IN THE

United States Court of Appeals for the Fourth Circuit

No. 16-1468 (L)

NORTH CAROLINA STATE CONFERENCE OF THE NAACP; ROSANELL EATON; EMMANUEL BAPTIST CHURCH; BETHEL A. BAPTIST CHURCH; COVENANT PRESBYTERIAN 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

JOHN DOE 1; JANE DOE 1; JOHN DOE 2; JANE DOE 2; JOHN DOE 3; JANE DOE 3; NEW OXLEY HILL BAPTIST CHURCH; CLINTON TABERNACLE AME ZION CHURCH; BAHEEYAH MADANY,

Plaintiffs

v.

PATRICK L. MCCRORY, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF NORTH CAROLINA; KIM WESTBROOK STRACH, IN HER OFFICIAL CAPACITY AS A MEMBER OF THE STATE BOARD OF ELECTIONS; 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; JAMES BAKER, IN HIS OFFICIAL CAPACITY AS A MEMBER OF THE NORTH CAROLINA STATE BOARD OF ELECTIONS,

Defendants-Appellees

On Appeal from the United States District Court
for the Middle District of North Carolina (No. 1:13-cv-00658-TDS-JEP)

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No. 16-1469

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Intervenors/Plaintiffs-Appellants

and

CHARLES M. GRAY; ASGOD BARRANTES; MARY-WREN RITCHIE

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 (No. 1:13-cv-00660-TDS-JEP)

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No. 16-1474

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

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

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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 undersigned Plaintiffs-Appellants and Intervenors-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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INTRODUCTION

"There is no right more basic in our democracy than the right to participate in electing our political leaders." *McCutcheon v. FEC*, 134 S. Ct. 1434, 1440-41 (2014) (Roberts, C.J., plurality op.). For that reason, the right to vote enjoys extraordinary protections as a matter of both statutory and constitutional law. These voting protections have been earned, recognized, and protected through the efforts, sweat, and blood of many over generations. Voting recognizes the dignity of every American and is the destiny of our democracy.

In a brazen attempt to ignore these protections and abridge the right of many minorities to freely exercise the right to vote, the North Carolina legislature enacted sweeping changes to the State's voting and registration practices in 2013. These changes, encompassed in House Bill 589 ("HB589"), reduced or eliminated practices—including same-day registration ("SDR"), out-of-precinct ("OOP") voting, early voting, and pre-registration—which had been specifically introduced to increase voter participation and which were disproportionately used by African Americans and Latinos as compared to white voters. And it introduced a voter photo identification requirement in the face of clear

evidence that African Americans are less likely to possess the requisite ID than whites. The Defendants do not dispute these facts, and the District Court readily acknowledged them.

Despite recognizing the undisputed evidence of disproportionate use on the part of these minority groups, the District Court erroneously concluded that the challenged provisions of HB589 did not violate Section 2 of the Voting Rights Act, or the Fourteenth, Fifteenth, or Twenty-Sixth Amendments to the U.S. Constitution. And it did so in clear contravention of the relevant legal standards, and in particular, this Court's earlier guidance in *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 246 (4th Cir. 2014) ("*LWVNC*").

In *LWVNC*, this Court identified two—and only two—elements to finding a Section 2 violation: (1) the challenged practice or procedure "imposes a discriminatory burden," meaning that it "disproportionately impact[s] minority voters"; and (2) the disproportionate impact is "in part caused by or linked to social and historical conditions that have or currently produce discrimination against members of the protected class." *Id.* at 245. On each of these scores, the case-critical evidence remains undisputed: African Americans have disproportionately used

each of the voting and registration practices that were targeted by HB589, such that the repeal of those measures disproportionately burdens minority voters. And North Carolina's African Americans continue to bear the effects of racial discrimination and subjugation in all aspects of social, economic, and political life, such that they will be most keenly affected by the burdens imposed by the challenged provisions.

Nonetheless, the District Court's latest opinion upholds the changes made by HB589 by introducing irrelevant elements—including the laws in other States and the supposed ability for minority groups to adapt to changes in electoral rules—that have no basis in the law. This Court has previously rejected those arguments and should do so again now. The undisputed factual evidence combined with the straightforward legal principles this Court has already identified require reversal of the District Court's judgment and entry of judgment in favor of the Plaintiffs.

STATEMENT OF JURISDICTION

Plaintiffs filed these actions pursuant to 42 U.S.C. § 1983 and Section 2 of the Voting Rights Act, 52 U.S.C. § 10301. The District Court exercised jurisdiction pursuant to 28 U.S.C. §§ 1331, 1343(a)(3), and 1357, and 42 U.S.C. §§ 1983 and 1988, and entered final judgment on April 25, 2016. This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether the District Court erred in concluding that HB589 does not violate Section 2 of the Voting Rights Act.

2. Whether the District Court erred in concluding that HB589 does not violate the Fourteenth or Fifteenth Amendments to the United States Constitution.

3. Whether the District Court erred in concluding that HB589 does not violate the Twenty-Sixth Amendment to the United States Constitution.

STATEMENT OF THE CASE AND FACTS[1]

A. Racial Discrimination and Inequality in North Carolina

"North Carolina has a sordid history dating back well over a century," including "Jim Crow laws and other forms of segregation" touching upon every social and economic aspect of life. JA24711, JA24715 (Op. 227, 231). For decades, North Carolina enforced "a literacy test and other laws that had the effect of suppressing the vote of African Americans and supporters of minority political parties." JA24715 (Op. 231). As the District Court found, "African Americans experience socioeconomic factors that may hinder their political participation generally," and these "socioeconomic disparities experienced by African Americans can be linked to the State's disgraceful history of discrimination." JA24727 (Op. 243).

Against this backdrop, North Carolina adopted early voting, OOP voting, SDR, and pre-registration between 2000 and 2012 "to increase voter participation." *LWVNC*, 769 F.3d at 246; *see also id.* at 232-34. It

[1] The Plaintiffs provide an abbreviated listing of the facts here and incorporate the Statement of the Case provided in the brief filed today by the United States.

is undisputed that "African Americans disproportionately used" these new practices, as the District Court found:

- SDR: African Americans comprised 35.5% of registrants during the SDR period for the 2008 election and 32.0% of registrants during the 2012 SDR period, which exceeded their roughly 22% proportionate share of all registered voters. JA24647 (Op. 163).
- OOP Voting: Compared to their share of the electorate, African-American voters were disproportionately more likely than whites to cast an OOP provisional ballot in the elections prior to HB589. JA24663 (Op. 179).
- Early Voting: In the presidential elections of 2008 and 2012, over 70% of black voters used early voting compared to just over 50% of white voters. JA18042 n.64. African Americans also disproportionately used the first seven days of early voting. JA24616 (Op. 132).
- Pre-registration: In 2012, 30% of pre-registrants were African American, compared to 22% of all registered voters. JA24669-70 (Op. 185-86).

During this period, the African-American registration rate increased from 81.1% (9.1 points lower than the white registration rate) to 95.3% (7.5 points above it), and its ranking for youth registration increased from 43rd to 8th in the nation. *See* JA24643 (Op. 159), JA3944, JA3947-48.

Turnout also surged. Defendants' own expert acknowledged that, between 2000 and 2012, North Carolina experienced the largest increase in African-American turnout in the country. *See* JA19837-38.

Youth turnout similarly soared, moving North Carolina from 31st to 10th in the nation. JA3944, JA3947-48.

B. House Bill 589

In this context of "unprecedented gains by African Americans in registration and turnout," and while in possession of "data on disparate use of early voting, SDR, and OOP voting by African Americans," the General Assembly enacted HB589 in July 2013. JA24895, JA24960 (Op. 411, 476). Originally limited to voter ID and absentee requirements when it was introduced in the spring of 2013, HB589 expanded considerably in the wake of the Supreme Court's decision in *Shelby County v. Holder*, 133 S. Ct. 2612 (2013), to eliminate modes of participation disproportionately used by African-American and young voters. JA24502, JA24504, JA24507 (Op. 18, 20, 23). Additionally, the original ID requirement became stricter, removing forms of ID that are held disproportionately by minorities (including government, state university, and community college IDs) from the acceptable list of IDs. JA24507, JA24880-81 (Op. 23, 396-97). The District Court found that "whatever the true number of individuals without qualifying IDs,

African Americans are more likely to be among this group than whites" and "are more likely to lack qualifying ID." JA24585-86 (Op. 101-02).

The 2014 midterm election transpired while a stay of this Court's previous decision was in place, and thus were conducted without SDR and OOP voting. *See* JA24531-32 (Op. 47-48). In that general election, "11,993 people registered to vote during the ten-day early-voting period," *i.e.*, the time period when SDR would have been available, and thus they were unable to vote in the election. JA24651 (Op. 167). During that same period, African Americans applied to register at a greater rate than whites. JA4472 & n.97. The District Court also found that 1,387 provisional ballots were not counted because they were cast out of precinct, and that "African American voters disproportionately cast [these OOP] ballots." JA24664 (Op. 180).

SUMMARY OF ARGUMENT

This Court previously found that "[t]here can be no doubt that certain challenged measures in House Bill 589 disproportionately impact minority voters," and that "the disproportionate impacts of eliminating [SDR] and [OOP] voting are clearly linked to relevant social and historical conditions." *LWVNC*, 769 F.3d at 245. It concluded that

the elimination of those provisions constituted a "textbook example of Section 2 vote denial." *Id*. at 246.

The case-dispositive facts have not changed. The District Court found "disproportionate use" by African Americans of SDR, OOP voting, early voting, and pre-registration, and acknowledged that "the educational and socioeconomic disparities suffered by African Americans might suggest that the removed mechanisms would disproportionately benefit African Americans." JA24710, JA24859 (Op. 226, 375). Those findings compel a ruling that HB589 violates Section 2.

And yet the District Court again ruled against Plaintiffs, repeating many of the same errors it made in its preliminary injunction decision. Although purporting to conduct "an 'intensely local' analysis," JA24857 (Op. 373), the Court once again repeatedly compared North Carolina's laws to those of other states, *see, e.g.*, JA24638 (Op. 154) (SDR); JA24662 (Op. 178) (OOP); JA24611 (Op. 127) (early voting), and then relied on that comparison to deny relief, concluding "it would no doubt bear relevance if North Carolina were seeking to return to an electoral system that was not in the mainstream of other States."

