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

NORTH CAROLINA STATE CONFERENCE OF THE NAACP, et al.,

Plaintiffs,

v.

PATRICK LLOYD MCCRORY, in his official capacity as the Governor of North Carolina, et al.,

Defendants.

PLAINTIFFS' BRIEF IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

Case No.: 1:13-CV-658

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

Plaintiffs,

v.

THE STATE OF NORTH CAROLINA, et al.,

Defendants.

Case No.: 1:13-CV-660

UNITED STATES OF AMERICA,

Plaintiffs,

v.

THE STATE OF NORTH CAROLINA, et al,

Defendants.

Case No.: 1:13-CV-861

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INTRODUCTION

These cases seek to protect the voting rights of North Carolina citizens. "There is no right more basic in our democracy than the right to participate in electing our political leaders." *McCutcheon v. Fed. Election Comm'n*, 134 S. Ct. 1434, 1440-41 (2014). Because voting is the fundamental building block of political power, "[o]ther rights, even the most basic, are illusory if the right to vote is undermined." *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964). Restrictions on voting rights thus "strike at the heart of representative government" and warrant the closest attention from courts and lawmakers alike. *Reynolds v. Sims*, 377 U.S. 533, 555 (1964).

Congress enacted Section 2 of the Voting Rights Act ("VRA") to provide added protection to the fundamental right to vote. Section 2 announces a straightforward rule: regardless of the reasons why a state chooses to change a voting practice, that change is unlawful if it "results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color." 42 U.S.C. § 1973(a). By the plain terms of the statute, such an abridgement occurs if a voting practice imposes electoral burdens that result in racial minorities having "less opportunity than other members of the electorate to participate in the political process." *Id.* § 1973(b).

Section 2 has proved to be a powerful and necessary tool for blocking restrictions on racial minorities' access to the franchise. Plaintiffs in North Carolina alone have brought more than 50 successful challenges to voting practices under Section 2. *See* JA1259-60 (Lawson Rpt. ¶ 16). And although the North Carolina General Assembly

proceeded in the wake of *Shelby County v. Holder*, 133 S. Ct. 2612, 2619 (2013), as if the entire VRA had been nullified, the Supreme Court reiterated in that case that Section 2 continues to protect the right to vote for citizens of color. Indeed, another federal court just recently applied Section 2 to enjoin less burdensome voter restrictions than those at issue here. *See Frank v. Walker*, 2014 WL 1775432 (E.D. Wis. Apr. 29, 2014).

Applying Section 2 in this case—just as it has been applied by federal courts for decades—requires the issuance of a preliminary injunction. During the waning hours of the 2013 legislative session, the General Assembly enacted House Bill 589 ("HB 589"), which severely impairs access to the franchise of all North Carolinians—but especially African-American and young voters. Among other things, HB 589 imposes onerous and strict voter ID requirements; sharply reduces the availability of in-person early voting; eliminates same-day registration ("SDR"); eliminates out-of-precinct provisional voting; eliminates the discretion previously given to localities to keep polls open for an extra hour on Election Day; expands poll observers and challengers; and eliminates the State's civic engagement programs that allowed 16- and 17-year-olds to pre-register to vote.

A straightforward application of Section 2 requires that those provisions be enjoined. Defendants do not (because they cannot) dispute that HB 589 imposes disproportionate burdens on African Americans. Indeed, at the time it enacted HB 589, the General Assembly had before it (or previously had been told) that African Americans used early voting, SDR, and out-of-precinct voting at far higher rates than whites. The evidence shows, moreover, that the elimination of these practices will interact with

existing socioeconomic conditions to impose material burdens on African Americans' ability to vote. North Carolina has an unfortunate and judicially recognized history of racial discrimination, and the effects of that discrimination persist to this day: poverty rates for African Americans are far higher than poverty rates for whites; unemployment rates for African Americans are two times higher than those for whites; and educational attainment is significantly lower for African Americans than it is for whites. Under the statute and governing case law, these facts are enough to establish a Section 2 violation, and the Court should enjoin the challenged provisions on that statutory basis alone.

HB 589 also suffers from several constitutional defects that further justify preliminary injunctive relief. The law's disproportionate burdens on African Americans, the highly unusual and expedited manner in which HB 589 was enacted, the evidence that was before the legislature at the time, and the absence of any credible legislative rationale all show that the legislature enacted the statute (at least in part) to depress minority voter turnout, in violation of the Fourteenth and Fifteenth Amendments. Even if the legislature had lacked discriminatory intent, HB 589 would nonetheless be unlawful because it imposes substantial burdens on the right to vote that are not outweighed by any substantial state purpose. Finally, the legislative history and the unjustified burdens that HB 589 places on young voters reveal that the law was enacted with the purpose of discriminating against young voters, in violation of the 26th Amendment.

The evidence developed to date and presented below is more than enough to justify enjoining the challenged provisions during the pendency of this litigation.

Plaintiffs ask simply that the 2014 general election be carried out under the same voting practices that were utilized in the 2010 and 2012 elections. Absent such relief, thousands of North Carolina citizens will be irreparably harmed by having their right to vote unconstitutionally abridged, and in many cases denied outright, in the 2014 elections.

BACKGROUND

A. The History of Racial Discrimination in North Carolina

The sweeping effects of HB 589 can be fully understood only when set in historical context. North Carolina has a long and lamentable history of racial discrimination. *See* JA1359-67, JA1372-73 (Leloudis Rpt.). Even after emancipation from centuries of slavery, African Americans in North Carolina were subjected to a regime of racial discrimination that permeated every aspect of social and political life. *Id*. Restrictions on African-American political power were long a prominent feature of that regime, with North Carolina lawmakers using an array of voting restrictions—including literacy tests, poll taxes, and racial gerrymandering—that were specifically calculated to disenfranchise African Americans. *Id*.

The VRA was enacted to address such entrenched racial discrimination in the electoral system. In addition to outlawing any "tests or devices" that suppressed minority voting strength, 42 U.S.C. § 1973, the law required certain jurisdictions to obtain federal "preclearance" from either the Department of Justice ("DOJ") or a three-judge panel before they implemented any change in voting procedures. In light of their history of voting-related discrimination, 40 counties in North Carolina were designated as covered

jurisdictions under the VRA, and between 1971 and 2012, DOJ objected to 65 changes in voting practices that would have resulted in increased electoral burdens on minorities. *See* JA1259-60 (Lawson Rpt. ¶ 16).

Although the VRA eliminated the most pernicious practices used to suppress minority voting, African-American voting rates continued for decades to lag behind those of whites. *See* JA1189-92, JA1225 (Kousser Rpt.). To this day, the effects of centuries of racial discrimination continue to be felt by African Americans in North Carolina in areas such as employment, wealth, transportation, education, health, criminal justice, and housing. *See* JA1150-59 (Duncan Rpt.). The consequences of discrimination are thus a present reality, not a distant memory, for millions of North Carolina citizens.

B. North Carolina Expands Access to the Franchise

For much of the past decade, North Carolina lawmakers took steps to make the franchise more accessible for African-American voters. In 2001, the General Assembly passed legislation permitting 17 days of no-excuse early voting, a practice that was meant to facilitate access to the electoral process for an increased number of voters. N.C.S.L. 2001-319. The following year, the legislature authorized the counting of "out-of-precinct ballots"—provisional ballots cast by registered voters outside of their assigned precincts for elections in which the voters were entitled to vote in their assigned precincts. That practice, the legislature later reaffirmed, was particularly important for African-American voters, a "disproportionately high percentage" of whom had cast out-of-precinct ballots in then-recent elections. JA2633-36 (N.C.S.L. 2005-2 § 1). In 2007, the General Assembly

enacted legislation allowing for SDR, whereby an individual could both register and cast an in-person ballot on the same day. JA2645 (N.C.S.L. 2007-253). That practice too was enacted after the General Assembly had been presented with evidence that similar legislation in other states had increased minority turnout. JA239 (Adams Decl. ¶ 14); JA398 (Martin Decl. ¶ 10). Finally, in 2009, the General Assembly approved legislation that allowed 16- and 17-year olds to pre-register to vote and automatically be registered when they turned eighteen. *See* N.C.S.L. 2009-541; JA1436 (Levine Rpt.).

These efforts to provide access to voting in North Carolina worked. In 1992, North Carolina ranked 46th in the country in voter participation, and that number had crawled to 37th by the 2000 election. *See* JA1196 (Kousser Rpt.). By 2012—after the measures described above had been enacted—North Carolina had jumped to 11th in voter participation, a remarkable increase in such a short period of time. *See id*. Voter participation among African Americans in North Carolina skyrocketed from 41.9% in 2000 to 68.5% in 2012. *See id*. JA1197. Indeed, the turnout rate among African-American voters in North Carolina surpassed that of white voters in the 2008 and 2012 general elections. *See id*. Similarly, youth (18-24 year olds) voter registration in North Carolina improved from 50.7% in 2000 (a national ranking of 43rd) to 63.7% in 2012 (a ranking of 8th), and youth voter turnout climbed from 30.7% in 2000 (a ranking of 31st) to 50.0% in 2012 (a ranking of 10th). *See* JA1432, JA1435 (Levine Rpt.).

The increased turnout among African-American voters was made possible by the voting measures described above, which those groups used at much higher rates than

whites. Over 70% of African-American voters utilized early voting during the two most-recent presidential elections—a rate that is more than 140% higher than the rate at which whites used early voting. *See* JA617 (Gronke Rpt. ¶ 27). Similarly, in 5 of the last 6 federal elections, African Americans used SDR at far higher rates than whites. JA243 (Adams Decl. ¶ 33). And black voters cast out-of-precinct provisional ballots at a rate of more than 1.8 times that of white voters in 2012. JA733 (Lichtman Rpt.).

North Carolina's increase in young voter registration and turnout was also due in part to the voting measures described above. *See* JA1436 (Levine Rpt.). From 2010-2013, over 160,000 young people pre-registered to vote. *Id.* JA1433. In addition, over 50,000 young voters utilized SDR in the 2012 presidential election, *id.* JA1439, and there is compelling evidence that SDR increases turnout among young voters, both in absolute terms and relative to older voters, *id.* JA1440-43. In both the 2008 and 2012 presidential elections, over 200,000 young North Carolinians used early voting. *Id.* JA1444.

