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.	**UNITED STATES' OPPOSITION TO DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS** Civil Action No. 1:13-CV-658
LEAGUE OF WOMEN VOTERS OF NORTH CAROLINA, et al., Plaintiffs, v. THE STATE OF NORTH CAROLINA, et al., Defendants.	Civil Action No. 1:13-CV-660
UNITED STATES OF AMERICA, Plaintiff, v. THE STATE OF NORTH CAROLINA, *et al.*, Defendants.	Civil Action No. 13-cv-861

The United States' Complaint has properly pleaded claims that North Carolina violated Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, when it enacted provisions of House Bill 589 ("HB 589"), both because the challenged provisions of HB 589 will result in denying African-American voters an equal opportunity to participate in the political process and because those provisions were adopted for the purpose of denying or abridging African-American voters' rights. *See* Complaint, 13-cv-861, ECF No. 1. Accordingly, the Court should reject the Defendants' motion for judgment on the pleadings.[1] *See* Defendants' Memorandum in Support of Their Motion for Judgment on the Pleadings Pursuant to Fed. R. Civ. P. 12(c), 13-cv-861, ECF No. 95.

I. BACKGROUND

A. The Legal Standard Under Federal Rule 12(c)

A motion for judgment on the pleadings under Federal Rule of Civil Procedure 12(c) and a motion to dismiss under Rule 12(b)(6) are virtually interchangeable, and the same standards apply. *See Occupy Columbia v. Haley*, 738 F.3d 107, 115 (4th Cir. 2013). Both motions test the sufficiency of the complaint, which only needs to set forth "a short and plain statement . . . showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2); *Burbach Broad Co. v. Elkins Radio Corp.*, 278 F.3d 401, 405-06 (4th Cir. 2002). The presumption is that the factual allegations in the Complaint are true and all reasonable inferences are drawn in favor of the nonmoving party. *Blue Rhino Global*

[1] This Memorandum addresses only those arguments Defendants make that are relevant to the claims raised in the United States' Complaint.

Sourcing, Inc. v. Well Traveled Imps., Inc., 888 F. Supp. 2d 718, 721 (M.D.N.C. 2012). The "real difference" between a 12(b)(6) and 12(c) motion is that, with respect to the latter, the Court considers the answer, as well as the complaint. *Garcia-Contreras v. Brock & Scott, PLLC*, 775 F. Supp. 2d 808, 817 (M.D.N.C. 2011). However, "[i]f the complaint alleges—directly or indirectly—each of the elements of 'some viable legal theory,' the plaintiff should be given the opportunity to prove that claim" and the motion for judgment on the pleadings should be denied. *Capetta v. GC Servs. Ltd.*, 654 F. Supp. 2d 453, 457 (E.D. Va. 2009); *Tobey v. Jones*, 706 F.3d 379, 387 (4th Cir. 2013).

B. Overview of the Facts Alleged in the United States' Complaint

As alleged in the United States' Complaint, the North Carolina legislature enacted HB 589 in 2013, after a recent surge in black voter participation and with full knowledge that various provisions of the bill would undercut the ability of African-American voters to participate in the electoral process. *See, e.g.*, Compl. ¶¶ 13, 27, 81. HB 589 reduced the one-stop absentee voting period ("early voting") by seven days, eliminated same-day registration in its entirety, prohibited the counting of out-of-precinct provisional ballots, and enacted a restrictive voter photo identification ("ID") law. *Id.* ¶¶ 24-25, 36, 40 & 44-46. The Complaint sets out detailed allegations that African-American voters will be disproportionately harmed by these provisions, because they are more likely than other voters to rely on early voting (including the first seven days), to use same-day registration, to cast out-of-precinct provisional ballots, and to lack one of the acceptable forms of voter photo ID. *Id.* ¶¶ 49-50, 28-30, 37-38, 41-42, & 49-50.

