In The
United States Court of Appeals
For The Fourth Circuit

RECORD NO. 14-1845(L)

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

Plaintiffs,

and

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

Intervenors/Plaintiffs – Appellants,

v.

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

Defendants – Appellees.

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(*Caption and Counsel Continued Inside*)

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RECORD NO. 14-1856

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

Plaintiffs – Appellants,

and

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

Plaintiffs,

v.

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

Defendants – Appellees.

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RECORD NO. 14-1859

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

Plaintiffs – Appellants,

and

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

Intervenors/Plaintiffs,

v.

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

Defendants – Appellees.

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

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, and Local Rule 26.1, all of the Plaintiffs-Appellants and Intervenors/Plaintiffs-Appellants herein hereby disclose the following:

1. No party is a publicly held corporation or other publicly held entity.
2. No party has any parent corporations.
3. No publicly held company owns 10% or more of the stock of a party.
4. No publicly held corporation or other publicly held entity has a direct financial interest in the outcome of the litigation.
5. No party is a trade association.
6. The case does not arise out of a bankruptcy proceeding.

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JURISDICTIONAL STATEMENT

Plaintiffs filed these actions pursuant to 42 U.S.C. § 1983 and the Voting Rights Act, 52 U.S.C. § 10301. The district court exercised subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331, 1343(a)(3), and 1357, and 42 U.S.C. §§ 1983 and 1988. On August 18, 21, and 22, 2014, Plaintiffs filed timely appeals. This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1292(a)(1).

STATEMENT OF ISSUES

I. Did the district court abuse its discretion in denying Plaintiffs' motion for a preliminary injunction by misapplying the *Anderson-Burdick* standard?

II. Did the district court abuse its discretion in denying Plaintiffs' motion for a preliminary injunction under Section 2 of the Voting Rights Act?

III. Did the district court abuse its discretion in denying the Duke Plaintiffs' motion for a preliminary injunction on 26th Amendment grounds?

STATEMENT OF CASE

On August 8, 2014, the district court denied Plaintiffs' motion for a preliminary injunction, and these appeals followed. Plaintiffs adopt the statement of facts as set forth in their motion and supporting memoranda in the district court.

SUMMARY OF ARGUMENT

The court below abused its discretion by making multiple legal errors. Under a proper application of the law, the court should have enjoined the elimination of same day registration ("SDR") and out of precinct provisional voting ("OOP"), the reduction in early voting, and the elimination of preregistration.

STANDARD OF REVIEW

The Fourth Circuit reviews the denial of a preliminary injunction for abuse of discretion. *United States v. South Carolina*, 720 F.3d 518, 524 (4th Cir. 2013). "Factual determinations are reviewed for clear error and legal conclusions de novo." *Id.*; *see also Centro Tepeyac v. Montgomery Cnty.*, 722 F.3d 184, 188 (4th Cir. 2013).

ARGUMENT

I. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS OF THEIR CLAIMS

Fourteenth Amendment Claims. The district court committed four errors of law in construing the *Anderson-Burdick* test for equal protection violations. First, the district court erroneously interpreted the *Anderson-Burdick* framework as a binary test that applies either strict scrutiny or rational basis review. Op. at 74-75. The Supreme Court has made clear that in resolving equal protection challenges to voting regulations, courts should apply a flexible, sliding-scale test, in which "the rigorousness of [the] inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens [voting rights]." *Burdick v. Takushi*, 504 U.S. 428, 434 (1992). Under this standard, "election laws are usually, but not always, subject to ad hoc balancing." *McLaughlin v. N.C. Bd. of Elections*, 65 F.3d 1215, 1221 (4th Cir. 1995). That is, "the majority of cases" involve significant but not severe burdens, and thus "fall[] between" the extremes of strict scrutiny and rational basis. *Ne. Ohio Coal. for Homeless v. Husted*, 696 F.3d 580, 592 (6th Cir. 2012).