C. The Legislative History of HB 589

HB 589 was introduced in early April 2013. Initially, HB 589 proposed only to institute a voter ID requirement, and did not include any provisions relating to early voting, SDR, or out-of-precinct voting. *See* JA1214 (Kousser Rpt.). After four weeks of consideration—including testimony and public hearings before the House Elections Committee and the opportunity for debate and amendment in three committees—the House passed HB 589 on April 24, 2013. *Id*. Although HB 589 was received in the

Senate the next day and promptly referred to the Rules and Operations of the Senate Committee ("Rules Committee"), the measure sat dormant for several months. *Id*.

On June 25, the Supreme Court decided *Shelby County*, which invalidated the formula for determining which jurisdictions were subject to the VRA's preclearance requirement. The result was that the General Assembly, which previously had been constrained by the preclearance requirement that applied to 40 North Carolina counties, was now free to enact any and all restrictions on voting without first obtaining approval from DOJ. The implications of this change were not lost on the members of the General Assembly: on the day *Shelby County* was issued, Senator Tom Apodaca, the Chairman of the Rules Committee, told the press, "Now we can go with the full bill." *See* JA182-83 (Stein Decl. ¶ 13); JA357 (McKissick Decl. ¶ 17); JA166 (H. Michaux Decl. ¶ 21).

Yet the Senate took no action on HB 589 in the immediate wake of *Shelby County* and provided no information publicly about the contents of the "full bill." Rather, members of the Senate waited until July 23, 2013—just days before the end of the legislative session—to introduce the "full-bill" version of HB 589. That bill converted what had been a 16-page bill imposing a voter ID requirement into a 57-page bill that included not only a much more onerous voter ID provision, but also a number of other restrictions on the franchise, including the elimination of SDR, out-of-precinct voting, straight-ticket voting, and pre-registration, and a sharp reduction in the number of early voting days. JA165-66 (H. Michaux Decl. ¶¶ 20-24); JA183-84 (Stein Decl. ¶ 15); JA68-JA85 (NAACP Decl. ¶ 53).

Notwithstanding the dramatic expansion in the scope of HB 589, the full bill passed both chambers on July 25—just two days after the full bill was first introduced. JA166-67 (H. Michaux Decl. ¶¶ 24-25). In the Senate, the Rules Committee was the only committee even superficially to consider the bill, and its members did not receive a draft of the 57-page full bill until 10 p.m. on July 22—the night before the committee discussed the bill. JA183-84 (Stein Decl. ¶¶ 14-15); JA378 (Kinnaird Decl. ¶ 23); JA254-55 (Blue Decl. ¶¶ 19, 21). There was no testimony before the Rules Committee from subject-matter experts or representatives from the State Board of Elections ("SBOE") or any county boards of elections ("CBOEs") about the impact of HB 589's new voting restrictions. *See* JA186-87 (Stein Decl. ¶ 20); JA278-79 (Parmon Decl. ¶ 26).

The proceedings in the House—which passed the full bill on the day it was received from the Senate, *see* JA166-67 (H. Michaux Decl. ¶ 25); JA405 (Martin Decl. ¶ 30)—were even more unusual. There was no testimony of any kind regarding the consequences of the full bill. *See* JA2505 (7/25/14 N.C. House Sess. Tr.); JA403 (Martin Decl. ¶ 25); JA166-67 (H. Michaux Decl. ¶ 25); JA306-08 (Glazier Decl. ¶¶ 28-33). The full bill did not go through any House committees, and a motion to go into the Committee of the Whole, which "would have given all members of the House the opportunity to openly discuss the changes [to the bill], to offer amendments to the legislation, or to call witnesses" was dismissed as a "waste of time." JA167 (H. Michaux Decl. ¶ 27). "It is extremely unusual for a bill of this magnitude and with this many new provisions to [have] be[en] adopted without the opportunity for any meaningful vetting through a

committee, committees, or testimony from the public." JA402-03 (Martin Decl. ¶ 23). "[I]n many instances, the House has appointed a Conference Committee to review significantly amended and controversial bills like the full version of H.B. 589." JA266 (Hall Decl. ¶ 19). And yet, members of the House were not afforded the opportunity to propose or debate amendments and were given less than two hours in total to speak in opposition to the bill, contrary to normal House rules that permit each legislator to offer two comments totaling fifteen minutes. JA402-03, JA404-05 (Martin Decl. ¶¶ 23, 27-28); JA404-405 (H. Michaux Decl. ¶¶ 26-27). And perhaps most conspicuously, in the debate regarding the full bill in the House, *only one* legislator argued for the bill, *see* JA2516, 2610 (7/25/13 N.C. House Session Tr. at 12:5-27:5, 116:11-20:13).

In sum, the legislative process employed in enacting HB 589 was highly irregular—particularly for a bill with drastic effects on voting rights. *See* JA399 (Martin Decl. ¶ 14); JA304 (Glazier Decl. ¶ 18); JA278-79 (Parmon Decl. ¶¶ 28-29); JA179 (Stein Decl. ¶ 3); JA239 (Adams Decl. ¶ 16). Indeed, Representative John Blust, a *supporter* of the bill, acknowledged the flawed nature of the legislative process. *See* JA1887-88 ("[HB 589] was received by the House only at 6:11 p.m. on the last night of the session for concurrence only. I readily admit that is not good practice. That is something we can be justly criticized for doing.").

D. The Challenged Provisions Of HB 589

As enacted, HB 589 includes a number of provisions (hereinafter, the "challenged provisions") that are relevant to Plaintiffs' current motion:

- ***Elimination of SDR.*** Through SDR, qualified voters could register *and* vote in one visit to a "one-stop" early voting polling place. HB 589 eliminated SDR altogether. *See* JA2268 (HB 589, Part 16). Now, voters appearing at early voting sites can only update an existing registration with address or name changes.
- ***Prohibition on Counting Out-of-Precinct Ballots.*** Before HB 589, a voter who attempted to vote in a precinct other than the one to which he was assigned (but that was located in his county of residence) was allowed to cast a provisional ballot, which was counted for all of the elections that would have appeared on the voter's ballot if he had gone to his assigned precinct—such as county-wide, statewide, and presidential elections. Under HB 589, votes cast outside the voter's assigned precinct will simply not be counted. *See* JA2286 (HB 589, Part 49).
- ***Shortening the Early Voting Period.*** HB 589 shortened the early voting timeframe by a full week—from 17 to 10 days—and eliminated the discretion of county boards of elections to permit early voting from 1:00 p.m. to 5:00 p.m. on the Saturday before an election. *See* JA2273 (HB 589, Part 25).
- ***Elimination of Pre-Registration.*** Prior to HB 589, sixteen and seventeen year olds could "pre-register" so that they were automatically registered to vote when they turned eighteen. HB 589 eliminated pre-registration. *See* JA2265 (HB 589, Part 12).
- ***Removal of Discretion to Keep Polls Open*.** HB 589 removed discretion from county boards of elections to keep polling locations open an extra hour in extraordinary circumstances. *See* JA2280 (HB 589, Part 33).
- ***Expansion of poll observers and voter challenges.*** H.B. 589 expands the number of poll observers ballot challengers. H.B. 589 allows any registered voter to challenge another voter anywhere in the state before Election Day and any registered voter to challenge another voter from the same county on Election Day. *See* JA2264-71 (HB 589, Parts 11 & 20.2).
- ***Photo ID Requirement.*** With very limited exceptions, HB 589 requires voters who cast an in-person ballot to show one of a few specific forms of unexpired photo identification for all voting in person. *See* JA2242 (HB 589, Part 2). This provision does not go into effect until the 2016 general election, the law mandates a soft rollout in 2014 requiring that voters be asked if they have acceptable ID and if not, sign an acknowledgment form, which will be a public record.

LEGAL STANDARD

The purpose of a preliminary injunction is to "protect the status quo and to prevent irreparable harm during the pendency of a lawsuit ultimately to preserve the court's

ability to render a meaningful judgment on the merits." *United States v. South Carolina*, 720 F.3d 518, 524 (4th Cir. 2013) (quotations omitted). A Court may enter a preliminary injunction if a plaintiff shows "[1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

ARGUMENT

All four factors of the *Winter* test strongly favor issuing a preliminary injunction. Because the final three factors of the *Winter* test are readily satisfied in this case, Plaintiffs first address these factors, explaining why they are likely to suffer irreparable harm, why the balance of equities factors an injunction, and why an injunction would be in the public interest. Plaintiffs then discuss why their statutory and constitutional claims are likely to succeed on the merits.

I. THE NATURE OF THE INJURY, BALANCE OF HARDSHIPS, AND PUBLIC INTEREST ALL FAVOR A PRELIMINARY INJUNCTION

The latter three factors of the *Winter* test strongly favor enjoining the challenged provisions until these cases are resolved. *First*, Plaintiffs and thousands of other North Carolina citizens will suffer irreparable injury absent a preliminary injunction from this Court. The deprivation of a constitutional right, even for a brief period of time, amounts to irreparable injury. *See Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."). Courts thus recognize that the denial or

abridgement of the right to vote constitutes irreparable harm. *See, e.g., Williams v. Salerno*, 792 F.2d 323, 326 (2d Cir. 1986) (denial of right to vote is "irreparable harm"). Of particular note in this case, North Carolina district courts have found irreparable harm and enjoined redistricting schemes found likely to violate Section 2 of the VRA and state laws requiring unduly burdensome election methods. *See, e.g., NAACP-Greensboro Branch v. Guilford Cnty. Bd. of Elections*, 858 F. Supp. 2d 516, 517 (M.D.N.C. 2012) (granting preliminary injunction because, *inter alia*, plaintiffs would be irreparably harmed if redistricting law were allowed to go into effect); *Republican Party of N.C. v. Hunt*, 841 F. Supp. 722, 727-28 (E.D.N.C. 1994) (granting preliminary injunction because, *inter alia*, plaintiffs would be irreparably harmed if existing method for electing superior court judges was followed).

