No. _____

In The
Supreme Court of the United States

STATE OF NORTH CAROLINA, *et al.*,
Petitioners,

v.

LEAGUE OF WOMEN VOTERS OF NORTH CAROLINA, *et al.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

DID THE COURT OF APPEALS ERR BY EFFECTIVELY INCORPORATING INTO § 2 OF THE VOTING RIGHTS ACT THE RETROGRESSION STANDARD APPLICABLE ONLY TO § 5 OF THE VOTING RIGHTS ACT?

HAS THE PRELIMINARY INJUNCTION ORDERED BY THE FOURTH CIRCUIT SUBJECTED NORTH CAROLINA TO A DE FACTO PRECLEARANCE STANDARD IN DEROGATION OF NORTH CAROLINA'S CONSTITUTIONAL PREROGATIVE TO ENACT LAWS GOVERNING THE TIME, PLACE, AND MANNER OF HOLDING ELECTIONS?

LIST OF PARTIES TO THE PROCEEDINGS BELOW

Petitioners, who were Defendants-Appellees below, are the State of North Carolina, the North Carolina State Board of Elections and its members, Joshua B. Howard, Ronda K. Amoroso, Joshua D. Malcolm, Paul J. Foley, Maja Kricker, its Executive Director, Kim Westbrook Strach, and the Governor of the State of North Carolina, Patrick L. McCrory. All of the individual defendants were sued in their official capacities.

Respondents, who were Plaintiffs-Appellants below, are the North Carolina State Conference of the NAACP and several aligned organizations and individual Plaintiffs (the "NAACP Plaintiffs"), the League of Women Voters of North Carolina along with several aligned organizations and individual Plaintiffs (the "League Plaintiffs"), and a group of "young" voters who were permitted to intervene as Plaintiffs in the proceedings before the district court (the "Intervenors") (collectively "Plaintiffs").

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PETITION FOR WRIT OF CERTIORARI

The State of North Carolina, the North Carolina State Board of Elections, its individual members and Executive Director, Kim Westbrook Strach, and the Governor of the State of North Carolina, Patrick L. McCrory (collectively "Defendants") respectfully petition for a writ of *certiorari* to review the United States Court of Appeals for the Fourth Circuit's judgment in this case.

OPINIONS BELOW

On August 8, 2014, the United States District Court for the Middle District of North Carolina entered an order denying Plaintiffs' motions for a preliminary injunction that sought to block the State of North Carolina from implementing various provisions of an election-reform law during the 2014 General Election. The order of the district court is reported at 997 F. Supp. 2d 322 (M.D.N.C. 2014). (Pet. App. 72a – 190a.)

The United States Court of Appeals for the Fourth Circuit on October 1, 2014, entered an order affirming, in part, and reversing, in part, the order of the United States District Court for the Middle District of North Carolina. (Pet. App. 1a - 65a.) The Fourth Circuit entered its judgment and mandate the same day.

The Fourth Circuit's decision is reported at 769 F.3d 224 (4th Cir. 2014).

On October 3, 2014, in accordance with the order, judgment, and mandate of the Fourth Circuit, the United States District Court for the Middle District of North Carolina entered an order granting, in part, Plaintiffs' motions for a preliminary injunction. (Pet. App. 191a - 196a.)

This Court, on October 8, 2014, entered an order granting an application filed by Defendants to Recall and Stay the Mandate of the Fourth Circuit and staying the preliminary injunction entered by the district court on October 3, 2014. This Court's order is reported at 135 S. Ct. 6 (2014).

JURISDICTION

The Fourth Circuit entered its judgment on October 1, 2014. (Pet. App. 66a – 71a.) This petition has been filed within ninety days of October 1, 2014. Accordingly, this Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the following constitutional and statutory provisions:

- Article I, Section 4, Clause I of the United States Constitution:

> The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by

> Law make or alter such Regulations, except as to the Places of chusing Senators.

- Sections 2 and 5 of the federal Voting Rights Act, 52 U.S.C. § 10301 (formerly 42 U.S.C. § 1973) and 52 U.S.C. § 10304 (formerly 42 U.S.C. § 1973c). These statutes are reproduced in the Appendix at 247a - 250a.

- Parts 16 and 49 of N.C. Sess. Laws 2013-381. These provisions are reproduced in the Appendix at 251a - 257a.

INTRODUCTION

Petitioners respectfully submit that *certiorari* should be granted and the Fourth Circuit opinion below should be reversed on the merits. Alternatively, this Court should grant *certiorari*, vacate the decision by the Fourth Circuit, and remand the case for further proceedings. *See Youngblood v. West Virginia*, 547 U.S. 867, 870 (2006). The decision below creates a serious conflict between the Fourth, Seventh and Ninth Circuit Courts of Appeal involving important questions of federal law that threaten the authority of all states to enact laws governing the time, place, and manner of holding elections. The decision also conflicts with numerous decisions of this Court delineating the different standards for claims arising under §§ 2 and 5 of the Voting Rights Act. The Fourth Circuit improperly based its decision on a *de facto* retrogression standard that applies only to claims arising under § 5 of the Voting Rights Act. Unless reversed or vacated, the preliminary injunction

entered at the direction of the Fourth Circuit will bar North Carolina from administering its current election laws until it obtains a final judgment that the challenged practices do not violate § 2 under the effective retrogression standard adopted by the Fourth Circuit. Such a result will improperly place North Carolina under a *de facto* § 5-like preclearance regime. This judicial invasion of North Carolina's sovereign authority is not supported by the Voting Rights Act, conflicts with prior decisions by this Court, and usurps North Carolina's right to enact laws governing the time, place, and manner of elections.

STATEMENT OF THE CASE

The consolidated appeals heard by the Fourth Circuit arose from lawsuits challenging the enactment of North Carolina Session Law 2013-381 ("S.L. 2013-381") by the North Carolina General Assembly. In relevant part, S.L. 2013-381 eliminated "same-day registration" ("SDR"), which allowed persons to register and vote on the same day during the one-stop absentee voting period and eliminated a practice called "out-of-precinct provisional balloting," which allowed ballots cast on Election Day by registered voters in the incorrect precinct within their county to be counted in certain races.

In the proceedings below, Plaintiffs moved for a mandatory preliminary injunction to (1) enjoin enforcement of the challenged sections of S.L. 2013-381 for the 2014 General Election; (2) and order the State to reinstate repealed election practices used by North Carolina prior to the enactment of S.L. 2013-

381. Beginning on July 7, 2014, the district court held a four-day evidentiary hearing to consider Plaintiffs' motions. On August 8, 2014, the district court entered a Memorandum Opinion and Order denying Plaintiffs' motions. All Plaintiffs except the United States appealed from the district court's order.

On October 1, 2014, by a 2-1 vote, the Fourth Circuit reversed the district court's decision, in part, by ordering the State to reinstitute SDR and out-of-precinct voting. In doing so, the court found that Plaintiffs had established a likelihood of success on the merits of their claims under § 2 of the Voting Rights Act.

On October 8, 2014, this Court granted Petitioners' Emergency Application to Recall and Stay Mandate of the Fourth Circuit, pending disposition of a petition for a writ of *certiorari*. These cases are currently set for trial in the district court on the July 2015 trial calendar.

REASONS FOR GRANTING THE PETITION

I. THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT CREATES A SERIOUS CONFLICT BETWEEN THE FOURTH, SEVENTH AND NINTH CIRCUITS THAT WILL CAUSE MORE LITIGATION AND CONFUSION FOR STATES AS THEY ATTEMPT TO ADMINISTER OR REFORM ELECTION PRACTICES FOR THE 2016 PRESIDENTIAL ELECTION.

The decision of the Fourth Circuit creates a serious conflict between the Fourth, Seventh, and Ninth Circuit Courts of Appeal involving important questions of federal law that threaten the authority of all states to enact laws governing the time, place, and manner of holding elections. In what amounts to imposition of a retrogression standard under § 2 of the Voting Rights Act, the Fourth Circuit's decision below interprets § 2 without regard to whether the challenged election laws on their face apply equally to all voters regardless of race and without regard to whether the laws actually cause a decline of minority participation in the election process. In contrast, the Seventh Circuit has found that state laws governing the time, place, and manner of holding elections do not violate § 2 absent evidence that action by the state causes unequal opportunity for a minority group as compared to non-minority voters. *Frank v. Walker*, 768 F.3d 744, 753 (7th Cir. 2014). In addition, the Ninth Circuit has held that a photo identification requirement to vote does not violate § 2 absent proof of a "causal connection

between the challenged voting practice and a prohibited discriminatory result." *Gonzalez v. Arizona*, 677 F.3d 383, 405 (9th Cir. 2012) (en banc), *aff'd*, *Arizona v. Inter Tribal Council of Arizona, Inc.*, 133 S. Ct. 2247 (2013). The split created by the Fourth Circuit's decision below needs to be resolved to provide guidance to all of the states in their administration and enactment of election laws for the 2016 Presidential Election.

The Fourth Circuit, by departing from the Ninth Circuit's reasoning and the reasoning that would soon be followed by the Seventh Circuit, created this split by ignoring this Court's precedent and instead adopting the legal analysis followed by the United States District Court for the Southern District of Ohio and the Sixth Circuit in *Ohio State Conference of N.A.A.C.P. v. Husted*, ___ F. Supp. 2d ___, No. 2:14-cv-404, 2014 WL 4377869 (S.D. Ohio Sept. 4, 2014), *aff'd*, 768 F.3d 524 (6th Cir. 2014), *stayed* 135 S. Ct. 42 (2014), *vacated*, No. 14-3877 (6th Cir. Oct. 1, 2014) (copy of unreported order vacating judgment located at ECF Doc. No. 53-1) and the district court's opinion in *Frank v. Walker*, 17 F. Supp. 3d 837 (E.D. Wis. 2014), *rev'd*, 768 F.3d 744 (7th Cir. 2014).[1] While purporting not to rely on a retrogression standard from § 5 jurisprudence, the Fourth Circuit majority opinion stated that it considered North Carolina's previous practices of

[1] The Seventh Circuit stayed the decision of the district court in *Frank* which would have allowed Wisconsin to enforce its photo identification law for the 2014 General Election. 766 F.3d 755, 756 (2014). The Seventh Circuit's stay was vacated by this Court pending the disposition of any petition for a writ of *certiorari*. 135 S. Ct. 7 (2014).

allowing SDR and out-of-precinct voting as "centrally relevant" and a "critical piece" of its § 2 analysis. 769 F.3d at 242. The Fourth Circuit did not attempt to determine whether minorities were subject to unequal opportunity because of the election system established by S.L. 2013-381, despite the factual findings by the district court that the current system does not deprive African-Americans of equal opportunity. Instead, the Fourth Circuit found that a higher rate of minority participation in the repealed practices than non-minority voters was "linked" to "relevant social and historical conditions," and that Plaintiffs had therefore demonstrated a likely violation of § 2. 769 F.3d at 245.

The only evidence available at the time of the Fourth Circuit's ruling indicated that minority participation had *increased* after North Carolina eliminated SDR and out-of-precinct voting. *See infra* at p. 20 & n. 9. The Fourth Circuit focused instead on evidence of disproportionate participation rates in the repealed practices and only three of the "*Gingles* factors"[2]: (1) past historical discrimination against African-American voters in the area of election law (most examples of which were more than 30 or 40 years old); (2) the presence of racially polarized voting in North Carolina; and (3) expert testimony that minorities continue to lag behind in the areas of "education, employment, income, access to transportation, and residential stability." *League of Women Voters*, 769 F.3d at 246. Based upon this evidence, the majority concluded that North Carolina was obligated to give African-Americans more time and more options to vote than the options

[2] *Thornburg v. Gingles*, 478 U.S. 30 (1986).

and opportunities provided to all other voters. Under this interpretation, and as described by Plaintiffs' expert Charles Stewart, Ph.D., laws that require all voters to register 25 days before an election or vote in their assigned precinct violate § 2 because African-Americans are supposedly less capable than other more affluent and more "sophisticated" non-minority voters of complying with neutral rules for registering and voting. *See infra* at p. 23.

In contrast, the Seventh Circuit held that § 2 plaintiffs are required to prove a causal connection between some form of state action, such as an election law, and actual injury to the minority group; i.e., that the challenged law causes unequal opportunity for minorities to participate in the election process. *Frank*, 768 F.3d at 753-55. Under this standard, an election law that applies equally to all voters regardless of race, as North Carolina's challenged provisions do, does not violate § 2 absent proof that the challenged law actually caused a decline in minority participation. *Id.*[3]

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[3] Subsequent to the decisions in *Husted* and *Frank*, the district court in *Veasey v. Perry*, Civil Action No. 13–CV–00193, 2014 WL 5090258 (S.D. Tex. Oct. 9, 2014), relying upon the decision by the district court in *Frank* (even though that decision had already been reversed by the Seventh Circuit on October 6, 2014), found that the Texas photo identification law violated § 2 because of alleged disproportionate burdens on black and Latino voters. On October 14, 2014, the United States Court of Appeals for the Fifth Circuit entered a stay pending appeal by the State of Texas. *Veasey v. Perry*, 769 F.3d 890, 896 (5th Cir. 2014). The Fifth Circuit has not yet entered a ruling on the merits of this case.

In *Frank*, Plaintiffs challenged Wisconsin's photo identification requirement under § 2. The district court in *Frank* permanently enjoined enforcement of the Wisconsin statute based upon an interpretation of § 2 similar to the standard used by the Fourth Circuit. The district court held that minority voters would be more "burdened" than other voters in their efforts to obtain a photo identification card because of their economic status. These burdens, which the district court found weighed more heavily on voters from lower socio-economic backgrounds, included the burden of obtaining a birth certificate and the burden of having to visit a DMV office to obtain a photo identification card. *Frank*, 17 F. Supp. 3d at 855-62.

The Seventh Circuit rejected the analysis of the district court. Accepting as true the district court's findings that minorities disproportionately lacked photo identification cards, the Seventh Circuit held that a "disparate outcome" does not show a "denial" of a citizen's right to voter because of race under § 2(a) of the Voting Rights Act. *Frank*, 768 F.3d at 753. Relying upon the text of § 2, the Seventh Circuit held that "§ 2(b) tells us that § 2(a) does not condemn a voting practice just because it has a disparate effect on minorities." *Id.* Under § 2(b), "a violation of § 2(a) is established only if, based upon the totality of the circumstances, it is shown that political processes . . . are *not equally open* to participation by members of a [protected] class . . . in that its members have *less opportunity* than other members of the electorate to participate

in the political process." *Id.* The Seventh Circuit noted that Wisconsin's photo identification law did "not draw any line by race, and that the district judge did not find that [the minority groups] have 'less opportunity' than whites to get photo IDs." *Id.*

Instead, the Seventh Circuit held that the district judge found that "because they [minorities] have lower incomes, these groups are less likely to *use* that opportunity. And that does not violate § 2." *Id.* The Seventh Circuit observed that the district court had made no findings that the State of Wisconsin had discriminated and that "units of government are responsible for their own discrimination but not for rectifying the effects of other persons' discrimination." *Id.* at 753 (citing *Milliken v. Bradley*, 418 U.S. 717 (1974)). In short, while § 2 "forbids discrimination" by the State based upon "race or color," it "does not require states to overcome societal effects of private discrimination that affect the income or wealth of potential voters." *Id.*

The Ninth Circuit interpreted § 2 similarly in *Gonzalez*. There, the plaintiffs challenged Arizona's requirement that voters produce a photo identification card that bears the name, address, and photo of a voter, or two forms of identification that bear the name and address of the voter. *Gonzalez*, 677 F.3d at 404. Plaintiffs argued that Arizona's identification requirement unlawfully diluted the voting rights of Latino voters because Latinos were less likely to have the required identification. *Id.* at

406-07. The Ninth Circuit rejected the argument that a violation of § 2 could be established "'based purely on a showing of some relevant statistical disparity between minorities and whites,' without any evidence that the challenged voting qualification causes that disparity . . . " *Id.* at 405 (citing *Smith v. Salt River Project Agric. Improvement & Power Dist.*, 109 F.3d 586, 595 (9th Cir. 1997)). Plaintiffs' claims failed because they "adduced no evidence that Latinos' ability or inability to obtain or possess identification for voting purposes (whether or not interacting with the history of discrimination and racially polarized voting) resulted in Latinos having less opportunity to participate in the political process and to elect representatives of their choice." *Id.* at 407.

This Court's resolution of the split between the Fourth, Seventh, and Ninth Circuits is needed not only in those circuits but for purposes of guiding the Fifth and Sixth Circuits in the cases that remain pending in these jurisdictions, as well as in guiding other courts in cases that may arise in other circuits. It is also necessary for legislative and election officials in the States of North Carolina, Wisconsin, Texas, and Ohio. All four states remain in active litigation concerning the administration of their election laws and need clarification regarding their obligations under § 2. Failure to clarify the split between the Fourth, Seventh, and Ninth Circuits is likely to create confusion and unnecessary litigation in states that have recently enacted election law reforms, or may be considering election law reforms,

including but not limited to photo identification requirements. *See* Trende Decl. ¶ 19.[4]

Moreover, out of the fifty states, thirty-seven, including North Carolina, do not allow SDR, and a majority do not allow out-of-precinct voting. *McCrory*, 997 F. Supp. 2d at 351, 367. If North Carolina's failure to offer these two practices violates § 2, the same principles would apply to these other states. *See id.* at 351-52. These states could then expect to see similar claims made against them as they prepare for the 2016 Presidential Election. Thus, *certiorari* should be granted to resolve the circuit split between the Fourth and Seventh and Ninth Circuits on an important federal issue that impacts the administration of election laws in all fifty states as they prepare for the 2016 Presidential Election.

[4] The complete report and supporting exhibits for Defendants' expert Sean P. Trende are available at ECF Docket Nos. 126-5 to 126-7 in M.D.N.C. Case No. 1:13-cv-861. Mr. Trende was accepted as an expert witness by the district court in *Husted*, however, the district court did not rule on a motion by the Plaintiffs in this case to exclude his report.

II. THE DECISION BY THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT IS IN CONFLICT WITH RELEVANT DECISIONS BY THIS COURT AND INVOLVES IMPORTANT QUESTIONS OF FEDERAL LAW THAT SHOULD BE DECIDED BY THIS COURT.

A. The Fourth Circuit's Ruling Reduces § 2 Claims in the Vote Denial Context to Retrogression *Simpliciter* and is Contrary to All Prior Decisions of this Court that Explain the Differences between § 5 and § 2.

Plaintiffs have been advocating for their unprecedented interpretation of § 2 as a response to the decision of this Court in *Shelby Cnty., Ala. v. Holder*, 133 S. Ct. 2612 (2013). The Fourth Circuit majority's adoption of Plaintiffs' interpretation is similarly predicated on an implicit rejection of the decision in *Shelby County*. For example, the Fourth Circuit majority quoted the dissenting opinion of Justice Ginsburg describing the Court's *Shelby County* opinion as "casting aside" the Voting Rights Act. 769 F.3d at 242. The Fourth Circuit majority then accused the district court "of parrot[ing]" the "Supreme Court's proclamation that 'history did not end in 1965'" and that "past discrimination cannot in the manner of original sin condemn government action." *Id.* at 242 (quoting *McCrory*, 997 F. Supp. 2d at 349 (quoting *Shelby Cnty.*, 133 S. Ct. at 2628)). In foretelling its decision to employ a retrogression analysis, the Fourth Circuit majority stated that "[t]he facts of this case attest to the prophylactic

success of § 5's preclearance requirements." *Id.* at 239. The Fourth Circuit majority also stated that North Carolina's legislative leadership knew that S.L. 2013-381 would not have been precleared and that because of this knowledge the General Assembly waited to "go with the full bill" until after *Shelby County*. *Id.* at 231. In support of this conclusion, the Fourth Circuit majority cited one newspaper article reporting a comment by one legislator. *Id.* at 231 (citing *McCrory*, 997 F. Supp. 2d at 336 (quoting a newspaper article found at J.A. 1831)). The import of these statements by the Fourth Circuit is clear: the challenged "retrogressive" actions by the North Carolina General Assembly became possible only because this Court in *Shelby County* "cast aside" the Voting Rights Act.

The Fourth Circuit majority then essentially acknowledged that it was applying a preclearance-like retrogression analysis. For example, without citing any precedent, the Fourth Circuit stated that North Carolina could not eliminate "its more generous registration provisions [SDR] without *ensuring* that, in doing so, it is not violating § 2." *Id.* at 243 (emphasis added). The Fourth Circuit majority cited no precedent for a § 5-like burden shifting requirement applicable to all legislatures before they enact voting changes. The Fourth Circuit majority also incorrectly cited *Gingles*, 478 U.S. at 45 n. 10, stating that § 2 "'prohibits all forms of voting discrimination' that *lessen opportunity* for minority voters." 769 F.3d at 238 (emphasis added). Contrary to the Fourth Circuit's holding, while *Gingles* does indeed say that § 2 "prohibits all forms

of voting discrimination," *Gingles* does not state that it prohibits all forms of voting discrimination that "lessen the opportunity for minority voters."

Neither the Fourth Circuit nor Plaintiffs cite any precedent for this interpretation of § 2. While a statute that allegedly provides "less opportunity" than a repealed practice might be subject to an objection under § 5, it does not violate § 2 if it provides equal opportunity. *See Bartlett v. Strickland*, 556 U.S. 1, 23-35 (2009) (plaintiffs not entitled to the election practices they prefer or practices that benefit them and their political allies); *League of United Latin Am. Citizens ("LULAC") v. Perry*, 548 U.S. 399, 446 (2006) ("The inquiry under § 2, however, concerns the opportunity 'to elect representatives of their choice,' 42 U.S.C. § 1973(b), not whether a change has the purpose or effect of 'denying or abridging the right to vote,' § 1973c."). Simply because a new statute might have been denied preclearance under § 5 does not prove a violation of § 2. *Holder v. Hall*, 512 U.S. 874, 883-85 (1994) (stating that change that is subject to the preclearance requirements of § 5 is not necessarily subject to a claim under § 2). And, prior to *Shelby County*, denial of preclearance was not required simply because a statute might violate § 2. *Reno v. Bossier Parish School Board*, 528 U.S. 320, 325 (2000) ("*Bossier II*") (finding that § 5 only banned "backsliding," not all changes that might violate § 2); *Reno v. Bossier Parish School Board* ("*Bossier I")*, 520 U.S. 471, 480-85 (1997) (proof of an alleged violation of § 2 does not demonstrate retrogression under § 5).

Petitioners respectfully contend that the district court applied this Court's substantive standard for claims under § 2 as followed by the Seventh and Ninth Circuits. The district court stated that the question under § 2 is whether North Carolina's "existing voting scheme (without [the practices repealed by the challenged statute]) interacts with past discrimination and present conditions to cause a discriminatory result." *McCrory*, 997 F. Supp. 2d at 352. Section 2 is not concerned with whether the elimination of a preferred election practice will "worsen the position of minority voters in comparison to the preexisting" election system. *Id.* Rather, the § 2 results standard is "an assessment of equality of opportunity under the current system." *Id.* at 367; *cf. Holder*, 512 U.S. at 874 ("Retrogression is not the inquiry in § 2 vote dilution cases.").[5]

This Court has repeatedly held that § 2 and § 5 serve different purposes and impose different standards. *Holder*, 512 U.S. at 883 (stating that § 2 and § 5 of the VRA "differ in structure, purpose, and application"); *see also Bossier II*, 528 U.S. at 334; *Bossier I*, 520 U.S. at 480. Section 5 only applied to jurisdictions covered by a formula established by Congress. This formula focused on an established history of racial discrimination in voting. *Holder*, 512 U.S. at 883; *Shelby Cnty.*, 133 S. Ct. at 2625.

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[5] The Fourth Circuit majority mischaracterized the district court's opinion as suggesting that "courts are categorically barred from considering past practices" in the § 2 analysis. 769 F.3d at 241. The district court made no such suggestion and, in fact, considered minorities' disparate participation rates in the repealed practices. *See McCrory*, 997 F. Supp. 2d at 348-49.

Unlike § 2, the evidentiary burden under § 5 was upon the state to prove that a change was not retrogressive – i.e., it did not place minorities in a less favorable position than under the past practice. *Bossier II*, 528 U.S. at 334; *Beer v. United States*, 425 U.S. 130, 141 (1976).

Vote dilution decisions by this Court provide guidance for all § 2 claims. These decisions make it clear that under § 2, Plaintiffs must offer a hypothetical standard which proves by comparison that the challenged practices cause discriminatory results. *Bossier II*, 528 U.S. at 334; *see also Holder*, 512 U.S at 880 (quoting *Gingles*, 478 U.S. at 88 (O'Connor, J., concurring)). Thus, in a typical vote dilution case, Plaintiffs must first show a hypothetical district in which minorities are politically cohesive and would constitute a majority. *Gingles*, 478 U.S. at 49-51. Plaintiffs must then offer expert testimony that because of racially polarized voting, the minority group does not have an equal opportunity to elect their candidates of choice. *Id.* at 48-51. The *Gingles* factors and the totality of the circumstances test are not relevant unless a hypothetical standard is shown and there is proof of a causal link between the challenged voting practice and the absence of equal opportunity to participate in the electoral franchise. *Id.* at 63. Until Plaintiffs show the hypothetical standard and a causal link, it is error to base a ruling on a few selected "*Gingles* factors" as the Fourth Circuit did in this case. *Bartlett*, 556 U.S. at 11-12; *Growe v. Emison*, 507 U.S. 25, 38-40 (1993). The decision of the Fourth Circuit majority below unmoors § 2 claims such as

those brought by Plaintiffs from the analysis required by this Court.

Under these substantive standards, Plaintiffs in this case were required to demonstrate a likelihood that the minority group cannot register or vote on an equal basis as compared to non-minority voters because of the elimination of SDR or out-of-precinct voting. This would require proof that the challenged election practices (not alleged economic or educational status or participation rates in past practices) prevent minorities from registering and voting on an equal basis as compared to non-minorities.

The evidence before the district court and the Fourth Circuit more than demonstrated that Plaintiffs did not show a likelihood of success under this Court's § 2 jurisprudence. Plaintiffs admitted that conducting a cross-state comparison of minority registration and turnout in states that do not have SDR or out-of-precinct voting is a generally accepted method for proving a statistically significant connection between the presence or absence of these practices and African-American participation rates. Yet, Plaintiffs' experts did not conduct such a study. Transcript of Hearing on Motion for Preliminary Injunction ("Tr.")[6] Vol. III, pp. 54-61 (Pet. App. 216a - 225a.) (testimony of Dr. Charles Stewart), pp. 136-37 (Pet. App. 231a - 232a.) (testimony of Dr. Barry Burden); Deposition of J. Morgan Kousser

[6] All cited pages from the transcript of the Preliminary Injunction hearing conducted by the district court are included in the Appendix.

("Kousser Dep.")[7] pp. 26-30, 33, 100-03, 290-92.[8] Defendants' expert did this analysis and concluded that there is no statistically significant connection between the repealed practices and minority registration and turnout. Trende Decl. ¶¶ 117-25. The results of the 2014 May Primary bolstered Defendants' position that there is no causal link between the repealed practices and African-American participation rates in voting. *See McCrory*, 997 F. Supp. 2d at 375 n.72.[9]

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[7] The entire transcript of the Deposition of J. Morgan Kousser is available at ECF Docket No. 158-3 in M.D.N.C. Case No. 1:13-cv-861.

[8] The evidence before the district court, which was ignored by the Fourth Circuit, showed high levels of African-American turnout during the 2012 General Election in states without SDR or out-of-precinct voting, including Virginia and Florida. *McCrory*, 997 F.Supp.2d at 335, 352; Tr. Vol. III pp. 34, 36, 41-42, 44-45 (Pet. App. 207a - 215a.) (testimony of Dr. Charles Stewart); Trende Decl. ¶¶ 21, 45, 62-90.

[9] Mr. Trende's opinions were further validated by the results of the 2014 General Election. In 2014, African-American participation in early voting exceeded the African-American participation rate in the 2010 General Election. Further, overall African-American turnout exceeded the percentage of African-American turnout in the 2010 election. In the 2014 General Election, North Carolina had 6,628,584 registered voters as compared to 6,207,063 in 2010 (an increase of 6.79%). In 2014, a total of 629,179 African-Americans voted as compared to 540,307 in 2010 (an increase of 16.45%). In 2014, African-Americans represented 21.42% of the total number of voters as compared to only 20.11% in 2010 (an increase of 1.31%). In 2014, 42.17% of registered African-Americans voted as compared to 40.30% in 2010 (an increase of 1.89%). *See* **ftp://alt.ncsbe.gov/data/Elections%20Summary/2014%20General%20Election%20Summary.pdf**. (Pet App. 258a.) These results prove the wisdom of Justice Stevens' observation

Plaintiffs' experts conceded that they could not predict that the repeal of SDR and out-of-precinct voting would cause a decline in minority registration and turnout. They also admitted that minority registration and turnout in prior North Carolina elections could have increased without SDR or out-of-precinct voting. Tr. Vol. III pp. 21, 54-61 (Pet. App. 202a – 203a, 216a -225a.) (testimony of Dr. Stewart); pp. 136-37 (Pet. App. 231a - 232a.) (testimony of Dr. Burden); Kousser Dep. 100-03, 290-92. All three of these experts also conceded that registration and turnout in 2008 and 2012 were dramatically increased because of the Get–Out–The–Vote program of the Obama presidential campaign and not merely because of the presence of SDR or out-of-precinct voting. Deposition of Dr. Charles Stewart ("Stewart Dep.")[10] pp. 254-60; Tr. Vol. III pp. 139, 142 (Pet. App. 233a - 236a.) (testimony of Dr. Burden); Kousser Dep. 35-36, 108, 116-17.

The evidence also showed that, during the 2012 election cycle, registration by minorities during SDR and the one-stop absentee voting period (also known as "Early Voting") was facilitated by the location of Early Voting locations. Only 30 counties had Sunday voting in 2012. Counties with Sunday voting had 28.9% African-American voting age population as compared to 18.3% in non-Sunday

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that "historical facts rather than speculation" enhance the probability of correct resolutions of issues such as those presented by this case. *Purcell v. Gonzalez*, 549 U.S. 1, 6 (2006) (Stevens, J., concurring).

[10] The entire transcript of the Deposition of Dr. Charles Stewart is available at ECF Docket No. 158-1 in M.D.N.C. Case No. 1:13-cv-861.

voting counties. Declaration of Dr. Janet Thornton ("Thornton Decl.") ¶ 29, Fig. 5 (complete declaration available at ECF Docket No. 126-9 in M.D.N.C. Case No. 1:13-cv-861). Moreover, Early Voting locations were located in Census tracts that were disproportionately African-American. Thornton Decl. ¶¶ 25-37. SDR was therefore disproportionately more accessible to African Americans as compared to non-minorities.

Given these unrebutted facts, it is telling that the Fourth Circuit majority ignored decisions of this Court that require evidence of a causal link between challenged practices and actual discriminatory results. *Gingles*, 478 U.S. at 47; 52 U.S.C. § 10301(b) (formerly 42 U.S.C. § 1973(b)). Instead, the Fourth Circuit majority held that disproportionately high participation rates under repealed practices, coupled with testimony on only three of the *Gingles* factors, proves that repealing SDR and out-of-precinct voting will "burden" African-Americans more than non-minorities. Under such a theory, before North Carolina repealed SDR and out-of-precinct voting, it was required to elicit expert testimony from academics like Plaintiffs' experts explaining how repeal of SDR and out-of-precinct voting would not burden black voters. The Fourth Circuit held that North Carolina could not repeal election practices without "ensuring" that any such legislation did not violate § 2. 769 F.2d at 243. This preclearance-like shifting of an evidentiary burden onto the State is contrary to all prior decisions by this Court that explain the difference between § 5 and § 2 and raises serious

constitutional issues.[11] Unless this Court issues its writ of *certiorari* and reverses the decision of the Fourth Circuit majority, North Carolina will be prohibited from enforcing its validly-enacted laws until it can, in essence, satisfy § 5 preclearance standards.

Plaintiffs', and now the Fourth Circuit's, incorrect understanding and application of federal law rests upon Plaintiffs' expert witness's opinions that minority voters are somehow "less sophisticated" than non-minority voters and therefore will not be able to discern the multiple opportunities that North Carolina law continues to provide for them to register and vote. Tr. Vol. II, pp. 193, 196; Vol. III, pp. 20, 21, 28-30 (Pet. App. 201a - 206a.) (testimony of Dr. Charles Stewart) Vol. III, pp. 116-17, 120, 141, 142 (Pet. App. 227a - 236a.) (testimony of Dr. Barry Burden). This is the same type of expert testimony accepted by the district court in *Frank,* 17 F. Supp. 3d at 853-62, and rejected by the Seventh Circuit, 768 F.3d at 753-55. But, as found by the district court in this case, the facts show that the current opportunities to register and vote in North Carolina remain ample and reflect electoral practices of a majority of the other fifty states. *McCrory*, 997 F. Supp. 2d at 364, 367.

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[11] The strict remedies provided by § 5 survived constitutional scrutiny because of the specific coverage formula adopted by Congress to focus the remedies on jurisdictions with an undisputed history of discrimination in voting. *South Carolina v. Katzenbach*, 383 U.S. 301, 329 (1966). Insertion of a nationwide retrogression standard under § 2 is not supported by similar findings and would raise serious constitutional issues. *Bossier II*, 528 U.S. at 336-37; *Bossier I*, 520 U.S. at 480.

Plaintiffs' assertions that North Carolina's African-American voters are less able to understand and comply with North Carolina's election practices amount to a "racial classification" that is "'odious to a free people whose institutions are founded upon the doctrine of equality," *Shaw v. Hunt*, 509 U.S. 630, 643 (1993) (quoting *Hirabayashi v. United States*, 320 U.S. 81, 200 (1943)), and "threaten to stigmatize individuals by reason of their membership in a racial group and to incite racial hostility." *Id.* (quoting *Richmond v. J. A. Croson Co.*, 488 U.S. 469, 493 (1989)).

B. The Fourth Circuit's Decision Replaces this Court's Causation Element for § 2 claims with Selected *Gingles* Factors Cherry-Picked from the Vote Dilution Context.

The Fourth Circuit majority ignored the district court's correct legal conclusion, based upon this Court's § 2 jurisprudence, that a "bare statistical showing of disproportionate *impact* on a racial minority does not satisfy" § 2. *McCrory*, 997 F. Supp. 2d at 347 (citations omitted) (emphasis in original). *See also Frank*, 768 F.3d at 753. In the instant case, Plaintiffs at best demonstrated disparate *participation rates* (and only during Presidential elections in 2008 and 2012) by minorities in repealed practices such as SDR and out-of-precinct voting. Plaintiffs offered no evidence that SDR or out-of-precinct voting caused these disproportionate participation rates in 2008 and 2012. They also failed to explain why African-

American participation rates in these practices had not been disproportionately high in off-year elections such as 2006 and 2010. *McCrory*, 997 F. Supp. 2d at 356, 372-74; Thornton Decl. ¶¶ 17-24. Plaintiffs also failed to demonstrate, and the Fourth Circuit relieved them from demonstrating, that the elimination of SDR and out-of-precinct voting has caused or will cause any disproportionate decrease in future voting and registration by minorities. In essence, the Fourth Circuit's decision, contrary to decisions by this Court, relieves Plaintiffs of any obligation to show causation under the current practices as long as they have shown correlation in two Presidential elections under the past practices. Unless this Court issues its writ of *certiorari* and reverses the holding below, the erroneous analysis of the Fourth Circuit majority will strip North Carolina of its right to control the time, place and manner of elections.

Even if minority voters participated in SDR and out-of-precinct voting at a higher rate than non-minority voters, it does not follow that the repeal of those options will result in minority voters suffering disproportionate participation rates in registration and voting in future elections. Just because SDR is no longer available does not mean that minority voters will not take advantage of existing ways to register at higher rates than non-minority voters. Even without SDR, any potential voter in North Carolina may take advantage of many different registration opportunities including registration by mail; registration at the Division of Motor Vehicles, public health departments, social services agencies; and through registration drives conducted by

organizations. *McCrory*, 997 F. Supp. 2d at 350-51. These factual findings were completely ignored by the Fourth Circuit.

The Fourth Circuit also ignored that Plaintiffs have not alleged a true disparate impact claim. Disparate *participation* does not equate to disparate *impact*. In disparate impact cases, the impacted Plaintiff has no ability to influence the adverse impact. For instance, in redistricting cases, the voting strength of a minority group may be diluted through various mechanisms in the construction of the district which the voters cannot control. *Gingles*, 478 U.S. at 46 n.11, 50, 51; *Voinovich v. Quilter*, 507 U.S. 146, 153-54 (1993). However, the challenged provisions of S.L. 2013-381 apply equally to all voters regardless of race. Thus, any impact by S.L. 2013-381 on minority participation rates is not caused by the challenged statute *per se*, but by the choices and preferences of individual voters. *Smith,* 109 F.3d at 595-96. Voters remain in control. "That voters preferred to use SDR over [other] methods [of registration] does not mean that without SDR voters lack equal opportunity." *McCrory*, 997 F. Supp. 2d at 351; s*ee also LULAC*, 548 U.S. at 445; *Bartlett*, 556 U.S. at 23 (finding plaintiffs were not entitled to the election practices they prefer or practices that benefit them and their political allies).

This error was compounded when the Fourth Circuit ignored decisions by this Court and proceeded to its "totality of [some but not all] the

circumstances" analysis. *Growe*, 507 U.S. at 38-40.[12] There is no governmental action here that causes an unequal playing field in voting or registration. Even Plaintiffs' experts admitted that all voters, regardless of race, have the same opportunity to register up to and including 25 days before Election Day and vote in their assigned precinct on Election Day. Stewart Dep. pp. 227-28 (confirming that there is no legal impediment to voters registering up to and including 25 days before the election or voting during the 10-day Early Voting period, voting absentee, or voting in their assigned precinct); Tr. Vol. III pp. 161-63 (Pet. App. 243a - 246a.) (Testimony of Dr. Barry Burden) (admitting that nothing done by the State of North Carolina prevents voters, regardless of their race, from registering up to and including 25 days before the election or voting during the 10-day Early Voting

[12] The only "*Gingles* factor" actually listed in § 2 is the extent to which minorities have been elected to office. The record here shows that African-Americans have proportionality in the number of majority-minority districts under the State's legislative plan and that the number of African-Americans currently serving in this legislature is at an all-time high. *Johnson v. DeGrandy*, 512 U.S. 997, 1000 (1994); *LULAC*, 548 U.S. at 436; Kousser Dep. 87-88, 92, Ex. 141, pp. 26-28 (Judgment and Memorandum Decision in *Dickson v. Rucho*, 2013 WL 3376658 (N.C. Super. Ct. July 8, 2013)); Tr. Vol. III pp. 149-50 (Pet. App. 237a - 238a.). African-Americans are currently registered at a higher percentage of their voting age population and turnout among African-Americans in the 2008 and 2012 general elections was higher than non-minorities. *McCrory*, 197 F. Supp. 2d at 350. Defendants are aware of no case under § 2 where these "*Gingles* factors" existed and a court found a challenged practice illegal under the totality of the circumstances test.

period, voting absentee, or voting in their assigned precinct).

As noted by the district court, the burdens associated with S.L. 2013-381 are not more severe than the burdens caused by the photo identification requirement upheld in *Crawford v. Marion County Elections Board*, 553 U.S. 181 (2008). Yet the Fourth Circuit ignored *Crawford* and the district court's factual findings and instead endorsed Plaintiffs' selective use of only three of the *Gingles* factors. The Fourth Circuit got it backwards. None of the *Gingles* factors are relevant, much less only three of those factors, absent proof of state action that causes discriminatory results. *Frank*, 768 F.3d at 753, 755.

C. The Fourth Circuit's Flawed Order Has Effectively and Impermissibly Placed North Carolina Under a Preclearance Standard for the Administration of North Carolina Election Laws.

Jurisdictions covered by § 5 could not administer newly-enacted election laws until the laws were precleared. *Lopez v. Monterey County*, 525 U.S. 266, 277-82 (1999); *Beer*, 425 U.S. at 132-33. If this Court declines to issue a writ of *certiorari*, lifts its stay, and fails to reverse or vacate the preliminary injunction directed by the Fourth Circuit, North Carolina will be preliminarily enjoined from administering its current election practices until it obtains a final judgment that its election practices do not violate § 2 under a *de facto*

retrogression standard.[13] In order to obtain such a judgment, under the Fourth Circuit's burden-shifting standard, North Carolina will be obligated to offer evidence "ensur[ing]" that it did "not violate § 2" by placing "burdens" on less affluent and less "sophisticated" voters who cannot register or vote as easily as more affluent and more "sophisticated" voters. Without regard to the Fourth Circuit's erroneous standard, the practices which purportedly disproportionately burden African-American voters have already been successfully implemented in two major elections without any decrease in African-American participation rates (the 2014 May Primary and the 2014 General Election). Given these facts, it is contrary to this Court's § 2 jurisprudence for this quasi-preclearance standard to be imposed only upon North Carolina, based upon the Fourth Circuit's incorrect interpretation of § 2.

This Court's writ of *certiorari* should issue and the Fourth Circuit's opinion should be reversed or vacated because of another significant right at stake in this case – the right of the people of North Carolina, acting through their elected representatives, to make legitimate policy decisions. *McCrory*, 997 F. Supp. 2d at 334. The preliminary injunction erroneously required by the Fourth Circuit majority prevents North Carolina from

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[13] Because this Court stayed the preliminary injunction issued by the Fourth Circuit, North Carolina conducted the 2014 General Election pursuant to the challenged practices. North Carolina will continue to administer elections pursuant to the challenged practices in the absence of the Fourth Circuit's required preliminary injunction. Thus, the issues raised by petitioners are not moot. *Cf. Honig v. Students of California School for the Blind*, 471 U.S. 148 (1985).

enacting and administering laws governing the time, place, and manner of holding elections. This is an area reserved to the states by the Elections Clause absent Congressional action. U.S. CONST. art. I, § 4, cl. 1. *See Burdick v. Takushi*, 504 U.S. 428, 433 (1992).

The Fourth Circuit's order relies upon evidence that S.L. 2013-381 was enacted by a Republican party-line vote, implying that Republicans are hostile to voting rights. 769 F.3d at 232. However, the Fourth Circuit ignored the district court's factual findings that in enacting S.L. 2013-381, North Carolina was repealing practices that had been implemented in North Carolina, relatively recently, based upon a Democratic party-line vote. Out-of-precinct voting was adopted in the opening days of the 2005 General Assembly, was made retroactively effective by a legislature controlled by Democrats to legislatively settle an ongoing election contest in favor of a candidate who was a Democrat, and reversed a state court ruling which explicitly refused to endorse the practice. *McCrory*, 997 F. Supp. 2d at 365-66. N.C. Sess. Law 2005-2; *see James v. Bartlett*, 359 N.C. 260, 607 S.E.2d 638 (2005). SDR was enacted in 2007 by a Democratic-controlled General Assembly on a "near party-line vote." *McCrory*, 997 F. Supp. 2d at 356. Policy decisions by a Democratic-controlled General Assembly should not bar a Republican-controlled General Assembly from making different policy choices.

