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 Governor of North Carolina, *et al.*, Defendants.	1:13CV658
LEAGUE OF WOMEN VOTERS OF NORTH CAROLINA, *et al.*, Plaintiffs, *and* LOUIS M. DUKE, *et al.*, Plaintiffs-Intervenors, v. THE STATE OF NORTH CAROLINA, *et al.*, Defendants.	1:13CV660
UNITED STATES OF AMERICA, Plaintiff, v. THE STATE OF NORTH CAROLINA, *et al.*, Defendants.	1:13CV861

DEFENDANTS' MEMORANDUM IN SUPPORT OF THEIR MOTION FOR JUDGMENT ON THE PLEADINGS PURSUANT TO Fed. R. Civ. P. 12(c)

I. INTRODUCTION

This case is about the authority of the State of North Carolina to enact neutral voting practices that provide equal opportunity to all voters. The United States Constitution and the Voting Rights Act require equality of *opportunity* to vote, *Bartlett v. Strickland*, 556 U.S. 1, 35-36 (2009), and the laws challenged by Plaintiffs in these actions do not in any way deny any voter an equal opportunity to vote. Plaintiffs fail to allege how they or anyone else are "denied" equal opportunity by changes in elections procedures that would require that they register and vote according to the same rules that apply to all voters. There is no "neutral" practice here that prevents them from registering or voting on the same terms and conditions as other members of the electorate. Instead, each and every voter has the ability to control his or her own conduct as it relates to registering to vote and voting according to the rules that apply to everyone. Returning North Carolina to rules in place prior to the fairly recent enactment of the rules changed by the challenged provisions no more violates the law now than it did in the absence of the voting practices favored by Plaintiffs.

Moreover, North Carolina has the constitutional authority to establish reasonable rules regarding the procedures for holding elections. Indeed, the Elections Clause of the United States Constitution expressly grants North Carolina this authority, at least as to members of Congress:

> The Times, Places, and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations.

U.S. CONST. art. I, § 4 cl. 1.

Thus, the Elections Clause "imposes" on state governments a "duty" to set "the time, place, and manner of electing Representatives and Senators." *Arizona v. Inter-Tribal Council of Ariz., Inc.*, 133 S.Ct. 2247, 2253 (2013). The Elections Clause also grants Congress "the power to alter those [state] regulations or supplant them altogether." *Id.* (citing *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 804-05 (1995)). In areas where Congress has declined to act, states have the authority to establish rules and regulations regarding the time, place, and manner for registered voters to cast their ballots. *Id*. This authority includes "regulations relating to 'registration.'" *Id.* (quoting *Smiley v. Holm*, 285 U.S. 355, 366 (1932)).

The legislation challenged by plaintiffs in this case concerns election practices related to the time, place, and manner for conducting elections in North Carolina, including the times a person may vote or register to vote. These practices, established in 2013 by 2013 N.C. Sess. Laws 381,[1] repealed certain practices established by prior General Assemblies mainly within the last ten years. Congress has never mandated that states adopt the practices repealed by the General Assembly in 2013. Nor has any court

[1] 2013 N.C. Sess. Laws 381 is frequently referenced by the bill designation given it when it was introduced in and considered by the General Assembly—House Bill, or H.B. 589. Because the Act is frequently identified as H.B. 589, Defendants will refer to it in that way in this memorandum, even though upon enactment and ratification, the Act ceased to be a bill and became a duly-enacted and ratified act of the General Assembly.

ever ordered a state to adopt the practices repealed by the General Assembly in 2013 as a remedy for violations of the Fourteenth Amendment or Section 2 of the Voting Rights Act.

Finally, in asking this Court to force the State of North Carolina to return to voting systems that were in place prior to H.B. 589, Plaintiffs seek to import the "retrogression" standard from Section 5 of the Voting Rights Act – now inapplicable to North Carolina – into Section 2 of the Voting Rights Act. As a matter of law, Section 2 does not go as far as Plaintiffs want to take it. Plaintiffs' incorrect reading of Section 2 would result in unprecedented remedies. As a matter of law, Plaintiffs rely upon legal theories regarding the Fourteenth Amendment and Section 2 of the Voting Rights Act that have been squarely rejected by the United States Supreme Court. For these reasons, Defendants are entitled to judgment on the pleadings in all three of the above-captioned cases.

A. STANDARD OF REVIEW

"Pursuant to Rule 12(c) of the Federal Rules of Civil Procedure, a party is entitled to a judgment on the pleadings when no genuine issues of material fact exist, and the case can be decided as a matter of law." *Davenport v. Robert H. Davenport, D.D.S., M.S., P.A.*, 146 F. Supp. 2d 770, 783 (M.D.N.C. 2001) (citing Fed. R. Civ. P. 12(c)). A motion for judgment on the pleadings is analyzed under the same standard as a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6). *Burbach Broad. Co. of Del. v. Elkins Radio Corp.*, 278 F.3d 401, 405-06 (4th Cir. 2002). Accordingly, this Court must assume that the facts alleged in the complaint are true and draw reasonable inferences in favor of the non-moving party. *See id.* at 406.

But the standard of review applicable to a motion to dismiss under Rule 12(b)(6) differs in several material ways from the standard applicable to a motion for judgment on the pleadings under Rule 12(c). One such difference is that when considering a motion for judgment on the pleadings, the court may consider allegations in the moving party's pleadings that are not controverted by the non-moving party's pleadings. *See e.g. John S. Clark Co., v. United Nat'l Ins. Co.*, 304 F. Supp. 2d 758, 763-64 (M.D.N.C. 2004). The court may also take judicial notice of additional facts where appropriate. *Armbruster Prods., Inc. v. Wilson*, Nos. 93-2427, 93-2428, 93-2429, at *2 (4th Cir., Sept. 12, 1994) (unpublished). Judicially noticed facts "must be (1) not subject to reasonable dispute and (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." *Id.* Judicially noticed facts that meet these criteria include facts that are matters of public record. *Id.*

B. HISTORY OF RELEVANT NORTH CAROLINA VOTING PROCEDURES

1. One-Stop Absentee Voting ("Early Voting")

Prior to 1973, North Carolina required all voters to cast their ballots on Election Day or to apply for an absentee ballot by mail. Mail-in absentee ballots were allowed only when a voter provided a statutorily acceptable excuse for being absent and unable to vote in person at the proper polling place on Election Day. *See* 1973 N.C. Sess. Laws 536. In 1973, the General Assembly provided an initial "early voting" accommodation to voters by allowing them to apply for excuse-only absentee ballots and to cast their ballots

in person at the board of elections office in the county where the voter resided. 1973 N.C. Sess. Laws 536.

Then, as now, under North Carolina law, a voter must have registered to vote at least 25 days before the day of the primary or general election in which the voter wishes to vote. *See* N.C. GEN. STAT. § 163-82.6(c) (2013). In 1977, the General Assembly first described the in-person excuse-only absentee voting authorized in 1973 as "one-stop" absentee voting because a voter could apply for an absentee ballot at the voter's county board of elections office and return the ballot to the county board office on the same day. 1977 N.C. Sess. Laws 469.