JA24960 (Op. 476). In so doing, the District Court ignored this Court's admonition that "Section 2, on its face, is local in nature," and once again committed "grave error" by relying on practices in other states to "suggest[] that a practice must be discriminatory on a nationwide basis to violate Section 2." *LWVNC*, 769 F.3d at 243.

The District Court also claimed to follow this Court's guidance "not to require Plaintiffs to show … that voting mechanisms are 'practically unavailable' in order to establish a § 2 violation," JA24857 (Op. 373) (quoting *LWVNC*, 769 F.3d at 243), yet devoted hundreds of pages to finding that "African Americans did not ***need*** the [eliminated] mechanisms," and that they are "adaptable" to the "many [remaining] easy ways for North Carolinians to register and vote." JA24860 (Op. 376) (emphasis added); JA24833, JA24858 (Op. 349, 374). The court also relied heavily on turnout in 2014, which in the court's view, showed that "African Americans are not only capable of adjusting, but have adjusted." JA24956 (Op. 472). In so doing, the District Court failed to heed this Court's explanation that "nothing in Section 2 requires a showing that voters cannot register or vote under any circumstance," and once again "abused its discretion" by relying on the availability of

other alternate methods to inappropriately "waiv[e] off disproportionately high African American use of certain curtailed registration and voting mechanisms as mere 'preferences.'" *LWVNC*, 769 F.3d at 243. As at the preliminary injunction stage, these errors are fatal to the District Court's Section 2 analysis (as well as its *Anderson-Burdick* ruling under the Fourteenth Amendment).

But the District Court's errors did not cease there. Turning to Plaintiffs' discriminatory intent claims under the Fourteenth, Fifteenth, and Twenty-Sixth Amendments, the court acknowledged that "a plaintiff is not required to prove that 'the challenged action rested ***solely*** on racially discriminatory purposes.'" JA24861-62 (Op. 377-78) (citations omitted). After finding that Plaintiffs' "strongest fact" was that "African Americans disproportionately used" the eliminated practices, JA24863 (Op. 379), and that "the legislature had data on [this] disparate use," JA24895 (Op. 411), the court improperly pivoted to its results finding to cleanse any inference of discriminatory intent, holding that these facts "do[] not mean that the impact of [HB589] … bears more heavily on them" because "North Carolina's remaining mechanisms continue to provide African Americans with an equal

opportunity to participate." JA24863 (Op. 379). Then, without analyzing the legislature's ***actual*** motives or subjecting them to material scrutiny, the court improperly hypothesized that, "[r]egardless of whether or not" the proffered justifications for the law "are true, the legislature could reasonably have believed them to be true." JA24874-75 (Op. 390-91).

The decision below should be reversed in full.

STANDARD OF REVIEW

The Fourth Circuit generally reviews "judgments resulting from a bench trial under a mixed standard of review: factual findings may be reversed only if clearly erroneous, while conclusions of law are examined de novo." *Nat'l Fed'n of the Blind v. Lamone*, 813 F.3d 494, 502 (4th Cir. 2016). If, however, a trial court "bases its findings upon a mistaken impression of applicable legal principles, the reviewing court is not bound by the clearly erroneous standard." *Inwood Labs., Inc. v. Ives Labs., Inc.*, 456 U.S. 844, 855 n.15 (1982); *see also Gilbane Bldg. Co. v. Fed. Reserve Bank of Richmond*, 80 F.3d 895, 905 (4th Cir. 1996) (court reviews mixed questions of law and fact "under a hybrid standard, applying to the factual portion of each inquiry the same

standard applied to questions of pure fact and examining *de novo* the legal conclusions derived from those facts").

ARGUMENT

I. The District Court Erred in Finding No Section 2 Violation.

Notwithstanding its brief references to this Court's directives in *LWVNC*, the District Court applied the incorrect legal standard when considering Plaintiffs' claims under Section 2. Under the proper standard set forth in *LWVNC*, however, Plaintiffs demonstrated that HB589 violates Section 2.

A. The District Court Failed to Apply the *LWVNC* Legal Standard.

A voting practice or procedure violates Section 2 if:

(i) it "imposes a discriminatory burden," meaning that "members of [a] protected class 'have less opportunity than other members of the electorate to participate in the political process …'"; and

(ii) the disproportionate impact is "in part 'caused by or linked to "social and historical conditions" that have or currently produce discrimination against members of the protected class.'"

LWVNC, 769 F.3d at 240, 245 (citations omitted); *see also, e.g.*, *Veasey v. Abbott*, 796 F.3d 487, 504 (5th Cir. 2015), *reh'g en banc granted*, 815 F.3d 958 (5th Cir. 2016); *Ohio State Conference of NAACP v. Husted*,

768 F.3d 524, 554 (6th Cir. 2014) (*"Ohio NAACP"*), *vacated on other grounds*, 2014 WL 10384647 (6th Cir. Oct. 1, 2014); *Lee v. Va. State Bd. of Elections*, --- F. Supp. 3d ---, 2015 WL 9274922, at *8 (E.D. Va. Dec. 18, 2015).

Plaintiffs have satisfied their burden at both steps of this analysis. *First*, Plaintiffs have demonstrated that the challenged provisions disproportionately impact minority voters. In "waiving off disproportionately high African American use" of the voting procedures at issue, the District Court repeated its error from the preliminary injunction stage. *LWVNC*, 769 F.3d at 243.

Second, Plaintiffs have demonstrated that African Americans' disproportionate reliance on SDR, OOP voting, early voting, and pre-registration, and their disproportionate lack of qualifying photo identification, is "in part … caused by or linked to social and historical conditions that have or currently produce discrimination." *Id.* at 245 (citations omitted). These undisputed facts form a textbook Section 2 violation. Yet in denying Plaintiffs' Section 2 claim, the District Court layered on judge-made requirements that are not found in the text of the statute or the caselaw interpreting it.

1. The District Court Erred by Again Relying on Voting Practices in Other States.

In *LWVNC*, this Court made clear that the Section 2 analysis requires "an intensely local appraisal of the design and impact of' electoral administration 'in the light of past and present reality.'" *Id.* at 241 (quoting *Thornburg v. Gingles*, 478 U.S. 30, 78 (1986)). Ignoring that directive, the District Court again repeatedly emphasized comparisons between North Carolina's post-HB589 voting regime and other States. *See, e.g.*, JA24939 (Op. 455) ("notable that the State still compares very favorably to most States"); JA24662 (Op. 178) (comparing OOP rule to other states); JA24611 (Op. 127) (comparing early voting days to the "national median of all States"). And despite this Court's explicit instruction to the contrary, the District Court stated that it could not find HB589 to violate Section 2 without endangering voting regimes currently in place in other jurisdictions. *See, e.g.*, JA24910 (Op. 426).

This Court expressly rejected such doomsday predictions regarding other states at the preliminary injunction stage when it found that the District Court's "failure to understand the local nature of Section 2 constituted ***grave error***." *LWVNC*, 769 F.3d at 243

(emphasis added). Despite this clear direction, the District Court again failed to properly consider whether ***these*** particular changes in ***this*** state with ***this*** specific history violate Section 2. The same conclusion applies as last time: the District Court has again committed "grave error" warranting reversal.

2. The District Court Erred by Holding that the Ability of African Americans to Adapt to New Voting Laws Precluded a Section 2 Violation.

The District Court found no Section 2 violation because it concluded that there remain, in its view, "very many easy ways for North Carolinians to register and vote," to which African Americans can "adapt[]" or "adjust[]." *See, e.g.*, JA24833, JA24858, JA24859 (Op. 349, 374, 375). As it did in its preliminary injunction decision, the District Court focused repeatedly on the remaining opportunities under "the electoral system established by [HB589]." JA24857 (Op. 373); *see also* JA24896 (Op. 412) ("What remains under the law provides all voters with an equal and ample opportunity to participate in the political process."); JA24939 (Op. 455) ("North Carolinians who wish to register and vote still have many convenient ways that provide ample opportunity to do so."). In essence, the court held that voting laws

categorically do not violate Section 2 if other voting opportunities remain, presuming that minority voters will be equally able as white voters to "adapt" no matter how burdensome the alternative procedures may be to minority voters.

That "adaptation" analysis is wrong as a matter of law. For one, it has no grounding in the text of Section 2, which prohibits not only laws that make it ***impossible*** for minorities to vote—*i.e.*, the outright "denial" of the right to vote—but also laws that the make voting ***disproportionately more burdensome***—*i.e.*, the "abridgement" of the right to vote. 52 U.S.C. § 10301. Indeed, as this Court previously held, "nothing in Section 2 requires a showing that voters cannot register or vote under any circumstance." *LWVNC*, 769 F.3d at 243; *see also Ohio NAACP*, 768 F.3d at 552 ("Section 2 applies to any 'standard, practice, or procedure' that makes it harder for an eligible voter to cast a ballot, not just those that actually prevent individuals from voting."). That makes sense: in virtually every Section 2 case, there will be some plausible argument that voters can potentially "adapt" via alternative voting mechanisms. Under the District Court's version of the Section 2 standard, a State's voting practices pass muster if there are, in some

subjective sense, "enough" opportunities to vote and those opportunities compare favorably with other jurisdictions. This standard will rarely (if ever) find a Section 2 violation so long as changes in election laws leave ***some*** mechanism to register and vote, regardless of the comparative burden of the change on minority groups. That is not the standard Section 2 provides or the standard this Court articulated in *LWVNC*.

The relevant inquiry under Section 2 is not whether African Americans can ***overcome*** the disproportionate burdens imposed by HB589 by "adapting" or "adjusting," but whether HB589 imposes disproportionate burdens ***in the first place***. *See, e.g.*, *LWVNC*, 769 F.3d at 243; *Ohio NAACP*, 768 F.3d at 552. The District Court erred by focusing on the former question while neglecting the latter. *See, e.g.*, JA24635 (Op. 151) ("no persuasive evidence that voters … had any difficulty adjusting to the new schedule"); JA24859 (Op. 375) ("African Americans are equally as capable as all other voters of adjusting"). As in its prior decision, "[i]n refusing to consider the elimination of voting mechanisms successful in fostering minority participation" and instead focusing exclusively on the mechanisms that remain, the District Court "misapprehended and misapplied Section 2." *LWVNC*, 769 F.3d at 242.

