No. 16-1468 (L)

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NORTH CAROLINA STATE CONFERENCE OF THE NAACP, et al.,
Plaintiffs/Appellants,

v.

PATRICK L. MCCRORY, et al.
Defendants/Appellees.

On Appeal from the United States District Court
For the Middle District of North Carolina

Nos. 1:13-cv-658, 1:13-cv-660, and 1:13-cv-861 (TDS-JEP)

BRIEF OF *AMICUS CURIAE* AMERICAN CIVIL RIGHTS UNION IN SUPPORT OF DEFENDANTS/APPELLEES AND AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Fourth Circuit Local Rule 29(c)(1), *amicus curiae* American Civil Rights Union ("ACRU") hereby submits the following corporate disclosure statement.

The ACRU is a non-profit 501(c)(3) organization. It is not a publicly held corporation and no corporation or other publicly held entity owns more than 10% of its stock.

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INTEREST OF *AMICUS CURIAE*

Amicus curiae American Civil Rights Union (ACRU) is a non-partisan 501(c)(3) tax-exempt organization dedicated to protecting the civil rights of all Americans by publicly advancing a Constitutional understanding of our essential rights and freedoms. It was founded in 1998 by long-time policy advisor to President Reagan, and the architect of modern welfare reform, Robert B. Carleson. Carleson served as President Reagan's chief domestic policy advisor on federalism and originated the concept of ending the federal entitlement to welfare by giving the responsibility for those programs to the states through finite block grants. Since its founding, the ACRU has filed *amicus curiae* briefs on constitutional law issues and election matters in cases nationwide.

The members of the ACRU's Policy Board are former U.S. Attorney General Edwin Meese III; former Assistant Attorney General for Civil Rights William Bradford Reynolds; former Assistant Attorney General for the Office of Legal Counsel Charles J. Cooper; John M. Olin Distinguished Professor of Economics at George Mason University Walter E. Williams; former Ambassador to Costa Rica Curtin Winsor, Jr.; former Ohio Secretary of State J. Kenneth Blackwell; former U.S. Department of Justice Voting Rights Section attorney J. Christian Adams; former Counsel to the Assistant Attorney General for Civil Rights and former member of the Federal Election Commission Hans von

Spakovsky; and former head of the U.S. Department of Justice Voting Rights Section Christopher Coates.

This case interests *amicus* because it implicates the constitutional power of a state to enact appropriate regulations to preserve the integrity of its elections, which in turn preserves the right to vote of the citizens within that state.

Pursuant to Federal Rule of Appellate Procedure 29(c) and Fourth Circuit Rule 29(5), *amicus curiae* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* or their counsel made a monetary contribution to the preparation or submission of this brief.

All parties consent to the filing of this brief.

SUMMARY OF THE ARGUMENT

Before the United States Supreme Court decided *Shelby County v. Holder*, 133 S. Ct. 2612 (2013), Section 5 of the Voting Rights Act employed certain triggering formulas to impose a federal veto on all new election regulations in certain parts of the country. 52 U.S.C. §§ 10301-10508 (2014) (formerly cited as 42 U.S.C. §§ 1973-1973aa-6). This system fundamentally rearranged the constitutional order regarding federal power over state election laws. While the Voting Rights Act certainly has been instrumental in removing voting barriers for minorities, the Supreme Court in *Shelby County* decided that the preclearance enforcement mechanism in Section 5 was obsolete in that it placed all or part of sixteen states under federal control for election law changes based on decades-old circumstances. *Shelby County*, 133 S. Ct. at 2631. Nearly all of the other provisions of the Voting Rights Act passed in 1965 were unaffected by the *Shelby County* decision and remain in full effect.

Even though *Shelby County* rejected federal oversight of state elections through Section 5, a conscious effort has been made on several fronts to resurrect federal supremacy over state control of elections. But in place of preclearance power by the executive branch, this effort employs the very same standards that were used under Section 5 and attempts to have them enforced through the courts

by means of Section 2 of the Voting Rights Act. This case is part of this broader effort.

