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

NORTH CAROLINA STATE CONFERENCE OF THE NAACP, et al., Plaintiffs, v. PATRICK LLOYD MCCRORY, in his official capacity as the Governor of North Carolina, et al., Defendants.	**PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS** **Case No.: 1:13-CV-658**
LEAGUE OF WOMEN VOTERS OF NORTH CAROLINA, et al., Plaintiffs, v. THE STATE OF NORTH CAROLINA, et al., Defendants.	**Case No.: 1:13-CV-660**
UNITED STATES OF AMERICA, Plaintiffs, v. THE STATE OF NORTH CAROLINA, et al, Defendants.	**Case No.: 1:13-CV-861**

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INTRODUCTION

Nine months after Plaintiffs initiated this litigation, sixth months after discovery commenced, and just as Plaintiffs filed motions for a preliminary injunction which were supported by volumes of factual material and expert reports, Defendants now argue that they are entitled to judgment on the pleadings. Rather than try to point out flaws in Plaintiffs' pleadings, however, Defendants appear to be engaged in a transparent attempt to preview their legal arguments for this Court (in advance of the upcoming preliminary injunction hearing) and future appellate courts. Indeed, Defendants' brief includes pages of argument that either include no case citations whatsoever or that are grounded on materials far outside of the pleadings. And many of Defendants' arguments—including most notably their attempt to reinterpret Section 2 of the Voting Rights Act ("VRA") as having no application to vote-denial cases such as this—have no support in principle or precedent.

The preliminary injunction briefing explains why Plaintiffs are likely to prevail on their claims under Section 2 of the Voting Rights Act and the 14th, 15th, and 26th Amendments. The standard for a motion for judgment on the pleadings, however, is much more deferential. As this Court is well aware, judgment on the pleadings is appropriate only if, after assuming the truth of *all* of the allegations in the complaints, and drawing all reasonable inferences in the light most favorable to Plaintiffs, there is no set of facts on which Plaintiffs could prevail. Defendants simply cannot make that showing in this case. All four complaints include detailed allegations explaining how

certain provisions of HB 589 (i) impose disproportionate burdens on racial minorities; (ii) will interact with existing social and economic conditions in North Carolina to cause an inequality in the opportunities of minorities to vote; (iii) impose substantial burdens on the right to vote that are not outweighed by any credible state interest; and (iv) were enacted with the intent to discriminate against African Americans, other racial minorities, and young voters. A Rule 12(c) motion simply cannot be sustained in the face of such allegations.

Defendants themselves recognize as much. Defendants' Motion for Judgment on the Pleadings (ECF No. 107) does not argue that the complaints include insufficient factual allegations or otherwise fall short of the pleading requirements for claims under the VRA and the Constitution. Instead, Defendants' argument can be boiled down to a single assertion: Because North Carolina was not required to adopt the various voting practices at issue in this case in the first instance, it necessarily must also have unfettered discretion to eliminate those practices—regardless of the General Assembly's reasons for doing so, the burdens such a reversal will impose on voters, or the disparate impact such an act will have on minority citizens. *See* Defs.' Br. at 2.

That is not the law. A state's decision to adopt certain voting practices and its later decision to repeal those practices are separate legislative acts that *each* must independently comply with the requirements of federal statutory and constitutional law. Thus, regardless of whether a state was required to adopt certain practices in the first place, it cannot repeal those practices if, for example, the repeal was motivated by racial

discrimination (in violation of the 14th Amendment) or if the repeal would interact with existing social and economic conditions to impose disproportionate burdens on the ability of African Americans to vote (in violation of Section 2 of the VRA). Indeed, courts have not hesitated to find that states may not reduce voting opportunities when doing so would violate the VRA or a constitutional violation. *See, e.g.*, *Obama for Am. v. Husted*, 888 F. Supp. 2d 897, 911 (S.D. Ohio 2012) (restoring three days of early voting), *aff'd* 697 F.3d 423 (6th Cir. 2012); *Florida v. Holder*, 885 F. Supp. 2d 299, 357 (D.D.C. 2012) (blocking five Florida counties from reducing early voting hours).

In short, even if the *adoption* of the modes of participation at issue in this case was not compelled in the first instance, nothing in law or logic forever insulates the *elimination* of those practices from review. Plaintiffs have adequately alleged that the challenged provisions of HB 589 impose discriminatory and undue burdens on the right to vote, and Defendants have failed to establish that Plaintiffs' allegations, if proved, could not permit relief. Defendants' motion should therefore be denied.

LEGAL STANDARD

A motion for judgment on the pleadings merely tests the sufficiency of a complaint; it "does not resolve contests surrounding the facts, the merits of a claim, or the applicability of defenses." *Butler v. United States*, 702 F.3d 749, 752 (4th Cir. 2012). At this stage, "the court's task is to test the legal feasibility of the complaint without weighing the evidence that might be offered to support or contradict it." *Clatterbuck v. City of Charlottesville*, 708 F.3d 549, 558 (4th Cir. 2013).

A 12(c) motion is analyzed under the same standard as a 12(b)(6) motion to dismiss for failure to state a claim. *Alexander v. City of Greensboro*, 801 F. Supp. 2d 429, 433 (M.D.N.C. 2011). The applicable test is "whether or not, when viewed in the light most favorable to the party against whom the motion is made, genuine issues of material fact remain or whether the case can be decided as a matter of law." *Id.* In resolving Defendants' motion, this Court must assume that the facts alleged in the complaints are true and draw all reasonable factual inferences in Plaintiffs' favor. *Id.*

In deciding a motion for judgment on the pleadings, "a court is strictly constrained to base its decision solely on information obtained from the pleadings." *Dobson v. Cent. Car. Bank & Trust Co.*, 240 F. Supp. 2d 516, 519 (M.D.N.C. 2003). Although the court may consider the Answer on a 12(c) motion, "[f]or the purposes of this motion [the defendants] cannot rely on allegations of fact contained only in the answer, including affirmative defenses, which contradict [the] complaint," because "plaintiffs were not required to reply to [the] answer, and all allegations in the answer are deemed denied." *Alexander*, 801 F. Supp. 2d at 433 (citation and internal quotation marks omitted). Outside of the pleadings, as with a 12(b)(6) motion, the court may take judicial notice of a narrow category of facts, but these again must be construed in the light most favorable to the plaintiff. *Id.* at 557-58.

With regard to evaluating purpose or intent, "the court is constrained upon considering a motion for judgment on the pleadings to limit its analysis of governmental interest to the allegations of the complaint." *Price v. City of Fayetteville*, 2014 WL

2115335, at *6 (E.D.N.C. May 21, 2014) (citing *Clatterbuck*, 708 F.3d at 556). A court's evaluation should "not [be] based on the government's asserted evidence or [the court's] independent judgment of likely purposes." *Clatterbuck*, 708 F.3d at 556.

ARGUMENT

I. Plaintiffs Have More Than Adequately Pleaded A Claim For Relief Under Section 2 Of The Voting Rights Act

Plaintiffs have more than adequately pleaded a claim for relief under Section 2 of the Voting Rights Act, 42 U.S.C. § 1973. Section 2 embraces two types of claims: (i) "vote dilution" claims; and (ii) "vote denial" claims. *See, e.g.*, *Simmons v. Galvin*, 575 F.3d 24, 28-29 (1st Cir. 2009); *Hayden v. Pataki*, 449 F.3d 305, 321 (2d Cir. 2006) (*en banc*). Because Defendants consistently confuse the two, it is worthwhile to distinguish them here.

