

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

3 NORTH CAROLINA STATE CONFERENCE ) CASE NO. 1:13CV658  
4 OF THE NAACP, et al., )  
5 Plaintiffs, )  
6 V. )  
7 PATRICK LLOYD MCCRORY, in his )  
8 Official capacity as Governor )  
9 Of North Carolina, et al., )  
Defendants. )

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10 LEAGUE OF WOMEN VOTERS OF NORTH ) CASE NO. 1:13CV660  
11 CAROLINA, et al., )  
12 Plaintiffs, )  
13 V. )  
14 STATE OF NORTH CAROLINA, et al., )  
15 Defendants. )

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16 UNITED STATES OF AMERICA, ) CASE NO. 1:13CV861  
17 Plaintiff, )  
18 V. )  
19 STATE OF NORTH CAROLINA, et al., ) Winston-Salem, North Carolina  
20 Defendants. ) July 31, 2015  
9:03 a.m.

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22 TRANSCRIPT OF THE **TRIAL/DAY FIFTEEN/CONCLUSION**  
23 BEFORE THE HONORABLE THOMAS D. SCHROEDER  
24 UNITED STATES DISTRICT JUDGE

25 Proceedings recorded by mechanical stenotype reporter.  
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1  
2           **THE COURT:** Good morning, everyone. Mr. Donovan,  
3 good morning.

4           **MR. DONOVAN:** Good morning, Your Honor. You asked  
5 yesterday if there were any other outstanding issues. I  
6 canvassed with the Plaintiffs. I think the only other issue  
7 Mr. Kaul had raised -- I think you reserved judgment on certain  
8 Jay DeLancy emails.

9           **THE COURT:** Yes.

10          **MR. DONOVAN:** So that's outstanding as well.

11          **THE COURT:** Yes. I had also some -- paragraph 78 to  
12 82 of Dr. Thornton's report, and I think that's it with  
13 everything else. All right. I presume if there is something  
14 that occurs to you, that you'll include that in your post-trial  
15 submissions. You should feel free to do that.

16          **MR. DONOVAN:** We will.

17          **THE COURT:** Okay. Anything further we need to  
18 address before we --

19          **MR. FARR:** I'm sorry, Your Honor?

20          **THE COURT:** Anything further that you want to  
21 address?

22          **MR. FARR:** I don't think so, Your Honor.

23          **THE COURT:** All right. Mr. Donovan.

24          **MR. DONOVAN:** Thank you. Your Honor, may I approach?

25          **THE COURT:** Yes.

1           **MR. DONOVAN:** Your Honor, what I handed you are the  
2 slides that Plaintiffs have prepared. We may refer to them.  
3 We may not refer to all of them, and I provided a copy for  
4 Mr. Farr as well.

5           **THE COURT:** All right.

6           **MR. DONOVAN:** Just for planning purposes so you know,  
7 I am going to begin, followed by Mr. Russ of the Department of  
8 Justice, Ms. Riggs on behalf of the League, and Mr. Spiva on  
9 behalf of the Duke Intervenors. We've kind of coordinated it  
10 to do our best not to cover any of the same issues twice.

11           **THE COURT:** All right.

12           **MR. DONOVAN:** With that, Your Honor, let me begin.

13           In this case, it is recognized that voting is a  
14 fundamental right; and, indeed, Courts have recognized that,  
15 that no right is more basic in a democracy than the right to  
16 vote. For that reason, the law, both in the Constitution and  
17 statutes, provide extraordinary protections: the Fourteenth  
18 Amendment, the Fifteenth Amendment, the Voting Rights Act, a  
19 law that was passed to protect against voting discrimination  
20 impacting African-Americans and other minorities.

21           It was an act that was passed that was earned through  
22 the blood, the sweat and tears of many people; but,  
23 importantly, it recognizes that the right to vote is the  
24 cornerstone of our democracy, and it protects that protection,  
25 too. As the Chief Justice said even in *Shelby County*, it is a

1 ban against racial discrimination and voting that's permanent  
2 and nationwide and to be broadly interpreted.

3           The law and evidence I'm going to walk through,  
4 Judge, will establish that the challenged provisions of  
5 H.B. 589 violate both the Voting Rights Act and the  
6 Constitution.

7           We submit that the evidence shows that these  
8 challenged provisions burden the right to vote for  
9 African-Americans and Latinos relative to whites in violation  
10 of Section 2 of the Voting Rights Act, were drafted with the  
11 purpose to suppress the votes of African-Americans, and  
12 substantially burden unjustifiably the right to vote.

13           So as I've thought about the evidence in this case  
14 for some time, Your Honor -- the trial has lasted three weeks.  
15 We had the one-week preliminary injunction. The Court issued  
16 an opinion. We went to the Court of Appeals. We have that  
17 opinion. But after all this, as I walk through this, what we  
18 will submit is the case critical evidence is undisputed, and  
19 much of it was found by the Court last year; and we submit the  
20 evidence we have submitted since then has only made it  
21 stronger.

22           The key facts, the case critical facts under the  
23 Fourth Circuit standard is African-Americans have used same-day  
24 registration, out-of-precinct voting, early voting, and  
25 preregistration disproportionately to white voters in North

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1 Carolina. The repeal of these challenged measures will  
2 disproportionately impact and burden minority voters.

3 In addition, the evidence is that these  
4 disproportionate impacts are linked to the social and  
5 historical conditions. That hasn't changed since last year  
6 when we were here, especially as we walk through the Senate  
7 Factors.

8 So, in the end, the voting practices at issue in this  
9 case, Your Honor, were enacted to increase voter participation.  
10 There is no dispute. African-American voters  
11 disproportionately used those to increase their registration in  
12 voting. There is no dispute, and H.B. 589 now restricts those  
13 very mechanisms, and we submit that violates Section 2 and The  
14 United States Constitution.

15 So against that background, let me begin the  
16 summation, and this is kind for the Department of Justice, the  
17 NAACP, and the League of Women Voters, what we are going to  
18 cover, three sections.

19 I want to start with the undisputed fact that these  
20 repealed provisions were implemented to increase voter  
21 participation, and the evidence is that they were done at least  
22 in part to increase registration and voting for  
23 African-Americans.

24 **THE COURT:** Is it permitted under the Fourteenth  
25 Amendment to favor one race in passing a voting law?

1           **MR. DONOVAN:** It is, Your Honor, in the sense of it  
2 was to increase participation of all voters, but it was at a  
3 time when it was recognized that African-Americans versus  
4 white -- this goes back to around 2000, in the sense at that  
5 point, in looking at that, saying that the African-American  
6 vote was behind.

7           **THE COURT:** Is it the Plaintiffs' position in this  
8 case that the earlier enactment of same-day registration,  
9 out-of-precinct voting, early voting, and preregistration had  
10 at least as part of their purpose to make it easier for  
11 African-Americans to vote?

12           **MR. DONOVAN:** I wouldn't say easier. I think it was  
13 to enable them to vote because it was recognized at that time  
14 that African-Americans were not registering and voting. It  
15 clearly helped all North Carolinians.

16           **THE COURT:** So is it your position that  
17 African-Americans -- certain African-Americans were unable to  
18 vote without these provisions?

19           **MR. DONOVAN:** They were certainly burdened in the  
20 sense that they were abridged and some were denied, yes. And  
21 these enabled -- and again, the law looks at the burdens.  
22 Sometimes people were able to overcome those burdens; but as I  
23 get into the Voting Rights Act, that certainly looks at the  
24 burdens, which sometimes people can overcome themselves or  
25 through others, but the law doesn't permit.

1           And one point, Judge, from that question is it's not  
2 our position that these did not help other North Carolinians.  
3 They definitely did, but they disproportionately have been used  
4 by African-Americans.

5           And that's what the next slide I want to show, Your  
6 Honor, and I show both, all North Carolinians, in the 2012,  
7 because we do want to focus -- I know last time, when we were  
8 here for the PI, it was midterm to midterm, but I am going to  
9 focus mostly on Presidential elections because I think that's  
10 where these problems are mostly acute.

11           And you know these facts, Your Honor. I've  
12 memorialized them here, but in 2012, 97,000 people used  
13 same-day registration to vote in North Carolina. More than a  
14 third of them were African-American versus 22 percent of their  
15 voting-age population.

16           The out-of-precinct ballots was the same analysis.  
17 Early voting, 2.5 million people in North Carolina used it.  
18 Almost 30 percent were African-Americans versus 16 percent of  
19 other voters. And preregistration has the same analysis.

20           I am going to get to this, Judge, but these are not  
21 mere conveniences. These were mechanisms that enabled  
22 African-Americans to overcome both historic and current  
23 socioeconomic issues to vote.

24           **THE COURT:** So under that analysis then, I take it,  
25 that at the time that these -- well, let me say, immediately

1 preceding the time these were enacted, it could have been  
2 argued that North Carolina was in violation of Section 2 for  
3 not having them?

4 **MR. DONOVAN:** I'd put it a little differently. And  
5 they could have been held in violation. I haven't done that  
6 analysis, but I think as a theoretical, they could have been.  
7 But what would have happened is what one would have done is  
8 sued saying the system, whatever mechanism, is in violation of  
9 Section 2. You wouldn't sue to say the State must provide  
10 same-day registration under that hypothetical. You would sue;  
11 that might be a remedy.

12 **THE COURT:** So you would sue and say that there is  
13 unequal opportunity to participate or elect the candidates of  
14 their choice in the language of Section 2?

15 **MR. DONOVAN:** Correct. And what the State may  
16 propose as a remedy, if they're found liable, is we will offer  
17 same-day registration.

18 **THE COURT:** Is that the same test I apply at this  
19 point in time?

20 **MR. DONOVAN:** It is not.

21 **THE COURT:** Now why is that?

22 **MR. DONOVAN:** Because the facts are different.

23 **THE COURT:** Why would the test be different if the --  
24 just because the facts have changed?

25 **MR. DONOVAN:** Because that's what the Fourth Circuit

1 says, Your Honor, in *Gingles*. It's an intensely local  
2 functional, and what I am going to get to is you got to look at  
3 the current practices.

4 **THE COURT:** I understand that.

5 **MR. DONOVAN:** The test -- I'm sorry. The test isn't  
6 any different, but your application -- the test is not any  
7 different. Your application --

8 **THE COURT:** So the test is to take a look at the  
9 snapshot now of the world with 589 and ask, under Section 2,  
10 whether there is an equal opportunity of African-Americans to  
11 participate with all other voters and to elect the candidate of  
12 their choice?

13 **MR. DONOVAN:** Correct. But you need to look at the  
14 current facts, and I am going to get to the past and present  
15 realities, but I am not suggesting there are different tests.

16 **THE COURT:** All right.

17 **MR. DONOVAN:** So against that, let's kind of walk  
18 through Section 2. And, obviously, we start with the plain  
19 language. I just want to highlight a few, and this focuses on  
20 any voting practice that's applied by the State in a manner --  
21 in a manner which results in the denial or the abridgment of  
22 the right to vote of any citizen of the United States to vote  
23 on account of race or color.

24 So that's the starting point. We then go to, well,  
25 what's the test Your Honor should apply? And here, in light of

1 the Fourth Circuit's opinion, we know the vote-denial standard  
2 here in the Fourth Circuit, and it's the two elements I don't  
3 need to walk through. But two points, the first element, which  
4 I will talk about, the legal issue and the facts, is the  
5 discriminatory burden, what does that mean and what's the  
6 evidence. And second, that burden must in part -- in part be  
7 caused by or linked to social and historical conditions that  
8 have or currently produce discrimination against members of the  
9 protected class.

10           Your Honor, the Defendants argued in their trial  
11 brief that the Fourth Circuit opinion is not law of the case.  
12 I think that's wrong, but, more importantly, I believe it  
13 misses the relevant point. The relevant point is this standard  
14 is the standard for all vote denial cases in the Fourth  
15 Circuit. If we brought a new case today and it was assigned to  
16 a different District Court, they would have to apply this  
17 standard; and that's the key.

18           Second, I do believe it's law of the case on certain  
19 issues. I understand you are going to decide this on the trial  
20 record, not the PI record, but I do believe that the law of the  
21 case would apply to certain issues. It was a fully developed  
22 record, and, in fact, that was one of the Defendants' arguments  
23 to the Fourth Circuit is that we spent so much time and Your  
24 Honor did, and they also sought a writ of certiorari from the  
25 Supreme Court. That was denied, and the Fourth Circuit's

1 mandate was issued.

2           Your Honor, I direct Your Honor to one case. I did  
3 not find a Fourth Circuit case right on point, but there is  
4 other appellate courts that talk about these situations where  
5 there's a PI, and you may have -- but the leading one that kind  
6 of summarizes the cases, it's from the DC Circuit, *Sherley v.*  
7 *Sebelius*, 689 F.3d 776. 782 to 83 are the key discussion, and  
8 that's from 2012.

9           Your Honor, I come back to the key point, the  
10 critical point is that we have the standard for vote denial,  
11 and that applies, not only in this Court, but any Court in the  
12 Fourth Circuit.

13           So against that background, what did the Fourth  
14 Circuit do? Well, they used the *Gingles'*  
15 the-totality-of-the-circumstances test, and they said you look  
16 to certain Senate Factors in evaluating Section 2.

17           And what does that mean? Well, we don't need to  
18 rehash. We've talked before about how some of those factors  
19 may not apply to vote denial.

20           **THE COURT:** They would seem to have been developed  
21 largely in dilution cases.

22           **MR. DONOVAN:** I think that's right, and I think  
23 that's likely -- Your Honor recognized, I think that's likely  
24 because Section 5 was around. So there wasn't as many  
25 Section 5 -- or, excuse me, Section 2 vote denial cases.

1           So here's the Fourth Circuit key takeaways. There is  
2 no requirement that any particular number of Senate Factors be  
3 proved. That's the totality of the circumstances, and this is  
4 important, Your Honor, is that the Fourth Circuit said that's  
5 not surprising because Congress intended to give the Voting  
6 Rights Act the broadest possible scope.

7           So what is a Court to do? It's to undertake -- and  
8 the key parts of this, I believe, are a searching practical  
9 evaluation. It's not a technical, it's a practical evaluation  
10 of the past and present reality with a functional, not a  
11 technical, a functional view of the political process. And as  
12 Your Honor knows, the Courts -- it is an intensely local  
13 appraisal of the impact of these rules on the past and present  
14 reality.

15           Before moving on, Your Honor, I want to discuss --  
16 we've discussed before the relationship between Section 5 and  
17 Section 2 briefly.

18           Section 5 is a pure retrogression standard. It  
19 simply looks at the position here of African-Americans before  
20 the change and after the change; and if the effect makes it  
21 worse, it is a violation, plain and simple, full stop.

22           Section 2, by contrast, looks at the position of the  
23 minority voters, compares it to white voters at the same time  
24 period. So it is not over time. It's comparing, in this  
25 situation, African-Americans and whites at similar positions;

1 and then it looks and see if there is a burden on the minority.

2 And here, Your Honor, I am going to walk through we  
3 believe the challenge --

4 **THE COURT:** Whether there is a burden how?

5 **MR. DONOVAN:** I am going to get to that, but --

6 **THE COURT:** By removal of the previous practice?

7 **MR. DONOVAN:** Yeah, if you're doing your intensely  
8 local appraisal -- and not just that, we have to look at more  
9 than that, or at least we can here. But in light of the past  
10 and present reality, we can't ignore that these practices were  
11 in place and have become part of the North Carolina voting  
12 system. I am going to walk through that in moment.

13 But under Section 2, Your Honor, as you know, we also  
14 look at how that practice interacts with social and historical  
15 conditions. So I think there is a real difference between  
16 Section 5 and Section 2 that we've articulated, such that we  
17 are not relying on Section 5 as the Defendants argue.

18 **THE COURT:** The Supreme Court has referred to  
19 Section 5 as preventing what they call backsliding; that is,  
20 you're frozen in time and can do no worse, so to speak, and if  
21 you want to pass any voting change, you have to get permission.  
22 Is that essentially Section 5?

23 **MR. DONOVAN:** That's Section 5. And I think the key  
24 takeaways in how Section 2 is different and in some way more  
25 protective is Section 5, as we know, only applied to certain

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1 covered jurisdictions. And the Supreme Court's concern there  
2 was really starting with federalism concerns at that time;  
3 whereas, Chief Justice Roberts said Section 2 is permanent and  
4 nationwide, and that's actually the route to go if you want  
5 injunctive relief.

6 **THE COURT:** As a practical matter, though, Section 5  
7 covered, I think, 39 jurisdictions in North Carolina at the  
8 time that *Shelby County* came down; but, as a practical matter,  
9 the State Legislature would be prohibited from doing anything  
10 statewide as long as any county was covered, I take it, unless  
11 they exempted that county.

12 **MR. DONOVAN:** I agree, yeah, if it violates --

13 **THE COURT:** But they wanted the state -- if the  
14 legislature wanted a statewide enactment, the whole state was  
15 covered, as a practical reality.

16 **MR. DONOVAN:** I agree with that.

17 **THE COURT:** Okay.

18 **MR. DONOVAN:** Okay. So let's look at what the Fourth  
19 Circuit then said, because this argument was made by the  
20 Defendants as well, about retrogression. The Fourth Circuit  
21 said, "The fact that a practice or law eliminates voting  
22 opportunities that used to exist under prior law that  
23 African-Americans disproportionately used is therefore relevant  
24 to an assessment of whether, under the current system today,  
25 African-Americans have an equal opportunity to participate in

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1 the political process as compared to other voters." And in  
2 this case, North Carolina's previous voting practices are  
3 centrally relevant under Section 2.

4           They went further, kind of this is more of the legal  
5 discussion, but contrary to Defendants' argument. The Fourth  
6 Circuit found that "Neither the Supreme Court nor" the Fourth  
7 Circuit "has ever held that in determining whether an  
8 abridgment has occurred, that courts are categorically barred  
9 from considering the past practices" and, in fact, the previous  
10 changes are a critical piece of that analysis.

11           And that makes sense in a  
12 totality-of-the-circumstances analysis with an intensely local  
13 appraisal, and I know we've talked about some other states that  
14 I'll get to, but we need to look at what has developed here in  
15 North Carolina.

16           So before getting into the evidence and a bit more on  
17 the burden standard, Your Honor, I want to address a question  
18 you had I believe last time we were here, which is what happens  
19 to my decision in other places whatever way I rule? And I  
20 understand that, although it's an intensely local appraisal,  
21 that's a concern.

22           **THE COURT:** I am not sure --

23           **MR. DONOVAN:** Or a consideration.

24           **THE COURT:** Maybe -- if I phrased it that way, that's  
25 not exactly my concern. My concern is any decision I issue

1 should make sense in other contexts.

2 **MR. DONOVAN:** Understood.

3 **THE COURT:** That's my concern. My decision will be  
4 based on North Carolina and the facts of this case.

5 **MR. DONOVAN:** Understood. Even under that framing,  
6 let me explain why I think it should and it would and it makes  
7 sense, is that with that intensely local appraisal, you look at  
8 each of the voting practices that have been repealed or limited  
9 here in North Carolina have been disproportionately used by  
10 African-Americans to register and vote; and then only after  
11 that, that they were successfully used by African-Americans in  
12 North Carolina, were these practices repealed all at once in  
13 one omnibus bill.

14 So that's kind of the background. Those are the  
15 facts before you, and I submit those are pretty unique facts.

16 No other state, as the testimony has been, has  
17 initiated same-day registration or repealed it; but I think  
18 what we need to keep in mind is all these provisions repealed  
19 at one time. So what happens if another state did that? If  
20 another state with a similar pattern, history of voting  
21 discrimination, similar populations, socioeconomic, had these  
22 practices where a minority used them disproportionately and  
23 they were repealed all at once, such a decision would apply to  
24 them. It would be applicable. I think we could go to that  
25 Court and say, you should rely; this is persuasive.

1           But as we know, as I said, there's no other state  
2 that's done that; and that's why this case is so important,  
3 Your Honor, is after *Shelby*, no other state has tried this  
4 other than the State of North Carolina.

5           And I want to give a few --

6           **THE COURT:** Tried, you mean, to do as many things?

7           **MR. DONOVAN:** Correct.

8           **THE COURT:** Florida reduced the early voting?

9           **MR. DONOVAN:** Yeah, and I am going to get to Florida,  
10 but you're right --

11          **THE COURT:** And Ohio has reduced its early voting?

12          **MR. DONOVAN:** Ohio has reduced that.

13          **THE COURT:** What happened in that case? Did it get  
14 settled?

15          **MR. DONOVAN:** That case settled. It settled. So  
16 they basically --

17          **THE COURT:** So these cases can be settled?

18          **MR. DONOVAN:** One moment, Your Honor. They can be,  
19 Your Honor. But I am going to come back to those. But, yeah,  
20 that was settled. An agreement was come to where -- it was in  
21 the middle basically I think was the agreement.

22          **THE COURT:** All right.

23          **MR. DONOVAN:** But I want to give the counterfactual  
24 about the decision here, how it would be used. If you assume  
25 another state, when it's just early voting, and they limit it

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1 for ten days because it has low usage, it is not used  
2 disproportionately by African -- or any minority, but maybe it  
3 started from 45 days and they lowered it to 21, your decision  
4 wouldn't really apply there. It is different facts. In fact,  
5 that's what Georgia did. That's a much different situation.

6 Assume you had a practice that wasn't used  
7 disproportionately by African-Americans, and there was actually  
8 a rationale for limiting low usage --

9 **THE COURT:** Was it that it was disproportionately  
10 used by whites and an African-American -- how can I put it?  
11 Let's say it's disproportionately used by whites, and it was  
12 repealed, and the claim was made that it was repealed because  
13 the other political party or -- and race were using it.  
14 Wouldn't that violate the Fourteenth Amendment?

15 **MR. DONOVAN:** I think it could.

16 **THE COURT:** Or at least if there is a claim.

17 **MR. DONOVAN:** If there is a claim.

18 **THE COURT:** So only when they are in perfect parity  
19 would there not be any claim?

20 **MR. DONOVAN:** No, that's not what we are submitting.  
21 I think the issues in that situation, in our country and most  
22 states, the whites haven't had the socioeconomic problems or  
23 disparities. In fact, they have been on the other side of that  
24 equation. So I think --

25 **THE COURT:** But that's a Section 2 analysis. What

1 about the Fourteenth Amendment?

2 **MR. DONOVAN:** I think if you intentionally did it,  
3 you could have a claim. I would have to understand more of the  
4 facts. I don't think it is barred. The claim is not barred,  
5 but I think that would be a pretty unusual claim.

6 **THE COURT:** So what if North Carolina had -- instead  
7 of going from 17 to 10 days of early voting went from 17 to 16  
8 days?

9 **MR. DONOVAN:** That would be a different case. I  
10 agree.

11 **THE COURT:** Well, it's retrogressive, would it not  
12 be? That probably would not pass Section 5, would it?

13 **MR. DONOVAN:** I don't know, Your Honor, because,  
14 actually, in analysis --

15 **THE COURT:** As I saw the evidence, if it excluded the  
16 first Sunday, the Plaintiffs' evidence was that that was a  
17 popular day --

18 **MR. DONOVAN:** For Sunday, totally agree.

19 **THE COURT:** Okay. So let's say that the legislature  
20 went from -- I think it started on a Wednesday. So let's say  
21 they cut three or four days instead of the seven. Would that  
22 be retrogressive and require under pre-*Shelby* an approval?

23 **MR. DONOVAN:** Well, it would require approval because  
24 they were covered jurisdictions, and then it would be the  
25 analysis by the Department of Justice or the three --

1           **THE COURT:** But by your definition, it would be  
2 retrogressive?

3           **MR. DONOVAN:** It would be retrogressive under  
4 Section 2, and my point is I would have to do more analysis  
5 whether it violates Section 2, because it isn't our position  
6 that --

7           **THE COURT:** You said it was retrogressive -- under  
8 Section 5?

9           **MR. DONOVAN:** Yes. Section 5, excuse me, but under  
10 Section 2, which is why I think it's different, and I made that  
11 point, is you would need to analyze does it disproportionately  
12 impact, and probably would, I think it probably would, but my  
13 point being is if there is other things that are being done or  
14 they could show that there is really low usage on one day.

15           That's why I keep coming back to -- I understand the  
16 kind of attempt to have a limiting principle, but in a  
17 totality-of-the-circumstances analysis, it is hard to apply  
18 Georgia or Ohio on its own. I know you're not trying to do  
19 that, but it is hard to apply those or to say, well, what if  
20 the legislature just did a study and said on one day, it  
21 doesn't really affect the turnout, the numbers end up the same,  
22 African-Americans don't use that, minorities don't. It just  
23 doesn't make sense. That would be a completely different case.

24           **THE COURT:** So if the legislature in North Carolina  
25 had gone from early voting from 17 to 15 days and took one

1 of -- the first Sunday, under the Plaintiffs' evidence in this  
2 case, it had been disproportionately used by African-Americans;  
3 therefore, there's been a burden?

4 **MR. DONOVAN:** I believe under -- if there is a  
5 Sunday -- I'm just thinking about that hypothetically -- I  
6 think it would be.

7 **THE COURT:** So you would say you would still be here  
8 and would have a claim?

9 **MR. DONOVAN:** We would be here and have a claim,  
10 although it would be a much different claim, right. It would  
11 be a much narrower claim. It wouldn't have taken us three  
12 weeks to try that claim.

13 **THE COURT:** I am not sure.

14 **MR. DONOVAN:** Fair enough.

15 **THE COURT:** So --

16 **MR. DONOVAN:** But my only point being is I think it  
17 is important, and I understand in the totality of the  
18 circumstances, is to look at the hand we've been dealt here and  
19 understanding the limiting principle, but the legislature  
20 didn't try to make it by one day because they thought, geez,  
21 this would be more efficient. I'm going to get to the  
22 tenuousness. In fact, the evidence --

23 **THE COURT:** I understand that when -- and I hesitate  
24 to interrupt because you've spent a lot of time putting  
25 together your presentation, and I want to hear it. But the

1 case law says that if I were to grant relief under Section 2,  
2 then I should allow the legislature an opportunity to remedy  
3 the problem.

4 **MR. DONOVAN:** I was going to get that. I agree with  
5 that.

6 **THE COURT:** Let's say I grant relief. What is the  
7 remedy?

8 **MR. DONOVAN:** Well, the initial remedy, we believe,  
9 would be the injunction we are asking for.

10 **THE COURT:** Let's stick with early voting. Make it  
11 simple. They go back to 17 days?

12 **MR. DONOVAN:** They do, but they can come back to Your  
13 Honor. We would then have a remedy phase where they could  
14 present evidence why certain modifications that they want  
15 actually then are not disproportionate -- do not violate  
16 Section 2.

17 **THE COURT:** So what's -- so how do I determine when  
18 they are not in violation of Section 2 in that phase?

19 **MR. DONOVAN:** Well, we would have the same analysis  
20 then of your example. What if they took away one day, and they  
21 actually developed some evidence -- look, I think under the  
22 current facts, it is very difficult for them. That's why I  
23 think our case is so strong. I think they have a real problem  
24 because it was used so much, and was so much used, not just by  
25 all North Carolinians, but --

1           **THE COURT:** How would I know in the remedy phase that  
2 they've achieved an appropriate remedy? What is the standard  
3 that would be applied?

4           **MR. DONOVAN:** I think you would have to look -- under  
5 Section 2 at least, you look at both elements. You look at is  
6 there a burden. Are there other ways that the socioeconomic  
7 factors -- they can modify it. They can do other things. That  
8 goes back to my original point, is if people thought there was  
9 a problem with the system, you wouldn't sue for same-day  
10 registration. You would sue, back in the old days before these  
11 existed and nobody knew how they were used, for a remedy.

12           And then just like everything, there is limitations  
13 and there's remedies. The same way Ohio ended up with a  
14 settlement, you might end up with a settlement, but you also  
15 might end up with just a remedy. And Your Honor and Courts  
16 across the country enter remedies, both sides propose remedies,  
17 and how they would fit in the Section 2 framework.

18           **THE COURT:** Now, the Section 2 cases in the vote  
19 dilution context talk about a baseline, the establishment of a  
20 baseline so the Court can understand what to measure against.  
21 What is the baseline in this context?

22           **MR. DONOVAN:** First of all, under Section 2 results,  
23 I don't believe there is a baseline the way you look at that in  
24 a vote dilution case. I think under Section 2, what they've  
25 told you is to look at the intensely local appraisal of the

1 totality of the circumstances. And the Fourth Circuit said,  
2 here, you have a bit of a baseline. My point is I don't think  
3 you need one, but here you do to some extent under this  
4 different analysis because of the --

5 **THE COURT:** The reason I ask about it is if I follow  
6 down the path, I grant relief, at some point, the Court is  
7 going to be faced with a decision of, well, when is there  
8 parity, if you will? When is Section 2 satisfied? And so the  
9 question I have is how would one know?

10 **MR. DONOVAN:** So let me give you kind of an example.  
11 I think --

12 **THE COURT:** If it's a -- if retrogression is  
13 important -- there's been a lot said about retrogression. I've  
14 read the Fourth Circuit's opinion. How would the Court know if  
15 the issue is, well, if you took it away, it must be a burden,  
16 if that's the test?

17 **MR. DONOVAN:** On these facts, and I go to same-day  
18 registration -- on these facts, Your Honor, the same-day  
19 registration has been shown to be used a lot. And I get into  
20 the numbers in a bit for registration for African-Americans.

21 I think it would be very difficult for the State to  
22 offer something different -- maybe they are creative -- that  
23 would provide the same opportunity to vote that same-day  
24 registration has been proven to vote [sic].

25 **THE COURT:** So once a State offers same-day

1 registration, and it is disproportionately used by  
2 African-Americans, under that theory, the State could never  
3 take it away?

4 **MR. DONOVAN:** I think that goes too far. I think  
5 under these facts, again, in North Carolina, where  
6 African-Americans and Latinos and minorities have used it more,  
7 for a lot reasons I am going to get into, than whites, I think  
8 Section 2, yes, it does preclude it.

9 But we know about -- we've talked about all these  
10 other states. There is -- Oregon has gone to voting by mail.  
11 So has Colorado. Those are states where the minorities have  
12 different practices, okay. So --

13 **THE COURT:** Why is Colorado not in violation of  
14 Section 2 for not allowing African-Americans the opportunity to  
15 vote in person, which there's been a lot of evidence that  
16 that's very important?

17 **MR. DONOVAN:** Exactly. But it is a different  
18 population. It is a different history, right. North Carolina  
19 has the history we've talked about of voting discrimination and  
20 other discrimination.

21 **THE COURT:** Well, I suspect their history of  
22 discrimination is different from North Carolina's but has a lot  
23 of the same parallels.

24 **MR. DONOVAN:** It wouldn't surprise me if there's  
25 discrimination, Your Honor, but I don't think it's anything on

1 the scale or the type simply because of the populations. You  
2 know, it just hasn't had that.

3 And that's where we go back -- I think it is very --

4 **THE COURT:** So why is -- from a causal point of view,  
5 what is that issue relevant to? If they have a different  
6 history of discrimination, how is that relevant to not being  
7 able to vote in person?

8 **MR. DONOVAN:** Sure.

9 **THE COURT:** And the burden of having to fill out an  
10 application versus -- let's say the socioeconomic is the same.  
11 Let's say that the educational level is roughly the same.  
12 Let's say that the -- that still in Colorado, there are more  
13 whites with automobiles than African-Americans, so that  
14 statistic has some disparity, as in this case. Why wouldn't  
15 those be enough factors to say, you know, they need to provide  
16 an in-person vote for African-Americans?

17 **MR. DONOVAN:** They may need to, but on the  
18 hypothetical, my point is being that I think the populations  
19 are different. I think the burden is likely different because  
20 they just simply didn't use it as much.

21 **THE COURT:** They didn't use what as much?

22 **MR. DONOVAN:** They didn't use the in-person voting in  
23 those states. And, likely, we heard from the experts --

24 **THE COURT:** How do we know they didn't use it as --

25 **MR. DONOVAN:** Well, we don't. I mean, I am not

1 trying to get into the other states. That's my point. I think  
2 we need to focus here, but under the hypothetical, I was trying  
3 to give you the counterfactual from another state.

4 **THE COURT:** One concern I have is under the elections  
5 clause, the states have some freedom to decide their own rules,  
6 but they have to do it within the confines of the Constitution  
7 and federal statutes.

8 **MR. DONOVAN:** I agree.

9 **THE COURT:** If this becomes a one-way ratchet, where  
10 in any state where these are enacted, it is going to be very  
11 difficult, maybe not impossible, but very difficult to change  
12 them in any way without being litigated every time they do it.  
13 Would that not serve as a disincentive to many states to trying  
14 it?

15 A good example in this case is the state of New York.  
16 It astounds me that New York has Election Day voting only, but  
17 apparently they do it and they survive, and they apparently  
18 have long lines. They probably have a lot more voting  
19 machines, but they manage it. Some day, they may want to have  
20 Election Day registration, same-day registration. Maybe they  
21 had that. I don't recall, but they may want to do some of  
22 these things.

23 And if the rule is, well, once you do it, you are  
24 never going back, that may -- is that not, from a policy point  
25 of view, a disincentive to a state legislature?

1           **MR. DONOVAN:** So a couple of responses. First, I  
2 think that policy goes away because of the Voting Rights Act,  
3 which is the law, but, more importantly, I think, is -- the  
4 answer is, no, if it is instituted.

5           And, first of all, the evidence is that the states  
6 should be providing these opportunities to vote. It still  
7 blows everyone's mind that these were so successful; yet, North  
8 Carolina ripped them away. But put that to the side --

9           **THE COURT:** I don't think you need to argue that the  
10 State ought to be in the business of making it easier to vote,  
11 because I accept that. The government should not make it  
12 harder for people to vote. Government ought to make it easier  
13 for people to engage in the fundamental right to vote.

14           **MR. DONOVAN:** That's just a segue to my point being  
15 that, if that's the great incentive for the government, I don't  
16 think a state is going to institute a policy such as same-day  
17 registration and then take it away if it's shown to be  
18 successful, especially disproportionately for  
19 African-Americans, unless they are doing it either with the  
20 intent or with discriminatory results.

21           So, you know, we have this testimony, I think from  
22 Ms. Strach, that looking at different states -- I am not aware  
23 of any state that has instituted same-day or early and taken it  
24 away.

25           So I actually think if you think that states should

1 be offering opportunities, and if they offer that opportunity  
2 and it's successful, that there is some concern that they say,  
3 geez, I am stuck with a successful voting practice. It  
4 shouldn't be a policy concern, I don't believe, either.

5 **THE COURT:** Who among your group is the Dr. Stewart  
6 burden --

7 **MR. DONOVAN:** Well, we are going to address some  
8 burden here, but Mr. Russ is as well.

9 **THE COURT:** Okay. Well, one issue I am interested in  
10 is -- I am still focused on remedy.

11 **MR. DONOVAN:** Sure.

12 **THE COURT:** Because if I grant relief, at some point,  
13 I have to decide, well, okay, so when is enough enough and when  
14 have they compiled. And I don't know what to measure that  
15 against other than so far the evidence is, well, we've been  
16 injured because we had something, you took it away, and we were  
17 using it more than other folks.

18 **MR. DONOVAN:** Well, I am going to get to -- there is  
19 much more than that.

20 **THE COURT:** But Dr. Stewart gave evidence as to what  
21 the -- and everybody did -- what the turnout numbers were and,  
22 lo and behold, the turnout has increased in 2014.

23 And the argument now is, well, it would have been  
24 higher, but nobody has told me what it should have been, I  
25 don't think, without H.B. 589. So I don't know what -- I don't

1 know what the number should have been. Usually -- and  
2 Dr. Stewart testified even on his rebuttal that you do two  
3 different things. You look at the old and then you conduct a  
4 case control study for what the new should have been, and then  
5 you measure the difference; and nobody did that in this case  
6 for me. So I don't know how I measure it.

7 **MR. DONOVAN:** Sure. Two answers to this question.  
8 Mr. Russ is going to address remedy as well, probably in more  
9 detail. I am going to address burden in a little bit.

10 I don't think it is error to think of this as a  
11 turnout to turnout for a lot of reasons, but let me walk up to  
12 that and kind of then explain the law and I think the evidence  
13 here and why that isn't -- and I get the concern, or at least  
14 that question, and I want to address that.