3. The District Court Compounded its "Adaptation" Error By Affording Undue Weight to 2014 Turnout.

The District Court further erred in treating increased African-American turnout in the 2014 midterm election as nearly conclusive evidence that, "African Americans are not only capable of adjusting, but have adjusted, to [HB589]," and that therefore the challenged provisions do not impose unlawful burdens on African Americans. JA24956, JA24859 (Op. 472, 375). This flawed analysis, not only replicates the erroneous reliance on voter "adaptation" described above, but also accords inordinate weight to turnout statistics from a single midterm election.

Both Plaintiffs' ***and Defendants'*** experts agreed that voter turnout in any single election cycle (particularly a midterm election) is driven by a number of variables, making it nearly impossible to attribute changes in aggregate turnout to any one specific variable—such as a change in an election law. Defendants' expert, Dr. M.V. Hood III, agreed that: "[Y]ou can't just take aggregate turnout in one election and compare it to aggregate turnout in another election to make causal inferences about voters." JA21114. For that reason, a Section 2 claim

does not rise or fall on minority turnout in a single election, particularly given the multitude of factors at play in any single election. *Cf. Ohio NAACP*, 768 F.3d at 541 ("[T]hat overall turnout might not be affected is not determinative of the Equal Protection analysis." (citation omitted)); *see also Gingles*, 478 U.S. at 74-76 (rejecting argument that minority group's attainment of parity in one election precludes Section 2 violation); *Collins v. City of Norfolk*, 883 F.2d 1232, 1241-42 (4th Cir. 1989) (rejecting district court's reliance on single election in denying Section 2 claim). Just as a lower election turnout does not prove a Section 2 violation, a higher election turnout does not preclude one.

Even the District Court acknowledged that other factors affected turnout in 2014. For one, North Carolina's 2014 U.S. Senate election was one of the closest in the nation and involved the highest level of campaign spending for a Senate race in American history. JA19401-02; JA3510-11; JA4462-63; JA3887-88; JA19788. Defendants' experts agreed that increased spending and competitiveness are associated with higher turnout. JA21116-17; JA23854. And the testimony was undisputed that participation by African-American voters in 2014—the

first federal election following enactment of HB589—was temporarily driven in part by anger over the bill and unprecedented mobilization efforts, which cannot be replicated in future elections (nor should they have to be). *See* JA19072-73, JA10976-78. Again, Defendants' experts agreed that mobilization efforts impact turnout. *See* JA21116-17.

Not only did the District Court improperly rely on aggregate turnout, it turned a blind eye to the substantial evidence demonstrating HB589's disproportionate impact on African-American voters in the 2014 election:

- African Americans were disproportionately more likely than whites to submit registration applications during the early voting period.[2] These individuals were unable to vote in the election, but would have been able to do so had SDR been available.
- African Americans cast over 40% of uncounted OOP ballots in (well in excess of their share of the electorate).[3]
- African Americans were disproportionately more likely to use early voting, with approximately 45% of African-American voters voting early, compared to only 36% of white voters.[4]

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[2] JA4472 & n.97.

[3] JA878-79; JA152; JA2635; JA17511-12; JA19624; JA4482-83; JA8427; JA4606; JA19622; JA21012-14.

[4] JA4466-67, JA4554; JA19881; JA3883-85.

Thus, the Court relied on evidence that Defendants' experts agreed was unreliable, while ignoring evidence demonstrating that, despite the aggregate turnout data from this single midterm election—an election in which the electorate was unusually exercised and spending and GOTV efforts were at an unparalleled pitch—disproportionate burdens persist.

4. The District Court Erred in Evaluating the Linkage Between the Disparate Impact of HB589 and Social and Historical Conditions.

In evaluating the second prong of the Section 2 analysis, the District Court disregarded this Court's direction that the disparate impact of an election law can be caused "***in part***" by social and historical conditions, instead requiring Plaintiffs to show that the impact was caused ***entirely*** by those conditions. *LWVNC*, 769 F.3d at 245 (emphasis added). In doing so, the court set an erroneously high bar for Plaintiffs by requiring them to prove that most (or even all) of the increased burdens they would suffer from HB589 were caused by social and historical conditions.

The myriad lingering socioeconomic disparities attributable to North Carolina's history of racial discrimination were not disputed by

Defendants and were readily acknowledged by the District Court. Indeed, the court found that North Carolina's African Americans:

- "are more likely to be unemployed and more likely to be poor than whites";
- "are less likely than whites to have access to a vehicle";
- "are more likely to move than whites";
- "fare worse than whites in terms of health outcomes"; and
- "are more likely to experience disparate educational outcomes than whites."

JA24723-24 (Op. 239-41). Furthermore, the court accepted that "historical discrimination" against African Americans is "assuredly linked by generations" creating "socioeconomic factors that may hinder their political participation generally," and that these disparities "can be linked to the State's disgraceful history of discrimination." JA24727 (Op. 243.) The court even acknowledged connections between the effects of discrimination and specific challenged practices. *See, e.g.*, JA24828 (Op. 344) ("easy to see a connection between certain reasons for ending up in the incomplete registration queue and literacy"). Yet, after all that, the District Court—applying a heightened causation standard found nowhere in Section 2 or relevant caselaw—failed to credit this undisputed evidence in demonstrating how these

socioeconomic disparities relate to the disproportionate burdens identified by Plaintiffs. This was reversible error.

B. Once Legal Errors Are Corrected, the Evidence Shows a Section 2 Violation.

When viewed through the proper legal framework set forth in *LWVNC*, the evidence established a Section 2 violation with regard to each of the challenged provisions of HB589.

1. Same-Day Registration

The District Court acknowledged that, considering "total aggregate numbers, it is indisputable that African American voters disproportionately used SDR when it was available." JA24647 (Op. 163). Furthermore, the court agreed that the burden of voter registration falls more heavily on African Americans, who are more likely to move between counties due to housing instability, and "have less access to transportation." *See* JA24660, JA24727 (Op. 176, 243). Eliminating the in-person assistance with registration that is available through SDR also weighs more heavily on African Americans, who more frequently submit incomplete application forms. *See* JA24658 (Op. 174). Nevertheless, returning to the familiar refrain of turnout, the District Court dismissed the significance of African Americans'

disproportionate use of (and need for) SDR, finding that Plaintiffs failed to establish that SDR enhances turnout because there have been no studies on the matter. *See* JA24648, JA24657-58 (Op. 164, 172-73). But even assuming, *arguendo*, that turnout is the sole bellwether, the evidence showed that turnout ***is*** higher when SDR is offered with early voting (as North Carolina did pre-HB589) as compared to when it is offered alone. *See* JA14080.

The District Court spent most of its SDR Section 2 analysis on the administrative burdens ***that the State faces*** to maintain SDR, particularly in the process for verifying new registrants by mail. *See* JA24766-92 (Op. 282-308). This was clear error for several reasons.

First, the court's findings rested on an unsupported premise: that the State's interest in timely mail verification is substantial because those who do not complete the verification process before Election Day are fraudulently casting votes. *See* JA24780-82 (Op. 296-98). But this Court already rejected this justification as tenuous because there is no evidence to "suggest[] that any of [the SDR votes] were fraudulently or otherwise improperly cast." *LWVNC*, 769 F.3d at 246. The evidence at trial corroborated this Court's prior conclusion: mail to a voter's

registration address can be returned to the sender for a host of benign reasons. JA17315; JA8493-94; *see infra* § III.

Second, as Plaintiffs demonstrated, same-day registrants verify at rates comparable to, and sometimes higher than, non-same-day registrants. *See* JA1621-26; JA226-27; JA17257-58. This is likely true because same-day registrants register in person, where the assistance of pollworkers can reduce errors on the registration form. JA17242-43, JA17250-51, JA17253.

Third, the District Court's singular focus on the "administrative burdens" on County Boards of Elections (CBOEs) and the burden on the State Board of Elections (SBOE) to "hire additional staff to process [same-day] registrations" was misguided. JA24771-72 (Op. 287-88). This Court directly rejected this very logic in *LWVNC*, explaining that election changes harmful to minority voters cannot be rationalized "on the pretext of procedural inertia and under-resourcing." 769 F.3d at 244.

2. Out-of-Precinct Voting

As the District Court acknowledged, "compared to their share of the electorate, African American voters were disproportionately more

likely than whites to cast an OOP provisional ballot in the elections prior to [HB589]." JA24663 (Op. 179). Even after HB589, a disproportionate percentage (42%) of the 1,387 OOP ballots that were not counted during the 2014 election were cast by African Americans. *See* JA24664 (Op. 180). Nor can there be any doubt that the disproportionate burden of eliminating OOP voting is linked to historical discrimination, given that—as a result of the State's long history of official discrimination—African Americans are more likely to be poor, less educated, unhealthy, more likely to move, and have less access to transportation. *See* JA24724-27 (Op. 240-43). These socioeconomic factors make it more difficult to identify and travel to their assigned precinct.

That should have been the end of the analysis of OOP voting. Instead, contrary to this Court's guidance, the District Court once again erroneously relied on its assessment that "individuals who used OOP have many remaining convenient alternatives." JA24844 (Op. 360). Contrary to its approach elsewhere in its opinion, the District Court downplayed the 2014 election results by noting that "***only*** 1,387" OOP

ballots were "not counted" during that election. JA24664 (Op. 180) (emphasis added).

Unpersuaded that disenfranchising more than a thousand North Carolina voters violated Section 2—in contravention of this Court's prior instruction that "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," *LWVNC*, 769 F.3d at 244—the District Court instead concocted a nonsensical concern that counting of OOP ballots would actually "***partially*** disenfranchise[]" those same voters whose ballots would otherwise have gone ***completely*** uncounted without OOP voting. JA24796 (Op. 312) (emphasis added).

Insofar as the State's administrative burden arguments are centered on the difficulty in counting OOP ballots, counsel for the State has previously conceded that the requisite counting is "eas[y]": "[I]t's simply a matter of the county Boards of Elections going back to counting those ballots rather than leaving them where they will not be counted." 10/7/14 Status Conf. Tr. 6:16-7:9, No. 1:13-cv-00658-TDS-JEP

(M.D.N.C. Oct. 9, 2014), ECF No. 203. And there was no evidence to the contrary.

3. Early Voting

African Americans have used early voting at higher rates than whites in each of the North Carolina's last four general elections. *See* JA24614-15 (Op. 130-31 & n.74). Racial disparities in early voting usage have been largest in the last two presidential elections in particular, when over 70% of African-American voters used early voting, as compared with approximately 50% of white voters. *See* JA18042 n.64.