In endorsing the policy choices by prior Democratic-controlled legislatures, the Fourth

Circuit majority ignored the important State interests served by the elimination of SDR. Since SDR was first implemented in 2007, because of the short time between registration by SDR and the counting of votes, the votes of thousands of SDR voters have been counted before verification cards were returned by the U.S. Postal Service and elections officials could confirm that these voters actually resided at the location listed on their registration applications. Any such voters whose registration could not be confirmed and who, given adequate time, would have failed verification and denied the right to vote if their two verification cards had been returned before they attempted to vote, were, in fact, illegal voters. These illegal voters were allowed to vote because of the short-cut available only to SDR voters (and not others) that allowed them to cast a ballot on the same day they registered. *McCrory*, 997 F. Supp. 2d at 352-54.

The Fourth Circuit majority ignored the district court's factual findings on this issue. It instead incorrectly and without any factual foundation blamed the postal service's inability to return two verification cards sent to SDR voters on "bureaucratic difficulty attributable at least as much to under-resourcing of boards of election." *League of Women Voters*, 769 F.3d at 246. There is simply no evidence in the record to support this speculation.

The district court, unlike the Fourth Circuit, heard four days of testimony and reviewed thousands of pages of evidence. *Id.* at 252 (Motz, J., dissenting). Thus, the district court understood that SDR voters who failed verification after they had

voted were, in fact, illegal voters. Given the district court's factual findings, eliminating SDR, and requiring all voters to register up to 25 days before an election, is a "reasonable non-discriminatory restriction" on the right to vote, chosen by an overwhelming majority of states, and approved by both this Court and the United States Congress. *McCrory*, 997 F. Supp. 2d at 363-64.

The district court's factual findings also demonstrate the important state interests served by an election law that requires voters to vote at their assigned precincts on Election Day. Allowing voters to appear at any precinct on Election Day can result in "overwhelming delays, mass confusion, and the potential for fraud that robs the validity and integrity of our election procedures." *Id.* at 368 (quoting *James*, 607 S.E.2d at 644). It also can result in substantial burdens on election officials who are required to separate these ballots and count them by hand, thus increasing the chances of error in election tallies. Declaration of Kim Westbrook Strach ("Strach Decl.")[14] ¶¶ 40-42; Declaration of Cherie Poucher ("Poucher Decl.")[15] ¶ 5. Moreover, allowing or encouraging voters to vote in a random precinct results in the disenfranchisement of some of these voters. Because there is no guarantee that the ballots used in the random precinct will match perfectly the ballot used in the voter's assigned

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[14] The complete Declaration of Kim Westbrook Strach was filed with the Fourth Circuit and is available at ECF Doc. 30-5 in Appeal No. 14-1845.

[15] The complete Declaration of Cherie Poucher is available at ECF Doc. 134-1 in M.D.N.C. Case No. 1:13-cv-861.

precinct, out-of-precinct voters inevitably waste their votes on contests in which they are ineligible to vote. *McCrory*, 997 F. Supp. 2d at 368 n.55. The Fourth Circuit ignored these factual findings.[16]

The people of North Carolina, acting through their elected representatives, have made policy choices concerning the time, place and manner of elections. The district court's decision denying a preliminary injunction recognized the validity of these policy choices. In contrast, the preliminary injunction required by the Fourth Circuit majority operates as a preclearance requirement until the State proves that the challenged laws do not violate § 2. Moreover, the preliminary injunction required by the Fourth Circuit majority requires the State of North Carolina to prove that the challenged laws do not violate § 2 *as § 2 has been interpreted by Plaintiffs and by the Fourth Circuit*, not as it has been interpreted and applied by this Court. Unless this Court issues its writ of *certiorari* and reverses or vacates the decision of the Fourth Circuit majority,

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[16] The Fourth Circuit majority also incorrectly held that § 2 protects the rights of individual voters over groups of voters. *League of Women Voters*, 769 F.3d at 244. Section 2, however, protects the rights of the minority group, not a single voter. *Bartlett*, 556 U.S. at 14-16; *Gingles*, 478 U.S. at 88; *Holder*, 512 U.S. at 880; *Bossier I*, 520 U.S. at 479. Nowhere was this error more apparent than in the majority's analysis of the claim against disallowing out-of-precinct voting. During the 2012 General Election, 99.7% of African-American voters voted in ways other than out-of-precinct. This compared to 99.8% of white voters who voted by ways other than out-of-precinct. *McCrory*, 997 F. Supp. 2d at 368. If North Carolina remained covered by § 5, eliminating out-of-precinct voting could not possibly be construed as even having a retrogressive effect, much less as causing discriminatory results in violation of § 2.

North Carolina will be prohibited, without justification, from enforcing its election laws.

CONCLUSION

For the foregoing reasons, the petitioners request that this Court issue a writ of *certiorari* for purposes of reversing or vacating the decision below by the Fourth Circuit.

This the 30th day of December, 2014.

Respectfully Submitted,

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APPENDIX

APPENDIX TABLE OF CONTENTS

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[ENTERED OCTOBER 1, 2014]

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 14-1845

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

Plaintiffs,

and

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

Intervenors/Plaintiffs – Appellants,

v.

STATE OF NORTH CAROLINA; JOSHUA B. HOWARD, in his official capacity as a member of the State Board of Elections; RHONDA K. AMOROSO,

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

Defendants – Appellees.

UNITED STATES OF AMERICA,

Amicus Curiae,

BRENNAN CENTER FOR JUSTICE AT NYU SCHOOL OF LAW,

Amicus Supporting Appellants,

JUDICIAL WATCH, INCORPORATED; ALLIED EDUCATIONAL FOUNDATION; CHRISTINA KELLEY GALLEGOS-MERRILL,

Amici Supporting Appellees.

No. 14-1856

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

Plaintiffs – Appellants,

and

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

Plaintiffs,

v.

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

official capacity as a member of the State Board of Elections; PAUL J. FOLEY, in his official capacity as a member of the State Board of Elections; MAJA KRICKER, in her official capacity as a member of the State Board of Elections,

Defendants – Appellees.

UNITED STATES OF AMERICA,

Amicus Curiae,

BRENNAN CENTER FOR JUSTICE AT NYU SCHOOL OF LAW,

Amicus Supporting Appellants,

JUDICIAL WATCH, INCORPORATED; ALLIED EDUCATIONAL FOUNDATION; CHRISTINA KELLEY GALLEGOS-MERRILL,

Amici Supporting Appellees.

No. 14-1859

LEAGUE OF WOMEN VOTERS OF NORTH CAROLINA; A. PHILIP RANDOLPH INSTITUTE; UNIFOUR ONESTOP COLLABORATIVE; COMMON CAUSE NORTH CAROLINA; GOLDIE

WELLS; OCTAVIA RAINEY; HUGH STOHLER; KAY BRANDON; SARA STOHLER,

Plaintiffs – Appellants,

and

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

Intervenors/Plaintiffs,

v.

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

Defendants – Appellees.

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UNITED STATES OF AMERICA,

Amicus Curiae,

BRENNAN CENTER FOR JUSTICE AT NYU SCHOOL OF LAW,

Amicus Supporting Appellants,

JUDICIAL WATCH, INCORPORATED; ALLIED EDUCATIONAL FOUNDATION; CHRISTINA KELLEY GALLEGOS-MERRILL,

Amici Supporting Appellees.

Appeals from the United States District Court for the Middle District of North Carolina, at Greensboro. Thomas D. Schroeder, District Judge. (1:13-cv-00658-TDS-JEP; 1:13-cv-00861-TDS-JEP; 1:13-cv-00660-TDS-JEP)

Argued: September 25, 2014

Decided: October 1, 2014

Before MOTZ, WYNN, and FLOYD, Circuit Judges.

Reversed in part, affirmed in part, and remanded with instructions by published opinion. Judge Wynn

wrote the majority opinion, in which Judge Floyd joined. Judge Motz wrote a dissenting opinion.

ARGUED: Allison Jean Riggs, SOUTHERN COALITION FOR SOCIAL JUSTICE, Durham, North Carolina; Penda Denise Hair, ADVANCEMENT PROJECT, Washington, D.C.; Marc Erik Elias, PERKINS COIE LLP, Washington, D.C., for Appellants. Alexander McClure Peters, NORTH CAROLINA DEPARTMENT OF JUSTICE, Raleigh, North Carolina; Thomas A. Farr, OGLETREE, DEAKINS, NASH, SMOAK & STEWART, P.C., Raleigh, North Carolina, for Appellees. Holly Aiyisha Thomas, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Amicus United States of America. **ON BRIEF:** Anita S. Earls, George E. Eppsteiner, SOUTHERN COALITION FOR SOCIAL JUSTICE, Durham, North Carolina; Dale Ho, Julie A. Ebenstein, Sean Young, New York, New York, Laughlin McDonald, ACLU VOTING RIGHTS PROJECT, Atlanta, Georgia; Christopher Brook, ACLU OF NORTH CAROLINA LEGAL FOUNDATION, Raleigh, North Carolina, for Appellant League of Women Voters of North Carolina. Elisabeth C. Frost, Washington, D.C., Joshua L. Kaul, PERKINS COIE LLP, Madison, Wisconsin; Edwin M. Speas, Jr., John W. O'Hale, Caroline P. Mackie, POYNER SPRUILL LLP, Raleigh, North Carolina, for Appellant Louis M. Duke. Edward A. Hailes, Jr., Denise D. Lieberman, Donita Judge, Caitlin Swain, ADVANCEMENT PROJECT, Washington, D.C.; Irving Joyner, Cary, North Carolina; Adam Stein, TIN FULTON WALKER & OWEN, PLLC, Chapel

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JOHNSON LAW FIRM, P.A., Arden, North Carolina, for Amici Judicial Watch, Incorporated, Allied Educational Foundation, and Christina Kelley Gallegos-Merrill.

WYNN, Circuit Judge:

The right to vote is fundamental. "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined." Wesberry v. Sanders, 376 U.S. 1, 17 (1964). And a tight timeframe before an election does not diminish that right.

"In decision after decision, [the Supreme] Court has made clear that a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction." Dunn v. Blumstein, 405 U.S. 330, 336 (1972). Congress sought to further ensure equal access to the ballot box by passing the Voting Rights Act, which was aimed at preventing "an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives." Thornburg v. Gingles, 478 U.S. 30, 47 (1986).

On June 25, 2013, the Supreme Court lifted certain Voting Rights Act restrictions that had long prevented jurisdictions like North Carolina from passing laws that would deny minorities equal access. See Shelby Cnty., Ala. v. Holder, 133 S. Ct. 2612 (2013). The very next day, North Carolina

began pursuing sweeping voting reform—House Bill 589—which is at the heart of this appeal.

With House Bill 589, North Carolina imposed strict voter identification requirements, cut a week off of early voting, prohibited local election boards from keeping the polls open on the final Saturday afternoon before elections, eliminated same-day voter registration, opened up precincts to "challengers," eliminated pre-registration of sixteen- and seventeen-year-olds in high schools, and barred votes cast in the wrong precinct from being counted at all.

In response, various Plaintiffs and the United States Government sued North Carolina, alleging that House Bill 589 violates equal protection provisions of the United States Constitution as well as the Voting Rights Act. Plaintiffs sought to prevent House Bill 589 from taking effect by asking the district court for a preliminary injunction. Such an injunction would maintain the status quo to prevent irreparable harm while the lawsuit plays itself out in the courts.

But the district court refused. In so doing, the district court laid out what it believed to be the applicable law. Notably, however, the district court got the law plainly wrong in several crucial respects. When the applicable law is properly understood and applied to the facts as the district court portrayed them, it becomes clear that the district court abused its discretion in denying Plaintiffs a preliminary injunction and not preventing certain provisions of House Bill 589 from taking effect while the parties

fight over the bill's legality. Accordingly, we reverse the district court's denial of the preliminary injunction as to House Bill 589's elimination of same-day registration and prohibition on counting out-of-precinct ballots.

However, we affirm the district court's denial of Plaintiffs' request for a preliminary injunction with respect to the following House Bill 589 provisions: (i) the reduction of early-voting days; (ii) the expansion of allowable voter challengers; (iii) the elimination of the discretion of county boards of elections to keep the polls open an additional hour on Election Day in "extraordinary circumstances"; (iv) the elimination of pre-registration of sixteen- and seventeen-year-olds who will not be eighteen years old by the next general election; and (v) the soft roll-out of voter identification requirements to go into effect in 2016. With respect to these provisions, we conclude that, although Plaintiffs may ultimately succeed at trial, they have not met their burden of satisfying all elements necessary for a preliminary injunction. We therefore affirm in part, reverse in part, and remand to the district court with specific instructions to enter, as soon as possible, an order granting a preliminary injunction enjoining enforcement of certain provisions of House Bill 589.[1]

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[1] While the separate opinion is styled as a dissent, it concurs with the majority opinion in affirming the district court's decision to deny an injunction as to multiple House Bill 589 provisions. We agree with a number of the concerns the separate opinion raises as to all but two of the challenged provisions—the elimination of same-day registration and out-of- precinct voting.

I. Background[2]

In spring 2013, the North Carolina General Assembly began working on a voter identification law. The House Committee on Elections, chaired by Representative David R. Lewis, held public hearings, and an initial version of House Bill 589 was introduced in the House on April 4. In April, House Bill 589 was debated, amended, and advanced; it ultimately passed the House essentially along party lines, with no support from any African American representatives.

In March 2013, before the bill was introduced to the house, the various sponsors of House Bill 589 sent an e-mail to the State Board of Elections asking for a "cross matching of the registered voters in [North Carolina] with the [DMV] to determine a list of voters who have neither a [North Carolina] Driver's License nor a [North Carolina] Identification Card." Id. at 357. The legislators also wanted "that subset broken down into different categories within each county by all possible demographics that [the State Board of Elections] typically captures (party affiliation, ethnicity, age, gender, etc.)." McCrory, 997 F. Supp. 2d at 357. The

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[2] As an appellate court, we neither re-weigh evidence nor make factual findings. And though we may, in this procedural posture, call out clear error if the district court "ma[de] findings without properly taking into account substantial evidence to the contrary[,]" United States v. Caporale, 701 F.3d 128, 140 (4th Cir. 2012), we are taking the facts as they have been depicted by the district court in North Carolina State Conference of Branches of the NAACP v. McCrory, 997 F. Supp. 2d 322 (M.D.N.C. 2014).

State Board of Elections sent the data in a large spreadsheet the next day.

Later in March 2013, Representative Lewis sent a ten-page letter to State Board of Elections Director Gary Bartlett asking about the State Board of Elections' conclusion that 612,955 registered voters lacked a qualifying photo identification. He asked the State Board of Elections to "provide the age and racial breakdown for voters who do not have a driver's license number listed." Id. In April, Bartlett sent a nineteen-page response along with a spreadsheet that included the requested race data. That same day, Speaker of the House Thom Tillis's general counsel e-mailed the State Board of Elections, asking for additional race data on people who requested absentee ballots in 2012; that data, too, the State Board of Elections provided.

In late April 2013, House Bill 589 made its way to the North Carolina Senate, passed first reading, and was assigned to the Senate Rules Committee. That committee took no action on the bill for three months, until July 23. "The parties do not dispute that the Senate believed at this stage that [House Bill] 589 would have to be submitted to the United States Department of Justice . . . for 'pre-clearance' under Section 5 of the [Voting Rights Act], 42 U.S.C. § 1973c(a), because many North Carolina counties were 'covered jurisdictions' under that Section. However, at that time the United States Supreme Court was considering a challenge

to the . . . ability to enforce Section 5." McCrory, 997 F. Supp. 2d at 336.[3]

On June 25, the Supreme Court issued its decision in Shelby County, declaring the formula used to determine the Section 5 covered jurisdictions unconstitutional. The very next day, Senator Thomas Apodaca, Chairman of the North Carolina Senate Rules Committee, publicly stated, "So, now we can go with the full bill." Id. at 336. The contents of the "full bill" were not disclosed at the time.

A meeting of the Rules Committee was subsequently scheduled for July 23. The night before the Rules Committee meeting, the new bill, by then fifty-seven pages in length, was posted for the members on the Rules Committee website. Unlike the original bill, which focused mainly on voter identification, the amended House Bill 589 expanded the list of restrictive provisions to include (1) the reduction of early-voting days; (2) the elimination of same-day registration; (3) a prohibition on counting out-of-precinct ballots; (4) an expansion of allowable poll observers and voter challenges; (5) the elimination of the discretion of county boards of elections to keep the polls open an additional hour on Election Day in extraordinary circumstances; and (6) the elimination of pre-registration of sixteen- and seventeen-year-olds who will not be eighteen years old by the next general election.

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[3] Under Section 5's preclearance requirement, no change in voting procedures in covered jurisdictions could take effect until approved by federal authorities. A jurisdiction could obtain such preclearance only by proving that the change had neither "the purpose [nor] the effect of denying or abridging the right to vote on account of race or color." 52 U.S.C. § 10304(a).

After debate on July 23, the amended bill passed the committee and proceeded to the floor. On July 25, the Senate began its session with the third reading of the substantially amended House Bill 589. Proponents and opponents of the bill debated its provisions and various proposed amendments for four hours. "Several Senators characterized the bill as voter suppression of minorities." McCrory, 997 F. Supp. 2d at 337. Nevertheless, at the close of debate, a party-line vote sent House Bill 589, as amended, back to the House for concurrence.

That same day, after the bill had been modified and passed by the Senate, a State Board of Elections employee e-mailed data to Representative Lewis, one of the bill's House sponsors. The data contained verification rates for same-day registration in the 2010 and 2012 elections and information about the type of identifications presented by same-day registrants.

On the evening of July 25, the House received the Senate's version of House Bill 589. During debate, opponents characterized the measure "variously as voter suppression, partisan, and disproportionately affecting" African Americans, young voters, and the elderly. McCrory, 997 F. Supp. 2d at 337. At 10:39 p.m. that night, the House voted–again along party lines–to concur in the Senate's version of House Bill 589.

The bill was ratified the next day, July 26, and presented to Governor Patrick McCrory on July 29. The Governor signed House Bill 589 into law on August 12, 2013.

That very same day, Plaintiffs filed lawsuits challenging certain House Bill 589 provisions in the federal district court for the Middle District of North Carolina. Plaintiffs alleged that the challenged provisions violated both the United States Constitution and the Voting Rights Act. Soon thereafter, in September 2013, the United States filed a lawsuit challenging certain House Bill 589 provisions exclusively under the Voting Rights Act. And finally, a group of young voters intervened, also asserting constitutional claims.

The lawsuits were consolidated, the parties undertook discovery, and Plaintiffs moved for a preliminary injunction. House Bill 589 contains numerous provisions, only some of which Plaintiffs challenge. Specifically, Plaintiffs challenge the legality of, and asked the court to enjoin: the elimination of same-day voter registration; the elimination of out-of-precinct voting; the reduction of early-voting days; an increase in at-large observers at the polls and the deputizing of any resident to challenge ballots at the polls; the elimination of the discretion of county boards of elections to extend poll hours under extraordinary circumstances; and the soft roll-out of voter identification requirements to go into effect in 2016.

A. Same-Day Registration

In 2007, the General Assembly passed legislation permitting same-day registration at early-voting sites. The law provided that "an individual who is qualified to register to vote may register in person and then vote at [an early-voting]

site in the person's county of residence during the period for [early] voting provided under [Section] 163-227.2." 2007 N.C. Sess. Laws 253, § 1 (codified at N.C. Gen. Stat. § 163-82.6A(a) (2008)). The law required a prospective voter to complete a voter-registration form and produce a document to prove his or her current name and address. Id. (codified at N.C. Gen. Stat. § 163-82.6A(b) (2008)).

If the registrant wanted to vote immediately, he or she could "vote a retrievable absentee ballot as provided in [Section] 163-227.2 immediately after registering." Id. (codified at N.C. Gen. Stat. § 163-82.6A(c) (2008)). Within two business days, both the pertinent county board of elections and the State Board of Elections were required to verify the voter's driver's license or social security number, update the database, proceed to verify the voter's proper address, and count the vote unless it was determined that the voter was not qualified to vote. Id. (codified at N.C. Gen. Stat. § 163-82.6A(d) (2008)).

House Bill 589 eliminated same-day registration. A voter's registration must now be postmarked at least twenty-five days before Election Day or, if delivered in person or via fax or scanned document, received by the county board of elections at a time established by the board. N.C. Gen. Stat. § 163-82.6(c)(1)-(2).

Plaintiffs' expert presented unrebutted testimony that African American North Carolinians have used same-day registration at a higher rate than whites in the three federal elections during which it was offered. Specifically, in 2012, 13.4% of

African American voters who voted early used same-day registration, as compared to 7.2% of white voters; in the 2010 midterm, the figures were 10.2% and 5.4%, respectively; and in 2008, 13.1% and 8.9%. The district court therefore concluded that the elimination of same-day registration would "bear more heavily on African-Americans than whites." McCrory, 997 F. Supp. 2d at 355.

B. Out-of-Precinct Voting

In 2002, Congress passed the Help America Vote Act, 42 U.S.C. §§ 15301-15545. Under the Help America Vote Act, states are required to offer provisional ballots to Election Day voters who changed residences within thirty days of an election but failed to report the move to their county board of elections. See 42 U.S.C. § 15482(a). However, such provisional ballots are only required to be counted "in accordance with State law." Id. § 15482(a)(4).

In response, the North Carolina General Assembly passed Session Law 2005-2, removing the requirement that voters appear in the proper precinct on Election Day in order to vote. 2005 N.C. Sess. Law 2, § 2 (codified at N.C. Gen. Stat. § 163-55(a) (2006)). The law provided that "[t]he county board of elections shall count [out-of-precinct provisional ballots] for all ballot items on which it determines that the individual was eligible under State or federal law to vote." Id. § 4 (codified at N.C. Gen. Stat. § 163-166.11(5) (2006)).

The General Assembly made a finding when it adopted the mechanism in SL 2005-2 that "'of those

registered voters who happened to vote provisional ballots outside their resident precincts on the day of the November 2004 General Election, a disproportionately high percentage were African-American.'" McCrory, 997 F. Supp. 2d at 368 (citation omitted).

The district court found that (1) between the years 2006 and 2010, an average of 17.1% of African Americans in North Carolina moved within the State, as compared to only 10.9% of whites; and (2) 27% of poor African Americans in North Carolina lack access to a vehicle, compared to 8.8% of poor whites. Also, the court accepted the determinations of Plaintiffs' experts that "the prohibition on counting out-of-precinct provisional ballots will disproportionately affect black voters." Id. at 366. According to calculations the district court accepted, the total number of African Americans using out-of-precinct voting represents 0.342% of the African American vote in that election. The total share of the overall white vote that voted out-of-precinct was 0.21%. Id. House Bill 589 bars county boards of elections from counting such ballots.

C. Early Voting

"No-excuse" early voting was established for even-year general elections in North Carolina beginning in 2000. 1999 N.C. Sess. Law 455, § 1 (codified at N.C. Gen. Stat. §§ 163-226(a1), 163-227.2(a1) (2000)). At that point, a registered voter could present herself at her county board of elections office "[n]ot earlier than the first business day after the twenty-fifth day before an election . . . and not

later than 5:00 p.m. on the Friday prior to that election" to cast her ballot. N.C. Gen. Stat. § 163-227.2(b) (2000).

After the 2000 election cycle, the General Assembly expanded no-excuse early voting to all elections. 2001 N.C. Sess. Law 337, § 1. It also amended the early-voting period so that voters could appear at the county board of elections office to vote "[n]ot earlier than the third Thursday before an election . . . and not later than 1:00 P.M. on the last Saturday before that election." 2001 N.C. Sess. Law 319, § 5(a) (codified at N.C. Gen. Stat. § 163-227.2(b) (2002)). Under this law, county boards of elections were required to remain open for voting until 1:00 p.m. on that final Saturday, but retained the discretion to allow voting until 5:00 p.m. Id. They were also permitted to maintain early-voting hours during the evening or on weekends throughout the early-voting period. Id. § 5(b) (codified at N.C. Gen. Stat. § 163-227.2(f) (2002)).

House Bill 589 changes the law to allow only ten days of early voting. It also eliminates the discretion county boards of elections had to stay open until 5:00 p.m. on the final Saturday of early voting.

The district court found that in 2010, 36% of all African American voters that cast ballots utilized early voting, as compared to 33.1% of white voters. By comparison, in the presidential elections of 2008 and 2012, over 70% of African American voters used early voting compared to just over 50% of white voters.

D. Poll Observers and Challengers

North Carolina law permits the chair of each political party in every county to "designate two observers to attend each voting place at each primary and election." N.C. Gen. Stat. § 163-45(a). House Bill 589 allows the chair of each county party to "designate 10 additional at-large observers who are residents of that county who may attend any voting place in that county." 2013 N.C. Sess. Law 381, § 11.1 (codified at N.C. Gen. Stat. § 163-45(a)). "Not more than two observers from the same political party shall be permitted in the voting enclosure at any time, except that in addition one of the at-large observers from each party may also be in the voting enclosure." Id. The list of at-large observers must be "provided by the county director of elections to the chief judge [for each affected precinct]." Id. (codified at § 163-45(b)).

In conjunction with the addition of at-large observers, the law now permits any registered voter in the county to challenge a ballot on Election Day. Id. § 20.2 (codified at N.C. Gen. Stat. § 163-87)). And during early voting, any state resident may now challenge ballots. Id. § 20.1 (codified at N.C. Gen. Stat. § 163-84)).

E. County Boards of Elections Discretion to Keep the Polls Open

Under North Carolina law, the polls on Election Day are to remain open from 6:30 a.m. until 7:30 p.m. N.C. Gen. Stat. § 163-166.01. Beginning in 2001, each county board of elections had the power

to "direct that the polls remain open until 8:30 p.m." in "extraordinary circumstances." 2001 N.C. Sess. Laws 460, § 3 (codified at N.C. Gen. Stat. § 163-166 (2002)). House Bill 589 eliminates the discretion of the county boards of elections by deleting the "extraordinary circumstances" clause. 2013 N.C. Sess. Law 381, § 33.1.

The law now provides "If the polls are delayed in opening for more than 15 minutes, or are interrupted for more than 15 minutes after opening, the State Board of Elections may extend the closing time by an equal number of minutes. As authorized by law, the State Board of Elections shall be available either in person or by teleconference on the day of election to approve any such extension." N.C. Gen. Stat. § 163-166.01.

F. Socioeconomic Disparities in North Carolina

The district court found that Plaintiffs' expert testimony "demonstrate[d] that black citizens of North Carolina currently lag behind whites in several key socioeconomic indicators, including education, employment, income, access to transportation, and residential stability." McCrory, 997 F. Supp. 2d at 348. Plaintiffs presented "unchallenged statistics," for example, that (1) as of 2011-12, 34% of African American North Carolinians live below the federal poverty level, compared to 13% of whites; (2) as of the fourth quarter of 2012, unemployment rates in North Carolina were 17.3% for African Americans and 6.7% for whites; (3) 15.7% of African American North Carolinians over age 24

lack a high school degree, as compared to 10.1% of whites; (4) 27% of poor African American North Carolinians do not have access to a vehicle, compared to 8.8% of poor whites; and (5) 75.1% of whites in North Carolina live in owned homes as compared to 49.8% of African Americans. Id. at 348 n.27. The district court accepted that "North Carolina's history of official discrimination against blacks has resulted in current socioeconomic disparities with whites." Id. at 366.

II. Standard of Review

The district court made these and other findings and conclusions in an opinion and order filed August 8, 2014. Therein, the district court denied completely Plaintiffs' request for a preliminary injunction. Plaintiffs in turn filed an Emergency Motion for Injunction Pending Appeal, which we denied, instead granting Plaintiffs' motion to expedite this appeal.

We evaluate the district court's decision to deny a preliminary injunction "for an abuse of discretion[,] review[ing] the district court's factual findings for clear error and . . . its legal conclusions de novo." Pashby v. Delia, 709 F.3d 307, 319 (4th Cir. 2013) (internal quotation marks and citations omitted). A district court abuses its discretion when it misapprehends or misapplies the applicable law. See, e.g., Centro Tepeyac v. Montgomery Cnty., 722 F.3d 185, 188 (4th Cir. 2013)(en banc). "Clear error occurs when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake

has been committed." United States v. Harvey, 532 F.3d 326, 336 (4th Cir. 2008)(internal quotation marks and citations omitted).

III. Preliminary Injunction Analysis

A preliminary injunction may be characterized as being either prohibitory or mandatory. Here, Plaintiffs assert that the preliminary injunction they seek is prohibitory while Defendants claim it is mandatory, which "in any circumstance is disfavored." Taylor v. Freeman, 34 F.3d 266, 270 n.2 (4th Cir. 1994).

Whereas mandatory injunctions alter the status quo, prohibitory injunctions "aim to maintain the status quo and prevent irreparable harm while a lawsuit remains pending." Pashby, 709 F.3d at 319. We have defined the status quo for this purpose to be "the last uncontested status between the parties which preceded the controversy." Id. at 320 (internal quotation marks and citation omitted). "To be sure, it is sometimes necessary to require a party who has recently disturbed the status quo to reverse its actions, but . . . [s]uch an injunction restores, rather than disturbs, the status quo ante." Aggarao v. MOL Ship Mgmt. Co., 675 F.3d 355, 378 (4th Cir. 2012) (internal quotation marks and citation omitted).

Here, Plaintiffs brought their lawsuits challenging elements of House Bill 589 on the very same day it was signed into law—August 12, 2013. Plaintiffs then filed motions seeking to enjoin House Bill 589's "elimination of [same-day registration], out-of-precinct provisional voting, and pre-

registration[, and] its cutback of early voting." McCrory, 997 F. Supp. 2d at 339 (emphasis added). Without doubt, this is the language and stuff of a prohibitory injunction seeking to maintain the status quo.

To win such a preliminary injunction, Plaintiffs must demonstrate that (1) they are likely to succeed on the merits; (2) they will likely suffer irreparable harm absent an injunction; (3) the balance of hardships weighs in their favor; and (4) the injunction is in the public interest. Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7, 20 (2008).

IV. Preliminary Injunction Denied On Certain House Bill 589 Provisions

At the outset, we determine that Plaintiffs have failed to establish at least one element necessary to win a preliminary injunction with respect to the following provisions of House Bill 589: (i) the reduction of early-voting days; (ii) the expansion of allowable voter challengers; (iii) the elimination of the discretion of county boards of elections to keep the polls open an additional hour on Election Day in "extraordinary circumstances"; (iv) the elimination of pre-registration of sixteen- and seventeen-year-olds who will not be eighteen years old by the next general election; and (v) the soft roll-out of voter identification requirements to go into effect in 2016.

With respect to early voting, we are convinced that the significant risk of a substantial burden to

the State tips the balance of hardships in its favor. Were we to enjoin House Bill 589's reduction in early-voting days, early voting would need to begin in approximately two weeks. We conclude that this very tight timeframe represents a burden not only on the State, but also on the county boards of elections. The balance of hardships thus favors denying a preliminary injunction as to early voting.

With respect to pre-registration of sixteen- and seventeen-year-olds, as the district court correctly noted, only citizens eighteen years and older may vote. The State's refusal to pre-register sixteen- and seventeen-year-olds will, therefore, not harm citizens who may vote in the upcoming general election. The district court therefore did not abuse its discretion in determining that, while Plaintiffs could well succeed on this claim at trial, they have not shown that "they will be irreparably harmed before trial absent an injunction." McCrory, 997 F. Supp. 2d at 378.

Regarding the elimination of the discretion of county boards of elections to keep the polls open an additional hour on Election Day in "extraordinary circumstances," the district court did not abuse its discretion in finding that Plaintiffs have failed to show that they will be irreparably harmed by this provision in the upcoming election. This is particularly true, as the district court noted, given that the State Board of Elections "retains the ability to make up significant losses in time by ordering the polls to remain open on the event of a delay." Id. at 380. Again, this is not to say that Plaintiffs will not ultimately succeed with their challenge to this

provision at trial. They simply have not shown irreparable harm for purposes of the preliminary injunction.

With respect to the soft roll-out of voter identification requirements to go into effect in 2016, as the district court noted, Plaintiffs did provide evidence that a husband and wife were improperly advised that they needed a photo identification in order to vote in the May 2014 primary. McCrory, 997 F. Supp. 2d at 377. While that couple was certainly misinformed, and while that fact raises a red flag, Plaintiffs cannot escape the fact that even that couple was, in fact, allowed to vote. Id. While we share Plaintiffs' concern that requiring poll workers to implement the soft rollout without adequate training might result in some confusion, we are unable to find that the district court committed clear error in deeming this argument "speculative." McCrory, 997 F. Supp. 2d at 377. Again, Plaintiffs may well succeed with their challenge to the identification law at trial. We hold only that, for purposes of the upcoming election, they have not shown irreparable injury.

Finally, with respect to House Bill 589's poll challenger and observer provision, we agree with the district court that "African-American voters in North Carolina and elsewhere have good reason to be concerned about intimidation and other threats to their voting rights. Any intimidation is unlawful and cannot be tolerated, and courts must be vigilant to ensure that such conduct is rooted out where it may appear." McCrory, 997 F. Supp. 2d at 380. Nevertheless, the district court did not abuse its

discretion in finding that Plaintiffs have not shown that any such irreparable harm is likely to occur in the upcoming election. The district court found that "Plaintiffs have provided no basis to suggest that poll observers or any challenger(s) will abuse their statutory power." Id. Although we are skeptical as to the ultimate accuracy of this prediction, we cannot say that the district court committed clear error.

We do not mean to suggest that Plaintiffs cannot prove and eventually succeed on their challenges to all of these provisions when their case goes to trial. Indeed, a proper application of the law to a more developed factual record could very well result in some or all of the challenged House Bill 589 provisions being struck down. At this point in time, however, we hold that, for purposes of a preliminary injunction as to this November's election and based on the facts as found by the district court for the limited purpose of addressing Plaintiffs' request for a preliminary injunction, the district court did not abuse its discretion in determining that Plaintiffs have not shown that the balance of hardships tips in their favor as to early voting or that they will suffer irreparable harm as to the other provisions discussed above.

V. Analysis Of Same-Day Registration and Out-of-Precinct Voting Challenges

We now turn to the remaining two challenged provisions of House Bill 589: the elimination of same-day registration and the prohibition on counting out-of-precinct ballots. We begin our analysis by evaluating Plaintiffs' likelihood of

success on the merits of their Section 2 claims. Determining that Plaintiffs have shown that they are likely to succeed on the merits, we then proceed to the remaining elements of the preliminary injunction analysis: whether Plaintiffs are likely to suffer irreparable harm; whether the injunction is in the public interest; and finally, whether the balance of hardships tips in Plaintiffs' favor.

A. Likelihood of Success on the Merits on Section 2

Section 2 of the Voting Rights Act forbids any "standard, practice, or procedure" that "results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color." 52 U.S.C. § 10301(a) (formerly codified at 42 U.S.C. § 1973(a)). "A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by" citizens of protected races "in that [they] have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 52 U.S.C. § 10301(b).

With Section 2, Congress effectuated a "permanent, nationwide ban on racial discrimination" because "any racial discrimination in voting is too much." Shelby Cnty., 133 S. Ct. at 2631. Accordingly, Section 2 "prohibits all forms of voting discrimination" that lessen opportunity for minority voters. Gingles, 478 U.S. at 45 n.10.

"Both the Federal Government and individuals" may sue to enforce Section 2, under which "injunctive relief is available . . . to block voting laws from going into effect." Shelby Cnty., 133 S. Ct. at 2619. Thus, in two very recent cases, courts granted injunctive relief to plaintiffs with vote-denial claims where state election laws less sweeping than North Carolina's had recently been passed. Ohio State Conference of N.A.A.C.P. v. Husted, __ F. Supp. 2d __, 2014 WL 4377869 (S.D. Ohio 2014), aff'd, No. 14–3877, 2014 WL 4724703 (6th Cir. Sept. 24, 2014), stayed, No. 14A336, Order List 573 U.S., 2014 WL 4809069 (U.S. Sept. 29, 2014); Frank v. Walker, __ F. Supp. 2d. __, 2014 WL 1775432 (E.D. Wis. 2014), stayed, 2014 WL 4494153 (7th Cir. Sept. 12, 2014).

Under Section 2 as it exists today, showing intentional discrimination is unnecessary.[4] Instead, a Section 2 violation can "be established by proof of discriminatory results alone." Chisom v. Roemer, 501 U.S. 380, 404 (1991). Thus, the "right" Section 2 inquiry "is whether 'as a result of the challenged practice or structure plaintiffs do not have an equal opportunity to participate in the political processes and to elect candidates of their choice.'" Gingles, 478 U.S. at 44 (footnote omitted)(quoting S.Rep. No. 97–

[4] The Supreme Court had previously read an intent requirement into Section 2, but Congress quickly amended the law to reject that interpretation. See, e.g., Gingles, 478 U.S. at 43-44 (noting that Congress "dispositively reject[ed] the position of the plurality in Mobile v. Bolden, 446 U.S. 55, 100 S. Ct. 1490, 64 L.Ed.2d 47 (1980), which required proof that the contested electoral practice or mechanism was adopted or maintained with the intent to discriminate against minority voters").

417, 97th Cong.2nd Sess. 28 (1982), U.S. Code Cong. & Admin. News 1982, p. 206). In other words, "[t]he essence of a [Section] 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives." Id. at 47.

Section 2's use to date has primarily been in the context of vote-dilution cases. "Vote dilution claims involve challenges to methods of electing representatives—like redistricting or at-large districts—as having the effect of diminishing minorities' voting strength." Husted, 2014 WL 4724703, at *24. The district court in this case correctly noted that there is a paucity of appellate case law evaluating the merits of Section 2 claims in the vote-denial context. McCrory, 997 F. Supp. 2d at 346. It may well be that, historically, Section 2 claims focused on vote dilution. But the predominance of vote dilution in Section 2 jurisprudence likely stems from the effectiveness of the now-defunct Section 5 preclearance requirements that stopped would-be vote denial from occurring in covered jurisdictions like large parts of North Carolina. Even the district court recognized as much. Id.

The facts of this case attest to the prophylactic success of Section 5's preclearance requirements. It appears that Section 5, which required covered jurisdictions to prove that a change in electoral law had neither "the purpose [nor] the effect of denying or abridging the right to vote on account of race or

color," 52 U.S.C. § 10304(a), was the only reason House Bill 589's sponsors did not reveal the "full bill" to the public until after the Shelby County decision came down. McCrory, 997 F. Supp. 2d at 336.

Nonetheless, despite the success of Section 5's preclearance requirement at tamping down vote denial in covered jurisdictions, Section 2's use to date has not been entirely dilution-focused. Rather, courts have entertained vote-denial claims regarding a wide range of practices, including restrictive voter identification laws (Frank, 2014 WL 1775432); unequal access to voter registration opportunities (Operation PUSH v. Allain, 674 F. Supp. 1245 (N.D. Miss. 1987), aff'd sub nom, Operation PUSH v. Mabus, 932 F.2d 400 (5th Cir. 1991)); unequal access to polling places (Brown v. Dean, 555 F. Supp. 502 (D.R.I. 1982)); and omnibus laws combining registration and voting restrictions (Husted, 2014 WL 4377869, aff'd, 2014 WL 4724703).

Indeed, Section 2's plain language makes clear that vote denial is precisely the kind of issue Section 2 was intended to address. Section 2 of the Voting Rights Act forbids any "standard, practice, or procedure" that "results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color." 52 U.S.C. § 10301(a). See also Gingles, 478 U.S. at 45 n.10 ("Section 2 prohibits all forms of voting discrimination, not just vote dilution.").

Further, the principles that make vote dilution objectionable under the Voting Rights Act logically extend to vote denial. Everyone in this case

agrees that Section 2 has routinely been used to address vote dilution—which basically allows all voters to 'sing' but forces certain groups to do so pianissimo. Vote denial is simply a more extreme form of the same pernicious violation—those groups are not simply made to sing quietly; instead their voices are silenced completely. A fortiori, then, Section 2 must support vote-denial claims.

Justice Scalia has provided a helpful illustration of what a Section 2 vote-denial claim might look like:

> If, for example, a county permitted voter registration for only three hours one day a week, and that made it more difficult for blacks to register than whites, blacks would have less opportunity "to participate in the political process" than whites, and [Section] 2 would therefore be violated . . . .

Chisom, 501 U.S. at 408 (Scalia, J., dissenting).

Based on our reading of the plain language of the statute and relevant Supreme Court authority, we agree with the Sixth Circuit that a Section 2 vote-denial claim consists of two elements:

- First, "the challenged 'standard, practice, or procedure' must impose a discriminatory burden on members of a protected class, meaning that members of the protected class 'have less

opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.'" Husted, 2014 WL 4724703, at *24 (quoting 42 U.S.C. § 1973(a)-(b));

- Second, that burden "must in part be caused by or linked to 'social and historical conditions' that have or currently produce discrimination against members of the protected class." Id. (quoting Gingles, 478 U.S. at 47).

"In assessing both elements, courts should consider 'the totality of circumstances.'" Id. at *24 (quoting 42 U.S.C. § 1973(b)). In evaluating Section 2 claims, courts have looked to certain "typical" factors pulled directly from the Voting Rights Act's legislative history:

- The history of voting-related discrimination in the pertinent State or political subdivision;
- The extent to which voting in the elections of the pertinent State or political subdivision is racially polarized;
- The extent to which the State or political subdivision has used voting practices or procedures that tend to enhance the opportunity for discrimination against the minority group, such as unusually large election districts, majority vote requirements, and prohibitions against bullet voting;
- The exclusion of members of the minority group from candidate slating processes;

- The extent to which minority group members bear the effects of past discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process;
- The use of even subtle racial appeals in political campaigns;
- The extent to which members of the minority group have been elected to public office in the jurisdiction;
- Evidence demonstrating that elected officials are unresponsive to the particularized needs of the members of the minority group; and
- The extent to which the policy underlying the State's or the political subdivision's use of the contested practice or structure is tenuous.

Gingles, 478 U.S. at 44-45. These factors may shed light on whether the two elements of a Section 2 claim are met.

Notably, while these factors "may be relevant" to a Section 2 analysis, "'there is no requirement that any particular number of factors be proved, or [even] that a majority of them point one way or the other.'" Id. at 45 (quoting S. Rep. No. 97–417, 97th Cong.2nd Sess. 29 (1982), U.S. Code Cong. & Admin. News 1982, p. 207). This is not surprising, given that Congress intended to give the Voting Rights Act "the broadest possible scope." Allen v. State Bd. of Elections, 393 U.S. 544, 567 (1969).

Instead, courts must undertake "a searching practical evaluation of the 'past and present reality,' [with] a 'functional' view of the political process."

Gingles, 478 U.S. at 45 (quoting S. Rep. at 30, U.S. Code Cong. & Admin. News 1982, p. 208). Courts must make "an intensely local appraisal of the design and impact of" electoral administration "in the light of past and present reality." Id. at 78 (quoting White v. Regester, 412 U.S. 755, 769-70 (1973)).

With this legal framework in mind, we turn now to the district court's Section 2 analysis.

1. The District Court Misapprehended and Misapplied the Law

A close look at the district court's analysis here reveals numerous grave errors of law that constitute an abuse of discretion. Centro Tepeyac, 722 F.3d at 188.

First, the district court bluntly held that "Section 2 does not incorporate a 'retrogression' standard" and that the court therefore was "not concerned with whether the elimination of [same-day registration and other features] will worsen the position of minority voters in comparison to the preexisting voting standard, practice or procedure—a Section 5 inquiry." McCrory, 997 F. Supp. 2d at 351-52 (internal quotation marks and citations omitted).