15 **THE COURT:** Everybody is focusing on the  
16 disproportionate use, and that's -- notwithstanding what others  
17 may have interpreted, that's an important fact. I get that,  
18 but at the end of the day, the question has to be the Section 2  
19 question.

20 **MR. DONOVAN:** Yes.

21 **THE COURT:** And I am struggling with and I need some  
22 help with how do I know when there is no longer a violation.  
23 Because if there is a way to know that, then you can prove to  
24 me there is a violation.

25 **MR. DONOVAN:** Sure.

1           **THE COURT:** If there is no way to know when it's in  
2 parity, if you will, under your analysis, then I struggle with  
3 how I know it's in violation.

4           **MR. DONOVAN:** I'm going to come to that, but I  
5 suggest parity or turnout is not the right at least framework  
6 for the Court to think about it. It really is burden --

7           **THE COURT:** I am using the language of Section 2. So  
8 when I use "parity," what I mean is equal opportunity to  
9 participate or elect persons of a choice.

10           **MR. DONOVAN:** And I am going get to this. I think  
11 the key point we'd say is, look, you've got to look at -- it's  
12 both Element 1 and 2. And I understand if you look at Element  
13 1 and say, oh, there's just a statistical disparity, that's not  
14 enough, and we're not suggesting that. And that's where --

15           **THE COURT:** Do you accept -- there are a number of  
16 cases that say that disparity alone is not enough. Do you  
17 accept that proposition?

18           **MR. DONOVAN:** I do for this case because we don't  
19 need to just prove that. I think here, and I think the easier  
20 way for the framework, and definitely the Fourth Circuit says,  
21 is you need to look at both elements together. Each one -- if  
22 there were just kind of socioeconomic factors, just disparity,  
23 and you need to look at both, and it is a totality of the  
24 circumstances, which I know is never as satisfying as kind of a  
25 complete test, but that is, in this world of voting and social

1 science --

2 **THE COURT:** You look at everything.

3 **MR. DONOVAN:** You got to look at everything.

4 **THE COURT:** I agree.

5 **MR. DONOVAN:** But the Fourth Circuit did find -- and,  
6 again, just with respect to same-day registration and  
7 out-of-precinct and just at the preliminary injunction  
8 standard, but they found that the prior use disproportionately  
9 and then taking away all at once was a discriminatory burden.  
10 We've developed the record, and there is more. I am going to  
11 get to that.

12 **THE COURT:** How is that a discriminatory burden just  
13 by taking it away?

14 **MR. DONOVAN:** Well, it is not just the taking away.  
15 It is the past and present reality of its use that went from --

16 **THE COURT:** Let me posit a -- you have a county where  
17 voting is by -- are you familiar with Redbox video rentals?

18 **MR. DONOVAN:** I am.

19 **THE COURT:** There is a Redbox on every corner, and it  
20 is now for registering and voting. It is on every corner in a  
21 precinct, and you can't walk anywhere a block without passing  
22 at least one. And the local county board or whoever,  
23 governmental entity, decides they don't want to pay for all  
24 these Redboxes, so they are going to cut them in half.

25 So now instead of one every corner, you have one

1 every two blocks. So they are everywhere, but they're every  
2 two blocks. You've now cut by 50 percent the ability of people  
3 to register and vote, and you've taken away -- let's assume  
4 they were disproportionately used by a certain race. There is  
5 a claim. You've taken them away. It's disproportionate use.

6           Would you say that that's a violation of Section 2,  
7 assuming they were disproportionately used by  
8 African-Americans?

9           **MR. DONOVAN:** I think I would, but I think you would  
10 need a lot more facts around that hypothetical because you  
11 would need to know kind of what is the usage, is it available  
12 24/7, 365 days a year.

13           **THE COURT:** Wouldn't you also ask, well, everything  
14 else being equal, what other opportunities do they have? Isn't  
15 that the ultimate question is what opportunities remain  
16 available, and now, under the various *Gingles* factors, do they  
17 interact to make it more difficult for African-Americans?  
18 Isn't that the question?

19           **MR. DONOVAN:** I don't think that's the ultimate  
20 question, but I think that's a fair consideration. I am going  
21 to walk through why those are not sufficient here. I think  
22 that's a fair consideration. I don't think it is the ultimate  
23 question.

24           But we come to this totality of the circumstances,  
25 and I think that's a fair consideration. There are other

1 reasons why those weren't working --

2           **THE COURT:** In looking at the disproportionate use  
3 and you-took-it-away analysis, doesn't that beg the question of  
4 Section 2, and that is, is there equal opportunity nevertheless  
5 under the new system?

6           **MR. DONOVAN:** No. Because, again, this was the  
7 Defendants' argument that equal opportunity -- this goes back  
8 to kind of moving polls around, moving registration. This is  
9 Justice Scalia saying, look, if you made it available in one  
10 neighborhood, and it happens to be three hours and only white  
11 voters can get it, it's equal opportunity. Anybody could go.  
12 But it's the functional test you need to look at. What is  
13 really happening on the ground? What is the past and present  
14 reality? So I think it is very dangerous --

15           **THE COURT:** But doesn't that still take you back to  
16 the Section 2 question of is there equal opportunity under the  
17 current system now that you don't have whatever it was that was  
18 taken away?

19           **MR. DONOVAN:** But remember what equal opportunity --  
20 under the Section 2 and the Fourth Circuit, it's the functional  
21 opportunity --

22           **THE COURT:** I grant that.

23           **MR. DONOVAN:** So that's -- the issue you are asking  
24 is kind of could it be. You know, it could be, but that's why  
25 you need to fill it in with facts.

1           **THE COURT:** Don't you have to prove as Plaintiffs  
2 that there is no -- you have the burden of proof.

3           **MR. DONOVAN:** We do.

4           **THE COURT:** You have to prove there is not an equal  
5 opportunity currently, and you -- can you simply say, well, we  
6 had a thousand Redboxes, and you took away 500. Judge, we  
7 don't have an equal opportunity. They cut in half our  
8 opportunity. It is not equal anymore. Wouldn't you have to  
9 say, and with the 500 that are left, they are only open two  
10 hours a day or there is some problem, and so we can't -- we now  
11 don't have an equal opportunity?

12           **MR. DONOVAN:** Possibly under that hypothetical. But  
13 here, I do think, again looking at those facts and what the  
14 Fourth Circuit looked at and what's before Your Honor, is if  
15 you look at the two issues, again, just same-day registration  
16 and out of precinct, the Fourth Circuit said there can be no  
17 doubt that the challenged measures in H.B. 589  
18 disproportionately impact minority voters, and went through the  
19 evidence, which I want to go through, because that wasn't it.  
20 There was more and then you --

21           **THE COURT:** There is no doubt of that --

22           **MR. DONOVAN:** I'm sorry?

23           **THE COURT:** There is no doubt about that in that they  
24 were disproportionately used by African-Americans.

25           **MR. DONOVAN:** Correct.

1           **THE COURT:** That's true.

2           **MR. DONOVAN:** And that's kind of the standard, and  
3 there is more that, as I will walk through, is there is reasons  
4 why before this African-American registration was so low.  
5 There's some socioeconomic factor. That's why these worked  
6 together to say -- here, I actually think you have an easier  
7 case than you would in a case where you are just challenging  
8 the registration process. Here, we have real-world facts that  
9 when this -- before it was in place, African-Americans, there  
10 was the disparity, they then used this disproportionately to  
11 increase registration and voting.

12           **THE COURT:** What is the -- help me out. What is the  
13 proof in the record that African-Americans, before these 589  
14 reductions, could not or would not or were unable to use the  
15 existing mechanisms?

16           **MR. DONOVAN:** Sure. First, we have the actual  
17 numbers. There was a large disparity.

18           **THE COURT:** Now, you are pointing to turnout.

19           **MR. DONOVAN:** No, I am turning to registration  
20 numbers, which is looked at in the past in other cases, but you  
21 also look --

22           **THE COURT:** It seems to me that -- okay. Go ahead.

23           **MR. DONOVAN:** Sure. You look at that. You also look  
24 at why. Then I am going to look at still today why the others  
25 aren't sufficient for a population -- and you have this

1 real-world factor that once it was put in place, it was used to  
2 register at a much higher rate, and we have expert testimony on  
3 that as well, Your Honor.

4           But I think if you put those together and you look at  
5 why these others are not sufficient -- and, remember, we are  
6 looking at the disproportionate use. It's not that some people  
7 can't do it. This is the protection for all people to vote,  
8 and that's where, when we walk through the socioeconomic,  
9 especially on same-day registration for your question, that you  
10 see these other methods of registration all -- again, unlike  
11 same-day that African-Americans disproportionately used to  
12 register, these other ones disproportionately were used against  
13 them or they are on the other side of the equation. When you  
14 put that together, that is the Section 2 violation.

15           Let me walk through some of that on the same-day  
16 registration because I think when we look at the evidence, it  
17 will fill out the legal standard.

18           It's important to look at what was able to be done  
19 pre-589, as the Fourth Circuit said; that is, a citizen could  
20 register same day who was not registered for whatever reason,  
21 who had moved into North Carolina, who moved from a different  
22 county, whose registrations were not properly recorded. I am  
23 going to come that, because that is an important one where if  
24 you ask the question, why weren't the prior systems sufficient.

25           Post-589, it is a guillotine. Twenty-five days

1 before, no exceptions.

2           So, Your Honor, we already know the numbers. I will  
3 move past that, but this is where African-Americans were less  
4 likely to register during the registration period.

5           **THE COURT:** What is the evidence on how many states  
6 have some form of same-day registration? Was it 30-something?

7           **MR. DONOVAN:** I believe it's about 25. And,  
8 actually, Utah is starting a pilot project, and there is  
9 additional ones adding. And California's, I think, has just  
10 started as well.

11           What we showed is before, during it went up, and then  
12 after the elimination period, the evidence is that  
13 African-Americans continued to submit voter registration forms  
14 during this period.

15           So what that does mean? Well, why was that? This is  
16 where you need to look at both factors together is the social  
17 and historic. We spent a lot of time, Your Honor, presenting  
18 evidence about the difficulties and the burdens on  
19 African-Americans in North Carolina, whether it's education,  
20 employment, income, less access to a vehicle.

21           And you asked, well, why does that matter? Well,  
22 that's because same-day registration allowed African-Americans  
23 and Hispanics to overcome that burden of more restrictive  
24 registration rules, and that is the racial inequalities the and  
25 socioeconomic --

1           **THE COURT:** Can you go back a slide, please?

2           **MR. DONOVAN:** Sure.

3           **THE COURT:** So the evidence, as I recall, was that on  
4 education, that pre-high school that there is no statistically  
5 significant difference between whites and blacks anymore. Am I  
6 right about that?

7           **MR. DONOVAN:** I don't believe so, Your Honor. There  
8 is still a difference. It is not big as college, but there is  
9 still --

10          **THE COURT:** I thought one of the witnesses conceded  
11 that on cross.

12          **MR. DONOVAN:** I have it here. I don't have the high  
13 school rates here.

14          **THE COURT:** I thought pre-high school. Now, high  
15 school, there was still a statistically significant difference.

16          **MR. DONOVAN:** No, there is a still a big difference  
17 actually. This is the 2007 North Carolina State Board of  
18 Education report for eighth graders, showed that below basic  
19 was 51 percent of African-Americans, and whites was only  
20 21 percent. And the ones that are basic, whites 79 percent,  
21 African-Americans only 49 percent. So there is evidence on  
22 that very point.

23                 But we go to each of these, Judge, and this is a  
24 critical point which I think gets around your question of, you  
25 know, is it just statistical. It is not. We have employment

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1 5.3 versus 10.3. And it is not just the numbers. It's what  
2 they do to someone in real life, and that's why we brought  
3 people here; not to kind of extend the trial, but there's  
4 people with real life problems trying to go vote. And people  
5 say, well, there's just these statistical differences on  
6 employment. They affect real people, and that's why we brought  
7 them here.

8           The lower scores in both reading and mathematics,  
9 that's from Professor Burden's report. You have other experts  
10 that provide on poverty --

11           **THE COURT:** How much -- let me back up.

12           **MR. DONOVAN:** Sure.

13           **THE COURT:** It seems that when the Voting Rights Act  
14 was enacted, there were huge disparities in these numbers.

15           **MR. DONOVAN:** I agree.

16           **THE COURT:** And, fortunately, they're being  
17 eliminated, not totally eliminated, but they are getting  
18 better. The numbers are improving. So there are gains.

19           How much level of education is required to be able to  
20 be considered sufficiently able to vote and to go through the  
21 process? In other words, there may be disparities for a while,  
22 but it hopefully will be at the Ph.D. level at some point, and  
23 we'll all be much happier; but I don't think anybody is going  
24 to argue that a Ph.D. is going to have any trouble figuring out  
25 how to vote. I know that's extreme, but it does raise a

1 question of when you have high school graduation rates that are  
2 approaching 90 percent now, and you are being asked to fill out  
3 a seven-question registration form, how important do these  
4 differences become in that part of the analysis from a causal  
5 point of view?

6 **MR. DONOVAN:** Sure. I think they are quite  
7 important, Your Honor, because -- and it interplays with the  
8 State, because I think it depends on what you have to do to  
9 register. And we have the evidence -- go back to same-day  
10 registration, I am going get to this -- to show that the people  
11 kind of end up in that incomplete queue because of various  
12 mistakes. We had expert testimony that said it's tied to lower  
13 literacy rates. Wait until you see this chart. It skews way  
14 against African-Americans, which shows you why the other  
15 methods are not a mitigation for getting rid of same-day  
16 registration.

17 Let me go to the next -- you asked a question also,  
18 and I am going to get this, on history, Judge. I think,  
19 especially here in North Carolina -- and I am going to -- is  
20 there is a history when African-Americans, you know, started to  
21 increase their voting power. Again, it's history. I agree.  
22 That's back, but it is relevant because it's happened here, and  
23 it is the lesson that if we ignore history, we are bound to  
24 repeat it, is that simply because turnout, let's say, or  
25 registration is increasing, which it has, does not mean that

1 here a white majority is permitted under either the  
2 Constitution of Voting Rights Act to put a burden and push that  
3 back.

4 Will it be as bad as it was in the 1900s? We hope  
5 not, but what the Voting Rights Act doesn't even permit the  
6 State to do is to place that burden. That's what I want to get  
7 to on -- we talked about this.

8 Your Honor, this just walks through the different  
9 experts for your reference on these socioeconomic, but let's  
10 get to what you asked about; that is, why aren't the other  
11 systems sufficient, and the State is permitted to just take  
12 away same-day registration?

13 So the voter registration process, as we -- you know,  
14 as you said, requires information. And the voter, if they  
15 don't do it sufficiently -- and just for your reference, I'm on  
16 slide 19 -- is placed in the incomplete queue. It's more  
17 likely they will end up in it, and it is difficult to cure it.  
18 If you remember the evidence, they send these notices that the  
19 one county board of election director called the reject notices  
20 and said, in effect, people don't respond to it.

21 So what happens? Well, this, Judge, is important, is  
22 the African-American applicants comprise a disproportionate  
23 share of the individuals who end up in this queue. And this is  
24 the evidence shows -- you say, well, why aren't the other ones  
25 sufficient? Well, look, you have over 35 percent this year --

1 I'm sorry, last year, November 2014 -- 35 percent of  
2 African-Americans of those in the incomplete queue. 33 percent  
3 didn't check the citizenship box, so it's in the incomplete  
4 queue. And 59 percent of those in the incomplete queue with  
5 missing date of birth.

6 This is the evidence, Your Honor, and there is more.  
7 But when you asked, well, why were they low before and why  
8 can't African-Americans just use it, this is evidence, hard  
9 facts.

10 And then we go to really the discriminatory burden,  
11 Your Honor. I did want to spend a few more minutes. I know we  
12 talked about it, but Your Honor asked about turnout. But the  
13 analysis of burden has to focus on the burdens, as we talked  
14 about, and not just one high-profile election. And, here, we  
15 know that use -- but one form of burden that we talked about,  
16 why is it harder? Well, African-Americans have to work harder  
17 than whites to attain the same registration rates. That's a  
18 violation, and we've used burden to mean both things in these  
19 situations.

20 And the voting experts have testified in this trial,  
21 and this is the evidence in this area, Judge. This is the  
22 well-known and accepted cost of voting methodology. This was  
23 presented by Dr. Burden, but even Defendants' expert Dr. Hood  
24 said it's an accepted social science; and when you consider  
25 that with the socioeconomic, the cost of voting, the burden is

1 placed more on African-Americans than it is white voters.

2 One other point here, Your Honor, on Section 2, I  
3 mentioned, does not require the Plaintiffs to wait until the  
4 burden has become so great that we get the kind of disparities  
5 we had at the time of the Voting Rights Act. This -- even  
6 Chief Justice Roberts said it is Section 2 that permits you to  
7 go seek the injunction once that burden is placed to prevent  
8 that harm from happening.

9 I know the Defendants are going to say, well, yeah,  
10 but African-American turnout was up, so what are we worried  
11 about? But that's not the right analysis. And, in fact, even  
12 in *Shelby County*, they said you are allowed to seek the  
13 injunction to prevent that burden from causing more of the  
14 harm.

15 There was also the discussion --

16 **THE COURT:** What does the turnout tell me? I mean,  
17 when there is increased -- let me put it this way. If there  
18 were decreased turnout, then the argument would be made, see,  
19 there is the harm that results in inequality because they can't  
20 turn out; but when there is increased turnout, the argument is  
21 either, well, it would have been higher, and it was harder for  
22 us to get to the level we got to.

23 **MR. DONOVAN:** I agree with that. But my first point  
24 is -- addresses, well, wait, the turnout wasn't so bad, so you  
25 don't get to sue or you can't succeed on your claim. That's

1 just wrong as a matter of law.

2           **THE COURT:** I agree that if it's made harder and it  
3 is done on -- for a racial reason, that that's a violation. I  
4 understand that. The focus that I have been trying to get to  
5 is is it made harder.

6           **MR. DONOVAN:** No, exactly. That's -- I want to  
7 address -- let me address the 2014. So we have the turnout in  
8 the one election. We had a lot of testimony, but I think  
9 there's a few critical takeaways to start.

10           First, in 2014, African-Americans still  
11 disproportionately registered after the registration cutoff. I  
12 understand the Defendants say, well, you don't know they would  
13 have same-day registered, but what we do know is the facts are  
14 African-Americans still registered more than whites. They  
15 disproportionately cast these out-of-precinct ballots that  
16 weren't even going to count and they disproportionately voted  
17 early. So there were still these attempts to use these  
18 methods.

19           Why is this not kind of the touchstone? Well, this  
20 is the evidence, Judge, is -- look, I don't need to repeat all  
21 of this, but we know they were completely two different  
22 elections. The argument is not that actually African-American  
23 turnout was at parity. It was still below and statistically  
24 below, but it did go up from '10, as did the white vote; but we  
25 had the most expensive Senate race in history versus kind of a

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1 very modest spending in 2010, the commercial ads and, in fact,  
2 how hotly contested.

3           We also have, Judge, that you can't not take into  
4 account -- and Reverend Barber spoke to this, but  
5 African-Americans were mad, Judge. I mean, this came out. We  
6 filed this lawsuit the day it was filed. This is one where no  
7 one was surprised, but there was anger and outrage. People are  
8 mad, and they are here. What they did is they went and showed  
9 up.

10           But as Reverend Barber testified, and this is really  
11 the social sciences, they can't keep doing that. I mean, the  
12 cost and the burden will not be able to be replicated, and  
13 that's the burden where you talk about -- it's not our only  
14 proof, but the burden that's placed on a community. It's kind  
15 of like, you know, you could have a basketball game where it's  
16 five on five, but one player has kind of their arm tied behind  
17 their back. Yeah, they both have five players. It is equal  
18 opportunity, and the other team may even win, but it doesn't  
19 mean they are not burdened. And that's this evidence, Judge,  
20 is they are forced to do more or others are forced to help them  
21 under that cost-of-voting calculus.

22           Then we get to -- if you want to look at the data,  
23 and this was Dr. Lichtman, that if you controlled for the one  
24 district -- and I know we had this whole debate -- he said it  
25 had a stimulative effect. This was Mel Watt's old district, is

1 that they were able to go out and vote for a new  
2 representative. Not only the reason, but if you controlled for  
3 that one district, the white turnout was the same as -- the  
4 growth was the same as in North Carolina -- excuse me, as in  
5 the white vote.

6 So the turnout alone can be considered, but I think  
7 the '14 is really a misleading calculus here based on the  
8 evidence, the evidence before you. I go back that you don't  
9 need to wait to -- for the harm.

10 I want to show a little bit more on same-day  
11 registration --

12 **THE COURT:** Can I ask, why didn't Dr. Stewart do the  
13 counterfactual analysis that he said could be done, and, that  
14 is, to estimate what it would have been without 589 in 2014?

15 **MR. DONOVAN:** Well, Mr. Russ was prepared to answer  
16 that, Your Honor, but I think there is a lot of reasons,  
17 including whether or not it could really show, because every  
18 state really does have different voting systems -- you know,  
19 you can isolate some -- that some experts do certain practices,  
20 but, remember, this was repealing all of these at once. I will  
21 let Mr. Russ get into more detail, but I'm not sure it was  
22 appropriate here.

23 But, Your Honor, I want to go back to same-day  
24 registration preferences.

25 The Defendants have argued, geez, African-Americans,

1 this is just a preference, but these facts are centrally  
2 relevant and really the preference analysis, Judge, and  
3 conveniences grown out of really the Seventh Circuit's reversal  
4 of the District Court on photo ID, and they talk about that. I  
5 think the key takeaway is what the Seventh Circuit said there.  
6 They actually -- it was after the Fourth Circuit opinion, and  
7 they talk about the Fourth Circuit's and Sixth Circuit's  
8 vote-denial standard, and they say, "We are skeptical about the  
9 second of these steps." And that may be true, but we are here  
10 in the Fourth Circuit.

11           So I think when discussing conveniences and  
12 preferences, as the Seventh Circuit did, it is simply a  
13 different standard. The Defendants may want to be in the  
14 Seventh Circuit, but they are not.

15           **THE COURT:** What do I make of the fact that the two  
16 cases the Fourth Circuit relied on were both either reversed --  
17 they relied on Judge Adelman's decision in Wisconsin that was  
18 reversed by the Seventh Circuit, and they relied on the Sixth  
19 Circuit's decision in early voting, which was vacated.

20           **MR. DONOVAN:** I know the Defendants argue that that's  
21 wrong, Your Honor. At Footnote 12 of the opinion, they say  
22 based -- this is the Fourth Circuit, "Based on our reading of  
23 the plain language of the statute and relevant Supreme Court  
24 authority, we agree with the Sixth Circuit that a Section 2  
25 vote-denial claim consists of two elements." The Fourth

1 Circuit adopted their own -- they didn't rely -- I know they  
2 read it, and they discussed it, but I don't think that has any  
3 impact on what the standard is.

4           On the Sixth Circuit standard, that case was -- I  
5 know vacated is vacated, as you say, Your Honor, but is  
6 still -- it was never reversed. It was from the Supreme Court,  
7 and I think it's at least informative for Your Honor. It  
8 definitely is not binding, and one could argue it is not  
9 persuasive; but it was a Court and three judges that grappled  
10 with the same issues; but, most importantly, the Fourth Circuit  
11 didn't rely on that.

12           So let me walk through why the other methods also  
13 don't mitigate elimination -- or, excuse me, mitigate. The  
14 remaining methods don't because they have shortcomings that  
15 same-day registration helped to overcome. And it is important,  
16 contrary to the Defendants' argument, that Section 2 does not  
17 require a showing that voters can't register or vote under any  
18 circumstances, kind of why can't they just do this and get to  
19 the polls, but it is whether there is a burden and the  
20 availability of another method.

21           **THE COURT:** That's saying that they don't have to  
22 show they're totally denied. You can show that they're  
23 abridged; they're burdened?

24           **MR. DONOVAN:** Yes, Your Honor.

25           **THE COURT:** I understand.

1           **MR. DONOVAN:** So, Your Honor, a couple of slides  
2 here, just -- this is a summary. We have the cites. You can  
3 look at the evidence. But registering at the DMV -- this was  
4 my -- is not sufficient. Not only are they in the incomplete  
5 queue even when they register, but the minorities,  
6 African-Americans and Hispanics, are less likely to be DMV  
7 customers because of their lower ownership of cars. The DMV  
8 only offers voter registration to those who are seeking DMV.  
9 And also the evidence, and this is really Dr. Webster, that DMV  
10 offices and counties -- and this is the combination of poverty,  
11 lack of vehicle, that really put a burden on someone, that cost  
12 of voting.

13           We don't need to spend much time, Judge, but we had a  
14 lot of debate about public assistance registrations. We  
15 know -- we did not present that to say there was an NVRA  
16 violation. That's not this case. What it's presented for is  
17 that this isn't an alternative here. First of all, as I  
18 showed, it is less than 4 percent, and it's going down.

19           **THE COURT:** But I presume that was being presented to  
20 say that the alternatives are not available, so --

21           **MR. DONOVAN:** They are not sufficient.

22           **THE COURT:** I guess my question is, what is the  
23 reason? I mean, how do I know that it's still not available,  
24 people just aren't using it? I mean, is there some suggestion  
25 that the various agencies are doing something improper?

1           **MR. DONOVAN:** We have two points. One is we never  
2 thought it was an option because it does get offered, but it is  
3 very inconsistent, from the expert reports. It is not -- first  
4 of all, it doesn't generate much, and I don't think, from the  
5 evidence, that it's done very well. And what we show here --

6           **THE COURT:** Do they ask? Wasn't their testimony they  
7 ask whether they want to register?

8           **MR. DONOVAN:** They're suppose to, let's say. I think  
9 the evidence from the social sciences experts are it is unclear  
10 whether they really do. There is no check. It is a  
11 person-to-person interaction.

12           **THE COURT:** Are they required by law to ask?

13           **MR. DONOVAN:** They are required by law to ask, but as  
14 we've seen --

15           **THE COURT:** Can I presume that they do?

16           **MR. DONOVAN:** I don't think you can, any more than  
17 you --

18           **THE COURT:** So if somebody's required by law to note  
19 their driver's license address has changed within 60 days, I'm  
20 being asked to presume that that happens.

21           **MR. DONOVAN:** I don't think you are being asked to  
22 presume that. I think that's one safety in SDR because, as we  
23 know, not everybody does, okay. So I am not asking you and  
24 wouldn't ask you to presume that, and I'm not asking you -- I  
25 don't think you have to presume they're not asked. I think

1 what we show this evidence for is the fact, the fact that it is  
2 a very small number of applications; and if you are looking at  
3 the past and present, reality is, for whatever reasons, it's  
4 decreased.

5 **THE COURT:** Is it still available as an option?

6 **MR. DONOVAN:** It is.

7 **THE COURT:** Is there any suggestion from the evidence  
8 that there is some problem in its availability?

9 **MR. DONOVAN:** Yes. That's the evidence we presented  
10 was that --

11 **THE COURT:** What's the problem -- as opposed -- let  
12 me back up. You presented evidence that seems to be undisputed  
13 that the numbers are down, the number of new registrations.

14 **MR. DONOVAN:** Correct.

15 **THE COURT:** There is some dispute about whether they  
16 were doing other things, like updating registrations or  
17 something.

18 **MR. DONOVAN:** Correct.

19 **THE COURT:** So the numbers are down. There seems to  
20 be a dispute as to why that might be. Maybe they are going to  
21 the Affordable Care Act website. I understand that. What is  
22 the evidence that the reason it's down is it because it's being  
23 either discouraged or not being provided?

24 **MR. DONOVAN:** There is, in the expert reports,  
25 discussions of that, but I think the evidence I would present

1 and I would argue is that we have the real world on the ground,  
2 is that it's not an alternative that's used. And this goes  
3 back to the burdens that it certainly is not -- it's less than  
4 4 percent --

5 **THE COURT:** That seems to invite the preference  
6 question.

7 **MR. DONOVAN:** Well, but I don't think it does because  
8 the question -- if we look at our current situation, we had a  
9 system that was working, same-day registration  
10 disproportionately used. It then gets taken away. And the  
11 question that I understand is, well, why don't these other  
12 methods make up the difference or take care of that?

13 **THE COURT:** One of the things that I observed is  
14 that, at least with some of the witnesses, they just didn't  
15 focus on it until it was too late. I think we all have been in  
16 that position at one point in our lives. And so same-day  
17 registration was a fail-safe for people that, for whatever  
18 reason, didn't get around to registering. It clearly was that.

19 But then the question is, well, if there is going to  
20 be a deadline, can people get around to doing it by the  
21 deadline, and is that a burden? I heard the testimony that any  
22 registration is a burden, but I don't think that's legally  
23 sufficient, and I don't think you are arguing that.

24 **MR. DONOVAN:** But keep in mind this totality of the  
25 circumstances, is that under these facts, which, again, I

1 submit is an easier case, is that it was in place. It was  
2 working, especially for African-Americans; and for all the  
3 socioeconomic reasons, it may be that African-Americans don't  
4 make the deadline, for whatever reason.

5 **THE COURT:** I accept all of that. My question  
6 remains that any time things are made easier to do most  
7 anything, we'll all choose to do the easier option because that  
8 makes sense. So if the new rule becomes that the -- you just  
9 show up on Election Day and register, then everybody is going  
10 to want to do that, because why waste your time doing it before  
11 then if you could just show up on Election Day and register?

12 But that doesn't answer the question of were you  
13 capable of registering before then when it was not quite as  
14 easy, but it still wasn't a burden?

15 **MR. DONOVAN:** It doesn't in the technical sense, but  
16 it does in the functional sense, which is why you -- I agree  
17 with you. Technically, can everybody maybe do it 25 days?  
18 Technically, but when we look at the functional, and that's why  
19 you focus on that, is the world we are living in is there is  
20 this functional analysis that it's not happening. That isn't  
21 just what happens on the ground.

22 So whether or not -- and I think easier is the harder  
23 way when it comes to registration, and really for the next  
24 reason, which is we look at the testimony, and this was from  
25 Dr. Summers, that at least in North Carolina -- and, again,

1 this is on average, not all, but African-Americans are burdened  
2 due to racial disparities in civic literacy, reading level and  
3 computer. It makes -- remember her testimony wasn't just that  
4 it is harder to fill it out. It's the engagement of even  
5 knowing about that 25-day deadline. Obviously, people who are  
6 engaged, they're in politics --

7 **THE COURT:** Is that a burden, not knowing the  
8 deadline?

9 **MR. DONOVAN:** Well, that's not a burden, but you  
10 can't overcome it without knowing that. It is the  
11 socioeconomic factors, because, remember, people said, I didn't  
12 know 25 days. And if you look at the functional test of saying  
13 African-Americans in North Carolina, we've shown through  
14 evidence, tend to register after that.

15 **THE COURT:** Let me back up just for a minute. I  
16 understand your point is just a practical point, but Congress  
17 has set a 30-day cutoff for registration. No state can have  
18 registration shorter than -- is that right, shorter than that?  
19 They have to provide --

20 **MR. DONOVAN:** There is a floor.

21 **THE COURT:** There's a floor of 30 days. North  
22 Carolina gives five extra days. So they have 25 days before  
23 the election. I presume that that's some evidence that  
24 Congress, when passing that, was aware of the Voting Rights  
25 Act. So if --

1           **MR. DONOVAN:** I disagree with that, Your Honor, and  
2 for these reasons. First, this came up in the Fourth Circuit,  
3 which was it expressly was a floor and said it's subject to  
4 other federal laws, like the Voting Rights Act, number one.  
5 That floor was obviously its own compromise, just this is what  
6 it is. And a lot of states --

7           **THE COURT:** How could Congress have set 30 days  
8 knowing that the Voting Rights Act was there?

9           **MR. DONOVAN:** Because they have an exception. If you  
10 look at that, they say --

11           **THE COURT:** So are you saying -- well, what's the  
12 30 days mean?

13           **MR. DONOVAN:** The 30 days is just a floor. For that  
14 law, it is a floor. And that's actually what the Court --

15           **THE COURT:** But if a State chooses to have the  
16 30 days, then --

17           **MR. DONOVAN:** They are not --

18           **THE COURT:** -- that in and of itself cannot be a  
19 violation of the Voting Rights Act.

20           **MR. DONOVAN:** I don't think we have ever suggested  
21 that, Your Honor.

22           **THE COURT:** All right.

23           **MR. DONOVAN:** But the more important point is the  
24 other side of that equation is true. Just because they set  
25 30 days, as HAVA, has really very little, and the Fourth

1 Circuit, I think, said none, relevance here because we have a  
2 system that sets 25 days; and this question is, again, going  
3 back to the system that used it, was there a need to use  
4 same-day registration to overcome this past and present  
5 reality?

6           Because -- kind of on these socioeconomic factors,  
7 Judge, and again it is step two, but it plays into the burden  
8 as well, is that the discrimination, Your Honor, is not just  
9 assigned to history books that children are going to read. It  
10 is everyday reality, which is why we brought people in here,  
11 and they have effects. It is not just that there may be  
12 discrimination. It's that it burdens people; it hurts people.  
13 They have to live with the educational differences, employment,  
14 and that shows up in voting. That's why we presented that  
15 evidence, and that's the reality of that evidence, what it  
16 does.

17           The same, Your Honor -- I am way over my allocated  
18 time to my cocounsel. I owe them. But on out-of-precinct,  
19 Judge, I will be brief just to highlight the evidence. This, I  
20 think, is pretty straightforward. Out-of-precinct voting was a  
21 fail-safe. It, importantly, are registered North Carolina  
22 voters. No one disputes these people. They show up in the  
23 right county. They just might show up at a precinct different  
24 than the one assigned by the State, which changes over time.

25           **THE COURT:** So there is out of precinct during early

1 voting that remains?

2           **MR. DONOVAN:** Well, actually -- during early voting,  
3 yeah, you're right. They just say, don't worry about it, just  
4 show up at this center and --

5           **THE COURT:** So North Carolina still effectively  
6 offers out of precinct; it's just eliminated as of Election  
7 Day.

8           **MR. DONOVAN:** On Election Day. But this is where  
9 it's critical, because when your Election Day -- that's your  
10 last chance to vote, right, and it is Election Day. It is  
11 busy. It is congested, and this is a critical point especially  
12 in Presidential elections. It is more acute. We know newer  
13 voters have less experience, and this is a fact I learned in  
14 this case that was really, I think, very important is that  
15 Presidential elections, only 50 percent of the voters had voted  
16 in the last election. It doesn't mean they never voted. They  
17 didn't vote in the last one.

18           Look at the midterm. Those people, 92 percent had  
19 voted in the last election. What does that mean? We have the  
20 experts just say, look, that means during Presidential, and we  
21 saw this in the numbers, these are people who don't know about  
22 the precincts, they might not show up at the right one, the  
23 lines might be longer.

24           And especially --

25           **THE COURT:** Does that -- is that what that means?

1           **MR. DONOVAN:** It increases the chance, I think --

2           **THE COURT:** Does it mean that people who vote in  
3 Presidential elections are not motivated to vote in the  
4 midterm?

5           **MR. DONOVAN:** There is definitely -- there's the  
6 evidence that the intensity of it definitely increases the  
7 turnout for everybody, that's for sure, but I do think -- it is  
8 not probably a one-to-one. But I do think it's people who  
9 aren't as familiar with precincts, and this last point -- this  
10 is big in North Carolina. And I have been told you have one of  
11 these cases as well -- redistricting, but with redistricting  
12 and changing of precincts, this happens a lot. And it is  
13 likely that as you get more and more precincts, they get  
14 consolidated, people will go to the wrong precincts.

15           And this one is really mind boggling, why you'd get  
16 rid of this, because this especially -- we are talking about  
17 the Voting Rights Act. There was a legislative finding when  
18 this was reinstated in 2005 that one of the reasons was that  
19 African-Americans disproportionately used this, and we've shown  
20 from the evidence they are twice as likely to use it, and they  
21 are overrepresented in those.

22           **THE COURT:** Is that permissible in the Fourteenth  
23 Amendment, to enact something because it is going to be  
24 disproportionately used by a certain race?

25           **MR. DONOVAN:** That wasn't what they said. What it

1 was is a legislative finding saying of those registered who  
2 happened to vote, a disproportionate high percentage. Of  
3 course, white voters, Hispanic voters, every other voter can  
4 use it. And the term has been used -- I know you asked, Your  
5 Honor, is we are not suggesting that any of these laws only  
6 affect African-Americans. I mean, the term has been used that  
7 others are collateral damage from this law.