Second, the balance of equities strongly favors a preliminary injunction. While Defendants might incur some administrative or financial costs if the Court enjoins the challenged provisions, the burden to Defendants of administering the upcoming elections under the pre-HB 589 regime—in the same manner and according to the same rules that Defendants used in recent elections—cannot be considered substantial. And even if it were, this burden would be far outweighed by the injury that Plaintiffs and others in North Carolina will suffer—the abridgement or denial of their right to vote—absent an injunction. *See Taylor v. Louisiana*, 419 U.S. 522, 535 (1975) ("administrative convenience" cannot justify practice that impinges upon fundamental right); *Johnson v. Halifax Cnty.*, 594 F. Supp 161, 171 (E.D.N.C. 1984) ("administrative and financial

burdens on the defendant … are not … undue in view of the otherwise irreparable harm to be incurred by plaintiffs"); *Pashby v. Delia*, 709 F.3d 307, 329 (4th Cir. 2013). The balance of equities therefore also weighs in favor of a preliminary injunction.

Third, enjoining the challenged provisions will serve the public interest. There is extraordinary public interest in preventing the right to vote from being denied or abridged. *See NAACP-Greensboro Branch*, 858 F. Supp. 2d at 529 ("[T]he public interest in an election … that complies with the constitutional requirements of the Equal Protection Clause is served by granting a preliminary injunction."); *see generally McCutcheon*, 134 S. Ct. at 1440-41; *Wesberry*, 376 U.S. at 17. In contrast, the purported benefits from implementation of the challenged provisions—the prevention of in-person voter fraud and increased electoral confidence—are nonexistent. *See infra* at Section II.A.4. The public interest therefore weighs heavily in favor of the issuance of an injunction. *See U.S. Student Ass'n Found. v. Land*, 546 F.3d 373, 388-89 (6th Cir. 2008) ("Because the risk of actual voter fraud is miniscule when compared with the concrete risk that [the State's] policies will disenfranchise eligible voters, we must conclude that the public interest weighs in favor of [preliminary injunctive relief].").

II. PLAINTIFFS' CLAIMS ARE LIKELY TO SUCCEED ON THE MERITS

The challenged provisions are unlawful, and Plaintiffs are likely to succeed on the merits, for four independent reasons. *First*, the challenged provisions violate Section 2 of the VRA because they deny or abridge North Carolinians' voting rights on account of race. *Second*, they violate the 14th and 15th Amendments because they were enacted with

the purpose of suppressing minority voting. *Third*, they violate the 14th Amendment because they place a substantial burden on the right to vote that is not justified by any significant state interest. *Fourth*, the challenged provisions unlawfully deny or abridge the right to vote on the basis of age in violation of the 26th Amendment.

A. HB 589 Violates Section 2 Of The Voting Rights Act

Section 2 of the VRA prohibits a state from "impos[ing] or appl[ying]" any electoral practice which "results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color." 42 U.S.C. § 1973(a) . It is a simple and straightforward directive. A showing of discriminatory intent is not required; "Congress [has] made clear that a violation of § 2 c[an] be established by proof of discriminatory results alone." *Chisom v. Roemer*, 501 U.S. 380, 404 (1991). As a U.S. District Court recently explained, "the meaning of this language is clear: Section 2 requires an electoral process equally open to all, not a process that favors one group over another." *Frank*, 2014 WL 1775432 at *25.

The standard for proving prohibited "discriminatory results" is set out in 42 U.S.C. § 1973(b), which provides:

> A violation of [Section 2] is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a [protected class] in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.

Courts applying that language have distilled two requirements for proving a Section 2 violation. *First*, a plaintiff must show that a challenged electoral practice "creates a

barrier to voting that is more likely to appear in the path of a voter if that voter is a member of a minority group." *Frank*, 2014 WL 1775432 at *25. *Second*, a plaintiff must show that a challenged electoral practice interacts with historical and social conditions to cause an inequality in the opportunities of minorities to participate in the political process. *See Thornburg v. Gingles*, 478 U.S. 30, 35-36, 44, 47 (1986) (courts must "assess the impact of the contested structure or practice on minority electoral opportunities" and determine whether a law "interacts with social and historical conditions to cause an inequality in the [voting] opportunities enjoyed by" minorities).

Plaintiffs bringing a Section 2 claim need not show that a challenged practice makes voting ***impossible*** for minorities—only that it makes voting disproportionately more ***burdensome***. *See id*.; *see also Holder v. Hall*, 512 U.S. 874, 922 (1994) (Thomas, J. concurring in the judgment). Section 2 thus prohibits not only the outright "denial," but also the "abridgement" of the right to vote.[1] 42 U.S.C. § 1973. Courts have therefore found that plaintiffs could state a claim under Section 2 when challenging barriers such as: restrictions on registration, *Operation Push v. Allain*, 674 F. Supp. 1245, 1262-68 (N.D. Miss. 1987); limits on early voting, *Brooks v. Gant*, 2012 WL 4482984, at *7 (D.S.D. Sept. 27, 2012); closure or relocation of polling places, *Spirit Lake Tribe v. Benson Cnty*., 2010 WL 4226614, at *3 (D.N.D. Oct. 21, 2010), *Brown v. Dean*, 555 F. Supp. 502, 504-05 (D.R.I. 1982); and the frequent use of old voting technology in

[1] Abridge is defined as "[t]o reduce or diminish." Black's Law Dictionary 7 (9th ed. 2009); *Gray v. Johnson*, 234 F. Supp. 743, 746 (S.D. Miss. 1964) ("When the word is used in connection with … the word deny, it means to circumscribe or burden.") (quotation omitted).

predominantly minority communities, *Stewart v. Blackwell*, 444 F.3d 843, 877-79 (6th Cir. 2006), *Sw. Voter Registration Educ. Project v. Shelley*, 344 F.3d 914, 918 (9th Cir. 2003) (per curiam). "There is nothing in these cases indicating that a Section 2 plaintiff must show that the challenged voting practice makes it impossible for minorities to vote." *Frank*, 2014 WL 1775432, at *29.

1. The Challenged Provisions Of HB 589 Disparately Impact African Americans In North Carolina

The challenged provisions fall more heavily on African Americans in North Carolina than on whites. Drs. Paul Gronke, Allen Lichtman, and Charles Stewart conducted a comprehensive analysis of the impact HB 589 would have on voters in North Carolina. Relying on data obtained from the SBOE, and applying well-accepted methods, those experts concluded—and explain in detail in their expert reports—that HB 589's elimination of SDR, prohibition on out-of-precinct balloting, and reduction in early voting will have a substantial disparate impact on African Americans. JA624-25 (Gronke Rpt.); JA687 (Lichtman Rpt.); JA788-89 (Stewart Rpt. ¶¶ 17-18).

a. African American Voters Rely Disproportionately on SDR

The elimination of SDR will disproportionately burden African-American voters in North Carolina. African Americans used SDR at higher rates than white voters in 5 of the last 6 federal elections, including all of the last 3 general elections. *See* JA628, JA630, JA631 (Gronke Rpt. ¶¶ 46, 48, Ex. 15). In 3 of the last 6 elections, African Americans used SDR at approximately *double* the rate of white voters. *See id.* JA628, JA630, JA629, JA631¶¶ 46, 48, Ex. 14, Ex. 15; *see also* JA642-714 (Lichtman Rpt.).

The adoption of SDR was followed by increased registration rates, *see* JA818-20 (Stewart Rpt. ¶¶ 90-93), with over 30,000 African Americans registering for the first time using SDR during the last two presidential elections. JA631 (Gronke Rpt. Ex. 15). Significantly, Defendants' experts do not deny that African-American voters in North Carolina disproportionately rely on SDR, or that these trends would continue into the future but for HB 589. *See id.* JA633 ¶ 53.

b. African-American Voters Rely Disproportionately on Out-Of-Precinct Voting

Defendants' experts also do not deny that "blacks are more likely to have their vote count because of out-of-precinct provisional ballot practices than are whites." JA878-79 (Stewart Rpt. ¶ 244). In 2005, the General Assembly found that "of those … who happened to vote provisional ballots outside their resident precincts on the day of the November 2004 General Election, a disproportionately high percentage were African-American." JA2635 (S.L. 2005-2 §1(9)). What was true in 2004 remains true a decade later: "African Americans are twice as likely to vote an out-of-precinct provisional ballot in North Carolina as are whites." JA868 (Stewart Rpt. ¶ 217); *see also id.* JA878 ¶¶ 241-42; JA728-34 (Lichtman Rpt.) (African Americans cast 30.1%, 56.5%, and 35% of out-of-precinct ballots in 2008, 2010, and 2012 and only 20-23% of all other ballots).

c. African-American Voters Rely Disproportionately on Early Voting

As explained by Dr. Gronke, African Americans in North Carolina have used early voting at higher rates than whites in all of the last three general elections, and in two of

the last three primaries. JA615-16 (Gronke Rpt. ¶ 26, Ex. 10). Other expert reports, as well as testimony by North Carolina elections officials, confirm disproportionate reliance by African Americans on early voting. *See* JA715-27 (Lichtman Rpt.); JA834-35, JA845-50 (Stewart Rpt. ¶¶ 131, 157-67); JA143 (Bartlett Decl. ¶ 23). These racial disparities persist even when controlling for factors such as age and partisanship. *See* JA617, JA618 (Gronke Rpt. ¶ 28, Ex. 10-B). African Americans have also relied more heavily than white voters on "*early* early in-person voting," *i.e.*, the specific days that have been eliminated by HB 589. *See id.* JA622-25 ¶¶ 38-41, Exs. 12-13; *see also* JA718-19, JA726-27 (Lichtman Rpt.); JA846-47 (Stewart Rpt. ¶ 160-161). *Cf. Florida v. United States*, 885 F. Supp. 2d 299, 323-24 (D.D.C. 2012) (finding it relevant that "African-American voters disproportionately used the [days that] will now be eliminated").