Instead of using traditional Section 2 standards as found in the Supreme Court's jurisprudence, these cases import statistical tests for Section 2 liability, which were previously utilized under the Section 5 retrogression standard to block state election laws. *Allen v. State Bd. of Elections*, 393 U.S. 544, 548-49 (1969). The appropriate standard is one that looks to the totality of the circumstances, as expressed in the very language of Section 2, and does not use statistical disparities between groups of voters to establish liability. Going even further, the Intervenors/Appellants seek to impose a statistical disparity preclearance in the context of the 26th Amendment out of thin air, without even the pretense of a basis in the Voting Rights Act, much less the Amendment itself.

The District Court here employed the proper standard and found that, based on the evidence, this challenge must fail on all counts because appellants seek to impose a statistical disparity test for Section 2. Thus, the decision below is consistent with traditional Section 2 jurisprudence, does not conflict with *Shelby County*, and preserves the constitutional balance between states and the federal government.

ARGUMENT

I. Section 2 and Section 5 of the Voting Rights Act Employ Fundamentally Different Standards.

As originally passed, the Civil Rights Act of 1957 gave the U.S. Attorney General authority to pursue litigation against racial discrimination in voting and gave courts an avenue to enjoin election practices that were designed to restrict access to voting on the basis of race. 42 U.S.C. § 1971(c) (1964), recodified at 52 U.S.C. § 10101. But as quickly as one particular barrier could be enjoined, another more inventive one took its place. *See, e.g.*, *Lopez v. Monterey Cnty.*, 525 U.S. 266, 297 (1999) (Thomas, J., dissenting). Litigation before 1965 proved futile because each time a new restriction was put in place, new litigation had to be pursued.

Congress enacted Sections 2 and 5 of the Voting Rights Act in 1965 to counteract these amorphous and ever-shifting barriers to voting. 52 U.S.C. §§ 10301, 10304. Section 5 required certain states with histories of racial discrimination in voting to submit any election related change, no matter how small, to the U.S. Attorney General for approval. *Id.* Thus, new voting restrictions could be caught and halted before they went into effect. Section 2 was enacted at the same time, but effectively only provided an individual cause of action for intentional discrimination under the 15th Amendment.

A. Section 5's Retrogression Standard.

Section 5 required covered jurisdictions to obtain preclearance for "any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting." 52 U.S.C. § 10304(a). Preclearance could be obtained from either the U.S. Attorney General or from the United States District Court for the District of Columbia. *Id.* Both methods employed a retrogression standard, that is, the jurisdiction had to affirmatively prove the absence of any negative impact or diminishment of electoral access by minorities. *See generally Bush v. Vera*, 517 U.S. 952 (1996) (Section 5 "seeks to prevent voting-procedure changes leading to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise.").

Section 5's retrogression standard for triggering an objection to an election regulation change was further modified by Congress in 2006 by making it explicit that a change must be blocked if it "will have the effect of diminishing the ability" of minorities to vote. In practice, the Department of Justice or the court would look to the status quo and then analyze whether the new change in the law would diminish the electoral strength of minorities. If there was any such diminishment, the proposed change was blocked. *See, e.g.*, *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 334 (2000) ("[T]he baseline is the status quo that is proposed to be

changed: If the change 'abridges the right to vote' relative to the status quo, preclearance is denied . . . .").

Under Section 5 the burden was on the submitting jurisdiction to prove the absence of any diminishment in electoral ability. *Id.* The Department of Justice was not required to show the extent or existence of diminishment. If the jurisdiction could not show through quantitative evidence that the proposed change in its election laws would have no negative effect whatsoever on minorities, that change would not be precleared. *Id.* at 336.