8 **THE COURT:** I think in absolute numbers, it's  
9 actually affecting other races.

10 **MR. DONOVAN:** Yeah, and what we've had is the  
11 testimony that -- at least in the -- it's disproportion is what  
12 changes elections, and that's why it's done.

13 But I want to go another point, Your Honor. This is  
14 2014. I don't think we need to spend much time. The State  
15 made an argument that, look, out-of-precinct went down. It  
16 wasn't available, and people were supposed to be told that, but  
17 even so, it still -- the out-of-precinct ballots cast were  
18 still 3.5 to 1 African-Americans. I think one of the biggest  
19 issues, Judge, is --

20 **THE COURT:** Was there anything said during the  
21 H.B. 589 legislative hearings about out-of-precinct?

22 **MR. DONOVAN:** I think there was one statement by  
23 someone, but it was in passing, and that's one that I don't --  
24 there was definitely no justification for it. I think there  
25 might have been someone in opposition who had a quick

1 statement, but there was no rationale that I saw in the  
2 legislative record.

3 But the Defendants argue that, look, there is only 6-  
4 to 7,000 in a Presidential election. So compared to total  
5 votes, registered votes, we did a lot of math, it is a small  
6 number. It is, Your Honor, relative. But the Fourth Circuit  
7 rejected that argument when the Defendants' made it last time,  
8 saying, you know, one disenfranchised voter is too many, and  
9 you have to look at the burden.

10 It is also a double-edged sword; right. The State  
11 argues it is a low number. Then you really have to wonder why  
12 they would --

13 **THE COURT:** So are you saying that for a Section 2  
14 violation, if you show that one African-American voter is  
15 burdened, then under that language --

16 **MR. DONOVAN:** No, I am not arguing that. My point  
17 only being is they rejected that a low number -- because they  
18 then said -- there's another part. They said, well, here, it's  
19 thousands.

20 So the point being is 6- to 7,000, and we heard  
21 Ms. Strach here, who was worried about a municipal election of,  
22 you know, one or two. These are 6- to 7,000 across the state.

23 That's where I get to the double-edged sword. Think  
24 about this. They say, well, geez, you know, this is -- they  
25 don't have a justification, but their lawyers have argued maybe

1 it's a burden, but there is 2,000 to 2,500 precincts across the  
2 state. So that's -- I know it's averages, but then it's two to  
3 three per precinct.

4           And your follow-up questions of Ms. Strach really  
5 illustrated this point, is they don't need to count those at  
6 the precincts. They go back to the county board, and they get  
7 counted; they get reviewed. On examination, she agreed and so  
8 did Mr. Bartlett previously that they are able to do this.  
9 They have done it, and just have to review it.

10           And it's really mind boggling in the voting rights  
11 that federal law requires to provide the provisional ballots.  
12 They provide it. People do it. They take it to the county  
13 board and have to review it, and the only issue is whether a  
14 properly -- or a vote cast by a properly registered North  
15 Carolina resident gets counted.

16           **THE COURT:** But the vast majority of the states do  
17 not have out-of-precinct; correct?

18           **MR. DONOVAN:** I think that's right, but that's part  
19 of the uniqueness --

20           **THE COURT:** How many states have out-of-precinct  
21 during early voting; do you know?

22           **MR. DONOVAN:** I don't know, Your Honor, but I think  
23 that's -- especially for out-of-precinct, is not a proper  
24 consideration here because it is --

25           **THE COURT:** What is not?

1           **MR. DONOVAN:** Kind of considering do other states  
2 have out-of-precinct, because it is such an intensely local --  
3 because North Carolina also has an unbelievable amount of  
4 litigation, changing of precincts and redistricting, and that's  
5 part of the intensely local appraisal.

6           I think I understand the questions on some of the  
7 other ones, but, here, where there is a -- there is no burden,  
8 and if there is a burden, federal law already requires it to  
9 not count it.

10          **THE COURT:** Well, federal laws requires it, but  
11 virtually every State is saying we are not going to do it.

12          **MR. DONOVAN:** I'm not sure that's true. I don't  
13 think the converse is true because I'm not sure how other  
14 states deal with their precinct system. So I don't think you  
15 can jump to that conclusion.

16          **THE COURT:** I thought the evidence was there was  
17 something like six states or jurisdictions had out-of-precinct,  
18 something close to that.

19          **MR. DONOVAN:** I'm not sure.

20          **THE COURT:** It was single digit.

21          **MR. DONOVAN:** Your Honor, I just don't know, but I  
22 think this one is different than the others in that it is an  
23 intensely local appraisal on this one.

24          But, Judge, this is one that's disproportionately  
25 used, and I am not going to repeat the socioeconomic factors,

1 why we get there. And I know Ms. Riggs will talk about it, but  
2 on *Anderson-Burdick* balancing, I mean, it's mind boggling why  
3 you would take that away.

4           Let me turn briefly to early voting. I won't repeat  
5 kind of -- the same kind of arguments come up, Your Honor, but  
6 there is a few variants. First, we know all North Carolinians  
7 continue to use this, so kind of making it harder for everyone,  
8 but disproportionately African-Americans. And we walk through  
9 the evidence. You can review.

10           But here, importantly, even the Defendants recognize  
11 that for African-Americans, early voting, they  
12 disproportionately used it every day of the early voting  
13 period; and they do it for several reasons. We had people  
14 testify it is the legacy of racial discrimination, less history  
15 and experience, the real mindset of being fearful of voting,  
16 and this was really Reverend Moss from Charlotte talking about  
17 why African-Americans, especially young men, have a mistrust of  
18 the voting system, the health system, government, and really  
19 voting gives African-Americans confidence. That's why they  
20 show up in person, because I know there is arguments in these  
21 cases that say, well, people can vote by mail. In North  
22 Carolina, that is not, tends to be, what African-Americans  
23 vote.

24           You could review this, Your Honor. The  
25 socioeconomic -- we had experts discuss how it helps overcome

1 difficulties. Dr. Webster showed the lack of access to  
2 vehicles.

3 **THE COURT:** Can you go back one slide?

4 **MR. DONOVAN:** Definitely. We have the cites at the  
5 bottom for reference, Your Honor.

6 We have Dr. Webster on vehicle access, and this comes  
7 to what was discussed by the experts and, again, validated by  
8 Dr. Hood as a process of the cost of voting.

9 And the Defendants argued and they put on evidence,  
10 they kind of cut, and said people may show up on different  
11 days. We don't dispute that people may show up different days,  
12 but it doesn't change the critical fact that African-Americans  
13 disproportionately use it. And I am going to walk through the  
14 effects of what are going to happen, especially when you take  
15 into account some of this flexibility.

16 So let's look at some of those key -- I know Your  
17 Honor saw this, the first Sunday and last Sunday. Obviously,  
18 one Sunday is lost in the elimination of seven days. Heavily  
19 used, very disproportionately African-American. As well,  
20 counties prohibited from offering the full day of voting until  
21 5:00 p.m. And that last day was disproportionately used by  
22 African-Americans in '08 and '12.

23 What else is going to happen? Well, the evidence --  
24 clearly the un rebutted evidence --

25 **THE COURT:** How do I measure the importance of the

1 disproportionate use? It was -- I forget the number.

2 **MR. DONOVAN:** Sure.

3 **THE COURT:** 30-something percent to 22 percent, or  
4 whatever the number is when you tally it all.

5 **MR. DONOVAN:** This is the disproportionate use here.

6 **THE COURT:** So how do I measure how much  
7 disproportionality counts, if you will?

8 **MR. DONOVAN:** Sure. I am not suggesting any  
9 bright-line test. I think it is part of the factors, I think,  
10 is the difference is bigger. You then weigh with the  
11 socioeconomic -- again, it's the totality of the circumstances.  
12 The closer it is, you need to look at the other factors.

13 And here it is really disproportionate in that when  
14 you combine that with the socioeconomic factors, it's the  
15 totality of the circumstances that has to be decided.

16 When we walk through, Your Honor, kind of the longer  
17 lines, the curtailing, it is undisputed it is going to increase  
18 congestion during the early voting period. It is going to  
19 redistribute voters, just a matter --

20 **THE COURT:** But there was some testimony, now that --  
21 I think Ms. Strach said they've increased the number of sites.  
22 We had testimony about increased number of hours. I think I  
23 asked one of the experts, one of the Plaintiffs' experts,  
24 whether they had now looked at the new sites and hours and had  
25 some sense of whether that's insufficient, and they hadn't done

1 that.

2           How I do determine whether or not the sufficient  
3 number of sites will now remedy the problem? For example, if  
4 they used the same number of locations, then people have to  
5 queue up if there are fewer days. I understand that. But if  
6 they double the locations in Forsyth County instead of the  
7 board of elections or city hall, they now have them in three  
8 other places, people don't have to queue up all in one place.  
9 So you can accommodate more people.

10           **MR. DONOVAN:** Sure.

11           **THE COURT:** How do I make that analysis from your  
12 point of view at this point?

13           **MR. DONOVAN:** Sure. A couple of different ways. One  
14 is the testimony that days are not comparable to more hours,  
15 number one.

16           Number two, the evidence was during 2014, there were  
17 increased wait times compared to 2010. And then the most  
18 critical, Your Honor -- and this is where early voting shows  
19 up, and it is most acute is in Presidential elections. And  
20 what I am showing you are the two memos, because the turnout is  
21 just so much larger that you can't run all these people  
22 through. And this was from 2008. And remember the testimony  
23 was in 2016, the total hours are going to be the same as '12,  
24 although we know even in 2014, it was a small percentage less.  
25 It was 3 percent less.

1           But assume it is the same. Even when they had 17  
2 days in those hours, if we look at 2008 and 2012, these memos  
3 at the time -- let's look at the 2012. This was saying there  
4 was a robust one-stop absentee voting activity in all counties  
5 for the 2012 general election, but the wait time at some sites  
6 is as long as two hours. County boards should consider  
7 extending one-stop days.

8           **THE COURT:** Now, but I thought Ms. Strach had said  
9 since this memo, they have increased the number of locations  
10 and hours.

11           **MR. DONOVAN:** No. The hours have actually gone down,  
12 but, again, that's 2010 to '14. The hours went down. Some  
13 places increased the sites because you couldn't put that many  
14 hours in it, and also the testimony was that they offered  
15 hours, especially late-night hours that people aren't really  
16 using, you know, all hours of the day. And Dr. Stewart  
17 testified about how early voting is really a middle-of-the-day  
18 activity. So if you add hours at 7:00 a.m. and later, that  
19 doesn't compensate --

20           **THE COURT:** I get confused by some of the early  
21 voting arguments, because in the Florida case, from what I  
22 understand, there was a settlement where the parties agreed to  
23 provide the same number of hours. And one of the arguments, as  
24 I recalled, was that it is more convenient for people to be  
25 able to vote after work and at odd hours.

1 North Carolina now provides more hours after work,  
2 and the argument is, no, people need to vote during the middle  
3 of the day. And I had some fact witnesses who said it is hard  
4 to get off of work or I have got to run -- one of them said  
5 they had to go run, as part of the church duties, to go help  
6 somebody, and so going during the middle of the day is kind of  
7 a hard thing to do.

8 How do I figure out what the right answer is on  
9 whether there is now a burden under the new system?

10 **MR. DONOVAN:** So a couple of things from my read of  
11 the evidence is that Dr. Stewart -- it is more of a  
12 middle-of-the-day, lunch-hour activity. No one is saying that  
13 no one would go right after 5:00 to 6:00. The issue is -- a  
14 couple -- is that adding those early morning hours are not  
15 helpful and later at night is not helpful to ameliorate the  
16 loss of days.

17 The other that Florida did in that case is they  
18 didn't just add hours, they added specifically weekend hours  
19 and another day of -- on Sunday, okay. So that really  
20 distinguishes here from that case.

21 **THE COURT:** What was the justification for cutting  
22 early voting?

23 **MR. DONOVAN:** I think there were two, although it is  
24 a little unclear. The two -- one was uniformity, which we have  
25 proven doesn't exist. It didn't exist before now. And then

1 cost, which I am going to get to on the tenuousness. There is  
2 no evidence that there's a cost savings. The evidence actually  
3 is from the time of the passage is it is going to cost more,  
4 because, remember, it's the counties boards of elections. So  
5 instead of having the same hours maybe just at the board of  
6 elections that's open already, they need to go open another  
7 facility because you just can't get the same number of hours at  
8 that same location.

9           So, Your Honor, you have these memos. And also this  
10 was March 11, 2013, to the General Assembly. Mr. Russ is going  
11 to speak to intent, but the executive director at the time said  
12 higher turnout elections, Presidential elections, because,  
13 especially in North Carolina where you elect the governor,  
14 attorney general, it is not in the off year, the Presidentials  
15 are really supersized, is going to limit voters' participation.  
16 They say it is extremely popular, and reducing it will restrict  
17 flexibility and almost surely cause some voters not to be able  
18 to vote in person.

19           We also have briefly, Your Honor, I will just refer  
20 to it so you can look at it, Dr. Ted Allen, the industrial  
21 engineer from the Ohio State University, testifying not about  
22 just kind of the early days, it's what it's going to do to  
23 Election Day. And the question of how many, we don't know yet,  
24 but some percentage, and here we just had a quarter, end up on  
25 Election Day. The wait times on Election Day will magnify the

1 problems that already exist.

2           **THE COURT:** How do I know -- this gets to my remedy  
3 question I asked about because it's easier, if you will, to  
4 make the argument, make the claim. It is harder to figure out  
5 what the right answer is. And so the question is how do I know  
6 what the right answer is?

7           Let's assume -- how do I know what is going to happen  
8 in the next Presidential election most likely by a  
9 preponderance of the evidence? How do I know that wait times  
10 are going to increase on Election Day? And if they are, by  
11 what amount are they likely to increase?

12           And then the next question is, well, how much would  
13 be too much where there is a constitutional violation or  
14 statutory violation? There is some suggestion in some of the  
15 case law about two-hour waits.

16           **MR. DONOVAN:** Well, I think two-hour -- let me take  
17 this position. One issue, Judge, I think is I don't think it  
18 is an appropriate way to frame the issue for your consideration  
19 is trying to have somebody predict. I know kind of it gives  
20 more specificity, but I don't think that's the right inquiry.  
21 I think, again, going to the burden and then how do you get a  
22 preponderance of the evidence that you expect to have --

23           **THE COURT:** I guess the way I look at it, in part, is  
24 to determine the existence of a violation depends, in part, on  
25 there being a remedy; because if you can prove that this can be

1 fixed, then you can show me we are in violation. And right now  
2 one of the arguments is this can be fixed by returning to where  
3 we were because that's where we were, which to me sounds like  
4 Section 5. So I am worried with how do I get a Section 2  
5 remedy.

6 **MR. DONOVAN:** First, I would suggest -- and Mr. Russ  
7 can speak to remedy more. And I understand your thought  
8 process, saying I want to figure out the remedy because that  
9 tells me if there is a violation, but I think that's --

10 **THE COURT:** Do you disagree with that?

11 **MR. DONOVAN:** I do.

12 **THE COURT:** Okay.

13 **MR. DONOVAN:** And only in a way to think about it is  
14 I think what you need to think about under Section 2 that I'm  
15 focused on --

16 **THE COURT:** And I don't mean that's the only  
17 consideration.

18 **MR. DONOVAN:** I understand.

19 **THE COURT:** That is a consideration.

20 **MR. DONOVAN:** That, I understand, but I think the  
21 focus needs to be is there a burden as defined under  
22 Section 2, and, that is, is it a disproportionate burden that,  
23 due to socioeconomic factors, are going to functionally,  
24 practically provide less opportunity. And then the remedy --  
25 it may be the same. The remedy may be go back to what you had.

1 It may be a modification, Judge. I mean, there's a lot of --

2 **THE COURT:** What concerns me is burdens of proof,  
3 that -- it is one thing to argue that, as Plaintiffs, we want  
4 relief. We think there is burden. It's measured by the fact  
5 that we disproportionately use these things. They took it  
6 away, and we now have an injury, accepting the *Gingles* factors  
7 that apply, and then to say to the State, you need to come up  
8 with something that's better that fixes this if you want it  
9 fixed; otherwise, we are going to back to where we were, which,  
10 again, sounds to me like Section 5.

11 So then the State has to come up with some answer of,  
12 well, here is what will fix it, which to me puts the burden on  
13 the State to prove what it's going -- what's going to be  
14 required for there to be equal opportunity to participate, and  
15 it kind of sounds like maybe a burden shifting.

16 **MR. DONOVAN:** Yeah, I don't think it is, because I  
17 think it is like a lot of cases. Once liability is proven, the  
18 remedy gets -- but, here, actually, it kind of permits the  
19 State to offer a different remedy that they could offer. So it  
20 is not so much a burden. We've carried our burden once  
21 liability is found, and we propose a remedy.

22 **THE COURT:** But --

23 **MR. DONOVAN:** But --

24 **THE COURT:** -- liability includes injury, and injury  
25 is, by definition, unequal opportunity; correct?

1           **MR. DONOVAN:** Correct.

2           **THE COURT:** Under Section 2.

3           **MR. DONOVAN:** No, I agree. But if you go to then the  
4 injury is by not having the period before, and they could say,  
5 well, we can provide and prevent that injury in a different way  
6 that we would like to do, that's then for Your Honor -- it is  
7 not a burden of proof issue. It really isn't. It is like in  
8 any remedy case, where once liability is proven, there is a  
9 remedy; but here the State can come back and say, well, we  
10 would prefer to do it another way, and we will show, again to  
11 your judgment, that it will prevent the injury that is found.

12           **THE COURT:** Okay. I understand.

13           **MR. DONOVAN:** So, Your Honor, we then have the  
14 increased burdens. This walks through why there are these wait  
15 times, why African-Americans are more likely. But you asked,  
16 what's the result. Again, I know there is not a statistical  
17 because it is the social science, but this is all by a  
18 preponderance of the evidence. And let me spend one minute on  
19 preponderance, Judge, in this case.

20           Judge, we spent a lot of time presenting our case,  
21 and we appreciate the time we received. What I think is very  
22 telling is the amount of evidence you received compared to what  
23 the defense offered. They don't have a burden. I recognize  
24 that, but it is telling that the State of North Carolina  
25 presented very little testimony, very little of their own, and

1 most of their experts, at best, just sought to rebut, which is  
2 their -- they're permitted to do. But I think when you are  
3 weighing the evidence, Judge, you need to think about what  
4 these private parties have had to do to present the evidence  
5 and the State of North Carolina, when you balance that  
6 evidence, the credentials of the experts, the witnesses, the  
7 fact witnesses, the Representatives and Senators of this state  
8 that agreed to waive legislative privilege -- and that's not my  
9 area -- but I do think when you weigh this evidence, Judge,  
10 there is a real difference in the quality and the quantity of  
11 evidence if you are doing burden of proof.

12           But going back to early voting on disproportionate  
13 burdens, this lays out, Judge, when you think about it, there  
14 is not one way people will be burdened here, but it's a whole  
15 litany going from they may be deterred from voting, they may  
16 encounter long lines and then be unable to vote, increases the  
17 chance of casting an invalid ballot. They can confront greater  
18 burdens and longer wait times all on early voting.

19           Your Honor, we have similar claims on  
20 preregistration, but I know the Duke Intervenor is to going to  
21 speak about preregistration. So I'll move beyond that.

22           But I do want to spend a few minutes on what the  
23 Fourth Circuit and even Judge Motz in the dissent talked about  
24 and what I think is where I started and what I think is so  
25 critical, which is this is not a case where you can ask the

1 hypothetical that the State of Florida took some days away from  
2 early voting. It's the cumulative impact.

3           And that's -- when you think about these same-day  
4 registration, preregistration, taking away of early voting,  
5 taking away of out of precinct, they work together. They are  
6 not individual.

7           **THE COURT:** Isn't that question part of the totality  
8 of the circumstances at looking at the current system and  
9 whether, under the current system, there is an equal  
10 opportunity to participate?

11           **MR. DONOVAN:** I think that's part of the  
12 consideration, except I know a lot times during this trial we  
13 talked about same-day registration and we talked about  
14 out-of-precinct, and I think -- I want to make sure --

15           **THE COURT:** All I am saying is, of course you look at  
16 the key of impact, because when you look at the current system,  
17 it is without those things. So it's, by definition, a  
18 cumulative impact.

19           **MR. DONOVAN:** I agree. I think you need to -- I  
20 thought Judge Motz put it well in the dissent. He said, well,  
21 the burden imposed by one restriction can reinforce the other.  
22 And that's a point that, although we've talked about a lot of  
23 things individually, we don't want to lose because really one  
24 hurdle, especially for people of less socioeconomic or less  
25 ability or less civic engagement -- it overcomes one hurdle,

1 but could fall into the next --

2 **THE COURT:** Is there one of these mechanisms that's  
3 causing the most damage, in your view?

4 **MR. DONOVAN:** Same-day registration, in my view, but  
5 they really work together because think how they reinforce each  
6 other. If you lose same-day registration, you are denied the  
7 right to vote. You are denied. Out-of-precinct is the same.  
8 You are disenfranchised. You are a registered voter. And  
9 early voting plays into that because you have less time during  
10 early voting, less time to same-day register. The early voting  
11 leads to longer lines on Election Day. You get  
12 out-of-precinct, and the preregistration as well, especially  
13 for what is a larger percent of the African-American community,  
14 the younger community, those people. So they are not  
15 registered. They are not in the system, but they really work  
16 together, but it is hard to kind of have --

17 **THE COURT:** Was there evidence on the time -- on the  
18 two-day mail verification process, on the time that most cards  
19 come back within? Was that in the record?

20 **MR. DONOVAN:** I am going to have to think about that,  
21 Judge. I'm not sure. I think there was from one of the county  
22 board of directors that was pretty brief, but I would have to  
23 check. I just don't know. I don't want to speculate.

24 **THE COURT:** Because the Defendants' argument is, in  
25 part, that by having same-day registration, you are pushing the

1 mail verification process -- you are condensing it before the  
2 Election Day and then the canvas, but it is really Election Day  
3 because once you vote, it counts.

4 **MR. DONOVAN:** I am going to address that. Just to be  
5 clear, Judge, I probably need to sit down -- or can we have a  
6 bit more time --

7 **THE COURT:** Yes. I'm sorry. Yes.

8 **MR. DONOVAN:** I just want to make sure from my  
9 co-plaintiffs I don't --

10 **THE COURT:** Let's -- why don't we take a 15-minute  
11 break. We'll come back at 11:00. How much more do you want to  
12 have on your part?

13 **MR. DONOVAN:** I think about fifteen minutes. I want  
14 to address briefly the Senate Factors, although I don't think  
15 they're in dispute, so I don't need to spend -- the State  
16 rationales. Mr. Russ will speak --

17 **THE COURT:** All right. And then how long do you  
18 think you would like to have?

19 **MR. RUSS:** Twenty minutes, Your Honor.

20 **THE COURT:** I am not limiting. I am just asking at  
21 this point.

22 **MS. RIGGS:** Twenty minutes, Your Honor.

23 **MR. SPIVA:** Twenty minutes also, Your Honor.

24 **THE COURT:** All right.

25 **MR. DONOVAN:** So 11:00?

1           **THE COURT:** So we'll take a break until 11:00.

2           (The Court recessed at 10:43 a.m.)

3           (The Court was called back to order at 11:03 a.m.)

4           **MR. DONOVAN:** A few follow-ups from the issues before  
5 I turn to the second step, Your Honor, is I would direct your  
6 attention to Dr. Burden's testimony. This is in response to  
7 your hypothetical of what kind of changes could be made that  
8 might be retrogressive but not disproportionate; and during his  
9 testimony, he gave his several examples, and I would just as  
10 well point you to those.

11           Following up kind of -- as well on that, kind of the  
12 Redbox hypothetical, as I thought about that more, it's really  
13 what the data may show as kind of where were they being used.  
14 And that really goes back to my point that a lot of the  
15 hypotheticals the Defendants or we would just discuss as  
16 hypotheticals are really more counterfactuals than here on the  
17 sense of not just the use but the reason for the use, rather  
18 than kind of -- and I think those facts go to the totality and  
19 the intensely local. I understand why we look at other ones,  
20 but the more I think about it, these facts, as I started with,  
21 is kind of, in my view, really unique.

22           **THE COURT:** So are you arguing that the -- is it your  
23 contention that the addition of these mechanisms, early voting,  
24 same-day registration, et cetera, increased participation?

25           **MR. DONOVAN:** Yes, they did.

1           **THE COURT:** All right. And what evidence is there  
2 that -- of a causal nature that it caused the increase?

3           **MR. DONOVAN:** Well, we start -- and the first point  
4 is just the evidence, that it did go up, and I understand; but  
5 we start first with you had a starting point and it did go up,  
6 and we also know how it went up. It went through the use of  
7 these practices and especially focused on same-day registration  
8 to increase --

9           **THE COURT:** That sounds a little bit like a circular  
10 reason, that we know that these increased use because people  
11 used them. I am inquiring as to whether there is evidence, and  
12 I would like for you to show me what's the causal evidence on  
13 increased use, because I have -- I think it was Dr. Burden that  
14 wrote the article about some of these things where at least at  
15 that point in time, they couldn't draw any causal connection  
16 except maybe for Election Day registration.

17           **MR. DONOVAN:** Yeah, I think the issue there was a  
18 couple, which is one is he had admitted he kind of -- it is a  
19 mixture of all the states and kind of their definitions were  
20 quite different, but I think here the right question to ask is  
21 did registrations go up, not same-day, did registrations go up  
22 for African-Americans. The answer is yes.

23           What was the basis for why they went up? They went  
24 up disproportionately through the use of same-day registration.  
25 It is not like just registrations went up and we are saying --

1 we actually pointed to -- there's both. That's the cause. We  
2 know, one, overall registrations went up --

3 **THE COURT:** But they also increased, though, at an  
4 extraordinary point in our nation's history. We elected the  
5 first African-American president.

6 **MR. DONOVAN:** That's true.

7 **THE COURT:** And they track those time periods.

8 **MR. DONOVAN:** They started to go up before that,  
9 right, and the issue becomes that the taking that away --  
10 because, remember, this is where we spent a lot of time. It's  
11 not once you are registered in the state of North Carolina, you  
12 are done for life. And it's -- that's where we get into the  
13 facts is you need to reregister and reregister and reregister,  
14 and that's when we tied it to who's more likely to have to  
15 reregister. This is African-Americans, higher mobility, move  
16 more, all those reasons. When you tie all that together --

17 **THE COURT:** How do I know the registration rates  
18 wouldn't have been the same without same-day registration,  
19 given all the other factors in the case, including the  
20 elections -- the Presidential elections in 2008 and 2012?

21 **MR. DONOVAN:** But I think you have the evidence, and  
22 I'm not sure what that inquiry would do. Because the inquiry  
23 by the Fourth Circuit was the same, which is it did go up and  
24 was used disproportionately. Now, whether or not it might have  
25 gone up at some lower rate without it I don't think is part of

1 our burden of proof and I don't think is one that you would on  
2 this record try to estimate.

3           What I would estimate is the past and present reality  
4 is we know the reality was it did go up, and I agree there were  
5 some other factors, but we know -- it would be different if we  
6 didn't know what was disproportionately used. In fact, it  
7 disproportionately went up through same-day registration.  
8 African-Americans were disproportionately below the traditional  
9 registrations, and that was the slide that I went through  
10 before; and from that, I think it actually isn't kind of --  
11 it's the evidence that it went up on this basis.

12           So turning to step two, Your Honor, I start with what  
13 the Fourth Circuit found, and this is where -- this is the  
14 *Gingles* factors primarily. But as they found in their  
15 decision, that when they applied the legal standard to the  
16 findings made last year, the disproportionate impacts of  
17 eliminating same-day registration and out-of-precinct voting  
18 are clearly linked to relevant "social and historical  
19 conditions." And I would submit those haven't changed since  
20 last year. In fact, the evidence we presented makes it even  
21 stronger, and that that's what I want to walk through.

22           We have the *Gingles* factors. We start first where  
23 there is no dispute that North Carolina has a history of  
24 voting-related discrimination through the years, and, in fact,  
25 it's fitting today, as you said, kind of the point in

1 history -- this was my reference earlier to history has a way  
2 of repeating itself that, granted, it was back in 1900s, but  
3 African-Americans had increase in registration and voting in  
4 office --

5 **THE COURT:** Is that red line their participation  
6 rate?

7 **MR. DONOVAN:** No, it is not a scale. It is  
8 illustrative. It's just an illustrative scale of kind the  
9 history. It is not tied to any particular --

10 **THE COURT:** It's, I guess, meant to suggest something  
11 positive, though?

12 **MR. DONOVAN:** Yeah -- oh, no. What Dr. Leloudis was  
13 pointing to is, remember, he talked about the cycles; that is,  
14 there was the increase after Reconstruction. The party of  
15 Lincoln and African-Americans were getting elected, and they  
16 were participating. And then over time, you hit a point right  
17 at the turn when whites started to pass laws that effectively,  
18 again, some explicit, some just effectively, preventing the  
19 vote and the vote dropped. And then it started to build up,  
20 and then he talked about the Jim Crow laws and then you had  
21 World War II, and then he finally got -- after Selma and some  
22 of the other events, you get to the Voting Rights Act.

23 And his point was it didn't just increase right away.  
24 And, in fact, Reverend Barber testified and others about how  
25 the first African-American even into the legislature and

1 Congress wasn't for a while, and then it has built up, and we  
2 agree.

3 And the point is is we are back undertaking the very  
4 practices used. We believe we are back to where there will be  
5 the harm, and Section 2 permits stopping that harm, but this is  
6 not -- the other statistical experts did the math. This the  
7 historical --

8 **THE COURT:** That's the concern that I raised earlier,  
9 and there will be the harm. So where should things be that  
10 were not there? In other words, what's your baseline? Where  
11 should we be without 589?

12 **MR. DONOVAN:** So the baseline -- first of all, as I  
13 started before, there is no baseline for a vote denial, I would  
14 submit. But I go back to I think you have the easier case in  
15 that it provides you the baseline the Fourth Circuit talked  
16 about, that the practices in place are centrally relevant to  
17 looking at North Carolina's voting process, right. They were  
18 part of the way you voted in North Carolina, and I know  
19 different times for different periods, and Mr. Russ will talk  
20 about this, but --

21 **THE COURT:** How is that not a retrogression baseline?  
22 How is that different?

23 **MR. DONOVAN:** Sure. Retrogression is you would  
24 look -- let's just take African-Americans. African-Americans  
25 were at one point -- let's compare before and after the law,

1 full stop, that's it. That's the end.

2           Section 2, we're not comparing African-Americans to  
3 African-Americans. We are comparing African-Americans to  
4 whites and are they burdened more than whites. So you are not  
5 looking just at a change in a number. We are looking at the  
6 burden, because think about it. That's why the injunction is  
7 so critical is if we just say, well, look, African-Americans  
8 kind of scratched, clawed, they made their way up, you know,  
9 they are increasing, they are almost at parity, and now you  
10 could start pushing it down again.

11           Now, granted, in some cases, the cases weren't  
12 brought until it got really bad. I agree with that, but I  
13 would suggest that we knew that. We brought this case day one  
14 because we want the injunction to stop it before it gets worse,  
15 before the burden starts to show the really bad effects that  
16 history has shown.

17           **THE COURT:** And I'm not disputing that fact. So I am  
18 accepting if you show a likelihood of injury, you are entitled  
19 to an injunction. My question is the causal relationship on  
20 the injury point.

21           **MR. DONOVAN:** But that's where I am trying to focus  
22 the Court, because I think it is critical here under these  
23 facts is it's not a numerical -- like in some cases, I  
24 understand that's like where there's a big differential in  
25 registrations, okay. Here the point is it's the burden now

1 placed on African-Americans, and they shouldn't have to vote  
2 kind of under duress, and there may be times when they can  
3 overcome that burden, but I think the key issue is to really  
4 look at the burden because I frankly think looking at kind of  
5 just the parity, it's a consideration, I think that's error  
6 under Section 2.

7 **THE COURT:** Okay. I understand.

8 **MR. DONOVAN:** So, Your Honor, turning to some of the  
9 other Senate Factors. Racially polarized voting patterns, the  
10 State has admitted this in this case and in other cases that in  
11 the area of voting rights, those cases speak for themselves and  
12 racially polarized voting continues in North Carolina.

13 Dr. Lichtman also did an analysis to show that that  
14 is true, in fact. That then takes us to kind of Senate  
15 Factor 5, which is do African-Americans bear --

16 **THE COURT:** I'm sorry. Is your theory of the case  
17 that the law was passed with the intent to keep  
18 African-Americans from voting or to make it harder?

19 **MR. DONOVAN:** Yes.

20 **THE COURT:** Or is your theory the law was passed to  
21 keep African-Americans from electing the candidate of their  
22 choice because they vote almost 90 some percent as Democrats,  
23 and by skewing enough white Democrats through this same  
24 procedure, you are now eliminating the African-Americans'  
25 ability to elect their candidate of their choice?

1           **MR. DONOVAN:** The former. It's that it -- and  
2 Mr. Russ is going to speak to intent, but the intent was to  
3 keep African-Americans -- and under *LULAC*, which would be  
4 Mr. Russ', whether this is kind of the danger of race and  
5 party, and he'll speak to that, but it is -- the intent was to  
6 keep African-Americans from voting.

7           Now, it is true in North Carolina there is a high  
8 correlation between that; but, remember, for intent, if the  
9 motive is at all in part, it doesn't need to be exclusively.  
10 If it's in part, it is unjustified, but Mr. Russ will speak to  
11 that issue.

12           **THE COURT:** All right.

13           **MR. DONOVAN:** But turning to Senate Factor 5, Your  
14 Honor, we've already spoken to some of that, and the record is  
15 rich and deep, unfortunately, with kind of the effects of  
16 racial discrimination and educational attainment, geographic  
17 mobility, the blue-collar low-skilled jobs, which kind of get  
18 to the voting and how many get to vote and register and how  
19 these disproportionate effects will -- and we cite a lot of the  
20 experts at the bottom of this slide, Judge. And I know  
21 Mr. Russ will speak some about the Department of Justice  
22 experts as well.

23           So then we turn Senate Factor 6 as well. The  
24 evidence shows -- and these are from the expert reports -- that  
25 even today -- and I know you asked, is it the same? No, it's

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1 not the same as 1965, but it still exists. There are still  
2 racial appeals, and there's racial appeals because they  
3 sometimes, unfortunately, still work, and they were racially  
4 appealed during Governor McCrory's gubernatorial campaign.  
5 Reverend Barber and others talked about the effigies and  
6 depictions of President Obama in the state during voting and  
7 displays and demonstrations. It still exists even today.

8           And then there's been discussion in the case, Judge,  
9 about the increase in the number of African-Americans in the  
10 North Carolina legislature, and that's true; there have been an  
11 increase, but that's not the whole picture, and I don't think  
12 that's a fair way to look at the entirety of minorities in  
13 elected office under Senate Factor 7. This speaks for itself.

14           If we look at all the other offices, especially  
15 statewide offices, there's been one ever. There are no  
16 currently, and very important offices for participation, such  
17 as municipal officials and sheriffs, are well below the voting  
18 averages.

19           Senate Factor 8 talks about ignoring the needs of  
20 minorities, and I think in this case it kind of puts a fine  
21 point on it. African-Americans disproportionately use these.  
22 We've established that. And the legislators know it. And  
23 Mr. Russ is going to go through how they know, but I think it  
24 is undisputed that they knew that the data reflected -- and  
25 Senator Stein talked about this on the floor, that these were

1 disproportionately used by African-Americans, and knowing that,  
2 they took these very practices away.

3           There is other evidence on other issues, but I think  
4 this one puts a fine point because it brings -- it's this very  
5 issue. It is not kind of -- it's connected directly to their  
6 participation.

7           Now, Your Honor, you asked about -- which I want to spend  
8 a few minutes on, which is the rationales. It is difficult to  
9 understand the rationales when a system worked, why you would  
10 try to find a solution to a problem that doesn't exist, and  
11 there is really not rationales in the record. There are a few  
12 statements, I agree, but there is very little on the actual  
13 reasons; and it really goes to the tight time frame, and the  
14 way this was passed. I know Mr. Russ will talk about it, but I  
15 want to address for tenuousness those reasons.