Plaintiffs' expert Dr. Gronke presented evidence that African-American voters have become habituated to early voting to a stronger degree than white voters. *See* JA609-10, JA633; JA3881, 38892. Plaintiffs further presented evidence that higher early voting usage rates among African Americans are not a one-time or temporary occurrence caused by the presence of a particular candidate on the ballot, but rather are likely to continue in the future. JA3885; JA633.

Rather than credit this evidence, the District Court focused on two articles written by Plaintiffs' experts to conclude that the "scholarly

consensus" was that early voting depresses turnout. JA24611-13 (Op. 127-29). But the District Court simply ignored testimony from the experts themselves explaining that these articles were inapt for assessing this case. For one, the articles lumped together forms of voting that "North Carolinians would not think of as early voting" including "[a]bsentee voting, voting by mail, [and] voting at a county clerk's office." JA19422. Additionally, these articles looked at the impact of ***adding*** early voting, not the impact of ***restricting*** it (as HB589 did). JA19451. "[E]ven if the addition of early voting days does not significantly increase turnout, 'it is not methodologically sound to assume that there will … be little or no impact … when voters … face a ***loss*** of previously available voting days.'" *Florida v. United States*, 885 F. Supp. 2d 299, 332 (D.D.C. 2012) (emphasis added). Here, the critical analysis is how ***disruptions*** to voting habits raise costs for voters and deter participation. *See* JA1097; JA19396-97; JA19624; JA19781. By focusing only on the effect of adding voting options while "refusing to consider the elimination of voting mechanisms"—which is the actual scenario this case presents—the District Court erred. *LWVNC*, 769 F.3d at 242.

4. Photo ID

There is no dispute that African Americans in North Carolina are less likely than whites to possess a form of qualifying voter ID under HB589. *See* JA24585-86 (Op. 101-02). Indeed, both the SBOE and the United States's expert found that African-American voters are at least twice as likely as white voters to lack a qualifying ID. *See* JA9960, JA9963; JA5233-41; JA19782-73; JA4432-33 (showing 10.1% of African-American registered voters lacked HB589 ID, compared to 4.6% of white voters).

The burdens of obtaining qualifying ID also fall more heavily on minority voters because they disproportionately lack access to transportation and the underlying documents required to obtain a qualifying ID.[5] Despite this undisputed evidence, the District Court found that "North Carolina's voter ID law ***with the reasonable impediment exception*** does not deprive African Americans and

[5] JA20162-67; JA4292-93, JA4296-300; JA4311, JA4315, JA4319, JA4323, JA4327; JA3501; JA3569; *see also* JA23083; JA12153-58 (describing efforts to get DMV ID for sisters whose birth certificates contained errors); JA12138-40 (describing inability to obtain DMV ID because of missing letter on birth certificate).

Hispanics of an equal opportunity to participate in the political process as other groups." JA24823 (Op. 339) (emphasis added).

The District Court's reliance on the reasonable impediment process was error because the burdens of the photo ID requirement—which is still in effect, *see* JA23615—continue to fall disproportionately on minorities. For one, in spite of the reasonable impediment option, SBOE staff are still instructing voters that they must attempt to obtain a qualifying ID in order to vote in North Carolina, even when the voter is eligible to file a reasonable impediment declaration. *Id.; see, e.g.*, JA12344-51; JA12379-81; JA12385-89. Moreover, Plaintiffs presented evidence that the reasonable impediment provision does not alleviate the burden for at least three reasons: (1) the new reasonable impediment process is difficult to navigate; (2) the process forces the disproportionately African-American group of voters who lack qualifying ID into a separate and lesser voting process; and (3) reasonable impediment declaration challenges are intimidating and will deter voters from participating in the voting process in the first place. JA24390-471; JA23098-99; JA23407-08.

Relying solely on SBOE Director Kim Strach's testimony regarding SBOE's ***plans*** for implementation, the District Court concluded that the law would not be "applied in an intimidating and discriminatory manner." JA24608 (Op. 124). But undisputed evidence suggested the contrary. Particularly for low-literacy voters, navigating the reasonable impediment form creates yet another hurdle that will be difficult to surmount.[6] This is of particular concern in North Carolina, which has a higher rate of rejecting provisional ballots than the national average. *See* JA23391. Moreover, the reasonable impediment declaration process opens a voter to the threat of the declaration being challenged and the provisional ballot being rejected. *See, e.g.*, JA23318-19, JA23332-33; JA23541. The record is clear that these provisions are likely to deter voters from casting a ballot. JA23473.

5. Pre-Registration

The District Court acknowledged that African Americans disproportionately use pre-registration and that "pre-registration increases youth turnout." JA24669-70, JA24673 (Op. 185-86, 189)

[6] JA23321-22; JA12170, JA12178-79; JA23475-77; JA23519-21, JA23524, JA23541; JA12192 (intimidation of completing government forms).

(finding that African Americans were 30% of all pre-registrants as of 2012, despite making up only 22% of the State's population). Moreover, because African Americans in North Carolina are younger on average than whites, the elimination of pre-registration falls disproportionately on members of this protected class. *See* JA3505 (25.9% of African-American citizens in North Carolina are under 18 as compared to 19.5% of whites).

Despite these undisputed facts, the District Court, relying predominantly on so-called alternative means available for citizens to register to vote, erroneously declined to acknowledge the disparate impact of the elimination of pre-registration.[7]

6. Cumulative Racial Impact

This Court previously directed that "a searching practical evaluation" of the "totality of the circumstances" under Section 2 requires an examination of the "sum of [the] parts" of a challenged law "and their cumulative effect on minority access to the ballot box." *LWVNC*, 769 F.3d at 241-42; *see also Clingman v. Beaver*, 544 U.S. 581, 607-08 (2005) (O'Connor, J., concurring in part and concurring in the

[7] JA4611; *see also* JA3571; JA3505; JA19881-82.

judgment) ("A panoply of regulations, each apparently defensible when considered alone, may nevertheless have the combined effect of severely restricting participation and competition.").

As set forth above, the District Court found that African Americans used SDR, OOP voting, early voting, and pre-registration, and lacked qualifying ID, at substantially higher rates than whites. Yet the court concluded that not only was each individual provision not independently actionable under Section 2, but that the cumulative impact from these concurrent voting changes—all of which constricted access to the franchise—did not violate Section 2. "By inspecting the different parts of [HB589] as if they existed in a vacuum, the district court"—again—"failed to consider the sum of those parts and their cumulative effect on minority access to the ballot box." *LWVNC*, 769 F.3d at 242.

The burdens imposed by HB589 are undoubtedly cumulative. JA3503, JA3505. Voting involves a series of steps, each of which must be successfully completed for a voter's ballot to be cast and counted. The challenged provisions of HB589 impose an additional hurdle at each step. JA19637-39. For instance, minority voters who are

channeled into election-day voting because of cuts to early voting would be more likely to vote OOP and will be forced to marshall additional resources to find transportation to their assigned precinct on Election Day in the absence of OOP voting. Similarly, the advent of the Photo ID requirement—complete with the reasonable impediment process and its multiple voter forms and provisional ballots—will contribute to congestion at the polls, which falls disproportionately on voters with inflexible job schedules, fewer resources, and less access to transportation (a group that is disproportionately African American).

Where, as here, plaintiffs challenge multiple, simultaneously-imposed voting restrictions, the effects must be measured cumulatively, not in isolation, and must be justified with evidence of correspondingly weighty interests. *See, e.g.*, *Pisano v. Strach*, 743 F.3d 927, 933 (4th Cir. 2014) (court must "evaluate the combined effect" of ballot access rules); *Wood v. Meadows*, 207 F.3d 708, 711 (4th Cir. 2000). The District Court's failure to take into account the relationship between the challenged provisions and their cumulative effect was reversible error.

C. The Senate Factors Provide Additional Support for Finding a Section 2 Violation.

In addition to satisfying this Court's two-pronged Section 2 analysis, Plaintiffs established a majority of the Senate factors identified by the Supreme Court in *Gingles*, 478 U.S. at 44-45, which form part of the "totality of [the] circumstances" analysis required by Section 2, *see LWVNC*, 769 F.3d at 240.

1. History of Official Discrimination

The District Court correctly recognized that "North Carolina has a sordid history" of official discrimination "dating back over a century." JA24711 (Op. 227); *see also* JA24719 (Op. 235) ("There is significant, shameful past discrimination."). The District Court nonetheless erroneously found that this factor did not favor Plaintiffs because, in its view, none of these procedures are "currently used in North Carolina." JA24721-22 (Op. 237-38).

2. Racially Polarized Voting

The District Court correctly recognized that "polarized voting between African Americans and whites remains in North Carolina, so this factor favors Plaintiffs." JA24720 (Op. 236).

1. Practices that Enhance Opportunities for Discrimination

The District Court erred by ignoring evidence of practices and procedures ***that persist today*** that enhance the opportunity for discrimination, including the Department of Justice's issuance of nineteen Section 5 objections since 1990. *See* https://www.justice.gov/crt/voting-determination-letters-north-carolina. Perhaps most starkly, the court failed to mention litigation over North Carolina's 2011 redistricting plans, which involved charges that state legislative and congressional districts were drawn discriminatorily to pack African-American voters into as few districts as possible, thus limiting their influence statewide. *See Dickson v. Rucho*, 781 S.E.2d 404, 410 (N.C. 2015) (cert. petition pending); *Harris v. McCrory*, --- F.3d ---, 2016 WL 482052, *17, 21 (M.D.N.C. Feb. 5, 2016) (invalidating two congressional districts as unconstitutional racial gerrymanders); *see also Covington v. North Carolina*, No. 1:15-cv-00399 (M.D.N.C.) (challenge to state legislative districts). These redistricting efforts are "voting practices or procedures that may enhance the opportunity for discrimination against the minority group," which the court should have credited. *Gingles*, 478 U.S. at 37.

2. Continuing Effects of Discrimination that Hinder Political Participation

The record contains manifest evidence of the present-day effects of discrimination and how those effects hinder African-American electoral participation. *See, e.g.*, JA1228-29, JA1239; JA3491-96; JA1150-59; JA19261; JA20862-63, JA20867, JA20871, JA20892; JA19411-12; *see also* JA21142. Indeed, the District Court accepted that "African Americans experience socioeconomic factors that may hinder their political participation generally" and that these disparities "can be linked to the State's disgraceful history of discrimination." JA24727 (Op. 243).