After the 2006 amendments, Section 5 operated in such a way that bare statistical evidence of retrogression automatically resulted in freezing any change to state election practices. Submissions were often blocked when no evidence of retrogression was presented, simply because the submitting jurisdiction could not prove the total absence of any discriminatory effect. *See, e.g.*, Objection Letter of Loretta King, Assistant Attorney General, to Thurbert E. Baker, Attorney General of Georgia (May 29, 2009), *available at* http://www.justice.gov/crt/records/vot/obj_letters/letters/GA/1_090529.pdf. Furthermore, any ambiguity weighed against the jurisdiction. *McCain v. Lybrand*, 465 U.S. 236, 257 (1984). And finally, there was no consideration given to the totality of the circumstances or any non-discriminatory factors or reasons for the

change in election procedures. *See, e.g.*, *LaRoque v. Holder*, 650 F.3d 777, 794 (D.C. Cir. 2011).

This was the state of federal veto power over the ability of States to control their own elections under Section 5. After *Shelby County*, however, this statistical tripwire has been rendered obsolete. But instead of continuing to stop truly discriminatory election practices using the remaining traditional Section 2 jurisprudence, the Department of Justice and other groups are attempting to graft the *de minimis* statistical thresholds used in Section 5 onto the enforcement of Section 2. This is both unprecedented and in direct contravention of *Shelby County*. The District Court was correct to dismiss the claims in this case because they rely on a theory of Section 2 at odds with the law. Bare statistical data that supposedly shows some kind of retrogression in the electoral influence of minorities is not the essence of a Section 2 claim.

B. Section 2 Jurisprudence, Based on *Gingles*, Dictates a Totality of the Circumstances Standard.

Unlike Section 5, Section 2 applies nationwide and functions as a ban on racial discrimination in voting with enforcement provided by litigation in federal court. It forbids any "standard, practice, or procedure" that "results in a denial or abridgment 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 contrast to the retrogression standard in Section 5, the clear language of Section 2 targets denial of the right to vote "on

account of" race. The first subsection bans election laws that were enacted with a discriminatory intent, but the second sub-section also prohibits election laws that have discriminatory results. This brief will focus on the proper standard that should be used when applying the results subsection. That standard it requires a far more robust showing than a statistical demonstration that a given minority might be less likely to be able to vote at a certain time, use a particular voting practice more often than non-minorities, or possess certain types of documentation at different rates.

Since being amended in 1982, Section 2 creates a cause of action when a particular election practice was not necessarily enacted with a racially discriminatory intent, but had the result or effect of discriminating on the basis of race. The foundational case for the application of this "results" section is *Thornburg v. Gingles*, 478 U.S. 30 (1986). Though the case involved a redistricting plan challenge, it provides the central guidance for courts addressing Section 2 challenges. *See, e.g.*, *Growe v. Emison*, 507 U.S. 25, 40-41 (1993); *Johnson v. De Grandy*, 512 U.S. 997, 1011-13 (1994).

The *Gingles* Court set forth a standard by which certain factors must be present in order to meet the "totality of the circumstances" portion of Section 2 and to find that a violation has occurred. These factors were taken from the Senate

Judiciary Committee's majority report on the 1982 amendment to Section 2 and they include:

1. The extent of any history of official discrimination in the jurisdiction that touched the right of minorities to register, vote, or otherwise participate in the electoral process;

2. The extent to which voting in elections is racially polarized;

3. The extent to which the jurisdiction has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices that may enhance the opportunity for discrimination;

4. Whether minority candidates have been denied access to any candidate slating process;

5. The extent to which minorities in the jurisdiction bear the effects of discrimination in education, employment, and health that hinder their ability to participate effectively in the political process;

6. Whether political campaigns have been characterized by overt or subtle racial appeals;

7. The extent to which minorities have been elected to public office.

Senate Report No. 97-417, 28-29 (1982), *reprinted in* 1982 U.S.C.C.A.N. 117, 206-07.