These disparate usage rates are not a one-time or temporary occurrence; rather, over the past decade, African-American voters in North Carolina have become habituated to the early voting period, such that these trends are likely to continue in the future. JA630 (Gronke Rpt. ¶ 50). Over 70% of African-American voters in North Carolina (totaling approximately 700,000 voters) utilized early voting during the two most recent presidential elections, approximately 140% the rate of white voters. *See* JA615-17, JA616 (Gronke Rpt. ¶¶ 26-27, Ex. 10). African-American early voting usage also increased markedly in the 2010 midterm elections (as compared to the prior midterm), from 13.06% in 2006, to 35.99% in 2010, an increase of 176%. *See id.*; JA833, JA835-36 (Stewart Rpt. ¶¶ 130, 133). This indicates that racial disparities in early voting are likely

to continue in midterms as well as presidential elections, because, "when assessing future usage rates of early voting, comparisons are best made between 'like' elections, and … the most recent analogous election is the best predictor of what will happen in the future." *Florida*, 885 F. Supp. 2d at 326. Thus, eliminating seven days of early voting—or over 40% of the early voting period—will significantly burden African-American voters.

2. Historical And Social Conditions In North Carolina Disfavor Racial Minorities

Because the challenged provisions have a disproportionate impact on African Americans, Section 2 requires the Court to identify the relevant historical and social conditions in North Carolina and then determine whether HB 589 interacts with those conditions to impose a disproportionate burden on the ability of African Americans to vote. *See supra* at Section A. In evaluating the social and historical conditions relevant to a Section 2 claim, courts have looked to a nonexclusive list of factors found in the Senate Report that accompanied the 1982 amendments to the VRA:

(1) the history of voting-related discrimination in the State or political subdivision;

(2) the extent to which voting in the elections of the State or political subdivision is racially polarized;

(3) the extent to which the State or political subdivision has used voting practices or procedures that tend to enhance the opportunity for discrimination against the minority group;

(4) the exclusion of members of the minority group from candidate slating processes;

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

(6) the use of overt or subtle racial appeals in political campaigns;

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

(8) whether elected officials are unresponsive to the particularized needs of the members of the minority group; and

(9) whether the policy underlying the State's or the political subdivision's use of the contested practice or structure is tenuous.

Gingles, 478 U.S. at 44-45 (citing S. Rpt. No. 97-417, at 28-29 (1982)). "'[T]here is no requirement that any particular number of factors be proved, or that a majority of them point one way or the other.'" *Id.* at 45 (quoting S. Rpt. No. 97-417, at 29). Indeed, depending on the nature of the challenged practice, some factors may not be relevant at all. *See Frank*, 2014 WL 1775432 at *24 (explaining that the Senate Factors "are not necessarily relevant" in vote denial and abridgement cases).

a. Factors 1 And 3: North Carolina Has A Long And Substantial History Of Voting-Related Discrimination

The first and third Senate Factors are closely related: both focus on whether the jurisdiction has a history of voting-related discrimination or practices that enhance the opportunity for such discrimination. As numerous judicial decisions, scholars, and experts have recognized, North Carolina has a long and regretful history of both.

The Supreme Court has recognized North Carolina's history of official discrimination against African Americans in voting-related matters. In *Gingles*, the Court affirmed the district court's finding that "North Carolina had officially discriminated against its black citizens with respect to their exercise of the voting franchise from approximately 1900 to 1970 by employing at different times a poll tax, a literacy test, a

prohibition against bullet (single-shot) voting, and designated seat plans for multimember districts." 478 U.S. at 38-39. The district court in *Gingles* further explained that "[t]he history of black citizens' attempts since the Reconstruction era to participate effectively in the political process and the white majority's resistance to those efforts is a bitter one, fraught with racial animosities that linger in diminished but still evident form to the present and that remain centered upon the voting strength of black citizens as an identified group." *Gingles v. Edminsten*, 590 F. Supp. 345, 359 (E.D.N.C. 1984), *aff'd in part, rev'd in part sub nom.*, 478 U.S. 30; *see also Johnson v. Halifax Cnty.*, 594 F. Supp. 161, 164 (E.D.N.C. 1984) (finding history of voting discrimination in North Carolina).

Drs. Barry C. Burden, James L. Leloudis, and Morgan Kousser similarly recount North Carolina's long history of voting-related discrimination. *See* JA1100-03 (Burden Rpt.); JA1184-89, JA1224-25 (Kousser Rpt.) ; JA1351-73 (Leloudis Rpt.). At the turn of the 20th Century, North Carolina adopted a literacy test for registration and a poll tax for voting, both of which were specifically designed to exclude African Americans from the polls. *See* JA1102 (Burden Rpt.); JA1187-88 (Kousser Rpt.); JA1355-56 (Leloudis Rpt.). The literacy test in particular was used selectively by vote registrars to discriminate against African Americans. JA1102 (Burden Rpt.). As a result of these discriminatory tactics, African-American voter participation fell to nearly 0% in elections held during the early part of the 20th century. *Id*.

Although the poll tax lasted only until 1920, the official literacy test continued to be freely applied for decades in North Carolina in a variety of forms that effectively

disenfranchised most African Americans. *Id*. JA1102-03 . "At least until around 1970, the practice of requiring black citizens to read and write the Constitution in order to vote was continued in some areas of the state." *Gingles*, 590 F. Supp. at 360. One of the plaintiffs, Rosa Nell Eaton, had to take a literacy test before being allowed to register in North Carolina. JA32 (R. Eaton Decl. ¶ 5). And even when African-American enfranchisement finally began to increase in the 1970s, "other electoral rules—racial gerrymandering and at-large elections—intentionally kept them from attaining power proportionate to their numbers in the electorate." JA1180 (Kousser Rpt.).

Nor have discriminatory voting practices in North Carolina ceased in recent decades. From 1971 to 2012, DOJ objected to 64 changes in North Carolina voting practices in the 40 North Carolina counties that were previously subject to the preclearance requirements of Section 5 of the VRA. JA1259-60 (Lawson Rpt. ¶ 16). Similarly, plaintiffs litigated 55 successful challenges to voting practices under Section 2—with 10 cases ending in a judgment and 45 settled favorably out of court. *Id*.

b. Factor 5: African Americans In North Carolina Continue To Bear The Effects Of Discrimination

African Americans in North Carolina also continue to bear the effects of racial discrimination. *See* JA1342-94 (Leloudis Rpt.); JA1184-89 (Kousser Rpt.). Following centuries of slavery, African Americans during Reconstruction were subject to vigilante violence at the hands of the Ku Klux Klan and the crippling system of sharecropping, which ensured racial economic subjugation. JA1345-47 (Leloudis Rpt.). Near the turn of the century, legislators enacted a series of laws that officially sanctioned discrimination

and came to be known as the Jim Crow system. *Id*. JA1357-63. Those laws required, among other things, separate seating for blacks on public transportation; the segregation of drinking fountains, toilets, and other public facilities; and bans on miscegenation. *Id*.

These and other measures—which persisted in North Carolina for more than 60 years—"relegated the majority of black North Carolinians to the countryside and created, in effect, a bound agricultural labor force." *Id*. JA1358. African Americans' earnings were kept to near-subsistence levels, their children were denied quality education, and they suffered greater health problems and higher mortality rates than whites. *Id*. JA1358-59. Elections in North Carolina were characterized by overt and implicit racial appeals, with white candidates routinely stoking racial fears and arguing that certain candidates and policies posed a threat to white privilege. *Id*. JA1361-63. And, in jurisdictions across the State, white lawmakers gerrymandered wards and precincts to isolate black voters, and employed other mechanisms designed to dilute black political power. *Id*. JA1361-68.

African Americans in North Carolina today continue to bear the effects of discrimination and economic and political subjugation. *See* JA1103-07 (Burden Rpt.); JA1143-66 (Duncan Rpt.). These disadvantages, which are pervasive and enduring, impact all aspects of social, economic, and political life in North Carolina, and include the following:

- ***Poverty***. Poverty rates for African Americans and in North Carolina are two to three times higher than poverty rates for whites. *See* JA1104 (Burden Rpt.) (34% of African Americans and only 13% of whites in North Carolina live below the federal poverty level); *see also* JA1146 (Duncan Rpt.). Living in poverty for these North Carolina citizens means "the lack of resources necessary to permit

participation in the activities, customs, and diets commonly approved by society." JA1146 (Duncan Rpt.) (quotations omitted).

- ***Employment***. As of the fourth quarter of 2012, the State unemployment rates were 6.7% for whites and 17.3% for African Americans. JA1104 (Burden Rpt.). Those racial disparities continued in 2013, with preliminary annual unemployment rates showing that whereas only 6.5% of whites were unemployed, 12.6% of African Americans were unemployed. *See id*.; JA1153 (Duncan Rpt.). Even when employed, minorities are more likely to be trapped in poverty, as 12.7% of employed African Americans live below the poverty line, as compared to 6.2% of employed whites. *See* JA1154 (Duncan Rpt.).

- ***Education***. Educational attainment is significantly lower for African Americans in North Carolina than it is for whites—including lower standardized testing scores, higher high-school dropout rates, longer average school-suspension times, and lower rates of college degrees. *See* JA1104-05 (Burden Rpt.). 15.7% of African Americans over the age of 24 have less than high school degree, compared with just 10.1% of whites. *See* JA1151 (Duncan Rpt.). And even when minorities achieve educational parity with whites, they fare worse, as African Americans with a high school degree are more than twice as likely as their white counterparts to be poor. *See id.* JA1151-53. These educational disparities are particularly significant here because "[n]umerous studies have shown that educational attainment is often the single best predictor of whether an individual votes." JA1105 (Burden Rpt.).

- ***Transportation***. Poor African Americans in North Carolina are far more likely than poor whites to lack access to a vehicle. *See* JA1143 (Duncan Rpt.). Indeed, 27% of poor African Americans in the state do not have a vehicle available to them, as compared to 8.8% of poor whites. *Id*.

- ***Residential Transiency***. While 75.1% of whites live in owned homes, only 49.8% of African Americans do. *See* JA1158 (Duncan Rpt.). As a result, racial minorities experience much higher rates of residential instability, with over 18% of African Americans in North Carolina having moved within the last year, as compared to only 13.6% of whites. *See id*.

