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 OPPOSITION TO PLAINTIFFS' MOTIONS FOR PRELIMINARY INJUNCTION AND TO THE UNITED STATES' MOTION FOR APPOINTMENT OF FEDERAL OBSERVERS

STATEMENT OF THE NATURE OF THE CASE

This case is about the authority of the State of North Carolina to enact neutral voting practices that provide an equal opportunity to all voters. As stated by the United States Supreme Court, "the Framers of the Constitution intended the States to keep for themselves, as provided in the Tenth Amendment, the power to regulate elections." *Gregory* v. *Ashcroft*, 501 U.S. 452, 461–62 (1991) (quoting *Sugarman v. Dougall*, 413 U.S. 634, 647 (1973) (internal quotation marks omitted)). "[T]he Federal Government retains significant control over federal elections." *Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2623 (2013). "For instance, the Constitution authorizes Congress to establish the time and manner for electing Senators and Representatives." *Id.* (citing U.S. Const. art. I, §4, cl. 1, and *Arizona v. Inter Tribal Council of Ariz., Inc.*, 133 S. Ct. 2247 (2013)). However, "[s]tates have 'broad powers to determine the conditions under which the right of suffrage may be exercised.'" *Id.* (quoting *Carrington v. Rash*, 380 U.S. 89, 91 (1965) (internal quotation marks omitted)).

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. *Inter Tribal Council of Ariz., Inc.*, 133 S. Ct. at 2253. This authority includes "regulations relating to 'registration.'" *Id.* (quoting *Smiley v. Holm*, 285 U.S. 355, 366 (1932)). The State of North Carolina has exercised its "broad powers to

determine the conditions under which the right of suffrage may be exercised" by enacting laws that return the State to election rules that have been in place until roughly the last decade.

The United States Constitution and the Voting Rights Act ("VRA") require equality of *opportunity* to vote. *See Bartlett v. Strickland*, 556 U.S. 1, 35-36 (2009). The laws challenged by plaintiffs in these actions do not deny any voter an equal opportunity to vote. Plaintiffs fail to demonstrate how they or any voters 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 electing their candidate of choice, or registering, or voting on the same terms and conditions as other members of the electorate. Instead, each 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.

The challenged legislation concerns election practices established in 2013 by 2013 N.C. Sess. Laws 381,[1] which repealed certain practices established by prior General Assemblies, primarily within the last ten years or so. Congress has never mandated that

[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.

states adopt the practices repealed by the General Assembly in 2013. Nor has any court 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 VRA.

Plaintiffs claim that the challenged statutes will disproportionately burden their right to vote and the right to vote of all minority voters. Specifically, Plaintiffs claim that African American voters have relied disproportionately on same-day registration, out-of-precinct provisional balloting and on voting during the first seven days of the former 17-day one-stop absentee voting period. Based on these claims, Plaintiffs predict that participation of minority voters will be suppressed, and they argue that this Court must issue a preliminary injunction to avoid this result. Plaintiffs offer other predictions as well, including that minority and young voters will have a harder time registering to vote and that the shortened one-stop absentee voting period will result in a heavier turnout, and consequently longer wait times, on Election Day. Plaintiffs, however, have failed to support these claims with evidence of a statistically significant causal relationship between the participation of minority voters and the practices repealed by the challenged provisions of H.B. 589.

If Plaintiffs were correct about the number of minority voters who will be disproportionately affected by the challenged provisions of H.B. 589, then the results of the 2014 primary election, held on 6 May 2014, would reflect lower participation by minority voters and longer lines on Election Day. Each of the provisions challenged by Plaintiffs, with the exception of the photo-identification requirement, was in effect for that primary election, yet not one of the predictions made by Plaintiffs occurred. To the

contrary, when the experience of the 2014 primary is compared to the most recent comparable election—the 2010 primary—it becomes clear that total voter turnout and minority voter turnout in the 2014 primary was *higher* than in the 2010 primary, that *more* voters overall and more African American voters utilized one-stop absentee voting, and that there were no significant reports of long lines. (*See* Attachment 1, Declaration of Kim Westbrook Strach, Executive Director of the North Carolina State Board of Elections ("SBOE"), ¶¶ 35, 61-67.)

Rather than presenting evidence that actually shows a causal connection between the election practices repealed by H.B. 589 and increased minority- and young-voter participation, or any causal connection between the practices put in place by H.B. 589 and the harms Plaintiffs predict, Plaintiffs rely on unsupported assumptions that a connection exists. They offer theoretical speculation by academics who predict a dramatic decline in participation by African American voters as a result of the challenged legislation. In their speculations, Plaintiffs have relied almost completely on African American turnout statistics in North Carolina for presidential year elections only; they have avoided a more complete analysis by looking at African American turnout rates in non-presidential election years or in states that do not offer early voting, same-day registration, or out-of-precinct voting. Likewise, Plaintiffs' experts do not demonstrate how the affirmative relief sought by Plaintiffs is necessary to provide minority voters with an equal opportunity to register and vote. In essence, Plaintiffs argue that because they prefer the voting practices that were in place prior to the enactment of H.B. 589, they are entitled to retain those practices.

Plaintiffs are not likely to prevail on these claims, nor should they obtain the preliminary injunctive relief they seek. Defendants are not aware of a court that has ordered the sweeping kind of affirmative relief of that Plaintiffs seek, overruling policy decisions made by the elected representatives for any state in the union, in a preliminary or permanent injunction under Section 2 or the Fourteenth Amendment. It would be particularly inappropriate for the Court to grant such relief in this case, where the hard facts of the 2014 primary election flatly refute the academic predictions relied on by Plaintiffs. Neither the law nor the facts support Plaintiffs' claims. Plaintiffs have not carried *their* burden in seeking preliminary injunctive relief that would enjoin the State of North Carolina from enforcing validly enacted statutes that have already gone into effect and that have been applied in the most recent election. For these reasons, Plaintiffs' motions should be denied.

STATEMENT OF THE FACTS

At pages 5–15 of their Memorandum in Support of Their Motion for Judgment on the Pleadings [*NAACP* D.E. 107; *LWV* D.E. 111; *US* D.E. 95], Defendants describe the history of the North Carolina voting procedures relevant to this action—one-stop absentee voting, out-of-precinct voting, same-day registration and preregistration of 16- and 17-year-olds—as well as the changes made to those procedures by H.B. 589 and the new requirement that voters who present themselves to vote during one-stop absentee voting on Election Day will need to present a photo-identification card to poll workers. That Memorandum is incorporated herein by reference as though fully set forth.

All of the statutes challenged by Plaintiffs, with the exception of the photo-identification requirement, went into effect prior to the 2014 primary election in North Carolina, which was held on 6 May 2014. Thus, the May 2014 election provided an opportunity to test Plaintiffs' claims and see if the harms predicted by Plaintiffs actually occurred. They did not.

The most recent comparable election to the 2014 primary was the 2010 primary. Both primaries were "mid-term" elections, occurring between presidential and Council of State elections. Both elections included primary elections for United States Senator, United States Representative, members of the North Carolina General Assembly, and appellate judicial seats. (Strach Decl. ¶ 3) In 2010, 171,477 voters cast one-stop absentee ballots over a 17-day period. This amounted to 2.8% of registered voters. (Strach Decl. ¶ 65) By contrast, in 2014, 255,075 voters cast one-stop absentee ballots during the ten-day period. (*Id.*) This amounted not only to 3.9% of registered voters, but also to a 39% increase over 2010. In total, 878,858 voters (14.4% of registered voters) voted in the 2010 primary election, while 1,028,053 voters (15.8% of registered voters) voted in the 2014 primary. (Strach Decl. ¶¶ 61-62, Exs. 4-5)

A similar pattern appeared with African American voters. In 2010, 34,377 African American voters cast one-stop absentee ballots during the longer 17-day period, while in 2014, 57,015 African American voters, a 66% increase, cast ballots during the shorter ten-day period. (Strach Decl. ¶¶ 66-67, Exs. 4-5) Over all, 195,551 African American voters voted in the 2014 primary, a 29.6% increase over the 150,829 African American total voters who voted in 2010 primary. (Strach Decl. ¶¶ 63-64, Exs. 4-5)

These statistics show that the changes implemented by H.B. 589 did not have the effects predicted by Plaintiffs.

QUESTIONS PRESENTED

I. Have Plaintiffs established that they are entitled to a preliminary injunction enjoining enforcement of the challenged statutes while this case is pending?

II. Has the United States established that federal observers should be appointed to observe the 2014 general election in North Carolina?

ARGUMENT

I. THE STANDARD FOR PRELIMINARY INJUNCTIONS

As acknowledged by Plaintiffs [*NAACP* D.E. 110-1, pp. 11–12; *LWV* D.E. 114-1, pp. 11–12], courts issue preliminary injunctions to preserve the *status quo* pending litigation. As the United States Supreme Court and the United States Court of Appeals for the Fourth Circuit have stated: "[t]he purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held." *United States v. South Carolina*, 720 F.3d 518, 524 (4th Cir. 2013) (quoting *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395, 101 S. Ct. 1830, 68 L. Ed. 2d 175 (1981)). "The traditional office of a preliminary injunction is to protect the status quo and to prevent irreparable harm during the pendency of a lawsuit ultimately to preserve the court's ability to render a meaningful judgment on the merits." *Id.* (quoting *In re Microsoft Corp. Antitrust Litig.*, 333 F.3d 517, 525 (4th Cir. 2003)).

To obtain preliminary injunctive relief, Plaintiffs must make a "clear showing" that: (1) they are likely to succeed on the merits; (2) they are likely to suffer irreparable harm in the absence of preliminary injunctive relief; (3) the balance of equities tip in their favor; and (4) that an injunction is in the public interest. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 12 (2008). All four elements must be satisfied. *Id.* Under this standard, Plaintiffs have the demanding burden of "clear[ly] showing" that they are likely to succeed on the merits.

