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

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

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

BRIEF OF SENATORS THOM TILLIS, LINDSEY GRAHAM, TED CRUZ, MIKE LEE, AND THE JUDICIAL EDUCATION PROJECT AS AMICI CURIAE IN SUPPORT OF DEFENDANTS-APPELLEES AND AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

The undersigned counsel for *amici curiae* certifies that the Judicial Education Project has no parent corporation, and that no publicly held corporation holds 10% or more of their stock.

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RULE 29 STATEMENT

The individual amici are members of the United States Senate who have a strong interest in the correct interpretation of the Voting Rights Act, and in their States' sovereign power to enact reasonable, race-neutral election regulations, in North Carolina and elsewhere. The Judicial Education Project ("JEP") is a non-profit organization dedicated to strengthening liberty and justice by defending the Constitution as envisioned by its Framers, which creates a federal government of defined and limited power, is dedicated to the rule of law, and is supported by a fair and impartial judiciary. Amici support the defendants-appellees in this matter and urge affirmance of the decision below. No party or party's counsel authored the brief in whole or in part, or contributed money that was intended to fund preparing or submitting the brief. No person other than amici, their members, or their counsel contributed money that was intended to fund preparing or submitting the brief.

Because all parties have granted consent, the filing of this brief is authorized under Fed. R. App. P. 29(a).

INTRODUCTION

Section 2 of the Voting Rights Act prohibits "impos[ing]" any voting practice that "results in a denial or abridgment of the right . . . to vote on account of race or color," which occurs when the electoral system is "not equally open to participation" by racial minorities because they "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(a)-(b). Thus, under the plain text, a Section 2 violation occurs only if a practice "imposed" by the "State or political subdivision" "results" in a system that is not "equally open" to minorities because they have "less opportunity" than others to "participate in the political process." Contrary to Plaintiffs' argument, Section 2 neither mandates the alteration of race-neutral laws to *maximize* minorities' opportunity to vote, nor condemns voting processes that are "equally open" simply because minorities fail to vote at the same rate as non-minorities. This is particularly true if the disparity results from underlying socio-economic factors, rather than any unequal burden imposed by the state.

Section 2 contemplates two types of claims: a "vote-denial" claim, which asserts that a voting practice denies minorities equal opportunity to "*participate* in the political process" by casting ballots; and a "vote-dilution" claim, which asserts

that a districting practice denies minorities an equal opportunity "to *elect* representatives of their choice." This is a vote-denial case.

In the vote-denial context, the difficulty of showing a disparate denial of minority voter "opportunity" depends on the nature of the law being challenged. In a challenge to a law "establish[ing] *qualifications*" to vote—*i.e.*, "*who* may vote" in elections—the showing is relatively easy to make. *Arizona v. Inter-Tribal Council of Az., Inc.,* 133 S. Ct. 2247, 2257 (2013). A voting qualification by definition "den[ies]" unqualified people the "opportunity" to vote. By contrast, it is far more difficult to prevail on a challenge to a law that merely "regulate[s] *how* . . . elections are held" by setting forth the time, place, and manner of casting a vote. *Id.* Ordinary race-neutral regulations of the time, place, and manner of elections do not "deny or abridge" anyone's *opportunity* to vote; they merely regulate when, where, and how that opportunity must be exercised. *See id.* at 2253 (Regulation of the "Times, Places and Manner" of elections include "regulations relating to 'registration.'" (quoting *Smiley v. Holm*, 285 U.S. 355, 366 (1932)).

Plaintiffs propose a radically different theory of Section 2. They contend that Section 2 authorizes the federal judiciary to dictate the time, place, and manner of voting—including the days of early voting, the type of ID used to verify voter eligibility, and the timing of voter registration—in order to maximize voting opportunities and ameliorate disparities in minority participation rates.

Specifically, Plaintiffs claim that even if a State's voting procedures are "equally open to participation" and provide the same "opportunity" to all voters, the State's voting laws nonetheless violate Section 2 if minorities are less likely to vote due to underlying socio-economic inequalities. Consequently, Plaintiffs argue that North Carolina's race-neutral election process violates Section 2 and must be replaced with a system that maximizes minority voting participation to overcome the effects of socio-economic disparities among racial groups. But Section 2 plainly does not condemn voting practices merely because they "result" in statistically disparate *outcomes*. It condemns only those practices that "result" in minorities having "*less opportunity*" because the voting process is not "*equally open*" to them. This is clear from Section 2's plain language, as well as Supreme Court and Fourth Circuit precedent identifying the sort of discriminatory "results" that the law proscribes.

First, Section 2 does not prohibit a race-neutral regulation of the time, place, or manner of voting merely because it results in statistically disparate participation rates. Such regulations do not "*deny or abridge*" anyone's right to vote as long as they impose nothing more than the "usual burdens of voting," as do photo ID laws and other ordinary election laws. *See Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 198 (2008) (Stevens, J.). If minorities are free to vote subject only to the usual burdens of voting imposed on everyone, they have a full and fair "opportunity" to vote, and cannot possibly have any *less* opportunity than non-

minorities. Thus, at the threshold, plaintiffs bringing this sort of Section 2 "results" claim must establish that the challenged practice exceeds the ordinary burdens of voting in a way that affords minorities "less opportunity" to cast a ballot.