16           The first -- and I think this is primarily same-day  
17 registration that the State is pushing -- is that there is the  
18 potential for voter fraud. And the first thing we have to do  
19 is tie -- to the extent this can be considered, that the fraud  
20 is tied to these laws, something that would be stopped. We  
21 know the evidence -- and that this would stop in-person voter  
22 fraud arguably -- is that, I think it's over 35 million votes,  
23 there were two cases referred for voter impersonation.

24           Even if you want to add current hardcore investigations,  
25 there is four over all these years. But then we can focus on

1 not just North Carolina -- or, excuse me, not just that report,  
2 Dr. Minnite, which is unrebutted. Her testimony is that voter  
3 fraud, again, as she defines it for our purposes, for relevant  
4 purposes, it is exceedingly rare both in registering to vote  
5 and voting both in North Carolina, she looked at, and  
6 nationally.

7 **THE COURT:** Is it a legitimate legislative concern to  
8 pass an election law that addresses the potential for fraud  
9 even if there is no actual fraud?

10 **MR. DONOVAN:** I go with what the Fourth Circuit said  
11 is you have to actually show it. And this is on page 246, but  
12 they said "nothing" in the findings and the "portrayal of the  
13 facts below suggests that those are anything other than merely  
14 imaginable." And Dr. Minnite goes through this, Judge. This  
15 is part of the function. You can't deny that this voter fraud  
16 kind of concept is being used, okay. It's unsubstantiated  
17 across the country, and it was used here in North Carolina to  
18 try to support to passing of this law; but as the Fourth  
19 Circuit said, you can't "burden the right to vote in order to  
20 address dangers that are remote and only 'theoretically  
21 imaginable'".

22 So, yes, you could say that, like a lot of things,  
23 but there is absolutely no evidence supporting it, and the  
24 Fourth Circuit said so; and there is no new evidence since the  
25 PI hearing and the PI appeal to show that there is any such

1 thing as in-person voter fraud.

2           But the biggest reason that hit me from day one, Your  
3 Honor, is that if you think about not only does the evidence  
4 support it, who would do it. You need to go to a precinct,  
5 know somebody votes there, know their name, know that they  
6 didn't already vote, hope to vote for them to change one vote  
7 and subject yourself to a Class I felony. Just thinking about  
8 that is why the evidence showing that it doesn't exist -- there  
9 is other election fraud. Campaign officials', people do stuff,  
10 but in-person voter fraud, either in the legislative record or  
11 Dr. Minnite, it simply does not exist.

12           Then let's look at just same-day registration, and  
13 the argument is, well, there could be voter fraud. And I want  
14 to put a fine point just starting there. There is not a single  
15 instance that the State has addressed in this entire year and a  
16 half of trial that any person -- that there's any voter fraud  
17 in SDR. And, in fact, we spent a lot on time on mail  
18 verification, which I want to turn to now.

19           But when we think about same-day registration, it was  
20 a successful program without any issues as it went. In fact,  
21 the report -- and, again, this goes more to intent, but it does  
22 go to the tenuousness as well. That was before the legislature  
23 in 2013 showed that same-day registration verified at a higher  
24 rate than others.

25           But from my comparisons, it doesn't matter which one

1 you look at. Even if the mail verification didn't work for  
2 traditional registrants, there is no proof of fraud of them  
3 either. So that kind of goes -- there's not fraud anywhere.

4 **THE COURT:** All right. Let me ask you this question:  
5 Is a voter who has failed mail verification any more eligible  
6 to have his vote counted than a voter who commits a fraud?

7 **MR. DONOVAN:** Can you say that again, Your Honor?

8 **THE COURT:** If a voter who has failed mail  
9 verification under North Carolina statutes, is he in any  
10 stronger position to have his vote count than a voter who's  
11 voted by fraud?

12 **MR. DONOVAN:** Well, in fact, North Carolina statutes  
13 provide even if you fail mail verification, your vote counts.

14 **THE COURT:** Before you vote. If you fail mail  
15 verification before you vote --

16 **MR. DONOVAN:** Correct.

17 **THE COURT:** -- then under North Carolina law, as the  
18 statute requires, then that vote is ineligible; right?

19 **MR. DONOVAN:** No. Let me make sure we are on the  
20 same page.

21 **THE COURT:** Two cards came back before you vote.

22 **MR. DONOVAN:** Right. You are denied and the vote can  
23 be pulled.

24 **THE COURT:** Well, you haven't voted, so --

25 **MR. DONOVAN:** Oh, if you haven't voted.

1           **THE COURT:** Right. So before you vote, you are  
2 ineligible?

3           **MR. DONOVAN:** Correct.

4           **THE COURT:** And --

5           **MR. DONOVAN:** But you could reapply. But at that  
6 point, that registration is denied.

7           **THE COURT:** So this North Carolina statute --

8           **MR. DONOVAN:** But that doesn't mean you are eligible.  
9 I want to be very clear on this. If you read the statute --

10          **THE COURT:** Yeah, the statute is what it is and --

11          **MR. DONOVAN:** Yeah, fair enough.

12          **THE COURT:** -- it could be criticized, and it has  
13 been, I think, here, but it's not challenged. So for whatever  
14 merit, North Carolina has said that this is how they are going  
15 to verify voters to see if they're eligible. If one card comes  
16 back and you have voted, then your vote counts but could be  
17 challenged. If two cards come back and you have not voted,  
18 you're not eligible; your vote doesn't count.

19                 So putting the fraud question aside, under North  
20 Carolina law, what's your response to the claim that having  
21 same-day registration shortens the window for mail verification  
22 and provides an additional group of people whose votes will be  
23 counted without them being -- having an opportunity to pass  
24 mail verification? So what is the response to that?

25          **MR. DONOVAN:** So there is a couple of things. First

1 is there's not any proof -- again, I go back to they still  
2 permit it, right. The real problem for the General Assembly is  
3 they expressly by statute still permit people to vote without  
4 mail verifying under many circumstances, so that really to the  
5 tenuous of that, Number 1.

6 Number 2, there's no basis for a concern of fraud,  
7 and this is what the Fourth Circuit talked about the altar of  
8 bureaucratic --

9 **THE COURT:** Put the fraud question aside. I accept  
10 the fraud arguments. The evidence is, I think, uncontested as  
11 to fraud, as I understand it.

12 **MR. DONOVAN:** So first --

13 **THE COURT:** I'm focused just on the North Carolina  
14 statute, which defines when a vote counts.

15 **MR. DONOVAN:** Understood. So the first is that they  
16 still permit other voters to vote even if they are not mail  
17 verified.

18 **THE COURT:** "Other voters" being voters with the  
19 25-day cutoff?

20 **MR. DONOVAN:** No, there is actually a whole range of  
21 them, Judge. So that's one of them. If I show up -- and  
22 remember, the whole theory of mail verification is I need to  
23 send this to verify a residence. If I'm a regular -- if I'm  
24 registered, I go in, but I say, I moved within the county. I  
25 can give them a new address. They don't know if that's true or

1 not. They then start mail verification. I'm effectively --  
2 that's the same time a same-day registrant -- because,  
3 remember, identity, they have HAVA ID and they also -- if you  
4 use a driver's license or Social Security, that memo said  
5 within seconds, once it's entered, can confirm your identity at  
6 least. So you have that. So you have people doing the same  
7 thing same-day registrants did. So that's the problem.

8           And also, Judge, if you look back at the same-day  
9 registration statute when it existed -- we didn't talk much  
10 about this, but the statute itself provided that "The State  
11 Board of Elections may designate additional documents or  
12 methods that suffice and shall prescribe procedures for  
13 establishing proof of residence." So the State Board could  
14 have, if there were any problems; but, frankly, the report show  
15 that there weren't.

16           So the mail verification issue shows up, not only in  
17 traditional registrants, but people that show up early voting  
18 and give them a different address in the same county. So I  
19 would submit that it doesn't support the State's because they  
20 actually still offer all these different ways to vote that  
21 aren't mail verified. It doesn't help the tenuousness  
22 rationale that they're offering for this. And, in fact, that's  
23 kind of what we are showing.

24           I want to show why they actually did add things.  
25 This, Your Honor, is the point, that there are, in fact,

1 traditional registrants that vote without mail verification,  
2 but here is the big difference. Same-day registration includes  
3 safeguards that verify the identity and protect against this  
4 fraud. And, in fact, what we've shown is the overwhelmingly  
5 majority, anywhere from 98 percent plus for all of them -- we  
6 always think about the negative -- they actually do mail  
7 verify, right. So the small amount that don't, same-day  
8 registration, you need to show up in person, look someone in  
9 the eye, give your proof of residency, and then actually your  
10 ballot is retrievable and could be challenged through that.

11           The same-day registration, Your Honor, we would  
12 submit is actually the State's view of how you should do it  
13 because, remember, if you are a traditional registrant but fail  
14 mail verification once before you vote, the State actually  
15 requires you to go in person. So you should really think about  
16 why does the State require those people to go in person. Then  
17 they followed this very procedure that same-day registration  
18 provides; same people, they didn't mail verify, and they are  
19 permitted.

20           So I would suggest, especially under Section 2, there  
21 is a real tenuousness to that, and I come back to what the  
22 Fourth Circuit said: It can't be a justification that's  
23 anything other than merely imaginable.

24           This is brief, Your Honor, public confidence. There  
25 is no public scandal. There is no testimony that there was any

1 lack in confidence. What we showed is -- we actually brought  
2 individuals in here that testified there was less confidence,  
3 whether it's Reverend Moss who, for his community, does the  
4 good work and says the people he works with have less,  
5 Ms. Jackson -- and this is when I go to evidence, Judge. This  
6 is the sum total of citizens the State brought in to say there  
7 is less confidence in the system. There is not. I think that  
8 really goes -- especially on tenuousness, it's very easy to say  
9 we want more confidence, but I think the Fourth Circuit has  
10 made clear, for the Section 2 at least, they need to be proven.

11           Your Honor, we mentioned early voting. We covered  
12 some of this. I believe the rationales proffered are  
13 uniformity or consistency, but there is no uniformity or any  
14 consistency because it's still locked into the hours of the  
15 past. There is different locations. And the biggest one is  
16 really the cost savings.

17           There's a suggestion that maybe there would be a cost  
18 savings. Well, we covered a county board of elections has to  
19 pay for their own election. In fact, they need to pay more to  
20 open more sites to have those same number of hours rather than  
21 just be at the county board.

22           And this is the March 11, 2013 -- I would like to  
23 spend one moment on this -- memo from Mr. Bartlett at the  
24 request of the General Assembly to talk about the reductions in  
25 one-stop voting, and this is the gentleman who has lived both

1 through one-stop voting from its initiation. The first line he  
2 says, "Reducing the one-stop voting period likely would  
3 increase the cost of elections," and he explains why.

4 He says, "First, the popularity of one-stop  
5 voting" -- skipping the parenthetical -- "has allowed counties  
6 to combine precincts in certain locations. Reducing the  
7 one-stop opportunity would affect this trend." Then he goes on  
8 to say, "The CEE county board offices might have to purchase  
9 additional voting equipment for existing precincts and some  
10 counties may have to open new polling places to equip them and  
11 send the statutorily required first mail notice to early voters  
12 of the precinct change."

13 And then goes on, "The county surely will have to  
14 employ additional poll workers." But it is the Election Day  
15 poll workers to handle the increased Election Day turnout.

16 And, finally, Your Honor, on kind of rationales  
17 out-of-precinct, you asked me earlier, I am not aware of  
18 anything in the record of the rationale for it. I know there  
19 was some discussion, and we went through it, about how --  
20 provisional balloting, but I think the State's counsel, when we  
21 were here for the preliminary injunction, said it well when we  
22 were talking about same-day registration. "It's simply a  
23 matter of the county boards of elections going back to counting  
24 those ballots rather than leaving them where they will not be  
25 counted." That's the entirety of it.

1           So, Your Honor, a couple of points before I conclude  
2 and pass, which is what are a couple of the Defendants'  
3 arguments? And I know we spent time and I know at different  
4 times, but there is an argument that North Carolina or laws  
5 outside the North Carolina, the mainstream, that's simply not  
6 the benchmark. That was rejected, as I quote here, by the  
7 Fourth Circuit. And, frankly, I think it has very little, if  
8 any, relevance to a Section 2 analysis in and of itself.

9           It also is the evidence that that is what North  
10 Carolina looks at. Ms. Strach testified, rightly so, that  
11 she's focused on trying to provide voting practices for North  
12 Carolina voters. Other states face different issues. And also  
13 she couldn't identify a state that had same-day registration or  
14 early voting and repealed it.

15           Another argument we heard, Judge, which is that  
16 facial neutrality. In and of itself, that's irrelevant. You  
17 know, there is lots of restrictions because the words aren't  
18 used that it's not against Latinos or African-Americans, but  
19 that's why the Fourth Circuit in *Gingles* talk about the  
20 function. You have to look -- things can be facially neutral  
21 but impact different groups a lot. And we kind of list these  
22 from the old days, the poll taxes, literacy taxes, but as  
23 recently as using outdated technology, whether  
24 African-Americans are behind on the digital divide or whether  
25 or not it is using a different technology, location of polling

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1 places, or limits on early voting.

2 We talked about the vote denial and the meaning of  
3 abridgment, Judge. Those are really the Defendants' arguments  
4 in this case. As I wrap this up, I submit that the arguments  
5 that the Defendants focus on are ones already rejected by the  
6 Fourth Circuit.

7 The Fourth Circuit had this case on a full record,  
8 and you have it on a trial record, to be sure, and you need to  
9 make that decision; but we spent a lot of time, and there is a  
10 framework, and that legal standard's in place and the Fourth  
11 Circuit identified the proper considerations.

12 When you consider the Fourth Circuit's standard and  
13 the evidence that we presented, I know over a lot of time, I  
14 would submit that it overwhelmingly establishes that the repeal  
15 of same-day registration, out-of-precinct, preregistration, and  
16 the seven days in early voting in North Carolina violates  
17 Section 2, and the injunction should be entered and then we can  
18 have the remedy phase.

19 With that, Your Honor, I pass my time to Mr. Russ.

20 **THE COURT:** All right. Thank you very much.

21 **MR. RUSS:** Good morning, Your Honor.

22 **THE COURT:** Good morning, Mr. Russ.

23 **MR. RUSS:** After Mr. Donovan's presentation on  
24 results, I will address -- I should say Bert Russ for the  
25 United States. I will be addressing the question of intent and

1 the question of remedies. I'll also be answering any questions  
2 that you have.

3           Before I start that, just so I put on the record the  
4 United States' position in this case. Based on the evidence  
5 presented at trial as well as the record from the preliminary  
6 injunction hearing, three of the challenged provisions of House  
7 Bill 589 -- the reduction of the early voting period, the  
8 elimination of same-day registration, and the prohibition on  
9 counting out-of-precinct provisional ballots -- they all  
10 violate Section 2 of the Voting Rights Act because they worked  
11 individually and collectively to result in the denial and  
12 abridgment of a right to vote for African-Americans living in  
13 North Carolina. And we believe the evidence shows that these  
14 challenged provisions will have a discriminatory result, as  
15 Mr. Donovan laid out, but that they were also adopted in part  
16 for a discriminatory purpose.

17           Before I turn to the intent argument, I wanted to --  
18 you asked a few questions that touched upon some of the experts  
19 that the United States presented. You asked a question about  
20 high school education rates and some similarities between white  
21 and African-Americans and high school education rates.

22           I believe Dr. Lynne Vernon-Feagans testified that  
23 even when you have similar high school education levels,  
24 African-Americans still have lower literacy. So even getting  
25 to the mark -- obviously, we know about disparities in

1 education at -- beyond high school. There are still  
2 disparities in attaining a high school education in North  
3 Carolina, but even there for those African-Americans that get  
4 the high school education, there are higher -- I should say  
5 there are -- African-Americans have lower literacy rates  
6 compared to white voters with similar educational backgrounds.

7 **THE COURT:** So when the evidence in previous time  
8 might have been the disparity between high school graduates and  
9 you focus on a larger disparity in terms of how far somebody  
10 was educated in terms of years, it is easier to measure  
11 literacy and how that might affect the ability to interact in  
12 the voting process. When people then get closer toward  
13 equality towards high school level education, then the issue  
14 becomes literacy.

15 And so my question is: If I accept that the literacy  
16 rates are lower, how do I determine how a lower literacy rate  
17 at that level interacts with the ability to engage in a voting  
18 process?

19 **MR. RUSS:** I think we've seen that in the evidence  
20 that was has been presented here, Your Honor. We have examples  
21 of voters with low literacy who -- there was one gentleman who,  
22 you know, had to drop out of school at a young age and work as  
23 a sharecropper. When you have lower literacy, it becomes a  
24 challenge to navigate this process. Mistakes are more likely  
25 to be made along the way. You are less -- you may be less

1 familiar with some of the requirements or may misunderstand or  
2 end up at the wrong polling place.

3           So it increases the chances that someone is going to  
4 need the fail-safes, the safeguards that House Bill 589  
5 eliminated, and that's how we believe that interacts.

6           **THE COURT:** All right. Thank you.

7           **MR. RUSS:** The other point, before I turn to intent,  
8 you had asked about Dr. Stewart and about -- you know, he  
9 talked about the counterfactual analysis; in 2014, what would  
10 the situation have been if House Bill 589 had never passed.  
11 And we believe he did look at that question. There are several  
12 sources to provide some sense of who would have -- how many  
13 folks might have lost the right to vote and just kind of a  
14 floor for that.

15           You can certainly look at, in a prior midterm, how  
16 many people used same-day registration, out-of-precinct; in a  
17 prior Presidential election, how many people used same-day  
18 registration, out-of-precinct provisional ballots. And in this  
19 case, in 2014, in the midterm election, there were about 11,000  
20 people who registered after the deadline. There were, I  
21 believe, 1,600 people who voted out-of-precinct provisional  
22 ballots. Disproportionately still African-American in each of  
23 those cases. African-Americans are still attempting to rely on  
24 those mechanisms. And you certainly have heard testimony from  
25 individuals who, if same-day registration had been available,

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1 they would not have lost their right to vote in 2014.

2           **THE COURT:** Can I make any determination as to  
3 whether they were capable of -- let's pick the 11,000 who  
4 registered after the 25-day cutoff. Is there any record  
5 evidence that they were not able, without being burdened, to be  
6 able to timely register?

7           **MR. RUSS:** I think there is evidence in the record --

8           **THE COURT:** And I'm putting aside the people who just  
9 forget and the people who are not properly not evaluated. Let  
10 me ask you: Would that be fair? I mean, I am supposed to  
11 consider people as being burdened if they're simply forgetting  
12 or not motivated?

13           **MR. RUSS:** I think you look at everyone, Your Honor.  
14 You take voters as they are. You have voters who, through no  
15 fault of their own, they show up, they think they are  
16 registered, and they are not; and before there was a fail-safe  
17 that would allow them to register and participate in a  
18 particular election, and that is gone.

19           **THE COURT:** I was focusing, I guess, on your -- the  
20 first part of that response and that was through no fault of  
21 their own. We all make choices as to what we do in life, and  
22 for some reason, a lot of people just don't vote, which is  
23 amazing in our nation that the voting rates still are so low  
24 among everybody; but there seems to be a level of motivation  
25 for every voter.

1           So how do I determine that factor when I look at some  
2 numbers of people who either missed a deadline or -- do I look  
3 at those factors, or am I simply looking at the factors that  
4 relate to historical discrimination?

5           **MR. RUSS:** I think there are several factors that you  
6 look at here, Your Honor. Congress in its judgment in passing  
7 Section 2 came up with the Senate Factors, came up with the  
8 socioeconomic impact. They wanted you to look at voters as  
9 they are; and because of socioeconomic disparities, not  
10 everyone -- busy lives, busy work schedules, difficulty getting  
11 to the polls, a variety of things can influence whether they  
12 were able to register in time. And Dr. Webster talked about  
13 some of the challenges about getting to the DMV if you don't  
14 have a car. We've had witnesses testify about the various  
15 challenges about getting to the polls, and so I wouldn't blame  
16 these voters. Because of their life situation, they may not  
17 have got to the polls in time.

18           You also have testimony from people who made  
19 Herculean efforts to get to the polls, driving around for hours  
20 between counties, and because the safeguard wasn't there, they  
21 lost their right to vote.

22           I think all of those voters are impacted, all of  
23 those voters should be considered, and all of those voters are  
24 harmed by the provisions of House Bill 589.

25           **THE COURT:** Okay.

1           **MR. RUSS:** Turning --

2           **THE COURT:** Anytime you have a fail-safe and you take  
3 it away, you are likely to have people harmed, are you not  
4 because, by definition, it is for people who make a mistake or  
5 have a problem?

6           **MR. RUSS:** And here, Your Honor, we have a  
7 disproportionate impact based on race. I just speak to the  
8 Section 2 question. My colleagues can speak to the  
9 constitutional questions.

10           But from the perspective of the Voting Rights Act,  
11 it's the racial disparities that create a problem in removing  
12 that safeguard that tens of thousands of people have come to  
13 rely upon, tens of thousands of people relying on same-day  
14 registration, thousands relying on out-of-precinct provisional  
15 ballots. It is the racial disparity that is part of the  
16 analysis and makes it different from just removing a safeguard;  
17 and if it had no racial impact, that would be a different case  
18 than what we have here.

19           **THE COURT:** So in terms of my trying to determine the  
20 question of injury, are you saying I should be looking at the  
21 people who still tried to do these things and couldn't do them,  
22 that is, to register after the cutoff date or who tried to vote  
23 out of precinct, that that's a measure of injury?

24           **MR. RUSS:** That is certainly one measure of injury.  
25 I think that the folks who gave up, who did learn what the new

1 rule was but said, I missed it, I'm out of luck, there is no  
2 way to measure that; but we certainly can measure the folks who  
3 tried and failed. The folks who didn't try because they -- the  
4 education campaign, whatever, they realized I'm not -- I moved  
5 recently and I didn't change my information with the election  
6 offices and now I'm out of luck, I think those people should be  
7 considered as well, the folks who gave up on the process.

8 **THE COURT:** So is the United States arguing that I  
9 don't need to have a measure of what the African-American  
10 turnout should have been in 2014?

11 **MR. RUSS:** That's correct, Your Honor. I don't think  
12 you have to measure what it could have been. We know as a  
13 floor that African-Americans -- thousands of African-Americans  
14 disproportionately tried to register after the 25-day deadline,  
15 that African-Americans disproportionately cast out-of-precinct  
16 provisional ballots, and we believe that's enough to show what  
17 the Fourth Circuit was talking about, the disparate effect of  
18 this law on African-Americans.

19 On the question of intent, before I go through the  
20 *Arlington Heights* factors, there were several things that I  
21 wanted to address about the intent question. Starting with a  
22 point that you made in your preliminary injunction ruling,  
23 intentional discrimination does not require animus or prejudice  
24 or racism. You cited to Judge Kozinski from the Ninth Circuit,  
25 and he's made this point before: If the intended consequence

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1 of the action -- in this case the voting practice -- is to  
2 target the method of voting and registering relied  
3 disproportionately by African-Americans, then race is part of  
4 this motive behind the law, even if there were other motives,  
5 even if there were other factors.

6           Just very briefly, I would also call the Court's  
7 attention to the case *Rogers* -- the *Rogers* case,  
8 *Rogers v. Lodge*, 458 U.S. 613 (1982). I cite that because that  
9 was a Supreme Court case that under Section 2 affirmed a  
10 finding of racially discriminatory purpose based on a number of  
11 factors that later became what we call the Senate Factors.

12           And so there is the *Arlington Heights* analysis.  
13 That's certainly one way to find purpose. I also note that in  
14 the *Rogers v. Lodge* case, the Supreme Court used the Senate  
15 Factors, or what became the Senate Factors, to find -- to  
16 uphold a finding of racially discriminatory purpose.

17           So the Senate Factors -- I think we've also sometimes  
18 referred to them in this argument today as *Gingles* factors, but  
19 the nine Senate Factors can also be relevant to the question of  
20 purpose.

21           I want to address an issue the Court raised in your  
22 question a day or two ago about the interplace of race --  
23 interplay of race in politics because I think that is an  
24 important issue here. When we spoke a year ago, you asked me a  
25 question about whether partisanship was the real motivation

1 going on here. Was this an effort to disadvantage  
2 African-American voters because it would increase the  
3 likelihood that the majority in the legislature would be able  
4 to get reelected, if they could shave off a few percentage  
5 points of African-American turnout?

6           And I think that's important because if  
7 partisanship -- trying to gain partisan advantage is one of the  
8 goals here in a state where race is the most -- the best  
9 indicator of someone's political preferences, how they vote,  
10 even more so than party identification. And both Dr. Hofeller  
11 for the Defendants and Plaintiffs' experts have all said race  
12 is the best indicator of how someone may vote based on  
13 politics. If that is true, if partisanship was the motive or  
14 part of the motive for passing this law, then we have the same  
15 troubling mix of race and politics that Justice Kennedy talked  
16 about in the *LULAC v. Perry* decision from 2006.

17           I want to spend a moment talking about those facts in  
18 *LULAC* because I think there is a number of similarities to the  
19 situation we have here. In *LULAC*, they redistricted the  
20 Congressional districts, and District 23 was an Hispanic  
21 district that Hispanics were on the verge of achieving real  
22 political power. This political power was threatening to the  
23 incumbent congressmen, and so the legislature redrew the  
24 district to exclude certain Hispanics from that old district to  
25 increase the likelihood that the incumbent would be successful.

1           And what Justice Kennedy -- Justice Kennedy was very  
2 troubled by this. He looked at the Section 2 violation. He  
3 looked at the long history of discrimination in Texas. He  
4 cited to that in his majority opinion. He looked at the fact  
5 that they broke up a district where Latinos were on the verge  
6 of success, and he and the majority found a violation of  
7 Section 2.

8           Justice Kennedy cautioned, he said -- he referred to,  
9 quote, the troubling mix of race in politics, unquote, that  
10 existed when the Texas legislature redrew this Congressional  
11 district right when Hispanic voters were on the verge of  
12 exercising real political power.

13           I think we have a similar situation here in North  
14 Carolina. In the first decade of the 21st Century,  
15 African-American turnout grew tremendously. Voter registration  
16 rates grew tremendously. We certainly believe it is related to  
17 the reforms that were passed, but whatever the cause, it was  
18 the reality that African-American turnout was growing.

19           After decades of not being a battleground state,  
20 suddenly, 2008, North Carolina was a battleground state. The  
21 politics in North Carolina was changing. I've already  
22 mentioned the experts on both sides have indicated that race is  
23 the best indicator of how someone may vote.

24           I think this was clearly known by the legislature,  
25 this fact. As politicians who have to get reelected, they know

1 95 percent of African-Americans are voting Democratic and that  
2 they are not voting Republican. I think this is known -- when  
3 Mr. Trende was on the stand and, you know, in some of his prior  
4 writings, he talked about some of the concern among some  
5 Republicans about the nonwhite vote and the inability to win  
6 the nonwhite vote and the impact that that could have on their  
7 ability to get reelected.

8 Dr. Hofeller's long testimony about the impact of  
9 these early voting sites and they tend to be where  
10 African-Americans are, they tend to be where Democrats are, I'm  
11 not really sure the point of all that that we heard unless it  
12 is this is about race and this is about politics.

13 **THE COURT:** Well, what if it is about race and  
14 politics? Accept that. There is evidence that Mr. Donovan  
15 showed that some of these things were put in place specifically  
16 for that purpose and to advantage -- that may be a strong word,  
17 but to assist African-Americans to make sure that they could  
18 then vote. And, of course, the legislature, the General  
19 Assembly has been for 100 years in the control of Democrats, I  
20 think, up and through until very recently. So when all these  
21 things were passed, they were passed, as I understand it, by  
22 the Democrat-controlled legislature, and then you have  
23 Hofeller's testimony. That's why I thought of that.

24 **MR. RUSS:** Sure.

25 **THE COURT:** So it seems to be that it's playing on

1 both sides of this case, that the race/party affiliation is  
2 on -- potentially involved on both sides of the argument. Am I  
3 right about that?

4 **MR. RUSS:** I would disagree with that  
5 characterization in this sense. I believe Representative  
6 Michaux and others talked about the concern about  
7 African-Americans having a lower turnout rate, the history of  
8 discrimination, how do we get people to the polls. They --  
9 these various methods benefited everyone, and obviously, you  
10 know, millions of people have taken advantage of early voting.  
11 Hundreds of thousand people take advantage of same-day  
12 registration. Thousands take advantage of out-of-precinct  
13 provisional balloting.

14 **THE COURT:** I think, by definition, anytime you take  
15 away a convenience, people probably are not going to be happy.

16 **MR. RUSS:** I wouldn't call it a convenience as much  
17 as a safeguard.

18 **THE COURT:** I didn't mean to label it for that  
19 purpose. I am just saying a fail-safe, safeguard. I will  
20 accept that.

21 **MR. RUSS:** Yes.

22 **THE COURT:** Anytime you take that away, generally,  
23 voters are -- in this context are not going to be happy with  
24 that.

25 **MR. RUSS:** And what is specific about this situation

1 is that African-Americans disproportionately relied upon it.  
2 If we were in another state where that was not the case, we  
3 would have a different situation, but I think the difference  
4 here is when African-Americans -- the intersection of race and  
5 politics, where African-Americans are on the verge of having  
6 some real influence in the statewide elections in North  
7 Carolina, the legislature stepped in and took away the methods  
8 of registering and the methods of voting that African-Americans  
9 disproportionately relied upon.

10           And perhaps this is the time to go through the  
11 *Arlington Heights* factors because if I walk you through those,  
12 I think it shows why there is a discriminate intent as part of  
13 the motive.

14           **THE COURT:** Well, the part that's got me puzzled is  
15 there is some evidence these were put in place to assist the  
16 African-American vote and to make it easier to vote, and I have  
17 to wonder in the back of my mind whether that would have passed  
18 a Fourteenth Amendment analysis at the time. The argument is  
19 made, well, no, they are really to help everybody, which is  
20 kind of the flip side of what the State argues. It's that they  
21 are really just for everybody. We don't mean to hurt  
22 African-Americans.

23           **MR. RUSS:** They are hurting everybody.

24           **THE COURT:** Yes. We kind of made everybody upset  
25 with these.

1           **MR. RUSS:** I think what is different -- the State has  
2 argued affirmative action in their brief. You know, in  
3 affirmative action, there is a scarce resource. It's a limited  
4 number of jobs, a limited number of university slots, and then  
5 the Courts look at the decision-making process involved and  
6 decide what role race can play in that process.

7           Voting is not a zero-sum game. I mean, I think we  
8 all agree or should agree that we want every eligible voter to  
9 be able --

10          **THE COURT:** As I said earlier, the State ought to  
11 make it easier, not harder.

12          **MR. RUSS:** Yes.

13          **THE COURT:** The government does enough to make it  
14 hard to do things; it ought to make voting easier.

15          **MR. RUSS:** And that's what the legislature did. So  
16 they didn't just say we are going to only give same-day  
17 registration to African-Americans. They came up with  
18 procedures that made it -- that increased participation across  
19 the board, and you certainly heard testimony, not just within  
20 the African-American community about participation rates going  
21 up, but everybody's participation rates went up. The problem  
22 now with taking it away after African-Americans have come to  
23 disproportionately rely on it is the Section 2 violation that  
24 we are talking about here.

25          **THE COURT:** But doesn't that presuppose that it was

1 then necessary to have had it in the first place? I mean,  
2 because if it wasn't necessary to have it, the fact that people  
3 got used to using it is a difficult reason, it seems like, to  
4 be a basis to take it away.

5 **MR. RUSS:** So this gets to the issue about what about  
6 the other states that don't have --

7 **THE COURT:** I am willing to limit that one to North  
8 Carolina, but I am concerned about how it affects the other  
9 states. It is a conundrum to me that you can say, well, we are  
10 not arguing that North Carolina was in violation for not having  
11 these things before they put them in place, but we are sure  
12 arguing now that if you take it away, they'll be in violation.  
13 That's seems to suggest they would have been in violation if  
14 they didn't have it, or else there is something else going on  
15 here.

16 **MR. RUSS:** I think what's -- I guess I would disagree  
17 with that, Your Honor. I think the Fourth Circuit talked a  
18 little bit about this, about looking at the recent past. This  
19 is different from a case where, you know, low registration  
20 rates and you sue and what are you comparing it to. Here, we  
21 know what worked before. The old system was working. Whether  
22 that was everyone's intention when it passed or that's just how  
23 it ended up happening to be, African-Americans came to rely on  
24 these methods of voting.

25 **THE COURT:** How is that different from the Section 5

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1 question? Because that sounds like retrogression.

2 **MR. RUSS:** The Fourth Circuit, I think, was able to  
3 see a distinction that this is not applying retrogression in  
4 this case. To echo something that Mr. Donovan said, with  
5 retrogression under Section 5, the burden is on the  
6 jurisdiction, and you look at are African-Americans worse off  
7 than they were before. If they are, full stop. There is  
8 liability.

9 In the Section 2 context, it's the totality of the  
10 circumstances. So the fact that African-Americans are worse  
11 off than before is not the end of the inquiry. It is one  
12 element to the story. For a vote-denial claim to exist, to  
13 take away something -- you can think about the opposite in the  
14 opposite direction, a conundrum in the other way. If Section 2  
15 doesn't apply to taking away something people came to rely on,  
16 that could cause all sorts of mischief and could encourage  
17 other states, particularly now that Section 5 is not  
18 applicable, to take all sorts of actions that would harm  
19 minority voters.

20 You know, the protections of Section 2 are still  
21 there, and it's one element -- the story about the recent  
22 history is one element. It is under the historical conditions  
23 under the Senate Factors. It also goes to the lack of  
24 responsiveness as well, we think, because African-American --  
25 legislators said this would harm African-Americans, and they

1 kind of -- the State charged ahead with it anyway. So it is  
2 not the end of inquiry. I think that is the difference between  
3 Section 2 and Section 5. As the Fourth Circuit acknowledges,  
4 it is just part of the inquiry.

5 **THE COURT:** Okay.

6 **MR. RUSS:** Going through --

7 **THE COURT:** Do you have any cases that the Department  
8 of Justice was involved in, the United States as a party, where  
9 the Government is claiming a Section 2 violation where the  
10 African-American registration rates actually exceed the white  
11 registration rates as in North Carolina?

12 **MR. RUSS:** I'm not sure of all of the specific facts  
13 of the cases that we brought. I know that we are in a somewhat  
14 unique situation today. You know, two years ago, we still had  
15 Section 5, and that stopped a lot of things from happening  
16 before.

17 **THE COURT:** This would be a different lawsuit if  
18 Section 5 were still around perhaps.

19 **MR. RUSS:** Yes.

20 **THE COURT:** All right.

21 **MR. RUSS:** Yes. So we are in a little bit different  
22 situation now. We now must rely even more on Section 2 than we  
23 did in the past.

24 I think on the question of the success of the prior  
25 changes, allowing for the first time, I think in the history of

1 North Carolina -- you have registration rates of  
2 African-Americans reaching a parity -- a fragile parity with  
3 those of white voters. There is nothing in Section 2 that  
4 says, well, we are done. We've achieved it. It's all over.

5           The fact of the matter is, I think as Dr. Stewart has  
6 talked about, there is churn. 10 percent of the people on the  
7 rolls come off the rolls every two years and new people come  
8 on. There is constantly reregistering as people move from  
9 county to county. And so the fact that at a moment in time  
10 there was briefly parity on registration rates alone, because  
11 if you saw in the midterm, African-Americans turned out at a  
12 lower rate than white voters, that doesn't end the inquiry on  
13 Section 2.

14           **THE COURT:** What's your reaction and assistance to me  
15 on how will I know from the United States' point of view -- if  
16 I enjoin H.B. 589, how will I know when the State of North  
17 Carolina complies with Section 2 at anything less than the full  
18 relief sought by the United States?

19           **MR. RUSS:** I guess what I would say about that, Your  
20 Honor -- if I'm understanding the question correctly, it's when  
21 do we have full equality?

22           **THE COURT:** Yes. And when is it no longer a  
23 Section 2 violation?