- ***Health***. There are "widespread disparities" between whites and African Americans in terms of health metrics. JA1105 (Burden Rpt.). "On an array of official state health indicators that include such diverse measures as infant deaths, heart disease, and homicides, African Americans routinely fare worse than whites." *Id*. For example, the North Carolina Department of Health and Human Services found in 2010 that 24% of African Americans (as compared with just 16% of whites) are rated as having "fair" or "poor" overall health. *Id*. Moreover, poor non-whites in

North Carolina are "more likely to be disabled," than are poor whites. JA1143 (Duncan Rpt.). And whereas only 12.2 % of whites lack access to health insurance coverage, that is true for 18.8 % of African Americans. *Id*. JA1157.

- ***Criminal Justice***. Several indicators show that African Americans "suffer from unequal treatment by the criminal justice system." JA1106 (Burden Rpt.). African Americans receive disproportionate sentences for drug-related offenses, are far more often searched and arrested during traffic stops, and are incarcerated at far higher rates than whites. *Id*. In 2011, DOJ calculated that African Americans accounted for 56% of the North Carolina prison population and are incarcerated at six times the rate for whites. *Id*.

These considerations are highly relevant to the Section 2 analysis, because "[d]emographic markers such as these are strongly associated with the likelihood of an individual being deterred from voting by a new and burdensome voting practice." JA1107 (Burden Rpt.). Indeed, "[d]ecades of political science research" shows that disparities in these areas mean that new barriers to voting—like those imposed by HB 589—are far more consequential for African-American voters than for white voters. *Id*. JA1106. Senate Factor Five thus strongly cuts in favor of finding that historical and social conditions in North Carolina will interact with voting restrictions to cause African-American voters to have less ability to participate in the political process. *Cf. Spirit Lake****Error! Bookmark not defined.***, 2010 WL 4226614 at *3 ("Native American citizens in Benson County continue to bear the effects of this past discrimination, reflected in their markedly lower socioeconomic status compared to the white population. These factors hinder Native Americans' present-day ability to participate effectively in the political process.").

c. Other Senate Factors

Although less relevant outside of the redistricting context, several other Senate Factors support the conclusion that North Carolina politics have been racialized in a manner that makes full participation difficult for African Americans. One such factor is racial polarization (Factor 2), which "refers to the situation where different races … vote in blocs for different candidates," *Gingles*, 478 U.S. at 62, thus "allow[ing] those elected to ignore [minority] interests without fear of political consequences." *Rogers v. Lodge*, 458 U.S. 613, 623 (1982). Defendants have acknowledged in another ongoing case that there is a "pervasive pattern" of racial polarization in North Carolina. *Dickson v. Rucho*, 2013 WL 3376658 at *18 (N.C. Super. Ct. July 8, 2013); *see also* JA1103 (Burden Rpt.); JA1225-26 (Kousser Rpt.).

Given this polarization, it is hardly surprising that there have been racial appeals in political campaigns (Factor 6), from blatant demagoguery in the 1950s through the notorious 1990 Gantt-Helms Senate race. *See* JA1189-92, JA1229 (Kousser Rpt.). Such appeals are not a thing of the past. *See* JA68-JA85 (NAACP Decl. ¶¶ 36-37,39). During the 2008 presidential race, voters at one early voting site in North Carolina were subjected to the sight of a casket with a picture of presidential candidate Barack Obama. *See* JA1526 (11/3/08 *Voting Rights Watch*). North Carolina elected officials have also been unresponsive to the needs of minority voters (Factor 8), including, for example: failing to accommodate minority concerns related to the racially disparate impacts of the provisions of HB 589 (which every African-American member of the General Assembly

voted against), *see* JA1111 (Burden Rpt.); the repeal of the Racial Justice Act (which prohibited capital sentences tainted by racial discrimination); and economic policies that disproportionately burdened African Americans, such as the rejection of federal Medicaid funds and the termination of unemployment benefits. *See* JA1371 (Leloudis Rpt.); JA1230-32 (Kousser Rpt.). In sum, the relevant historical and social conditions in North Carolina are such that voting restrictions interact with these conditions to impose a disproportionate burden on the ability of African Americans to vote.

3. The Challenged Provisions Interact With Existing Social And Historical Conditions To Cause Disproportionate Burdens On African-American Voters

Against that background, there is a "causal connection" between HB 589 and the abridgement of minority voters' "opportunity … to participate in the political process." *Gonzalez v. Arizona*, 677 F.3d 383, 404 (9th Cir. 2012); *see also Irby v. Va. State Bd. of Elections*, 889 F.2d 1352, 1358 (4th Cir. 1989). To prove causation, plaintiffs "need not show that the challenged voting practice caused disparate impact itself." *Gonzalez v. Arizona*, 624 F.3d 1162, 1193 (9th Cir. 2010), *on reh'g en banc*, 677 F.3d 383 (9th Cir. 2012), *aff'd sub nom. Arizona v. Inter Tribal Council of Arizona, Inc.*, 133 S. Ct. 2247 (U.S. 2013). Instead, "the plaintiff may prove causation by pointing to the interaction between the challenged practice[s] and external factors such as surrounding racial discrimination." *Id.*; *see also Gingles*, 478 U.S. at 47 ("The essence of a § 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities employed by black and white voters to elect

their preferred representatives."); *Frank*, 2014 WL 1775432 at *30 ("[P]laintiff must show that the disproportionate impact results from the interaction of the voting practice with the effects of past or present discrimination and is not merely a product of chance.").

a. Same-Day Registration

The social and historical factors described above establish a causal connection explaining why African Americans "will be substantially and negatively impacted" by the elimination of SDR. JA630 (Gronke Rpt. ¶ 50). Eliminating SDR will impose particular burdens on voters of lower socioeconomic status, who often find it challenging to make multiple trips to election offices to register to vote and cast a ballot, as well as voters who have recently moved from another county and who need to update their address when voting. *Id*. JA629 ¶ 49. This pool of burdened North Carolina voters is disproportionately comprised of African Americans who (as compared to whites) have lower rates of vehicle and home ownership, higher rates of residential mobility, and a higher likelihood of working hourly-wage jobs. Thus, SDR has been "critical to [get-out-the-vote] work" in African-American communities. JA7 (Brandon Decl. ¶ 15); *see also* JA256 (Blue Decl. ¶ 25); JA242 (Adams Decl. ¶ 27); JA68-JA85 (NAACP Decl. ¶ 15).

This conclusion is supported by the longstanding academic consensus that SDR—especially when coupled with early voting—boosts turnout, particularly among voters who are poorer, of lower educational attainment, and who have recently moved. *See* JA627-28 (Gronke Rpt. ¶ 43). Given the lower income and education rates (and higher residential mobility) of African Americans in North Carolina, *see supra* at Section

II.A.2.b, it is unsurprising that academic scholarship has found that SDR is associated with higher minority turnout. *See* JA627-28 (Gronke Rpt. ¶ 43). Notably, Defendants' experts do not deny this consensus, and, in fact, rely on academic work supporting the notion that SDR boosts turnout. *See* JA678 (Gronke Surrebuttal Rpt. ¶ 53).

Given these facts, eliminating SDR will "have a disparate impact on African-American voters." JA633 (Gronke Rpt. ¶ 54). This is an undeniable—and undenied—fact. This disparate impact is not the product of chance, but rather is due to the social and historical factors described above, including the effects of past and present discrimination. Under these circumstances, eliminating SDR violates Section 2. *See Chisom*, 501 U.S. at 408 (Section 2 is violated when a state "ma[kes] it more difficult for [minorities] to register") (Scalia, J., dissenting); *Operation Push*, 674 F. Supp. at 1255 (registration restrictions "have a disparate impact on the opportunities of black citizens … to vote because of their socio-economic and occupational status"); *id.* at 1256 (requiring voters to register separately for municipal and state elections violated Section 2).

b. Out-Of-Precinct Voting

HB 589's repeal of out-of-precinct voting will also interact with existing social and historical conditions in North Carolina to impose real and substantial burdens on the ability of African Americans to exercise political power. *First*, voters who move between elections will be burdened by the loss of out-of-precinct voting, because they face the task of accurately identifying their new polling place, and are less likely than those who have lived in a community for years to be familiar with their polling site, and thus more

likely to appear out of precinct. *See* JA410-11 (Martin Decl. ¶ 55); JA318 (Glazier Decl. ¶ 70). This group of voters is disproportionately comprised of African Americans who as a group are far more transient than whites.

Second, when voters arrive at a polling place other than the one to which they are assigned, they must now relocate to the correct polling site, which imposes a burden on voters of lower socioeconomic status in particular—and, again, such voters are disproportionately minorities. As compared to whites, African Americans are less likely to have access to a vehicle and more likely to rely on public transportation or other non-personal means (such as rides from friends, volunteers, or churches) to get to the polls. *See* JA1159 (Duncan Rpt.); *see also* JA332, JA333-34, JA335 (Harrison Decl. ¶¶ 37, 43, 48). Reliance on those modes of transportation makes it far more difficult for those voters to change polling locations on voting day. *See* JA244 (Adams Decl. ¶ 37); JA256 (Blue Decl. ¶ 27); JA411 (Martin Decl. ¶ 57); JA318 (Glazier Decl. ¶ 71); JA26 (Dorlouis Decl. ¶ 10). Similarly, because African Americans disproportionately hold working-class jobs that afford less flexibility to take time off to vote, JA410 (Martin Decl. ¶ 53), many will lack the time necessary to change voting locations on Election Day—a difficulty exacerbated by the fact that voters often stand in long lines before discovering that they are at the wrong precinct. JA282-83 (Parmon Decl. ¶ 39).

Third, the burdens imposed by the repeal of out-of-precinct voting will have even more severe effects on African Americans in North Carolina in light of the redistricting that occurred following the 2010 census, which "split" a record number of precincts. The

result is that voters in the same polling place can end up with different ballots and participating in elections for different offices. These changes disproportionately affect African Americans, thus compounding the disproportionate impact from the elimination of our-of-precinct voting. *See* JA410 (Martin Decl. ¶ 54); JA282 (Parmon Decl. ¶ 38); JA175 (H. Michaux Decl. ¶ 55). Some 26.8% of the state's African-American voting age population now lives in a split precinct, compared to 15.6% of the state's white population. JA2017. For Senate districts the figures are 19.4% for African Americans and 11.8.% for whites. *Id*. In sum, the repeal of out-of-precinct voting will interact with the factors described above to have a disparate impact on African-American voters.

c. Early Voting

i. Reductions in Early Voting Will Burden African Americans

"[E]liminating the first seven days of … early voting … will have a differential and negative impact on the ability of African Americans to cast a ballot in North Carolina." JA633 (Gronke Rpt. ¶ 52). *First*, lower socio-economic status voters will be uniquely burdened by the loss of one week of early voting. Such voters—who are disproportionately African Americans—frequently have jobs with hourly wages, inflexible hours, and/or transportation difficulties (including lower rates of vehicle ownership), which can effectively prohibit them from voting on Election Day. *See* JA1143 (Duncan Rpt.); JA364-65 (McKissick Decl. ¶ 42); JA93-94 (Palmer Decl. ¶ 21). Thus, there is a clear causal link between HB 589's early voting cuts and reduced opportunity for African Americans to participate in the political process.