Here, the burdens warrant heightened scrutiny,[1] as hundreds of thousands of voters will be affected by the voting restrictions at issue:

	First week of early voting	Out-of-precinct ballots	Same-day registration
2006 Midterm Election	Over 90,000 votes	3,115 cast, 96.8% counted in whole or in part	N/A
2008 Presidential Election	Over 700,000 votes	6,032 cast, 91.7% counted in whole or in part	104,387 new voters registered and voted on same day
2010 Midterm Election	Over 200,000 votes	6,052 cast, 95.1% counted in whole or in part	21,250 new voters registered and voted on same day
2012 Presidential Election	Nearly 900,000 votes	7,486 cast, 89.6% counted in whole or in part	94,656 new voters registered and voted on same day

See Case no. 13-660, Dkt. 114-1, memo in support of MPI ("MPI") at 58-61. Election administrators and experts testified that, given the widespread reliance on these practices, their elimination will impose substantial burdens on North Carolina voters. *See* MPI at 19-20, 32-36, 60-65 (early voting); *id.* at 17-19, 29-30, 57-58 (SDR); *id.* at 30-32, 59-60 (OOP); Case no. 13-660, Dkt. 164, MPI Reply, at 3-4, 8-10, 12, 21-22 (early voting); *id.* at 7, 22 (SDR); *id.* at 7, 22-23 (OOP); *cf. Obama for Am. v. Husted*, 697 F.3d 423, 431 (6th Cir. 2012) (*"OFA II"*); *Ohio State Conference of NAACP v. Husted*, No. 2:14-cv-404, 2014 U.S. Dist. LEXIS 123442, at *31-32 (S.D. Ohio Sept. 4, 2014); *Florida v. United States*, 885 F. Supp. 2d 299, 328-29 (D.D.C. 2012). Those burdens

[1] The district court held that the burdens imposed on voters were not severe solely because "Plaintiffs do not argue strict scrutiny applies," Op. at 75, which is incorrect. Plaintiffs repeatedly argued, *see* MPI at 2, 32, 61-64; MPI Reply at 21-22, and maintain that the burdens collectively imposed by the restrictions are severe.

necessitate the heightened scrutiny that numerous courts have applied under the *Anderson-Burdick* test. *See* MPI at 57, 64 (cases cited); *Ass'n of Cmty. Orgs. for Reform Now v. Cox*, No. 1:06-CV-1891-JTC, 2006 U.S. Dist. LEXIS 87080, at *16-18 (N.D. Ga. Sept. 27, 2006); *League of Women Voters of Fla. v. Cobb*, 447 F. Supp. 2d 1314, 1332-34 (S.D. Fla. 2006). In this context, equal protection demands more than rational basis review.

Second, the district court erred in failing to recognize that significant burdens on *subgroups* of voters may constitute a basis for liability under the *Anderson-Burdick* test. *See Crawford v. Marion County Election Bd.*, 553 U.S. 181, 198 (2008) (in challenge to voter ID law, "[t]he burdens that are relevant… are those imposed on persons who… do not possess a current photo [ID]"). The district court focused exclusively on the burdens imposed by the challenged restrictions on "voters generally,"[2] and gave great weight to the fact that that most voters do not use the eliminated means of participation. Op. at 75-77 (SDR), 91-92 (OOP). But courts applying *Anderson-Burdick* frequently focus on the effects of a challenged voting restriction on those voters who are actually burdened by it, rather than on the electorate as a whole. *See Anderson v. Celebrezze*, 460 U.S. 780, 782, 789 (1983); *Burdick*, 504 U.S. at 434; *see also NEOCH*,

[2] Remarkably, the district court relied for this proposition on Justice Scalia's concurrence in *Crawford* on behalf of only three justices. Op. at 77. Justice Stevens' lead opinion in *Crawford*, which rejected that view and recognized that laws could be held unconstitutional based on burdens imposed on subgroups of voters, *see* 553 U.S. at 189-91, is plainly controlling because it presented the "narrowest grounds" on which the decision was made. *Marks v. United States*, 430 U.S. 188, 193 (1977).

696 F.3d at 593 (disqualification of 0.248% of ballots likely violated the Fourteenth Amendment); *Crawford*, 553 U.S. at 201 (assessing burdens on "indigent voters"); *OFA II*, 697 F.3d at 431 (assessing burdens on voters with "lower incomes and less education"); *NAACP*, at *33, *37 (weighing "the burdens they impose on *groups* of voters") (emphasis added). Here, there was substantial uncontradicted evidence that tens of thousands of impoverished voters would face particularly heightened burdens as a result of the eliminated voting provisions. *See* MPI at 29 (SDR), 31 (OOP), 32-34 (early voting). And uncontroverted expert witness testimony established that low-income voters are generally more affected by disruptions in voting procedures to which they have become habituated. *See* JA 633, 1097-98; 7/9/14 Hr'g Tr. at 118.