24           **MR. RUSS:** Not today. I think with this --

25           **THE COURT:** How -- the more important question is how

1 will I know? Because it seems to me that there has to be a way  
2 to measure it; otherwise, I would be saying to the State of  
3 North Carolina, you are in violation, and then they would say,  
4 well, we have an opportunity to now try to fix it. What do we  
5 need to do?

6 And I would then say to the United States, well, what  
7 do you think they need to do? And so far, the answer is, well,  
8 you can't keep doing what you are doing. Come back with some  
9 answer. And it seems to me there needs to be some way to  
10 measure when there would be equal opportunity. There has to be  
11 some yardstick or definition.

12 **MR. RUSS:** I would offer two points, Your Honor, on  
13 this. One is on this question of equal opportunity. I mean,  
14 there's been disparities for a long time in North Carolina. In  
15 prior cases, violations of Section 2 have been found even  
16 though we had not achieved some Nirvana of perfect equality  
17 between African-Americans and white. So that is not the goal.  
18 The goal is just to --

19 **THE COURT:** Give me a for instance or an example on  
20 one of those. What you mean by that?

21 **MR. RUSS:** So I guess maybe I'm misunderstanding your  
22 question, but I understood it to be that your job is to remedy  
23 the violations that are in front of you. It is not necessarily  
24 to say the entire system is now perfect and we are done, and  
25 there is no more Section 2 cases. So that was the first point

1 I wanted to make.

2           The second point was about remedying how this kind of  
3 works. If the Plaintiffs establish a violation of Section 2,  
4 you enjoin the practices that are violating Section 2. The  
5 State could then -- they could do nothing. They could offer an  
6 alternative proposal. The burden always remains on the  
7 Plaintiffs to show that if they have another proposal -- if we  
8 disagree that that would satisfy the violation, the burden  
9 would be on us to say, Your Honor, that won't satisfy the  
10 violation.

11           **THE COURT:** How are you going to measure that?

12           **MR. RUSS:** The one thing that we do know, and I think  
13 the Fourth Circuit pointed out as well, is we know what worked  
14 recently. We know that the 17 days of early voting was  
15 working. We know that having same-day registration was  
16 working. We know that out-of-precinct provisional ballots were  
17 working.

18           **THE COURT:** How do I know they don't need 21 days of  
19 early voting?

20           **MR. RUSS:** It is not the remedy the Plaintiffs are  
21 seeking here. The Plaintiffs are seeking to return to what was  
22 working before and which African-Americans were relying on. It  
23 would be a harder case, I think, when you don't have something,  
24 when you don't have 21 days, when you don't have same-day  
25 registration. I think that's a different case than taking away

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1 something people relied on. Doing it in this cumulative  
2 fashion where you do it all at once, I think that's a different  
3 case than the other scenarios where people didn't have it and  
4 didn't have come to rely on it.

5 **THE COURT:** So the State is supposed to be given an  
6 opportunity, if I find violations, to remedy under Section 2.  
7 Am I right about that?

8 **MR. RUSS:** Yes, they --

9 **THE COURT:** I am supposed to give them an opportunity  
10 to do that. So if I give the State the opportunity to come  
11 back with a proposal on something, and they come back  
12 hypothetically with 15 days of early voting and two days of  
13 same-day registration and allow preregistration of somebody  
14 when they are 16 and a half, just pick something, how do I  
15 measure whether that's now okay, other than the United States  
16 saying we're satisfied? How do I know that what you are using  
17 to measure it against to know whether it's now equal to prove  
18 that it wasn't equal before?

19 **MR. RUSS:** I think we go through the -- we could go  
20 through the same analysis, totality of the circumstances.

21 **THE COURT:** It sounds like an iterative process, and  
22 we won't know it until we see it.

23 **MR. RUSS:** Well, you're the ultimately fact finder,  
24 so you'll know it when you see it.

25 **THE COURT:** But I don't know what I'm looking -- my

1 problem is I don't know what I'm looking for other than parity,  
2 and I don't know how we determine parity.

3 **MR. RUSS:** I think what makes this case easier is we  
4 know what worked before, and that would provide the remedy if  
5 the State wanted to come back and say, we don't need 17 days  
6 for municipals, but we'll do them for the federal --

7 **THE COURT:** But what that says is you liked what you  
8 had before because it was more helpful, and the State,  
9 therefore, has to provide it at least that, which doesn't seem  
10 to me to say that the State has to provide that to make it  
11 equal. It is just saying it was working by whatever definition  
12 you are using for "working."

13 I'm still struggling with how do I measure this. It  
14 is easy to say we feel harmed, we don't have what we have, you  
15 took it away. That's very palpable. It is harder to say how  
16 do I figure out what the right answer is.

17 **MR. RUSS:** Well, if we're talking about remedy, that  
18 means we have gotten to the stage where there is a finding of  
19 liability; and if there are challenges in crafting a remedy, it  
20 doesn't change the fact that there is liability under  
21 Section 2.

22 **THE COURT:** I am positing it now partly because, in  
23 order to determine whether there is liability, I need to know  
24 what the remedy ought to be. For example, it is not a perfect  
25 analogy, but I go to the vote dilution cases. If the Supreme

1 Court says you need a baseline for these -- and there is a lot  
2 of discussion about how are we supposed to know what a baseline  
3 is for these vote dilution cases, and I am feeling the same  
4 lack of guidance here as to what's the baseline other than  
5 where we were and, boy, that sounds like Section 5 to me,  
6 sounds a lot like we would really like to have *Shelby County*  
7 reversed. And I am a lower Court. I can't do that.

8 **MR. RUSS:** Sure. I know. I think -- but you have  
9 clear guidance, I think, from the Fourth Circuit that this is  
10 not just doing Section 5 all over again by looking to the  
11 recent past for a solution. And, in fact, when the Fourth  
12 Circuit was confronted with these questions, like is there a  
13 violation -- are we likely to succeed on the merits of a  
14 violation, the remedy the Fourth Circuit came up with was bring  
15 back same-day registration, bring back out-of-precinct  
16 provisional ballots.

17 **THE COURT:** I think the remedy was there is a trial  
18 coming up, put them back in for now, and let the trial judge  
19 figure out what to do.

20 **MR. RUSS:** I think it went beyond that in that the  
21 Fourth Circuit said that the evidence they had before it, and  
22 the evidence has only grown since then, that these were -- that  
23 those specific two examples were textbook examples of Section 2  
24 violations. So the question about remedy, it would still be  
25 looking at the totality of the circumstances.

1           It is hard to imagine, particularly with same-day  
2 registration and out-of-precinct, what it would look like to  
3 remedy the violation other than having those back. I am having  
4 trouble thinking of what would work other than bringing those  
5 provisions back that African-Americans relied on, because you  
6 still have all the socioeconomic factors. You still have  
7 people who move around frequently, as African-Americans do more  
8 than white voters. You have transportation issues. You have  
9 inflexible work hours, all of these things that these  
10 safeguards help protect someone's right --

11           **THE COURT:** But all of those assume that whatever  
12 North Carolina had was based on some empirical study that now  
13 matches what's needed to what was provided, and I don't know  
14 that that was ever done.

15           **MR. RUSS:** And that's not necessary, Your Honor, to  
16 make a Section 2 claim. I mean, there is no -- the totality of  
17 the circumstances, at different times different Senate Factors  
18 can be relevant. There is no requirement that you must do X in  
19 order to have --

20           **THE COURT:** But once a State acts, does a State not  
21 have some prerogative in doing what it wants to do as long as  
22 it is not unconstitutional and in violation of a federal  
23 statute?

24           **MR. RUSS:** I think that is the general rule, and here  
25 we are saying it violates Section 2 of the Voting Rights Act,

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1 what choices they made here.

2 **THE COURT:** Okay.

3 **MR. RUSS:** There is also the intent argument here.

4 We've strayed a little, but the results of that, you know, that  
5 that is an important element of this case.

6 On the intent aspect of it, having a discriminatory  
7 purpose is reason to enjoin these provisions of House Bill 589  
8 on its own.

9 **THE COURT:** What is the evidence of "because of and  
10 not in spite of" intent? As I read the transcripts from the  
11 Senate and the House, as I recall, most of, if not all of, the  
12 evidence as to racial impact came in opposition to these  
13 changes as the uproar came.

14 **MR. RUSS:** That's not correct.

15 **THE COURT:** Okay. So what is the evidence of before?  
16 There was a memo from, I think, the State Board; is that right?

17 **MR. RUSS:** I think there's several pieces. I mean,  
18 there was an earlier finding by the legislature going back to  
19 2005 that African-Americans rely on out-of-precinct more than  
20 others. There were memos by the State Board in early 2013  
21 about the ID provisions and who had and who did not have voter  
22 ID. African-Americans disproportionately did not have the  
23 driver's license numbers. The legislators also requested data  
24 about early voting usage rates and about same-day registration  
25 usage rates.

1           In the slide presentation, which you have up there,  
2 there is a reference to one of the representatives getting  
3 information from colleges about African-American possession of  
4 college IDs, what the rates were. So they were gathering all  
5 this information, and it's fine to gather the information. The  
6 question is kind of what happened next. I think the sequence  
7 of events tell the story here.

8           They gather this information. It's at a time where  
9 they are required to comply with Section 5 of the Voting Rights  
10 Act, and they have a longer, more deliberative process. There  
11 were certainly critiques of the old -- the original ID law, but  
12 I think generally there was a lot of airing, a lot of time, a  
13 lot of discussion. It passes the House and then sits for  
14 months with no action happening.

15           In the background, the *Shelby County* case is  
16 challenging Section 5 and whether it can still be applied. The  
17 Supreme Court, in late June of 2013, decides that the formula  
18 used to get jurisdictions covered under Section 5 is no longer  
19 valid. It used 40-, 50-year-old data, and so they eliminate  
20 the formula. They still allow Congress to come up with a new  
21 formula, which has not happened yet, but Congress could have a  
22 Section 5 regime. They just wanted more current conditions.

23           When that decision came down, when North Carolina no  
24 longer had the burden to show that there was not a  
25 discriminatory effect or purpose to their proposed law --

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1           **THE COURT:** That's -- that may not be correct.  
2 Isn't -- wasn't it at the point in time that they only had a  
3 burden not to show retrogressive -- to show it was not  
4 retrogressive?

5           **MR. RUSS:** Section 5 prohibited -- the burden was on  
6 the jurisdiction to show that there was not retrogression, but  
7 also that there was not a discriminatory purpose. A lot of  
8 times when you get to retrogression, you don't necessarily have  
9 to reach the purposes issue in a Section 5 inquiry.

10          **THE COURT:** If a law under Section 5, when it was in  
11 place, if a proposed law was not retrogressive but had a  
12 discriminatory purpose, was it -- could it pass the Department  
13 of Justice? I don't know if there is such a thing, but --

14          **MR. RUSS:** As I recall from the 2006 amendments to  
15 Section 5, any discriminatory purpose could be a grounds for  
16 denying preclearance to a statute, if I'm remembering --

17          **THE COURT:** It would be grounds, but that would  
18 then --

19          **MR. RUSS:** That would be grounds to deny preclearance  
20 if there was a discriminatory purpose, and you could look at  
21 the *Arlington Heights* factors to see did the State meet its  
22 burden under Section 5 that there was no discriminatory  
23 purpose.

24          **THE COURT:** So does a State -- did a State under  
25 Section 5 have to prove both it wasn't retrogressive and there

1 was no discriminatory purpose?

2           **MR. RUSS:** Yes, Your Honor, the burden was on both,  
3 on both elements.

4           **THE COURT:** Okay.

5           **MR. RUSS:** The State no longer has the burden to show  
6 that the law is no longer discriminatory. Senator Apodaca --  
7 and you've allowed this quote in -- said, "Now we can go with  
8 the full bill," with no public indication of what that meant,  
9 what the full bill was. No one had seen a full bill at least  
10 publicly.

11           And then at the end of July, there was a rush. In  
12 the Senate Rules Committee on Tuesday night, they sprung a  
13 giant 50-some-page bill on the committee. There was a hearing  
14 and not a lot of time to prepare. They loaded it up with a  
15 bunch of provisions. And I think, as Dr. Lichtman said, all  
16 these provisions went in the same direction: African-Americans  
17 disproportionately rely on same-day registration; they  
18 disproportionately use early voting; 70 percent of  
19 African-Americans, that's how they vote in a Presidential  
20 election.

21           It cut back out-of-precinct provisional ballots,  
22 which admittedly not many people talked about. There were so  
23 many things going on. And of course, the ID provisions, not  
24 allowing college IDs anymore, restricting the number of IDs  
25 that are available, again with data from the State Board

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1 showing that African-Americans disproportionately did not have  
2 those IDs and, of course, at a time when there was no  
3 reasonable impediment form. If you did not have one of the  
4 limited forms of ID and you weren't able to get it, your ballot  
5 was not going to count under the old regime.

6           The process went very quickly. The Senate passed it.  
7 There were about three hours in the House of debate, and the  
8 House passed it. All of this happened very quickly. Once the  
9 State was no longer under an obligation under Section 5 -- as  
10 Dr. Lichtman said, Section 5 was about race and about voting,  
11 and that's the thing that changed, and suddenly the bill  
12 changed as well. It grew into this mammoth vote suppression  
13 bill right after there was no longer an obligation where they  
14 had the burden anymore.

15           There were departures from the normal practice  
16 procedurally and substantively. I think Dr. Lawson and  
17 Senator Stein testified about several of these departures. For  
18 example, in the Senate, the bill was referred to the Senate  
19 Rules Committee, which was very unusual. I think Senator Stein  
20 said that's where a lot of bills go to die.

21           The Judiciary Committee in the Senate normally has  
22 the expertise, but, for whatever reason, it was sent to the  
23 Rules Committee. There was scant time to review these dramatic  
24 changes to the right to vote. The legislature rushed this  
25 through. So there was little time for consideration and,

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1 frankly, little time to defend the law on the record about what  
2 was the rationales for this law.

3           When it passed the Senate -- normally, when you have  
4 a major piece of legislation, there is some back and forth  
5 between the Senate and House to try to harmonize different  
6 versions or come to a compromise. There was none of that.  
7 There was just a concurrence vote, and that was the end of it  
8 and that became the law.

9           We think that all this, you know, contributes to the  
10 *Arlington Heights* factors about how there is the circumstantial  
11 evidence of discriminatory effect.

12           On the contemporaneous statements, I mean, certainly  
13 we've talked a lot about the legislators, other than what's in  
14 the record, not wanting to say any more about what they did.  
15 One thing I would point to from the legislative record --

16           **THE COURT:** I suppose they had the votes, so they  
17 didn't care what was said. Is that a fair inference? I  
18 mean --

19           **MR. RUSS:** There was no --

20           **THE COURT:** They weren't negotiating is the  
21 inference, is that we don't care what was said. We are voting  
22 it through, so knock yourself out, talk as long as you want.

23           **MR. RUSS:** I think that's absolutely right, Your  
24 Honor, because there was no response in the record to the  
25 statistics provided by Senator Stein, to the arguments made by

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1 the different opponents that African-Americans were going to be  
2 harmed by this. You would think there would be some effort  
3 to -- other than saying, no, that's not true, to try to engage  
4 on that issue, but there was no effort to engage on that issue.  
5 There was no time. It was just being rushed through.

6           One of the things that I believe Representative Lewis  
7 said on the floor during the House debate goes to this  
8 partisanship issue, whether partisanship was maybe what was  
9 going on here. And he said -- he said the opponents of the  
10 bill were accusing them, saying, quote, to roll back in a  
11 partisan fashion, then those rules that passed, the 26 of them  
12 since 2001, must have been passed with a partisan motive, too.  
13 That's a logical assumption; right?

14           So he didn't come out and say this is like payback  
15 for the Democrats passing these various reforms, but he  
16 suggested that partisanship was certainly on his mind. I think  
17 in *LULAC*, that case shows that when you have a troubling racial  
18 history in a state in voting, like Texas, like North Carolina,  
19 when there is a mix of race and politics where race is used as  
20 a way to get a political advantage, that that is discriminatory  
21 intent under Section 2 and a violation.

22           To make sure my folks have -- colleagues have some  
23 time, let me talk briefly about remedy. We are asking that the  
24 Court permanently enjoin the reduction of the early voting  
25 period, the elimination of same-day registration, and the

1 prohibition on counting out-of-precinct provisional ballots.

2 I would like to talk briefly about Section 3, the  
3 federal observers and the bail-in provisions. Obviously, if  
4 the Court finds liability, there could be a later proceeding on  
5 remedy, but whether there is or not, let me explain these  
6 provisions.

7 Bail-in under Section 3(c), if there is a finding of  
8 intent, it will require the State to submit voting changes for  
9 preclearance to ensure the State will not again implement  
10 changes that discriminate African-Americans voters. Typically,  
11 what we ask for is a ten-year period starting from the filing  
12 of the complaint. The changes are submitted either for  
13 administrative review by the Department of Justice or by this  
14 Court for approval. So the State has a choice about where to  
15 go.

16 And, again, then the standards we talked about for  
17 Section 5, retrogression, discriminatory purpose, those are the  
18 inquiries under Section 5 that would be examined for --

19 **THE COURT:** What is my discretion and what triggers  
20 either ordering federal observers or putting North Carolina  
21 back under Section 5?

22 **MR. RUSS:** If you find that discriminatory intent was  
23 part of the motive, then we are entitled to relief.  
24 Section 3(c), bail-in, you need discriminatory intent. On  
25 federal observers for a final judgment, you also need intent.

1 For interlocutory orders or temporary orders, we certainly have  
2 other cases where, for a short period of time, federal  
3 observers are placed to monitor, are the problems being fixed,  
4 and then it ends. But for final judgment, the statute does  
5 talk about violations of the Fourteenth and Fifteenth  
6 Amendment, which would be intentional discrimination.

7 **THE COURT:** All right.

8 **MR. RUSS:** On the question of federal observers, we  
9 talked about this a year ago. I also monitor the -- I also run  
10 the election monitoring program, so I feel rather passionate  
11 about this, but I'll keep it brief.

12 The federal observers are, you know, neutral,  
13 nonpartisan observers. They go to a polling place, they watch  
14 the process, they make sure that the law is being followed.

15 **THE COURT:** Are those usually for cases where there  
16 are irregularities at the polling place as opposed to a  
17 legislature that, through a public process, passes a bill?

18 Are those usually federal observers put in place when  
19 there is an irregularity at the polling place, among other  
20 things like that, as opposed to the passage of a bill that was  
21 done through the democratic process?

22 **MR. RUSS:** The federal observers, we ask for them  
23 when there is something related to Election Day or the counting  
24 of ballots to watch.

25 **THE COURT:** What is there here that triggers that

1 concern?

2           **MR. RUSS:** There is -- the counting of  
3 out-of-precinct provisional ballots is something that we could  
4 watch. There is the, you know -- we watch the early voting  
5 period. The same-day registration procedures provisions, that  
6 is something that we could watch.

7           The State has talked about, because they ended some  
8 of these provisions, it's a manual process now that leads to  
9 the possibility of more errors. That's something that we could  
10 watch.

11           **THE COURT:** Is there any concern that the State has  
12 in any way conducted same-day registration, out-of-precinct  
13 counting, or early voting in a fashion that's suggestive in any  
14 way of unfairness to anybody?

15           **MR. RUSS:** You mean previously when it was in place?

16           **THE COURT:** Yes.

17           **MR. RUSS:** My colleagues might know of other  
18 examples. I am not aware in the record that we have in this  
19 case of that question being developed. So we may not have  
20 evidence one way or the other about whether African-Americans  
21 were discriminated in any way when same-day registration was  
22 being offered.

23           **THE COURT:** All right.

24           **MR. RUSS:** A related issue -- the issue is not before  
25 you, but this question of a reasonable impediment is another

1 thing that would be watched. The State spent a year and a half  
2 training poll workers and telling poll workers you're going to  
3 need ID or people are going to vote provisional ballots. Now  
4 there is a new provision. We have no information about how  
5 this will be applied, and that is something else that could be  
6 watched on Election Day to make sure that it's being  
7 implemented in a way that doesn't discriminate.

8 **THE COURT:** That would depend on the outcome of that  
9 part of case, though, I take it?

10 **MR. RUSS:** Certainly if we have federal observers, we  
11 would look at any potential violations of the Voting Rights  
12 Act.

13 So in conclusion, based on the evidence presented at  
14 trial and the preliminary injunction hearing, we believe the  
15 Defendants have violated Section 2. We ask for an injunction  
16 to return to the 17 days of early voting, to return to same-day  
17 registration, and return to the counting out-of-precinct  
18 provisional ballots. We also ask the Court to authorize  
19 federal observers and bail-in.

20 And just one final point, Your Honor. You know,  
21 people lost their right to vote in November 2014 because  
22 same-day registration and out-of-precinct provisional ballots  
23 weren't (inaudible). We heard testimony from folks like  
24 Tawanda Pitt that the lines at some of the early voting sites  
25 were so long that she was not -- they were not able to vote.

1           If these provisions are not enjoined, even more  
2 people will lose their right to vote in 2016. So we ask the  
3 Court to grant the relief we've requested. Thank you, Your  
4 Honor.

5           **THE COURT:** Thank you very much.

6           Ms. Riggs -- can we go at least 20 minutes or so?

7           (Off-the-record discussion.)

8           How long do you think you'll be?

9           **MS. RIGGS:** That is a good question.

10          **THE COURT:** I think we better take a break. So let's  
11 do that. What is your plan if I don't interrupt you?

12          **MS. RIGGS:** It would be 20 minutes, 25 at the most.

13          **THE COURT:** Okay.

14          **MR. SPIVA:** Same thing, Your Honor.

15          **THE COURT:** And then do you have --

16          **MR. FARR:** I was hoping it was going to be five  
17 minutes, Your Honor, but I think it is going to be quite a bit  
18 longer than that, and I think it will be longer than the  
19 30 minutes that we talked about yesterday when we thought the  
20 argument would be two hours.

21          **THE COURT:** So you are thinking about two hours?

22          **MR. FARR:** I'm thinking that I will go for an hour, I  
23 think.

24          **THE COURT:** Are you speaking, too?

25          **MR. PETERS:** I'm planning to speak, Your Honor, and

1 it really will not be more than ten minutes unless you have --

2 **THE COURT:** All right. Well, you are entitled to --  
3 you've got 15 or so hours left, not that you ought to use it.

4 I think what we'll do is take a break. I don't want  
5 to go to the very end of the day, if we can help to do that,  
6 but this is helpful. So I am going to propose that we break.

7 So I am going to say let's come back at 1:30, and  
8 we'll start then, and I am going to hope to finish by 4:00, if  
9 we can do that, if everybody can keep that in their mind. If  
10 you have a problem, let me know. I am interested in hearing  
11 from everyone. Let's shoot for that.

12 (The Court recessed at 12:29 p.m. )

13 (The Court was called back to order at 1:33 p.m.)

14 **THE COURT:** Ms. Riggs.

15 **MS. RIGGS:** Good afternoon, Your Honor. As  
16 Mr. Donovan explained, I will be discussing the race neutral  
17 Fourteenth Amendment claims being brought by the League of  
18 Women Voters, the NAACP Plaintiffs, and the Duke Intervenors.  
19 These claims are being brought on behalf of voters of all races  
20 and are separate and distinct from our Fourteenth Amendment  
21 intentional discrimination claims.

22 **THE COURT:** These are the *Anderson-Burdick* claims?

23 **MS. RIGGS:** Yes, Your Honor.

24 The evidence in the record in this case is that the  
25 challenged provisions of House Bill 589, specifically the

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1 repeal of same-day registration, the cut to early voting, and  
2 the prohibition on the counting of out-of-precinct provisional  
3 ballots, impose a substantial and undue burden on the right to  
4 vote, in some cases a burden so severe that it actually  
5 disenfranchised voters, and that these burdens are imposed  
6 without any sufficiently weighty justification.

7           In a line of cases, starting with  
8 *Anderson v. Celebrezze* in 1983, the Supreme Court articulated a  
9 particular test for constitutional challenges to election laws.  
10 Because of the precious nature of the fundamental right to  
11 vote, and recognizing that some regulation of elections are  
12 necessary, that test, now known as the *Anderson-Burdick* test,  
13 it excused the more typical binary standard of review under a  
14 constitutional challenge. So it isn't a question of rational  
15 basis or strict scrutiny. Instead, what the Court has  
16 articulated and has been applied in this circuit and others is  
17 a sliding scale.

18           So under the sliding scale, the Court first has to  
19 look at both the character and the magnitude of the burden on  
20 the right to vote, and I like to describe that as, not just  
21 being concerned about the number of voters, but what the burden  
22 on the right to vote actually is.

23           The Court, after assessing those burdens, then turns  
24 to the State's justifications. "It must identify and evaluate  
25 the precise interests put forward by the State," and it must go

1 on to "determine the legitimacy and strength of each of those  
2 interests," especially whether those interests necessitate the  
3 burden being placed on the right to vote. And that's from  
4 *Anderson*.

5 Courts apply the *Anderson-Burdick* sliding scale to a  
6 variety of different types of election laws, from ballot access  
7 cases to third-party voter registration regulation cases, to  
8 cases like ours where we are talking about the ability of  
9 voters to cast a ballot on Election Day or during early voting.

10 But what's been critical is that this isn't a litmus  
11 test. There isn't one set of rules that are constitutional and  
12 one set of rules that aren't. And in the Fourth Circuit, the  
13 Court in *McLaughlin* explained that "election laws are  
14 usually...subject to an ad hoc balancing test." So this  
15 faithful application of the *Anderson-Burdick* sliding case is  
16 the governing law here in this circuit and was reaffirmed as  
17 recently as last year in *Pisano v. Strach*.

18 So then as a primary matter, assessing the burden,  
19 again, as I mentioned, we have to look at the magnitude of the  
20 burden, how many voters are affected, but also what is the  
21 nature of the burden, is it just making it harder to vote or is  
22 it keeping people from voting at all.

23 Also in the Fourth Circuit, *McLaughlin* and *Woods* both  
24 reaffirmed that this Court must consider the cumulative effect  
25 of the challenged provisions together but also how the

1 challenged provisions operate in the electoral scheme as a  
2 whole. So I think --

3 **THE COURT:** Is it a burden to -- is it making it  
4 harder by not making it easier?

5 **MS. RIGGS:** I think so, Your Honor. There might be a  
6 situation where there was no effect at all, but I don't know  
7 how anyone can straight face say that taking away same-day  
8 registration made it easier to vote. I don't know how you can  
9 say taking away out-of-precinct provisional voting makes it  
10 easier to vote.

11 So what's happened here isn't that voting has become  
12 more difficult for voters, and we heard testimony, both live in  
13 front of you and on the papers, about people who were actually  
14 kept from voting. So we believe, of course, that the  
15 challenged provisions make it even harder for voters of color  
16 than they do for the general population; hence, the Section 2  
17 claim. But even, you know, this Court and defense counsel have  
18 suggested that maybe it makes harder for everyone to vote, some  
19 of these changes.

20 So under *Anderson-Burdick* and the subsequent case law  
21 applying that standard, any increase in the burdens on the  
22 right to vote, however slight, "must be justified by relevant  
23 and legitimate state interests' sufficiently weighty to justify  
24 that limitation." So here the burdens are not insubstantial.  
25 In some cases, they are quite severe and they warrant

1 heightened scrutiny.

2           Additionally, before I get to the State  
3 justifications, some other factors to consider under the  
4 *Anderson-Burdick* analysis is that burdens on subgroups alone,  
5 including transient voters, can constitute a basis for  
6 liability under *Anderson-Burdick*. And we have been clear  
7 through the course of this litigation as well that --

8           **THE COURT:** What is the legal citation for that?

9           **MS. RIGGS:** The controlling opinion in *Crawford*,  
10 Justice Stevens, discussed that even though there was no burden  
11 in that case, the controlling law is that a subgroup, including  
12 indigent voters, the elderly and more generally voters who  
13 lacked photo ID in that case, there could be a constitutional  
14 violation using the *Anderson-Burdick* analysis for those  
15 subgroups.

16           **THE COURT:** Is that dicta given the holding of the  
17 Court that there was a violation?

18           **MS. RIGGS:** I don't think so, Your Honor. That is  
19 the controlling opinion, and I think it is consistent with what  
20 we've seen --

21           **THE COURT:** But it wasn't necessary for the holding  
22 though, was it? I mean, didn't *Crawford* determine that there  
23 was no violation?

24           **MS. RIGGS:** *Crawford* determined there was no  
25 violation, but I think that that determination is consistent

1 with what we have seen in cases coming out of circuits across  
2 the -- so I think it is consistent with two things. One, the  
3 Supreme Court's jurisprudence on ballot access laws, examining  
4 how certain ballot access laws can make it harder for certain  
5 political groups outside the main two-party system to get  
6 access to the ballot. I think those are subgroups.

7           And you also have two -- good case law in two  
8 circuits where -- *OFA* from the Sixth Circuit and *Veasey* from  
9 the Fifth Circuit that confirm that you can and should look at  
10 the effect on subgroups, and that can be a basis for liability  
11 under *Anderson-Burdick*.

12           **THE COURT:** Won't there always be somebody affected  
13 by any change in any voting law as a matter of definition?

14           **MS. RIGGS:** But that's the beauty of the equation  
15 here in *Anderson-Burdick*. Yes, there will always be someone,  
16 and that's why we have to look at the justifications. The  
17 balancing -- or taking the magnitude, multiplying it by the  
18 character of the burden, and then weighing it against the  
19 justifications can tell us -- you know, reveals to us the  
20 constitutionality.

21           So, for example, I think using this calculus is  
22 helpful in understanding why this isn't a one-way ratchet. So  
23 in your example that you used with Mr. Donovan this morning  
24 with regard to New York, you might have Election Day  
25 registration and people might use it a lot, and you might have

1 chaos. On the State justification side, if you had chaos, if  
2 you had it costing millions of dollars, if you just had it  
3 being fundamental -- a record of it being fundamentally  
4 unworkable, not a, oh, this isn't any fun to administer kind of  
5 thing, but if you had that record, then it's not -- I mean, it  
6 is -- it's not something that can never be undone. It just  
7 depends on what the justifications are.

8           So my -- then now turning to State justifications, I  
9 want to be clear that *Anderson-Burdick* requires us to identify  
10 with precision the State's interest and not rely on  
11 generalizations, and especially in -- well, in situations where  
12 heightened review is applied, which is this case because of the  
13 nature of the burdens, post hoc justifications don't suffice in  
14 that kind of constitutional review. That's from  
15 *U.S. v. Virginia*.

16           I think this Court also needs to assess the -- given  
17 the burden, has to assess whether some of these justifications  
18 are internally inconsistent and factually untenable. So a  
19 concern about cost from one part of the bill when other parts  
20 of the bill create enormous new costs, that's internally  
21 inconsistent and something that should be queried under a  
22 heightened review. We think strict scrutiny should apply, just  
23 to be clear, but anything in the middle is -- of the sliding  
24 scale should still necessitate that probing inquiry into the  
25 justifications.

1           And, finally, the Court needs to ask whether the  
2 justifications necessitated the burden imposed. So Mr. Bob  
3 Phillips, executive director of Common Cause and a lobbyist in  
4 the General Assembly, came and testified about the alternatives  
5 that he had shared with legislators. He didn't agree with  
6 wanting to repeal same-day registration, but it didn't have to  
7 be an all or none. There were lots of options that could have  
8 been adopted that were less burdensome on voters.

9           I know our time is limited here, so I will not repeat  
10 any of the facts that you've already --

11           **THE COURT:** Let me ask a general question. Is it  
12 your position that any tweaking of any of these laws by the  
13 General Assembly would require the same *Anderson-Burdick*  
14 analysis; that is, if they went from 17 days to 16 days, that  
15 that would require an *Anderson-Burdick* analysis as to the  
16 burden versus the benefits?

17           **MS. RIGGS:** If challenged in Court under a  
18 race-neutral Fourteenth Amendment claim, I think that is the  
19 standard. It is a different -- the equation comes out  
20 differently probably, depending on what the justification is.  
21 Reducing early voting by a day, the character of that burden is  
22 different than the character of repealing same-day  
23 registration, which means you have people like Reverend Colbert  
24 who just can't vote.

25           **THE COURT:** Somebody has a phone. Will you grab

1 that, please? Thank you.

2 **MS. RIGGS:** So I want to talk -- to delve a little  
3 more deeply into the character of the burden. Same-day  
4 registration is a great example of how overwhelming that burden  
5 can actually be. This isn't having to go another block to a  
6 Redbox. This is a voter not being able to cast a ballot that  
7 counts. And one of the things to think about also from  
8 *Crawford* is the extent to which the ability for a voter --

9 **THE COURT:** Well, isn't one way to look at the burden  
10 the question of having to register within the 25-day cutoff  
11 period, that is, before the 25-day cutoff period versus  
12 registering after that period?

13 **MS. RIGGS:** I don't think that dichotomy is useful  
14 given the evidence that we've seen. So we heard from numerous  
15 people -- voters who did everything right. This wasn't a  
16 question of voters not being focused or voters not being  
17 motivated. Jessica Jackson's voter registration record was  
18 deleted, essentially merged by her county board of elections.  
19 She had no reason to -- I mean, she didn't do anything wrong,  
20 and there was no fail-safe to fix her registration.

21 Same thing with all of the people you heard from who  
22 went to DMV, who asked to register to vote. UOCAVA voters  
23 whose registrations were temporary, who were longtime North  
24 Carolina voters, these are things -- there are situations where  
25 people misunderstand the law, but I want to point you to a

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1 critical piece of evidence, I think, that hasn't been discussed  
2 enough, which is PX357.

3           This is an email from George McCue to the voter  
4 outreach team, including Ms. Strach. And he mentions that  
5 "During this morning's meeting," he -- it was reaffirmed -- he  
6 was reminded "that a constant point of confusion for voters,  
7 and pretty much everyone involved, is the difference between a  
8 registered voter who moves within the county versus a  
9 registered voter who moves to a different North Carolina  
10 county."

11           This is something that even people who work for the  
12 State Board of Elections are confused about. So it is not  
13 voters who aren't engaged. It is a situation where there is  
14 understood, acknowledged misunderstanding. And Mr. McCue notes  
15 that when same-day registration was in effect, you know, this  
16 understanding wasn't fatal. People could still vote. "But now  
17 that same-day registration is gone," he says, "it is more  
18 likely that we can see this situation result in a person not  
19 being able to vote...."

20           And he notes -- you know, making this even more  
21 consistent, he notes "with society becoming more transient,  
22 that also means that these situations will become more common,"  
23 and that's the unrebutted testimony of Dr. Duncan as well.

24           **THE COURT:** I take it that in a lot of states that  
25 don't have same-day registration or Election Day registration,

1 that those people who fail to register properly, through no  
2 fault of their own, may lose their right to vote in that state,  
3 without some protection -- fail-safe like this?

4 **MS. RIGGS:** Right.

5 **THE COURT:** Is that a fair assumption?

6 **MS. RIGGS:** I am sure there are states where that's  
7 the situation.

8 **THE COURT:** So what if one of those States says we  
9 want to move our voting cutoff date -- we have 30 days before  
10 the election. We think North Carolina has a great idea. We  
11 are going to go to 25 days, give people five more days to  
12 register, but they don't allow any fail-safe, same-day  
13 registration. Could that law be challenged on the grounds that  
14 under *Anderson-Burdick* you're not providing a fail-safe by  
15 moving this date?

16 **MS. RIGGS:** The only change is giving people more  
17 time?

18 **THE COURT:** Well, it is giving more time in the  
19 absence of providing what you say is a fail-safe that, without  
20 it, people would be disenfranchised.

21 **MS. RIGGS:** So not every fail-safe has the same  
22 effect. I think what we have seen on the facts of this case is  
23 that in North Carolina having a fail-safe is more necessary.  
24 This is what we see on a number of different levels. One,  
25 we've seen --

1           **THE COURT:** What is my answer to what happens in the  
2 other states?

3           **MS. RIGGS:** It depends on the facts. It depends on  
4 the -- this is not a situation where I'm saying the Fourteenth  
5 Amendment requires same-day registration in every state. This  
6 is taking away same-day registration, making voting harder than  
7 it was, and then what's the justification for it. There could  
8 be a situation where that's justified. Not on this record, but  
9 there could be. That's the analysis, so without looking at the  
10 justifications. But the fact that it's taking something away  
11 and making it harder is critical to assessing the burden. The  
12 burden is increased on the voter.