3. Racial Appeals in Campaigns

The District Court erred in concluding that Plaintiffs did not satisfy the sixth *Gingles* factor because "the passage and enforcement of [HB589] was not and has not been marked by subtle or overt racial appeals." JA24742 (Op. 258). That mischaracterizes *Gingles*, which requires inquiry into "whether [North Carolina] ***political campaigns*** have been characterized by overt or subtle racial appeals." 478 U.S. at 37 (emphasis added). On that score, the District Court acknowledged one "undeniable" "recent" racial appeal involving a mailer distributed

by the North Carolina Republican Party's Executive Committee. JA24742 (Op. 258). Thus, viewed under the proper rubric, this factor favors Plaintiffs.

4. Minority Electoral Success

The District Court concluded that because African Americans' "electoral success, at least outside of statewide races, approaches parity," Plaintiffs had only "weakly" demonstrated that they are underrepresented among elected officials. JA24745 (Op. 261). But the court's qualification—"at least outside of statewide races"—goes too far: between nine statewide constitutional officers and two U.S. senators, North Carolinians have elected an African American ***once*** in the State's history. JA3495. This factor, too, favors Plaintiffs.

5. Non-Responsiveness of Elected Officials

The District Court dismissed Plaintiffs' assertion that North Carolina's lingering race-based socioeconomic disparities are evidence enough of unresponsiveness on the part of government officials because Plaintiffs failed to identify "specific State policies" that contribute to those disparities. JA24746 (Op. 262). That is erroneous as both a legal and factual matter. For one, the law does not require identification of particular policies; after all, ***un***responsiveness is not necessarily

attributable to any particular policy but to a ***lack*** of action in the face of obvious inequality. And in any event, Plaintiffs ***did*** present evidence of the General Assembly's lack of responsiveness to minority concerns through at least two specific policies: repeal of North Carolina's Racial Justice Act and the State's failure to expand Medicaid and preserve unemployment benefits eligibility. *See* JA1230-32.

6. Tenuousness of the State's Justifications for HB589

The final *Gingles* factor asks whether the State's policy underlying a change in voting practices is "tenuous." 478 U.S. at 37. Here, the State's lawyers argued various rationalizations for the challenged provisions of HB589—but there was little to no evidence of contemporaneous rationalizations, as the legislators that passed this sweeping law hid behind legislative privilege.[8] Many of the lawyer-generated arguments were nothing more than unsubstantiated, *post hoc* rationales that should be viewed with skepticism, including: inability to verify addresses (SDR), voter confusion (pre-registration),

[8] The District Court erred in denying discovery of legislator communications on ground of legislative privilege for the reasons set forth in ECF Nos. 88, 135, and 153 in No. 1:13-cv-00658-TDS-JEP (M.D.N.C.).

administrative burdens (OOP voting), cost savings (early voting), and in-person voter fraud (Photo ID). *See Veasey*, 796 F.3d at 501-02.

As a matter of law, to be non-tenuous, the General Assembly's rationale for enacting each challenged provision of HB589 has to be substantial, and the General Assembly was required to consider alternative, less discriminatory procedures to achieve its goals. Here, none of the various rationales credited by the District Court are compelling. For instance, the District Court relied on Defendants' broad and unproven *post hoc* justifications that HB589 helped the State "free up resources," create "cost savings," and eliminate "administrative burdens." JA24761, JA24765, JA24771 (Op. 277, 281, 287). In doing so, the District Court committed error by once again "sacrificing voter enfranchisement at the altar of bureaucratic (in)efficiency and (under-)resourcing." *LWVNC,* 769. F.3d at 244.

Furthermore, the means chosen by the General Assembly to attain its goals are not consistent with minimizing discriminatory impact. For example, if the General Assembly's goal was to prevent voting by unverified registrants, the legislature could have changed the law to allow challenges of these types of ballots until the canvass or

delayed the canvass date. Indeed, CBOEs have the ability to retrieve these ballots—and avoid counting them—up to the date of the canvass. JA17293-95. The total elimination of SDR to deal with concerns regarding mail verification is not just a competing "policy choice" but a failure to tailor the law to minimize racial impact. This same analysis should invalidate each of the challenged provisions.

II. The District Court Erred In Finding A Lack of Racially Discriminatory Intent.

The Fourteenth and Fifteenth Amendments and Section 2 prohibit legislation enacted with racially discriminatory intent.[9] In order to prevail on a claim of racially discriminatory purpose, a plaintiff must demonstrate only that discriminatory purpose was ***one*** of the

[9] The Court should not avoid Plaintiffs' Fourteenth or Fifteenth Amendment claims (both intentional discrimination and undue burden) even if Plaintiffs prevail on their Section 2 claims. Although avoidance of constitutional questions is sometimes appropriate, s*ee Norfolk S. Ry. Co. v. City of Alexandria*, 608 F.3d 150, 156-57 (4th Cir. 2010), such avoidance is improper where a statutory ruling does not provide plaintiffs the "same relief they could access if they prevailed on … [constitutional] claims." *Veasey*, 796 F.3d at 513. Here, Plaintiffs seek preclearance relief under Section 3(c) of the Voting Rights Act, which may be invoked upon a finding of "violations of the [F]ourteenth or [F]ifteenth [A]mendment justifying equitable relief." 52 U.S.C. § 10302(c). Because Section 2 does not provide coextensive relief, Plaintiffs respectfully request that the Court address their constitutional claims regardless of the Section 2 outcome.

motivating factors underlying State action. *See Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977). To that end, the Supreme Court in *Arlington Heights* established a non-exhaustive list of factors that can prove discriminatory intent. *Id.* at 265-68. Here, the District Court erred in ignoring evidence clearly establishing that Plaintiffs satisfied these factors, and that discriminatory purpose was—at least—one of the motivating factors. Accordingly, Plaintiffs join and fully incorporates the arguments in the United States' brief. A few points, however, bear emphasis here:

A. The District Court Misunderstood the Legal Significance of Pre-Enactment Knowledge.

The District Court failed to credit the undisputed evidence presented to the legislature prior to HB589's enactment showing the disparate impact of the challenged provisions (the first *Arlington Heights* factor). For example, before enacting the Photo ID requirement, the legislature requested data from the SBOE regarding the racial impact of the proposed requirement. All four of the SBOE's "no-match" analyses comparing registered voters to the list of DMV ID-card holders categorically and consistently showed that African

Americans were disproportionately less likely to possess ID. JA24585 (Op. 101). The District Court nevertheless erroneously whitewashed the legislators' requests—without any evidence or testimony presented by the legislators themselves, who claimed legislative privilege. JA24870 (Op. 386). But legislators' knowledge that the expected impact of their actions would "bear[] more heavily on [African Americans]," is highly significant under *Arlington Heights*, regardless of any possible legitimate reason for acquiring that knowledge. *See United States v. Brown,* 561 F.3d 420, 433 (5th Cir. 2009); *see also McMillian v. Escambia Cty.*, 748 F.2d 1037, 1046-47 (5th Cir. 1984).

The District Court instead relied on *post hoc* evidence of eventual racial impact in the 2014 election rather than pre-enactment knowledge (*i.e.*, the data the legislature had in its hand when it was passing HB589). JA24893 (Op. 409). Those 2014 results were obviously unknown to legislators at the time they passed HB589 and are therefore of little use in a discriminatory intent analysis.

B. The District Court Erroneously Dismissed the Significance of the Sequence of Events Leading up to the Passage of HB589.

The District Court ignored clear evidence that HB589 was reflexively enacted to reverse the preceding period of expansion of the franchise, during which North Carolina began to redress discrimination through measures that HB589 reversed.

Indeed, Plaintiffs demonstrated that in the wake of *Shelby County*—a decision which solely concerned race—the legislature made dramatic and unjustified changes to HB589 that disproportionately affected African-American voters, including with regard to both Photo ID and non-ID-related provisions. The analysis of changes to HB589 before and after *Shelby County* demonstrated that all of the material choices made by the General Assembly following *Shelby County* disadvantaged African Americans. But rather than heed this Court's prior warning that "the post-*Shelby County* facts on the ground in North Carolina should have cautioned the district court," *LWVNC*, 769 F.3d at 242-43, the District Court erroneously ignored the obvious inference of racial intent from the General Assembly's rush to pass the "full bill" version of HB589 so soon after *Shelby County*.

C. The District Court Erred by Not Performing a Pretext Analysis.

The District Court also erred in failing to assess the pretextual nature of the Defendants' justifications for HB589. Rather, the court erroneously evaluated the tenuousness of the State's purported justifications under a rational basis review, and compounded that error by improperly relying on those findings in its intent analysis. *E.g.*, JA24805-06 (Op. 321-22); *see also id.* 24861 (Op. 377) ("The court's conclusion regarding [*Gingles*] factors would be similar here in the discriminatory intent context.").

Notably, *post hoc* rationalizations are not probative of intent under *Arlington Heights*. *See, e.g.*, *Barber v. Thomas*, 560 U.S. 474, 485-86 (2010). Even contemporaneous rationales must be scrutinized carefully, and statements by legislative proponents of a challenged law articulating an ostensibly permissible intent should not be accorded any special weight. *See Smith v. Town of Clarkton*, 682 F.2d 1055, 1064 (4th Cir. 1982).[10] Yet the District Court improperly credited

[10] Particularly where legislators hide behind the cloak of legislative privilege and decline to testify under oath, any rationales they have offered in unsworn statements outside the courtroom should be presumptively suspect.

rationalizations not in the contemporaneous legislative record, including evidence created well after HB589 was enacted. *See, e.g.*, JA24778-81 (Op. 294-97) (discussing data provided by SBOE employee hired in October 2014—more than a year after HB589's passage); *id.* 24889 (Op. 405) (considering affidavit by former legislator not in the legislature at time of the bill). As discussed further *supra* § I.C.8, the court's tenuousness analysis relied heavily on non-contemporaneous evidence uncited by proponents or in the legislative record, *see, e.g.*, JA24794-96 (Op. 310-12) (discussing purported effect of the 2005 *James v. Bartlett* case); JA24750 (Op. 266) (discussing 2005 Carter-Baker Report), while ignoring clear evidence of intent from the legislative record.[11]

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[11] For instance, the District Court failed to consider or credit:

- A contemporaneous statement by a Senate proponent conceding that "many of the soft policies [in the pre-Shelby version of HB589] are a result of squeamishness about the mandatory federal review." JA4950; JA20027.
- A statement virtually admitting HB589's partisan motive by the only Republican who spoke on the House floor, describing prior election reforms as "passed with a partisan motive, too." JA2623.
- Legislative hearing testimony from a Republican Precinct Chair that disenfranchisement of Democrats' "special voting

The State suggested at trial that the Photo ID requirement was necessary to combat voter impersonation fraud and to increase voter confidence in elections. But the evidence further confirmed what this Court already acknowledged in *LWVNC*: that these goals were nothing "other than merely imaginable." 769 F.3d at 246. Indeed, the District Court itself agreed this time around that "***there is no evidence of voter impersonation fraud in North Carolina***." JA24751 (Op. 267) (emphasis added).