In 1999, the General Assembly expanded one-stop absentee voting. 1999 N.C. Sess. Laws 455. Voters were no longer required to provide a statutorily acceptable excuse for in-person absentee voting. The General Assembly also authorized county boards of election to open more than one site for one-stop voting. *Id.* Additional locations could not be opened unless the local county board of elections unanimously agreed to open more than one site. *Id.*[2]

In 2000, the General Assembly added a provision that allowed the North Carolina State Board of Elections ("SBOE") to adopt one-stop locations for individual counties when a county board could not reach a unanimous agreement. 2000 N.C. Sess. Laws 136. The General Assembly granted the SBOE authority to establish one-stop locations for a particular county based upon a majority (and not unanimous) vote by the members

[2] In 2001, the General Assembly removed the excuse requirement for mail-in absentee ballots. 2001 N.C. Sess. Laws 337. Since that time, voters have been able to apply for and receive a mail-in absentee ballot for any reason.

of the SBOE. *See id.* There are three members of every county board of elections. By law, not more than two members may belong to the same political party. N.C. GEN. STAT. § 163-30. Accordingly, two members of each county board belong to the same political party as the governor while the third member generally belongs to the opposing political party. Similarly, there are five members of the SBOE and, by law, no more than three members may belong to the same political party. N.C. GEN. STAT. § 163-19. As such, three members typically belong to the same political party as the governor while the other two members typically belong to the opposing political party. Therefore, prior to 2000, early voting plans required the unanimous, bi-partisan consent of all three county board members. After the voting changes made by the General Assembly during the 2000 session, the members of the majority party on the SBOE could unilaterally impose an early voting plan on a county.

In 2001, the General Assembly gave county boards the authority to designate a single "one-stop" location at a place other than the county board office. The General Assembly also reduced the number of days available for voters to participate in one-stop voting to 17 days. 2001 Gen. Sess. Laws 319.[3]

Congress has never enacted legislation that requires states to either establish a process for early voting or that specifies a time frame for early voting.

[3] Prior to the enactment of 2013 N.C. Sess. Laws 381, all counties had the authority to open early voting sites for 17 days but some counties decided to open early voting sites for less than 17 days. County boards were not required by statute to have all early voting sites within their county open for all 17 days.

2. Out-of-Precinct Voting

Under the Help America Vote Act of 2002 ("HAVA"), 42 U.S.C. §§ 15301-15545 (2012), Congress mandated that states must offer provisional ballots to Election Day voters who moved their residence within 30 days of an election but who failed to report their move to their county board of elections. However, Congress also decreed that any such ballot should be counted only under state law. *See* 42 U.S.C. § 15482(a)(4). In 2003, the General Assembly enacted legislation designed to bring North Carolina into compliance with HAVA. 2003 N.C. Sess. Laws 226.

After this change in 2003, two Republican candidates challenged a decision by the SBOE to count ballots cast by certain Election Day voters in Guilford County who voted in precincts where they did not reside. *James v. Bartlett*, 359 N.C. 260, 263, 607 S.E.2d 638, 640 (2005). The Republican candidates alleged that the counting of these ballots (or "out-of-precinct ballots") violated article VI, Section 2 of the North Carolina Constitution. *Id.* at 266, 607 S.E.2d at 642. The North Carolina Supreme Court avoided the state constitutional issue and ruled instead that the 2003 session law required that voters cast their ballots in the precinct in which they resided. *Id.* at 267, 607 S.E.2d at 642 (citing N.C. GEN. STAT. § 163-55 (2003)). The North Carolina Supreme Court ruled that the SBOE had incorrectly counted non-resident out-of-precinct ballots in these elections, remanding the case for further proceedings. *Id.* at 271, 607 S.E.2d at 645.

Following the decision in *James*, and before further proceedings could take place in the election protests that were the subject of that opinion, the General Assembly immediately enacted a "clarification" of the 2003 session law. This Act was entitled "An

Act to Restate and Reconfirm the Intent of the General Assembly with Regard to Provisional Voting in 2004; and to Seek the Recommendations of the State Board of Elections on Future Administration of Out-of-Precinct Provisional Voting." 2005 N.C. Sess. Laws 2. This Act stated that it had been the intent of the General Assembly that an out-of-precinct ballot cast by a voter in the county of his or her residence be counted for any office for which he or she was otherwise eligible to vote. *Id.* The effect of this session law was to legislatively over-rule the decision by the North Carolina Supreme Court in *James* that Election Day voters were required by statute to vote in the precinct where they resided. The Act also provided for retroactive application to the election challenges that had been the subject of the *James* decision.[4]

Congress has not enacted legislation requiring states to count all out-of-precinct ballots. To the contrary, the only legislation enacted by Congress regarding this issue primarily requires that out-of-precinct ballots be counted in accordance with state law.

3. Same-Day Registration

While Congress has not enacted any legislation requiring that states implement one-stop early voting or count out-of-precinct ballots, Congress has decreed that states must allow voters an opportunity to vote provided that they register within 30 days of an election or within any shorter period allowed by state law. *See* 42 U.S.C. § 1973 gg-6(a)(1) (2012). Until 2007, North Carolina required that all voters be registered to vote at

[4] There is no indication of any further judicial review of the election protests filed in *James* and the North Carolina Supreme Court has never ruled on whether Article VI, Section 2, of the North Carolina Constitution requires that Election Day voters cast their ballots in the precinct where they reside.

least 25 days before an election. *See* N.C. GEN. STAT. § 163-82.6(c). Federal law does not require that states allow voters who register less than 25 days before an election to be allowed to vote in that election.

In 2007, the General Assembly passed legislation allowing persons to register to vote and to vote at the same time during the period of time provided for one-stop voting. 2007 N.C. Sess. Laws 253. This process has been described as "same-day registration" ("SDR") and was available to voters only since the time of local elections in 2007 through the 2012 general election. There is no federal law requiring states to implement SDR for persons who register to vote for the first time during early voting.

4. "Pre-Registration" of 16- and 17-Year-Olds

Under the Twenty-Sixth Amendment to the United States Constitution, citizens who are 18 years of age or older have been granted the right to vote. U.S. CONST. amend. XXVI, § 1. Before 2010, all North Carolina citizens who turned 18 prior to an election were permitted to vote as a matter of state law. *See* N.C. GEN. STAT. § 163-55(a)(1); N.C. GEN. STAT. § 163-59. In 2009, the General Assembly enacted legislation that required county boards of election to allow 16- and 17-year-olds to submit papers by which they "pre-registered" even when they would not be 18 years old at the time of the next general election. 2009 N.C. Sess. Laws 541. This legislation, which became effective on January 1, 2010, also required the SBOE to conduct voter-registration drives and pre-registration drives at public high schools. Congress has not enacted legislation requiring states to "pre-register" 16- and 17-year-olds, or requiring boards of election to conduct registration drives at public schools.

5. House Bill 589

In 2013, the General Assembly modified or repealed some of the election laws that were enacted by prior General Assemblies from 2000 through 2009. House Bill 589 reduces the time during which county boards of election may decide to conduct one-stop absentee voting from 17 days to ten days. H.B. 589, pt. 25; N.C. GEN. STAT. § 163-227.2(b) (2013). H.B. 589 repeals SDR during one-stop voting. H.B. 589, pt. 16. This enactment means that unregistered voters will now need to register to vote 25 days before an election.

