In The
United States Court of Appeals
For The Fourth Circuit

RECORD NO. 14-1845(L)

LEAGUE OF WOMEN VOTERS OF NORTH CAROLINA; A. PHILIP RANDOLPH INSTITUTE; UNIFOUR ONESTOP COLLABORATIVE; COMMON CAUSE NORTH CAROLINA; GOLDIE WELLS; KAY BRANDON; OCTAVIA RAINEY; SARA STOHLER; HUGH STOHLER,

Plaintiffs,

and

LOUIS M. DUKE; CHARLES M. GRAY; ASGOD BARRANTES; JOSUE E. BERDUO; BRIAN M. MILLER; NANCY J. LUND; BECKY HURLEY MOCK; MARY-WREN RITCHIE; LYNNE M. WALTER; EBONY N. WEST,

Intervenors/Plaintiffs – Appellants,

v.

STATE OF NORTH CAROLINA; JOSHUA B. HOWARD, in his official capacity as a member of the State Board of Elections; RHONDA K. AMOROSO, in her official capacity as a member of the State Board of Elections; JOSHUA D. MALCOLM, in his official capacity as a member of the State Board of Elections; PAUL J. FOLEY, in his official capacity as a member of the State Board of Elections; MAJA KRICKER, in her official capacity as a member of the State Board of Elections; PATRICK L. MCCRORY, in his official capacity as Governor of the state of North Carolina,

Defendants – Appellees.

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(*Caption and Counsel Continued Inside*)

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RECORD NO. 14-1856

NORTH CAROLINA STATE CONFERENCE OF BRANCHES OF THE NAACP; ROSANELL EATON; EMMANUEL BAPTIST CHURCH; BETHEL A. BAPTIST CHURCH; COVENANT PRESBYTERIAN CHURCH; CLINTON TABERNACLE AME ZION CHURCH; BARBEE'S CHAPEL MISSIONARY BAPTIST CHURCH, INC.; ARMENTA EATON; CAROLYN COLEMAN; JOCELYN FERGUSON-KELLY; FAITH JACKSON; MARY PERRY; MARIA TERESA UNGER PALMER,

Plaintiffs – Appellants,

and

NEW OXLEY HILL BAPTIST CHURCH; BAHEEYAH MADANY; JOHN DOE 1; JANE DOE 1; JOHN DOE 2; JANE DOE 2; JOHN DOE 3; JANE DOE 3,

Plaintiffs,

v.

PATRICK L. MCCRORY, in his official capacity as Governor of the state of North Carolina; JOSHUA B. HOWARD, in his official capacity as a member of the State Board of Elections; RHONDA K. AMOROSO, in her official capacity as a member of the State Board of Elections; JOSHUA D. MALCOLM, in his official capacity as a member of the State Board of Elections; PAUL J. FOLEY, in his official capacity as a member of the State Board of Elections; MAJA KRICKER, in her official capacity as a member of the State Board of Elections,

Defendants – Appellees.

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RECORD NO. 14-1859

LEAGUE OF WOMEN VOTERS OF NORTH CAROLINA; A. PHILIP RANDOLPH INSTITUTE; UNIFOUR ONESTOP COLLABORATIVE; COMMON CAUSE NORTH CAROLINA; GOLDIE WELLS; OCTAVIA RAINEY; HUGH STOHLER; KAY BRANDON; SARA STOHLER,

Plaintiffs – Appellants,

and

LOUIS M. DUKE; CHARLES M. GRAY; ASGOD BARRANTES; JOSUE E. BERDUO; BRIAN M. MILLER; NANCY J. LUND; BECKY HURLEY MOCK; MARY-WREN RITCHIE; LYNNE M. WALTER; EBONY N. WEST,

Intervenors/Plaintiffs,

v.

STATE OF NORTH CAROLINA; JOSHUA B. HOWARD, in his official capacity as a member of the State Board of Elections; RHONDA K. AMOROSO, in her official capacity as a member of the State Board of Elections; JOSHUA D. MALCOLM, in his official capacity as a member of the State Board of Elections; PAUL J. FOLEY, in his official capacity as a member of the State Board of Elections; MAJA KRICKER, in her official capacity as a member of the State Board of Elections; PATRICK L. MCCRORY, in his official capacity as Governor of the state of North Carolina,

Defendants – Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA AT GREENSBORO

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STATEMENT OF ISSUE PRESENTED FOR REVIEW

Did the district court abuse its discretion when it denied Plaintiffs-Appellants' motions for preliminary injunction?