Recognizing that there was no evidentiary support for either premise, the District Court nevertheless found that these unsupported justifications could be considered because "the legislature could reasonably have believed them to be true." JA24875 (Op. 391). This reliance on "potential" or "possible" rationales for the law does not pass muster where (i) such rationales have no demonstrated connection to the ***actual*** motivation for the legislation, and (ii) the plaintiff need only show that discriminatory purpose was ***part*** of the legislature's

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blocks [sic]" was "within itself" the "reason for photo voter ID, period, end of discussion." JA5557.

motivation—not that "the challenged action rested solely on racially discriminatory purposes." *Arlington Heights*, 429 U.S. at 265.

D. The District Court Erred in Ignoring the Role of Partisanship and Race.

Finally, the District Court erred in its analysis of the "troubling blend of politics and race." *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 442 (2006) ("*LULAC*"). Throughout its opinion, the District Court suggests HB589's restriction of voting opportunities was an appropriate partisan counterpoint to the expansion in voting opportunities previously enacted by the opposing political party. Not so. Instead, the evidence shows that ***a predominant purpose*** of HB589 was to assist the majority party to maintain its political power through the suppression of African-American and Latino voters' political participation.

Once again, the evidence here is clear-cut and largely undisputed. Between 2004 and 2012, North Carolina's African Americans achieved a ten-percentage-point swing in voter strength as compared to whites between 2004 and 2012. JA19858-59. Moreover, among other demographic characteristics, race yielded larger disparities in party voting than other voter characteristics, such as sex, age, education, and

income. JA19859-61. Accordingly, North Carolina Republicans had every incentive to target African Americans (and the voting practices they disproportionately utilized). However, achieving partisan electoral aims by targeting a protected class is no better than targeting a protected racial class for any other reason; to the contrary, the Constitution strictly prohibits it. *See LULAC*, 548 U.S. at 440 (striking down attempt to "[take] away the [minority group's] opportunity because [they] were about to exercise it.").

Though failing to consider possible Republican partisan motivation behind HB589, the District Court identified partisan motivation in prior reforms supported by Democrats. JA24793, JA24952 (Op. 309, 468.) This logically inconsistent attribution of ***expansion*** of African-American rights (and resulting participation gains) to improper partisan motivation, while at the same time failing to address Plaintiffs' substantial evidence of partisan motivation in ***reversing*** these gains, constituted legal error.

III. The District Court Erred in Finding No Fourteenth Amendment Violation.

The Fourteenth Amendment prohibits any encumbrance on the right to vote not adequately justified by the State's asserted interests.

See Anderson v. Celebrezze, 460 U.S. 780, 788-89 (1983); *Burdick v. Takushi*, 504 U.S. 428, 433-34 (1992). A court reviewing a challenge to a voting law must apply a balancing test that weighs the severity of the burden (its "character and magnitude") against the State's "precise interests." *Burdick*, 504 U.S. at 434; *see also Obama for Am. v. Husted*, 697 F.3d 423, 433 (6th Cir. 2012) ("*OFA*").

This balancing test is a "flexible" sliding scale, where the scrutiny becomes more rigorous as the burden increases. *Burdick*, 504 U.S. at 434. This Court has acknowledged that most cases fall in between strict scrutiny (which applies to severe restrictions on the right to vote) and rational basis review (reserved for regulations that impose merely incidental or no burdens at all), and are "subject to ad hoc balancing," such that "a regulation which imposes only moderate burdens could well fail the *Anderson* balancing test when the interests that it serves are minor, notwithstanding that the regulation is rational." *McLaughlin v. N.C. Bd. of Elections*, 65 F.3d 1215, 1221 & n. 6 (4th Cir. 1995) (expressly rejecting the proposition that "election laws that impose less substantial burdens need pass only rational basis review"). This Court has invalidated laws under the *Burdick* framework in recent

years. *See, e.g.*, *Libertarian Party of Va. v. Judd*, 718 F.3d 308, 317-19 (4th Cir. 2013) (invalidating law requiring petition circulators to be accompanied by State residents as witnesses).

Plaintiffs challenge the same five provisions under the Fourteenth Amendment as they did under Section 2. Although the court identified the correct legal standard under *Anderson-Burdick*, it nonetheless misapplied that standard, leading it to wrongly conclude that the challenged provisions did not create "more than the usual burdens of voting," and apply only rational basis review. JA24914 (Op. 430). Specifically, the court erred by (i) failing to properly assess both the magnitude ***and*** character of the burdens imposed on voters; (ii) ignoring the failsafe nature of the challenged provisions; (iii) failing to adequately assess the cumulative burden of the challenged provisions as well as the burden on subgroups of voters; and (iv) applying the incorrect level of scrutiny in analyzing the State's asserted justifications. Each of these flaws demands reversal.

A. The District Court Did Not Properly Assess the Burden that HB589 Imposes on Voting.

1. Same-Day Registration

The evidence showed that approximately 100,000 new voters used SDR in the 2008 and 2012 general elections, and more than 20,000 did so in 2010. JA630-31. This heavy pre-HB589 usage is evidence that the repeal of SDR creates burdens on many voters. *OFA*, 697 F.3d at 431. Additionally, the evidence demonstrated that thousands of voters were disenfranchised in November 2014 because of the SDR repeal. Specifically, the court acknowledged Plaintiffs' expert's finding that nearly 12,000 voters registered during the ten-day early voting period in the 2014 election. JA24651-52 (Op. 167-68); *see also, e.g.*, JA24834-36 (Op. 350-52); JA8847-52; JA8857-63; JA8873-82; JA8905-16; JA8948-51; JA8986-89; JA8999-9004; JA9019-25; JA9166-70; JA9334-38; JA9348-52. These individuals would have been able to vote at early voting sites before HB589, but could not in 2014 due to the removal of SDR. Yet after acknowledging these undisputed statistics, the District Court failed to acknowledge the character and magnitude of the burden, as *Burdick* requires .

Moreover, the District Court's identification of so-called alternatives to SDR starts from the wrong temporal point and ignores the fact that the SDR repeal has (and will continue) to leave voters without any voting options. For instance, Plaintiffs presented the evidence of Rev. Moses Colbert who attempted to vote early in 2014, believing he had properly registered at DMV; when he learned at the polling place that his registration was not complete, there was no alternate mechanism he could use at that point to avoid disenfranchisement. JA19043-48.

2. Out-of-Precinct Voting

Like SDR, OOP voting was used by thousands of voters in the years prior to HB589:

Election	OOP Ballots	% Counted
2006	3,115	96.8%
2008	6,032	91.7%
2010	6,052	95.1%
2012	7,486	89.6%

JA873. In November 2014, 1,387 OOP ballots were uncounted because of HB589. JA24664 (Op. 180).

Again, the District Court improperly disregarded the burden caused by the elimination of OOP voting. Michael Owens is a prime example: Owens, who works at a carwash 16 miles from his home, did not have access to a vehicle on Election Day 2014. JA24848 (Op. 364). Unable to get to his assigned precinct, he borrowed a co-worker's car and cast an OOP ballot at the precinct near his job, which was ultimately discarded. The court glossed over this by noting Owens had a car as of July 2015—some 8 months later—and "now knows … he will need to vote in his correct precinct." *Id.* Likewise, the court heard the story of the Washingtons, an elderly couple from Goldsboro who cast uncounted OOP ballots in 2014. Both were too disabled to travel to their assigned precinct, JA24849 (Op. 365), and instead visited a much closer precinct. Despite acknowledging that "OOP would make their burden less," the court concluded that their story demonstrated the need for voting by mail. *Id.* That was not the correct legal inquiry.

3. Early Voting

By 2008, early voting "constituted the most popular method of voting, being used by 48.7% of North Carolina voters." JA24614 (Op.

130). The pre-HB589 usage rates of early voting—including in the first week of early voting—are not in dispute:

Election	Votes in First 7 Days of Early Voting
2006	>90,000
2008	>700,000
2010	>200,000
2012	Nearly 900,000

JA4466, JA4554, JA3882, JA19760-70. Despite this, the District Court wrongly concluded that the reduction in early voting days did not constitute a substantial voting burden.

The District Court also mistakenly disregarded testimony of leading scholars regarding current scholarship demonstrating that early voting reductions in a presidential election—when volume is the highest—results in long lines and depressed participation (as in Florida in 2012). JA19780-81; JA3874; JA20259-60. The court also dismissed powerful examples of the character of the burden imposed by early voting cuts, including Sherry Durant, a disabled voter living in a group

home who testified that her caretaker did not have time to take her to the polls during the shortened 2014 early voting period. JA24632-33 (Op. 148-49).

Finally, the District Court erred in finding the SBOE's requirement that counties maintain the same number of early voting hours in 2014 as they did in 2010 alleviated the burden of the early voting reduction. The court ignored the State's own evidence that over 30% of all counties received a waiver from complying with that requirement in 2014. JA24633 (Op. 149); *see also* JA9541-42.[12] Moreover, as Plaintiffs' experts explained, early voting hours are not fungible: popular hours immediately after work cannot be replaced by hours later at night, and a lost weekend of early voting cannot be replaced by additional hours on a weekday morning. JA622. The court failed to even acknowledge this unrebutted testimony.

4. Photo ID

The record reflected that hundreds of thousands of North Carolina registered voters do not possess a qualifying ID, along with countless eligible-but-unregistered voters. JA9957-85. Furthermore, Plaintiffs

[12] The court signaled that it likely would have reached a different conclusion if the same hours were not provided. JA24763 (Op. 279).

demonstrated that the Photo ID requirement necessarily funnels individuals to the DMV (JA3296-373), and a number of voters testified to the extraordinary time and cost required to obtain even free DMV IDs. *See e.g.* JA24556 (Op. 72); JA23706-09; JA12085-95; JA12149-62; JA12183-213; JA12344-12346; JA12379-81; JA12385-89. Even the District Court had "substantial questions about the accessibility of free voter ID" for voters who lacked transportation or work flexibility to get to DMV. JA24556 (Op. 72).