The legislation repeals out-of-precinct voting by voters who cast their ballots in a precinct other than the precinct of their residence. H.B. 589, pt. 49; N.C. GEN. STAT. § 163-55(a). This enactment means that, on Election Day, voters will need to cast their ballots in the precincts where they reside. H.B. 589 repeals "pre-registration" for 16- and 17-year-olds as well as any mandate that the SBOE conduct voter drives at public high schools. H.B. 589, pt. 12. Any person who becomes 18 prior to a general election will still be able to register to vote and can vote in the general election and the primary for that general election, as was the case prior to the enactment of 2009 N.C. Sess. Laws 541; N.C. GEN. STAT. § 163-82.4(d); N.C. GEN. STAT. § 163-59.

H.B. 589 also adds several new provisions to North Carolina's election laws. Starting in 2016, voters who present themselves to vote during one-stop absentee voting and on Election Day will need to present a photo identification card to poll workers. H.B. 589, pts. 2 & 6, sec. 6.2(2). H.B. 589 also allows each political party the right to appoint six additional poll observers for each county. These observers may observe

election activity in any precinct within the county, but no party may have more than three observers at a single precinct. H.B. 589, pt. 11; N.C. GEN. STAT. § 163-45(a). Finally, H.B. 589 removes from county boards any discretion to extend voting hours at a particular precinct within its county and instead places that discretion under the authority of the SBOE. H.B. 589, pt. 33; N.C. GEN. STAT. § 163-166.01.

Congress has not enacted legislation requiring or prohibiting photo identification for registered voters who vote during early voting or on Election Day, limiting or setting the number of poll observers that may be appointed within a county by a political party, or stating whether county boards of elections or a state board of elections should be given the authority to extend voting hours on Election Day.

These changes to the rules governing the time, place, or manner of holding elections do not violate any law governing the conduct of elections enacted by Congress. Plaintiffs make no such allegations in their complaints.

C. PLAINTIFFS' CLAIMS

There are four different sets of plaintiffs in these actions: (1) The United States of America, acting through the United States Department of Justice ("USDOJ") in *United States v. North Carolina*, No. 1:13-CV-861; (2) a group of organizational and individual plaintiffs in *League of Women Voters v. North Carolina*, No. 1:13-CV-660 ("LWV Plaintiffs"); (3) the North Carolina State Conference of the NAACP, several churches, and several individual plaintiffs in *N.C. State Conferences of the NAACP v. McCrory*, No. 1:13-CV-658 ("NAACP Plaintiffs"), and a group of college students and other individual plaintiffs who have intervened in these actions ("Intervening Plaintiffs").

Plaintiffs' claims may be categorized and summarized as follows:

1. Fourteenth Amendment to the United States Constitution–Unconstitutional Burden on the Right to Vote

The LWV Plaintiffs contend that the following provisions of H.B. 589 constitute an unconstitutional burden on their right to vote in violation of the Fourteenth Amendment: (1) the elimination of SDR and out-of-precinct voting; and (2) the reduction of the number of hours for one-stop absentee voting. (LWV Plaintiffs' Compl., First Claim for Relief, ¶¶ 75-76).

The Intervening Plaintiffs contend that the following provisions of H.B. 589 constitute an unconstitutional burden on their right to vote in violation of the Fourteenth Amendment: (1) the requirement that one-stop and Election Day voters present a photo identification card in 2016; (2) the elimination of SDR and out-of-precinct voting; (3) the reduction of the number of hours for one-stop absentee voting; (4) the transfer of discretion from county boards of election to the SBOE to determine whether polls should be kept open on Election Day for an additional hour; (5) the elimination of pre-registration for 16- and 17-year-olds; and (6) the alleged targeting of young voters by the Watauga County Board of Elections, the Pasquotank County Board of Elections, the Forsyth County Board of Elections, and the Chairman of the Pasquotank Republican Party. (Intervening Plaintiffs' Compl., ¶¶ 46-94, Count I, ¶¶ 95-101).

2. Alleged Intentional Discrimination against African Americans in Violation of the Fourteenth and Fifteenth Amendments to the United States Constitution.

The NAACP Plaintiffs allege that the following provisions of the H.B. 589 constitute intentional discrimination against African Americans in violation of the Fourteenth Amendment: (1) the requirement that one-stop and Election Day voters present a photo identification card beginning in 2016; (2) the elimination of SDR and out-of-precinct voting on election day and "pre-registration" of 16- and 17-year-olds; (3) the reduction of the number of days for which counties can decide to schedule one-stop absentee voting from 17 days to ten days; and (4) the provision that allows each political party to appoint for each county up to six additional poll observers in each county. (*See* NAACP Plaintiffs' Compl., Count II, ¶¶ 126-37).

The LWV Plaintiffs allege that the following provisions of H.B. 589 constitute intentional discrimination against African American voters in violation of the Fourteenth Amendment: (1) the reduction of the number of days for one-stop absentee voting; and (2) the elimination of SDR and out-of-precinct voting. (*See* LWV Plaintiffs' Compl., "Second Claim for Relief," ¶¶ 77-82).[5]

3. Violation of Section 2 of the Voting Rights Act.

The USDOJ contends that the following provisions of H.B. 589 violate Section 2 of the Voting Rights Act: (1) the requirement that one-stop and Election Day voters present a photo identification card in 2016; (2) the elimination of SDR and out-of-

[5] The NAACP Plaintiffs also allege a claim of intentional discrimination under the Fifteenth Amendment.

precinct voting; and (3) the reduction of the number of days for one-stop absentee voting. (*See* USDOJ Compl., "Cause of Action," ¶¶ 95-100).

The NAACP Plaintiffs contend that the following provisions of H.B. 589 violate Section 2 of the Voting Rights Act: (1) the requirements that one-stop and Election Day voters present a photo identification card in 2016; (2) the elimination SDR and out-of-precinct voting; (3) the reduction of the number of days for one-stop absentee voting; and (4) the provision that allows each political party to appoint up to six additional poll observers in each county. (*See* NAACP Plaintiffs' Compl., Count I, ¶¶ 109-25).

The LWV Plaintiffs contend that the following provisions of H.B. 589 violate Section 2 of the Voting Rights Act: (1) the elimination of SDR and out-of-precinct voting; and (2) the reduction of the number of hours for one-stop absentee voting. (*See* LWV Plaintiffs' Compl., "Third Claim for Relief," ¶¶ 38-97.)

4. Violation of the Twenty-Sixth Amendment to the United States Constitution.

The Intervening Plaintiffs contend that all of the provisions challenged by them deprive 18-year-olds of their right to vote under the Twenty-Sixth Amendment to the United States Constitution. (*See* Intervenor-Plaintiffs' Compl., "Count II," ¶¶ 102-06.)

II. ARGUMENT

A. SUMMARY OF ARGUMENT

As a matter of law, the provisions of H.B. 589 challenged by Plaintiffs as described *supra* do not in any way create unconstitutional burdens on the right to vote.[6] These provisions of H.B. 589 are lawful regulations regarding the time, manner, and place of elections and further rational state interests.

All of Plaintiffs' claims regarding discrimination in violation of the Fourteenth Amendment or Section 2 of the Voting Rights Act should be dismissed as a matter of law. Defendants are not aware of a single case where a federal court has enjoined a state from requiring that registered voters present a photo identification card during early voting or Election Day based on claims of racial discrimination under the Fourteenth Amendment or Section 2 of the Voting Rights Act where the state has delayed enforcement of the identification requirement for over two years. Nor are Defendants aware a federal court ordering a state to conduct early voting, SDR, out-of-precinct voting, or pre-registration of 16- and 17-year-olds pursuant to the Fourteenth Amendment or Section 2 of the VRA. The Fourteenth Amendment's Equal Protection Clause and Section 2 of the VRA only require states to provide equal opportunity to voters regardless of race. North Carolina does just that; the provisions of H.B. 589 apply equally to all voters regardless of race. Thus, all voters will need to obtain a photo identification card

[6] Intervening Plaintiffs' claims regarding the Watauga County Board of Elections, the Pasquotank Board of Elections, the Forsyth County Board of Elections, and the Chairman of the Pasquotank Republican Party involve persons and boards who are not parties to any of these cases. These claims should therefore be dismissed.

by 2016 if they decide to cast their vote during the early-voting period or on Election Day.