STATEMENT OF THE CASE

Defendants incorporate by reference the recitation and analysis of the facts adopted by the district court. Memorandum Opinion and Order ("Mem. Op.") pp. 29, 30, 44-46, 49-51, 52, 53, 64-70, 81, 82, 86, 87, 88-90, 92-95, 97-112.

SUMMARY OF ARGUMENT

From July 7 through July 10, 2014, the district court heard the testimony of numerous witnesses and hours of arguments from attorneys on plaintiffs' motions for preliminary injunction.[1] Following that hearing, Judge Schroeder spent four weeks examining all of the evidence offered prior to and during the hearing, considering the extensive written and oral arguments of the parties and crafting a thorough and well-reasoned opinion. Both the transcript of the hearing and the 125-page opinion itself exhibit the district court's familiarity with the evidence and command of the legal principles involved.

[1] Appellants include the plaintiffs in *North Carolina State Conference of Chapters of the NAACP, et al., v. McCrory* (M.D.N.C. 1:13CV658) and the plaintiffs and plaintiff-intervenors in *League of Women Voters of North Carolina, et al., v. State of North Carolina* (M.D.N.C. 1:13CV660). They will be referred to collectively as "plaintiffs."

Now, with fewer than 50 days remaining until the 2014 general election, and fewer than 40 days before the start of early voting, plaintiffs seek to have the decision of the district court overturned. The burden plaintiffs bear is significant—they must demonstrate that the district court abused its discretion in denying their motions for preliminary injunction—while the consequences of the relief they seek would be extensive.

The district court found that plaintiffs were unlikely to succeed on the merits of their claims that the elimination of same-day registration and out-of-precinct voting violates Section 2 of the Voting Rights Act and the Fourteenth and Fifteenth Amendments to the United States Constitution. With respect to all other claims, the district court found that plaintiffs failed to offer evidence that they would suffer irreparable harm in the 2014 general election absent a preliminary injunction requiring the State of North Carolina to implement practices and procedures eliminated by the North Carolina General Assembly.

There can be no question that requiring the State to change the rules of the election this close to Election Day would cause all North Carolina voters to suffer irreparable harm by depriving them of their right to orderly elections. Even if plaintiffs had offered evidence of irreparable harm and could, contrary to the clear record in these cases, establish an abuse of discretion by the district court, it is already too late to change the rules by which the 2014 general election will be

conducted.[2] The district court properly denied the motions for preliminary injunction; this Court should not accept plaintiffs' invitation to throw North Carolina's elections into chaos by holding otherwise.

ARGUMENT

I. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION WHEN IT DENIED PLAINTIFFS' MOTIONS FOR PRELIMINARY INJUNCTION.

A. Standard of Review

This Court reviews the district court's denial of a request for a preliminary injunction for "'abuse of discretion, accepting the court's findings of fact absent clear error, but reviewing its conclusions of law de novo.'" *Perry v. Judd*, 471 F. App'x 219, 223 (4th Cir. 2012) (quoting *Child Evangelism Fellowship of Md., Inc. v. Montgomery County Pub. Sch.*, 373 F.3d 589, 593 (4th Cir. 2004)). This is because a preliminary injunction is "'an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief.'" *Id.* (quoting *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008)). Those seeking a preliminary injunction "'must establish that [they are] likely to succeed on the merits, that [they are] likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in [their] favor, and that an injunction is in the public interest.'" *Id.* (quoting *Winter*, 555 U.S. at 20).

[2] As is shown *infra*, this is even more true now than it was at the time of the July hearing.

Additionally, this Court has drawn a significant distinction between "prohibitory" preliminary injunctions, versus "mandatory" preliminary injunctions. *Pashby v. Delia*, 709 F.3d 307, 319 (4th Cir. 2013). Prohibitory preliminary injunctions maintain the status quo and prevent irreparable harm while a lawsuit remains pending. A mandatory preliminary injunction accomplishes anything other than maintenance of the status quo. *Id.* at 319-20. Such "[m]andatory preliminary injunctive relief in any circumstance is disfavored, and warranted only in the most extraordinary circumstances." *Perry*, 471 F. App'x at 223. This is not surprising given that preliminary injunctions requested of a trial court are "extraordinary remedies involving the exercise of very far-reaching powers." *Direx Israel, Ltd. v. Breakthrough Med. Corp.*, 952 F.2d 802, 814 (4th Cir. 1991). For these reasons, this Court applies an "exacting" standard when reviewing an order granting a preliminary injunction, *Sun Microsystems, Inc. v. Microsoft Corp.* (*In re Microsoft Corp. Antitrust Litig.*), 333 F.3d 517, 524 (4th Cir. 2003), *abrogated on other grounds by ebay, Inc. v. Merc Exchange, L.L.C.*, 547 U.S. 388 (2006), and that review is "even more searching" when the preliminary injunction issued by the district court is "mandatory rather than prohibitory in nature," *id.* at 525.