Contrary to the district court's statements, Section 2, on its face, requires a broad "totality of the circumstances" review. 52 U.S.C. § 10301(b). Clearly,

an eye toward past practices is part and parcel of the totality of the circumstances.

Further, as the Supreme Court noted, "some parts of the [Section] 2 analysis may overlap with the [Section] 5 inquiry." Georgia v. Ashcroft, 539 U.S. 461, 478 (2003). Both Section 2 and Section 5 invite comparison by using the term "abridge[]." Section 5 states that any voting practice or procedure "that has the purpose of or will have the effect of diminishing the ability of any citizens of the United States on account of race or color . . . to elect their preferred candidates of choice denies or abridges the right to vote." 52 U.S.C. § 10304(b) (emphasis added). Section 2 forbids any "standard, practice, or procedure" that "results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color." 52 U.S.C. § 10301(a) (emphasis added). The Supreme Court has explained that "[t]he term 'abridge,' . . . whose core meaning is 'shorten,'. . . necessarily entails a comparison. It makes no sense to suggest that a voting practice 'abridges' the right to vote without some baseline with which to compare the practice." Reno v. Bossier Parish Sch. Bd., 528 U.S. 320, 333–34 (2000) (citations omitted).

Neither the Supreme Court nor this Court has ever held that, in determining whether an abridgement has occurred, courts are categorically barred from considering past practices, as the district court here suggested. In fact, opinions from other circuits support the opposite conclusion. For example, the Tenth Circuit, quoting directly from Section 2's legislative history, has explained that

"'[i]f [a challenged] procedure markedly departs from past practices or from practices elsewhere in the jurisdiction, that bears on the fairness of its impact.'" Sanchez v. State of Colo., 97 F.3d 1303, 1325 (10th Cir. 1996) (quoting 1982 U.S.C.C.A.N. at 207, n.117). And as the Sixth Circuit recently held, under Section 2, "the focus is whether minorities enjoy less opportunity to vote as compared to other voters. The fact that a practice or law eliminates voting opportunities that used to exist under prior law that African Americans disproportionately used is therefore relevant to an assessment of whether, under the current system, African Americans have an equal opportunity to participate in the political process as compared to other voters." Husted, 2014 WL 4724703, at *28.

In this case, North Carolina's previous voting practices are centrally relevant under Section 2. They are a critical piece of the totality-of-the-circumstances analysis Section 2 requires. In refusing to consider the elimination of voting mechanisms successful in fostering minority participation, the district court misapprehended and misapplied Section 2.

Second, the district court considered each challenged electoral mechanism only separately. See McCrory, 997 F. Supp. 2d at 344 (addressing same-day registration), at 365 (addressing out-of-precinct voting), at 370 (early voting), at 375 (identification requirements), at 378 (pre-registration of teenagers), and at 379 (poll challengers and elimination of discretion to keep the polls open). Yet "[a] panoply of regulations, each apparently defensible when

considered alone, may nevertheless have the combined effect of severely restricting participation and competition." Clingman v. Beaver, 544 U.S. 581, 607-08 (2005) (O'Connor, J., concurring in part and concurring in the judgment).

By inspecting the different parts of House Bill 589 as if they existed in a vacuum, the district court failed to consider the sum of those parts and their cumulative effect on minority access to the ballot box. Doing so is hard to square with Section 2's mandate to look at the "totality of the circumstances," 52 U.S.C. § 10301(b), as well as Supreme Court precedent requiring "a searching practical evaluation" with a "functional view of the political process." Gingles, 478 U.S. at 45 (internal quotation marks and citations omitted). By looking at each provision separately and failing to consider the totality of the circumstances, then, the district court misapprehended and misapplied the pertinent law.

Third, the district court failed to adequately consider North Carolina's history of voting discrimination. Instead the district court parroted the Supreme Court's proclamation that "'history did not end in 1965,'" McCrory, 997 F. Supp. 2d at 349 (quoting Shelby Cnty., 133 S. Ct. at 2628) and that "'[p]ast discrimination cannot, in the manner of original sin, condemn governmental action.'" Id. (quoting City of Mobile, Ala. v. Bolden, 446 U.S. 55, 74 (1980)).

Of course, the history of voting discrimination in many states in fact did substantially end in

1965—due in large part to the Voting Rights Act. The Supreme Court's observation that a state's history should not serve to condemn its future, however, does not absolve states from their future transgressions. As Justice Ginsburg pointed out in her Shelby County dissent, casting aside the Voting Rights Act because it has worked "to stop discriminatory changes is like throwing away your umbrella in a rainstorm because you are not getting wet." 133 S. Ct. at 2650 (Ginsburg, J., dissenting).

Immediately after Shelby County, i.e., literally the next day, when "history" without the Voting Rights Act's preclearance requirements picked up where it left off in 1965, North Carolina rushed to pass House Bill 589, the "full bill" legislative leadership likely knew it could not have gotten past federal preclearance in the pre–Shelby County era. McCrory, 997 F. Supp. 2d at 336. Thus, to whatever extent the Supreme Court could rightly celebrate voting rights progress in Shelby County, the post-Shelby County facts on the ground in North Carolina should have cautioned the district court against doing so here.

Fourth, in analyzing the elimination of same-day registration, the district court looked to the National Voter Registration Act, which generally allows for a registration cut-off of thirty days before an election. McCrory, 997 F. Supp. 2d at 352. The district court then declared that "it is difficult to conclude that Congress intended that a State's adoption of a registration cut-off before election day would constitute a violation of Section 2." Id. In doing so, the district court lost sight of the fact that

the National Voter Registration Act merely sets a floor for state registration systems.

That North Carolina used to exceed National Voter Registration Act registration minimums does not entitle it to eliminate its more generous registration provisions without ensuring that, in doing so, it is not violating Section 2. Indeed, Congress made that quite clear by including in the National Voter Registration Act an express warning that the rights and remedies it established shall not "supersede, restrict, or limit the application of the Voting Rights Act." 52 U.S.C. § 20510(d)(1).

Fifth, also with respect to same-day registration, the district court suggested that because voting was not completely foreclosed and because voters could still register and vote by mail, a likely Section 2 violation had not been shown. See McCrory, 997 F. Supp. 2d at 356 (noting that "North Carolina provides several other ways to register" besides same-day registration that "have not been shown to be practically unavailable to African–American residents").

However, nothing in Section 2 requires a showing that voters cannot register or vote under any circumstance. Instead, it requires "that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives." Gingles, 478 U.S. at 47. In waiving off disproportionately high African American use of certain curtailed registration and voting

mechanisms as mere "preferences" that do not absolutely preclude participation, the district court abused its discretion. See McCrory, 997 F. Supp. 2d at 351.

Sixth, Section 2, on its face, is local in nature. Under Section 2, "[a] violation . . . is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by citizens of protected races." 52 U.S.C. § 10301(b) (emphasis added). As the Supreme Court has noted, in undertaking a Section 2 analysis, courts make "an intensely local appraisal of the design and impact of" electoral administration "in the light of past and present reality." Gingles, 478 U.S. at 78.

Nevertheless, without any basis in the statute or binding precedent, the district court suggested that a practice must be discriminatory on a nationwide basis to violate Section 2 and held that a conclusion it might reach as to North Carolina would somehow throw other states' election laws into turmoil. For example, the district court stated that "a determination that North Carolina is in violation of Section 2 merely for maintaining a system that does not count out-of-precinct provisional ballots could place in jeopardy the laws of the majority of the States, which have made the decision not to count such ballots." McCrory, 997 F. Supp. 2d at 367. The district court's failure to understand the local nature of Section 2 constituted grave error. Cf. Husted, 2014 WL 4724703, at *29 ("There is no reason to think our decision here compels any

conclusion about the early-voting practices in other states, which do not necessarily share Ohio's particular circumstances.").

Seventh, the district court minimized Plaintiffs' claim as to out-of-precinct voting because "so few voters cast" ballots in the wrong precincts. McCrory, 997 F. Supp. 2d at 366. The district court accepted evidence that "approximately 3,348 out-of-precinct provisional ballots cast by [African American] voters were counted to some extent in the 2012 general election." Id. Going forward under House Bill 589, a substantial number of African American voters will thus likely be disenfranchised.

Though the district court recognized that "failure to count out-of-precinct provisional ballots will have a disproportionate effect on [African American] voters," it held that such an effect "will be minimal." Id. Setting aside the basic truth that even one disenfranchised voter—let alone several thousand—is too many, what matters for purposes of Section 2 is not how many minority voters are being denied equal electoral opportunities but simply that "any" minority voter is being denied equal electoral opportunities. 52 U.S.C. § 10301(a) (forbidding any "standard, practice, or procedure" that interacts with social and historical conditions and thereby "results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color") (emphasis added).

Eighth and finally, the district court rationalized election administration changes that disproportionately affected minority voters on the

pretext of procedural inertia and under-resourcing. For example, in evaluating Plaintiffs' Section 2 challenge to the elimination of same-day registration, the district court noted that county boards of elections "sometimes lack[] sufficient time to verify registrants." McCrory, 997 F. Supp. 2d at 353. But in detailing why that was so, the district court exposed that the problem's roots lie largely in boards of elections' own procedures. Id. at 353 and n.36. The district court then noted that "a voter who registered before the 'close of books' 25 days before election day will have more time to pass the verification procedure than a voter who registered and voted during early voting." McCrory, 997 F. Supp. 2d at 353. But more time alone guarantees nothing, and nothing suggests that a voter who registers earlier will therefore be verified before voting.

The district court failed to recognize, much less address, the problem of sacrificing voter enfranchisement at the altar of bureaucratic (in)efficiency and (under-)resourcing. After all, Section 2 does not prescribe a balancing test under which the State can pit its desire for administrative ease against its minority citizens' right to vote. The district court thus abused its discretion when it held that "[i]t is sufficient for the State to voice concern that [same-day registration] burdened [county boards of elections] and left inadequate time for elections officials to properly verify voters." Id. at 354.

These flaws in the district court's Section 2 analysis make it clear that the district court both

misapprehended and misapplied the pertinent law. Accordingly, the district court abused its discretion. Centro Tepeyac, 722 F.3d at 188.

2. Proper Application of Section 2

Properly applying the law to the facts, even as the district court portrayed them, shows that Plaintiffs are, in fact, likely to succeed on the merits of their Section 2 claims regarding the elimination of same-day registration and out-of-precinct voting, contrary to the district court's determination.

In the first step of our Section 2 analysis, we must determine whether House Bill 589's elimination of same-day registration and out-of-precinct voting imposes a discriminatory burden on members of a protected class, meaning that members of the protected class "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 52 U.S.C. 10301. See also Husted, 2014 WL 4724703, at *24 (identifying the two steps of the Section 2 vote-denial inquiry).

There can be no doubt that certain challenged measures in House Bill 589 disproportionately impact minority voters. The district court found that Plaintiffs "presented unrebutted testimony that [African American] North Carolinians have used [same-day registration] at a higher rate than whites in the three federal elections during which [same-day registration] was offered" and recognized that the elimination of same-day registration would "bear more heavily on African-Americans than whites."

McCrory, 997 F. Supp. 2d at 348-49. The district court also "accept[ed] the determinations of Plaintiffs' experts that" African American voters disproportionately voted out of precinct and that "the prohibition on counting out-of-precinct provisional ballots will disproportionally affect [African American] voters." Id. at 366.

Second, we must determine whether this impact was in part "caused by or linked to 'social and historical conditions' that have or currently produce discrimination against members of the protected class." Husted, 2014 WL 4724703, at *24 (quoting Gingles, 478 U.S. at 47). Here, when we apply the proper legal standard to the district court's findings, the disproportionate impacts of eliminating same-day registration and out-of-precinct voting are clearly linked to relevant social and historical conditions.

In making this determination, we are aided by consideration of the "typical" factors that Congress noted in Section 2's legislative history. However we recognize that "there is no requirement that any particular number of factors be proved, or that a majority of them point one way or the other." Gingles, 478 U.S. at 45 (internal quotation marks and citation omitted).

Regarding the history of voting-related discrimination in the pertinent State, the district court found that "North Carolina . . . has an unfortunate history of official discrimination in voting and other areas that dates back to the Nation's founding. This experience affects the

perceptions and realities of [African American] North Carolinians to this day." McCrory, 997 F. Supp. 2d at 349.

One of Plaintiffs' witnesses testified, for example, that at around age 19—in the 1940s—she was required to recite the Preamble to the Constitution from memory in order to register to vote. Id. at 349 n.29. As of 1965, 39 counties in North Carolina were considered covered jurisdictions under the Voting Rights Act, having "maintained a test or device as a prerequisite to voting as of November 1, 1964, and [having] had less than 50 percent voter registration or turnout in the 1964 Presidential election." Shelby Cnty., 133 S. Ct. at 2620. And in 1975, when the Voting Rights Act's preclearance formula was extended to cover jurisdictions that provided "English-only voting materials in places where over five percent of voting-age citizens spoke a single language other than English," several additional North Carolina counties became covered jurisdictions. Id.

The district court recognized that the legacy of overtly discriminatory practices such as these and the concurrent "struggle for African-Americans' voting rights" justifies North Carolinians' skepticism of changes to voting laws. McCrory, 997 F. Supp. 2d at 349. The fact that the Supreme Court struck down the Voting Rights Act's "covered jurisdictions" formula in Shelby County does not allow us to simply ignore Congress's directive to view current changes to North Carolina's voting laws against the mire of its past.

Regarding effects of past discrimination that hinder minorities' ability to participate effectively in the political process, the district court pronounced that "Plaintiffs' expert testimony demonstrates that [African American] citizens of North Carolina currently lag behind whites in several key socioeconomic indicators, including education, employment, income, access to transportation, and residential stability." McCrory, 997 F. Supp. 2d at 348. To this end, Plaintiffs presented the following unchallenged statistics: (1) as of 2011-12, 34% of African American North Carolinians live below the federal poverty level, compared to 13% of whites; (2) as of the fourth quarter of 2012, unemployment rates in North Carolina were 17.3% for African Americans and 6.7% for whites; (3) 15.7% of African American North Carolinians over age 24 lack a high school degree, as compared to 10.1% of whites; (4) 27% of poor African American North Carolinians do not have access to a vehicle, compared to 8.8% of poor whites; and (5) 75.1% of African Americans in North Carolina live in owned homes as compared to 49.8% of whites. Id. at n.27.

Finally, as to the tenuousness of the reasons given for the restrictions, North Carolina asserts goals of electoral integrity and fraud prevention. But nothing in the district court's portrayal of the facts suggests that those are anything other than merely imaginable. And "states cannot burden the right to vote in order to address dangers that are remote and only 'theoretically imaginable.'" Frank, 2014 WL 1775432, at *8 (quoting Williams v. Rhodes, 393 U.S. 23, 33 (1968)).

Indeed, the best fact for North Carolina in the district court's opinion—the only specific problem cited, beyond naked statements of bureaucratic difficulty attributable at least as much to under-resourcing of boards of elections—is that a thousand votes that had not yet been properly verified had been counted in an election. McCrory, 997 F. Supp. 2d at 353. But nothing in the district court's opinion suggests that any of those were fraudulently or otherwise improperly cast. Thus, even the best fact the State could muster is tenuous indeed.

At the end of the day, we cannot escape the district court's repeated findings that Plaintiffs presented undisputed evidence showing that same-day registration and out-of-precinct voting were enacted to increase voter participation, that African American voters disproportionately used those electoral mechanisms, and that House Bill 589 restricted those mechanisms and thus disproportionately impacts African American voters. To us, when viewed in the context of relevant "social and historical conditions" in North Carolina, Gingles, 478 U.S. at 47, this looks precisely like the textbook example of Section 2 vote denial Justice Scalia provided:

> If, for example, a county permitted voter registration for only three hours one day a week, and that made it more difficult for blacks to register than whites, blacks would have less opportunity "to participate in the political process" than whites,

> and [Section] 2 would therefore be violated . . . .

Chisom, 501 U.S. at 408.

Further, even if we were to accept North Carolina's purported non-discriminatory basis for keeping the full bill a secret until the federal preclearance regime had been thrown over in Shelby County, we cannot ignore the discriminatory results that several measures in House Bill 589 effectuate. Section 2's "'results' criterion provides a powerful, albeit sometimes blunt, weapon with which to attack even the most subtle forms of discrimination." Chisom, 501 U.S. at 406 (Scalia, J., dissenting). Neither North Carolina nor any other jurisdiction can escape the powerful protections Section 2 affords minority voters by simply "espous[ing]" rationalizations for a discriminatory law. McCrory, 997 F. Supp. 2d at 357.

While plaintiffs seeking preliminary injunctions must demonstrate that they are likely to succeed on the merits, they "need not show a certainty of success." Pashby, 709 F.3d at 321. For the reasons set out above, Plaintiffs here have shown that with respect to the challenged provisions of House Bill 589 affecting same-day registration and out-of-precinct voting, they are likely to succeed with their Section 2 claims. In deciding otherwise, the district court abused its discretion.

B. Irreparable Harm, the Public Interest, and the Balance of Hardships

Having concluded that Plaintiffs have met the first test for a preliminary injunction, likelihood of success on the merits, as to their same-day registration and out-of-precinct voting challenges, we must consider whether the other elements have similarly been met. In other words, we must analyze whether Plaintiffs are likely to suffer irreparable harm; the balance of the hardships; and whether the injunction is in the public interest. Winter, 555 U.S. at 20.

Courts routinely deem restrictions on fundamental voting rights irreparable injury. See, e.g., Obama for Am. v. Husted, 697 F.3d 423, 436 (6th Cir. 2012); Williams v. Salerno, 792 F.2d 323, 326 (2d Cir. 1986); cf. Alternative Political Parties v. Hooks, 121 F.3d 876 (3d Cir. 1997). And discriminatory voting procedures in particular are "the kind of serious violation of the Constitution and the Voting Rights Act for which courts have granted immediate relief." United States v. City of Cambridge, 799 F.2d 137, 140 (4th Cir. 1986). This makes sense generally and here specifically because whether the number is thirty or thirty-thousand, surely some North Carolina minority voters will be disproportionately adversely affected in the upcoming election. And once the election occurs, there can be no do-over and no redress. The injury to these voters is real and completely irreparable if nothing is done to enjoin this law.[5]

[5] The district court seemingly failed to understand this point. For instance, in ruling that reduction in early voting was

By definition, "[t]he public interest . . . favors permitting as many qualified voters to vote as possible." Husted, 697 F.3d at 437. See also Purcell v. Gonzalez, 549 U.S. 1, 4 (2006) (The public has a "strong interest in exercising the fundamental political right to vote." (citations omitted)). And "upholding constitutional rights serves the public interest." Newsome v. Albermarle Cnty. Sch. Bd., 354 F.3d 249, 261 (4th Cir. 2003). The election laws in North Carolina prior to House Bill 589's enactment encouraged participation by qualified voters. But the challenged House Bill 589 provisions stripped them away. The public interest thus weighs heavily in Plaintiffs' favor.

By contrast, balancing the hardships is not wholly unproblematic for Plaintiffs. North Carolina will have little time to implement the relief we grant. But for some of the challenged changes, such as the elimination of same-day registration, systems have existed, do exist, and simply need to be resurrected. Similarly, counting out-of-precinct ballots merely requires the revival of previous

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unlikely to cause irreparable harm to African American voters, the district court noted that during the 2010 midterm election, "the racial disparity in early-voting usage that was observed in 2008 and 2012 all but disappeared." McCrory, 997 F. Supp. 2d at 372. In fact, the disparity was reduced from twenty percent to three percent. Thus, the district court seemed to believe that the injury to a smaller margin of African American voters that would occur during a midterm election year would be somehow less "irreparable." That conclusion misapprehends the irreparable harm standard and constituted an abuse of discretion.

practices or, however accomplished, the counting of a relatively small number of ballots.[6]

In conclusion, Plaintiffs have satisfied every element required for a preliminary injunction as to their Section 2 claims relating to same-day registration and out-of-precinct voting.[7] Accordingly, the district court abused its discretion in refusing to grant the requested injunctive relief as to those provisions.[8]

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[6] In Purcell, 549 U.S. 1, on which the dissenting opinion relies, the Supreme Court seemed troubled by the fact that a two-judge motions panel of the Ninth Circuit entered a factless, groundless "bare order" enjoining a new voter identification provision in an impending election. At the time of the "bare order," the appellate court also lacked findings by the district court. By contrast, neither district court nor appellate court reasoning, nor lengthy opinions explaining that reasoning, would be lacking in this case.

[7] By not addressing Plaintiffs' constitutional claims, we do not mean to suggest that we agree with the district court's analysis. But because we find that Plaintiffs are likely to succeed on the merits under the Voting Rights Act, we need not, and therefore do not, reach the constitutional issues.

[8] We respectfully disagree with the dissenting opinion that our decision today will create any significant voter confusion. The continuation of same-day registration and out-of-precinct voting after today's decision means more opportunity to register and vote than if the entirety of House Bill 589 were in effect for this election. Voters who are confused about whether they can, for example, still register and vote on the same day will have their votes counted. In this sense, our decision today acts as a safety net for voters confused about the effect of House Bill 589 on their right to vote while this litigation proceeds.

VI. Relief Granted

Appellate courts have the power to vacate and remand a denial of a preliminary injunction with specific instructions for the district court to enter an injunction. See, e.g., Elrod v. Burns, 427 U.S. 347, 350 (1976) (affirming the Seventh Circuit's grant of a preliminary injunction the district court had denied); Am. Civil Liberties Union of Ill. v. Alvarez, 679 F.3d 583, 608 (7th Cir. 2012) (reversing and remanding with instructions to enter a preliminary injunction); Newsom ex rel. Newsom v. Albemarle Cnty. Sch. Bd., 354 F.3d 249, 252 (4th Cir. 2003) (vacating the district court's order and remanding with instructions to enter a preliminary injunction).

For the many reasons above, we remand with instructions to the district court to enter as swiftly as possible a preliminary injunction granting the following relief:

- Part 16: House Bill 589's elimination of Same-Day Voter Registration, previously codified at G.S. 163-82.6A, is enjoined, with the provisions in effect prior to House Bill 589's enactment in full force pending the conclusion of a full hearing on the merits;

- Part 49: House Bill 589's elimination of Voting in Incorrect Precinct, previously codified at G.S. 163-55, is enjoined, with the provisions in effect prior to House Bill 589's enactment in full force pending the conclusion of a full hearing on the merits.

REVERSED IN PART, AFFIRMED IN PART, AND REMANDED WITH INSTRUCTIONS TO ENTER A PRELIMINARY INJUNCTION

DIANA GRIBBON MOTZ, Circuit Judge, dissenting:

With great respect for my colleagues' contrary views and genuine regret that we cannot agree on the outcome of these important cases, I dissent.

At the center of these cases are changes made by the North Carolina General Assembly to the State's election laws. Plaintiff-Appellants and the United States moved the district court to grant a preliminary injunction prohibiting the State of North Carolina from enforcing many of the new laws. After considering the evidence offered at a week-long hearing (including the testimony of twelve witnesses and thousands of pages of written material) and the extensive written and oral legal arguments, the district court denied the motions. The court explained its reasoning in a 125-page opinion and order. Three sets of plaintiffs appealed; the United States did not. The district court's order is now before us, on interlocutory appeal, less than five weeks before voters in North Carolina go to the polls in a statewide general election.

Nothing in the record suggests that any dilatoriness by either the parties or the court caused this unfortunate timing. For, to give the important issues at stake here their due required extensive preparation, including months of discovery by the parties, and consideration and analysis by the district court. But the fact of the timing remains.

Appellants ask this court to reverse the district court's denial of relief, and to grant a preliminary injunction requiring the State to revert to abandoned election procedures for which the State maintains it has not, and is not, prepared. For the reasons that follow, I cannot agree that such extraordinary relief should issue.

I.

To obtain a preliminary injunction, a plaintiff must establish that: (1) he is likely to succeed on the merits; (2) he is likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities tips in his favor; and (4) an injunction is in the public interest. Winter v. Natural Res. Def. Council, 555 U.S. 7, 20 (2008). Critically, each of these four requirements must be satisfied. Id. Moreover, a plaintiff must make a "clear" showing both that he is likely to suffer irreparable harm absent relief and he is likely succeed on the merits at trial. Id.; Real Truth About Obama, Inc. v. Fed. Election Comm'n, 575 F.3d 342, 346 (4th Cir. 2009), vacated on other grounds, 559 U.S. 1089 (2010).

The majority emphasizes that unlawfully or unconstitutionally depriving North Carolinians of the opportunity to vote is an irreparable harm. I do not contend to the contrary. But by the same token, the requested injunction will require the State to halt the ongoing implementation of one of its duly enacted statutes -- a statute that, for now at least, has not been rendered invalid. As the Chief Justice recently reminded us, this itself constitutes "a form

of irreparable injury." Maryland v. King, 133 S.Ct. 1, 3 (2012) (Roberts, C.J., in chambers).

Moreover, even a showing of irreparable harm does not, without more, entitle a plaintiff to a preliminary injunction. While we once permitted the mere presence of "grave or serious questions for litigation" to tip the balance in the movant's favor, Rum Creek Coal Sales, Inc. v. Caperton, 926 F.2d 353, 363 (4th Cir. 1991), we have since recognized that this approach is in "fatal tension" with the Supreme Court's instruction in Winter that all four factors must be independently satisfied. Real Truth, 575 F.3d at 346. Accordingly, no matter how likely the irreparable injury absent an injunction, a plaintiff can obtain a preliminary injunction only if he demonstrates a clear likelihood of success on the merits, and the balance of equities favors him, and the injunction is in the public interest.

Such plaintiffs comprise a small class. As the Supreme Court explained in Winter, the grant of a preliminary injunction is "an extraordinary remedy never awarded as of right." 555 U.S. at 24; see also id. at 32 (noting that even issuance of a permanent injunction after trial "is a matter of equitable discretion; it does not follow from success on the merits as a matter of right."). In a recent case, our en banc court similarly recognized that the grant of such a remedy involves "the exercise of a very far-reaching power, which is to be applied only in [the] limited circumstances which clearly demand it." Centro Tepeyac v. Montgomery Cnty., 722 F.3d 184,

188 (4th Cir. 2013) (en banc) (internal citation and quotation marks omitted).

Our review of a district court's denial of such an "extraordinary remedy" is also highly deferential. We review the grant or denial of a preliminary injunction for "abuse of discretion." Real Truth, 575 F.3d at 345-47. Under this standard, we review the district court's factual findings for clear error. Pashby v. Delia, 709 F.3d 307, 319 (4th Cir. 2013). We review its "legal rulings de novo" but we review the district court's "ultimate decision to issue the preliminary injunction for abuse of discretion." Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 428 (2006). Thus, as the Third Circuit has explained, an appellate court "use[s] a three-part standard to review a District Court's grant of a preliminary injunction: we review the Court's findings of fact for clear error, its conclusions of law de novo, and the ultimate decision to grant the preliminary injunction for abuse of discretion." Miller v. Mitchell, 598 F.3d 139, 145 (3d Cir. 2010).

While securing reversal of a denial of preliminary relief is an uphill battle for any movant, Appellants face a particularly steep challenge here. For "considerations specific to election cases," including the risk of voter confusion, Purcell v. Gonzalez, 549 U.S. 1, 4-5 (2006), counsel extreme caution when considering preliminary injunctive relief that will alter electoral procedures.* Because

* Although the majority steadfastly asserts that the requested injunction seeks only to maintain the status quo, the provisions challenged by Appellants were enacted more than a year ago and governed the statewide primary elections held on

those risks increase "[a]s an election draws closer," id. at 5, so too must a court's caution. Cf. Riley v. Kennedy, 553 U.S. 406, 426 (2008) ("[P]ractical considerations sometimes require courts to allow elections to proceed despite pending legal challenges."). Moreover, election cases like the one at hand, in which an appellate court is asked to reverse a district court's denial of a preliminary injunction, risk creating "conflicting orders" which "can themselves result in voter confusion and consequent incentive to remain away from the polls." Purcell, 549 U.S. at 4-5.

II.

Given the standard of review, and the Supreme Court's teaching on injunctive relief in the weeks before an election, I cannot join the majority in reversing the judgment of the district court.

My colleagues argue that we should reverse because, in assessing the likelihood of Appellants' success on the merits, the district court articulated certain legal standards incorrectly. Such a misstep, they assert, constitutes an abuse of discretion and so requires reversal and grant of injunctive relief. Usually an error of law does constitute an abuse of

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May 6, 2014. Appellants did not move for a preliminary injunction until May 19, 2014, almost two weeks after the new electoral procedures had been implemented in the primary. Moreover, regardless of how one conceives of the status quo, there is simply no way to characterize the relief requested by Appellants as anything but extraordinary. Appellants ask a federal court to order state election officials to abandon their electoral laws without first resolving the question of the legality of those laws.

discretion and does require reversal. But when reviewing the denial of a preliminary injunction, an appellate court can find an abuse of discretion requiring reversal only if the appellant demonstrates that the corrected standard renders its likelihood of success clear and establishes that the other requirements for a preliminary injunction have been met.

In my view, Appellants have not done this here. That is, Appellants have neither established a clear likelihood of success on the merits, nor demonstrated, particularly at this late juncture, that the balance of the equities and the public interest weigh in their favor. Absent the required showing on each of these elements, the district court's "ultimate decision" to deny preliminary relief was not an abuse of discretion. O Centro, 546 U.S. at 428.

III.

Giving due deference, as we must, to the district court's findings of fact, Appellants have not established that the district court abused its discretion in finding no clear likelihood of their success on the merits. This is not to say that I believe the district court's legal analysis was without error, only that Appellants have not shown that correcting the errors would render clear their likelihood of success.

For instance, I am troubled by the court's failure to consider the cumulative impact of the changes in North Carolina voting law. Specifically, the district court found that prohibiting the counting

of out-of-precinct provisional ballots would not burden minority voters because early voting provides "ample opportunity" for individuals "who would vote out-of-precinct" to otherwise cast their ballot. North Carolina State Conference of Branches of the NAACP v. McCrory, 997 F. Supp. 2d 322, 367 (M.D.N.C. 2014). That finding rests on the assumption that eliminating a week of early voting still leaves minority voters with "ample opportunity." But the district court discussed plaintiffs' challenges to these two provisions without acknowledging that the burden imposed by one restriction could reinforce the burden imposed by others. Compare id. at 366-68 with id. at 370-75. Similarly, the district court discussed same-day registration, id. at 46, without recognizing that eliminating, in one fell swoop, preferred methods of both registration and ballot casting has a more profound impact on the opportunity to vote than simply eliminating one or the other. Cf. Pisano v. Strach, 743 F.3d 927, 933 (4th Cir. 2014) ("When deciding whether a state's filing deadline is unconstitutionally burdensome, we evaluate the combined effect of the state's ballot-access regulations." (emphasis added)).

At this stage, however, I cannot conclude that correcting these, or similar, errors requires the holding that Appellants are clearly likely to succeed on the merits. The district court's factual findings about early voting and same-day registration suggest Appellants' evidence simply did not sway the court. The court rejected as unpersuasive evidence offered that constricting the early voting period assertedly would create long lines at the polls, McCrory, 997 F. Supp. 2d at 372, affect black voters

disproportionately, id., or cut down on Sunday voting hours in the upcoming election. Id. at 373. So too with same-day registration: the district court rejected Appellants' assertions that eliminating same-day registration would cause registration rates among black North Carolinians to drop. Id. at 350. Whatever the wisdom of these factual findings, they are not clearly erroneous.

In short, had I been overseeing this case in the district court, I might have reached a different conclusion about Plaintiffs' chances of success on the merits. But neither I nor my colleagues oversaw this case and its 11,000-page record. Nor did we consider the evidence and arguments produced in five days of hearings. And though I share some of my colleagues' concerns about the district court's legal analysis, those concerns do not establish that plaintiffs have shown a clear likelihood of success on the merits.

IV.

Further, Appellants have not shown that the balance of equities and the public interest support issuance of the preliminary injunction they seek. Any such showing would require overcoming the burden the State faces in complying with ordered changes to its election procedures and the risk of confusing voters with dueling opinions so close to the election.

Election day is less than five weeks away, and other deadlines loom even closer. In fact, for the many North Carolina voters that have already submitted absentee ballots, this election is already

underway. The majority's grant of injunctive relief requires boards of elections in North Carolina's 100 counties to offer same-day registration during the early voting period and count out-of-precinct provisional ballots -- practices for which neither the State nor the local boards have prepared. See, e.g., Poucher Decl. 4, ECF No. 146-1 ("To have to revert back to conducting an election under the prior statute would be confusing to [election] officials, and again unfunded.").

The majority suggests that the State exaggerates the burden imposed on it, and that resurrecting past practices is a simple matter. Perhaps. But the logistics of running an election seem to me far more complex than my colleagues suggest. Poll workers have been trained and polling centers have been equipped in reliance on the procedures that governed the most recent statewide primary. An injunction will render some of those procedures a nullity. Additionally, it is undisputed that the same-day registration system used in elections under the prior law was administered electronically through an application embedded within a comprehensive computer program. That application was disengaged after the enactment of SL 2013-381, and is now out of date. Reliable restoration of the application in time for the general election is apparently impossible. For this reason, the injunction will require the same-day registration process to be manually administered by each county board, risking delays, errors, and general confusion. Thus, while reverting to the old procedure may make for a simple order, it will require substantial effort to effectuate in practice.

In addition to the burden it places on the State, an about-face at this juncture runs the very real risk of confusing voters who will receive incorrect and conflicting information about when and how they can register and cast their ballots. Under North Carolina law, ensuring voters have the correct information in a timely fashion is not just good policy, it is a statutory mandate. See N.C. Gen. Stat. § 163-278.69 (a). The State is required to send to every household a Judicial Voter Guide "no more than 28 days nor fewer than seven days before" early voting begins. Id. We were told at oral argument that this Guide, and a timeline of important dates, have already been printed and sent to every household in the State, and have been made available on the State Board of Elections' website. See 2014 General Election Judicial Voter Guide, http://www.ncsbe.gov/ncsbe/Portals/0/FilesT/JudicialVoterGuide2014.pdf (last visited Sept. 30, 2014). The majority's order renders this information inaccurate. For instance, the current Guide lists a registration cut-off date of October 10 and instructs voters that they must vote in their proper precinct. Id. Moreover, the widespread dissemination of flat-out contradictory information undermines confidence in the State's ability to carry out orderly elections.

Recognizing the importance of avoiding confusion at the polls, both we and the Supreme Court have deferred to a state's own assessment of when such confusion is likely to occur. See, e.g., U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 834 (1995); Munro v. Socialist Workers Party, 479 U.S. 189, 195-96 (1986); Pisano, 743 F.3d at 937. The majority downplays the State's concerns about

confusion here, suggesting that the effect of any confusion will be minimal. My colleagues see the injunction as a "safety net" that will ensure that any confused voters at least have the opportunity to cast a ballot. But this assumes that those who may be confused by "conflicting orders" will resist the "consequent incentive to remain away from the polls." Purcell, 549 U.S. at 5. For "conflicting orders" cause not only uncertainty about the status of particular voting procedures, but also general frustration with and distrust of an election process changed on the eve of the election itself.

In sum, to obtain a preliminary injunction, Appellants must establish that the balance of hardships and public interest weigh in their favor. I cannot conclude that they have done so here.

V.

Appellants will have the opportunity at trial to demonstrate precisely how SL 2013-381 burdens voters in North Carolina. And if Appellants can show that the multiple provisions of that law work in tandem to limit voting opportunities, I am confident that the district court will consider the totality of that burden. A law that adopts a "death by a thousand cuts" approach to voting rights is no more valid than a law that constricts one aspect of the voting process in a particularly onerous manner. But at this juncture, in my view, Plaintiffs have not met the high bar necessary to obtain the relief they seek. Accordingly, I respectfully dissent.

[ENTERED OCTOBER 1, 2014]

FILED: October 1, 2014

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 14-1845 (L)
(1:13-cv-00660-TDS-JEP)
(1:13-cv-00658-TDS-JEP)
(1:13-cv-00861-TDS-JEP)

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

Plaintiffs

and

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

Intervenors/Plaintiffs - Appellants

v.

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

Defendants – Appellees

UNITED STATES OF AMERICA

Amicus Curiae

BRENNAN CENTER FOR JUSTICE AT NYU SCHOOL OF LAW

Amicus Supporting Appellant

JUDICIAL WATCH, INCORPORATED; ALLIED EDUCATIONAL FOUNDATION; CHRISTINA KELLEY GALLEGOS-MERRILL

Amici Supporting Appellee

No. 14-1856
(1:13-cv-00658-TDS-JEP)
(1:13-cv-00660-TDS-JEP)
(1:13-cv-00861-TDS-JEP)

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

Plaintiffs - Appellants

and

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

Plaintiffs

v.

PATRICK L. MCCRORY, in his official capacity as Governor of the state of North Carolina; JOSHUA B. HOWARD, in his official capacity as a member of the

State Board of Elections; RHONDA K. AMOROSO, in her official capacity as a member of the State Board of Elections; JOSHUA D. MALCOLM, in his official capacity as a member of the State Board of Elections; PAUL J. FOLEY, in his official capacity as a member of the State Board of Elections; MAJA KRICKER, in her official capacity as a member of the State Board of Elections

Defendants - Appellees

UNITED STATES OF AMERICA

Amicus Curiae

BRENNAN CENTER FOR JUSTICE AT NYU SCHOOL OF LAW

Amicus Supporting Appellant

JUDICIAL WATCH, INCORPORATED; ALLIED EDUCATIONAL FOUNDATION; CHRISTINA KELLEY GALLEGOS-MERRILL

Amici Supporting Appellee

No. 14-1859
(1:13-cv-00660-TDS-JEP)
(1:13-cv-00658-TDS-JEP)
(1:13-cv-00861-TDS-JEP)

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

Plaintiffs - Appellants

and

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

Intervenors/Plaintiffs

v.

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

Defendants - Appellees

UNITED STATES OF AMERICA

Amicus Curiae

BRENNAN CENTER FOR JUSTICE AT NYU SCHOOL OF LAW

Amicus Supporting Appellant

JUDICIAL WATCH, INCORPORATED; ALLIED EDUCATIONAL FOUNDATION; CHRISTINA KELLEY GALLEGOS-MERRILL

Amici Supporting Appellee

J U D G M E N T

In accordance with the decision of this court, the judgment of the district court is reversed in part and affirmed in part. This case is remanded to the district court for further proceedings consistent with the court's decision.

This judgment shall take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK

[ENTERED AUGUST 8, 2014]

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

NORTH CAROLINA STATE CONFERENCE, OF THE NAACP, EMMANUEL BAPTIST CHURCH, NEW OXLEY HILL BAPTIST CHURCH, BETHEL A. BAPTIST CHURCH, COVENANT PRESBYTERIAN CHURCH, CLINTON TABERNACLE AME ZION CHURCH, BARBEE'S CHAPEL MISSIONARY BAPTIST CHURCH, INC., ROSANELL EATON, ARMENTA EATON, CAROLYN COLEMAN, BAHEEYAH MADANY, JOCELYN FERGUSON-KELLY, FAITH JACKSON, MARY PERRY, and MARIA TERESA UNGER PALMER,	)	
Plaintiffs,	)	
v.	)	1:13CV658
PATRICK LLOYD MCCRORY, in his Official capacity as Governor of North Carolina, KIM WESTBROOK STRACH, in her official capacity As Executive Director of the North Carolina State Board of Elections, RHONDA K. AMOROSO, in her official capacity as Secretary of the North Carolina State Board of Elections, JOSHUA D. MALCOLM, in his official Capacity as a member of the North	)	

Carolina State Board of Elections,)
PAUL J. FOLEY, in his official)
Capacity as a member of the North)
Carolina State Board of Elections)
and MAJA KRICKER, in her official)
capacity as a member of the North)
Carolina State Board of Elections,)
)
Defendants.)
_____)

LEAGUE OF WOMEN VOTERS OF NORTH)
CAROLINA; A. PHILIP RANDOLPH)
INSTITUTE; UNIFOUR ONESTOP)
COLLABOARATIVE; COMMON CAUSE NORTH)
CAROLINA; GOLDIE WELLS; KAY)
BRANDON; OCTAVIA RAINEY; SARA)
STOHLER; and HUGH STOHLER,)
)
Plaintiffs,)
)
and)
)
LOUIS M. DUKE; ASGOD BARRANTES;)
JOSUE E. BERDUO; CHARLES M. GRAY;)
NANCY J. LUND; BRIAN M. MILLER;)
BECKY HURLEY MOCK; MARY-WREN)
RITCHIE, LYNNE M. WALTER, and)
EBONY N. WEST,)
)
Plaintiff-Intervenors,)
)
v. 1:13CV660)
)

THE STATE OF NORTH CAROLINA, JOSHUA B. HOWARD, in his official capacity as a member of the State Board of Elections; RHONDA K. AMOROSO, in her official capacity as a member of the State Board of Elections; JOSHUA D. MALCOLM, in his official capacity as a member of the State Board of Elections; PAUL J. FOLEY, in his official capacity as a member of the State Board of Elections; MAJA KRICKER, in her official capacity as a member of the State Board of Elections; and PATRICK L. MCCRORY, in his official capacity as the Governor of the State of North Carolina,		)
Defendants.		)
UNITED STATES OF AMERICA,		)
Plaintiff,		)
v.	1:13CV861	)

THE STATE OF NORTH CAROLINA, THE NORTH CAROLINA STATE BOARD OF ELECTIONS; and KIM W. STRACH, in her official capacity as Executive Director of the North Carolina State Board of Elections,	)
Defendants.	)

MEMORANDUM OPINION AND ORDER

THOMAS D. SCHROEDER, District Judge.

In these related cases, Plaintiffs seek a preliminary injunction pursuant to Federal Rule of Civil Procedure 65 barring Defendants from implementing various provisions of North Carolina Session Law 2013-381 ("SL 2013-381"), an omnibus election-reform law.[1] (Docs. 96 & 98 in case 1:13CV861; Docs. 108 & 110 in case 1:13CV658; Docs. 112 & 114 in case 1:13CV660.)[2] Defendants move for judgment on the pleadings pursuant to Federal Rule of Civil Procedure 12(c). (Doc. 94.) A

[1] Throughout the proceedings the parties have referred to the challenged law as "House Bill 589," its original designation by the North Carolina General Assembly. Because it is a duly-enacted law passed by both chambers of the General Assembly and signed by the Governor, the court will refer to the final product as Session Law 2013-381. Prior to passage, the bill will be referred to as HB 589.

[2] Because of the duplicative nature of the filings in these three cases, for the remainder of this Memorandum Opinion the court will refer only to the record in case 1:13CV861 except where necessary to distinguish the cases.

trial on the merits is currently scheduled for July 2015. (Doc. 30 at 4.)