Plaintiffs' motion for a preliminary injunction must be denied for two fundamental reasons. First, Plaintiffs are not seeking to preserve the *status quo*; rather, they are asking this Court to ignore the current *status quo* and enjoin the enforcement of laws that have already been implemented in North Carolina elections, returning the State to an elections scheme that was not used in the most recent election. Second, the motion should be denied because Plaintiffs have failed to make a clear showing that *any* of the four necessary elements that are required for a preliminary injunction are present, starting with a clear showing of a likelihood of succeeding on the merits.

II. PLAINTIFFS ARE NOT LIKELY TO SUCCEED ON THE MERITS OF THEIR CLAIMS.

Plaintiffs' arguments cannot withstand scrutiny. Far from demonstrating that they are likely to succeed on the merits, Plaintiffs have failed to establish any violation of the United States Constitution or of Section 2 of the VRA, or connection between the statutes they challenge and the harms they claim they are likely to suffer. To the contrary, the results of the 2014 primary election shows Plaintiffs' predictions of disenfranchisement

and diminished ability to participate in the electoral process are unfounded. Indeed, the experience of the 2014 primary shows that Plaintiffs' arguments are predicated on a logical fallacy: that alleged correlation between the conveniences repealed by H.B. 589—same-day registration, out-of-precinct provisional balloting, the longer one-stop absentee voting period and pre-registration of 16- and 17-year-olds—and higher participation rates by Plaintiffs and those they represent implies causation. Because Plaintiffs have failed to establish any statistically significant connection between the repeal of the prior practices and the harms that they claim they will suffer unless a preliminary injunction is issued, Plaintiffs have failed to demonstrate a likelihood of succeeding on the merits.

A. Plaintiffs' Claims Cannot Withstand Defendants' Motion for Judgment on the Pleadings.

In their Memorandum in Support of Their Motion for Judgment on the Pleadings [*NAACP* D.E. 107; *LWV* D.E. 111; *US* D.E. 95], Defendants showed how they are entitled, as a matter of law, to judgment on Plaintiffs' claims. That Memorandum shows that the challenged provisions of H.B. 589 apply equally to all North Carolina voters, that returning North Carolina to practices in place prior to the fairly recent enactment of the practices ended or changed by H.B. 589 is no more a violation of the Constitution or the VRA than were North Carolina's laws before those practices were adopted, and that Plaintiffs are essentially attempting to insert into the Fourteenth Amendment and Section 2 the "retrogression" standard applicable only to cases brought under Section 5 of the VRA. Those arguments are incorporated herein by reference as though fully set forth. Because the pleadings establish that Defendants are entitled to judgment as a matter of

law, it follows that Plaintiffs cannot show a likelihood of success on the merits of their claims.

1. Plaintiffs have failed to demonstrate a discriminatory result.

The threshold question in any case alleging a discriminatory "result" under Section 2 of the VRA is: Compared to what? If the challenged procedure is a *qualification* for participating in the relevant activity—here, voting—the answer is straightforward: compared to the minority opportunity that would result if the state-imposed barrier (*e.g.*, a literacy test) were eliminated. *Holder v. Hall*, 512 U.S. 874, 880-81 (1994) (in such cases, the "effect . . . [is] evaluated by comparing the system with the rule to the system without the rule."). A discriminatory result is shown if the additional qualification barrier that disproportionately excludes minority voters results in providing them less opportunity than non-minority voters, and if eliminating the barrier redresses that unequal opportunity.

Under Section 5 of the VRA, which prohibits voting procedures with a "retrogressive effect," the analysis is equally straightforward. Minority participation under the current procedure is compared to minority participation under the pre-existing voting procedure or "benchmark." If a voting procedure – even a procedure not establishing qualifications for voting—reduces minority participation below the benchmark procedure previously in place, it may constitute "retrogression" under Section 5. *See Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 328-36 (2000). Thus, in a Section 5 challenge to North Carolina's procedures, the question would be whether minorities'

participation in the election was diminished by changing from a 17-day early voting period to a ten-day system.

However, in claims brought under Section 2 of the VRA that do not involve exclusionary qualifications to vote (or vote dilution cases), there is no acceptable or "objective benchmark" by which to measure disproportionate harm to minorities, and thus no cognizable argument that the state's voting procedure results in the denial of equal opportunity to minority voters. *Holder*, 512 U.S. at 880-81. To be sure, in such cases plaintiffs can always *hypothesize* alternatives that eliminate or reduce disproportionate outcomes—*i.e.*, a system where the times and circumstances for voting are less restrictive than the challenged system and therefore may increase minority participation. But the *availability* of such minority-enhancing alternatives does not suggest that the present system results in an election process that is not equally open to minority voters. This is so for two related reasons.

First, since plaintiffs can almost always hypothesize fewer restrictions on the manner of voting that could increase minority opportunities or participation rates, the choice of a Section 2 "benchmark" by which to measure disproportionate harm is inherently "standardless" and provides no "objective," "acceptable principles" for measuring discrimination. *Holder*, 512 U.S. at 885. For example, plaintiffs could hypothesize a system where registration and voting could be done at home, without the "burden" of going to a public facility to register or vote, by *sending* registration forms and ballots to voters through the mail or electronically.

More important, a maximizing alternative is not only a "standardless" benchmark, but it is legally irrelevant. The availability of such maximizing alternatives does not suggest that the challenged system denies the equal opportunity guaranteed by Section 2, but only that the State has not maximized minority participation or achieved equal outcomes, neither of which is required by Section 2. That is, the question under Section 2 is not whether the state's procedures provide minorities less opportunity than a plaintiff's *proposed alternative*, but less opportunity than that provided to *non-minority voters*. Moreover, Section 2 does not prohibit an election process that results in disproportionate or unequal *outcomes*. Instead, it proscribes only state-imposed procedures that result in diminution of minority *opportunities* relative to the opportunities afforded non-minority voters.

If the challenged voting procedure, such as a literacy test, limits who is qualified or eligible to vote, then the procedure's disproportionate exclusion of minorities from the electorate *does* result in less opportunity for minority voters to vote than it does for non-minority voters. But where, as here, the State allows all qualified residents to vote (and Plaintiffs, of course, do not challenge those basic minimum-age and residency requirements), it does not impose any voting procedure that *limits* minority opportunities. Consequently, any statistical disparity in the rate of minority participation is not the result of state-imposed limits on who may vote, but simply the result of minority voters' choices, for whatever reasons, to not take advantage of the equally open voting and registration process to the same extent as non-minority voters.

In sum, since Section 2 neither requires the State to create a voting system that maximizes minority participation, nor to achieve proportionate outcomes, minority voters' disproportionate participation in an equally open system cannot constitute a forbidden discriminatory result under Section 2. For this reason, there has never been a successful Section 2 challenge to neutral voting and registration processes not involving voting qualifications. If Section 2 were so extended, this would require federal courts to usurp the traditional state function of conducting elections by mandating that all enforcement of voting qualifications and all aspects of conducting elections be structured to maximize minority outcomes.

2. Plaintiffs fail to offer an objective benchmark by which their Section 2 claims can be considered.

Regardless, it is clear that H.B. 589 did not have the effect of burdening and decreasing minority voter participation. In light of the experience of the 2014 primary election, Plaintiffs' claims clearly are without merit. Section 2 claims are only viable where the challenged voting practice can be compared against an objective alternative benchmark. *Holder*, 512 U.S. at 880 (Kennedy, J.). *Id.* at 883 ("[W]ith some voting practices, *there in fact may be no appropriate benchmark* to determine if an existing voting practice is dilutive under § 2."). *Id.* at 885 "[T]he wide range of possibilities [for alternative schemes] makes the choice inherently standardless."); *id.* at 889 (opinion of O'Connor, J.) (same).

The facts of *Holder v. Hall* are instructive. In that case, the Supreme Court rejected a Section 2 "results" challenge to the size of a government commission. Prior to

1985, Beckley County, Georgia, had a form of government in which one county commissioner exercised all legislative and executive power for the county. In 1985, the state legislature enacted legislation that would allow the voters of Beckley County to adopt by referendum a system with a five-member board of county commissioners elected from single-member districts and a chairman elected at large. The voters of the county defeated the referendum. The Plaintiffs claimed that electing a single commissioner resulted in dilution of their voting power, because an alternative plan of having five commissioners would allow minorities to elect at least some members of the commission. Notably, boards of county commissioners comprising five commissioners were quite common in the state, and the county had moved from a single superintendent of education to a school board comprising five members. *Id*. at 876–77, 881.

The court rejected the Section 2 claim, holding that there was no objective, non-arbitrary benchmark for determining how many commissioners there should be. Plaintiffs could always claim that more would be better; why wouldn't six, or seven or eight commissioners be more appropriate? This lack of a limiting principle demonstrates that Section 2 applies only when the effect of a challenged law can be measured against an *objective* benchmark of voter opportunity. To show a lack of opportunity to vote or elect candidates of their choice, Plaintiffs must be able to point to some objective benchmark that would enhance voting opportunity, not merely an alternative benchmark that is chosen simply *because* it enhances minority voting. The Court emphasized that "it does not matter . . . how popular" or "quite common" the proposed alternative is. *Id.* at 881. Although a five-commissioner system enhanced minority voting strength, there was

"no principled reason why [that size] should be picked . . . as the benchmark" because enhancing minority voting power is not a principled reason for judicial imposition of the maximizing alternative. It was irrelevant that *Section 5* would have required *maintaining* a five-member commission because "retrogression is not the inquiry in § 2 . . . cases." *Id.* at 883-884. [2]

[2] In fact, even in a Section 5 case, whether a law would have a so-called "disparate impact" is not sufficient in a case involving ballot access issues such as this one. The court in *Florida v. United States*, 885 F. Supp. 2d 299, 312 (D.D.C. 2012) (three-judge court) put it this way:

> [A] change is not retrogressive simply because it deals with a method of voting or registration that minorities use more frequently, or even because it renders that method marginally more difficult or burdensome. Rather, to be retrogressive, a ballot access change must be sufficiently burdensome that it will likely cause some reasonable minority voters not to register to vote, not to go to the polls, or not to be able to cast an effective ballot once they get to the polls.