The Complaint further alleges that the challenged provisions violate Section 2 of the Voting Rights Act in two separate ways. Compl. ¶¶ 95-100. First, the Complaint alleges that, "[d]ue to social and economic conditions caused by historical and ongoing discrimination, including poverty, unemployment, lower education attainment, and lack of access to transportation, minority voters will be disproportionately burdened by provisions of HB 589." *Id.* ¶ 97; *see also id.*¶¶ 29-30, 37-38, 42, 49-50, 68-76, 79. Second, the Complaint alleges that the legislature adopted the challenged provisions with the "purpose of denying or abridging African Americans' equal access to the political process." *Id.* ¶¶ 99, 97. Facts supporting this allegation include the legislature's knowledge that the challenged provisions would bear more heavily on black voters, the historical background preceding the enactment of HB 589 (including the recent surge in black participation), the sequence of events leading to passage of HB 589, and the departures from accepted legislative practice used to enact the law.[2] *See id.* ¶¶ 80-92.

II. ARGUMENT

The United States' Complaint alleges sufficient facts to establish a claim that the challenged provisions of HB 589, collectively and individually, violate Section 2. Notwithstanding Defendants' arguments to the contrary, Section 2 of the Voting Rights Act addresses the electoral changes at issue in this case.

[2] The Complaint also highlights that North Carolina's non-Hispanic black population had higher rates of poverty, were three times as likely to lack access to a vehicle, were far less likely to have a high school diploma, and had an unemployment rate twice as high as North Carolina's non-Hispanic white population. *Id*. ¶¶ 14-17.

A. The United States' Complaint States a Claim That the Challenged Provisions Violate Section 2 of the Voting Rights Act.

Section 2 prohibits the use of any "voting qualification or prerequisite to voting" or any voting "standard, practice, or procedure" in a manner that, based on the totality of the circumstances, results in members of a racial or language minority group having "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973(a), (b). As the Supreme Court has explained, "[t]he essence of a § 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by [minority] and white voters to elect their preferred representatives." *Thornburg v. Gingles*, 478 U.S. 30, 47 (1986).

To evaluate whether a law violates Section 2, Congress identified several "[t]ypical factors" that may inform a court's evaluation of the totality of circumstances (the "Senate Factors").[3] S. Rep. No. 97-417, at 28-29 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 206-07 ("Senate Report"); *Gingles*, 478 U.S. at 36-37. Although "[t]he results test . . . is applicable to all claims arising under § 2," *Chisom v. Roemer*, 501 U.S. 380, 398 (1991), the relevant factors "will vary from case to case, depending upon the nature of the statute or practice challenged[,]"*Operation PUSH v. Allain*, 674 F. Supp. 1245, 1263 (N.D. Miss 1987) *aff'd sub nom Operation PUSH v. Mabus*, 932 F.2d 400 (5th Cir. 1991) ; *see also* Senate Report at 29. No one factor is dispositive of a

[3] In *Gingles*, the Supreme Court recognized that the Senate Report is "the authoritative source for legislative intent" behind Section 2. 478 U.S. at 43 n.7.

Section 2 claim, and "there is no requirement that any particular number of factors be proved, or that a majority of them point one way or the other." Senate Report at 29; *see also Gingles*, 478 U.S. at 45. Proof of relevant Senate Factors establishes the framework for determining whether the challenged practice results in a prohibited denial or abridgment of the right to vote. *See Operation PUSH v. Mabus*, 932 F.2d at 405.[4]

1. Section 2 Applies to HB 589's Challenged Provisions.

"Section 2 prohibits all forms of voting discrimination, not just vote dilution," *Gingles*, 478 U.S. at 45 n.10, including practices that interfere with or impair the ability of would-be voters to register and cast a vote, or to have that vote counted on an equal basis with other members of the electorate. The Voting Rights Act defines the terms "vote" and "voting" broadly to include "all action necessary to make a vote effective," including, among other things, "registration . . . casting a ballot, and having such ballot counted properly." 42 U.S.C. § 1973*l*(c)(1); *Allen v. State Bd. of Elections*, 393 U.S. 544, 565-66 (1969). This definition applies to all provisions of the Act.

Recognizing the Act's broad scope, courts have applied Section 2 to a wide range of practices, including restrictive voter photo ID laws, *Frank v. Walker*, 2014 WL

[4] Defendants appear to argue that Plaintiffs must satisfy the three-pronged threshold test the Supreme Court articulated in *Gingles*. *See* Defs.' Mem. at 35. They are incorrect. As they recognize, "this is not a vote dilution case." *Id.* at 32. The *Gingles* test, however, was developed to address vote dilution claims, not vote denial/voter access claims such as the one advanced here. The Supreme Court has cautioned that "the *Gingles* factors cannot be applied mechanically and without regard to the nature of the claim." *Johnson v. DeGrandy*, 512 U.S. 997, 1007 (1994) (internal quotation marks omitted). To the best of the United States' knowledge, no court has ever required that plaintiffs satisfy the *Gingles* preconditions in a claim that does not allege vote dilution.