Third, the district court failed to recognize that the elimination of existing voting opportunities imposes burdens that are distinct from, and must be analyzed differently than, a failure to provide those opportunities in the first place. "[W]hen the state legislature vests the right to vote…the right to vote *as the legislature has prescribed* is fundamental" and changes to it must comport with Fourteenth Amendment guarantees. *Bush v. Gore*, 531 U.S. 98, 104 (2000) (per curiam) (emphasis added); *see also Obama for Am. v. Husted* ("*OFA I*"), 888 F. Supp. 2d 897, 907 (S.D. Ohio 2012) (Ohio "granted the right to in-person early voting," such that eliminating three days constitutes a "retract[ion of] that right" subject to *Anderson-Burdick* review), *aff'd* 697 F.3d 423 (6th Cir. 2012); *NAACP*, at *31 ("Having decided to enact a broad scheme of [early voting], Ohio . . . may not capriciously change or implement that system[.]").

Instead, the district court relied on the fact that the "majority of States" do not offer SDR or OOP. Op. at 76, 91-92. But that improperly turns the constitutional inquiry into a "litmus test." *Crawford*, 553 U.S. at 190. The issue is not whether there is an abstract right to early voting, OOP, or SDR, but whether, given reliance on these practices by hundreds of thousands of North Carolinians, the state has offered an adequate justification for their elimination under the Equal Protection Clause. *See* MPI at 17-19.

Fourth, the district court erred by examining each of the challenged provisions in isolation, failing to assess the combined effect of these restrictions. *See Burdick*, 504 U.S. at 438-39. The restrictions interact to magnify their burdens. MPI at 41–42, 57; *see, e.g.*, *Wood v. Meadows*, 207 F.3d 708, 713 (4th Cir. 2000).

A proper application of *Anderson-Burdick* would have involved a more searching review of the provisions at issue and demonstrated that Defendants' *post hoc* rationales do not justify eviscerating voting mechanisms that hundreds of thousands of North Carolinians rely upon to register and vote.[3] *See, e.g.*, *Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579, 594 (6th Cir. 2006); *NEOCH*, 696 F.3d at 596; *OFA II*, 697 F.3d at 433, 435-36; *NAACP*, at *34-35.

Section 2 Claim. In construing Section 2, the district court committed three legal errors that warrant reversal on appeal. *First*, by emphasizing the other means by which

[3] *See* MPI at 43-49; MPI Reply at 16-17 (early voting); *id.* at 15-16 (SDR); *id.* at 17-18 (OOP). The state's argument that SDR allows ballots to be counted before the voter's address is verified is too flimsy to survive proper equal protection scrutiny, and belied by evidence that SDR and non-SDR registrations are similar in this regard. 7/7/2014 H'rg Tr. at 185 (Gilbert); 7/8/2014 Hr'g Tr. at 129-33 (Bartlett).

African Americans can register and vote even after the elimination of SDR and OOP and the significant reduction to early voting, the Court erroneously required Plaintiffs to prove that African Americans will find it ***impossible*** to vote under the new regime. Section 2, however, requires a plaintiff to show only that a challenged voting practice (or elimination of a practice) makes voting disproportionately more ***burdensome*** for African Americans. *See Thornburg v. Gingles*, 478 U.S. 30, 35-36, 44 (1986); *Operation Push v. Allain*, 674 F. Supp. 1245, 1262-68 (N.D. Miss. 1987); *Stewart v. Blackwell*, 444 F.3d 843, 877-79 (6th Cir. 2006); *Sw. Voter Registration Educ. Project v. Shelley*, 344 F.3d 914, 918 (9th Cir. 2003). The relevant question is whether the challenged electoral practice will "result in fewer voting opportunities for African Americans than other groups of voters, as it will be more difficult for African Americans to vote…than for members of other groups." *NAACP*, at *62.