Defendants' research discloses no recent cases in which this Court has reversed a district court's refusal to grant a mandatory preliminary injunction. In

contrast, there have been at least three recent cases in which this Court has reversed or vacated mandatory injunctions entered by a district court. *Sun Microsystems, Inc.*, 333 F.3d at 535 (vacating mandatory preliminary injunction requiring Microsoft to incorporate in and distribute with every copy of its Windows PC operating system and every copy of its web browser Sun's Java software); *Beskind v. Easley*, 325 F.3d 506, 520 (4th Cir. 2003) (vacating mandatory injunction requiring North Carolina officials to accept excise tax payments from plaintiffs that are due on wine received directly from out-of-state sources); *Petersburg Cellular P'ship v. Bd. of Supervisors*, 205 F.3d 688, 706, 710 (4th Cir. 2000) (vacating mandatory injunction ordering that defendant Board of Supervisors approve plaintiff's application for a conditional use permit). As these cases show, there is almost no recent authority supportive of the relief plaintiffs seek in this appeal, particularly where they seek a mandatory injunction directing a state to change statewide election practices for a general election that is less than two months away.[3]

[3] There is, however, strong counsel against disturbing the district court's denial of preliminary injunctive relief. In *Purcell v. Gonzalez*, 549 U.S. 1 (2006), the Supreme Court considered the Ninth Circuit's entry of an interlocutory injunction pending appeal enjoining enforcement of Arizona's voter identification law. The injunction was entered on October 5, 2006, just one month before the 2006 general election. The Ninth Circuit took this action after the district court, on September 11, 2006, denied the request for preliminary injunction, but before the district court had entered findings of fact and conclusions of law to support its decision. On October 20, 2006, the Supreme Court vacated the injunction entered by the Ninth

B. The District Court Properly Found that Plaintiffs Failed to Demonstrate that they are Likely to Suffer Irreparable Harm in the 2014 General Election. However, the Harm to the Public if Plaintiffs Prevail is Incalculable.

The district court specifically found that plaintiffs failed to demonstrate irreparable harm on their claims regarding reduction of the one-stop absentee voting period (often called the "early voting" period) and elimination of pre-registration. As to elimination of same-day registration ("SDR") and out-of-precinct voting, the district court found that plaintiffs had not demonstrated a likelihood of success on the merits of their claims brought under Section 2 and the Fourteenth and Fifteenth Amendments.[4] As to all of plaintiffs' claims, however, the factual findings made by the district court demonstrate that plaintiffs failed to demonstrate irreparable harm in allowing all of the challenged practices to be implemented in the November 2014 general election.

Circuit. In its *per curiam* opinion, the Court noted that enjoining the operation of election laws just weeks before an election requires an appellate court "to weigh, in addition to the harms attendant upon issuance or nonissuance of an injunction, considerations specific to election cases . . . . Court orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase." *Purcell*, 549 U.S. at 4-5.

[4] The district court found that the Intervenors failed to demonstrate irreparable harm with respect to any of their claims, including their challenges under the Twenty-Sixth Amendment to the elimination of SDR and out-of-precinct voting, in addition to the elimination of preregistration. Mem. Op. pp. 79-80, 92.

1. The District Court Properly Found that Plaintiffs Failed to Demonstrate that They Will Suffer Irreparable Harm with Regard to Early Voting.