A "vote dilution" claim under Section 2 alleges that minority voting strength has been unlawfully diluted by dispersing minorities "into districts in which they constitute an ineffective minority of voters." *Thornburg v. Gingles*, 478 U.S. 30, 46 n.11 (1986). To prove unlawful vote dilution, a plaintiff must first establish three preconditions.[1] If those preconditions are satisfied, "then the trier of fact must determine whether, based on the totality of the circumstances, there has been a violation of Section 2." *United States*

[1] Those preconditions are: "(1) demonstrate that it is sufficiently large and compact to constitute a majority in a single member district, (2) show that it is politically cohesive, and (3) demonstrate that the white majority votes sufficiently as a bloc to enable it ... usually to defeat the minority's preferred candidate." *Hall v. Virginia*, 385 F.3d 421, 426 (4th Cir. 2004) (internal quotation marks omitted; ellipsis in original).

v. Charleston Cnty., S.C., 365 F.3d 341, 345 (4th Cir. 2004). In evaluating the totality of the circumstances, courts look to the factors listed in the Senate Report that accompanied Congress's 1982 amendments to the Voting Rights Act (hereinafter, the "Senate Factors"). *See id.* Thus, a vote-dilution claim challenges situations where, although minority voters can *participate* in the political process, the districts are arranged in such a way that they cannot *aggregate* their votes effectively to elect their preferred candidates. *See* Daniel P. Tokaji, *The New Vote Denial: Where Election Reform Meets the Voting Rights Act*, 57 S.C. L. Rev. 689, 718 (2006).

A "vote denial" claim, in contrast, alleges that a change in voting practices or procedures results in the "denial or abridgement" of the right to vote, *i.e.*, that it inhibits *participation* in the political process itself. 42 U.S.C. § 1973(a); *see also Simmons*, 575 F.3d at 29. Courts have explained that there are two elements to a vote-denial claim. *First*, a plaintiff must show that a challenged electoral practice has a disparate impact on minorities—that it, in other words, "creates a barrier to voting that is more likely to appear in the path of a voter if that voter is a member of a minority group." *Frank v. Walker*, 2014 WL 1775432, at *25 (E.D. Wis. Apr. 29, 2014). *Second*, a plaintiff must show that a challenged electoral practice interacts with historical and social conditions to result in an inequality in the opportunities of minorities to vote. *See Gingles*, 478 U.S. at 44, 47 (courts must "assess the impact of the contested structure or practice on minority electoral opportunities" and determine whether a law "interacts with social and historical conditions to cause an inequality in the [voting] opportunities enjoyed by" minorities);

see also Brown v. Detzner, 895 F. Supp. 2d 1236, 1249-50 (M.D. Fla. 2012) (identifying those two requirements for a Section 2 vote-denial claim). One key distinction between a "vote dilution" and a "vote denial" claim is that plaintiffs asserting a vote-denial claim need not first establish the "preconditions" described in *Gingles*—those inquiries are relevant only to a vote-dilution claim. *See, e.g.*, *Common Cause S. Christian Leadership Conference of Greater Los Angeles v. Jones*, 213 F. Supp. 2d 1106, 1110 (C.D. Cal. 2001); Tokaji, *supra*, at 709.

Under that legal backdrop, it is clear that the complaints adequately allege both elements of a vote-denial claim under Section 2 of the VRA. *First*, the complaints allege—and for present purposes it must be accepted as true—that the challenged provisions will have a disproportionate impact on minority voters. *See, e.g.*, NAACP 2d Am. Compl. ¶¶ 7-9, 69, 84-85 (disparate impact of photo ID provisions); ¶¶ 90-93 (disparate impact of elimination of SDR); ¶¶ 97-99 (disparate impact of shortening early voting period); ¶¶ 102, 104 (disparate impact of elimination of out-of-precinct voting); ¶ 107 (disparate impact of expansion of poll observers and ballot challengers); *see also* LWV Compl. ¶¶ 33-42, 48-50, 56-57. Those allegations are more than sufficient to establish, as a matter of pleading, that racial minorities rely disproportionately on the methods of participation eliminated by the challenged provisions and thus will be disproportionately burdened by their elimination.

Second, the complaints include detailed allegations explaining how the challenged provisions will interact with existing socioeconomic conditions to result in minorities

having less opportunity than whites to participate in the electoral process. *See, e.g.*, NAACP 2d Am. Compl. ¶¶ 85-86 (explaining how disadvantages in the areas of education, employment, transportation, and economic status cause African Americans and Latinos to be less able to acquire the identification required to vote); ¶ 90 (explaining how higher rates of transiency among African Americans means that they will be disproportionately burdened by the elimination of SDR); ¶¶ 95-99 (explaining why African Americans and Latinos disproportionately rely on early voting and will be disproportionately burdened by the shortened early voting period); ¶¶ 102-104 (explaining why African Americans disproportionately use out-of-precinct voting); *see also* LWV Compl. ¶¶ 40-42, 49-50, 56-57. The Defendants have not even challenged the historic and socioeconomic conditions detailed in Plaintiffs' complaints. Again, at the pleadings stage, these allegations are more than enough to establish that the challenged provisions will interact with existing socioeconomic conditions to impose unique burdens on minorities, disproportionately burdening their ability to vote.

Indeed, the parallel preliminary injunction briefing demonstrates that not only have the Plaintiffs adequately asserted a Section 2 claim, but they also are likely to succeed on the *merits* of such a claim. The reports of three separate expert witnesses all provide substantial testimony, including detailed statistical analysis, that the challenged provisions of HB 589 will have a substantial disparate impact on African Americans. *See* Pls.' Br. in Support of Mot. For Prelim, Inj. at 17-20 (ECF No. 110-1). That fact, moreover, came as no surprise to Defendants, given that the State Board of Election's

("SBOE") own analysis—which was done at the request of members of the General Assembly—showed that HB 589 would have a disparate impact on racial minorities. *Id*. at 52-53. In addition, the fact discovery and expert testimony collected to date show indisputably that the challenged provisions will interact with existing socioeconomic conditions in North Carolina to cause a decrease in the ability of racial minorities to vote and participate in the political process. *See id*. at 28-42.

Unable to seriously argue that Plaintiffs have not adequately alleged the elements of a Section 2 claim, Defendants raise a number of arguments that are either irrelevant, unsupported in the case law, or flatly wrong. For example, Defendants make the incredible argument that because the Senate Report accompanying the 1982 amendments to the VRA "makes no mention of photo identification requirements, reduction of early voting, elimination of SDR, or requiring voters to vote in their own precincts as 'discriminatory techniques,'" Congress necessarily must have found that those practices are lawful under Section 2. Defs.' Br. at 32. But Section 2 does not forbid only *some* discriminatory voting practices, or even any single voting practice in all circumstances. To the contrary, Section 2 prohibits "*any* voting qualifications or prerequisites to voting, or *any* standards, practices, or procedures which result in the denial or abridgment of the right to vote" for racial minorities. *Gingles*, 478 U.S. at 43 (second emphasis added). Thus, the fact that Congress did not specifically refer to the practices at issue in this case is neither here nor there—Section 2 forbids *all* changes in voting procedure that have a

disproportionate impact on African Americans and that interact with existing socioeconomic conditions to "result in unequal access to the electoral process." *Id.* at 46.