1775432 (E.D. Wis. Apr. 29, 2014); unequal access to voter registration opportunities, *Operation PUSH v. Allain*, 674 F. Supp. at 1253; unequal access to polling places, *Spirit Lake Tribe v. Benson Cnty.*, 2010 WL 4226614 (D.N.D. Oct. 21, 2010); *Brown v. Dean*, 555 F. Supp. 502 (D.R.I. 1982); unequal establishment of early voting sites, Order, *Wandering Medicine v. McCulloch*, No. CV 12-135 (D. Mont. May 15, 2014) (unpublished) (Ex. A); *Brooks v. Gant*, 2012 WL 4482984 (D.S.D. Sept. 27, 2012); voting mechanisms resulting in disproportionate rejection of minority ballots, *Common Cause v. Jones*, 213 F. Supp. 2d 1106 (C.D. Cal. 2001); unequal access to absentee voting opportunities, *Brown v. Post*, 279 F. Supp. 60 (W.D. La. 1968); and underrepresentation of minority poll officials, *Harris v. Graddick*, 615 F. Supp. 239 (M.D. Ala. 1985), among other things.[5]

Although Defendants appear to argue that Section 2 does not reach HB 589's challenged provisions in part because this case is not a vote dilution case, *see* Defs.' Mem. at 32-33, no court has ever exempted any voter registration procedure or ballot-access issue from review under Section 2, and nothing in the statute or the legislative history of Section 2 suggests that Congress intended such an exemption. "The Voting

[5] Under Section 5, courts have also held that changes similar to those at issue here were voting practices reachable under the Voting Rights Act. *See, e.g., Florida v. United States*, 885 F. Supp. 2d. 299, 313 (D.D.C. 2012) (three-judge court) (finding that reductions in early voting and changes to provisional ballot procedures for voters who had moved between counties "fall squarely within that expansive definition of voting rights" found at 42 U.S.C. § 1973*l*(c)(1)); *Texas v. Holder*, 888 F. Supp. 2d 113, 123 (D.D.C. 2012) (three-judge court) (rejecting Texas' argument that voter ID laws can never deny or abridge the right to vote) (vacated on jurisdictional grounds following *Shelby* decision).

Rights Act was aimed at the subtle, as well as the obvious, state regulations which have the effect of denying citizens their right to vote because of their race." *Allen*, 393 U.S. at 565; *see also* Senate Report at 5-6. As the Supreme Court explained in *Chisom v. Roemer*, the Voting Rights Act "should be interpreted in a manner that provides 'the broadest possible scope' in combating racial discrimination." 501 U.S. at 403 (quoting *Allen*, 393 U.S. at 567).

Thus, Defendants are simply wrong when they argue that the changes adopted by HB 589 "do not violate any law governing the conduct of elections enacted by Congress." *See, e.g.*, Defs.' Mem. at 12. The Voting Rights Act is precisely such a law, an act adopted by Congress to enforce the guarantees of the Fourteenth and Fifteenth Amendments to the U.S. Constitution.

Defendants are further mistaken when they seek to defeat the United States' Section 2 claim by arguing that changes such as the repeal of same-day registration are somehow consistent with other federal laws such as the National Voter Registration Act ("NVRA"). *See id.* at 9-10. Even if they were, that fact would be irrelevant. In enacting other statutes relating to federal elections, such as the NVRA or the Help America Vote Act ("HAVA"), Congress expressly stated that nothing in those statutes "authorizes or requires conduct that is prohibited by the Voting Rights Act of 1965." *See* 42 U.S.C. § 1973gg-9(d)(2) (NVRA); 42 U.S.C. § 15545(a)(1) (same for HAVA).[6]

[6] Defendants' citation to felon disenfranchisement cases such as *Johnson v. Governor of Fla.*, 405 F.3d 1214 (11th Cir. 2005) (en banc) is similarly unavailing. Defs.' Mem. at 32-33. In *Johnson* and other cases, *see, e.g.*, *Hayden v. Pataki*, 449 F.3d 305, 315-16 (2d