Regarding the reduction of the early voting period, the district court found that there was "no evidence in the record that it is likely that counties will not be able to handle the turnout this fall with the remaining ten days" of early voting. Mem. Op. p. 97. The court found that in 2010, on which the 2014 early voting hours will be based, "blacks used early voting at a rate nearly comparable with that of whites." *Id.* at p. 98. Regarding Sunday voting, the district court found only seven counties offered such voting in 2010, and that plaintiffs' claims regarding Sunday voting were "unsubstantiated." *Id.* at pp. 98-99. The district court also relied on testimony from the hearing in concluding that the loss of one week of early voting would not hamper plaintiffs' Get-Out-the-Vote efforts. *Id.* at 102.[5]

Against plaintiffs' failure to demonstrate irreparable harm to them, this Court should consider the irreparable harm to the State and voters of North Carolina in the event a mandatory injunction is entered. This harm is described more fully in Appellees' Response to Appellants' Motion to Expedite Appeal; to Proceed on Original Record; or to Defer Filing of Joint Appendix, which was filed on September 2, 2014.

[5] The district court found plaintiffs' claims of irreparable harm similarly without merit regarding their claims concerning the so-called soft rollout of Voter ID, increased poll observers, and elimination of discretion to keep the polls open by county officials. *Id.* at pp. 108, 111-12, 115-16.

In addition, developments since the July 2014 hearing confirm that there is no danger of irreparable harm to plaintiffs. As each day since entry of the district court's order has progressed, the State Board of Elections staff has continued to review and approve early voting plans for North Carolina counties. According to statistics posted by the State Board of Elections, the number of early voting hours in 2014 will be 96.8% of the hours in 2010. Moreover, in 2010, seven counties held Sunday voting while in 2014 it will be held in ten counties. In 2010, only 34 counties had Saturday voting on two Saturdays, while in 2014 there will be at least 80 counties with two Saturdays of early voting.[6] These statistics confirm the district court's determination that plaintiffs will not suffer irreparable harm as a result of a shorter early voting period.[7]

2. The District Court Properly Found that Plaintiffs Failed to Demonstrate that They Will Suffer Irreparable Harm with Regard to Preregistration.

The district court correctly found that neither the NAACP plaintiffs nor Intervenors had demonstrated that they would be irreparably harmed by the

[6] A chart published by the State Board of Elections containing this information may be accessed at: ftp://alt.ncsbe.gov/One-Stop_Early_Voting/summary_onestop_schedules_2010_2014.pdf. Supporting data for the 2010 and 2014 general election may be accessed at: ftp://alt.ncsbe.gov/One-Stop_Early_Voting/onestop_schedule_nov2010.pdf and http://www.ncsbe.gov/webapps/os_sites/.

[7] These statistics also demonstrate how circumstances have changed since the July 2014 hearing, such that should this Court reverse the district court's decision, it would be necessary to remand to the district court for additional proceedings, including a balancing of harms as they exist now.

elimination of preregistration. The district court noted that no one who was 16 years old as of the date the order issued would be eligible to vote in the 2014 general election, and any 17-year-old who would be eligible to vote in the 2014 general election was, at the time of the order (and had been for some time), able to register without using preregistration. Furthermore, the court noted that any harm to plaintiffs' or Intervenors' ability to engage in preregistration efforts would not be irreparable. Mem. Op. pp. 110-12.[8]

3. The District Court's Findings of Fact Establish that Plaintiffs Similarly Failed to Demonstrate that They Will Suffer Irreparable Harm with Regard to Same-Day Registration and Out-of-Precinct Provisional Balloting.

As the district court found, plaintiffs' own experts concluded that black voters in North Carolina have reached "parity" with whites in turnout in presidential elections, and that the registration rates of blacks now exceeds that of whites. Additionally, the high registration rate of African Americans "suggests strongly that black voters will not have unequal access to the polls" and that African Americans have equal opportunities to "easily register to vote." *Id.* at pp. 41, 44. Moreover, plaintiffs' own witnesses acknowledged that SDR allowed the

[8] The district court correctly found that Intervenors failed to show irreparable harm with respect to their other claims as well. With respect to these claims, the district court noted that Intervenors did not assert associational claims, but are proceeding as ten individuals. Intervenors presented no evidence to show that they, individually, would be harmed by the elimination of SDR or out-of-precinct voting. *Id*. at pp. 79-80, 92.

counting of ballots cast by individuals who could not be properly verified. This problem was a factor requiring one recent election to be re-done. *Id.* at pp. 50-51, 53. The district court further found that the "overwhelming majority of States" close their registration books before Election Day, a choice that has been "sanctioned by" the United States Supreme Court and Congress. *Id.* at p. 76. These findings are plainly supported by the evidence and therefore may not be disturbed on appeal.