Instead of outlawing specific practices, Congress deliberately enacted a flexible standard that is dependent on the individualized facts of each case, necessarily requiring case-by-case evaluation. *See, e.g.*, *id*. at 79. For example, although Section 2 may be used to challenge at-large electoral arrangements, such arrangements are "not … considered *per se* violative of § 2," but rather must be scrutinized on a case-by-case basis, and rendered invalid only when the facts demonstrate that such practices, in interaction with existing socioeconomic conditions, "result in unequal access to the electoral process" in a particular case. *Id.* at 46. What is true in the vote dilution context is also true here: while the challenged provisions may not be categorically prohibited by the VRA, the specific facts alleged in Plaintiffs' complaints are sufficient to find that these provisions will "result in unequal access to the electoral process" in violation of Section 2. *Id.* at 46.

Inexplicably, Defendants repeatedly argue that Plaintiffs have not alleged "state action … that prevents the minority group from having an equal opportunity to participate in the electoral process." Defs.' Br. at 33; *see also id.* at 34-35 (arguing that there is no "action by the state [that] prevents members of a minority from enjoying the same opportunities enjoyed by other members of the electorate") (internal quotation marks omitted). But that is *exactly* what the complaints allege. The "state action" was the General Assembly's conscious and intentional decision to deny or abridge the right to

vote by eliminating SDR and out-of-precinct voting, shortening the early-voting period, imposing a photo identification requirement, and increasing the number of poll observers and ballot challengers. *See, e.g.*, NAACP 2d Am. Compl. ¶ 5. And, contrary to Defendants' repeated and conclusory assertions to the contrary, the complaints explain in detail why that state action will interact with existing socioeconomic conditions—which are themselves traceable in part to a history and ongoing pattern of discrimination in North Carolina, *see, e.g.*, LWV Compl. ¶ 62—to "prevent[] [African-Americans] from having an equal opportunity to participate in the electoral process," Defs.' Br. at 33. *See, e.g.*, NAACP 2d Am. Compl. ¶¶ 7-10, 85-86, 90-94, 97-100, 111-19.

Perhaps what Defendants really mean (and what they ultimately end up arguing) is that HB 589 must be lawful because it is facially neutral—it "applies equally to all voters regardless of race." Defs.' Br. at 34; *see also id*. (arguing that the challenged provisions "apply to all voters equally"). But facial discrimination in the text of a challenged statute—or even in its application—is not a requirement of a Section 2 claim. To the contrary, courts have repeatedly held that facially neutral voting restrictions—*i.e.*, restrictions that "appl[y] equally to all voters regardless of race," *id.*—nonetheless violate Section 2 if they interact with existing socioeconomic conditions to make voting disproportionately more burdensome for minorities. *See, e.g.*, Pls.' Br. in Support of Mot. For Prelim, Inj. at 16-17 (ECF No. 110-1) (citing cases in which courts held that violations of Section 2 may arise from facially neutral restrictions on voting and registration, including voter ID laws, early voting restrictions, and limitations on

registration). Indeed, if Defendants' "facially neutral" argument were true, then Section 2 would do nothing at all to outlaw literacy tests and poll taxes—the very practices that prompted the VRA's enactment in the first place, *see* 42 U.S.C. § 1973h; *Simmons*, 575 F.3d at 37 n.14, since those practices too "appl[y] equally to all voters regardless of race." Defs.' Br. at 34.

Defendants also badly misstate the law when they argue that the socioeconomic status of African Americans in North Carolina—including the fact that they "lag behind in the areas of health, education, and poverty"—is "not relevant unless there is evidence of an exclusory practice—namely the placement of minority voters in a district where they are deprived of an equal opportunity to elect their candidates of choice." *Id*. at 35. No case has ever embraced that proposition, which conflates vote-dilution and vote-denial claims. And for good reason: Such a rule would effectively restrict Section 2's applicability to vote-dilution cases, despite the fact that the Voting Rights Act was enacted to address the "denial" of the right to vote, and courts have long recognized that Section 2 extends beyond vote-dilution cases to also reach vote-denial claims. In short, nothing in the text, history, or case law of Section 2 justifies ignoring the "totality of circumstances" analysis that the text of the statute requires in vote-denial cases. *See* 42 U.S.C. § 1973(b).

Nor are Plaintiffs "attempting to convince this Court to read into Section 2 of the Voting Rights Act the same legal standards that applied to Section 5 of the Voting Rights Act." Defs.' Br. at 36. Plaintiffs agree that "[i]n a Section 2 case, the burden of proof is

on the plaintiffs, not the covered jurisdiction." *Id.* at 37. But that does nothing at all to support Defendants' current motion. As explained, when all of the allegations of the complaints are accepted as true, Plaintiffs have more than adequately alleged all of the necessary elements of a Section 2 claim.

Defendants also set up a straw man when they claim that Plaintiffs are "seeking an order from this Court mandating that the State of North Carolina adopt voting practices or rules to ensure proportional representation," or an order requiring the State "to adopt voting practices any time they hypothesize an alternative voting practice that maximizes minority participation." *Id.* at 38. That is not true. Plaintiffs are merely seeking to maintain the status quo and have North Carolina conduct elections under the same procedures used in prior elections.

In the end, Defendants resort to their often-repeated argument that because federal law did not require North Carolina to adopt many of the practices at issue in the first place, it must necessarily be true that nothing in federal law prevents the State from repealing those practices. That logic is fatally flawed for several reasons.

First, that line of reasoning fails to recognize that the decision to enact a voting practice and the later decision to repeal that practice are separate and independent legislative acts, each of which must comply with binding statutory and constitutional rules. For example, even if a State need not adopt a practice in the first instance, a later legislative decision to repeal that practice would clearly be unconstitutional if the repeal was undertaken with a racially discriminatory purpose. *Crawford v. Bd. of Educ. of City*

of Los Angeles, 458 U.S. 527, 539 n.21 (1982) ("Of course, if the purpose of repealing legislation is to disadvantage a racial minority, the repeal is unconstitutional for this reason."). Similarly, the repeal of HB 589 by the General Assembly is unlawful if the repeal would violate Section 2 of the VRA, or the 14th, 15th, or 26th Amendments of the U.S. Constitution. That is precisely what Plaintiffs have alleged.