Plaintiffs include the United States of America (the "United States") in case 1:13CV861, the North Carolina State Conference of the NAACP and several organizations and individual plaintiffs (the "NAACP Plaintiffs") in case 1:13CV658, and the League of Women Voters of North Carolina along with several organizations and individuals (the "League Plaintiffs") in case 1:13CV660. Additionally, the court allowed a group of young voters and others (the "Intervenors") to intervene in case 1:13CV660. (Doc. 62 in case 1:13CV660.) Considered together, Plaintiffs raise claims under the Fourteenth, Fifteenth, and Twenty-Sixth Amendments to the United States Constitution as well as Section 2 of the Voting Rights Act of 1965 ("VRA"), 42 U.S.C. § 1973. (Doc. 1 in case 1:13CV861; Doc. 52 in case 1:13CV658; Docs. 1 & 63 in case 1:13CV660.) The United States also moves for the appointment of federal observers to monitor future elections in North Carolina pursuant to Section 3(a) of the VRA, 42 U.S.C. § 1973a(a). (Doc. 97 at 75-77.) Finally, Plaintiffs move to exclude and strike the testimony of three of Defendants' expert witnesses. (Docs. 146, 148, & 150.)

Defendants are the State of North Carolina, Governor Patrick L. McCrory, the State Board of Elections ("SBOE"), and several State officials acting in their official capacities. They contend that Plaintiffs have not stated any claims for which relief can be granted under either the Constitution or the VRA and, in any event, have not established

entitlement to preliminary relief. (Docs. 94, 95 & 126.)

The court held a four-day evidentiary hearing and argument beginning July 7, 2014. The record is extensive. Throughout the proceedings, there was much debate over the policy merits of SL 2013-381 as an election law and the popularity and desirability of various voting mechanisms it affects. It is important to note that, while these have evoked strongly-held views, this is not the forum for resolving that aspect of the parties' dispute; such considerations are matters for legislative bodies to address. The jurisdiction of this court is limited to addressing the legal challenges raised based on the evidence presented to the court.

After careful consideration, the court concludes that Defendants' motion for judgment on the pleadings should be denied in its entirety. Plaintiffs' complaints state plausible claims upon which relief can be granted and should be permitted to proceed in the litigation. However, a preliminary injunction is an extraordinary remedy to be granted in this circuit only upon a "clear showing" of entitlement. After thorough review of the record, the court finds that as to two challenged provisions of SL 2013-381, Plaintiffs have not made a clear showing they are likely to succeed on the merits of the underlying legal claims. As to the remaining provisions, the court finds that even assuming Plaintiffs are likely to succeed on the merits, they have not demonstrated they are likely to suffer *irreparable* harm - a necessary prerequisite for preliminary relief - before trial in the absence of an

injunction. Consequently, the motions for preliminary injunction and the United States' request for federal observers will be denied. This resolution renders the motions to exclude expert testimony moot.

I. BACKGROUND

A. Legislative History

The North Carolina General Assembly began consideration of a voter identification ("voter ID") requirement in March 2013. On March 12, the House Committee on Elections, chaired by Republican Representative David R. Lewis, held public hearings on voter ID. (See J.A. at 2388-92.)[3] Over 70 citizens from a wide variety of organizations spoke before the committee. (Id.) The next day, the committee met and considered the testimony of five individuals representing a wide variety of organizations, including the Brennan Center for Justice and the Heritage Foundation. (See J.A. at 2393-2416.) One of the speakers was Allison Riggs, counsel of record for the League Plaintiffs in case 1:13CV660, who appeared on behalf of the Southern Coalition for Social Justice. (J.A. at 2394.) On April 3, the committee heard from Ion Sancho, the Supervisor of Elections for Leon County, Florida, who testified about Florida's experience when it reduced early-voting days in advance of the 2012 general election. (J.A. at 2418, 2420-23.)

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[3] Citations to "J.A." refer to the joint appendix submitted by Plaintiffs along with their briefs in support of the motions for preliminary injunction. (Docs. 99 through 111 & Doc. 154, along with their attachments.)

The initial version of HB 589 was introduced in the House of Representatives on April 4. (J.A. at 2101-12.) The bill dealt almost exclusively with the implementation of a voter ID requirement beginning in 2016 in portions titled the "Voter Information Verification Act."[4] (J.A. at 2101-06, 2112.) On April 8, it passed "first reading" and was referred to the Committee on Elections.[5] (J.A. at 2354.) The committee subsequently held another public hearing on April 10, whereupon over 70 citizens from across the political spectrum had the opportunity to speak. (J.A. at 2424-28.) It further debated the bill and added amendments at a meeting held on April 17. (J.A. at 2432-43.) The bill was also referred to the Committees on Finance and Appropriations. (J.A. at 2354, 2444-45.)

HB 589 advanced, as amended, from the various House committees, and was debated on the House floor on April 24, 2013. (J.A. at 2354, 2446-51.) After three amendments were adopted and six others rejected, the bill passed "second reading" on a roll-call vote of 80-36.[6] (J.A. at 2354, 2450.) The bill

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[4] The remainder dealt with the procedure for obtaining and voting mail-in absentee ballots. (J.A. at 2106-11.)

[5] House Rule 41(a) states: "Every bill shall receive three readings in the House prior to its passage. The first reading and reference to standing committee of a House bill shall occur on the next legislative day following its introduction." H.R. 54, 2013 Gen. Assemb., Reg. Sess. (N.C. 2013), available at http://www.ncleg.net/Sessions/2013/ Bills/House/PDF/H54v3.pdf.

[6] House Rule 41(b) states: "No bill shall be read more than once on the same day without the concurrence of two-thirds of the members present and voting . . . ." H.R. 54.

subsequently passed "third reading" immediately, on a vote of 81-36, and was passed by the House. (J.A. at 2450-51.) Five House Democrats joined all present Republicans in voting for the final voter ID bill (J.A. at 2366, 2573, 2581, 2592), but none of the black members of the House supported it (J.A. at 2655). Representative Rick Glazier, who strongly opposed the bill, testified at the preliminary injunction hearing in this case that he felt that "for a large bill," HB 589 received up to this point "the best process possible" in the House, one he characterized as "excellent." (Doc. 165 at 56-57.)

HB 589 was received in the North Carolina Senate the next day, passed first reading, and was assigned to the Senate Rules Committee. (J.A. at 2354.) The committee took no immediate action on the bill. The parties do not dispute that the Senate believed at this stage that HB 589 would have to be submitted to the United States Department of Justice ("DOJ") for "pre-clearance" under Section 5 of the VRA, 42 U.S.C. § 1973c(a), because many North Carolina counties were "covered jurisdictions" under that Section. However, at that time the United States Supreme Court was considering a challenge to the DOJ's ability to enforce Section 5. On June 25, the Supreme Court issued its decision in Shelby County v. Holder, 133 S. Ct. 2612 (2013), declaring the formula used to determine the Section 5 covered jurisdictions, 42 U.S.C. § 1973b(b), to be unconstitutional. The next day, Senator Thomas Apodaca, Republican Chairman of the Rules Committee, publicly stated, "So, now we can go with the full bill." (J.A. at 1831.) The contents of the "full bill" were not disclosed at the time. A meeting of the

Rules Committee was subsequently scheduled for July 23. (See J.A. at 2452.)

The night before the Rules Committee meeting, the new bill, now 57 pages in length, was posted for the members on the Rules Committee website.[7] (J.A. at 183-84 (declaration of Sen. Josh Stein); Doc. 164 at 111-12 (testimony of Sen. Dan Blue); J.A. at 2129-85.) In addition to the voter ID provisions,[8] HB 589 now included many additional provisions, including the following that are being challenged in this litigation: (1) the reduction of the period for so-called "early voting"[9] from 17 to ten days; (2) the elimination of same-day registration ("SDR"), which permitted voters to register and then vote at the same time during the early-voting period; (3) the prohibition on the counting of provisional ballots cast outside of a voter's correct voting precinct on Election Day ("out-of-precinct" ballots); (4) the expansion of allowable poll observers and voter challenges; (5) the elimination of the discretion of county boards of election ("CBOEs") to keep the polls open an additional hour on Election Day in

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[7] A version of HB 589 appears to have been distributed to members of the Rules Committee who were present on July 18, 2013. (Doc. 134-4 at 3.) It is not clear whether this version differed from that posted on the website on July 22.

[8] The voter ID provisions contained significant changes. For example, the list of acceptable identifications no longer included those issued by a state university or community college. (Compare J.A. at 2102-03 (original bill filed in the House on April 4, 2013), with J.A. at 2130 (version approved by the Senate Rules Committee on July 23, 2013).)

[9] Early voting is a term used to describe in-person absentee voting at designated locations before Election Day.

"extraordinary circumstances"; and (6) the elimination of "pre-registration" of 16- and 17-year-olds who will not be 18 by the next general election.[10] The bill proposed that the voter ID requirement go into effect in 2016 but be implemented through a "soft rollout," whereby voters would be advised at the polls in 2014 and 2015 of the law's requirement that they will need a qualifying picture ID to vote beginning in 2016.

At the committee meeting on July 23, Senator Apodaca allowed members of the public in attendance to speak for two minutes.[11] (See Doc. 134-4 at 45-60.) Speakers included the League Plaintiffs' counsel, Riggs, as well as Jamie Phillips,

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[10] Apart from the voter ID provisions, which were new, the bill largely purported to repeal, amend, or update existing law. Other amendments included: (1) making it illegal to compensate persons collecting voter registrations based on the number of forms submitted (Part 14); (2) reducing the number of signatures required to become a candidate in a party primary (Part 22); (3) deleting obsolete provisions about the 2000 census (Part 27) (4) changing the order of candidates appearing on the ballot (Part 31); (5) eliminating straight-ticket voting (Part 32); (6) moving the date of the North Carolina presidential primary earlier in the year (Part 35); (7) eliminating taxpayer funding for appellate judicial elections (Part 38); (8) allowing funeral homes to participate in canceling voter registrations of deceased persons (Part 39); and (9) requiring provisional ballots to be marked as such for later identification (Part 52). The bill also proposed mandating that several matters be referred for further study, including requiring the Joint Legislative Oversight Committee to examine whether to maintain the State's current runoff system in party primaries. (Part 28.)

[11] There is no indication the two-minute time allotment was a deviation from normal rules.

who represented the North Carolina State Conference of the NAACP. (Id. at 45-47, 57-58.) Although the majority of comments addressed the voter ID requirement, citizens also spoke in opposition to the other challenged provisions, including the elimination of SDR and pre-registration and reduction of early voting. Several opponents characterized the bill as an effort at voter suppression. (See, e.g., id. at 45 (Riggs: "voter suppression at its very worst"); id. at 57 (Phillips: "The fewer young people and minorities who vote, the better it seems in your minds. We get it. No one is being fooled.").) After debate, the bill passed the committee and proceeded to the floor for second reading. (Id. at 80.)

The following afternoon, on July 24, HB 589 was introduced on the floor of the full Senate. (Id. at 84.) During several hours of debate after the bill's second reading, Democratic Senators introduced and discussed several proposed amendments. Most significantly, Senator Josh Stein introduced an amendment to require the CBOEs to offer the same number of aggregate hours of early voting as were offered in the last comparable election (whether presidential or off-year). (Id. at 125-26.) This could be accomplished, he proposed, by CBOEs offering more hours at present sites, or by opening more sites. (Id. at 130-31.) Senator Stein argued that the amendment would reduce, but not eliminate, the impact the reduction of early-voting days would have on all voters, including African-Americans. (Id. at 111.) Senator Robert Rucho, the Republican sponsor of HB 589, asked the Senate to support Senator Stein's amendment (id. at 126), and it passed by a

vote of 47 to 1 (id. at 131). The Senators also exchanged argument on many of the other challenged provisions, including voter ID, SDR, pre-registration, and the increase in allowable poll observers, as well as several provisions not at issue here (including the elimination of straight-ticket voting and reduction of various campaign-finance restrictions). (See generally id. at 148-223.) At the close of debate on July 24, Senator Apodaca objected to a third reading, effectively mandating that the debate of the bill be carried over into the next day. (Id. at 224.)

On July 25, the Senate began its session with the third reading of amended HB 589. (Id. at 229.) Senator Rucho then offered a bipartisan amendment, which passed 46 to 0; it clarified the aggregate-hours amendment and permitted a county to obtain a waiver from the aggregate-hours requirement upon unanimous approval of both the CBOE and the SBOE. (Id. at 232-33, 236, 241.) Proponents and opponents of the bill debated both its provisions and the merits of various amendments over the next four hours, and the Senate accepted an amendment dealing with electioneering from Senator Dan Blue (Democrat). (Id. at 307-08.) Several Senators characterized the bill as voter suppression of minorities. (E.g., id. at 251-60 (Sen. Stein), 282-93 (Sen. Blue), & 293-99 (Sen. Robinson).) At the close of debate fourteen amendments had been considered, and the Senate voted in favor of HB 589 along party lines, sending the bill back to the House for concurrence, as amended. (Id. at 325.) Senator Martin Nesbitt (Democrat), although opposing the bill strongly,

noted that "we've had a good and thorough debate on this bill over two days." (Id. at 315.)

With the end of the legislative session approaching, the House received the Senate's version of HB 589 that night. (J.A. at 2355.) At the beginning of a two-hour floor session starting at 7:45 p.m., Representative Henry M. Michaux, Jr. (Democrat) moved that the House form a Committee of the Whole[12] to consider the bill. (J.A. at 2507-08.) Representative Tim Moore opposed the motion on the grounds that "it is simply a waste of time" because such a committee "is the same as the full House," which the bill was properly before at the moment. (J.A. at 2509.) The motion failed by a vote of 41 to 69. (J.A. at 2510.)

Two amendments offered by opponents (Sen. Blue's amendment of the date for electioneering; Sen. Rucho's and Stein's amendment altering several items, including the types of ID that can be presented for voting, and requiring the same number of hours of early voting) were adopted 109 to 0. (J.A. at 2511-15.) The provisions of the new full bill were then reviewed. (J.A. at 2516-31.) Each member of the House Democratic caucus present – including four of the five members who voted for the House version in April – were granted time to speak in opposition to the bill. (J.A. at 2571-73, 2580-81, 2581-83, 2592-93; Doc. 165 at 64-65 (testimony of Rep. Glazier).) Among other things, opponents characterized the

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[12] A Committee of the Whole is a legislative device where the whole membership of a legislative house sits as a committee and operates under informal rules. Webster's Third New International Dictionary 458 (1986).

measure variously as voter suppression, partisan, and disproportionately affecting African-Americans, young voters, and the elderly. (E.g., J.A. at 2561 ("[O]ur anger tonight is palpable. Passage of this bill is a political call to arms."); 2563 ("the most pointedly, obviously politically partisan bill I've ever seen"); 2568 ("voter suppression"). On the Republican side, only Representative Lewis, the bill's primary House sponsor, spoke in support of the amended bill. (J.A. at 2620-24.) He pointed out, among other things, that the bill does not bar Sunday voting, does not reduce overall hours of early voting, provides for free photo ID, and, in his opinion, strengthens the requirements for absentee voting. (Id.) Subsequently, the House voted – again along party lines – to concur in the Senate's version of HB 589 at 10:39 p.m. (J.A. at 2369.)

The bill was ratified the next day and presented to Governor McCrory on July 29. (J.A. at 2355.) The governor signed SL 2013-381 into law on August 12, 2013. (Id.)

B. Procedural History

Almost immediately after SL 2013-381 became law, two of the instant cases were filed in this court. The NAACP Plaintiffs filed a complaint challenging the voter ID requirement, elimination of SDR, reduction of early-voting days, prohibition on counting out-of-precinct provisional ballots, and the expansion of poll observers and ballot challengers under Section 2 of the VRA and the Fourteenth and Fifteenth Amendments. (Doc. 1 in case 1:13CV658 ¶¶ 56-80, 82-119.) In an amended complaint, the

NAACP Plaintiffs also challenge the elimination of pre-registration. (Doc. 52 ¶¶ 112, 130-32 in case 1:13CV658.) The League Plaintiffs initiated their case on the same day, challenging the elimination of SDR, prohibition on counting out-of-precinct ballots, elimination of the discretion of CBOEs to extend poll hours one hour on Election Day in "extraordinary circumstances," and the reduction in early-voting days pursuant to both Section 2 and the Fourteenth Amendment. (Doc. 1 in case 1:13CV660 at 27 (prayer for relief).) On September 30, 2013, the United States filed its complaint challenging the early voting, SDR, out-of-precinct voting, and voter ID provisions of SL 2013-381 under Section 2.[13] (Doc. 1 in case 1:13CV861.) The Magistrate Judge consolidated the three cases for the purposes of scheduling and discovery on December 13, 2013. (Doc. 30.)

On January 27, 2014, the court permitted a group of young voters and others to intervene as plaintiffs in case 1:13CV660 pursuant to Federal Rule of Civil Procedure 24(b). (Doc. 62 in case 1:13CV660.) Intervenors' complaint contends that the elimination of pre-registration, reduction in early voting, repeal of SDR, prohibition on counting out-of-precinct ballots, elimination of CBOE discretion to keep the polls open an extra hour on Election Day, and implementation of a voter ID requirement

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[13] The various complaints refer at times to Hispanics in addition to African-Americans and young voters, but the motions for a preliminary injunction do not mention Hispanic voters. This Memorandum Opinion therefore addresses only the claims with respect to black and young voters.

violate the Fourteenth and Twenty-Sixth Amendments. (Doc. 63 in case 1:13CV660.)

Pursuant to the scheduling order (Doc. 91), Plaintiffs filed motions for a preliminary injunction on May 19, 2014.[14] Combined, Plaintiffs seek to preliminarily enjoin SL 2013-381's provisions regarding poll observers, challenges, and hours; its elimination of SDR, out-of-precinct provisional voting, and pre-registration; its cutback of early voting; and its "soft rollout" of the voter ID requirement. The United States seeks to preliminarily enjoin only the early voting, SDR, and out-of-precinct voting sections of the law. (Doc. 97.) On the same day, Defendants filed their motion for judgment on the pleadings, contending that Plaintiffs have failed to state viable legal claims. (Docs. 94 & 95.) The parties responded to the various motions on June 18 (Docs. 126, 129, & 135), and replies were filed on June 30 (Docs. 152, 153, & 155). Plaintiffs also moved to exclude three of Defendants' experts. (Docs. 146, 148, & 150.)

During a four-day evidentiary hearing on the pending motions beginning July 7, 2014, Plaintiffs presented nine live lay witnesses, two live expert witnesses, and one witness by video deposition, while Defendants rested on the record, which

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[14] The parties have also been engaged in various discovery disputes, some of which have yet to be resolved. Most significantly, Plaintiffs are currently seeking various legislative communications that Defendants and the legislators maintain are privileged. (See Doc. 93.) This court has affirmed the Magistrate Judge's rejection of Defendants' contention that the legislative privilege is absolute and returned the matter to the Magistrate Judge for further proceedings, which are ongoing.

contains many more depositions and extensive expert reports. The court then allowed a full day of legal argument, including argument by counsel representing Judicial Watch, Inc., Allied Educational Foundation, and Christina Gallegos-Merrill, whom the court permitted to appear as *amici curiae*. (Doc. 136.) Post-hearing, the court allowed the parties to file hundreds of pages of deposition designations as well as supplemental briefing on the issue of standing and exclusion of Defendants' experts, bringing the total paper record in these cases to over 11,000 pages. The motions are now ripe for decision.

Ordinarily, the court would address a dismissal motion before turning to motions based on the evidence. However, because the court has determined that Plaintiffs have stated claims on their pleadings and the legal claims must also be analyzed in the context of the evidence presented on the injunction motions, it makes sense to address the motions for preliminary relief first before addressing Defendants' Rule 12(c) motion. Before reaching these topics, though, there is a threshold issue of Intervenors' standing to challenge SL 2013-381's elimination of pre-registration, to which the court now turns.

II. STANDING OF INTERVENORS

Intervenors are the only party challenging the repeal of pre-registration for 16- and 17-year-olds on Twenty-Sixth Amendment grounds.[15] Because none

[15] The NAACP Plaintiffs' challenge to the elimination of pre-registration is made under the Fourteenth Amendment and

of them is under the age of 18, their standing to assert that claim is not readily apparent. Although Defendants did not raise the question and no party addressed it in the original briefing, standing is a jurisdictional prerequisite, and the court has an independent obligation to ensure it. Fed. R. Civ. P. 12(h)(3); Goldsmith v. Mayor & City Council of Baltimore, 845 F.2d 61, 64 (4th Cir. 1988). At the preliminary injunction hearing, the court directed Intervenors to brief their standing to challenge the elimination of pre-registration.[16] Intervenors did so (Doc. 159), and Defendants have responded (Doc. 168).

To establish standing, a party must demonstrate three elements: (1) an "injury in fact," (2) a "causal connection between the injury and the conduct complained of," and (3) a likelihood that the injury would be redressed by a favorable decision. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992). Plaintiffs sufficiently allege a causal connection and a likelihood of redressability; at issue is whether Intervenors have suffered an "actual or imminent" injury from the elimination of pre-registration, creating a particularized "injury in fact." Id. at 560.

Section 2, claiming an injury to young minority voters, not young voters generally. (Doc. 52 ¶ 93 in case 1:13CV658.)

[16] Intervenors' standing to challenge the reduction in early-voting days, the elimination of SDR, and the elimination of out-of-precinct voting is not in dispute because they have alleged that they are personally and directly injured by those provisions.

First, Intervenors contend that some of them are or will be imminently injured because they can no longer register voters through the pre-registration program following its repeal. (Doc. 159 at 3.) Defendants dispute that harm to an interest in registering voters can create legally cognizable injury and further assert that such harm is not present here because pre-registration – not registration – is at issue. (Doc. 168 at 4.)

Preventing an individual from registering others to vote has been recognized as a legally sufficient injury for the purpose of standing. In Coalition for Sensible and Humane Solutions v. Wamser, 771 F.2d 395 (8th Cir. 1985), an association dedicated to helping minority and low-income citizens register to vote sued the Board of Election Commissioners of St. Louis for refusing to allow their qualified volunteers to serve as deputy registration officials. The Eighth Circuit held that the association had standing to sue on behalf of its members because the Board of Election Commissioners injured individual association members "by preventing them from registering new voters." Id. at 399.[17] By contrast, in People

[17] Wamser specifically addressed the association's standing to sue on the basis of injury to its individual members, see Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 181 (2000) (to have standing, an association must prove that its members would have had standing to sue in their own right), rather than organizational injury, see Havens Realty Corp. v. Coleman, 455 U.S. 363, 379 (1982) (an action adverse to an organization's interests that causes a drain on its resources is a legally cognizable injury). Thus, Wamser is applicable to Intervenors' claim, which only involves individuals – not an association or organization.

Organized for Welfare and Employment Rights (P.O.W.E.R.) v. Thompson, 727 F.2d 167 (7th Cir. 1984), an association dedicated to increasing political power of the poor and unemployed sued to compel the State to allow city registrars to conduct voter-registration drives in the waiting rooms of State social services offices. The Seventh Circuit found that the association lacked standing:

> P.O.W.E.R. in bringing this suit alleged only that its goal of improving the lot of the poor and the unemployed required for its fulfillment that the state make it easier for them to register. This might be a persuasive basis for standing if P.O.W.E.R. had been trying to advance its goal by registering new voters itself. Anyone who prevented it from doing that would have injured it, just as the defendants in this case would have injured it if they had prevented it from going into waiting rooms and urging the people waiting there to register. But P.O.W.E.R. was never forbidden to do *that*, and never sought to do the actual registering of voters.

Id. at 170 (emphasis in original) (citations omitted). Read together, Wamser and P.O.W.E.R. indicate that an individual or association would not have standing to compel Defendants to allow a third party to conduct voter-registration drives but suffers a cognizable injury if they prevent the litigant him- or herself from registering voters.

Here, Intervenors allege and produced evidence that they pre-registered young voters in the past and would continue doing so had SL 2013-381 not eliminated that program. (Doc. 63 ¶ 10 in case 1:13CV660; Doc. 159-3 ¶¶ 5-6.) Although Defendants attempt to draw a distinction between registration and pre-registration, they fail to explain why any difference matters. Rather, pre-registration appears to be the functional equivalent of registration, except that 16- and 17-year-olds' applications wait in a "hopper" to be processed by the State upon eligibility. (Doc. 167 at 184.) Furthermore, harm to an interest in registering voters is not the only civic harm courts have recognized as sufficient for standing. See Lerman v. Bd. of Elections in City of N.Y., 232 F.3d 135, 141-43 (2d Cir. 2000) (finding harm to an individual's interest in witnessing petition signatures legally cognizable). Based on the current allegations and evidence, Intervenors have sufficiently alleged standing to challenge the elimination of pre-registration because they allege that SL 2013-381 directly injures their interest in registering 16- and 17-year-olds.

Ordinarily, the standing inquiry would end here. However, Intervenors have moved to preliminarily enjoin the elimination of pre-registration, and whether they can demonstrate irreparable harm to justify an injunction depends in part on the scope of the harm they properly assert. So, the court must consider Intervenors' alternative bases for standing to the extent they rely on other claims of harm.

Intervenors contend that they will have to expend greater effort and resources to register young, 18-and-older voters because they were not pre-registered as 16- or 17-year-olds. (Doc. 159 at 4-5.) Defendants dispute this as a factual matter, arguing that there is no greater effort required to register an 18-year-old than a 16-year-old. (Doc. 168 at 6-7.) However, there may be reasons why registering 16- and 17-year-olds is more effective and less expensive than registering 18-year-olds, and at this stage in the litigation the court is bound to accept Intervenors' reasonable factual allegations as true. Therefore, to the extent that Intervenors assert it takes greater effort to register young voters who otherwise would have been pre-registered, they have alleged a direct, legally cognizable injury. However, to the extent they seek to ground their injury in loss of resources, relying on authority applicable to organizational plaintiffs and without any allegations or evidence of financial harm (Doc. 159 at 4-5), that argument fails.

Intervenors also contend that they will have to expend greater effort and resources to get out the vote because SL 2013-381 discourages young voters from voting. (Id. at 5-6.) Intervenors are not a political party or any other kind of organization, however. Intervenors, as individuals, do not have a direct, particularized interest in the outcome of an election like that of the Democratic Party, see Crawford v. Marion Cnty. Election Bd., 472 F.3d 949, 951 (7th Cir. 2007), aff'd by 553 U.S. 181 (2008), or of an association of candidates challenging incumbents, see Common Cause v. Bolger, 512 F. Supp. 26, 30 (D.D.C. 1980). They have no budget

from which resources must now be diverted to deal with the effects of SL 2013-381. Even assuming the truth of all Intervenors' factual allegations and evidence, therefore, they do not have standing on this ground.

Next Intervenors assert that SL 2013-381 harms their interest in living in a State that does not discriminate against young voters. (Doc. 159 at 6-7.) Under such a theory, any one of North Carolina's approximately 6.5 million registered voters would have standing to challenge the elimination of pre-registration. That injury is not sufficiently particularized to confer standing, and Intervenors' argument and authority do not indicate otherwise. Cf. Shaw v. Reno, 509 U.S. 630, 650 (1993) (discussing the merits of the Fourteenth Amendment claim, not standing). Intervenors' attempt to ground standing in their support of a particular Democratic candidate similarly fails. (Doc. 159 at 7-9.)

Finally, Intervenors contend that they are "not require[d]" to "have standing independent from the original [P]laintiffs." (Id. at 9.) While that may be true as to claims that other Plaintiffs actually assert, here, no other Plaintiff has challenged the elimination of pre-registration as to all young voters. The circuits appear to be split on whether the jurisdictional rule requiring a party to have standing to bring a claim can be dispensed with entirely for Intervenors injecting new claims into the litigation. Cf. Shaw v. Hunt, 154 F.3d 161 (4th Cir. 1998) (permissive Intervenors not required to have standing where they adopted plaintiffs' complaint and asserted no new claim); S.E.C. v. U.S. Realty &

Improvement Co., 310 U.S. 434, 460 (1940) (intervenor had "a sufficient interest in the maintenance of its statutory authority and the performance of its public duties to entitle it through intervention to prevent [bankruptcy] reorganizations"); King v. Christie, 981 F. Supp. 2d 296, 307 (D.N.J. 2013) (noting circuit split on the question of whether an intervenor must have standing). Intervenors cite no Fourth Circuit case addressing the issue, nor has the court found one. Because Intervenors fail to allege any different harm should its position be correct, the court need not decide this issue at this stage; and, in light of the lack of Fourth Circuit precedent, the court declines to do so.

For these reasons, therefore, the court finds that Intervenors have alleged sufficient harm to their interest in registering 16- and 17-year-olds to provide standing at this stage, but have not properly asserted any broader harm than that.[18]

III. PRELIMINARY INJUNCTION MOTIONS

A. Preliminary Injunction Standard and General Principles

Issuance of a preliminary injunction is "an extraordinary remedy involving the exercise of a very far-reaching power, which is to be applied only in the limited circumstances which clearly demand it." Centro Tepeyac v. Montgomery Cnty., 722 F.3d 184, 188 (4th Cir. 2013) (en banc) (quoting Direx

[18] Of course, whether SL 2013-381 actually causes injury to Intervenors remains to be demonstrated at trial.

Israel, Ltd. v. Breakthrough Med. Corp., 952 F.2d 802, 811 (4th Cir. 1991)); Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7, 22, 24 (2008). This is true even when the asserted injury is a violation of the Constitution or the VRA. See, e.g., Centro Tepeyac, 722 F.3d at 187 (First Amendment claim); Perry-Bey v. City of Norfolk, 679 F. Supp. 2d 655, 662 (E.D. Va. 2010) (VRA claim).

To demonstrate entitlement to preliminary relief, Plaintiffs must make a "clear showing" that (1) they are likely to succeed on the merits of their claims; (2) they are likely to suffer irreparable harm if an injunction does not issue; (3) the balance of the equities tips in their favor; and (4) an injunction is in the public interest. Winter, 555 U.S at 20, 22; Dewhurst v. Century Aluminum Co., 649 F.3d 287, 290 (4th Cir. 2011). All four requirements must be satisfied in order for relief to be granted. Real Truth About Obama, Inc. v. Federal Election Comm'n, 575 F.3d 342, 346 (4th Cir. 2009), vacated on other grounds by 559 U.S. 1089 (2010). It is not enough that a plaintiff show a grave or serious question for litigation; he must make a "clear" demonstration he will "likely" succeed on the merits. Id. at 346-47.

The denial of a constitutional right, such as the right to vote, constitutes irreparable harm. Ross v. Meese, 818 F.2d 1132, 1135 (4th Cir. 1987); United States v. Berks Cnty., 250 F. Supp. 2d 525, 540 (E.D. Pa. 2003). Because a trial on the merits is scheduled in these cases for July 2015, Plaintiffs and Intervenors must therefore make a clear showing that they will be irreparably harmed in connection

with the November 2014 general election – the only scheduled election between now and the trial date.

The Supreme Court has long recognized that the right to vote is fundamental and preservative of all other rights in our republic. See Reynolds v. Sims, 377 U.S. 533, 561–62 (1964) (citing Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886)). The Constitution's Elections Clause reserves to the States the general power to regulate "[t]he Times, Places and Manner of holding Elections for Senators and Representatives," subject to laws passed by Congress. U.S. Const. art. I § 4 cl. 1. "Common sense, as well as constitutional law, compels the conclusion that government must play an active role in structuring elections; 'as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes.'" Burdick v. Takushi, 504 U.S. 428, 433 (1992) (quoting Storer v. Brown, 415 U.S. 724, 730 (1974)). The State's power to regulate elections is subject to limits imposed by the Constitution, including the Fourteenth, Fifteenth, and Twenty-Sixth Amendments, and federal law.

Here, Plaintiffs challenge several provisions of SL 2013-381, individually and cumulatively. The statute contains a severability provision that would allow the court to enjoin portions without striking it wholesale.[19] Thus, the court will examine the challenged provisions with this in mind.

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[19] SL 2013-381 provides: "[i]f any provision of [SL 2013-381] or its application is held invalid, the invalidity does not affect other provisions or applications of [the law] that can be given

B. SDR

In 2007, the General Assembly passed legislation permitting SDR at early-voting sites, which the governor signed into law effective October 9, 2007. The law provided that "an individual who is qualified to register to vote may register in person and then vote at [an early-voting] site in the person's county of residence during the period for [early] voting provided under [Section] 163-227.2." 2007 N.C. Sess. Laws 253, § 1 (codified at N.C. Gen. Stat. § 163-82.6A(a) (2008)). The law required a prospective voter to complete a voter-registration form and produce a document to prove his or her current name and address. Id. (codified at N.C. Gen. Stat. § 163-82.6A(b) (2008)). If the person elected to vote immediately, he or she could "vote a retrievable absentee ballot as provided in [Section] 163-227.2 immediately after registering." Id. (codified at N.C. Gen. Stat. § 163-82.6A(c) (2008)). Within two business days, both the CBOE and SBOE were required to verify the voter's driver's license or social security number, update the database, proceed to verify the voter's proper address, and count the vote unless it was determined that the voter was not qualified to vote. Id. (codified at N.C. Gen. Stat. § 163-82.6A(d) (2008)).

SL 2013-381 repealed the SDR provisions. Now, to be eligible to vote in any primary or general election, a voter must comply with preexisting law that requires that the registration be postmarked at

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effect without the invalid provisions or application, and to this end the provisions of [SL 2013-381] are severable." 2013 N.C. Sess. Law 381, § 60.1.

least 25 days before Election Day or, if delivered in person or via fax or scanned document, received by the CBOE at a time established by the board. N.C. Gen. Stat. § 163-82.6(c)(1)-(2).

All Plaintiffs, including Intervenors, move to preliminarily enjoin SL 2013-381's elimination of SDR for the November 2014 election. Plaintiffs rely on four distinct legal theories: (1) racially discriminatory results under Section 2 of the VRA; (2) racially discriminatory intent under Section 2 and the Fourteenth and Fifteenth Amendments; (3) undue burden on the right to vote of all voters under the Fourteenth Amendment; and (4) unlawful denial or abridgment of the right to vote on account of age under the Twenty-Sixth Amendment. Each basis will be addressed in turn.

1. Section 2 "results"

Section 2 of the original VRA provided that "[n]o voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color." 42 U.S.C. § 1973 (1976). In City of Mobile v. Bolden, 446 U.S. 55 (1980), the Supreme Court held that plaintiffs were required to show discriminatory intent in order to prevail on a Section 2 claim. In response to Bolden, Congress amended the VRA to clarify that Section 2 plaintiffs need only show that a particular voting practice "results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color." 42 U.S.C. § 1973(a); see

Thornburg v. Gingles, 478 U.S. 30, 35 (1986) ("Congress substantially revised § 2 to make clear that a violation could be proved by showing discriminatory effect alone and to establish as the relevant legal standard the 'results test,' applied by this Court in White v. Regester, 412 U.S. 755 (1973), and by other federal courts before.") Consequently, a Section 2 violation may be proven either by showing discriminatory results or discriminatory intent. See, e.g., Garza v. Cnty. of Los Angeles, 918 F.2d 763, 766 (9th Cir. 1990); Brown v. Detzner, 895 F. Supp. 2d 1236, 1244 (M.D. Fla. 2012); United States v. Charleston Cnty., 316 F. Supp. 2d 268, 272 n.3 (D.S.C. 2003). Section 2(b) now provides:

> A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, That nothing in this section establishes a right to have members of a protected class elected in numbers

> equal to their proportion in the population.

42 U.S.C. § 1973(b).

"The essence of a § 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives." Gingles, 478 U.S. at 47. The Gingles Court noted that the Senate Judiciary Committee's majority Report that accompanied the amendment provided several factors that may be probative in establishing a Section 2 violation:

> 1. the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;
>
> 2. the extent to which voting in the elections of the state or political subdivision is racially polarized;
>
> 3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;

4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process;

5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;

6. whether political campaigns have been characterized by overt or subtle racial appeals;

7. the extent to which members of the minority group have been elected to public office in the jurisdiction.

Additional factors that in some cases have had probative value as part of plaintiffs' evidence to establish a violation are:

whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group.

whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to

> voting, or standard, practice or procedure is tenuous.

Id. at 36-37 (quoting S. Rep. No. 97–417, pp. 28-29, 97th Cong. 2nd Sess. 28 (1982)).

As other courts have noted, these factors were clearly designed with redistricting and other "vote-dilution" cases in mind. See Brown, 895 F. Supp. at 1245 n.13; Miss. State Chapter, Operation Push v. Allain, 674 F. Supp. 1245, 1263 (N.D. Miss. 1987), aff'd sub nom Miss. State Chapter, Operation Push, Inc. v. Mabus, 932 F.2d 400 (5th Cir. 1991); see also Daniel P. Tokaji, The New Vote Denial: Where Election Reform Meets the Voting Rights Act, 57 S.C. L. Rev. 689, 709 (2006) ("The legislative history of the 1982 amendments, however, provides little guidance on how Section 2 should apply to practices resulting in the disproportionate denial of minority votes."). In contrast, claims challenging voting procedures that disproportionately affect minority voters are referred to as "vote-denial" cases. See, e.g., Brown, 895 F. Supp. 2d at 1244-45 ("Vote denial occurs when a state employs a standard, practice, or procedure that results in the denial of the right to vote on account of race." (quoting Johnson v. Governor of State of Fla., 405 F.3d 1214, 1227 n.26 (11th Cir. 2005) (en banc) (internal quotation marks omitted))).

Vote-denial claims under Section 2 have thus far been relatively rare, perhaps due in part to the fact that since 1965, many jurisdictions - including many North Carolina counties - were under federal control and barred from enacting any new voting

procedure without first obtaining "pre-clearance" under Section 5 of the VRA from the DOJ or the United States District Court for the District of Columbia. 42 U.S.C. § 1973c(a). Under Section 5, the covered jurisdiction was required to show that the new provision would not "lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." Reno v. Bossier Parish Sch. Bd., 520 U.S. 471, 478 (1997) (quoting Beer v. United States, 425 U.S. 130, 141 (1976)). The Supreme Court's 2013 decision in Shelby County, declaring the formula used to determine the "covered jurisdictions" under Section 5 to be unconstitutional, relieved several States, counties, and townships of the burden of submitting their voting changes to federal authorities to be pre-cleared.[20] As a result, very few appellate cases have considered vote-denial claims under Section 2.[21] See,

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[20] Since Shelby County, at least one other State has had its newly-enacted voting law challenged under Section 2. See Veasey v. Perry, _ F. Supp. 2d _, Civ. A. No. 13-CV-00193, 2014 WL 3002413 (S.D. Tex. July 2, 2014) (denying Texas' motion to dismiss Section 2 and other claims challenging its voter ID law).

[21] 21 This excludes cases challenging felon-disenfranchisement provisions. While these are technically vote-denial claims, the courts of appeal have analyzed them differently because of the Fourteenth Amendment's specific sanction of such laws and the long history of disenfranchisement of felons in many States. See, e.g., Simmons v. Galvin, 575 F.3d 24, 35-36 (1st Cir. 2009) ("When we look at the terms of the original VRA as a whole, the context, and recognized sources of congressional intent, it is clear the original § 2 of the VRA of 1965 was not meant to create a cause of action against a state which disenfranchises its incarcerated felons."); Hayden v. Pataki, 449 F.3d 305, 328 (2d Cir. 2006) (en banc) (applying a clear-statement rule because of the history of felon-disenfranchisement provisions

e.g., Irby v. Va. State Bd. of Elections, 889 F.2d 1352 (4th Cir. 1989) (holding that black voters could not establish Virginia's choice to appoint, rather than elect, school board members violated Section 2 because there was no evidence the admitted disparity between black and white school board members had been caused by the appointive system); Ortiz v. City of Philadelphia, 28 F.3d 306, 312-14 (3d Cir. 1994) (holding that State statute removing voters who did not vote in the last two federal elections from the registration rolls did not violate Section 2 because its disparate impact on minorities was not caused by the statute, but rather "because [individual voters] do not vote, and do not take the opportunity of voting in the next election or requesting reinstatement"); Smith v. Salt River Project Agric. Improvement & Power Dist., 109 F.3d 586, 595-96 (9th Cir. 1997) (holding that a special utility district's decision to limit the right to vote in the district to property owners was not a Section 2 violation because, even though the requirement disproportionately affected minorities, there was no

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and concluding that "Congress unquestionably did not manifest an 'unmistakably clear' intent to include felon disenfranchisement laws under the VRA"); Johnson, 405 F.3d at 1230 ("Here, the plaintiffs' interpretation [that Section 2 covers felon-disenfranchisement provisions] creates a serious constitutional question by interpreting the Voting Rights Act to conflict with the text of the Fourteenth Amendment."); but see Wesley v. Collins, 791 F.2d 1255 (6th Cir. 1986) (upholding Tennessee's felon-disenfranchisement law, but classifying the challenge as a vote-dilution claim); Farrakhan v. Washington, 338 F.3d 1009 (9th Cir. 2003), reh'g denied by 359 F.3d 1116 (9th Cir. 2004) (concluding that vote-denial claims challenging felon-disenfranchisement laws are cognizable under Section 2, and remanding to the district court to conduct analysis).

causal connection between the decision and a discriminatory result).

These cases indicate that "a bare statistical showing of disproportionate *impact* on a racial minority does not satisfy the § 2 'results' inquiry."[22] Smith, 109 F.3d at 595 (emphasis in original). However, few cases attempt to set out the proper test in vote-denial cases. Two recent district court cases provide some guidance. In Brown, the Middle District of Florida denied the plaintiffs' motion to preliminarily enjoin a Florida law that reduced the number of days of early voting from between 12 and 14 days to eight days, leaving each county discretion to offer between 48 and 96 hours of early voting (after 96 had been required under the old law). 895 F. Supp. 2d at 1239. After considering evidence that Florida's largest counties (as well as the State's five covered counties under Section 5) would offer the maximum number of hours of early voting,[23] the

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[22] The Sixth Circuit's decision in Stewart v. Blackwell, 444 F.3d 843 (6th Cir. 2006), vacated as moot by 473 F.3d 692 (6th Cir. 2007) (en banc), is not to the contrary. There, the court merely clarified that Section 2 plaintiffs are not required to show an "actual denial" of the right to vote but could prevail based on a showing of "discriminatory effect." Id. at 878. It did not hold that a bare showing that a law would have a disparate impact on a minority group would be sufficient under Section 2.

[23] The United States District Court for the District of Columbia, sitting as a three-judge court, had previously refused to pre-clear the same law under Section 5 on the ground that it could be retrogressive if the five covered counties chose to offer fewer than the maximum number of hours of early voting permitted by the statute. See Florida v. United States, 885 F. Supp. 2d 299 (D.D.C. 2012). After the five covered counties committed to using the maximum number of hours, the

district court found that the plaintiffs' claim was not likely to succeed on the merits. The court stated the Section 2 inquiry as "whether, based on an objective analysis of the totality of the circumstances, the application of the [statute] will act to exclude African American voters from meaningful access to the polls, on account of race." Id. at 1249–50 (internal quotation marks omitted). Despite accepting the findings of experts that the changes would disproportionately impact black voters, see id. at 1251, the court found that "[b]ecause [the new statute] allows early voting during non-working hours, as well as voting during the weekend, including one Sunday, voting times which are important to African American voters, as well as to [get-out-the-vote] efforts, the Court cannot find that [it] denies equal access to the polls." Id. at 1255. In doing so, the court emphasized that it was not comparing the old law to the new one, because that retrogression standard applies only in a Section 5 proceeding.[24]

In Frank v. Walker, __ F. Supp. 2d __, 2014 WL 1775432 (E.D. Wis. Apr. 29, 2014), the court permanently enjoined enforcement of Wisconsin's voter ID law. Drawing from Gingles – although declining to apply the Gingles factors, which the court viewed as applicable only in the vote-dilution context – the court held that Section 2 plaintiffs

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Attorney General pre-cleared the changes. Brown, 895 F. Supp. 2d at 1241–42.