Second, the early voting period offers an essential in-person participation opportunity for African Americans who have grown distrustful of the political process due to the legacy of racial discrimination in voting (Senate Factors 1 and 3) and the racialized context of North Carolina politics (Factors 2, 6, and 8). For these voters, the opportunity to participate in person at a polling place during early voting cannot be replaced by other methods such as absentee voting by mail. *See* JA364 (McKissick Decl. ¶ 41) ("[M]any African-American communities take special pride in being able to vote in person."); JA281 (Parmon Decl. ¶ 34) ("In the African-American community, and particularly among our seniors, in-person voting has a great deal of significance."); JA68-JA85 (NAACP Decl. ¶¶ 15, 24); *Accord Brooks*, 2012 WL 4482984 at *7 (sustaining challenge to early voting limits where "voting by mail is not a viable option for [minority voters] because past discrimination and hostilities cause them to distrust that their vote will be counted when sent by mail.").

Third, get-out-the vote (GOTV) efforts in African-American communities will be less effective with a shorter early voting period. *See* JA364-65 (McKissick Decl. ¶ 42) (African-American constituents disproportionately rely on "rides from community organizations such as their church to get to the polls," such that early voting cutbacks "make[] it more difficult for these individuals, such as the parishioners at Union Baptist Church who lack personal means of transportation, to access their right to vote."). *Accord Florida*, 885 F. Supp. 2d at 330 ("[T]hird-party groups would not be able to assist

minority voters as effectively. This, in turn, would likely make it more difficult for those minority voters who rely on such efforts to make it to the polls.") (quotations omitted).

Thus, reducing early voting constitutes a "materially increased burden on African–American voters' effective exercise of the electoral franchise. . . analogous to (although certainly not the same as) closing polling places in disproportionately African–American precincts." *Florida*, 885 F. Supp. 2d at 328-29. Indeed, in describing a smaller reduction of the early voting period in Florida, another district court observed that, although such a reduction "would not bar African–Americans from voting, it would impose a sufficiently material burden to cause some reasonable minority voters not to vote." *Id.* at 329. *Cf. Holder*, 512 U.S. at 922 (limitations on "the times polls are open" may violate Section 2) (Thomas, J., concurring in the judgment); *Brooks*, 2012 WL 4482984, at *8 (denying motion to dismiss claim challenging six-day limit on early voting).

ii. HB 589's Purported Requirement to Maintain the Same Number of Aggregate Early Voting Hours Will Not Compensate for Lost Voting Days

HB 589's requirement that counties maintain the same total number of early voting *hours*, notwithstanding its elimination of 7 early voting *days*, will not offset these burdens. To begin, early voting hours will *not* remain the same for many voters, as 32 counties sought waivers to reduce early voting hours in the primary election. *See* JA701 (Lichtman Rpt.); JA857 (Stewart Rpt. ¶¶ 186-188); JA479 (Strach Dep. Tr. at 105:4-7).

Moreover, expanding early voting hours cannot compensate for a loss of early voting days. *First*, as Gary Bartlett—who was Executive Director of North Carolina's

SBOE for 20 years—explains, "election hours are not fungible." JA143-44 (Bartlett Decl. ¶ 24). Most voters tend to vote during the lunch hour and immediately after the end of the work day, such that opening polls extremely early in the morning or keeping them open late into the evening, when voter traffic tends to be light, provides little benefit. *See* JA836, JA853-57 (Stewart Rpt. ¶¶ 135, 178-185); JA143-44 (Bartlett Decl. ¶ 24); JA440 (Sancho Decl. ¶ 16). Thus, reducing the range of early voting *days*, even while maintaining a particular level of *hours*, will damage GOTV activities in African-American communities. *See* JA132 (Wells Decl. ¶ 15) ("Losing a week of Early Voting will certainly mean fewer votes from minority communities."); JA56-57 (R. Michaux Decl. ¶ 14) (African-American GOTV efforts will be "significantly less effective with the shortened early voting schedule").

Second, "even if all of the voters who would have used the repealed days of early voting did attempt to adjust to a shortened early voting schedule … that shift would create problems of its own for minority voting," in the form of "substantially increased lines, overcrowding, and confusion at the polls, which would in turn discourage some reasonable minority voters from waiting to cast their ballots." *Florida*, 885 F. Supp. 2d at 330. Because voting is a middle-of-the day activity, many voters who would have voted during the eliminated 7-day period will now shift to voting at a similar time in the remaining 10-day period. *See* JA854 (Stewart Rpt. ¶179). Thus, unless counties open additional early voting sites, "the result will be to add even more people to a congested early voting environment." *Id*. JA855 ¶ 180. Many counties in North Carolina, however,

lack the resources necessary to open additional polling locations to meet the high early voting demand in North Carolina. *Id*. JA857-60 ¶¶ 189-195. This will be particularly problematic given that, according to internal SBOE documents, early voting locations in North Carolina have already experienced "extremely heavy voter turnout and long lines," JA1525 (10/30/08 SBOE Mem.), with the wait time[s] at some sites … as long as 2 hours," JA1545 (10/22/12 SBOE Mem.). These wait times will only get worse.

Florida's experience from the 2012 election confirms that reducing early voting days, even while maintaining roughly the same number of hours, will result in heavier burdens for African Americans. Prior to 2012, Florida reduced its early voting period from a discretionary range of 12-14 days to a maximum of 8 days, while maintaining the same aggregate number of early voting hours in counties holding 84% of Florida's population. *See* JA622 (Gronke Rpt. ¶ 37). The result was that waiting times to vote increased during the early voting period by 50-100%; and, because African Americans are disproportionately represented in the pool of early voters, the burdens of this increased congestion fell disproportionately on them. *See* JA615 (Gronke Rpt. ¶ 25); JA437 (Sancho Decl. ¶ 8). Moreover, overall early voting rates fell significantly, and, the decline in the African-American early voting rate was four times that of white voters. *See* JA620-22 (Gronke Rpt. ¶¶ 33-36). In essence, "after Florida cut back on early voting, its population of early voters became less black, and more white." *Id.* JA621-22 ¶ 36.

Accordingly, this Court should find that North Carolina's reductions to early voting—regardless of the requirement to maintain the same number of hours—will

interact with social conditions to cause African Americans to have less ability to participate in the political process.[2]

d. Challengers and Observers

By expanding the number of poll observers and weakening protections against challenges by private citizens, HB 589 will "encourage increased levels of voter challenge and intimidation," burdening African Americans' ability to participate in the political process. JA1372 (Leloudis Rpt. ¶ 34). When combined with the history of voting-related racial intimidation in North Carolina—and more recent discriminatory observer and challenger activity—these changes will produce a chilling effect on voters of color. *See* JA257 (Blue Decl. ¶ 28); JA281 (Parmon Decl. ¶ 34); JA72, JA79, JA80 (NAACP Decl. ¶¶ 11, 35, 38); JA1399 (Leloudis Sur-rebuttal Rpt.).

Before HB 589, each political party could have no more than two observers in the voting enclosure at any time, and both had to be registered in the same county; challenges before Election Day could be made only by citizens registered to vote in the same county; and Election-Day challenges could only be made by voters registered in the same precinct. Under HB 589, ten new "at-large observers" can now travel to any polling place in a county, and can be stationed at any time to join the two site-based observers within

[2] *Brown v. Detzner*, 895 F. Supp. 2d 1236, 1256 (M.D. Fla. 2012), does not support a contrary conclusion. *Brown* held that expanded early voting hours could, under some circumstances, effectively compensate for the elimination of early voting days, but the effects of Florida's reduction in early voting days were not and could not have been known at the time *Brown* was decided. The problems that plagued Florida during the 2012 election prompted that state to restore its original early voting period to allow for up to 14 days of early voting for up to 12 hours each day, essentially granting the relief sought by the *Brown* plaintiffs. *See* JA867 (Stewart Rpt. ¶ 214); JA438 (Sancho Decl. ¶ 9); JA433 (Sawyer Decl. ¶ 14).

the voting enclosure; any registered voter in the state can challenge any other person's right to register or vote before an election; and Election-Day challenges may be issued by any registered voter in the county. These changes give "challengers broader standing and scope of action than at any time since the historic white supremacy campaign of 1900." JA1399 (Leloudis Sur-rebuttal Rpt.).

North Carolina has a long history of poll watchers being used to intimidate and discourage African-American voters. *See* JA1353-54 (Leloudis Rpt.). Such intimidation, moreover, is not just a vestige of the past. In 2010, aggressive poll observers in Wake County prompted complaints from voters and from the North Carolina NAACP. *See* Poll Observers Upset Voters, News & Observer (10/27/2010), available at http://goo.gl/nbF0fJ; JA80 (NC NAACP Decl Rpt. ¶ 38). In 2012, the North Carolina Voter Integrity Project petitioned to have more than 500 voters, most of them people of color, removed from the registration rolls in Wake County based on unfounded claims that they were non-citizens. *See* Wake Elections Board Dismisses Most Voter Challenges, Raleigh Public Record (08/21/12), available at http://goo.gl/E0HEQG. In 2013, challenges were brought against dozens of students at the historically black Elizabeth City State University, while no challenges were brought at a predominantly white college in the same locality. *See* State Elections Board Reverses Pasquotank Decision, News & Observer (09/03/13), available at http://goo.gl/yC4h58. Nor are these challenges likely to stop: The Voter Integrity Project announced in March 2014 that its voter challenges

"should continue for quite some time." *See* Local Voter Registration Challenge Draws National Media Attention," The Tribune Papers (03/23/14), http://goo.gl/57n47Z.