Similarly, the court erred in finding that the reasonable impediment process eliminates the burden. As set forth *supra* § I.B.4, the State has made clear that it maintains a Photo ID requirement and many voters are still navigating the tortuous ID process; and those that cannot meet the State's continued mandate must overcome the confusing and intimidating reasonable impediment process.

5. Pre-Registration

From 2009 through 2013, over 150,000 voters used pre-registration. The court acknowledged that pre-registration substantially increases turnout among young voters. JA24673, JA24850, JA24933 (Op. 189, 366, 449). Pre-registrants also were more

likely to stay on the voter rolls than non-pre-registered young voters. JA3947. With the elimination of pre-registration, thousands of young voters cannot register while obtaining their first driver's licenses, and instead have to find a different means of registering. JA24671-72 (Op. 187-88); JA3914. Despite these findings, the court came to the legally flawed conclusion that the burden from the repeal of pre-registration was slight or non-existent, principally because voters have other mechanisms by which they could register. JA24934-35 (Op. 450-51).

B. The District Court Failed to Consider the Failsafe Role of the Eliminated Provisions.

The District Court also failed to credit unrebutted evidence regarding the need for the eliminated provisions as failsafe mechanisms. For example, with respect to SDR, the court acknowledged that numerous witnesses, including CBOE officials, testified to significant problems in transmitting voter registrations from DMV offices. JA24923-24 n.236 (Op. 439-40 n.236); *see also* JA19043-48; JA8857-63; JA8842-46; JA8419-26; JA9114-19; JA9290-92. This included Isabel Najera, a recently naturalized citizen, who attempted to vote during early voting after registering at DMV, only to find there was no record of her registration. JA19237-44. Before HB589, she

could have simply used SDR; afterwards, she was disenfranchised—despite doing everything required of her to vote.

Other voters were disenfranchised when CBOEs improperly purged eligible registrants from the rolls, JA19043-48 (voter registration record incorrectly merged with other voter with same name; purged voter's provisional ballot not counted); JA8952-69 (voter incorrectly identified as convicted felon and purged from roll), or because CBOEs failed to receive or record registrations submitted through third-party registration drives, JA9060-69 (voter registered at church registration drive); JA9334-38 (same; CBOE employee worked the drive). Once again, these voters could previously have taken advantage of SDR.[13]

Likewise, OOP voting operates as a failsafe when pollworkers direct voters to the wrong precinct or when voters are not notified of precinct changes. JA8883-90 (voter unaware of precinct change was sent from former precinct to new precinct at the end of the day, arriving too late to vote); JA8917-22 (voter sent to the incorrect precinct by

[13] This is particularly problematic because North Carolina does not provide a method for appealing an improper removal from the rolls or failure to receive a registration. JA20632-33.

pollworker). Again, the District Court either ignored these real-life situations or dismissed them as random, infrequent problems. JA24923-24 n.236 (Op. 439-40 n. 236). The proper legal question is whether these problems occur often enough that voters are burdened without a failsafe, and the undisputed evidence is that they do.

C. The District Court Did Not Properly Analyze the Cumulative Effect of HB589 or the Burdens Imposed on Subgroups.

The District Court also erred in failing to assess the cumulative effect of the challenged provisions as well as the burdens on subgroups.

The cumulative burden of HB589 can be assessed by fairly examining the voting process in North Carolina, which involves a series of steps, each necessary for the voter to successfully cast a ballot. Each challenged provision creates an additional hurdle at every step. For example, a shortened early voting period means a shorter period in which voters may vote at any county polling place, and thus increased reliance on Election Day voting, when voters must vote in their assigned precinct. Gwendolyn Farrington and Terrilin Cunningham were examples of voters who, because of long, inflexible working hours, could not vote during the shortened early voting period in 2014; the

same constraints kept them from their assigned precincts on Election Day. JA19019-22; JA19296-310. Thus, fewer days for early voting increased the likelihood that voters would be disenfranchised by the absence of OOP voting. Had the court looked at the cumulative effect of and interactions among these provisions—rather than just assuming that the aggregate effect of the challenged provisions must be "no more than slight to modest," JA24938-39 (Op. 454-55)—it would have reached the opposite conclusion. *See also supra* § I.B.6.

The District Court also failed to fully examine the burdens on particular subgroups of voters. *See, e.g.*, *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 198, 201 (2008) (assessing burdens on "indigent voters"); *Ohio NAACP*, 768 F.3d at 543-44 (evaluating burdens on "African American, lower-income, and homeless voters"); *Frank v. Walker*, 2016 U.S. App. LEXIS 6656, at *6 (7th Cir. Apr. 12, 2016) (right to vote "is not defeated by the fact that 99% of other people can secure the necessary credentials easily"). For example, the court did not consider whether the repeal of SDR would create a greater burden on transient voters, even when presented with evidence that voters who move from county-to-county have to re-register to vote,

JA4861, and that a substantial number of voters in North Carolina are transient. JA1157-58. The court also did not examine whether the disparate use of SDR and early voting by young voters indicated that those voters might be unduly burdened by the changes in HB589. Failure to assess the burden on particular segments of the population warrants reversal.

D. The District Court Failed to Scrutinize the State's Justifications.

Finally, the District Court erred by insufficiently scrutinizing the State's asserted justifications. Given the burdens described above, the proper level of scrutiny was, at the very least, heightened. Instead, the court applied rational basis review and accepted the justifications as proffered. JA24919, JA24923, JA24926, JA24931-32, JA24935 (Op. 435, 439, 442, 447-48, 451).

For instance, in upholding the repeal of SDR, the court cited the "important" number of SDR registrations in 2012 that later failed mail verification (2,361). JA24926, JA24713 (Op. 442, 229). But it did not use the proper balancing test, failing to compare the number of voters who failed mail verification to either (i) the number of voters disenfranchised in 2014 due to the ***elimination*** of SDR (thousands

more), JA8427; JA24834-36 (Op. 350-52), or (ii) the hundreds of thousands of voters who had used SDR successfully (and without any evidence of fraudulent voting or registration) in the past. JA630-31.[14]

Additionally, under heightened review, the District Court should have invalidated HB589 due to the State's failure to employ a less burdensome avenue in addressing its concerns. *Libertarian Party of Va.*, 718 F.3d at 318 (no narrow tailoring where defendant could not explain "why plaintiffs' proposed solution, manifestly less restrictive of [constitutional rights] would be unworkable or impracticable"). The court acknowledged that legislators were presented with three ways to

[14] Importantly, unrebutted evidence shows that a voter is not an illegal voter merely because he or she fails mail verification. The court repeatedly acknowledged that mail verification is an imperfect process. JA24782, JA24784 (Op. 298, 300). And the SBOE admitted that it did not examine the list of 2,361 to see how many registrants lived at homeless shelters, college campuses, or military bases—all of whom are not ineligible voters. JA21721-25. To the contrary, homeless voters are entitled to register to vote, even though their lack of permanent residence will frequently result in failed mail verifications. With respect to students, SBOE admitted to recent experience with universities failing to deliver SBOE mail to students. JA20646-47. And the testimony of Sergeant Alexander Ealy demonstrated that a valid voter living on a military base, which oftentimes have complicated postal addresses, can fail mail verification. JA8490-508. When such voters fail verification, they are not casting "improper ballots"; they are victims of a mail verification system that even the District Court concedes is "imperfect." JA24784 (Op. 300).

modify SDR to address voter concerns without repealing it. However, the court mistakenly concluded that such alternatives did not make the chosen path irrational. JA24785 (Op. 301).

Other justifications fare no better. The District Court itself acknowledged that the justification for the repeal of pre-registration was weak, based only on a legislator stating that his son had found pre-registration confusing. JA24935 (Op. 451). And with OOP voting, this Court already rejected the primary justification offered for its elimination—administrative ease. *LWVNC*, 769 F.3d at 244. Under the heightened scrutiny demanded in this case, these weak and contradicted justifications fail.

IV. The District Court Erred in Finding No Twenty-Sixth Amendment Violation.

Between 2000 and 2012, North Carolina's youth registration rate rose from 43rd to 8th in the country and its young voter turnout rate climbed from 31st to 10th. JA3948. With HB589, the General Assembly acted to reverse this trend. The District Court agreed that that the repeal of the challenged provisions disproportionately impacted young voters, *see* JA24944 (Op. 460), but its conclusion that HB589 was enacted "in spite of, not because of, these disparities," JA24946 (Op.

462), finds little basis in fact and rests on a misapplication of the legal standard. Because the impact on young voters is not an accidental result but rather one of the purposes of the challenged provisions, they violate the 26th Amendment.

A. Legal Framework

Under the 26th Amendment, "[t]he right of citizens … who are eighteen years of age or older, shall not be ***denied or abridged*** by … any State on account of age." The Amendment was intended "not merely to empower voting by our youths but … 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 Cty. Bd. of Elections*, 61 N.J. 325, 345 (1972); *accord Jolicoeur v. Mihaly*, 5 Cal. 3d 565, 575 (1971) ("Congress … disapproved of … treatment …that … 'might … dissuade [youth] from participating'" in the franchise (quoting S. Rep. No. 92-26, *reprinted in* 1971 U.S.C.C.A.N. 932)). The Amendment thus guards against "onerous procedural requirements" which "frustrate youthful willingness" to engage in the political system, *id.* at 571, 575, and forbids discriminatory treatment of

young voters "without a showing of some substantial justification," *Walgren v. Bd. of Selectmen of Amherst*, 519 F.2d 1364, 1368 (1st Cir. 1975).

B. The Undisputed Facts Show that HB589 Was Intended to Burden Youth Voting.

HB589 does precisely what the 26th Amendment forbids: it intentionally burdens the ability of young people to register and vote. The District Court's conclusion to the contrary ignores the undisputed facts and controlling authority in favor of unsupported and unsupportable justifications.

First, HB589 specifically and facially targets young voters. It repealed the highly successful pre-registration program and mandatory voter-registration drives in high schools—both used exclusively by young people. JA2314-15, JA2320. HB589 also ***specifically excluded college IDs***, while permitting military IDs, veterans' IDs, and tribal enrollment cards to be used for voting. These provisions target only young voters, and such facial discrimination is "by its very terms" intentional discrimination. *Lovell v. Chandler*, 303 F.3d 1039, 1057 (9th Cir. 2002).