[24] The court underscored the important role the distinction between the Section 2 standard and the Section 5 retrogression standard and their different burdens of proof played in the case. Id. at 1251 (citing Reno, 528 U.S. at 324).

"must show that the disproportionate impact results from the interaction of the voting practice with the effects of past or present discrimination and is not merely a product of chance." Id. at *31. After concluding that black voters disproportionately lacked IDs, the court found that the ID requirement interacted with historical conditions of discrimination in housing, employment, and other areas to cause an additional barrier to be placed in the path of black voters. Id. at *32-33. Thus, the voter ID provision violated Section 2.[25]

The Brown court's formulation accurately captures the Section 2 results inquiry: whether the current electoral law interacts with historical discrimination and social conditions to cause black voters to have unequal access to the polls.[26] Plaintiffs contend that North Carolina's lack of SDR interacts with its history of official discrimination and present conditions to cause a discriminatory result. Plaintiffs' expert testimony demonstrates that black citizens of North Carolina currently lag behind whites in several key socioeconomic indicators, including education, employment, income, access to transportation, and residential

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[25] On July 31, 2014, the Wisconsin Supreme Court issued a contrary ruling, finding the Wisconsin photo ID law constitutional under Wisconsin law. Milwaukee Branch of NAACP v. Walker, _ N.W.2d _, 2014 WL 3744073 (Wis. July 31, 2014). The Wisconsin Supreme Court did not address Section 2, however.

[26] Plaintiffs here concede that the applicable inquiry is whether the current system under SL 2013-381 results an inequality of opportunity of white and black citizens to exercise the franchise. (Doc. 164 at 26-27.)

stability.[27] They also presented unrebutted testimony that black North Carolinians have used SDR at a higher rate than whites in the three federal elections during which SDR was offered.[28]

North Carolina also has an unfortunate history of official discrimination in voting and other areas that dates back to the Nation's founding. See, e.g., Gingles v. Edmisten, 590 F. Supp. 345, 359-61 (E.D.N.C. 1984), aff'd in part and rev'd in part by Thornburg v. Gingles, 478 U.S. 30 (1986); (see also J.A. at 1036-92 (report of Dr. Lorraine C. Minnite).). This experience affects the perceptions and realities of black North Carolinians to this day.[29] Simply put, in light of the historical struggle for African-

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[27] Plaintiffs presented the following unchallenged statistics: (1) as of 2011-12, 34% of black North Carolinians live below the federal poverty level, compared to 13% of whites (J.A. at 1104); (2) as of the fourth quarter of 2012, unemployment rates in North Carolina were 17.3% for blacks and 6.7% for whites (id.); (3) 15.7% of black North Carolinians over age 24 lack a high school degree, as compared to 10.1% of whites (J.A. at 1151); (4) 27% of poor black North Carolinians do not have access to a vehicle, compared to 8.8% of poor whites (J.A. at 1155); and (5) 75.1% of whites in North Carolina live in owned homes as compared to 49.8% of blacks (J.A. at 1158).

[28] In 2012, 13.4% of black voters who voted early used SDR, as compared to 7.2% of white voters; in the 2010 midterm, the figures were 10.2% and 5.4%, respectively; and in 2008, 13.1% and 8.9%. (J.A. at 629.)

[29] For example, Plaintiff Rosanell Eaton, now 94 years old, testified impressively as to how at approximately age 19 (in the 1940s) she was required to recite the Preamble to the Constitution from memory in order register to vote. (Doc. 165 at 39-40.)

Americans' voting rights, North Carolinians have reason to be wary of changes to voting laws.

Plaintiffs' historical evidence in these cases focuses largely on racial discrimination that occurred between a quarter of a century to over a century ago. However, as the Supreme Court recently stated, "history did not end in 1965." Shelby Cnty., 133 S. Ct. at 2628. In the period between the enactment of the VRA and 2013, "voting tests were abolished, disparities in voter registration and turnout due to race were erased, and African-Americans attained political office in record numbers." Id. The record reflects such progress in North Carolina, too. Plaintiffs' expert, Dr. Barry C. Burden, indicates that black North Carolinians have reached "parity" with whites in turnout for presidential elections. (J.A. at 1100.) And Dr. Charles Stewart III concludes that "[t]he registration rate of African-Americans has surged in North Carolina since 2000, to the point that the registration rate of African Americans now exceeds that of whites," a development he characterizes as "significant."[30] (J.A. at 800.) Plaintiffs' experts attribute these increases to the candidacy of President Barack Obama as well as to North Carolina's election law changes since 2000. (See J.A. at 1100 (report of Dr. Burden); 1193 (report

[30] To put this advance in perspective, by 2012 black registration reached 95.3% and white registration 87.8%. (J.A. at 806.) This compares to the Gingles court's finding that in 1982 the black registration rate was 52.7% and the white registration rate was 66.7%. Gingles, 590 F. Supp. at 360. By 2000, the black registration rate was 81.1% and the white registration rate was 90.2%, and by 2006, 82.3% of voting-age blacks were registered as opposed to 87.4% of whites. (J.A. at 807.)

of Dr. J. Morgan Kousser).)[31] In addition, Dr. Burden notes, blacks in North Carolina have been elected to political office at levels that now "approach[] parity with their prevalence in the electorate."[32] (J.A. at 1107.) In examining the totality of the circumstances, therefore, the court views all evidence in context, giving it due weight, but also being careful to acknowledge that "[p]ast discrimination cannot, in the manner of original sin, condemn governmental action that is not in itself unlawful." Bolden, 446 U.S. at 74.

Plaintiffs rely on Operation Push. There, the plaintiffs challenged Mississippi's system of maintaining, for some municipalities, a system of "dual registration" that required a person to register in two different locations to be eligible to vote in municipal elections as well as county, state, and federal elections. 674 F. Supp. at 1249-50. It was admitted that the practice was initially enacted in 1890 as part of a plan to disenfranchise black voters, but the court did not address whether it was being maintained for a discriminatory purpose in the 1980s. Id. at 1251-52. The district court nevertheless enjoined the requirement after a searching examination of what it considered to be the relevant Gingles factors: (1) history of discrimination, (2) socioeconomic results of discrimination, (3) the extent that black citizens have been elected to public office, (4) lack of responsiveness among elected

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[31] The largest increases in black turnout occurred in 2008 and 2012, with turnout in the intervening off-year elections falling by nearly half relative to presidential years. (J.A. at 1197.)

[32] Of course, the VRA expressly provides that there is no right to proportional representation. 42 U.S.C. § 1973(b).

officials to the black community, and (5) the tenuousness of the State's interest. Id. at 1263-68.

The present cases are distinguishable in important respects, however. The Mississippi system had led to a large disparity in registration between black and white voters, and the court found that the valid registration rate for whites remained approximately 25 percentage points above that for blacks. Id. at 1254. Thus, the discriminatory results of the lingering dual-registration system were clear – fewer black than white Mississippians were able to register to vote over a long period, magnifying the effect of the system. Also, the dual-registration system had been in effect to varying degrees for almost 100 years, propagating its effects even further, and the court found that the challenged statutes did not advance or relate rationally to any substantial or legitimate governmental interest. Id. at 1260-61. In fact, at the time of the decision Mississippi was the only State maintaining such a dual-registration scheme. Id. at 1252. Finally, Operation Push was decided in 1987, not long after Mississippi had engaged in official disenfranchisement of black would-be voters. Here, voting-age blacks in North Carolina maintain a *higher* current registration rate than whites, black registration rates continued to make significant increases in the seven years before the adoption of SDR (J.A. at 804, Table 2 (noting an increase of black registered voters from 988,134 to 1,116,818 in the period from 2000 to 2006)), and SDR existed for

only three federal election cycles (six years) before it was repealed by SL 2013-381.[33]

Additionally, the high registration rate of black North Carolinians – 95.3%, some 7.5 percentage points above that of whites – suggests strongly that black voters will not have unequal access to the polls. Plaintiffs point to Dr. Stewart's conclusion that SL 2013-381 would have affected 3% of the 2012 African-American registrants if it had then been in effect. (J.A. at 789.) From this, Plaintiffs predict that without SDR, North Carolina will experience a similar reduction in black registrants. But this prediction appears to ignore important considerations.

Particularly, Plaintiffs have not shown that African-American voters in 2012 lacked – or more importantly, that they currently lack - an equal opportunity to easily register to vote otherwise. For example, under current law, every State resident can register to vote by mail. See N.C. Gen. Stat. § 163-82.6(a) ("The county board of elections shall accept any form described in [N.C. Gen. Stat. §] 163-82.3 if the applicant submits the form by mail, facsimile transmission, transmission of a scanned document, or in person."). Thus, those with transportation, economic, or other challenges need not physically appear to register. Cf. Operation Push, 674 F. Supp. at 1250-52 (describing Mississippi law that initially prevented all registration outside of the office of the

[33] Moreover, as noted above, according to Dr. Burden, some of the recent increase in black registration since 2008 is attributable to the candidacy of the first black major-party presidential candidate. (J.A. at 1100.)

county registrar). Certain State agencies are also required to offer voter registration services. Such agencies include departments of social services and public health, disability services agencies (vocational rehabilitation offices, departments of services for the blind, for the deaf, and for mental health), the North Carolina Employment Security Commission, and, under certain circumstances, the North Carolina Division of Motor Vehicles ("DMV"), pursuant to N.C. Gen. Stat. §§ 163-82.19 & 163-82.20. (Doc. 126-1 ¶ 10.) In response to questioning at the hearing, no Plaintiff demonstrated how these various other options failed to provide an equal opportunity to any black voter who otherwise wished to use SDR. (See, e.g., Doc. 167 at 135-40 (acknowledging that these other avenues mean that "many people who are of lower socioeconomic status have an opportunity to register to vote elsewhere"). In addition, State law permits any individual, group, or organization - such as the get-out-the-vote ("GOTV") efforts conducted by some Plaintiffs - to conduct a voter registration drive, without any special training, pursuant to SBOE-published guidelines and with materials the SBOE and CBOEs provide. (Doc. 126-1 ¶ 11.) Finally, under SL 2013-381, a voter who has moved within the county can still update his or her registration during early voting (i.e., after the 25-day registration cut-off). N.C. Gen. Stat. § 163-82.6A(e). That voters *preferred* to use SDR over these methods does not mean that without SDR voters lack equal opportunity.

Furthermore, because Section 2 does not incorporate a "retrogression" standard, the logical conclusion of Plaintiffs' argument would have

rendered North Carolina in violation of the VRA before adoption of SDR simply for not having adopted it. Yet, neither the United States nor the private Plaintiffs have ever taken the position that a jurisdiction was in violation of Section 2 simply for failing to offer SDR. Indeed, "[e]xtending Section 2 that far could have dramatic and far-reaching effects," Irby, 889 F.2d at 1358, placing the laws of at least 36 other states which do not offer SDR in jeopardy of being in violation of Section 2.[34] The district court in Brown recognized this inherent

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[34] See Ala. Code. § 17-3-50 (14-day registration deadline); Alaska Stat. Ann. § 15.07.070(c)-(d) (30 days); Ariz. Rev. Stat. Ann. § 16-120 (30 days); Ark. Code Ann. § 7-5-201(a) (30 days); Del. Code tit. 15 § 2036 (24 days); Fla. Stat. § 97.055(1)(a) (29 days); Ga. Code Ann. § 21-2-224(a) (29 days); Haw. Rev. Stat. § 11-24(a) (30 days); 10 Ill. Comp. Stat. 5/4-50 (three days, with some variation among counties, except for limited SDR in the fall of 2014); Ind. Code. §§ 3-7-13-11, 3-7-33-3, 3-7-33-4 (29 days); Kan. Stat. Ann. § 25-2311(3)-(7) (21 days); Ky. Rev. Stat. Ann. § 116.045(1)-(2) (28 days); La. Rev. Stat. Ann. § 18:135(1) (30 days); Md. Code Ann., Elec. Law § 3-302(a) (21 days); Mass. Gen. Laws ch. 51, § 26 (20 days); Mich. Comp. Laws § 168.497(1) (30 days); Mo. Rev. Stat. § 115.135 (27 days); Neb. Rev. Stat. §§ 32-311.01(d), 32-302 (11 days if delivered in person by the applicant, 18 days otherwise); Nev. Rev. Stat. § 293.560(1) (21 days); N.J. Stat. Ann. §§ 19:31-6, 31-7 (21 days); N.M. Stat. Ann. § 1-4-8(A) (28 days); N.Y. Elec. Law §§ 5-210(3), 5-211(11)-(12), 5-212(6)-(7) (25 days); Ohio Rev. Code Ann. § 3503.19(A) (30 days); Okla. Stat. tit. 26 § 4-110.1(A) (24 days); Or. Rev. Stat. § 247.012(3)(b) (21 days); 25 Pa. Cons. Stat. § 1326(b) (30 days); R.I. Gen. Laws § 17.9.1-3(a) (30 days); S.C. Code Ann. § 7-5-150 (30 days); S.D. Codified Laws § 12-4-5 (15 days); Tenn. Code Ann. § 2-2-109(a) (30 days); Tex. Elec. Code Ann. § 13.143(a) (30 days); Utah Code Ann. § 20A-2-102.5(2) (30 days); Vt. Stat. Ann. tit. 17 § 2144(a) (six days); Va. Code Ann. § 24.2-416 (22 days); Wash. Rev. Code Ann. § 29A.08.140(1) (eight days if in person, 29 days otherwise); W. Va. Code § 3-2-6(a) (21 days).

difficulty in Plaintiffs' argument in the context of the early-voting reduction, where the court stated:

> Consider the fact that many states do not engage in any form of early voting. Following Plaintiffs' theory to its next logical step, it would seem that if a state with a higher percentage of registered African–American voters than Florida did not implement an early voting program a Section 2 violation would occur because African–American voters in that state would have less of an opportunity to vote than voters in Florida. It would also follow that a Section 2 violation could occur in Florida if a state with a lower percentage of African–American voters employed an early voting system . . . that lasts three weeks instead of the two week system currently used in Florida. This simply cannot be the standard for establishing a Section 2 violation.

Brown, 895 F. Supp. 2d at 1254 (quoting Jacksonville Coal. for Voter Protection v. Hood, 351 F. Supp. 2d 1326, 1335-36 (M.D. Fla. 2004)). Rather, the court clarified, it "must consider whether the State of Florida, having decided to allow early voting, has adopted early voting procedures that provide *equal* access to the polls for all voters in Florida." Id. at 1254-55 (emphasis in original). Similarly here, the court is not concerned with whether the elimination of SDR will "worsen the

position of minority voters in comparison to the preexisting voting standard, practice, or procedure," id. at 1251 (internal quotation marks omitted) – a Section 5 inquiry, but whether North Carolina's existing voting scheme (without SDR) interacts with past discrimination and present conditions to cause a discriminatory result.

Moreover, in the National Voter Registration Act of 1993 ("NVRA"), Congress explicitly sanctioned a State's power to set a registration cut-off of 30 days before an election. 42 U.S.C. § 1973gg-6(a)(1).[35] As this statute was passed 11 years after the amendment to Section 2, it is difficult to conclude that Congress intended that a State's adoption of a registration cut-off before Election Day would constitute a violation of Section 2. See United States v. Stewart, 311 U.S. 60, 64 (1940) (concluding that "all acts *in pari materia* are to be taken together, as if they were one law," and thus that "[t]he later act can therefore be regarded as a legislative interpretation of the earlier act in the sense that it aids in ascertaining the meaning of the words as used in their contemporary setting" (internal citations omitted)); cf. Johnson, 405 F.3d at 1230 (concluding that Section 2 did not prohibit enforcement of felon-disenfranchisement provisions in part because such laws are explicitly sanctioned by the Fourteenth Amendment).

Finally, Plaintiffs argue that Defendants' stated policy underlying elimination of SDR is

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[35] In fact, North Carolina has granted voters another five days, setting its cut-off at 25 days before Election Day. N.C. Gen. Stat. § 163-82.6(c)(1)-(2).

tenuous, noting that supporters expressed concern for providing "integrity of the voting process" to ensure that votes "be protected and not negated by fraud." (J.A. at 2516-17.) To be sure, a free-standing claim of "electoral integrity does not operate as an all-purpose justification flexible enough to embrace any burden." McLaughlin v. N.C. Bd. of Elections, 65 F.3d 1215, 1228 (4th Cir. 1995) (quoting Republican Party of Ark. v. Faulkner Cnty., 49 F.3d 1289, 1299 (8th Cir. 1995) (internal quotation marks omitted)). But here there is more in the legislative record. During the Senate Rules Committee debate on the challenged SDR provision, Senator Rucho contended:

> There's no way and there's no simple way to validate. What we're trying to do is give the Board of Elections an opportunity to do their job correctly, validate those individuals and be sure that the election is above board.

(Doc. 134-4 at 45.) Later, during the second reading, he added:

> It also allows time for – to verify voters' information by repealing same day registration and which will ensure accuracy. It's been a challenge for the Board of Elections to be able to identify and validate everyone that has come there on the basis of one-day registration . . . .

(Id. at 87.) Defendants have presented evidence in support of this interest.

Plaintiff's witness, Gary Bartlett (SBOE Executive Director from 1993 to 2013), acknowledged at the hearing that under SDR, CBOEs sometimes lacked sufficient time to verify registrants under State law.[36] (Doc. 165 at 166.) As a consequence, over a thousand ballots were counted in recent elections by voters who were not (or could not be) properly verified.[37] (Doc. 165 at 148-66; J.A. at 3267, 3269-72.) George Gilbert, former director of the Guilford County Board of Elections, acknowledged that a voter who registered before the "close of books" 25 days before Election Day will have more time to pass the verification procedure than a voter who registered and voted during early voting. (Doc. 165 at 16.) These concerns were not

[36] When a voter registered using SDR during early voting, she was required to present proper identification under the Help America Vote Act of 2002 ("HAVA"), 42 U.S.C. §§ 15301-15545 ("HAVA ID"), proving residence within the State. After receiving the registration, the CBOE sent out a verification card via the United States Postal Service intended to determine if the voter in fact lived at the address presented at the early-voting location. (Doc. 164 at 183.) If the voter's card was twice returned undeliverable, the CBOE canceled the voter's ballot. (Id. at 202.) However, the CBOEs allow 15 days for each card to be returned undeliverable, and if the second card has not yet been returned before the canvass (which occurs seven days after the election in non-presidential years and ten days after in presidential years), the voter's vote is counted even though the voter has not yet been properly verified through the State's procedure. (Id. at 205-07.)

[37] For example, in the 2012 general election, SBOE records show that approximately 1,288 ballots were counted despite being cast by voters who did not complete the verification process. (J.A. at 3271.) In the May 2012 primary, 205 ballots were counted without ever being verified (J.A. at 3269), and in the 2010 general election, 153 such ballots were counted (J.A. at 3267).

new; they had been identified by Director Bartlett in a 2009 report to the General Assembly, following the implementation of SDR. (J.A. at 1528-36.) Specifically, the report noted: "county boards found that there was not enough time between the end of [early] voting (and SDRs) and the canvass date to ensure that verification mailings completed the mail verification process." (J.A. at 1533.) In addition, because of the volume of voters, CBOEs had difficulty simultaneously conducting registrations and early voting such that "it was not possible to process the number of voter registration applications received during one-stop voting" within the two-day statutory window. (Id.) Also, "[d]ue to volume issues, [CBOEs] experienced minor in [sic] DMV validations, especially during the last few days of [early] voting."[38] (Id.)

The State has an interest in closing the voter rolls at a reasonable time before Election Day. In Marston v. Lewis, 410 U.S. 679, 681 (1973), the Supreme Court held that "it is clear that the State has demonstrated that [a] 50-day voter registration cutoff (for election of state and local officials) is necessary to permit preparation of accurate voter lists." In passing the NVRA's authorization in 1993 for States to have a 30-day cut-off for registration, Congress specifically noted its purposes included "to establish procedures that will increase the number of eligible citizens to register to vote," "to protect the integrity of the electoral process," and "to ensure that accurate and current voter registration rolls are

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[38] Opponents of the bill were apparently unaware of this report. (See, e.g., Doc. 134-4 at 220 ("Same day registration, I don't know of a single problem we've had with that . . . .").)

maintained." 42 U.S.C. § 1973gg(b)(1), (3) & (4); see also Lucas Cnty. Democratic Party v. Blackwell, 341 F. Supp. 2d 861, 865 (N.D. Ohio 2004) (noting that State law closing registration books 30 days before Election Day "serves and promotes orderly administration of elections" and "enables election officials to verify information, including the driver's license and social security numbers of persons who have registered, thereby avoiding fraud").

Plaintiffs argue that SDR is actually more reliable than traditional registration because CBOEs are less likely to *deny* voters who registered during early voting than those who registered before the 25-day cutoff. But as their own witness, Director Bartlett, demonstrated, this argument ignores the fact that with SDR over a thousand voters have had their votes counted without being properly *verified* by the CBOEs. Current SBOE Director, Kim Strach, testified that this concern was recently validated when improper and unverified votes cast as a result of SDR tainted the outcome of a municipal election in the town of Pembroke in November 2013 and caused the SBOE to issue an order to conduct an entirely new election. (Doc. 126-1 ¶ 28; Doc. 161-9 at 48.)

Plaintiffs' argument, therefore, fails to rebut Defendants' point. It is sufficient for the State to voice concern that SDR burdened CBOEs and left inadequate time for elections officials to properly verify voters before the canvass and that unverified votes were counted as a result. In fact, the State has more than an *interest* in allowing time for verification – it has a *duty* to ensure that unverified

voters do not have their votes counted in an election. Thus, to the extent this Gingles factor applies here, the court finds that the State's asserted justification for the repeal of SDR is not tenuous. Plaintiffs' further contention that these unverified voters nevertheless represent a low level of possible fraud in view of the nearly half a million people who use SDR does not somehow render the State's interest tenuous. Cf. Florida, 885 F. Supp. 2d at 355-56. Whether other – arguably better - policy solutions exist to address the problem is for elected officials, not the courts, to decide.

For all these reasons and considering the complete record, the court finds that Plaintiffs have not shown a likelihood of success on the merits of their claim that current North Carolina law (without SDR) interacts with current conditions and historical discrimination to result in an inequality of opportunity for African-Americans to exercise their right to vote in violation of Section 2 of the VRA. The motion for preliminary injunction on this basis will be denied.[39]

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[39] Plaintiffs' contention that these cases are analogous to cases like Spirit Lake Tribe v. Benson County, No. 2:10-cv-095, 2010 WL 4226614 (D.N.D. Oct. 21, 2010), is not persuasive. In Spirit Lake Tribe, the district court preliminarily enjoined under Section 2 a county's decision to close seven of eight precincts, including those closest to a Native American reservation. Id. at *1. There, it was apparent that the lack of polling places, combined with social and historical conditions, caused the Native American population to have less opportunity to vote on Election Day than the white population. Id. at *3-4. Here, because of the numerous other methods for registration and the already high African-American registration rate, it has not been shown that a lack of SDR will likely cause similar issues. See also, e.g., Common Cause S. Christian Leadership

2. Racially discriminatory intent under Section 2 and the Fourteenth and Fifteenth Amendments

The showing of intent required to prove a violation of Section 2 is the same as that required to establish a violation of the Fifteenth Amendment and the Fourteenth Amendment's Equal Protection Clause. See Charleston Cnty., 316 F. Supp. 2d at 272 n.3 (citing Garza, 918 F.2d at 766); cf. Reno, 520 U.S. at 481 ("Since 1980, a plaintiff bringing a constitutional vote dilution challenge, whether under the Fourteenth or Fifteenth Amendment, has been required to establish that the State or political subdivision acted with a discriminatory purpose."). The analysis to follow, therefore, applies to the Section 2 claim as well as to Plaintiffs' claims under the Fourteenth and Fifteenth Amendments.

In Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 265-66 (1976), the Supreme Court held that discriminatory intent is established where a plaintiff proves that racial discrimination was a "motivating factor" in the governing body's decision. See also Reno, 520 U.S. at 488; Brown, 895 F. Supp. 2d at

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Conference v. Jones, 213 F. Supp. 2d 1106 (C.D. Cal. 2001) (denying defendants' motion for judgment on the pleadings where plaintiffs alleged punch-card voting used only in minority areas had a discriminatory result); Berks Cnty., 250 F. Supp. 2d at 538-40 (granting preliminary injunction under Section 2 where county failed to provide bilingual poll workers and election officials made discriminatory remarks about Hispanics and did not allow them to use their choice of poll assisters).

1245–46. "Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." Arlington Heights, 429 U.S. at 266. The Court instructed that whether the impact of the action "bears more heavily on one race than another" is "an important starting point." Id. (quoting Washington v. Davis, 426 U.S. 229, 242 (1976)). Next, the court should consider "[t]he historical background of the decision . . . particularly if it reveals a series of official actions taken for invidious purposes." Id. at 267. "The specific sequence of events leading up to the challenged decision also may shed some light on the decisionmaker's purposes." Id. This includes departures from the normal legislative procedure as well as substantive departures, "particularly if the factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached." Id. Also relevant are "[t]he legislative or administrative history . . . especially where there are contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports." Id. at 268. The Supreme Court did not purport to establish a conclusive list of factors in Arlington Heights, and other factors, particularly the nature and weight of the State interest involved, may be specifically relevant to a claim of discriminatory intent. See, e.g., Florida, 885 F. Supp. 2d at 348, 355; Terrazas v. Clements, 581 F. Supp. 1329, 1347 (N.D. Tex. 1984).

a. Impact of decision

As to the first factor and as discussed above, the enactment of SL 2013-381's elimination of SDR will bear more heavily on African-Americans than whites because the former disproportionately took advantage of SDR. As in Brown, however, the disparate impact is softened by the fact that elimination of SDR will not likely result in an inequality of opportunity to vote for black citizens. Cf. Brown, 895 F. Supp. 2d at 1246 ("Because . . . the evidence before the Court does not demonstrate that the changes will deny minorities equal access to the polls, the otherwise disproportionate effect of the amendments does not weigh heavily in favor of finding discriminatory purpose."). Moreover, as noted, Dr. Stewart predicts that elimination of SDR would have affected just 3% of black voters (and 1.5% of whites) in 2012, and he predicts it would have affected only 1.4% of black voters (and 1% of white voters) in 2010.[40] (J.A. at 789-91.) Further, as noted above, North Carolina provides several other ways to register (including amending registration) that, at least on this record, have not been shown to be practically unavailable to African-American residents. Thus, the disproportionate impact of SL 2013-381's elimination of SDR supports a finding of discriminatory intent, but only moderately so.

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[40] Although SDR was used disproportionately by black voters, it bears noting that its elimination affects vastly more whites than blacks. During its existence, SDR was used by 360,536 whites compared to 243,396 blacks in federal elections. (J.A. at 629.)

b. Historical background of decision

As for the historical background of the decision, Plaintiffs contend that it "was not lost on the members of the General Assembly" that, prior to SL 2013-381, North Carolina's decade of State action liberalizing election laws "had succeeded in dramatically increasing overall voter turnout in North Carolina, and had increased African-American voter participation in particular." (Doc. 98-1 at 61.) Plaintiffs argue that race data was offered by opponents to HB 589 during debate on the bill (id.) and that the "marked upward trend in black voter registration and turnout was well-known and widely discussed by local media sources and in public hearings of the House Elections Committee, as well as documented in SBOE data" (Doc. 97 at 65).

There is evidence that at its initiation – before any indication of how it would be used by any minority group - SDR was a partisan issue insofar as it was passed by a Democratically-controlled General Assembly on a near-party line vote and was signed into law by a Democratic governor. (J.A. at 1209 (report of Dr. Kousser), 2643-44.) When Republicans gained control of the legislature and the governorship in 2013, they moved to repeal SDR. During debate on HB 589, while asserting its disproportionate impact on blacks, some opponents of the bill nevertheless attributed the supporters' motivation to partisanship. (See, e.g., J.A. at 2563 (statement of Representative Hall that the bill was "the most pointedly, obviously politically partisan bill [he had] ever seen"); 1109 (report of Dr. Burden,

noting that "[a]ll evidence indicates that SL 2013-381 was enacted primarily for political gain . . .").)

To be sure, a partisan motive does not preclude or excuse the existence of a racial motivation. While "[r]arely can it be said that a legislature or administrative body operating under a broad mandate made a decision motivated solely by a single concern," "racial discrimination is not just another competing consideration." Arlington Heights, 429 U.S. at 265. "Protecting incumbency and safeguarding the voting rights of minorities are purposes often at war with each other," and racial animus in this context need not be "based on any dislike, mistrust, hatred or bigotry." Garza, 918 F.2d at 778 (Kozinski, J., concurring in part and dissenting in part). But the fact that a bill reverses prior practice does not itself constitute impermissible intent. This is especially true not only where evidence suggests that the reversal was the result of a partisan split, but more importantly where a new political majority espouses a legitimate reason to change the law. Here, as previously detailed, see supra Part III.B.1., the reasons the proponents offered for the elimination of SDR were identified at some length in the SBOE's 2009 report to the General Assembly.

Plaintiffs also argue that the sponsors of HB 589 sought data from the SBOE on the potential racial impact of some of its provisions, but the evidence is sparse as to SDR. Plaintiffs note that on March 5, 2013, the various House sponsors of HB 589 sent an email to the SBOE asking for a "cross matching of the registered voters in [North Carolina]

with the [DMV] to determine a list of voters who have neither a [North Carolina] Driver's License nor a [North Carolina] Identification Card." (J.A. at 1713.) This evidence seems to relate only to the voter ID provisions then under consideration. The legislators additionally stated that they "would need to have that subset broken down into different categories within each county by all possible demographics that [the SBOE] typically captures (party affiliation, ethnicity, age, gender, etc.)." (Id.) The SBOE sent the data in a large spreadsheet the next day. (J.A. at 1714-81.) On March 28, Representative Lewis sent a ten-page letter to Director Bartlett containing nearly 100 numbered inquiries regarding the SBOE's January 2013 conclusion that 612,955 registered voters lacked a qualifying photo ID. (J.A. at 3128-37.) *One* of the inquiries mentioned race, asking the SBOE to "provide the age and racial breakdown for voters who do not have a driver's license number listed." (J.A. at 3131.) On April 11, Director Bartlett sent a 19-page response with an attached spreadsheet that included the requested race data. (J.A. at 3148-66.) That same day, the Speaker's general counsel emailed the SBOE, asking for additional race data regarding people who requested absentee ballots in 2012 (J.A. at 3234), which was provided (J.A. at 3235-46).

As to SDR, Kim Strach emailed some data to Representative Lewis, one of the bill's House sponsors, on July 25, the day of the House concurrence vote. (J.A. at 3265.) This data included the verification rates for SDR in the 2010 and 2012 elections and information about the type of IDs

presented by same-day registrants. (J.A. at 3267-84.) It also included spreadsheets that contain race data for individual same-day registrants and whether those registrants were verified. (J.A. at 3278, 3280.) This was the same data that Defendants relied upon during the preliminary injunction hearing to demonstrate that SDR resulted in the counting of over a thousand ballots of voters who were never properly verified. Thus, as to SDR, there is little evidence from which to infer that the General Assembly's course of action was based on research of the racial effect or implications of its repeal.

Plaintiffs also argue that the General Assembly proceeded to pass the bill even after opponents cited the disproportional use of SDR by black North Carolinians. Plaintiffs rely on a declaration from Senator Stein stating that during Senate debate he emphasized that in 2012 nearly 100,000 people registered with SDR, and that 34% were minority. (J.A. at 190.) The Senate transcript reveals that Senator Stein mentioned the first figure but not the minority participation; however, he did refer to SL 2013-381 several times as "disproportionately affect[ing] minorities."[41] (See Doc. 134-4 at 253-55, 259.) He argued that the State's registration cut-off was instituted historically to minimize African-American participation and that by eliminating SDR, "you all are going back to the

[41] Although Senator Stein attached a document to his declaration containing statistics regarding African-American use of SDR in the 2012 general election (J.A. at 198), there is no indication in the legislative record that this was shared with Senate members during the debate. The record refers elsewhere only to three charts – all related to early voting - that Senator Stein shared during debate. (J.A. at 198-200.)

sorry old history that we should not embrace."[42] (Id. at 255.)

While Plaintiffs rely heavily on these facts to establish improper intent, the United States also argues that the court should infer improper intent from the General Assembly's failure to solicit expert opinions about the impact of the changes. (Doc. 166 at 219.) Cf. Brown, 895 F. Supp. 2d at 1248 (noting plaintiffs' urging to infer intent from the Florida legislature's failure to conduct any study or analysis of the effect the changes prior to amending the statute). When the court asked during the hearing if it would have been better or worse not to have asked for any race data, the United States responded that "[i]t would be just an additional factor to consider." (Id. at 219-20.) Consequently, Plaintiffs' effort to simultaneously rely on the presence and absence of race information presents a challenge.

Discriminatory purpose "implies more than intent as volition or intent as awareness of consequences." Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 (1979). "It implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." Id. To infer from the opponents' objections that the General Assembly passed the bill because of the objections is difficult on this record. This is especially true where some of the

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[42] Whatever the original purpose of a registration cut-off, the Supreme Court, as noted, recognized in 1973 that the States have an interest in closing voter rolls at a reasonable time before Election Day. Marston, 410 U.S. at 681.

contemporaneous legislative criticism eschewed any improper intent. (See, e.g., Doc. 134-4 at 204 (statement of Sen. Bryant clarifying that he was not trying to accuse Republicans of being racist, but only stating that the bill would have a racial impact regardless of its purpose).[43] In sum, evidence that legislators knew or may have known that SDR was used disproportionately by African-Americans in the State is contrasted by evidence that SDR was used overwhelmingly by whites and that it was causing a significant number of unverified voters' ballots to be counted. The historical background of the decision, therefore, presents a conflicting picture.

c. Sequence of events leading to decision

The next factor is "[t]he specific sequence of events leading up to the challenged decision," including whether the decision was a "[d]eparture[] from the normal procedural sequence" or if "factors usually considered important . . . would strongly favor" a contrary decision. Arlington Heights, 429 U.S. at 267. Plaintiffs describe the procedure used in the passage of SL 2013-381 as "irregular," "highly expedited," and "unorthodox." (Doc. 98-1 at 62.) Particularly, they note that (1) the original version of HB 589 that left the House of Representatives in April concerned only voter ID; (2) the Senate took no action on HB 589 until after the Supreme Court's

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[43] To the extent Plaintiffs point to evidence of race data on HB 589 generally, it is relevant that during the Senate debate, proponents of the bill emphasized that African-American turnout increased in Georgia after the State passed a voter ID law. (Doc. 134-4 at 158-59.)

decision in Shelby County; (3) Senator Apodaca announced the day after Shelby County the intent to go with the "full bill" without disclosing the contents of that bill; (4) the new provisions were inserted into HB 589 in a process known as "gut-and-amend," and the expanded bill was not posted online until the night before the Senate Rules Committee meeting; (5) after the bill passed the Senate, the House received it that same night and concurred in the changes without referring the bill to a Committee of the Whole or any other committee; (6) of the proponents of the bill, only Representative Lewis spoke in favor of it during the House session, while every Democratic opponent spoke against it; and (7) the bill represented what Plaintiffs characterize as a reversal of course from the previous decade of North Carolina legislation on election laws. Defendants contend that HB 589 complied with all General Assembly rules and procedures and that several other bills have followed similar procedural paths, particularly the controversial 2003 redistricting legislation passed by the then Democratically-controlled legislature.

A reading of the complete legislative record reveals that, although the procedural path of the bill left room for criticism by opponents, any inference of impermissible intent is marginal. As Plaintiffs must concede, the General Assembly complied with all of its rules during the passage of SL 2013-381. (See Doc. 164 at 28-29 (statement of United States' counsel).) No one raised a point of order. Moreover, testimony established that the process known as "gut-and-amend" used to transform the voter ID bill into the omnibus bill that became SL 2013-381 is not

uncommon in the General Assembly. (Id. at 133 (testimony of Senator Dan Blue, an opponent of the bill, acknowledging that gut-and-amend happens "quite a bit" and "too often" in the General Assembly).) Such a process occurs because the General Assembly must meet a "cut-off" date – known as the "cross-over date" - by which a piece of legislation must be approved by one House lest it die for the remainder of the session. (Id. at 131-33.) Plaintiffs' legislator-witnesses admitted that it is not uncommon for a bill to return to its originating house with significant material not originally part of the bill. (Id. at 133; Doc. 165 at 85-88 (testimony of Rep. Glazier).) In this regard, Plaintiffs' *real* contention seems to be that the process for HB 589 was unusual for a bill having the significance they contend it did and the majority's failure to give deference to existing political relationships with those on the other side of the aisle. (See Doc. 165 at 67 (testimony of Rep. Glazier: "I was shocked by it, not by, in some respects, some of the provisions, but by the -- and, again, my comments on the floor that night made it clear -- by the process"), 69 ("[t]he process this bill got was nothing more than what we give to a golf cart bill"); J.A. 179 ¶ 3 (declaration of Sen. Stein describing the Senate proceedings as "irregular for a bill of this magnitude").)

The fact that the Senate acted after Shelby County favors Plaintiffs, but it does not bear the full significance that they attribute to it. That decision greatly altered the burden of proof calculus for a legislative body considering changes to voting laws. It would not have been unreasonable for the North Carolina Senate to conclude that passing the "full

bill" before Shelby County was simply not worth the administrative and financial cost of seeking permission from the United States. Proponents were aware that – as opponents sharply reminded them during debate – they were still obliged to comply with Section 2 and the Constitution. (Doc. 134-4 at 153, 192.)

Plaintiffs' contention that only one legislator spoke in favor of the bill is inaccurate. While it is true that only Representative Lewis spoke in the House before the vote to concur in the Senate's changes, several Republican Senators spoke in favor of the bill both during the Rules Committee meeting and during the two floor sessions. (See generally Doc. 134-4.) Additionally, the initial bill was debated over several committee sessions and a floor session in March and April 2013. (See generally J.A. at 2388-2451.) It is not necessarily nefarious that no Republican in the House other than Representative Lewis rose to speak in favor of the bill when it was late in the evening, the caucus knew it had the votes to pass the bill, and the end of the legislative session was approaching.[44]

Plaintiffs further rely on the fact that the House voted to concur in the Senate's changes without forming a Committee of the Whole or referring the bill to another committee. The record establishes that forming a Committee of the Whole is quite rare. As noted, Representative Moore stated

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[44] Indeed, an opponent of the bill candidly testified at the hearing that had he been the lawyer for the Republicans, he would have similarly advised the strategy to avoid further discussion. (Doc. 165 at 70.)

that "[i]t would be pointless to do so, because the Committee of the Whole would be the entire House sitting as a Committee and then later simply sitting as the House." (J.A. at 2507-08.) Defendants also adduced evidence during the hearing that previous Democratically-controlled majorities of the General Assembly returned politically-sensitive bills for concurrence as to extensive changes without referring the substitute bill to a committee.[45]

The Senate debated the bill over two separate sessions and a Rules Committee meeting, debated over a dozen amendments and added several (including two by Democrats), and each opponent was given the floor and sufficient time to speak and explain his or her objections. The Senate also granted time to adjourn between debate to allow members to caucus and consider further amendments. (Doc. 134-4 at 123-25.) At the end of the Senate debate, Senator Nesbitt – a strong opponent of the bill – stated "[w]e've had a good and thorough debate on this bill over two days," and "I think we've reviewed the bill in great detail." (Id. at 315-16.) When the bill returned to the House, every opponent was given time to speak, some were given extensions, and many did not even use their full allotment of time. (J.A. at 2615.) While the proceedings moved quickly, the court cannot say that

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[45] Representative Glazier testified that the 2003 redistricting legislation, affecting all voters in the State, returned to the House following significant changes in the Senate. The Democratically-controlled House voted to concur in the Senate's changes without additional committee hearings. (Doc. 165 at 83-86.) He also testified that controversial bills regarding Sharia law and regulatory reform were also returned to the House on a motion to concur. (Id. at 87-89.)

it is uncommon for a controversial bill to be passed near the end of a legislative session.

As for the remaining procedural argument, Plaintiffs point to the fact that the bill expanded to 57 pages before the Rules Committee meeting. This is a significant difference. However, a review of the bill reveals that apart from the original voter ID provisions, a significant portion of those 57 pages consisted of existing law. Moreover, several component parts – including the reduction of early voting and elimination of SDR – had been included in other bills introduced in the House and Senate around the same time as the original HB 589.[46] As noted, their inclusion as part of the "gut-and-amend" process was not unusual. (Doc. 165 at 88-89.) As a political matter, it may have been preferable, even highly so, to put the bill on a slower track, but the court cannot say that the manner of the proceedings in the General Assembly raises a strong inference of discriminatory intent.

d. Legislative history

Arlington Heights also instructs the court to consider the legislative history of the decision, especially "contemporaneous statements by members of the decisionmaking body, minutes of its meetings, or reports." 429 U.S. at 268. Much of this has been addressed in the preceding discussion regarding the

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[46] See HB 451 (would have reduced early voting to ten days, eliminated SDR, and eliminated Sunday voting); HB 913 (would have eliminated SDR and enhanced observers' rights); SB 428 (would have eliminated SDR and reduced early voting to ten days); and SB 666 (would have eliminated SDR and reduced early voting to ten days). (Doc. 134-3 ¶ 23.)

debate of the bill. Plaintiffs have not identified any comment, and the court has found none, of a racial nature by any supporter of the bill during the legislative process.[47] Thus, the fourth Arlington Heights factor weighs in favor of Defendants.

e. State interest

Plaintiffs argue that the State invented post-hoc rationales to defend the provisions of SL 2013-381. To be sure, "in some circumstances it is reasonable to infer discriminatory intent based on evidence of pretext." Florida, 885 F. Supp. 2d at 355. As to SDR, however, the principal interest the State asserts in this litigation – the verification problem described above – had been identified by the SBOE in 2009 and was raised more than once by Senator Rucho. (J.A. at 1533; Doc. 134-4 at 45, 87.) The legislative record and the evidence presented at the hearing falls short of demonstrating that Senator Rucho's proffered reason likely was not the General Assembly's actual reason for eliminating SDR.

In the totality of the circumstances, Plaintiffs' evidence that the General Assembly acted at least in

[47] Plaintiffs argued at the hearing that the court should draw an adverse inference from the fact that Defendants have asserted legislative privilege and refused to disclose certain communications that Plaintiffs argue might be probative of intent. This would be inappropriate. Drawing such an inference would be tantamount to punishing a party for asserting a privilege – especially one that as of yet has not been determined to be unavailable. It would also be contrary to the court's prior discovery ruling. (Doc. 93 (finding that the legislative privilege is qualified).) Because of the assertion of privilege, it is not unusual therefore that Defendants did not call any legislators to testify.

part with discriminatory animus certainly raises suspicions and presents substantial questions. But it is opposed with at least equally compelling evidence that the lawmakers acted rather for a legitimate State interest. In this circuit, Plaintiffs must demonstrate more than "only a grave or serious *question* for litigation"; they must "clearly demonstrate that [they] will *likely* succeed on the merits." Real Truth About Obama, 575 F.3d at 347 (emphasis in original). Where such competing evidence exists, especially where Defendants have presented evidence that the State interest was eliminating a practice that permitted (if not encouraged) a not insignificant number of unverified ballots to be counted, the court cannot say at this preliminary stage that it is likely that racial animus was a motivating factor for the General Assembly's elimination of SDR. See Charleston Cnty., 316 F. Supp. 2d at 306 (declining to determine that invidious discrimination was a motivating factor where South Carolina county's decision to institute an at-large voting system "might reasonably be explained in the context of either of the historical explanations advanced by Plaintiffs and Defendants, respectively" and concluding therefore that "the Court will not disparage [the legislature] without more compelling evidence, particularly in light of other reasonable and historical explanations" for the action); Brown, 895 F. Supp. 2d at 1247 (denying preliminary injunction of reduction of early-voting days where Plaintiffs proffered evidence of unusual legislative procedures and a racial statement made by a legislator, while the State possessed a legitimate interest).[48] Therefore, Plaintiffs' motions

[48] In Brown, the court did not find discriminatory intent even

for preliminary injunction based on their intent claims under Section 2 and the Fourteenth and Fifteenth Amendments will be denied.

