.

These justifications are not only unsubstantiated—SBOE Executive Director Strach testified that she had never heard of any confusion regarding pre-registration, JA529 (Strach Dep. Tr. 307:14-308:10); *see also* JA230 (Gilbert Decl. ¶ 35)—they are patently unreasonable. If a young person pre-registered to vote and mistakenly attempted to cast a ballot at the polls, election officials would realize that the voter was not registered and not permit him to cast a ballot. *See* JA529 (Strach Dep. Tr. at 307:14-308:10). Adults mistakenly appear at the polls believing they are registered in every election, *id*. JA529 (at 308:11-25), but that is no reason to make it *more difficult* for them to register. Far more plausible than these unsupportable and illogical explanations is the conclusion that pre-registration and mandatory voter-registration drives were eliminated to reduce the registration rate and turnout of young voters. *Cf. Church of the Lukumi*

[6]*See* Statement of Sen. Rucho, JA2455 (7/23/13 N.C. Senate Sess. Tr. at 22:3-23); Statement of Sen. Rucho, JA2470 (7/24/13 N.C. Senate Sess. Tr. at 6-7).

Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 538 (1993) ("It is not unreasonable to infer, at least when there are no persuasive indications to the contrary, that a law which visits 'gratuitous restrictions' on religious conduct seeks not to effectuate the stated governmental interests, but to suppress the conduct because of its religious motivation.").

Egregiously, the State is also using HB 589 as a justification to erect an additional barrier to registration for young voters. In deposition testimony, Strach—a close personal associate of one of the architects of HB 589, JA547 (Strach Dep. at 17:19-18:7)—confirmed that the SBOE issued a directive to the DMV to stop registering 17 year olds who will turn 18 by the general election, despite the fact that they are indisputably eligible to register and vote in that election. *Id*. JA531, JA1891 at 314:21-316:21, Ex. 59; *see also id*. at JA530, JA1891 at 310:16-311:125, Ex. 57; JA1895 (2013 VIVA Update to Elections Directors). This directive is not required by HB 589's elimination of pre-registration, as Strach conceded, since these 17 year olds are not pre-registrants but, instead, are no different from all other eligible voters. *Id.* JA530, JA1880, JA1891 at 309:1-311:125, Exs. 56, 57. Yet, Strach admitted, no other class of eligible voters is prohibited from registering at the DMV. *Id.* JA531-34, JA534-35, JA1892 at 316:22-326:25; 328:6-330:22, Ex. 60. Even more remarkably, Strach explained that SBOE issued the directive specifically to the DMV in order to maximize the effect of the directive, explaining that "there's a lot of voter registration activity that goes on [at the DMV]." *Id.* JA534 at 325:2-3. As a result, one of the most commonly used methods for registering to vote—which North Carolina is required to offer under the National Voter Registration

Act, 42 U.S.C. § 1973(gg)—is unavailable to young voters. No other class of voters faces this impediment to registration; by its own admission, SBOE has singled out 17-year-old voters. JA535 (Strach Dep. Tr. at 330:-18-22).

SDR. SDR "made it much easier for students and other first time voters to participate in the electoral process as they were not required to master the nuances of [North Carolina] electoral law regarding absentee ballots or the date by which they must register in order to participate in the upcoming election." JA409 (Martin Decl. ¶ 50); *see also* JA335 (Harrison Decl. ¶ 49); JA317 (Glazier Decl. ¶ 64); JA172 (H. Michaux Decl. ¶ 43); *cf.* JA 1441-42 (Levine Rpt.) (explaining that "[m]issing the deadline for registration is an especially important problem for young voters," who are more likely than older citizens to be unregistered and to move); JA227, JA231 (Gilbert Decl. ¶¶ 25, 38); JA267 (Hall Decl. ¶ 23). Predictably, SDR has a positive effect on youth turnout, both in absolute and relative terms.[7] In North Carolina in the 2012 presidential election, "young people were 2.6 times more likely to utilize [same-day] voter registration than older voters." JA1438-39 (Levine Rpt.); *see also* JA335 (Harrison Decl. ¶ 49); JA382 (Kinnaird Decl. ¶ 33). The elimination of SDR therefore burdens young voters in particular and will likely result in a reduction in their share of the vote.

As set forth above, the justifications provided for the elimination of SDR are not defensible and, it follows, likely pretextual. *See supra* at Section II.A.4. Indeed, some

[7]*See* Levine Rpt. at 13 (states with SDR saw an increase in 18-24-year-old turnout of 5.9% and a significant, but weaker, effect for older voters); *id.* at 12 (noting another study that concludes that SDR raises turnout by roughly four percent and that "18 to 21 year olds benefit most").

senators indicated that they supported the elimination of SDR, at least in part, because they wanted to make it more difficult for individuals to register to vote. *See id*. Given that unregistered eligible voters are disproportionately young and that young voters disproportionately utilized SDR in North Carolina, as well as the other evidence of discriminatory intent discussed herein, it is reasonable to conclude that the General Assembly eliminated SDR, at least in part, to suppress the youth vote.

Out-of-Precinct Voting. "Many college students are registered to vote at their family's home address," and "young people are less likely to have a license or to drive than older people," meaning that "getting to home precincts may pose a hardship for college students." JA1455 (Levine Rpt.); *see also* JA1524 (7/14/08 Ltr. from S. Lawrence) (noting that freshman at Fayetteville State University were prohibited from having vehicles on campus); JA333, JA333-34 (Harrison Decl. ¶¶ 40, 43). Indeed, young voters nationally who did not vote were more likely than older voters to say that they could not vote because they were out of town. JA1455 (Levine Rpt.). In addition, students and other transient individuals "are less likely to be familiar with their voting places than those who have lived in a community for years." JA410 (Martin Decl. ¶ 55); *see also id.* JA411¶ 56; JA318 (Glazier Decl. ¶ 70); JA374-74, JA380-81 (Kinnaird Decl. ¶¶ 11, 30). Thus, it is no surprise that "younger voters [in North Carolina] are more likely than older voters to attempt to vote in the incorrect precinct or not report a move." JA1455 (Levine Rpt.); *see also* JA380-81 (Kinnaird Decl. ¶ 30). Nor is it a surprise that out-of-precinct voting, which offsets these issues by permitting many voters who are

away from home or vote at the wrong precinct to have their votes counted, "has been much more important for young voters than for older voters." JA1453 (Levine Rpt.). It follows that the repeal of out-of-precinct voting will disproportionately burden, and in many cases effectively disenfranchise, young voters.

Notwithstanding this impact on young citizens, the General Assembly provided no explanation for the elimination of out-of-precinct voting. The General Assembly's decision to eliminate out-of-precinct voting thus provides strong evidence that in enacting HB 589, it intended to discriminate against young voters.

Early Voting. There is evidence suggesting that reductions in early voting periods are likely to penalize young voters disproportionately. *See* JA1443 (Levine Rpt.). HB 589's reduction in early voting is particularly likely to burden young voters because it removes discretion from CBOEs to permit early voting from 1:00 p.m. to 5:00 p.m. on the Saturday before an election, a time when young voters are especially likely to vote. *See* JA1444-45 (Levine Rpt.). As with other changes effected by HB 589, the legislative record contains no defensible explanation for the reduction in early voting hours. This absence of a reasonable explanation, in conjunction with the disproportionate impact this change is likely to have on young voters, supports an inference that the General Assembly curtailed early voting to make it more difficult for young citizens to vote.

Voter ID. The enactment of strict voter ID requirements further reflects an intent to discriminate against young voters.[8] Among provisional voters who showed ID to vote in North Carolina in the 2012 presidential election, young voters were 14% less likely than older voters to use a North Carolina driver's license and 178% more likely than older voters to use an ID categorized as "other government document." JA1455 (Levine Rpt.) (pattern persisted in 2008 presidential, 2010 general, and 2012 primary and presidential elections). Indeed, in North Carolina in 2013, over 14% of registered voters aged 18 to 25 "may not have [had] a state ID or driver's license." *Id.* at 20; *see also* JA1612 (2013 DMV-ID Analysis) (no match to DMV records provided to SBOE in December 2012 could be found for 89,964 voters under age 26 registered in North Carolina as of January 1, 2013). Further, as the SBOE recognized in 2012, "[c]ollege students who live in dormitories or other campus residences may have difficulty producing a document that lists their campus address." JA1544 (8/28/12 SBOE Mem.)

Nonetheless, HB 589 does not permit high school or university IDs to be used as voter IDs. The bill does, however, permit military IDs, veteran's IDs, and certain types of tribal enrollment cards to be used as voter IDs. § 2.1. The General Assembly's decision to permit some exceptions to its generally strict limitations on the types of ID that can be

[8]Because the voter ID requirement does not go into effect until 2016, Plaintiffs are not seeking to enjoin the implementation of that requirement at this time (although certain Plaintiffs are seeking to enjoin the "soft rollout" that will take place in 2014). Nonetheless, HB 589's voter ID requirement is highly relevant here, because discriminatory purpose may be inferred from the totality of the facts, *Davis*, 426 U.S. at 242, and the General Assembly's intent in passing the voter ID provisions is plainly probative of its intent in passing other HB 589 provisions.

used for voting, but not to make an exception for high school or college IDs, is strong evidence that the legislature *wanted* to make it difficult for young citizens to vote.

Moreover, the legislative history confirms that the General Assembly purposefully omitted college and high school IDs from the list of approved forms of ID. While the original version of HB 589 was being considered in the House, legislators repeatedly asserted that in determining what types of voter ID would be acceptable, they were drawing the line at "government-issued IDs."[9] Even then, however, the legislative intent to discriminate against particularly young voters was evidenced by the House Elections Committee's rejection of a proposal to include public high school IDs in the bill's list of examples of government-issued IDs that could be used for voter ID, even though such IDs are government issued. *See* JA2439-43 (4/17/13 N.C. House Elections Comm. Tr. at 62:19-66:6); *see generally Arlington Heights*, 429 U.S. at 267 ("Substantive departures too may be relevant, particularly if the factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached.").

Further, although HB 589 as initially passed by the House would have permitted voters to identify themselves with IDs issued by public universities, *see* JA2115, Fifth Ed. of HB 589 § 4, at 3, the full bill does not. Thus, the House jettisoned the distinction it had drawn between government-issued and private IDs, specifically to the detriment of

[9]*See* Statement of Rep. Murry 4/10/13 N.C. House Elections Comm. Tr. at 39:10-39:17; 41:5-9; Statement of Rep. Samuelson 4/24/13 N.C. House Sess. Tr. at 84:20-25; Statement of Rep. Samuelson 4/17/13 N.C. House Elections Comm. Tr. at 33:9-17; Statement of Rep. Warren 4/17/13 N.C. House Elections Comm. Tr. at 19:19-23; Statement of Rep. Stam 4/23/13 N.C. House Appropriations Comm. Tr. at 35:13-19..

young voters. There is only one plausible explanation for the decision of the House (which, unlike the Senate, had extensively examined the topic of voter ID) to defer to the Senate on this matter: this change makes it harder for young voters to vote. *See* JA347-48 (Goodman Decl. ¶ 20); *see also* Gov 1287, 1297 (containing written comments by member of Governor McCrory's staff that demonstrate that the Governor's own staff could not identify a basis for this "controversial" decision). Thus, the passage of the voter ID provisions at issue and the relevant legislative history further establish that HB 589 was intended to discriminate against young citizens.

Discretion to Extend Polling Hours. The removal from CBOEs of discretion to keep the polls open for an extra hour also supports the conclusion that HB 589 was intended to discriminate against young voters. The elimination of this discretion will likely result in longer lines at the polls, as the ability of CBOEs to alleviate long lines (often caused by unexpected failures of equipment or higher than anticipated voter turnout) will be reduced. *See* JA365 (McKissick Decl. ¶ 44) (explaining that Durham County, where Duke and North Carolina Central are located, "has historically had occasional problems with voting machines and, prior to the introduction of early voting, long lines on Election Day," and that HB 589, which removed discretion from the CBOE to keep polling places open for an additional hour if necessary, "takes away a means of addressing such Election Day problems"). Because young voters are disproportionately low-propensity voters, *see* JA1443 (Levine Rpt.), they are more likely than older voters to be deterred from voting, and their share of the vote will thus be reduced, by such lines.

Given that the legislative record contains no explanation for removing this discretion from CBOEs, as well as the other evidence discussed that the General Assembly acted with discriminatory purpose in passing HB 589, an inference should be drawn that this change too was motivated by an intent to reduce the youth vote.

Other Proposed Legislation. Defendants have objected to every attempt to obtain discovery from members of the General Assembly as to their intent, claiming a broad "legislative immunity." Despite this evasion, the legislative record contains important and compelling circumstantial evidence that a particular focus of the General Assembly in 2013 was to make voting more difficult for young North Carolinians. Specifically, Senate Bill 667 ("SB 667"), which was introduced in 2013 and sponsored by six senators who later voted for HB 589, *see* SB 667, Ed. 1, at 1, would have prevented a parent from claiming a tax exemption for a child registered to vote at an address other than the parent's address. *Id*. at 1, lns. 1-4, § 1(a). SB 667, in short, would have imposed a voter-registration tax on college students, and the parents of college students, who lawfully registered to vote at their college addresses. *Cf. United States v. Texas*, 445 F. Supp. 1245 (S.D. Tex. 1978), *aff'd mem. sub nom. Symm v. United States*, 439 U.S. 1105 (1979). And a primary sponsor of the bill left no doubt about its discriminatory purpose by stating, in an interview three days after the introduction of the bill, that college students "don't pay squat in taxes" and "*skew the results of elections* in local areas."JA1818 (4/10/13 *NC Bills Could Cut Early Voting, Affect College Students*) (emphasis added); *see also* JA1808 (4/3/13 *Bill Cook Seeks to Put Integrity Back In Our Elections Procedures*)

(statement by Executive Director of the Voter Integrity Project of North Carolina, that "[w]e've gotten a bill into the Senate" and that, "[i]f other states pick up this legislation, it will shift the landscape of college town voting all across the nation").

The introduction of SB 667 and contemporaneous statements of its supporters thus provide strong evidence that as of April 2013, members of the Senate were seeking to pass legislation that punished young voters for registering at their college addresses. It is not plausible that just months later, these same senators voted for HB 589 (as all of the SB 667 sponsors did), JA2371 (HB589 Senate Roll-Call Tr.), a bill that heavily burdens young voters, without the intent to prevent such voters from "skew[ing] the results of elections" by having their votes counted. *See Arlington Heights*, 429 U.S. at 267 (evidence of decisionmaker's purpose may include historical background of and sequence of events leading up to challenged decision). Indeed, the same sentiments offered as support for SB 667 were later echoed by a sponsor of HB 589. *See* JA1886 (8/21/13 *Blust says Voting Changes are Meant to Strike a "Proper Balance"*) (claiming to "have for years heard complaints that college students ought to vote in their home towns").

Totality of the Relevant Facts. In enacting HB 589, the General Assembly passed two provisions that exclusively, and several provisions that disproportionately, burden the voting rights of young citizens. In some cases no rationale was given for these provisions; in others, the explanation does not withstand scrutiny. *Cf. Busbee v. Smith*, 549 F.Supp. 494, 517 (D.D.C. 1982) ("The absence of a legitimate, non-racial reason for a voting change is probative of discriminatory purpose, particularly if the factors usually

considered by the decision makers strongly favor a decision contrary to the one reached.") (quotations omitted). Moreover, these provisions were enacted through an extraordinary process. Viewing all of the circumstances as a whole, it is clear that the challenged provisions were passed, at least in part, with the intent to discriminate against young voters. *See Walgren*, 482 F.2d at 102 ("'Fencing out' from the franchise a sector of the population because of the way [its members] may vote is constitutionally impermissible."); *see generally Davis*, 426 U.S. at 242 ("[A]n invidious discriminatory purpose may often be inferred from the totality of the relevant facts."). Plaintiffs are therefore likely to succeed on the merits of their 26th Amendment claim.[10]

CONCLUSION

For these reasons, Plaintiffs respectfully request that the Court preliminary enjoin implementation of the challenged provisions pending the outcome of this litigation.

[10]The 15th Amendment's proscription of race-based discrimination in the voting context is absolute. *Rice v. Cayetano*, 528 U.S. 495, 512 (2000); *Prejean v. Foster*, 227 F.3d 504, 519 (5th Cir. 2000). It follows that the 26th Amendment's proscription of age-based discrimination in voting is also absolute. And even if it were not, because the challenged provisions fail to satisfy the *Burdick* test, *see supra* at Section II.C.2, they cannot withstand strict scrutiny.

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EXHIBIT C

IN THE

United States Court of Appeals for the Fourth Circuit

No. 16-1468 (L)

NORTH CAROLINA STATE CONFERENCE OF THE NAACP; ROSANELL EATON; EMMANUEL BAPTIST CHURCH; BETHEL A. BAPTIST CHURCH; COVENANT PRESBYTERIAN CHURCH; BARBEE'S CHAPEL MISSIONARY BAPTIST CHURCH, INC.; ARMENTA EATON; CAROLYN COLEMAN; JOCELYN FERGUSON-KELLY; FAITH JACKSON; MARY PERRY; MARIA TERESA UNGER PALMER,

Plaintiffs-Appellants

and

JOHN DOE 1; JANE DOE 1; JOHN DOE 2; JANE DOE 2; JOHN DOE 3; JANE DOE 3; NEW OXLEY HILL BAPTIST CHURCH; CLINTON TABERNACLE AME ZION CHURCH; BAHEEYAH MADANY,

Plaintiffs

v.

PATRICK L. MCCRORY, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF NORTH CAROLINA; KIM WESTBROOK STRACH, IN HER OFFICIAL CAPACITY AS A MEMBER OF THE STATE BOARD OF ELECTIONS; JOSHUA B. HOWARD, IN HIS OFFICIAL CAPACITY AS A MEMBER OF THE STATE BOARD OF ELECTIONS; RHONDA K. AMOROSO, IN HER OFFICIAL CAPACITY AS A MEMBER OF THE STATE BOARD OF ELECTIONS; JOSHUA D. MALCOLM, IN HIS OFFICIAL CAPACITY AS A MEMBER OF THE STATE BOARD OF ELECTIONS; PAUL J. FOLEY, IN HIS OFFICIAL CAPACITY AS A MEMBER OF THE STATE BOARD OF ELECTIONS; MAJA KRICKER, IN HER OFFICIAL CAPACITY AS A MEMBER OF THE STATE BOARD OF ELECTIONS; JAMES BAKER, IN HIS OFFICIAL CAPACITY AS A MEMBER OF THE NORTH CAROLINA STATE BOARD OF ELECTIONS,

Defendants-Appellees

On Appeal from the United States District Court
for the Middle District of North Carolina (No. 1:13-cv-00658-TDS-JEP)

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Intervenors/Plaintiffs-Appellants

and

CHARLES M. GRAY; ASGOD BARRANTES; MARY-WREN RITCHIE

Intervenors/Plaintiffs

v.

STATE OF NORTH CAROLINA; JOSHUA B. HOWARD, IN HIS OFFICIAL CAPACITY AS A MEMBER OF THE STATE BOARD OF ELECTIONS; RHONDA K. AMOROSO, IN HER OFFICIAL CAPACITY AS A MEMBER OF THE STATE BOARD OF ELECTIONS; JOSHUA D. MALCOLM, IN HIS OFFICIAL CAPACITY AS A MEMBER OF THE STATE BOARD OF ELECTIONS; PAUL J. FOLEY, IN HIS OFFICIAL CAPACITY AS A MEMBER OF THE STATE BOARD OF ELECTIONS; MAJA KRICKER, IN HER OFFICIAL CAPACITY AS A MEMBER OF THE STATE BOARD OF ELECTIONS; PATRICK L. MCCRORY, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF NORTH CAROLINA

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v.

STATE OF NORTH CAROLINA; JOSHUA B. HOWARD, IN HIS OFFICIAL CAPACITY AS A MEMBER OF THE STATE BOARD OF ELECTIONS; RHONDA K. AMOROSO, IN HER OFFICIAL CAPACITY AS A MEMBER OF THE STATE BOARD OF ELECTIONS; JOSHUA D. MALCOLM, IN HIS OFFICIAL CAPACITY AS A MEMBER OF THE STATE BOARD OF ELECTIONS; PAUL J. FOLEY, IN HIS OFFICIAL CAPACITY AS A MEMBER OF THE STATE BOARD OF ELECTIONS; MAJA KRICKER, IN HER OFFICIAL CAPACITY AS A MEMBER OF THE STATE BOARD OF ELECTIONS; PATRICK L. MCCRORY, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF NORTH CAROLINA

Defendants-Appellees

On Appeal from the United States District Court
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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, and Local Rule 26.1, all of the undersigned Plaintiffs-Appellants and Intervenors-Appellants herein hereby disclose the following:

1. No party is a publicly held corporation or other publicly held entity.

2. No party has any parent corporations.

3. No publicly held company owns 10% or more of the stock of a party.

4. No publicly held corporation or other publicly held entity has a direct financial interest in the outcome of the litigation.

5. No party is a trade association.

6. The case does not arise out of a bankruptcy proceeding.

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INTRODUCTION

"There is no right more basic in our democracy than the right to participate in electing our political leaders." *McCutcheon v. FEC*, 134 S. Ct. 1434, 1440-41 (2014) (Roberts, C.J., plurality op.). For that reason, the right to vote enjoys extraordinary protections as a matter of both statutory and constitutional law. These voting protections have been earned, recognized, and protected through the efforts, sweat, and blood of many over generations. Voting recognizes the dignity of every American and is the destiny of our democracy.

In a brazen attempt to ignore these protections and abridge the right of many minorities to freely exercise the right to vote, the North Carolina legislature enacted sweeping changes to the State's voting and registration practices in 2013. These changes, encompassed in House Bill 589 ("HB589"), reduced or eliminated practices—including same-day registration ("SDR"), out-of-precinct ("OOP") voting, early voting, and pre-registration—which had been specifically introduced to increase voter participation and which were disproportionately used by African Americans and Latinos as compared to white voters. And it introduced a voter photo identification requirement in the face of clear

evidence that African Americans are less likely to possess the requisite ID than whites. The Defendants do not dispute these facts, and the District Court readily acknowledged them.

Despite recognizing the undisputed evidence of disproportionate use on the part of these minority groups, the District Court erroneously concluded that the challenged provisions of HB589 did not violate Section 2 of the Voting Rights Act, or the Fourteenth, Fifteenth, or Twenty-Sixth Amendments to the U.S. Constitution. And it did so in clear contravention of the relevant legal standards, and in particular, this Court's earlier guidance in *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 246 (4th Cir. 2014) ("*LWVNC*").

In *LWVNC*, this Court identified two—and only two—elements to finding a Section 2 violation: (1) the challenged practice or procedure "imposes a discriminatory burden," meaning that it "disproportionately impact[s] minority voters"; and (2) the disproportionate impact is "in part caused by or linked to social and historical conditions that have or currently produce discrimination against members of the protected class." *Id.* at 245. On each of these scores, the case-critical evidence remains undisputed: African Americans have disproportionately used

each of the voting and registration practices that were targeted by HB589, such that the repeal of those measures disproportionately burdens minority voters. And North Carolina's African Americans continue to bear the effects of racial discrimination and subjugation in all aspects of social, economic, and political life, such that they will be most keenly affected by the burdens imposed by the challenged provisions.

Nonetheless, the District Court's latest opinion upholds the changes made by HB589 by introducing irrelevant elements—including the laws in other States and the supposed ability for minority groups to adapt to changes in electoral rules—that have no basis in the law. This Court has previously rejected those arguments and should do so again now. The undisputed factual evidence combined with the straightforward legal principles this Court has already identified require reversal of the District Court's judgment and entry of judgment in favor of the Plaintiffs.

STATEMENT OF JURISDICTION

Plaintiffs filed these actions pursuant to 42 U.S.C. § 1983 and Section 2 of the Voting Rights Act, 52 U.S.C. § 10301. The District Court exercised jurisdiction pursuant to 28 U.S.C. §§ 1331, 1343(a)(3), and 1357, and 42 U.S.C. §§ 1983 and 1988, and entered final judgment on April 25, 2016. This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether the District Court erred in concluding that HB589 does not violate Section 2 of the Voting Rights Act.

2. Whether the District Court erred in concluding that HB589 does not violate the Fourteenth or Fifteenth Amendments to the United States Constitution.

3. Whether the District Court erred in concluding that HB589 does not violate the Twenty-Sixth Amendment to the United States Constitution.

STATEMENT OF THE CASE AND FACTS[1]

A. Racial Discrimination and Inequality in North Carolina

"North Carolina has a sordid history dating back well over a century," including "Jim Crow laws and other forms of segregation" touching upon every social and economic aspect of life. JA24711, JA24715 (Op. 227, 231). For decades, North Carolina enforced "a literacy test and other laws that had the effect of suppressing the vote of African Americans and supporters of minority political parties." JA24715 (Op. 231). As the District Court found, "African Americans experience socioeconomic factors that may hinder their political participation generally," and these "socioeconomic disparities experienced by African Americans can be linked to the State's disgraceful history of discrimination." JA24727 (Op. 243).

Against this backdrop, North Carolina adopted early voting, OOP voting, SDR, and pre-registration between 2000 and 2012 "to increase voter participation." *LWVNC*, 769 F.3d at 246; *see also id.* at 232-34. It

[1] The Plaintiffs provide an abbreviated listing of the facts here and incorporate the Statement of the Case provided in the brief filed today by the United States.

is undisputed that "African Americans disproportionately used" these new practices, as the District Court found:

- SDR: African Americans comprised 35.5% of registrants during the SDR period for the 2008 election and 32.0% of registrants during the 2012 SDR period, which exceeded their roughly 22% proportionate share of all registered voters. JA24647 (Op. 163).
- OOP Voting: Compared to their share of the electorate, African-American voters were disproportionately more likely than whites to cast an OOP provisional ballot in the elections prior to HB589. JA24663 (Op. 179).
- Early Voting: In the presidential elections of 2008 and 2012, over 70% of black voters used early voting compared to just over 50% of white voters. JA18042 n.64. African Americans also disproportionately used the first seven days of early voting. JA24616 (Op. 132).
- Pre-registration: In 2012, 30% of pre-registrants were African American, compared to 22% of all registered voters. JA24669-70 (Op. 185-86).

During this period, the African-American registration rate increased from 81.1% (9.1 points lower than the white registration rate) to 95.3% (7.5 points above it), and its ranking for youth registration increased from 43rd to 8th in the nation. *See* JA24643 (Op. 159), JA3944, JA3947-48.

Turnout also surged. Defendants' own expert acknowledged that, between 2000 and 2012, North Carolina experienced the largest increase in African-American turnout in the country. *See* JA19837-38.

Youth turnout similarly soared, moving North Carolina from 31st to 10th in the nation. JA3944, JA3947-48.

B. House Bill 589

In this context of "unprecedented gains by African Americans in registration and turnout," and while in possession of "data on disparate use of early voting, SDR, and OOP voting by African Americans," the General Assembly enacted HB589 in July 2013. JA24895, JA24960 (Op. 411, 476). Originally limited to voter ID and absentee requirements when it was introduced in the spring of 2013, HB589 expanded considerably in the wake of the Supreme Court's decision in *Shelby County v. Holder*, 133 S. Ct. 2612 (2013), to eliminate modes of participation disproportionately used by African-American and young voters. JA24502, JA24504, JA24507 (Op. 18, 20, 23). Additionally, the original ID requirement became stricter, removing forms of ID that are held disproportionately by minorities (including government, state university, and community college IDs) from the acceptable list of IDs. JA24507, JA24880-81 (Op. 23, 396-97). The District Court found that "whatever the true number of individuals without qualifying IDs,

African Americans are more likely to be among this group than whites" and "are more likely to lack qualifying ID." JA24585-86 (Op. 101-02).

The 2014 midterm election transpired while a stay of this Court's previous decision was in place, and thus were conducted without SDR and OOP voting. *See* JA24531-32 (Op. 47-48). In that general election, "11,993 people registered to vote during the ten-day early-voting period," *i.e.*, the time period when SDR would have been available, and thus they were unable to vote in the election. JA24651 (Op. 167). During that same period, African Americans applied to register at a greater rate than whites. JA4472 & n.97. The District Court also found that 1,387 provisional ballots were not counted because they were cast out of precinct, and that "African American voters disproportionately cast [these OOP] ballots." JA24664 (Op. 180).

SUMMARY OF ARGUMENT

This Court previously found that "[t]here can be no doubt that certain challenged measures in House Bill 589 disproportionately impact minority voters," and that "the disproportionate impacts of eliminating [SDR] and [OOP] voting are clearly linked to relevant social and historical conditions." *LWVNC*, 769 F.3d at 245. It concluded that

the elimination of those provisions constituted a "textbook example of Section 2 vote denial." *Id*. at 246.

The case-dispositive facts have not changed. The District Court found "disproportionate use" by African Americans of SDR, OOP voting, early voting, and pre-registration, and acknowledged that "the educational and socioeconomic disparities suffered by African Americans might suggest that the removed mechanisms would disproportionately benefit African Americans." JA24710, JA24859 (Op. 226, 375). Those findings compel a ruling that HB589 violates Section 2.

And yet the District Court again ruled against Plaintiffs, repeating many of the same errors it made in its preliminary injunction decision. Although purporting to conduct "an 'intensely local' analysis," JA24857 (Op. 373), the Court once again repeatedly compared North Carolina's laws to those of other states, *see, e.g.*, JA24638 (Op. 154) (SDR); JA24662 (Op. 178) (OOP); JA24611 (Op. 127) (early voting), and then relied on that comparison to deny relief, concluding "it would no doubt bear relevance if North Carolina were seeking to return to an electoral system that was not in the mainstream of other States."

JA24960 (Op. 476). In so doing, the District Court ignored this Court's admonition that "Section 2, on its face, is local in nature," and once again committed "grave error" by relying on practices in other states to "suggest[] that a practice must be discriminatory on a nationwide basis to violate Section 2." *LWVNC*, 769 F.3d at 243.

The District Court also claimed to follow this Court's guidance "not to require Plaintiffs to show … that voting mechanisms are 'practically unavailable' in order to establish a § 2 violation," JA24857 (Op. 373) (quoting *LWVNC*, 769 F.3d at 243), yet devoted hundreds of pages to finding that "African Americans did not ***need*** the [eliminated] mechanisms," and that they are "adaptable" to the "many [remaining] easy ways for North Carolinians to register and vote." JA24860 (Op. 376) (emphasis added); JA24833, JA24858 (Op. 349, 374). The court also relied heavily on turnout in 2014, which in the court's view, showed that "African Americans are not only capable of adjusting, but have adjusted." JA24956 (Op. 472). In so doing, the District Court failed to heed this Court's explanation that "nothing in Section 2 requires a showing that voters cannot register or vote under any circumstance," and once again "abused its discretion" by relying on the availability of

other alternate methods to inappropriately "waiv[e] off disproportionately high African American use of certain curtailed registration and voting mechanisms as mere 'preferences.'" *LWVNC*, 769 F.3d at 243. As at the preliminary injunction stage, these errors are fatal to the District Court's Section 2 analysis (as well as its *Anderson-Burdick* ruling under the Fourteenth Amendment).

But the District Court's errors did not cease there. Turning to Plaintiffs' discriminatory intent claims under the Fourteenth, Fifteenth, and Twenty-Sixth Amendments, the court acknowledged that "a plaintiff is not required to prove that 'the challenged action rested ***solely*** on racially discriminatory purposes.'" JA24861-62 (Op. 377-78) (citations omitted). After finding that Plaintiffs' "strongest fact" was that "African Americans disproportionately used" the eliminated practices, JA24863 (Op. 379), and that "the legislature had data on [this] disparate use," JA24895 (Op. 411), the court improperly pivoted to its results finding to cleanse any inference of discriminatory intent, holding that these facts "do[] not mean that the impact of [HB589] … bears more heavily on them" because "North Carolina's remaining mechanisms continue to provide African Americans with an equal

opportunity to participate." JA24863 (Op. 379). Then, without analyzing the legislature's ***actual*** motives or subjecting them to material scrutiny, the court improperly hypothesized that, "[r]egardless of whether or not" the proffered justifications for the law "are true, the legislature could reasonably have believed them to be true." JA24874-75 (Op. 390-91).

The decision below should be reversed in full.

STANDARD OF REVIEW

The Fourth Circuit generally reviews "judgments resulting from a bench trial under a mixed standard of review: factual findings may be reversed only if clearly erroneous, while conclusions of law are examined de novo." *Nat'l Fed'n of the Blind v. Lamone*, 813 F.3d 494, 502 (4th Cir. 2016). If, however, a trial court "bases its findings upon a mistaken impression of applicable legal principles, the reviewing court is not bound by the clearly erroneous standard." *Inwood Labs., Inc. v. Ives Labs., Inc.*, 456 U.S. 844, 855 n.15 (1982); *see also Gilbane Bldg. Co. v. Fed. Reserve Bank of Richmond*, 80 F.3d 895, 905 (4th Cir. 1996) (court reviews mixed questions of law and fact "under a hybrid standard, applying to the factual portion of each inquiry the same

standard applied to questions of pure fact and examining *de novo* the legal conclusions derived from those facts").

ARGUMENT

I. The District Court Erred in Finding No Section 2 Violation.

Notwithstanding its brief references to this Court's directives in *LWVNC*, the District Court applied the incorrect legal standard when considering Plaintiffs' claims under Section 2. Under the proper standard set forth in *LWVNC*, however, Plaintiffs demonstrated that HB589 violates Section 2.

A. The District Court Failed to Apply the *LWVNC* Legal Standard.

A voting practice or procedure violates Section 2 if:

(i) it "imposes a discriminatory burden," meaning that "members of [a] protected class 'have less opportunity than other members of the electorate to participate in the political process …'"; and

(ii) the disproportionate impact is "in part 'caused by or linked to "social and historical conditions" that have or currently produce discrimination against members of the protected class.'"

LWVNC, 769 F.3d at 240, 245 (citations omitted); *see also, e.g.*, *Veasey v. Abbott*, 796 F.3d 487, 504 (5th Cir. 2015), *reh'g en banc granted*, 815 F.3d 958 (5th Cir. 2016); *Ohio State Conference of NAACP v. Husted*,

768 F.3d 524, 554 (6th Cir. 2014) (*"Ohio NAACP"*), *vacated on other grounds*, 2014 WL 10384647 (6th Cir. Oct. 1, 2014); *Lee v. Va. State Bd. of Elections*, --- F. Supp. 3d ---, 2015 WL 9274922, at *8 (E.D. Va. Dec. 18, 2015).

Plaintiffs have satisfied their burden at both steps of this analysis. *First*, Plaintiffs have demonstrated that the challenged provisions disproportionately impact minority voters. In "waiving off disproportionately high African American use" of the voting procedures at issue, the District Court repeated its error from the preliminary injunction stage. *LWVNC*, 769 F.3d at 243.

Second, Plaintiffs have demonstrated that African Americans' disproportionate reliance on SDR, OOP voting, early voting, and pre-registration, and their disproportionate lack of qualifying photo identification, is "in part … caused by or linked to social and historical conditions that have or currently produce discrimination." *Id.* at 245 (citations omitted). These undisputed facts form a textbook Section 2 violation. Yet in denying Plaintiffs' Section 2 claim, the District Court layered on judge-made requirements that are not found in the text of the statute or the caselaw interpreting it.

1. The District Court Erred by Again Relying on Voting Practices in Other States.

In *LWVNC*, this Court made clear that the Section 2 analysis requires "an intensely local appraisal of the design and impact of' electoral administration 'in the light of past and present reality.'" *Id.* at 241 (quoting *Thornburg v. Gingles*, 478 U.S. 30, 78 (1986)). Ignoring that directive, the District Court again repeatedly emphasized comparisons between North Carolina's post-HB589 voting regime and other States. *See, e.g.*, JA24939 (Op. 455) ("notable that the State still compares very favorably to most States"); JA24662 (Op. 178) (comparing OOP rule to other states); JA24611 (Op. 127) (comparing early voting days to the "national median of all States"). And despite this Court's explicit instruction to the contrary, the District Court stated that it could not find HB589 to violate Section 2 without endangering voting regimes currently in place in other jurisdictions. *See, e.g.*, JA24910 (Op. 426).

