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

NORTH CAROLINA STATE CONFERENCE OF THE NAACP, *et al.*, Plaintiffs, v. PATRICK LLOYD MCCRORY, in his official capacity as Governor of North Carolina, *et al.*, Defendants.	1:13CV658
LEAGUE OF WOMEN VOTERS OF NORTH CAROLINA, *et al.*, Plaintiffs, *and* LOUIS M. DUKE, *et al.*, Plaintiffs-Intervenors, v. THE STATE OF NORTH CAROLINA, *et al.*, Defendants.	1:13CV660
UNITED STATES OF AMERICA, Plaintiff, v. THE STATE OF NORTH CAROLINA, *et al.*, Defendants.	1:13CV861

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

INTRODUCTION

Plaintiffs challenge the authority of the State of North Carolina to enact neutral voting practices that provide equal opportunity to all voters. The United States Constitution and the Voting Rights Act ("VRA") require equality of *opportunity* to vote, *Bartlett v. Strickland*, 556 U.S. 1, 35-36 (2009), and the laws challenged by Plaintiffs in these actions do not deny voters an equal opportunity to vote. Plaintiffs fail to allege how they or others are denied equal opportunity by changes in elections procedures that would require that they register and vote according to the same rules that apply to all voters. Instead, their allegations amount to assertions that they preferred the election procedures in place prior to the enactment of 2013 N.C. Sess. Laws 381.[1] Plaintiffs are no more denied equal opportunity to vote within the meaning of Section 2 now than they were prior to the establishment of the various practices that they prefer and that were repealed by H.B. 589.

The complaints filed by Plaintiffs[2] cannot withstand the Motion for Judgment on the Pleadings.[3] To a significant degree, Plaintiffs' claims are based on conclusory and

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

[2] For ease of reference, the three Plaintiff groups and the Plaintiffs-Intervenors in these cases are referred to collectively simply as "Plaintiffs" unless context requires otherwise.

speculative allegations, not on actual allegations of fact. Moreover, Plaintiffs' allegations, taken as a whole, do not support any claim of violation of the United States Constitution or of the VRA. Rather, these actions attempt to have the judiciary reverse policy decisions of the North Carolina General Assembly that Plaintiffs oppose. The pleadings establish that Defendants are entitled to judgment as a matter of law.

ARGUMENT

I. PLAINTIFFS' FACTUAL ALLEGATIONS DO NOT SUPPORT ANY CLAIM OF AN UNCONSTITUTIONAL BURDEN ON THEIR RIGHT TO VOTE OR ANY CLAIM OF INTENTIONAL DISCRIMINATION.

Plaintiffs spend much of their responsive briefs asserting that they have alleged adequate facts to survive a motion for judgment on the pleadings. In so doing, however, Plaintiffs fail to distinguish between true factual allegations and allegations that are conclusory, speculative, or legal conclusions couched as factual allegations.

To support their claims that H.B. 589 denied them an equal opportunity to participate in the electoral process, Plaintiffs rely solely upon allegations that African Americans participated in a disproportionately higher percentage in early voting, same-day registration ("SDR"), and out-of-precinct voting in some previous elections, that registered voters who were not matched by the North Carolina State Board of Elections

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[3] Plaintiffs suggest that Defendants were somehow dilatory in filing the motion "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." (*NAACP*/*LWV* Br. at 1) Defendants, who advised the Court and Plaintiffs at the first scheduling conference in these cases of their intent to file a motion judgment on the pleadings pursuant to Rule 12(c) of the Federal Rules of Civil Procedure, did in fact file that motion at the time prescribed in the Court's Scheduling Order (*NAACP* D.E. 39; *LWV* D.E. 41; *US* D.E. 30), as later amended by order of the Court. (*NAACP* D.E. 103; *LWV* D.E. 106; *US* D.E. 91)

("SBOE") with Department of Motor Vehicle ("DMV") records were disproportionately African American, and that the elimination of pre-registration will deny 18-year-olds the right to vote. In order to prevail on these claims under Section 2, Plaintiffs "must demonstrate that, under the totality of the circumstances, the [laws they challenge] result in unequal access to the electoral process." *Thornburg v. Gingles*, 478 U.S. 30, 46 (1986). It follows, then, that in order to withstand a motion for judgment on the pleadings, Plaintiffs must allege *facts* sufficient to support a determination that the challenged laws "result in unequal access to the electoral process." *Id*. Rather than alleging and relying on such facts, however, Plaintiffs rely on conclusory and speculative allegations.