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where (1) a Senator stated on the floor that "he did not want to make it easier to vote, but rather that it should be harder to vote - as it is in Africa," 895 F. Supp. 2d at 1247 (internal quotation marks omitted); (2) members of the public were limited to three minutes of public comment during the Senate Budget Committee Hearing, id. at 1246; (3) proponents used a "strike-all" amendment to introduce changes the day before amendments were taken up by the Senate Rules Committee, "such that there was less time to analyze and prepare comments regarding the proposed changes," id. at 1246-47; (4) amendments were effective immediately, rather than at some post-enactment date, id. at 1246; and (5) there was some evidence that members of the House and Senate had once participated in a meeting where "not letting blacks vote" was discussed, id. at 1248-49. The court found that the Senator's "single statement [was] not enough to suggest that his purpose, whatever it was, represented the purpose of the Florida legislature as a whole. Accordingly, . . . the 'contemporaneous statements' factor [did] not materially weigh in favor of a finding of discriminatory purpose." Id. at 1248 (quoting Florida, 885 F. Supp. 2d at 355). It also concluded that the State's interests in increasing early-voting flexibility and efficiency were legitimate and that the mere fact the legislature did not conduct a study of the effect the changes was insufficient to warrant a finding of discriminatory intent. Id. at 1248. With respect to the procedure, there was scant evidence it had been unusual, as "strike-all" amendments had been used in the past and the legislative process as a whole allowed for extensive public comment. Id. at 1247 (citing Florida, 885 F. Supp. 2d at 382-84). Finally, there was no evidence connecting the alleged meeting to the enactment of the early-voting changes. Id. at 1249. Thus, the court found that the plaintiffs could not make a clear showing of likelihood of success on the merits on their intent claim. Id.

3. Anderson-Burdick

The private Plaintiffs have asserted Fourteenth Amendment claims under the line of Supreme Court Equal Protection cases specifically applicable to voting restrictions. In Harper v. Virginia State Board of Elections, 383 U.S. 663 (1966), the Court struck down Virginia's poll tax in State elections as violative of the Equal Protection Clause. In so doing, the majority hinted that because voting is a fundamental right, strict scrutiny applies to all State restrictions on that right. See id. at 670. However, later decisions established that, because "[e]lection laws will invariably impose some burden upon individual voters," they are subjected to strict scrutiny only when they impose a "severe" burden. Burdick, 504 U.S. at 433–34. Two freedom-of-association cases, Burdick and Anderson v. Celebrezze, 460 U.S. 780 (1983), established a balancing test for election laws that do not severely burden First and Fourteenth Amendment rights.

> A court considering a challenge to a state election law must weigh "the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate" against "the precise interests put forward by the State as justifications for the burden imposed by its rule," taking into consideration "the extent to which those interests make it necessary to burden the plaintiff's rights."

Burdick, 504 U.S. at 434 (quoting Anderson, 460 U.S. at 789).[49]

In Crawford v. Marion County Election Board, 553 U.S. 181 (2008), the Court extended the Anderson-Burdick balancing test outside the context of the First Amendment and applied it to State election procedures as a whole. In upholding Indiana's voter ID law, the plurality stated that "however slight [a] burden may appear . . . it must be justified by relevant and legitimate state interests 'sufficiently weighty to justify the limitation.'" 553 U.S. at 191 (plurality opinion) (quoting Norman v. Reed, 502 U.S. 279, 288–89 (1992)). Justice Scalia, joined by Justices Thomas and Alito, agreed that the Anderson-Burdick framework applied to the voter ID law. Id. at 204-05 (Scalia, J., concurring in the judgment).

Thus, the court first must determine whether the burden imposed by SL 2013-381's elimination of SDR is severe. If it is, it must be "narrowly drawn to advance a state interest of compelling importance." Burdick, 504 U.S. at 434 (quoting Norman, 502 U.S. at 289). Otherwise, if a law "imposes only 'reasonable, nondiscriminatory restrictions' upon [voters' Fourteenth Amendment rights], 'the State's important regulatory interests are generally sufficient to justify' the restrictions." Id. (quoting Anderson, 460 U.S. at 788). Under this framework, the court must balance North Carolina's precise

[49] Burdick upheld Hawaii's prohibition on write-in voting, while Anderson struck down an early-filing deadline for independent candidates.

interests against the burden imposed by the elimination of SDR.

Plaintiffs' claims under this test are not based on race, but on their right to vote generally. (Doc. 167 at 122.) Plaintiffs do not argue that strict scrutiny applies in this case and thus concede that the repeal of SDR does not create a severe burden on the right to vote. In any event, the Court essentially resolved this question in Crawford. The plurality recognized that "[f]or most voters who need them, the inconvenience of making a trip to the [Bureau of Motor Vehicles], gathering the required documents, and posing for a photograph surely does not qualify as a substantial burden on the right to vote, or even represent a significant increase over the usual burdens of voting." 553 U.S. at 198 (plurality opinion). Even though the plurality recognized that the requirements may create a special burden for some voters, it found that it is unlikely the voter ID law "would pose a constitutional problem unless it is wholly unjustified." Id. at 199. The burden imposed by the repeal of SDR – that is, the requirement that voters register at least 25 days before Election Day – is even less than the one at issue in Crawford. This is particularly true because voters may register without making a trip anywhere; they simply must mail the proper form to their CBOE along with a copy of a HAVA-compliant ID. See id. at 205 (Scalia, J., concurring in the judgment) ("Ordinary and widespread burdens, such as those requiring 'nominal effort' of everyone, are not severe." (quoting Clingman v. Beaver, 544 U.S. 581, 591 (2005)). Thus, the Anderson-Burdick framework is applicable here.

It is equally clear that, under Crawford, a requirement to register 25 days before Election Day constitutes a "reasonable, nondiscriminatory restriction[]" on the right to vote. Id. at 190 (plurality opinion) (quoting Burdick, 504 U.S. at 434). The law's reasonableness is evidenced by the fact that an overwhelming majority of States have chosen to close their registration books some time before Election Day, and that this choice has been sanctioned both by the Supreme Court, see Marston, 410 U.S. at 681, and by Congress in the NVRA, 42 U.S.C. § 1973gg-6(a)(1). The burden is also nondiscriminatory in the sense that it applies to every voter without regard to race or other classification. See Crawford, 553 U.S. at 205 (Scalia, J., concurring in the judgment). As such, the Court has recognized that a State's legitimate regulatory interests are generally sufficient to uphold such a restriction. Burdick, 504 U.S. at 434.

Here, the slight burden imposed by the 25-day cut-off is more than justified by the State's important interest in detecting fraud and ensuring that only properly verified voters have their votes counted at the canvass. See supra Part III.B.1-2. While the removal of the SDR option will affect some voters more than others, this is not the standard upon which voting regulations are judged under Anderson-Burdick. As Justice Scalia explained in Crawford, "[t]he Indiana law affects different voters differently, but what petitioners view as the law's several light and heavy burdens are no more than the different impacts of the single burden that the law uniformly imposes on all voters." 553 U.S. at 205 (citations omitted). Supreme Court precedents

"refute the view that individual impacts are relevant to determining the severity of the burden it imposes." Id. For example, the write-in ballot prohibition in Burdick was upheld despite the fact that it entirely deprived the plaintiff of his right to vote for his candidate of choice.[50] See id. at 205-06 (comparing the Burdick majority, which upheld the prohibition after assessing the burden on voters generally, with the dissent, which would have struck down the restriction because of its effect on specific voters). Thus, the court must consider the burden on "voters generally." Id. at 206.

Under this standard, the burden imposed by elimination of SDR is slight – much less severe than the burden created by the voter ID law at issue in Crawford. As Defendants have articulated an important interest directly served by the elimination

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[50] The court recognizes that the district court in Frank, in evaluating the burden imposed by Wisconsin's voter ID law, determined that a burden should be assessed based upon its effect on a subgroup of voters. 2014 WL 1775432, at *5. The court concluded that Crawford did not constitute binding authority on this question because the plurality "seemed to assume that a law could be invalid based on its effect on a subgroup of voters." Id. at *4. To be sure, no position on this issue received five votes in Crawford. But this conclusion seems to be at odds with Justice Scalia's observation that "Clingman's holding that burdens are not severe if they are ordinary and widespread would be rendered meaningless if a single plaintiff could claim a severe burden." Crawford, 553 U.S. at 206. Such a conclusion also appears inconsistent with the result in Burdick itself, as the plaintiff who sought to vote for a write-in candidate was entirely disenfranchised by the restriction. The Wisconsin Supreme Court also declined to follow the analysis in Frank, concluding that doing so would "stand[] the Anderson/Burdick analysis on its head." Milwaukee Branch of the NAACP, 2014 WL 3744073, at *8 n.9.

of SDR – not counting votes of those whose registrations have not been properly verified - the court finds that Plaintiffs have not demonstrated a likelihood of success on the merits on this portion of their Anderson-Burdick claim. Therefore, Plaintiffs' motion to preliminarily enjoin SL 2013-381's elimination of SDR on this basis will be denied.

4. Twenty-Sixth Amendment

Intervenors challenge the elimination of SDR under the Twenty-Sixth Amendment, which provides that "[t]he right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age." Because the elimination of SDR allegedly impacts voters in the 18- to 24-year-old age bracket disproportionally, Intervenors urge the court to apply the Arlington Heights framework to a claim of age discrimination in voting under the Twenty-Sixth Amendment. While it is true that the Twenty-Sixth Amendment was patterned after the Fifteenth, see Walgren v. Howes, 482 F.2d 95, 101 (1st Cir. 1973), no court has ever applied Arlington Heights to a claim of intentional age discrimination in voting. Nor has any court considered the application of the Twenty-Sixth Amendment to the regulation of voting procedure, such as the decision whether to offer SDR. Thus, Intervenors' Twenty-Sixth Amendment arguments present an issue of first impression in the federal courts.

However, it is unnecessary to decide at this stage whether Intervenors are likely to succeed on this novel claim. Unlike the Twenty-Sixth

Amendment cases cited to the court, Intervenors do not proceed as a class, but rather as ten individuals. Cf. Walgren v. Bd. of Selectmen of Town of Amherst, 373 F. Supp. 624, 625 (D. Mass. 1974), aff'd by 519 F. 2d 1364 (1st Cir. 1975); Sloane v. Smith, 351 F. Supp. 1299, 1300 (M.D. Pa. 1972); see also, e.g., McCoy v. McLeroy, 348 F. Supp. 1034, 1036 (M.D. Ga. 1972). Consequently, they must present evidence that *they themselves* are entitled to the relief sought. They have presented no evidence that would permit the court to conclude that any of them is likely to suffer any irreparable harm before trial. Indeed, counsel for Intervenors indicated at the hearing that he did not intend to produce any evidence in support of Intervenors' claims because they had been unrebutted by Defendants.[51] (Doc. 164 at 31.) Without evidence of irreparable harm, however, the court cannot grant injunctive relief to a particular plaintiff. Thus, Intervenors' motion for preliminary injunction against SL 2013-381 because it allegedly violates the Twenty-Sixth Amendment will be denied.

C. Out-of-precinct Provisional Voting

In 2002, Congress passed HAVA, 42 U.S.C. §§ 15301-15545. Under HAVA, states are required to offer provisional ballots to Election Day voters who changed residences within 30 days of an election but

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[51] The only evidence Intervenors presented are three declarations attached to their supplemental brief on the issue of standing to raise their challenge to the elimination of pre-registration. (See Docs. 159-1 through 159-3.) These declarations contain no evidence that any Intervenor is likely to suffer irreparable harm absent an injunction requiring the State to continue offering SDR.

failed to report the move to their CBOE. See 42 U.S.C. § 15482(a). However, such provisional ballots are only required to be counted "in accordance with State law." Id. § 15482(a)(4). After HAVA, in 2003 the General Assembly passed Session Law 2003-226 in order to bring North Carolina into compliance with federal law.

Soon after, two plaintiffs challenged the authority of the SBOE to count provisional ballots cast outside the voter's correct precinct – referred to as "out-of-precinct provisional ballots." The North Carolina Supreme Court held that the counting of such ballots violated State law. James v. Bartlett, 607 S.E.2d 638, 642 (N.C. 2005) ("The plain meaning of [N.C. Gen. Stat. § 163–55 (2003)] is that voters must cast ballots on election day in their precincts of residence."). In response, the General Assembly passed Session Law 2005-2, amending Section 163-55 to remove the requirement that voters appear in the proper precinct on Election Day in order to vote. 2005 N.C. Sess. Law 2, § 2 (codified at N.C. Gen. Stat. § 163-55(a) (2006)). The law provided that "[t]he [CBOE] shall count [out-of-precinct provisional ballots] for all ballot items on which it determines that the individual was eligible under State or federal law to vote." Id. § 4 (codified at N.C. Gen. Stat. § 163-166.11(5) (2006)).

Passage of SL 2013-381 reinstated the James court's interpretation of State law by prohibiting the counting of out-of-precinct provisional ballots. Section 163-55(a) now provides: "Every person born in the United States, and every person who has been naturalized, and who shall have resided in the State

of North Carolina and in the precinct in which the person offers to vote for 30 days next preceding an election, shall, if otherwise qualified as prescribed in this Chapter, be qualified to vote in the precinct in which the person resides." Section 163-166.11(5) provides that a "ballot shall not be counted if the voter did not vote in the proper precinct under [section] 163-55, including a central location to be provided by that section." Thus, if a voter appears at the wrong precinct on Election Day, he or she will have to get to the proper precinct before the close of the polls in order to cast a valid vote.

All Plaintiffs move to enjoin the prohibition on counting out-of-precinct provisional ballots. They rely on the same four legal theories, which will be addressed in turn.

1. Section 2 results claims

In order to show likelihood of success on the merits of their Section 2 results claims, Plaintiffs must show that the system put in place by SL 2013-381 with respect to out-of-precinct provisional ballots interacts with historical and current conditions to deny black North Carolinians equal access to the polls. As noted above, for purposes of these motions the court accepts that North Carolina's history of official discrimination against blacks has resulted in current socioeconomic disparities with whites. Particularly relevant for the purposes of out-of-precinct voting are the following: (1) between the years 2006 and 2010, an average of 17.1% of blacks in North Carolina moved within the State, as compared to only 10.9% of whites (J.A. at 1228); and

(2) 27% of poor blacks in North Carolina lack access to a vehicle, compared to 8.8% of poor whites (J.A. at 1155). Also, the court accepts the determinations of Plaintiffs' experts that the prohibition on counting out-of-precinct provisional ballots will disproportionally affect black voters. (E.g., J.A. at 728-34 (report of Plaintiffs' expert Dr. Allan J. Lichtman), 868-69, 878 (report of Dr. Stewart).) However, Plaintiffs have nevertheless not shown an inequality of opportunity under the totality of the circumstances and thus a likelihood of success on the merits of this claim.

First, although failure to count out-of-precinct provisional ballots will have a disproportionate effect on black voters, such an effect will be minimal because so few voters cast them. According to Dr. Stewart's calculations, which the court accepts, approximately 3,348 out-of-precinct provisional ballots cast by black voters were counted to some extent in the 2012 general election. (J.A. at 878.) This represents 1.16% of the votes cast by black voters on Election Day.[52] (Id.) Because 70.5% of black voters voted early in 2012, the total number of blacks utilizing out-of-precinct voting represents 0.342% of the black vote in that election. (J.A. at 616, 878.) Dr. Stewart also estimates that white voters cast 6,037 out-of-precinct provisional ballots that were at least partially counted in that same election, accounting for 0.44% of Election Day votes. (J.A. at 878.) After accounting for the percentage of white voters that voted early, the total share of the

[52] Voters may only cast out-of-precinct votes on Election Day because early voters may present themselves at any early-voting site in the county in order to vote.

overall white vote that voted out-of-precinct was 0.21%.[53] (J.A. at 616, 878.) These numbers suggest that a system prohibiting the counting of out-of-precinct provisional ballots will not result in unequal access to the polls; nearly 99.7% of black voters in 2012 either voted in the correct precinct on Election Day or utilized early voting. Moreover, the existence of early voting without regard to precinct tends to reduce any inequality even further, because those who would vote out-of-precinct have ample opportunity to vote at a location more convenient to them. (See J.A. at 2635 (noting seven different ways to vote without respect to precinct).)

Here, too, the court is concerned with the potential scope of a determination that North Carolina's failure to partially count out-of-precinct votes violates Section 2. As noted earlier in the context of SDR, the Section 2 results standard is not retrogression, but an assessment of equality of opportunity under the current system. The fact that North Carolina counted out-of-precinct provisional ballots for four federal election cycles before reversing course, while relevant for the purposes of determining disproportionate impact, does not affect the ultimate inquiry under Section 2. Thus, a determination that North Carolina is in violation of Section 2 merely for maintaining a system that does not count out-of-precinct provisional ballots could place in jeopardy the laws of the majority of the

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[53] The numbers were similar during the 2010 general election, when even fewer out-of-precinct ballots were cast. (See J.A. at 731 (noting that a total of 2,635 out-of-precinct provisional ballots were cast in 2010 and that 56.5% of those ballots with available racial information were cast by black voters).)

States, which have made the decision not to count such ballots.[54] A contrary interpretation would import the retrogression standard of Section 5 into Section 2 cases, making a plaintiff's case at least partially dependent on whether a State chose to count out-of-precinct provisional ballots at some point. This cannot be the proper standard under Section 2.

Finally, the State has articulated a legitimate administrative interest in requiring Election Day voters to vote in their proper precinct. The North Carolina Supreme Court said as much in James, when it noted that "our State's statutory residency requirement provides protection against election fraud and permits election officials to conduct elections in a timely and efficient manner." James,

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[54] See Ala. Code §§ 17-9-10, 17-10-2(b)(2); Ariz. Rev. Stat. Ann. § 16-584; Ark. Code Ann. § 7-5-308(d)(2); 108-00-9 Ark. Code R. § 909;; Del. Code Ann. tit. 15, § 4948(h)(7); Fla. Stat. § 101.048(2)(b); Haw. Code R. § 3-172-140(c)(3); Ind. Code § 3-11.7-5-3(a); 31 Ky. Admin. Regs. 6:020(14); Me. Rev. Stat. tit. 21-A, § 673(A)(1)(A)(3)(c); Mass. Gen. Laws ch. 54, § 76C(d); Minn. Stat. § 201.016 (making voting outside the proper precinct after receiving an initial violation notice a petty misdemeanor); Miss. Code Ann. §§ 23-15-571(3)(a), (d), 23-15-573; Mo. Rev. Stat. § 115.425; Neb. Rev. Stat. § 32-1002(5)(e); Nev. Rev. Stat. § 293.3085(4); N.H. Rev. Stat. Ann. §§ 659:12, 659:27(II), 659:27-a; N.Y. Elec. Law § 8-502; Okla. Stat. tit. 26, § 7-116.1(C); S.C. Code Ann. §§ 7-13-820, 7-13-830; S.D. Codified Laws § 12-20-5.1; Tenn. Code Ann. § 2-7-112(a)(3)(B)(iii), (v); Tex. Elec. Code Ann. § 63.011(a); Vt. Stat. Ann. tit. 17, § 2555(1)(C); Va. Code Ann. § 24.2-653(B); W. Va. Code § 3-1-41(d); Wis. Stat. §§ 6.92, 6.94; see also State ex rel. Painter v. Brunner, 941 N.E.2d 782, 794 (Ohio 2011) ("Under Ohio law . . . only ballots cast in the correct precinct may be counted as valid." (quoting Sandusky Cnty. Democratic Party v. Blackwell, 387 F.3d 565, 578 (6th Cir. 2004) (per curiam))).

607 S.E.2d at 644. The unanimous court also found that "[i]f voters could simply appear at any precinct to cast their ballot, there would be no way under the present system to conduct elections without overwhelming delays, mass confusion, and the potential for fraud that robs the validity and integrity of our elections process." Id.

> The advantages of the precinct system are significant and numerous: it caps the number of voters attempting to vote in the same place on election day; it allows each precinct ballot to list all of the votes a citizen may cast for all pertinent federal, state, and local elections, referenda, initiatives, and levies; it allows each precinct ballot to list only those votes a citizen may cast, making ballots less confusing; it makes it easier for election officials to monitor votes and prevent election fraud; and it generally puts polling places in closer proximity to voter residences.

Id. at 644-45 (quoting Sandusky Cnty. Democratic Party, 387 F.3d at 569). The State's proffered justifications are consistent with the observations of the James court and the Sixth Circuit. (See Doc. 126 at 39-40.) Moreover, testimony presented at the hearing confirmed one of the State's concerns; Melvin F. Montford of Plaintiff North Carolina A. Phillip Randolph Institute testified that his organization's GOTV volunteers take prospective voters to the polls without regard to precinct. (Doc. 164 at 78.) Such activity has the potential to burden

precincts, create confusion, and lead to mistakes and election fraud. Because the State's interest in the precinct system is significant and legitimate, it cannot be tenuous.[55]

In conclusion, the minimal usage of out-of-precinct ballots, ready availability of other methods of voting – including early voting and mail-in absentee balloting – without regard to precinct, and the State's legitimate interest in the precinct system all counsel against a Section 2 results finding. Considering the totality of the circumstances, Plaintiffs have not demonstrated a likelihood of success on their Section 2 results claim with respect to the counting of out-of-precinct provisional ballots. Consequently, their motion for a preliminary injunction on this theory of recovery will be denied.

2. Racially discriminatory intent

Plaintiffs' Arlington Heights argument tracks the analogous argument discussed above with respect to SDR, with one major distinction. Plaintiffs contend that the decision to repeal the provisions for counting out-of-precinct provisional ballots was racially motivated because the General Assembly made a finding when it adopted the mechanism in SL 2005-2 that "of those registered voters who happened to vote provisional ballots outside their

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[55] As Defendants further noted at the hearing and in their brief, to the extent voters who are recruited through GOTV efforts are not directed to their proper precinct for reasons of convenience, out-of-precinct voting has the potential of actually disenfranchising their vote to the extent they cast ballots for candidates not within their proper precinct (because such votes would not be counted). (See Doc. 126 at 40.)

resident precincts on the day of the November 2004 General Election, a disproportionately high percentage were African-American." (J.A. at 2635.) While it can be assumed that the General Assembly is deemed to be aware of its prior findings, it does not follow that any future decision to reverse course evidences racial motivation. This is especially true given the legitimate interest articulated by both Defendants and the North Carolina Supreme Court. Moreover, the bill to "reconfirm" out-of-precinct voting was opposed by a significant minority in both Houses in 2005.[56]

The legislative record contains no evidence that race motivated the opponents of SL 2005-2.[57] The record also contains no more evidence for the claim that race motivated out-of-precinct elimination in SL 2013-381 than it did with SDR, which the court has addressed. In fact, out-of-precinct provisional ballots were only occasionally mentioned during the three days of legislative debates on HB 589, while debate focused on other provisions such as voter ID, early voting, SDR, and the elimination of straight-ticket voting (which is not challenged in these cases). Specifically, the legislative record

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[56] The bill passed the Senate 29-21 and the House 61-54. (J.A. at 2631-32.)

[57] The record indicates that the primary reason for Republican opposition to SL 2005-2 was the General Assembly's decision to apply the law to elections that had already taken place. (J.A. at 1204.) Republicans attempted to pass an amendment that would have applied the law only to future elections, but when that failed, "the bill rapidly passed both houses on party-line votes." (J.A. at 1206.) Thus, the race data in 2005 was, on this record, apparently unrelated to the motive of the opponents.

includes an explanation of the out-of-precinct provision in the Rules Committee meeting that states it "basically moves the law back to the way it was in 2005," making it so a voter "cannot vote in a random precinct." (Doc. 134-4 at 16-17.) Opponents did not attack the rationale for repealing out-of-precinct provisional voting in the Senate, and only Representative Glazier mentioned it in passing in the House. (J.A. at 2556.) Much like the decisions to enact and then repeal SDR, the injection of race data by itself by opponents of the bill cannot create a likelihood of discriminatory intent when a legitimate State interest – here, one expressly recognized by the North Carolina Supreme Court in James - animates the reversal of course. Given the lack of evidence regarding the consideration out-of-precinct voting, the court cannot conclude that the legislative record is indicative of impermissible intent.

Thus, considering the totality of the circumstances, the court concludes that Plaintiffs have not demonstrated a clear showing of likelihood of success on the merits insofar as racial discrimination is alleged to have been a motivating factor in the decision to prohibit the counting of out-of-precinct provisional ballots. Plaintiffs' motion for preliminary injunction on this basis, therefore, will be denied.

3. Anderson-Burdick

The private Plaintiffs also challenge SL 2013-381's prohibition on counting out-of-precinct provisional ballots under the Anderson-Burdick balancing test. As the court has already concluded with respect to SDR, because the requirement to vote in one's correct precinct applies to each voter

equally, the relevant burden under Anderson-Burdick is that which applies to voters generally. Of course, the requirement will *affect* voters who would have voted out-of-precinct more than it will *affect* those who vote early or who normally vote at their precinct of residence. But this is not the proper standard under Anderson-Burdick. Like the decision not to offer SDR, the current law prohibiting the counting of out-of-precinct provisional ballots "imposes only 'reasonable, nondiscriminatory restrictions,'" and therefore "the State's important regulatory interests are generally sufficient to justify" the law. Burdick, 504 U.S. at 434 (quoting Anderson, 460 U.S. at 788).

The minor nature of the burden imposed is demonstrated by the fact that less than one-half of one percent of voters utilized the option to cast an out-of-precinct provisional ballot in the 2012 general election. Cf. Crawford, 553 U.S. at 188 n.6 (plurality opinion) (noting that the district court found 99% of Indiana residents already possessed an ID meeting the criteria under State law). Additionally, there are other ways to vote, including during the early-voting period and absentee by mail, which do not require the voter to appear at the proper precinct. As the North Carolina Supreme Court stated, "it is but a perfunctory requirement that voters identify their proper precinct and appear within that precinct on election day to cast their ballots." James, 607 S.E.2d at 645. Indeed, it is hard to imagine how the elimination of out-of-precinct voting constitutes an impermissible burden when the majority of States have decided, apparently lawfully, not to offer it. See supra n.54. Because any slight burden is justified by

an important and legitimate State interest, see supra Part III.C.1, Plaintiffs have not demonstrated a likelihood of success on the merits of their Fourteenth Amendment Anderson-Burdick claim. Their motion to enjoin those provisions on that ground, therefore, will be denied.

4. Twenty-Sixth Amendment

Intervenors also argue that the prohibition on counting out-of-precinct provisional ballots violates the Twenty-Sixth Amendment because it has the purpose and effect of discriminating in voting based on age. As noted above as to SDR, however, none of the ten Intervenors has presented any evidence that *they* will likely suffer irreparable harm before trial in the absence of an injunction. See supra Part III.B.4. Thus, they have not demonstrated entitlement to preliminary relief, and their motions to preliminarily enjoin the prohibition on counting out-of-precinct provisional ballots will be denied.

D. Early Voting

"No-excuse" early voting[58] was established for even-year general elections in North Carolina beginning in 2000. 1999 N.C. Sess. Law 455, § 1 (codified at N.C. Gen. Stat. §§ 163-226(a1), 163-227.2(a1) (2000)). At that point, a registered voter could present herself at the CBOE office in her county of residence "[n]ot earlier than the first business day after the twenty-fifth day before an election . . . and not later than 5:00 p.m. on the

[58] "No-excuse" refers to the fact that voters need not present any justification in order to vote before Election Day.

Friday prior to that election" to cast her ballot. N.C. Gen. Stat. § 163-227.2(b) (2000). After the 2000 election cycle, the General Assembly expanded no-excuse early voting to all elections. 2001 N.C. Sess. Law 337, § 1. It also amended the early-voting period so that voters could appear at the CBOE office to vote "[n]ot earlier than the third Thursday before an election . . . and not later than 1:00 P.M. on the last Saturday before that election." 2001 N.C. Sess. Law 319, § 5(a) (codified at N.C. Gen. Stat. § 163-227.2(b) (2002)). Under this law, CBOEs were required to remain open for voting until 1:00 p.m. on that final Saturday, but retained the discretion to allow voting until 5:00 p.m. Id. They were also permitted to maintain early-voting hours during the evening or on weekends throughout the early-voting period.[59] Id. §5(b) (codified at N.C. Gen. Stat. § 163-227.2(f) (2002)).

The challenged provision makes two changes to the permissible duration of the early-voting period. First, early voting must now begin "[n]ot earlier than the second Thursday before an election," a reduction of one week of permissible early-voting days. 2013 N.C. Sess. Law 381, Part 25 (codified at N.C. Gen. Stat. § 163-227.2(b)). As such, SL 2013-381 reduces the number of permissible early-voting days from 17 to ten throughout the State. Second, it eliminates the discretion of the CBOEs to keep early-voting sites open until 5:00 p.m. on the final

[59] 59 CBOEs were, and still are, also permitted to open additional early-voting sites other than the CBOE office by unanimous vote of the board members. N.C. Gen. Stat. § 163-227.2(g).

Saturday before Election Day, instead mandating that early voting end at 1:00 p.m. everywhere. Id.

However, the decrease in permissible days is coupled with a required increase in voting hours. SL 2013-381 requires the CBOEs, before the 2014 elections, to "calculate the cumulative total number of scheduled voting hours at all sites during the 2010 . . . elections" and "ensure that at least the same number of hours offered in 2010 is offered for [early voting] under this section through a combination of hours and numbers of [early-voting] sites during the . . . election." N.C. Gen. Stat. § 163-227.2(g2)(2).[60] In other words, counties must generally offer the same number of aggregate hours of early voting this November 2014 as they did in November of 2010. The CBOEs can meet this requirement either by opening more early-voting sites or keeping the existing sites open for more hours, including expanding weekend voting. See id. § 163-227.2(f) ("A county board may conduct [early] voting during evenings or on weekends, as long as the hours are part of a plan submitted and approved according to subsection (g) of this section."). SL 2013-381 also requires that each early-voting site within a county maintain the same hours of operation as every other site in that county. Id. § 163-227.2(g).

In the event a county determines that it either cannot meet the aggregate-hours requirement or that additional hours are unnecessary, it may seek a waiver. A CBOE may only decide to seek a waiver

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[60] CBOEs must make the same calculation with respect to the 2012 elections in 2016, and then must offer the same number of aggregate hours in 2016 as in 2012. Id. § 163-227.2(g2)(1).

"by unanimous vote of the board, with all members present and voting." Id. § 163-227(g3). The waiver request is then transmitted to the SBOE, where it also must be approved by a unanimous vote before a county will be granted a waiver. Id. Absent a waiver, counties must either open more early-voting sites or keep existing sites open longer to satisfy SL 2013-381's aggregate-hours requirement.

All Plaintiffs, including Intervenors, seek to enjoin enforcement of SL 2013-381's early-voting provisions. Plaintiffs' claims are brought under the same four legal theories discussed above. Plaintiffs' principal arguments are the following: (1) the reduction in early-voting days will lead to long lines both during early voting and on Election Day, deterring black and young voters from participating in the election; (2) seven fewer days will make it harder for GOTV operations to target black voters who need transportation to the polls and otherwise would not vote; (3) the aggregate-hours amendment will not compensate for the lost days because counties cannot add more hours during the mid-day times that voters prefer to use, and over 30 counties obtained a waiver from the requirement during the May 2014 primaries; and (4) the seven lost days will result in fewer Sunday voting hours, which are particularly important to black voters and GOTV operations because of "souls to the polls" efforts by churches. Defendants generally contend that the State is not required to have any early voting and that no State action prevents black and young voters from voting on the remaining ten days of early voting, by absentee ballot, or on Election Day.

Even assuming, without deciding,[61] that Plaintiffs can show a likelihood of success on the merits on any of their early-voting claims, they have not made the necessary clear showing of irreparable harm during the November 2014 general election to warrant the entry of a preliminary injunction. First, Plaintiffs' arguments regarding long lines are not supported factually with respect to the upcoming election. Neither party has proffered any evidence of expected turnout in the fall, but it is undisputed that turnout will be significantly lower than it was during the presidential elections of 2008 and 2012.[62] For example, in the November 2008 presidential election, 706,445 voters utilized the first seven days of early voting. (J.A. at 1543.) In the 2010 midterm,

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[61] It is noteworthy that the United States conceded at the hearing it has never previously taken the position that a State was in violation of Section 2 for failing to have any, much less a particular number of, days of early voting. (Doc. 166 at 192.) It also conceded that it has previously pre-cleared states for significant reductions in early-voting periods. (Id. at 223; see also Florida, 885 F. Supp. 2d at 332 n.39 (noting that Georgia was pre-cleared for a reduction of their early-voting period from 45 to 21 days).) Additionally, Plaintiffs have cited no decision from any court finding a State in violation of Section 2 for failing to maintain a particular number of early-voting days.

[62] The record reflects that the 2010 midterm (which hosted a contested U.S. Senate race between the incumbent Senator and the Democratic challenger) is the most recent comparable contest to this fall's election. Although there was some speculation at the hearing that turnout in November 2014 may exceed that in 2010 because of the contested U.S. Senate race, no party contends that turnout will approach presidential-year levels. See J.A. at 790 n.4 (expert report of Dr. Stewart) (noting that turnout for 2006 and 2010 averaged 46.9% less than that of 2008 and 2012).

however, just 208,051 voters – 29.4% of the 2008 total – used those days. (Id.)

There is also no evidence in the record that it is likely that counties will not be able to handle the turnout this fall with the remaining ten days.[63] Indeed, Senator Stein's amendment to require the same number of aggregate hours for comparable elections, which was adopted, was designed to ameliorate the effect of any lost days on everyone, including African-Americans. (Doc. 134-4 at 111.) Moreover, in 2010, the racial disparity in early-voting usage that was observed in 2008 and 2012 all but disappeared; the statistics show blacks used early voting at a rate nearly comparable with that of whites during that midterm election.[64] The same is true of young voters, who used early voting at a

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[63] An "important part" of Plaintiffs' argument on longer lines is an Internet poll of 334 North Carolina voters discussed in Dr. Stewart's report. (Doc. 166 at 186-87; J.A. at 852.) However, methodological challenges aside, the data in that study relate to the 2008 and 2012 general elections, which have much higher turnout as presidential elections. Thus, the study's conclusions have limited persuasiveness for the 2014 election cycle. Indeed, Plaintiffs' expert Dr. Theodore Allen testified that he did not include any midterm election data in his report concluding that waiting times would increase on Election Day due to the elimination of seven days of early voting. (Doc. 163-9 at 78-79.)

[64] In 2010, 36% of all black voters that cast ballots utilized early voting, as compared to 33.1% of white voters. (J.A. at 616.) By comparison, in the presidential elections of 2008 and 2012, over 70% of black voters used early voting compared to just over 50% of white voters. (Id.) In addition, 80.2% of the voters using the first week of early voting in 2010 were white. (J.A. at 1543.)

lower rate than blacks or whites as a whole in 2010.[65]

Furthermore, Plaintiffs' generalized arguments with respect to Sunday voting lack force in the context of the preliminary injunction standard. Only seven of North Carolina's 100 counties offered any Sunday voting in the 2010 general election, i.e., before SL 2013-381 was enacted.[66] (Doc. 126-4 at 45-90.) Even among those seven, none offered any voting hours during the first Sunday of the early-voting period – October 17, 2010.[67] Thus, Plaintiffs' claims that the number of

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[65] In the 2010 general election, 28.2% of young voters (ages 18-24) voted early. (J.A. at 1444.) In the 2012 and 2008 general election, this age cohort voted early at approximately the same rate as white voters as a whole; 53.1% in 2012 and 49.4% in 2008. (Id.)

[66] The seven counties offering Sunday voting were Mecklenburg (Charlotte), Wake (Raleigh), Guilford (Greensboro), Forsyth (Winston-Salem), Durham (Durham), Pitt (Greenville), and Vance (Henderson). (Doc. 126-4 at 57-58, 61-62, 71-73, 78, 86-87.) The first five of these are among the six most populous counties in North Carolina.

[67] Durham County offered Sunday voting at the CBOE office from 12:00 p.m. to 3:00 p.m. on the second available Sunday – October 24 – and two additional sites without Sunday voting. (Id. at 57.) Forsyth County offered Sunday voting at the CBOE office from 1:00 p.m. to 5:00 p.m. on October 24 and maintained seven other sites not offering any Sunday voting. (Id. at 58.) Guilford County offered nine Sunday voting sites opened between 12:00 p.m. and 4:00 p.m. on October 24 and two sites without Sunday voting. (Id. at 61-62.) Mecklenburg County – the State's most populous county – offered 16 sites open from 1:00 p.m. to 4:00 p.m. on October 24. (Id. at 71-73.) Pitt County offered one site open from 1:00 p.m. to 5:00 p.m. on October 24 in addition to three sites not offering Sunday voting. (Id. at 78.)

Sunday voting days has been "cut in half" by SL 2013-381 are unsubstantiated, at least for the purposes of a preliminary injunction sought for the November 2014 cycle.[68] The seven counties offering Sunday voting may still offer it on the second Sunday before Election Day – October 26, 2014 – under SL 2013-381.[69] It will not be possible for many counties to comply with the aggregate-hours requirement of N.C. Gen. Stat. § 163-227.2(g2) if

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Vance County provided two sites open from 1:00 p.m. to 5:00 p.m. on October 24. (Id. at 86.) Finally, Wake County offered nine sites open from 1:00 p.m. until 5:00 p.m. on that second Sunday. (Id. at 86-87.)

[68] The court notes that Gloria Hill of the Hoke County Board of Elections testified that in some cases black voters in her county would not be able to get to the polls without Sunday voting. (Doc. 164 at 154-55.) But Hoke County did not maintain any Sunday voting hours in the 2010 general election. (Doc. 126-4 at 64.) It offered only two sites with an aggregate total of 11 weekend hours, all on the Saturday before Election Day. (Id.)

[69] For example, Durham County will have four early-voting sites this November (as opposed to three in 2010), and all four will feature Sunday voting from 2:00 p.m. through 6:00 p.m. See N.C. State Bd. of Elections, N.C. One-Stop Voting Site Results – November 4, 2014 Election, http://www.ncsbe.gov/webapps/os_sites/OSVotingSiteList.aspx?County=DURDUR&Election=11/04/2014 (last visited Aug. 5, 2014). This represents an increase of 13 aggregate Sunday voting hours. One of the new Sunday voting sites is located on the campus of North Carolina Central University, a historically black university. Id. Wake County will offer Sunday voting at eight sites between the hours of 1:00 p.m. and 5:00 p.m., a decrease of just four aggregate hours throughout the county. See N.C. State Bd. of Elections, N.C. One-Stop Voting Site Results – November 4, 2014 Election, http://www.ncsbe.gov/webapps/ os_sites/OSVotingSiteList.aspx?County=WAKE&Election=11/04/2014 (last visited Aug. 5, 2014).

they were to cut existing Sunday hours or voting sites. Plaintiffs' request asks the court to assume that some counties will obtain waivers for the general election as they did for the primary elections, but there is no indication they will and such speculation would be inconsistent with the Supreme Court's direction that a preliminary injunction should not be granted "based on only a possibility of irreparable harm." Winter, 555 U.S. at 22. Because Plaintiffs have the burden to make a clear showing of that irreparable harm is *likely*, the court must assume that counties will comply with the law until it is shown that they will not.[70] Plaintiffs have not shown that any fewer Sunday hours will be offered this year than in the 2010 general election.[71]

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[70] In fact, Michael Dickerson, chair of the Mecklenburg County Board of Elections, testified that his county would be able to meet the aggregate-hours requirement by opening up more early-voting sites. (Doc. 160-2 at 7-10.) He stated that he expected the Mecklenburg CBOE would open five additional sites as compared to November 2010. (Id. at 10.)

[71] Plaintiffs also contend that SL 2013-381's removal of one possible Saturday for early voting and mandate that early-voting sites on the final Saturday before Election Day close at 1:00 p.m. will cause them harm. But the reality of what counties actually offered in 2010 belies this contention. Only eight of the State's 100 counties exercised their discretion to keep a voting site open after 1:00 p.m. on the final Saturday of early voting in 2010. (Doc. 126-4 at 45-90.) None of these counties was among the State's most populous; Harnett County, the State's 24th most populous county, is the largest that made the choice to remain open past 1:00 p.m. in 2010. (Id. at 62.) Only three of the eight counties to stay open past 1:00 p.m. had at least one site open until 5:00 p.m. on the last Saturday. (Id. at 51, 65-66, 69.) In 2010, Harnett County had three sites open on the final Saturday from 8:00 a.m. through

Plaintiffs' witnesses opined that the loss of one week of early voting will hamper GOTV efforts and thus depress black turnout. (Doc. 164 at 74-76 (testimony of Melvin F. Montford); Doc. 165 at 95-97 (testimony of Rev. Jimmy Hawkins).) But no witness testified that he or she will not be able adjust operations readily to fit the new early-voting period. Cf. Brown, 895 F. Supp. 2d at 1253-54 (citing Florida, 885 F. Supp. 2d at 336) (finding that, despite testimony suggesting a two-week period was

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3:00 p.m., and in 2014 it will have four sites open from 6:30 a.m. through 1:00 p.m., accounting for an increase of five aggregate final Saturday hours. See N.C. State Bd. of Elections, N.C. One-Stop Voting Site Results – November 4, 2014 Election http://www.ncsbe.gov/webapps/os_sites/OSVotingSiteList.aspx? County=HARNETT&Election=11/04/2014 (last visited Aug. 5, 2014). This surely cannot constitute irreparable harm.

In addition, only 14 counties offered any voting on the first Saturday available in 2010. (Id. at 45-90.) Once again, the largest counties (Mecklenburg, Guilford, Forsyth, Wake, Durham, and Cumberland) offered no hours of early voting on the first Saturday. (Id.) The counties that chose to offer voting on the first Saturday in 2010 will have two additional Saturdays in 2014 as well as one Sunday (on which none of them previously offered voting) to make up the required hours. Voters will have no fewer than two Saturdays of early voting in counties that previously offered three Saturdays. In most counties, including the six largest, the weekend voting situation will remain unchanged from 2010. Indeed, counties may actually be compelled to add *more* weekend hours to comply with the aggregate-hours requirement. For example, Chatham County will now offer four sites with 33 aggregate hours of voting on the second Saturday before Election Day, as opposed to three sites and 15 aggregate hours in 2010. See N.C. State Bd. of Elections, N.C. One-Stop Voting Site Results – November 4, 2014 Election, http://www.ncsbe.gov/webapps/os_sites/OSVotingSiteList.aspx?County=CHATHAM&Election=11/04/2014 (last visited Aug. 5, 2014). This falls far short of the showing necessary to demonstrate irreparable harm.

essential to GOTV efforts, groups would be able to adjust to a new distribution of hours over fewer days). In fact, one witness testified that even 17 days was not sufficient for his efforts and that a whole month of early voting would be preferable. (Doc. 165 at 100.) This suggests that although GOTV operators would prefer more days of early voting, they will be able to adjust to a reduced schedule of days with more voting sites and hours. This is especially true for the purposes of irreparable harm in the lower-turnout 2014 midterm election.[72]

Finally, Plaintiffs argue that historically black voters disproportionately used the first week of early voting under the old law and that SL 2013-381 "takes that away." This is a reformulation of the same argument. The evidence shows that black voters utilized the initial days of early voting more than white voters. To say that they will no longer use the first seven days of the new ten-day period is speculative and insufficient to show irreparable harm.