Without this threshold requirement, Section 2 would "swee[p] away almost all registration and voting rules." *Frank v. Walker*, 768 F.3d 744, 754 (7th Cir. 2014). Plaintiffs could eliminate in-person voting or registration requirements and demand voting and registration by mail—or, better yet, no registration at all, since disadvantaged minority groups are allegedly less equipped to submit the required documents. Plaintiffs could demand an early-voting period of 40, or 50, or 100 days per year, because each marginal expansion would decrease the "hardship" of voting. Plaintiffs could even insist that state election officials go door-to-door collecting ballots, because they allege that minority populations "are more likely to be poor, less educated, unhealthy, more likely to move, and have less access to transportation," all of which make it more difficult to vote in person or by mail. NAACP Br. 27.

Second, Section 2 applies only to disparate effects that "result" from *state voting practices*, and thus the law "only protect[s] racial minority vote[r]s" from exclusionary effects that are "proximately caused by" the challenged practice. *Thornburg v. Gingles*, 478 U.S. 30, 50 n.17 (1986). Accordingly, as this Court has

recognized, plaintiffs must provide "proof that the [challenged] process *caused* the disparity." *Irby v. Va. State Bd. of Elections*, 889 F.2d 1352, 1358 (4th Cir. 1989) (emphasis added). This vindicates the basic principle that "units of government are responsible for their own discrimination but not for rectifying the effects of other persons' discrimination." *Frank*, 768 F.3d at 753, 755. In short, Section 2 requires states to avoid *imposing* disparate burdens on minority voters. It does not require states to take affirmative action to ameliorate underlying socio-economic disparities that might make minority voters less equipped to navigate the "usual burdens of voting" inherent in ordinary election laws. *Crawford*, 553 U.S. at 198.

Third, to assess whether a practice causes a denial or abridgement of the right to vote, plaintiffs must establish that the practice results in less minority opportunity compared to an "*objective*" "benchmark," not compared to what would result from a hypothetical alternative that would *maximize* minority voter participation. *Holder v. Hall*, 512 U.S. 874, 881 (1994) (Kennedy, J.). Here, Plaintiffs cannot point to any "benchmark" of voting procedures that are *objectively* superior to the challenged practices, but instead propose alternatives that are purportedly superior only because they *enhance* minority participation.

Fourth, Plaintiffs' reading would render Section 2 unconstitutional. Plaintiffs would require states not only to refrain from *causing* disparities in opportunity, but to rearrange their laws to *enhance* minority participation. That

would exceed Congress's power to enforce the Fifteenth Amendment's prohibition against intentional discrimination. Moreover, requiring States to use race-based criteria to tailor their election laws to enhance minority voting prospects would violate the Equal Protection Clause.

This Court has recognized that the first threshold "element[]" of a vote-denial claim is that "the challenged standard, practice, or procedure *must 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." *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 240 (4th Cir. 2014) (emphases added) (citation omitted). It is only *after* establishing that first element, by showing a substantial burden that diminishes minority voter "opportunity," that the court asks whether the resulting disparity is *also* "caused by or linked to social and historical conditions that have or currently produce discrimination against members of the protected class." *Id.* Under that standard, North Carolina's race-neutral regulations of the time, place, and manner of its elections do not violate Section 2.

ARGUMENT

I. PLAINTIFFS MISINTERPRET THE "RESULTS" TEST OF SECTION 2

Congress enacted Section 2 pursuant to its power to enforce the Fifteenth Amendment. Originally, Section 2 prohibited States from "impos[ing] or appl[ying]" any voting practice "to den[y] or abridge[] . . . the right . . . to vote on account of race or color." 52 U.S.C. § 10301(a). Because that language parallels the Fifteenth Amendment, which prohibits only "purposeful" discrimination, the Supreme Court concluded that Section 2 likewise prohibited only purposeful discrimination. *City of Mobile v. Bolden*, 446 U.S. 55, 60-61 (1980) (plurality op.). In 1982, however, Congress revised the law to make a showing of purposeful discrimination unnecessary. It amended what is now subsection (a) to prohibit States from imposing or applying voting practices "in a manner which *results* in a denial or abridgment of the right . . . to vote on account of race or color." 52 U.S.C. § 10301(a) (emphasis added).

Accordingly, the new Section 2 "results" test does not require a showing of intentional discrimination. Rather, regardless of motivation, the law forbids the State from "impos[ing]" a voting practice that causes ("results in") the "political processes" not being "equally open to participation" by minority voters because they have "less opportunity" than others to participate. *Id.* § 10301(a)-(b). Under this "results" test, then, the question is not whether minorities *proportionally*

participate in voting, but whether the state procedures are "equally open" to participation. The question is not whether minorities proportionally *avail themselves* of the equal opportunity to vote, but whether state law gives them "*less* opportunity" to vote.