HB 589's expansion of poll observers and ballot challengers has "opened the door to intimidation of voters of color." JA1398-99 (Leloudis Sur-rebuttal Rpt.). When considered in interaction with North Carolina's history of electoral racial discrimination, unless HB 589's provisions on observers and challenges are enjoined, African Americans' ability to participate in the political process will be reduced by "increased levels of voter challenge and intimidation" at the polls. JA1372 (Leloudis Rpt.).

e. Photo Identification Requirement

The NAACP Plaintiffs further move the Court to enjoin the planned "soft rollout" of HB 589's photo ID provisions during the 2014 general election. The soft rollout will confuse poll workers and voters, add additional time at the polls, contribute to longer lines, and disproportionately burden voting for African Americans. Under the "soft rollout," voters will be asked if they have qualifying ID, and if they do not, will be advised of the forms of ID required by HB 589 and asked to complete a form acknowledging they lack requisite ID. JA507, JA518 (Strach Dep. Tr. at 220, 262). The SBOE admits: that it has not promulgated implementation regulations, JA507, JA508 (Strach Dep. Tr. at 219, 222); that it has provided no guidance to CBOEs to train poll workers on the soft rollout protocols, *id.* JA507-08 at 220-21; and that is has not reviewed the rollout experiences of other states, *id.* JA508 at 221-222. The SBOE also admits that it has not considered the potential for voter confusion. *Id.* JA508 at 224.

Together, these admissions render it a near certainty that the soft rollout will result in longer lines, confusion, and wrongful disenfranchisement by poorly trained poll workers. Asking every voter whether they have acceptable ID, providing them with information, and requiring voters to complete an acknowledgement form, will add to the time it takes to get through the line. These added hurdles will cumulatively increase the "costs" associated with voting, JA1097-98 (Burden Rpt.), disenfranchising voters who lack the job or transportation flexibility to wait in such lines. Additionally, because the SBOE has undertaken almost no efforts to adequately educate CBOEs or the public as to how the soft rollout will operate, see JA507-08 (Strach Dep. Tr. at 220-223), there is a very high likelihood of voter confusion and inconsistent administration of the soft rollout from county to county. Indeed, many of these problems were observed first hand turning the May 2014 primary election, which had far lower turnout rates than will be true for the November general election. See JA43-45 (A. Eaton Decl. ¶¶ 18-19) (observing inconsistent and inaccurate implementation of the soft rollout by poll workers).

These harms will be disproportionately felt by North Carolina's African-American voters. The state's own data demonstrates that African Americans are disproportionately less likely to possess a state-issued Photo ID. See JA1672 (2013 DMV-ID Analysis) (finding that African Americans comprise 33% of North Carolina voters without a matching DMV-issued ID, even though they make up just 22% of the population). African Americans will thus disproportionately bear the additional steps at the polls (and the longer lines that result) due to the soft rollout's requirement that voters without ID be

questioned, be made to complete additional paperwork and be given information about acceptable forms of ID. Those disproportionate burdens will interact with existing financial, educational, and health-related disadvantages suffered by African Americans in North Carolina to afford them "less opportunity" to vote than whites.

A "soft rollout" of Pennsylvania's photo ID law during the 2012 elections proved to be a source of confusion and voter disenfranchisement. That soft rollout campaign was "confusing," according to Prof. Diana Mutz, an expert in litigation challenging the photo ID law. *See Applewhite v. Pennsylvania*, 2012 WL 4497211, *10 (Pa. Cmwlth. Aug. 15, 2012). Despite a more extensive budget and education plan, the effort was "ineffective and consistently confusing," engendering "unfairness." *See Applewhite*, 2012 WL 4497211, at *32-33. Election hotline reports show that voters were turned away or given inaccurate information about ID requirements.

f. Cumulative Impact

HB 589's full impact on African Americans can be understood only when the challenged provisions are considered collectively. Under the previous regime, an unregistered African American in North Carolina had 17 days in which to appear at the polls, at which time she could simultaneously register to vote and cast a ballot, with the assurance that if she had erroneously gone to the wrong precinct, she could cast a provisional ballot that would be counted for eligible elections. The post-HB 589 regime is much different. Now a voter must properly register to vote at least 25 days before the election, appear to vote within a 10-day window before the election, and ensure that she

has arrived at the correct polling location. Large numbers of observers may be inside her polling place, clogging the system and intimidating voters. JA68-JA85 (NAACP Decl. ¶ 38) (In 2012, "NC NAACP was made aware of reports of poll observers … harassing workers."). Private persons may challenge the legitimacy of her registration without even living in the county. If she indicates she lacks requisite ID, she will be made to complete additional paperwork. Any misstep along the way and the voter will be disenfranchised. The challenged provision thus combine to greatly increase the time, resources, and activity needed to cast a ballot successfully. "[U]nder the dominant framework used by scholars to study voter turnout, even small increases in the costs of voting can deter a person from voting." *Frank*, 2014 WL 1775432, at *17.

These costs are disproportionately borne by African Americans, who continue to suffer disproportionately high rates of poverty and low rates of educational attainment. In other words, the challenged provisions interact with existing social and historical conditions in North Carolina to impose costs that are "more acute" and "especially consequential" for African Americans, JA1097-98 (Burden Rpt.), thus imposing disproportionate burdens on their ability to exercise political power and elect candidates of their choice. That is the very definition of a Section 2 violation.

4. The State's Rationales For Enacting The Challenged Provisions Are Tenuous And Unsupported

Finally, the tenuous nature of the State's proffered reasons for enacting HB 589 constitutes an additional factor weighing strongly in favor of liability. One key factor in evaluating a Section 2 claim is "whether the policy underlying the [S]tate['s] … use of

[the contested] practice or procedure is tenuous." *Gingles*, 478 U.S. at 37; *see also Frank*, 2014 WL 1775432, at *32 (concluding that because Wisconsin's photo ID requirement "only weakly serves the state interests put forward by the defendants," those interests "are tenuous and do not justify the photo ID requirement's discriminatory result"); *Operation Push*, 674 F. Supp. at 1266-68 (Section 2 violation where registration restrictions lacked any "legitimate" or "compelling" basis). That is certainly true here. In enacting HB 589, the General Assembly relied on highly tenuous rationales that, when fairly evaluated, only confirm that the law violates Section 2 of the VRA.

Cost Savings. Without ever soliciting cost analysis from the SBOE or any CBOE, some legislators suggested that HB 589's early voting reductions was justified as a means of reducing costs to the State. *See, e.g.*, JA2472 (7/24/13 N.C. Senate Sess. Tr. at 11:2-13) (statement of Sen. Rucho); JA1221-22 (Kousser Rpt.). Precisely the opposite is true. Because counties must (absent a waiver) still offer the same number of early-voting hours as they have in past elections, *see supra* at Section II.A.3.c.ii, counties will be required to pay overtime salaries for poll workers, hire additional workers to handle the increased time that early voting sites will need to remain open, open additional polling sites, and/or purchase additional voter machines to handle more traffic. *See* JA141-43 (Bartlett Decl. ¶¶ 15-20); JA221-222 (Gilbert Decl. ¶ 11-13); JA441 (Sancho Decl. ¶ 18); JA432 (Sawyer Decl. ¶ 11). Indeed, the General Assembly knew as much when it enacted HB 589, given that 2011 and 2013 memos from the SBOE had explained that cutting a week from the early-voting period would actually increase election costs. *See* JA1700-02

(3/11/2013 SBOE Mem.); JA1541-42 (5/18/11 SBOE Mem.). In other words, the evidence before the legislature at the time it enacted HB 589 showed conclusively that the law would increase—not decrease—the cost of administering elections in the State.

Election Efficiency. Some supporters sought to justify HB 589 by arguing that it would "streamline" voting in the state and "make the system work smoothly as it was intended." JA2454 (7/23/13 N.C. Senate Sess. Tr. at 3:10-11) (statement of Sen. Rucho); *see also* JA2479 (7/24/13 N.C. Senate Sess. Tr. at 78:6-11) (statement of Sen. Tillman); JA1222-23 (Kousser Rpt.). That purported rationale makes little sense. Early voting sites were *already* highly congested even before HB 589 took away seven days of the early voting period. *See* JA851-53 (Stewart Rpt. ¶¶ 171-175) ("North Carolina early voting centers were among the most congested in the nation in 2012," with 27.2% of early voters in North Carolina spending more than 30 minutes in line (compared with only 15.8% nationwide)). By eliminating those seven days of early voting, HB 589 only exacerbates that problem. Early voters who previously voted in the eliminated 7-day period are likely to shift to voting at a similar time of day in the remaining 10-day period. *See id*. JA854 ¶179. The result is that early voting sites during the 2014 general election are likely to see even worse congestion than they saw in previous elections, and thus could replicate the experience of Florida when that State similarly reduced early voting days while allowing counties to maintain the total number of early voting hours.

Nor was the elimination of SDR needed to improve election efficiency. North Carolina election administrators found the implementation of SDR to be easy to manage.

See, e.g., JA226 (Gilbert Decl. ¶ 23) ("The same day registration system was well-designed, and we at the Guilford County Board of Elections experienced no impediments to implementing it effectively."); JA292 (Willingham Decl. ¶ 18) (" I do not ever recall receiving or reporting any major problems with administration of SDR."). For that reason, the SBOE explained to the General Assembly that SDR "was a key factor in why the 2008 post-election season was essentially 'uneventful.' There were no election challenges and voters for the most part were pleased with the process, irrespective of outcome of election contests. … SDR was a success."JA1529 (3/31/09 SBOE Mem.).