Id. at 312. Plaintiffs in the instant case have not satisfied this standard, where the burden is much higher on the state, much less the more difficult standard for Plaintiffs under Section 2, where the burden rests squarely on Plaintiffs. In *Florida*, the court refused to preclear under Section 5 reductions in early voting days that did not also guarantee a particular number of hours of early voting that would be offered during the shortened early voting period. When the state of Florida agreed to provide an early voting plan that offered the same number of hours as under prior law, the United States Department of Justice ("USDOJ") precleared the statute, thus mooting that issue. *See Brown v. Detzner*, 895 F. Supp. 2d 1236, 1241-42 (M.D. Fla. 2012).

In *Brown*, the court considered the same statute under Section 2 of the VRA. Significantly, that court held that the reduction in early voting days did not violate Section 2. The court emphasized that it was "not conducting a 'retrogression' analysis." *Brown*, 895 F. Supp. 2d at 1251. The court explained that the "important distinction between a Section 5 and a Section 2 claim play[ed] a significant role in the Court's decision." *Id.* Here, as in *Brown*, Plaintiffs are inviting the Court to use the retrogression standard from Section 5 to decide this Section 2 vote denial case. The well-reasoned opinion in *Brown* thoroughly rejected the invitation in that case.

If Section 2 allowed plaintiffs to bring challenges without showing a deprivation of voting opportunity as measured against an objective benchmark, plaintiffs could bring an endless parade of Section 2 challenges based on hypothetical alternative voting laws that would be ever more favorable to them. Section 2 would thus be redirected to require every state to maximize the electoral prospects of minority voters.

In the present case, Plaintiffs' claims fail for the same reason they did in *Holder v. Hall*. Namely, Plaintiffs fail to provide any objective benchmark to measure whether a Section 2 violation has occurred. There is no objective, non-arbitrary benchmark to determine how many early-voting days and hours there should be. Why not 30 days? Why not 60? Why not 90? Under their theory, Plaintiffs could have challenged the former 17-day period as having a discriminatory "result" compared to a theoretical 24-day period. A *more* objective benchmark than 17 days is *one* day of voting on Election Day, since that is still common, was typically used, and was universally used, with the exception of absentee voters who established that they could not present themselves at their polling place on Election Day, in 1982. Under this benchmark, ten-day early voting significantly *expands* voting opportunities, including minority voting opportunities. This demonstrates how arbitrary it is to use Plaintiffs' proposed alternative as the benchmark for measuring discriminatory result. It is irrelevant whether Plaintiffs prefer a 17-day system over a ten-day system because Section 2 forbids providing minority voters less opportunity than non-minorities, not less opportunity than the prior system or a maximizing alternative. Regarding Plaintiffs' claim that elimination of same-day registration violates Section 2, Plaintiffs offer no objective benchmark for determining

how long the wait should be between voting and registration. Under Plaintiffs' theory, the old system could have been challenged because it prohibited same-day registration on *Election Day*. Congress plainly did not intend to eliminate *every* state's practice in 1982 of having a gap between registration and voting.

Regarding Plaintiffs' challenge to the elimination of out-of-precinct provisional ballots, Plaintiffs offer no objective benchmark to determine how many polling places should be required to accept ballots of voters who go to the wrong polling place. Should Plaintiffs be allowed to bring Section 2 claims if voters are not allowed to cast their ballots at any polling place in the entire state? The failure of Plaintiffs to provide the Court with anything other than standardless benchmarks dooms their claims; no preliminary injunction should be issued as a result.

B. Matters Outside the Pleadings Further Show that Plaintiffs' Claims Are Unlikely to Succeed.

The pleadings alone establish that Plaintiffs are not likely to succeed on the merits; indeed, the pleadings establish that judgment should be entered for Defendants. But should the Court choose to look beyond the pleadings it will find further indication that Plaintiffs' claims lack merit.

This is especially so if the Court considers the changes implemented by H.B. 589 in the broader context of election laws nationally. Sean Trende is a recognized expert in the fields of psephology (the study of elections), voter behavior, voter turnout, polling, demographic trends and political history, with an emphasis on Southern politics. (*See* Attachment 2, Declaration of Sean Patrick Trende ¶¶ 2, 4, 6–16, and Ex. 1) He

examined relevant provisions of the laws of all 50 states as well as the District of Columbia and found that H.B. 589 puts North Carolina's elections procedures squarely within the mainstream of American voting laws. (*Id*. ¶¶ 18–61, Exs. 3–7) Indeed, prior to the enactment of H.B. 589, North Carolina was the national outlier, being the only *state* that did not require photo identification to vote, that counted out-of-precinct provisional ballots, that allowed for an "early voting" period in excess of 16 days, that allowed same-day registration, and that allowed pre-registration of 16- and 17-year-olds. (*Id*. ¶ 61)

Examining the various election practices at issue in this action separately, Trende notes that:

- Sixteen states do not offer any form of no-excuse early voting.[3] (*Id*. ¶ 44)
- At the present time, 11 states, plus the District of Columbia, allow for same-day registration.[4] (*Id*. ¶ 45, Ex. 6)
- Only six states, plus the District of Columbia, allow pre-registration at the age of 16. (*Id*. ¶ 48, Ex. 7)

[3] Unlike many states, North Carolina does not require an excuse—that only voters meeting certain conditions, such as that they are infirm or will be absent on election day—for a voter to utilize absentee voting, including one-stop absentee voting. (Strach Decl. ¶¶ 31, 37) As Trende notes, the analysis of Plaintiffs' expert Charles Stewart, which found that North Carolina had moved away from the median in terms of the number of days of early voting, failed to take into account states that do not allow any form of no-excuse in-person early voting. (Trende Decl. ¶¶ 30–33)

[4] Trende treated North Dakota, which does not have voter registration at all, as a state that allows same-day registration and pre-registration. (Trende Decl. ¶¶ 47, 49)

Notably, numerous other states offer none of the practices that Plaintiffs would require North Carolina to maintain. (*Id.* ¶ 60) Virginia is a particularly instructive state to examine. Virginia does not have no-excuse early voting, same-day registration, out-of-precinct provisional balloting or pre-registration, and it does require photo identification to vote. (*Id.* ¶¶ 32, 33) Yet Virginia has a high African American turnout in elections. (*See Id.* ¶ 118, Fig. 11 (Virginia experienced 13.3% increase in African American voter participation from 2000-2012)). Mississippi is another state where African American voter turnout is as high as or higher than North Carolina, yet Mississippi has none of the practices Plaintiffs ask the Court to impose. (*Id.* ¶¶ 75-78) Clearly then, the lack of no-excuse early voting, same-day registration, out-of-precinct provisional balloting or pre-registration in Virginia and Mississippi does not have a negative impact on the ability of minority voters to participate equally in the electoral process.[5]

Donald Schroeder, Ph.D., a political science professor at Campbell University, reached similar conclusions. (*See generally* Attachment 3, Declaration of Donald Schroeder) Like Trende, Schroeder compared the challenged provisions of H.B. 589 to the laws of the other 49 states, as well as the District of Columbia. From his analysis, Schroeder concluded that "[i]f one were to place North Carolina on a continuum reflecting the restrictiveness of the voter verification process relative to other States, it would place somewhere within the center of that continuum." (*Id.* ¶ 10)

[5] None of Plaintiffs' experts consider the effect on voter turnout of election practices in other states such as Virginia and Mississippi.

The analyses of Trende and Schroeder demonstrate that there is nothing unusual or exceptional about the changes implemented by H.B. 589. Far from being a return to a pre-VRA status, H.B. 589 represents a return to voting practices that are firmly grounded in the mainstream of American election laws now and at the time of the 1982 amendments to the VRA.[6] Simply put, Plaintiffs have failed to demonstrate how practices that were the norm in 1982 and that are the norm today in much of the United States are violations of the Fourteenth Amendment or of Section 2.

C. Plaintiffs Have Failed to Establish That They are Disproportionately Affected by the Challenged Statutes.

1. Plaintiffs erroneously assume that the apparent correlation between the election practices repealed or amended by H.B. 589 and minority voter participation establishes that those elections practices were the cause of increased minority voter participation.

Plaintiffs' entire preliminary injunction argument rests on one assumption: that because minority voters used one-stop absentee voting, same-day registration and out-of-precinct provisional balloting at a higher rate than non-minority voters, the elimination or curtailment of these practices will disproportionately affect minority voters and impose material burdens on their right to vote.[7] The mistake that Plaintiffs and their experts

[6] As shown at pp. 30–32 of Defendants' Memorandum in Support of Their Motion for Judgment on the Pleadings [*NAACP* D.E. 107; *LWV* D.E. 111; *US* D.E. 95], none of the practices Plaintiffs seek to have restored were in effect in North Carolina or elsewhere when the 1982 amendments to Section 2 were passed. Nowhere in the legislative history for the 1982 amendments does Congress state that early voting, same-day registration, out-of-precinct voting, or pre-registration of teens were needed to provide equal opportunity to minorities as compared to the rest of the electorate.

[7] There are compelling arguments to support the conclusion that one-stop absentee balloting has not been curtailed. While H.B. 589 does reduce the time during which

make is to assume, without any supporting evidence, that because over the past decade in North Carolina high minority voter participation correlates with one-stop absentee voting, same-day registration and out-of-precinct provisional balloting, those practices are the *cause* of the higher participation. This conclusion is the result of flawed logic and is not supportable without evidence actually demonstrating a causal connection between high minority participation in elections and the practices at issue. At a glance, this assumption—and the resulting conclusion that ending these practices will have a negative effect on minority voter participation—may seem to be intuitively accurate, but the assumption falls apart on closer examination.