On this record, Plaintiffs have failed to carry their burden to make a clear showing that they are likely to be irreparably harmed by the reduction of

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[72] The court also acknowledges that data from the May 2014 primary suggest that black turnout increased more than did white turnout when compared with the May 2010 primary. (See Doc. 126-1 ¶¶ 61-67.) Although this tends to weigh against a finding of irreparable harm, it is of limited significance because of the many noted differences between primaries and general elections.

seven possible days of early voting.[73] Thus, even assuming Plaintiffs will succeed at trial on the merits of their claims as to the early-voting changes of SL 2013-381, they have not met this important prerequisite for entry of a pretrial injunction, and their motion will be denied.

E. Voter ID "Soft Rollout"

SL 2013-381 institutes for the first time in North Carolina a requirement that a voter "present photo identification bearing any reasonable resemblance to that voter to a local election official at the voting place before voting."[74] N.C. Gen. Stat.

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[73] In assessing likelihood of success on the merits, the Brown court recognized the ameliorative effect of the increased hours significantly lessened the burden on voters. See Brown, 895 F. Supp. 2d at 1252. The court also noted that the new Florida law would actually increase weekend hours, creating a further ameliorative effect. Id. at 1253. The same analysis applies here in the context of irreparable harm for the 2014 midterm election. As discussed above, see supra nn.67, 69-71, SL 2013-381 will likely result in either no change or an increase in the total number of weekend voting hours for voters in most counties in 2014.

[74] Acceptable forms of photo identification include (1) a North Carolina driver's license; (2) a special identification card for nonoperators; (3) a United States passport; (4) a United States military identification card; (5) a Veterans Identification Card issued by the United States Department of Veterans Affairs; (6) a tribal enrollment card issued by a federally recognized tribe; (7) a tribal enrollment card issued by a tribe recognized by North Carolina, so long as it is signed by an elected official of the tribe and the requirements for obtaining it are equivalent to the requirements for obtaining a special identification card from the DMV; and (8) a driver's license or nonoperator's identification card issued by another State or the District of

§ 163-166.13(a). The new law provides three exceptions: for voters who are permitted to vote curbside under Section 163-166.9, those who have a religious objection to being photographed, and those who have been the victim of a natural disaster occurring within 60 days of Election Day. Id. § 163-166.13(a)(1)–(3). Any voter who does not comply with the ID requirement will be permitted to vote a provisional ballot, which will be counted if the voter appears at her CBOE before noon on the day prior to the convening of the election canvass and presents a form of photo ID bearing a reasonable resemblance to herself. Id. § 163-182.1A(b)(1). The voter may also choose to execute a declaration of religious objection at that time. Id. § 163-182.1A(b)(2).

If a local election official determines that a voter's photo identification "does not bear any reasonable resemblance to that voter," she must "notify the judges of election of the determination." Id. § 163-166.14(a). The judges of election then must review the photo identification and determine if it bears any reasonable resemblance to the voter. Id. § 163-166.14(b). The judges may take into account additional evidence proffered by the voter and must construe all evidence in the light most favorable to the voter. Id. Unless the judges unanimously determine that the voter's photo identification bears no reasonable resemblance to him or her, the voter will be allowed to vote. Id. § 163-166.14(c). If the judges unanimously agree that the identification is invalid, the voter will be permitted to vote a provisional ballot. Id. § 166-166.14(d).

Columbia so long as the voter registered to vote within 90 days of Election Day. Id. § 163-166.13(e)(1)–(8).

SL 2013-381 requires the State to provide a special photo identification card free of charge to any registered voter who executes a declaration "stating the registered voter is registered and does not have other photo identification acceptable under [the photo ID requirement]." Id. § 20-37.7(d)(5). The State must also provide a free photo identification card to anyone appearing before the DMV for the purpose of registering to vote who declares that she does not have an acceptable photo ID. Id. § 20-37.7(d)(6). In addition, the State may not charge the usual ten dollar fee to obtain a copy of one's birth certificate or marriage license if the registered voter declares she needs such document in order to obtain acceptable photo ID. Id. § 130A-93.1(c).

SL 2013-381's voter ID requirement does not take immediate effect. Instead, Section 6.2 of the law provides that the requirement to present valid photo ID "becomes effective January 1, 2016, and applies to primaries and elections conducted on or after that date." 2013 N.C. Sess. Law 381, § 6.2(2). Before the 2016 elections, the law provides for a "soft rollout" of the voter ID requirement, such that,

> [a]t each primary and election between May 1, 2014, and January 1, 2016, each voter presenting in person shall be notified that photo identification will be needed to vote beginning in 2016 and be asked if that voter has one of the forms of photo identification appropriate for voting. If that voter indicates he or she does not have one or more of the types of photo identification appropriate for

> voting, that voter shall be asked to sign an acknowledgment of the photo identification requirement and be given a list of types of photo identification appropriate for voting and information on how to obtain those types of photo identification.

Id. § 6.2(6).[75]

The private Plaintiffs move to enjoin the "soft rollout" on the ground that it will create confusion and long lines at polling places and increase the costs associated with voting, and because the State has not engaged in any public education campaigns

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[75] The "soft rollout" appears to be patterned after a bipartisan report drafted by former President Jimmy Carter and former Secretary of State James A. Baker, III. See Crawford, 553 U.S. at 193-94 (citing Comm'n on Federal Election Reform, Building Confidence in U.S. Elections (2005)). That report recommended that States adopt a photo ID requirement for voting if it is "'phased in' over two federal election cycles, to ease the transition." Id. at 238 (Breyer, J., dissenting). In fact, Justice Breyer based his objection to the Indiana voter ID law in part on the fact that Indiana failed to follow this recommendation. Id. He also objected to what he saw as Indiana's failure to abide by the Carter-Baker report's other condition - that IDs "be easily available and issued free of charge." Id. at 238-39. As noted infra, SL 2013-381 purports to alleviate the cost of obtaining an ID for those who need to obtain one. Compare N.C. Gen. Stat. § 130A-93.1(c) (waiving the usual ten dollar fee for obtaining a birth certificate or marriage license if a voter declares she needs such a document in order to vote), with Crawford, 553 U.S. at 239 (noting that those needing a birth certificate in Indiana would still have to pay the State's usual 12 dollar fee, and the indigency exception required voters to travel to the county clerk's office after each election to sign an affidavit).

or properly trained poll workers to handle the rollout. While Plaintiffs urge they are likely to succeed on the merits of their claims that the voter ID requirement violates Section 2 and the Constitution, the court need not reach that issue at this time.[76] Plaintiffs have not made a clear showing that SL 2013-381's notice provisions for the implementation of the requirement, which does not become effective until 2016, will cause irreparable harm in the upcoming November 2014 general election.

Plaintiffs rely on the declarations of a husband and wife in Pitt County who state they were improperly advised they needed a photo ID in order to vote in the May 2014 primary (but were able to vote).[77] (J.A. at 2821-27.) Plaintiffs argue the State's failure to allocate funds to educate poll workers on the nature of the soft rollout suggests that voters are likely to be denied the right to vote due to confusion created by the effective date of the new law. But this limited evidence fails to show a

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[76] Defendants argue that the requirement serves important State interests and is constitutional, citing Crawford. See Crawford, 553 U.S. at 194-200 (plurality opinion) (noting that a properly-drafted voter ID law advances the important State interests of preventing election fraud and maintaining confidence in elections).

[77] Plaintiffs also cite the experience of a resident of Hoke County who, while unable to register during early voting in May 2014 because SDR had been eliminated, also sought to update her address but says she was not permitted to do so because she did not have a driver's license bearing an address in the county. (J.A. at 2828-30.) Her problem, however, had nothing to do with voter ID; rather, she simply failed to have a HAVA-compliant ID in order to register.

likelihood that poll workers will misinterpret the clear requirements of State law that voters are not to be turned away for failure to present an ID this fall. As the Supreme Court clarified in Winter, a plaintiff seeking preliminary relief must "demonstrate that irreparable injury is *likely* in the absence of an injunction." 555 U.S. at 22 (emphasis in original).[78] Arguments concerning longer lines are speculative; there is no showing that the "soft rollout" will cause confusion or undue lines during the November 2014 election. Indeed, the "soft rollout" occurred in the May 2014 primary, and Plaintiffs present no evidence it caused any delays. Moreover, in light of the Supreme Court's acknowledgement of the merits of adequate notice for such a requirement, see Crawford, 553 U.S. at 238 (Breyer, J., dissenting), and until the provision is declared invalid or repealed, the State has an interest in attempting to fulfill the statutory purpose of educating the electorate about it.

In conclusion, the private Plaintiffs have not shown that they are likely to suffer irreparable harm if the "soft rollout" is not enjoined before the November 2014 election. Therefore, the motions to enjoin the soft rollout will be denied.

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[78] Cf. Reed v. Chambersburg Area Sch. Dist. Found., No. 1:13-cv-00644, 2014 WL 1028405, at *16 (M.D. Pa. Mar. 17, 2014) (finding that plaintiff pointed only to speculative harm and demonstrated "no clear factual basis to conclude that further disparaging remarks are imminent"); Oneida Nation of N.Y. v. Cuomo, 645 F.3d 154, 173 n.20 (2d Cir. 2011) (finding that plaintiffs' concern over one scenario that might arise upon implementation of tax law was insufficient to support preliminary injunction).

F. Elimination of Pre-registration

SL 2013-381 ends the practice of "pre-registering" 16- and 17-year-olds who would not be 18 before the next general election, which had begun in 2009. 2013 N.C. Sess. Law 381, § 12.1. Prior to enactment, N.C. Gen. Stat. § 163-82.1(d) provided "[a] person who is at least 16 years of age but will not be 18 years of age by the date of the next election and who is otherwise qualified to register may preregister to vote and shall be automatically registered upon reaching the age of eligibility following verification of the person's qualifications and address in accordance with [Section] 163-82.7." 2009 N.C. Sess. Laws 541, § 7(a). After the passage of SL 2013-381, voter registration application forms in North Carolina now ask only one question regarding the applicant's age: "Will you be 18 years of age on or before election day?" N.C. Gen. Stat. § 163-82.4(d)(2)(a). Thus, those who are 17 but will be 18 before Election Day still may register to vote in that election under SL 2013-381.

The NAACP Plaintiffs and Intervenors move to enjoin SL 2013-381's elimination of pre-registration of 16- and 17-year-olds. As discussed above, Intervenors claim injury not because the repeal of pre-registration will infringe *their* right to vote (as they are all over 18 years of age) or any *16- or 17-year-olds'* right to vote, but because the statute will make it harder for Intervenors to conduct voter-registration drives targeting young people. (See, e.g., Doc. 63 in case 1:13CV660 ¶ 88.) The difficulty posed to Intervenors on the present motions is demonstrating that, even assuming they could

succeed on the merits, they will be irreparably harmed before trial absent an injunction. The NAACP Plaintiffs, however, appear to assert direct claims on behalf of their 16- or 17-year-old members. (Doc. 52 in case 1:13CV658 ¶ 93.)

To be sure, assuming the direct right of 16- or 17-year-olds to vote is at issue in these cases, an injunction would not protect any young person's right to vote during the November 2014 general election. No present 16-year-old would be eligible to vote this fall, and any 17-year-old who will be 18 by Election Day has been able to register for some time even under SL 2013-381. Although Plaintiffs have presented evidence that the DMV refused to register people who were under 18 for some time after the passage of SL 2013-381 (Plaintiffs' Hearing Exhs. 220-23), SBOE Director Strach testified that this problem has been corrected and the DMV is now sending all voter registration applications for 17-year-olds directly to the SBOE. (Doc. 161-9 at 93-95, 99.) While individuals who turned 17 between September 1 and November 4 of 2013 would have suffered some harm in the sense that they "lost" two months of possible registration time, and individuals who were turned away by the DMV undoubtedly suffered harm at that time, a preliminary injunction at this time would do nothing for either of these groups.

It is also clear that SL 2013-381's elimination of pre-registration will not irreparably harm Plaintiffs' or Intervenors' ability to engage in pre-registration efforts for 16- and 17-year-olds. "'I]rreparable harm, as the name suggests, is harm

that cannot be undone.' In other words, easily reversed harm cannot be considered irreparable." Kobach v. U.S. Election Assistance Comm'n, No. 13-cv-4095, 2014 WL 1806703, at *2 (D. Kan. May 7, 2014) (footnote omitted) (quoting Salt Lake Tribune Publ'g Co., LLC v. AT&T Corp., 320 F.3d 1081, 1105 (10th Cir. 2003)). For those 16- and 17-year-olds who are not eligible to vote in the upcoming November 2014 general election, an injunction would be ineffective. Plaintiffs and Intervenors will have an opportunity to register them after trial, should they be successful. For those 17-year-olds who are eligible to vote this fall, Plaintiffs and Intervenors can assist them in registering under current law. Indeed, under current law Plaintiffs may continue to conduct registration activities in high schools and other locations, targeting those who will be 18 years-old before the next general election. SL 2013-381 does not even prohibit them from collecting registration forms and forwarding them to the boards of elections at the appropriate time. The law only provides that the State will not process for registration anyone who will not be 18 years old before the next general election.

Thus, because the NAACP Plaintiffs and Intervenors have failed to demonstrate how they will suffer irreparable harm absent an injunction, their motion to enjoin the elimination of pre-registration pending trial will be denied.

G. Increased Poll Observers/Poll Challenges and Elimination of Discretion to Keep the Polls Open

North Carolina law permits the chair of each political party in every county to "designate two observers to attend each voting place at each primary and election." N.C. Gen. Stat. § 163-45(a). SL 2013-381 allows the chair of each county party to "designate 10 additional at-large observers who are residents of that county who may attend any voting place in that county." 2013 N.C. Sess. Law 381, § 11.1 (codified at N.C. Gen. Stat. § 163-45(a)). "Not more than two observers from the same political party shall be permitted in the voting enclosure at any time, except that in addition one of the at-large observers from each party may also be in the voting enclosure." Id. The list of at-large observers must be "provided by the county director of elections to the chief judge [for each affected precinct]." Id. (codified at § 163-45(b)). In conjunction with the addition of at-large observers, the law now permits any registered voter in the county, rather than in the precinct, to exercise the right to challenge a ballot on Election Day. Id. § 20.2 (codified at N.C. Gen. Stat. § 163-87)). During early voting, any resident of the State may now file a challenge. Id. § 20.1 (codified at N.C. Gen. Stat. § 163-84)).

Under North Carolina law, the polls on Election Day are to remain open from 6:30 a.m. until 7:30 p.m. N.C. Gen. Stat. § 163-166.01. Beginning in 2001, each CBOE had the power to "direct that the polls remain open until 8:30 p.m." in "extraordinary circumstances." 2001 N.C. Sess. Laws 460, § 3

(codified at N.C. Gen. Stat. § 163-166 (2002)). SL 2013-381 eliminates the discretion of the CBOEs by deleting the "extraordinary circumstances" clause. 2013 N.C. Sess. Law 381, § 33.1. The law now provides:

> If the polls are delayed in opening for more than 15 minutes, or are interrupted for more than 15 minutes after opening, the [SBOE] may extend the closing time by an equal number of minutes. As authorized by law, the [SBOE] shall be available either in person or by teleconference on the day of election to approve any such extension.

N.C. Gen. Stat. § 163-166.01. The law thus vests discretion in the SBOE to the exclusion of the CBOEs and conditions the exercise of discretion on a delay of 15 minutes or longer.

The private Plaintiffs move to preliminarily enjoin these two provisions from going into effect during the November 2014 general election. With respect to the discretion to keep the polls open, Plaintiffs bring claims of racially discriminatory intent, undue burden under the Anderson-Burdick framework, and intent to discriminate against young voters in violation of the Twenty-Sixth Amendment. As to the poll observers and challenges, Plaintiffs bring all claims except a Twenty-Sixth Amendment challenge. The court need not determine at this stage whether Plaintiffs are likely to succeed on the merits on these claims because Plaintiffs have failed

to demonstrate that they will suffer irreparable harm this November if these provisions are not enjoined. Therefore, the motions for a preliminary injunction as to these provisions will be denied.

As noted, African-American voters in North Carolina and elsewhere have good reason to be concerned about intimidation and other threats to their voting rights. Any intimidation is unlawful and cannot be tolerated, and courts must be vigilant to ensure that such conduct is rooted out where it may appear. Several witnesses testified to recalling personal experiences in their lifetimes when intimidation based on race occurred, or worse, was condoned.

However, Plaintiffs' legitimate concerns do not support a conclusion that the potential for additional poll observers and challengers renders any intimidation likely under the facts presented to the court. The law provides that "[a]n observer shall do no electioneering at the voting place, and shall in no manner impede the voting process or interfere or communicate with or observe any voter in casting a ballot," unless the chief judge of elections permits the observer to make observations and take notes. N.C. Gen. Stat. § 163-45(c). Plaintiffs have provided no basis to suggest that poll observers or any challenger(s) will abuse their statutory power.[79]

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[79] Senator Blue testified that a concern was that black voters may be intimidated by the presence of a white observer who does not look familiar to them and that bringing in people from outside the precinct may create an intimidating environment. (Doc. 164 at 109-11.) But as he stated, individuals have a First Amendment right to stand outside the polling place in this manner, and SL 2013-381 does not address this. (Id. at 108.)

With respect to the discretion to keep the polls open, it is unclear how the elimination of the "extraordinary circumstances" clause will cause irreparable harm. This is especially true because the SBOE retains the ability to make up significant losses in time by ordering the polls to remain open in the event of a delay.[80] N.C. Gen. Stat. § 163-166.01.

On these provisions, Plaintiffs fall short of the showing necessary to establish irreparable harm. Therefore, the motion to preliminarily enjoin the poll observers and discretion provisions will be denied.

IV. MOTION FOR JUDGMENT ON THE PLEADINGS

A. Standard of Review

Defendants move for judgment on the pleadings on all claims pursuant to Federal Rule of Civil Procedure 12(c). The standard of review governing motions for judgment on the pleadings is the same as that employed on motions to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). Drager v. PLIVA USA, Inc., 741 F.3d 470, 474 (4th Cir. 2014). "[A] complaint must contain sufficient factual matter . . . to 'state a claim

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Moreover, the intimidation he was most concerned with, he said, occurs outside the polling place, not inside the restricted area where observers from both parties would be present under SL 2013-381. (Id. at 136-37.)

[80] Director Bartlett testified that any concern he had about the removal of discretion from the CBOEs would be addressed as long as the SBOE could keep the polls open in the event of a delay. (Doc. 160-3 at 151.)

to relief that is plausible on its face.'" Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007)). A claim is plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id. (citing Twombly, 550 U.S. at 556). "A Rule 12(c) motion tests only the sufficiency of the complaint and does not resolve the merits of the plaintiff's claims or any disputes of fact." Drager, 741 F.3d at 474 (citing Butler v. United States, 702 F.3d 749, 752 (4th Cir. 2012)). It is important to emphasize that the fact-based discussion necessitated by the voluminous preliminary injunction record is not at issue in consideration of Defendants' Rule 12(c) motion.

B. Analysis

1. Voter ID

With respect to the voter ID provision, Defendants contend that Crawford is controlling precedent and requires dismissal of the private Plaintiffs' Anderson-Burdick claims. But Crawford turned on the specific facts relevant in the context of Indiana's voter ID law and recognized that the determination of whether such a law satisfies the Constitution is factually intensive. See Crawford, 553 U.S. at 191-203 (plurality opinion). Plaintiffs here have alleged that approximately 5% of the voting-age population of North Carolina lacks valid ID, that it would be a significant burden for many voters to obtain such ID, and that the State has minimal evidence of voter fraud. (Doc. 1 in case

1:13CV861 ¶¶ 49-50, 76; Doc. 52 in case 1:13CV658 ¶¶ 71-72, 81, 83.) Such allegations are sufficient to make a claim under Anderson-Burdick at least plausible. See Veasey, 2014 WL 3002413, at *14-18; Frank, 2014 WL 1775432, at *3-18.

Plaintiffs have also alleged that blacks disproportionally lack IDs and that their socioeconomic conditions interact with the ID requirement to create an inequality of opportunity to vote. (See, e.g., Doc. 1 in case 1:13CV861 ¶¶ 14-17, 74-75.) Such facts state a plausible Section 2 results claim that depends on the facts adduced at trial. Finally, Plaintiffs have plausibly alleged that the General Assembly was motivated by discriminatory intent when it passed SL 2013-381, and the voter ID provision particularly. (See, e.g., id. ¶¶ 81-89, 92.) Thus, they have stated claims under both Section 2 and the Fourteenth and Fifteenth Amendments.

As to the Twenty-Sixth Amendment claim, the court will exercise its discretion under Federal Rule of Civil Procedure 12(i) to defer a ruling until trial. See Design Res., Inc. v. Leather Indus. of Am., 900 F. Supp. 2d 612, 621 (M.D.N.C. 2012). Not only would it assist the court to have a more developed factual record, but, as recognized above, Intervenors raise a novel claim. The court need not decide the proper framework to apply at this early stage, especially considering that if the other Plaintiffs are ultimately successful, such a claim will not have to be adjudicated. Thus, rather than to wrestle with a matter of first impression, the court will defer any ruling on Intervenors' Twenty-Sixth Amendment voter ID claim to trial.

2. SDR, out-of-precinct, and early voting

Plaintiffs have also pleaded plausible claims with respect to SDR, out-of-precinct voting, and early voting. Although the court determined that Section 2, Fourteenth and Fifteenth Amendment challenges to the SDR and out-of-precinct provisions were unlikely to succeed on the merits, the inquiry here is a lesser standard. Plaintiffs have *pleaded* adequate factual matter to make these claims plausible. (See, e.g., Doc. 1 in case 1:13CV861 ¶¶ 14-22, 27-34, 37-38, 41-42, 69-73.) Section 2 results claims require a fact-sensitive inquiry in order to determine whether the challenged provisions interact with current and historical conditions to produce an inequality of opportunity for black voters. While the court concludes that Plaintiffs have not demonstrated a likelihood of success on the merits on this record, their claims are not barred as matter of law. Cf. Salas v. Sw. Texas Jr. Coll. Dist., 964 F.2d 1542, 1551 (5th Cir. 1992) (holding that no *per se* rule prevents a protected class constituting a majority of registered voters in a jurisdiction from bringing a vote dilution claim under Section 2). Plaintiffs have also sufficiently alleged discriminatory intent under the Arlington Heights standard (e.g., Doc. 1 in case 1:13CV861 ¶¶ 81-89, 92), although the court is not persuaded that the preliminary injunction record establishes a likelihood of success on the merits with respect to SDR and out-of-precinct voting. Similar to Section 2, Anderson-Burdick claims are fact intensive and the private Plaintiffs have sufficiently alleged an impermissible burden on the right to vote of voters

generally. For the same reasons stated above, the court will defer any ruling on Intervenors' Twenty-Sixth Amendment claims under Rule 12(i).

3. Other provisions

With respect to the other provisions, it is clear to the court that the private Plaintiffs' and Intervenors' claims "can be adjudicated more accurately after the parties have developed the factual record." Design Res., 900 F. Supp. 2d at 621 (quoting Flue-Cured Tobacco Co-op Stabilization Corp. v. EPA, 857 F. Supp. 1137, 1145 (M.D.N.C. 1994)). Very little of the parties' arguments and evidence have been devoted toward certain challenged provisions, such as the increased numbers of poll observers and eligible challengers and the elimination of CBOE discretion to keep the polls open for an additional hour. The court would benefit from additional factual development in these areas and is reluctant to rule on the face of the complaint, especially when challenges to so many provisions are already proceeding. Although more arguments were directed toward the elimination of pre-registration, the court would also benefit from further development of the record and argument in this area.

Therefore, the court finds that Plaintiffs have stated plausible claims under Section 2 and the Fourteenth and Fifteenth Amendments (both discriminatory intent and Anderson-Burdick) regarding voter ID, SDR, out-of-precinct voting, and early voting. The remainder of the claims by Plaintiffs and Intervenors will be deferred under

Rule 12(i). Defendants' Rule 12(c) motion will therefore be denied in its entirety.[81]

V. UNITED STATES' REQUEST FOR FEDERAL OBSERVERS

The United States also seeks the appointment of federal observers "to monitor future elections in North Carolina, including the November 2014 general election," pursuant to Section 3 of the VRA. (Doc. 97 at 76.) Section 3(a) authorizes the court to appoint such monitors if it determines that doing so is "necessary to enforce [the] voting guarantees" of the VRA and the Fourteenth and Fifteenth Amendments. 42 U.S.C. § 1973a(a). According to the United States, the adoption of SL 2013-381 "creates needless obstacles to minority voters' ability to cast a ballot," and thus federal observers from the Government's Office of Personnel Management will "provide a safeguard against additional violations of the Voting Rights Act," "provide reassurance to minority voters," and provide a "calming effect" in light of the law's provisions that "expand[] the ability of partisan groups to send monitors to the polls and to challenge voters." (Doc. 97 at 76.)

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[81] Defendants' brief in support of its Rule 12(c) motion indicates that certain claims were made in Intervenors' complaint against several CBOEs that are not defendants in these cases, as well as the Chairman of the Pasquotank County Republican Party. (Doc. 95 at 13.) However, these factual allegations are not additional *claims* made by Intervenors, but merely factual allegations Intervenors contend support their claims against the named Defendants. Thus, because there are no claims to dismiss, the motion is denied on this basis as well.

The United States' request is premised on its only claim in the case - violation of the Section 2 of the VRA. As noted above, however, the United States demonstrated neither irreparable harm nor, where addressed, a likelihood of success on its claims. The United States has also not demonstrated that any of the changes implemented by SL 2013-381 will render federal observers necessary for the November general election. For example, neither the elimination (or return, if it had been ordered) of SDR, nor the reduction of seven days of early voting, nor the prohibition on counting out-of-precinct provisional ballots has been shown likely to create the kind of problem at the polls that observers can monitor to ensure compliance. Cf. Berks Cnty., 250 F. Supp. 2d at 543 (appointing federal examiner to oversee defendant's compliance with court order requiring Spanish ballots). Similarly, and as explained previously, to conclude that potential poll monitors or challengers under SL 2013-381 will somehow act unlawfully would be speculative. Indeed, the State's experience during the May 2014 primary, where black turnout *increased* without serious incident, suggests otherwise.[82]

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[82] Although not argued by the United States, the court notes the isolated experience of a husband and wife in Pitt County who were asked for a photo ID (and were able to vote) and a resident of Hoke County who tried unsuccessfully to register during early voting but did not have a driver's license bearing an address in the county. (J.A. at 2821-30.) These fail to rise to a showing of necessity. See 42 U.S.C. § 1973a(a) (providing that the court need not authorize the appointment of observers if any incidents of denial or abridgement were few in number, corrected promptly and effectively, lack a continuing effect, and lack a reasonable probability of recurrence).

Consequently, the United States' request for federal observers prior to trial will be denied. Coleman v. Bd. of Educ., 990 F. Supp. 221, 233 (S.D.N.Y. 1997) (declining to appoint federal observers because showing was insufficient).

VI. CONCLUSION

For the reasons stated, the court finds that Plaintiffs have stated plausible claims that should not be dismissed at this stage. Defendants' motion for judgment on the pleadings will therefore be denied. However, based on a careful review of the extensive record submitted by the parties and the applicable law, the court finds that at this stage of the proceedings Plaintiffs and Intervenors have failed to demonstrate a likelihood of success on their claims that SL 2013-381's changes as to same-day registration and out-of-precinct provisional voting were implemented with intent to deny or abridge the right to vote of African-American North Carolinians or otherwise violate Section 2 of the VRA or the Constitution. Further, even if the court assumes, without deciding, that Plaintiffs and Intervenors can demonstrate a likelihood of success on their legal challenges to the remaining provisions of SL 2013-381, they have not made a clear showing that they will nevertheless suffer *irreparable* harm if the court does not enjoin the law before a trial on the merits can be held. The only election slated before trial is the November 2014 general election. As to SL 2013-381's reduction of early-voting days from 17 to ten, the parties acknowledge, and history demonstrates, that turnout for the fall election will likely be significantly lower than that in presidential years.

The evidence presented, in light of the law's requirements for counties to provide the same number of aggregate voting hours as in the comparable previous election under prior law, fails to demonstrate that it is likely the State will have inadequate polling resources available to accommodate all voters for this election. The court expresses no view as to the effect of the reduction in early voting on other elections. As to the voter ID provisions, Plaintiffs only challenged the "soft rollout," which the court does not find will likely cause irreparable harm, and not the photo ID requirement, as to which the court also expresses no view. In the absence of the clear showing for preliminary relief required by the law, it is inappropriate for a federal court to enjoin a State law passed by duly-elected representatives.

IT IS THEREFORE ORDERED that Defendants' motions for judgment on the pleadings (Doc. 94 in case 1:13CV861, Doc. 106 in case 1:13CV658, and Doc. 110 in case 1:13CV660) are DENIED.

IT IS FURTHER ORDERED that Plaintiffs' and Intervenors' motions for a preliminary injunction (Docs. 96 & 98 in case 1:13CV861; Docs. 108 & 110 in case 1:13CV658; and Docs. 112 & 114 in case 1:13CV660) are DENIED.

IT IS FURTHER ORDERED that Plaintiffs' motions to strike Defendants' experts (Docs. 146, 148, & 150 in case 1:13CV861; Docs. 156, 158, & 160 in case 1:13CV658; and Docs. 157, 159, & 161 in case 1:13CV660) are DENIED AS MOOT.

/s/ Thomas D. Schroeder
United States District Judge

August 8, 2014

[ENTERED OCOTBER 3, 2014]

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

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

Plaintiffs,

v. 1:13CV658

PATRICK LLOYD MCCRORY, in his Official capacity as Governor of North Carolina, KIM WESTBROOK STRACH, in her official capacity As Executive Director of the North Carolina State Board of Elections, RHONDA K. AMOROSO, in her official capacity as Secretary of the North Carolina State Board of Elections, JOSHUA D. MALCOLM, in his official Capacity as a member of the North

Carolina State Board of Elections,
PAUL J. FOLEY, in his official
Capacity as a member of the North
Carolina State Board of Elections
and MAJA KRICKER, in her official
capacity as a member of the North
Carolina State Board of Elections,

Defendants.

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

Plaintiffs,

and

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

Plaintiff-Intervenors,

v. 1:13CV660

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

Defendants.

UNITED STATES OF AMERICA,

Plaintiff, 1:13CV861

THE STATE OF NORTH CAROLINA, THE NORTH CAROLINA STATE BOARD OF ELECTIONS; and KIM W. STRACH, in her official capacity as Executive Director of the North Carolina State Board of Elections,

Defendants.

ORDER OF PRELIMINARY INJUNCTION

On August 8, 2014, this court issued its Memorandum Opinion and Order, denying a preliminary injunction requested by Plaintiffs in the above-captioned cases. (Doc. 184 in case 1:13cv658; Doc. 182 in case 1:13cv660; Doc. 171 in case 1:13cv861.) Plaintiffs appealed this decision to the Court of Appeals for the Fourth Circuit, which issued a split decision on October 1, 2014, that affirmed this court's judgment in part and reversed in part. See League of Women Voters v. North Carolina, Nos. 14-1845, 14-1856, 14-1859, 2014 WL 4852113 (4th Cir. Oct. 1, 2014). The court of appeals remanded the case with instructions to this court to issue a preliminary injunction against the Defendants from enforcing two components of the voting law in question – North Carolina Session Law 2013-381 (referred to by the court of appeals as "HB 589," its earlier House Bill designation) – "as swiftly as possible." Id. at *21. On October 2, 2014, Defendants filed a motion with the Fourth Circuit for a recall and stay of that court's mandate pending the filing and disposition of a petition for a writ of certiorari with the Supreme Court of the United States. The filing of the motion to stay had the effect of staying the mandate during the pendency of the motion. Fed. R. App. P. 41(d)(1). Later that day, the Fourth Circuit denied the motion, with a dissent, which had the effect of lifting the stay of the mandate.

Late on October 2, 2014, Defendants filed an Emergency Application for Recall and Stay of Mandate with the Chief Justice of the United States Supreme Court as Circuit Justice for the Fourth Circuit. The Court has directed Plaintiffs to file a response by 5:00 p.m. Sunday October 5, 2014.

No party has indicated to this court that the filing of the emergency application with the Supreme Court acts as a further stay of the mandate and the court of appeals' direction to act "as swiftly as possible," and this court is unaware of any authority that it does.

Therefore, in accordance with, and at the direction of, the majority opinion of the court of appeals and the mandate issued thereupon, the court's Memorandum Opinion and Order denying the injunction request of Plaintiffs (Doc. 184 in case 1:13cv658; Doc. 182 in case 1:13cv660; Doc. 171 in case 1:13cv861) is modified such that

IT IS ORDERED that Defendants in the above-captioned cases, their officers, agents, servants, employees, and attorneys, as well as any other person acting in active concert or participation with the Defendants are PRELIMINARILY ENJOINED as follows:

> • Part 16: House Bill 589's elimination of Same Day Voter Registration, previously codified at G.S. 163-82.6A, is enjoined, with the provisions in effect prior to House Bill 589's enactment in

full force pending the conclusion of a full hearing on the merits;

• Part 49: House Bill 589's elimination of Voting in Incorrect Precinct, previously codified at G.S. 163-55, is enjoined, with the provisions in effect prior to House Bill 589's enactment in full force pending the conclusion of a full hearing on the merits.

League of Women Voters, 2014 WL 4852113, at *21.

IT IS FURTHER ORDERED that the parties appear before the court on Tuesday October 7, 2014, at 3:00 p.m. in Winston-Salem, Courtroom # 2 for a status conference to address how Defendants intend to comply with this Order.

/s/ Thomas D. Schroeder
United States District Judge

October 3, 2014

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household that shows that there is one person that needs a ride to the polls. When we get there, there might be some children that just turned 18, or there might be some other folks there. So if they are not registered, and we can actually take all of them to the polls, those that are not registered can actually register and vote at the same time. We are going to lose some voters because of that.

Q So why would you say the same-day registration was so important in the communities that you Serve specifically?

A Well, it's going to eliminate the number of people that actually -- that we can even actually register to vote.

Q And how will it affect APRI's operations to no longer be able to use same-day registration or have the communities you serve lose same-day registration?

A Goodness, ask me that again.

Q How will it affect APRI' s services to lose same—day registration?

A We won't be able to get as much people out to vote, because our mission is to encourage more political activity on the local, national, and state level; and without that, we won't be able to be as effective.

Q Mr. Montford, are you aware of the change brought about by HB589 to out-of-precinct balloting?

A Yes.

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Q And can you tell us what out-of-precinct provisional

balloting is?

A That means, to us, if you vote early, if you go to vote and you happen to be in the wrong precinct, that it's not going to count. It just won't count.

Q Have you in your pers0nal experience with APRI seen voters or spoken to voters who have used out-of-precinct balloting?

A Yes, yes, I have.

Q Under what circumstances?

A Well, it's -- again, when we go to a person's house and they might have somebody else over there that they don't live in that precinct but they want to vote also, with the new rule, they won't be able to. There are situations where if -- we run the sounds trucks on Election Day.

Q What's that?

A The sound trucks, where we go out in the neighborhood and we have music and we ask people

to go out and vote. Sometimes we'll pick up people that are not really in their precinct. Under the old rules, those people could still vote. Under the new rules, they won't be able to. We are afraid that if that person -- if we are actually working in Raleigh and that person actually is registered in Cary or Apex, and they might be working in an area that we are in, then we can't take them over there, and they probably won't vote.

Q And in the communities that you work in, do people have

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moments ago, I think you said that the post-HB589 laws will burden African American voters disproportionately; is that right?

A That's correct, yes.

Q What did you mean by "burden"?

A When I think of burdens, I think in two frame -- using two framing devices. The first is with respect to cost, and I think this is the traditional way that political scientists, the election community have considered matters of election law over many, many years, the idea being that voting is a costly act. In order for people to vote, they need to pay either literal money costs or costs in terms of time and attention, costs in terms of mental capacity in order to vote -- actually in order to register and then to vote.

Alot of attention has been paid on both the reform side and the academic side over at least the last half century, if not longer, in understanding those costs within political science and within activism and legislation, by and large, lowering those costs so that more people can register and more people can vote.

And so within that framing, anything -- it is possible to raise or lower costs; and when costs are raised for voters, that is a burden. So that is one of way of thinking about costs. I would say that's the traditional way of thinking about burdens, at least within political science.

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Recross by Mr. Farr -- Gary Bartlett 196

Q What did you conclude about the lack of same-day registration in the post-HB589 regime?

A There are two things, and the first thing is the empirical finding, which is that African Americans were disproportionately likely to utilize the same-day registration provisions before the passage of HB589 and, therefore, taking away or abolishing this provision would disproportionately affect African Americans.

It's also the case that -- well, yes, so it would empirically more likely affect African Americans. Also, understanding within political science, that people who register to vote the closer and closer one gets to Election Day tend to be less sophisticated voters, tend to be less educated voters, tend to be voters who are less attuned to public affairs. That

also tells me from the literature of political science that there are likely to be people who will end up not registering and not voting. People who correspond to those factors tend to be African Americans, and, therefore, that's another vehicle through which African Americans would be disproportionately affected by this law.

Q And in addition to the likelihood that some individuals, African Americans, won't register, is it also the case that fewer African Americans will be likely to vote?

A Yes, it is, and there is a couple of ways of seeing this. First of all, given the nature of the law itself, which ties

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Direct by Mr. Cooper -- Dr. Stewart 20

part, the B part, talks about out-of-precinct provisional ballots, and it documents how African Americans use out-of-precinct provisional ballots at a ratio of between two-and three-to-one compared to whites.

Q Dr. Stewart, does the lack of same-day registration have any relationship to the availability of out-of-precinct voting?

A Well, yes. So same-day registration, as I think I actually -- as I talked about earlier, same-day registration is an opportunity for a voter to -- there is a couple of things. Actually, let me start again.

The important thing about same-day registration is it happens within the window of early voting; and so when a voter uses the same-day registration provisions, they are within actually kind of an official setting where they can deal with registration issues and, in fact, may even change registration, if they've moved, those sorts of things, which they're obviously not able to do if they are voting in precinct on Election Day.

So out-of-precinct voters, you know, are unable to deal with the registration issues that they would be able to deal with in the same-day registration setting.

Q So we've now talked about burdens imposed by each of the provisions that you considered. In your opinion, how do these burdens create an unequal opportunity to vote for black voters as compared to white voters?

Direct by Mr. Cooper -- Dr. Stewart 21

A Well, first of all, in each instance, African Americans have shown by their behavior a greater tendency to rely on each of these -- rely on each of these provisions.

In different ways, moving forward, African Americans will therefore be subjected to the burdens in different ways given the different procedures, through same-day registration, through the difficulties of less sophisticated voters to actual register and vote.

For Election Day – I'm sorry -- earlier voters, for the ability to vote in a more controlled, high-quality, administrative-quality environment, and in the case of out-of-precinct voting, to be able to vote when there is a question about whether the voter has shown up in the right place.

These are kind of connected, as I mentioned previously, connected issues, and in each case, t,hey are instances where African Americans would be disadvantaged compared to whites.

Q Okay. Before we wrap up, I would like to ask you a couple of questions about the information that you considered in reaching your conclusions. First of all, in conducting your analysis, did you use data regarding turnout rates?

A I did not. I did not analyze turnout rates in my reports.

Q And why is that?

A A couple of reasons. The primary reason is that the issue

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Cross by Mr. Farr -- Dr. Stewart 28

A I did not have all the resources of the Justice Department. I had my time and I had assistance from essentially a research assistant to help me in the data analysis.

Q And your first report was 103 pages long?

A If that's what you counted I will trust that, yes.

Q I won't get my calculator out to do that. I believe had over 100 exhibits in that first report?

A Many of which were reporting on the quality of the state files, yes.

Q And you also then did a surrebuttal report several weeks after that?

A Yes, I did.

Q And when you did that surrebuttal report, did you prepare that after you had received the reports that the defendants have filed from their experts?

A Yes, I believe I did.

Q And that was 40 or 50 pages long also, was it not?

A My surrebuttal report is -- my signature is on page 43.

Q Now, I wanted to start off just hitting on a couple of things that you've testified about in direct examination. You kept using the phrase "sophisticated voters." Do you remember that?

A Yes, sir.

Q And is it fair to say that you think sophisticated (sic)

voters are less able to understand the rules that apply when you show up to vote or register?

A Unsophisticated voters, which I took to be a shorthand, a term of art, which summarizes basically the human capital of voters, yes.

Q Right. And you are saying that unsophisticated voters have more trouble figuring out what the rules and regulations are for voting. Is that your testimony?

A People who have lower education and who have less – that pay less attention to public affairs will have greater problems figuring out how to vote, yes.

Q Okay. So your testimony is that African Americans are less sophisticated than white voters; is that right?

A My understanding is that African Americans have lower levels of education in North Carolina, and I know from the public opinion work that African Americans report that they paid less attention to public affairs on average than white voters do probably because of the differences the education.

Q Do you think they are less able to figure out what the rules are for when you have to register to vote and when you have to go vote?

A The ability to figure these things out is related to one's education. As I said, that ability -- those average abilities are due to differences in things like education.

Q Okay. So then you are saying that African American voters

have less ability to figure out what the rules are for voting?

A I said African Americans have less education, which leads to an ability to navigate the rules of the game.

Q Okay. Isn't that a racial stereotype, Dr. Stewart?

A I'm making a I am reporting on statistical findings that try to actually get beyond the racial stereotypes. Indeed, that's one of the reasons I have been giving the responses that I have been giving. I think it's the duty of the social scientist, once you find differences between whites and blacks, to understand the root of those differences, and the root of those differences, by and large, in my understanding of the literature are due to the different levels of education.

Q Did you ever take a survey -- did you ever do a survey in the case of African American voters in North Carolina to see if they were less able to understand the. rules for voting and registration?

A I have not done any survey that asks directly about understanding the rules of registering and voting.

Q Now, you talked about out-of-precincts voters?

A Yes, sir.

Q And you gave two reasons for why people wouldn't want to vote out-of-precinct, did you not?

A I gave a couple of reasons why they wouldn't, yes.

Q One of them was that they didn't know where their precinct

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Cross by Mr. Farr -- Dr. Stewart 34

MR. FARR: Yes, sir, thank you, Your Honor.

BY MR. FARR

Q All right. You looked at Dr. Trende's report prior to giving your surrebuttal, did you not?

A Yes, I did.

Q And I am looking at Exhibit 4 where Mr. Trende lists states with out-of-precinct voting. Do you see that?