This Court expressly rejected such doomsday predictions regarding other states at the preliminary injunction stage when it found that the District Court's "failure to understand the local nature of Section 2 constituted ***grave error***." *LWVNC*, 769 F.3d at 243

(emphasis added). Despite this clear direction, the District Court again failed to properly consider whether ***these*** particular changes in ***this*** state with ***this*** specific history violate Section 2. The same conclusion applies as last time: the District Court has again committed "grave error" warranting reversal.

2. The District Court Erred by Holding that the Ability of African Americans to Adapt to New Voting Laws Precluded a Section 2 Violation.

The District Court found no Section 2 violation because it concluded that there remain, in its view, "very many easy ways for North Carolinians to register and vote," to which African Americans can "adapt[]" or "adjust[]." *See, e.g.*, JA24833, JA24858, JA24859 (Op. 349, 374, 375). As it did in its preliminary injunction decision, the District Court focused repeatedly on the remaining opportunities under "the electoral system established by [HB589]." JA24857 (Op. 373); *see also* JA24896 (Op. 412) ("What remains under the law provides all voters with an equal and ample opportunity to participate in the political process."); JA24939 (Op. 455) ("North Carolinians who wish to register and vote still have many convenient ways that provide ample opportunity to do so."). In essence, the court held that voting laws

categorically do not violate Section 2 if other voting opportunities remain, presuming that minority voters will be equally able as white voters to "adapt" no matter how burdensome the alternative procedures may be to minority voters.

That "adaptation" analysis is wrong as a matter of law. For one, it has no grounding in the text of Section 2, which prohibits not only laws that make it ***impossible*** for minorities to vote—*i.e.*, the outright "denial" of the right to vote—but also laws that the make voting ***disproportionately more burdensome***—*i.e.*, the "abridgement" of the right to vote. 52 U.S.C. § 10301. Indeed, as this Court previously held, "nothing in Section 2 requires a showing that voters cannot register or vote under any circumstance." *LWVNC*, 769 F.3d at 243; *see also Ohio NAACP*, 768 F.3d at 552 ("Section 2 applies to any 'standard, practice, or procedure' that makes it harder for an eligible voter to cast a ballot, not just those that actually prevent individuals from voting."). That makes sense: in virtually every Section 2 case, there will be some plausible argument that voters can potentially "adapt" via alternative voting mechanisms. Under the District Court's version of the Section 2 standard, a State's voting practices pass muster if there are, in some

subjective sense, "enough" opportunities to vote and those opportunities compare favorably with other jurisdictions. This standard will rarely (if ever) find a Section 2 violation so long as changes in election laws leave ***some*** mechanism to register and vote, regardless of the comparative burden of the change on minority groups. That is not the standard Section 2 provides or the standard this Court articulated in *LWVNC*.

The relevant inquiry under Section 2 is not whether African Americans can ***overcome*** the disproportionate burdens imposed by HB589 by "adapting" or "adjusting," but whether HB589 imposes disproportionate burdens ***in the first place***. *See, e.g.*, *LWVNC*, 769 F.3d at 243; *Ohio NAACP*, 768 F.3d at 552. The District Court erred by focusing on the former question while neglecting the latter. *See, e.g.*, JA24635 (Op. 151) ("no persuasive evidence that voters … had any difficulty adjusting to the new schedule"); JA24859 (Op. 375) ("African Americans are equally as capable as all other voters of adjusting"). As in its prior decision, "[i]n refusing to consider the elimination of voting mechanisms successful in fostering minority participation" and instead focusing exclusively on the mechanisms that remain, the District Court "misapprehended and misapplied Section 2." *LWVNC*, 769 F.3d at 242.

3. The District Court Compounded its "Adaptation" Error By Affording Undue Weight to 2014 Turnout.

The District Court further erred in treating increased African-American turnout in the 2014 midterm election as nearly conclusive evidence that, "African Americans are not only capable of adjusting, but have adjusted, to [HB589]," and that therefore the challenged provisions do not impose unlawful burdens on African Americans. JA24956, JA24859 (Op. 472, 375). This flawed analysis, not only replicates the erroneous reliance on voter "adaptation" described above, but also accords inordinate weight to turnout statistics from a single midterm election.

Both Plaintiffs' ***and Defendants'*** experts agreed that voter turnout in any single election cycle (particularly a midterm election) is driven by a number of variables, making it nearly impossible to attribute changes in aggregate turnout to any one specific variable—such as a change in an election law. Defendants' expert, Dr. M.V. Hood III, agreed that: "[Y]ou can't just take aggregate turnout in one election and compare it to aggregate turnout in another election to make causal inferences about voters." JA21114. For that reason, a Section 2 claim

does not rise or fall on minority turnout in a single election, particularly given the multitude of factors at play in any single election. *Cf. Ohio NAACP*, 768 F.3d at 541 ("[T]hat overall turnout might not be affected is not determinative of the Equal Protection analysis." (citation omitted)); *see also Gingles*, 478 U.S. at 74-76 (rejecting argument that minority group's attainment of parity in one election precludes Section 2 violation); *Collins v. City of Norfolk*, 883 F.2d 1232, 1241-42 (4th Cir. 1989) (rejecting district court's reliance on single election in denying Section 2 claim). Just as a lower election turnout does not prove a Section 2 violation, a higher election turnout does not preclude one.

Even the District Court acknowledged that other factors affected turnout in 2014. For one, North Carolina's 2014 U.S. Senate election was one of the closest in the nation and involved the highest level of campaign spending for a Senate race in American history. JA19401-02; JA3510-11; JA4462-63; JA3887-88; JA19788. Defendants' experts agreed that increased spending and competitiveness are associated with higher turnout. JA21116-17; JA23854. And the testimony was undisputed that participation by African-American voters in 2014—the

first federal election following enactment of HB589—was temporarily driven in part by anger over the bill and unprecedented mobilization efforts, which cannot be replicated in future elections (nor should they have to be). *See* JA19072-73, JA10976-78. Again, Defendants' experts agreed that mobilization efforts impact turnout. *See* JA21116-17.

Not only did the District Court improperly rely on aggregate turnout, it turned a blind eye to the substantial evidence demonstrating HB589's disproportionate impact on African-American voters in the 2014 election:

- African Americans were disproportionately more likely than whites to submit registration applications during the early voting period.[2] These individuals were unable to vote in the election, but would have been able to do so had SDR been available.
- African Americans cast over 40% of uncounted OOP ballots in (well in excess of their share of the electorate).[3]
- African Americans were disproportionately more likely to use early voting, with approximately 45% of African-American voters voting early, compared to only 36% of white voters.[4]

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[2] JA4472 & n.97.

[3] JA878-79; JA152; JA2635; JA17511-12; JA19624; JA4482-83; JA8427; JA4606; JA19622; JA21012-14.

[4] JA4466-67, JA4554; JA19881; JA3883-85.

Thus, the Court relied on evidence that Defendants' experts agreed was unreliable, while ignoring evidence demonstrating that, despite the aggregate turnout data from this single midterm election—an election in which the electorate was unusually exercised and spending and GOTV efforts were at an unparalleled pitch—disproportionate burdens persist.

4. The District Court Erred in Evaluating the Linkage Between the Disparate Impact of HB589 and Social and Historical Conditions.

In evaluating the second prong of the Section 2 analysis, the District Court disregarded this Court's direction that the disparate impact of an election law can be caused "***in part***" by social and historical conditions, instead requiring Plaintiffs to show that the impact was caused ***entirely*** by those conditions. *LWVNC*, 769 F.3d at 245 (emphasis added). In doing so, the court set an erroneously high bar for Plaintiffs by requiring them to prove that most (or even all) of the increased burdens they would suffer from HB589 were caused by social and historical conditions.

The myriad lingering socioeconomic disparities attributable to North Carolina's history of racial discrimination were not disputed by

Defendants and were readily acknowledged by the District Court. Indeed, the court found that North Carolina's African Americans:

- "are more likely to be unemployed and more likely to be poor than whites";
- "are less likely than whites to have access to a vehicle";
- "are more likely to move than whites";
- "fare worse than whites in terms of health outcomes"; and
- "are more likely to experience disparate educational outcomes than whites."

JA24723-24 (Op. 239-41). Furthermore, the court accepted that "historical discrimination" against African Americans is "assuredly linked by generations" creating "socioeconomic factors that may hinder their political participation generally," and that these disparities "can be linked to the State's disgraceful history of discrimination." JA24727 (Op. 243.) The court even acknowledged connections between the effects of discrimination and specific challenged practices. *See, e.g.*, JA24828 (Op. 344) ("easy to see a connection between certain reasons for ending up in the incomplete registration queue and literacy"). Yet, after all that, the District Court—applying a heightened causation standard found nowhere in Section 2 or relevant caselaw—failed to credit this undisputed evidence in demonstrating how these

socioeconomic disparities relate to the disproportionate burdens identified by Plaintiffs. This was reversible error.

B. Once Legal Errors Are Corrected, the Evidence Shows a Section 2 Violation.

When viewed through the proper legal framework set forth in *LWVNC*, the evidence established a Section 2 violation with regard to each of the challenged provisions of HB589.

1. Same-Day Registration

The District Court acknowledged that, considering "total aggregate numbers, it is indisputable that African American voters disproportionately used SDR when it was available." JA24647 (Op. 163). Furthermore, the court agreed that the burden of voter registration falls more heavily on African Americans, who are more likely to move between counties due to housing instability, and "have less access to transportation." *See* JA24660, JA24727 (Op. 176, 243). Eliminating the in-person assistance with registration that is available through SDR also weighs more heavily on African Americans, who more frequently submit incomplete application forms. *See* JA24658 (Op. 174). Nevertheless, returning to the familiar refrain of turnout, the District Court dismissed the significance of African Americans'

disproportionate use of (and need for) SDR, finding that Plaintiffs failed to establish that SDR enhances turnout because there have been no studies on the matter. *See* JA24648, JA24657-58 (Op. 164, 172-73). But even assuming, *arguendo*, that turnout is the sole bellwether, the evidence showed that turnout ***is*** higher when SDR is offered with early voting (as North Carolina did pre-HB589) as compared to when it is offered alone. *See* JA14080.

The District Court spent most of its SDR Section 2 analysis on the administrative burdens ***that the State faces*** to maintain SDR, particularly in the process for verifying new registrants by mail. *See* JA24766-92 (Op. 282-308). This was clear error for several reasons.

First, the court's findings rested on an unsupported premise: that the State's interest in timely mail verification is substantial because those who do not complete the verification process before Election Day are fraudulently casting votes. *See* JA24780-82 (Op. 296-98). But this Court already rejected this justification as tenuous because there is no evidence to "suggest[] that any of [the SDR votes] were fraudulently or otherwise improperly cast." *LWVNC*, 769 F.3d at 246. The evidence at trial corroborated this Court's prior conclusion: mail to a voter's

registration address can be returned to the sender for a host of benign reasons. JA17315; JA8493-94; *see infra* § III.

Second, as Plaintiffs demonstrated, same-day registrants verify at rates comparable to, and sometimes higher than, non-same-day registrants. *See* JA1621-26; JA226-27; JA17257-58. This is likely true because same-day registrants register in person, where the assistance of pollworkers can reduce errors on the registration form. JA17242-43, JA17250-51, JA17253.

Third, the District Court's singular focus on the "administrative burdens" on County Boards of Elections (CBOEs) and the burden on the State Board of Elections (SBOE) to "hire additional staff to process [same-day] registrations" was misguided. JA24771-72 (Op. 287-88). This Court directly rejected this very logic in *LWVNC*, explaining that election changes harmful to minority voters cannot be rationalized "on the pretext of procedural inertia and under-resourcing." 769 F.3d at 244.

2. Out-of-Precinct Voting

As the District Court acknowledged, "compared to their share of the electorate, African American voters were disproportionately more

likely than whites to cast an OOP provisional ballot in the elections prior to [HB589]." JA24663 (Op. 179). Even after HB589, a disproportionate percentage (42%) of the 1,387 OOP ballots that were not counted during the 2014 election were cast by African Americans. *See* JA24664 (Op. 180). Nor can there be any doubt that the disproportionate burden of eliminating OOP voting is linked to historical discrimination, given that—as a result of the State's long history of official discrimination—African Americans are more likely to be poor, less educated, unhealthy, more likely to move, and have less access to transportation. *See* JA24724-27 (Op. 240-43). These socioeconomic factors make it more difficult to identify and travel to their assigned precinct.

That should have been the end of the analysis of OOP voting. Instead, contrary to this Court's guidance, the District Court once again erroneously relied on its assessment that "individuals who used OOP have many remaining convenient alternatives." JA24844 (Op. 360). Contrary to its approach elsewhere in its opinion, the District Court downplayed the 2014 election results by noting that "***only*** 1,387" OOP

ballots were "not counted" during that election. JA24664 (Op. 180) (emphasis added).

Unpersuaded that disenfranchising more than a thousand North Carolina voters violated Section 2—in contravention of this Court's prior instruction that "what matters for purposes of Section 2 is not how many minority voters are being denied equal electoral opportunities but simply that 'any' minority voter is being denied equal electoral opportunities," *LWVNC*, 769 F.3d at 244—the District Court instead concocted a nonsensical concern that counting of OOP ballots would actually "***partially*** disenfranchise[]" those same voters whose ballots would otherwise have gone ***completely*** uncounted without OOP voting. JA24796 (Op. 312) (emphasis added).

Insofar as the State's administrative burden arguments are centered on the difficulty in counting OOP ballots, counsel for the State has previously conceded that the requisite counting is "eas[y]": "[I]t's simply a matter of the county Boards of Elections going back to counting those ballots rather than leaving them where they will not be counted." 10/7/14 Status Conf. Tr. 6:16-7:9, No. 1:13-cv-00658-TDS-JEP

(M.D.N.C. Oct. 9, 2014), ECF No. 203. And there was no evidence to the contrary.

3. Early Voting

African Americans have used early voting at higher rates than whites in each of the North Carolina's last four general elections. *See* JA24614-15 (Op. 130-31 & n.74). Racial disparities in early voting usage have been largest in the last two presidential elections in particular, when over 70% of African-American voters used early voting, as compared with approximately 50% of white voters. *See* JA18042 n.64.

Plaintiffs' expert Dr. Gronke presented evidence that African-American voters have become habituated to early voting to a stronger degree than white voters. *See* JA609-10, JA633; JA3881, 38892. Plaintiffs further presented evidence that higher early voting usage rates among African Americans are not a one-time or temporary occurrence caused by the presence of a particular candidate on the ballot, but rather are likely to continue in the future. JA3885; JA633.

Rather than credit this evidence, the District Court focused on two articles written by Plaintiffs' experts to conclude that the "scholarly

consensus" was that early voting depresses turnout. JA24611-13 (Op. 127-29). But the District Court simply ignored testimony from the experts themselves explaining that these articles were inapt for assessing this case. For one, the articles lumped together forms of voting that "North Carolinians would not think of as early voting" including "[a]bsentee voting, voting by mail, [and] voting at a county clerk's office." JA19422. Additionally, these articles looked at the impact of ***adding*** early voting, not the impact of ***restricting*** it (as HB589 did). JA19451. "[E]ven if the addition of early voting days does not significantly increase turnout, 'it is not methodologically sound to assume that there will … be little or no impact … when voters … face a ***loss*** of previously available voting days.'" *Florida v. United States*, 885 F. Supp. 2d 299, 332 (D.D.C. 2012) (emphasis added). Here, the critical analysis is how ***disruptions*** to voting habits raise costs for voters and deter participation. *See* JA1097; JA19396-97; JA19624; JA19781. By focusing only on the effect of adding voting options while "refusing to consider the elimination of voting mechanisms"—which is the actual scenario this case presents—the District Court erred. *LWVNC*, 769 F.3d at 242.

4. Photo ID

There is no dispute that African Americans in North Carolina are less likely than whites to possess a form of qualifying voter ID under HB589. *See* JA24585-86 (Op. 101-02). Indeed, both the SBOE and the United States's expert found that African-American voters are at least twice as likely as white voters to lack a qualifying ID. *See* JA9960, JA9963; JA5233-41; JA19782-73; JA4432-33 (showing 10.1% of African-American registered voters lacked HB589 ID, compared to 4.6% of white voters).

The burdens of obtaining qualifying ID also fall more heavily on minority voters because they disproportionately lack access to transportation and the underlying documents required to obtain a qualifying ID.[5] Despite this undisputed evidence, the District Court found that "North Carolina's voter ID law ***with the reasonable impediment exception*** does not deprive African Americans and

[5] JA20162-67; JA4292-93, JA4296-300; JA4311, JA4315, JA4319, JA4323, JA4327; JA3501; JA3569; *see also* JA23083; JA12153-58 (describing efforts to get DMV ID for sisters whose birth certificates contained errors); JA12138-40 (describing inability to obtain DMV ID because of missing letter on birth certificate).

Hispanics of an equal opportunity to participate in the political process as other groups." JA24823 (Op. 339) (emphasis added).

The District Court's reliance on the reasonable impediment process was error because the burdens of the photo ID requirement—which is still in effect, *see* JA23615—continue to fall disproportionately on minorities. For one, in spite of the reasonable impediment option, SBOE staff are still instructing voters that they must attempt to obtain a qualifying ID in order to vote in North Carolina, even when the voter is eligible to file a reasonable impediment declaration. *Id.; see, e.g.*, JA12344-51; JA12379-81; JA12385-89. Moreover, Plaintiffs presented evidence that the reasonable impediment provision does not alleviate the burden for at least three reasons: (1) the new reasonable impediment process is difficult to navigate; (2) the process forces the disproportionately African-American group of voters who lack qualifying ID into a separate and lesser voting process; and (3) reasonable impediment declaration challenges are intimidating and will deter voters from participating in the voting process in the first place. JA24390-471; JA23098-99; JA23407-08.

Relying solely on SBOE Director Kim Strach's testimony regarding SBOE's ***plans*** for implementation, the District Court concluded that the law would not be "applied in an intimidating and discriminatory manner." JA24608 (Op. 124). But undisputed evidence suggested the contrary. Particularly for low-literacy voters, navigating the reasonable impediment form creates yet another hurdle that will be difficult to surmount.[6] This is of particular concern in North Carolina, which has a higher rate of rejecting provisional ballots than the national average. *See* JA23391. Moreover, the reasonable impediment declaration process opens a voter to the threat of the declaration being challenged and the provisional ballot being rejected. *See, e.g.*, JA23318-19, JA23332-33; JA23541. The record is clear that these provisions are likely to deter voters from casting a ballot. JA23473.

5. Pre-Registration

The District Court acknowledged that African Americans disproportionately use pre-registration and that "pre-registration increases youth turnout." JA24669-70, JA24673 (Op. 185-86, 189)

[6] JA23321-22; JA12170, JA12178-79; JA23475-77; JA23519-21, JA23524, JA23541; JA12192 (intimidation of completing government forms).

(finding that African Americans were 30% of all pre-registrants as of 2012, despite making up only 22% of the State's population). Moreover, because African Americans in North Carolina are younger on average than whites, the elimination of pre-registration falls disproportionately on members of this protected class. *See* JA3505 (25.9% of African-American citizens in North Carolina are under 18 as compared to 19.5% of whites).

Despite these undisputed facts, the District Court, relying predominantly on so-called alternative means available for citizens to register to vote, erroneously declined to acknowledge the disparate impact of the elimination of pre-registration.[7]

6. Cumulative Racial Impact

This Court previously directed that "a searching practical evaluation" of the "totality of the circumstances" under Section 2 requires an examination of the "sum of [the] parts" of a challenged law "and their cumulative effect on minority access to the ballot box." *LWVNC*, 769 F.3d at 241-42; *see also Clingman v. Beaver*, 544 U.S. 581, 607-08 (2005) (O'Connor, J., concurring in part and concurring in the

[7] JA4611; *see also* JA3571; JA3505; JA19881-82.

judgment) ("A panoply of regulations, each apparently defensible when considered alone, may nevertheless have the combined effect of severely restricting participation and competition.").

As set forth above, the District Court found that African Americans used SDR, OOP voting, early voting, and pre-registration, and lacked qualifying ID, at substantially higher rates than whites. Yet the court concluded that not only was each individual provision not independently actionable under Section 2, but that the cumulative impact from these concurrent voting changes—all of which constricted access to the franchise—did not violate Section 2. "By inspecting the different parts of [HB589] as if they existed in a vacuum, the district court"—again—"failed to consider the sum of those parts and their cumulative effect on minority access to the ballot box." *LWVNC*, 769 F.3d at 242.

The burdens imposed by HB589 are undoubtedly cumulative. JA3503, JA3505. Voting involves a series of steps, each of which must be successfully completed for a voter's ballot to be cast and counted. The challenged provisions of HB589 impose an additional hurdle at each step. JA19637-39. For instance, minority voters who are

channeled into election-day voting because of cuts to early voting would be more likely to vote OOP and will be forced to marshall additional resources to find transportation to their assigned precinct on Election Day in the absence of OOP voting. Similarly, the advent of the Photo ID requirement—complete with the reasonable impediment process and its multiple voter forms and provisional ballots—will contribute to congestion at the polls, which falls disproportionately on voters with inflexible job schedules, fewer resources, and less access to transportation (a group that is disproportionately African American).

Where, as here, plaintiffs challenge multiple, simultaneously-imposed voting restrictions, the effects must be measured cumulatively, not in isolation, and must be justified with evidence of correspondingly weighty interests. *See, e.g.*, *Pisano v. Strach*, 743 F.3d 927, 933 (4th Cir. 2014) (court must "evaluate the combined effect" of ballot access rules); *Wood v. Meadows*, 207 F.3d 708, 711 (4th Cir. 2000). The District Court's failure to take into account the relationship between the challenged provisions and their cumulative effect was reversible error.

C. The Senate Factors Provide Additional Support for Finding a Section 2 Violation.

In addition to satisfying this Court's two-pronged Section 2 analysis, Plaintiffs established a majority of the Senate factors identified by the Supreme Court in *Gingles*, 478 U.S. at 44-45, which form part of the "totality of [the] circumstances" analysis required by Section 2, *see LWVNC*, 769 F.3d at 240.

1. History of Official Discrimination

The District Court correctly recognized that "North Carolina has a sordid history" of official discrimination "dating back over a century." JA24711 (Op. 227); *see also* JA24719 (Op. 235) ("There is significant, shameful past discrimination."). The District Court nonetheless erroneously found that this factor did not favor Plaintiffs because, in its view, none of these procedures are "currently used in North Carolina." JA24721-22 (Op. 237-38).

2. Racially Polarized Voting

The District Court correctly recognized that "polarized voting between African Americans and whites remains in North Carolina, so this factor favors Plaintiffs." JA24720 (Op. 236).

1. Practices that Enhance Opportunities for Discrimination

The District Court erred by ignoring evidence of practices and procedures ***that persist today*** that enhance the opportunity for discrimination, including the Department of Justice's issuance of nineteen Section 5 objections since 1990. *See* https://www.justice.gov/crt/voting-determination-letters-north-carolina. Perhaps most starkly, the court failed to mention litigation over North Carolina's 2011 redistricting plans, which involved charges that state legislative and congressional districts were drawn discriminatorily to pack African-American voters into as few districts as possible, thus limiting their influence statewide. *See Dickson v. Rucho*, 781 S.E.2d 404, 410 (N.C. 2015) (cert. petition pending); *Harris v. McCrory*, --- F.3d ---, 2016 WL 482052, *17, 21 (M.D.N.C. Feb. 5, 2016) (invalidating two congressional districts as unconstitutional racial gerrymanders); *see also Covington v. North Carolina*, No. 1:15-cv-00399 (M.D.N.C.) (challenge to state legislative districts). These redistricting efforts are "voting practices or procedures that may enhance the opportunity for discrimination against the minority group," which the court should have credited. *Gingles*, 478 U.S. at 37.

2. Continuing Effects of Discrimination that Hinder Political Participation

The record contains manifest evidence of the present-day effects of discrimination and how those effects hinder African-American electoral participation. *See, e.g.*, JA1228-29, JA1239; JA3491-96; JA1150-59; JA19261; JA20862-63, JA20867, JA20871, JA20892; JA19411-12; *see also* JA21142. Indeed, the District Court accepted that "African Americans experience socioeconomic factors that may hinder their political participation generally" and that these disparities "can be linked to the State's disgraceful history of discrimination." JA24727 (Op. 243).

3. Racial Appeals in Campaigns

The District Court erred in concluding that Plaintiffs did not satisfy the sixth *Gingles* factor because "the passage and enforcement of [HB589] was not and has not been marked by subtle or overt racial appeals." JA24742 (Op. 258). That mischaracterizes *Gingles*, which requires inquiry into "whether [North Carolina] ***political campaigns*** have been characterized by overt or subtle racial appeals." 478 U.S. at 37 (emphasis added). On that score, the District Court acknowledged one "undeniable" "recent" racial appeal involving a mailer distributed

by the North Carolina Republican Party's Executive Committee. JA24742 (Op. 258). Thus, viewed under the proper rubric, this factor favors Plaintiffs.

4. Minority Electoral Success

The District Court concluded that because African Americans' "electoral success, at least outside of statewide races, approaches parity," Plaintiffs had only "weakly" demonstrated that they are underrepresented among elected officials. JA24745 (Op. 261). But the court's qualification—"at least outside of statewide races"—goes too far: between nine statewide constitutional officers and two U.S. senators, North Carolinians have elected an African American ***once*** in the State's history. JA3495. This factor, too, favors Plaintiffs.

5. Non-Responsiveness of Elected Officials

The District Court dismissed Plaintiffs' assertion that North Carolina's lingering race-based socioeconomic disparities are evidence enough of unresponsiveness on the part of government officials because Plaintiffs failed to identify "specific State policies" that contribute to those disparities. JA24746 (Op. 262). That is erroneous as both a legal and factual matter. For one, the law does not require identification of particular policies; after all, ***un***responsiveness is not necessarily

attributable to any particular policy but to a ***lack*** of action in the face of obvious inequality. And in any event, Plaintiffs ***did*** present evidence of the General Assembly's lack of responsiveness to minority concerns through at least two specific policies: repeal of North Carolina's Racial Justice Act and the State's failure to expand Medicaid and preserve unemployment benefits eligibility. *See* JA1230-32.

6. Tenuousness of the State's Justifications for HB589

The final *Gingles* factor asks whether the State's policy underlying a change in voting practices is "tenuous." 478 U.S. at 37. Here, the State's lawyers argued various rationalizations for the challenged provisions of HB589—but there was little to no evidence of contemporaneous rationalizations, as the legislators that passed this sweeping law hid behind legislative privilege.[8] Many of the lawyer-generated arguments were nothing more than unsubstantiated, *post hoc* rationales that should be viewed with skepticism, including: inability to verify addresses (SDR), voter confusion (pre-registration),

[8] The District Court erred in denying discovery of legislator communications on ground of legislative privilege for the reasons set forth in ECF Nos. 88, 135, and 153 in No. 1:13-cv-00658-TDS-JEP (M.D.N.C.).

administrative burdens (OOP voting), cost savings (early voting), and in-person voter fraud (Photo ID). *See Veasey*, 796 F.3d at 501-02.

As a matter of law, to be non-tenuous, the General Assembly's rationale for enacting each challenged provision of HB589 has to be substantial, and the General Assembly was required to consider alternative, less discriminatory procedures to achieve its goals. Here, none of the various rationales credited by the District Court are compelling. For instance, the District Court relied on Defendants' broad and unproven *post hoc* justifications that HB589 helped the State "free up resources," create "cost savings," and eliminate "administrative burdens." JA24761, JA24765, JA24771 (Op. 277, 281, 287). In doing so, the District Court committed error by once again "sacrificing voter enfranchisement at the altar of bureaucratic (in)efficiency and (under-)resourcing." *LWVNC,* 769. F.3d at 244.

Furthermore, the means chosen by the General Assembly to attain its goals are not consistent with minimizing discriminatory impact. For example, if the General Assembly's goal was to prevent voting by unverified registrants, the legislature could have changed the law to allow challenges of these types of ballots until the canvass or

delayed the canvass date. Indeed, CBOEs have the ability to retrieve these ballots—and avoid counting them—up to the date of the canvass. JA17293-95. The total elimination of SDR to deal with concerns regarding mail verification is not just a competing "policy choice" but a failure to tailor the law to minimize racial impact. This same analysis should invalidate each of the challenged provisions.

II. The District Court Erred In Finding A Lack of Racially Discriminatory Intent.

The Fourteenth and Fifteenth Amendments and Section 2 prohibit legislation enacted with racially discriminatory intent.[9] In order to prevail on a claim of racially discriminatory purpose, a plaintiff must demonstrate only that discriminatory purpose was ***one*** of the

[9] The Court should not avoid Plaintiffs' Fourteenth or Fifteenth Amendment claims (both intentional discrimination and undue burden) even if Plaintiffs prevail on their Section 2 claims. Although avoidance of constitutional questions is sometimes appropriate, s*ee Norfolk S. Ry. Co. v. City of Alexandria*, 608 F.3d 150, 156-57 (4th Cir. 2010), such avoidance is improper where a statutory ruling does not provide plaintiffs the "same relief they could access if they prevailed on … [constitutional] claims." *Veasey*, 796 F.3d at 513. Here, Plaintiffs seek preclearance relief under Section 3(c) of the Voting Rights Act, which may be invoked upon a finding of "violations of the [F]ourteenth or [F]ifteenth [A]mendment justifying equitable relief." 52 U.S.C. § 10302(c). Because Section 2 does not provide coextensive relief, Plaintiffs respectfully request that the Court address their constitutional claims regardless of the Section 2 outcome.

motivating factors underlying State action. *See Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977). To that end, the Supreme Court in *Arlington Heights* established a non-exhaustive list of factors that can prove discriminatory intent. *Id.* at 265-68. Here, the District Court erred in ignoring evidence clearly establishing that Plaintiffs satisfied these factors, and that discriminatory purpose was—at least—one of the motivating factors. Accordingly, Plaintiffs join and fully incorporates the arguments in the United States' brief. A few points, however, bear emphasis here:

A. The District Court Misunderstood the Legal Significance of Pre-Enactment Knowledge.

The District Court failed to credit the undisputed evidence presented to the legislature prior to HB589's enactment showing the disparate impact of the challenged provisions (the first *Arlington Heights* factor). For example, before enacting the Photo ID requirement, the legislature requested data from the SBOE regarding the racial impact of the proposed requirement. All four of the SBOE's "no-match" analyses comparing registered voters to the list of DMV ID-card holders categorically and consistently showed that African

Americans were disproportionately less likely to possess ID. JA24585 (Op. 101). The District Court nevertheless erroneously whitewashed the legislators' requests—without any evidence or testimony presented by the legislators themselves, who claimed legislative privilege. JA24870 (Op. 386). But legislators' knowledge that the expected impact of their actions would "bear[] more heavily on [African Americans]," is highly significant under *Arlington Heights*, regardless of any possible legitimate reason for acquiring that knowledge. *See United States v. Brown,* 561 F.3d 420, 433 (5th Cir. 2009); *see also McMillian v. Escambia Cty.*, 748 F.2d 1037, 1046-47 (5th Cir. 1984).

The District Court instead relied on *post hoc* evidence of eventual racial impact in the 2014 election rather than pre-enactment knowledge (*i.e.*, the data the legislature had in its hand when it was passing HB589). JA24893 (Op. 409). Those 2014 results were obviously unknown to legislators at the time they passed HB589 and are therefore of little use in a discriminatory intent analysis.

B. The District Court Erroneously Dismissed the Significance of the Sequence of Events Leading up to the Passage of HB589.

The District Court ignored clear evidence that HB589 was reflexively enacted to reverse the preceding period of expansion of the franchise, during which North Carolina began to redress discrimination through measures that HB589 reversed.

Indeed, Plaintiffs demonstrated that in the wake of *Shelby County*—a decision which solely concerned race—the legislature made dramatic and unjustified changes to HB589 that disproportionately affected African-American voters, including with regard to both Photo ID and non-ID-related provisions. The analysis of changes to HB589 before and after *Shelby County* demonstrated that all of the material choices made by the General Assembly following *Shelby County* disadvantaged African Americans. But rather than heed this Court's prior warning that "the post-*Shelby County* facts on the ground in North Carolina should have cautioned the district court," *LWVNC*, 769 F.3d at 242-43, the District Court erroneously ignored the obvious inference of racial intent from the General Assembly's rush to pass the "full bill" version of HB589 so soon after *Shelby County*.

C. The District Court Erred by Not Performing a Pretext Analysis.

The District Court also erred in failing to assess the pretextual nature of the Defendants' justifications for HB589. Rather, the court erroneously evaluated the tenuousness of the State's purported justifications under a rational basis review, and compounded that error by improperly relying on those findings in its intent analysis. *E.g.*, JA24805-06 (Op. 321-22); *see also id.* 24861 (Op. 377) ("The court's conclusion regarding [*Gingles*] factors would be similar here in the discriminatory intent context.").

Notably, *post hoc* rationalizations are not probative of intent under *Arlington Heights*. *See, e.g.*, *Barber v. Thomas*, 560 U.S. 474, 485-86 (2010). Even contemporaneous rationales must be scrutinized carefully, and statements by legislative proponents of a challenged law articulating an ostensibly permissible intent should not be accorded any special weight. *See Smith v. Town of Clarkton*, 682 F.2d 1055, 1064 (4th Cir. 1982).[10] Yet the District Court improperly credited

[10] Particularly where legislators hide behind the cloak of legislative privilege and decline to testify under oath, any rationales they have offered in unsworn statements outside the courtroom should be presumptively suspect.

rationalizations not in the contemporaneous legislative record, including evidence created well after HB589 was enacted. *See, e.g.*, JA24778-81 (Op. 294-97) (discussing data provided by SBOE employee hired in October 2014—more than a year after HB589's passage); *id.* 24889 (Op. 405) (considering affidavit by former legislator not in the legislature at time of the bill). As discussed further *supra* § I.C.8, the court's tenuousness analysis relied heavily on non-contemporaneous evidence uncited by proponents or in the legislative record, *see, e.g.*, JA24794-96 (Op. 310-12) (discussing purported effect of the 2005 *James v. Bartlett* case); JA24750 (Op. 266) (discussing 2005 Carter-Baker Report), while ignoring clear evidence of intent from the legislative record.[11]

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[11] For instance, the District Court failed to consider or credit:

- A contemporaneous statement by a Senate proponent conceding that "many of the soft policies [in the pre-Shelby version of HB589] are a result of squeamishness about the mandatory federal review." JA4950; JA20027.
- A statement virtually admitting HB589's partisan motive by the only Republican who spoke on the House floor, describing prior election reforms as "passed with a partisan motive, too." JA2623.
- Legislative hearing testimony from a Republican Precinct Chair that disenfranchisement of Democrats' "special voting

The State suggested at trial that the Photo ID requirement was necessary to combat voter impersonation fraud and to increase voter confidence in elections. But the evidence further confirmed what this Court already acknowledged in *LWVNC*: that these goals were nothing "other than merely imaginable." 769 F.3d at 246. Indeed, the District Court itself agreed this time around that "***there is no evidence of voter impersonation fraud in North Carolina***." JA24751 (Op. 267) (emphasis added).

Recognizing that there was no evidentiary support for either premise, the District Court nevertheless found that these unsupported justifications could be considered because "the legislature could reasonably have believed them to be true." JA24875 (Op. 391). This reliance on "potential" or "possible" rationales for the law does not pass muster where (i) such rationales have no demonstrated connection to the ***actual*** motivation for the legislation, and (ii) the plaintiff need only show that discriminatory purpose was ***part*** of the legislature's

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blocks [sic]" was "within itself" the "reason for photo voter ID, period, end of discussion." JA5557.

motivation—not that "the challenged action rested solely on racially discriminatory purposes." *Arlington Heights*, 429 U.S. at 265.