The 2014 primary election provides the Court with the most substantive and compelling evidence that the challenged provisions of H.B. 589 will not result in disproportionately lower turnout by minority voters, and it squarely refutes Plaintiffs' assumptions. Same-day registration, out-of-precinct provisional balloting, pre-registration and a 17-day one-stop absentee voting period were all in effect for the 2010 primary election, the most recent comparable election. If Plaintiffs' assumptions were correct, the 2014 primary should have seen a decrease in minority participation, but the opposite occurred. Minority voter participation increased, both during one-stop absentee voting and overall. (Strach Decl. ¶¶ 61-67) The crowds and long lines on Election Day predicted by Plaintiffs did not materialize, even though overall the turnout in the 2014

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county boards of election may decide to conduct one-stop absentee voting from 17 days to ten days, it also requires that county boards of elections, unless granted a waiver by the State Board of Elections, provide the same number of hours for one-stop absentee voting as were provided in the most recent comparable election.

primary was higher than the turnout in the 2010 primary. (*Id.* ¶ 35) Using the logic employed by Plaintiffs and their experts, one would have to assume that H.B. 589 had the effect of facilitating and increasing total voter participation and minority voter participation.

2. Plaintiffs fail to consider other factors that may have contributed to minority voter turnout in recent years.

It is necessary to distinguish between circumstances where minority voters *lack opportunity* compared to white voters, as opposed to situations where fewer minority voters *take advantage* of the equal opportunity that is available to them. *See, e.g., Salas v. Sw. Tex. Junior Coll. Dist.*, 964 F.2d 1542 (5th Cir.1992) ("failure to take advantage of political opportunity" does not give rise to "a violation of § 2").

For example, if everyone has an equal chance to register to vote, but fewer members of minority groups choose to register, then it cannot reasonably be said that those persons have "less opportunity" to vote. In this example, these individuals simply failed to take advantage of the opportunity. Even more obviously, minority voters have precisely the same opportunity as non-minority voters to vote in their assigned precinct, so disqualifying ballots from outside the precinct does not deny them an equal opportunity. Similarly, even if minority voters are deemed to have less opportunity than non-minority voters, Section 2 reaches only denials of opportunity that are the result of—*i.e.*, caused by—a voting practice imposed by the government, not by the relative inaction of minority voters. If minority voters do not proportionately avail themselves of the same

opportunities offered to both minority and non-minority voters, it is plainly not attributable to any practice imposed by the state on minority voters.

Several cases demonstrate this proposition. For instance, a mere statistical disparity in voter participation is not sufficient to establish a Section 2 claim. In *Irby v. Virginia State Board of Elections*, 889 F.2d 1352 (4th Cir. 1989), the plaintiffs brought a Section 2 challenge against Virginia's method of selecting school-board members by appointment rather than election. *Id.* at 1353. The Fourth Circuit rejected the claim, noting that 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." *Id*. at 1358. The disparity was not due to anything the state had done, but instead it was mainly attributable to the fact that African Americans were "not seeking school board seats in numbers consistent with their percentage of the population." *Id*.

Likewise, in *Smith v. Salt River Project Agric. Improvement & Power Dist*., 109 F.3d 586, (9th Cir. 1997), the Ninth Circuit rejected a Section 2 claim against a land-ownership requirement for voting in an agricultural improvement district. The court noted that although land ownership was not proportionate among racial groups, "a bare showing of disproportionate impact on a racial minority does not satisfy the Section 2 'results' inquiry." *Id.* at 595. Instead, the court indicated that the disparity must be attributable to some form of discrimination, because the results test of Section 2 was adopted to "prohibit election practices that accommodate or amplify the effect that private discrimination has on the voting process." *Id*. at 595 n.7.

In *Wesley v. Collins*, 791 F.2d 1255 (6th Cir. 1986), plaintiffs challenged felon disenfranchisement claiming that it had a racially disparate impact. *Id.* at 1257. The court rejected the challenge, stating that although a "significantly higher number of black Tennesseans are convicted of felonies than whites," "[i]t is well-settled . . . that a showing of disproportionate racial impact alone does not establish a per se violation." *Id.* at 1260. Instead, a court must look at "the interaction of the challenged legislation 'with those historical, social and political factors generally probative of dilution.'" *Id*. at 1261 (quoting *Gingles v. Edmisten*, 590 F. Supp. 345 (E.D.N.C. 1984), *aff'd in part and rev'd in part sub nom. Thornburg v. Gingles*, 478 U.S. 30 (1986)). Evidence of past discrimination alone is not enough; it must be causally linked to the present disparity. Evidence of past discrimination "cannot, in the manner of original sin, condemn action that is not in itself unlawful." *Id.* (quoting *City of Mobile v. Bolden*, 446 U.S. 55, 74 (1980)).

Similarly, in *Ortiz v. City of Philadelphia Office of the City Commissioners Voter Registration Division*, 28 F.3d 306 (3d Cir. 1994), the Third Circuit rejected a Section 2 claim against a statute purging voter registrations of those who did not vote for two years. *Id.* at 307. Although the law resulted in a disproportionate purging of minority voters, the court concluded that plaintiffs "failed to demonstrate that the purge law interacts with social and historical conditions to deny minority voters equal access to the political process and to elect their preferred representatives." *Id*. at 312 (quoting *Ortiz v. City of Phila. Office of City Comm'rs Voter Registration Div*., 824 F. Supp. 514, 539 (E.D. Pa. 1993)).

In *Salas v. Southwest Texas Junior College District*, 964 F.2d 1542 (5th Cir. 1992), the Fifth Circuit rejected a Section 2 claim against an at-large voting system. *Id.* at 1556. Evidence introduced at trial showed that the Hispanic voter turnout was roughly seven percentage points below that of Anglo whites, but the plaintiffs could not show that Hispanic voters lacked opportunity due to state action or past discrimination. *Id.* To the contrary, the court stated that "the cause of Hispanic voters' lack of electoral success [was] failure to take advantage of political opportunity, rather than a violation of § 2." *Id*. "Obviously, a protected class is not entitled to § 2 relief merely because it turns out in a lower percentage than whites to vote." *Id*.

Because North Carolina's May 2014 primary election flatly refutes Plaintiffs' claims and demonstrates the inaccuracies of their predictions that the challenged legislation would have a disproportionate impact on minority voters, and consistent with the cases discussed above, it is clear that the reasons for increased minority participation in elections must be found somewhere other than in the conveniences of a longer one-stop absentee voting period, same-day registration, out-of-precinct provisional balloting or pre-registration of 16- and 17-year-olds. While Plaintiffs and their experts did not consider other contributing factors, Defendants' experts have identified a number of possible causes, as well as other flaws in Plaintiffs' experts' analyses that call into the question the underlying correlation claimed by Plaintiffs.

In arriving at their conclusions, Plaintiffs and their experts focus almost exclusively on the 2008 and 2012 general elections.[8] This focus on those two elections leads to skewed results. As noted by Janet Thornton, managing director of ERS Group, a consulting firm specializing in the application of economic, econometric and statistical analysis to litigation, regulatory compliance and risk assessment, while African American voters had a statistically significant higher participation rate among registered voters in the 2008 and 2012 general elections when compared to white voters, African American voters had a statistically significant *lower* participation rate among registered voters when compared to white voters in all other general elections beginning in 2006. (*See* Attachment 4, Declaration of Janet R. Thornton ¶ 18; *see generally* Attachment 5, Deposition of Janet R. Thornton) If Plaintiffs' arguments were correct, the participation rate should have been higher in all elections.

Notably, the voter participation rates in the 2008 and 2012 general elections are similar to the 1984 and 1992 general elections. (Thornton Decl. ¶ 21) None of the practices that are the subject of Plaintiffs' preliminary injunction motions—no excuse one-stop absentee voting, out-of-precinct provisional voting, same-day registration or pre-registration—were in effect in 1984 or 1992, which indicates that voters' decisions to register and vote are not tied solely to these practices. (*Id.*)

[8] Plaintiffs seek the extraordinary remedy of compelling the State in a non-presidential year election to return to prior election practices based on supposed evidence derived from voter turnout in presidential election years. Plaintiffs have submitted almost no evidence whatsoever of the supposed impact of those practices in prior non-presidential elections.

What the 1984, 1992, 2008 and 2012 elections have in common, of course, is that they were all presidential election years. The general elections in 2008 and 2012 are particularly worth examination to assess the claims of Plaintiffs' experts. As shown by Trende, the increased minority voter participation in those elections was primarily a result of the following:

> the fact that the historic nature of the Obama campaign generated massive enthusiasm among African American voters; that the Obama campaign, sensing that North Carolina was winnable given overall political conditions, funneled massive resources, unprecedented in recent years, into the state in an attempt to increase African American turnout and capitalize fully upon this enthusiasm; and that the Obama campaign's efforts were successful. But these efforts seem to be transitory and are not replicated when Obama is not on the ballot and, importantly, do not seem to correlate nationally with the liberalization of a state's election regime.

(Trende Decl. ¶ 66) Trende's observations nationally are corroborated locally in North Carolina by reports prepared by John Davis, a recognized political analyst, explaining the extent of the Obama campaign turnout effort in North Carolina. For example, the Obama campaign established 47 offices in North Carolina staffed with over 400 paid operatives. (*See* Attachment 6, Declaration of John Davis Ex. 2, p.3) As Trende explained, the campaign's mission in North Carolina was to target and take to the polls likely Democratic voters including high percentages of minority voters. (Trende Decl. ¶¶ 66, 104-112) In other words, the increased minority voter participation identified by Plaintiffs had little to do with the practices repealed or amended by H.B. 589 and much to do with national politics. Indeed, the African American voter participation rate in North Carolina from 1980 to 2012 largely moves in tandem with the national African American voter participation rate. (*Id*. ¶¶ 82–90)

This can more clearly be seen when North Carolina is compared to other states that have not offered the practices at issue in this case, such as Virginia and Mississippi. Neither of these states offers early voting, same-day registration, out-of-precinct voting or pre-registration of 16- or 17-year olds, but the African American turnout in these two states is equal to or higher than in North Carolina. (*See* Attachment 7, Deposition of Sean Trende, pp. 93-101, 316-318, Ex. 122) Moreover, Trende performed a cross-state registration analysis comparing African-American turnout in states with the practices sought by Plaintiffs and states without such practices. (Trende Decl. ¶¶ 117-125) Trende concluded that the cross-state analysis shows no statistically significant connection between the practices sought by Plaintiffs and participation rates by African American voters. (*Id.* ¶¶ 121-125) Plaintiffs' experts cite a respected treatise stating that cross-state comparisons should be conducted to test the impact of election practices, but none of Plaintiffs' experts performed such an analysis – either in their initial reports or after they had reviewed Trende's report in their surrebuttal reports. (Surrebuttal of Charles Stewart III, PhD, p. 6 Table 1; Trende Dep. pp. 275-76) (noting failure of Plaintiffs' experts to conduct cross-state analysis)).