The district court's error led it to effectively disregard Plaintiffs' ***unrebutted*** evidence that African Americans in North Carolina continue to experience worse outcomes than whites "in several key socioeconomic indicators, including education, employment, income, access to transportation, and residential stability." Op. at 39. The district court failed to consider those factors once it was satisfied that there was still some way for African Americans to vote—even though Plaintiffs had established that social and historic conditions made it more burdensome for African Americans to vote than for whites.

Second, the district court wrongly disregarded entire categories of important

evidence. Plaintiffs presented undisputed evidence showing that (i) SDR, OOP, and early voting were all enacted (or expanded) to increase voter participation and particularly African-American participation; (ii) that African Americans used those voting practices at higher rates than whites; and (iii) that in enacting HB 589, the General Assembly repealed or restricted those very voting practices on which African Americans had come to disproportionately rely. The district court held that such evidence "d[id] not affect the ultimate inquiry under Section 2," Op. at 85, because the court believed that it was relevant only to a claim under Section 5.

To the contrary, evidence that certain voting practices worked to increase African-American turnout, or were relied on by African Americans more than others, is ***relevant*** to determining whether African Americans will face disproportionate burdens in the absence of those provisions. *See NAACP*, at *62 ("[I]n the Court's view, a comparison between past and current EIP voting days and hours is relevant to the totality of the circumstances inquiry that the Court must conduct and to the ultimate question of whether the voting rights of African Americans in Ohio have been abridged[.]"). Disproportionate use of SDR, OOP, and early voting, for instance, evidences that African Americans have come to rely on these voting opportunities and will bear a disproportionate burden now that those practices have been repealed.

Third, the district court erred by refusing to afford Section 2 relief because of its fear that a ruling for Appellants would have sweeping consequences on the laws of other states. *See*, *e.g.*, Op. at 46. The Supreme Court has instructed that a Section 2

analysis focuses on the ***specific*** "state or political subdivision" at issue—not on the nation as a whole. *See Gingles*, 478 U.S. at 44-45.

There are important differences between a state that adopts and then repeals a voting practice on which African Americans disproportionately rely (as North Carolina did here) and a state that never adopted a voting practice in the first place. Voters become habituated to new voting practices. MPI at 27. Eliminating practices on which African Americans disproportionately rely can thus impose substantial burdens—and result in disproportionately fewer voting opportunities—that would not occur in a state where those practices were never enacted in the first instance.

Once the legal errors are corrected, Appellants' strong likelihood of success is apparent. In *LULAC v. Perry*, 548 U.S. 399 (2006), the Court found a violation of Section 2 because "the State took away the Latinos' opportunity because Latinos were about to exercise it." Here, North Carolina took away with precision the very mechanisms used increasingly by African Americans to exercise the right to vote.

"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." *Gingles*, 478 U.S. at 47. The district court accepted as true that the elimination of SDR and OOP will disproportionately impact African-American voters. Op. at 39-40, 56, 83. The Court also explicitly recognized "North Carolina's history of official discrimination against blacks resulted in current socioeconomic disparities with whites." Op. at 83. Those findings and the

undisputed evidence compel the conclusion that the relevant social and historic conditions "interact with" the repeal of OOP and SDR to burden African Americans more than whites and thus, repealing these practices denies equal opportunity.

Instead of making this crucial third finding regarding "interaction," the legal errors outlined above caused the district court to mistakenly cite several factors as undermining plaintiffs' Section 2 case. First, the district court erred in characterizing African Americans' use of SDR as a mere preference. Op at 46. The court's own findings establish that African Americans disproportionately use SDR because of social and historic disadvantage. That interaction is at the "essence" of a section 2 violation. *Gingles*, 478 U.S. at 47. The district court also hypothesizes that African Americans will be able easily to switch to other methods of registering. Yet uncontradicted evidence disproves this hypothesis. MPI at 18, 30; *cf. NAACP*, at *33.