The factual allegations in the various complaints fall into five general categories:

1. Allegations concerning the identities and other information about the parties, including Get-Out-the-Vote efforts by some of the Plaintiffs;
2. Allegations describing the history of election laws and practices in North Carolina, including the practices eliminated or altered by the enactment of H.B. 589;
3. Allegations concerning the history of racial discrimination in North Carolina;
4. Allegations concerning current social conditions in North Carolina; and
5. Allegations concerning the enactment of H.B. 589, including the process by which it was enacted.

These allegations, even if true, are not sufficient to support the claims presented in these cases, because none of these allege as fact that the challenged laws "result in unequal access to the electoral process." *Id*. To support their claims, Plaintiffs must rely on allegations of actual harm, but the only allegations that they make of *actual* harm are conclusory and speculative, not factual.

As just one example, the *NAACP* Plaintiffs allege that:

> Sunday voting is particularly important to African-American communities in North Carolina. Many African-American churches in North Carolina conduct "Souls to the Polls" voting drives. A disproportionate number of African-Americans vote on Sundays as compared to whites. The elimination of one day of Sunday voting will have a disparate impact on African-Americans.

(*NAACP* D.E. 52, ¶ 99) Notably, even with no more Sunday voting, there is no allegation here that *any* voter, regardless of race, and even those who work other days of the week, will be deterred from voting.

The final sentence of the allegation is not fact. It is a conclusory allegation predicting what *may* happen. It is not sufficient to allege *as fact* that a disparate impact *will* occur. Alleging that Sunday voting is "particularly important" to African American voters, that many churches use Sunday voting as part of their Get-Out-the-Vote efforts, and that a disproportionate number of African Americans have voted on Sunday as compared to whites, do not lead inexorably to the conclusion that the elimination of Sunday voting will have a "disparate impact" on African Americans' right to participate in the electoral process. At best, the only conclusion that must follow from the factual allegations is that the elimination of Sunday voting will have an effect on Get-Out-the-

Vote efforts and may cause groups to reconsider how to get people to the polls. Whether it will also have a disparate impact on African American voters within the meaning of Section 2 jurisprudence is conjecture. The Court is not required to assume the truth of conclusory allegations such as this. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) ("Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.").

Indeed, the hypothetical nature of the allegations necessary to support Plaintiffs' claims becomes clear when the experience of the May 2014 primary election is taken into account. Defendants have discussed that experience at length in the Response in Opposition to the Motions for Preliminary Injunction. (*NAACP* D.E. 136; *LWV* D.E. 138; *US* D.E. 126) Data concerning voter turnout during that primary election and during the most recent comparable election, the 2010 primary election, are data held by the SBOE and provided by that State agency to the public in the course of the SBOE's duties. Those data are public records of which the Court may take judicial notice. *Armbruster Prods., Inc. v. Wilson*, 1994 WL 489983, at *2 (4th Cir. Sept. 12, 1994) (copy attached). S*ee also MGIC Indemnity Corp. v. Weisman*, 803 F.2d 500, 504 (9th Cir. 1986) ("On a motion to dismiss, we may take judicial notice of matters of public record outside the pleadings.") The experience of the May 2014 primary election demonstrates that Plaintiffs' conclusory allegations of "disparate impact" are not factual, but rather are conclusory and speculative.