This dynamic of how national politics and national campaigns influenced voter turnout in North Carolina in 2008 and 2012 can also be seen more clearly when aspects of one-stop absentee voting are examined more closely. Prior to the enactment of H.B. 589, all counties in North Carolina had the authority to open one-stop absentee voting sites for 17 days but county boards were not required by statute to have all early voting sites within their county open for all 17 days, nor were they required to have early one-

stop absentee sites open on Sundays. Sites in addition to a county board of elections office could only be opened by unanimous votes of the county board of elections; if a county board could not reach unanimity on a one-stop absentee voting plan, a majority of the SBOE could adopt a plan for that county.[9] 1999 N.C. Sess. Laws 455; 2000 N.C. Sess. Laws 136. An analysis of the locations of one-stop absentee voting sites shows that they were more likely to be located at sites convenient to African American and Democratic voters.[10]

None of Plaintiffs' experts considered the locations of one-stop absentee voting sites in concluding that minority voters were more likely than other voters to rely on one-stop absentee voting. Dr. Thornton, on the other hand, did conduct this analysis. She found the following:

> census tracts with an early voting site had a statistically significantly higher percentage of African-Americans among the voting age population compared to census tracts without an early voting site. On the other hand, census tracts with an early voting site had a lower Caucasian and Hispanic composition relative to census tracts without an early voting site.

(Thornton Decl. ¶ 27)[11]

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[9] 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.

[10] It is undisputed that African American voters in North Carolina tend to vote Democratic at a rate in excess of 90%. *Easley v. Cromartie*, 532 U.S. 234, 245 (2001).

[11] The United States Department of Justice has long acknowledged the importance of the proximity of vote centers to voters, including minority voters. Many objections under

Section 5 of the VRA have been lodged by USDOJ to proposals by covered jurisdictions to close or move precincts, including voting locations. Since the passage of the Voting Rights Act, the USDOJ has repeatedly objected under Section 5 of the Act to the proposed closing or moving of polling places—both in North Carolina and elsewhere—on the grounds that the location of the resulting polling place(s) would be inconvenient to a protected class. In large part, these objections have focused on the alleged inconvenience to protected classes resulting from the distance and accessibility of the new polling place(s). While the specific facts have differed, the central issue in all of these objections has been the same—the location of the polling place. *See, e.g.*, USDOJ Section 5 Obj. Ltr. NC-1250 (Sept. 21, 1984) (objecting to consolidation of two voting precincts and the elimination of one polling place because "the largely minority electorate" would "be subjected to the inconvenience of having to travel a substantial distance to vote some eight miles away"); USDOJ Section 5 Obj. Ltr. NC-1100 (Jan. 3, 1978) (objecting to proposed change of polling place after original polling place "was sold to a black organization" and County contended "that the building was unsafe and unsuitable for the voting machines," where County's assertion "that the distance between the old and new polling places is only one half mile [was] contradicted by members of the black community" and black community "suggested that in choosing the new location, the county deliberately by-passed other suitable locations . . . which would be more convenient to the black community"); *see also, e.g.*, USDOJ Section 5 Obj. Ltr. AZ-1070 (Aug. 16, 1985) (objecting to the elimination of two polling places and implementation of a five-polling-place rotation system in part because "voters who reside on the reservation, as well as those in the nonhost communities, are subjected to the inconvenience of having to travel great distances in order to participate in the district's electoral process"); USDOJ Section 5 Obj. Ltr. GA-2610 (Mar. 20, 1995) (objecting to change of polling place out of "a predominantly black neighborhood" and into "a predominantly white neighborhood" based on the allegedly resulting difficulty African American voters would have accessing the polling place); USDOJ Section 5 Obj. Ltr. LA-1340 (July 17, 1973) (objecting to change of polling place because the location of the new "site is extremely inconvenient for many of the registered voters in [the] Precinct . . . , 95% of whom are black"); USDOJ Section 5 Obj. Ltr. MS-2670 (June 28, 1999) (objecting to a change of polling place because the location of the new polling place would require approximately five and one half miles of travel for many minority voters who had previously been able to walk to a polling place in closer proximity to their homes); USDOJ Section 5 Obj. Ltr. TX-2960 (May 5, 2006) (objecting to a consolidation of 84 polling places to 12 polling places because the resulting polling places "will serve a geographic area of well over 1,000 square miles with over 540,000 registered voters [and the] assignment of voters to these 12 sites is remarkably uneven: the site with the smallest proportion of minority voters will serve 6,500 voters, while the most heavily minority site (79.2% African American and Hispanic) will serve over 67,000 voters"); USDOJ Section 5 Obj. Ltr. VA-1270 (Oct. 27, 1999) (objecting to a change of polling place to the eastern portion of the precinct because "the black population is heavily concentrated in the

A similar correlation can be seen with Sunday one-stop absentee voting. Plaintiffs argue that eliminating one day of Sunday voting has a disproportionate impact on African American voters because 39% percent of Sunday voters were African Americans, despite the fact that African Americans only represent 21% of the state's voting age population ("VAP"). Plaintiffs, however, fail to take into account that only 30 of North Carolina's 100 counties had Sunday voting, and that, on average, the African American VAP in these 30 counties was 28.9%, compared to 18.3% in counties that did not have Sunday voting sites. (Thornton Decl. ¶29) Conversely, on average the white VAP in counties with Sunday voting was 59.1%, compared to an average white VAP of 74.9% in counties without Sunday voting. (*Id*. ¶ 29) Similarly, on average, the percentage of African American VAP in census tracts that include Sunday one-stop absentee voting sites was 33.5% compared to 21.2% in census tracks without one-stop absentee voting sites. (Thornton Decl. ¶33) On the other hand, white VAP in census tracts with one-stop absentee sites was, on average, 54.2%, compared to 68.6% in census tracts without one-stop absentee sites. (*Id*.; *see also* Attachment 8, Declaration of Thomas Brooks Hofeller ¶¶ 68–74) (showing how the location of one-stop locations favored Democratic and African American voters).

These facts show that one-stop absentee sites generally, and particularly those that provided Sunday voting, tended to be in locations more likely to accommodate African American voters. This, more than the mere general availability of one-stop absentee

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western part of the precinct [and] it appears that the proposed polling place change will impose a significantly greater hardship on minority voters than white voters").

voting, better explains why African American voters may have been more likely than other voters to avail themselves of one-stop absentee voting. When these facts are coupled with the Get-Out-the-Vote efforts of the Obama campaign (*see*, *e.g.*, Davis Decl.), it becomes clear that this is the most plausible explanation for high minority participation rates in early voting, same-day registration, and out-of-precinct voting in 2008 and 2012 as opposed to 2010. A well-organized campaign strategy that actively encouraged use of early voting, same-day registration, and other practices at issue explains not only the higher rates cited by Plaintiffs, but it also explains why those higher rates are not seen in elections other than 2008 and 2012, and why the patterns in North Carolina mirror the patterns in other states with no or limited early voting. Finally it is consistent with statements of Plaintiffs' own expert, Paul Gronke, who has written that early voting does not boost turnout. (*See* Thornton Decl. ¶ 36)

With regard to the counting of out-of-precinct provisional ballots, Plaintiffs point to the language of 2005 N.C. SESS. LAWS 2, which required the counting of such ballots following a North Carolina Supreme Court decision holding that counting of such ballots was not authorized by law. *See James v. Bartlett*, 359 N.C. 260, 263, 607 S.E.2d 638, 640 (2005). Plaintiffs read too much into the language of the session law. That language says: "The General Assembly takes note of the fact that of those registered voters who happened to vote provisional ballots outside their resident precincts on the day of the November 2004 General Election, a disproportionately high percentage were African-

American." 2005 N.C. SESS. LAWS 2, § 9.[12] This language does no more than recognize that a disproportionate number of ballots at issue in the 2004 election were cast by African American voters; it says nothing about trends or patterns.[13]

The enactment of 2005 N.C. SESS. LAWS 2, which, like the enactment of H.B. 589, was along partisan lines highlights a salient factor, however—it illustrates the public and partisan disagreement on these questions of policy. The practices that are the subject of Plaintiffs' preliminary injunction motions are questions of policy about which people and partisan groups can and do disagree. Resolution of such questions and, often, revisiting those questions when the balance of power shifts from one party to another, is part of the political and legislative process. Plaintiffs have failed here to establish that North Carolina's resolution of these policy questions through H.B. 589 implicates in any way their rights under the Constitution or the VRA. They are not likely, therefore, to succeed on the merits of their claims.