A. Plaintiffs Must Show That The Challenged Laws Provide "Less Opportunity" To Minority Voters

As the Supreme Court has explained, "the ultimate right of § 2 is equality of *opportunity*." *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 428 (2006) (emphasis added). It does not require proportional representation, or "electoral advantage" or "maximiz[ation]" for minority groups. *Bartlett v. Strickland*, 556 U.S. 1, 20, 23 (2009). The opportunity to vote does not become unequal merely because minorities "are less likely to *use* that opportunity," whether it be due to a lack of interest, socio-economic conditions, or any other reason. *Frank*, 768 F.3d at 753.

By prohibiting the denial of equal "opportunity," Section 2(b) implements the prohibition contained in Section 2(a), which prohibits practices that "result[] in a *denial or abridgment of the right . . . to vote* on account of race or color." 52 U.S.C. § 10301(a) (emphases added). The plain language of Section 2(a) and 2(b), particularly when read together, makes clear that Section 2 does not prohibit ordinary race-neutral regulations of the time, place, and manner of elections.

First, such regulations do not "deny or abridge" anyone's right to vote. "Election laws will invariably impose some burden upon individual voters," because the State must determine when and where voting must occur, how voters must register and establish eligibility, what kind of ballots they must use, and so on. *Burdick v. Takushi*, 504 U.S. 428, 433 (1992). Shouldering these "usual burdens of voting" is an inherent part of voting. *Crawford*, 553 U.S. at 198 (Stevens, J.). And because such baseline requirements are an inherent *part of* the right to vote, they cannot be said to *abridge* the right to vote.

Second, as detailed below, the concept of "abridgement" inherently requires asking the question, "abridge compared to what?" *See infra* p. 15-18. Section 2(b) explicitly answers that question by stating the relevant comparison is to the opportunity afforded non-minorities. Section 2 is violated only if minorities have "less opportunity" than others to vote because the system is not "equally open" to them. Thus, minorities' right to vote is not "abridged" merely because minorities do not *use* the equally open voting process to the same extent as others, or because the voting system provides less than the *maximum feasible* "opportunity."

Section 2(b) therefore confirms that Section 2 "does not condemn a voting practice just because it has a disparate effect on minorities." *Frank*, 768 F.3d at 753. For example, the fact that voter registration makes voting less convenient and might lower minority turnout does not make registration requirements subject to

attack under Section 2. A race-neutral law cannot "abridge" minorities' right to vote unless it imposes a *disparate* burden beyond the *ordinary* burdens of voting.

The legislative history confirms that Congress meant what it said. "It is well documented" that the 1982 amendments were the product of "compromise." *Holder*, 512 U.S. at 933 (Thomas, J., concurring in the judgment); *e.g.*, *id.* at 956 (Ginsburg, J., dissenting); *Gingles*, 478 U.S. at 84 (O'Connor, J., concurring in the judgment). The original version of the 1982 amendments proposed by the House of Representatives would have prohibited "all discriminatory 'effects' of voting practices," but "[t]his version met stiff resistance in the Senate," which worried that it would "lead to requirements that minorities have proportional representation, or . . . devolve into essentially standardless and ad hoc judgments." *Miss. Republican Exec. Comm. v. Brooks*, 469 U.S. 1002, 1010 (1984) (mem.) (Rehnquist, J., dissenting) (citing H.R. Rep. No. 97-227, at 29 (1981)). Senator Dole proposed a compromise. *See Gingles*, 478 U.S. at 96 (O'Connor, J., concurring in the judgment). He assured his colleagues that, as amended, Section 2 would "[a]bsolutely not" allow challenges to a jurisdiction's voting mechanisms "if the process is open, if there is equal access, if there are no barriers, direct or indirect, thrown up to keep someone from voting . . . , or registering . . . ." 128 Cong. Rec. 14133 (1982). This confirms that Section 2 applies only where the

State denies "equal *access*" by "throw[ing] up" barriers beyond the usual, uniform burdens of voting.

Plaintiffs' contrary interpretation fundamentally rewrites Section 2. It revamps a law about disparate *denial* of voter opportunity into a law assuring proportional *utilization* of voter opportunity. It converts a prohibition on *abridging* minorities' right to vote into a mandate for *boosting* minority participation. It replaces a ban on *state-imposed barriers* to minority voting with an affirmative duty of *state facilitation* of minority voting. And it transforms a guarantee of equal *access* into a guarantee of equal *outcomes*.

Under Plaintiffs' reading, Section 2 would outlaw ordinary, uncontroversial voting procedures, from Election Day to in-precinct voting, whenever plaintiffs can hypothesize a less-burdensome alternative. Yet nowhere in Section 2's voluminous legislative history is there any hint that Section 2 would have this radical effect on normal processes. "Congress' silence in this regard can be likened to the dog that did not bark." *Chisom v. Roemer*, 501 U.S. 380, 396 n.23 (1991).

B. Plaintiffs Must Show That Any Disparity in Voter Opportunity Is Proximately Caused By The Challenged Law

To violate Section 2, a voting practice must proximately cause harm to minority voters. The law applies only if a voting practice "*imposed* . . . by [the] *State*" "*results in* a denial or abridgement of the right of any citizen . . . to vote on

account of race or color." 52 U.S.C. § 10301(a) (emphases added). Thus, if the alleged "abridgement" "results" from something *other* than the *state-imposed practice*, Section 2 does not reach it.