2. Laws that Appear on Their Face to Be Race Neutral Are Not Insulated from Section 2 Review.

Defendants are also wrong to contend that Plaintiffs cannot, as a matter of law, establish a violation of Section 2's results test because the challenged provisions of HB 589 "apply to all voters without regard to race." Defs.' Mem. at 17, 34. That argument is foreclosed by the text of Section 2 and decades of case law. Laws that are race-neutral on their face are not exempt from scrutiny under Section 2. Indeed, to the best of the United States' knowledge, *all* of the laws that have been struck down under Section 2's results test are race-neutral on their face. *See, e.g.*, *Operation PUSH*, 674 F. Supp. at 1249-50, 1268 (Mississippi's dual registration requirement); *Frank v. Walker*, 2014 WL 1775432, at *25, 29 (Wisconsin's photo voter identification law). Section 2 "invalidates facially neutral practices with discriminatory effects even in the absence of purposeful discrimination." *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 369 n.15 (2000) (Souter, J., concurring in part and dissenting in part).

Not only does Section 2 reach facially race-neutral practices, but it also reaches those practices regardless of whether they were adopted or maintained for a discriminatory purpose. To hold otherwise would inject an intent requirement back into Section 2 of the Voting Rights Act, in direct contravention of the 1982 amendments to the Act, which adopted the results test. Congress amended Section 2 "to make clear that

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Cir. 2006) (en banc), the courts have limited the application of Section 2 to felon disfranchisement laws because of an explicit recognition in the Fourteenth Amendment of States' ability to limit the right to vote in response to criminal conviction. *See* U.S. Const. amend. XIV, § 2.

proof of discriminatory intent is not required to establish a violation of Section 2." Senate Report at 2. "Now plaintiffs can prevail under § 2 by demonstrating that a challenged election practice has resulted in the denial or abridgement of the right to vote based on color or race," *Chisom*, 501 U.S. at 394, or membership in a language minority group, 42 U.S.C. § 1973(a). Providing "proof of discriminatory intent is no longer necessary" to establish a violation. *Chisom*, 501 U.S. at 395.

3. Section 2 Reaches Practices That Disproportionately Place a Burden on Minority Voters and Does Not Require Proof That Minority Voters Are Completely Excluded By Factors Totally Beyond Their Control.

Defendants also contend that Plaintiffs cannot state a claim under Section 2 because "government action" is not responsible for depriving black voters in North Carolina of an equal opportunity to participate in the electoral process; rather, in Defendants' view, it is those voters' own "failure to comply" with facially neutral state laws. Defs.' Mem. at 34. This argument fundamentally misconstrues the nature of the inquiry under Section 2.

First, the plain language of Section 2 reaches "abridgment" as well as "denial" of the right to vote, 42 U.S.C. § 1973(a); abridgement occurs when minority voters have "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice," *id.* § 1973(b). It does not require proof that minority voters have "no" opportunity. The burden imposed by a contested practice need only "hinder [minority] citizens' ability to participate in the political process[,]" not totally preclude participation. *Operation PUSH*, 932 F.2d at 409. In

Operation PUSH, the plaintiffs challenged Mississippi's dual registration requirement, which required registration with the county registrar to vote in federal, state, and county elections, and separate registration with the municipal clerk to vote in municipal elections. Although this requirement did not categorically bar African Americans from registering to vote, the court nevertheless held that the law violated Section 2 because, under the totality of the circumstances, it imposed "administrative barriers [that] are harder to overcome for persons of lower socio-economic status and persons of lower educational attainment, a group that is disproportionately black." 674 F. Supp. at 1256, 1263-68.