In the alternative, voters who do not choose to obtain a photo identification card may cast a no-excuse, mail-in absentee ballot. Starting in 2014, all voters will decide whether they want to participate in early voting during the ten-day one-stop period. All voters will need to be registered 25 days before the next election, and all 17-year-olds will be able to vote in any primary or second primary provided they turn 18 years of age on or before the date of the general election. These rules apply to all voters without regard to race, and they do not have a discriminatory effect.

Plaintiffs' discrimination arguments are based upon theories that have been rejected by the United States Supreme Court. Plaintiffs' main argument is that requiring photo identification violates the Equal Protection Clause or Section 2 of the Voting Rights Act because African Americans are disproportionately represented in the number of registered voters for whom the SBOE was unable to match against records maintained by the North Carolina Department of Transportation, Division of Motor Vehicles ("DMV") of persons who possess a North Carolina driver's license or identification card. Plaintiffs also contend that the reduction in the number of days that a county board may schedule early voting and the elimination of SDR, out-of-precinct voting, and pre-registration of 16- and 17-year-olds are racially discriminatory. Plaintiffs claim these actions are discriminatory based on their allegations that in the last two presidential elections African Americans took advantage of these procedures at a rate that was disproportionately higher than their percentage in the voting age population. These

arguments are based upon Plaintiffs' attempts to insert into the Fourteenth Amendment and Section 2 the "retrogression" standard applicable only to cases brought under Section 5 of the Voting Rights Act. In effect, what Plaintiffs seek is an order from this Court requiring that the State should be forced to adopt election practices that maximize the political influence of minority voters. All of these theories have been rejected by Congress and the United States Supreme Court.

Finally, Plaintiffs' claims must be dismissed because their complaints do not show that the General Assembly acted with a discriminatory motive. Plaintiffs have not alleged any direct evidence of intentional discrimination and they have failed to allege how this General Assembly departed from its rules or past practices during the process leading to the enactment of H.B. 589.

B. NONE OF THE POLICY DECISIONS MADE BY THE GENERAL ASSEMBLY IN H.B. 589 CONSTITUTE AN UNCONSTITUTIONAL BURDEN ON THE RIGHT TO VOTE

1. Reducing the time that a county board may schedule early voting and eliminating SDR, out-of-precinct voting, and pre-registration for 16- and 17-year-olds do not impose unconstitutional burdens on voters.

Voting is fundamentally significant "under our constitutional structure." *Ill. Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979). However, the right to vote in any manner is not "absolute." *Munro v. Socialist Workers Party*, 479 U.S. 189, 193 (1986). Under the Elections Clause, states retain "the power to regulate their own elections." *Sugarman v. Dougall*, 413 U.S. 634, 647 (1983). "Common sense, as well as constitutional law, compels the conclusion that government must play an active role in

structuring elections…" *Burdick v. Takushi*, 504 U.S. 428, 433 (1992). There "must be a substantial regulation of elections . . . if some sort of order, rather than chaos, is to accompany the democratic process." *Storer v. Brown*, 415 U.S. 724, 730 (1974).

Election laws will always impose some type of burden on a voter. *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983). Requiring "strict scrutiny" for every election regulation "would tie the hands of States seeking to assure that elections are operated equitably and efficiently." *Burdick*, 504 U.S. at 433. Instead, a "more flexible standard applies." *Id.* at 434. When the right to vote is subjected to "severe" restrictions, "the regulation must be 'narrowly drawn to advance a state interest of compelling importance.'" *Id.* (quoting *Norman v. Reed*, 502 U.S. 279, 289 (1992)). "But when a state election law provision imposes only 'reasonable, non-discriminatory restrictions' upon the First and Fourteenth Amendment rights of voters, 'the State's important regulatory interests are generally sufficient to justify' the restrictions." *Id.* (quoting *Anderson*, 460 U.S. at 788). Under this standard, none of the long-standing election law practices historically followed by the State of North Carolina and reinstated by H.B. 589 impose severe restrictions on the right to vote.

There is no requirement under the Constitution or any law passed by Congress that states allow "early voting" prior to Election Day or that states must allow new voters to register and vote at the same time during an early voting period. To the contrary, the Supreme Court has held that states may close registration at a reasonable time before an election. *Marston v. Lewis*, 410 U.S. 679, 681 (1973); *Burns v. Fortson*, 410 U.S. 686 (1973). This is because closing registration before an election serves an important state

interest "in accurate voter lists." *Burns*, 410 U.S. at 687 (quoting *Marston*, 410 U.S. at 681). Congress has also recognized the important state interest by legislation that permits a state to close its registration books up to 30 days before an election. *See* 42 U.S.C. § 1973aa—1(d)(2012) ("[E]ach state shall provide by law for the registration or other means of qualification of all duly qualified residents of such State, who apply, not later than thirty days immediately prior to any presidential election, for registration or qualification to vote…"); 42 U.S.C. § 1973gg-6(a)(1) ("In the administration of voter registration for Federal office, each state shall -- (1) ensure that any eligible applicant is registered to vote in an election… (c) . . . not later than the lesser of 30 days, or the period provided by State law, before the date of election…"). Thus, there can be no dispute that, under the Elections Clause and federal law, North Carolina has the legal authority to close registration up to 30 days before an election.

These same principles apply to early voting. No Supreme Court decision and no act of Congress requires any type of early voting. Early voting is an accommodation to voters, not a constitutional or fundamental right. North Carolina would act within its constitutional authority to eliminate all forms of "early voting" and require voters to cast excuse-only absentee ballots or vote only on Election Day, subject to Congressional mandates for overseas and military voters. *See* The Uniformed and Overseas Citizens Absentee Voting Act, 42 U.S.C. §§ 1973ff – 1973ff-7. Instead, North Carolina has elected to continue its early voting accommodation to voters through no-excuse absentee voting by mail and no-excuse, in-person, one-stop voting for a ten-day period.

Plaintiffs contend that reducing the days county boards can schedule early voting from 17 days to ten days places an unconstitutional burden on voters. Yet plaintiffs can offer no guidelines on what would constitute a legally sufficient number of days for "early voting" versus an illegal reduction. While 45 days of early voting – or even the 60 days North Carolina allows for no-excuse absentee voting – might be *preferable* to only 17 days, Plaintiffs cannot claim that North Carolina *must* expand the days for early voting over and above 17 days. Nor do Plaintiffs challenge the 2001 decision by the General Assembly to reduce the time available for county boards to schedule early voting to 17 days. The amount of time a state decides to provide voters for an early-voting accommodation is a policy decision left to state legislatures under the Elections Clause. Under H.B. 589, "any burden on voters' freedom of choice and association is borne only by those who fail" to apply for and cast a no-excuse, mail-in absentee ballot or who fail to appear and vote during the ten-day period of one-stop voting that now may be scheduled by each county board of elections. *Burdick*, 504 U.S. at 436-37. In short, under H.B 589, voters still retain many options that allow them to vote at times other than on Election Day under the laws that apply to all voters equally regardless of race or any other personal characteristic.