Similarly, Plaintiffs make no factual allegation to support their claims that the challenged statutes were enacted with discriminatory intent and therefore violate the

Fourteenth and Fifteenth Amendments to the United States Constitution. Plaintiffs' allegations that support this claim fall into four general categories:

1. That the General Assembly was aware that minority voters utilized the practices eliminated by H.B. 589 to a disproportionate degree as compared to white voters;
2. That the General Assembly was aware of one report by the SBOE showing that African Americans were disproportionately represented in the group of voters for whom matches could not be made by comparing the State's list of registered voters against DMV records;
3. That the General Assembly waited to enact H.B. 589 until receiving notice of the decision in *Shelby County v. Holder*, 133 S.Ct. 2612, 2618 (2013); and
4. That intentional discrimination may be inferred because of the legislative process followed by the General Assembly.

These allegations do not support claims of discriminatory intent.[4]

The first two categories in no way give rise to an inference of discriminatory intent, especially when considered in the context of the challenged law itself, which contains provisions designed to ameliorate any potential negative effects of the

[4] Moreover, to the extent that Plaintiffs' claims rely on the supposed absence of justifications for the challenged provisions in the legislative record, it is clear that the United States Supreme Court "never require[s] a legislature to articulate its reasons for enacting a statute, [and] it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature." *Federal Commc'ns Comm'n v. Beach Commc'ns, Inc.*, 508 U.S. 307, 315 (1993).

shortening of one-stop absentee voting or requiring a photo identification. The Court may consider the entirety of H.B. 589, including these ameliorative provisions, which include providing resources to make sure that all eligible voters have access to necessary photo identification at no cost, requiring that counties have all one-stop absentee voting locations open during the one-stop absentee voting period, and requiring that counties provide the same number of hours of one-stop absentee voting as were provided in the most recent comparable election. Similarly, the fact that the General Assembly did not enact H.B. 589 until the issuance of the *Shelby County* decision, which was widely anticipated, indicates the General Assembly acted cautiously and waited until the State's obligations under the VRA were clear before enacting changes to the State's election laws.

Finally, Plaintiffs allege that the process used by the General Assembly can support an inference of intentional discrimination. They cite various ways in which they take issue with the process, such as failure of the General Assembly to accept certain amendments, but they fail to allege how the process followed by the General Assembly deviated from established rules or from the procedures followed in the enactment of other laws. Absent such allegations, the allegations of a "flawed process" that might give rise to an inference of discriminatory intent are conclusory.

In short, Plaintiffs would have the Court treat their speculations, inferences, opinions, and predictions as facts. They would have the Court treat allegations of what *might* happen as allegations of what *will* happen, even when the challenged law itself and facts of which the Court may take judicial notice disputes Plaintiffs' speculations. For

these reasons, Plaintiffs have not alleged a sufficient factual basis for their claims. *Papasan v. Allain*, 478 U.S. 265, 286 (1986).

II. PLAINTIFFS' CLAIMS FAIL AS A MATTER OF LAW.

Not only have Plaintiffs failed to allege adequate facts to support their claims, their claims must fail as a matter of law. Despite their efforts to frame their allegations in the language of cases involving denial to minority voters of equal opportunity to participate in the electoral process, what those allegations actually show is not a denial of opportunity to participate but a rejection of policy choices preferred by Plaintiffs. In the process, Plaintiffs are inviting the Court to impose the "retrogression" standard of Section 5 of the VRA on their Section 2 claims.

A. Plaintiffs have not pled a viable Section 2 claim.

What is clear from Plaintiffs' response to Defendants' motion for judgment on the pleadings is that Plaintiffs' claims are facts in search of a legal theory. For the first time, Plaintiffs make clear that they are proceeding under a vote denial, as opposed to vote dilution, theory. (*NAACP* D.E. 139, p. 7) Plaintiffs, however, have to contort the legal elements of a vote denial claim in order to shoehorn this case into that theory. Plaintiffs strain to fit this case into the vote denial framework because their claim is really a "retrogression" claim under Section 5 of the VRA, a claim that is no longer available to them.