[12] To the extent Plaintiffs argue that African American voters are more burdened by the elimination of out-of-precinct voting, this is not supported by the evidence. White voters and Republican voters who voted out-of-precinct in 2012 did so in a precinct located a farther distance from their home precinct than Democratic and African American voters. (Hofeller Decl. ¶¶ 81, 87, Table 23)

[13] In his Declaration submitted in this case, Gary Bartlett, the former Executive Director of the State Board of Elections, claimed that this finding was based on information provided by his office, and that the information was provided to him by Marc Burris, the current Chief Information Officer for the SBOE. According to the Declaration of Kim Strach, the current Executive Director of the SBOE, the agency is aware of a 2005 spreadsheet purporting to include out-of-precinct voter data in which out-of-precinct data for four of North Carolina's largest counties is not included. (Strach Decl. ¶ 53)

3. The challenged provisions of H.B. 589 further legitimate State interests.

North Carolina has a strong and undeniable interest in preventing voter fraud and maintaining confidence in the election system. One way of maintaining confidence in elections is to ensure that only those who are qualified to vote are actually registered to vote. In *Crawford v. Marion County Elections Board*, 553 U.S. 181 (2008), the Supreme Court acknowledged that the National Voter Registration Act of 1993 (NVRA), 107 Stat. 77, 42 U.S.C. § 1973gg *et seq.*, has resulted in the inflation of voter rolls. *Id.* at 192. This inflation is relevant to eliminating same-day registration and closing the registration books 25 days prior to an election.

The North Carolina voter rolls are highly inflated and include many alleged registered voters who no longer reside in North Carolina. For example, many precincts in North Carolina have more registered voters than voting age population. (Hofeller Decl. ¶¶ 78, 95, Table 17) In some cases, the number of supposed registered voters is 90% or more of the voting age population. *Id.* Other analysis by Dr. Hofeller shows that many persons listed as registered voters in North Carolina may no longer be alive or have since moved out of North Carolina. (Hofeller Decl. ¶¶ 78, 94)

Eliminating same-day registration helps to ensure that only those who are qualified to vote in North Carolina actually do so. With same-day registration, the verification process simply cannot be completed before ballots are counted at the canvass. (Strach Decl. ¶¶ 26-28) While there is some chance that a person who registers at least 25 days prior to an election will vote in an election and have his voted counted

when he is in fact not eligible to vote, it is virtually certain that a person who does not meet residency requirements and utilizes same-day registration will have his vote counted when it should not be. (Strach Decl. ¶¶ 26-28) Moreover, same-day registration has caused multiple election administration problems in recent elections. (Strach Decl. ¶¶ 26-28)

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 likewise recognized this important state interest by enacting 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…"); *id.* § 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 thirty days, or the period provided by State law, before the date of election…"). Thus, under the Elections Clause and federal law, North Carolina has the legal authority to close registration up to 30 days before an election. This presumably is why only 11 states plus the District of Columbia have anything that resembles same-day registration. (Trende Decl. ¶¶ 45–47)

The reduction of the number of one-stop absentee voting days furthers the state interest in uniformity and fair treatment of all voters. As noted *supra*, prior to H.B. 589, some counties took advantage of the full 17 days available for one-stop absentee voting while others did not. Some counties opened some one-stop absentee voting sites earlier than others in the same county. And some counties allowed one-stop absentee voting on Sunday, while others did not. H.B. 589 creates uniformity throughout a county by requiring that all one-stop absentee sites be open on the same days and during the same hours, and provides more uniformity across the State by delineating the parameters for when one-stop absentee sites can be open.

At the same time, the waiver provision for number of hours furthers legitimate state interests in counties that cannot afford to pay for more one-stop absentee voting sites or where the flow of voters does not support additional sites. In contrast to the previous statutes governing one-stop absentee voting that allowed a simple majority of the SBOE to approve a reduction of hours, any reduction of total hours must be approved by unanimous vote of the county board and the SBOE. This works to ensure that a reduction in hours is indeed warranted and in a county's and the voters' best interests. The experience of the 2014 primary election shows that any reductions in one-stop absentee voting hours did not adversely affect the ability of voters to utilize one-stop absentee voting.

Moreover, delaying the start of the early voting period decreases the cost of political campaigns. According to one of the most experienced campaign consultants in North Carolina, early voting significantly increases the cost of political races, especially

in smaller campaigns that lack the extensive financial resources necessary to deploy political advertising months prior to Election Day. (Attachment 9, Declaration of Thomas H. Fetzer, Jr. ¶ 9) Smaller contests, including races for state legislature and local campaigns for county commission, school board, sheriff and city council, do not result in substantial war chests for political advertising. These campaigns often have limited funds to devote to political advertising. Accordingly, these campaigns must strategically deploy their advertising for these races within the two-week period prior to Election Day. (Fetzer Decl. ¶ 9) Because early voting adds weeks to the traditional political cycle, campaigns must start their advertising, voter contact, and turnout operations much earlier, which drives up the costs of a campaign by tens of thousands of dollars at the local and legislative level and by hundreds of thousands at the state level. (Fetzer Decl. ¶ 10)

Campaign resources spent during the early voting period are also inefficient because turnout in that timeframe is generally lower than on Election Day and also fluctuates from election to election at a much greater rate than turnout on Election Day. The early voting period therefore results in inefficiency because campaigns are forced to expend valuable and finite resources attempting to engage and turnout voters who have no intention of voting until Election Day. (Fetzer Decl. ¶ 11)

Moreover, while early voting may result in some voters voting earlier in the process rather than waiting to Election Day, a great majority of voters wait until Election Day to go to the polls and cast their vote. (Fetzer Decl. ¶ 8) Of course, once a voter has voted during the early voting period, he or she may not vote again, even if important developments in the campaign occur after he or she has cast an early vote.

In light of the increased campaign spending early voting prompts as well as the likelihood of voters voting with incomplete information about the candidates, it would have been completely rational for the General Assembly to have eliminated completely early voting. Instead, the General Assembly chose to maintain ten days of early voting closer to Election Day while ensuring the number of hours of early voting would not be reduced from the last comparable election. There is plainly no workable, objective standard by which Plaintiffs can say that maintaining ten days of early voting under these circumstances was discriminatory under Section 2.

Similarly, the elimination of out-of-precinct voting serves important election administration interests. The number of personnel and voting machines assigned to a precinct on Election Day is based upon the number of voters in a precinct. (*See* Strach Decl. ¶ 50) The possibility that candidates and political parties can deliver large groups of voters to vote in precincts to which they are not assigned could create backlogs and lines. Indeed, one of Plaintiffs' declarants, Melvin Montford, concedes that the group he is affiliated with, North Carolina A. Philip Randolph Institute, offers prospective voters rides to the polls and makes no effort to determine whether the voter is being taken to the correct precinct. (*US* D.E. 99-8, ¶ 20) While that may be convenient for the A. Philip Randolph Institute and its volunteers, it burdens local elections officials and creates unnecessary administrative hurdles. Clearly, practices such as those described by Montford have the potential to create significant problems at a polling place.

Significantly, requiring voters to vote in their own precinct also helps ensure that voters will not be disenfranchised. If a voter votes in the wrong precinct, his vote is

counted only for the races in which he is eligible to vote. For example, voters typically would be eligible to vote for state-wide or county-wide candidates but they could be denied the right to have their ballot counted for legislative or local district elections when the ballot they cast out-of-precinct included elections for districts to which they have not been assigned. (*See* Attachment 10, Declaration of Cherie Poucher ¶ 5) Out-of-precinct voting has the real potential to affect the results of local election. (*See* Attachment 11, Declaration of Michael Dickerson) (second primary may have been avoided if out-of-precinct voters had been directed to vote in their proper precincts). Finally, requiring that county boards count out-of-precinct ballots also adds election administration burdens that would not be present if these voters were sent to their correct precinct and could have their ballot scanned or counted by a DRE machine as opposed to having to have their ballot evaluated at the canvass to determine the offices to which they were entitled to vote and then hand counted. (Poucher Decl. ¶ 5)

Moreover, the pre-registration of 16- and 17-year-olds created confusion among students and local boards of elections. (Poucher Decl. ¶ 4) It also increased administrative costs for the counties, specifically Wake County. (*Id.*)

4. The process followed in the enactment of H.B. 589 was consistent with legislative rules and practices and do not suggest any improper motive on the part of the North Carolina General Assembly.

Plaintiffs seek to prove intentional discrimination through the circumstantial evidence model adopted by the United States Supreme Court in *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp*., 429 U.S. 252 (1977). More specifically, Plaintiffs have

argued that the process followed by the General Assembly in the enactment of H.B. 589 substantially departed from past practices of the General Assembly, thus raising an inference of discrimination. The actual facts show that to be false.

None of the declarations submitted by Plaintiffs allege that the Rules of the North Carolina House of Representatives or of the North Carolina Senate were violated in any way during the legislative process that enacted H.B. 589 into law. To the contrary, Plaintiffs' declarants simply express their opinions, as members of the political caucus that is not in the majority, that the process was "unfair." The fact of the matter is that H.B. 589 was enacted into law in accordance with all applicable Rules of the North Carolina House of Representatives and the North Carolina Senate. (*See* Attachment 12, Declaration of Carolyn Justice)

As explained by Carolyn Justice, a former member of the North Carolina House of Representatives who served nearly a decade and shepherded many bills into law during her career, the Rules governing the North Carolina House of Representatives (House Resolution 54) were adopted on February 6, 2013 by a vote of 98 to 21. (Justice Decl. ¶ 6) The Rules governing the North Carolina Senate (Senate Resolution 1) were adopted on January 9, 2013 by a vote of 47 to 0. (*Id.*) While H.B. 589 was pending in the House, a public hearing was held and the bill was also heard in committee multiple times. (*Id.* at ¶ 7) The House Rules did not require a public hearing. (*Id.*) On April 4, 2013, H.B. 589 "VIVA/Elections Reform" was filed with the House Principal Clerk and was introduced on April 8, 2013 in accordance with House Rule 31.1(d) ("All public bills which would not be required to be re-referred to the Appropriations or Finance Committees under Rule

38 … must be introduced not later than 3:00 P.M. on Wednesday, April 10, 2013). (*Id.* at ¶ 8)