Second, fleeting parity in registration rates attained by African Americans in two Presidential election years cannot shield from Section 2 scrutiny the elimination of the very mechanisms for voting that led to the increases. The correct metric under the Section 2 standard is whether the challenged voting restrictions will disproportionately burden African Americans as compared to Whites *going forward*.[4]

[4] The district court also erroneously rejected the Section 2 claim as to out-of-precinct voting because "so few voters cast" out of precinct ballots. *See* Op. at 83. Section 2 does not set a floor for the number of individuals that must be harmed before unequal opportunity can be found; the answer to a Section 2 analysis rests upon whether the harm that arises because of the change is disproportionate by race, not the number of individuals harmed.

Third, the district court improperly weighted defendant's *post hac* rationales and erroneously treated one Senate Factor (tenuousness) as determinative. This selective application of one unenumerated Senate Factor to immunize the law from Section 2 review misapprehends the function of the Senate Factors under a totality of the circumstances test. *See* S. Rep. No. 417, 97th Cong., 2d Sess. 28-29 (1982).

Finally, the district court erroneously reasoned that the NVRA, which was enacted 11 years after the 1982 Amendments to the VRA, sheds light on Congress' intent regarding Section 2 or somehow implicitly amends Section 2. Op. at 48. This is clear legal error. Congress took pains to make clear that compliance with the VRA is a separate and independent obligation from compliance with the NVRA. 42 U.S.C. § 1973gg-9(d)(1)(2).

26th Amendment Claim—Likelihood of Success. The 26th Amendment claim is also likely to succeed on the merits. The 26th Amendment bars discrimination in the voting context "on account of age." The amendment's broad text reflects that "America's youth entreated, pleaded for, demanded a voice in the governance of this nation….And in the land of Vietnam they lie as proof that death accords youth no protected status." *Jolicoeur v. Mihaly*, 488 P.2d 1, 7 (Cal. 1971). "The goal was not merely to empower voting by our youths but was affirmatively to encourage their voting, through the elimination of unnecessary burdens and barriers, so that their vigor and idealism could be brought within rather than remain outside lawfully constituted institutions." *Worden v. Mercer Cnty. Bd. of Elections*, 61 N.J. 325, 345 (1972);

see also Walgren v. Bd. of Selectmen of Town of Amherst, 519 F.2d 1364, 1367-68 (1st Cir. 1975) (upholding action under 26th Amendment where defendants "acted in good faith in a crisis atmosphere" but stating that it did not want case "construed as authority for setting critical election dates during college recesses in communities having a very large if not majority proportion of students who are also eligible voters in the 18-20 year age group, without a showing of some *substantial justification*") (emphasis added); *United States v. Texas*, 445 F. Supp. 1245 (S.D. Tex. 1978), *aff'd mem. sub nom. Symm v. United States*, 439 U.S. 1105 (1979); *Colo. Project-Common Cause v. Anderson*, 178 Colo. 1, 8 (1972).

Through HB 589, the General Assembly directly targeted young citizens by repealing preregistration and mandatory high school voter-registration drives, and permitting military IDs, veterans' IDs, and certain tribal enrollment cards, *but not college IDs*, to be used for voting. MPI at 67, 69, 75-77. It also substantially burdened youth voting through the repeal of SDR and OOP, the reduction in early voting days, and the passage of a voter ID law that, even aside from the exclusion of college IDs, is highly restrictive. *Id.* at 72-75. And the unrebutted factual and expert evidence shows that "HB 589 is likely to have a strong negative effect on registration and turnout among [North Carolina's] young voters." JA 1433.[5]

[5] *See generally* JA 172, 229, 267, 316-17, 334-35, 376-377, 382, 409 (impact of elimination of SDR); JA 229, 315, 333-34, 382 (impact of elimination of early voting); JA 267, 318, 410 (impact of elimination of OOP); JA 174, 191, 230, 239, 243, 268, 293, 318, 411 (importance of preregistration).

The General Assembly provided no explanation for some of these measures; in other cases, the explanations were clearly pretextual. MPI at 43-49, 69-70, 74, 76-77. The elimination of preregistration—through which *160,000* young people registered to vote between 2010 and 2013—because a senator's son was purportedly confused about whether he could vote before he turned 18 is particularly shocking. *Id.* at 69-70. In addition, members of the General Assembly that enacted HB 589 were openly hostile to young and new voters. *E.g.*, JA 1818 (statement of senator that college students "don't pay squat in taxes" and "skew the results of elections in local areas"); MPI at 49-50, 78-79. And, in an obvious attempt by the majority to avoid creating a record, only one member of the House spoke in favor of the final version of the bill. MPI at 10. In short, the provisions at issue are not substantially justified, and they are directly at odds with the 26th Amendment's goal of empowering young citizens.