D. The District Court Erred in Ignoring the Role of Partisanship and Race.

Finally, the District Court erred in its analysis of the "troubling blend of politics and race." *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 442 (2006) ("*LULAC*"). Throughout its opinion, the District Court suggests HB589's restriction of voting opportunities was an appropriate partisan counterpoint to the expansion in voting opportunities previously enacted by the opposing political party. Not so. Instead, the evidence shows that ***a predominant purpose*** of HB589 was to assist the majority party to maintain its political power through the suppression of African-American and Latino voters' political participation.

Once again, the evidence here is clear-cut and largely undisputed. Between 2004 and 2012, North Carolina's African Americans achieved a ten-percentage-point swing in voter strength as compared to whites between 2004 and 2012. JA19858-59. Moreover, among other demographic characteristics, race yielded larger disparities in party voting than other voter characteristics, such as sex, age, education, and

income. JA19859-61. Accordingly, North Carolina Republicans had every incentive to target African Americans (and the voting practices they disproportionately utilized). However, achieving partisan electoral aims by targeting a protected class is no better than targeting a protected racial class for any other reason; to the contrary, the Constitution strictly prohibits it. *See LULAC*, 548 U.S. at 440 (striking down attempt to "[take] away the [minority group's] opportunity because [they] were about to exercise it.").

Though failing to consider possible Republican partisan motivation behind HB589, the District Court identified partisan motivation in prior reforms supported by Democrats. JA24793, JA24952 (Op. 309, 468.) This logically inconsistent attribution of ***expansion*** of African-American rights (and resulting participation gains) to improper partisan motivation, while at the same time failing to address Plaintiffs' substantial evidence of partisan motivation in ***reversing*** these gains, constituted legal error.

III. The District Court Erred in Finding No Fourteenth Amendment Violation.

The Fourteenth Amendment prohibits any encumbrance on the right to vote not adequately justified by the State's asserted interests.

See Anderson v. Celebrezze, 460 U.S. 780, 788-89 (1983); *Burdick v. Takushi*, 504 U.S. 428, 433-34 (1992). A court reviewing a challenge to a voting law must apply a balancing test that weighs the severity of the burden (its "character and magnitude") against the State's "precise interests." *Burdick*, 504 U.S. at 434; *see also Obama for Am. v. Husted*, 697 F.3d 423, 433 (6th Cir. 2012) ("*OFA*").

This balancing test is a "flexible" sliding scale, where the scrutiny becomes more rigorous as the burden increases. *Burdick*, 504 U.S. at 434. This Court has acknowledged that most cases fall in between strict scrutiny (which applies to severe restrictions on the right to vote) and rational basis review (reserved for regulations that impose merely incidental or no burdens at all), and are "subject to ad hoc balancing," such that "a regulation which imposes only moderate burdens could well fail the *Anderson* balancing test when the interests that it serves are minor, notwithstanding that the regulation is rational." *McLaughlin v. N.C. Bd. of Elections*, 65 F.3d 1215, 1221 & n. 6 (4th Cir. 1995) (expressly rejecting the proposition that "election laws that impose less substantial burdens need pass only rational basis review"). This Court has invalidated laws under the *Burdick* framework in recent

years. *See, e.g.*, *Libertarian Party of Va. v. Judd*, 718 F.3d 308, 317-19 (4th Cir. 2013) (invalidating law requiring petition circulators to be accompanied by State residents as witnesses).

Plaintiffs challenge the same five provisions under the Fourteenth Amendment as they did under Section 2. Although the court identified the correct legal standard under *Anderson-Burdick*, it nonetheless misapplied that standard, leading it to wrongly conclude that the challenged provisions did not create "more than the usual burdens of voting," and apply only rational basis review. JA24914 (Op. 430). Specifically, the court erred by (i) failing to properly assess both the magnitude ***and*** character of the burdens imposed on voters; (ii) ignoring the failsafe nature of the challenged provisions; (iii) failing to adequately assess the cumulative burden of the challenged provisions as well as the burden on subgroups of voters; and (iv) applying the incorrect level of scrutiny in analyzing the State's asserted justifications. Each of these flaws demands reversal.

A. The District Court Did Not Properly Assess the Burden that HB589 Imposes on Voting.

1. Same-Day Registration

The evidence showed that approximately 100,000 new voters used SDR in the 2008 and 2012 general elections, and more than 20,000 did so in 2010. JA630-31. This heavy pre-HB589 usage is evidence that the repeal of SDR creates burdens on many voters. *OFA*, 697 F.3d at 431. Additionally, the evidence demonstrated that thousands of voters were disenfranchised in November 2014 because of the SDR repeal. Specifically, the court acknowledged Plaintiffs' expert's finding that nearly 12,000 voters registered during the ten-day early voting period in the 2014 election. JA24651-52 (Op. 167-68); *see also, e.g.*, JA24834-36 (Op. 350-52); JA8847-52; JA8857-63; JA8873-82; JA8905-16; JA8948-51; JA8986-89; JA8999-9004; JA9019-25; JA9166-70; JA9334-38; JA9348-52. These individuals would have been able to vote at early voting sites before HB589, but could not in 2014 due to the removal of SDR. Yet after acknowledging these undisputed statistics, the District Court failed to acknowledge the character and magnitude of the burden, as *Burdick* requires .

Moreover, the District Court's identification of so-called alternatives to SDR starts from the wrong temporal point and ignores the fact that the SDR repeal has (and will continue) to leave voters without any voting options. For instance, Plaintiffs presented the evidence of Rev. Moses Colbert who attempted to vote early in 2014, believing he had properly registered at DMV; when he learned at the polling place that his registration was not complete, there was no alternate mechanism he could use at that point to avoid disenfranchisement. JA19043-48.

2. Out-of-Precinct Voting

Like SDR, OOP voting was used by thousands of voters in the years prior to HB589:

Election	OOP Ballots	% Counted
2006	3,115	96.8%
2008	6,032	91.7%
2010	6,052	95.1%
2012	7,486	89.6%

JA873. In November 2014, 1,387 OOP ballots were uncounted because of HB589. JA24664 (Op. 180).

Again, the District Court improperly disregarded the burden caused by the elimination of OOP voting. Michael Owens is a prime example: Owens, who works at a carwash 16 miles from his home, did not have access to a vehicle on Election Day 2014. JA24848 (Op. 364). Unable to get to his assigned precinct, he borrowed a co-worker's car and cast an OOP ballot at the precinct near his job, which was ultimately discarded. The court glossed over this by noting Owens had a car as of July 2015—some 8 months later—and "now knows … he will need to vote in his correct precinct." *Id.* Likewise, the court heard the story of the Washingtons, an elderly couple from Goldsboro who cast uncounted OOP ballots in 2014. Both were too disabled to travel to their assigned precinct, JA24849 (Op. 365), and instead visited a much closer precinct. Despite acknowledging that "OOP would make their burden less," the court concluded that their story demonstrated the need for voting by mail. *Id.* That was not the correct legal inquiry.

3. Early Voting

By 2008, early voting "constituted the most popular method of voting, being used by 48.7% of North Carolina voters." JA24614 (Op.

130). The pre-HB589 usage rates of early voting—including in the first week of early voting—are not in dispute:

Election	**Votes in First 7 Days of Early Voting**
2006	>90,000
2008	>700,000
2010	>200,000
2012	Nearly 900,000

JA4466, JA4554, JA3882, JA19760-70. Despite this, the District Court wrongly concluded that the reduction in early voting days did not constitute a substantial voting burden.

The District Court also mistakenly disregarded testimony of leading scholars regarding current scholarship demonstrating that early voting reductions in a presidential election—when volume is the highest—results in long lines and depressed participation (as in Florida in 2012). JA19780-81; JA3874; JA20259-60. The court also dismissed powerful examples of the character of the burden imposed by early voting cuts, including Sherry Durant, a disabled voter living in a group

home who testified that her caretaker did not have time to take her to the polls during the shortened 2014 early voting period. JA24632-33 (Op. 148-49).

Finally, the District Court erred in finding the SBOE's requirement that counties maintain the same number of early voting hours in 2014 as they did in 2010 alleviated the burden of the early voting reduction. The court ignored the State's own evidence that over 30% of all counties received a waiver from complying with that requirement in 2014. JA24633 (Op. 149); *see also* JA9541-42.[12] Moreover, as Plaintiffs' experts explained, early voting hours are not fungible: popular hours immediately after work cannot be replaced by hours later at night, and a lost weekend of early voting cannot be replaced by additional hours on a weekday morning. JA622. The court failed to even acknowledge this unrebutted testimony.

4. Photo ID

The record reflected that hundreds of thousands of North Carolina registered voters do not possess a qualifying ID, along with countless eligible-but-unregistered voters. JA9957-85. Furthermore, Plaintiffs

[12] The court signaled that it likely would have reached a different conclusion if the same hours were not provided. JA24763 (Op. 279).

demonstrated that the Photo ID requirement necessarily funnels individuals to the DMV (JA3296-373), and a number of voters testified to the extraordinary time and cost required to obtain even free DMV IDs. *See e.g.* JA24556 (Op. 72); JA23706-09; JA12085-95; JA12149-62; JA12183-213; JA12344-12346; JA12379-81; JA12385-89. Even the District Court had "substantial questions about the accessibility of free voter ID" for voters who lacked transportation or work flexibility to get to DMV. JA24556 (Op. 72).

Similarly, the court erred in finding that the reasonable impediment process eliminates the burden. As set forth *supra* § I.B.4, the State has made clear that it maintains a Photo ID requirement and many voters are still navigating the tortuous ID process; and those that cannot meet the State's continued mandate must overcome the confusing and intimidating reasonable impediment process.

5. Pre-Registration

From 2009 through 2013, over 150,000 voters used pre-registration. The court acknowledged that pre-registration substantially increases turnout among young voters. JA24673, JA24850, JA24933 (Op. 189, 366, 449). Pre-registrants also were more

likely to stay on the voter rolls than non-pre-registered young voters. JA3947. With the elimination of pre-registration, thousands of young voters cannot register while obtaining their first driver's licenses, and instead have to find a different means of registering. JA24671-72 (Op. 187-88); JA3914. Despite these findings, the court came to the legally flawed conclusion that the burden from the repeal of pre-registration was slight or non-existent, principally because voters have other mechanisms by which they could register. JA24934-35 (Op. 450-51).

B. The District Court Failed to Consider the Failsafe Role of the Eliminated Provisions.

The District Court also failed to credit unrebutted evidence regarding the need for the eliminated provisions as failsafe mechanisms. For example, with respect to SDR, the court acknowledged that numerous witnesses, including CBOE officials, testified to significant problems in transmitting voter registrations from DMV offices. JA24923-24 n.236 (Op. 439-40 n.236); *see also* JA19043-48; JA8857-63; JA8842-46; JA8419-26; JA9114-19; JA9290-92. This included Isabel Najera, a recently naturalized citizen, who attempted to vote during early voting after registering at DMV, only to find there was no record of her registration. JA19237-44. Before HB589, she

could have simply used SDR; afterwards, she was disenfranchised—despite doing everything required of her to vote.

Other voters were disenfranchised when CBOEs improperly purged eligible registrants from the rolls, JA19043-48 (voter registration record incorrectly merged with other voter with same name; purged voter's provisional ballot not counted); JA8952-69 (voter incorrectly identified as convicted felon and purged from roll), or because CBOEs failed to receive or record registrations submitted through third-party registration drives, JA9060-69 (voter registered at church registration drive); JA9334-38 (same; CBOE employee worked the drive). Once again, these voters could previously have taken advantage of SDR.[13]

Likewise, OOP voting operates as a failsafe when pollworkers direct voters to the wrong precinct or when voters are not notified of precinct changes. JA8883-90 (voter unaware of precinct change was sent from former precinct to new precinct at the end of the day, arriving too late to vote); JA8917-22 (voter sent to the incorrect precinct by

[13] This is particularly problematic because North Carolina does not provide a method for appealing an improper removal from the rolls or failure to receive a registration. JA20632-33.

pollworker). Again, the District Court either ignored these real-life situations or dismissed them as random, infrequent problems. JA24923-24 n.236 (Op. 439-40 n. 236). The proper legal question is whether these problems occur often enough that voters are burdened without a failsafe, and the undisputed evidence is that they do.

C. The District Court Did Not Properly Analyze the Cumulative Effect of HB589 or the Burdens Imposed on Subgroups.

The District Court also erred in failing to assess the cumulative effect of the challenged provisions as well as the burdens on subgroups.

The cumulative burden of HB589 can be assessed by fairly examining the voting process in North Carolina, which involves a series of steps, each necessary for the voter to successfully cast a ballot. Each challenged provision creates an additional hurdle at every step. For example, a shortened early voting period means a shorter period in which voters may vote at any county polling place, and thus increased reliance on Election Day voting, when voters must vote in their assigned precinct. Gwendolyn Farrington and Terrilin Cunningham were examples of voters who, because of long, inflexible working hours, could not vote during the shortened early voting period in 2014; the

same constraints kept them from their assigned precincts on Election Day. JA19019-22; JA19296-310. Thus, fewer days for early voting increased the likelihood that voters would be disenfranchised by the absence of OOP voting. Had the court looked at the cumulative effect of and interactions among these provisions—rather than just assuming that the aggregate effect of the challenged provisions must be "no more than slight to modest," JA24938-39 (Op. 454-55)—it would have reached the opposite conclusion. *See also supra* § I.B.6.

The District Court also failed to fully examine the burdens on particular subgroups of voters. *See, e.g.*, *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 198, 201 (2008) (assessing burdens on "indigent voters"); *Ohio NAACP*, 768 F.3d at 543-44 (evaluating burdens on "African American, lower-income, and homeless voters"); *Frank v. Walker*, 2016 U.S. App. LEXIS 6656, at *6 (7th Cir. Apr. 12, 2016) (right to vote "is not defeated by the fact that 99% of other people can secure the necessary credentials easily"). For example, the court did not consider whether the repeal of SDR would create a greater burden on transient voters, even when presented with evidence that voters who move from county-to-county have to re-register to vote,

JA4861, and that a substantial number of voters in North Carolina are transient. JA1157-58. The court also did not examine whether the disparate use of SDR and early voting by young voters indicated that those voters might be unduly burdened by the changes in HB589. Failure to assess the burden on particular segments of the population warrants reversal.

D. The District Court Failed to Scrutinize the State's Justifications.

Finally, the District Court erred by insufficiently scrutinizing the State's asserted justifications. Given the burdens described above, the proper level of scrutiny was, at the very least, heightened. Instead, the court applied rational basis review and accepted the justifications as proffered. JA24919, JA24923, JA24926, JA24931-32, JA24935 (Op. 435, 439, 442, 447-48, 451).

For instance, in upholding the repeal of SDR, the court cited the "important" number of SDR registrations in 2012 that later failed mail verification (2,361). JA24926, JA24713 (Op. 442, 229). But it did not use the proper balancing test, failing to compare the number of voters who failed mail verification to either (i) the number of voters disenfranchised in 2014 due to the ***elimination*** of SDR (thousands

more), JA8427; JA24834-36 (Op. 350-52), or (ii) the hundreds of thousands of voters who had used SDR successfully (and without any evidence of fraudulent voting or registration) in the past. JA630-31.[14]

Additionally, under heightened review, the District Court should have invalidated HB589 due to the State's failure to employ a less burdensome avenue in addressing its concerns. *Libertarian Party of Va.*, 718 F.3d at 318 (no narrow tailoring where defendant could not explain "why plaintiffs' proposed solution, manifestly less restrictive of [constitutional rights] would be unworkable or impracticable"). The court acknowledged that legislators were presented with three ways to

[14] Importantly, unrebutted evidence shows that a voter is not an illegal voter merely because he or she fails mail verification. The court repeatedly acknowledged that mail verification is an imperfect process. JA24782, JA24784 (Op. 298, 300). And the SBOE admitted that it did not examine the list of 2,361 to see how many registrants lived at homeless shelters, college campuses, or military bases—all of whom are not ineligible voters. JA21721-25. To the contrary, homeless voters are entitled to register to vote, even though their lack of permanent residence will frequently result in failed mail verifications. With respect to students, SBOE admitted to recent experience with universities failing to deliver SBOE mail to students. JA20646-47. And the testimony of Sergeant Alexander Ealy demonstrated that a valid voter living on a military base, which oftentimes have complicated postal addresses, can fail mail verification. JA8490-508. When such voters fail verification, they are not casting "improper ballots"; they are victims of a mail verification system that even the District Court concedes is "imperfect." JA24784 (Op. 300).

modify SDR to address voter concerns without repealing it. However, the court mistakenly concluded that such alternatives did not make the chosen path irrational. JA24785 (Op. 301).

Other justifications fare no better. The District Court itself acknowledged that the justification for the repeal of pre-registration was weak, based only on a legislator stating that his son had found pre-registration confusing. JA24935 (Op. 451). And with OOP voting, this Court already rejected the primary justification offered for its elimination—administrative ease. *LWVNC*, 769 F.3d at 244. Under the heightened scrutiny demanded in this case, these weak and contradicted justifications fail.

IV. The District Court Erred in Finding No Twenty-Sixth Amendment Violation.

Between 2000 and 2012, North Carolina's youth registration rate rose from 43rd to 8th in the country and its young voter turnout rate climbed from 31st to 10th. JA3948. With HB589, the General Assembly acted to reverse this trend. The District Court agreed that that the repeal of the challenged provisions disproportionately impacted young voters, *see* JA24944 (Op. 460), but its conclusion that HB589 was enacted "in spite of, not because of, these disparities," JA24946 (Op.

462), finds little basis in fact and rests on a misapplication of the legal standard. Because the impact on young voters is not an accidental result but rather one of the purposes of the challenged provisions, they violate the 26th Amendment.

A. Legal Framework

Under the 26th Amendment, "[t]he right of citizens … who are eighteen years of age or older, shall not be ***denied or abridged*** by … any State on account of age." The Amendment was intended "not merely to empower voting by our youths but … affirmatively to encourage their voting, through the elimination of unnecessary burdens and barriers, so that their vigor and idealism could be brought within rather than remain outside lawfully constituted institutions." *Worden v. Mercer Cty. Bd. of Elections*, 61 N.J. 325, 345 (1972); *accord Jolicoeur v. Mihaly*, 5 Cal. 3d 565, 575 (1971) ("Congress … disapproved of … treatment …that … 'might … dissuade [youth] from participating'" in the franchise (quoting S. Rep. No. 92-26, *reprinted in* 1971 U.S.C.C.A.N. 932)). The Amendment thus guards against "onerous procedural requirements" which "frustrate youthful willingness" to engage in the political system, *id.* at 571, 575, and forbids discriminatory treatment of

young voters "without a showing of some substantial justification," *Walgren v. Bd. of Selectmen of Amherst*, 519 F.2d 1364, 1368 (1st Cir. 1975).

B. The Undisputed Facts Show that HB589 Was Intended to Burden Youth Voting.

HB589 does precisely what the 26th Amendment forbids: it intentionally burdens the ability of young people to register and vote. The District Court's conclusion to the contrary ignores the undisputed facts and controlling authority in favor of unsupported and unsupportable justifications.

First, HB589 specifically and facially targets young voters. It repealed the highly successful pre-registration program and mandatory voter-registration drives in high schools—both used exclusively by young people. JA2314-15, JA2320. HB589 also ***specifically excluded college IDs***, while permitting military IDs, veterans' IDs, and tribal enrollment cards to be used for voting. These provisions target only young voters, and such facial discrimination is "by its very terms" intentional discrimination. *Lovell v. Chandler*, 303 F.3d 1039, 1057 (9th Cir. 2002).

The District Court specifically found that each of the challenged provisions disproportionately burden young voters—and that the General Assembly was well aware of this fact. JA24944-45 (Op. 460-61). Young voters were:

- more than twice as likely as older voters to use SDR, JA24655, JA24925 n.237 (Op. 171, 441 n.237);
- were disproportionate users of OOP voting, JA24668 n.117 (Op. 184 n.117);
- are less likely to possess acceptable voter ID under HB589, JA24944 (Op. 460); and
- were more likely to vote after 1 p.m. on the final day of early voting (which HB589 cut), JA24617, JA24944 (Op. 133, 460).

These facts provide additional strong bases for finding that HB589 was enacted with discriminatory intent. *LWVNC*, 769 F.3d at 247 ("[W]e cannot ignore the discriminatory results that several measures in House Bill 589 effectuate."); *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 487 (1997) (disproportionate impact "is often probative of why the action was taken in the first place since people usually intend the natural consequences of their actions").

Rather than giving this evidence its appropriate weight, the District Court adopted an improper and unsustainable standard for assessing the 26th Amendment claim, based entirely on whether it

could find some "non-tenuous reason" for the challenged provisions. JA24946 (Op. 462). Not only is the State not exonerated by "simply 'espous[ing]' rationalizations for a discriminatory law," *LWVNC*, 769 F.3d at 247 (brackets in original) (citation omitted), the rationales for the challenged provisions that single out young voters are nonexistent or cannot withstand the slightest scrutiny. The State did not offer ***any*** rationale for the elimination of school voter-registration drives, and the legislative history makes clear that the two justifications that the court found were "at least plausible" explanations for the exclusion of student IDs were pretextual, JA24945 (Op. 461). During House debates on the original HB589, legislators repeatedly asserted that they were drawing the line at "government-issued IDs," including public university IDs. *See, e.g.*, JA2433; JA2442-47; JA2115. But the General Assembly ultimately jettisoned that distinction, specifically to the detriment of young voters. *See Arlington Heights*, 429 U.S. at 267 ("Substantive departures … may be relevant, particularly if the factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached."). The isolated references to "inconsistency" and "redundancy," unearthed by the District Court from

the abbreviated Senate debate, hardly stack up against the House's extensive examination—and initial embrace—of college IDs.

The District Court's finding of a "non-tenuous" rationale for eliminating pre-registration is also unsustainable. The only explanation for the repeal came from Senator Rucho, one of the bill's main defenders, whose son was purportedly confused about whether pre-registration permitted him to vote before he turned 18. JA24801-02 (Op. 317-18). Indeed, even the court seemed skeptical of this justification, recognizing that the eliminated "pre-registration [system] is simpler than the current registration process," JA24804 (Op. 320); *see also* JA24806 (Op. 322) ("[T]he State's justifications are weaker than for the other provisions."). Nevertheless, the court apparently believed it survived challenge because it found that this exceedingly weak justification is not "a tenuous pretext for racial intent." JA24804-05 (Op. 320-21). Not only was this finding in error, *see supra* § II, for purposes of the 26th Amendment—which asks whether a particular provision burdens the right to vote on account of age without "substantial justification," *Walgren*, 519 F.2d at 1367-68—it is irrelevant. The facts as found by the District Court lead to the

inexorable conclusion that HB589 was intended, at least in part, to suppress the youth vote.

C. The District Court Erred in Failing to Consider Additional Evidence of Discriminatory Intent.

The District Court compounded its error by dismissing outright direct and damning evidence of intentional discrimination against young voters.

First, the court's analysis completely ignored precursor legislation directly aimed at squelching the youth vote. Two bills introduced in 2013—SB666, a "similar bill" after which HB589 was "patterned," JA24508 (Op. 24), and SB667—would have prevented parents from claiming tax exemptions for children registered to vote at another address, *see* JA2648, JA3289. Both provide evidence that the same legislature that enacted HB589 was specifically (and improperly) focused on dissuading college students from voting at their college residences. *Cf. Jolicoeur*, 5 Cal. 3d at 575.

Second, the District Court improperly excluded direct evidence of those bills' discriminatory purpose. Plaintiffs offered legislators' comments regarding voting measures being considered in 2013, including Plaintiffs' proffered Exhibit 79, in which Senator Cook, the

primary sponsor of SB666 and SB667, complained that college students "don't pay squat in taxes" and "skew the results of elections in local areas." *See* JA1818. These same sentiments were later echoed by a sponsor of HB589 who claimed to "have for years heard complaints that college students ought to vote in their home towns." JA1887. Although the parties stipulated before trial that these exhibits "shall be incorporated into the trial record as trial exhibits," JA18213, the District Court inexplicably allowed Defendants to renege on that agreement, JA20228. The court also incorrectly rejected these exhibits as irrelevant, finding that they were simply indicative of "animus generally." JA20826. But such evidence laying bare the legislators' "general animus" toward young voters is ***directly*** relevant to this case. *Arlington Heights*, 429 U.S. at 267.[15]

Third, the District Court turned a blind eye to the General Assembly's obvious motive: It did not like the way young people voted. Young North Carolinians voted overwhelmingly for Democratic

[15] For this same reason, and contrary to the District Court's finding, JA20828, these statements of legislative "motive" and "intent" are either hearsay exceptions, FRE 803(3), or hearsay exemptions, FRE 807; *see United States v. Dunford*, 148 F.3d 385, 393 (4th Cir. 1998); Pls.' Opp'n to Defs.' Mot. in Limine, No. 1:13-cv-00658-TDS-JEP (M.D.N.C. July 8, 2015), ECF No. 322.

candidates. JA3623; JA2563. As such, Republican elected officials had a strong political incentive to restrict the ability of young citizens to vote.

Fourth, the court failed to consider the actions of state and local entities further demonstrating the State's hostility to youth voting. In 2013, SBOE Executive Director Kim Strach—a close associate of an architect of HB589, JA20497—unlawfully directed the DMV not to register 17-year-olds even if eligible, barring over 2,700 young people from registering to vote at a DMV location. *See* JA20637-42. The court inexplicably referred to this as "a foul-up at DMV," JA24650 (Op. 166), ignoring that it was undisputedly the result of Strach's explicit direction. Moreover, several counties that had provided on-campus early voting locations in 2012 decided not to do so in 2014, *see* JA20648-49, leading one state court judge to find intent to discourage student voting, JA21585.

No other conclusion can be drawn from the State's consistent efforts to erect barriers between young voters and the franchise. The District Court's refusal to credit undisputed evidence of the State's systematic efforts to suppress youth voting flouts the "sensitive inquiry"

courts must undertake to evaluate discriminatory intent. *See Bossier Parish I*, 520 U.S. at 488.

D. The District Court's Opinion Undermines the Purpose of the 26th Amendment.

The opinion below repeatedly misconstrues facts to minimize the burdens faced by young voters and, in so doing, contravenes the very purpose of the 26th Amendment.

First, despite relying heavily on turnout statistics as "highly probative" in determining (and discounting) the burdens imposed on minority voters, JA24680 (Op. 196), the District Court inexplicably found that the fact that pre-registration "***increases*** youth turnout," JA24673, JA24850, JA24933 (Op. 189, 366, 449) (emphasis added), has ***no*** probative value, and that the resulting burden is "extremely slight." JA24933-36 (Op. 449-452). This inconsistent approach to turnout data ensures that voters always lose.[16]

Second, the District Court's assumption that the repeal of provisions intended to benefit young voters levels the playing field, *see*

[16] To the extent that pre-registration increased turnout, *see* JA24673 (Op. 189), one would expect to see that increase in 2014, when those who had pre-registered in the three years prior would be casting their first ballots.

JA24935, JA34949 (Op. 451, 465), ignores a fundamental difference between first-time voters and all others—namely, they are not already registered. Registration obstacles necessarily impose more severe burdens on those who are unregistered, including ***all*** young people approaching voter eligibility. It is because of these inherent barriers that young voters were more likely to make use of provisions such as pre-registration and SDR. *See* JA3958.

Finally, the District Court's dismissal of the burdens imposed on young voters in light of "ample alternative registration and voting mechanisms," JA24948 (Op. 464), replicates the same fundamental misunderstanding found in its Section 2 analysis. *See supra* § I.A.2.

The message of HB589 to young voters is loud and clear. The challenged provisions are directly at odds with the goal of the 26th Amendment "not merely to empower voting by our youths but … affirmatively to encourage their voting, through the elimination of unnecessary burdens and barriers." *Worden*, 61 N.J. at 345.

CONCLUSION

For the reasons set forth above, Plaintiffs request that this Court (i) reverse the District Court's order on the grounds that the challenged

provisions of HB589 violate Section 2 of the Voting Rights Act, and the Fourteenth, Fifteenth, and Twenty-Sixth Amendments; (ii) restore North Carolina's SDR, OOP voting, early voting, pre-registration, and voter identification requirements to their pre-HB589 status; (iii) authorize the appointment of Federal observers, pursuant to Section 3(a) of the Voting Rights Act; and (iv) place the State under preclearance of future voting changes pursuant to Section 3(d) of the Voting Rights Act.

This 19th Day of May, 2016.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 16-1468 **Caption:** N.C. State Conference of the NAACP v. McCrory

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Dated: 5/19/2016

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 19th day of May, 2016, I caused this Joint Brief of Plaintiffs-Appellants to be filed electronically with the Clerk of the Court using the Court's CM/ECF system, which will send notice of such filing to all counsel of record. I further certify that on this 19th day of May, 2016, I arranged for the required copies of this Joint Brief of Plaintiffs-Appellants to be delivered to the office of the Clerk of the Court in accordance with Local Rule 25(a)(1)(B).

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EXHIBIT D

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, *et al.*,

Plaintiffs

v.

PATRICK LLOYD MCCRORY, in his Official Capacity as Governor 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

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(*Continuation of caption*)

LEAGUE OF WOMEN VOTERS OF NORTH CAROLINA, *et al.*,

Plaintiffs-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.*,

Intervenors/Plaintiffs

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

CHRISTINA KELLEY GALLEGOS-MERRILL, *et al.*,

Intervenors/Defendants

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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

UNITED STATES OF AMERICA,

Plaintiff-Appellant

v.

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

Defendants-Appellees

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

BRIEF FOR THE UNITED STATES AS APPELLANT

STATEMENT OF JURISDICTION

These cases involve challenges to North Carolina House Bill 589 (HB 589) under Section 2 of the Voting Rights Act (VRA), 52 U.S.C. 10301, and the United States Constitution. The district court exercised jurisdiction under 28 U.S.C. 1331, 1345, and 52 U.S.C. 10308(f). The court entered judgment for defendants on April 25, 2016. J.A. 24964-24966. The United States timely appealed on May 6, 2016; the other plaintiffs appealed on April 26, 2016. J.A. 24980-24981; J.A. 24967-24979. This Court has jurisdiction under 28 U.S.C. 1291.

STATEMENT OF THE ISSUES

1. Whether the challenged provisions of HB 589 were adopted in part for a racially discriminatory purpose in violation of Section 2 of the VRA.

2. Whether three provisions of HB 589—the abolition of same-day registration, cutbacks in early voting, and the prohibition on counting out-of-precinct provisional ballots—violate the results test of Section 2 of the VRA.

STATEMENT OF THE CASE

1. Section 2 imposes a "permanent, nationwide ban on racial discrimination in voting." *Shelby Cnty.* v. *Holder*, 133 S. Ct. 2612, 2631 (2013). It prohibits any "prerequisite to voting" or "standard, practice, or procedure" that "results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color." 52 U.S.C. 10301(a). In 1982, Congress amended Section 2 to make clear that a violation can be established by showing a discriminatory purpose, a discriminatory result, or both. See *Thornburg* v. *Gingles*, 478 U.S. 30, 34-37, 43-45 & nn.8-9 (1986); 52 U.S.C. 10301; S. Rep. No. 417, 97th Cong., 2d Sess. 27 (1982) (Senate Report).

2. In 2013, the North Carolina General Assembly enacted an omnibus elections bill—House Bill 589 (HB 589)—that curtailed opportunities for citizens to register, vote, and have their ballot counted. HB 589 "represents the first major constriction of access to the polls in North Carolina since the passage of the 1965

Voting Rights Act." J.A. 791. The bill was passed following significant increases in voter registration and turnout by African Americans, and one month after *Shelby County* left those African-American voters newly vulnerable.

From 2000 to 2012, voter registration in North Carolina soared, increasing by 28.2% overall. J.A. 804. African-American citizens played an outsized role in that growth. The number of registered African-American voters increased by 51.1% (compared to a 15.8% gain for whites). J.A. 804. In 2008, the percentage of African Americans who were registered to vote surpassed the percentage of whites. J.A. 807. Turnout increases followed. J.A. 1196. North Carolina moved from 37th in overall presidential-year turnout among all states in 2000 to 11th in 2012. J.A. 692. And in both the 2008 and 2012 presidential elections, African-American voters made history by turning out at rates higher than whites. J.A. 1193-1197, 1268-1269; see also J.A. 952.

As introduced in and passed by the North Carolina House of Representatives, HB 589 was a short bill focused primarily on adopting a photo-ID requirement for voting. J.A. 2101-2112. Following House passage on April 24, 2013, the Senate stalled. J.A. 1290-1291. Then, on June 25, 2013, the Supreme Court issued its decision in *Shelby County*, releasing North Carolina from the requirements of Section 5 of the VRA. That same day, Senator Tom Apodaca

announced that the Senate would move ahead with the "full bill" version of HB 589. J.A. 1290-1291; J.A. 1831-1832.

The post-*Shelby County* version of HB 589 undercut three key provisions of North Carolina law: a 17-day early voting period; same-day registration (SDR) during early voting; and the counting of out-of-precinct (OOP) ballots for all offices for which the voter was entitled to vote. J.A. 2119-2185. It cut the early voting period by a week and eliminated SDR and the counting of out-of-precinct ballots altogether. And it imposed a restrictive voter-ID regime that eliminated several forms of acceptable ID from the House-passed version, including public university IDs, employee IDs, and public assistance IDs. Over the objection of senators who decried the bill as voter suppression, J.A. 6117-6119, 6185-6186, 6234-6245, the Senate passed HB 589 on July 25, 2013, on a party-line vote, with every African-American senator voting against it. J.A. 2371, 2503, 2653-2654. Two hours later, and one day before the legislature adjourned its 2013 session, the House took up the omnibus bill. J.A. 2506. Debate in opposition was capped, no conference committee was appointed, and there was no opportunity to offer amendments. J.A. 167-168, 309, 329, 404-405; J.A. 2367, 2507-2511, 2650-2652. Every African-American representative, and every member of the Democratic Caucus who was present—including legislators who had supported the prior version—spoke out against the omnibus bill. J.A. 308-309, 329, 341, 348, 404;

J.A. 2555-2562, 2531-2539, 2561. Only one supporter rose to defend the legislation. J.A. 2620-2624. HB 589 was given less than three hours' consideration before the House—strictly along party lines—voted to concur. J.A. 2372, 2655; see also J.A. 1277-1305.

3. HB 589 was signed into law on August 12, 2013. That day, two sets of private plaintiffs filed challenges to the law alleging violations of the Constitution and the VRA. In September 2013, the United States filed its complaint under Section 2 of the VRA. A group of young voters later intervened, alleging constitutional violations. J.A. 15859; J.A. 16339-16399, 16569-16596. The United States asserted that the following provisions of HB 589, individually and cumulatively, violate Section 2's results test:

Same-Day Registration. Beginning in 2007, North Carolina allowed a prospective voter to register at an early voting site during the early voting period and cast a retrievable absentee ballot that same day. 2007 N.C. Sess. Laws 253, § 1 (codified at N.C. Gen. Stat. § 163-82.6A(a) (2008)); J.A. 2645. HB 589 eliminated SDR. J.A. 2317. Now, with a limited exception, aspiring voters cannot vote in an upcoming election unless they have registered at least 25 days before the election. N.C. Gen. Stat. §§ 163-54, 163-82.6(c) (2014).

Early Voting. North Carolina's prior early voting regime extended over 17 days, including two Sundays. 2001 N.C. Sess. Laws 319, § 5(a) (codified at N.C.

Gen. Stat. § 163-227.2(b) (2002)). HB 589 eliminates a full week of early voting, including one Sunday. See N.C. Gen. Stat. § 163-227.2(b) (2014).

Out-of-Precinct Provisional Voting. Before HB 589, a voter could cast a provisional ballot at any precinct in the county where the voter was registered, and the votes cast were counted for all contests in which the voter would have been eligible to vote had he or she cast a regular ballot at his or her home precinct. 2005 N.C. Sess. Laws 2, § 2 (codified at N.C. Gen. Stat. § 163-55(a) (2006)); J.A. 2636-2637. HB 589 repealed that provision. J.A. 2335-2336. Now, provisional ballots will not be counted if they are cast outside the voter's assigned precinct. J.A. 2335.