In *Gingles*, Justice Brennan's majority opinion emphasized that Section 2 "only protect[s] racial minority vote[r]s" from denials or abridgements that are "proximately caused by" the challenged voting practice. 478 U.S. at 50 n.17. Applying this basic rule in the vote-dilution context, *Gingles* held that plaintiffs were required to show, as a "necessary precondition[]," that the disparate exclusion of minority candidates from office was caused by the state's multi-member districting practice, and was not attributable to the absence of a minority community "sufficiently large and geographically compact to constitute a majority in a single-member district." *Id.* Absent that showing, the state-imposed "*multi-member form* of the district cannot be responsible for minority voters' inability to elect its [sic] candidates." *Id.* And if the *voting procedure* "cannot be blamed" for the alleged dilution, there is no cognizable Section 2 problem because the "results" standard does "*not assure racial minorities proportional representation*" but only protection against "diminution proximately caused by the districting plan." *Id.* at 50 n.17.

Thus, in the vote-*denial* context, *Gingles* requires plaintiffs to show, as a necessary "precondition," that an alleged deprivation is proximately caused by a

state-imposed voting practice rather than underlying socio-economic factors such as fewer minority voters having cars or photo ID. The Supreme Court recently reaffirmed this causation requirement in a related context, emphasizing that "a disparate-impact claim that relies on a statistical disparity must fail if the plaintiff cannot point to a defendant's policy or policies *causing* that disparity." *Tex. Dep't of Hous. & Cmty. Aff. v. Inclusive Cmtys. Project, Inc.*, 135 S. Ct. 2507, 2523 (2015) (emphasis added). Without the "safeguard[]" of a causation requirement "at the prima facie stage, disparate-impact liability might cause race to be used and considered in a pervasive way and would almost inexorably lead governmental or private entities to use numerical quotas, and serious constitutional questions then could arise." *Id*.

Applying this causation requirement, the Fourth Circuit rejected a Section 2 challenge against Virginia's decision to choose school-board members by appointment rather than election because, although there was a "significant disparity . . . between the percentage of blacks in the population and the racial composition of the school boards," there was "no proof that the appointive process caused the disparity." *Irby*, 889 F.2d at 1358. The disparity was attributable only to the reality that "blacks in the population" were "not seeking school board seats in numbers consistent with their percentage of the population." *Id.* Similarly, the Ninth Circuit recently explained that "a § 2 challenge based purely on a showing of

some relevant statistical disparity between minorities and whites, without any evidence that the challenged voting qualification *causes* that disparity, will be rejected." *Gonzalez v. Arizona*, 677 F.3d 383, 405 (9th Cir. 2012) (en banc) (emphasis added) (citation omitted), *aff'd sub nom. Arizona v. Inter Tribal Council of Az., Inc.*, 133 S. Ct. 2247 (2013).

Because Section 2 reaches only racial disparities caused by the challenged *voting* practice—not even other *governmental* discrimination—it plainly does not reach disparities attributable to *private*, *societal* discrimination. Since "units of government are responsible for their own discrimination but not for rectifying the effects of other persons' discrimination," courts must "distinguish discrimination by the defendants from other persons' discrimination." *Frank*, 768 F.3d at 753, 755.

Here, Plaintiffs have not shown that any practice adopted by North Carolina proximately causes the exclusion of minority voters. They have not demonstrated that North Carolina has "imposed or applied" a barrier—such as a literacy test or a poll tax—that "results in" the disproportionate denial of the right to vote to members of minority races. Quite to the contrary, North Carolina allows all adult citizens to vote. Although members of minority races may disproportionately choose, for socio-economic or other reasons, not to take advantage of this equal

opportunity, North Carolina's practices are not the proximate cause of this phenomenon.

C. Plaintiffs Must Show That The Challenged Laws Harm Minority Voters Relative to an Objective Benchmark

To invalidate a voting practice under Section 2, a challenger must identify an "objective and workable standard for choosing a reasonable benchmark by which to evaluate a challenged voting practice." *Holder*, 512 U.S. at 881 (Kennedy, J.). This requirement of an "objective" benchmark follows from Section 2(a)'s text, which prohibits practices that result in the discriminatory "denial or abridgement" of voting rights. The concept of "abridgement" "necessarily entails a comparison." *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 334 (2000) (*Bossier II*). "It makes no sense to suggest that a voting practice 'abridges' the right to vote without some baseline with which to compare the practice." *Id.* In Section 2 cases, "the comparison must be made with . . . what the right to vote *ought to be*." *Id.*; *see Holder*, 512 U.S. at 880-81 (Kennedy, J.). The benchmark must be "objective"; it cannot be purportedly superior only because it enhances minority voting prospects. *Id*. For some voting practices, there is "no objective and workable standard for choosing a reasonable benchmark by which to evaluate [the] challenged voting practice," and thus "the voting practice cannot be challenged . . . under § 2." *Id.* at 881.