Second, the possibility that minority voters could overcome barriers created by state law does not immunize a law from scrutiny under Section 2. Defendants' argument proves too much, since under their theory, a law restricting the right to vote only to college graduates would be immune from scrutiny under Section 2, since aspiring voters who could not cast ballots would simply have "failed" to get bachelors' degrees. But the case law shows that Section 2's totality-of-the-circumstances test reaches practices precisely because they interact with social, economic, and historical factors to make it *more difficult*—and not necessarily impossible—for minority voters to participate. *See United States v. Marengo Cnty.*, 731 F.2d 1546, 1568 (11th Cir. 1984) (rejecting notion that the state could defend practices that resulted in reduced African American political participation by claiming black "voter apathy"). Under the Voting Rights Act, the United States need not allege that the challenged provisions of HB 589 make it *impossible* for

African Americans to register to vote or cast an effective ballot. *See Frank*, 2014 WL 1775432, at *29 (concluding that "no authority supports [this] view of the law"); *Florida v. United States*, 885 F. Supp. 2d 299, 312 (D.D.C. 2012) (three-judge court) (finding that a reduction in early voting could violate Section 5 if "the change imposes a burden material enough that it will likely cause some reasonable minority voters not to exercise the franchise"); *United States v. Texas*, 252 F. Supp. 234, 252 (W.D. Tex. 1966) (rejecting the argument that people who did not care enough to pay a poll tax well in advance of the election were "not intelligent enough or competent enough to manage the affairs of the government"), *aff'd*, 384 U.S. 155 (1966).[7]

Most recently, the court reviewing Wisconsin's photo voter identification law rejected an argument similar to Defendants' argument here, finding that "[t]here is nothing in [the case law] indicating that a Section 2 plaintiff must show that the challenged voting practice makes it impossible for minorities to vote or that minorities are incapable of complying with the challenged voting procedure." *Frank*, 2014 WL 1775432, at *29. The court held that Wisconsin's law violated Section 2 because, under the totality of circumstances, "a disproportionate share of the [minority] populations [compared to the white population] must shoulder an additional burden in order to

[7] In the Section 5 context, a three-judge district court held that "our rejection of Texas' unqualified assertion that laws are immune from Section 5 so long as they can be tied to 'voter choice'" should come as little surprise. . . . Just as educational and economic conditions might affect whether minorities 'choose' to vote, those conditions could also affect whether minorities 'choose' to obtain photo ID. Poorer people, for example, may be disproportionately unable to pay the costs associated with obtaining" acceptable forms of ID. *See Texas v. Holder*, 888 F. Supp. 2d at 124.

exercise the right to vote," *id.*, and that this "disproportionate impact results from the interaction of the [photo identification] requirement with the effects of past or present discrimination[,]" *id.* at *31; *see also Dean*, 555 F. Supp. at 505 (ordering a polling place location change after finding that "the use of polling places at locations remote from black communities . . . may well abridge [minority voters'] free exercise of the right to vote"). In none of these cases did the court require that the challenged practice constitute an insurmountable barrier to minority voter participation in order to violate Section 2.

Likewise, to the extent Defendants contend there can be no Section 2 claim because the challenged provisions, alone, do not independently cause the discriminatory result, *see* Defs.' Mem. at 33-35, this argument is foreclosed by the case law, and by the text of Section 2. *See, e.g.*, *Farrakhan v. Washington*, 338 F.3d 1009, 1017-19 (9th Cir. 2003) (rejecting independent causation argument); *Frank*, 2014 WL 1775432, at *29. Section 2 requires a court to consider whether a challenged practice produces a discriminatory result *when combined with other relevant factors*. *See* 42 U.S.C. § 1973(a), (b); *Chisom*, 501 U.S. at 394 ("[A]pplication of the results test requires an inquiry into 'the totality of the circumstances.'"); Order at 1, *Wandering Medicine*, (Ex. A) (in a Section 2 case alleging unequal access to voter registration and early voting, denying summary judgment because factual disputes "implicate[d] the totality of the circumstances analysis the Court must perform under the Voting Rights Act"); *see also Operation PUSH*, 674 F. Supp. at 1263. "[E]ven a consistently applied practice premised on a racially neutral policy would not negate a plaintiff's showing through other factors

that the challenged practice denies minorities fair access to the process." Senate Report at 29 n.117.