A Yes, I see that.

Q And do you see where he says that Florida did not have out-of-precinct voting?

A I see that.

Q And do you see where he says that South Carolina does not have out-of-precinct voting?

A I see that.

Q And do you see where he says Virginia does not have out-of-precinct voting?

A Yes, I see that.

Q Do you have any reason to dispute Mr. Trende's analysis?

A I have no reason to dispute this.

Q All right. And you didn't dispute it in your surrebuttal report?

A I did not.

Q Okay. Let's now turn to Exhibit 5 of Mr. Trende's report.

A Okay.

Q This is the -- his assessment of the states with in-person

early voting. Do you see that?

A Yes, I do.

Q Do you see that he says that Florida had 8 days of in-person early voting in 2012?

A Yes, I see that.

Q Okay. And North Carolina has reduced its early voting to days; right?

A I am just trying to find how we alphabetized North Carolina. Yes.

If I could step back to say that, having not seen the text that this belongs to and not studied it -- you said -- you were asking about 2012. Is this for 2014 because North Carolina had more than 10 days in 2012?

Q We all know that in 2012 North Carolina had 17 days, and it's going to have 10 days in 2014.

A Correct. I just want to make sure that we are talking about--

Q Unless Mr. Donovan has his way. I understand he disagrees with me on that. So South Carolina is not listed as having early voting, is it?

A It is not listed.

Q And Virginia is listed as not having early voting; correct?

A That's correct

Cross by Mr. Farr -- Dr. Stewart 36

Q And you don't dispute that, do you?

A I don't dispute this is proper characterization of those laws.

Q Okay. Now, let's turn to Exhibit 6, and this is Mr. Trende's assessment analysis of the states that have same-day registration. Do you see that he indicates that Florida did not have same-day registration?

A I see that.

Q And you don't dispute that?

A No dispute.

Q And do you see that he indicates that South Carolina did not have same~day registration?

A I see that.

Q. And you don't dispute that?

A I do not dispute that.

Q Okay. And he indicates that Virginia does not have same-day registration?

A That is correct, and I don't dispute that.

Q And you don't dispute that, do you?

A No, I do not.

Q Now --

MR. FARR: May I approach the bench, Your Honor?

THE COURT: Yes, you may.

BY MR. FARR

Q I am handing up Exhibit. 3, a declaration of Charles

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Cross by Mr. Farr -- Dr. Stewart 41

reports that the early voting was down by 10.7 percent in 2012 as compared to 2008.

A Yes, I see that.

Q Okay. And then he reports that the voting on Election Day higher in 2012 and 2008. Do you see that?

A Can you point that out to me?

Q It is in the one, two, three -- third column.

A That seems to be total voting in Florida, not Election Day voting.

Q Right; that's what I am saying.

A Oh, I'm sorry. I misunderstood.

Q Election Day voting was up, right, on Election Day?

MR. COOPER: Objection. It's confusing.

MR. FARR

Q Do you have the exhibit in front of you?

A I have the exhibit in front of me. The column I believe you are referring to, the third over, says "Total Voting in Florida," which I take to be the total number of people voting, which would include early voting, absentee voting, and Election Day voting.

Q Okay. Great. So the total vote went up in Florida by 1 percent?

A Yes.

Q And it went down nationally minus 1.7 percent; right?

A I see that, yes.

Q And Dr. Trende reports that between 2008 and 2012 the turnout for black voters only went down 9. Do you see that? That's less than a percent.

A Yes, I see that.

Q He also reports that the white vote went down by 3.3 percent, does he not?

A I see that.

Q Okay. So regardless of whether or not they had long lines in Florida, Dr. Stewart, as far as the number of African Americans who participated in the election, your testimony in the Florida case was wrong; the turnout, as established by the election, did not. have a disparate impact on black voters?

MR. COOPER: Objection, mischaracterizes the testimony.

THE COURT: Overruled.

THE WITNESS: As I recall my earlier report, and I have not studied it in detail, I was not -- I mean, turnout is one factor, but it needs to be -- when you are making predictions about turnout, as I was mentioning during the direct, there are many factors that play into turnout, including the hotness of the election and other things.

So the -- I would approach it as a political scientist, asking, all things being equal -- in retrospect now with the data in front of us, holding everything else constant, did the law lead to lower or higher turnout? But as in terms

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Cross by Mr. Farr -- Dr. Stewart 44

Q And you didn't dispute this document during your deposition or in your surrebuttal?

A Well, I believe in the deposition I did note that Dr. Trende did not use the individual-level data here in which he would have gotten different results than using the publishedCensus Bureau data.

Q What do you mean individual-level data?

A Well, in addition to the data that are published by the Census Bureau, which Dr. Treride relies on, you can download from the Census Bureau or get from the data archives the social scientists use the actual individual answers to the survey questions, and you can calculate turnout yourself. The Census Bureau uses a nonorthodox way of calculating turnout. Political scientists would typically download the data directly, calculate these percentages directly, and so and I believe I mentioned in my depos.ition that I would have mentioned the individual-level data and the way that a political scientist would have approached this question.

Q But you did not go back and do that in your supplemental report?

A No, sir, I did not.

Q And based upon the data that Mr. Trende has cited in Hearing Exhibit 7, would you agree that the black turnout, as a percentage of their voting-age population, increased in 2008 and 2012 as compared to prior years?

A That's what these numbers say. Again, this is not how I would perform this analysis as a political scientist, but these numbers are what they are.

Q This is not how you would do it, but is it also true that the black candidate of choice in Virginia for the presidential race was President Obama?

A I believe that's true.

Q Isn't it true that President Obama carried Virginia in 2008 and 2012?

A I believe that to be true, yes.

Q And we've already agreed that Virginia does not have early voting?

A It does not have early voting.

Q And it does not have out-of-precinct voting?

A We saw that earlier, yes.

Q And it doesn't have same-day registration?

A And it doesn't have same-day registration.

MR. FARR: Your Honor, may I ask a request for a personal reason an early break?

THE COURT: A normal break?

MR. FARR: Five minutes will be fine.

THE COURT: We'll take our break a little bit early. We'll take a 15-minute break then.

(The Court recessed at 10:08 a.m.)

(The Court was called back to order at 10:24 a.m.)

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Cross by Mr. Farr -- Dr. Stewart 54

Q Right. But if someone is giving the blueberries away, that doesn't mean the person prefers the blueberries to the strawberries if they have to pay for the strawberries?

A Well, again, you don't know that until you've observed the behavior. Again, as the choice set changes, then you observe how the behavior changes.

Q Okay.

A That ends up being a different sort of analysis about basically price elasticities.

Q Now, you testified that -- counsel for the Justice Department said that you think that black voting will decrease, or something to that effect. Do you recall that?

A I don't recall that. I was not asked that. If I did say that, it was a mistake on my behalf.

Q So in your report, you have not predicted whether black registration or black voting will decrease in 2014?

A I have not made those sorts of point predictions. I have made references with respect to burdens, which sometimes will affect the tendency to register to vote and, in other cases, will affect the administrative quality of the election.

Q But you have not testified that the elimination of these practices will reduce registration or voting?

A I have not been focused -- like I said, I have noted that there will be times when people would be deterred, such as with certain circumstances with early voting, but I have not made a

point prediction that says aggregate turnout will go down, if I understand the question.

Q So, Dr. Stewart, what is the point noting your opinion that people will be deterred if you can't make a prediction on how registration or turnoub will actually decrease?

A Because, as I said, predicting registration requires a multi-various statistical analysis and consideration of all the factors that go into turnout levels. There is a large literature that I've made reference to, and it would be outside of the data in order to make point predictions about aggregate turnout levels in North Carolina moving forward.

Q It would be outside the data that you looked at?

A It would be outside I think the data and the analysis that's possible at this point.

Q Okay. Now, in making your study, you did not consider the impact of the preferences of African American voters of the President Obama campaign in North Carolina in 2008 or 2012?

A I did not. Again, I didn't study turnout, and I did not make that a centerpiece of my analysis, no, sir.

Q Okay. And, yet, earlier today didn't you say that there were a lot of issues that could affect turnout and registration particularly when there is a hot election?

A I did say there were many things that could affect aggregate levels of registration and turnout, yes, sir.

Q And, Dr. Stewart, in your deposition, didn't you testify

Cross by Mr. Farr -- Dr. Stewart 56

that you think it's possible that the black participation rate and registration and turnout could have increased in North Carolina even in the absence of same-day registration, early voting, and out-of-precinct voting?

A Well, I think the political science literature is clear that there are campaign effects that can move registration and turnout rates independent of the election laws, yes, sir.

Q You did testify that it's possible that the participation rate could have gone up in North Carolina without same-day registration, early voting, or out-af-precinct voting?

A I think that is certainly a possibility, yes, sir.

Q And you didn't study that?

A I did not study turnout rates,

Q Okay. Now, is there -- I believe in your deposition were giving me a very good explanation of a retrogression analysis, and I appreciate that.

A Excuse me? I don't think I talked about retrogression.

Q I mean regression. I get that confused just like I get doctor and mister confused. So I apologize.

So it was regression analysis that you talked about in the deposition, and we talked about that within the context of cross-state comparisons, did we not?

A I remember talking about regression a bit and what regression was. I don't recall the details of that discussion with respect to the subject matter, but there is no reason to

dispute your characterization.

Q Okay. So if you were going to try to determine whether or not there was a statistically significant relationship between early voting, same-day registration, and out-of-precinct voting, how would you do that? You explained that to me in your deposition. I would like for you to tell the judge.

A Well, in the deposition, I believe, although, you know, having not read the deposition on that point -- but the way that I would proceed to do that analysis would be to, first of all, start with individual-level data, if I could.

I mentioned earlier the data from the current population survey, the voting and registration

supplement, which is a survey that has individual survey respondent information in it, I would use that data, and I would study those individuals. There is about, let's say, 50,000 to pick an average number 50,000 observations per election. I would want to make sure I studied voters from all the states and voters across a wide variety of years, as many years as possible. With computer technologies, we could study ten elections. So we could have half a million different observations.

I would then go back and I would code the different laws that were in effect each time those respondents -- reporting their registration and voting behavior. Doing that, I would have information comparing across states at any slice in time. Some states will have certain features in law and others won't.

Cross by Mr. Farr -- Dr. Stewart 58

I would also be able to study within states. Sometimes a state will change its laws. I will have that leverage, and I would have the statistical empirical leverage of being able to study the effects of individual demographic characteristics like education and income.

Q In your deposition, didn't you tell me that you could separate states -- if you were trying to determine whether there was a statistically significant connection between -- or relationship between early voting, out-of-precinct voting, and same-day registration, you could separate the states that had those practices from the ones that did not

have those practices and then make comparisons between those two states?

A Well, I mean, that's one way -- I mean, that's a simple way of summarizing it. More precisely, I would enter in variables that would code whether states had these procedures or not in particular elections, and the regression analysis would produce an estimated probability that, holding everything else constant, someone would either register or turn out and vote as a function of having one of these laws available to them in their state.

Q So, for example, there was -- I think we'll all agree there was a high turnout amongst African Americans in the 2008 and 2012 presidential elections?

A Yes, sir.

Q So you could have compared the African American turnout in

the states without early voting, without same-day registration and without out-of-precinct voting, and you could have compared that to the states that had those practices and done a regression analysis to see if there was a statistically significant relationship between those practices and turnout?

A I mean, it's certainly possible to do that sort of analysis. It would take many months, if not years, to do that analysis properly because you would need to

code the laws of the states for each one of those years over time, and that's not an easy thing to do. You would need to acquire all the other information about other laws that you would need to acquire, but one could certainly do that, but it would be quite an undertaking.

Q Well, you could certainly get the turnout statistics for 2008 and 2012. That would be fairly easy, would it not?

A Well, you could get that, but that would not be the best way to do this analysis. You would want -- you would actually -- you would want the individual-level data for many, many years in order to control for as many compounding effects as possible.

Q Okay.

A And another reason why you want as many years as possible is that data that I use and many people use, which is the Census Bureau data, it's well known that there are different tendencies across the different states -- response in different

states to over or underreport their turnout level. So I also need this long time trend so that we can account for different state respondents' propensities to over or underreport their election behavior.

So just looking at 2008 and 2012 in this sort of analysis would be of limited value because of the nature of the data set we would be analyzing.

Q Okay. So you've been hired for seven or eight months, and you are saying you didn't: have time to do a cross-state comparison of the laws in place in states in 2008 and 2012 and the black turnout in those states in 2008 and 2012. Wouldn't that have shed some light on this issue?

A I don't believe it would have. As I testified before, I don't think turnout is the core issue; and, furthermore, I think you are underestimating the amount of time to do this sort of analysis in a way that's consistent with the principles of political science.

Q Okay. Let's go back to that for a second. In your deposition -- can you turn to page 275. Actually, we are going to start on page 274. So you will see my question there on line 18 was "Okay. So whether these practices have an impact on voter turnout in your view is not relevant?" And what was your answer?

A My answer was, "It is not relevant." Shall I continue?

Q You can if you want to.

A It's not relevant, and I -- "It's not relevant to disparate impacts as -- as understood by the social sciences."

Q Okay. So whether or not these practices that were eliminated in North Carolina are going to depress black turnout or participation is not relevant?

A It's not relevant in the time period that we are discussing, the short-term time period.

Q And you are unable to make -- give any opinion today about whether or not these practices that have been eliminated will depress registration or turnout?

A As I have given my testimony, I report in my opinions about the different mechanisms by which there could be reduced levels of registration and turnout, but I've made no point predictions about what those numbers would be.

Q Right. So you haven't predicted what the number would be -- or reasonable number would be that we could expect for depressed black registration and black turnout?

A I have not predicted aggregate turnout in the upcoming general election.

A Okay.

MR. FARR: May I approach, Your Honor?

THE COURT: Yes.

THE CLERK: Number 8.

BY MR. FARR

Q So, Dr. Stewart, I now want to talk to you about your

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Direct by Ms. O'Connor -- Dr. Burden 115

media coverage and other documents involved in this case.

Q And could you describe what analysis you used to do work that you've done here?

A So I applied a very common framework that's used in political science to understand voter participation, something known as the calculus of voting. That calculus is thought of as a formula that describes how voters make decisions about whether to participate.

The formula has three real elements. Those are represented by letters. The letter P is the probability that all voter's vote will be decisive in an election if they are the pivotal voter. B, which is multiplied times P, is the benefit that a voter sees in electing their preferred candidate, really the difference between the two candidates. Those two are multiplied, and then from that, I subtracted the

cost of voting, and the cost of voting encompassed a wide range of things, both literal and figurative. Those may be monetary costs that a person has to pay. Those could be time costs, effort spent in figuring out how to navigate the registration process and the voting process, time spent learning about the candidates, becoming vested in the campaign.

MS. O'CONNOR: At this point, Your Honor, I would like to offer Dr. Barry Burden as an expert in the analysis of election laws and administration and their effect on voter behavior.

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MR. FARR: No objection, Your Honor.

THE COURT: All right. He may gave his opinions.

BY MS. O'CONNOR

Q Okay. Dr. Burden, you mentioned your formula, the calculus of voting. Could you explain a bit more about what that means practically speaking?

A Practically in this case, it matters quite directly because it incorporates this cost term, and the costs are something that the state, in large part, controls. Those can be administrative costs. Again, it is the kind of hurdles or barriers that a person has to overcome in order to register and to vote. There are certainly other factors that affect whether a person participates in the P term and the B term. Those

vary across people and over time and across elections, but it is really the C term that is critically controlled by state law.

Q And the C term again is the costs?

A It is the cost term.

Q Could you elaborate on the cost piece? What are some of the things that are considered costs of voting?

A There are costs in terms of time and effort that a voter has to put in in order to participate. That, again, would be figuring out the administrative process of registering and deadlines of voting, of providing documentation at both of those stages. It would involve locating the polling place, getting the right paperwork, understanding who the candidates

are, becoming informed.

Q And how do those costs then relate to the behavior piece? What impact do they tend to have on voter behavior?

A It's been pretty well documented over a number of decades now in political science that increasing costs decreases participation. It is a pretty rational, straightforward explanation. When costs are less, then voters are more likely to participate because they see some of the benefits in

being involved. As costs are increased, voters are less likely to participate.

Q I think you mentioned a few of them, but, again, what are some of the things that impact the costs or change the costs for different people?

A Well, individuals vary in their ability to pay those costs. We think of voters as having resources, which may be skills or background or experience, that makes them more likely to participate. Those could be things like higher levels of formal education. We might talk more about that, but they can also include things like simply the habit of voting. A voter who has participated in multiple elections has established a behavior that becomes robust to small changes in costs. And so by voting once, you become -- it becomes more likely that you will be a voter in the future.

Q Is the socioeconomic status of a voter important to how costs will pertain to them in a given election?

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Direct by Ms. O'Connor -- Dr. Burden 120

lives. By limiting the number of days that are available, you are imposing costs.

By offering voters the ability to vote a ballot in the wrong precinct but in the right county, you are giving them an option that, again, lower the costs. If you then force those voters to travel to a different precinct, you will be increasing costs.

So many of the provisions in HB589 are about increasing costs.

Q But don't those costs apply to all voters equally?

A The law is certainly uniform in that it is a state statute that applies to all voters, but we know that the abilities of voters to pay those costs differ in systematic ways based on those demographic characteristics that separate them; and because black and Latino voters, on the one hand, and white voters, on the other, differ in such .substantial and enduring ways in all of the demographic factors that are the very ones that predict whether a person will vote, we can predict with a high level of confidence that HB589 will impose more costs, more acute costs on blacks and Latinos than on whites.

Q Putting HB589 to the side for a moment, are you familiar with any other examples of laws that, although they technically apply to all voters equally, had this different impact on the costs that were, in fact, associated for minority voters?

A Yeah, there are examples from other states where a law has

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Cross by Mr. Farr -- Dr. Burden 136

Q Have you ever -- I wanted to ask you about your testimony in the Wisconsin case. Was that a recent case in Wisconsin?

A Yes, it was decided late last year.

Q I was wondering. Did your calculus-of-voting theory come up in that case?

A Yes. I would just clarify. It is not my theory. It is a well-established model in political science that I have adopted for understanding effects of the law.

Q Okay. I want to turn to your original report, which is labeled -- or marked, I think, PX0044. Do you have that in front of you?

A Yes.

Q Now, in your report, did you make any predictions about how black turnout or registration rates would be decreased in North Carolina because of HB589?

A I did not make specific predictions about registration rates or turnout rates.

Q Okay. And did you look at any other states where there had been high black registration or high black turnout where the states did not have the practices that were eliminated by HB589?

A Maybe you could rephrase that question for me.

Q For example, let's talk about the state of Virginia. Virginia does not have early voting, out-af-precinct voting, same-day registration. Did you analyze and compare the black

turnout or registration rates in Virginia as compared to North Carolina?

A I did not compare black turnout rates across states, not Virginia and North Carolina particularly.

Q Did you do that for any state? Did you look at the turnout or registration rates for black voters in any other state besides North Carolina?

A No.

Q I am looking at page 3 of your initial report, and I just want to ask you to clarify something. At the bottom of the page, you have a statement that a study of the 2000 election showed that increasing the cost of voting by shortening polling hours and not mailing sample ballots decreased turnout by 4 percentage points among whites, 4.8 points among blacks, and 6.8 percent among Latinos. Do you see that?

A I do.

Q I didn't understand where that came from. Could you explain that to me, what that report was?

A Well, there is a footnote at the end of that sentence that cites the article that it comes from. It is Footnote 6.

Q What election was that? Was it a national election for president or an election for city council? What was that exactly?

A As the footnote says, it's an article by Wolfinger, et al., based on a national analysis. I don't remember exactly

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Cross by Mr. Farr -- Dr. Burden 139

Q And you say in your report that one factor for that was because of the Obama campaign?

A I suspect so, yes.

Q I wanted to ask you about that. Did you make any study of exactly what the Obama campaign did in North Carolina in 2008 or 2012?

A I did not make a study, but I am aware of other studies that have been done on campaign effects and of the Obama campaign in particular. I am aware of surveys that have been done of white and black voters in those two elections, and I am aware casually of media coverage of those efforts.

Q Do you know how many election offices the Obama campaign set up in North Carolina?
A I don't.

Q Do you know how much money they spent on paid workers in North Carolina in 2008 and 2012?

A No.

Q Do you know anything about what their strategy was for "Get Out the Vote" and whether they targeted early voting and same-day registration as a part of their political strategy?

A My sense is that they did.

Q Could that have had a significant impact on the participation rates by black voters in early voting and same-day registration in 2008 and 2012?

A Following the calculus of voting, absolutely. That

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Cross by Mr. Farr -- Dr. Burden 141

Those are captured in the calculus of voting but also just in our lay understanding of how elections work. There are small things like the weather. There are big things like the efforts the campaigns put in. There are factors such as the demographics of the state that feed into voter turnout. Election laws are part of that story. So I think it would be a mistake to look only at turnout rates and try to infer something about election laws based solely on those. It would

need to be a multi-variant kind of analysis that accounts for all those other factors, holding them constant, so that we can observe the effects of the laws on turnout.

Q Do you agree that what we are talking about here is an equal opportunity to vote?

A We are talking about the costs that a law imposes on voters and whether the burden is disproportionate.

Q So you don't think this case is about whether voters have an equal opportunity to vote based upon race?

A I think costs and burdens affect the opportunity to participate.

Q Okay. I will just ask this one more time. Is it not possible that the Obama campaign achieved similar turnout rates and registration rates in Virginia by employing different campaign strategies than those that they used in North Carolina to achieve high turnout rates and high registration rates?

Cross by Mr. Farr -- Dr. Burden 142

A The campaign strategies surely vary across the states. I don't know the details of what was happening on the ground in those two states. The Obama campaign surely had some impact in both states.

Q But you didn't look at that -- you didn't analyze that between North Carolina and Virginia?

A No, I was focused on the law and its effect on costs not on campaign activities.

Q Okay. I wanted to talk about the Senate factors. One of -- the Senate factors are things such as large election districts, whether there is candidate slating, anti-single-shot laws, et cetera. Those things are not present in North Carolina anymore, are they?

A Not to my knowledge.

Q And you talked about literacy tests, poll tax, and a law that changed the day of elections?

A Yes.

Q And that's never been done in North Carolina, has it?

A Yes, I documented.

Q When did that happen?

A These were efforts I described that began in the late 1800s into the early 1900s as part of the white supremacy movement. Some of those deterrent efforts stuck. Some of them were passing.

Q When was the last time North Carolina changed the day of

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elected officials they are in North Carolina today as compared to some prior date?

A Are you asking about all levels? Local officials?

Q Yes.

A I did not do that analysis.

Q Do you recall that that was something that the *Gingles* Court looked at?

A I know there are a wide variety of offices one might look at. For me, this was just illustrative.

Q Okay. And you said that there's been a higher number of African Americans elected in the last couple of years?

A Yes.

Q And did that happen after the enactment of the 2011 redistricting plans?

A Again, I didn't do a year-by-year analysis. I did track in a rough way the increase in black. .representation in the state legislature and observed that it was a recent phenomenon to have gotten to the levels it's at today.

Q Would you agree that you say in the report there are now ten African Americans members in the State Senate. Would you dispute me if I told you that was the highest number of African Americans elected to the State Senate in the history of the state?

A I don't know that I can attest to the history of the state.

Cross by Mr. Farr -- Dr. Burden 150

Q But in the last 50 years?

A It would be a high mark. I don't know that it's the highest mark.

Q And what about 22 members of the House of Representatives, would you consider that to be a high mark also?

A In the same way. I wouldn't render a firm opinion about every year of North Carolina history. I would say that blacks are achieving representation in the state legislature today in a way that they were not in recent history.

Q And you've testified that the larger number of African Americans elected to the legislature is a good thing for encouraging black registration and black turnout?

A Other political science research has shown that.

Q And you agree with that?

A I find it to be high-quality research. It is convincing.

Q Did you consider the concept of proportionality?

A Yes.

Q Proportionality in terms of the number of districts where minorities can elect a candidate of choice?

A You'll have to be more clear about that.

Q If you don't understand this, then we'll move on to something else; but under the law there is a concept of proportionality, which means that the number of districts in the state legislature where blacks have an equal opportunity to elect a candidate of their choice is proportional to their

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Cross by Mr. Farr -- Dr. Burden 158

McDonald did; right?

A It is not a report, It is a public service he provides by posting data on his website.

Q Okay. And when he -- in your paragraph on page 7, you say that for the 2012 general election he reports turnout at 64.6 percent in North Carolina and 59.7 percent in Mississippi. Do you see that?

A Yes.

Q That's overall turnout, is it not?

A Yes, sir.

Q That's not by race?

A Correct.

MR. FARR: Can I have a few minutes, Your Honor?

THE COURT: Yes.

(Defendants' counsel conferred.)

BY MR. FARR

Q I just have a couple more questions. In your report, you compare the system as it existed prior to HB589 to HB589; right?

A Yes.

Q And you have not done any sort of analysis as to how the current system will affect black voters in registration or turnout going forward?

A You are asking whether I have done an analysis of how the law after the passage of HB589 will affect black and Latino

turnout? I have not made specific predictions along those lines.

MR. FARR: No more questions, Your Honor.

THE COURT: All right. Any redirect?

MS. O'CONNOR: One moment, Your Honor.

REDIRECT EXAMINATION

BY MS. O'CONNOR

Q Dr. Burden, following up on that last question, why is that you have not made a prediction or an analysis on the expected turnout in the upcoming election resulting from the implementation of HB589?

A So I think turnout is not the right metric for judging how an election law affects voter behavior. My analysis was on the costs and burdens imposed on voters by the law. Turnout is affected both by those costs and by other factors that are beyond the control of the state, things like who the candidates are, what the issues are in the race, what groups or campaigns are doing, and the demographics of voters themselves.

MS. O'CONNOR: Thank you. That's all I have.

MR. FARR: I have a follow-up, Your Honor.

THE COURT: On that?

MR. FARR: Yes, sir.

THE COURT: All right.

RECROSS-EXAMINATION

BY MR. FARR

Q So, Dr. Burden, you say turnout -- you looked at turnout under HB589 -- under the practices prior to HB589, did you not?

A I did.

Q So turnout was an important factor for the conclusions that you have made as far as the cost of voting. So past turnout was important in your calculus of voting?

A I provided some data on turnout in recent federal elections, not precisely to show the effect of election laws in North Carolina, but to demonstrate that blacks and Latinos were not participating at the same rates as whites. Only until recent presidential elections have black turnout reached the same levels or slightly above the levels of whites, and that indicated to me that the voting habit -- a robust voting habit had not yet been established for minority voters in North Carolina and that makes them more susceptible to the changes in habit or the

disruptions imposed by the restrictions that are part of HB589.

Q So past turnout is relevant but future turnout is not relevant because you didn't look at future turnout?

A In neither case am I using or would I use voter turnout as the metric for judging the effectiveness of a set of election laws.

Q If the black turnout in both voting and registration after the implementation of HB589 was equal to or higher than the

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turnout prior to HB589, would you still say there was a claim of unfair treatment by this law?

A I am going to take us back to what Professor Stewart said this morning. A sophisticated, careful analysis of the effect of an election law, whether it be 589 Or any other set of practices, has to account for all the other factors that drive turnout.

Again, going back to the calculus of voting, some of those factors are beyond the control of the state. They are the psychological factors in a voter's mind through the efforts of campaigns or the role of the media, the attention being given to the race, demographics.

What I focused on is the cost side of that equation, and that's what is affected by HB589.

Q Okay. But nothing the state is going to do after HB589 prevents someone from registering 25 .days before an election because of race?

A That closing date of 25 days would still be in place with 589 being passed.

Q Right. And the state would not be preventing someone from registering 25 days before the election because of race?

A That's right.

Q And the state is not preventing anyone from voting during the 10-day early voting period?

A My argument is that the changes in voting by 589 imposed

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new costs by restricting paths that blacks and Latinos disproportionately use. Same-day registration, early voting, out-of-precinct voting have been shown by Professors Herron and Smith, by Professor Stewart to be disproportionately used by blacks and Latinos.

It is as if HB589 were designed in a way to curtail the very practices that blacks and Latinos are disproportionately likely to use. Because blacks and Latinos suffer from lower levels of socioeconomic

status, they lack the resources to be able to pay those costs. So my expectation that I feel confident about is that HB589 imposes disproportionate and acute costs on blacks and Latinos relative to white voters.

Q And that was a good rehash of your testimony, Dr. Burden, but my question was is there anything that the state is going to do to prevent someone from voting during the 10-day early voting period? Anybody can go vote during the 10-day early voting period because of race and nothing the state is going to do is going to stop that.

A There is nothing explicit about race in that provision; that's right.

Q And there is nothing that the state is going to do to stop someone from going to vote in the precinct they have been assigned to; that's up to the voter?

A As much as the voter is aware of that practice and what it means for them, yes.

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Q Okay. And nothing the state does prevents someone because of race from voting in no-excuse or mailing an absentee ballot?

A That's right. That provision has hardly been touched by 589.

MR. FARR: All right. Thank you.

THE COURT: All right. Doctor, I had one question. You had a chart earlier, and you showed us the numbers for graduation rates. I think education, if I am not mistaken, was broken down into two things, reading and graduation. Did I remember that right?

THE WITNESS: Yes.

THE COURT: On the graduation, did you include in that people who had the equivalency of a graduation, a GED or that type of thing?

THE WITNESS: I don't remember. My recollection is that statistic does include an equivalency like a GED but I am not certain.

THE COURT: Would be able to tell by looking at your report?

THE WITNESS: I would probably have to go back to the original source material.

THE COURT: Thank you. Anybody have any other questions in light of that?

MS. O'CONNOR: No.

THE COURT: Thank you, Doctor. You may step down.

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52 U.S.C. § 10301. (formerly 42 U.S.C. § 1973) Denial or abridgement of right to vote on account of race or color through voting qualifications or prerequisites; establishment of violation

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 10303(f)(2) of this title, as provided in subsection (b).

(b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

(Pub. L. 89–110, title I, §2, Aug. 6, 1965, 79 Stat. 437; renumbered title I, Pub. L. 91–285, §2, June 22, 1970, 84 Stat. 314; amended Pub. L. 94–73, title II,

§206, Aug. 6, 1975, 89 Stat. 402 ; Pub. L. 97–205, §3, June 29, 1982, 96 Stat. 134)

§10304. (formerly 42 U.S.C. § 1973c) Alteration of voting qualifications; procedure and appeal; purpose or effect of diminishing the ability of citizens to elect their preferred candidates

(a) Whenever a State or political subdivision with respect to which the prohibitions set forth in section 10303(a) of this title based upon determinations made under the first sentence of section 10303(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 10303(a) of this title based upon determinations made under the second sentence of section 10303(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 10303(a) of this title based upon determinations made under the third sentence of section 10303(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972, such State or subdivision may institute an action in the United

States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 10303(f)(2) of this title, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: *Provided*, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. In the event the Attorney General affirmatively indicates that no objection will be made within the sixty-day period following receipt of a submission, the Attorney General may reserve the right to reexamine the submission if additional information comes to his attention during the remainder of the sixty-day period which would

otherwise require objection in accordance with this section. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28 and any appeal shall lie to the Supreme Court.

(b) Any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting that has the purpose of or will have the effect of diminishing the ability of any citizens of the United States on account of race or color, or in contravention of the guarantees set forth in section 10303(f)(2) of this title, to elect their preferred candidates of choice denies or abridges the right to vote within the meaning of subsection (a) of this section.

(c) The term "purpose" in subsections (a) and (b) of this section shall include any discriminatory purpose.

(d) The purpose of subsection (b) of this section is to protect the ability of such citizens to elect their preferred candidates of choice.

(Pub. L. 89–110, title I, §5, Aug. 6, 1965, 79 Stat. 439; renumbered title I and amended Pub. L. 91–285, §§2, 5, June 22, 1970, 84 Stat. 314, 315; Pub. L. 94–73, title II, §§204, 206, title IV, §405, Aug. 6, 1975, 89 Stat. 402, 404; Pub. L. 109–246, §5, July 27, 2006, 120 Stat. 580)

PART 16. ELIMINATE SAME-DAY VOTER REGISTRATION

SECTION 16.1. The subsections of G.S. 163-82.6A, other than subsection (e), are repealed. SECTION 16.1A. The catch line of G.S. 163-82.6A reads as rewritten: "§ 163-82.6A. ~~In-person registration and voting~~ **Address and name changes at one-stop sites**."

SECTION 16.2. G.S. 163-59 reads as rewritten: **"§ 163-59. Right to participate or vote in party primary.** No person shall be entitled to vote or otherwise participate in the primary election of any political party unless that person complies with all of the following: (1) Is a registered voter. (2) Has declared and has had recorded on the registration book or record the fact that the voter affiliates with the political party in whose primary the voter proposes to vote or participate. (3) Is in good faith a member of that party. Notwithstanding the previous paragraph, any unaffiliated voter who is authorized under G.S. 163-119 may also vote in the primary if the voter is otherwise eligible to vote in that primary except for subdivisions (2) and (3) of the previous paragraph. Any person who will become qualified by age to register and vote in the general election for which the primary is held, even though not so qualified by the date of the primary, shall be entitled to register for the primary and general election prior to the primary and then to vote in the primary after being registered. Such person may register not earlier than 60 days nor later than the last day for making application to register under G.S. 163-82.6(c) prior to the primary. In addition, persons who will become qualified by age to register and vote in the

general election for which the primary is held, who do not register during the special period may register to vote after such period as if they were qualified on the basis of age, but until they are qualified by age to vote, they may vote only in primary elections. ~~Such a person also may register and vote in the primary and general election pursuant to G.S. 163-82.6A(f)."~~

SECTION 16.3. G.S. 163-82.6(c) reads as rewritten: "(c) Registration Deadlines for a Primary or Election. – In order to be valid for a primary or election, ~~except as provided in G.S. 163-82.6A~~, the form: (1) If submitted by mail, must be postmarked at least 25 days before the primary or election, except that any mailed application on which the postmark is missing or unclear is validly submitted if received in the mail not later than 20 days before the primary or election, (2) If submitted in person, by facsimile transmission, or by transmission of a scanned document, must be received by the county board of elections by a time established by that board, but no earlier than 5:00 P.M., on the twenty-fifth day before the primary or election, (3) If submitted through a delegatee who violates the duty set forth in subsection (a) of this section, must be signed by the applicant and given to the delegatee not later than 25 days before the primary or election, except as provided in subsection (d) of this section."

SECTION 16.4. G.S. 163-166.12(b2) reads as rewritten: "(b2) Voting When Identification Numbers Do Not Match. – Regardless of whether an individual has registered by mail or by another method, if the individual has provided with the registration form a drivers license number or last

four digits of a Social Security number but the computer validation of the number as required by G.S. 163-82.12 did not result in a match, and the number has not been otherwise validated by the board of elections, in the first election in which the individual votes that individual shall submit with the ballot the form of identification described in subsection (a) or subsection (b) of this section, depending upon whether the ballot is voted in person or absentee. If that identification is provided and the board of elections does not determine that the individual is otherwise ineligible to vote a ballot, the failure of identification numbers to match shall not prevent that individual from registering to vote and having that individual's vote counted. ~~If the individual registers and votes under G.S. 163-82.6A, the identification documents required in that section, rather than those described in subsection (a) or (b) of this section, apply."~~

SECTION 16.5. G.S. 163-227.2(a) reads as rewritten: "(a) Any voter eligible to vote by absentee ballot under G.S. 163-226 may request an application for absentee ballots, complete the application, and vote under the provisions of this ~~section and of G.S. 163-82.6A, as applicable~~ section."

SECTION 16.6. G.S. 163-283 reads as rewritten: **"§ 163-283. Right to participate or vote in party primary.** No person shall be entitled to vote or otherwise participate in the primary election of any political party unless that person complies with all of the following: (1) Is a registered voter. (2) Has declared and has had recorded on the registration book or record the fact that the voter affiliates with the political party in whose primary the voter

proposes to vote or participate. (3) Is in good faith a member of that party. Notwithstanding the previous paragraph, any unaffiliated voter who is authorized under G.S. 163-119 may also vote in the primary if the voter is otherwise eligible to vote in that primary except for subdivisions (2) and (3) of the previous paragraph. Any person who will become qualified by age to register and vote in the general election for which the primary is held, even though not so qualified by the date of the primary election, shall be entitled to register while the registration books are open during the regular registration period prior to the primary and then to vote in the primary after being registered, provided however, under full-time and permanent registration, such an individual may register not earlier than 60 days nor later than the last day for making application to register under G.S. 163-82.6(c) prior to the primary. In addition, persons who will become qualified by age to register and vote in the general election for which the primary is held, who do not register during the special period may register to vote after such period as if they were qualified on the basis of age, but until they are qualified by age to vote, they may vote only in primary elections. ~~Such a person also may register and vote in the primary and general election pursuant to G.S. 163-82.6A(f).~~"

SECTION 16.7. G.S. 163-283.1 reads as rewritten: "§ 163-283.1. Voting in nonpartisan primary. Any person who will become qualified by age to register and vote in the general election for which a nonpartisan primary is held, even though not so qualified by the date of the primary, shall be entitled to register for the primary and general election prior to the primary and then to vote in the

primary after being registered. Such a person may register not earlier than 60 days nor later than the last day for making application to register under G.S. 163-82.6(c) prior to the primary. ~~Such a person also may register and vote in the primary and general election pursuant to G.S. 163-82.6A(f)."~~

SECTION 16.8. G.S. 163-330 reads as rewritten: "§ 163-330. Voting in primary. Any person who will become qualified by age to register and vote in the general election for which the primary is held, even though not so qualified by the date of the primary, shall be entitled to register for the primary and general election prior to the primary and then to vote in the primary after being registered. Such person may register not earlier than 60 days nor later than the last day for making application to register under G.S. 163-82.6(c) prior to the primary. ~~Such a person also may register and vote in the primary and general election pursuant to G.S. 163-82.6A(f)."~~

PART 49. VOTING IN INCORRECT PRECINCT

SECTION 49.1. G.S. 163-55 reads as rewritten: **"§ 163-55. Qualifications to vote; exclusion from electoral franchise**. (a) Residence Period for State Elections. – Every person born in the United States, and every person who has been naturalized, and who shall have resided in the State of North Carolina and in the ~~precinct, ward, or other election district~~ precinct in which the person offers to vote for 30 days next preceding an election, shall, if otherwise qualified as prescribed in this Chapter, be qualified to vote in ~~any election held in this State~~. the precinct in which the person resides. Removal from one

~~precinct, ward, or other election district~~ precinct to another in this State shall not operate to deprive any person of the right to vote in the ~~precinct, ward, or other election district~~ precinct from which ~~he~~ the person has removed until 30 days after the person's removal. Except as provided in this Chapter, the following classes of persons shall not be allowed to vote in this State: (1) Persons under 18 years of age. (2) Any person adjudged guilty of a felony against this State or the United States, or adjudged guilty of a felony in another state that also would be a felony if it had been committed in this State, unless that person shall be first restored to the rights of citizenship in the manner prescribed by law. (b) ~~Precincts and Election Districts~~. Precincts. – For purposes of qualification to vote in an election, a person's residence in a ~~precinct, ward, or election district~~ precinct shall be determined in accordance with G.S. 163-57. ~~When an election district encompasses more than one precinct, then for purposes of those offices to be elected from that election district a person shall also be deemed to be resident in the election district which includes the precinct in which that person resides. An election district may include a portion of a county, an entire county, a portion of the State, or the entire State. When a precinct has been divided among two or more election districts for purposes of elections to certain offices, then with respect to elections to those offices a person shall be deemed to be resident in only that election district which includes the area of the precinct in which that person resides.~~ Qualification to vote in referenda shall be treated the same as qualification for elections to fill offices. (c) Elections. – For purposes of the 30-day residence

requirement to vote in an election in subsection (a) of this section, the term "election" means the day of the primary, second primary, general election, special election, or referendum."

SECTION 49.3. G.S. 163-166.11(5) reads as rewritten: "(5) The county board of elections shall count the individual's provisional official ballot for all ballot items on which it determines that the individual was eligible under State or federal law to ~~vote~~. vote, except that the ballot shall not be counted if the voter did not vote in the proper precinct under G.S. 163-55, including a central location as provided by that section."

SECTION 49.4 G.S. 163-182.2(a)(4) reads as rewritten: "(4) Provisional official ballots shall be counted by the county board of elections before the canvass. If the county board finds that an individual voting a provisional official ballot is not eligible to vote in one or more ballot items on the official ballot, the board shall not count the official ballot in those ballot items, but shall count the official ballot in any ballot items for which the individual is eligible to vote. Eligibility shall be determined by whether the voter is registered in the county as provided in G.S. 163-82.1 and whether the voter is qualified by residency to vote in the ~~election district~~ precinct as provided in G.S. 163-55 and G.S. 163-57. If a voter was properly registered to vote in the election by the county board, no mistake of an election official in giving the voter a ballot or in failing to comply with G.S. 163-82.15 or G.S. 163-166.11 shall serve to prevent the counting of the vote on any ballot item the voter was eligible by registration and qualified by residency to vote."

2014 GENERAL ELECTION SUMMARY

		2014	Δ %	2010
Statewide Participation		2,937,949	9.33%	2,687,298
Statewide Registered Voters		6,628,584	6.79%	6,207,063
Statewide Turnout		44.32%	1.03%	43.29%
PARTY				
Democrat	Participation	1,275,369	4.48%	1,220,691
	Proportion	43.41%	-2.01%	45.42%
	Turnout	46.07%	2.03%	44.05%
Republican	Participation	1,015,772	3.49%	981,499
	Proportion	34.57%	-1.95%	36.52%
	Turnout	50.46%	0.39%	50.08%
Unaffiliated	Participation	639,515	32.71%	481,893
	Proportion	21.77%	3.84%	17.93%
	Turnout	35.10%	2.24%	32.86%
Libertarian	Participation	7,293	126.84%	3,215
	Proportion	0.25%	0.13%	0.12%
	Turnout	28.42%	-6.28%	34.70%
RACE				
Af. Am.	Participation	629,179	16.45%	540,307
	Proportion	21.42%	1.31%	20.11%
	Turnout	42.19%	1.89%	40.30%
White	Participation	2,186,507	5.93%	2,064,039
	Proportion	74.42%	-2.38%	76.81%
	Turnout	46.77%	1.29%	45.49%
Other	Participation	122,263	47.39%	82,952
	Proportion	4.16%	1.07%	3.09%
	Turnout	26.44%	1.20%	25.24%
AGE				
18 - 25	Participation	143809	37.52%	104575
	Proportion	4.89%	1.00%	3.89%
	Turnout	17.83%	3.02%	14.81%
26 - 40	Participation	476472	7.82%	441927
	Proportion	16.22%	-0.23%	16.45%
	Turnout	28.78%	1.75%	27.03%
41 - 65	Participation	1525796	5.92%	1440580
	Proportion	51.93%	-1.67%	53.61%
	Turnout	52.32%	0.48%	51.85%
66+	Participation	791872	13.09%	700216
	Proportion	26.95%	0.90%	26.06%
	Turnout	63.33%	-1.07%	64.39%

*Source: NC State Board of Elections 12/16/2014. Figures rounded to nearest hundredth. Data is subject to ongoing revision.

Definitions Key

Participation: Total votes from identified demographic.

Proportion: Demographic as a percentage of all votes cast.

Turnout: Percentage of registered voters who participated from identified demographic.