These same principles also apply to the requirement that voters cast their ballots in the precinct where the voter resides. Congress has agreed that voters who cast out-of-precinct ballots shall have their votes counted in accordance with state law. 42 U.S.C. § 15482(a)(4). Prior to 2005, state law precluded voters from voting in a precinct where they have never resided. *See James*, 359 N.C. at 267, 607 S.E.2d at 642. This principle

did not violate federal law and it remains undecided whether it might be required by the North Carolina Constitution. Requiring voters to cast their ballots in the precinct where they reside promotes sound election administration and avoids disputes over the offices for which an out-of-precinct voter is eligible to vote.[7]

Furthermore, Plaintiffs fail to explain why the principles underlying the 2005 session law should not apply to out-of-precinct voting anywhere in North Carolina as opposed to only within a voter's county of residence. For example, logically extending Plaintiffs' legal theory, why shouldn't a resident of Guilford County be allowed to vote in Wake County on Election Day and at least have his or her ballot counted for all statewide offices since the voter would be eligible to vote in those contests? If there is no rational reason for requiring voters to vote in the precinct of their residence, there can be no rational reason for making voters vote in the county of their residence. Clearly, such an argument would be just as baseless as Plaintiffs' contentions that the Fourteenth Amendment bars a state from requiring Election Day voters to vote in the precinct of their residence.

Just like the number of days established for early voting and the provisions allowing for SDR during early voting, the decision by the 2007 General Assembly to allow voters within a county to vote in a precinct other than the one in which they resided was an accommodation to voters, albeit one with a substantial administrative burden on election officials; it was not required by the United States Constitution. Requiring all

[7] This restriction does not apply to voters on Election Day who have not reported a change of their residence outside of the 30 day period prior to a general election. These voters will continue to be allowed to vote using a provisional ballot.

Election Day voters to vote in the precinct of their residence does not create a "severe burden" on the right to vote.

Finally, these same principles apply to pre-registration of 16- and 17-year-olds. This, too, was an accommodation provided by a prior General Assembly. While opinions may differ as to whether it has any merit as public policy, it is not required by either the Fourteenth Amendment or the Twenty-Sixth Amendment, so long as the State retains voting regulations that allow new voters to register and vote in time for any general election that is held after they turn 18 years old. Nothing in H.B. 589 can be construed as denying voters who will be 18 years of age at the time of the next General Election from registering to vote and from voting in that election.[8]

2. The requirement under H.B. 589 that voters possess an approved voter identification card by the 2016 general election does not impose a severe burden on voters.

In *Crawford v. Marion Cnty. Elections Bd.*, 533 U.S. 181 (2008), the Supreme Court rejected a Fourteenth Amendment challenge to Indiana's voter identification requirement. In 2005, Indiana enacted a statute that required voters to present a photo identification card if they vote "in-person." *Id.* at 185. The provision does not apply to absentee ballots submitted by mail. *Id.* Indiana requires that its photo identification card meet the following criteria: (1) the document shows the name of the individual to whom the document was issued and the name conforms to the name in the individual's voter

[8] The claim by the Intervening Plaintiffs that a state violates the Fourteenth Amendment by granting the SBOE the sole authority to extend voting hours in a particular county is frivolous. The same is true of Plaintiffs' claims regarding H.B. 589 allowing each political party to appoint additional poll observers.

registration record; (2) the document shows a photograph of the individual to whom the document was issued; (3) the document includes an expiration date and is not expired or expired after the date of the most recent general election; and (4) the document was issued by the United States or the State of Indiana. *Id.* at 198 n.16.

The Indiana statute requires that its Bureau of Motor Vehicles provide an acceptable voter identification card for free. *Id.* at 186 n.4. In order to obtain a photo identification from the Indiana Bureau of Motor Vehicles, a person is required to present at least one "primary" document, which could be a birth certificate, certificate of naturalization, U.S. Veterans photo identification, U.S. Military photo identification, or a U.S. passport. *Id.* at 198 n.17. The fee charged by Indiana counties for obtaining a birth certificate ranged from $3.00 to $12.00. *Id.*[9] Expert testimony presented in *Marion County* indicated that between 42,000 and 989,000 voters in Indiana might not possess a driver's license or other acceptable form of photo identification. *Id.* at 187-88.

In sustaining the constitutionality of the Indiana statute, the Court held that "even-handed restrictions that protect the integrity and reliability of the electoral process itself" are not "invidious" regulations subject to strict scrutiny. *Id.* at 189-90. Instead, in reviewing non-invidious election laws, a court is required to "weigh the asserted injury to

[9] Indiana also provided an accommodation to indigents and voters with a religious objection to having a photo identification card. For every election, individuals from either group were required to cast a provisional ballot which would then be counted only if the indigent or religious objector executed an "appropriate affidavit" before each county's circuit court clerk "within 10 days following the election." *Crawford*, 553 U.S. at 186.

the right to vote against the 'precise interests put forward by the state as justification for the burden imposed by its rule.'" *Id.* at 190 (quoting *Burdick*, 504 U.S. at 434).

The Court first observed that the National Voter Registration Act ("NVRA"), 42 U.S.C. § 1973gg *et seq*. (2012), has had the effect of inflating the lists of registered voters. *Crawford*, 553 U.S. at 192. This inflation is caused in part by a requirement under the NVRA that states allow persons to register to vote at the time they apply for a state-issued driver's license. *Id.* The Court also noted that HAVA, specifically 42 U.S.C. § 15483(a), requires all states to maintain a state-wide list of registered voters that includes each voter's driver's license number, the last four digits of the applicant's social security number, or that the state assign a special identification number to each voter. *Id.* HAVA also provided that voters voting in person for the first time must provide written identification such as a "valid photo identification" or another written form of identification such as a bank statement or paycheck. Similar documentation is required by HAVA for a first-time voter who votes by mail. *Id.* at 193.

Based on the foregoing, the Court observed that both HAVA and the NVRA demonstrate Congressional approval for the principle "that photo identification is one effective method of establishing a voter's qualification to vote." *Id.* This "conclusion" of Congress is also supported by the Commission on Federal Election Reform, chaired by former President Jimmy Carter and former Secretary of State James A. Baker, III, which noted:

> A good registration list will ensure that citizens are only registered in one place, but election officials still need to make sure that the

> person arriving at the polling site is the same one that is named in the registration book . . . some form of identification is needed.
>
> There is no evidence of extensive fraud in U.S. elections or of multiple voting, but both occur and it could affect the outcome of a close election. The electoral system cannot inspire public confidence if no safeguards exist to deter or detect fraud or to confirm the identity of voters. Photo identification cards are needed to board a plane, enter federal buildings, and cash a check. Voting is equally important.

Id. at 193-9 (quoting Building Confidence in U.S. Elections §§ 2, 5 (Sept. 2005), app. 136-37).