The District Court specifically found that each of the challenged provisions disproportionately burden young voters—and that the General Assembly was well aware of this fact. JA24944-45 (Op. 460-61). Young voters were:

- more than twice as likely as older voters to use SDR, JA24655, JA24925 n.237 (Op. 171, 441 n.237);
- were disproportionate users of OOP voting, JA24668 n.117 (Op. 184 n.117);
- are less likely to possess acceptable voter ID under HB589, JA24944 (Op. 460); and
- were more likely to vote after 1 p.m. on the final day of early voting (which HB589 cut), JA24617, JA24944 (Op. 133, 460).

These facts provide additional strong bases for finding that HB589 was enacted with discriminatory intent. *LWVNC*, 769 F.3d at 247 ("[W]e cannot ignore the discriminatory results that several measures in House Bill 589 effectuate."); *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 487 (1997) (disproportionate impact "is often probative of why the action was taken in the first place since people usually intend the natural consequences of their actions").

Rather than giving this evidence its appropriate weight, the District Court adopted an improper and unsustainable standard for assessing the 26th Amendment claim, based entirely on whether it

could find some "non-tenuous reason" for the challenged provisions. JA24946 (Op. 462). Not only is the State not exonerated by "simply 'espous[ing]' rationalizations for a discriminatory law," *LWVNC*, 769 F.3d at 247 (brackets in original) (citation omitted), the rationales for the challenged provisions that single out young voters are nonexistent or cannot withstand the slightest scrutiny. The State did not offer ***any*** rationale for the elimination of school voter-registration drives, and the legislative history makes clear that the two justifications that the court found were "at least plausible" explanations for the exclusion of student IDs were pretextual, JA24945 (Op. 461). During House debates on the original HB589, legislators repeatedly asserted that they were drawing the line at "government-issued IDs," including public university IDs. *See, e.g.*, JA2433; JA2442-47; JA2115. But the General Assembly ultimately jettisoned that distinction, specifically to the detriment of young voters. *See Arlington Heights*, 429 U.S. at 267 ("Substantive departures … may be relevant, particularly if the factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached."). The isolated references to "inconsistency" and "redundancy," unearthed by the District Court from

the abbreviated Senate debate, hardly stack up against the House's extensive examination—and initial embrace—of college IDs.

The District Court's finding of a "non-tenuous" rationale for eliminating pre-registration is also unsustainable. The only explanation for the repeal came from Senator Rucho, one of the bill's main defenders, whose son was purportedly confused about whether pre-registration permitted him to vote before he turned 18. JA24801-02 (Op. 317-18). Indeed, even the court seemed skeptical of this justification, recognizing that the eliminated "pre-registration [system] is simpler than the current registration process," JA24804 (Op. 320); *see also* JA24806 (Op. 322) ("[T]he State's justifications are weaker than for the other provisions."). Nevertheless, the court apparently believed it survived challenge because it found that this exceedingly weak justification is not "a tenuous pretext for racial intent." JA24804-05 (Op. 320-21). Not only was this finding in error, *see supra* § II, for purposes of the 26th Amendment—which asks whether a particular provision burdens the right to vote on account of age without "substantial justification," *Walgren*, 519 F.2d at 1367-68—it is irrelevant. The facts as found by the District Court lead to the

inexorable conclusion that HB589 was intended, at least in part, to suppress the youth vote.

C. The District Court Erred in Failing to Consider Additional Evidence of Discriminatory Intent.

The District Court compounded its error by dismissing outright direct and damning evidence of intentional discrimination against young voters.

First, the court's analysis completely ignored precursor legislation directly aimed at squelching the youth vote. Two bills introduced in 2013—SB666, a "similar bill" after which HB589 was "patterned," JA24508 (Op. 24), and SB667—would have prevented parents from claiming tax exemptions for children registered to vote at another address, *see* JA2648, JA3289. Both provide evidence that the same legislature that enacted HB589 was specifically (and improperly) focused on dissuading college students from voting at their college residences. *Cf. Jolicoeur*, 5 Cal. 3d at 575.

Second, the District Court improperly excluded direct evidence of those bills' discriminatory purpose. Plaintiffs offered legislators' comments regarding voting measures being considered in 2013, including Plaintiffs' proffered Exhibit 79, in which Senator Cook, the

primary sponsor of SB666 and SB667, complained that college students "don't pay squat in taxes" and "skew the results of elections in local areas." *See* JA1818. These same sentiments were later echoed by a sponsor of HB589 who claimed to "have for years heard complaints that college students ought to vote in their home towns." JA1887. Although the parties stipulated before trial that these exhibits "shall be incorporated into the trial record as trial exhibits," JA18213, the District Court inexplicably allowed Defendants to renege on that agreement, JA20228. The court also incorrectly rejected these exhibits as irrelevant, finding that they were simply indicative of "animus generally." JA20826. But such evidence laying bare the legislators' "general animus" toward young voters is ***directly*** relevant to this case. *Arlington Heights*, 429 U.S. at 267.[15]

Third, the District Court turned a blind eye to the General Assembly's obvious motive: It did not like the way young people voted. Young North Carolinians voted overwhelmingly for Democratic

[15] For this same reason, and contrary to the District Court's finding, JA20828, these statements of legislative "motive" and "intent" are either hearsay exceptions, FRE 803(3), or hearsay exemptions, FRE 807; *see United States v. Dunford*, 148 F.3d 385, 393 (4th Cir. 1998); Pls.' Opp'n to Defs.' Mot. in Limine, No. 1:13-cv-00658-TDS-JEP (M.D.N.C. July 8, 2015), ECF No. 322.

candidates. JA3623; JA2563. As such, Republican elected officials had a strong political incentive to restrict the ability of young citizens to vote.

Fourth, the court failed to consider the actions of state and local entities further demonstrating the State's hostility to youth voting. In 2013, SBOE Executive Director Kim Strach—a close associate of an architect of HB589, JA20497—unlawfully directed the DMV not to register 17-year-olds even if eligible, barring over 2,700 young people from registering to vote at a DMV location. *See* JA20637-42. The court inexplicably referred to this as "a foul-up at DMV," JA24650 (Op. 166), ignoring that it was undisputedly the result of Strach's explicit direction. Moreover, several counties that had provided on-campus early voting locations in 2012 decided not to do so in 2014, *see* JA20648-49, leading one state court judge to find intent to discourage student voting, JA21585.

No other conclusion can be drawn from the State's consistent efforts to erect barriers between young voters and the franchise. The District Court's refusal to credit undisputed evidence of the State's systematic efforts to suppress youth voting flouts the "sensitive inquiry"

courts must undertake to evaluate discriminatory intent. *See Bossier Parish I*, 520 U.S. at 488.

D. The District Court's Opinion Undermines the Purpose of the 26th Amendment.

The opinion below repeatedly misconstrues facts to minimize the burdens faced by young voters and, in so doing, contravenes the very purpose of the 26th Amendment.

First, despite relying heavily on turnout statistics as "highly probative" in determining (and discounting) the burdens imposed on minority voters, JA24680 (Op. 196), the District Court inexplicably found that the fact that pre-registration "***increases*** youth turnout," JA24673, JA24850, JA24933 (Op. 189, 366, 449) (emphasis added), has ***no*** probative value, and that the resulting burden is "extremely slight." JA24933-36 (Op. 449-452). This inconsistent approach to turnout data ensures that voters always lose.[16]

Second, the District Court's assumption that the repeal of provisions intended to benefit young voters levels the playing field, *see*

[16] To the extent that pre-registration increased turnout, *see* JA24673 (Op. 189), one would expect to see that increase in 2014, when those who had pre-registered in the three years prior would be casting their first ballots.

JA24935, JA34949 (Op. 451, 465), ignores a fundamental difference between first-time voters and all others—namely, they are not already registered. Registration obstacles necessarily impose more severe burdens on those who are unregistered, including ***all*** young people approaching voter eligibility. It is because of these inherent barriers that young voters were more likely to make use of provisions such as pre-registration and SDR. *See* JA3958.

Finally, the District Court's dismissal of the burdens imposed on young voters in light of "ample alternative registration and voting mechanisms," JA24948 (Op. 464), replicates the same fundamental misunderstanding found in its Section 2 analysis. *See supra* § I.A.2.

The message of HB589 to young voters is loud and clear. The challenged provisions are directly at odds with the goal of the 26th Amendment "not merely to empower voting by our youths but … affirmatively to encourage their voting, through the elimination of unnecessary burdens and barriers." *Worden*, 61 N.J. at 345.

CONCLUSION

For the reasons set forth above, Plaintiffs request that this Court (i) reverse the District Court's order on the grounds that the challenged

provisions of HB589 violate Section 2 of the Voting Rights Act, and the Fourteenth, Fifteenth, and Twenty-Sixth Amendments; (ii) restore North Carolina's SDR, OOP voting, early voting, pre-registration, and voter identification requirements to their pre-HB589 status; (iii) authorize the appointment of Federal observers, pursuant to Section 3(a) of the Voting Rights Act; and (iv) place the State under preclearance of future voting changes pursuant to Section 3(d) of the Voting Rights Act.

This 19th Day of May, 2016.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 16-1468 **Caption:** N.C. State Conference of the NAACP v. McCrory

CERTIFICATE OF COMPLIANCE WITH RULE 28.1(e) or 32(a)
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1. **Type-Volume Limitation:** Appellant's Opening Brief, Appellee's Response Brief, and Appellant's Response/Reply Brief may not exceed 14,000 words or 1,300 lines. Appellee's Opening/Response Brief may not exceed 16,500 words or 1,500 lines. Any Reply or Amicus Brief may not exceed 7,000 words or 650 lines. Counsel may rely on the word or line count of the word processing program used to prepare the document. The word-processing program must be set to include footnotes in the count. Line count is used only with monospaced type.

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(s) Daniel T. Donovan

Attorney for NC NAACP Plaintiffs-Appellants

Dated: 5/19/2016

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 19th day of May, 2016, I caused this Joint Brief of Plaintiffs-Appellants to be filed electronically with the Clerk of the Court using the Court's CM/ECF system, which will send notice of such filing to all counsel of record. I further certify that on this 19th day of May, 2016, I arranged for the required copies of this Joint Brief of Plaintiffs-Appellants to be delivered to the office of the Clerk of the Court in accordance with Local Rule 25(a)(1)(B).

/s/ *Daniel T. Donovan*

Counsel for NAACP Appellants