In mangling the elements of a Section 2 vote denial claim, Plaintiffs purport to divide the elements into two parts—first, that the electoral practice "has a disparate impact on minorities," and second, that the practice "interacts with historical and social

conditions to result in an inequality in the opportunities of minorities to vote." (*See NAACP* D.E. 139, p. 6) Yet, in discussing how the pleadings allegedly contain allegations on both of these elements, it is clear that Plaintiffs have read the second element out of the proper test in favor of only a "disparate impact" element. (*NAACP* D.E. 139, pp. 7-8) Essentially, then, while paying lip service to the Section 2 requirement to plead an actual "inequality in the opportunities of minorities to vote," Plaintiffs have reduced the Section 2 analysis to the issue of whether a so-called disparate impact exists. The allegations relied upon by Plaintiffs to support the second element of the claim do not in fact allege that the challenged provisions of H.B. 589 will result in unequal opportunities to vote—those allegations simply recite the supposed disparate impact of the challenged provisions on minorities. (*Id.*) (citing *NAACP* 2d Am. Compl. ¶¶ 85-86; 90, 95-99, 102-04)

A disparate impact alone is not sufficient to state a vote denial claim under Section 2. *Irby v. Virginia State Bd. of Elections*, 889 F.2d 1352, 1353 (4th Cir. 1989); *Johnson v. Governor of State of Fla.*, 405 F.3d 1214, 1228 (11th Cir. 2005) ("Despite its broad language, Section 2 does not prohibit all voting restrictions that may have a racially disproportionate effect."). Indeed, this is clear from the cases involving the denial of the right to vote for persons convicted of felonies. Despite the disproportionate impact of such laws on minorities, they are routinely upheld despite Section 2. *See Simmons v. Galvin*, 575 F.3d 24, 30-42 (1st Cir. 2009); *Johnson*, 405 F.3d at 1227-1232; *Wesley v. Collins*, 791 F.2d 1255, 1260-1262 (6th Cir. 1986).

Plaintiffs cannot demonstrate as a matter of law that the repeal of the former election law choices favored by Plaintiffs will result in unequal opportunities to vote because nothing in H.B. 589 erects an actual barrier to voting. The photo identification requirement enforces existing North Carolina law—not challenged by Plaintiffs—that voters be who they purport to be when presenting themselves to vote. N.C. Gen. Stat. § 163-85(c)(10) (2013). The other challenged provisions simply repeal or scale back choices on when and how to voter or register to vote: in no respect do they impose additional qualifications or barriers to vote. Plaintiffs have cited no cases holding that the repeal of options some voters might find convenient and that are preferred by a group of voters is itself the erection of a barrier preventing "meaningful access" to the polls. *Jacksonville Coalition for Voter Protection v. Hood*, 351 F.Supp.2d 1326, 1333, 1335 (M.D. Fla. 2004). The legal and logical fallacy of Plaintiffs' argument, of course, is that just because minorities find a particular election practice to be convenient does not mean that the repeal of those options will hinder their ability to comply with the prior practices which no one disputes did in fact provide all voters with the equal opportunity to vote.

B. Plaintiffs have not pled a true disparate impact claim.

Even if a showing of bare "disparate impact" alone was enough to state a Section 2 vote denial claim, Plaintiffs have failed to allege such a claim.

First, even if Plaintiffs' allegations that minority voters used practices such as same-day registration at a higher rate than white voters are assumed to be true, it does not follow that the repeal of those options that some voters might find convenient will result in minority voters being disproportionately inconvenienced in voting and registering to

vote in future elections. For instance, while H.B. 589 shortened early voting from 17 to ten days, it is not an inexorable conclusion that minority voters will not continue to take advantage of the ten-day early voting period at a rate higher than white voters. Similarly, just because same-day registration is no longer available does not mean that minority voters will not take advantage of existing ways to register at higher rates than whites.

Second, it is one thing to say that repealing election options preferred by minority voters means that minority voters will therefore be disproportionately unable to take advantage of those options in the future. It is an entirely different matter, however, to say that the repeal of election options preferred by minority voters will disproportionately burden or prevent the equal opportunity of minorities to vote. While Plaintiffs have arguably alleged the former, they have clearly not alleged the latter. Their failure to make such an allegation is not surprising because any such allegation would be conjecture. Moreover, it would be wholly unwarranted since the effect of the repeal of these options is to simply return the State to electoral practices that were not alleged to be discriminatory when they were formerly in place.