In *Holder*, the Supreme Court rejected a Section 2 challenge asserting that using a single-member instead of a five-member commission "resulted" in vote dilution. Although the five-member alternative clearly would enhance minority voting strength by allowing them to elect a commissioner, there was "no principled reason" why this alternative was the proper "benchmark for comparison" as opposed to a "3-, 10-, or 15-member body." *Id.* at 881. That was true even though over *90 percent* of commissions in the state had five members. *Id*. at 876-77. *Holder* thus establishes that Section 2 plaintiffs must rely on an "objective" benchmark of voter opportunity, not merely alternatives that would *enhance* opportunity.

Here, Plaintiffs cannot identify any objective benchmarks for the voting practices they challenge. This is most clear with respect to the shortening of the early-voting period. The number of days of early voting is not susceptible to Section 2 challenge because there is no objective benchmark of how many days *should* be offered. Sixteen states do not allow *any* early voting, and there is "tremendous variation" among those that do, ranging from "three to forty-six days." Op. 125-26. "The wide range of possibilities makes the choice inherently standardless." *Holder*, 512 U.S. at 889 (O'Connor, J., concurring in part). To vividly illustrate the point, while Plaintiffs here claim that Section 2 requires *17* days of early voting, the same plaintiffs' counsel contend that Ohio *violates*

Section 2 by providing *28* days of early voting, instead of 35. *See* Am. Compl., *The Ohio Organizing Collaborative, et al v. Husted, et al*., No. 2:15-cv-01802, at ¶ 3 (S.D. Ohio Sept. 8, 2015), ECF No. 41. There is thus no limiting or even internally consistent principle cabining Plaintiffs' minority-maximization theory.

The same problem dooms Plaintiffs' argument regarding photo ID, because there is no objective, or even typical, standard for determining which form of identification best serves the (unchallenged) policy of assessing the voter's real identity, to prevent fraudulent or duplicative voting that inherently cancels out a qualified vote. In the thirty-three states that require voters to show some form of ID at the polls (not counting states that require ID at registration), seventeen require photo ID. *See* Nat'l Conf. of State Legislatures, Voter ID, *available at* http://goo.gl/8onLtr. Nor is there any consistent policy on how to treat voters without proper ID. *Id.*

Plaintiffs argue that North Carolina's voting practices harm minorities *relative to a conceivable alternative that would be better for minorities*, such as eliminating the photo-ID requirement, allowing more days of early voting, and allowing same-day registration. But it is always possible to hypothesize an alternative practice that would increase minority voting rates. For example, *even more* minority voters would vote if North Carolina required no ID at all, allowed voting year-round, eliminated registration requirements, or allowed everyone to

vote by mail like Oregon does. Yet Section 2 plainly does not require North Carolina to adopt those alternatives for the same reason that *Holder* did not require a five-member commission: "Failure to maximize cannot be the measure of § 2." *Johnson v. De Grandy*, 512 U.S. 997, 1017 (1994).

Plaintiffs also argue that North Carolina's current voting laws are worse for minorities *relative to the State's prior laws*, thus claiming that the benchmark for a Section 2 challenge should be the prior status quo. But that approach wrongly conflates Section 2 with Section 5 of the Voting Rights Act. Section 5 proceedings "uniquely deal only and specifically with *changes* in voting procedures," so the appropriate baseline of comparison "is the status quo that is proposed to be changed." *Bossier II*, 528 U.S. at 334. Section 2 proceedings, by contrast, "involve not only changes but (much more commonly) the status quo itself." *Id.* Because "retrogression"—*i.e.*, whether a change makes minorities worse off—"is not the inquiry [under] § 2," the fact that a state *used to have* a particular practice in place does not make it the benchmark for a § 2 challenge. *Holder*, 512 U.S. at 884 (Kennedy, J.). In short, by ignoring any objective benchmark and instead relying on retrogression and minority-maximizing alternatives, Plaintiffs seek to do exactly what the Supreme Court rejected in *Holder*.

D. Plaintiffs' Interpretation of Section 2 Would Violate the Constitution

The Supreme Court has never "addresse[d] the question whether § 2 . . . is consistent with the requirements of the United States Constitution." *Chisom*, 501 U.S. at 418 (Kennedy, J., dissenting); *De Grandy*, 512 U.S. at 1028-29 (1994) (Kennedy, J., concurring in the judgment) (same). And indeed, Plaintiffs' boundless interpretation of the "results" test would render it unconstitutional.

1. Congress enacted Section 2 to enforce the Fifteenth Amendment, which prohibits "purposeful discrimination," but does not prohibit laws that "resul[t] in a racially disproportionate impact." *City of Mobile*, 446 U.S. at 63, 70 (quoting *Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 265 (1977)). Although Congress may use its enforcement power to proscribe certain discriminatory "results," it may only do so as a "congruen[t] and proportional[] . . . means" to "remedy or prevent" the unconstitutional "injury" of intentional discrimination. *City of Boerne v. Flores*, 521 U.S. 507, 519-20 (1997). The enforcement power does not allow Congress to "alter[] the meaning" of the Fifteenth Amendment. *Id.* at 519. Accordingly, to ensure that Section 2 stays within the bounds of the Constitution, the "results" test must be "limited to those cases in which constitutional violations [are] most likely." *Id.* at 533. It cannot be a freestanding ban on ordinary voting laws that have a racially disparate impact.