Neither of the Section 2 cases that Defendants cite—*Gingles*, 478 U.S. 30, and *Voinovich v. Quilter*, 507 U.S. 146 (1993)—supports their independent causation argument. In neither case did the Court require plaintiffs to show that the challenged practice *by itself* caused a discriminatory result. To the contrary, in both cases the Court affirmed that the key question in a Section 2 case is whether the challenged practice "interacts with social and historical conditions" to impair minority voters' ability to participate in the political process on an equal basis with white voters. *Gingles*, 478 U.S. at 47; *Voinovich*, 507 U.S. at 153; *see also Gingles*, 478 U.S. at 80 (affirming district court's determination that various social, political, and historical factors "acted in concert with" the challenged practice "to impair the ability of" minority voters "to participate equally in the political process and to elect candidates of their choice"); *Voinovich*, 507 U.S. at 154-55 (reversing because district court failed to evaluate the effect of the challenged practice under the totality of the circumstances).

B. Under a Proper Interpretation of Section 2, the United States Has Pleaded Sufficient Facts to Establish Both a Section 2 Results Claim and a Section 2 Intent Claim.

The United States has pleaded sufficient facts to establish that, under the totality of the circumstances, HB 589's challenged provisions result in black voters having less opportunity than white voters to participate effectively in the political process. The

Complaint also pleads facts sufficient to show that the North Carolina General Assembly enacted HB 589 with the intent to discriminate against African-American voters.

1. The United States Sufficiently Pleaded Its Claim that, Under the Totality of the Circumstances, HB 589 Will Have a Discriminatory Result in Violation of Section 2.

Contrary to North Carolina's assertion, the United States does not "solely" rely on allegations of racial disparity to establish its Section 2 claim. *Compare* Defs.' Mem. at 36, *with* Compl. ¶¶ 14-22, 97-98, 79(b-c, e), 25, 61,79 (h-i) & 92 (alleging Senate Factors 1, 2, 5, and 9). Quantifiable racial disparities are a highly relevant starting point for analyzing whether a Section 2 violation exists. *See Operation PUSH*, 932 F.2d at 409. But the Complaint pleads far more than a simple disparity. It also alleges precisely the relevant circumstances Congress identified in the Senate Report accompanying the enactment of Section 2 "that might be probative of a § 2 violation." *Thornburg v. Gingles*, 478 U.S. 30, 36 (1986). Together, the allegations of racial disparity and relevant Senate Factors establish the elements of a Section 2 claim under the totality of the circumstances, which, as explained above, *see supra* II.A, offer the framework for distinguishing lawful and unlawful voting practices and procedures. *Operation PUSH*, 932 F.2d at 405.

The United States' complaint alleges that the same socio-economic disparities that Congress and the courts have found to hinder minorities' effective political participation—higher levels of poverty, unemployment, disparate educational attainment rates, and less access to transportation—persist in North Carolina and interact with HB

589's challenged provisions to present obstacles to equal political participation. Compl. ¶¶ 14-17; 79(e), 97-98. In addition, the electoral process in North Carolina is marked by both a history of racial discrimination, particularly in voting, and an electoral context where voting continues to be racially polarized. Compl. ¶¶ 18-22, 79(a), 79(b-c), 90. Moreover, the Defendants' stated policy justifications for enacting the challenged provisions of HB 589 are tenuous and not supported by the evidence before the legislature. *See, e.g.*, Compl. ¶¶ 31, 33-34, 41, 49-51, 52, 79 (h-i), 84, & 92. These facts are sufficient to state a claim under Section 2 because the "the court [can] draw the reasonable inference that the defendant is liable for the misconduct alleged."[8] *Tobey*, 706 F.3d at 386.

North Carolina's argument that allegations of racial disparities "ha[ve] no relevance in this case" and constitute nothing more than an effort to import the retrogression standard from Section 5 into Section 2, *see* Defs.' Mem. at 36-37, are wholly misguided. Under the Section 5 standard, a proposed voting change is measured against the existing practice to determine whether the change has a racially discriminatory retrogressive effect. *Beer* v. *United States*, 425 U.S. 130, 140-141 (1976). In contrast, under Section 2, retrogression is not the standard. *See Holder v. Hall*, 512

[8] Defendants' arguments regarding the sufficiency of mail-in absentee voting procedures, *see* Defs.' Mem. at 28-29 & 35, represent a factual dispute over the nature of the obstacles presented by HB 589's voter ID requirement and are therefore not appropriate grounds for granting judgment on the pleadings. *See Colin v. Marconi Commerce Sys. Emp. Ret. Plan*, 335 F. Supp. 2d 590, 596 (M.D.N.C. 2004); *Common Cause/Georgia, et al. v. Billups*, 406 F. Supp. 2d 1326 (N.D. Ga. 2005).