Photo Voter-ID Requirement. Prior to the enactment of HB 589, there was no state-law requirement for registered voters in North Carolina to present identification in order to vote. Beginning in 2016 and with limited exceptions, HB 589 required in-person voters to present one of only seven forms of government-issued IDs to vote. The law did not provide an exception to this requirement for voters who face barriers to obtaining qualifying IDs due to poverty, lack of transportation, or other reasons. J.A. 2291-2295.

The United States also argued that passage of HB 589 was motivated in part by a racially discriminatory intent, in violation of Section 2. J.A. 22649-22654.

On May 19, 2014, plaintiffs moved for a preliminary injunction to enjoin the challenged provisions of HB 589. J.A. 17961. The district court denied the motions. *North Carolina State Conference of the NAACP* v. *McCrory*, 997 F. Supp. 2d 322 (M.D.N.C. 2014). On appeal, this Court found "numerous grave errors of law" in the district court's analysis. *League of Women Voters of N.C.* v. *North Carolina*, 769 F.3d 224, 241 (4th Cir. 2014) (*LWV*), cert. denied, 135 S. Ct. 1735 (2015). On the record before the Court, the panel majority concluded that HB 589's elimination of SDR and out-of-precinct voting "looks precisely like [a] textbook example of Section 2 vote denial." *Id.* at 246. The Court remanded the case with instructions to the district court to reinstitute SDR and OOP voting under North Carolina's pre-HB 589 law. *Id.* at 248-249. The day after the district court entered the preliminary injunction, the Supreme Court, over a dissent, recalled and stayed the mandate and the injunction, pending disposition of defendants' petition for a writ of certiorari. *North Carolina* v. *League of Women Voters of N.C.*, 135 S. Ct. 6 (2014). After the Supreme Court denied defendants' petition, this Court issued its mandate, and the injunction reinstituting SDR and OOP voting went back into effect. J.A. 18203-18207.

While the preliminary injunction had been stayed, North Carolina held its 2014 midterm general and primary elections. During those elections, HB 589's cutbacks of early voting, and its ban on SDR and OOP voting, were all in place.

Trial on the merits was scheduled for July 2015. On June 18, 2015, the North Carolina General Assembly passed House Bill 836, which modified HB 589's photo-ID requirements. See N.C. Gen. Stat. §§ 163-166.13(c)(2), 163-166.15 (2015); J.A. 10019-10030. This modification allowed in-person voters without an acceptable photo ID to cast a provisional ballot, so long as they completed a declaration explaining that they have a reasonable impediment to obtaining a qualifying photo ID. The July 2015 trial addressed all claims except those challenging the voter-ID provision.

In January 2016, the district court held trial on plaintiffs' voter ID claims. The United States pressed a Section 2 intent claim as to the voter-ID requirement as enacted in 2013. The United States has not maintained a Section 2 results challenge to the voter-ID provision as amended in 2015.

The district court entered final judgment against plaintiffs on April 25, 2016. J.A. 24479-24966. Under that judgment, the injunction requiring North Carolina to continue offering same-day registration and counting out-of-precinct ballots will be lifted on June 8, 2016. J.A. 24966.

STANDARD OF REVIEW

This Court "review[s] the district court's factual findings for clear error and its legal conclusions de novo." *Federal Trade Comm'n* v. *Ross*, 743 F.3d 886, 894 (4th Cir.), cert. denied, 135 S. Ct. 92 (2014). Clear error results "when, although

there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States* v. *Harvey*, 532 F.3d 326, 336 (4th Cir. 2008) (citations and internal quotation marks omitted).

SUMMARY OF THE ARGUMENT

After remand, the district court committed several errors of law—including errors that this Court had already corrected in the initial appeal—that warrant reversal of its judgment dismissing the United States' claims. Although the district court *acknowledged* the proper legal framework for the discriminatory result and intent claims, it *applied* the wrong analysis, which infected its assessment of the evidence and its factual findings.

For the discriminatory purpose claim, the district court recognized that *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), provides the proper framework, but it made several legal errors in analyzing this claim. First, the court erred by failing to address the United States' argument that HB 589 was adopted, in part, with a race-based purpose to preserve partisan political control, in reaction to the surge in voter participation by African Americans. Second, the district court erred by engaging in a "rational basis"-type review of *possible* motivations, instead of analyzing *actual* motive, as required by

Arlington Heights. Finally, the district court erred by improperly disregarding or entirely ignoring broad categories of probative intent evidence.

In analyzing the Section 2 results claim, the district court recognized that the statute requires a totality of the circumstances review, but committed legal error by repeatedly elevating the importance of one kind of evidence—aggregate minority turnout—above all other factors. The district court then compounded that legal error in two ways. First, the court looked to turnout evidence from midterm elections, rather than presidential elections, which feature an electorate more likely to be burdened by HB 589's restrictions. Where the electorate itself is different, including for reasons relating to the socioeconomic effects of a history of discrimination, Section 2 requires courts to account for those differences. Second, the overemphasis on turnout was particularly prejudicial to plaintiffs because the court mischaracterized testimony about HB 589's likely impact on aggregate turnout.

The court also made several other reversible errors in assessing the Section 2 results claim. For example, the court disregarded this Court's prior instructions by again understating the burdens that HB 589 imposes and by applying a heightened causation standard that is not required under Section 2.

This Court's review of both the discriminatory intent and discriminatory results claims is necessary to address the full panoply of relief requested.[1] The United States seeks relief under Section 3 of the VRA, 52 U.S.C. 10302, which depends on a finding of a discriminatory purpose.[2] Because the district court's multiple legal errors infected its assessment of the United States' Section 2 claims, this Court should reverse the judgment below.

ARGUMENT

I

THE DISTRICT COURT COMMITTED SEVERAL ERRORS OF LAW IN ANALYZING WHETHER HB 589 WAS ENACTED WITH DISCRIMINATORY INTENT

The district court improperly analyzed whether HB 589 was enacted for a discriminatory purpose. The central premise of the United States' discriminatory intent claim is that when African Americans began showing signs of political success after a long history of having their vote circumscribed, the legislative

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[1] Reaching both grounds for a Section 2 violation also conserves judicial resources and avoids piecemeal review, especially where a petition for a writ of certiorari is probable in any event.

[2] The United States requested relief under Section 3(c), 52 U.S.C. 10302(c), which authorizes courts to impose a preclearance requirement, and Section 3(a), 52 U.S.C. 10302(a), which permits the appointment of Federal observers in elections as part of a final judgment, if a discriminatory purpose is found, or an interlocutory order. J.A. 22654, 22657; see also J.A. 22285.

found that their continued control of the legislature was at risk. The legislature responded after *Shelby County* by enacting HB 589 to restrict or eliminate voting methods used disproportionately by African Americans, and did so precisely *because* race is an especially powerful predictor of voting preference in North Carolina—indeed, it better predicts a voter's likely vote than does party registration. In other words, this claim was not about a legislature's efforts to change voting laws in the abstract, but about its efforts to change the racial composition of the electorate to maintain political power. In failing to confront this evidence connecting politics and race, the district court omitted a critical component of the discriminatory intent analysis. This was error.

The district court also erred as a matter of law by engaging in a "rational basis"-type review of *possible* motivations, instead of analyzing the *actual* justifications, or absence thereof, that the legislature proffered in enacting the challenged provisions of HB 589. Although the district court correctly acknowledged that the Supreme Court's decision in *Arlington Heights* provides the proper framework, it failed to focus on the ultimate question in the *Arlington Heights* analysis—whether a discriminatory purpose was one of the legislature's *actual* motives in enacting HB 589. Rather, the court improperly focused throughout its analysis on a different question—the possible, rational motivations that the legislature *could* have had in adopting HB 589. Finally, the district court

erred by improperly disregarding or entirely ignoring broad categories of significant intent evidence, including "fail[ing] to adequately consider North Carolina's history of voting discrimination," despite this Court's express guidance in the initial appeal. *LWV*, 769 F.3d at 242.

A. By Failing To Consider The Legislature's Actions In The Context Of "A Troubling Blend Of Politics And Race," The District Court Erred By Omitting A Critical Component Of The Discriminatory Intent Analysis

To establish a violation of Section 2 based on a racially discriminatory purpose, plaintiffs must show that such purpose was a "motivating factor" in enacting the challenged law. *Arlington Heights*, 429 U.S. at 264-266. Plaintiffs, however, need not show that such a purpose was the "sole[]" or even "primary" motive. *Id.* at 265. Determining whether discriminatory intent exists "demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Id.* at 266. In this sensitive inquiry, discriminatory purpose "may often be inferred from the totality of the relevant facts, including" if "the law bears more heavily on one race than another." *Rogers* v. *Lodge*, 458 U.S. 613, 618 (1982) (quoting *Washington* v. *Davis*, 426 U.S. 229, 242 (1976)). If a race-based purpose is shown to be a motivating factor, "the burden shifts to the law's defenders to demonstrate that the law would have been enacted without this factor." *Hunter* v. *Underwood*, 471 U.S. 222, 228 (1985).

1. The legislative actions at issue must be analyzed against a backdrop of the high levels of racially polarized voting in a State with many highly competitive elections. First, defendants admitted that racially polarized voting has existed and continues to exist in the State, see J.A. 8247; J.A. 21400; see also J.A. 3489, 3622. As a defense expert conceded, "in North Carolina, African-American race is a better predictor for voting Democratic than party registration." J.A. 21400. Experts also testified that "[p]arty and race had become cemented to the foundation of North Carolina politics," J.A. 1270, and that "race is the most important demographic correlate of Democratic voting," J.A. 19860. Second, the implication of such a correlation is that relatively small racial shifts in voting turnout can significantly affect elections, and ultimately legislative control. See J.A. 19860.

It was this fact of North Carolina politics, particularly in presidential election years, that explained and provided context for the race-based motivations of the legislature in adopting HB 589. The district court, however, failed to address the central premise of the discriminatory intent claim: when African Americans began showing signs of political success after a long history of voting suppression, the legislative majority felt that its continued control over the legislature was threatened precisely because of this correlation between race and politics.

Specifically, the case presented to the district court was that the legislature was reacting to this political threat when it enacted HB 589 to target voting methods used disproportionately by newly empowered African Americans. See J.A. 22649-22653; J.A. 2270-2272. The evidence showed that African Americans had accounted for much of the soaring growth in voter registration from 2000 to 2012. J.A. 804. This growth paved the way for historic turnouts in 2008 and 2012, when African Americans voted at higher rates than whites for the first time in modern North Carolina history. And in 2008, the first year that the State allowed a combination of SDR, early voting, and OOP voting—without strict photo-ID requirements—President Obama became the first Democratic presidential candidate to win North Carolina since 1976. J.A. 1196, 1252-1253, 1267-1268. It was also in 2008 that a Democratic gubernatorial candidate won a narrow victory. J.A. 1211.

The United States argued that the legislative majority acted with this context in mind soon after *Shelby County* released the State from the oversight of the preclearance process. The majority sought to preserve its political control by adopting HB 589 to restrict or eliminate voting methods used disproportionately by newly powerful African-American voters. And as the district court found, African Americans disproportionately relied on same-day registration, OOP voting, and early voting, and they would be disproportionately injured by HB 589's ID

provision.[3] This evidence, the United States argued, showed that the legislature acted "at least in part 'because of,' not merely 'in spite of,'" a law's "adverse effects upon an identifiable group." *Personnel Adm'r of Mass.* v. *Feeney*, 442 U.S. 256, 279 (1979).

2. The district court's wholesale failure to address this central claim constitutes legal error. Although in reviewing the Section 2 *results* claim, the district court found "that polarized voting between African Americans and whites remains in North Carolina," the court's *intent* analysis never addressed the significance of this evidence. J.A. 24720; cf. *Reno* v. *Bossier Parish Sch. Bd.*, 520 U.S. 471, 486, 490 (1997) (vacating the district court's "intent to retrogress" determination under Section 5 of the VRA "[b]ecause we are not satisfied that the District Court considered" certain relevant evidence). Instead, the court emphasized only the partisan nature of the legislature's actions as if to suggest that politics alone explains the adoption of HB 589. See, *e.g.*, J.A. 24515, 24518, 24793.

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[3] See J.A. 24657 (OOP voting); J.A. 24614-24615 (early voting); J.A. 24647 (SDR); J.A. 21084-21085 (noting African-American Democrats were twice as likely to use SDR as white Democrats in 2008); see also *LWV*, 769 F.3d at 233 ("Plaintiffs' expert presented unrebutted testimony that African American North Carolinians have used same-day registration at a higher rate than whites in the three federal elections during which it was offered.").

But where race and politics are so strongly correlated, it was legal error for the district court to treat racially discriminatory purposes and partisan goals as if they were somehow mutually exclusive. To properly consider whether race was used to achieve partisan goals, the district court should have applied the Supreme Court's guidance in *League of United Latin Am. Citizens* v. *Perry*, 548 U.S. 399 (2006) (*LULAC*), which analyzed the Texas legislature's electoral changes against a similar backdrop of "a troubling blend of race and politics." *Id.* at 442. In *LULAC*, the Supreme Court determined that Texas had violated Section 2 of the VRA based on evidence of voting changes that diluted the voting power of Latino voters who threatened the incumbency of a Representative in the majority party. See *id.* at 423-425, 438-440. Significant to the Supreme Court's analysis was the backdrop of the "troubling blend of politics and race," which explained that the legislature redrew a district to divide a cohesive Latino community "[i]n response to [its] growing [voting] participation that threatened [a Representative's] incumbency." *Id.* at 439, 442. The Supreme Court determined that the legislature's actions "undermined the progress of a racial group that has been subject to significant voting-related discrimination and that was becoming increasingly politically active and cohesive." *Id.* at 439. Based on this evidence, which provided important context for the legislature's actions, the Supreme Court concluded that "[i]n essence the State took away the Latinos' opportunity because

Latinos were about to exercise it. This bears the mark of intentional discrimination that could give rise to an equal protection violation." *Id.* at 440.

By contrast, the district court's discriminatory intent analysis here failed to discuss the use of racial means to achieve partisan ends in adopting HB 589, even though the evidence of the "troubling blend" in this case was every bit as strong as the evidence in *LULAC*. As in *LULAC*, the evidence here showed that the legislature was acting against a backdrop of starkly polarized voting, a history of discrimination against a minority group, and a recent surge in voter participation by that minority group that threatened the majority party. See J.A. 1184-1195, 1249-1251, 1266-1275; J.A. 3619-3625. The district court erred in ignoring this context and failing to consider whether the North Carolina legislature had adopted HB 589 to "[take] away [African Americans'] opportunity because [they] were about to exercise it." *LULAC*, 548 U.S. at 440.

Instead, the district court incorrectly focused on extraneous questions, such as whether passage of HB 589 involved "racial animus." The district court mischaracterized plaintiffs' theory as resting on the assertion "that HB 589's proponents' statements on the floor are pretextual for racial animus." J.A. 24892. It then proceeded to find an absence of such animus. J.A. 24892-24893. But, as a matter of law, plaintiffs were not required to provide proof of racial animus to show discriminatory purpose. See, *e.g.*, *Garza* v. *County of L.A.*, 918 F.2d 763,

778 & n.1 (9th Cir. 1990) (Kozinski, J., concurring and dissenting in part) (explaining how intentional discrimination can exist without racial animus, particularly in the context of incumbency protection efforts), cert. denied, 498 U.S. 1028 (1991). Consistent with its arguments, the United States showed that the legislature enacted HB 589 in part "because of," not "in spite of," its impact on newly empowered African-American voters, and the district court erred in failing to address these arguments that race was used to maintain political control.

B. The District Court Erred By Engaging In A "Rational Basis"-Type Review Of Possible Motivations, Instead Of Reviewing The Actual Justifications, Or Absence Thereof, Proffered By The Legislature

In *Arlington Heights*, the Supreme Court identified several factors relevant to determining whether a law has a discriminatory purpose based on the actual motivations of the legislative body that enacted the law. See 429 U.S. at 265-268 (discussing a nonexhaustive list of five factors). The Supreme Court has also recognized that the Senate Factors, see p. 33, *infra*, may support a finding of a discriminatory purpose. See *Lodge*, 458 U.S. at 620-621 (affirming use of these factors as outlined in *Zimmer* v. *McKeithen*, 485 F.2d 1297 (5th Cir. 1973), to find discriminatory purpose); see also *United States* v. *Brown*, 561 F.3d 420, 433 (5th Cir. 2009) (acknowledging that the Senate Factors "supply a source of circumstantial evidence regarding discriminatory intent").

The ultimate question, however, is whether the evidence as a whole shows that, more likely than not, one of the factors actually motivating the adoption of a law was a racially discriminatory purpose. In other words, the heart of the discriminatory intent inquiry seeks to discern the *actual* motivations in passing a law. It does not ask whether there are possible justifications for the law. Thus, a district court errs when it advances hypothetical justifications for a challenged law; the only relevant motives are those held by the officials who enacted or maintained the law.

While a discriminatory purpose implies more than "intent as awareness of consequences," it is enough to show that the legislature acted "at least in part 'because of,' not merely 'in spite of,'" a law's "adverse effects upon an identifiable group," regardless of whether politics or another goal drove that intent. *Feeney*, 442 U.S. at 279. Once a discriminatory purpose is shown to be a motivating factor, "the burden shifts to the law's defenders to demonstrate that the law would have been enacted without this factor." *Hunter*, 471 U.S. at 228.

1. Although the district court recognized that *Arlington Heights* provides the proper framework for analyzing discriminatory intent, throughout its intent analysis, the court improperly focused on the legislature's *possible*, instead of *actual*, motivations. Rather than limiting its intent analysis to the direct and circumstantial evidence in the record, the court relied on unsubstantiated

conjectures about possible justifications for enacting HB 589. Indeed, some of these post-hoc rationales were neither asserted by legislators nor advanced by defendants during litigation. The district court committed legal error by proposing its own hypothetical justifications.

For instance, to reject plaintiffs' argument that the legislature's sweeping transformation of HB 589 immediately after *Shelby County* revealed a racially discriminatory intent, the district court relied on unsupported conjectures of what factors *could* have motivated the legislature, instead of determining what *did* motivate the legislature in suddenly producing the "full bill." The court's intent analysis was improperly based on its own judgment that "the administrative and financial cost" of seeking preclearance or the differences in the "burden of proof" under Section 5 and Section 2 could have motivated the legislature to transform HB 589 as it did. J.A. 24886. The court's conclusion that "[i]t *would not have been unreasonable* for the North Carolina Senate" to have such motivations, however, is irrelevant to whether the legislature in fact *had* such motivations. J.A. 24885-24886 (emphasis added). The court cited to no evidence showing that any legislator waited to add the challenged voting provisions to HB 589 because of the "administrative and financial cost" of preclearance. Nor did defendants make such an assertion in their post-trial filings.

Under those circumstances, the district court's finding that the United States had failed to prove a discriminatory purpose was infected by legal error. These possible motives proffered by the district court appear to be no more supported by the record than the legislature's proffered goals of electoral integrity and fraud prevention that this Court suggested were nothing "other than merely imaginable." *LWV*, 769 F.3d at 246.

The district court also erroneously focused on potential justifications for adopting HB 589's voter-ID provisions generally, rather than on the legislature's actual reasons for changing its voter-ID requirements to strictly limit the acceptable forms of IDs, and more important, for waiting until after *Shelby County* to do so. The post-*Shelby County* version of HB 589 harshly restricted acceptable voter IDs to only seven types and excluded certain forms of ID previously deemed acceptable, including public assistance IDs, college IDs, and government employee IDs. Compare J.A. 2115, with J.A. 2292. But the district court failed to address why the legislature had cut back the voter-ID provision so severely after *Shelby County* even though the House had all of the information it purportedly relied on, following thorough deliberation, when it passed its pre-*Shelby County* version.

Instead, the district court conjectured that "[a] legislator *could* have" adopted HB 589 by crediting public hearing testimony asserting the benefits of voter-ID requirements and questioning the accuracy of a State Board of Elections'(SBOE)

analysis showing racial disparities in registered voters who could not be matched with DMV-issued IDs.[4] J.A. 24874-24875 (emphasis added). But here, too, the court's theoretical explanations for how the legislature *could* have acted "in spite of" this racially disparate impact, does not answer the relevant question of whether it in fact did. Nor does it address the critical question of why legislators changed the voter-ID requirements, exacerbating the disparate impact, after *Shelby County*.

Focusing on possible justifications for adopting a law based on a "rational basis"-type review effectively prevents plaintiffs from ever satisfying their burden of proof of discriminatory purpose. Not only does relying on seemingly endless post-hoc justifications for why a legislature *may* have passed a law conflict with the framework set forth in *Arlington Heights*, such an analysis is also inconsistent with the burden-shifting framework required in *Hunter*, 471 U.S. at 228. Moreover, the district court's rational basis-type approach to justifying HB 589 misses the point. The purpose of a discriminatory intent inquiry is to sift out the

[4] In reaching this conclusion, the court failed to consider that several key legislative supporters of HB 589 were directly involved in developing the criteria for the SBOE's subsequent matching analysis in April 2013. J.A. 5241; J.A. 22193-22194. Indeed, one legislator's counsel involved in approving the final SBOE matching report, which showed racial disparities in registered voters unmatched with DMV-issued IDs, affirmed that the new analysis had "hit the nail on the head." J.A. 4836.

legislature's *actual* intent, not to determine whether the law *could* have been passed for rational reasons.

2. The significance of this error was compounded by other flaws in the intent analysis, such as ignoring instances when there was no explanation for an action the court found suspect and analyzing intent in the abstract untethered from the specific provisions of HB 589. The district court, for example, recognized that the legislators' removal, post-*Shelby County*, of public assistance IDs as an acceptable type of voter ID was "suspect" because legislators "could have surmised that African Americans would be more likely to possess this form of ID." J.A. 24882. But instead of determining whether the legislature had a non-discriminatory explanation for this "suspect" change, the court ignored the absence of any such reason and simply concluded that the ID changes "as a whole" were not "as suspect as" claimed. J.A. 24882.

In failing to consider the actual explanations—discriminatory or otherwise—for the legislature's adoption of HB 589's voter-ID provisions, the district court also improperly focused its intent analysis on the benefits and burdens of voter ID laws generally. The court relied on *Crawford* v. *Marion Cnty. Election Bd.*, 553 U.S. 181, 192-197 (2008) (plurality opinion), to suggest "that there are many legitimate (i.e., non-discriminatory) reasons for a legislature to enact an ID requirement." J.A. 24875-24876. But the Supreme Court's affirmance of an

unrelated Indiana voter ID law against a facial constitutional challenge says nothing about whether North Carolina's legislature acted with a racially discriminatory purpose. See *Crawford*, 553 U.S. at 187, 204 (plurality opinion). The question is not whether the legislature might have passed *some* voter ID law without a discriminatory motive; it is why it passed *this* law, and whether it would have done so absent a discriminatory purpose. And *this* law was significantly more restrictive than almost every other state's photo-ID requirement that had been enacted at that time. J.A. 2595-2596; J.A. 3501-3503; J.A. 4403-4405.

C. The District Court Erred By Improperly Disregarding Or Ignoring Broad Categories Of Significant Intent Evidence

1. The District Court Improperly Disregarded Evidence Showing That The Legislature Had Actively Sought Racial Data That Showed HB 589's Disparate Racial Impacts And Then, With This Knowledge, Had Presented And Adopted The Bill

Given the sensitive nature of a discriminatory intent analysis, it is critical to evaluate evidence in context. The United States argued below that a discriminatory purpose should be inferred from the historical and immediate context in which the legislature held onto a voter ID bill until *Shelby County* was decided, and then transformed it by loading the new omnibus bill with provisions that disproportionately harmed African-American voters. Instead of analyzing whether the evidence supported this argument, the district court assessed the evidence in silos, divorced from the United States' theory of its claim. This

approach led the court to "examine the trees so minutely that [it] los[t] sight of the forest." *Merritt* v. *Old Dominion Freight Line, Inc.*, 601 F.3d 289, 302 (4th Cir. 2010) (Davis, J., concurring).

This approach was particularly problematic given that the challenged provisions of HB 589 interact with each other to depress African-American voter participation, as explained below. See note 7, *infra*; see also *LWV*, 769 F.3d at 242 ("By inspecting the different parts of House Bill 589 as if they existed in a vacuum, the district court failed to consider the sum of those parts and their cumulative effect on minority access to the ballot box."). That is, the problem was not just that district court reviewed the evidence piecemeal, but that the nature of this discriminatory intent claim required a forest-level view.

The district court individually analyzed and disregarded each piece of evidence showing that the legislature had proactively requested racial data showing HB 589's disparate racial impacts; in doing so, the court failed to consider the overarching context in which the legislature had requested or been presented with this data. The court, for example, assessed in the abstract the probative value of evidence that a legislative staffer and the House co-sponsors of HB 589 had specifically requested or received racial data on voter turnout, type of vote (early and election day), provisional ballots, one-stop voters, verification rates for SDR, and possession of certain types of IDs. J.A. 24864-24867. The court then

dismissed the probative value of this evidence, including because the requests were "not necessarily as suspect as Plaintiffs claim" and certain data was received after HB 589 had been drafted.[5] J.A. 24866-24867.

But the question is not whether the requests are "necessarily" suspect. For example, a different legislature might have made similar requests and then modified proposed legislation to avoid its impact on the minority community. What makes the requests probative of the legislature's discriminatory purpose here is that the information the legislature acquired increased its confidence that HB 589 would have its intended effect—to deter participation by African-American voters whose votes threatened the drafters' continued control of the legislature.

Because the district court's analysis was untethered from the context of plaintiffs' discriminatory intent claim, the court failed to consider how this evidence showed the salience of race in the North Carolina legislature and how this data related to the post-*Shelby County* transformation of HB 589. In deeming this evidence as less "suspect," the district court justified the requests for racial data as necessary for "[a]ny responsible legislator" to address possible challenges to HB

[5] The court also suggested that evidence of a legislative staffer's request for certain racial data had little probative value because the court did not have evidence of the underlying data, despite a voluminous record. J.A. 24865. The court, however, failed to consider that it had denied plaintiffs access to discovery of communications between legislators and their staff, which could have uncovered the information that the court deemed significant. J.A. 18194-18195.

589. J.A. 24866. The court, however, failed to consider that the version of the bill at that time did not include the challenged provisions on SDR, provisional voting, early voting, and other restrictive voting changes that related to the racial data requested. Thus, by analyzing the evidence in isolation, the court lost sight of the bigger picture—that soon after *Shelby County*, the legislature transformed and quickly passed HB 589, which cut back on voting practices for which it had previously requested racial data. See *LWV*, 769 F.3d at 242-243.

2. Despite This Court's Express Guidance In The Initial Appeal, The District Court Continued To Erroneously Downplay North Carolina's History Of Voting Discrimination

In the initial appeal in this case, this Court determined that the district court erred as a matter of law by "fail[ing] to adequately consider North Carolina's history of voting discrimination." *LWV*, 769 F.3d at 242. This Court highlighted the district court's insufficient consideration of voting discrimination in North Carolina after 1965, and explained that "the post-*Shelby County* facts on the ground in North Carolina should have cautioned the district court against" celebrating the voting rights progress here. *Id.* at 243.

Despite this guidance, the district court once again failed to adequately consider the history of voting discrimination in North Carolina. This omission tainted the court's intent analysis because North Carolina's history of discrimination provided circumstantial support for the experts' theory that HB 589

was adopted in reaction to rising voter participation by African Americans, which threatened the majority's political control. See *McMillan* v. *Escambia Cnty.*, 748 F.2d 1037, 1044 (5th Cir. 1984) ("A history of pervasive purposeful discrimination may provide strong circumstantial evidence that the present-day acts of elected officials are motivated by the same purpose, or by a desire to perpetuate the effects of that discrimination." (quoting *United States* v. *Marengo Cnty. Comm'n*, 731 F.2d 1546, 1567 (11th Cir.), cert. denied, 469 U.S. 976 (1984))).

The district court largely discounted evidence of the State's history of voting discrimination and incorrectly concluded that "there is little evidence of official discrimination since the 1980s." J.A. 24883. This failed to take into account, however, this Court's insight regarding "the prophylactic success of Section 5's preclearance requirements" and the context in which the legislature rushed to enact HB 589. *LWV*, 769 F.3d at 239; see *id.* at 242 (observing that the legislature "rushed to pass House Bill 589" immediately after *Shelby County*, when "history" without the VRA "picked up where it left off in 1965").

The court, moreover, failed to adequately consider evidence that during this time period in which it asserted that there was little evidence of discrimination—*i.e.*, 1980 to 2013—the Department of Justice objected to more than 50 voting changes in North Carolina for failing to show that the proposed changes would have neither a discriminatory purpose nor a discriminatory effect. J.A. 1963,

1968-1975; J.A. 4096-4097. Despite the probative value of this evidence, and given the changes made to HB 589 immediately after *Shelby County*, the court made only a cursory reference in its analysis to "various objection letters issued by the DOJ when North Carolina was subject to § 5 pre-clearance." J.A. 24721. This was error.

3. The District Court Improperly Rejected Plaintiffs' Expert Testimony Regarding Discriminatory Intent

The district court also improperly discounted evidence presented by expert historians. Courts in voting cases routinely consider expert testimony concerning discriminatory intent and the history of voting discrimination. See, *e.g.*, *Garza*, 918 F.2d at 767 n.1, 771; *Dillard* v. *Crenshaw Cnty.*, 640 F. Supp. 1347, 1356, 1358-1359 (M.D. Ala. 1986); *Bolden* v. *City of Mobile*, 542 F. Supp. 1050, 1075 (S.D. Ala. 1982). The question of legislative purpose is complex, and opinions of expert historians are particularly probative in voting cases where the legislature's actions echo historical patterns of discrimination or react to past racially-charged situations in that jurisdiction. For example, here, expert testimony explained North Carolina's historical pattern: backlash through the use of voting restrictions in response to rising political participation by African Americans. See J.A. 1255-1256; J.A. 19196-19197; see also J.A. 802-803; J.A. 22142. That historical pattern sheds light on the motive behind HB 589.

The district court discounted this testimony because it ostensibly "constituted nothing more than [an] attempt to decide the ultimate issue for the court," J.A. 24876, but its treatment rests on a legally erroneous view of what expert historians do. Such experts do not substitute their judgment for the court's with respect to the ultimate factual conclusion regarding legislative purpose. But testimony like that offered here, by experts with extensive specialized knowledge of historical voting discrimination and experience analyzing legislative records and other records to discern a legislature's intent, illuminates the political context for the present legislative action, within North Carolina's particular lived history. See, *e.g.*, J.A. 1179, 1182-1183, 1247-1250; J.A. 3605. That is, these experts offered "specialized knowledge [that] will help the trier of fact to understand the evidence or to determine a fact in issue." Fed. R. Evid. 702(a). That an expert's opinion "embraces an ultimate issue" does not undermine its relevance or probative value. Fed. R. Evid. 704 ("An opinion is not objectionable just because it embraces an ultimate issue."). It was error for the district court to reject this expert testimony by giving it little to no weight.

II

THE DISTRICT COURT FAILED TO PROPERLY APPLY THE SECTION 2 RESULTS TEST

A Section 2 results violation is proven when, "based on the totality of circumstances," members of a racial group "have less opportunity than other

members of the electorate to participate in the political process and to elect representatives of their choice." 52 U.S.C. 10301(b). The "essence" of a results claim is that a challenged practice "interacts with social and historical conditions" attributable to race discrimination "to cause an inequality in the opportunities enjoyed by [minority] and white voters." *Gingles*, 478 U.S. at 47. Section 2 thus requires a "peculiarly" fact-based inquiry into the "design and impact of the contested electoral mechanism[]" in light of the jurisdiction's "past and present reality." *Id.* at 79 (citations and internal quotation marks omitted).

This Court has adopted a two-element framework for determining the existence of a Section 2 violation in vote denial and abridgement cases such as this one:

First, the challenged provision "must impose a discriminatory burden," meaning that it "disproportionately impact[s] minority voters." *LWV*, 769 F.3d at 240, 245. This first step incorporates both the likelihood that minority voters are affected and their relative ability to overcome the burdens the law imposes.

Second, the disproportionate impact "must in part be caused by or linked to social and historical conditions that have or currently produce discrimination against members of the protected class." *LWV*, 769 F.3d at 240 (citation and internal quotation marks omitted). This second step requires the court to determine whether, based on "the totality of circumstances," the law works in concert with

conditions tied to race discrimination to produce a discriminatory result "on account of race or color." *LWV*, 769 F.3d at 240-241. The causal inquiry under Section 2 is not whether the challenged practice standing alone causes the disproportionate impact, but rather whether the practice "interacts with social and historical conditions" to produce "an inequality in the opportunities enjoyed by black and white voters." *Gingles*, 478 U.S. at 47; see also *Gonzalez* v. *Arizona*, 624 F.3d 1162, 1192 (9th Cir. 2010), aff'd, 133 S. Ct. 2247 (2013).

When assessing both elements, "courts should consider the totality of circumstances." *LWV*, 769 F.3d at 240 (citation and internal quotation marks omitted). To do so, courts rely on a nonexhaustive list of factors articulated in the Senate Report accompanying the 1982 VRA Amendments (Senate Factors). See *Gingles*, 478 U.S. at 44-45; Senate Report 28-29. No one factor is dispositive and "there is no requirement that any particular number of factors be proved, or that a majority of them point one way or the other." *LWV*, 769 F.3d at 245 (quoting *Gingles*, 478 U.S. at 45). "The need for such 'totality' review springs from the demonstrated ingenuity of state and local governments in hobbling minority voting power" as "jurisdictions have substantially moved from direct, over[t] impediments to the right to vote to more sophisticated devices" that nonetheless impair minority political power. *Johnson* v. *De Grandy*, 512 U.S. 997, 1018 (1994) (brackets in original; citations omitted).

The Senate Factors help courts analyze whether a challenged practice interacts with preexisting conditions to deny or abridge the right to vote "on account of race or color." *Gingles*, 478 U.S. at 36, 45 & n.10. The list includes the jurisdiction's history of official discrimination (Factor 1), the extent to which the socioeconomic effects of discrimination hinder access to the political process (Factor 5), and the tenuousness of the justification for the challenged practice (Factor 9). See *id.* at 36-37; Senate Report 28-29. Where plaintiffs challenge the repeal of voting procedures that minority voters have relied on, the state's "previous voting practices * * * are a critical piece of the totality-of-the-circumstances analysis Section 2 requires." *LWV*, 769 F.3d at 242; see also *Ohio State Conference of the NAACP* v. *Husted*, 768 F.3d 524, 558 (6th Cir.), vacated, No. 14-3877, 2014 WL 10384647 (6th Cir. Oct. 1, 2014).

A. The District Court Gave Impermissible Weight To Evidence Regarding 2014 Turnout

While the district court recognized that Section 2 requires a totality of the circumstances review, the court used one piece of evidence to frame its legal analysis. The court repeatedly gave impermissible weight to evidence regarding increased African-American turnout in the 2014 midterm elections as compared to the 2010 midterm elections. Thus, the court held that African-American 2014 turnout numbers "contradict the claim that [HB 589] has a negative, disparate impact on African Americans," J.A. 24618, and concluded that North Carolina's

2014 turnout data undermined the Section 2 results claim as to each practice challenged.

This was legal error because Section 2 requires judgments regarding "the ultimate conclusions about equality or inequality of opportunity" be grounded in a "comprehensive, not limited, canvassing of relevant facts." *De Grandy*, 512 U.S. at 1011. Prioritizing 2014 turnout over all other evidence contravenes this fundamental requirement.

The district court's legal error regarding the treatment of turnout evidence prevented the court from properly weighing the evidence as a whole. Aggregate turnout evidence may not be at all probative of whether a challenged practice imposes an unlawful burden on minority voters. Moreover, the court failed to recognize that where such evidence is limited to a single before- and after-implementation comparison of midterm election years, aggregate turnout data are of particularly limited value and cannot substitute for "carefully and searchingly review[ing] the totality of the circumstances." *De Grandy*, 512 U.S. at 1026 (O'Connor, J., concurring). Due to these legal errors, the court made the clearly erroneous factual findings that none of HB 589's challenged provisions have a discriminatory result.