Properly interpreted, the "results" test is legitimate enforcement legislation because it prohibits only substantially burdensome voting practices that depart from an "*objective* benchmark" and proximately cause minorities to have "*less opportunity*" to vote than non-minorities. If such practices "remain unexplained," "one can infer . . . that it is more likely than not that [they] [a]re [purposefully] discriminatory." *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 576 (1978).

In the vote-dilution context, the Supreme Court has carefully limited the "results" test to apply only where there is a strong inference of discriminatory purpose. The first *Gingles* "pre-condition" requires a showing that minority voters could naturally constitute a "geographically compact" majority under "traditional districting principles" *Abrams v. Johnson*, 521 U.S. 74, 91 (1997); *see LULAC*, 548 U.S. at 433. Because districts *normally* encompass "geographically compact" groups, failure to draw such a district for a *minority* community creates a plausible inference of intentional discrimination. Conversely, Section 2 does not require States to engage in *preferential* treatment by *deviating* from traditional districting principles in order to *create* majority-minority districts. *LULAC*, 548 U.S. at 434. The same must hold true in the vote-denial context: Section 2 cannot be interpreted to require departure from ordinary election regulations in order to *enhance* minority voting participation.

2. Interpreting Section 2 to require states to boost minority voting participation also would violate the Constitution's equal-treatment guarantee. Subordinating "traditional race-neutral districting principles" to enhance minority voting strength violates the Constitution. *See Shaw v. Hunt*, 517 U.S. 899, 907 (1996) (citation omitted). Section 2 thus cannot displace ordinary race-neutral voting practices for the "predominant" purpose of maximizing minority voter convenience. *Miller v. Johnson*, 515 U.S. 900, 916 (1995). This is especially true because, under Plaintiffs' interpretation, any ordinary voting law that is less convenient for minority voters constitutes a discriminatory "result," and Section 2's text flatly prohibits all such "results," *regardless* of the State's justification. Plaintiffs' interpretation would thus prioritize race *uber alles*, banning even the most strongly justified electoral procedures unless all racial groups find it equally convenient to comply. *Cf. Ricci v. DeStefano*, 557 U.S. 557, 595 (2009) (Scalia, J., concurring).

Moreover, requiring states to adjust race-neutral voting laws to compensate for underlying social inequalities would violate the constitutional requirement that race-based remedial action must be justified by "some showing of prior discrimination by the *governmental unit* involved." *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 274 (1986) (plurality opinion) (emphasis added). "[R]emedying past societal discrimination does not justify race-conscious

government action." *Parents Involved v. Seattle*, 551 U.S. 701, 731 (2007). But Plaintiffs' interpretation would require just that.

3. Because Plaintiffs' sweeping interpretation raises such serious constitutional questions, it must be rejected if "fairly possible." *NFIB v. Sebelius*, 132 S. Ct. 2566, 2594 (2012) (citation omitted). That is particularly true because the Constitution expressly grants the states the power to establish the time, place and manner of holding elections (and enforce voter qualifications). *See Inter Tribal Council of Ariz.*, 133 S. Ct. at 2259. Because Plaintiffs' interpretation dramatically intrudes on this realm and rearranges "the usual constitutional balance of federal and state powers," it must be rejected unless Congress's intent to achieve this result is "unmistakably clear in the language of the statute." *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) (citation omitted). Congress did not remotely provide any clear indication that it meant Section 2 to authorize federal judges to override ordinary race-neutral election laws as extensively as Plaintiffs claim.

II. FOURTH CIRCUIT PRECEDENT DOES NOT SUPPORT PLAINTIFFS' INTERPRETATION

To support their sweeping interpretation of Section 2, Plaintiffs rely heavily on the decision by a panel of this Court in *League of Women Voters.* Their reliance is misplaced. Under that decision, the first threshold "element[]" of a "vote-denial claim" is that "the challenged 'standard, practice, or *procedure*' must *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." 769 F.3d at 240 (emphases added) (citation omitted). This test properly incorporates the threshold requirements discussed above since it requires establishing a "state-imposed" "burden" that is "discriminatory" because it affords minority voters "less opportunity" than non-minorities to cast a vote. Since it is clear that Plaintiffs have not established any such "burden," much less a "discriminatory" one, (*see supra* p. 8-11) there is no need to reach *League of Women Voters*' second "element," to determine whether that nonexistent "burden . . . [is] caused by or linked to social and historical conditions that have or currently produce discrimination against" minorities. *Id.* (citation omitted). Plaintiffs have already failed the first element.

The second element of the *League of Women Voters*' test simply asks, *after* plaintiffs establish that the state-imposed burden provides them "less opportunity," whether that unequal "burden" is linked to societal discrimination. Such a showing is necessary to show that the challenged practice "abridges" voting opportunities "on account of *race*." Consequently, the *League of Women Voters* second element serves a purpose similar to the "Senate Report factors" or "totality of circumstances" analysis that is conducted after the *Gingles* preconditions have been established. The plaintiffs must *first* establish that the challenged practice "result[s] in unequal access to the electoral process" by showing that it causes an

unequal ability to elect, and the Section 2 inquiry *then* becomes whether the proven inequality is linked to racial discrimination by public or private actors. *Gingles*, 478 U.S. at 46-51.