Second, Defendants' argument cannot be reconciled with the case law. Courts have routinely invalidated changes to election practices—including reductions to early voting—that states presumably were not required to adopt in the first instance. *See, e.g.*, *Florida v. United States*, 885 F. Supp. 2d 299, 312 (D.D.C. 2012) (early voting cut from 12-14 days to eight days imposed a burden material enough that it will likely cause some reasonable minority voters not to exercise the franchise, and violated Section 5 of the VRA); *Operation Push v. Allain*, 674 F. Supp. 1245, 1262-68 (N.D. Miss. 1987) (prohibition on satellite voter registration was an administrative barrier harder to overcome for persons of lower socio-economic status and persons of lower educational attainment, and violated Section 2 of the VRA); *Spirit Lake Tribe v. Benson Cnty.*, 2010 WL 4226614, at *3 (D.N.D. Oct. 21, 2010) (polling place closures would make it more difficult for some voters to vote, and violated Section 2 of the VRA); *Brown v. Dean*, 555 F. Supp. 502, 504-05 (D.R.I. 1982) (change in polling place from previous community center location to new location would make it harder for some voters to participate, and violated Section 2 of the VRA). Thus, it is irrelevant whether North Carolina was

required to adopt any of the practices at issue, because, as alleged in the complaints, the elimination of these practices will result in unequal access to the electoral process.

II. Plaintiffs Have More Than Adequately Pleaded A Claim For Intentional Discrimination Under The Fourteenth And Fifteenth Amendments

There is also no merit to Defendants' brief attempt to argue that Plaintiffs' intentional-discrimination allegations are "insufficient as a matter of law." Defs.' Br. at 39. To prove unlawful intentional discrimination, Plaintiffs need not "prove that the challenged action rested solely on racially discriminatory purposes." *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977). "Rather, Plaintiffs need only establish that racial animus was one of several factors that, taken together, moved [the decision-maker] to act as he did." *Orgain v. City of Salisbury*, 305 Fed. App'x 90, 98 (4th Cir. 2008) (per curiam). Determining whether racial animus was one such motivating factor demands a totality-of-the-circumstances analysis. *Arlington Heights*, 429 U.S. at 266. Relevant factors include "[t]he historical background of the decision … particularly if it reveals a series of official actions taken for invidious purposes." *Id*. at 267. Courts should also take account of "[t]he specific sequence of events leading up to the challenged decision," including any "[d]epartures from the normal procedural sequence" in the legislature's consideration of a bill. *Id*. And "the fact, if it is true, that the law bears more heavily on one race than another" is relevant to the determination of whether there was an "invidious discriminatory purpose." *Washington v. Davis*, 426 U.S. 229, at 242 (1976); *see also Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 487 (1997)

(disproportionate impact of legislation "is often probative of why the action was taken in the first place since people usually intend the natural consequences of their actions").

Plaintiffs have more than adequately alleged sufficient facts giving rise to a claim of intentional discrimination. *First*, the complaints describe how the historical background of HB 589 strongly suggests intentional discrimination. The complaints describe North Carolina's long history of voting-related discrimination, *see, e.g*, NAACP 2d Am. Compl. ¶¶ 55-59, 119-21; LWV Compl. ¶¶ 58-62, including the fact that other courts in this District and elsewhere have acknowledged that history.

Second, the complaints adequately allege that the General Assembly "[d]epart[ed] from the normal procedural sequence" in enacting HB 589. *Arlington Heights*, 429 U.S. at 267. This included, for example, limiting debate on the bill, pushing the bill though both chambers of the legislature in an unusually speedy fashion, and refusing to refer the bill to the proper committees. *See*, NAACP 2d Am. Compl. ¶¶ 64-78, LWV Compl. ¶¶ 65-67, 71.

Third, and finally, the complaints allege that the challenged provisions have a disparate impact on racial minorities ***and*** that the General Assembly was well aware of that disparate impact during their consideration and enactment of HB 589. *See* NAACP 2d Am. Compl. ¶¶ 68-70, 124; LWV Compl. ¶¶ 71, 80-82. In addition to documenting how new voting requirements will disproportionately burden African Americans and Latinos, the complaints also describe how the legislature via HB 589 repealed the very means of participation that have been relied on disproportionately by minority voters as

they have become an ever-larger share of the North Carolina electorate. *See* NAACP 2d Am. Compl. ¶¶ 90-94, 96-99, 104; LWV Compl. ¶¶ 30, 33-42, 44-50, 55-57. Furthermore, the complaints include detailed allegations explaining how the rationales put forward by state lawmakers—including the prevention of voter fraud—lacked any basis in fact or law. *See* NAACP 2d Am. Compl. ¶¶ 71-72, 75-77; LWV Compl. ¶ 71. That the General Assembly enacted HB 589 with full knowledge that the challenged provisions would impose disproportionate burdens on African Americans is highly "probative" of why the General Assembly enacted the challenged provisions "in the first place." *Reno*, 520 U.S. at 487.

III. Plaintiffs Have More Than Adequately Pleaded That The Challenged Provisions Unduly Burden The Right To Vote In Violation Of The 14th Amendment

Plaintiffs have adequately pleaded that the challenged provisions, individually and collectively, will result in an undue burden on the right to vote in violation of the 14th Amendment. In determining whether a challenged electoral practice unduly burdens the right to vote, courts apply the *Burdick/Anderson* framework (which Defendants concede is applicable here, *see* Defs.' Br. at 19). *See Burdick v. Takushi*, 504 U.S. 428, 434 (1992); *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983); *see also* Pls.' Br. in Support of Mot. For Prelim, Inj. at 56-57 (ECF No. 110-1). That framework requires a factually sensitive inquiry—more than mere rational basis review—into the nature of the burdens imposed by that electoral practice. And under that framework, if a law "imposes burdens

on a subgroup of a state's voting population that are not outweighed by the state's justifications for the law," it must be invalidated. *Frank*, 2014 WL 1775432, at *5.

The applicable scrutiny operates on a sliding scale: the more serious the burden, the more probing the scrutiny that must be applied. But, "[h]owever slight th[e] burden may appear, ... it must be justified by relevant and legitimate state interests sufficiently weighty to justify the limitation." *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 191 (2008) (Stevens, J., controlling opinion) (internal quotation marks omitted); *accord Frank*, 2014 WL 1775432, at *4 ("Even very slight burdens must be justified by relevant and legitimate state interests sufficiently weighty to justify the limitation.") (internal quotation marks omitted).

Early Voting. Plaintiffs have clearly alleged that the burdens imposed by North Carolina's reduction in early voting outweigh any state interest in that reduction. Plaintiffs have alleged that, because of the elimination of a week of early voting, there will be "even longer lines and waiting times for all voters throughout the early voting period and on Election Day itself, unduly burdening the right to vote throughout the electorate and effectively denying the franchise to thousands of voters who are prevented or deterred from casting ballots." LWV Compl. ¶ 31; *accord* Duke Compl. ¶ 60 ("the right to vote of thousands of North Carolinians" will be "abridge[d], and in some cases ... effectively den[ied]"); NAACP 2d Am. Compl. ¶¶ 132-34 (provisions of HB 589 "impose real and substantial burdens on the right to vote," including "longer lines, limited times and opportunities to cast a ballot, undue delay, and, in many cases, ...

complete[] prevent[ion] from voting"). The complaints also explain how evidence from the 2012 presidential election in Florida—where six early voting days were eliminated and chaos resulted—"demonstrates that reductions in the number of early voting days will result in dramatically longer lines on Election Day." LWV Compl. ¶ 32; *see also* Duke Compl. ¶ 62. And, Plaintiffs have alleged that the reduction in early voting will especially burden African Americans, individuals living in poverty, and young voters. *See* LWV Compl. ¶¶ 33-42; Duke Compl. ¶¶ 55-56, 60-62; NAACP 2d Am. Compl. ¶¶ 8, 97.