While some of the analysis in *Gingles* might only apply in the reapportionment context, two central thresholds can be discerned for all Section 2 claims. First, the plaintiff must show than a discriminatory effect came about "on account of" race. There must be some *causal nexus* between the supposed statistical retrogression and some concrete indicia of discrimination, such as one or more of the Senate factors. Second, the disparate impact must *result in actual real world unequal access* to the political process. Ultimately, a plaintiff must do more than show a statistical difference in how an election law impacts minority voters by demonstrating how the election law actually impairs access to the electoral process.

If, based on the totality of the circumstances, a plaintiff can show that the statistical differences were generated by one or more of the Senate factors or other indicia of discrimination that result in unequal access to the political process, then Section 2 is violated. *Gingles*, 478 U.S. at 44-46, 50-51. A plaintiff must show some causality between disparate treatment, disparate impact, and a demonstrable impact on actual election outcomes. If Section 2 liability were to lie in simple statistical disparity, absent causality and unsupported by a board non-quantitative body of evidence, then that version of Section 2 may well face serious constitutional challenge in light of *Shelby County*. In addition, if plaintiffs were not required to show some close nexus between statistical retrogression and actual

disparate treatment and electoral results, then the words "totality of the circumstances" and "on account of" in Section 2 would be without meaning.

II. This Case Represents One of Several Deliberate Attempts to Graft a Retrogression Standard Onto Section 2.

In reaction to the Supreme Court's decision in *Shelby County*, the Department of Justice and many other groups brought cases around the country to reinstate federal control over state elections through a statistical retrogression standard, this time using Section 2 in place of Section 5. Two months after the Supreme Court decided *Shelby County*, the Justice Department filed a challenge to Texas's voter photo identification law as a violation of Section 2 because of statistically disparate impact. The claims there are almost identical to those here and are currently before the Fifth Circuit. Complaint, *United States v. Texas*, No. 13-cv-00263 (S.D. Tex. Aug. 22, 2013), consolidated on appeal into *Veasey v. Abbot*, No. 14-41126 (5th Cir.). Other cases include *Frank v. Walker*, 768 F.3d 744 (7th Cir. 2014).

The arguments of the plaintiffs in these cases depart from traditional Section 2 jurisprudence as established in *Gingles* and advocate for an unprecedented federal usurpation of control over state elections nationwide. Instead of considering the fact that there was no barrier to obtaining photo identification based on race and that the times and places for voting are equally open to all, these claims instead focused on statistical differences in ID ownership. If that difference is greater than

zero, according to the Plaintiffs/Appellants, the voting rules at issue violate Section 2.

Such an analysis matches the statistical inquiry used in a Section 5 retrogression analysis, but not a consideration of a causal link with actual disparate treatment and the actual results of the electoral system as required by *Gingles* and the plain language of Section 2. In a Section 5 review, the Department of Justice may well conclude that an election law change should be blocked when a disproportionate number of minorities populate the group of potentially disenfranchised voters. But in a Section 2 claim, something more than a calculation as to how a racially neutral administrative rule lands among differing racial groups is necessary.

Section 2 does not rely on the concept of reduction or diminishment, as does Section 5. Instead, the language of Section 2 focuses on whether an equal opportunity to participate in the political process exists. 52 U.S.C. § 10301. The plain language of Section 2 mandates a broad "totality of the circumstances" inquiry into the practice or procedure in question. 52 U.S.C. § 10301(b). Section 2 inherently incorporates concepts of causality. A violation of Section 2 in challenges to at-large election systems, for example, occurs only after racial minority groups are effectively shut out of the political process because their preferred candidates actually lose elections more often than not.

The broad totality of the circumstances inquiry also provides defendants an opportunity to establish defenses such as mitigating measures to remedy discrimination from long ago, increases in minority participation and office holding, and other measures. *See, e.g.*, *League of United Latin Am. Citizens, Council No. 4434 v. Clements*, 999 F.2d 831 (5th Cir. 1993); *Harvell v. Blytheville Sch. Dist. No. 5*, 71 F.3d 1382 (8th Cir. 1995); *Teague v. Attala Cnty., Miss.*, 92 F.3d 283 (5th Cir. 1996).