Plaintiffs seek to avoid this rule by skipping over the first element and revising the inquiry under the second element. Rather than asking whether the state-imposed, unequal "*burden*" is linked to race, Plaintiffs frame the question as whether less-than-proportionate electoral *outcomes* can be linked to societal discrimination, even though the voting procedure imposes no unequal "burden" and affords perfectly equal opportunity to participate. This revision, however, eviscerates the first element and is contrary to the language of the second.

Moreover, Plaintiffs' revisionist interpretation of *League of Women Voters* cannot be accepted because it would bring that decision into irreconcilable conflict with the square holdings of *Gingles*, *Irby*, and *Inclusive Communities Project* that Section 2 (and disparate-impact claims generally) only reach disparities "proximately caused" by the challenged voting procedure, not those attributable to general "social and historical conditions." *Id*. at 47, 50 n.17; *Irby*, 889 F.2d at 1358; *Inclusive Cmtys. Project*, 135 S. Ct. at 2523. Because *Irby* was "the first case to decide the issue" of causation under Section 2 in this circuit, it "is the one that must be followed." *McMellon v. United States*, 387 F.3d 329, 332-34 (4th Cir. 2004) (en banc). That is especially true because *League of Women Voters* involved

a preliminary injunction ruling that is "not binding" on the merits, even as law of the case. *See Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981). And even that preliminary injunction was stayed by the Supreme Court, *North Carolina v. League of Women Voters of N.C.*, 135 S. Ct. 6 (2014) (mem.), reflecting a judgment that a majority of the Justices likely "would . . . set the order aside," *INS v. Legalization Assistance Project of L.A. Cnty. Fed. of Labor*, 510 U.S. 1301, 1304 (1993) (O'Connor, J., in chambers).

In short, even if *League of Women Voters could* be interpreted as Plaintiffs advocate, any such broad construction of that tenuous precedent would impermissibly conflict with governing Supreme Court and Fourth Circuit precedent.[1]

III. THE CHALLENGED LAWS COMPLY WITH SECTION 2

Under the legal standards discussed above, Plaintiffs' Section 2 claims fail at the threshold for three reasons. First, the challenged laws are reasonable, race-neutral regulations of the time, place, and manner of holding elections, and do not impose "a substantial burden on the right to vote," much less an unequal burden on voting opportunities. *Crawford*, 553 U.S. at 198. Second, North Carolina's voting

[1] In all events, the only relevant "social and historical conditions" mentioned in *League of Women Voters* were the "overtly discriminatory practices" in North Carolina's "history of voting-related discrimination." 769 F.3d at 245. As shown below, Plaintiffs provide no causal link between such discrimination and any current disproportionate effects.

practices do not proximately cause any racial disparity in voter "opportunity." And third, Plaintiffs cannot identify any objective benchmark of voting practices. In any event, Plaintiffs' claims also fail as a factual matter even under their boundless disparate-effects standard.

A. Photo ID

As the district court found, Plaintiffs failed to carry their burden of establishing that North Carolina's photo-ID requirement causes any forbidden discriminatory result, particularly in light of the "reasonable impediment" provision. Indeed, even the United States has now expressly disavowed any "Section 2 results challenge to the voter-ID provision." U.S. Br. 8. That is because any such challenge is clearly meritless.

Courts must assess "the *totality* of circumstances" to determine whether a practice burdens a "*voting*" opportunity. *League of Women Voters*, 769 F.3d at 240 (emphases added). Thus, Plaintiffs cannot establish that photo ID has even a disparate effect on voting unless they show that minorities, under all the relevant circumstances, will be disproportionately unable to cast a vote under North Carolina's scheme. Plaintiffs cannot rely on a narrow snapshot concerning whether minorities proportionately *possess* photo ID. Instead, they must show that a disproportionate number of minority voters cannot *obtain* an ID *and* cannot invoke the "reasonable impediment" exception. As to the first issue, the district

court found that "[i]t is difficult to know with any reasonable assurance how many voters still lack a valid photo ID . . . *due to any burden in acquiring it*." Op. 330 (emphasis added). Plaintiffs claim that minority voters "disproportionately lack access to transportation and the underlying documents required to obtain a qualifying ID." NAACP Br. 31. But they failed to *prove* any link between transportation inequalities and obtaining ID, or that minorities disproportionately lack the "underlying documents," which is why they cannot cite any factual finding on this point.

In any event, even if a photo-ID requirement by itself would impose a cognizable disparate impact, any such impact is entirely ameliorated by North Carolina's "reasonable impediment" provision, which allows anyone to vote *without* a qualifying ID simply by asserting a "subjective belief" that he faced a "reasonable impediment" to obtaining one. Op. 333. Plaintiffs do not attempt to show that any disparity remains under this generous exception, instead asserting that the reasonable-impediment process is "difficult to navigate" and "intimidating" for minorities (NAACP Br. 32). Again, however, they fail to substantiate those assertions with any cognizable evidence, which is why the district court rejected them. *See* Op. 101-125; 325-39.

B. Early Voting

Plaintiffs have also failed to show that North Carolina's early-voting period

violates Section 2. As noted, early-voting challenges cannot be cognizable under Section 2 because, *inter alia*, there is no objective benchmark to measure the appropriate number of early-voting days, and neither retrogression nor minority-maximization is a permissible metric.