13           **THE COURT:** So once it's added, it can't be taken  
14 away unless it's justified?

15           **MS. RIGGS:** If it's being used then, yes. I mean, I  
16 think --

17           **THE COURT:** Presumably it is going to be used by  
18 somebody.

19           **MS. RIGGS:** I mean, again, this is why the  
20 multiplying matters, too, right. So you have to care, not just  
21 about the nature of the vote, but how many folks are really  
22 affected by this. In Colorado, for example, where people just  
23 aren't using early voting, moving to absentee voting by mail or  
24 all-mail voting doesn't -- that's one of the situations where  
25 the burden is so low that the only rational basis is applied.

1           **THE COURT:** There is a constitutional right to vote;  
2 right?

3           **MS. RIGGS:** Yes, Your Honor.

4           **THE COURT:** Do you agree with that?

5           **MS. RIGGS:** Yes.

6           **THE COURT:** Is there a constitutional right to an  
7 early vote?

8           **MS. RIGGS:** Not in and of itself, but there is a  
9 constitutional right to not -- to avoid having your fundamental  
10 rights not being unduly burdened.

11           **THE COURT:** I understand that, but if there is no  
12 constitutional right to early voting, you are saying that if  
13 you do provide it, though, you can't take it away without going  
14 through the *Anderson-Burdick* Fourteenth Amendment analysis?

15           **MS. RIGGS:** Right. I would say, to clarify, in some  
16 factual settings, if voting was so difficult that not having  
17 any early voting was really what was stopping voters from  
18 voting, so you see this in the ballot access cases --

19           **THE COURT:** So you are making the argument now that  
20 there might be some jurisdictions where the absence of early  
21 voting might be a violation of the Fourteenth Amendment?

22           **MS. RIGGS:** It would be a really hard case if they  
23 never had it before. I mean, if you have no way to assess the  
24 magnitude --

25           **THE COURT:** But you could compare it to what's

1 happening in other states that have early voting like North  
2 Carolina that, your evidence is, was used not only by a lot of  
3 people, but disproportionately by African-Americans; ergo, it  
4 would be used disproportionately by African-Americans in other  
5 states with similar historical facts.

6 **MS. RIGGS:** Well, I think consistent with our  
7 position throughout this case and consistent with what the  
8 *Anderson-Burdick* test really requires is looking at the effect  
9 of the burden in the actual electoral scheme in place. And so  
10 if the question was West Virginia wants -- doesn't have early  
11 voting and wants early voting, what's happening in North  
12 Carolina doesn't really explain what other options voters have  
13 in West Virginia. So I think it's still not particularly  
14 helpful to look to another state.

15 But in this situation, the facts before the Court on  
16 this case are that voters were relying on same-day  
17 registration. They were using it. 11,000 voters registered  
18 during the early voting period, and those were voters who could  
19 have voted with same-day registration.

20 There was nearly a thousand -- nearly a thousand  
21 provisional ballots during early voting discarded because there  
22 was no record of registration. So on the -- in this case  
23 before this Court, there is a record that both the magnitude of  
24 the burden is large, that the character is severe in some  
25 cases, particularly with same day and out-of-precinct, and the

1 fail-safe was really critically necessary.

2 I will note quickly before moving on to the  
3 justifications that Justice Stevens in *Crawford* -- one of the  
4 key pieces to his deciding that there was no constitutional  
5 violation was the ability of voters to mitigate their situation  
6 after the election. So a voter who showed up without an ID on  
7 Election Day had ten days to go to the county clerk's office to  
8 sign an affidavit.

9 Reverend Colbert shows up to early vote only to find  
10 out that his wife's registration has gone through at DMV but  
11 his hasn't. There is no way at that point for him to mitigate  
12 the error that was not his. And so in North Carolina, there is  
13 also in the record -- we didn't get to discuss it enough live,  
14 but exhibits --

15 **THE COURT:** I'm having a hard time imagining that  
16 actually.

17 **MS. RIGGS:** I know you don't believe it, but we could  
18 have gone much longer.

19 PX373 and 374 explain some of the problems that  
20 county boards of elections are routinely seeing with  
21 U.S. Postal Service returning mail as undeliverable. We heard  
22 from Mr. Ealy who tried numerous to get his registration fixed.  
23 And we have the Wake County Board of Elections here saying, DMV  
24 is, you know, again and again not doing their job. And what  
25 we're not talking about is the number of provisional ballots

1 that are not getting counted because DMV is not doing its job.  
2 So this isn't just Wake County. It's Nash County. It's all  
3 throughout the record. There is substantial evidence of the  
4 need for a fail-safe here in North Carolina.

5 Pivoting then to the State interests quickly, there  
6 have been two articulated, and I want to address them very  
7 quickly. The first is that implementing same-day registration  
8 is somehow an administrative burden that's insurmountable, and  
9 that's belied by the successful elections conducted with  
10 same-day registration in 2008, 2010, and 2012.

11 You heard last summer from Mr. Gilbert and  
12 Mr. Bartlett, very experienced election administrators, who  
13 from the election administrative side, not the voter side, said  
14 this was great. It reduced the number of provisionals. It  
15 made interactions between poll workers and voters more -- less  
16 conflict ridden. So it was a good thing from an election  
17 administration side.

18 You heard the video testimony of Kate Cosner, who is  
19 currently employed by the State Board of Elections, saying her  
20 experience as a county board director was that there was no  
21 problem implementing same-day registration.

22 And then you've heard a lot about the mail  
23 verification rates. Unverified ballots, unverified changes to  
24 registration, and registrations are not illegal. The mail  
25 verification statute allows for the counting of unverified

1 registrations. Voters can change their address during early  
2 voting and those -- same issue, not time to verify the address,  
3 those get counted. On Election Day, you can go and do an  
4 unreported move provisional ballot.

5           **THE COURT:** What is your response to the contention  
6 that the State just wants to have a cutoff date so they can  
7 determine everything, and just because there are also ballots  
8 that will be counted in the traditional cutoff date that don't  
9 get fully mail verified, there is no reason to add more people  
10 to that stack of unverified ballots by shortening the  
11 verification period effectively by having same-day  
12 registration? From a policy point of view, if the State  
13 decides they just don't want to do that, are you saying once  
14 they have done it, they've got to go through *Anderson-Burdick*  
15 to justify taking it away?

16           **MS. RIGGS:** Yes. I mean, the State could say  
17 conducting elections is time consuming and awful. From a  
18 policy standpoint, I don't want to do it anymore. And that's  
19 not constitutional.

20           In this case, I think the Sixth Circuit's discussion  
21 in *OFA II* is useful. There one of the justifications was poll  
22 workers are just too busy in the three days before an election  
23 to be offering early voting. I mean, these poor poll workers,  
24 can't we give them a break? And that's the type of  
25 justification that when there is a real, substantial burden on

1 voters, doesn't -- that justification doesn't survive under the  
2 sliding scale test.

3 **THE COURT:** I understand.

4 **MS. RIGGS:** And the final point I will make on that  
5 is 48 hours -- I mean, the law was designed with -- the  
6 same-day registration law was designed with the -- with  
7 safeguards that Mr. Donovan talked about, and one of them was  
8 mailing out verifications within 48 hours. These are voters  
9 that live on military bases and college campuses and they  
10 graduate at the end of the semester, and if you don't mail out  
11 those verification statuses right away, it is going to change  
12 the nature when you are analyzing SDR versus non-SDR.

13 The Fourth Circuit was clear in its decision that  
14 administrative inefficiencies can't be a justification for the  
15 lawsuit. To the extent that -- I mean, this was a workable  
16 law. Counties did it right. If some counties did it wrong,  
17 that's not a reason then to say that the burdens created by the  
18 law on voters survive constitutional scrutiny.

19 I have slides on out-of-precinct and early voting,  
20 but I think you can look through those on your own. There is  
21 evidence --

22 **THE COURT:** Do I have your set of slides, or are you  
23 going to --

24 **MR. DONOVAN:** They are in the same --

25 **THE COURT:** They are in my notebook?

1           **MS. RIGGS:** Yes.

2           **THE COURT:** Thank you very much.

3           **MS. RIGGS:** Thank you, Your Honor.

4           **THE COURT:** All right. Thank you.

5           **MR. SPIVA:** Good afternoon. Bruce Spiva for the Duke  
6 Intervenor Plaintiffs. First, I just want to say it's been a  
7 pleasure appearing before you these past three weeks, and I  
8 just wanted to express my thanks, along with my colleagues,  
9 Josh Kaul, Amanda Callais, and John Hale.

10           **THE COURT:** It's been a pleasure to have all of you  
11 here.

12           **MR. SPIVA:** Thank you.

13           As Your Honor knows, the Duke Intervenor Plaintiffs  
14 represent young voters. We challenged H.B. 589 on two grounds.  
15 The first, the challenged provisions place substantially and  
16 unjustified burdens on voting rights, including, in particular,  
17 the voting rights of young voters.

18           Those burdens --

19           **THE COURT:** Are any of your Plaintiffs under 18?

20           **MR. SPIVA:** Are any of our Plaintiffs under 18?

21           **THE COURT:** Yes.

22           **MR. SPIVA:** No, Your Honor.

23           **THE COURT:** So they are all 18 or older?

24           **MR. SPIVA:** Yes, they are.

25           The burdens on our Plaintiffs and young voters must

1 be balanced against the precise asserted interests of the State  
2 of North Carolina in making the changes to the voting laws, and  
3 the State's asserted interests in repealing or curtailing the  
4 voting methods eliminated by H.B. 589 are either insubstantial  
5 and/or unsupported by any evidence; and, accordingly, the  
6 provisions, we believe, fail under the *Anderson-Burdick*  
7 balancing test and violate the Fourteenth Amendment.

8           The second basis for our challenge to H.B. 589 is  
9 that the State also intentionally discriminated against young  
10 North Carolinians. The provisions of H.B. 589 intentionally  
11 burdened young citizens' right to vote in violation of the  
12 Twenty-sixth Amendment. The Twenty-sixth Amendment prohibits  
13 not only the outright denial of the right to vote of those  
14 18 years or older, but the abridgment, which is the term used  
15 in the amendment itself, of that right by any state on account  
16 of age. And as I will discuss in more detail below, abridge is  
17 a broader term than deny and is intended to prevent the  
18 curtailment of the franchise for those 18 years older.

19           Let me begin with the *Anderson-Burdick* argument, and  
20 I will try not to repeat the -- some of the legal framework  
21 that my colleague, Ms. Riggs, has so ably already stated, but  
22 there are a couple of things I would like to just emphasize.

23           And as I know Your Honor has heard, Courts making  
24 this determination must apply a balancing test that weighs the  
25 severity of the burden imposed on the exercise of the franchise

1 against the precise interests put forward by the State as  
2 justifications for the burden imposed by the rule. This, of  
3 course, is out of the *Anderson-Burdick* cases.

4           The State's asserted rationales for adopting a  
5 restriction that imposes burdens on voters are subject to a  
6 flexible sliding scale, as you've heard. The more severe the  
7 burden, the stricter the Court's review.

8           But it is critical, I think, to emphasize here that  
9 voters do not need to show that they are prohibited from voting  
10 altogether, only that they -- and I am quoting from the *Obama*  
11 *for America v. Husted* case from the Sixth Circuit in 2012.  
12 They only have to show that they "have few alternate means of  
13 access to the ballot."

14           And the *OFA* case, Your Honor, was the case that  
15 required Ohio to keep open early voting in the final three days  
16 of the election for nonmilitary voters, and Ohio had only  
17 adopted that method of voting in 2005, partly in response to  
18 the long lines in the 2004 general election, and that -- the  
19 Court found that that method had been -- had come to be relied  
20 upon particularly by women, African-Americans, and lower income  
21 people. I would also briefly note the *Ohio State Conference*  
22 case, the one that has been mentioned a couple of times that it  
23 was vacated based on a settlement, but the legal principles of  
24 the case are still perfectly valid, obviously not binding on  
25 this Court, but persuasive.

1           That Court said, "The Supreme Court" -- I'm  
2 quoting -- "has not required absolute certainty in predicting  
3 how many voters would be prevented from voting by laws that  
4 impose burdens on the right to vote." And that case, of  
5 course, also involved the elimination of early voting  
6 opportunities, particularly what was called in Ohio the Golden  
7 Week, where one could same-day register and vote at the same  
8 time. Now, Ohio had 35 days of early voting at that point.  
9 The Golden Week occurred at the beginning of that period.

10           One other -- I mention the *Veasey v. Perry* case  
11 simply because that case out of the Southern District of Texas  
12 said that even a burden which is considered perhaps not as  
13 severe is subject to something more than rational basis review.

14           The second point I would make about the legal  
15 framework is that it is especially difficult for the State to  
16 justify a restriction that limits political participation by an  
17 identifiable political group whose members share a particular  
18 viewpoint, associational preference, or economic status. And  
19 so, here, where we have an argument that this burden is lower  
20 income people and African-Americans and young people, and  
21 particularly where we have had some hints that perhaps this was  
22 done for partisan reasons, I would just like to say that at  
23 least the position of the Duke Intervenors is that would be a  
24 patently unconstitutional basis to try to defend the burdens  
25 imposed here.

1           In *Anderson*, the Supreme Court struck down a law that  
2 affected only those voters who supported a minor candidate  
3 that, Your Honor may recall, John Anderson, who ran as a  
4 third-party candidate in 1980, comprising only about 6 percent  
5 of the electorate. And the Court said, and here I'm going to  
6 quote again, Voters have rights, quote, regardless of their  
7 political persuasion to cast their votes effectively.

8           **THE COURT:** How are the 18-and-over young voters  
9 burdened by the reduction in the preregistration period?  
10 That's your claim; right?

11           **MR. SPIVA:** That is one on our claims, yes, Your  
12 Honor.

13           **THE COURT:** As to that claim, how are they injured?

14           **MR. SPIVA:** We have an enormous wealth of evidence  
15 that they are directly burdened because registration is a key  
16 hurdle for this group, and if they go through the  
17 preregistration process, they are more -- less likely to trip  
18 on that tripwire.

19           **THE COURT:** So when Florida eliminated registration  
20 for 15-year-olds who could get a license and then I guess moved  
21 it, I don't recall exactly, but it went to 16 or older, that  
22 would be an *Anderson-Burdick* question as to whether they could  
23 do that, in your view, as to that claim?

24           **MR. SPIVA:** My understanding of what happened in  
25 Florida, Your Honor, and this is coming from our expert

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1 Dr. Hillygus, is that they actually -- it was triggered by the  
2 date you could get your license, and when that date was  
3 changed, there were some 15-year-olds, who had previously been  
4 able to preregister, lost that ability to do that.

5 **THE COURT:** So 15-year-olds could no longer  
6 preregister if they were able to obtain a license?

7 **MR. SPIVA:** That's correct, Your Honor. But to  
8 answer your question directly, potentially that could be  
9 subject to an *Anderson-Burdick* balancing test.

10 **THE COURT:** When would any state legislature's change  
11 in the timing of when preregistration can occur ever not  
12 implicate an *Anderson-Burdick* claim under your analysis?

13 **MR. SPIVA:** Well, I don't know that I can say that it  
14 would ever not implicate. I mean, certainly, I could imagine  
15 there would be plenty of situations where it would not be a  
16 successful challenge.

17 **THE COURT:** But every time a state legislature  
18 decides to move a preregistration date, under your analysis, it  
19 would always have to be evaluated under *Anderson-Burdick*.

20 **MR. SPIVA:** Well, if it were challenged. That would  
21 be the framework the Court would use. I mean, somebody can  
22 bring a lawsuit based on anything. I'm not saying that if  
23 somebody brought it based on 5-year-olds, that they would get  
24 very far; but, yes, they could bring a challenge and, yes, I  
25 would submit that wouldn't be a very successful one.

1           What we have here, of course, is three years of  
2 preregistration, 152,000 North Carolinians having used that  
3 method, many of them staying on the rolls; and our experts have  
4 testified that when you have preregistration, they stay on the  
5 rolls at a higher rate. They are better able to reregister  
6 when they need to.

7           **THE COURT:** I understand all of the policy reasons  
8 for doing it. I heard a lot of policy reasons for all of these  
9 laws, many of which are usually presented to a legislature to  
10 determine whether it is a good thing or a bad thing.

11           As to preregistration, what cases do you have where a  
12 Court has held that what a state does prior to the time  
13 somebody turns 18 implicates the Twenty-sixth Amendment?

14           **MR. SPIVA:** I don't have any case I can cite you  
15 where a Court has addressed that precise issue, but the  
16 Twenty-sixth Amendment and, of course, the *Anderson-Burdick*  
17 analysis under the Fourteenth Amendment basically looks to  
18 whether -- under *Anderson*, whether it burdens the right of --

19           **THE COURT:** I understand that. My -- I know about  
20 cases where they move a precinct and college kids then may not  
21 be able to vote, but those are kids who are already able to  
22 vote.

23           My question is where has a Court recognized a  
24 Twenty-sixth Amendment right based on something happening  
25 before the -- anybody turns 18 years old? Is there such a case

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1 yet?

2 **MR. SPIVA:** No. Directly to answer Your Honor's  
3 question, I don't believe so, but I do want to --

4 **THE COURT:** Has anybody ever challenged the  
5 registration requirements as being insufficient for somebody  
6 properly registered by the time they are 18?

7 **MR. SPIVA:** You mean preregistration requirements?

8 **THE COURT:** Yes, in any state.

9 **MR. SPIVA:** Not that I know of, Your Honor. I do  
10 want to, though, I guess take a little bit of issue with the  
11 premise that something that happens before they are 18, because  
12 the something that happens here actually has a direct and  
13 verifiable effect on --

14 **THE COURT:** I am not saying it doesn't. I am just  
15 asking has anybody ever addressed this issue?

16 **MR. SPIVA:** To my knowledge, Your Honor, no, I don't  
17 know of any cases.

18 **THE COURT:** So if somebody turns 18 on November the  
19 1st, and the cutoff for registration in a state is  
20 October 25th, and then election is November 2, that person  
21 should be eligible to vote under the Twenty-sixth Amendment  
22 because they will be 18 by the day of the election?

23 **MR. SPIVA:** Yes, Your Honor.

24 **THE COURT:** So your point is there needs to be a  
25 mechanism where they can get registered to vote for that?

1           **MR. SPIVA:** Well, yes, although our challenge to the  
2 preregistration period, as Your Honor knows, is not -- North  
3 Carolina does provide for 17-year-olds who are going to be 18  
4 by Election Day --

5           **THE COURT:** I understand.

6           **MR. SPIVA:** -- to vote.

7           **THE COURT:** If some state says, well, in my  
8 hypothetical, we are going to allow you to register 60 days  
9 before the election, and the state doesn't allow 16-year-olds  
10 to do it, what's to prevent that situation from being subject  
11 to the same kind of lawsuit and the same problems I mentioned  
12 with everybody else; that is, why couldn't somebody bring that  
13 claim?

14           **MR. SPIVA:** Well, I think they could. I mean, if I  
15 understand Your Honor's question correctly, if I'm a  
16 17-year-old, I'm going to be 18 by Election Day, so I have an  
17 absolute Constitutional right --

18           **THE COURT:** No, I want to say -- yeah, you're 17.  
19 You are going to be 18 by Election Day, but you want to be able  
20 to register when you're 16. And the state says, no, we are  
21 going to have a 60-day rule. That's our window. Can they sue  
22 and say, I am entitled to have an earlier date? This is -- if  
23 you don't do this, we'll marshal our evidence. You're going to  
24 lose 50,000 people.

25           **MR. SPIVA:** Right. Well, I guess I want to draw,

1 first of all, a distinction between -- and it's the same  
2 distinction Your Honor has heard, you know, throughout the  
3 morning with respect to some of these other provisions between  
4 a state adopting a new voting regime where they haven't had  
5 preregistration before and they are trying to decide do we  
6 adopt this and a state having already adopted it, decided it is  
7 a good idea --

8 **THE COURT:** So the burden to you is the same as  
9 Ms. Riggs, I think, said, and, that is, it's the taking away of  
10 something I previously had?

11 **MR. SPIVA:** Yes, I do think that's critical. I think  
12 it is a critical distinction. I wouldn't shy away, though,  
13 from saying there may be instances -- I don't know if it would  
14 be in the preregistration context, but maybe it's in the early  
15 voting context -- where there could be an absence of a way of  
16 voting. And, for instance, Virginia's election laws have been  
17 challenged, and the -- one of the claims is their lines are too  
18 long in the last Presidential election. Their lines are too  
19 long. They don't have early voting. They don't have a number  
20 of these provisions, but if the parties prevail in Virginia,  
21 that potentially could be --

22 **THE COURT:** So there is a lawsuit in Virginia where  
23 the contention is that the State must adopt early voting to  
24 avoid the long lines?

25 **MR. SPIVA:** Well, the contention is not so specific

1 as to what the State must do to cure the constitutional  
2 violation, but the claim is that it's unconstitutional to have  
3 a voting system that allows the lines to stretch out two to  
4 four hours during a Presidential election where people are  
5 standing in line until --

6 **THE COURT:** Okay. Do you have any burden you are  
7 alleging other than the taking away of the previous regime of  
8 16-year-old registration?

9 **MR. SPIVA:** With respect to the preregistration  
10 issue, Your Honor?

11 **THE COURT:** Yes.

12 **MR. SPIVA:** I think the burden -- of course, I would  
13 point again to the evidence that we presented through  
14 Dr. Hillygus and Dr. Levine that that will have an impact on  
15 18-year-olds and older voting basically, registering --

16 **THE COURT:** I was a little interested in some of the  
17 testimony where you had some pretty highly educated  
18 college-bound people saying that they were unable to register  
19 because they didn't realize there was a time they had to do it;  
20 and in one case, her father said, hey, you need to get on this,  
21 I think you need to register. So it seemed to me she wasn't  
22 even really -- it wasn't her radar screen to pay attention to  
23 it. So your argument is she's a disenfranchised voter because  
24 of the elimination of the preregistration?

25 **MR. SPIVA:** Well, yes, and also for her, of course,

1 the elimination of the same-day registration compounded the  
2 problem because had she had [sic] that mistake, which is a very  
3 common mistake -- we had lots of testimony by Dr. Levine and  
4 others about civic literacy and the lack of knowledge of  
5 these --

6 **THE COURT:** Are you contending that the current  
7 post-H.B. 589 regime for registration prior to age 18 is  
8 burdensome in some respect?

9 **MR. SPIVA:** The post-589?

10 **THE COURT:** Yes, the current regime, is it burdensome  
11 in some respect for people who are not yet 18 who will be  
12 before the next upcoming election?

13 **MR. SPIVA:** Our claim is with respect to -- you know,  
14 it is on behalf of people who are 18 and over, but it's  
15 basically saying that the denial of preregistration for 16- and  
16 17-year-olds impacts the ability --

17 **THE COURT:** I understand. How do the 18-year-olds  
18 have standing to raise this claim?

19 **MR. SPIVA:** Well, we saw -- of course, Ms. Cohen, I  
20 think, was the person that you were referring to. You know,  
21 she was unable to vote in the last election because she hadn't  
22 had the opportunity to preregister.

23 We also heard testimony from Louis Duke and Josue  
24 Berduo and others that they actually have used this as a method  
25 of organizing. So they have essentially -- you know, as

1 individuals, they have a claim that this is going to impact  
2 their ability to organize and Get Out the Vote, and this is an  
3 issue that I think Your Honor addressed during the preliminary  
4 injunction phase and found that that was sufficient to state  
5 their ability to have standing.

6           Let me, I guess, move away from the -- just laying  
7 the legal framework and maybe to the application here of the  
8 *Anderson-Burdick* test. You know, as a general matter,  
9 Plaintiff Intervenors' experts have submitted reports and  
10 provided testimony at trial that persuasively make the case  
11 that the multiple restrictions that H.B. 589 places on voting  
12 and registration methods used by young people is and will  
13 continue to substantially burden younger voters' ability to  
14 exercise their right to vote. Those reports and testimony --

15           **THE COURT:** The restrictions it places on them by  
16 taking away the things that it used to rely on; is that what  
17 you mean by that?

18           **MR. SPIVA:** Well, I think --

19           **THE COURT:** What restrictions do 589 place  
20 affirmatively on young voters?

21           **MR. SPIVA:** Well, I think the taking away of same-day  
22 registration --

23           **THE COURT:** So the restriction is the removal?

24           **MR. SPIVA:** Yes. You had a regime, Your Honor, that  
25 was adopted over the past 15 years, a number of different

1 methods of voting that young people, like African-Americans and  
2 Latinos, came to rely upon in disproportionate numbers, and the  
3 taking -- now the taking away of that is burdening their  
4 ability to vote.

5           And these stand pretty much unrebutted, these  
6 expert -- the expert testimony. Most of the Defendants'  
7 experts really say nothing at all about H.B. 589's effects on  
8 young voters.

9           **THE COURT:** How do I know what an appropriate remedy  
10 is for your clients?

11           **MR. SPIVA:** Well, the remedy we seek, Your Honor, is  
12 first of all, striking down H.B. 589 as unconstitutional and  
13 the reinstatement of the prior voting system. That's the  
14 remedy that we seek. It was a remedy that resulted in North  
15 Carolina moving in 2000 from 43rd in the nation in terms of  
16 young voter registration to 8th in the nation in 2012 and from  
17 31st to 10th in terms of young voter turnout, and so we  
18 basically want to replace the new regime with what was in place  
19 before.

20           It wouldn't stop the legislature from passing  
21 something new, and it would be subject potentially to challenge  
22 if it burdens -- unduly burdens the right of young voters or  
23 African-Americans to vote and they don't have a sufficient  
24 justification for that, but that's the remedy that we would  
25 seek and think is amply justified by the record in this case.

1 I don't know if Your Honor feels like you've heard  
2 enough about preregistration. I actually was going to begin  
3 with a discussion of that, but I can move to some of the  
4 other --

5 **THE COURT:** I am interested in the other claims.

6 **MR. SPIVA:** Okay.

7 **THE COURT:** I think I have what I need on  
8 preregistration.

9 **MR. SPIVA:** Okay.

10 **THE COURT:** To the extent your arguments are the same  
11 as what I have heard, particularly with Ms. Riggs, then you can  
12 rely on -- feel free to rely on that.

13 **MR. SPIVA:** I will do that, Your Honor. The one  
14 thing I did want to mention in terms of preregistration,  
15 because I don't think it has been mentioned before -- but I did  
16 want to also raise the issue about the State Board of Elections  
17 and the 2,700 17-year-olds who appeared at the DMV and were not  
18 offered the opportunity to register.

19 The State Board of Elections' executive director  
20 acknowledged the complexity of determining whether a  
21 17-year-old is eligible to vote under the post-H.B. 589 regime.  
22 That's complexity and confusion that did not exist with  
23 preregistration, and she conceded that the current  
24 post-H.B. 589 law allowing only 17-year-olds to register is  
25 confusing and a complicated process; and, as a result of that,

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1 that led her to instruct the DMV not to register 17-year-olds  
2 for a period of time. Over 2,726 individuals --

3 **THE COURT:** Was that the law before -- was it 2009  
4 when then preregistration was --

5 **MR. SPIVA:** It was enacted in 2009 and then went into  
6 effect January 1 --

7 **THE COURT:** So before 2009, was the shape of the  
8 world for 16-, 17-year-olds the way it is now in terms of the  
9 complexity of figuring out when you can register? I mean, in  
10 other words, has North Carolina returned to the pre-2009 state  
11 of affairs?

12 **MR. SPIVA:** You know, I learned long ago that I  
13 shouldn't answer a question that I'm not positive -- I am not  
14 sure of the answer to that question. I do know that before  
15 2009, and certainly during the period that this was in effect,  
16 and certainly now after H.B. 589, that 17-year-olds were  
17 supposed to be presented -- these individuals had a right, I  
18 think under the NVRA, to be offered these preregistration --  
19 registration services, that the State was legally obligated to  
20 do so, and they didn't.

21 And I think we offered the letter that documents that  
22 into evidence. I think it was Plaintiffs' Exhibit 726.

23 I want to speak for a few minutes about same-day  
24 registration. Drs. Levine and Kawashima-Ginsberg also found in  
25 their report, and Dr. Levine testified, that young voters in

1 North Carolina relied much more heavily on same-day  
2 registration than older voters and that limiting it burdens the  
3 youth vote significantly.

4 Dr. Levine testified that in 2012, young voters  
5 comprised 8.99 percent of all of North Carolina voters, but  
6 20.58 percent of those who utilized SDR. Moreover, his  
7 analysis of national and historical data demonstrates that  
8 same-day registration boosts youth turnout.

9 In addition, over 25 percent of young voters who cast  
10 provisional ballots in the 2012 Presidential election in North  
11 Carolina did so because they were either in the wrong precinct  
12 or had reported moving, and so you see how these things worked  
13 together.

14 Now there is no out-of-precinct voting. There is no  
15 same-day registration. You know, one could have cured the  
16 other if one had been in place in 2014, and young voters were  
17 3.81, almost four, times more likely to have their provisional  
18 ballots rejected due to out of precinct -- voting out of  
19 precinct, and that's again from the Levine report.

20 And the fact witnesses again confirmed that our  
21 experts' statistical analysis is based on real facts and not  
22 just some academic theory. Ms. Nadia Cohen, who wasn't  
23 registered in time, we talked about that. Mr. William  
24 Kittrell, he registered but moved counties and didn't realize  
25 he needed to reregister. Two North Carolina citizens who were

1 eligible to vote, Mr. Kittrell and Ms. Cohen, would have been  
2 able to exercise their right to vote had SDR still been in  
3 place in 2014. Instead, they were completely denied the  
4 ability to vote.

5           Had H.B. 589 been the law in 2012, Louis Duke, one of  
6 the Plaintiffs, would have been denied the right to vote  
7 despite having registered before the close of books; and as you  
8 will recall, Louis Duke was one of the many people who  
9 apparently fell victim to the State Board of Elections' flawed  
10 mail verification system, a system that really does nothing to  
11 prevent fraud, but which has prevented a lot of law-abiding  
12 eligible North Carolina voters from exercising their right to  
13 vote.

14           Duke, West, and Josue Berduo spoke about the  
15 additional outreach efforts they had to undertake as a result  
16 of the repeal of same-day registration.

17           **THE COURT:** How would you characterize the burden  
18 that H.B. 589 places on persons who are in your -- I guess in  
19 your young voter group in terms of what they have to do to  
20 properly register to become a voter in North Carolina? How  
21 would you characterize that burden?

22           **MR. SPIVA:** Well, I mean, there are many traps they  
23 have to run. One, they have to know, I guess, that there is  
24 this new regime. And with the multiple changes that were made,  
25 you know, that's actually -- and we've heard expert testimony

1 on that, that's actually difficult -- we've heard practical and  
2 expert testimony that's actually a difficult thing to do. It  
3 is harder than it might sound if you are 20 or 30 years older  
4 and, you know, you've lived in the same house for 20 years.  
5 You are not going to run into a lot of the traps of, well, I  
6 moved to start school and so -- and my dorm doesn't accept  
7 mail, so the mail verification gets bounced and I can't vote  
8 when I go because there is no more same-day registration.

9           You know, so it's that type of thing. First, you  
10 have to know; and, second, even if you know, you may still run  
11 into one of those traps.

12           And so, you know, I harken back to something that  
13 Mr. Russ said. You do take the voters as they are. One can  
14 say, look, you know, you should have been a better citizen.  
15 You should have known all of these complicated rules. You  
16 should have -- and some people do and still have problems  
17 voting, but what the law --

18           **THE COURT:** So I still don't know what your answer  
19 is. How would you characterize it? Is it complicated? Is it  
20 hard? Is it Herculean? Is it just a question of knowing what  
21 the law is? Is it a question of being interested enough to go  
22 read the law? I mean, how do you describe it in your words?

23           **MR. SPIVA:** Well, I think it is all of those things,  
24 Your Honor, but I think the question under *Anderson-Burdick* is  
25 is there a burden here. And one of the things to look to, one

1 of the primary things is, you know, have people become reliant  
2 on these modes of voting and will taking it away result in, you  
3 know -- a significant number is what we have shown. You don't  
4 really have to show a significant number -- but a significant  
5 number of people not being able to exercise the franchise.

6 I mean, these are people who are over 18, they are  
7 eligible North Carolina citizens, and they are not able to  
8 vote. And so one can always say, well, it was their fault  
9 because if they had known that it was 25 days out and they had  
10 gone to the DMV, if they could, and registered the minute they  
11 hit the college campus, if they're a student, or if they are  
12 not a student, the minute they moved from their parents'  
13 house -- but that's always true. You know, if you were a poor  
14 person in 1964, a poor African-American, if only you had gotten  
15 the money for the poll tax, you know, you could have voted.

16 **THE COURT:** Well, that strikes me as a little  
17 different. I mean, that seems to me that somewhere there's got  
18 to be a baseline of a certain amount of effort that every  
19 American is expected to put in to the effort to vote, whatever  
20 that level is. So my question's really designed toward what is  
21 that level, and why is it that younger people are being  
22 burdened without this fail-safe preregistration?

23 **MR. SPIVA:** Right. Your Honor, what I would say -- I  
24 guess two things. One is that that effort that needs to go  
25 into voting should be no more than is justified by some

1 interest in the State in electoral regulation. They shouldn't  
2 be placing burdens on people's ability to vote simply to -- for  
3 no reason, and I submit it is not for no reason here. When I  
4 get to the intent section, I will talk about that.

5 **THE COURT:** Why don't we -- if we can, can we move to  
6 that? I am getting a little concerned about time for this  
7 afternoon. I haven't even heard from the Defendants.

8 **MR. SPIVA:** Sure. Understood. I will -- I was going  
9 to talk a little bit about early voting and voter ID, but, you  
10 know, we submitted our papers. We'll have our proposed  
11 findings of fact, and so I will just -- I will rest on that in  
12 terms of the other burdens.

13 I do want to say one more thing on *Anderson-Burdick*,  
14 and then I will move directly to intent, and, that is, that the  
15 burdens from the challenged voting restrictions, you know, must  
16 be measured cumulatively and not in isolation, and Drs. Levine  
17 and Kawashima-Ginsberg have found that the various restrictions  
18 imposed by H.B. 589 have had and will have cumulatively  
19 negative effects on youth registration and turnout. They find  
20 that introducing a number of restrictions at once is related to  
21 lower turnout among youth voters; in other words, the whole is  
22 greater than its parts.

23 The other thing is that it's long term. Because  
24 voting is habitual, because once you've voted, you're on lists  
25 and people try to solicit your vote so there's more likelihood

1 that you're going to keep voting, but that was another  
2 critical, I think, finding from them that I wanted to mention.

3           Let me move to the Twenty-sixth Amendment. The text  
4 of the Twenty-sixth Amendment, which was modeled after the  
5 Fifteenth and Nineteenth Amendments, indeed is basically  
6 verbatim, forbids more than outright denials of the right to  
7 vote. The amendment reads, "The right of citizens of the  
8 United States, who are 18 years of age or older, to vote shall  
9 not be denied or abridged by The United States" Constitution  
10 [sic] "by any State on account of age."

11           Congress, quite self-consciously, Your Honor, modeled  
12 the language on the Fifteenth and Nineteenth Amendments, and  
13 here I am quoting from the legislative record of the  
14 Twenty-sixth Amendment. It, quote, embodies the language and  
15 formulation of the Nineteenth Amendment, which disenfranchised  
16 women, and that of the Fifteenth Amendment, which forbade  
17 racial discrimination at the polls." And the text proscribes,  
18 not only the outright denial, but also the abridgment, which  
19 literally -- and this is from the California Supreme Court  
20 case, but you can get it from Webster's, I mean, abridge means  
21 diminish, curtail, deprive.

22           And the Framers used those other amendments as a  
23 model because beyond simply granting the right to vote of all  
24 citizens between the ages of 18 and 21, they sought to  
25 ensure -- and I am quoting again from the legislative

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1 history -- quote, that citizens who are 18 years of age or  
2 older shall not be discriminated against on account of age, end  
3 quote, in the voting context.

4           It was actually intended to encourage young voters to  
5 participate. It was passed and ratified with huge bipartisan  
6 majority support in Congress, and it had the fastest  
7 ratification of any amendment in history, ratified by 38  
8 states, including North Carolina.