U.S. 874, 884 (1994). The Section 2 inquiry examines whether a challenged structure unlawfully interacts with the totality of the circumstances to create a discriminatory result. 42 U.S.C. 1973 (b). In effect, the cognizable right under Section 2 is equality of opportunity under the current conditions; that is, a comparison of the opportunity that African-American voters have currently to participate in the political process compared to the opportunity white voters have currently. As alleged in the Complaint, the facts here show that social, political, and historical factors interact with the challenged provisions of HB 589 to cause, under the totality of the circumstances, an unequal opportunity for African Americans to participate in the political process as compared to white voters (and not simply as compared to African-American voters prior to the enactment of HB 589). Comp. ¶¶ 95 & 97-99; *see also Gingles*, 478 U.S. at 36-37; Senate Report at 28-29; *see also Perry-Bey v. City of Norfolk*, 678 F. Supp. 2d 348, 370 (E.D.Va. 2009) ("There are two statutory elements to a claim under Section 2: (1) the use of an electoral 'standard, practice, or procedure,' and (2) a resulting diminution of the opportunity to African American and Latino voters 'to participate in the political process and to elect representatives of their choice.'") (quoting *Black v. McGuffage*, 209 F. Supp. 2d 889, 896 (N.D Ill. 2002)).[9]

[9] Defendants also raise several arguments relating to *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181 (2008), in the context of discussing constitutional claims regarding photo ID. Defs.' Mem. at 23-29. *Crawford*, of course, did not contain a Section 2 claim or any race discrimination claim, but instead concerned only a First and Fourteenth Amendment facial challenge to Indiana's photo ID law. *See Texas v. Holder*, 888 F. Supp. 2d at 125 ("Contrary to Texas' argument, *Crawford* does not control" a Section 5 lawsuit regarding a voter ID law).

2. The United States Sufficiently Pleaded Its Claim that North Carolina Enacted HB 589 with a Discriminatory Intent in Violation of Section 2.

The question of discriminatory intent is centrally a question of fact and is not appropriate for a judgment on the pleadings. *See Burns v. Vill. of Crestwood*, 2013 WL 352784, *4 (N.D. Ill. Jan. 29, 2013). Here, the United States has pleaded facts sufficient to state a claim that HB 589 was enacted with a discriminatory purpose, under the standard established by the Supreme Court in *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977) (requiring a "sensitive inquiry into such circumstantial and direct evidence of intent as may be available.").

In *Arlington Heights*, the Supreme Court identified a non-exhaustive list of factors to consider when determining whether racially discriminatory intent exists. 429 U.S. at 266-68. The Senate Report "expressly incorporates the considerations in *Arlington Heights* for purposes of analyzing a Section 2 intent standard claim." *United States v. Charleston Cnty.*, 316 F. Supp. 2d 268, 305 n.42 (D.S.C. 2003). The Senate Factors also "supply a source of circumstantial evidence regarding discriminatory intent." *United States v. Brown*, 561 F.3d 420, 433 (5th Cir. 2009). When evaluating a Section 2 claim of discriminatory intent, "normal inferences to be drawn from the foreseeability of defendant's actions" may also be considered, *McMillian v. Escambia Cnty.*, 748 F.2d 1037, 1047 (5th Cir. 1984) (quoting S. Rep. No. 97-417, at 27 n. 108), including whether reinstatement of a law "suited the purpose of discrimination." *Brown v. Bd. of Sch. Comm'rs*, 706 F.2d 1103, 1107 (11th Cir. 1983). Finally, "[r]acial discrimination need

only be one purpose, and not even a primary purpose, of an official act" to establish discriminatory intent under Section 2. *United States v. Brown*, 561 F.3d at 433; *see also Garza v. Cnty. of Los Angeles*, 918 F.2d 763, 778-79 & n.1 (9th Cir. 1990) (Kozinski, J., concurring and dissenting in part).