Fundamentally, Section 2 examines whether the electoral system in question is equally open to participation by racial minorities. The standard is not whether minorities take equal and full advantage of those equal opportunities. The plain terms of the statute look forward and ask whether a practice or procedure results in unequal opportunities to vote.

III. A Retrogression Standard Should Be Rejected.

A. A Retrogression Standard Conflicts with *Shelby County*.

In *Shelby County*, the Supreme Court struck down Section 4 of the Voting Rights Act. Section 4 determined which states were subject to Section 5 preclearance obligations. *Shelby County*, 133 S. Ct. at 2631. The plaintiffs had successfully challenged the coverage formula, which was based on turnout data from the 1964, 1968, and 1972 presidential elections. *Id.* at 2619-20. Thus, the Supreme Court effectively halted the enforcement of Section 5 by finding that the

coverage parameters were an outdated intrusion into state sovereignty to run their own elections.

In striking down the coverage of Section 5, the Court noted that the statistical retrogression standard of review used in Section 5 enforcement placed a heavy burden on states. *Id.* at 2631. This observation is very significant for the efforts to permit a Section 2 claim to rest on statistical disparities. The Court spoke disapprovingly of this statistical standard:

> In 2006, Congress expanded § 5 to prohibit any voting law "that has the purpose of or will have the effect of *diminishing* the ability of any citizens of the United States," on account of race, color, or language minority status, "to elect their preferred candidates of choice." In light of those two amendments, the bar that covered jurisdictions must clear has been raised even as the conditions justifying that requirement have dramatically improved.

Id. at 2626 (internal citations omitted) (emphasis added).

While not directly challenged in *Shelby County*, the strict retrogression standard used in Section 5 implicates constitutional concerns of federalism. The District Court below was correct to look closely at the evidence presented and come to the conclusion that little more was presented in this case beyond bare statistical differences, without showing any causal connection with actual access to the political process or any empirical impact on electoral results.

B. A Retrogression Standard Misapplies Supreme Court Section 2 Precedents.

Using a statistical retrogression standard to support liability under Section 2 is a plain misapplication of the Supreme Court's Section 2 jurisprudence, particularly of the test established in *Gingles*. The *Gingles* decision does not support the application of a statistical disparate impact test. *Gingles*, particularly the third precondition, relies heavily on notions of electoral causality, where minorities ultimately lose because of the electoral practice. The Court explained:

> The "right" question . . . is whether "as a result of the challenged practice or structure plaintiffs do not have an equal opportunity to participate in the political processes and to elect candidates of their choice. . . . In order to answer this question, a court must assess the impact of the contested structure or practice on minority electoral opportunities "on the basis of objective factors."

Gingles, 478 U.S. at 44. What *Gingles* said here differs a great deal from the idea that a statistical disparate impact analysis gives rise to Section 2 liability. Instead, the Court refers to "equal opportunity" and empirical election results. *Id.* at 44-46.

Nowhere does *Gingles* support a statistical retrogression test for Section 2 liability whenever an election law, equally open to all and facially race neutral, has some *de minimis* statistical difference in how the law interacts with racial subgroups. If conformity with the law is equally open to all, any differentiation in impact is highly detached from legitimate federal interests under Section 2. Absent a showing that an election regulation was enacted with discriminatory intent,

denies equal opportunity to participate in the political process, or has real world electoral impact on the ability to elect candidates of choice, Section 2 is simply not implicated.