1. The District Court Erred In Elevating The Importance Of A Single Aggregate Turnout Comparison Above All Other Evidence

No court has ever required evidence of decreased aggregate minority turnout as a threshold requirement for Section 2 liability. But in this case, the district court assigned greater weight to evidence of African-American turnout in the 2014 midterm elections than to all the other evidence presented regarding the burdens that African-American voters face under HB 589. Indeed, the court held that "the trial evidence contradicted many of the factual premises * * * that underlay the Fourth Circuit's decision" as "the 2014 election data is now available and provides this court with evidence of how minorities actually participate under [HB 589]." J.A. 24702-24703. The repeated emphasis on 2014 aggregate turnout as the singularly most probative evidence runs throughout the district court's analysis. See, *e.g.*, J.A. 24529, 24532, 24613, 24617-24619, 24627, 24630-24631, 24634, 24643-24645, 24659, 24678-24680, 24702-24705, 24709-24710, 24718, 24728, 24741, 24763, 24825, 24833, 24841, 24854, 24858-24860, 24954-24956.

To require or otherwise elevate the importance of decreased aggregate turnout ignores the plain language of Section 2, which forbids practices that "result[] in a denial *or abridgement* of the right * * * to vote on account of race or color." 52 U.S.C. 10301(a) (emphasis added). By its terms, Section 2 requires plaintiffs to show only that, as a result of a challenged practice, minority voters have "less opportunity" to participate relative to other voters, not that they have *no*

opportunity. 52 U.S.C. 10301(b). Aggregate minority turnout can increase—as compared to a single prior election cycle—notwithstanding the imposition of voting restrictions that disparately and materially burden minority voters as compared to white voters. This is so because turnout in any particular election is driven by many different factors, including the offices on the ballot, the competitiveness of the election, total campaign spending, get-out-the-vote efforts, and overall voter interest. J.A. 19698-19699; J.A. 21114-21117. Indeed, these other factors typically have a greater effect on aggregate turnout than do changes in election laws. J.A. 19698-19699. Courts cannot gauge the impact of new voting requirements on turnout simply by comparing the first election in which a requirement is implemented with the prior election. For example, it would be impossible to draw a conclusion about how a hypothetical voter ID law implemented in 2006 impacted African-American voters solely by comparing 2004 presidential-year turnout with the historically high African-American turnout in 2008. It is likewise impossible to draw causal conclusions about the burdens imposed by HB 589 simply by comparing aggregate turnout in the 2010 and 2014 elections. J.A. 19401; J.A. 19634, 19897; J.A. 21114.

Given the many factors that can affect voter participation, it is unsurprising that courts of appeals have found that it is a blatant error of law to deny relief to Section 2 plaintiffs based solely on the results of one or two elections. See, *e.g.*,

Ruiz v. *City of Santa Maria*, 160 F.3d 543, 549-550 (9th Cir. 1998), cert. denied, 527 U.S. 1022 (1999); *Teague* v. *Attala Cnty.*, 92 F.3d 283, 288-289 (5th Cir. 1996), cert. denied, 522 U.S. 807 (1997). In reviewing Section 2 claims, the Supreme Court, this Court, and other courts of appeals have repeatedly cautioned against placing too much emphasis on results from a single election cycle. See *Gingles*, 478 U.S. at 41, 57; *Hines* v. *Mayor of Ahoskie*, 998 F.2d 1266, 1272 (4th Cir. 1993); *Collins* v. *City of Norfolk*, 883 F.2d 1232, 1242 (4th Cir. 1989), cert. denied, 498 U.S. 938 (1990); *Johnson* v. *Hamrick*, 296 F.3d 1065, 1074 (11th Cir. 2002); *Vecinos De Barrio Uno* v. *City of Holyoke*, 72 F.3d 973, 984-985 (1st Cir. 1995); *Baird* v. *Consolidated City of Indianapolis*, 976 F.2d 357, 359-360 (7th Cir. 1992), cert. denied, 508 U.S. 907 (1993). While that caution has most often been raised in the context of vote dilution challenges addressing whether voting is racially polarized, it is fully relevant here. Overemphasis on any one metric for measuring equal access to the political process is legal error because it is inconsistent with Section 2's totality of the circumstances framework.

To be sure, minority participation rates can be relevant to determining whether a law has a discriminatory result. See, *e.g.*, Senate Report 29 & n.114. In *Mississippi State Chapter, Operation PUSH, Inc.* v. *Mabus*, 932 F.2d 400 (5th Cir. 1991) (*Operation PUSH*), the effect of the challenged laws on registration rates was relevant because those laws had been in place since 1892 (dual voter

registration requirement) and 1955 (no satellite offices for registration). See *id.* at 402. But the VRA does not *require* plaintiffs to endure discriminatory practices for multiple elections in order to prove an unlawful effect. Indeed, the VRA permits the Attorney General to seek "preventive relief," including a permanent injunction, where there are reasonable grounds to believe a practice will violate Section 2. 52 U.S.C. 10308(d); see also *Shelby Cnty.*, 133 S. Ct. at 2619 (Section 2 can be used to "block voting laws from going into effect").

Moreover, depressed turnout cannot be assumed to flow from every Section 2 violation. Limiting Section 2 results violations to only those practices that depress aggregate turnout ignores the clear statutory directive to consider the "totality of the circumstances." 52 U.S.C. 10301(b). Under the results test, courts analyze the comparative burden that a challenged practice imposes, and the comparative effort that minority voters must take to overcome it. Otherwise, a decision to hold voting hours from 7 a.m. to 7 p.m. in a majority white precinct, but only from 9 a.m. until 12 p.m. in a majority black precinct, would be immunized from challenge under Section 2's results test as long as black workers were willing to give up their morning pay in order to vote. Instead, a Section 2 vote denial claim need only be predicated on showing that the challenged practice has made it "more difficult" for African Americans than for whites to participate

electorally given the existing social and historical conditions. *Chisom* v. *Roemer*, 501 U.S. 380, 408 (1991) (Scalia, J., dissenting).

The district court attempted to find support for its contrary approach in other Section 2 cases where courts purportedly "rely on the electoral mechanism's effect on minority success in turnout and registration rates, or else find the failure to produce such evidence fatal." J.A. 24709. But the court misread those cases. For example, in *Smith* v. *Brunswick County*, 984 F.2d 1393 (4th Cir. 1993), this Court found no Section 2 violation because there was insufficient proof of racially polarized voting, not because African-American participation rates by themselves defeated liability. *Id.* at 1400-1402. The same is true for the denial of relief in *Salas* v. *Southwest Texas Junior College District*, 964 F.2d 1542, 1556 (5th Cir. 1992). In other cases cited by the district court, turnout evidence was important for deciding whether Senate Factor 5 weighed for or against plaintiffs—not for finding such evidence or lack thereof broadly "fatal" to a Section 2 claim. See, *e.g.*, *League of United Latin Am. Citizens, Council No. 4434* v. *Clements*, 999 F.2d 831, 866-867 (5th Cir. 1993) (en banc), cert. denied, 510 U.S. 1071 (1994); *Solomon* v. *Liberty Cnty.*, 957 F. Supp. 1522, 1563-1565 (N.D. Fla. 1997), aff'd, 221 F.3d 1218 (11th Cir. 2000).

The district court thus erred in giving the 2010 to 2014 aggregate turnout comparison outsized importance, especially when viewed in the context of the

record as a whole. The 2010 to 2014 turnout comparison simply does not speak to the plaintiffs' evidence showing that removal of OOP and SDR, and cutbacks in early voting, burdened minority voters more severely. J.A. 21810-21811; J.A. 22210-22215, 22217-22220, 22225-22230.

For example, that overall African-American turnout increased in one election does not negate evidence that removing SDR disparately burdens African-American voters because of persistent racial disparities in literacy and educational attainment. J.A. 22210-22212.[6] Nor can it negate undisputed evidence showing that in every federal general election from 2002 to 2014 except 2006—before, during, and after the period from 2007 to 2013 when SDR was available—African Americans were more likely than whites to register after the 25-day registration deadline and disproportionately used SDR when it was available. J.A. 819-820, 830-831, 964-965, 967; J.A. 4559-4560; J.A. 24647.[7]

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[6] Moreover, these burdens arise in the context of depressed minority turnout generally. While African-American turnout increased and white turnout decreased as compared to 2010, African-American turnout rates still lagged behind white turnout rates in 2014, as they had in the 2010 and 2006 midterm elections. J.A. 8416.

[7] The district court incorrectly states that plaintiffs' data from 2008 and 2012 only report how many North Carolinians registered during the early voting period, not how many actually used SDR. J.A. 24647 n.100. Dr. Stewart distinguished registrants who used SDR from individuals who used other registration methods during that period and found that African Americans

(continued…)

2. The District Court Erred In Failing To Note The Limited Probative Value Of Midterm Election Turnout Data As Compared To Presidential Year Impact

The overreliance on 2014 turnout evidence is legal error because the court failed to sufficiently consider that midterm-year voters are meaningfully different from voters participating in presidential election years. J.A. 2787-2788. Where the electorate itself is different, including for reasons relating to the socioeconomic effects of a history of discrimination, the proper Section 2 analysis requires the court to take account of those differences. See J.A. 23801-23802 (defendants' expert conceding that midterm voters are more likely to be repeat voters and of higher socioeconomic status).

There is an uncontested "gulf in prior voting experience" in North Carolina between presidential- and midterm-year voters. J.A. 4462.[8] New and

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(…continued)
disproportionately used SDR. See J.A. 821-825. The court further erred by failing to account for the combined and cumulative effect of cutbacks to early voting and the elimination of SDR. *LWV*, 769 F.3d at 242. The impact of SDR is dependent upon the length of the early voting period. Most starkly, if there were no early voting period, the absence of SDR would make no difference. Conversely, the impact of cutbacks to early voting lessens not just the opportunity to vote—but with SDR—the opportunity both to register and vote.

[8] In 2014, 90.7% of midterm voters in North Carolina had voted in the 2012 presidential election and 64.6% had voted in the 2010 and 2012 general elections. For the 2012 presidential election, barely half (53.5%) had voted in the 2010 midterm and less than half (49.7%) had voted in the past two elections. J.A. 4462.

inexperienced voters—the voters who are most likely to avail themselves of the voting mechanisms eliminated by HB 589—are far more likely to participate in presidential elections than in midterm elections. See J.A. 19620. The weight of the evidence consistently and repeatedly showed that the election changes at issue would have a significantly lesser effect in a midterm election as compared to a presidential general election. J.A. 812; J.A. 2787-2788; J.A. 4466, 4482, 4484-4486. In presidential elections, African-American turnout is far higher—in both proportional and absolute terms, J.A. 8416—and North Carolina's already higher-than-average early voting wait times will disproportionately burden African-American voters, who are more likely to work nonstandard and extended hours and lack access to vehicles and reliable transportation as compared to whites. J.A. 22151-22152, 22155-22156; 22219-22222. Moreover, in presidential election years, African-American voters were particularly and disproportionately likely to vote during the now eliminated first week of early voting. J.A. 834-835, 846-849. On the now-eliminated first Sunday of early voting, 49% of voters going to the polls in the 2008 general election were African American, as were 43% of such voters in 2012. J.A. 977; J.A. 19620; J.A. 22218.

In contrast, the minority voters who participate in midterm elections are better equipped to confront adverse elections rules and are sufficiently low in number so as to pose little threat to the enacting legislature. Not so for the newly

empowered minority voters who participated in record numbers in the 2008 and 2012 elections and who threatened to topple the majority party's hold on power. That burgeoning electorate was the primary perceived threat, and it includes minority voters more likely to be burdened and deterred by HB 589's restrictions. Thus, for example, racial disparities in early voting are largest in presidential elections. In the 2008 and 2012 general elections, more than 70% of African-American voters used early voting, as compared with 51% and 52% of white voters, respectively. J.A. 615-617; J.A. 4554. Similarly, midterm voters were less likely to avail themselves of SDR when it was available because they were likely already registered.[9] Midterm voters were also less likely to cast a provisional ballot because they had prior experience going to the polls to vote. J.A. 4461-4462, 4484-4486.

[9] Many more voters register during presidential election cycles (*e.g.*, 2010 to 2012—more than 1.1 million new registrations) than during midterm election cycles (*e.g.*, 2012 to 2014—approximately 640,000 new registrations), J.A. 8417, yet another reason why the district court's overreliance on data from a single midterm election was inappropriate. Dr. Stewart's testimony on "churn" in the voter rolls highlighted this pattern. J.A. 19611-19612; see also J.A. 8417. The district court misunderstood this testimony, see J.A. 24645 & n.98 (faulting Dr. Stewart for failing to compare voter registration during the 2010 and 2014 midterm election cycles), and as a result, wrongly discounted it.

3. The District Court Compounded The Error Of Its Overemphasis On Turnout By Misstating Relevant Testimony On The Subject

Finally, the prejudice to plaintiffs caused by the district court's legal error in overemphasizing 2014 turnout was compounded by the court's clear factual errors in recounting expert testimony on this subject. The court repeatedly stated that plaintiffs' experts made "inaccurate predictions" about the likely effects of HB 589 on minority turnout and stated that the 2014 "turnout numbers are contrary to Plaintiffs' experts' predictions." J.A. 24618; see also J.A. 24617-24618.

The district court further faulted plaintiffs' experts for not conducting an analysis of the 2014 elections that purported to isolate HB 589's effects on turnout. *E.g.*, J.A. 24656-24657. But these findings cannot be squared with the testimony that the court heard.

First, contrary to the district court's statements, during the preliminary injunction hearing, Dr. Stewart did not predict that African-American turnout in 2014 would be lower than aggregate African-American turnout in 2010. Dr. Stewart did not predict a drop-off in aggregate 2014 turnout at all. Instead, he told the court that he "could not give an opinion" on any possible reduction in African-American turnout, testified that many factors would affect turnout, including the "hot senate race at the top of the ballot," and stated that "most political scientists" and "most observers who are not political scientists[] are estimating that turnout in 2014 is going to be higher than in 2010." J.A. 17596-17597. He thus testified that

HB 589's restrictions would disparately burden African-American voters even as he recognized that 2014 aggregate turnout could increase. On cross-examination, he re-emphasized that he was not making any predictions on whether African-American turnout would decrease specifically in 2014 and explained that such predictions for a single election year "require[] a multi-vari[ate] statistical analysis" that "would be outside I think the data and the analysis that's possible at this point." J.A. 17547-17548.

Second, at trial, Dr. Stewart explained that there was insufficient data to reliably measure the turnout effects of HB 589 in the 2014 election. Isolating the effects of the law on turnout would "need a lot of observations" either from "a lot of years or a lot of people or a lot of geographic units" from more than one state. J.A. 19637. He reaffirmed that drawing conclusions based on 2014 alone was beyond the scope of what the data allowed. J.A. 19636-19637.

Discounting expert testimony based on an incorrect statement of what the experts actually said is clear error. Because the district court was wrongly fixated on assessing the impact of HB 589 solely through one year of turnout, and compounded that error by misstating what Dr. Stewart testified to on that subject, the court failed to take proper account of persuasive testimony by Dr. Stewart and other plaintiffs' experts about the disparate burdens that HB 589 imposes on minority voters.

B. The District Court Misapplied This Court's Instructions For Determining What Constitutes A "Discriminatory Burden" Under Section 2

The district court disregarded this Court's previous instructions for addressing the first element of the test for Section 2 vote denial and abridgment claims. That element asks whether the challenged restrictions "impose a discriminatory burden on members of a protected class, meaning that members of the protected class 'have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.'" *LWV*, 769 F.3d at 240 (quoting *Husted*, 768 F.3d at 55); see also 52 U.S.C. 10301.

1. The District Court Improperly Discounted Evidence Of Burden Based On The Number Of Voters Affected

The district court again erred when it "minimized Plaintiffs' claim as to out-of-precinct voting" based on the number of voters affected. *LWV*, 769 F.3d at 244. The district court acknowledged this Court's corrective instruction but then repeated the same error. Specifically, the district court relied on the relatively low number of out-of-precinct voters to hold that "OOP voting was not significant to the parity in political participation achieved by African Americans since 2008" given that "not having OOP would only have changed the turnout differential [between African Americans and whites] by .1% in 2008[,] .2% in 2010, and less than .1% in 2012." J.A. 24842-24843. In rejecting plaintiffs' claim, the court

concluded that "the number of voters affected is some evidence of the magnitude of the burden imposed." J.A. 24843.

Contrary to the district court's holding, the burden that results from disallowing OOP voting for those who vote in the wrong precinct is absolute—their votes are not counted. In the 2014 midterm general election, 1184 voters who cast OOP ballots (among whom African Americans were disproportionately included) were effectively disfranchised as result of HB 589. J.A. 4482, 4484. And African Americans were disproportionately represented among the voters who cast OOP ballots in 2012 (7486 total OOP voters), 2010 (6052 total OOP voters), 2008 (6031 total OOP voters), and 2006 (3115 total OOP voters). J.A. 876, 986-987.

Similarly, the district court erred in discounting evidence of the impact of eliminating SDR because a relatively modest number of individuals attempted to register in 2014 during what used to be the SDR period. J.A. 24839 ("Plaintiffs also did not show that African-American turnout in 2014 would have been any higher had SDR been in place."). As with OOP voting, these individuals—who were disproportionately likely to be African American—were entirely excluded from the 2014 election. J.A. 4470-4472.

"[N]o amount of voter disenfranchisement can be regarded as '*de minimis.*'" *Florida* v. *United States*, 885 F. Supp. 2d 299, 318 (D.D.C. 2012). The district

court thus again erred in minimizing the burden faced by these out-of-precinct and SDR voters. "[W]hat matters for purposes of Section 2 is not how many minority voters are being denied equal electoral opportunities but simply that 'any' minority voter is being denied equal electoral opportunity." *LWV*, 769 F.3d at 244 (quoting 52 U.S.C. 10301(a)); see also *Frank* v. *Walker*, No. 15-3582, 2016 WL 1426486, at *2 (7th Cir. Apr. 12, 2016) ("The right to vote is personal and is not defeated by the fact that 99% of other people can secure the necessary credentials easily.").

2. The District Court Ignored Evidence Of Burden Where The Right To Vote Was Not Completely Foreclosed

The district court's analysis of what constitutes a cognizable burden would have required plaintiffs to show that—absent SDR or OOP voting—affected voters would not have registered to vote or cast a ballot at all. Notwithstanding this Court's previous holding that "[t]here can be no doubt that" the elimination of SDR, like the elimination of OOP voting, "disproportionately impact[s] minority voters," *LWV*, 769 F.3d at 245, the district court disregarded that impact based on the continuing availability of other registration and voting methods. *E.g.*, J.A. 24648 ("[S]tatistics about SDR use do not demonstrate what these particular voters, of any race, would have done had SDR not been an option, especially given that there are a multitude of easy ways to register in North Carolina apart from

SDR."); J.A. 24844 ("[T]he relatively small number of individuals who used OOP have many remaining convenient alternatives.").

Such reasoning repeats the district court's prior legal error, when it concluded that "because voting was not completely foreclosed and because voters could still register and vote by mail, a likely Section 2 violation had not been shown." *LWV*, 769 F.3d at 243. But as this Court has already held, "nothing in Section 2 requires a showing that voters cannot register or vote under any circumstance." *Ibid.* In again "waiving off disproportionately high African-American use of certain curtailed registration and voting mechanisms as mere 'preferences' that do not absolutely preclude participation," the district court erred. *Ibid.*

C. The District Court Failed To Correctly Apply The Legal Framework For Determining Whether A Burden Is Caused By Or Linked To The Social And Historical Legacy Of Race Discrimination

The district court also failed to properly apply the second step of the test for vote denial and abridgment: whether the burdens disproportionately experienced by minority voters are "in part * * * caused by or linked to social and historical conditions that have or currently produce discrimination against members of the protected class." *LWV*, 769 F.3d at 246 (citation and internal quotation marks omitted).

Proof of the Senate Factor evidence under the totality of the circumstances establishes the required linkage to the ongoing legacy of race discrimination. See, *e.g.*, *Mississippi State Chapter, Operation PUSH* v. *Allain*, 674 F. Supp. 1245, 1264 (N.D. Miss. 1987) (finding violation of Section 2 based on evidence including "socio-economic disparities" such as a "disproportionate lack of transportation, disproportionate inability to register during working hours," and disproportionate inability "to travel to the offices of the county registrar to register to vote"), aff'd, 932 F.2d 400. The district court erred by imposing a heightened causation standard with respect to Senate Factor 5 (socioeconomic effects of discrimination on political participation) and by failing to properly analyze the evidence regarding Senate Factor 9 (tenuousness).

1. The District Court Improperly Imposed A Heightened Causation Standard

Despite finding under Senate Factor 5 that African Americans continue to bear the effects of historical discrimination, causing socioeconomic disparities that "hinder their political participation," J.A. 24727, the district court inappropriately required evidence that the burdens minority voters face under HB 589 are directly caused by historical discrimination. The court committed legal error by refusing to accept that an unlawful burden can result from the interaction of the challenged procedure with disparate socioeconomic circumstances and other vestiges of discrimination that minority voters face.

With respect to out-of-precinct voting, the district court held that the failure to vote in the assigned precinct was attributable to voter error or voter choice and not to "any connection with any effect of historical discrimination by the State of North Carolina or anyone else." J.A. 24847. Similarly, the court noted that "the data suggest that African Americans have an equal opportunity to participate in the electoral process without OOP" because of "the fact that a much larger number of African Americans endure socioeconomic disparities than the few who utilized OOP." J.A. 24844. To the district court, this meant that "something other than socioeconomic disparities is causing those voters to utilize" OOP voting. J.A. 24844. The court's reasoning—together with its repeated focus of finding fault with the individual voters who utilized OOP voting—has long been rejected by the courts. *E.g.*, *Marengo Cnty. Comm'n*, 731 F.2d at 1569 (rejecting the district court's reliance on voter "apathy unconnected with historical discrimination") (internal quotation marks omitted); *Kirksey* v. *Board of Supervisors*, 554 F.2d 139, 145 (5th Cir.) (en banc) (failure to register cannot be considered a matter of voter apathy without specific supporting evidence), cert. denied, 434 U.S. 968 (1977); *Veasey* v. *Perry*, 29 F. Supp. 3d 896, 919 (S.D. Tex. 2014) (rejecting the argument that "failure to overcome a burden to voting is nothing more than the individual's choice").

Plaintiffs were not required to prove that historical discrimination was directly causing individual minority voters to utilize OOP voting at higher rates than whites. Plaintiffs offered uncontested evidence that in multiple recent elections, African-American voters were more than *twice* as likely as whites to rely on OOP voting to have their votes counted. J.A. 876. Plaintiffs then offered ample evidence explaining how this wide racial disparity is linked to the history of racial discrimination: evidence that African Americans have more residential instability and far lower rates of access to a vehicle, as well as lower rates of income, education, and literacy. J.A. 22148-22156. These disparities make it more burdensome for voters to determine their assigned polling place and travel to it. It is thus more likely that African-American voters will present to vote at an incorrect polling place. J.A. 22228-22230; see also J.A. 4331-4333; J.A. 19622-19623; J.A. 20167, 20171-20172. These same socioeconomic disparities make it all the more difficult for affected minority voters, once informed that they are at the wrong precinct, to shoulder the burdens involved in travelling to their assigned polling place in order to cast a valid ballot—particularly given inflexible work hours and a comparative lack of access to transportation. J.A. 22228-22229. Proof of such totality of the circumstances evidence is all the causal linkage that Section 2 requires. Cf. *Clements*, 999 F.2d at 860 ("[T]he allocation of proof in § 2 cases

must reflect the central purpose of the Voting Rights Act and its intended liberality as well as the practical difficulties of proof in the real world of trial.").

The district court's improper insistence on a heightened causation requirement is found throughout its Section 2 results analysis. For example, the court dismissed the testimony of affected voters regarding SDR, stating that "[h]istorical discrimination is an unpersuasive basis for claiming that any of these people needed or wanted to use SDR" and that "the race of these voters played no role in their failure to vote." J.A. 24833, 24837. The court's resolution of plaintiffs' SDR claim depended both on its legally erroneous understanding of what is required to "link" a challenged practice to the ongoing effects of racial discrimination and the court's accompanying dismissal of exactly the evidence providing such a link.

Plaintiffs showed that eliminating SDR interacts with social and historical conditions to cause inequality in the opportunities enjoyed by African-American and white voters because African-American citizens, and particularly poor African-American citizens, move more often than their otherwise comparable white counterparts. This in turn necessitates that African-American voters re-register more often than whites—a requirement further exacerbated by the interaction of socioeconomic disparities, discrimination in education, and the post-HB 589 registration process itself. J.A. 22153-22156. This was not a case in

which plaintiffs asked the court to accept speculation about the interaction of these factors. Instead, plaintiffs showed exactly how these factors—given the removal of a fail-safe such as SDR—would interact. J.A. 22210-22212.[10]

But the district court disregarded evidence of this interaction, treating it as a function of North Carolina's registration requirement:

> It is easy to see a connection between certain reasons for ending up in the incomplete registration queue and literacy. But at the end of the day, these statistics are more a function of North Carolina's registration requirement – which has not been challenged – than a reflection of the need for SDR.

J.A. 24828 (footnote omitted). The court's reasoning is akin to holding that Section 2 plaintiffs may not challenge unequal access to polling places without challenging the underlying requirement to vote in person. That is obviously not the law. Plaintiffs need not challenge the entire registration process to show a

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[10] In the November 2014 general election, African-American applicants comprised a much larger proportion of individuals who had difficulty completing the registration process, when compared to their share of registrants, than white applicants. J.A. 22211. Registrants whose applications were disrupted because of errors linked to literacy were disproportionately African Americans: 33% of applicants placed in the incomplete queue because of a failure to check the citizenship box were African American, as compared to 29% who were white, and 59% of those applications with a missing date of birth were submitted by African-American applicants, as compared to 22% by whites. J.A. 7750; J.A. 22211-22212; J.A. 24828 & n.196. In sharp contrast to the SDR process, which could catch and fix immediately these types of incomplete information, the post-HB 589 regime means that the disproportionately African-American pool of registrants in the incomplete queue will find itself unregistered on Election Day.

sufficient causal link between the elimination of SDR and race-related inequality of access. This district court committed legal error in concluding otherwise.

2. The District Court Erred In Its Consideration Of The Tenuousness Factor

The district court committed further legal error as to Senate Factor 9, which looks to "whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, or practice or procedure is tenuous." *Gingles*, 478 U.S. at 37 (citation omitted). "The principal probative weight of a tenuous state policy is its propensity to show pretext." *Terrazas* v. *Clements*, 581 F. Supp. 1329, 1345 n.24 (N.D. Tex. 1984) (three-judge panel). Here, because the district court never addressed the significant evidence showing the racially infected partisan motivations behind HB 589, see pp. 19-24, *supra*, it failed to consider that "[f]encing out" voters, or placing additional burdens on them because of how they are predicted to vote, cannot provide a legitimate interest for a state's election laws. *Carrington* v. *Rash*, 380 U.S. 89, 94 (1965); see also *Gomillion* v. *Lightfoot*, 364 U.S. 339 (1960); *Gaffney* v. *Cummings*, 412 U.S. 735, 751-754 (1973).

Analysis of the legislature's actual—not potential or hypothetical—motivations in enacting HB 589 is critical for two reasons. First, this Court has already held that "states cannot burden the right to vote in order to address dangers that are remote and only 'theoretically imaginable.'" *LWV*, 769 F.3d at 246

(citation omitted). Second, the tenuousness factor allows courts to balance within the totality of the circumstances the weight of a state's interest in a challenged practice with the burden imposed on minority voters. *Clements*, 999 F.2d at 871. But the district court here could not properly apply that legal framework because it failed to inquire into actual—rather than hypothetical—evidence of legislative motivation.

D. The District Court's Alternative Holding That Plaintiffs' Section 2 Results Claim Had No Proper Remedy Infected The Entirety Of Its Liability Analysis

The district court's misplaced concerns about crafting a proper remedy, J.A. 24896-24910, demonstrate that the court improperly assumed that plaintiffs' Section 2 results claim was doomed from the start, regardless of the evidence put forward. *E.g.*, J.A. 24906 (plaintiffs' claims fail because they lack "any principled measurement of equality of opportunity").

Plaintiffs never contended that the district court needed to determine how many days of SDR or early voting would ideally be needed to ameliorate unequal opportunity for African Americans. That determination is not required under Section 2, nor would it be within the judicial role. The question is not how best to remake North Carolina's voting and registration system but whether, given the totality of circumstances, the specific restrictions of a particular law—HB 589—

resulted in African-American voters having "less opportunity than other members of the electorate to participate in the political process." 52 U.S.C. 10301(b).

The district court thus erred in asserting that it lacked an adequate benchmark for measuring the burdens imposed by HB 589, claiming that it had "no way to assess where 'more equal'—but nevertheless allegedly discriminatory—ends and the 'equal opportunity' § 2 mandates begins." J.A. 24904. As the Sixth Circuit has held, "Section 2 vote denial claims inherently provide a clear, workable benchmark. * * * [U]nder the challenged law or practice, how do minorities fare in their ability to participate in the political process *as compared to other groups of voters*?" *Husted*, 768 F.3d at 556 (internal quotation marks omitted).

The district court's extensive reliance on *Holder* v. *Hall*, 512 U.S. 874 (1994), for the proposition that this case presents no feasible benchmark is both unpersuasive and telling. The plaintiffs in *Holder* v. *Hall* brought a Section 2 vote dilution claim against a single-member county commission. The question before the Supreme Court was "whether the size of a governing authority is subject to a vote dilution challenge under § 2 of the Voting Rights Act." *Id.* at 876. The Court did not reject the Section 2 claim on the merits, but instead held, as a categorical matter, that plaintiffs "cannot maintain a [Section] 2 challenge to the size of a government body." *Id.* at 885. *Holder* v. *Hall* explains not why a Section 2 dilution claim will falter on the merits, but when one cannot be brought at all. *Id.*

at 884-885. Here, by contrast, no one can seriously argue that voter ID laws, rules on registration, election practices, and the like are not subject to Section 2 challenge; the only question is whether the specific practices at issue violate Section 2.

The district court's takeaway from *Holder* v. *Hall* appears to be that in addressing changes to voting practices—as here—a court is either applying a retrogression standard and benchmark from Section 5 of the VRA or is without a standard to apply at all. J.A. 24899-24902. But consideration of the fact that a state has changed its voting laws—and in a way that negatively and materially burdens African-American voters as compared to white voters—is plainly cognizable under Section 2 of the VRA. As this Court previously held, the "fact that a practice or law eliminates voting opportunities that used to exist under prior law that African Americans disproportionately used is therefore relevant to an assessment of whether, under the current system, African Americans have an equal opportunity to participate in the political process as compared to other voters." *LWV*, 769 F.3d at 241-242 (citation omitted). Indeed, the Supreme Court's decision in *Shelby County* squarely declared that discriminatory changes to election laws could continue to be addressed under "the permanent, nationwide ban on racial discrimination in voting found in § 2." 133 S. Ct. at 2631.

As such, it was legal error for the district court to again conclude that the only way to account for cutbacks in voting is through Section 5's retrogression standard. The inquiries under Section 2 and Section 5 are distinct. "[Section] 5 prevents nothing but backsliding" under its retrogression standard, whereas Section 2 prohibits "discrimination more generally" under its results standard. *Reno* v. *Bossier Parish Sch. Bd.*, 528 U.S. 320, 334-335 (2000). Simply considering—under the totality of circumstances—that a jurisdiction has eliminated a previously used practice is not the same thing as applying Section 5's retrogression standard.

Moreover, the district court's concern about a "standardless" remedy was a problem of its own creation. The question of whether "twenty" or "seventeen," or "thirteen or fifteen" days of early voting would provide minority voters with equal opportunity, in the abstract, was never a question that the court needed to answer. J.A. 24905. In voting cases it is a well-established principle that "the district court's modifications of" state law must be "limited to those [changes] necessary to cure any constitutional or statutory defect." *Upham* v. *Seamon*, 456 U.S. 37, 43 (1982) (per curiam). The "defect" in this case is that HB 589's restriction of certain voting practices was shown, in the localized totality of circumstances, to unlawfully abridge the rights of minority voters. Among other relief, see, *e.g.*, note 2, *supra*, a proper permanent injunction could simply have enjoined enforcement of HB 589's restriction or repeal of those voting mechanisms, leaving further

policy assessment to the legislature. Such an injunction would ensure that the courts do not unduly "pre-empt the legislative task nor intrude upon state policy any more than necessary." *Upham*, 456 U.S. at 41-43 (citation and internal quotation marks omitted); see also *Wise* v. *Lipscomb*, 437 U.S. 535, 540 (1978).

CONCLUSION

This Court should reverse the judgment of the district court dismissing the United States' claims under Section 2 of the Voting Rights Act.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify, pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), that the attached BRIEF FOR THE UNITED STATES AS APPELLANT:

(1) contains 13,985 words; and

(2) complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Word 2007, in 14-point Times New Roman font.

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Dated: May 19, 2016

CERTIFICATE OF SERVICE

I hereby certify that on May 19, 2016, I electronically filed the foregoing BRIEF FOR THE UNITED STATES AS APPELLANT with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system. I certify that all participants in this case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that on May 20, 2016, I will cause four paper copies of this brief to be sent by certified U.S. mail, postage prepaid, to this Court and will cause one paper copy of the same to be mailed to the following counsel by certified U.S. mail, postage prepaid:

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EXHIBIT E

No. 16A168

IN THE

SUPREME COURT OF THE UNITED STATES

STATE OF NORTH CAROLINA, *ET AL.*,

Applicants,

v.

NORTH CAROLINA STATE CONFERENCE OF THE NAACP, *ET AL.*,

Respondents,

v.

LEAGUE OF WOMEN VOTERS OF NORTH CAROLINA, *ET AL.*,

Respondents,

v.

LOUIS M. DUKE, *ET AL.*,

Intervenors/Respondents,

v.

UNITED STATES OF AMERICA,

Respondents.

ON APPLICATION FOR STAY FROM THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

RESPONSE TO APPLICANTS' EMERGENCY MOTION FOR RECALL AND STAY OF MANDATE

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INTRODUCTION

Just as African Americans were "poised to act as a major electoral force" in North Carolina, the State "target[ed] African Americans with almost surgical precision," App. at 10a-11a,[1] "rush[ing] through the legislative process the most restrictive voting legislation seen in North Carolina since enactment of the Voting Rights Act of 1965," *id.* at 41a. In a careful and detailed opinion issued on July 29, the Fourth Circuit enjoined five voting restrictions and effectively returned North Carolina to the status quo during the last presidential election. As Applicants acknowledge, the Fourth Circuit's decision came "months before the general election," Applicants' Emergency Appl. to Recall & Stay Mandate ("Br.") at 3, and within the timeframe the State represented to the court would be sufficient for implementation. The timing of the decision was also consistent with this Court's guidance that changes to elections procedures for a general election remain permissible through at least late July. *See Veasey v. Abbott,* 136 S. Ct. 1823 (2016).

Seventeen days later, the State filed this "emergency" request for a stay. But in the nearly four weeks that have now passed since the Fourth Circuit's decision, the State has already taken a number of critical remedial steps to implement the Fourth Circuit's decision, including:

- Convening the boards of elections in virtually all of North Carolina's 100 counties to consider, approve, and publicize voting sites, dates, and hours necessary to implement a restored 17-day early voting period;

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[1] Where necessary, Respondents cite to the Appendix appended to Applicants' pleadings. Respondents have also added a small number of additional documents and have started numbering those at page 103a, which picks up where Applicants' appendix finished.

- Conducting a two-day "State Elections Conference" for election administrators from each county, featuring training materials reflecting the post-injunction election rules and procedures; and

- Posting online, and preparing for print distribution to over four million households, a state-mandated voter guide (excerpted below), which describes the election rules under the terms of the injunction:

COURT-ORDERED ELECTION LAW CHANGES

On July 29, a federal court of appeals struck down challenged provisions of North Carolina Session Law 2013-381 ("HB-589"). The information below reflects the law in place as of August 15. In the event of any change, we will post updates to ncsbe.gov.