26th Amendment Claim—Irreparable Harm. *All* young voters, including many Duke Plaintiffs, will be irreparably injured if the 2014 election is conducted under rules that discriminate against them. In *Shaw v. Reno*, 509 U.S. 630, 650 (1993), the Supreme Court explained that "reapportionment legislation that cannot be understood as anything other than an effort to classify and separate voters by race injures voters" by "reinforc[ing] racial stereotypes and threaten[ing] to undermine our system of representative democracy by signaling to elected officials that they represent a particular racial group rather than their constituency as a whole." Likewise, voting laws intended to discriminate against young citizens reinforce age-based stereotypes

and signal to officials that young citizens are not equal to other eligible voters.

For this reason, the district court erred in holding that it need not consider the merits of the 26th Amendment claim—i.e., that it is irrelevant whether HB 589 was intended to discriminate against young voters—because the Duke Plaintiffs had "presented no evidence that would permit the court to conclude that any of them is likely to suffer any irreparable harm before trial." Op. at 80. Under that logic, the Duke Plaintiffs would not be entitled to an injunction even if the law stated that its purpose was to discriminate against young voters. That cannot be—and, as *Shaw* shows, is not—the law. *See also OFA II*, 697 F.3d at 436-37 (upholding issuance of preliminary injunction without inquiring whether statute would deny any individual plaintiff the right to vote) (internal quotation marks omitted).

Moreover, the deprivation of a constitutional right—including the unabridged right to vote—for any period of time constitutes irreparable injury. *See United States v. City of Cambridge*, 799 F.2d 137, 140 (4th Cir. 1986) (noting that "discriminatory [voting] procedures constitute the kind of serious violation of the Constitution … for which courts have granted immediate relief" and citing cases); *see also Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion); *Williams v. Salerno*, 792 F.2d 323, 326 (2d Cir. 1986). Indeed, the college student Plaintiffs have relied upon the practices at issue, *see* Case No. 13-660, Dkt. 78 ¶¶ 8-10, 15, 17; Case No. 13-658, Dkt. 172-2 at 1; Duke would have been disenfranchised in 2012 without SDR, and the 17-day early voting period ensured he had time to arrange transportation to his closest early voting

site, Case No. 13-658, Dkt. 172-1 at 1-3; and, as young voters, the college student Plaintiffs are disproportionately likely to need to rely in the future on one or more of the practices at issue, *see generally* JA 1429-56. Absent an injunction, there is a strong *likelihood* that one or more of the Duke Plaintiffs will have his or her right to vote abridged or denied due to the discriminatory provisions of HB 589. *See OFA II*, 697 F.3d at 436-37 ("When constitutional rights are *threatened* or impaired, irreparable injury is presumed.") (emphasis added).

II. ALL OTHER FACTORS FAVOR A PRELIMINARY INJUNCTION

In addition to the foregoing, Plaintiffs adopt the arguments set forth in their district court briefing that the certainty of irreparable harm, including the district court's erroneous conclusion that the cut to early voting would not result in irreparable harm; the balance of the equities; and the public interest all favor the entry of an injunction. Indeed, because Defendants have no legitimate interest in enforcing unconstitutional laws, the public has a strong interest in exercising the right to vote, and administrative convenience cannot justify laws that impinge upon fundamental rights, *Taylor v. Louisiana*, 419 U.S. 522, 535 (1975); *Newsom ex rel. Newsom v. Albemarle Cnty. Sch. Bd.*, 354 F.3d 249, 261 (4th Cir. 2003); *OFA II*, 697 F.3d at 436, the balance of the harms and public interest plainly favor granting the requested injunction.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision below and enter a preliminary injunction as requested in Plaintiffs' Motion for Preliminary Injunction.

This the 17th day of September, 2014.

Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 17th day of September, 2014, I caused this Brief of Appellants to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

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I further certify that on this 17th day of September, 2014, I caused the required copies of the Brief of Appellants to be hand filed with the Clerk of the Court.

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