H.B. 589 was posted on the North Carolina General Assembly website where it was available to the public. (*Id.* at ¶ 9) Editions 1 through 7 of the bill were posted on the General Assembly's website where they were available to the public. (*Id.*) On April 8, 2013, House Bill 589 was referred to the House Committee on Elections. (*Id.* at ¶ 10) This referral was published on the bill and on the General Assembly's website. (*Id.*) The regular meeting schedule of the House Elections Committee, House Finance Committee and House Appropriations Committee, each of which heard House Bill 589, are all posted on the General Assembly website. (*Id.* at ¶ 11) Additionally, notices of each meeting were distributed to Committee members and members of the public who have signed up to receive Committee notices via electronic mail, and were announced during open session on the floor of the House. (*Id.*)

On April 17, 2013, at a regularly scheduled meeting of the House Committee on Elections, a public hearing was held regarding a proposed committee substitute to House Bill 589. (*Id.* at ¶ 12) The proposed committee substitute was given a favorable report by the committee. (*Id.*) On April 17, 2013 House Bill 589 was given a serial referral to House Finance and House Appropriations for further public deliberation. (*Id.* at ¶ 13) On April 18, 2013, at a regularly scheduled meeting of the House Finance Committee, a second proposed committee substitute to House Bill 589 was given a favorable report. (*Id.* at ¶ 14) On April 23, 2013, at a regularly scheduled meeting of the House

Appropriations Committee, a third proposed committee substitute to House Bill 589 was given a favorable report. (*Id.* at ¶ 15)

On April 23, 2013, House Bill 589 was placed on the House Calendar for public debate on April 24, 2013 pursuant to House Rule 36(b). (*Id.* at ¶ 16) On April 24, 2013, the House held debate for House Bill 589. (*Id.* at ¶ 17) Of ten amendments offered, three were adopted (the sponsors were Reps. Tine, Graham and Fisher – all Democrats). (*Id.*) House Bill 589, as amended, passed the House on second and third reading by votes of 80 to 36 and 81 to 36. (*Id.* at ¶ 18) Several Democratic members of the House voted for the bill on both second and third readings. (*Id.*)

On April 25, 2013 the Senate received H.B. 589 from the House and the bill was referred to the Senate Committee on Rules and Operations of the Senate where it remained available for public review and comment until July 23, 2013. (*Id.* at ¶ 19) The Senate Committee on Rules and Operations of the Senate meets upon the Call of the Chair. (*Id.* at ¶ 20) In accordance with N.C. Gen. Stat. § 143-318.14A(b), a July 18, 2013 meeting of the Senate Rules Committee was noticed via electronic mail and the General Assembly website as well as during open session of the Senate. (*Id.*) During the July 18, 2013 meeting, a proposed committee substitute to H.B. 589 was distributed to members of the committee as well as posted on the General Assembly's website for review by the public. (*Id.*) On July 22, 2013, a second proposed committee substitute to H.B. 589 was distributed to members of the Senate Rules Committee in accordance with Senate Rule 45.1, which requires distribution of a proposed committee substitute to

committee members the night before the committee meeting at which the proposed committee substitute will be considered. (*Id.* at ¶ 21)

On July 23, 2013 the Senate Rules committee held a meeting to deliberate regarding the proposed committee substitute to H.B. 589. (*Id.* at ¶ 22) Of three amendments offered, three were adopted. (*Id.*) The sponsors of those amendments were Sen. Apodaca, a Republican, and Sen. Clark, a Democrat. (*Id.*) The proposed committee substitute, as amended, was given a favorable report. (*Id.*)

Many of the provisions added to the proposed committee substitute by the Senate Rules committee were pending in bills introduced earlier in the 2013 session. (*Id.* at ¶ 23) For example, H.B. 451, filed March 27, 2013, proposed to shorten one-stop absentee voting, eliminate Sunday voting, and eliminate same-day registration. (*Id.*) H.B. 913, filed April 11, 2013, proposed to eliminate same-day registration and enhance election observer rights. (*Id.*) Senate Bill 428, filed March 26, 2013, proposed to eliminate same-day registration and shorten the one-stop absentee voting period. (*Id.*) In addition, S.B. 666, filed on April 2, 2013, proposed to enhance observer rights, repeal same-day registration, and limit one-stop absentee voting to ten days. (*Id.*) Of course, the concept of photo identification to vote was well known because it had been extensively debated during the prior session when H.B. 351 was passed by the legislature but ultimately vetoed by the Governor. (*Id.*)

On July 24, 2013 H.B. 589 appeared on the Senate calendar in the ordinary course of business. (*Id.* at ¶ 24) Of ten amendments offered, three were adopted. (*Id.*) The amendment sponsors were Sen. Stein, a Democrat, Sen. Apodaca, a Republican, and Sen.

Rucho, a Republican. (*Id.*) H.B. 589 passed second reading in the Senate by a vote of 32 to 14. (*Id.*) No points of order were pursued by any member of the Senate. (*Id.*) Senator Apodaca, Republican, objected to third reading to provide additional time for review, debate and deliberation on a separate legislative day. (*Id.*)

On July 25, 2013 two amendments were adopted. (*Id.* at ¶ 25) The amendment sponsors were Sen. Blue, a Democrat, and Sen. Rucho, a Republican. (*Id.*) H.B. 589, as amended, passed third reading by a vote of 32 to14. (*Id.*) The bill was sent back to the House for concurrence. (*Id.*)

On July 25, 2013 the House received H.B. 589, as amended by the Senate, and concurred in the Senate's changes by a vote of 73 to 41. (*Id.* at ¶ 26) It is not unusual and is fully consistent with the rules of each chamber for one chamber to concur in changes made to the bill by the other chamber without referring the bill back to committee or forming a Committee of the Whole. (*Id.*) In fact, during Ms. Justice's tenure in the North Carolina General Assembly, she cannot recall a single time that the House formed a Committee of the Whole for any purpose. (*Id.*)

During the legislative process that led to the ratification of H.B. 589, no Democratic members pursued a point of order or alleged violations of House or Senate rules. (*See* Attachment 13, Transcript of Senate Proceedings on H.B. 589, Vols. I – IV.) In fact, Senate Minority Leader Martin Nesbitt thanked Rules Committee Chairman Tom Apodaca for the "good and thorough debate over two days" regarding the bill. (Senate Transcript, Vol. IV, p. 90.) Moreover, members of the public were allowed to comment

on the bill at multiple points in the legislative process, including during one of the meetings of the Senate Rules Committee. (Senate Transcript, Vol. II)

Moreover, the legislative process by which H.B. 589 became law was not unusual. (Justice Decl. ¶ 30) Many high profile or controversial bills have followed a similar process. (*Id.*) For example, in 2003 the legislature was tasked with adopting a new legislative redistricting plan after several previous plans had been struck down by the courts. (*Id.* at ¶ 31) The plan was introduced on November 24, 2003 as H.B. 3 and was immediately calendared for consideration on the House floor that day. (*Id.*) The Speaker of the House did not allow amendments to the plan and did not refer the bill to committee. (*Id.*) The bill was passed by the House and immediately sent to the Senate the same day. (*Id.*) In the Senate, the bill was referred to the Senate Redistricting Committee. (*Id.*) That committee met the same day and proposed a committee substitute. (*Id.*) No amendments offered by Republican Senators were adopted. (*Id.*) The Senate committee substitute made significant changes to the bill. (*Id.*) In addition to adding new Senate districts, the committee substitute created a three-judge panel of the Superior Court of Wake County for redistricting cases and dramatically altered how redistricting challenges are handled by the courts. (*Id.*) The committee substitute was adopted by the Senate Redistricting Committee the next morning, November 25, 2003. (*Id.*) It was then calendared for immediate consideration by the full Senate. (*Id.*) The Senate adopted the committee substitute and sent it to the House for immediate consideration the same day. (*Id.*) When the House received it, it did not refer the bill to committee and it did not form a Committee of the Whole. (*Id.*) Instead, the House

concurred in the Senate committee substitute. (*Id.*) During the final debate in the House on the bill, several Republican members of the House attempted to be recognized to debate the bill but were not recognized by the Speaker. (*Id.*) After the House concurred in the Senate committee substitute, the 2003 redistricting plan was immediately ratified and then signed by the Governor on November 25, 2003. (*Id.*)

Other election-related bills have been enacted late in the session. (*Id.* at ¶ 32) For example, during the 1999 Session, S.B. 568 was introduced. (*Id.*) S.B. 568 removed the excuse requirement from absentee ballots cast at one-stop voting sites during general elections in even-numbered years. (*Id.*) The legislation also allowed a county board to provide more than one site for one-stop voting, so long as a unanimous vote of all of the members of the county board approved such action. (*Id.*) This legislation also included language regarding challenges against voters at one-stop sites. (*Id.*) The bill was introduced in March 1999 and first passed the Senate on April 21, 1999. (*Id.*) The House did not take it up until nearly three months later when it passed an amended version of the bill on July 13, 1999. (*Id.*) A conference committee was formed, during which a voter identification requirement that had been added to the bill was removed. (*Id.*) The bill, as proposed by the conference committee was passed by the Senate and House on July 19 and July 20, respectively, was ratified on July 21, 1999, the last day of the Session. (*Id.*)

In addition, during the 2005 Session of the North Carolina General Assembly, S.B. 133, ultimately enacted as SL 2005-2, was a very controversial bill. (*Id.* at ¶ 33) The bill required the counting of out-of-precinct votes in the disputed election for State

Superintendent of Public Instruction race the previous November. (*Id.*) That election was subject to pending election protests regarding the counting of out-of-precinct ballots. (*Id.*) The bill was introduced on February 14, 2005 and was enacted and ratified by February 28, 2005 – a period of only two weeks. (*Id.*) The final votes in the House and Senate on the bill were split along party lines. (*Id.*)