NO PHOTO I.D. REQUIRED TO VOTE IN THIS ELECTION

Voters will no longer be required to present photo identification at the polls. Please note: the Help America Vote Act of 2002 (HAVA) will still require certain first-time voters to present proof of identity if a valid social security number or driver license number was not provided at the time of registration.

REGISTRATION DURING 17-DAY EARLY VOTING PERIOD

Individuals may register and vote at one-stop early voting locations within their county during a 17-day period, beginning October 20 and ending November 5.

OUT-OF-PRECINCT VOTING ON ELECTION DAY

Provisional ballots cast on Election Day outside a voter's assigned precinct but inside the voter's county of residence will count toward all contests in which the voter is eligible to participate. To avoid voting a provisional ballot, voters must appear at their properly-assigned precinct on Election Day or at any of their county's one stop early voting locations during the one-stop early voting period.

PRE-REGISTRATION FOR YOUNG ADULTS

Individuals who are at least 16 years old but will not yet be 18 years old on the date of the next election may now preregister to vote by submitting a registration application form. A downloadable form is available at NCSBE.gov.

App. at 115a.

The State's assertion that there is too little time to comply with the injunction is not only belied by this record of on-the-ground activity, it is also at odds with the State's own representations to the Fourth Circuit. At oral argument in June, the State offered "assur[ance] . . . that it would be able to comply with any order . . . issued by late July," and explained that changing election procedures in August—as the State now seeks to accomplish through its stay application—would impose significant administrative burdens. *See* App. at 101a-102a. Indeed, the Court of Appeals credited these admissions in denying the State's motion to recall or stay the mandate in that court. *Id.* Yet the State then waited ***another 11 days*** after the Fourth Circuit's denial of their stay request (for a ***total of 17 days***) before filing the present application. At this point, however, the only risk of "dramatically alter[ing] existing election procedures," Br. at 17, would be if the application were granted. Simply put, the State is not seeking a stay but rather an order that North Carolina's elections practices be changed from what has already been implemented in accordance with the Fourth Circuit's order.

The balance of equities also tips decidedly in favor of denying the stay given the Fourth Circuit's conclusion that the challenged restrictions were enacted with racially discriminatory intent. As described more fully below, that conclusion is amply supported by largely undisputed facts in the record. Most critically, the enjoined restrictions were adopted following a "surge[]" in voting by African Americans, App. at 13a, and targeted forms of voting "used disproportionately by African Americans," *id.* at 45a-46a (citation omitted)—a fact fully understood by the

Legislature, which had requested "racial data" on precisely that point, *id.* at 48a. Moreover, four of the five restrictions were added to a pre-existing voter ID bill soon after the State was relieved of its federal preclearance obligations and then "rushed through the legislative process" with little opportunity for meaningful debate. *Id.* at 41a. On the other side of the scale, the Fourth Circuit recognized the State's proffered justifications for the enjoined restrictions as "solutions in search of a problem" that "were not tailored to achieve [their] purported justifications, a number of which were in all events insubstantial." *Id.* at 68a.

The State nonetheless contends that this Court is likely to grant certiorari and reverse the decision below on the ground that the Fourth Circuit's finding of discriminatory intent was undermined by its failure to reverse the District Court's findings on discriminatory effect. That contention mischaracterizes both the record and the law. The Fourth Circuit did address discriminatory effects within the context of its intent analysis. And, as the Fourth Circuit correctly understood, a voting restriction that is enacted with a discriminatory purpose is not redeemed under either the Constitution or the Voting Rights Act by the fact that it does not fully achieve its discriminatory goals.

Ultimately, the Fourth Circuit's decision was based on a careful consideration of the legislative and trial record. The State fails to offer valid grounds for upsetting that well-reasoned ruling. And it certainly fails to offer grounds for a stay weeks down the road and after election officials have undertaken substantial measures to implement the Fourth Circuit's ruling for the upcoming election. It

would be a miscarriage of justice and inconsistent with this Court's precedents to permit North Carolina's discriminatory voting law to remain in force through the 2016 election by issuing the requested stay. The application should be denied.

STATEMENT OF THE CASE

A. North Carolina's Mix of Race and Politics

North Carolina has "a long history of race discrimination generally and race-based vote suppression in particular." App. at 31a. As a result, the State's "African Americans are disproportionately likely to move, be poor, less educated, have less access to transportation, and experience poor health"—a panoply of "socioeconomic factors that may hinder their political participation." *Id.* at 18a-19a.

Starting in 1999, the State adopted four voting reforms, each of which was disproportionately used by African Americans. *First*, the General Assembly passed legislation allowing for 17 days of no-excuse early in-person voting. *See* SL 1999-455; *see also* SL 2001-319. In the 2008 and 2012 elections, over 70% of African-American voters used early voting, compared to approximately 50% of white voters. *N.C. State Conference of NAACP v. McCrory*, 997 F. Supp. 2d 322, 372 n.64 (M.D.N.C.), *rev'd sub nom. League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224 (4th Cir. 2014). Notably, the District Court found that "African Americans disproportionately used the first seven days [of early voting]," particularly in presidential elections. *N.C. State Conference of NAACP v. McCrory*, __ F. Supp. 3d __, 2016 WL 1650774, at *49 (M.D.N.C. Apr. 25, 2016) ("D. Ct. Op."). *Second*, in 2005, the legislature authorized the counting of "out-of-precinct ballots"—provisional ballots cast by registered voters within their county of residence but

outside of their assigned precinct—expressly recognizing that African Americans had cast a "disproportionately high percentage" of such ballots in then-recent elections. SL 2005-2, § 1; *see also* D. Ct. Op. at *66-67. *Third*, in 2007, the State adopted same-day registration, whereby an individual could register to vote and cast a ballot at the same time during early voting, subject to heightened security requirements. SL 2007-253. Roughly 100,000 voters used same-day registration in both the 2008 and 2012 presidential elections. JA631; JA823-24.[2] As the District Court found, "it is indisputable that African American voters disproportionately used [same-day registration]," constituting over 30% of such registrants in those elections, "which exceeded their roughly 22% proportionate share of all registered voters." D. Ct. Op. at *61. *Finally*, in 2009, the General Assembly authorized 16- and 17-year-olds to "preregister to vote and . . . be automatically registered upon reaching the age of eligibility." SL 2009-541, § 7(a). Over 150,000 North Carolinians went on to use pre-registration, a disproportionate share of whom were African American. App. at 18a; *see also* D. Ct. Op. at *131; JA19528; JA20114; JA3906; JA3945.

"[B]etween 2000 and 2012, when the law provided for the voting mechanisms at issue here and did not require photo ID, African American voter registration swelled by 51.1%. . . . African American turnout similarly surged, from 41.9% in 2000 to . . . 68.5% in 2012." App. at 13a (comparing to an increase of 15.8% for white voters). Thus, "by 2013 African American registration and turnout rates had

[2] "JA" citations are to the Joint Appendix filed in *N.C. State Conference of the NAACP v. McCrory*, No. 16-1468 (4th Cir. May 19, 2016), ECF Nos. 89-95.

finally reached near-parity with white registration and turnout rates. African Americans were poised to act as a major electoral force." *Id.* at 10a.

"Voting in . . . North Carolina is racially polarized." *Id.* at 9a. Indeed, "one of the State's experts conceded, 'in North Carolina, African-American race is a better predictor for voting Democratic than party registration.'" *Id.* at 37a-38a. The legislature "certainly knew that African American voters were highly likely, and that white voters were unlikely, to vote for Democrats. And it knew that, in recent years, African Americans had begun registering and voting in unprecedented numbers . . . to a degree unmatched in modern history." *Id.* at 38a.

B. Session Law 2013-381 and Subsequent Amendments

"[T]he sheer number of restrictive provisions in SL 2013-381 distinguishes this case from others." App. at 52a-53a. "[I]n the immediate aftermath of unprecedented African American voter participation in a state with a troubled racial history and racially polarized voting," *id.* at 40a, the State abruptly eliminated the four voting practices described above, and imposed a strict voter identification requirement, "target[ing] African Americans with almost surgical precision," *id.* at 11a. It did so in a secretive and truncated legislative process, adopting "the first meaningful restrictions on voting access" in North Carolina in decades, with a bill that "came into being literally within days of North Carolina's release from the preclearance requirements of the Voting Rights Act." *Id.* at 32a.

"The sequential facts found by the district court are . . . undisputed. And they are devastating." *Id.* at 41a. House Bill 589 ("HB 589"), the bill that became SL 2013-381, was originally introduced in early 2013, and included only a

substantially less stringent voter ID requirement without making any other significant changes to election laws. *Id.* The initial bill permitted the use of all forms of government-issued photo ID, including public assistance ID cards. After four weeks of consideration—including public hearings and debate in three committees—it passed the House on April 24, 2013. *See id.* The Senate received the bill the following day, but took no legislative action for two months. *Id.* at 42a.

Two months later, this Court decided *Shelby County v. Holder*, 133 S. Ct. 2612 (2013), which invalidated the formula for determining which jurisdictions were subject to the Voting Rights Act's preclearance requirement, thus relieving North Carolina from having to seek federal approval for changes to its voting laws. "[T]he day after[wards] . . . the Republican Chairman of the [Senate] Rules Committee[] publicly stated . . . that the Senate would move ahead with the 'full bill.'" App. at 14a. "After that announcement, no further public debate or action occurred for almost a month," and "[i]t was not until July 23" with only two days left in the legislative session "that an expanded bill, including the election changes challenged in this case, was released." *Id.* at 42a (citation omitted). What had been "an essentially single-issue bill" suddenly reappeared as "omnibus legislation," *id.* at 14a, which also, *inter alia*, eliminated a week of early voting, same-day registration, out-of-precinct provisional balloting, and pre-registration.

The legislature's decision to target these modes of voting was no accident; the legislature restricted voting mechanisms that it "knew were used disproportionately by African Americans, and so likely would not have passed preclearance," *id.* at 45a-

46a (citation omitted), because it "requested and received racial data as to usage of the practices changed by the proposed law," "prior to and during the limited debate on the expanded omnibus bill," *id.* at 14a, 48a.

> This data revealed that African Americans disproportionately used early voting, same-day registration, and out-of-precinct voting, and disproportionately lacked DMV-issued ID. Not only that, it also revealed that African Americans did ***not*** disproportionately use absentee voting; whites did. SL 2013-381 drastically restricted all of these other forms of access to the franchise, but exempted absentee voting from the photo ID requirement. In sum, relying on this racial data, the General Assembly enacted legislation restricting all -- and only -- practices disproportionately used by African Americans.

Id. at 48a (citations omitted).[3]

But that is not all. The legislature also "substantially changed" the pre-*Shelby County* voter ID requirement. *Id.* at 46a. The aforementioned data requested by the legislature "showed that African Americans disproportionately lacked the most common kind of photo ID, those issued by the Department of Motor Vehicles (DMV)." *Id.* at 15a. Yet, whereas the pre-*Shelby County* version of the law provided that all government-issued IDs would be a valid alternative to DMV-issued photo IDs, the "full bill" did not. *Id.* at 14a-15a. Instead, "with race data in hand, the legislature amended the bill," *id.*, so that "the new ID provision ***retained only those types of photo ID disproportionately held by whites*** and excluded

[3] Although Applicants quibble about what precisely the data showed and the precise timing with which it was received, *see* Br. at 15, the record is unequivocal. Legislators requested a racial breakdown of early voting and provisional voting, which confirmed racially disproportionate usage. App. at 14a-18a. "[L]egislators similarly requested data as to the racial makeup of same-day registrants," which "'indisputabl[y]'" showed "'that African American voters disproportionately used same-day registration when it was available.'" *Id.* at 16a-17a.

those disproportionately held by African Americans." *id.* at 43a (emphasis added) (citation omitted). The legislature has never offered a public explanation for this change—either during the legislative process or three subsequent years of litigation, and thus, "[t]he district court specifically found that 'the removal of public assistance IDs' in particular was suspect." *Id.* at 43a. The new version of SL 2013-381 was then "rushed through the legislative process" in two days, with little opportunity for public scrutiny. *Id.* at 41a.

C. Judicial Proceedings

Respondents immediately challenged the law on grounds that, *inter alia*, it was enacted with discriminatory intent and has discriminatory results for African Americans. The District Court ruled for the State, but the Court of Appeals reversed, holding that SL 2013-381 was passed with discriminatory intent. In doing so, the court held that the District Court "clearly erred" by considering "each piece of evidence in a vacuum, rather than engaging in the totality of the circumstances analysis required by *Arlington Heights*." App. at 56a. Those circumstances include:

- "North Carolina's history of voting discrimination," App. at 56a, which the District Court "inexplicably failed to grapple with . . . in its analysis of [Applicants]' discriminatory intent claim," *id.* at 32a;
- North Carolina's recent "surge in African American voting," coupled with "the legislature's knowledge that African Americans voting translated into support for one party," *id.* at 56a;
- The sweeping nature of the bill, which, at every turn, "eliminat[ed] . . . the tools African Americans had used to vote," *id.* at 56a, and which was imposed "with race data in hand," *id.* at 15a, "at the first opportunity" right after *Shelby County*, *id.* at 56a; and
- The decision to "rush[] [the bill] through the legislative process," which "suggests an attempt to avoid in-depth scrutiny," *id.* at 43a-44a.

As explained by the Fourth Circuit, the totality of the circumstances "unmistakably reveal[ed] that the General Assembly used SL 2013-381 to entrench itself" by engaging in a form of "racial discrimination": namely, "by targeting voters who, based on race, were unlikely to vote" for the party in power. *Id.* at 56a. The Fourth Circuit therefore concluded that race was "***a*** factor" in the adoption of the voting restrictions at issue. *Id.* at 57a.

Following the framework set forth in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), the Fourth Circuit next turned to the State's proffered rationales for the enjoined provisions, App. at 57a, and found them wanting. The court found that, "[a]lthough the new provisions target African Americans with almost surgical precision, they constitute inapt remedies for the problems assertedly justifying them and, in fact, impose cures for problems that did not exist." *Id.* at 11a. The court noted the legislature's express acknowledgement that self-entrenchment was its purpose, which "comes as close to a smoking gun as we are likely to see in modern times, [as] the State's very justification for a challenged statute hinges ***explicitly*** on race -- specifically its concern that African Americans, who had overwhelmingly voted for Democrats, had too much access to the franchise." *Id.* at 40a. The court then "conclude[d] that race constituted a but-for cause of SL 2013-381, in violation of the Constitutional and statutory prohibitions on intentional discrimination." *Id.* at 69a.

Given the completeness of the record, *id.* at 59a, the Fourth Circuit determined that remand was unnecessary and ordered that the challenged

provisions be enjoined in their entirety. On the same day, the District Court permanently enjoined the challenged provisions. *See N.C. State Conference of NAACP v. McCrory*, No. 1:13-cv-658 (M.D.N.C. July 29, 2016), ECF No. 455. As described below, in the nearly four weeks since entry of the injunction, state and local elections officials have taken numerous steps to align the State's elections procedures with the injunction, and have substantially accomplished that goal.

REASONS FOR DENYING THE STAY

In assessing a stay application pending the filing and disposition of a petition for a writ of certiorari, the "judgment of the court below is presumed to be valid," and this Court defers to the judgment of the court of appeals "absent unusual circumstances." *Wise v. Lipscomb*, 434 U.S. 1329, 1333 (1977) (Powell, J., in chambers). "Denial of . . . in-chambers stay applications" pending the filing of a petition for certiorari "is the norm; relief is granted only in 'extraordinary cases.'" *Conkright v. Frommert*, 556 U.S. 1401, 1402 (2009) (Ginsburg, J., in chambers). "The party requesting a stay bears the burden of showing that the circumstances justify" such extraordinary relief. *Nken v. Holder*, 556 U.S. 418, 433-34 (2009).

Applicants do not remotely satisfy this Court's exacting standards. Applicants—who bear the burden—fail to demonstrate *any* of the three prongs required for granting a stay at this stage: (1) a likelihood that irreparable harm will result from the denial of a stay; (2) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari; and (3) a fair prospect that a majority of the Court will vote to reverse the judgment below. *See Conkright*, 556 U.S. at 1402. And even if Applicants could satisfy these prongs—and they

cannot—"[t]he conditions that are *necessary* for issuance of a stay are not necessarily ***sufficient***." *Barnes v. E-Systems, Inc. Grp. Hosp. Med. & Surgical Ins. Plan*, 501 U.S. 1301, 1304 (1991) (Scalia, J., in chambers). "It is ultimately necessary, in other words, 'to "balance the equities"—to explore the relative harms to applicant and respondent, as well as the interests of the public at large.'" *Id.* at 1305 (citations omitted). Here, the consequences of granting a stay would be severe: not only would it disrupt the status quo before an upcoming presidential election, it would permit the State to impose a discriminatory law that would irreversibly violate the fundamental rights of tens of thousands of North Carolinians.

I. The Fourth Circuit's Mandate Will Not Injure Applicants, But A Stay At This Juncture Would Confuse The Public And Disenfranchise Thousands Of North Carolina Voters.

The State cannot demonstrate irreparable harm, especially after having waited 17 days after the Fourth Circuit ruled to file this emergency application. The Fourth Circuit's judgment has already been implemented in substantial measure. What the State now seeks is to disrupt the status quo, which would impose severe burdens on elections officials and "result in voter confusion and consequent incentive to remain away from the polls"—a "risk" that has only "increase[d]" as the "election [has] draw[n] closer" during Applicants' inexplicable delay in seeking this Court's relief. *Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006) (per curiam).

A. The Fourth Circuit Ruled More Than 100 Days before Election Day and Its Decision Has Been Substantially Implemented.

The Fourth Circuit's July 29 order did not arrive at the "eleventh hour," as Applicants claim, Br. at 28, but rather came more than 100 days before Election Day. This is well within the permissible timeframe for modifying election procedures, and was based on the State's assurances that it could implement an injunction issued in July without disrupting the November election. *See* App. at 101a ("At oral argument, the State assured us that it would be able to comply with any order we issued by late July."). The timing here is also consistent with this Court's recent guidance in *Veasey v. Abbott*, 136 S. Ct. 1823 (2016), which recognized that a Fifth Circuit ruling in Texas's voter ID litigation by late July would allow enough time for implementation. *See id.* (inviting the parties to seek interim relief on July 20 if the Fifth Circuit did not act). Federal law similarly permits systemic changes to voter registration rolls more than 90 days before an election. *See* 52 U.S.C. § 20507(c)(2)(A).

Now, almost a month after the Fourth Circuit's ruling, State and local elections officials have taken nearly all of the steps to comply with that ruling. A stay at this juncture would raise rather than mitigate *Purcell* concerns.

Training of Election Officials. Per its tradition, and consistent with Applicants' representations to the Fourth Circuit, *see* Fourth Circuit Oral Argument ("Oral Arg.") at 01:13:51-01:14:55 (June 21, 2016), *available at* http://coop.ca4.uscourts.gov/OAarchive/mp3/16-1468-20160621.mp3, on August 8-9, the State Board of Elections ("SBOE") conducted a mandatory two-day State

Elections Conference training for administrators from each of North Carolina's 100 counties. *See* App. at 103a-106a. At that conference, SBOE Executive Director Kim Strach explained that the training would focus on conducting elections this fall in conformity with the Fourth Circuit's order and District Court injunction. *Id.* at 104a ("We're not going to focus on photo ID, we're going to focus on elections without photo ID."). To that end, Executive Director Strach represented to training attendees that the SBOE had already taken various steps to comply with the ruling, including: (1) updating its website to reflect the injunction; (2) removing billboards advertising the voter ID requirement; (3) halting its voter ID media campaign; and (4) cancelling the distribution of photo ID educational materials. *See id.* at 104a-105a.

Moreover, the materials produced for the training reflected the injunction's restoration of pre-2013 election procedures. *See id.* at 105a. And the SBOE represented that it was in the process of providing county boards with updated election administration materials (including a revised voting "station guide" for poll workers deleting all mention of the photo ID requirement). *Id.* at 104a.

Having already trained election officials on the pre-2013/post-injunction election procedures, it is, by the State's admission, too late to make substantial changes to those procedures. Indeed, during the Fourth Circuit argument in June, counsel for the State represented: "[I]f any changes are made after that date [the August 8-9 training], it becomes an issue, not just educating people what the rules are, but reeducating people. It's not what you've already been told. It's now going

to be this." *See* Oral Arg. at 01:13:51-01:14:58. Accordingly, far from causing confusion in the election process, the Fourth Circuit's decision came in time for the State's scheduled training—precisely because the State warned that changing procedures after the training would be problematic. Granting the State's newly-requested application would require extensive re-training. Given the lack of opportunity for such re-training before the election, re-implementing the law without adequate training of elections officials would be a recipe for disaster.

Public Pronouncements to Voters. In the weeks since the Fourth Circuit's ruling, the State has publicized the new election rules in several manners. Most notably, the SBOE voter guide that is on the State's website and will soon be mailed to every North Carolina household has already been updated to reflect the injunction. *See* App. at 114a-140a. The second page instructs voters about, *inter alia*, the absence of a photo ID requirement; the beginning of the first day of the 17-day early voting period; procedures for out-of-precinct voting; and the reinstatement of pre-registration. *Id.* at 115a. The guide is already available online.[4] Upon information and belief, the SBOE sent the guide to the printer more than a week ago and the guides started printing earlier this week for mailing to over 4.3 million households.[5]

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[4] *See* NC SBOE, *2016 Judicial Voting Guide*, *available at* http://www.ncsbe.gov/Portals/0/FilesP/PDF/2016_Voter_Judicial_Guide_Web.pdf.

[5] Applicants represented at oral argument that proofs for the voter guide were due on August 5; Respondents understand that deadline was extended to August 15, and proofs of the guide were sent to the printer on that date. By statute, the guides must be mailed between 7 and 28 days before early voting begins. *See* N.C. Gen. Stat. § 163-278.69(a).

Once again, consistent with the State's representations, the fact that the voter guide reflecting post-injunction election procedures is already in the process of printing is a critical marker after which additional changes to election procedures would be disruptive and confusing to voters. *See* Oral Arg. at 01:16:10-01:16:19. Applicants argued ***against*** preliminary relief in early September 2014, claiming it would be too late to implement an injunction before the November 2014 election because the voter guides had already been sent to the printer. *See* Decl. of K. Strach ¶ 6 ("Strach Decl."), *N.C. State Conference of Branches of NAACP v. McCrory*, No. 14-1856 (4th Cir. Sept. 2, 2014), ECF No. 26-5 (declaration stating that because the voter guide's "content and layout ha[d] already been approved" and "sent to the printer" by September 2—with "the information about the changes to election law . . . featured prominently"—"[i]t [wa]s not possible at this time to alter the content of the voter guides and have revised guides sent out in accordance with the statutory requirements"). To the extent the initiation of printing the voter guide supported ***granting*** a stay in 2014, it cuts exactly the opposite way here. This time, the Fourth Circuit's decision came well before the date the State represented it would commence printing the guide, and the election law changes mandated by the Fourth Circuit are reflected in the printed version.

Approval of 17-Day Early Voting Plans. As of the time of this filing, almost all 100 counties in the State have adopted a 17-day early voting plan. To adopt a plan, a three-member local board must give 48 hours public notice for a meeting at which the plan will be adopted. *See* N.C. Gen. Stat. § 142-318.12(b).

The boards must make arrangements for early voting sites and for staffing and funding. The Fourth Circuit's ruling required counties to develop plans to extend the 10-day early voting period to 17 days as was the case in the last presidential election cycle. Following the Fourth Circuit's decision, the SBOE promptly issued Numbered Memo 2016-11 (August 4, 2016), *available at* https://s3.amazonaws.com/dl.ncsbe.gov/sboe/numbermemo/2016/Numbered%20Memo%202016-11.pdf, providing guidance on how the counties could comply with the District Court's injunction. The counties acted immediately to follow that guidance. By the end of the day on August 15 (when Applicants sought relief from this Court), more than half of the counties (53) had adopted 17-day early voting plans. *See* App. at 111a-113a. On August 16, immediately following this Court's briefing order, the SBOE issued Numbered Memo 2016-12, which set today (August 25) as the deadline for the remaining counties to submit amended 17-day early voting plans. *See id.* at 141a. Respondents have confirmed that 99 out of the State's 100 counties have done so prior to this filing, with about two-thirds of those counties having adopted plans on a unanimous basis, which will require only administrative approval from the State Board. *See* N.C. Gen. Stat. § 163-227.2(g).

A stay would require nearly every county in the State to (i) reconvene to adopt a new 10-day plan, and (ii) publicize another revised plan to voters. Again, Applicants' representations from 2014 confirm that reversing course would be nearly impossible: Executive Director Strach stated on September 2 of that year that "[t]here is insufficient time for county boards to reformulate early voting plans,

obtain any new and necessary funding or approvals, and publicize different early voting locations and hours . . . ." Strach Decl. ¶ 15.

If modification of early voting plans across the State was problematic at this point in 2014, it is even more so today. After the Fourth Circuit's ruling, for example, some counties released carefully selected early voting sites and sometimes switched to new sites when others were available for 10 days but not 17 days. *See* App. at 109a. If a stay were granted, many now-defunct early voting sites would need to be reactivated, but certain of the released sites may no longer be available.[6]

Pre-Registration Changes. Finally, with respect to pre-registration, the DMV is already accepting pre-registrations manually and is in the process of changing its data entry system to accept such applications automatically. App. at 105a. Counties are no longer allowed to send denial letters to 16- and 17-year-olds who submit a voter registration application form, and must instead keep those registrations in queue for registration when the applicable age is reached. *Id.* Applicants identify ***no burden at all*** associated with maintaining pre-registration, which does not directly affect the upcoming election because 16- and 17-year-olds will not be eligible to vote in November.

* * * * *

[6] County boards are generally advised that they may not vote on an early voting plan without all three members of the county board participating in the vote. If a stay is issued and counties cannot reconvene in the short time left to adopt new plans, they would, by statute, default to offering early voting only at the County Board of Elections office during weekday regular business hours and on the last Saturday morning of the early voting period. In the largest counties, such a result would be nothing short of catastrophic.

Applicants represented to the Court of Appeals that any changes to elections procedures had to be ordered prior to various August deadlines for elections administration tasks. The Fourth Circuit relied on those representations, issuing its decision "a week in advance of those dates." App. at 101a. Notwithstanding the Fourth Circuit's diligence in accommodating the State's timing concerns, the State waited five days before seeking a stay from that court, which denied the stay the next day, concluding that "recalling or staying the mandate now would only undermine the integrity and efficiency of the upcoming election." *Id.* Then, rather than seeking immediate relief from this Court before at least some of the administrative deadlines passed, the State waited ***an additional eleven days*** before filing this "emergency" application. The State's delay alone is sufficient to warrant denial of this application. *See Winston-Salem/Forsyth Cty. Bd. of Educ. v. Scott*, 404 U.S. 1221, 1226-27, 1231 (1971) (Burger, C.J., in chambers) (rejecting stay of school desegregation decision where 29-day delay in making application was not explained). The only way North Carolina will be "forced to scramble" now, Br. at 3, would be if this Court were to issue a stay, which would require the re-training of election workers statewide, the revision and reprinting of more than four million voter guides (apparently impossible at this point), and the reconvening of 100 county boards of elections to redesign early voting plans. The Court should not order such extraordinary and disruptive relief.

B. The Facts of this Case Distinguish It from Those in which Stays Were Granted.

Given the circumstances and timeline set forth above, this case is nothing like the three cases in which this Court granted or affirmed stay applications in 2014. In those cases, this Court stayed (or affirmed a stay of) injunctions that had been issued between 11 days and four weeks before early voting was to commence. *See Husted v. Ohio State Conference of NAACP*, 135 S. Ct. 42 (2014) (Ohio); *North Carolina v. League of Women Voters of N.C.*, 135 S. Ct. 6 (2014) (North Carolina); *Veasey v. Perry*, 135 S. Ct. 9 (2014) (Texas).[7] The chart below summarizes dates of those injunctions compared to the commencement of early voting and Election Day:

	2014			2016
	Ohio	**North Carolina**	**Texas**	**North Carolina**
Injunction Issued	September 4 (affirmed by Court of Appeals on September 24)	October 1	October 9 (affirmed by Court of Appeals on October 15)	July 29
Days before Election Day	61 days after original injunction (41 days after affirmance by Court of Appeals)	35 days	25 days after original injunction (19 days after affirmance by Court of Appeals)	103 days
Days before Early Voting	28 days after original injunction (8 days after affirmance by	15 days	11 days after original injunction (5 days after affirmance by	86 days

[7] On October 9, 2014, the Court vacated an order entered by the Seventh Circuit staying a district court's order barring Wisconsin from implementing its strict photo ID requirement. *See Frank v. Walker*, 135 S. Ct. 7 (2014).

	Court of Appeals)		Court of Appeals)		

As reflected above, the injunction here came 103 days before Election Day, and more than ***12 weeks*** before the start of early voting. This left the State ample time to implement the Fourth Circuit's mandate, as Applicants assured the court was possible. Thus, while *Purcell* warned against making changes "just weeks before an election," 549 U.S. at 4, that is not at all what happened here.[8] Indeed, the facts of *Purcell* vividly illustrate the difference: there, the election rules changed three times between September 11, and the November 7 general election, with an injunction pending appeal granted on the day early voting started. That is a far cry from the circumstances here, where the State has already implemented the injunction well in advance of the upcoming election. The *Purcell* concerns that may have informed this Court's 2014 decisions warrant *denying* this application in 2016.

C. Thousands of Voters Will Be Irreparably Harmed by a Stay.

Finally, a "conflicting order" to stay the injunction would expose thousands of North Carolinians to disenfranchisement by curtailing widely-used voting opportunities. In 2012, nearly 900,000 North Carolina voters used the seven days of early voting that the State seeks to eliminate via its stay application, *see* JA626, and approximately 1,400 votes cast by people who lack photo ID were not counted in

[8] Notably, in each of the 2014 cases, the applicants also sought emergency relief from this Court with much more urgency—the very next day after the Court of Appeals ruled on a stay request—than North Carolina displayed here.

the March 2016 primary election,[9] despite the purported availability of an affidavit option. *See* Decl. of R. Hall at 9-10, *N.C. State Conference of NAACP v. McCrory*, No. 16-1468 (4th Cir. May 25, 2016), ECF No. 99-2.

A stay would leave in place intentionally discriminatory voting laws, which is repugnant to the guarantees of the Constitution and the Voting Rights Act. "[The Equal Protection Clause's] central purpose is to prevent the States from purposefully discriminating between individuals on the basis of race." *Shaw v. Reno*, 509 U.S. 630, 642 (1993). As the Fourth Circuit noted in rejecting the State's motion for a stay, "[v]oters disenfranchised by a law enacted with discriminatory intent suffer irreparable harm far greater than any potential harm to the State." App. at 102a. That is, even assuming that the injunction raises *Purcell* concerns—which it does not—the constitutional imperative to prevent racial discrimination in voting demands that the injunction remain undisturbed.

Applicants' asserted hassles from "rejigger[ing]" their plans, Br. at 3-4, pale in comparison to the constitutional injuries that would be visited upon thousands of voters if a stay is granted. With respect to the photo ID requirement, implementation of the injunction is straightforward and simple: poll workers should no longer ask voters to show such ID at the polls in order to vote. Election officials have already been trained on how to implement such straightforward relief. With respect to early voting, Applicants have failed to show ***any*** injury beyond two minor

[9] Applicants describe the only election in which the photo ID requirement was enforced as an "exceptionally high-turnout March 2016 primary." Br. at 29. Yet the 35.7% turnout was lower than the March 2008 primary, and substantially lower than the turnout expected in the upcoming presidential general election.

administrative hurdles, *see* Br. at 30, both of which are illusory. First, Applicants claim to need 90 days' notice to use public buildings as polling places, Br. at 30; but, in fact, state law requires only 45 days' notice, *see* N.C. Gen. Stat. § 163-128. And the actions already taken by 99 county boards to reconsider or amend their early voting plans—many of which involved securing public buildings for an additional seven days—further belie the State's contention. *See* App. at 111a-113a. Second, while "the budgets for county boards were set in June or July," Br. at 30, in March of this year, the SBOE instructed county boards "to request contingency funds for unforeseen changes to the election process" in light of this and other ongoing litigation. SBOE Numbered Memo 2016-06 at 5 (March 30, 2016), *available at* https://s3.amazonaws.com/dl.ncsbe.gov/sboe/numbermemo/2016/Numbered_Memo_2016-06.pdf. And Applicants conceded during oral argument that reverting to a 17-day early voting period will not likely increase the county boards' budgets. *See* Oral Arg. at 01:17:57-01:19:50. Furthermore, Applicants fail to identify any burden associated with reinstating pre-registration, which does not directly affect the upcoming election regardless. Thus, based on the State's application, the only "emergency" here appears to be the danger of too many eligible North Carolinians registering and subsequently voting.

Nor can the State credibly claim irreparable harm from the mere fact that an injunction prevents implementation of a state election law. This Court has consistently reaffirmed the role of federal courts in reviewing legislation that threatens the right to vote, *cf. Tashjian v. Republican Party of Conn.*, 479 U.S. 208,

217 (1986) ("The power to regulate the time, place, and manner of elections does not justify, without more, the abridgment of fundamental rights, such as the right to vote . . . ."), while recognizing the irreparable injury that necessarily inures from unlawful restrictions on constitutional rights, *see Elrod v. Burns*, 427 U.S. 347, 373 (1976); *see also League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 247 (4th Cir. 2014) ("Courts routinely deem restrictions on fundamental voting rights irreparable injury. . . . [O]nce the election occurs, there can be no do-over and no redress. The injury to these voters is real and completely irreparable if nothing is done to enjoin this law."), *cert. denied*, 135 S. Ct. 1735 (2015).

After diligently pursuing discovery that unearthed smoking-gun evidence of discrimination, Respondents' principal claims were tried over a year ago, with supplemental proceedings in January of this year. And following the District Court's decision in late April of this year, Respondents diligently pursued appeals, including expedited briefing and argument before the Fourth Circuit. Now, three years after SL 2013-381 was enacted, Respondents have succeeded before the Fourth Circuit (again), yet the State is asking for another federal election cycle to pass before relief is granted. But *Purcell* is not a license to squeeze out every last possible election under an unlawful regime. The stay should be denied.

II. The Fourth Circuit Correctly Held That The Challenged Law Was Enacted With Discriminatory Intent.

A. The Fourth Circuit Correctly Applied *Arlington Heights*.

The Fourth Circuit properly applied this Court's precedent in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977),

in holding that the challenged provisions were enacted with discriminatory intent. Contrary to Applicants' assertion that the court applied a presumption of racial animus because the eliminated practices were disproportionately used by minority voters, Br. at 23, the Fourth Circuit carefully applied the *Arlington Heights* rubric, looking first at the series of non-exhaustive factors indicative of discriminatory intent, App. at 25a, 31a-56a, as well as other pertinent facts from the record, and then assessing the Applicants' purported justifications for the law, *id.* at 57a-68a. Applying this framework, the Fourth Circuit correctly held that SL 2013-381 was enacted with discriminatory intent.

1. The Fourth Circuit properly considered the factors indicative of discriminatory intent.

In *Arlington Heights*, the Court established a set of non-exhaustive factors that are indicative of whether official action was taken with discriminatory intent. 429 U.S. at 265-68. These factors include: the "historical background of the [challenged] decision"; the "specific sequence of events leading up [to] the challenged decision," including "[d]epartures from the normal procedural sequence"; the legislative history of the decision; and whether the disparate "impact of the official action . . . bears more heavily on one race than another." *Id.* at 266-68. The Fourth Circuit devoted nearly thirty pages of its opinion to analyzing and applying these factors to the record developed before the District Court before concluding that SL 2013-381 was enacted with a discriminatory purpose. App. at 31a-59a.