Third, Plaintiffs' allegations that minorities disproportionately use the election conveniences at a higher rate than white voters does not allege a true disparate impact claim. In disparate impact cases, the impacted plaintiff has no ability to influence the adverse impact and no choice in the matter. The classic case, of course, is the use of a testing device by an employer which, while ostensibly neutral on its face, disproportionately excludes minorities from employment. In such a case, the employee

has no choice—he must either take the test or not take the test. If he takes the test, he has no control over the test questions or any other aspect of the administration of the test.

Similarly, in redistricting cases, a cohesive minority group that would constitute a majority of the voters in a reasonably compact district may be cracked into different districts where they cannot elect their candidate of choice because of racially polarized voting. *Gingles*, 478 U.S. at 46 n.11, 50, 51. The voting strength of a minority group may also be diluted when that group is packed into one or two districts but numerous enough to make two or three districts. *Voinovich v. Quilter*, 507 U.S. 146, 153-54 (1993). In either case, the minority group has no control over the composition of the district or its ability to elect a candidate of choice within it.

This same principle applies in annexation cases. Like discriminatory redistricting plans, discriminatory actions by government in annexation or zoning decisions operate to deprive a minority group of exercising its right to equal opportunity and the minority group has no control over the discriminatory decision or its effect. *Gomillion v. Lightfoot*, 364 U.S. 339 (1960).

In this case, there can be no discriminatory effect on African American voters, or other minority groups, because the challenged provisions of H.B. 589 apply equally to all voters regardless of race. African American residents of North Carolina have an equal opportunity, like all other voters, to register 25 days before the election, participate in the ten-day one-stop voting period, vote in their own precinct, register to vote when they will be 18 before the next election, and take the steps required of all voters to obtain an acceptable voter identification requirement. Voters decide whether they want to follow

election rules that apply to everyone. Thus, even if Plaintiffs' "disproportionate impact" allegations were sufficient under Section 2 in the normal course, in the context of the challenged provisions of H.B. 589, such allegations do not amount to a true claim of disparate impact.

C. Even if Plaintiffs had alleged a proper disparate impact claim, it would not support a Section 2 claim.

The Supreme Court has held that "[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 black and white voters to elect their preferred representatives." *Gingles*, 478 U.S. at 47. The Court has also noted that Section 2 requires proof that minorities have "less opportunity than other members of the electorate to . . . elect representatives of their choice" because of government action. *Strickland*, 556 U.S. at 14 (quoting 42 U.S.C. § 1973(b)). In the context of a motion for judgment on the pleadings, that means that plaintiffs must allege sufficient facts to support an assertion that a challenged law results in minority voters having "less opportunity than other members of the electorate to . . . elect representatives of their choice," *id*, or that the law "interacts with social and historical conditions to *cause* an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives." *Gingles*, 478 U.S. at 47 (emphasis added). Plaintiffs have failed to meet this burden.

Plaintiffs do make allegations concerning the social and historical conditions of minority groups in North Carolina, as well as allegations concerning how minority voters

have utilized the practices eliminated or altered by H.B. 589. They fail, however, to make the necessary connections to establish not only how those practices enhanced the ability of minority voters to participate in the electoral process but also how elimination or alteration of those practices will, in connection with social and historical conditions, work to burden the ability of those same voters to participate in the electoral process on the same basis as all other voters. Put simply, Plaintiffs argument boils down to this: Minority voters have in the past faced burdens on their ability to participate equally in the electoral process. Some of the historic and social conditions that contributed to this situation still exist in North Carolina. While the practices eliminated or altered by H.B. 589 were in place, minority participation in the electoral process increased, and minority voters used some of those practices more than non-minority voters. Therefore, the practices in question were the cause of increased minority participation, and eliminating or altering them will again burden minority participation.

This is a clear logical fallacy. Plaintiffs have alleged that higher minority participation in the electoral process *correlates* to the time that the practices in question were in place, but they have failed to allege that those practices were in fact a *cause* of increased minority participation. They simply assume it to be so, and therefore assume that elimination or alteration of those practices will burden the ability of minority voters to participate equally in the electoral process. Such an assumption simply is not sufficient to state claims for violation of Section 2 or under the Fourteenth or Fifteenth Amendments.