C. Other Circuits Have Refused to Employ a Retrogression Standard for Section 2 Liability.

In *Frank v. Walker*, 768 F.3d 744 (7th Cir. 2014), the Seventh Circuit rejected a statistical disparate effect challenge to Wisconsin's voter identification requirement. The court observed that "Section 2(b) tells us that Section 2(a) "does not condemn a voting practice just because it has a disparate effect on minorities." *Id.* at 753. Rather, Section 2(b) says that Section 2(a) requires that the evidence demonstrate a denial of the right to vote on account of race. *Id.* According to the court, "unless Wisconsin makes it *needlessly* hard to get photo ID, it has not denied anything to any voter" as far as Section 2 is concerned. *Id.* Moreover, none of the evidence at trial, like in the trial below here, demonstrated that minorities have less opportunity to get photo IDs. *Id.* Whether or not minorities are statistically less likely to use those opportunities "does not violate § 2." *Id.*

In so far as the impact of a voting regulation on "opportunity," that effect cannot be assessed in isolation, but must be considered along with the "entire voting and registration system." *Id.* On the whole, the Seventh Circuit found that minorities did "not seem to be disadvantaged by Wisconsin's electoral system as a whole." *Id.* Using a pure statistical retrogression standard as is advocated by the

Plaintiffs/Appellants here risks dismantling every piece of a state's voting system on the showing of mere statistics. *Id.* at 754 ("At oral argument, counsel for one of the two groups of plaintiffs made explicit what the district judge's approach implies: that if whites are 2% more likely to register than are blacks, then the registration system top to bottom violates § 2; and if white turnout on election day is 2% higher, then the requirement of in-person voting violates § 2.").

D. A Retrogression Standard Is Entirely Novel in the 26th Amendment Context.

The Intervenors/Appellants seek to import the Section 5 retrogression standard into the 26th Amendment. A retrogression standard has no place in an analysis under the 26th Amendment. Indeed, as acknowledged by the District Court, the Intervenors/Appellants "young voter" retrogression argument is entirely novel and has no support in case law, even as an extension of existing jurisprudence. It is with good reason, therefore, that the District Court devoted comparatively very little space to a discussion of this claim.

The ramifications of the adoption of a Section 5 retrogression standard in the context of Section 2 would effectively resurrect federal veto power over state election regulations. Adopting such a standard through the 26th Amendment would create new federal hurdles for states to change their election laws as they relate to those under the age of 21. If any election law practice or structure has a disparate impact on "young persons" it could be enjoined in federal court.

It is difficult to conceive of *any* election practice or structure whatsoever that does not have some bare statistical disparate impact among persons of different race, sex, or age. A change to an election law will invariably fall on one group differently than on another, regardless of the intent of the legislative body. Plaintiffs in this case seek to create a federal cause of action whenever the group that the change impacts more is their particular preferred group. This would create a one-way ratchet, where states may only change election laws if they end up benefiting the Plaintiff/Appellant's preferred groups. That is not what the 26th Amendment or Section 2 of the Voting Rights Act were designed to do. Thus, the "young voter" claim was appropriately rejected by the District Court because no precedent supports it, even by extension, and it would result in effectively preventing States from regulating their own elections altogether.

VI. Conclusion

The District Court was correct in finding that North Carolina's voting regulations challenged here do not violate Section 2 of the Voting Rights Act. The Plaintiffs/Appellants are arguing for the adoption of a drastically lower threshold for Section 2 enforcement—one that will effect an end-run around the Supreme Court's precedents and that erodes the Elections Clause of the Constitution. States have the power to run their own elections. Reversing the District Court would result in advancing centralized authority with control over state elections, which

would invariably erode liberty. As the Supreme Court stated in *Shelby*, "the federal balance 'is not just an end in itself: Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power.'" *Shelby County*, 133 S. Ct. at 2623 (quoting *Bond v. United States*, 131 S. Ct. 2355, 2364 (2011)). The judgment of the District Court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C) and Fourth Circuit Rule 29(c)(7), I certify the following:

This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 29(d) and Fourth Circuit Local Rule 29(d) because it contains 4,299 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

This brief complies with the typeface and style requirements of Federal Rule of Appellate Procedure 32(a)(5) and (6) and Fourth Circuit Rule 32(a)(5) and (6) because it has been set in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman 14-point font.

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CERTIFICATE OF SERVICE

I hereby certify that on June 16, 2016, I electronically filed the foregoing 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 further certify that all participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

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CERTIFICATE OF SERVICE

I certify that on 6/16/2016 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

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