Given the facts pleaded, Defendants are wrong to assert that the United States' Complaint only alleges formulaic evidence of intentional discrimination. Defs.' Mem. at 39. The allegations in the Complaint include facts establishing the foreseeable discriminatory impact of HB 589, the tenuous justifications espoused by its proponents, the General Assembly's summary rejection of ameliorative amendments, the clandestine development of an omnibus Senate version of the bill, the Senate Rules Committee chair's public admission that the committee charged with the bill waited until the Supreme Court's decision in *Shelby County v. Holder* before introducing the "full" Senate version of HB 589, the use of irregular and truncated legislative procedures in both chambers to pass the Senate version of HB 589, and the failure to garner the support of any African-American legislator at any point during the legislative process.[10] And all of these actions occurred against the backdrop of a history of discrimination against African-American voters in the State. *Id*. ¶¶ 18-22. If this Court were to find the facts alleged in the Complaint, it would be a straightforward matter to conclude that North Carolina enacted HB 589 for a discriminatory purpose.

[10] *See* Compl. ¶¶ (29, 37, 41, 50, 52, 75), (25, 61), (53, 55,63, 65, 77, 87), (55, 57, 59-60), (86), (85, 87), (54,64).

Defendants incorrectly describe the United State's Complaint as alleging that African Americans are entitled to a "higher than proportional participation rate," "proportional representation," or a "maximum" level of participation in North Carolina elections. *See* Defs' Mem. at 38. To the contrary, the Complaint alleges that African Americans had to overcome decades of depressed voter registration and turnout rates, and that after their turnout rates increased dramatically during the 2008 and 2012 general elections, the General Assembly in 2013 responded by enacting HB 589. *See, e.g.,* Compl. ¶¶ 13, 27, 81. Taking away an opportunity to vote because a minority group is poised to exercise it is intentional discrimination prohibited by Section 2. *See LULAC v. Perry*, 458 U.S. 399, 440-42 (2006). When, as here in North Carolina, a minority group begins to overcome prior electoral discrimination and the state takes away or limits the very methods of voter registration and participation that helped the minority group achieve that result, that state action may "bear[] the mark of intentional discrimination." *Id*. at 440. "[D]irect evidence" of intentional discrimination, *see* Defs' Mem. at 9, is not required to establish intentional discrimination and survive a motion for judgment on the pleadings. *Arlington Heights*, 429 U.S. at 266-68; *Blue Rhino*, 888 F. Supp 2d at 726.[11]

[11] It is typically inappropriate to resolve a disputed question of racially discriminatory intent even by summary judgment, rather than trial on the merits. *Hunt v. Cromartie*, 526 U.S. 541, 552-554 (1999) ("it was error in this case for the District Court to resolve the disputed fact of motivation at the summary judgment stage"). Moreover, additional discovery from the legislature "may illuminate the very contested issues" of the legislature's motivations in enacting HB 589. *See Price v. City of Fayetteville,* 2014 WL 2115335, *7-8 (E.D.N.C. May 21, 2014) (denying judgment on the pleadings).

Finally, the Court should reject Defendants' argument that the United States' intentional discrimination claim must fail "as a matter of law." Defs' Mem. at 39-41. Defendants offer several alternative views of the facts, including the significance of supporters of HB 589 receiving race data on certain election practices prior to the adoption of HB 589. *See id.* at 40-42. These factual disputes preclude judgment on the pleadings regarding the Complaint's intentional discrimination claim. *Watson Carpet & Floor Covering, Inc. v. Mohawk Indus.*, 648 F.3d 452, 458 (6th Cir. 2011) ("Ferreting out the most likely reason for the defendant's actions is not appropriate at the pleading stage."); *Mosher v. Wash. Gas Light Co.*, 18 Fed. Appx. 141, 147 (4th Cir. 2001) (unpublished); *see also Mendenhall v. Hanesbrands, Inc.*, 856 F. Supp. 2d 717, 727 (M.D.N.C. 2012) (factual inferences drawn in favor of non-moving party).

III. CONCLUSION

Section 2 applies to HB 589, and the United States' Complaint sufficiently pleads allegations of Section 2 results and intent claims. Accordingly, Defendants' motion for judgment on the pleadings should be denied.

Dated: June 18, 2014

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 18, 2014, I electronically filed the foregoing United States' Opposition to Defendants' Motion for Judgment on the Pleadings**,** using the CM/ECF system in case numbers 1:13- cv-658, 1:13- cv-660, and 1:13-cv-861, which will send notification of such filing to all counsel of record.

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