Likewise, the district court found that very few voters cast out-of-precinct ballots. In 2012, only .342% of the votes cast by African American voters were out-of-precinct ballots, while only .21% of votes cast by white voters were cast out-of-precinct. *Id.* at pp. 83-84. Thus, almost 99.7% of African American voters would not have been affected by a lack of out-of-precinct voting in 2012. *Id.* The district court also noted that the lack of out-of-precinct voting is mitigated by the provision of early voting without regard to precincts. *Id.* at p. 84. It also acknowledged the rationale of the North Carolina Supreme Court regarding the administrative burdens and possible fraud caused by out-of-precinct voting, and that the majority of states do not offer out-of-precinct voting. *Id.* at pp. 86, 91-92. These findings are not clearly erroneous and support the district court's refusal to enter a preliminary injunction with respect to out-of-precinct voting. The record discloses no abuse of discretion by the district court.

C. The District Court Properly Found that Plaintiffs Failed to Demonstrate that They Are Likely to Succeed on the Merits of Their Claims Regarding Same-Day Registration and Out-of-Precinct Voting, and Plaintiffs Similarly Are Not Likely to Succeed on Their Other Claims.

1. Plaintiffs Seek to Import a Retrogression Standard into Section 2 of the Voting Rights Act.

Plaintiffs' legal theories would effectively replace the "equality of opportunity" standard in Section 2 with the "non-retrogression" standard formerly applicable only under Section 5 of the VRA.[9] In rejecting this argument, the district court stated that the proper standard under Section 2 is whether North Carolina's "existing voting scheme (without [the practices plaintiffs' prefer]) interacts with past discrimination and present conditions to cause a discriminatory result." *Id.* at p. 48. Section 2 is not concerned with whether the elimination of a preferred election practice will "worsen the position of minority voters in comparison to the preexisting" election system. *Id.* at p. 48. Rather, the Section 2 results standard is "an assessment of equality of opportunity under the current system." *Id.* at p. 85. Plaintiffs have cited no precedent from this Court or the

[9] For example, under the "calculus of voting" theory espoused by Dr. Barry Burden, turnout rates in past elections are relevant but whether registration and voting by minorities will decrease under the current practice is irrelevant. His theory would result in current practices being unlawful if they resulted in disproportionate burdens or costs on voters who preferred the repealed practices. Transcript of Hearing on Motion for Preliminary Injunction ("Tr.") Vol. 3, pp. 115-16, 136, 158-59, 160-63. This is nothing more than retrogression disguised as an academic theory.

Supreme Court analyzing an election practice's effect on minority voters under Section 2 by comparing it to the previous practice. The district court was plainly correct in refusing to follow such an unprecedented analysis in its denial of the motions for preliminary injunction.

One of the many flaws in importing the retrogression standard into Section 2 is the "dramatic and far-reaching" effects it would have on the election practices of other states. *Id.* at 46 (citations omitted).[10] As the district court noted with regard to SDR, "neither the United States nor the private Plaintiffs have ever taken the position that a jurisdiction was in violation of Section 2 simply for failing to offer" SDR. *Id.* A determination that a state such as North Carolina is in violation of Section 2 because it does not offer SDR or out-of-precinct voting could "place in jeopardy the laws" of dozens of states that do not offer these practices. *Id.* at 85.

Importing a retrogression standard into Section 2 would also prove standardless and would elevate the voting preferences of minorities over equal opportunity. Section 2 claims are only viable where the challenged voting practice can be compared against an objective alternative benchmark. *Holder v. Hall*, 512 U.S. 874, 880 (1994) (Kennedy, J.). Since plaintiffs can almost always

[10] The strict remedies provided by Section 5 survived constitutional scrutiny because of the specific coverage formula adopted by Congress to focus the remedies on jurisdictions with an undisputed history of discrimination in voting. *South Carolina v. Katzenbach*, 383 U.S. 301, 329 (1966). Insertion of a nationwide retrogression standard under Section 2 is not supported by similar findings and would raise serious constitutional issues.

hypothesize fewer restrictions on the manner of voting that could increase minority opportunities or participation rates, the choice of a Section 2 "benchmark" by which to measure disproportionate harm is inherently "standardless" and provides no "objective," "acceptable principles" for measuring discrimination. *Holder*, 512 U.S. at 885.