Also, in 2002, S.B. 1054 was enacted. (*Id.* at ¶ 34) S.B. 1054 created a system of public financing for appellate judicial elections and was ultimately enacted along mostly partisan lines. (*Id.*) After passing the Senate, the House proposed a committee substitute which passed the House on September 26, 2002. (*Id.*) The Senate then voted to concur with the House committee substitute without referring the committee substitute to committee. (*Id.*) The bill was enacted just a few days prior to the adjournment of that session. (*Id.*) Relatedly, in 2007, a controversial bill creating a system of public financing for Council of State members was enacted. (*Id.* at ¶ 35) The bill, H.B. 1517, was filed on April 17, 2007, but did not pass the House until July 28, 2007, near the end of that session. (*Id.*) The Senate passed the bill on August 1, 2007, and the bill was ratified on the same day that the session was adjourned. (*Id.*)

Just this past session (2013), H.B. 522 began as a bill regarding "master meters" for electric service. (*Id.* at ¶ 36) It passed the House on May 20, 2013. (*Id.*) In the Senate, the bill was changed entirely to a bill regarding the application of foreign law in certain cases under state law. (*Id.*) The Senate passed its committee substitute on July 19, 2013. (*Id.*) The House then concurred in the Senate committee substitute on July 24, 2013, the day before the 2013 session adjourned. (*Id.*) Similarly, H.B. 74, a regulatory

reform bill, passed the House on May 13, 2013. (*Id.* at ¶ 37) The Senate then proposed a committee substitute which made significant changes to the bill. (*Id.*) The committee substitute passed the Senate on July 19, 2013. (*Id.*) The House then failed to concur and a conference committee was formed. (*Id.*) The conference committee report was adopted by both chambers on the very last day of the session, July 26, 2013. (*Id.*)

While the bills enacted in 2013, including H.B. 589, followed all legislative rules, controversial bills in prior sessions have been enacted despite what some perceived to be rules violations according to former Rep. Justice. (*Id.* at ¶ 38) For instance, according to former Rep. Justice the House rules were often ignored in the passage of the State Lottery, H.B. 1023. (*Id.*) State House members raising points of order during the debate were ignored. (*Id.*) Members who objected to the bill being read for the third time on the same day as second reading were also ignored in what she describes as a violation of then-House rules. (*Id.*) Ultimately, the bill was passed and ratified just a few days prior to the adjournment of the 2005 session. (*Id.*) As described by former Rep. Justice, in the case of H.B. 1023, members who believed that the applicable rules were not being followed raised points of order, which is the appropriate way to question whether the rules are being followed. In contrast, no members of the General Assembly, including those who have provided declarations on behalf of Plaintiffs, pursued any points of order while H.B. 589 was being considered.

In addition, according to former Rep. Justice, previous versions of House and Senate rules sometimes restricted the ability of members opposing legislation to have amendments adopted. (*Id.* at ¶ 39) For instance, the Racial Justice Act, a highly

controversial bill (S.B. 461) was adopted during the 2009 session. (*Id.*) Under the House rules then in effect, no amendment was in order if the amendment did not fit into the long title of the bill. (*Id.*) The long title of S.B. 461 was nearly an entire page long (almost as long as the text of the bill itself) and therefore proposed amendments were essentially out of order in the House. (*Id.*) The current House rules do not contain this restriction on amendments. (*Id.*) In addition, similar to the legislative route taken by H.B. 589, the Racial Justice Act was passed first by the Senate, then by the House with a committee substitute, which the Senate then concurred in without referring the matter to any committee or a Committee of the Whole. (*Id.*)

Despite the protests by Plaintiffs' declarants, it is and always has been routine that the majority caucus would control the flow of debate in numerous ways that outsiders might perceive as unfair. (*Id.* at ¶ 40) For instance, according to former Rep. Justice, in her experience, prior to 2010, some members attempting to gain the floor for debate, to propose an amendment, or to make a point of order were not recognized. (*Id.*) In other instances, according to former Rep. Justice, the motion for "previous question" would be used to close debate. (*Id.*) According to former Rep. Justice, the motion for previous question would be passed even before the minority caucus had a chance to speak on the bill. (*Id.*) If a member of the minority caucus did get an opportunity to sponsor an amendment to a bill, according to former Rep. Justice the majority caucus often moved to "table" the proposed amendment – a parliamentary technique that dispenses with consideration of the amendment without any debate. (*Id.*) Especially on controversial bills, these techniques were the norm. (*Id.*) To the extent they are used today, they are

not new or unusual. (*Id.*) However, under current House and Senate rules, the rules allow more opportunities for debate and amendments. (*Id.*)

Thus, while Plaintiffs have stated their opinion that they do not like the process which led to the enactment of H.B. 589 into law, they have offered no evidence of any rules violations or departures from normal past practices of the General Assembly. To the contrary, during the H.B. 589 legislative process the majority party accepted several amendments from the minority party including amendments from African American members. Plaintiffs can point to no case in which intentional discrimination has been found under *Arlington Heights* where the legislative body followed its rules, utilized a process that had been followed by the current legislative body and prior legislative bodies, and accepted amendments from the minority party and minority members of the legislative body.

III. PLAINTIFFS HAVE NOT SHOWN THAT THEY WILL SUFFER IRREPARABLE HARM IF A PRELIMINARY INJUNCTION IS NOT GRANTED.

As shown in Argument II, *supra*, Plaintiffs will suffer no harm if a preliminary injunction is not issued as shown by the experience of the 2014 primary election. Plaintiffs have not shown any causal connection between their speculative allegations of harm and the challenged provisions of H.B. 589. As a result, they have failed to show that they are entitled to preliminary injunctive relief.

IV. DEFENDANTS AND THE PUBLIC INTEREST WILL SUFFER SUBSTANTIAL IRREPARABLE HARM IF PRELIMINARY INJUNCTIVE RELIEF IS GRANTED.

In contrast to the nonexistent harms facing Plaintiffs, Defendants would be subjected to significant and irreparable harm if preliminary injunctive relief is granted. "[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *Maryland v. King*, 133 S. Ct. 1, 3 (2012) (quoting *New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers)); *see also Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 134 S. Ct. 506, 506 (2013) (mem.) (Scalia, J., concurring).

Moreover, the Defendants, as those charged with enforcement of North Carolina's election laws, represent the public interest in this case, for the laws themselves reflect the public's interest. "Because state officials are the parties against whom the injunction is sought, and they represent the public interest, consideration of the harm to them should the injunction issue merges with consideration of the public interest." *Jackson v. Leake*, 476 F. Supp. 2d 515, 530 (E.D.N.C. 2006). Here, it is important to recognize that the status quo consists of the challenged provisions of H.B. 589 being in effect. They were enforced in the 2014 primary. Numerous other actions have already been taken to implement those provisions. As noted by Cherie Poucher, Director of the Wake County Board of Elections, returning to pre-H.B. 589 practices now would significantly burden the counties. (Poucher Decl. ¶ 6) Any preliminary injunction requiring county boards of elections to revert to practices not used for the most recent election would result in

significant administrative burdens, not to mention significant costs to the counties and to the taxpayers as forms would have to be replaced and resources redistributed for additional days of one-stop absentee voting. (*Id.*) As Ms. Poucher states, her budget has already been set by the Wake County Board of County Commissioners. (*Id.*)

Plaintiffs will suffer no harm if a preliminary injunction is not issued. The State of North Carolina, on the other hand, will suffer irreparable harm if the Court enjoins enforcement of statues enacted by representatives of the people. This being the case, the balance of harms tips decidedly in favor of Defendants. It is also clear that preliminary injunctive relief is not in the public interest, as it would impose significant administrative and financial burdens on the State and on county boards of elections. It would also risk significant voter confusion as the rules governing elections, which were put in place prior to the beginning of the current election cycle, would change again mid-cycle. For these reasons, Plaintiffs have not demonstrated that they are entitled to a preliminary injunction.

V. THERE IS NO BASIS FOR THE COURT TO AUTHORIZE THE ASSIGNMENT OF FEDERAL OBSERVERS.

The United States has also requested that the Court authorize the assignment of federal observers for the 2014 general election in North Carolina. This request is baseless.

The United States makes this request pursuant to 42 U.S.C. § 1973a (2012). That statute states:

> Whenever the Attorney General or an aggrieved person institutes a proceeding under any statute to enforce the voting guarantees of the fourteenth or fifteenth amendment in any State or political subdivision the court shall authorize the appointment of Federal observers by the United States Civil Service Commission [Director of the Office of Personnel Management] in accordance with section 6 to serve for such period of time and for such political subdivisions as the court shall determine is appropriate to enforce the voting guarantees of the fourteenth or fifteenth amendment (1) as part of any interlocutory order *if the court determines that the appointment of such observers is necessary to enforce such voting guarantees* or (2) as part of any final judgment if the court finds that violations of the fourteenth or fifteenth amendment justifying equitable relief have occurred in such State or subdivision: Provided, That the court need not authorize the appointment of observers if any incidents of denial or abridgement of the right to vote on account of race or color, or in contravention of the voting guarantees set forth in section 4(f)(2) (1) have been few in number and have been promptly and effectively corrected by State or local action, (2) the continuing effect of such incidents has been eliminated, and (3) there is no reasonable probability of their recurrence in the future.

42 USCS § 1973a (emphasis added). Here, of course, Plaintiffs have failed to make any showing that their rights have been violated or that they are likely to suffer any harm. Therefore, they have failed to give this Court any basis to "determine[] that the appointment of such observers is necessary to enforce [their] voting guarantees." Here,

not only have any denials of the right to vote on account of race been "few in number," they are non-existent. Thus, the Court should decline to authorize federal observers. *See Coleman v. Bd. of Educ.*, 990 F. Supp. 221, 233 (S.D.N.Y. 1997) (court declined to authorize federal observers at when plaintiffs had failed to show, at preliminary injunction stage, that federal monitoring was either appropriate or necessary).

CONCLUSION

For the foregoing reasons, Defendants pray that the Court deny Plaintiffs' motions for preliminary injunction and the United States' motion for appointment of federal observers.

This the 18th day of June, 2014.

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This, the 18th day of June, 2014.

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