Moreover, Plaintiffs have alleged that the General Assembly lacked any credible justification for—and that there was no important government interest in—HB 589's reduction in early voting. *See, e.g.*, LWV Compl. ¶ 72 (early voting reduction "not supported by any plausible rationales or benefits to the State, even cost," because it will result in "more congestion," necessitating "more staff training and recruitment" and "more expenses to the State and to counties"); Duke Compl. ¶ 100 (challenged provisions "are irrational and not justified by an important government interest"); NAACP 2d Am. Compl. ¶¶ 130-31. Thus, Plaintiffs have alleged facts supporting the conclusions both that the State cannot identify the type of compelling interest necessary to justify the burdens described above from the reduction in early voting and that the reduction would be unconstitutional even if it imposed only slight burdens, because the State has failed entirely to produce any credible justification for that reduction. They have therefore

stated a claim that the reduction in early voting unduly burdens the right to vote in violation of the 14th Amendment.

Same-Day Registration. Plaintiffs have likewise adequately alleged that the elimination of same-day registration ("SRD") unduly burdens the right to vote in violation of the 14th Amendment. The complaints allege that the elimination of SDR abridges and in some cases will effectively deny the right to vote of thousands of North Carolinians. *See* Duke Compl. ¶ 70; *see also* LWV Compl. ¶ 76; NAACP 2d Am. Compl. ¶ 134. They allege that this burden will fall disproportionately on young, African-American, and Latino voters. *See* Duke Compl. ¶¶ 68, 70-71; LWV Compl. ¶¶ 48-50; NAACP 2d Am. Compl. ¶¶ 90-94. And they contend that there is no important government interest that justifies these burdens on voting rights. *See, e.g.*, LWV Compl. ¶ 72; Duke Compl. ¶ 100 (challenged provisions "are irrational and not justified by an important government interest"). The complaints therefore adequately state a claim that the elimination of SDR unduly burdens the right to vote.

Out-of-Precinct Voting. Plaintiffs have also adequately alleged that North Carolina's elimination of out-of-precinct voting unduly burdens the right to vote in violation of the 14th Amendment. The LWV complaint explains that "[i]n the 2012 presidential general election, 7,486 'out of precinct' provisional ballots were cast, and 89.6% of those were either accepted or partially accepted." LWV Compl. ¶ 54. Accepting this allegation as true, the elimination of out-of-precinct voting will effectively disenfranchise thousands of voters. *See also id.* ¶ 76 (alleging that "Plaintiffs' right to

vote is burdened by the arbitrary and unjustified reduction in early voting days, and the loss of same-day registration and 'out of precinct' provisional voting opportunities"; that "[h]undreds of thousands of voters relied on these methods of participation in recent elections and will now be denied an opportunity to do so"; and that "[v]oters ... who go to or are directed to vote in the incorrect precinct will be disfranchised"). In addition, the Duke complaint expressly alleges that "[t]he elimination of out-of-precinct provisional voting will result in the rejection of thousands of votes that would have been counted in prior elections," Duke Compl. ¶ 76, and "abridges and, in some cases will effectively deny, the right to vote of thousands of North Carolinians," *id.* ¶ 77; *see also* NAACP 2d Am. Compl. ¶¶ 102-04. And Plaintiffs expressly allege that these burdens will fall disproportionately on African Americans and young voters. *See* LWV Compl. ¶¶ 52, 56-57; Duke Compl. ¶ 77; NAACP 2d Am. Compl. ¶ 102-104.

Plaintiffs further allege that the elimination of out-of-precinct voting does not materially benefit the state. *See* LWV Compl. ¶ 76 ("there are no plausible benefits to the State" from the reduction in early voting days, and the loss of SDR and out-of-precinct voting); Duke Compl. ¶ 100 (the challenged provisions (one of which is the elimination of out-of-precinct voting) "are irrational and not justified by an important government interest").[2] Indeed, Plaintiffs note that the General Assembly itself found in 2005 that

[2] To the extent that Defendants dispute this, the allegations in the Complaints must be taken as true and the Defendants' unsupported assertions in their motion cannot be considered.

"[i]t would be fundamentally unfair to discount the provisional official ballots cast by properly registered and duly qualified voters." S.L. 2005-2, § 1(11), *quoted in* LWV Compl. ¶ 52 and Duke Compl. ¶ 74. Thus, Plaintiffs have alleged that the elimination of-out-of-precinct voting imposes the severe burden of effective disenfranchisement on thousands of North Carolinians, that this burden falls on African-American and young voters in particular, and that the elimination of out-of-precinct voting is not justified by a significant State interest. *See Burdick*, 504 U.S. at 434; *see also Frank*, 2014 WL 1775432, at *5.

Pre-Registration. Defendants' arguments relating to the elimination of pre-registration are no more persuasive. As set forth in the Duke complaint, North Carolina's pre-registration law permitted 16 and 17 year olds "to pre-register to ensure that they would be able to vote in the general election after they turned 18" and required the SBOE "to conduct voter registration and pre-registration drives at public high schools." Duke Compl. ¶¶ 83, 85; *see also* NAACP 2d Am. Compl. ¶ 89. "The pre-registration law," the Duke complaint continues, "was highly successful: more than 160,000 young people utilized the program to register." Duke Compl. ¶ 86. It follows that the elimination of pre-registration and the requirement that the SBOE conduct voter-registration drives will make it meaningfully more difficult for a very large number of citizens to register to vote and will result in a failure to register by, and thus the effective disenfranchisement of, a number of citizens who would have registered to vote through pre-registration and/or the mandatory voter-registration drives if they had remained in place. *See id.* ¶ 87 ("the right

to vote of young North Carolinians will be seriously infringed and, in some cases, denied entirely" as a result of these changes).

Thus, the complaints establish that the elimination of pre-registration will result in a significant burden on the voting rights of a large number of citizens. And because pre-registration was available only to young voters, *see* Duke Compl. ¶¶ 82-83, the burden from its elimination falls entirely on that subgroup of voters, which is disproportionately comprised of Latinos. *See id.* ¶ 87 ("the right to vote of young North Carolinians will be seriously infringed and, in some cases, denied entirely" as a result of the elimination of pre-registration and mandatory high school voting drives); NAACP 2d Am. Compl. ¶ 93 ("The elimination of pre-registration will have a particularly disparate impact on Latinos, for whom youth comprise a larger proportion of the population than the proportion of young whites in North Carolina."). *See generally* Duke Compl. ¶¶ 83-87. The complaints assert, moreover, that the challenged provisions (one of which is the elimination of pre-registration) "are irrational and not justified by an important government interest." Duke Compl. ¶ 100; NAACP 2d Am. Compl. ¶ 130. The complaints therefore adequately allege that the elimination of pre-registration unduly burdens the fundamental right to vote.