Based upon these principles, the United States Supreme Court found that the State of Indiana had rational and legitimate reasons to adopt its photo identification requirement, even in the absence of any evidence of voter fraud "actually occurring in Indiana at any time in its history." *Id.* at 195. The Court noted that photo identification advances the "interest in orderly administration and accurate record keeping and provides a sufficient justification for carefully identifying all voters participating in the election process." *Id.* at 196. The Court also found that Indiana's photo identification requirement had the general effect of protecting "public confidence 'in the integrity and legitimacy of representative government.'" *Id.* at 197. In contrast to these legitimate public interests, the *Crawford* Court held that any burdens on voters resulting from Indiana's photo identification requirement were "neither so serious nor so frequent as to raise any question about the constitutionality" of the statute. *Id.*

There are no material differences between the important public interests served by Indiana's identification requirement and North Carolina's. Moreover, North Carolina's

photo identification requirements are less burdensome than the requirements under the Indiana statute. Like the Indiana statute, North Carolina's photo identification requirement applies only to persons who vote in person during one-stop voting or on Election Day. H.B. 589, sec. 2.1.; N.C. GEN. STAT. § 163-166.13(a). Photo identification is not required for voters who cast their ballots through mail-in absentee procedures. Other exemptions include voters voting curbside, voters with a sincerely held religious objection to being photographed, and registered voters who are a victim of a natural disaster. H.B. 589, sec. 2.1; N.C. GEN STAT. §§ 163-166.13(a)(1)-(3). Voters who vote in person but who forget to bring their photo identification may cast a provisional ballot which will be counted provided the voter presents a valid photo identification card to the county board of elections no later than noon of the day prior to the county canvass. H.B. 589, sec. 2.1; N.C. GEN. STAT. §§ 163-13(c), § 163-1821A(a)-(c).

Except where otherwise provided, "photo identification" under the North Carolina statute must include a photograph of the registered voter and a printed expiration date that is unexpired (except that any voter having attained the age of 70 shall be permitted to present an expired document provided it was unexpired on the voter's 70th birthday). H.B. 589, sec. 2.1; N.C. GEN. STAT. § 163-166.13(e). The types of identification cards that are acceptable under the North Carolina statute include:

(1) A North Carolina driver's license;
(2) A special identification card for non-operators issued by the DMV under N.C. GEN. STAT. § 20-37.7;
(3) A United States passport;
(4) A United States military identification care;

(5) A Veterans Identification Card issued by the United States Department of Veterans Affairs;
(6) A tribal enrollment card issued by a federally recognized tribe;
(7) A tribal enrollment card issued by a tribe recognized by North Carolina; and
(8) A driver's license by another state, the District of Columbia, or territory or commonwealth but only if the voter's registration was within 50 days of the election.

H.B. 589, sec. 2.1; N.C. GEN. STAT. § 166.13(e) 1-8.

There are important distinctions between the Indiana and North Carolina statutes that lessen the burdens on North Carolina voters as compared to Indiana voters. First, North Carolina decided that it would delay enforcement of the photo identification requirement until 2016. H.B. 589, sec. 6.2(2). During the time period between the enactment of the photo identification requirement and its effective date, H.B. 589 requires that the SBOE and county boards of election engage in extensive educational and publicity programs to advise voters that photo identification be required starting in 2016. H.B. 589, sec. 5.2. In contrast, the Indiana statute did not defer implementation of its photo identification requirement for almost two and a half years nor did it mandate the extensive educational effort required by H.B. 589.

The list of photo identification documents required under the Indiana statute is similar to the list of identification documents permitted by H.B. 589, though the Indiana statute also allows any photo identification issued by state government. This slight difference between the two statutes is more than mitigated by the requirements for mail-in absentee ballots in both states. Voters in Indiana may cast mail-in absentee ballots only if they satisfy one of the categories that provide the voter with an excuse to vote

absentee. *See* Ind. Code §§ 3-11-4-18 and 3-11-10-24. In contrast, all voters in North Carolina may cast no-excuse absentee mail-in ballots. Thus, *all* voters in North Carolina have the option of voting a mail-in absentee ballot regardless of whether they have obtained an authorized photo identification card while only "excused" voters have that option in Indiana.

Finally, like Indiana, North Carolina does not require that voters pay a fee to obtain a non-operator's special identification card from the DMV. H.B. 589, sec. 3.1; N.C. GEN. STAT. § 20-37.7(d)(5). Like Indiana, applicants may use a birth certificate or their marriage license as proof of identity to obtain a non-operator's special identification card. Voters in Indiana are required to pay between $3.00 and $12.00 to obtain a birth certificate. In contrast, North Carolina voters may obtain a North Carolina birth certificate or marriage license without paying a fee. H.B. 589, sec. 3.2; N.C. GEN. STAT. § 130A-93.1.

The Supreme Court's decision in *Crawford* is controlling and requires that defendants receive a judgment on the pleadings dismissing plaintiffs' Fourteenth Amendment challenge to the State photo identification law.

C. PLAINTIFFS' DISCRIMINATION CLAIMS MUST BE DISMISSED BECAUSE THE POLICY DECISIONS MADE BY THE GENERAL ASSEMBLY IN H.B. 589 DO NOT HAVE A DISCRIMINATORY EFFECT BASED UPON RACE.

1. Plaintiffs must prove that H.B. 589 will have a discriminatory effect under the Fourteenth Amendment or Section 2 of the Voting Rights Act.

Traditionally, claims for "vote dilution" have applied only to challenges to redistricting plans. *See White v. Register*, 412 U.S. 755, 759 (1973). In *Mobile v. Bolden*, 446 U.S. 55 (1980), the Court clarified that the burden of proof for vote dilution claims under the Fourteenth and Fifteenth Amendments or Section 2 of the Voting Rights Act were identical. Under this standard, plaintiffs were required to show that a redistricting plan was purposefully discriminatory and had a discriminatory effect. *Id.* at 60-70.

Following the decision in *Bolden*, Congress amended Section 2 to provide that a violation in a vote dilution case could be established upon a showing of discriminatory effect. *Thornburg v. Gingles*, 478 U.S. 30, 35 (1986). As amended, Section 2 provides:

> (a) No voting qualification or prerequisite to voting or standard or practice or procedure shall be imposed or applied by any state or political subdivision in a manner which results in a denial or abridgment of the right of any citizen of the United States to vote on account of race or color or in contravention of the guarantees. . . as provided in subsection (b).
>
> (b) A violation of subsection (a) is established if, based on the totality of the circumstances, it is shown that the political process leading to nomination or election in the state or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) 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. The

> extent to which members of a protected class have been elected to office in the state or political subdivision is one circumstance which may be considered: provided that nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

42 U.S.C. § 1973 (2012).

The purpose of the 1982 amendments was to restore an analytical framework for the dilution cases derived from *White* and *Zimmerman v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973) (en banc), *aff'd sub nom. East Carroll Parish Sch. Bd. v. Marshall*, 424 U.S. 636 (1976) (per curiam). The Senate Judiciary Committee majority report accompanying the 1982 amendments listed the type of factors that might be considered under the totality of the circumstances. *Gingles*, 478 U.S. at 36-37.[10] However, before turning to the totality of the circumstances, plaintiffs in a vote dilution case must first prove three "preconditions."