By ignoring this distinction between causation and correlation, Plaintiffs are attempting to impose on Section 2 the "retrogression" analysis of Section 5 of the VRA. Under that standard, covered jurisdictions bore the burden of showing that an election change had neither the "purpose" nor the "effect" of "diminishing the ability of citizens of the United States on account of race . . . to elect their preferred candidate of choice." 42 U.S.C. § 1973c; *see also Georgia v. United States*, 411 U.S. 526, 530 (1973). While Plaintiffs' allegations of disproportionately high participation rates in the practices eliminated or altered by H.B. 589 might have been probative evidence of "diminished ability" in a Section 5 proceeding, such allegations have no relevance in this case absent allegations that an action by the State *causes* minority voters to be deprived of an equal opportunity – as compared to all other voters – to register and vote. *Strickland*, 556 U.S. at 14.

The provisions of H.B. 589 do not deny members of minority groups an opportunity equal to that of all other voters to register or to vote. Plaintiffs have failed to allege a discriminatory effect necessary to state a claim under the Fourteenth Amendment or under Section 2 of the VRA.

D. The authorities cited by Plaintiffs do not support their claims but rather demonstrate why these claims should be dismissed.

Few of the cases cited by Plaintiffs in their briefing on the motion for judgment on the pleadings or the motions for preliminary injunctions support the novel application of

Section 2 they ask this Court to apply in this case.[5] Indeed, those cases demonstrate the extent to which Plaintiffs are asking the Court to create a claim to fit these facts and why the claims should therefore be dismissed.

For instance, this case is completely unlike a case where a court has issued a preliminary injunction ordering a state's election officer to issue paper ballots to minority precincts where touch-screen voting machines were subject to fail. *NAACP v. Cortes*, 591 F. Supp. 757 (E.D. Pa. 2008). Voters in the affected precincts would obviously not have a right to vote, much less an equal opportunity, where machines were subject to failure and alternative paper ballots were not provided until every touch screen machine in the precinct had failed.

Similarly, vote dilution cases involving preliminary injunctions of at-large voting schemes are not relevant. In these cases, plaintiffs have no opportunity, much less an equal opportunity, to elect candidates of choice in multi-member districts because of racially polarized voting. *See Johnson v. Halifax Cnty.*, 594 F. Supp. 161 (E.D.N.C. 1984); *United States v. Village of Port Chester*, 2008 WL 190502 (S.D.N.Y. 2008); *Dillard v. Crenshaw County*, 640 F. Supp. 1347 (M.D. Al. 1986). In stark contrast to vote dilution cases, none of the practices adopted by North Carolina prevent African American voters from registering and voting on the same terms as white voters.

[5] Two cases relied on by Plaintiffs—*Frank v. Walker*, 2014 WL 1775432 (E.D. Wis. Apr. 29, 2014), and *Spirit Lake Tribe v. Benson County*, 2010 WL 4226614 (D. N.D. 2010)—are based on clear misreadings of Section 2 that focus only on the "disparate impact" element and effectively ignore the "unequal opportunity" element.

Similarly, *NAACP v. Guilford County Board of Elections*, 858 F. Supp. 2d 516 (M.D.N.C. 2012), is inapposite. There, the General Assembly re-districted the plan for electing Guildford County commissioners by reducing the size of the commission from 11 members to nine members with eight commissioners elected from districts and one member elected at large. The plan provided that only four commissioners would be elected in the 2012 general election. The court issued a preliminary injunction under the Fourteenth Amendment, not on grounds of racial discrimination, but because the General Assembly failed to specify which incumbent commissioners were to serve as the representatives of the other four districts. The court found that this created an equal protection issue for voters in districts that might lack representation that justified a preliminary injunction and its ruling had nothing to do with racial discrimination under the Fourteenth Amendment or Section 2.[6]

In addition, *Obama for America v. Husted*, 697 F.3d 423 (6th Cir. 2012), involved an issue that has not been raised by the Plaintiffs here. That court affirmed a preliminary injunction issued by the district court barring the State of Ohio from ending in-person early voting three days before the election because, under federal law, military voters can submit absentee ballots through Election Day. Thus, this case did not involve a neutral