9           And, quote, the goal was not merely to empower voting  
10 by our youths, but was affirmatively to encourage their voting  
11 through the elimination of unnecessary burdens and barriers so  
12 that their vigor and idealism could be brought within rather  
13 than remain outside lawfully constituted institutions." And  
14 that was a quote from the New Jersey Supreme Court in the  
15 *Worden v. Mercer* case.

16           A lot of the early cases, Your Honor, on the  
17 Twenty-sixth Amendment came out of state supreme courts often  
18 because they involved restrictions, some of the type that we  
19 have seen proposed in North Carolina about residency of young  
20 voters.

21           Again quoting from the Senate report for the  
22 Twenty-sixth Amendment, quote, indicates that Congress  
23 disapproved of treatment that it feared would give youth,  
24 quote, less of a sense of participation in the election system,  
25 quote, and, quote, might well serve to dissuade them from

1 participating in the election, quote, a result inconsistent  
2 with the goal of encouraging greater political participation on  
3 the part of the young.'" "

4           And consistent with that broad language and history,  
5 Courts interpreting the Twenty-sixth Amendment have explained  
6 that it guards against both blatant and subtle forms of  
7 discrimination. Again, the *Jolicoeur* case out of California  
8 says the Twenty-sixth Amendment "nullifies sophisticated as  
9 well as simple-minded modes of discrimination. It hits onerous  
10 procedural requirements which effectively handicap exercise of  
11 the franchise although the abstract right to vote may remain  
12 unrestricted...."

13           One more from the Colorado Supreme Court, Your Honor.  
14 History and reason that the -- that based on history and reason  
15 that the Twenty-sixth Amendment's, quote, prohibition against  
16 denying the right to vote to anyone 18 years or older by reason  
17 of age applies to the entire process involving the exercise of  
18 ballots and its concomitants."

19           The Supreme Court has considered the scope of the  
20 Twenty-sixth Amendment on only one occasion. That was *Symm v.*  
21 *United States*. The Supreme Court summarily affirmed a District  
22 Court's conclusion in line with the cases discussed a minute  
23 ago that a voter registration practice that made it more  
24 difficult for students than for other voters to register was  
25 unconstitutional.

1           The District Court decision *United States v. Texas*,  
2 which the Supreme Court was summarily affirming, relied on the  
3 history of the Twenty-sixth Amendment and Supreme Court  
4 precedent holding that, quote, 'Fencing out' from the franchise  
5 a sector of the population because of the way they may vote is  
6 constitutionally impermissible. 'The exercise of the rights so  
7 vital to the maintenance of democratic institutions' cannot  
8 constitutionally be obliterated because of the fear of the  
9 political views of a particular" --

10           **THE COURT:** What is your evidence and claim as to the  
11 Twenty-sixth Amendment here?

12           **MR. SPIVA:** Yes. Well, I've already talked about  
13 some of the ways in which it disproportionately burdens young  
14 voters, but it is critical to remember that H.B. 589 targets  
15 young voters on its face. The final bill removed  
16 preregistration as well as mandatory high school voter  
17 registration drives, a law which, as I've discussed, benefited  
18 only North Carolina's young voters, and the repeal of which  
19 burdens only young voters and cannot seriously be explained by  
20 any rationale other than open hostility to youth voting.

21           Further, unlike the original version of H.B. 589  
22 passed in the House, the final version of H.B. 589 removed a  
23 part of the previous voter ID bill that was aimed specifically  
24 at young voters: The option to use a public university student  
25 ID as an acceptable form of photo identification.

1           There is also no question that the General Assembly  
2 knew about the impact that H.B. 589 would have on young voters.  
3 Your Honor heard testimony from Reverend Barber that during the  
4 debates over the original ID bill, North Carolina's young  
5 people sat in the gallery with tape over their mouth saying,  
6 you are trying to shut us out of the process.

7           Emails introduced into evidence at Plaintiffs'  
8 Exhibit 69 and 72 show that a sponsor of H.B. 589 and other key  
9 legislators in its passage specifically asked for data by age  
10 regarding the use of same-day registration and out-of-precinct  
11 voting and photo ID possession, and this information was  
12 readily available and widely discussed, in any event.

13           Once the full bill version of H.B. 589 was  
14 introduced, Senator Stein, who testified here -- that he told  
15 legislators about college students' use of some of the  
16 challenged provisions, but rather than take those concerns  
17 seriously, Your Honor, the General Assembly rushed through the  
18 full bill version of H.B. 589 with an irregular and what's  
19 already been --

20           **THE COURT:** That part I've heard a lot about.

21           **MR. SPIVA:** You got that. Okay.

22           **THE COURT:** What else do you have that's specific?  
23 I'm keeping my eye on the clock because the --

24           **MR. SPIVA:** Understood.

25           **THE COURT:** -- forty minutes that both you and Ms.

1 Riggs were going to use are now well over an hour and ten  
2 minutes. I am trying to keep my eye on the clock.

3 **MR. SPIVA:** Sure. I'm sure the Court remembers the  
4 evidence about the role that Jay DeLancy played in the  
5 development of the Senate Bill 666 and Senate Bill 667, each of  
6 which included a proposal to prevent parents from claiming a  
7 tax deduction for a child registered at a different address,  
8 and his communications to legislators about the need to pass a  
9 student voting restriction and the possibility that such  
10 legislation would shift the landscape of college-town voting.

11 SB667 was sponsored by six senators who later voted  
12 for H.B. 589. And SB666 also included proposals to, quote,  
13 enhance observer rights, eliminate SDR, and reduce early voting  
14 to ten days. It is cited in the declaration of Carolyn  
15 Justice, who is a former Representative, a declaration the  
16 Defendants submitted as a precursor to H.B. 589.

17 Further, in the wake of H.B. 589, the State has  
18 continued to discriminate against young voters. Not only did  
19 the SBOE direct the DMV not to offer registration to eligible  
20 17-years-old, which I talked about a moment ago, but early  
21 voting sites have been moved off of several college campuses,  
22 and one of those moves resulted in a Court finding of an intent  
23 to discriminate against young voters, and that it's no  
24 coincidence that these actions took place within a year or so  
25 of the enactment of H.B. 589. And we would submit all of that

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1 is relevant to the issue of intent, Your Honor.

2           And so with that, I think I would conclude, and we  
3 would request that the Court find that the provisions of  
4 H.B. 589 discriminate against youth voters and strike them down  
5 under the -- both the Fourteenth Amendment and the Twenty-sixth  
6 Amendment.

7           **THE COURT:** Thank you very much. Are you prepared to  
8 go forward, or do you want a 10-minute break?

9           **MR. FARR:** We'll take a ten-minute break. I will  
10 tell you that our presentation -- we've thought about it, and  
11 we are not going to take as long to make our argument as we  
12 thought.

13           **THE COURT:** You argue as you want. We'll see where  
14 we are at 4:00.

15           **MR. FARR:** All right.

16           **THE COURT:** I would like to wrap it up today, if we  
17 can. We could go on all week on this next week probably.

18           **MR. FARR:** We prefer not to do that, Your Honor.

19           **MR. DONOVAN:** That's something we agree on.

20           **THE COURT:** Let's take a 10-minute break and then  
21 we'll come back.

22           (The Court recessed at 2:41 p.m.     )

23           (The Court was called back to order at 2:55 p.m.)

24           **THE COURT:** Mr. Farr, I know I said 4:00. I would  
25 like to finish this afternoon, but you don't need to feel

1 constrained. We've spent a lot of time with Plaintiffs, and I  
2 want to make sure you have adequate time to make whatever  
3 arguments the Defendants want to make.

4 **MR. FARR:** Thank you, Your Honor. We certainly do  
5 not feel constrained by the Court, but having been here for  
6 three weeks, I am feeling other aspects of constraints.

7 Your Honor, you've heard a lot of evidence, and  
8 you've paid very careful attention to the evidence; and with  
9 all the expert witnesses in this case, there has even been a  
10 bunch of, shall I say, legal argument going on back and forth  
11 between experts and lawyers. So we've kind of decided not to  
12 go over the whole case. We are not going to go over point by  
13 point what's been argued today by the Plaintiffs. We are just  
14 going to try to hit what we think are the high spots for the  
15 defense of the statute.

16 What's really at issue in this case is the authority  
17 of the states under the election clause and Congressional  
18 intent under Section 2, to what extent did Congress intend to  
19 take over a state's right to set election rules by way of  
20 Section 2.

21 I think there's lots of people in the courtroom, and  
22 I think it is very important for everyone to understand that as  
23 far as we know -- I stand to be corrected during rebuttal, but  
24 we have not found any case where any of the election laws  
25 established by VIVA have been found illegal under either

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1 Section 2 under the Fourteenth Amendment or because they have  
2 been deemed examples of intentional discrimination.

3 Now, Section 2 does not allow proportional  
4 representation, and I think that in the statute that that  
5 statement is made in connection with representation in a  
6 legislature, but I think it applies also to the concept of  
7 minorities are not entitled to proportional representation  
8 either in turnout or in registration.

9 Your Honor, we have gone over and over throughout  
10 this case about what happened in 2014. Again, I stand to be  
11 corrected, but I can certainly say that I am not aware and we  
12 are not aware of a Circuit Court decision or a Supreme Court  
13 decision in a vote-denial case where a practice or procedure  
14 was enacted, minority turnout registration increased, and the  
15 state was then found guilty of a Section 2 violation.

16 And, again, I stand to be corrected, Your Honor, but  
17 we cannot find a case where a practice and procedure was  
18 proposed, and there was evidence that minority participation  
19 and registration and turnout would go up, and that statute was  
20 then found to violate Section 5.

21 So what they are asking the Court to do here, Your  
22 Honor, is, as far as we know, completely unprecedented, and it  
23 calls to mind something the Supreme Court said in a case that I  
24 would like to read into the record, *Clingman v. Beaver*, 544  
25 U.S. 581 at page 583. Now, this is an *Anderson-Burdick* case,

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1 Your Honor. It is about Oklahoma's open primary law, which the  
2 Court found not to be in violation of the Fourteenth Amendment.

3 And what the Court said was "To deem ordinary and  
4 widespread burdens like these as severe would subject virtually  
5 every electoral regulation strict scrutiny, hamper the ability  
6 of States to run efficient and equitable elections, and compel  
7 federal courts," and I may add, not elected representatives,  
8 "to rewrite state electoral codes."

9 And, Your Honor, that's what the plaintiffs are  
10 asking you to do in this case. And I recall that sometime  
11 during the trial, you asked us to give you our thoughts on what  
12 benchmarks were, and we've heard some questions today from the  
13 Court on benchmarks.

14 Now, a benchmark is important because only by having  
15 a benchmark is there a way for the Court to determine if a new  
16 practice has caused some sort of injury. And in Section 5, the  
17 benchmark is the last legally effective law that was in place  
18 before the new change was implemented.

19 In Section 2, the benchmark are the three *Gingles*  
20 preconditions. Of course, we are familiar with those. The  
21 Plaintiffs have to prove that the minority group could be a  
22 majority in a single-member district, that they are politically  
23 cohesive, and they can't elect the candidate of choice because  
24 of racially polarized voting. They have got to show that to  
25 show some sort of injury or causal relationship between the new

1 statute and the injury they suffered.

2 And, Your Honor, it is also important to note that  
3 until that minimal or type of injury is established, the Senate  
4 Factors are irrelevant. You don't go to the Senate Factors  
5 until you've got a benchmark and you can prove that the  
6 minority group is injured.

7 So what happens in a vote dilution case is you have,  
8 say, a multi-member district and you have an expert come in and  
9 say minorities can't elect a candidate of choice in a  
10 multi-member district because they are going to be outvoted by  
11 the white majority.

12 **THE COURT:** You are saying this is the analysis for a  
13 vote dilution case?

14 **MR. FARR:** Yes, sir, but I think it is instructive.  
15 So what benchmark have the Plaintiffs given the Court in this  
16 case? They struggled to give a benchmark, Your Honor, other  
17 than the practices that were in place prior to H.B. 589, which  
18 sounds a whole lot like, as you said a couple of times, a  
19 retrogression standard.

20 But there are several other possible benchmarks that  
21 the Court could look at. For example, when the Voting Rights  
22 Act was enacted and amended -- and it was enacted in 1965, I  
23 think. I may have missed that by a year or so, but it was  
24 amended in 1982, and I know that's right because I was working  
25 in the Senate when that amendment was passed. And at the time

1 of the original enactment or at the time of the amendment, I  
2 would say there were few, if any, states that had early voting,  
3 same-day registration, out-of-precinct voting, or  
4 preregistration of 16-year-olds.

5           These were not the type of practices that Congress  
6 decided in the legislative history as having some sort of  
7 discriminatory impact on minorities, and one of the reasons is  
8 they didn't have a discriminatory impact on minorities, such as  
9 qualifications like a poll tax or a literacy test. So that  
10 could be one possible benchmark.

11           Another possible benchmark would be what's happened  
12 since that time. Well, Congress has deemed that it's proper  
13 for states to close their registration books 30 days before the  
14 election, which means it's proper and not unlawful to decline  
15 to offer same-day registration during some sort of early voting  
16 period.

17           Congress has not deemed that early voting is  
18 required, And Congress has also held that the states are free  
19 to decide how to count provisional ballots, and so states can  
20 count out-of-precinct ballots if they want to or they can  
21 decide not to count them; and as we've heard during the course  
22 of this trial, I think it is well over 30 states do not count  
23 out-of-precinct ballots.

24           So under those benchmarks, you could take either one  
25 of those and compare those to what North Carolina now has, and

1 North Carolina would have the more liberal practice compared to  
2 those two benchmarks because North Carolina allows early  
3 voting; whereas, under either of the other two historical  
4 benchmarks, or I would say current benchmarks that have been  
5 permitted by Congress, and I may say also by Supreme Court,  
6 Your Honor, because, as you know, the Supreme Court has said  
7 that registration can be cut off I think they said 50 days  
8 before Election Day, North Carolina would have a more liberal  
9 voting regime.

10 But let's assume that the benchmark is the pre-589  
11 practices. This is not a Section 5 case, Your Honor. This is  
12 a Section 2 case. So the burden is on the Plaintiffs. And  
13 what evidence has been produced in this case that H.B. 589 has  
14 had any disparate impact on minorities in terms of either  
15 voting or registration?

16 And there is none, Your Honor. The Plaintiffs'  
17 experts did not do a cross-state comparison. They did not --  
18 they did -- a couple of them did predict there would be a drop  
19 in turnout. I think it is fair to interpret Dr. Burden's  
20 report and certainly Dr. Gronke's report as saying that there  
21 would be a drop in turnout.

22 **THE COURT:** What about the argument that 11,000  
23 people can't same-day register in 2014?

24 **MR. FARR:** Your Honor, I appreciate you asking me  
25 that question. I am glad to answer that. I think if we recall

1 Dr. Stewart's testimony, Dr. Stewart did not go back in time to  
2 see how many people had registered during what let's call the  
3 after-the-books-close period in prior elections who did not do  
4 same-day registration.

5 Dr. Stewart did not know how or when or where those  
6 people registered. He did not know if any of them went to  
7 same-day registration. He also, Your Honor, did something, if  
8 you will recall his testimony -- I will try to explain what he  
9 did and then we'll recall what he agreed to after I  
10 cross-examined him.

11 In his report, it was very interesting when he was  
12 looking at the individuals who could not register -- or  
13 registered after the close of books. You will recall he didn't  
14 list the numbers of whites or blacks. He listed the percentage  
15 each day of the white and the black registrants, and he listed  
16 them as a percentage of the total number of whites and blacks  
17 who had registered during a two-year period. That's how he did  
18 his analysis.

19 But you will recall -- I know what the punchline is,  
20 but, quite frankly, don't ask me to repeat how I got him to  
21 admit to it. He admitted that he could figure out what the  
22 actual numbers were, race of the people who registered during  
23 that time frame. If you remember, I asked him to calculate  
24 that; and when he calculated it, it turned out that of that  
25 11,000 people, who we don't know how or when or where they

1 attempted to register -- we don't have that number in  
2 comparison to prior years -- 23 percent of those individuals  
3 were African-Americans, which is very, very close to what their  
4 percentage is in the citizen voting-age population and very,  
5 very close to what their percentage is of registered voters.

6           So once we got the actual numbers of blacks and  
7 Caucasians who registered during that time frame, it was clear  
8 there was no disparate impact, and it affected -- wherever  
9 these registrations came from, there was no disparate impact.

10           Your Honor, I think what's very important here in  
11 this case is that in a vote dilution case, the expert proves  
12 the district that minorities could have to elect their  
13 candidate of choice. So they prove the injury. They look at  
14 the district that the State enacts, and then they propose a  
15 hypothetical district where minorities can elect a candidate of  
16 choice. That's how they prove their injury.

17           **THE COURT:** Is that what the Supreme Court calls a  
18 baseline?

19           **MR. FARR:** Your Honor, I don't know if I can recall  
20 that that's how -- the term they use, but that is how injury is  
21 proven in a vote dilution case.

22           Not one of their experts, Your Honor, made any  
23 attempt -- we've heard about mad voters. We've heard about  
24 campaign effects of the 2014 election. You know,  
25 interestingly, if we go back to the preliminary injunction

1 stage, we were talking about campaign effects with President  
2 Obama in 2008 and 2012 that not only impacted the turnout, but  
3 the modes of voting that African-Americans used. Back in the  
4 preliminary injunction stage, oh, no, no, no, that was not  
5 something that had any merit. It was all the election  
6 practices that caused the turnout.

7           So then we have -- and, of course, again, they have  
8 never done any study with their 18 experts they have in the two  
9 years that this case has been pending. The only one who did do  
10 a study is Dr. Burden in his paper. Dr. Burden concluded in a  
11 paper that he did not write for this case that same-day  
12 registration and early voting does not have a positive impact  
13 on turnout.

14           But back to my point, campaign effects, according to  
15 the Plaintiffs, had no effect in 2008, 2012. It was all  
16 because of the election practices in 2014. The election  
17 practices only depress turnout. The high turnout was only  
18 because of the campaign effects.

19           So we have had numerous examples of the  
20 goose-and-gander argument that's been advanced during this  
21 trial. I think, Your Honor, that's the biggest goose-gander  
22 argument, for example, that the Defendants can think of.

23           And I would say, Your Honor, if they wanted to use  
24 the 2014 -- or if they wanted to use the pre-H.B. 589 practices  
25 as a benchmark, then just like in a vote dilution case, there

1 had to be some sort of testimony from the Plaintiffs proving  
2 that these election practices were the cause of the increased  
3 turnout; and they have never done that once. They never  
4 attempted to do it. One of their experts certainly knows how  
5 to do it. He didn't do it in this case, and there's been no  
6 testimony whatsoever that -- again, mad voters, we raised all  
7 this money that we'll never be able to do again, you know, all  
8 from people from the Plaintiffs side, but no one has given any  
9 sort of tangible proof that the election practices used in 2014  
10 suppressed the black vote, suppressed black registration, and  
11 that it would have been higher.

12 **THE COURT:** Well, the argument they make is that it's  
13 become much more difficult, not that it can't be done, but it's  
14 become more much difficult for African-Americans now to  
15 exercise the right to vote as whites because of, among other  
16 reasons, historical conditions and racism.

17 **MR. FARR:** Okay, Your Honor, I understand their  
18 argument, but you will recall that I got one of their experts,  
19 I forget which one it was -- there was some consternation on  
20 the side of Plaintiffs' counsel when I asked the question, but  
21 one of their experts admitted no matter what the election  
22 system is, it's always going to be harder for poor people to  
23 participate than it is for people who are relatively more  
24 affluent and have their own cars.

25 That can't possibly be the standard that Congress

1 intended when they adopted Section 2 because there would be no  
2 end to it. What exactly -- what exactly do you have to do to  
3 account for socioeconomic conditions that this law has got  
4 absolutely nothing to do with?

5           So I would say, Your Honor, you know, I was blessed.  
6 I had great parents. I got to go to college. I got to go to  
7 law school. I am thankful for that, but election laws cannot  
8 take into account every issue related to societal  
9 discrimination. In fact, Your Honor, I point you to the *Shaw*  
10 II case where Chief Justice Rehnquist says that, that you can't  
11 cure societal discrimination through election laws.

12           **THE COURT:** Maybe not, but certainly the cases say  
13 that the Court should take into account the current conditions  
14 and the historical practices and difficulties that  
15 African-Americans have had over time and how that affects their  
16 ability to exercise their right to vote.

17           So if there is a disparity between African-Americans  
18 and whites with respect to income and education and  
19 particularly literacy and ability to have transportation -- I  
20 think the evidence was that there were quite a few more  
21 African-Americans without a vehicle, access to a vehicle than  
22 there were whites -- those are all factors that I should take  
23 into account, should I not, in determining whether there is a  
24 burden with an election practice?

25           **MR. FARR:** Well, a couple of answers to that, Your

1 Honor. First of all, this is something that I have been  
2 puzzled about throughout this entire case because, again, this  
3 isn't a vote dilution case, but it is instructive because it is  
4 where the law was developed.

5 Before you go to the Senate Factors in a vote  
6 dilution case, you have to have a benchmark and you have to  
7 prove an injury. You have to prove that blacks cannot elect  
8 candidates of their choice. Unless you prove that, you don't  
9 go to the Senate Factors.

10 I would say, Your Honor, that they have not really  
11 offered a benchmark other than a retrogression standard. It is  
12 interesting that one of their experts, Dr. Kousser, kind of  
13 regretfully admitted that he thought this could be called a  
14 retrogression standard.

15 **THE COURT:** But that sounds like you are saying that  
16 you need a way to measure the effect. But my question is  
17 whether those factors, in fact, can't -- ought to be considered  
18 under *Gingles*. Following the Fourth Circuit's opinion, I have  
19 to consider that; right?

20 **MR. FARR:** You do, Your Honor, but I think that  
21 unless there is proof of an injury, those factors don't come  
22 into play because where is the end? What is the judicially  
23 manageable standard? If the Senate Factors are what election  
24 laws are based upon, where does it end?

25 **THE COURT:** So if I enjoin these practices and give

1 the State the opportunity to determine some other remedy, what  
2 will happen from the State's point of view at that point in  
3 time?

4 **MR. FARR:** Well, Your Honor, I don't speak for the  
5 State. I am a lawyer. It will have to go to the General  
6 Assembly, and there's people in the General Assembly who would  
7 have to weigh in on that issue; but I'm sure that the State  
8 would comply with any injunction that you issue. But the  
9 question is: What exactly is it that they are supposed to do?  
10 Again, what is the benchmark?

11 And, Your Honor, what the government -- after  
12 answering it several different ways, you know, they said, well,  
13 I think the right benchmark is past practices. But where does  
14 that lead us to?

15 First of all, there is no precedent for that under  
16 Section 2. You know, Section 2 requires equal opportunity. It  
17 doesn't -- laws that, quote, lessen opportunity do not violate  
18 Section 2. And the case law on that, Your Honor, is the  
19 Supreme Court in *Bossier Parish* cases and others.

20 **THE COURT:** Explain that to me.

21 **MR. FARR:** Well, for example, Your Honor, there is an  
22 argument that under Section 5 of -- if a State is covered by  
23 Section 5, there is an argument -- I'm not saying that I agree  
24 with it, but there is an argument that you cannot eliminate  
25 what would be known as a coalition district or a crossover

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1 district or an influence district. Those are specific types of  
2 districts.

3 An influence district is one where African-Americans  
4 allegedly have political influence. A crossover district is  
5 one where African-Americans make coalitions with the white  
6 majority to elect an African-American candidate. A coalition  
7 district is one where two minority groups form a coalition.  
8 There is an argument that a State can't get rid of districts  
9 like that under Section 5 because it could be considered  
10 retrogressive of the rights of the minorities in those  
11 districts.

12 There is no argument that the State has to draw  
13 districts like that under Section 2. Under Section 2, a State  
14 can only be required to draw a district following the  
15 *Strickland* opinion where you meet all the *Gingles* preconditions  
16 and the district has a majority black population.

17 **THE COURT:** So can a State adopt a practice that  
18 would be violative of Section 5 but not be violative of  
19 Section 2?

20 **MR. FARR:** Yes, sir. And I think Justice Scalia, or  
21 one of those justices, say that in those *Bossier Parish* cases.  
22 They are two different statutes. There may be some overlap.

23 Keep in mind, Your Honor, we think that these  
24 statutes would preclear today, and I would point you to the  
25 Florida -- I think it's the early voting case that's in our

1 brief, and in that case the Court said that Section 5 is not  
2 violated simply because of statistical disparities. It's not  
3 violated because you take away preferences of the minority  
4 group. It's not violated even if it makes the law marginally  
5 more burden -- or the voting marginally more burdensome.

6           They say that the evidence has got to show that the  
7 minority group -- the reasonable members of the minority group  
8 will have trouble voting or registering under the new law, and  
9 we cited the exact language in our brief.

10           **THE COURT:** Well, the taking away of the law is -- do  
11 you agree that's some evidence of what the burden might be  
12 without it, if you followed my question? In other words --

13           **MR. FARR:** Well, this all goes into the habituation  
14 argument, Your Honor.

15           **THE COURT:** The Fourth Circuit says the -- while  
16 retrogression is not the standard, that's certainly a factor in  
17 the totality of the circumstances. I take it you agree with  
18 that?

19           **MR. FARR:** I don't think the -- did the Fourth  
20 Circuit say retrogression was a part of the totality of the  
21 circumstances? I think they said that you have to look at the  
22 past practice, but I don't think they said retrogression is  
23 part of Section 2; and if they did, that's clearly wrong, if  
24 they said that.

25           So, Your Honor, I think your question gets into this

1 whole habituation argument. And so, you know, what we heard  
2 during the preliminary injunction stage, Dr. Stewart called  
3 them unsophisticated voters. You will recall that. He said  
4 they are less able to navigate the election system was his  
5 argument.

6           It took me two years to remember this, but Dr. Gronke  
7 is the one that came up with the term "habituation," which is  
8 something that I had never heard of before. So what is the  
9 evidence in this case? Okay. Well, first of all, Dr. Gronke  
10 testified that habituation is an individual thing. It is not a  
11 group thing. In other words, you don't say that blacks as a  
12 group are habituated to doing something. It's individuals who  
13 are habituated to doing something.

14           And the evidence -- and Dr. Gronke and no other  
15 expert on the Plaintiffs' side has put forth any evidence of  
16 tracking a group of specific voters to see if they are  
17 habituated to doing early voting, voting out of precinct, that  
18 no one has ever tracked that. They've looked at the group  
19 statistics, but they never tracked the individuals who they  
20 claim are habituated.

21           And, in fact, all the experts who looked at this  
22 issue gave evidence that I think around 25 percent of the  
23 African-American early voters in 2012 who voted in 2014 voted  
24 on Election Day. So -- and I recall Dr. Gronke saying, well,  
25 yeah, I admit that's evidence they are not habituated. So the

1 point being, Your Honor, is that there is an assumption here --  
2 and I think it's a wrong assumption. I could use stronger  
3 words, but I won't, but there's an assumption that voters,  
4 regardless of their race, are unable to adjust and figure out  
5 how the law has changed and what they need to do to go vote.  
6 And there just is no evidence of that.

7           If the burden theory that the Plaintiffs have put  
8 forth, if that had any factual merit, then there would be some  
9 evidence of early voters not voting because they took away the  
10 first seven days. Do you remember that argument? All these  
11 people wouldn't be able to vote because they took away seven  
12 days of early voting? What actually happened, Your Honor?  
13 What actually happened is early voting went up in 2014 as  
14 compared to 2010.

15           Another point I want to correct, another Dr. Stewart  
16 issue, Dr. Stewart testified that early voting was a midday  
17 phenomena. You know, that's when people wanted to vote. Well,  
18 prior to 2014, North Carolina didn't have many hours after  
19 5:00, and so this year, in order to meet the requirement that  
20 they have the same number of early voting hours as they had in  
21 2010, they substantially expanded the evening hours. They  
22 expanded the weekend hours.

23           There was a comment by one of the Plaintiffs' counsel  
24 that the weekend hours went down. And if I'm incorrect about  
25 that, I apologize, but I thought I heard that. That's not

1 true, even though they cut off one Sunday or seven days or  
2 whatever. Actually, there were more weekend hours for voters  
3 in 2014 than 2010, and no doubt -- and I think it is important  
4 to note that there were more early voting centers in North  
5 Carolina in 2014 than there were in 2012.

6 **THE COURT:** What is the evidence on whether the State  
7 has sufficient number of early voting sites and hours to avoid  
8 any meaningful problem for upcoming elections?

9 **MR. FARR:** Okay. Well, first -- my first answer to  
10 that, Your Honor, is there is no judicial standard I know of of  
11 what constitutes an unconstitutionally long line. We've heard  
12 testimony about eight-hour lines in Florida. We've heard  
13 argument from counsel about two-hour lines in Virginia.

14 **THE COURT:** Is it a claim that if some practice is  
15 adopted that purposefully makes a race have to have longer  
16 lines, that that would be a burden or an abridgment of a voting  
17 right?

18 **MR. FARR:** I think, you know, in theory, someone  
19 could make that claim, but that's not been made in this case;  
20 and, furthermore, Your Honor, the testimony from Dr. Stewart is  
21 the lines were longer during early voting. Honestly, without  
22 going into too much detail, unless you want me to, I don't  
23 think Dr. Stewart's testimony on long lines based upon an  
24 Internet survey is really good evidence of what the lines were  
25 in North Carolina.

1           But to the extent he gave evidence on that, the long  
2 lines were during early voting when we had the highest  
3 participation rate by African-Americans. So it didn't -- based  
4 upon the metrics that we have, it doesn't seem like that lines  
5 during early voting had any impact on African-Americans given  
6 the fact that their turnout was higher in 2014 and their early  
7 voting usage was higher in 2014 than it was in 2010.

8           **THE COURT:** Well, do they have to show that the lines  
9 still won't be long with 17 days of early voting, or is it  
10 sufficient if they show that with 10 days of voting, the lines  
11 are going to be longer?

12           **MR. FARR:** Your Honor, how have they proven that? I  
13 don't know of any evidence that they have presented in this  
14 case that lines were longer in 2014 than 2010 or --

15           **THE COURT:** I think their evidence, as I recall, was  
16 that without seven days of early voting, there is an increased  
17 likelihood that the Election Day line would be longer.

18           **MR. FARR:** Well, again, that's a hypothesis that they  
19 didn't really prove. And, again, Your Honor, what North  
20 Carolina did -- and this goes somewhat to the intent argument.  
21 I don't really want -- unless you have questions on that, I  
22 won't focus on that in my discussions, but --

23           **THE COURT:** I have a few questions on intent, but we  
24 can handle those separately.

25           **MR. FARR:** Okay. Well, Your Honor, you know --

1           **THE COURT:** My basic question is: How is North  
2 Carolina any different from Florida? Because the example given  
3 is that Florida cut back the days. They reached an agreement,  
4 under Section 5, I guess, at the time and then lo and behold,  
5 they still continued to have long line problems; and the  
6 legislature finally threw up their hands and said, we are not  
7 going to fight this anymore and, as I understand it, put it  
8 back in place.

9           **MR. FARR:** First of all, they had lines of -- if I  
10 recall this correctly -- I hope I do -- but I think there is  
11 testimony that the lines in Florida were seven and eight hours,  
12 you know, off the charts. Even given that testimony, or  
13 evidence, if I recall correctly, there still is no  
14 constitutional standard about what constitutes a long line and  
15 what doesn't constitute a long line. The point is, Your Honor,  
16 North Carolina is dramatically different than Florida.

17           **THE COURT:** What is different factually between  
18 pre-589 and post-589 in terms of the hours and facilities for  
19 early voting?

20           **MR. FARR:** Okay. Well --

21           **THE COURT:** The hours have to be at least the same  
22 under the statute for the previous analogous election; is that  
23 right?

24           **MR. FARR:** Yes, Your Honor. I need to explain that a  
25 little bit, though, because -- and again, this goes to the -- I

1 think an intent issue. We heard Senator Stein testify that he  
2 offered this amendment that the hours be retained at the same  
3 level as the most recent analogous election, and I think you  
4 are going to find it very difficult to find any *Arlington*  
5 *Heights* cases where the jurisdictions can be find guilty of  
6 intentional discrimination where they accepted a significant  
7 amendment like that.

8           But the way that amendment works -- and again, we  
9 also heard Senator Stein testify to this -- there is an option  
10 to reduce early voting hours. However, it's got to be a  
11 unanimous vote of the county board of elections, which today,  
12 given that we have a Republican governor, two Republicans and  
13 one Democrat, and the State Board of Elections, which is today  
14 three Republicans and two Democrats. So you have to have  
15 complete unanimity for all of these political appointees before  
16 you can reduce the early hours in a given county. And there  
17 were some reductions of early hours because some county boards  
18 of elections got together, and they all three agreed that this  
19 isn't a good use of resources. We don't have the resources,  
20 and then they presented it to the State Board.

21           And there is -- I can assure you, there is very  
22 active members on the State Board, very active Democratic  
23 members who are doing good service on State Board of Elections,  
24 and all five of those people had to agree to approve the  
25 waiver. So --

1           **THE COURT:** Your point is it's unlikely to happen,  
2 that the hours be reduced?

3           **MR. FARR:** It is very difficult to get a waiver, Your  
4 Honor, and certainly --

5           **THE COURT:** So they are going to have at least, in  
6 most cases, the same number of hours as they had for their  
7 comparable previous elections?

8           **MR. FARR:** Unless the Democrat members who would seem  
9 likely to support the concept of early voting agree to cut the  
10 hours. And then, Your Honor, the way the counties have to  
11 comply with that is that they have to create more early voting  
12 sites, and they have to expand the hours of operation, which is  
13 what happened in 2014. There were substantially more evening  
14 hours. There were more weekend hours.

15           **THE COURT:** Are there more actual voting sites now  
16 than there were before 589 was enacted?

17           **MR. FARR:** Yes. There's more -- there's not only  
18 more early voting centers -- there were not only more early  
19 voting centers in 2014 as compared to 2010, there were more  
20 early voting centers in 2014 than in 2012, which was a  
21 Presidential election.

22           **THE COURT:** So the burden is on the Plaintiff, but I  
23 am not intending to shift the burden, but what would you say is  
24 your evidence that there is not going to be a material change  
25 in the early voting situation? Is it because there are going

1 to be more sites? Is it because there are more hours? Is it a  
2 combination and --

3 **MR. FARR:** There will be more sites, Your Honor.  
4 There will be more evening hours. There will be more weekend  
5 hours. There might be a slight reduction in the total number  
6 of hours when a specific county board unanimously agrees that  
7 they should cut their hours and the State Board of Elections  
8 unanimously agrees that they should cut their hours.

9 **THE COURT:** Who has the authority to decide how many  
10 voting sites can be open in a county? Let's pick Durham  
11 County.

12 **MR. FARR:** Right.

13 **THE COURT:** Which is one of the five or seven that  
14 were really, seemed to me, to be at issue in this issue of  
15 early voting. They were the strongest candidates for the  
16 problems.

17 If Durham County wants to open 100 early voting  
18 sites, can they do that?

19 **MR. FARR:** If they have the money and they want to do  
20 that, they can have as many as they want. There's no --

21 **THE COURT:** So during the ten-day period, if they  
22 want to make sure there are not long lines, is Durham County  
23 free to open as many sites as they want?

24 **MR. FARR:** They sure are, Your Honor.

25 **THE COURT:** Do they have the equipment, or do they

1 have to go buy that?

2 **MR. FARR:** Well, I'm going to guess if they opened a  
3 hundred sites, they'd have to buy some more equipment, but we  
4 don't have any -- there is no evidence in this case, for  
5 example, that counties shorted early voting centers of the  
6 equipment that they had in 2010 --

7 **THE COURT:** I guess I put it this way: Do the  
8 counties have the resources to adapt to providing enough  
9 opportunity in the counties that need the early voting the most  
10 to avoid the prospect of long lines during early voting?

11 **MR. FARR:** Well, Your Honor, there is no evidence in  
12 the case one way or the other on that. Certainly the  
13 Plaintiffs haven't put forward any evidence that they don't  
14 have the resources to open more early voting centers; but the  
15 one piece of evidence that we do have is that in 2014, they  
16 came up with the money to not only statewide open more sites  
17 than they had in 2010, an off-year election, they had more  
18 early voting sites than they had in 2012, which is a  
19 Presidential election. So that would indicate to me that, at  
20 least insofar as the evidence that's before the Court, that the  
21 counties did have the resources to meet the requirements of the  
22 statute.