Discretion to Keep Polling Locations Open. Plaintiffs have likewise adequately alleged that North Carolina's change in the law as to when the closing times for polls can be modified unduly burdens the right to vote in violation of the 14th Amendment. Plaintiffs allege that HB 589 eliminated the discretion that county boards of elections

("CBOEs") previously had to keep polls open for an extra hour on Election Day and permits only the SBOE "to modify closing times of the polls, and only where the polls are delayed in opening for more than 15 minutes or are interrupted for more than 15 minutes after opening." Duke Compl. ¶¶ 78-79. As a result of this change, both the local boards and the SBOE have been left without "any discretion to keep the polls open to combat extraordinarily long lines or wait times," and "[t]hese added burdens unduly infringe upon the right to vote of thousands of North Carolinians, including young voters with inflexible schedules who may be discouraged from or rendered unable to vote at all." *Id.* ¶ 80. In addition, Plaintiffs allege that the challenged provisions (one of which is the removal of discretion from CBOEs to keep polling locations open for an extra hour) "are irrational and not justified by an important government interest." *Id.* ¶ 100. Plaintiffs assert, in sum, that North Carolina's change in the law as to when the closing times for polls can be modified burdens the right to vote without sufficient justification.

Defendants' argument that this claim should be dismissed consists of a single conclusory sentence in a footnote asserting that the claim is "frivolous." Defs.' Br. at 23 n.8.[3] Such a bare-bones footnote is not sufficient to raise this argument, and it has

[3] Defendants also misunderstand this claim. They state that Plaintiffs' argument is that "a state violates the Fourteenth Amendment by granting the SBOE the sole authority to extend voting hours in a particular county." Defs.' Br. at 23 n.8. That is incorrect. Plaintiffs' argument is based not on the switch in authority from the local boards to the SBOE, but rather on the elimination of discretion *for anyone*, absent a delay in opening or an interruption of more than 15 minutes, to keep polling locations open—including in the situation in which a polling location has multiple-hour wait times but opened on time

therefore been waived. *See infra* pp. 33-34. Moreover, it is no answer to the discussion in the preceding paragraph that the burden imposed by North Carolina's change in the rules governing the extension of polling hours is not sufficient to establish a 14th Amendment claim. As set forth above, "[h]owever slight th[e] burden may appear, ... it must be justified by relevant and legitimate state interests sufficiently weighty to justify the limitation." *Crawford*, 553 U.S. at 191 (Stevens, J., controlling opinion) (internal quotation marks omitted); *accord Frank*, 2014 WL 1775432, at *4.[4] Here, Plaintiffs have alleged that there is no important government interest that justifies the change at issue. Duke Compl. ¶ 100. Defendants' motion should be denied with regard to this claim.

Voter ID. In the more than six pages of argument in their brief regarding Plaintiffs' claim that North Carolina's voter ID law unduly burdens the right to vote in violation of the 14th Amendment, Defendants tellingly fail to make a single reference to Plaintiffs' complaints. *See* Defs.' Br. at 23-29. The complaints plainly allege facts establishing that North Carolina's voter ID law violates the 14th Amendment.

In particular, Plaintiffs allege that "[t]he voter ID requirement abridges, and in some cases will effectively deny, the right to vote of thousands of North Carolinians,"

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and stayed open. *See* Duke Compl. ¶¶ 79-80. By its plain language, the amended provision would not allow even the SBOE to keep the polls open for any additional amount of time under these circumstances.

[4] The burden from the change in the law governing the extension of polling hours must also be assessed within the context of HB 589 as a whole. *See Burdick*, 504 U.S. at 438-39; *Republican Party of Ark. v. Faulkner County*, 49 F.3d 1289, 1291 (8th Cir. 1995); *see also Wood v. Meadows*, 207 F.3d 708, 713-14 (4th Cir. 2000).

and that "[t]his is especially true of young voters." Duke Compl. ¶ 52. Plaintiffs also allege that "[s]tudies have demonstrated that voter ID laws in general have a significant and disproportionate detrimental impact on the turnout of young voters, especially young African-American and Hispanic voters," and that the "exclusion of student IDs will only exacerbate this effect, and is itself evidence of the General Assembly's intent to suppress young voters in North Carolina's elections." *Id.* ¶ 53; NAACP 2d Am. Compl. ¶¶ 80-86 ("The new voter ID requirements impose substantial burdens on those North Carolina voters who do not possess, and lack the means to obtain, the required identification. African-American and Latino voters are disproportionately represented among this group."). Further, the complaints allege that the challenged provisions (including the voter ID law) "are irrational and not justified by an important government interest." Duke Compl. ¶ 100; NAACP 2d Am. Compl. ¶ 130. Taking these allegations together, Plaintiffs have alleged that North Carolina's voter ID law imposes a substantial burden on the right to vote of many North Carolinians, including in particular certain subgroups of North Carolinians, with no countervailing benefit to the State. In other words, Plaintiffs have adequately alleged that North Carolina's voter ID law imposes an undue burden on the right to vote in violation of the 14th Amendment.

In asserting that *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008), compels a contrary result, Defendants misconstrue that case. *See* Defs.' Br. at 23-29. *Crawford* upheld Indiana's voter ID statute against a facial challenge. 553 U.S. at 203-04 (Stevens, J., controlling opinion). But in reaching that holding, the Court's controlling

opinion emphasized that its decision was based in significant part on the petitioners' failure to provide evidence establishing the burden that Indiana's voter ID law imposed on voters. *Id.**Error! Bookmark not defined.*** at 200-01 (noting that "*on the basis of the evidence in the record* it is not possible to quantify either the magnitude of the burden on this narrow class of voters or the portion of the burden imposed on them that is fully justified" and explaining that "the evidence in the record d[id] not provide [the Court] with the number of registered voters without photo identification"; "the deposition evidence presented in the District Court d[id] not provide any concrete evidence of the burden imposed on voters who currently lack photo identification"; and "[t]he record sa[id] virtually nothing about the difficulties faced by either indigent voters or voters with religious objections to being photographed") (emphasis added); *id.* at 202 ("*[O]n the basis of the record that has been made in this litigation*, we cannot conclude that the statute imposes excessively burdensome requirements on any class of voters.") (emphasis added and internal quotation marks omitted). Thus, contrary to Defendants' claims, *Crawford* supports the conclusion that this case should *not* be resolved while discovery is still ongoing; instead, Plaintiffs are entitled to the opportunity to present precisely the type of evidence that the *Crawford* Court found wanting in that case.

Frank, which recently held that Wisconsin's voter ID law violated the 14th Amendment, 2014 WL 1775432, at *18, confirms this conclusion. There, the court explained that in *Crawford*, "Justice Stevens seemed to assume that a law could be invalid based on its effect on a subgroup of voters"; "concluded that the plaintiffs had

failed to produce a record that enabled the Court to determine whether the law placed an excessive and/or unjustified burden on the rights of a subgroup of voters"; "determined that this gap in the record left the Court with no choice but to weigh the state's justifications for the law against its 'broad application to all Indiana voters'"; and "concluded that because 99% of Indiana's voting-age population already possessed photo IDs that would allow them to comply with the new law, the state's general interests in the law were sufficient to justify the burdens it imposed on Indiana voters generally." *Id.* at *4.