2. The District Court Properly Found that Plaintiffs Failed to Demonstrate That African American Participation Rates Will Decline Disproportionately Because of S.L. 2013-381 such as to Violate Section 2.

As the district court explained, a "bare statistical showing of disproportionate *impact* on a racial minority does not satisfy" Section 2. Mem. Op. p. 36 (citations omitted) (emphasis in original). In the instant case, plaintiffs have at best demonstrated a disparate *participation rate* by minorities in repealed practices such as SDR and out-of-precinct voting. However, plaintiffs have failed to demonstrate that the modification or elimination of the repealed election practices have or will disproportionately decrease future participation by minorities.

First, even if minority voters participated in practices such as SDR at a higher rate than white voters, it does not follow that the repeal of those options will result in minority voters suffering disproportionate participation rates in voting and

registering to vote in future elections.[11] For instance, while S.L. 2013-381 shortened the early voting period 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 SDR is no longer available does not mean that minority voters will not take advantage of existing ways to register at higher rates than whites.[12]

Next, plaintiffs' allegations do not allege a true disparate impact claim. In disparate impact cases, the impacted plaintiff has no ability to influence the adverse impact. For instance, in redistricting cases, the voting strength of a minority group may be diluted through various mechanisms in the construction of

[11] The district court recognized this point when it found that data from the May 2014 primary election "suggest that black turnout increased more than did white turnout when compared with the May 2010 primary." *Id.* at p. 102 n.72.

[12] At the hearing on plaintiffs' motions, plaintiffs conceded that they cannot demonstrate that the challenged election practices will have a negative (or even positive) impact on African American turnout or registration in connection with the November 2014 election. Indeed, they contended that voter turnout and registration are not relevant to their claims. Tr. Vol. 3, pp. 54-56, 60, 61, 136, 141, 160-63. Instead, they claim that minority voters will be "burdened" because they are "less sophisticated" and therefore less able to discern the existing, multiple opportunities for them to register and vote. Tr. Vol. 2, pp. 193, 196; Vol. 3, pp. 20, 21, 28-30, 116-17, 120, 141, 142. Expert testimony that minorities are less able to register 25 days before the election, vote early during the ten-day early voting period, and vote in their assigned precinct, because they are disproportionately "less sophisticated," is a "racial classification" that is "'odious to a free people whose institutions are founded upon the doctrine of equality.'" *Shaw v. Hunt*, 509 U.S. 630, 643 (1993) (quoting *Hirabayashi v. United States*, 320 U.S. 81, 200 (1943)). Plaintiffs' legal positions "'threaten to stigmatize individuals by reason of their membership in a racial group and to incite racial hostility.'" *Id.* (quoting *Richmond v. J. A. Crosson Co.*, 488 U.S. 469, 493 (1989)).

the district which the voters cannot control. *Thornburg v. Gingles*, 478 U.S. 30, 46 n.11, 50, 51 (1986); *Voinovich v. Quilter*, 507 U.S. 146, 153-54 (1993). However, the challenged provisions of S.L. 2013-381 apply equally to all voters regardless of race. Moreover, any impact is not caused by the challenged statute *per se*, but by the choices and preferences of individual voters. *Smith v. Salt River Project Agric. Improvement & Power Dist.*, 109 F.3d 586, 595-96 (9th Cir. 1997). Voters remain in control. "That voters preferred to use SDR over [other] methods [of registration] does not mean that without SDR voters lack equal opportunity." Mem. Op. p. 46. *See also League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 445 (2006); *Bartlett v. Strickland*, 556 U.S. 1, 23 (2009) (plaintiffs not entitled to the election practices they prefer or practices that benefit them and their political allies). The same is true of the other claims raised by plaintiffs.[13]

[13] There is no governmental action here that creates an unequal playing field in voting or registration. As noted by the district court, the burdens associated with S.L. 2013-381 are no more severe than the burdens caused by the photo identification requirement upheld in *Crawford v. Marion County Elections Board*, 553 U.S. 181 (2008). Thus, plaintiffs' use of some of the *Gingles* factors (while ignoring others) is inappropriate. Plaintiffs have it backwards. Just as the *Gingles* factors are not relevant to a vote dilution case until there is proof of the *Gingles* preconditions, the *Gingles* factors in this case cannot be relevant absent proof of state action that creates inequality of opportunity for minorities in voting and registration.

This the 17th day of September, 2014.

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