[6] Plaintiffs also cite *Cannon v. N.C. State Bd. of Elections*, 917 F. Supp. 387 (E.D.N.C. 1996), but it is not helpful to their case. While the court considered entering a temporary restraining order in that vote dilution case, the court instead set the matter for hearing on a motion for preliminary injunction and, after the hearing, denied the motion. *Id.* at 391; *Cannon v. N.C. State Bd. of Elections*, Case No. 96-cv-115 (E.D.N.C.) (D.E. 32) (order entered on April 1, 1996 denying motion for preliminary injunction; motion denied in open court on March 22, 1996).

practice but rather a practice that favored one group of voters over another by operation of federal law. Plaintiffs have not made any claim that any similar situation exists under North Carolina law. Indeed, such a situation could not arise in this State because of the existence of no-excuse mail-in absentee voting in North Carolina.[7]

Plaintiffs cite several cases involving attempts by a state to move precincts. Of course, this case does not involve any such issue. In any event, most of the cases cited by Plaintiffs involving this issue arose under Section 5 of the VRA. *See, e.g., Perkins v. Matthews*, 400 U.S. 379 (1971) (affirming injunctions by Alabama district court precluding the movement of a precinct until preclearance was obtained under Section 5). Indeed, one of the cases cited by Plaintiffs, *Brown v. Dean*, 555 F. Supp. 502 (D. R.I. 1982), improperly relies on *Perkins* as authority for finding a Section 2 violation even though *Perkins* was a Section 5 case and applied the higher Section 5 standard.

[7] Moreover, Plaintiffs fail to mention that the court in *Florida v. United States*, 885 F. Supp. 2d 299, 312 (D.D.C. 2012) (three-judge court), in a Section 5 case involving the higher retrogression standard for the State, initially refused to preclear reductions in early voting days that did not also guarantee a particular number of hours of early voting that would be offered during the shortened early voting period. When the state of Florida agreed to provide an early voting plan that offered the same number of hours as under prior law, the United States Department of Justice ("USDOJ") precleared the statute, thus mooting that issue. *See Brown v. Detzner*, 895 F. Supp. 2d 1236, 1241-42 (M.D. Fla. 2012). It is difficult to see how North Carolina's shortened early voting period, which also mandates the same number of hours of early voting as the previous comparable election, could possibly be held to violate Section 2 when USDOJ precleared under Section 5 a more restrictive practice in Florida.

IV. DEFENDANTS HAVE NOT WAIVED ANY CHALLENGE TO PLAINTIFFS-INTERVENORS' CLAIMS UNDER THE TWENTY-SIXTH AMENDMENT.

Plaintiffs argue that Defendants have somehow waived any challenge they might have raised concerning Plaintiffs-Intervenors' claims under the Twenty-Sixth Amendment. (*NAACP*/*LWV* Br. at 32 *et seq*.) Plaintiffs' argument is baseless.

The Twenty-Sixth Amendment to the United States Constitution states very simply:

> Section 1. The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age.
>
> Section 2. The Congress shall have the power to enforce this article by appropriate legislation.

U.S. Const., Amend. XXVI. While Plaintiffs cite to numerous allegations in Plaintiffs-Intervenors' Complaint by which they purport to allege violations of the Twenty-Sixth Amendment, they ignore one basic fact: Despite their allegations, nothing in H.B. 589 can be construed as denying citizens who are 18 years of age, or who will be 18 years of age at the time of the next election, from registering to vote and from voting in that election. Nothing more need be said. Plaintiffs-Intervenors' conclusory allegations to the contrary are insufficient in the face of the language of the challenged law. As a matter of law, the language of H.B. 589 establishes that the law does not deprive any 18-year-old citizen of the right to vote. Thus, Defendants are entitled to judgment on Plaintiffs-Intervenors' claims under the Twenty-Sixth Amendment.

CONCLUSION

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

This the 30th day of June, 2014.

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CERTIFICATE OF SERVICE

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

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