The *Frank* court subsequently evaluated the evidence regarding the benefits of and burdens imposed by Wisconsin's voter ID law. In doing so, the court found that the state interest in combating fraud had "very little weight," because "virtually no voter impersonation occurs in Wisconsin and it is exceedingly unlikely that voter impersonation will become a problem in Wisconsin in the foreseeable future." *Id*. at *6. The court also found that the "state's interest in safeguarding confidence in the electoral process is evenly distributed across both sides of the balance—a law such as [Wisconsin's voter ID law] undermines confidence in the electoral process as much as it promotes it." *Id.* at *18; *see also id.* at *9-*10. Further, the court found that "approximately 300,000 registered voters in Wisconsin, roughly 9% of all registered voters, lack a qualifying ID," *id.* at *12, and that it was "absolutely clear that [Wisconsin's voter ID law] will prevent more legitimate votes from being cast than fraudulent votes," *id.* at *18. The court accordingly found that the burdens imposed by

Wisconsin's voter ID law were not justified. *Id.*; *see also Applewhite v. Commonwealth*, 2014 WL 184988, at *24 (Pa. Commw. Ct. Jan. 17, 2014) (holding under the Pennsylvania constitution "that the photo ID provisions in the Voter ID Law violate the fundamental right to vote and unnecessarily burden the hundreds of thousands of electors who lack compliant photo ID"). Thus, *Frank* strongly supports the conclusion that Plaintiffs' allegations regarding North Carolina's voter ID law should survive the motion at issue.

Moreover, this case is distinguishable from *Crawford* in several respects. The complaints allege that North Carolina's voter ID law imposes a substantial burden on the right to vote generally and on certain classes of voters in particular, whereas Indiana's law, on the evidence presented in *Crawford*, did not "impose[] excessively burdensome requirements on any class of voters" and, when considering the statute's broad application to all Indiana voters, "impose[d] only a limited burden on voters' rights." 553 U.S. at 202-03 (Stevens, J.) (internal quotation marks omitted). Further, while the *Crawford* Court noted that the burden on certain voters from Indiana's law was "mitigated by the fact that, if eligible, voters without photo identification may cast provisional ballots that will ultimately be counted," *id.* at 199; *see also id.* at 186 (indigent individuals permitted to cast provisional ballot that would be counted if voter signed appropriate affidavit within 10 days of election), North Carolina's law makes no such allowance for indigent voters. And, in contrast to Indiana's law, which broadly permitted government-issued documents to be used for voter ID (subject to certain

requirements), *id.* at 198 n.16, North Carolina's law contains a restrictive list of the types of identification that can be used, HB 589 § 2.1.[5] Accordingly, North Carolina's voter ID law is more restrictive and in turn imposes more significant burdens on voting than Indiana's voter ID law.[6] For this reason and those set forth above, Defendants' contention that *Crawford* controls this case should be rejected, and the motion should be denied.

Defendants' Argument. Defendants' argument that the Constitution did not require North Carolina to adopt many of the practices at issue and thus cannot prevent the State from repealing those practices is without merit. *See, e.g.*, Defs.' Br. at 19. As set forth above, the decision to enact a voting practice and the later decision to repeal that practice are separate and independent legislative acts, and each must comply with the Constitution. *See supra* pp. 14-15. Indeed, the controlling opinion in *Crawford* explained that "[r]ather than applying any 'litmus test' that would neatly separate valid from invalid restrictions, ... a court must identify and evaluate the interests put forward by

[5] Defendants dismiss this as a "slight difference," Defs.' Br. at 28, but the difference is in fact quite significant for many voters, such as college students whose college IDs, if government issued, could be used for voting purposes in Indiana but not in North Carolina.

[6] Defendants' suggestions to the contrary are without merit. *See* Defs.' Br. at 26-29. Because white voters use absentee voting at disproportionately higher rates than African Americans, *see* PI Br. at 47, relatively liberal absentee voting polices, like restrictive in-person voting rules, are likely to *increase* racial disparities in voting. In addition, while HB 589 mandates educational programs regarding the voter ID requirement, the General Assembly did not provide any funding for these efforts, *id.* at 65-66.

the State as justifications for the burden imposed by its rule, and then make the 'hard judgment' that our adversary system demands." 553 U.S. at 190 (Stevens, J.). There is, in other words, no categorical rule permitting or prohibiting the challenged provisions under the 14th Amendment. Instead, the Constitution demands a fact-intensive inquiry into the manner in which the provisions at issue will burden voters and a determination of whether the severity and magnitude of those burdens are justified by the interests put forward by the State. The provisions of HB 589 eliminating or modifying voting reforms—like any other legislative acts—are subject to constitutional review, and Plaintiffs' allegations regarding these provisions are more than adequate to state a claim for relief.

Defendants' argument also fails to recognize that, for purposes of the *Burdick* test, the question whether an electoral practice can be eliminated is very different from the question whether that practice must be adopted—as this case illustrates. It would be difficult to demonstrate that voters are burdened by the *absence* of a voting practice upon which they never relied. Here, however, Plaintiffs seek to prevent the State from eliminating *existing* voting practices upon which thousands of voters have come to rely, *see* LWV Compl. ¶ 1, and to which voters have become habituated, *see id.* ¶ 15; *see also* Gronke Rpt. ¶ 50 (explaining that African-American voters in North Carolina have become habituated to the early voting period). This means that, from the perspective of voters, there is a qualitative difference between the failure to adopt new methods of participation and the removal of existing means of access to the franchise, only the latter

of which imposes significant burdens on voters. *See* Burden Rpt. at 3-4. Moreover, a claim that a State must adopt a voting practice, if successful, requires a State to *incur* the administrative costs associated with such a change, whereas an argument that a State cannot alter or eliminate a voting practice, if successful, results in a State *avoiding* the administrative costs associated with a proposed change. For these reasons, it is far more likely in a case involving the elimination of voting practices than in a case involving the failure to adopt voting practices that the burdens on voting rights will outweigh the State's interests.

Moreover, Defendants' argument is plainly at odds with the Sixth Circuit's decision in *Obama for Am. v. Husted*, 697 F.3d 423 (6th Cir. 2012). In that case, the court held that the plaintiffs were likely to succeed on the merits of their claim that a reduction in Ohio's early voting violated the Equal Protection Clause and upheld the district court's issuance of a preliminary injunction. *Id.* at 436-37. Given that Ohio, like North Carolina, presumably was not required to adopt early voting in the first instance, *Husted* further supports the conclusion that Defendant's argument is without merit.

IV. Any Challenge to the Duke Plaintiffs' 26th Amendment Claim on the Pleadings Has Been Waived and Is Without Merit

Defendants' contention that they are entitled to judgment on the pleadings with respect to the Duke Plaintiffs' 26th Amendment claim is also meritless. To begin with, Defendants have waived this argument. Courts have made clear that a party waives an argument by failing to make or develop it in an opening brief. *See, e.g.*, *Bratka v. Colvin*, 2014 WL 1870781, at *16 n.5 (D.S.C. May 8, 2014); *Samuels v. Midland Funding, LLC*,

921 F. Supp. 2d 1321, 1333 (S.D. Ala. 2013) (involving motion for judgment on the pleadings).[7] Indeed, it is a fundamental "premise of our adversarial system ... that ... courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them." *Carducci v. Regan*, 714 F.2d 171, 177 (D.C. Cir. 1983) (Scalia, J.).[8]

Here, although Defendants nominally move for judgment on the pleadings with respect to all of the claims in this case, Defendants' brief includes almost no argument with respect to the Duke Plaintiffs' 26th Amendment claim. The only portion of the brief specifically directed to that claim is the assertion—without citation—that pre-registration

> is not required by either the Fourteenth Amendment or the Twenty-Sixth Amendment, so long as the State retains voting regulations that allow new voters to register and vote in time for any general election that is held after they turn 18 years old. Nothing in HB 589 can be construed as denying voters who will be 18 years of age at the time of the next General Election from registering to vote and from voting in that election.