Historical Background. The Fourth Circuit properly observed that North Carolina "[u]nquestionably" has "a long history of race discrimination generally and

race-based vote suppression in particular." App. at 31a. While acknowledging the "limited weight" of the State's sordid pre-1965 history of discrimination, *id.*, the court observed that "[t]he record is replete with evidence of instances since the 1980s in which the North Carolina legislature has attempted to suppress and dilute the voting rights of African Americans," *id.* at 33a. Specifically, it pointed to the fifty objection letters to proposed election law changes from 1980 to 2013, ten judicial decisions in the same period "finding that electoral schemes in counties and municipalities across the state had the effect of discriminating against minority voters," and a spate of recent decisions finding that State redistricting plans were adopted with improper racial motive.[10] *See id.* at 33a-36a. The Fourth Circuit thus concluded that the State "continued in [its] efforts to restrict or dilute African American voting strength well after 1980 and up to the present day." *Id.* at 37a.

Sequence of Events Leading to the Law's Passage. The Fourth Circuit next evaluated the "specific sequence of events" leading up to the passage of HB 589, including the legislature's "[d]epartures from the normal procedural sequence." App. at 41a. Relying on the "undisputed" and "devastating" factual record as established by the District Court, the court found that "immediately after *Shelby County*, the General Assembly vastly expanded an earlier photo ID bill and rushed through the legislative process the most restrictive voting legislation seen in North Carolina since enactment of the Voting Rights Act of 1965." *Id.* The Fourth Circuit

[10] A three-judge district court has since issued an additional decision finding racially motivated redistricting in North Carolina. *See Covington v. North Carolina*, No. 1:15-cv-399, 2016 WL 4257351 (M.D.N.C. Aug. 11, 2016).

recognized the "unusual" and "abrupt" timeline for considering and debating HB 589, particularly given the "expanded law's proximity to the *Shelby County* decision" and the impact the law would have on African Americans. *Id.* at 44a-46a. Of particular salience to the court was the more restrictive post-*Shelby County* photo ID provision, which "retained only those types of photo ID disproportionately held by whites and excluded those disproportionately held by African Americans." *Id.* at 42a-43a. From this sequence of events, the court properly drew "the obvious inference" of discriminatory intent under *Arlington Heights*. *Id.* at 41a.

Legislative History. The Fourth Circuit focused on the fact that "members of the General Assembly requested and received a breakdown by race of DMV-issued ID ownership, absentee voting, early voting, same-day registration, and provisional voting (which includes out-of-precinct voting)." App. at 48a. As both the District Court and the Fourth Circuit agreed, "[t]his data revealed that African Americans disproportionately used early voting, same-day registration, and out-of-precinct voting"—the same voting reforms eliminated by SL 2013-381—and that African Americans "disproportionately lacked DMV-issued ID"—the primary form of ID among those mandated by SL 2013-381. *Id.* (citing D. Ct. Op. at *148). As the Fourth Circuit explained, "the General Assembly enacted legislation restricting all—and only—practices disproportionately used by African Americans." *Id.* In light of the perfect match between the requested data showing disproportionate use by African Americans and the restrictive provisions of SL 2013-281, the Fourth

Circuit rejected "the unpersuasive non-racial explanations the State proffered for the specific choices it made." *Id.* at 48a-49a.

Impact of Official Action. The Fourth Circuit also assessed whether the enacted law "bears more heavily on one race than another." *Arlington Heights*, 429 U.S. at 266 (citation omitted). In addition to addressing the "impact of the official action" in the elections that *followed* the law's enactment, *see infra* Part II.C, the Fourth Circuit (like the District Court before it) agreed that African Americans had disproportionately used the voting mechanisms eliminated by SL 2013-381 in the elections preceding the law, and disproportionately lacked DMV-issued photo IDs. *See* App. at 49a (citing D. Ct. Op. at *37, *136). Even in light of these clear findings, Applicants wrongly argue that the Fourth Circuit focused on the theoretical effects of the enjoined provisions based only on past results. Br. at 15-16. Not so. As the Fourth Circuit explained, the record "provides abundant support" for the conclusion that SL 2013-381 ***does*** have a disparate impact on minority voters, given that minority voters disproportionately use—and have continued to use—every one of the challenged voting mechanisms.[11] *See* App. at 51a. Particularly when viewed in the context of the other *Arlington Heights* factors, this cumulative disparate impact, *see id.*, provides a firm basis for the Fourth Circuit's conclusion that HB 589 was enacted with discriminatory intent.

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[11] Applicants misleadingly suggest that the District Court found that "preregistration is actually not disproportionately used by minorities." Br. at 23 n.3. The District Court found that African Americans disproportionately used pre-registration but Hispanics did not. D. Ct. Op. at *69. The Court of Appeals accepted the District Court's finding about African Americans and did not reach the claims of discrimination against Latinos. App. at 18a, 22a-23a.

2. The Fourth Circuit considered—and rejected—the Applicants' made-for-litigation justifications.

After finding that Respondents had demonstrated that a race-based purpose was at least ***a*** motivating factor behind SL 2013-381, the Fourth Circuit turned its attention to "the substantiality of the state's proffered non-racial interest and how well the law furthers that interest." *See* App. at 57a (citing *Hunter v. Underwood*, 471 U.S. 222, 228-33 (1985)). And Applicants could offer only the flimsiest rationales for each of the enjoined provisions.

Photo ID. Proponents of SL 2013-381 argued that the law would combat voter fraud and promote public confidence in the electoral system. *See* SL 2013-381, preamb. But the "voter fraud" the law seeks to address does not exist, and the law is ill-tailored to address it in any event. For instance, SL 2013-381 imposes a photo ID requirement on ***in-person*** voters even though "the State has failed to identify even a single individual who has ever been charged with committing in-person voter fraud in North Carolina," while exempting ***absentee*** voters (who the legislature knew were disproportionately white, *see* App. at 48a) from the requirement even though "the General Assembly ***did*** have evidence of alleged cases of mail-in absentee voter fraud." App. at 61a.

Early Voting. The early-voting period was supposedly reduced in response to calls for "consistency" in early-voting practices across counties, including with regard to Sunday voting. *E.g.*, JA12997-98, JA20943-44, JA22348. But SL 2013-381 does not even address such inconsistencies and instead vests each county's board of elections with discretion to set early-voting hours without regard to the

practices of other counties. *See* JA3325; N.C. Gen. Stat. § 163-227.2(f). And because the law mandated that counties utilize the same number of aggregate hours as the immediately prior election of that type (presidential versus non-presidential)—elections in which the counties had ***different*** numbers of early-voting hours—the law in effect codified existing inconsistencies. *See* App. at 64a-65a. Moreover, given that State asserted that "'[c]ounties with Sunday voting in 2014 were disproportionately black' and 'disproportionately Democratic,'" *id.* at 39a (brackets in original) (citation omitted), the Fourth Circuit observed that the elimination of one of two Sundays available for early voting "hinge[d] ***explicitly*** on race -- specifically its concern that African Americans, who had overwhelmingly voted for Democrats, had too much access to the franchise," *id.* at 40a. The Fourth Circuit further observed that proponents of the law ignored the recommendation of the SBOE regarding the ill-effects of reducing early voting, particularly in high turnout elections. *Id.* at 65a-66a.

Pre-Registration. According to HB 589's proponents, the pre-registration system was confusing to young voters. But the District Court rejected that explanation, finding that "pre-registration's removal . . . make[s] registration ***more*** complex," D. Ct. Op. at *116 (emphasis added), and the Fourth Circuit agreed that the State had "contrived a problem in order to impose a solution." App. at 68a.

Out-of-Precinct Provisional Ballots.[12] Applicants' initial justification for the elimination of counting out-of-precinct provisional ballots was that it "move[d] the law back to the way it was"—before precinct restrictions were eliminated "to facilitate greater participation in the franchise by minority voters." App. at 67a (citing JA3307). After this litigation commenced, however, the State altered course and asserted that SL 2013-381 eliminated out-of-precinct voting to "permit[] election officials to conduct elections in a timely and efficient manner." *Id.* (citing JA22328). As the Fourth Circuit correctly recognized, these types of ever-shifting, "*post hoc* rationalizations during litigation provide little evidence as to the actual motivations of the legislature." *Id.* (citing *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 730 (1982); *United States v. Virginia*, 518 U.S. 515, 533 (1996)).

Same-Day Registration. Finally, the Fourth Circuit observed that the legislature again ignored the advice of the SBOE in eliminating same-day registration, as well as in failing to consider less restrictive alternatives. App. at 66a-67a. While proponents of SL 2013-381 averred that same-day registration did not allow the State to verify the addresses of registrants at the very end of the early-voting period, the Fourth Circuit noted that 97% of same-day registrants passed the verification process and that "[t]he General Assembly had before it alternative proposals that would have remedied the problem without abolishing the popular program." *Id.* at 66a.

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[12] Even though Applicants do not seek a stay of the District Court's injunction reinstating same-day registration and the counting of out-of-precinct provisional ballots, the lack of legitimate justifications supporting the elimination of these practices bears upon the discriminatory intent behind the omnibus election law.

In sum, after finding that a race-based, discriminatory purpose was a factor motivating passage of SL 2013-381, the Fourth Circuit properly found Applicants' stated rationales to be tenuous and unpersuasive. Holding that "the legislature's ***actual*** non-racial motivations" alone cannot justify the legislature's choices, *id.* at 27a, the court "conclude[d] that race constituted a but-for cause of [the legislation]," *id.* at 69a. That finding represents a straightforward application of this Court's directives and is unlikely to be reversed should this Court grant certiorari.

B. The 2015 Amendment to the Photo ID Requirement Does Not Cure the State's Original Discriminatory Intent.

Applicants suggest that the Fourth Circuit's decision should be overturned because of a 2015 amendment to the photo ID requirement that somehow washes away the stain of discrimination that taints the 2013 bill. *See* Br. at 21. But Applicants affirmatively waived this argument, and, in any event, it is misplaced.

First, during the January 2016 trial, Applicants admitted they were *not* contending that the 2015 amendment (enacted via HB 836) cured any original discriminatory intent behind the original law (HB 589):

> Your Honor, as to that particular point, I am not aware of anywhere we've argued that 836 was curative of any alleged discriminatory intent in 589. . . . I don't recall anywhere we argued or used this concept of curative.

JA23585:13-19. Applicants' counsel confirmed that position minutes later:

> So I think we made it pretty clear that our position is that we are not arguing 836 cured any alleged intent from 589.

JA23588:23-25. And the District Court took note of Applicants' position:

> I will also note as well the Defendants have just admitted that they are not arguing that somehow the passage of 836 purges any discriminatory intent as to 589.

JA23590:4-7. There could hardly be a more clear waiver on this point.

Moreover, an amendment to the photo ID requirement—and only the photo ID requirement—enacted in 2015 cannot logically cure the discriminatory intent behind the passage of an omnibus bill covering multiple provisions almost two years earlier. The 2015 bill did not address any of the other enjoined provisions—thus, the sting of any discriminatory intent with regard to those provisions (all of which were subject of the Fourth Circuit's ruling) could not possibly have been cured. *See Hunter v. Underwood*, 471 U.S. 222, 233 (1985) ("[W]e simply observe that [the] original enactment was motivated by a desire to discriminate against blacks on account of race and the section continues to this day to have that effect.").

C. Applicants' Arguments as to Discriminatory Effect are Factually Inaccurate and Misconstrue the Applicable Legal Standard for Discriminatory Intent Claims.

The Applicants are doubly wrong in asserting that the Court of Appeals erred by invalidating provisions "affirmatively found to have no discriminatory effect". Br. at 1. Not only do they misconstrue the requirements for establishing a discriminatory ***intent*** claim, they ignore the Fourth Circuit criticism of the District Court's discriminatory results ruling, which observed that "while the district court recognized the undisputed facts as to the impact of the challenged provisions of SL 2013-381, it simply refused to acknowledge their import." App. at 55a.

As an initial matter, Applicants' disagreements with the Fourth Circuit regarding the discriminatory effects of the enjoined provisions are immaterial to the

court's ruling on discriminatory intent. As Applicants themselves acknowledge, a state's "failure to achieve discriminatory effects is no excuse for a law that truly is enacted with discriminatory intent." Br. at 31. The Fifteenth Amendment unequivocally provides that "[t]he right of citizens of the United States to vote" may not be "denied or ***abridged*** . . . by any State on account of race, color, or previous condition of servitude." U.S. Const. amend. XV, § 1 (emphasis added). Voting laws motivated by discriminatory intent therefore "ha[ve] no legitimacy at all under our Constitution or under the [Voting Rights Act]." *City of Richmond v. United States*, 422 U.S. 358, 378 (1975); *cf. Shelby County*, 133 S. Ct. at 2631 ("[A]ny racial discrimination in voting is too much . . . ."). In the State's view, however, a restriction on voting such as a literacy test would pass constitutional muster even if enacted with clear discriminatory intent, unless the plaintiffs also establish "a discriminatory effect on minority voters" via a consequent "depress[ion]" in "minority turnout." Br. at 11. The law does not require such showing.

In any event, the Court of Appeals noted that the enjoined provisions ***do*** have a discriminatory effect in light of socioeconomic disparities that have led African Americans to rely disproportionately on the eliminated practices. The State simply ignores the undisputed findings of both the District Court and Court of Appeals that "African Americans . . . in North Carolina are disproportionately likely to move, be poor, less educated, have less access to transportation, and experience poor health." App. at 55a (ellipsis in original) (quoting D. Ct. Op. at *89). As the Court of Appeals found, those disparities "led African Americans to disproportionately use early

voting, same-day registration, out-of-precinct voting, and preregistration" and to "lack acceptable photo ID." *Id.* While the District Court—and Applicants—described the eliminated practices as merely "'preferred' by African Americans," *id.* (quoting D. Ct. Op. at *170) the Court of Appeals found that the eliminated practices "are a necessity" "for many African Americans" in North Carolina. *Id.* And this was confirmed in the 2014 election, when "thousands of African Americans were disenfranchised" by the challenged provisions, including voters (disproportionately African American) who either "registered during what would have been the same-day registration period but because of SL 2013-381 could not then vote" or who cast an out-of-precinct provisional ballot, which went uncounted. *Id.* at 54a.

Ignoring the Fourth Circuit's conclusions, Applicants repeat the District Court's error of according "almost dispositive weight" to the 1.8% increase in African American turnout in the 2014 midterm election as compared to 2010. *See id.* at 53a. As an initial matter, this meager increase in African-American turnout—which occurred in the midst of the most expensive Senate race in U.S. history—"represents a significant ***decrease*** in the ***rate***" at which African-American participation had been growing ***before*** SL 2013-381: "For example, in the prior four-year period, African American midterm voting had increased by 12.2%." *Id.* at 54a-55a. Applicants' argument amounts to the claim that voting restrictions that target minorities are permissible so long as the State does not completely extinguish what had been a 16-year trend of surging participation. But such a dramatic result is not

a prerequisite for an intentional discrimination claim; the State's failure to fully effectuate discriminatory goals does not immunize it from liability.

Applicants' myopic focus on turnout in 2014 also ignores this Court's caution against "plac[ing] much evidentiary weight on any one election" when attempting to assess the effect of an electoral practice. *Id.* at 54a (citing *Thornburg v. Gingles*, 478 U.S. 30, 74-77 (1986)). For example, the Fifth Circuit, sitting *en banc*, recently rejected the argument that plaintiffs bringing a Section 2 discriminatory results claim against a voter ID law must establish that the law "directly caused a reduction in turnout," explaining that:

> An election law may keep some voters from going to the polls, but in the same election, turnout by different voters might increase for some other reason. . . . That does not mean the voters kept away were any less disenfranchised. . . . [N]o authority supports requiring a showing of lower turnout, since ***abridgement*** of the right to vote is prohibited along with denial.

Veasey v. Abbott, __ F.3d __, 2016 WL 3923868, at *29 (5th Cir. July 20, 2016) (en banc) (citations omitted).

III. The Court Is Unlikely To Grant Certiorari.

The requested stay should also be denied because it is unlikely that "four Justices will consider the issue[s presented by this case] sufficiently meritorious to grant certiorari." *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010). The State, to begin, points to no split of authority that it argues warrants review. Until such a split emerges, this Court's review would be both premature and unnecessary.

This case presents unique facts that are unlikely to arise in other litigation. *First*, "the sheer number of restrictive provisions in SL 2013-381 distinguishes this

case from others." App. at 52a-53a. Other voting-rights cases have typically involved challenges to only a single electoral practice. *See, e.g.*, *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 185 (2008) (challenging only a photo ID requirement); *Veasey*, 2016 WL 3923868, at *1 (same). This case, however, involves an "omnibus" bill that restricts an entire series of "voting mechanisms [the State] knew were used disproportionately by African Americans." App. at 45a-46a.

Second, the timing of SL 2013-381 distinguishes this case from others and lessens the need for this Court's review. The day after *Shelby County* was decided, the chairman of the Senate Rules Committee stated, "'I think we'll have an omnibus bill coming out' and . . . that the Senate would move ahead with the 'full bill.'" App. at 14a (quoting D. Ct. Op. at *9). The legislature then swiftly acted to expand what previously had been a single-issue bill into omnibus legislation targeting those very voting practices used disproportionally by African Americans. *Id*. That distinctive time sequence makes this case unique.

The State argues that the decision below must be reviewed because it "renders every voter-ID law in the country vulnerable to invalidation as intentionally discriminatory" and potentially undermines *Crawford*, 553 U.S. 181. Br. at 19-23. It does not. The analysis required by *Arlington Heights* is a multi-factored, highly fact-intensive inquiry that necessarily turns on the specific facts and circumstances of each case. *See, e.g.*, App. 24a-26a. The Fourth Circuit's decision was thus the result of the unique facts of ***this*** case, just as ***other*** cases will turn on ***their own*** unique circumstances. The number of electoral modifications in

SL 2013-381, and the timing with which that statute was enacted, are just two of the many facts on which the Fourth Circuit relied that are unlikely to be repeated in future cases. The highly fact-specific nature of the inquiry demanded by *Arlington Heights* fully rebuts the State's claim that the decision below somehow endangers voter-ID laws nationwide.

The Fourth's Circuit's decision also does not undermine *Crawford*. The Court in *Crawford* did not have before it, much less address, a claim of racially discriminatory intent. 553 U.S. at 186-87. Instead, *Crawford* held that certain photo-ID laws pass muster under the Fourteenth Amendment balancing approach applied to facially neutral election laws. *See id.* at 189-90. The Court did not foreclose plaintiffs from bringing ***other*** challenges to photo-ID laws, such as discriminatory-intent claims. And it is not uncommon for courts to invalidate facially neutral laws (that might otherwise be permissible) on the basis that such laws were enacted with a racially discriminatory intent. *See, e.g.*, *Hunter*, 471 U.S. at 231-33; *Rogers v. Lodge*, 458 U.S. 613, 622 (1982).[13]

Finally, Applicants repeatedly suggest that review is necessary because no other case in recent history has "reversed a fact-finder's finding that a State did *not*

[13] The decisions in *Hunter* and *Rogers* confirm that invalidating a law that was enacted with discriminatory intent does not "threaten the continued existence of all of those [types of] laws" throughout the country. Br. at 19. *Hunter* struck down a felon-disenfranchisement law, and *Rogers* invalidated an at-large electoral scheme, but notwithstanding those decisions, most states and municipalities continues those practices. *See* National Conference of State Legislatures, *Felon Voting Rights* (Apr. 25, 2016), http://www.ncsl.org/research/elections-and-campaigns/felon-voting-rights.aspx; National League of Cities, *Municipal Elections*, http://www.nlc.org/build-skills-and-networks/resources/cities-101/city-officials/municipal-elections (last visited Aug. 23, 2016).

enact an election law with discriminatory intent." Br. at 1; *see also id.* at 18. That is both irrelevant and incorrect. Courts of appeals ***have*** reversed district court decisions finding no discriminatory intent. *See, e.g.*, *Hunter*, 471 U.S. at 225 (noting that the Eleventh Circuit had "determined that the District Court's finding of a lack of discriminatory intent . . . was clearly erroneous"); *Perkins v. City of W. Helena*, 675 F.2d 201, 216 (8th Cir.) ("[W]e believe that the district court's finding that the plaintiffs did not prove discriminatory intent is clearly erroneous."), *aff'd*, 459 U.S. 801 (1982); *Foster v. Chatman*, 136 S. Ct. 1737, 1754-55 (2016) (reversing as clearly erroneous state-court finding that criminal defendant has failed to show purposeful discrimination for purposes of a *Batson* challenge); *Snyder v. Louisiana*, 552 U.S. 472, 485-86 (2008) (same). And in any event, the fact that such reversals may not be common only further illustrates that review is unwarranted: the unique circumstances of this case have only limited applicability to other matters.

CONCLUSION

The Fourth Circuit's ruling properly applied this Court's precedents in finding that the North Carolina legislature enacted the enjoined provisions of SL 2013-381 with discriminatory intent. And the extensive actions of North Carolina elections officials to implement the Fourth Circuit's order and subsequent District Court injunction in the almost-four weeks since have already created a new status quo, which this Court should not disrupt. For these and all the reasons stated above, Respondents respectfully urge this Court to deny the extraordinary relief sought by Applicants.

Dated: August 25, 2016

Respectfully submitted,

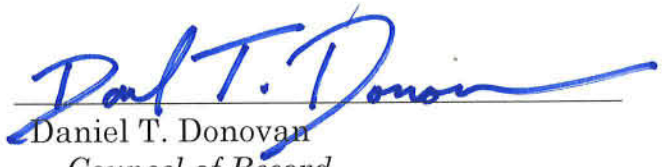
By: 

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EXHIBIT F

No. 16-833

IN THE

Supreme Court of the United States

STATE OF NORTH CAROLINA, *ET AL.*,

Petitioners,

v.

NORTH CAROLINA STATE CONFERENCE OF THE NAACP, *ET AL.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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January 30, 2017

COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

In the decision below, the Fourth Circuit applied this Court's settled analysis from *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), and concluded that North Carolina's "very justification for [Session Law 2013-381 ("SL 2013-381")] hinges ***explicitly*** on race—specifically [the] concern that African Americans . . . had too much access to the franchise." App. 40a (emphasis in original). The Fourth Circuit consequently held that SL 2013-381 violates the Fourteenth Amendment and Section 2 of the Voting Rights Act because it was enacted with discriminatory intent.

The following questions are presented:

1. Whether the Fourth Circuit's fact-bound decision—which applied *Arlington Heights* to undisputed facts unique to North Carolina and SL 2013-381 (including the elimination of multiple voting procedures used disproportionately by African Americans)—has broad implications for voting laws in other States.

2. Whether the Fourth Circuit's determination that SL 2013-381 was motivated by racially discriminatory intent conflicts with this Court's decision in *Shelby County*.

3. Whether the Fourth Circuit's finding of discriminatory ***intent*** conflicts with the rulings of other circuits regarding the probative value of statistical evidence for purposes of establishing a violation of the discriminatory ***results*** prong of Section 2 of the Voting Rights Act.

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INTRODUCTION

The petition for certiorari should be denied because the decision below concerns a unique, "omnibus" North Carolina law and is a fact-bound ruling that is consistent with this Court's precedents. Petitioners have identified no conflict among the circuits, but simply disagree with the Fourth Circuit's application of settled law to the facts of this case.

"[I]n the immediate aftermath of unprecedented African American voter participation in a state with a troubled racial history and racially polarized voting," App. 41a, North Carolina intentionally adopted its most "comprehensive set of restrictions" on the franchise since 1965, when Congress passed the Voting Rights Act. App. 33a. The sweeping legislation—North Carolina Session Law 2013-381 ("SL 2013-381")—"target[ed] African Americans with almost surgical precision," App. 16a, imposing a strict voter identification requirement that prohibited voters from relying on many common forms of government-issued photo ID, and abruptly eliminating or curtailing four voting practices—"***all*** of which" reduced or eliminated forms of voting disproportionately used by African Americans. App. 15a (emphasis added). And the legislature did so in a secretive and truncated legislative process, with a bill that "came into being literally within days of North Carolina's release from the preclearance requirements of the Voting Rights Act," and only after it had requested and received "data on the use, by race," of various voting practices. App. 33a.

The Fourth Circuit applied the well-established analysis set forth in *Village of Arlington Heights v.*

Metropolitan Housing Development Corp., 429 U.S. 252 (1977), to these undisputed facts and concluded that SL 2013-381 was enacted with an intent to discriminate against African American voters, in violation of the Equal Protection Clause of the Fourteenth Amendment and Section 2 of the Voting Rights Act. In so ruling, the court unequivocally held that the District Court "clearly erred in finding that the cumulative impact of the challenged provisions of SL 2013-381 does not bear more heavily on African Americans." App. 50a.

The Fourth Circuit did not engage in a retrogression analysis or otherwise contravene this Court's directives in *Shelby County v. Holder*, 133 S. Ct. 2612 (2013). Rather, its determination was based on factors unique to North Carolina and SL 2013-381, including the "omnibus" nature of the law, the hurried process for enacting it mere days after the State's preclearance obligations fell away, the precision with which this specific law targeted African-American voters, and the absence of evidence that the State actually relied on legitimate nondiscriminatory rationales. App. 15a-16a. The Fourth Circuit's ruling thus does not create a "roadmap" for invalidating other States' laws, Pet. 20; indeed, the court was explicit that its holding was focused on the record in North Carolina and that other States need not "forever tip-toe around certain voting provisions disproportionately used by minorities." App. 72a.

Nor does the decision below conflict with any ruling from another court of appeals. There is no pattern of appellate courts misapplying this Court's decision in *Arlington Heights*, and the Fourth

Circuit's intent analysis is consistent with decisions from other courts of appeals that have considered challenges to voting-related legislation. In any event, Petitioners' invocation of a purported split among the circuits on the standard for discriminatory ***results*** in a Section 2 case, Pet. 32-35, does not make the Fourth Circuit's decision—which was based solely on a finding of discriminatory ***intent***—an appropriate vehicle for this Court's review.

Petitioners have failed to present a valid basis for granting review of the Fourth Circuit's fact-bound ruling, particularly given the absence of any split of authority among the courts of appeals on the issues presented. For these reasons, the petition should be denied.

STATEMENT OF THE CASE

A. Session Law 2013-381

"North Carolina has a long history of race discrimination generally and race-based vote suppression in particular." App. 33a. As a result, the State's "African Americans are 'disproportionately likely to move, be poor, less educated, have less access to transportation, and experience poor health'"—a panoply of "socioeconomic factors that may hinder their political participation." App. 22a-23a.

Between 2000 and 2012, however, "African American voter registration swelled by 51.1%," and "African American turnout similarly surged, from 41.9% . . . to . . . 68.5%." App. 18a. "[B]y 2013 . . . African Americans were poised to act as a major electoral force." App. 15a. None of this was a secret

from the North Carolina legislature, which "knew that, in recent years, African Americans had begun registering and voting in unprecedented numbers . . . to a degree unmatched in modern history," and "certainly knew" that voting in North Carolina is racially polarized, with African-American voters tending to favor the Democratic party. App. 39a. Indeed, as "one of the State's experts conceded, 'in North Carolina, African-American race is a better predictor [of voting behavior] than party registration.'" App. 38a.

Against this backdrop, North Carolina enacted House Bill 589 ("HB589"), which became SL 2013-381. "The sequential facts found by the district court are . . . undisputed." App. 41a. HB589 was originally introduced in early 2013, and proposed a voter ID requirement that permitted the use of all forms of government-issued photo ID—including public assistance IDs and student IDs—without making any other significant changes to election laws. After four weeks of consideration—including public hearings and debate in three committees—it passed the House on April 24, 2013. The Senate received the bill the following day, but took no legislative action for two months. App. 42a.

Then, "the day after" this Court decided *Shelby County*, 133 S. Ct. 2612, which relieved North Carolina of its preclearance obligations, the "Chairman of the [North Carolina Senate] Rules Committee[] publicly stated . . . that the Senate would move ahead with [a] 'full bill.'" App. 18a. But "[a]fter that announcement, no further public debate or action occurred for almost a month," until, with two days remaining in the legislative session,

"an expanded bill, including the election changes challenged in this case, was released." App. 42a (citation omitted).

Broadly speaking, the "full bill" transformed the bill passed by the House in April 2013 in two material respects:

First, what had been "an essentially single-issue bill" suddenly reappeared as "omnibus legislation," App. 18a-19a, which, *inter alia*, eliminated (i) one week of early voting, (ii) same-day registration, (iii) out-of-precinct provisional balloting, and (iv) pre-registration.

Second, the bill's voter ID provision was "substantially changed." App. 45a. Whereas the pre-*Shelby County* version of the law provided that all government-issued photo IDs would be valid alternatives to DMV-issued IDs, the "full bill" did not.

Additionally, these changes unfolded in a suspect manner: "prior to and during the limited debate on the expanded omnibus bill," the legislature "requested and received racial data as to usage of the practices changed by the proposed law." App. 47a, 19a. As the Fourth Circuit observed, "[t]his data revealed that African Americans disproportionately used early voting, same-day registration, and out-of-precinct voting, and disproportionately lacked DMV-issued ID." App. 47a-48a. With regard to the voter ID requirement, the data received by the legislature "showed that African Americans disproportionately lacked the most common kind of photo ID, those issued by the [DMV]," yet "the legislature amended the bill to exclude many of the

alternative photo IDs used by African Americans," such as public assistance IDs and student IDs, while it "retained only the kinds of IDs that white North Carolinians were more likely to possess." App. 19a-20a. Additionally, the data "revealed that African Americans did not disproportionately use absentee voting; whites did," and the legislature "exempted absentee voting from the photo ID requirement." App. 47a-48a. "In sum, ***relying on this racial data, the General Assembly enacted legislation restricting all—and only—practices disproportionately used by African Americans***." App. 48a (emphasis added).

The new version of SL 2013-381 was then "rushed through the legislative process" in two days, with little opportunity for public scrutiny, including no public hearing. App. 41a.

B. Proceedings Below

Respondents challenged the law on numerous grounds, including that it was enacted with discriminatory intent against African Americans and had discriminatory results. App. 126a. The District Court ruled for the State on both the results and intent claims, App. 434a-470a, but the Fourth Circuit reversed, holding that, when viewed in the proper legal framework, the undisputed facts compelled the conclusion that SL 2013-381 was passed with discriminatory intent. App. 16a.[1] In particular, the Fourth Circuit held that the District

[1] Because the intent ruling was sufficient to enjoin the law, the Fourth Circuit did not directly address the District Court's ruling regarding discriminatory results. App. 26a.

Court "clearly erred" by considering "each piece of evidence in a vacuum, rather than engaging in the totality of the circumstances analysis required by *Arlington Heights*." App. 54a.

First, while acknowledging that the District Court purported to consider North Carolina's history of discrimination in its analysis of the Plaintiffs' discriminatory ***results*** claim, the Fourth Circuit found that the District Court "inexplicably failed to grapple" with "North Carolina's history of voting discrimination" for purposes of the required discriminatory ***intent*** analysis. App. 34a, 55a. In particular, North Carolina enacted SL 2013-381 against the backdrop of the State's "sordid history" of official racial discrimination "dating back well over a century." App. 299a. In considering this evidence, the Fourth Circuit heeded this Court's instruction that "history did not end in 1965," App. 33a (quoting *Shelby Cty.*, 133 S. Ct. at 2628), but observed that "state officials continued in their efforts to restrict or dilute African American voting strength well after 1980 and up to the present day." App. 37a-38a. Indeed, the court noted that the same legislature that enacted SL 2013-381 "impermissibly relied on race" when adopting North Carolina's post-2010 Census congressional redistricting plan. App. 37a (citing *Harris v. McCrory*, 159 F. Supp. 3d 600 (M.D.N.C. 2016)).

Second, it was undisputed that North Carolina had recently experienced a "surge in African American voting," and that "the legislature[] kn[ew] that African Americans voting translated into support for one party." App. 55a. Armed with that knowledge, and "with race data in hand," the

legislature enacted, on straight party lines, a "number of restrictive provisions," that, at every turn, curtailed or "eliminat[ed] . . . the tools African Americans had used to vote," and "amended the bill to exclude many of the alternative photo IDs used by African Americans." App. 19a, 51a, 55a.

Third, the "full bill" was "rushed through the legislative process" "at the first opportunity" after *Shelby County*. App. 18a, 41a, 55a. In particular, the Fourth Circuit noted that the lengthy bill received a total of only three days of legislative consideration—including a mere two hours in the North Carolina House of Representatives. *See* App. 43a. This hurried procedure, the Fourth Circuit reasoned, "strongly suggests an attempt to avoid in-depth scrutiny." App. 43a-44a.

Fourth, "[t]he only clear factor linking these various 'reforms' [wa]s their impact on African American voters." App. 65a. The Fourth Circuit observed that the legislature's acknowledgement that self-entrenchment was one of its purposes "comes as close to a smoking gun as we are likely to see in modern times, [as] the State's very justification for a challenged statute hinges ***explicitly*** on race—specifically its concern that African Americans, who had overwhelmingly voted for Democrats, had too much access to the franchise." App. 40a. That conclusion flowed from, *inter alia*, the State's admission that it eliminated one of the two days of early voting on Sundays ***because*** "[c]ounties with Sunday voting in 2014 were disproportionately black" and thus voted "disproportionately Democratic." *Id.*

The Fourth Circuit held that these undisputed facts "unmistakably reveal[ed] that the General Assembly used SL 2013-381 to entrench itself" by engaging in a form of "racial discrimination": namely, by "targeting voters who, based on race, were unlikely to vote" for the majority party in the legislature. App. 55a. The court concluded that, "as in *League of United Latin American Citizens v. Perry* (*LULAC*), 548 U.S. 399, 440 (2006), 'the State took away [minority voters'] opportunity because [they] were about to exercise it.'" App. 56a.

The court next turned to the State's proffered rationales for the enjoined provisions (including unfounded allegations of voter fraud, administrative concerns, and more), App. 55a-65a, and found them wanting. The District Court, in sustaining the challenged provisions, had relied on what it described as "at least plausible" justifications for these restrictions, App. 56a (quoting App. 457a), and did not inquire into whether the legislature was ***in fact*** motivated by these "imagined" *post hoc* rationales. *Id.* Indeed, the State offered ***no justification whatsoever*** for certain of the restrictions it imposed, such as its decision to "retain[] only those types of photo ID disproportionately held by whites and exclude[] those disproportionately held by African Americans." App. 43a.

With respect to the various rationales that the State actually did proffer, the Fourth Circuit found that, as a legal matter, the restrictions "constitute inapt remedies for the problems assertedly justifying them and, in fact, impose cures for problems that did not exist." App. 16a. The court further noted that

the State's professed goals of imposing consistency and eliminating confusion "do[] not hold water" in light of the inconsistency and complexity imposed by the bill. App. 61a-65a. The Fourth Circuit therefore concluded that race was "***a*** factor" in the adoption of the voting restrictions at issue. App. 55a.

Given the completeness of the record, App. 57a, and the fact that its determination did not turn on credibility determinations but on the cumulative strength of the undisputed evidence, the Fourth Circuit determined that remand was unnecessary and ordered that the challenged provisions be enjoined in their entirety.[2]

REASONS FOR DENYING THE WRIT

I. The Fourth Circuit's Fact-Bound Ruling Applied the Well-Established *Arlington Heights* Framework and Does Not Warrant This Court's Review.

Petitioners' dire warnings as to the "potential multi-State effects of the Fourth Circuit's decision," Pet. 24-25, are unfounded. The Fourth Circuit faithfully applied the well-established "totality of the circumstances analysis required by *Arlington Heights*" for assessing whether circumstantial

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[2] Judge Motz dissented in part, solely with respect to remedy as to the voter ID requirement. She agreed that the original bill was "enacted [in 2013] with racially discriminatory intent," but would have "temporarily enjoin[ed] the photo ID requirement and remand[ed] the case to the district court to determine if, in practice," the reasonable impediment exception enacted almost two years later (in 2015) "fully remedie[d] the discriminatory requirement or if a permanent injunction is necessary." App. 78a.

evidence indicates that a facially neutral law was motivated by discriminatory intent. App. 54a-55a. Its determination was a quintessentially fact-bound decision dependent on North Carolina's unique circumstances. While the facts of this case are unprecedented, the fact-intensive *Arlington Heights* legal framework applied by the Fourth Circuit is not.