These preconditions require that (1) the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a

[10] Factors under the totality of the circumstances include: (1) the extent of any history of official discrimination; (2) the extent voting in elections is racially polarized; (3) the extent the State has used large election districts, majority vote requirements, single-shot provisions or other voting practices that enhance the opportunity for discrimination; (4) candidate slating; (5) the extent minorities bear the effect of discrimination in education, employment and health, which hinder their ability to participate in the political process; (6) whether campaigns have been characterized by overt or subtle racial appeals; (7) the extent to which members of the minority group have been elected to office. Additional factors that in "some cases" have probative value are whether "there is a significant lack of responsiveness on the part of elected officials to the particular needs of members of a minority group" and "whether the policy underlying the voting qualification, prerequisite to voting or standard practice or procedure is tenuous." *Gingles*, 478 U.S. at 36-37 (quoting S. Rep. 97-417, at 28-29(1982), *reprinted in* 1982, U.S.C.C.A.N. 177, U.S. Code Cong. and Admin. News 1982, pp. 206-07).

majority in a single-member district; (2) the minority group must show that it is politically cohesive; and (3) the minority group must be able to demonstrate that the white majority votes sufficiently in a bloc to enable it in the absence of special circumstances to defeat the minority's preferred candidate of choice. *Id.* at 50-51.[11] Absent proof of these preconditions, the "totality of the circumstances" as explained in the Senate Report is irrelevant.

Plaintiffs' claims do not involve allegations that a redistricting plan has diluted the voting strength of minorities. Therefore, this is not a vote dilution case. Instead, at best, Plaintiffs' claims are that enforcement of H.B. 589 "results in the denial of the right to vote on account of race." *Burton v. City of Belle Glade*, 178 F.3d 1175, 1197-98 (11th Cir. 1999); *Johnson v. Gov. of Fla*. 405 F.3d 1214, 1227 n.26 (11th Cir. 2005). This is an important distinction. In amending Section 2 in 1982, Congress was "focused on reversing" the *Bolden* decision and "clarifying the standard for vote dilution claims." *Simmons v. Galvin*, 575 F.3d 24, 40 (1st Cir. 2009). The Senate Report that accompanied the 1982 amendments, "details many discriminatory techniques used by certain jurisdictions." The report makes no mention of photo identification requirements, reduction of early voting, elimination of SDR, or requiring voters to vote in their own precincts as "discriminatory techniques." Defendants believe that an examination of state laws would show that the voting practices reinstated by H.B. 589 were standard throughout the country in 1982. There is no indication that Congress has intended to give

[11] The terms "racial bloc voting" and "racially polarized voting" are "interchangeable." *Gingles*, 478 U.S. at 52 n.18.

federal courts the authority to bar photo identification or mandate early voting, SDR, out-of-precinct voting, or pre-registration of 16- and 17-year-olds.

In any event, it is far from clear that allegations of a disparate impact alone is sufficient to state a vote-denial claim. *Simmons*, 575 F.3d at 35 n.10; *Johnson*, 405 F.3d at 1229 n.30. The Eleventh Circuit has ruled that plaintiffs must establish something more than "disproportionate impact" to prove a discriminatory effect. *Johnson*, 405 F.3d at 1228. Finally, it is also far from clear whether the *Gingles* standards for vote dilution claims have application to vote denial claims. *Simmons*, 575 F.3d at 42 n.24.

2. Plaintiffs cannot prove an action by the State which causes a discriminatory effect.

In redistricting cases, vote dilution occurs when a cohesive minority group that would constitute a majority of the voters in a reasonably compact district is "cracked" into different districts so that racially polarized voting prevents minority voters from electing their candidate of choice. *Gingles*, 478 U.S. at 46 n.11, 50-51. The voting strength of a minority group may also be diluted when they are packed into one or two districts but numerous enough to make two or three districts. *Voinovich v. Quilter*, 507 U.S. 146, 153-54 (1993). In either case, there is state action–the imposition of racially discriminatory districts–that prevents the minority group from having an equal opportunity to participate in the electoral process.

This same principle–state action that prevents a minority group from having an opportunity for equal participation–applies in annexation cases. *See Gomillion v. Lightfoot*, 364 U.S. 339 (1960). African Americans removed from the city's boundaries

by a city ordinance have been the victim of discriminatory state action that has the effect of preventing an equal opportunity to participate as citizens of a city. *See id.* Similarly, minorities could be the victim of discriminatory state action where a city refuses to change its zoning ordinance because of race. *See Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977). Like discriminatory redistricting plans, discriminatory actions by government in annexation or zoning decisions operate to deprive a minority group of exercising its right to an equal opportunity to participate in the electoral process.

Minority residents of North Carolina have an equal opportunity—like all other voters—to register 25 days before the election, participate in the ten-day one-stop voting period, vote in their own precinct, and take the steps required of all voters to obtain acceptable photo identification. Government action does not deprive them in any way of equal opportunity to participate under the same rules applicable to all residents of North Carolina. Likewise, those who will be 18 years of age before a general election have the ability to register to vote in that election, and in any primary for that election. N.C. GEN. STAT. § 163-59. These election rules apply to all voters equally; any voter's failure to comply with these rules is not due to unequal application of the rules through state action.

In this case, there can be no discriminatory effect on minority voters because of state action that applies equally to all voters regardless of race. The challenged laws, then, stand in contrast to the kinds of governmental action courts have held might deny minorities equal opportunity, such as redistricting, annexation, or zoning. In each of these instances, an action by the state prevents members of a minority from enjoying the

same opportunities enjoyed by "other members of the electorate." 42 U.S.C. § 1973(b) (2012).

Plaintiffs argue that they are deprived of equal opportunity primarily because of one factor under the totality of the circumstances test under *Gingles*,—i.e., that African Americans continue, as a result of past discrimination, to lag behind in the areas of health, education, and poverty. (*See, e.g.*, NAACP Plaintiffs' Second Am. Compl., ¶¶ 85, 122). Assuming the *Gingles* factors apply at all to a vote denial claim—Plaintiffs are not properly applying the *Gingles* test. In vote dilution claims, the totality of the circumstances is not relevant unless there is evidence of an exclusory practice—namely the placement of minority voters in a district where they are deprived of an equal opportunity to elect their candidates of choice. Absent proof of the *Gingles* preconditions, there is no claim for vote dilution even assuming plaintiffs can offer proof of one or more of the "Senate factors" that constitute the totality of the circumstances.

All of Plaintiffs' claims therefore fail because nothing in H.B. 589 deprives minorities of an equal opportunity to register or to vote as compared to the rest of the electorate.

3. Plaintiffs' legal theories regarding the Fourteenth Amendment and Section 2 have been rejected by the Supreme Court and Congress.

As already shown, it is far from clear that proof of a disparate impact is sufficient to prove a case of vote denial under the Fourteenth Amendment or Section 2 of the VRA. Regardless, Plaintiffs' complaints do not allege a disparate impact because the complaints do not explain how or why minority participation in registration or voting will decline

disproportionately below white participation because of government action as reflected by H.B. 589. Instead, Plaintiffs rely solely upon allegations that African Americans participated in a disproportionately higher percentage in early voting, SDR, and out-of-precinct voting in some previous elections, and that registered voters who were not matched by the SBOE with DMV records were disproportionately African American. These allegations are based upon legal theories that do not apply to the Fourteenth Amendment or to Section 2.

First, plaintiffs are attempting to convince this Court to read into Section 2 of the Voting Rights Act the same legal standards that applied to Section 5 of the Voting Rights Act. Under Section 5, covered jurisdictions were required to submit for preclearance any change in a voting practice or procedure. *Shelby County v. Holder*, 133 S.Ct. 2612, 2618 (2013). Jurisdictions could seek preclearance administratively through the USDOJ or by filing an action in the United States District Court for the District of Columbia. 42 U.S.C. § 1973c. In a Section 5 proceeding, covered jurisdictions had the burden of showing that an election change had neither the "purpose" nor the "effect" of "diminishing the ability of citizens of the United States on account of race . . . to elect their preferred candidate of choice." *Id*; *see also Georgia v. United States*, 411 U.S. 526, 530 (1973). Voting changes could not be precleared unless the covered jurisdiction proved that the changes were not "retrogressive." *Beer v. United States*, 425 U.S. 130 (1976).