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[7] *Accord Belk, Inc. v. Meyer Corp., U.S.*, 679 F.3d 146, 152 n.4 (4th Cir. 2012); *Moseley v. Branker*, 550 F.3d 312, 325 n.7 (4th Cir. 2008).

[8] *See also Dean v. Daimler Chrysler Life, Disability & Health Care Benefits Program*, 439 F. App'x 265, 266 (4th Cir. 2011) (per curiam); *Brady v. Medtronic, Inc.*, 2014 WL 1377830, at *6 (S.D. Fla. Apr. 8, 2014) (court will not do litigant's research for him); *Tech. Planning Int'l, LLC v. Moore N. Am., Inc.*, 2003 WL 21228642, at *12 (D.N.H. May 23, 2003) (explaining, after quoting *Carducci*, that "[t]he same principles apply with equal force at the district court level").

Defs.' Br. at 23.[9] That is precisely the type of bare-bones assertion that courts have found inadequate to raise an argument and that would effectively require the Court to make Defendants' argument for them. *See, e.g.*, *Mineral Policy Ctr. v. Norton*, 292 F. Supp. 2d 30, 46 n.20 (D.D.C. 2003) ("Because Interior cites no authority nor offers any rhetorical support for its potential statute of limitations defense, it need not be considered here."). Any argument that Defendants are entitled to judgment on the pleadings as to the 26th Amendment claim has therefore been waived.

But, even if Defendants had raised the argument that the Duke Plaintiffs failed to state a 26th Amendment claim, that argument would fail. As set forth in Plaintiffs' Preliminary Injunction Brief, the 26th Amendment prohibits laws that deny or abridge the right to vote of citizens who are eighteen years of age or older and that were motivated, at least in part, by an intent to discriminate on the basis of age. *See* Pls.' Br. in Support of Mot. For Prelim, Inj. at 67-69 (ECF No. 110-1). The Duke complaint—repeatedly—alleges exactly that. *See* Duke Compl. ¶ 105 ("The challenged provisions of [HB 589] have the purpose and effect of abridging or denying the right to vote of thousands of North Carolinians on account of their age."); *accord id.* ¶ 2 ("The unlawful changes resulting from [HB 589] ... have the purpose and effect of suppressing Plaintiffs' right to

[9] Other portions of Defendants' argument cannot fairly be construed as pertaining to the 26th Amendment claim with the specificity required to raise an argument. For example, a paragraph summarizing North Carolina voting provisions is not argument. *See* Defs.' Br. at 10. Moreover, general arguments in the introduction and elsewhere in Defendants' brief—which are uncited and broadly address all of Plaintiffs' arguments—cannot, without more, support the dismissal of the 26th Amendment claim.

vote, in violation of ... the Twenty-Sixth Amendment."), ¶ 25 ("[T]he new laws are intended to and have the effect of denying or unreasonably infringing upon the voting rights of ... young people."), ¶ 42 ("An inordinate amount of the amendments [to HB 589] ... have the purpose and effect of detrimentally impacting young voters."); *see also id.* ¶ 53 (exclusion of student IDs from use for voter ID "is itself evidence of the General Assembly's intent to suppress young voters in North Carolina's elections").

In addition to these express allegations of discriminatory intent, the Duke complaint alleges several facts from which it can be inferred that HB 589 was enacted with the intent of denying or abridging the right to vote on the basis of age. As set forth in further detail above, the complaint asserts that HB 589's reduction in early voting days, elimination of SDR and out-of-precinct voting, and voter ID requirement abridge, and in some cases will effectively deny, the right to vote of many North Carolinians, including young voters in particular, *see supra* pp. 7-9, 18-30; establishes that the elimination of pre-registration and mandatory high school voter-registration drives will result in a significant burden on a large number of exclusively young voters, *see supra* pp. 22-23; and states that HB 589's removal of discretion from CBOEs to keep polling locations open for an extra hour will result in added burdens that "infringe upon the right to vote of thousands of North Carolinians, including young voters with inflexible schedules who may be discouraged from or rendered unable to vote at all." Duke Compl. ¶ 80; *see also supra* pp. 24-25. Thus, the complaint alleges that the provisions of HB 589 consistently burden the voting rights of young voters in particular. *See Reno*, 520 U.S. at

487 (disproportionate impact of legislation "is often probative of why the action was taken in the first place since people usually intend the natural consequences of their actions").

The Duke complaint also asserts that the challenged provisions "are irrational and not justified by an important government interest." Duke Compl. ¶ 100; *see Busbee v. Smith*, 549 F. Supp. 494, 517 (D.D.C. 1982) ("The absence of a legitimate, non-racial reason for a voting change is probative of discriminatory purpose, particularly if the factors usually considered by the decision makers strongly favor a decision contrary to the one reached.") (internal quotation marks omitted). Further, the complaint explains that "dramatic changes to significantly expand the scope and breadth of HB 589" were made in the final days of the 2013 legislative session, just before the bill was passed. Duke Compl. ¶¶ 38-40, 42-43; *see Arlington Heights*, 429 U.S. at 267 ("Departures from the normal procedural sequence also might afford evidence that improper purposes are playing a role."). And it explains that, although IDs issued by public colleges and universities were originally included in the list of IDs that could be used for voting, *see* Duke Compl. ¶¶ 30, 32, the version of the bill that was enacted does not allow the use of student IDs for voter ID purposes, *id.* ¶ 39. *Cf. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 538 (1993) ("It is not unreasonable to infer, at least when there are no persuasive indications to the contrary, that a law which visits 'gratuitous restrictions' on religious conduct seeks not to effectuate the stated governmental interests, but to suppress the conduct because of its religious motivation.").

The Duke complaint, in short, plainly alleges that the challenged provisions deny or abridge the right of young North Carolinians to vote in violation of the 26th Amendment. It further alleges facts that, when taken together, would justify the conclusion by a reasonable fact-finder that the challenged provisions were intended, at least in part, to discriminate against young voters. *See generally Washington v. Davis*, 426 U.S. at 242 ("[A]n invidious discriminatory purpose may often be inferred from the totality of the relevant facts."). For these reasons, as well as those set forth above, Defendants' motion should be denied as to the Duke Plaintiffs' 26th Amendment claim.

CONCLUSION

Defendants' Motion for Judgment on the Pleadings should be denied.

Dated: June 18, 2014

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CERTIFICATE OF SERVICE

I, Daniel T. Donovan, hereby certify that, on June 18, 2014, I filed a copy of the foregoing Plaintiffs' Opposition To Defendants' Motion For Judgment On The Pleadings using the CM/ECF system, which on the same date sent notification of the filing to the following:

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