Indeed, Petitioners do not identify an error of law in the Fourth Circuit's decision or dispute the fundamental legal principles on which the Fourth Circuit relied. Nor could they—the Fourth Circuit simply applied the long-settled *Arlington Heights* framework. The petition is, at bottom, a challenge to the Fourth Circuit's application of those principles to the undisputed facts of this case. Such an appeal not only fails to establish grounds for review, *see* S. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law."), it wholly undermines Petitioners' hyperbolic predictions about the nationwide impact of that fact-bound decision.

A. The Fourth Circuit Properly Considered the North Carolina–Specific Context of SL 2013-381.

Consistent with this Court's guidance in *Arlington Heights*, no one factor was dispositive in the Fourth Circuit's analysis. *See* App. 46a. Rather, the decision below rested on the combination of numerous factors that, collectively, are particular to this case. Those factors included:

The Number, Character, and Scope of the Challenged Restrictions. The broad scope of SL 2013-381, and its surgical targeting of voting mechanisms used by African Americans, were critical factors in the decision below, belying Petitioners' prediction that the Fourth Circuit's ruling will "provide[] a roadmap for invalidating election laws in numerous States." Pet. 20, 24. As set forth above, North Carolina did not simply enact a run-of-the-mill voter ID requirement; it enacted one of the strictest voter ID requirements in the nation in addition to a flurry of other restrictions on registration and voting practices all in one fell swoop. As the Fourth Circuit observed, no other "legislature in the Country . . . has ever done so much, so fast, to restrict access to the franchise," with a single bill "restricting all—and only—practices disproportionately used by African Americans." App. 44a, 48a. *See also* Daniel P. Tokaji, "Applying Section 2 to the New Vote Denial," 50 Harv. C.R.-C.L. L. Rev. 439, 457 (2015) ("North Carolina's voting restrictions were more sweeping than those of any other state that changed its voting rules after *Shelby County*.").

Petitioners describe SL 2013-318 as placing North Carolina "in the national mainstream," Pet. 20, but that assertion "misse[s] the forest in carefully surveying the many trees." App. 14a. *First*, the fact that other States maintain certain similar facially-neutral practices cannot save or protect voting restrictions that are adopted with racial intent. *Second*, no other State has simultaneously curtailed four different voting mechanisms disproportionately used by African Americans, while also imposing a strict photo ID requirement that

excludes all forms of government-issued photo ID disproportionately held by African Americans. And with respect to the unique combination of voting practices at issue in this case (same-day registration, out-of-precinct voting, pre-registration, 17 days of early voting, and voting without a strict photo ID requirement), Petitioners' expert conceded that a ***majority*** of states have at least two of those practices; by contrast, after SL 2013-318, North Carolina became one of only eight states to lack all of them. JA21287.

Under the *Arlington Heights* framework, "a court must be mindful of the number, character, and scope of the modifications enacted together in a single challenged law." App. 56a. Here, "the sheer number of restrictive provisions in SL 2013-381" that are targeted at African Americans "distinguishes this case from others." App. 51a-52a.

Sequence of Events Leading to Enactment and Legislative History. This case is also unique because the numerous voting restrictions at issue were "rushed" through the legislative process immediately following this Court's decision in *Shelby County*. App. 41a-42a. Moreover, while testimony from the bill's proponents regarding the express purpose of SL 2013-381 was limited by their invocation of legislative privilege, *see* App. 46a, the Fourth Circuit found key that, during this process, North Carolina lawmakers specifically "requested and received a breakdown by race of DMV-issued ID ownership, absentee voting, early voting, same-day registration, and provisional voting." App. 47a. And it was not until after receiving this data that the legislature enacted a law that—"with almost surgical precision,"

App. 16a—tightened the voter ID portions of the bill and curtailed or eliminated the voting mechanisms used more heavily by African Americans, while exempting absentee voting (which was used more heavily by white voters) from the ID requirement. *See* App. 47a-48a.

The Fourth Circuit acknowledged that "this sequence of events . . . is not dispositive on its own," App. 46a, but concluded that "it provides another compelling piece of the puzzle of the General Assembly's motivation" and "signals discriminatory intent." App. 41a-42a, 46a; *see also Arlington Heights*, 429 U.S. at 267 ("The specific sequence of events leading up [to] the challenged decision . . . may shed some light on the decisionmaker's purposes."). As explained below, *infra* at I.D.1, these are critical factors that a different panel of the Fourth Circuit subsequently found distinguish this case from others, limiting its broader applicability to other States' laws.

B. The Fourth Circuit Properly Determined That SL 2013-381 Would Bear More Heavily On African-American Voters.

Petitioners' criticism that the Fourth Circuit, in finding discriminatory intent, "did not disturb the district court's findings" that the challenged restrictions "have no discriminatory effect" is not only incorrect, it is legally irrelevant and does not remotely merit certiorari. Pet. 2. To be sure, Petitioners are correct that the Fourth Circuit did not directly address the District Court's ruling on Respondents' independent discriminatory ***results*** claim under Section 2 of the Voting Rights Act—

because it did not need to do so. Once the court found that SL 2013-381 was enacted with discriminatory ***intent***, it was unnecessary to address the distinct statutory question of discriminatory results, which rests on different factors. *See, e.g.*, *Veasey v. Abbott*, 830 F.3d 216, 244-45 (5th Cir. 2016) (en banc), *cert. denied*, No. 16-393, 2016 WL 5394945 (U.S. Jan. 23, 2017). Indeed, while this Court made clear in *Arlington Heights* that the effect of a law is one factor in the "totality of the circumstances" intent analysis, *see* 429 U.S. at 268, Petitioners themselves have conceded that "a plaintiff does not have to prove that a law has had a discriminatory impact to prove discriminatory intent." Emerg. Appl. to Recall & Stay 22.

In any event, the Fourth Circuit explicitly determined that the District Court "clearly erred in finding that the cumulative impact of the challenged provisions of SL 2013-381 does not bear more heavily on African Americans." App. 50a. While the District Court found that "African Americans disproportionately used each of the removed [voting] mechanisms, as well as disproportionately lacked the photo ID required by SL 2013-381," App. 50a, the Fourth Circuit noted that the lower court "refused to acknowledge the[] import" of these facts for purposes of an ***intent*** analysis. App. 53a. Indeed, the court observed, it is self-evident that the legislature's decision to single out precisely those voting methods used disproportionately by African Americans "bears more heavily" on them. App. 48a (quoting *Arlington Heights*, 429 U.S. at 266).

Finally, in the context of its intent analysis, the Fourth Circuit properly acknowledged—and

rejected—Petitioners' arguments regarding the effect of the challenged provisions, noting that the District Court (like Petitioners here) erroneously accorded "almost dispositive weight" to a modest increase in aggregate turnout between the 2010 and 2014 midterm elections, ignoring this Court's caution against "plac[ing] much evidentiary weight on any one election" when attempting to assess the effect of an electoral practice. App. 52a. In fact, the Fourth Circuit noted, when many of the challenged restrictions were in place during the 2014 election, "thousands of African Americans were disenfranchised" by the challenged provisions, and there was "a significant decrease in the rate" at which African-American participation had been growing before SL 2013-381. App. 53a. These facts, and others, properly supported the Fourth Circuit's finding regarding discriminatory intent.

C. The Fourth Circuit's Reversal of the District Court's Intent Finding Was Well Within Its Authority.

The Fourth Circuit's straightforward application of *Arlington Heights* to the unique facts and context of SL 2013-381 does not break new legal ground for claims based on discriminatory intent. Contrary to Petitioners' assertions, it is not "shocking" for an appellate court to reverse a district court's finding on the issue of discriminatory intent. Pet. 23.

In fact, there are a multitude of cases in which courts of appeals have properly reversed trial court findings related to intentional discrimination (be it a finding of discriminatory intent or a lack thereof). *See, e.g.*, *NAACP v. Gadsden Cty. Sch. Bd.*, 691 F.2d 978, 983-84 (11th Cir. 1982) (reversing district

court's finding that at-large electoral system was not motivated by discriminatory intent); *Rivera v. Nibco, Inc.*, 372 F. App'x 757, 761 (9th Cir. 2010) (reversing district court's finding of no intentional racial discrimination in use of peremptory challenges); *White v. Frank*, No. 92-1579, 1993 WL 411742, at *4 (4th Cir. 1993) (per curiam) ("Although we are reluctant to reverse a district court's finding of intent, we conclude that the court's ultimate determination in the instant case simply is not supported by the record as a whole."); *Walsdorf v. Bd. of Comm'rs for the E. Jefferson Levee Dist.*, 857 F.2d 1047, 1053 (5th Cir. 1988) (reversing district court's finding of no intentional gender discrimination in Title VII employment case brought against municipality board of commissioners).

And while courts of appeals typically "give substantial deference to the district court's evaluation of witness credibility," *Koszola v. FDIC*, 393 F.3d 1294, 1300-01 (D.C. Cir. 2005), here, there were no credibility determinations to defer to because legislative proponents of the bill invoked legislative privilege and refused to testify. Thus, although Petitioners criticize the Fourth Circuit's ruling as unsupported by "direct evidence," Pet. 18, the Fourth Circuit properly relied upon statements in the legislative record regarding the professed purposes of the bill to find that it was, in fact, motivated by race. *See, e.g.*, App. 58a, 61a, 64a-65a. Such evidence is not only more probative of intent than the *post hoc* justifications proffered at trial (by Petitioners' counsel or by witnesses who were not the legislative proponents), it was the only direct evidence available.

In sum, the Fourth Circuit's application of *Arlington Heights* to invalidate facially neutral voting practices as intentionally discriminatory is hardly novel and does not warrant review.

D. The Fourth Circuit's Decision Does Not Call Into Question the Voting Laws of Other States.

1. Petitioners' Predictions About the Impact of the Decision Below Are Incorrect and Have Already Been Disproven.

Petitioners' contention that "[t]he Fourth Circuit's analysis . . . 'would likely invalidate voter-ID laws in any State,'" Pet. 30 (citation omitted), has already been flatly disproven within the Fourth Circuit itself.

On December 13, 2016, the Fourth Circuit applied its decision in this case to ***uphold*** Virginia's photo identification requirement against charges that it was racially discriminatory. *See Lee v. Va. State Bd. of Elections*, 843 F.3d 592 (4th Cir. 2016). That decision belies Petitioners' assertions about the implications of the decision below and underscores the unique nature of North Carolina SL 2013-381 and the exceptional circumstances that surrounded its passage—factors that limit its applicability in future cases.

First, notwithstanding Petitioners' assertion that the "Virginia photo-ID law [is] quite similar to North Carolina's," Pet. 35, the laws and the circumstances surrounding their passage are quite different. Most obviously, the Virginia voter ID law was passed as a single-issue bill, while North Carolina enacted—in "one statute"—a sprawling "array of electoral

'reforms,'" uniform only in their disproportionate impact on African Americans. App. 65a, 19a. Even looking at just the voter ID provisions, the Fourth Circuit found that the laws are highly distinguishable: Virginia's law allows a broad scope of qualifying IDs, including student IDs from Virginia's public and private universities. *Lee*, 843 F.3d at 603-04. Virginia also allows individuals who need to obtain a free ID to do so without the cost and burden of obtaining various underlying documents—a provision the court found was adopted specifically to mitigate potential burdens on poor and minority voters. *Id.* at 603. By contrast, North Carolina's SL 2013-381 lacked these mitigating provisions, and was instead modified prior to its enactment to retain "only those types of photo ID disproportionately held by whites and [to] exclude[] those disproportionately held by African Americans" (including student and public assistance IDs). App. 43a.[3]

Moreover, the Fourth Circuit in *Lee* found that the "facts in *McCrory* are in no way like those found in Virginia's legislative process." 843 F.3d at 604. For one thing, the Virginia "legislature did not call for, nor did it have, the racial data used in the North Carolina process described in *McCrory*." *Id.* at 604.

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[3] While North Carolina—on the eve of trial in 2015—amended its voter ID requirement to incorporate a reasonable impediment exception, Petitioners expressly waived any argument that this amendment implicated Plaintiffs' discriminatory intent claim (which was based on conduct in 2013), *see* 1/28/16 Tr. 79, and the Fourth Circuit found that this belated amendment did not "fully cure[] the harm from the photo ID provision," and thus did not cleanse the initial enactment of its discriminatory intent. App. 69a.

Thus, while North Carolina, "with race data in hand," tightened its ID requirements to exclude forms of ID that the legislature knew were more likely to be held by African Americans, App. 19a, and restricted multiple voting mechanisms that it "knew were used disproportionately by African Americans," App. 45a-46a, the court found there was no evidence that happened in Virginia. While Petitioners assert that "'[a]ny responsible legislator' would have needed to consider such data in light of North Carolina's still-existing preclearance obligations" at the time (early 2013), Pet. 15, it is telling that the Virginia legislature, which was similarly subject to preclearance when it enacted its law, did not require such data.[4]

Lastly, whereas Virginia enacted its less restrictive voter ID law while *Shelby County* was pending, *Lee*, 843 F.3d at 604, North Carolina moved at the "first opportunity" on "the day after" it was relieved of its preclearance obligations to substantially tighten its ID requirements, and to add sweeping restrictions to what had been a single-issue voter ID bill. App. 55a, 15a. It then "rushed [the full bill] through the legislative process" in a mere "three days," a "hurried pace" that "strongly suggests an attempt to avoid in-depth scrutiny." App. 43a-44a. By contrast, the Fourth Circuit found that the Virginia ID law was "passed as part of Virginia's standard legislative process, following full and open

[4] Neither did the Texas legislature, which was also subject to preclearance at the time it adopted its voter ID law. *See* Pet. for Writ of Cert. 32-33, *Abbott v. Veasey*, No. 16-393 (U.S. Sept. 23, 2016).

debate," "[u]nlike the departure from the normal legislative process that occurred in North Carolina." *Lee*, 843 F.3d at 604.

In sum, the Fourth Circuit's decisions in the North Carolina and Virginia cases underscore the unique factual nature of the North Carolina case and its limited influence on future cases affecting other states.[5]

2. A Finding That SL 2013-381 Was Enacted with Discriminatory Intent Does Not Render Suspect Other Voting Laws Enacted Under Different Circumstances.

Given the fact-bound nature of the decision below, it does not render suspect other voting laws, as Petitioners predict. Rather, in its focus on the particular facts at hand, the decision below is consistent with this Court's decisions invalidating facially-neutral and otherwise constitutionally permissible voting procedures as intentionally discriminatory—decisions that have not had broad reverberations beyond the individual cases at hand.

For example, *Hunter v. Underwood*, 471 U.S. 222, 226-29 (1985)—which affirmed the Eleventh Circuit's

[5] Petitioners argue that the Fourth Circuit's decisions in these two cases have "deepened" the "confusion" over the legal analysis that applies in photo ID cases, Pet. 35, but the Fourth Circuit clearly and exhaustively explained why the two laws were different. And even if there were an intra-Circuit conflict between the Fourth Circuit's decisions in these two cases, intra-Circuit conflicts are not grounds for this Court's review, given the possibility of *en banc* review—which North Carolina did not seek here.

reversal of a district court's opinion on the issue of intent—struck down Alabama's felon-disenfranchisement law as intentionally discriminatory based on the particular history of that law. Nonetheless, lower courts have sustained other felon disenfranchisement laws untainted by intentional discrimination. *See, e.g.*, *Farrakhan v. Gregoire*, 623 F.3d 990, 994 (9th Cir. 2010) (en banc) ("no evidence of intentional discrimination"); *Simmons v. Galvin*, 575 F.3d 24, 32 (1st Cir. 2009) ("no allegation of intentional discrimination"). Indeed, notwithstanding *Hunter*, 48 states still have felon disenfranchisement laws.[6]

Similarly, *Rogers v. Lodge*, 458 U.S. 613 (1982), applied *Arlington Heights* and invalidated a particular at-large electoral scheme as intentionally discriminatory. But lower courts have sustained other at-large electoral schemes against claims of intentional discrimination. *See, e.g.*, *Askew v. City of Rome*, 127 F.3d 1355, 1374, 1385 (11th Cir. 1997) (Rome's at-large "electoral systems were not established and are not maintained for discriminatory purposes"). And most municipalities continue to utilize at-large elections in some form.[7]

Notwithstanding these cases, Petitioners argue that the Fourth Circuit's consideration of racial polarization evidence in its intent analysis was error,

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[6] *See* Nat'l Conference of State Legislatures, Felon Voting Rights (Sept. 29, 2016), http://www.ncsl.org/research/elections-and-campaigns/felon-voting-rights.aspx.

[7] Nat'l League of Cities, Municipal Elections, http://www.nlc.org/build-skills-and-networks/resources/cities-101/city-officials/municipal-elections (last visited Jan. 27, 2017).

and will have the wide-ranging effect of rendering "suspect by definition" any new voting restrictions "in any State." Pet. 25-26. The legal and factual premises of that contention are incorrect.

As a legal matter, the Fourth Circuit's consideration of racial polarization in its intent analysis is nothing new and conforms to this Court's guidance. In *Rogers*—which Petitioners mischaracterize as "rejecting [an] inference [of intent] based on polarization," Pet. 26—this Court made clear that "bloc voting along racial lines," is a factor that "bear[s] heavily on the issue of purposeful discrimination." 458 U.S. at 623. This is in part because "[v]oting along racial lines allows those elected to ignore black interests without fear of political consequences." *Id.* at 623-24. It is also because racial polarization "provide[s] an incentive for intentional discrimination in the regulation of elections," insofar as "[u]sing race as a proxy for party may be an effective way to win an election." App. 31a-32a. The Fourth Circuit found that this is precisely what happened here.

While evidence of racially polarized voting is "insufficient in [itself] to prove purposeful discrimination absent other evidence," *Rogers*, 458 U.S. at 624, the Fourth Circuit did not suggest otherwise. It merely found that the District Court "clearly erred in ignoring or dismissing" North Carolina's "troubled racial history and racially polarized voting," and should have considered the fact that legislators knew that African Americans tended to vote for Democratic candidates and that increasing African-American participation threatened their incumbency, as a part of the

"totality of . . . circumstances," particularly given that SL 2013-318 was enacted "in the immediate aftermath of unprecedented African American voter participation." App. 41a, 54a. That determination was wholly consonant with this Court's holding in *LULAC*, that Texas's redistricting plan, which diluted Latino voting power against a backdrop of racial polarization and in the wake of "growing participation" by Latinos, "b[ore] the mark of intentional discrimination that could give rise to an equal protection violation." 548 U.S. at 427, 439-40.

II. The Fourth Circuit's Decision Does Not Conflict with *Shelby County*.

Petitioners' claim that the decision below conflicts with *Shelby County*, *see* Pet. 16-19, is demonstrably false and, in fact, was the basis for an earlier petition in this dispute, which this Court denied. *See* Pet. for Writ of Cert., *North Carolina v. League of Women Voters of N.C.*, No. 14-780 (2014), *cert. denied*, 135 S. Ct. 1735 (2015). Here, Petitioners' argument is even more inapt, because the decision at issue was grounded in a finding of intentional discrimination under *Arlington Heights*. The court said nothing about an anti-retrogression principle; did not restore preclearance in North Carolina; did not rely unduly on North Carolina's history of voting rights discrimination; and did not in any way implicate *Shelby County*'s holding that the 2006 reauthorization of the Section 4(b) coverage provision of the Voting Rights Act violated the "fundamental principle of equal sovereignty" of the States. 133 S. Ct. at 2624. Indeed, this Court emphasized in *Shelby County* that that "decision in no way affects the permanent, nationwide ban on racial

discrimination in voting found in § 2" or the Fourteenth Amendment. 133 S. Ct. at 2631. That prohibition remains vital where, as here, a legislature impermissibly relies on race in its voting laws.

A. The Fourth Circuit Did Not Employ a Section 5 Retrogression Standard.

Petitioners misrepresent the Fourth Circuit's opinion in contending that it "employed a variant of §5's anti-retrogression analysis." Pet. 18. The Fourth Circuit did not even mention retrogression, much less rest its intentional discrimination finding on the fact of retrogression. Far from employing the Section 5 retrogression standard for discriminatory ***results***, the Fourth Circuit simply applied the long-established *Arlington Heights* standard for ***intentional*** discrimination claims to the circumstances surrounding the passage of SL 2013-381. *See, e.g.*, App. 54a ("In sum, assessment of the *Arlington Heights* factors requires the conclusion that, at least in part, discriminatory racial intent motivated the enactment of the challenged provisions in SL 2013-381."). These considerations are squarely within the province of a discriminatory intent inquiry, even after *Shelby County*. *See Arlington Heights*, 429 U.S. at 267.

Petitioners claim to divine that preclearance was "exactly what the panel had in mind," pointing to the Fourth Circuit's use of phrases such as "re-erect[ing] . . . barriers" to voting. Pet. 18 (quoting App. 39a-40a). But there is nothing inappropriate about the panel's focus on North Carolina's elimination of existing voting mechanisms used more heavily by African Americans. A barrier to voting can be

created by either (a) adding a new voting requirement, or (b) by "removing voting tools," *id.* (quoting App. 52a). If motivated by improper discriminatory motive, either legislative act can be unconstitutional: "[I]f the purpose of repealing legislation is to disadvantage a racial minority, the repeal is unconstitutional . . . ." *Crawford v. Bd. of Educ. of L.A.*, 458 U.S. 527, 539 n.21 (1982).

The fact that the Fourth Circuit noted the purposeful elimination of voting practices disproportionately used by African Americans as one element in its ***intent*** inquiry under Section 2 (and the Constitution) does not mean that it somehow *sub silentio* applied Section 5's retrogression standard for discriminatory ***results***.[8] A court engaging in an intent analysis may reference past electoral practices as part of the "historical background" and the "specific sequence of events leading up" to the passage of a challenged enactment. *Arlington Heights*, 429 U.S. at 267. Given that the legislature here eliminated existing voting mechanisms only after receiving data showing that they were disproportionately used by African Americans, it made perfect sense for the Fourth Circuit to consider those historical facts.

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[8] In discussions of the "results" prong of Section 2, this Court has explained repeatedly that "some parts of the § 2 analysis may overlap with the § 5 inquiry." *Georgia v. Ashcroft*, 539 U.S. 461, 478 (2003), *superseded by statute on other grounds* (citing *Holder v. Hall*, 512 U.S. 874, 883 (1994) (plurality opinion)). This conclusion about overlapping evidence across distinct legal standards is equally true in an intent case.

The Fourth Circuit was clear that its opinion "does not freeze North Carolina election law in place as it is today," or as it was when *Shelby County* was decided. App. 72a. Indeed, the Fourth Circuit was explicit that States need not "forever tip-toe around certain voting provisions disproportionately used by minorities"—only that election laws enacted by the legislature must be supported by legitimate, non-discriminatory justifications. *Id.* The decision was tied to the record in this case and is in no way inconsistent with *Shelby County*.

B. The Fourth Circuit Did Not Unduly Rely on North Carolina's Pre-1965 History of Official Racial Discrimination.

Nor did the Fourth Circuit flout *Shelby County* "in a deeper sense" by according undue weight to what Petitioners concede is North Carolina's "shameful histor[y] of discrimination." Pet. 19. The Fourth Circuit took great pains to make clear that it was ruling on the basis of the cumulative evidence on the record and not on the basis of pre-1965 discrimination. Indeed, the court explicitly recognized the "limited weight" of "North Carolina's pre-1965 history of pernicious discrimination," explaining that it merely "informs our inquiry." App. 33a (citing *Shelby Cty.*, 133 S. Ct. at 2628-29). This discussion of historical discrimination is not erroneous. Quite the contrary, it is expressly called for by *Arlington Heights* which directs courts to consider "[t]he historical background of the decision" challenged as racially discriminatory. 429 U.S. at 267. Just as "history did not end in 1965," it did not start then either; the Fourth Circuit's

acknowledgement of pre-1965 history was entirely appropriate.

The Fourth Circuit looked well beyond 1965 and specifically found that "[t]he record is replete with evidence of instances since the 1980s" where North Carolina "has attempted to suppress and dilute the voting rights of African Americans," and that "state officials continued in their efforts to restrict or dilute African American voting strength . . . ***up to the present day***." App. 34a-35a, 37a-38a (emphasis added). For example, the Fourth Circuit noted that, just last year, "a three-judge court addressed a redistricting plan adopted by the same [North Carolina] General Assembly that enacted SL 2013-381," and held that "race was the predominant motive in drawing two congressional districts, in violation of the Equal Protection Clause." App. 37a (citing *Harris v. McCrory*, 159 F. Supp. 3d 600, 603-04 (M.D.N.C. 2016)); *see also Covington v. North Carolina*, 316 F.R.D. 117 (M.D.N.C. 2016) (state legislative redistricting plans similarly tainted by impermissible racial considerations).

The Fourth Circuit also did not, as Petitioners assert, accuse North Carolina of trying to "usher in a new 'era of Jim Crow.'" Pet. 20. To the contrary, the Fourth Circuit was careful to note that it did "not suggest[] that any member of the General Assembly harbored racial hatred or animosity toward any minority group," App. 54a-55a, but found that the broader context of racially polarized voting suggested that "the State took away [minority voters'] opportunity because [they] were about to exercise it," App. 16a (quoting *LULAC*, 548 U.S. at 440). Such a finding of "intentional discrimination" need not be

"based on any dislike, mistrust, hatred or bigotry against" minorities, but rather can be premised, as here, on a finding that "elected officials engaged in the single-minded pursuit of incumbency" have intentionally "run roughshod over the rights of protected minorities." *Garza v. Cty. of L.A.*, 918 F.2d 763, 778 (9th Cir. 1990) (Kozinski, J., concurring in part and dissenting in part). *Cf. Ketchum v. Byrne*, 740 F.2d 1398, 1408 (7th Cir. 1984) ("We think there is little point for present purposes in distinguishing discrimination based on an ultimate objective of keeping certain incumbent whites in office from discrimination borne of pure racial animus.").

Rather than meaningfully grapple with the reality of recent discrimination in North Carolina, Petitioners quibble with some of the individual examples from the large body of evidence of discrimination "since the 1980s" cited by the Fourth Circuit. *See* Pet. 14, 27-29. Beyond misunderstanding the relevance of this evidence, Petitioners are largely wrong on the facts.

As to the record of 55 Section 2 lawsuits in North Carolina since 1980, Petitioners protest that "not ***every*** one concerned intentional discrimination," while conceding that "relevant" and "successful" Section 2 suits against North Carolina were brought as recently as 1997. Pet. 29 (emphasis added). In considering intent claims, this Court has relied on evidence of discrimination dating back several decades before a challenge. *See, e.g.*, *Rogers*, 458 U.S. at 624-25. And while many of these cases resulted in settlement, the majority of suits "voluntarily terminated when the parties reached an agreement to change the [discriminatory] voting

system." Anita S. Earls et al., *Voting Rights in North Carolina: 1982-2006*, 17 S. Cal. Rev. L. & Soc. Just. 577, 587 (2008). This hardly renders them "unsuccessful." Pet. 29 n.5. The Fourth Circuit properly assessed those cases as evidence that North Carolina's history of voting discrimination persisted into modern times. App. 36a.

Indeed, as recently as 2012, the Department of Justice cited *Arlington Heights* in objecting to the General Assembly's modification of school board election procedures under Section 5's intent prong. *See* Letter from U.S. Dep't of Justice to Pitt Cty., N.C. (Apr. 30, 2012), *available at* https://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/l_120430.pdf. Contrary to Petitioners' assertion that Section 5 objection letters "do[] not equate to a ***finding*** of anything," Pet. 28 (emphasis in original), this Court has long recognized that such objections constitute "administrative ***finding[s]*** of discrimination" and are probative of racial discrimination in voting. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 305 (1978) (emphasis added); *see also United Jewish Orgs. of Williamsburgh, Inc. v. Carey*, 430 U.S. 144, 156-57 (1977). The Fourth Circuit rightly considered this evidence as part of its analysis of North Carolina's all-too-recent history of voting discrimination.

III. The Fourth Circuit's Decision Does Not Conflict with the Decision of Any Other Court of Appeals.

Finally, the Fourth Circuit's finding of discriminatory intent is consistent with how other circuits have applied *Arlington Heights*, including the Fifth Circuit in *Veasey*. In an attempt to

manufacture a circuit split, Petitioners purport to identify confusion regarding the use of "statistical disparities" in the context of discriminatory ***results*** claims. Pet. 32-35. Even assuming that such confusion exists (and it does not), it does not implicate the Fourth Circuit's ***intent*** decision or justify certiorari here.

A. The Decision Below is Consistent with the Fifth Circuit's Decision in *Veasey*.

The Fourth Circuit's analysis is entirely consistent with the Fifth Circuit's application of the *Arlington Heights* standard in *Veasey*, 830 F.3d at 230-34. There, the Fifth Circuit reversed the district court's finding of intentional discrimination for weighing two particular factors too heavily in its *Arlington Heights* analysis. *First*, the *Veasey* court held that the Texas district court placed too much weight on distant historical evidence of official discrimination. 830 F.3d at 232. *Second*, the Fifth Circuit criticized the district court for relying on tenuous, post-enactment speculation as to legislative intent by ***opponents*** of the challenged legislation. *Id.* at 233-34. Although the Fifth Circuit reversed, it also expressly acknowledged that the record in that case did contain evidence that ***could*** support a finding of discriminatory intent, and remanded the matter back to the district court to re-weigh the evidence. *Id.* at 234-43.

Nothing in the Fourth Circuit's decision here conflicts with *Veasey*. The Fourth Circuit did not rely upon any post-enactment speculation by the bill's opponents as to legislative intent. *See* App. 46a ("The district court was correct to note that

statements . . . made by legislators after the fact[] are of limited value."). Nor did it place undue emphasis on distant historical evidence. Rather, as explained above, the court focused on the cumulative weight of all the evidence, including emphasizing more recent acts of official discrimination and finding that the District Court clearly erred in "finding that 'there is little evidence of official discrimination since the 1980s.'" App. 34a (quoting App. 458a).

The Fourth Circuit cited precisely the types of circumstantial evidence that the Fifth Circuit in *Veasey* identified as appropriate under *Arlington Heights*, including: the emerging political power of the targeted minority group, legislators' awareness of the likely disproportionate effect on minority voters, failure to modify the law in ameliorative ways, shifting public rationales (and the pretext underpinning those rationales), departures from normal legislative procedures, and the enactment of other racially discriminatory laws by the same legislature. *Compare Veasey*, 830 F.3d at 235-41, *with* App. 33a-55a. The Fourth Circuit's *Arlington Heights* analysis thus creates no conflict with the Fifth Circuit's decision in *Veasey*.

Finally, while the Fifth Circuit in *Veasey* remanded the case to the district court to re-weigh the evidence for a new determination on intent, the Fourth Circuit's entry of judgment here was proper for at least two reasons:

First, the nature of the evidence in *Veasey* was qualitatively different from that presented here. The district court in *Veasey* was presented with testimony from legislative proponents of the bill and

was able to make credibility assessments about their intent. Here, proponents cloaked themselves in legislative privilege and gave no evidence or testimony that required credibility assessments. App. 46a-47a. Remand is unnecessary where, as here, "the key evidence consisted primarily of documents and expert testimony" and "[c]redibility evaluations played a minor role." *Easley v. Cromartie*, 532 U.S. 234, 243 (2001).

Second, while the Fifth Circuit in *Veasey* explicitly found that the record permitted more than one resolution of the factual issue, *Veasey*, 830 F.3d at 241, the Fourth Circuit found that the record here "permits only one resolution of the factual issue," App. 57a-58a (citation omitted). All of the facts on which the Fourth Circuit based its decision are undisputed—there was nothing left for the District Court to re-assess. The Fourth Circuit therefore appropriately decided to enter judgment rather than remand. There is no dissonance with *Veasey* that warrants this Court's review.

B. The Fourth Circuit's Decision Does Not Create "Confusion" about the Relevance of "Statistical" Evidence.

Petitioners also assert that the decision below creates "confusion" about "whether statistical racial disparities in the use of particular voting mechanisms can prove discriminatory effect under §2." Pet. 32-35. That contention misrepresents both the decision below and the case law governing discriminatory results under Section 2, and once again does not warrant certiorari over the Fourth Circuit's ***intent*** decision.

Petitioners have failed to identify an actual circuit split with respect to "whether statistical racial disparities in the use of particular voting mechanisms can prove discriminatory effect[.]" Pet. 32. No court of appeals has held that evidence of racial disparities is irrelevant to assessing a law's discriminatory effect, and neither the Fourth Circuit nor any other court of appeals has held that racially disparate usage of electoral practices is, without more, sufficient to prove a Section 2 violation.

Quite the contrary, every court of appeals to find liability under Section 2's results prong in a vote denial case has required the plaintiffs to establish additional factors beyond racial disparities. *See, e.g.*, *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 240 (4th Cir. 2014) (two prong test for liability), *cert. denied*, 135 S. Ct. 1735 (2015); *Veasey*, 830 F.3d at 244 (same). Those rulings are therefore entirely consistent with the decisions cited by Petitioners, which have held that "statistical racial disparities," by themselves, "are insufficient to prove a §2 vote denial claim." Pet. 32-34 (citing *Gonzalez v. Arizona*, 677 F.3d 383, 407 (9th Cir. 2012) (en banc); *Frank v. Walker*, 768 F.3d 744, 752-53 (7th Cir. 2014); *Ohio Democratic Party v. Husted*, 834 F.3d 620, 627-28, 639 (6th Cir. 2016) ("*ODP*")). The Sixth, Seventh, and Ninth Circuits have never suggested (much less held) that evidence of racial disparities is irrelevant.

In any event, this case would be a poor vehicle for addressing any supposed "confusion" on this issue, because the Fourth Circuit's decision here rested solely on ***intent*** grounds, and therefore cannot pose a conflict with the cases from other circuits cited by

Petitioners, all of which were decided on ***results*** grounds. *See Gonzalez*, 677 F.3d at 390-97, 405-10 (NVRA preemption, Fourteenth Amendment and Section 2 results, Twenty-Fourth Amendment, and poll tax claims only); *Frank*, 768 F.3d at 749-54 (undue burden and Section 2 results claims only); *ODP*, 834 F.3d at 626-27 (considering plaintiffs' undue burden and Section 2 results claims only). To the extent that any confusion exists among the circuits about the use of statistical evidence in assessing Section 2 results claims, there are several cases—including *Veasey* itself—that would be a more appropriate vehicle for this Court to address that question. It would make little sense to review an intent case in order to address purported confusion about discriminatory results jurisprudence.

Moreover, Petitioners have again conflated the test for discriminatory ***results*** under Section 2 with the framework for analyzing a claim of discriminatory ***intent***. While a court may consider whether "the law bears more heavily" on minorities as relevant circumstantial evidence in an intentional discrimination case, App. 28a, 33a-34a, such evidence is not required; indeed, as noted, Petitioners conceded earlier in this proceeding that a State's "failure to achieve discriminatory effects is no excuse for a law that truly is enacted with discriminatory intent." Emerg. Appl. to Recall & Stay 31; *see also Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 277 (1979) ("Invidious discrimination does not become less so because the discrimination accomplished is of a lesser magnitude. Discriminatory intent is simply not amenable to calibration. It either is a factor that has influenced the legislative choice or it is not.").

Thus, while a law's effects are relevant to an intent claim, they are not necessarily outcome-determinative, as in a Section 2 results case. And here, data regarding African Americans' disproportionate use of the eliminated voting practices was only one factor on which the Fourth Circuit relied in determining intent. Therefore, granting review in this case to address the probative value of racial disparity statistics would require deciding the issue in the abstract and would not affect the disposition of this case, which found intentional discrimination based on several additional grounds.[9]

CONCLUSION

Ultimately, Petitioners simply take umbrage with the outcome of the Fourth Circuit's fact-bound decision, which is not a basis for certiorari. For this, and the foregoing reasons, this Court should deny the Petition.

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[9] A final reason to deny review is that reversal would not conclusively resolve this case. Respondents raised numerous claims beyond the intentional discrimination claim that formed the basis for the decision below. But because the Fourth Circuit resolved the appeal on discriminatory intent grounds, it did not reach the issue of discriminatory results under Section 2, or Respondents' other constitutional claims. *See* App. 23a-26a.

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