23 **THE COURT:** I don't want to derail you from what you  
24 want to talk about, but at some point in time, I want to hear  
25 from you about the justifications the legislature had for these

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1 things, so I don't know if you want to move to that now or  
2 whether you have something else, but I do want to --

3 **MR. FARR:** I can try to do that right now,  
4 Your Honor.

5 **THE COURT:** It seems to me these were extremely  
6 popular techniques at the time, and that the public generally  
7 seemed to like these, that is, particularly early voting and  
8 same-day registration, perhaps because they're conveniences.  
9 Let me use the other word, "fail-safe." They're fail-safes for  
10 people who --

11 **MR. FARR:** We don't like that word, Your Honor.

12 **THE COURT:** Maybe you can agree on --

13 **MR. FARR:** I am just kidding. Certainly, I  
14 understand your point.

15 **THE COURT:** But the point is they made voting easier,  
16 and the government ought to be in the position of not making  
17 anything any harder, and so there is a perception in this case  
18 that these rules were adopted counterintuitively because  
19 everybody liked them. So now it got harder. And why would you  
20 do that as a legislature unless you had some other purpose in  
21 mind?

22 **MR. FARR:** Well, Your Honor, when you say "everybody  
23 liked them," who are you speaking about?

24 **THE COURT:** Well, they seemed to be used a lot. Let  
25 me put it that way. So early voting was used mostly by whites.

1 It's disproportionately used by blacks, African-Americans, but  
2 it is mostly the whites who were using it on an absolute number  
3 basis.

4 **MR. FARR:** Right.

5 **THE COURT:** And it made it easier to vote because you  
6 expanded the time generally to exercise your right to vote, and  
7 I say it is easier because just so many people used it. So to  
8 reduce it seems counterintuitive. What's the justification  
9 offered at the time for reducing early voting? Is it the cost  
10 issue?

11 **MR. FARR:** Your Honor, I think my colleague,  
12 Mr. Strach, has got better recall on the legislative history  
13 than I do, but I believe that cost was one of the issues  
14 raised, that the legislature thought that this may help with  
15 costs.

16 **THE COURT:** But there seemed to be some pretty strong  
17 evidence that actually it's more expensive because now you have  
18 to open -- you have to extend the hours, and it is easier to  
19 have early voting in sites where they are going to be open  
20 anyway because -- during the government hours.

21 **MR. FARR:** Michael Dickerson, the executive director  
22 of the Mecklenburg County Board of Elections, which is one of  
23 the biggest counties in the state that would have one of the  
24 bigger issues, he testified that he didn't see any difference  
25 in cost one way or the other.

1           **THE COURT:** Where is the evidence that there is --  
2 well, I'll ask the Plaintiffs. When you get a chance -- point  
3 me to the cost evidence when you get a chance, either now or  
4 two weeks from now when you file your material.

5           **MR. FARR:** Well, Your Honor, to be frank, I don't  
6 think prior -- the prior State Board of Elections, it never did  
7 a study on costs. It may have -- a former executive director  
8 may have offered opinions, but he never studied the cost of --

9           **THE COURT:** One of the documents that I admitted was  
10 an email that had attached to it something from Senator Cook  
11 that said if we shorten early voting, you save \$68,000 a day,  
12 as I recall.

13           **MR. FARR:** I haven't looked at all the emails, Your  
14 Honor. I apologize.

15           **THE COURT:** Okay.

16           **MR. FARR:** But the other argument, Your Honor, was  
17 that the Plaintiffs kind of, I think, misapprehended the  
18 consistency point.

19           **THE COURT:** So explain that one to me.

20           **MR. FARR:** The consistency point was that there had  
21 been a dispute in Wake County, which Dr. Hofeller testified  
22 about, about the location of early voting centers, their hours  
23 of operation, when they were opened. The evidence in the case  
24 seemed to indicate that the location and the sites that were  
25 open longer seemed to favor Democratic voters. So one of the

1 things that was on the mind of the General Assembly is they  
2 wanted consistency within the county.

3 **THE COURT:** Couldn't they just have said, if that was  
4 the concern, let's just have everybody close at a certain time?  
5 How does that affect the number of days of early voting?

6 **MR. FARR:** Because, Your Honor, by shortening the  
7 number of days, it was easier for the counties to man and  
8 operate early voting centers, which would be open for around  
9 26 hours. I think that was what the thinking was. And that by  
10 requiring additional sites, you get more coverage within the  
11 counties so that more voters would have the opportunity to do  
12 early voting. In any case, Your Honor, it is a policy  
13 decision.

14 **THE COURT:** Well, there are a lot of documents, and I  
15 see some of them over there that I am going to be reading later  
16 that you all introduced, so I haven't had a chance to read  
17 everything yet. But some of them, I assume from the titles,  
18 deal with when these certain procedures were enacted in the  
19 first place --

20 **MR. FARR:** Yes, sir.

21 **THE COURT:** -- and the vote counts on that. So  
22 briefly tell me about, for example, early voting. Enacted in  
23 '99 or 2000; is that right?

24 **MR. FARR:** Yes, Your Honor. I will try to do the  
25 best I can.

1           **THE COURT:** Was it initially enacted as 17 days?

2           **MR. FARR:** No. Mr. Peters may have something on  
3 this, but I believe it was longer and actually the legislature  
4 cut the number of days in the subsequent statute. It was by  
5 two or three days after it was initially enacted. Then when it  
6 was first enacted, if I recall correctly, they were only  
7 required to have an early voting center at the county board of  
8 elections and then at one point to expand the number of  
9 centers. You had to have a unanimous vote by the county board  
10 of elections and --

11           **THE COURT:** Was it passed on a bipartisan basis?

12           **MR. FARR:** I would say, Your Honor, that of all the  
13 bills at issue here, I'm going to guess -- I don't know if it  
14 was -- if there was a majority of Republicans that voted for  
15 it, but I would guess that there were probably more Republicans  
16 voted for the early voting than the other practices.

17           The other practices were highly controversial. For  
18 example, the out-of-precinct voting statute, that was passed  
19 after there was an election contest where a couple of  
20 Republicans took an election contest to the North Carolina  
21 Supreme Court, and the North Carolina Supreme Court ruled  
22 that --

23           **THE COURT:** That was the *James* case?

24           **MR. FARR:** Yes, sir.

25           **THE COURT:** Yes, I am familiar with that. Well, when

1 these -- when H.B. 589 was passed ultimately, Republicans who  
2 favored it and proposed it said very little about it during the  
3 legislative proceedings that I read. Is that a fair statement?

4 **MR. FARR:** Your Honor, I hesitate to disagree with  
5 your understanding of "little," but I think there were  
6 statements in the Senate supporting the reasons why they were  
7 doing certain things.

8 **THE COURT:** It struck me that the legislative debate  
9 was not extended because the Republicans concluded they had the  
10 votes and they were going to do this anyway. That's my  
11 impression from reading the record. So there may have been  
12 more reasons why didn't they speak, but at a minimum, they had  
13 the votes, and they were going to do it.

14 **MR. FARR:** But it wasn't an unusual way to pass the  
15 statute, Your Honor. You've heard testimony that the 2003  
16 redistricting plan was enacted with much less process than the  
17 H.B. 589.

18 **THE COURT:** We've had a lot of legislation pass at  
19 the state and federal level that's been passed on a partisan  
20 basis, and our political system has become contentious. I  
21 understand that, but I guess what I am saying is it sure puts  
22 the legislature in a difficult position when they decide not to  
23 justify too much what they are doing because they have the  
24 votes. Then they have to come back later and explain what they  
25 are doing, which I think makes it more difficult.

1           **MR. FARR:** Well, Your Honor, we look forward to  
2 pointing out to you the justifications that were stated in the  
3 legislative record, but also, Your Honor, they don't need to  
4 state any justifications. Your Honor, there is several Supreme  
5 Court cases that hold that the State can put forward other  
6 justifications for a statute even when not stated in the  
7 legislative record. And quite honestly, Your Honor, it is very  
8 rare for there even to be a legislative record in North  
9 Carolina, and I would hazard to guess that's true for most  
10 states.

11           **THE COURT:** Well, I would be interested to read if  
12 you can provide that in the post-trial materials, because the  
13 Plaintiffs say -- they point heavily to the record about what  
14 was said in support of these various reductions, and so  
15 whatever you have in response to that I would be interested in  
16 seeing.

17           **MR. FARR:** All right, Your Honor.

18           **THE COURT:** All right.

19           **MR. FARR:** May I make a few concluding remarks?

20           **THE COURT:** Absolutely. We'll go a little beyond  
21 4:00. I want to make sure -- they've gone a long time. I  
22 don't want to cut you all off from what you want to say.

23           **MR. FARR:** Well, Your Honor, I had a lot of comments  
24 I was going to make about the *Burdick* cases. I think you  
25 understand those cases very well. I guess the only point I

1 want to make about that is, again, it is important to note that  
2 the practices that have been implemented by H.B. 589 represent  
3 the majority rule in every instance. And by the way, I don't  
4 think there is 25 states with same-day registration. I think  
5 that's a combination of Election Day registration and same-day  
6 registration.

7           And there is no indication that any of those  
8 practices, which represent the majority rule, could constitute  
9 any sort of undue burden under the *Marion County* verdict, that  
10 line of cases, because they're very common. Your Honor, we  
11 appreciate your -- what we think is the correct reading of the  
12 *Marion County* case, that there were, I guess, six justices that  
13 agreed on the point that you mentioned earlier before.

14           And it is hard for us to understand -- if federal  
15 law, statutes, the Constitution are to be read in some way that  
16 makes sense, we don't understand how election practices that  
17 represent the majority rule that could not possibly violate the  
18 *Marion County* test -- how could those be unduly burdensome  
19 under Section 2?

20           We don't think that is logical, particularly where  
21 the facts show that the Plaintiffs -- that the turnout went up  
22 and the Plaintiffs have utterly failed to show that there has  
23 been any sort of disparate impact on either voting or  
24 registration rates.

25           So, Your Honor, where I would like to conclude my

1 comments is I want to talk about the *LULAC* case that counsel  
2 for the United States mentioned, and he talked about this was a  
3 troubling interaction of race and politics, and he talked about  
4 how Justice Kennedy and I believe the Court decided that Texas  
5 had improperly eliminated a district that was growing into an  
6 Hispanic-opportunity district.

7           So, in other words, what they did in *LULAC* was the  
8 State took away a district where Hispanic voters had a chance  
9 to elect their candidate of choice and replaced it with  
10 something else to try to protect -- I think his name was  
11 Congressman Frost, I believe, who I think is a white Democrat.  
12 I could be wrong about that. And H.B. 589 did not do that.  
13 H.B. 589 is a completely different animal.

14           Even under Section 5, Your Honor -- and I again cite  
15 you to that Florida case -- minorities are not entitled to  
16 practices that they prefer, and the practices that were  
17 adopted, as Plaintiffs have admitted, apply, at least on their  
18 face, the same way to everybody. So the voter after 589  
19 retains the ability -- every voter, regardless of race, can  
20 register 25 days before the election, et cetera.

21           Now, *LULAC* is different -- is important for another  
22 reason, Your Honor, and I think this is very important. In  
23 *LULAC*, the Plaintiffs argued that the State could not delete  
24 something called an influence district. An influence district  
25 is where minorities can't elect their candidate of choice, but

1 they allegedly have political influence. And that was rejected  
2 by Justice Kennedy in the *LULAC* opinion, and he said that  
3 Section 5 is not a political weapon. Section 5 cannot be  
4 construed to require states to do things to enhance the  
5 political position of the minority group.

6           And this case came up again in *Strickland*, Your  
7 Honor, the North Carolina case, where North Carolina had what  
8 was known as a crossover district down around Wilmington and  
9 they drew that district in violation of the State's  
10 constitutional criteria for drawing legislative districts, and  
11 they argued it was justified because they were -- they needed  
12 this crossover district to comply with the Voting Rights Act.

13           And Justice Kennedy, again writing for the Court,  
14 rejected that and he made the same comments that Section 2 is  
15 about equal opportunity. It is not about maximizing the  
16 political influence of the minority group, that they've got to  
17 work just as hard as every other group to get political  
18 coalitions. I can't ever remember the quote, but there is a  
19 quote from the *De Grandy* case by Justice Souter about they got  
20 to pull, haul and whatever just as far as any other voter to  
21 get their political agenda.

22           So, basically, Your Honor, what those cases say that  
23 in redistricting, states are not obligated to draw  
24 redistricting plans that maximize the political influence of a  
25 minority group. And, Your Honor, I would say to you that is

1 what this case is. This case is unprecedented. The Plaintiffs  
2 can't cite a case like it where these types of practices have  
3 been declared illegal under the Fourteenth Amendment,  
4 Section 2, or for intentional discrimination. They represent  
5 the majority rule.

6 But what -- and there is no evidence at all that it  
7 has a negative impact on minority voting rights, but what they  
8 want, Your Honor, is they want the practices that their Get Out  
9 the Vote groups prefer. They want the practices that their  
10 political allies prefer. And essentially, Your Honor, they are  
11 asking you to do in this case what the Court rejected in the  
12 vote-dilution context in *LULAC* and *Strickland*. They are asking  
13 you to order in an unprecedented way North Carolina to adopt  
14 practices that tend to maximize minority participation, and I  
15 think that raises serious, serious constitutional questions,  
16 Your Honor.

17 It's just like the point you raised -- you've raised  
18 similar points during the course of this argument. So if you  
19 wanted to know a case or cases that we think this case in very  
20 similar to, it's the *LULAC* case and the *Strickland* case, Your  
21 Honor.

22 And unless you have any further questions of me, Your  
23 Honor --

24 **THE COURT:** No, thank you very much.

25 Mr. Peters?

1           **MR. PETERS:** Thank you, Your Honor. Before I make  
2 the point that I wanted to get up and make, and I said I would  
3 try to keep it to ten minutes and I will do my best to do that,  
4 there are two things that arose during the time Mr. Farr was up  
5 that I would like to address or clarify or add a little bit to.

6           You asked about whether or not early voting had  
7 always been 17 days. Originally, it was, and I hope I counted  
8 my days correctly because the way the law used to be worded is  
9 bulky, but I believe it was 19 days originally. It began on --  
10 it ran from a Monday through three weeks to the Friday of the  
11 third week later and including the weekends in between. And  
12 the legislature in 2001 cut the first three days off and added  
13 the last Saturday, which was a net change of two days. And  
14 that bill is Session Law 2001, Chapter 319, and you will find  
15 the provisions about the changes to the early voting period at  
16 Sections 5(a) to 5(c.)

17           **THE COURT:** Why did they do that?

18           **MR. PETERS:** Your Honor, the bill itself does not  
19 say. It just says that it's to change the length of the  
20 one-stop period, and it's a number of other -- this is another  
21 bill that has a number of election-related changes in it, and  
22 that's just one of them; but you find those at Sections 5(a)  
23 and following.

24           **THE COURT:** You said they cut 3 days. That would be  
25 16 days.

1           **MR. PETERS:** But they cut three days at the beginning  
2 but then added the last Saturday. So it was a net change of  
3 two days.

4           **THE COURT:** Okay.

5           **MR. PETERS:** But the bill still -- the law at that  
6 time -- and this is the second point I wanted to make -- still,  
7 as it still does, does not require that any where -- that any  
8 counties offer early voting every one of those days except for  
9 the requirement that it be offered at the county board of  
10 elections' office during business hours. This law, the session  
11 law I just cited, is the one that also included the change that  
12 basically said if the county board of elections' office isn't  
13 really equipped, isn't a good location for that, they can set  
14 up an alternate site.

15           But the counties could offer early voting outside the  
16 county board of elections' office whenever they wanted to,  
17 whenever they thought was appropriate or didn't think  
18 appropriate, and they could have it different ways at different  
19 sites. So this is the other point I wanted to make about the  
20 consistency argument, the uniformity argument.

21           The Plaintiffs throughout this case say, well,  
22 clearly that's not what the General Assembly was about because  
23 there's still no consistency across the state, but I think we  
24 have been clear from the outset that what the General Assembly  
25 was concerned about was consistency within a county.

1           Because during the 17 days of early voting, they  
2 could have it available every day at this site and maybe one  
3 day a week at this other site. So the concern was that some  
4 centers were open or some voters in the county, depending on  
5 where they lived, had early voting available to them to the  
6 degree that other voters in the county did not.

7           **THE COURT:** Why did they need to lop off seven days  
8 to achieve that purpose?

9           **MR. PETERS:** Because the choices were going to be for  
10 a county. Either everybody is only open one or two days --  
11 because we can't have anybody open the full time if we were  
12 going to have all of them open the full 17 days or as many days  
13 as we can. So it was a compromise. If you are going to have  
14 to make sure everybody is open the full length of time or  
15 everybody is open the same length of time at the same number of  
16 hours, then we won't have as many days so that the two things  
17 work out.

18           Condensing the period makes it more possible for  
19 counties to have all the centers open for the same number of  
20 hours.

21           **THE COURT:** But everybody can get exempted if they  
22 agree unanimously?

23           **MR. PETERS:** If the county board and the State Board  
24 of Elections agree unanimously that a reduction in hours is  
25 appropriate, and what they are going to have to show for that

1 is why the reduction is appropriate and how the county is not  
2 going to suffer because of that.

3           **THE COURT:** Can they get a reduction in days under  
4 the current one?

5           **MR. PETERS:** I believe, Your Honor, it is in hours.

6           **THE COURT:** So they have to be open ten days  
7 currently?

8           **MR. PETERS:** They have to be open at the county board  
9 of elections during those ten days during business hours plus  
10 Saturday morning.

11           **THE COURT:** Pre-589, did they have to be open 17  
12 days?

13           **MR. PETERS:** No, Your Honor. The county board office  
14 had to be open during business hours during those 17 days,  
15 which is really not a full 17 days.

16           **THE COURT:** But it had to offer early voting at the  
17 county board?

18           **MR. PETERS:** During those 17 days, if it was business  
19 hours, which means Thursday, Friday, Monday through Friday of  
20 the following week, Monday through Friday of the next week.

21           **THE COURT:** So pre-589 --

22           **MR. PETERS:** Pre-589, the requirement was that the  
23 county board of elections' office be open 12 and a half days,  
24 because they didn't have to be open on the weekends except for  
25 the final Saturday morning; but anytime between that first day

1 and the last day, which is a total of 17 days because it  
2 includes two weekends, anytime in there, they could offer  
3 one-stop voting elsewhere in the county, but they were not  
4 required to.

5           And I think the evidence you have in front of you  
6 shows there are a number of counties that didn't did not open  
7 any extra sites other than the county board of elections.

8           On post-589, the county board of elections' office  
9 must offer one-stop voting for seven and a half days. If I'm  
10 doing my math right, seven and a half days. If they have more  
11 than one satellite center, then those satellite centers must be  
12 open the same -- must have consistency in the times that they  
13 are open.

14           **THE COURT:** All right.

15           **MR. PETERS:** Your Honor, the main point I wanted to  
16 make was that as I sat and listened to the evidence over the  
17 last three weeks, as I listened to the questions and the  
18 arguments today, the questions that the Plaintiffs seemed  
19 unable to answer about what the baseline is that should be  
20 looked at to figure out if there is an injury at all, the  
21 question -- there's been a great deal of evidence about the  
22 statistics and what the statistics show, but I have yet to hear  
23 how those statistics line up to prove causality between -- with  
24 what the Plaintiffs claim.

25           This is in light of the fact that just a month ago,

1 the United States Supreme Court said that "a disparate-impact  
2 claim that relies on a statistical disparity must fail if the  
3 plaintiff cannot point to a defendant's policy or policies  
4 causing the disparity. A robust causality requirement is  
5 required." That was the United States Supreme Court in the  
6 *Texas Department of Housing and Community Affairs* case from  
7 last month, 135 S. Ct. 257. Yet, the Plaintiffs, nor their  
8 experts, have made that link with causality.

9           They have argued things such as that young voters,  
10 minority voters have become habituated. We heard today that  
11 young voters have learned to rely on same-day registration.  
12 They know that that's what they can do because they've moved so  
13 much, and they know they can do that. We didn't hear one -- I  
14 don't recall hearing one witness who was a young voter actually  
15 testify to that.

16           The voters -- young voters who testified were the  
17 ones who said things like, I didn't get around to it, or I  
18 hadn't looked into it to see what was required. As I recall,  
19 there was only one witness who testified to being habituated to  
20 using same-day registration, who had used it a number of times  
21 because of moving, and came in expecting to be able to use it  
22 in this past election; and that one witness was Amber  
23 Alsobrooks, who was a white woman, I believe at least 30 or 40  
24 years old, with a Ph.D. And she's the one witness who  
25 supported that sort of claim.

1           We've heard that had things like same-day  
2 registration been available or out-of-precinct provisional  
3 balloting been available, then the inability to vote that the  
4 Plaintiffs have claimed would have been avoided. But for that,  
5 they have offered witnesses such as Carnell Brown, who went to  
6 a polling place in the wrong county. Out-of-precinct  
7 provisional balloting would not have helped him because he was  
8 in the wrong county.

9           We've heard about how it affects the Get Out the Vote  
10 issues, Get Out the Vote plans, but we heard from Mr. Berduo  
11 from NC State about everything he did to inform students at  
12 NC State, including a countdown clock to how many days it would  
13 be until the books closed for registration.

14           We heard that the minority and young voters need the  
15 out-of-precinct because they are more likely to be working, not  
16 be able to get to the right polling place at the right time  
17 because of work schedules. The witness we heard testify about  
18 that was Gwen Farrington, and her testimony was that this law  
19 places a burden on people like me. When she was asked what she  
20 meant by "people like me," the answer was "people who work  
21 long, tiring hours who don't have lenient jobs." Not evidence  
22 of what the Plaintiffs have claimed.

23           When I hear this, it says to me that what's really  
24 being argued here -- and I think Your Honor recognized this in  
25 some of the earlier argument. You said you've heard lots of

1 policy arguments over the last three weeks, and I think that  
2 really is what we are looking at here. We are looking at  
3 arguments about policy and what is the right policy for this  
4 state.

5           There is no doubt under the Constitution, under  
6 Supreme Court precedent that the State can regulate how  
7 elections are conducted, and that as long as it doesn't violate  
8 the Constitution or violate federal law, the State can even  
9 place some burdens on voters if they are doing so to maintain  
10 the integrity of the electoral process.

11           That sets up a tension, an unavoidable tension in our  
12 system. Access, on one hand -- and no one is denying that  
13 access to the polls is important. That is vitally important,  
14 but the integrity of the system is also important, and those  
15 two things can be a tension at times.

16           **THE COURT:** How does same-day registration jeopardize  
17 the integrity of the system when the mail verification failure  
18 rates are what they are?

19           **MR. PETERS:** Well, Your Honor, I think it's exactly  
20 what you said earlier. I mean, we do have evidence that the  
21 failure rate is much higher for same-day registration, but  
22 there is also the question of does the State -- is it good for  
23 the integrity of the system for the State to do something where  
24 there is virtually no possibility of completing the mail  
25 verification rate in time for the election or very small

1 possibility?

2           There are two things at issue here --

3           **THE COURT:** Couldn't the State -- when they were  
4 considering the options, couldn't they do some of the things  
5 that the Common Cause witness testified to, and, that is,  
6 consider tweaking the mail verification statute or the canvas  
7 date or something like that, if that was the primary concern?

8           **MR. PETERS:** Perhaps they could have, Your Honor, but  
9 I would submit that's a policy question. Unless doing away  
10 with same-day registration -- and I think this is another issue  
11 that is very clear with the Plaintiffs' arguments. All they  
12 are able to say is we should go back to the way it was, which I  
13 don't see any way to avoid saying that means North Carolina was  
14 in violation of Section 2 before same-day registration was put  
15 into place or before these other electoral processes were put  
16 into place.

17           And I am not sure I see a way to avoid saying other  
18 states are in violation of Section 2 if they don't offer  
19 same-day registration. Yes, the General Assembly perhaps could  
20 have addressed this differently.

21           **THE COURT:** Is it possible to have a -- have no  
22 Section 2 claim, but to have a traditional Fourteenth Amendment  
23 violation here? In other words, what if I conclude that the  
24 legislature was motivated principally by protecting incumbency  
25 and recognized that the Get Out the Vote efforts of the black

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1 community was what was helping the Democrats win elections, and  
2 so they were going to make sure that didn't happen anymore; so  
3 they went after the various mechanisms that would prevent that  
4 from happening in the future so that they were intending to  
5 target African-Americans, and so they did it with an intent to  
6 discriminate, and the burden is that they, therefore, don't  
7 have these mechanisms anymore that they previously had?

8           Is it possible that there is a Fourteenth Amendment  
9 violation, even though under Section 2 the opportunity remains  
10 equal, it's just that there was this other mechanism that got  
11 taken away, and it was done for a racial reason, and the law  
12 just doesn't like that?

13           **MR. PETERS:** Your Honor, I think it is possible that  
14 if there were a clear discriminatory purpose, there might be a  
15 Fourteenth Amendment violation where there is not a Section 2  
16 violation. That's not the facts that you have before you in  
17 this case, I don't believe. I think what you have before you  
18 in this case is a question of different policy priorities,  
19 different policy concerns, different beliefs about what the  
20 policy of the State should be.

21           And you mentioned earlier that you are familiar with  
22 the *James v. Bartlett* case. I think that's worth looking at,  
23 as well as 2005 Session Law, Chapter 2, which came out in the  
24 wake of that, because I do think that gives some context to the  
25 political policy differences that are at play here.

1           The bottom line is these are policy concerns, policy  
2 disputes which are very real and which, I do not deny, matter a  
3 great deal to the people on both sides of the issue. The place  
4 that those are fought out, as you acknowledged earlier, is in  
5 the legislature and the political process, not in a Court.

6           And I think when there is an understanding here that  
7 what we are really arguing about is what the policy of the  
8 State should be, the way the evidence should be viewed all  
9 falls into place here, that what we are really arguing about is  
10 policy.

11           **THE COURT:** There seems to be an argument by the  
12 Plaintiffs that, well, if you weren't aiming at us, it sure  
13 feels like you aimed at us because you hit us.

14           **MR. PETERS:** I will agree that's an argument that the  
15 Plaintiffs are making. I don't think that's an argument that  
16 the evidence bears out. The evidence bears out policy  
17 disputes. And perhaps it feels like -- if you weren't aiming  
18 at us, it feels like it. It feels like it because we hold the  
19 counter-policy arguments very dear and very close, but that's a  
20 matter of whose policy is going to be the policy of the State.

21           **THE COURT:** All right. Thank you very much.

22           **MR. PETERS:** Thank you.

23           **THE COURT:** Okay. Let me first -- who wants to speak  
24 on the Plaintiffs' side other than Mr. Donovan, who is now  
25 rising?

1           **MR. DONOVAN:** I think I have generally been  
2 designated to do that briefly, and I am -- really what I'm  
3 going to do is highlight the areas of disagreement. We'll put  
4 it in our papers.

5           **THE COURT:** How long do you think you want to go?

6           **MR. DONOVAN:** Five, ten minutes tops.

7           **THE COURT:** All right. 10 minutes tops, can we agree  
8 on that?

9           **MR. DONOVAN:** I know you are aiming at me if I go  
10 beyond that.

11           **THE COURT:** No, that's all right.

12           **MR. DONOVAN:** So, Your Honor, what I really want to  
13 do is highlight the key points, and we'll address it in our  
14 papers following.

15           **THE COURT:** All right.

16           **MR. DONOVAN:** The first thing is really Mr. Farr, on  
17 behalf of the State, made several arguments, Your Honor, which  
18 I have to say would invite reversible error. He suggested  
19 benchmarks, vote dilution, and redistricting cases. Those were  
20 his key arguments, and they sounded familiar because he made  
21 them last year and he made them to the Fourth Circuit, and they  
22 were rejected.

23           And he also said, number two, that we don't have a  
24 case. Your Honor, you well know the case I have is this case  
25 from the Fourth Circuit. So I think to the extent the argument

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1 is you can't assert these kind of claims, I think the Fourth  
2 Circuit has said that's not true. You have to apply the facts,  
3 but the argument that you need a baseline is simply wrong under  
4 the Fourth Circuit's standard.

5 I just want to briefly say under a vote denial, you  
6 don't need a baseline or a benchmark. You need that under vote  
7 dilution, I have been taught, is because you don't know if  
8 there is a remedy that you can give until you have that  
9 baseline. The Fourth Circuit said, we know that here. First  
10 of all, you don't need it under vote denial, but here -- that's  
11 why I say this is an easier case -- they said the past  
12 practices are centrally relevant.

13 So to the extent in someone's mind they want a  
14 baseline, we have the exist -- we have the preexisting  
15 provisions, but I still don't think you need a baseline under  
16 Section 2.

17 Mr. Peters argued causation. The Fourth Circuit  
18 addressed that as well, is that Section 2 is set up in those  
19 two elements. The Senate Factors are the causation. It goes  
20 into your totality-of-the-circumstances analysis, but it is  
21 there. It is not a tort proximate causation. It is the exact  
22 causation talked about, and I would direct you to the Fourth  
23 Circuit.

24 Earlier we talked about turnout as a measure. We say  
25 the focus should be on burden. I just want to identify a

1 couple of cases I suggest. One is *U.S. versus Berks County* --  
2 this was a Department of Justice case that Mr. Russ referred  
3 you to -- 277 F. Supp. 2d 570, Eastern District of  
4 Pennsylvania, 2003. And, Your Honor, they found the burden  
5 without looking at any measure of turnout or otherwise on  
6 Hispanics for not having enough Spanish-speaking poll workers.

7           Number two, *Brooks v. Gant*, which we've cited before.  
8 I'll give you the Westlaw cite, 2012 WL 4482984. It's a 2012  
9 District of South Dakota case regarding poll locations related  
10 to Native Americans. Then I'd refer you as well to the *Stewart*  
11 *v. Blackwell* Sixth Circuit decision. I don't have the cite  
12 handy.

13           Next, Your Honor, again, just to review, we disagree  
14 with Mr. Farr's characterization of Dr. Stewart's testimony,  
15 and I would direct you to Appendix X of his 2015 report, which  
16 does show that African-Americans disproportionately registered  
17 in '14.

18           Your Honor, we will submit on the papers kind of the  
19 evidence on the long lines, but in the interim, if you look at  
20 PX71, his one fact Number 2, 38 counties had reduced hours in  
21 November 2014. And another that was very telling why these  
22 waivers happened is because the counties lack, many of them,  
23 the funds to open additional sites. They are given these  
24 waivers; whereas, if you had the longer period, the county  
25 board of elections' office would be open.

1           And, finally, before we submit on the papers on the  
2 uniformity, those satellite early voting locations, and we'll  
3 submit this, we believe can have different hours than the  
4 county board of elections. So, again, depending where the  
5 county boards of elections are, it is not still consistent  
6 within a county, so even that, but we will submit on that.

7           Finally, Your Honor, I come back to the key point,  
8 which is we brought this case -- and I know there are different  
9 parties. We brought it because there are racial effects, and  
10 it is about voting policies and overcoming those burdens and  
11 not removing them when they begin.

12           We've had lots of talks and I know there's lots of  
13 cases, but in conclusion, I would submit to not forget all  
14 these practices were removed at once. So I would submit that  
15 you really need to consider it that way.

16           On behalf of the Plaintiffs and I'm sure Mr. Farr, we  
17 thank your staff and the courthouse security for the logistics  
18 help. We really appreciate it.

19           **THE COURT:** Thank you very much. I look forward to  
20 reading the rest of the materials.

21           **MR. KAUL:** We had one very brief housekeeping matter.  
22 Your Honor suggested we file motions related to the exclusion  
23 of testimony within ten days yesterday. That falls on a  
24 Sunday. Would it be all right with the Court if we move back  
25 that back one day?

1           **THE COURT:** To Monday?

2           **MR. KAUL:** Yes.

3           **THE COURT:** That's fine. Any date that falls on a  
4 weekend goes to the next Monday.

5           **MR. FARR:** Your Honor, we were -- there was at least  
6 some chance we were going to be here for four weeks. You had  
7 perviously indicated that you wanted findings of fact and  
8 conclusions of law within two weeks. Can we have an additional  
9 week?

10           **THE COURT:** Now, I normally would say yes. My  
11 difficulty is that's going to make it more -- that's going to  
12 make it harder on me. I would like to have them in two weeks.  
13 Is that going to be an insurmountable thing for you all?

14           **MR. FARR:** Can we at least have, say, two weeks from  
15 Monday so we have another weekend?

16           **THE COURT:** That's fine.

17           **MR. FARR:** Thank you.

18           **THE COURT:** That would be fine.

19           **MS. O'CONNOR:** One other --

20           **THE COURT:** You don't have more exhibits, do you?

21           **MS. O'CONNOR:** No. Finally, I got that reaction. I  
22 promised Ms. Engle that I would clarify for the record during I  
23 believe it was the Trende cross-examination, Mr. Ho had  
24 referred to DX250 as the report that was being used. It had  
25 been previously referred to as DX2, and the version that's

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1 entered in the record is DX2. So references to DX250 in the  
2 record would really refer to DX2.

3 **THE COURT:** All right. Thank you. If you find  
4 anything else like that and there is agreement, you can  
5 stipulate to that afterwards and just let me know that. Yes,  
6 Mr. Russ?

7 **MR. RUSS:** Sorry, Your Honor, one final point. On  
8 the findings of fact, we have a 100-page limit. Given the  
9 volume of information in this case, we were going to request if  
10 we could have more pages. We are going to try to do one joint  
11 findings of fact and conclusions of law from all of the  
12 Plaintiffs, and we were wondering if we could have 150 pages to  
13 synthesize all the information we provided you. It will be in  
14 a more usable form for you if we are able to be comprehensive.

15 **THE COURT:** You know, I always hesitate to say no,  
16 because I know what it's like to practice. On the other hand,  
17 more is not always better. If you feel you need up to 150  
18 pages, you can use up to 150 pages. There is only so much I  
19 can digest. I've got a lot to read. So you do what you think  
20 you need, and I will -- I just want something that's  
21 manageable, and so if it's all valuable, great. If you're  
22 finding that it is not helpful, put yourself in my position and  
23 wonder whether you'd want to read all that.

24 **MR. RUSS:** Absolutely, Your Honor.

25 **THE COURT:** I will leave it at that.

1           Okay. All right. Let me thank all of you all. You  
2 did an excellent job preparing the case and trying it. I know  
3 it's been hard fought, as most trials are, but I do want to  
4 thank you for your effort and for your professionalism. I know  
5 it's taken quite a bit of effort and emotion to get the case to  
6 this point.

7           I'm sure this won't be the end of the line, but I  
8 will do my job and get an opinion out when I can. It's not  
9 going to be before I see your findings of fact and conclusions  
10 of law, and it probably won't be immediately after that. So it  
11 will take some consideration.

12           We worked very hard to get the preliminary injunction  
13 ruling out so that you would have an opportunity to seek your  
14 appellate rights, which you did. I will certainly keep in mind  
15 the election schedule as I look going forward so everybody can  
16 preserve their rights as best they can under the schedule. I  
17 understand the injunction is in place as to two of the items  
18 going forward.

19           So, again, thank you all very much.

20           Ms. Earls, I feel like I need to apologize to you  
21 again --

22           **MS. EARLS:** No, Your Honor.

23           **THE COURT:** -- for being short with you in your  
24 cross-examination, so you have my apologies.

25           All right. Anything further anybody else needs?

1           **MR. FARR:** No, Your Honor.

2           **MR. DONOVAN:** No, Your Honor.

3           **THE COURT:** Thank you all. You all have a good  
4 weekend.

5           (END OF PROCEEDINGS AT 4:21 P.M.)

6

7           END OF TRIAL DAY 15 AND TRIAL TRANSCRIPT

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1 UNITED STATES DISTRICT COURT  
2 MIDDLE DISTRICT OF NORTH CAROLINA  
3 CERTIFICATE OF REPORTER  
4  
5

6 I, Briana L. Nesbit, Official Court Reporter,  
7 certify that the foregoing transcript is a true and correct  
8 transcript of the proceedings in the above-entitled matter.  
9

10 Dated this 14th day of August 2015.  
11

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14 Briana L. Nesbit, RPR  
15 Official Court Reporter  
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