Even compared to the previous status quo, Plaintiffs' factual claims are badly deficient. Under the challenged law, North Carolina reduced the number of early-voting days from 17 to 10, but "kept the same number of early-voting hours," and there is "reason to believe" that this change "will *benefit* African Americans" due to the addition of "more voting sites and more high convenience night and weekend hours." Op. 339-40 (emphasis added). The fact that minorities previously voted disproportionately in the first 7 days of early voting proves nothing because they can do the same under the new 10-day system, which is quite probable since they are "more sophisticated voters" who are highly likely to vote "regardless of the [early-voting] practices in place." Op. 341. Plaintiffs offered no cognizable evidence that minority voters can cast a ballot between day 17 and day 10 of an election period, but not between day 10 and day 0.

C. Same-Day Registration

Despite the fact that 37 states currently do not allow same-day registration and voting,[2] Plaintiffs make the astonishing claim that Section 2 requires the

[2] *See* "Same Day Voter Registration," National Conference of State Legislatures, *available at* http://goo.gl/S5jjwP.

practice in North Carolina. Their primary argument is that "the burden of voter registration falls more heavily on African Americans," because they "are more likely to move between counties due to housing instability, and have less access to transportation." NAACP Br. 24. If this were sufficient, then *any* registration requirement would have a forbidden "result" under Plaintiffs' theory. In any event, the evidence and the district court's findings disprove Plaintiffs' factual assertion: "even when SDR registrations are not included, African American registration rates nearly approximated white registration rates in 2008 and *exceeded* them in 2010 and 2012." Op. 347 (emphasis added). Plaintiffs have utterly failed to rebut the natural inference, which is that minorities are just as willing and able to register as whites.

Plaintiffs contend that disallowing same-day registration cannot be justified because there is "no evidence" same-day registrants' votes have been "fraudulently or otherwise improperly cast." NAACP Br. at 25. But the Supreme Court disagrees, explaining that States may require registration "30 days" before an election to allow "whatever administrative tasks are necessary to prevent fraud." *Dunn v. Blumstein*, 405 U.S. 330, 348 (1972); *see also Rosario v. Rockefeller*, 410 U.S. 752 (1973). Congress agrees: The Voting Rights Act Amendments of 1970 allow registration to close "thirty days" before a presidential election. 52 U.S.C. § 10502(d). Likewise, the National Voter Registration Act of 1993 contemplates

that States may reject voter-registration forms submitted less than "30 days" before a federal election. 52 U.S.C. § 20507(a)(1). It is unthinkable that Congress meant Section 2 to prohibit such a ubiquitous voting practice, without anyone mentioning it anywhere in the extensive and divisive legislative history.

D. Out-of-Precinct Voting

Needless to say, voting in one's own precinct is a venerable, ubiquitous, neutral practice that cannot reasonably be characterized as a "burden," much less a discriminatory burden that provides minorities "less opportunity" to vote than non-minorities. Plaintiffs nonetheless contend that Section 2 outlawed this practice because it is "more difficult" for minorities to "identify and travel to their assigned precinct" than it is for their more "educated" non-minority counterparts. NAACP Br. 27. Even if this demeaning stereotype were remotely plausible or legally cognizable, Plaintiffs "failed to show that voters' assigned precincts are not on average the closest precinct to their residence or work." Op. 357. Anyway, there are "many remaining convenient alternatives" for minorities, including "voting during any of the ten days of early voting where they need *not* vote at their assigned precinct," and "casting an absentee ballot by mail during the forty-five to sixty days available (depending on the election)." Op. 360-61 (emphasis added).

E. Pre-Registration

Finally, Plaintiffs contend that Section 2 requires North Carolina to allow

"pre-registration" of voters beginning at age 16, because "African Americans in North Carolina are younger on average than whites," and they are thus "disproportionately" affected by a higher age requirement. NAACP Br. 33-34. Again, under Plaintiffs' radical view of Section 2 maximization, this would mean that the Voting Rights Act must eliminate not only the age requirement for voter *registration*, but *for voting itself*. After all, if minorities are disproportionately young, and Section 2 prohibits voting restrictions with a bare disparate impact, then it must prohibit states from barring 16-year-olds from *voting*. Plaintiffs' theory proves far too much.

The district court also found that the evidence did not support Plaintiffs' argument: If teenagers are motivated to pre-register at age 16 and stay motivated to vote at 18, they will be politically engaged enough to register *and* vote at 18. Thus, "even though African Americans disproportionately *used* pre-registration," plaintiffs' "own expert . . . never claimed that [pre-registration] disproportionately *benefits* African Americans." Op. 367-68 (emphases added).

Dated: June 16, 2016 Respectfully Submitted,

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Caption: *John Doe, et al. v. Patrick Lloyd McCrory, et al*.

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June 16, 2016 /s/ Michael A. Carvin
Michael A. Carvin

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I hereby certify that on this 16th day of June, 2016, I electronically filed the foregoing with the Court's CM/ECF system. All participants in this case are registered CM/ECF users and will be served via the CM/ECF system.

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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