Prior to the decision in *Shelby County*, North Carolina would have been required to submit H.B. 589 for preclearance because 40 counties in North Carolina were covered

by Section 5. *Shaw v. Reno*, 509 U.S. 630, 634 (1993). While USDOJ or Plaintiffs may have argued *in a Section 5 proceeding* that H.B. 589 was retrogressive,[12] under the *Shelby County* decision, Section 5 of the Voting Rights Act is no longer enforceable because of the unconstitutional formula for determining covered jurisdictions under Section 4. 133 S.Ct. at 2631.

Sections 5 and 2 of the Voting Rights Act serve different purposes. *Holder v. Hall*, 512 U.S. 874, 883 (1994). It is improper to read into either statute the legal standards applicable under the other statute. *Id.*; *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 477-80 (1997). In a Section 2 case, the burden of proof is on the plaintiffs, not the covered jurisdiction. *Brown v. Detzner*, 895 F. Supp. 2d 1236, 1250-51 (M.D. Fla. 2012) (denying plaintiffs' motion for a preliminary injunction pursuant to claims that Florida's decision to reduce the number of days for early voting violated the Fourteenth Amendment and Section 2). While disproportionately high participation rates in the practices eliminated by H.B. 589 may have been probative evidence in a Section 5 proceeding, it has no relevance in this case absent proof that an action by State government deprives minority voters of an equal opportunity to register and vote. *Bartlett v. Strickland*, 556 U.S. 1, 14 (2009) (stating that Section 2 requires proof that minorities have "less opportunity than other members of the electorate to … elect representatives of their choice" because of government action) (quoting 42 U.S.C. § 1973(b)).

[12] Defendants, of course, do not concede the validity of any such argument.

Plaintiffs also appear to allege that the Fourteenth Amendment and Section 2 of the VRA are both violated if the State fails to retain practices that provide proportional or higher than proportional participation rates by African Americans. This same argument, in the context of redistricting litigation, has been expressly rejected by the Supreme Court. *See League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 445 (2006) ("*LULAC*") (requiring states to draw districts giving minorities political influence "would unnecessarily infuse race into virtually every redistricting, raising serious constitutional questions"); *Johnson v. De Grandy*, 512 U.S. 997, 1014-16 (requiring states to enact districting plans that ensure proportional representation or plans that create the maximum number of minority districts in excess of proportionality "causes" constitutional challenges that "are not to be courted"). Further, Congress itself prohibited Section 2 from being interpreted in a manner that protected or guaranteed "proportional representation" in any voting practice or procedure. *See De Grandy*, 512 U.S. at 1014 n.11; 42 U.S.C. § 1973. Plaintiffs have no grounds for seeking an order from this Court mandating that the State of North Carolina adopt voting practices or rules to ensure proportional representation or minority participation in excess of proportionality.

Finally, the practical effect of Plaintiffs' allegations and claims appear to be a claim that the Court, pursuant to Section 2 or the Fourteenth Amendment, should order the State to adopt voting practices any time they hypothesize an alternative voting practice that maximizes minority participation. This argument has been squarely rejected by the Supreme Court. *See LULAC*, 548 U.S. at 445; *Bartlett*, 556 U.S. at 23 (holding

that states are not required to enact districts that maximize the political influence of African Americans).

The provisions of H.B. 589 do not deny members of minority groups an equal opportunity to register or to vote. It is within the ability of every minority voter to register and then to vote on the same terms and conditions as all other voters. Therefore, even assuming Plaintiffs' complaints raise issues regarding the General Assembly's alleged discriminatory intent, Plaintiffs have failed to allege a discriminatory effect necessary to state a claim under the Fourteenth Amendment or under Section 2 of the VRA.

D. PLAINTIFFS' FOURTEENTH AND FIFTEENTH AMENDMENT CLAIMS MUST BE DISMISSED BECAUSE PLAINTIFFS HAVE FAILED TO ALLEGE SUFFICIENT FACTS SHOWING DISCRIMINATORY INTENT.

There are no allegations of direct evidence of discrimination by the North Carolina General Assembly. *See e.g. Busbee v. Smith*, 549 F. Supp. 494, 500-01 (D.D.C. 1982), *aff'd*, 459 U.S. 166 (1983). Plaintiffs therefore must attempt to prove discriminatory intent pursuant to the standards established in *Arlington Heights*. Plaintiffs rely on three categories of allegations in their attempt to allege discriminatory intent by the General Assembly. These allegations are insufficient as a matter of law.

First, plaintiffs allege discriminatory intent based on evidence before the General Assembly showing that African Americans disproportionately participated in early voting, SDR, and out-of-precinct voting. (*See e.g.* USDOJ Compl. ¶¶ 29, 30, 37, 42.) Plaintiffs also allege that the General Assembly was aware of a report by the SBOE

showing that African Americans were disproportionately represented in the group of voters for whom matches could not be made by comparing the State's list of registered voters against DMV records. (*Id.* ¶¶ 49, 50.) Neither of these claims suffices to show any discriminatory intent. Because of the requirements of the Fourteenth Amendment and the Voting Rights Act, any change in election law is made with a consciousness of race. *See Bush v. Vera*, 517 U.S. 952, 958 (1996). In redistricting cases, the United States Supreme Court has held that a plaintiff's burden of proving intentional discrimination is "demanding." *Easley v. Cromartie*, 532 U.S. 234, 241 (2000). The fact that evidence regarding African American participation rates in early voting and SDR, and a report of unmatched voters produced by the SBOE was submitted to the General Assembly cannot, by itself, raise an inference of intentional discrimination. *Bush*, 517 U.S. at 958. Indeed, it can just as easily raise an inference of intent to *avoid* discrimination.

Plaintiffs also rely on allegations that the General Assembly waited to enact H.B. 589 until receiving notice of the decision in *Shelby County*. Assuming this is true, it is not evidence of intentional discrimination. As already shown, the burdens on a covered jurisdiction to obtain preclearance under Section 5 are far different from the standards applicable to claims under the Fourteenth Amendment or Section 2 of the VRA. Waiting on a decision by the United States Supreme Court which was obviously anticipated by lawyers and court observers of all types and which would have the effect of clarifying the states' obligations under the Voting Rights Act was prudent, not indicative of discriminatory intent.

Finally, Plaintiffs allege that intentional discrimination may be inferred because of the legislative process followed by the General Assembly. (*See*, *e.g.*, LWV Compl., ¶¶ 63-74). While Plaintiffs may dislike or misunderstand the legislative process that resulted in the enactment of H.B. 589, there are no allegations in the complaints explaining how the North Carolina Senate or North Carolina House of Representatives violated their procedural rules or otherwise departed from standard legislative practices routinely followed by either body.

III. CONCLUSION

For the foregoing reasons, Defendants are entitled to judgment on the pleadings pursuant to Rule 12(c) of the Federal Rules of Civil Procedure.

This the 19th day of May, 2014.

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CERTIFICATE OF SERVICE

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

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