Voter Fraud. Proponents of HB 589 also sought to justify the law by pointing to allegations of voter fraud in North Carolina's elections, which purportedly would be addressed by the law's implementation of a photo ID requirement and the elimination of SDR (but notably, would not be addressed by the other challenged provisions). *See, e.g.*, JA2479 (7/24/13 N.C. Senate Sess. Tr. at 78:6-12) (statement of Sen. Tillman); JA2460 (7/23/13 N.C. Senate Sess. Tr. at 41:2-11) (statement of Sen. Rucho); *see also* JA1218-20 (Kousser Rpt.); JA1045-50 (Minnite Rpt.). But as the General Assembly knew at the time it enacted HB 589—and as Speaker Tillis subsequently acknowledged—in-person voter fraud is simply not a problem in North Carolina. *See* JA1875 (7/25/2013 *Widespread Voter Fraud Not and Issue in NC, Data Shows*).

The SBOE itself has concluded that in-person voter fraud is exceedingly rare. Of the approximately 21 million votes cast from 2000-2012, the SBOE found only *two* cases of in-person voter fraud. *See* JA1215-16 (Kousser Rpt.); JA1699 (3/11/13 SBOE Mem.).

Expert analysis confirms the SBOE's determination that in-person voter fraud does not exist in North Carolina. After reviewing all available state and federal records, Dr. Lorraine C. Minnite "found no evidence presented by or to lawmakers that would have suggested voter fraud is a problem in the State of North Carolina." JA1048 (Minnite Rpt.). Indeed, in her assessment, "fraud committed by voters either in registering to vote or at the polls on Election Day is exceedingly rare, both nationally and in North Carolina." *Id*. JA1038. There is "virtually no evidence" suggesting that voters are attempting to cast fraudulent ballots by impersonating voters at the polls. *Id*. JA1055.

Voter fraud is particularly unlikely in the context of SDR. SDR had numerous built-in safeguards to prevent voter impersonation, including requiring that a registrant provide ID and the last 4 digits of her social security number—both of which were verified on the spot through a central voter-registration system. JA225-26 (Gilbert Decl. ¶ 22). And even after the registrant was allowed to vote, the CBOE sent two verification mailings to ensure the accuracy of the address. *Id*. Indeed, studies performed in Guilford County and statewide indicated that registration applications submitted via SDR were *more* accurate than applications submitted via the traditional process. *Id*. JA226 ¶ 24.

The General Assembly's alleged concern with voter fraud is undermined by its failure to address fraud perpetrated through mail-in absentee balloting. Fraud perpetrated through mail-in absentee balloting is far more common than in-person voter fraud. *See* JA1242 (Kousser Rpt. n. 196). Nonetheless, the legislature rejected proposals to require a copy of a photo ID to be included with mail-in ballots or that such ballots be notarized.

Id. JA1242. When combined with the fact that whites use absentee voting at disproportionately higher rates than African Americans, *see* JA735-40 (Lichtman Rpt.), the legislature's failure to address absentee-ballot fraud strongly suggests that suppressing minority voting—not rooting out voter fraud—was the General Assembly's true motivation for enacting HB 589.

Public Confidence In Elections. When it became clear that allegations of in-person voter fraud lacked empirical or evidentiary support, the proponents of HB 589 shifted rationales and began to argue that the law was needed, not to combat actual incidents of voter fraud, but instead because the *perception* of fraud was undermining public confidence in elections. *See* JA1050 (Minnite Rpt.); JA1220-21 (Kousser Rpt.). The Fourth Circuit has made clear, however, that the rationale of "electoral 'integrity' does not operate as an all-purpose justification flexible enough to embrace any burden, malleable enough to fit any challenge and strong enough to support any restriction." *McLaughlin v. N. C. Bd. of Elections*, 65 F.3d 1215, 1228 (4th Cir. 1995). Instead, the "true state of affairs" must be evaluated to determine whether the challenged practice is actually needed to preserve public confidence in the integrity of elections. *Id*.

No evidence was presented to the General Assembly—and none exists now—that North Carolina citizens are experiencing a crisis of confidence in their electoral system. As Dr. Minnite explains: "There is no evidence I could find in the public record of legislative debates that in general, the people of North Carolina have low confidence in the electoral system because photo ID is not required to vote." JA1052 (Minnite Rpt.).

Indeed, if there were some kind of depressed confidence in the electoral process in North Carolina, one would expect to see sharply lower voter-turnout levels. *See id*. JA1051. Yet North Carolina has experienced record voter participation in recent elections. *See* JA1196 (Kousser Rpt.). That massive growth in voter participation is fundamentally inconsistent with the notion that North Carolina citizens have lost confidence in government. As put by Plaintiffs' expert Morgan Kousser:

> [T]here was never any testimony in the hearings or attempt to demonstrate in the debates that there was any lack of confidence in elections among the populace, or that any of the provisions of the bill would increase confidence. Nor were there any polling results on the issue of whether there was any crisis of confidence among the voters, even though there were plenty of polling results discussed in the legislature and the media on generic photo ID bills, early voting, and SDR. Nor was there any recent event that would have destroyed the confidence of voters in North Carolina government in general or the election process in particular.

JA1242-43 (Kousser Rpt.).

If anything, HB 589 will *undermine* public confidence in North Carolina's electoral process. If the challenged provisions of HB 589 are allowed to go into effect for the upcoming election, the result will be that an untold number of eligible North Carolina citizens will be unable to register, unable to vote, or required to vote provisionally and thus unsure whether their votes counted. Disenfranchisement of these eligible voters will surely do more to call into question the legitimacy of future elections than will vague and unfounded allegations of widespread voter fraud. *See Frank*, 2014 WL 1775432, at *9 ("Perhaps the reason why photo ID requirements have no effect on confidence or trust in the electoral process is that such laws undermine the public's confidence in the electoral

process as much as they promote it" by creating "the false perception that voter-impersonation fraud is widespread, thereby needlessly undermining the public's confidence in the electoral process.").

No evidence exists that North Carolina's electoral process is (or has been) tainted by voter fraud or has otherwise been compromised. Nor is there persuasive evidence that the public has lost confidence in North Carolina's elections. In light of the total absence of any evidence that would support the State's alleged electoral-integrity and public-confidence arguments, these theories cannot be used to support the sweeping restrictions imposed by HB 589. *See McLaughlin*, 65 F.3d at 1228; *see also Frank*, 2014 WL 1775432, at *32 (holding that state's interests in preventing voter impersonation and deterring other types of fraud, promoting public confidence in electoral process, and promoting election administration and recordkeeping "[we]re tenuous and do not justify the photo ID requirement's discriminatory result.").

Making it More Difficult To Vote. Finally, some members of the General Assembly freely admitted that the purpose of HB 589 was to make it more difficult for individuals to vote. *See* JA2479 (7/24/13 N.C. Senate Sess. Tr. at 78:6-15) (statement of Sen. Tillman) ("And one-day registration, you think it's such a great idea to have mobs and mobs of people up there that have never bothered to register in a huge election and they want to come in on election day and register to vote. … If you don't think enough about voting to make sure you're registered—it used to be 30 days in advance, Senators, until recently."); JA2495 (7/25/13 N.C. Senate Sess. Tr. at 45:18-23) (statement of Sen.

Tillman) ("[I]f you don't think enough about voting and wait to register until you get there on election day, folks, you've not thought very much about the election and it doesn't mean very much to you to say, oh, I didn't register."); JA2502 (7/25/13 N.C. Senate Sess. Tr. at 81:13-22) (statement of Sen. Rabin) ("[My perspective] comes from considerably earlier where folks are supposed to take the initiative to go after what they want. I do not want a system personally when it comes to my vote that models on what I think I've heard some people would like to have in here and that's the model of the American Idol where everybody can just dial it up on the phone and vote for whoever they want to vote for or however they want to vote and we can't count who's voting how many times."). Erecting burdens to the franchise, however, violates Section 2 of the VRA where (as here) those burdens fall disproportionately on racial minorities.

B. HB 589 Was Enacted With Discriminatory Intent, In Violation Of The 14th And 15th Amendments

Legislation enacted with the intent to discriminate on the basis of race in the voting context violates the Fourteenth and Fifteenth Amendments. *See, e.g.*, *City of Mobile v. Bolden*, 446 U.S. 55, 62, 66 (1980) (plurality opinion); *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977). To show such intentional discrimination, plaintiffs are not required "to prove that the challenged action rested *solely* on racially discriminatory purposes." *Arlington Heights*, 429 U.S. at 265 (emphasis added). "Rather, Plaintiffs need only establish that racial animus was one of several

factors that, taken together, moved [the decision-maker] to act as he did." *Orgain v. City of Salisbury*, 305 Fed. App'x 90, 98 (4th Cir. 2008).[3]

"Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Arlington Heights*, 429 U.S. at 266; *see also Washington v. Davis*, 426 U.S. 229, 242 (1976) ("[A]n invidious discriminatory purpose may often be inferred from the totality of the relevant facts."). Relevant factors include "[t]he historical background of the decision … particularly if it reveals a series of official actions taken for invidious purposes." *Arlington Heights*, 429 U.S. at 267. Courts should also take account of "[t]he specific sequence of events leading up the challenged decision," including any "[d]epartures from the normal procedural sequence" in the legislature's consideration of a bill. *Id*. In addition, "[t]he legislative or administrative history may be highly relevant, especially where there are contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports." *Id.* at 268. And "the fact, if it is true, that the law bears more heavily on one race than another" is relevant to the determination of whether there was an "invidious discriminatory purpose." *Davis*, 426 U.S. at 242; *see*

[3]The Court noted in *Village of Arlington Heights* that "rarely can it be said that a legislature or administrative body operating under a broad mandate made a decision motivated solely by a single concern, or even that a particular purpose was the 'dominant' or 'primary' one," and that "it is because legislators and administrators are properly concerned with balancing numerous competing considerations that courts refrain from reviewing the merits of their decisions, absent a showing of arbitrariness or irrationality." 429 U.S. at 265. "But," the Court wrote, "racial discrimination is not just another competing consideration," and judicial deference is not justified "[w]hen there is a proof that a discriminatory purpose has been a motivating factor in the decision." *Id.* at 265-66.

also Reno v. Bossier Parish Sch. Bd., 520 U.S. 471, 487 (1997) (disproportionate impact of legislation "is often probative of why the action was taken in the first place since people usually intend the natural consequences of their actions").

Although discovery is far from over—and although Defendants have sought to block discovery at every turn—the evidence of discriminatory intent that has already come to light is powerful and troubling to a society dedicated to racial equality. From the very conception of HB 589, the main sponsors of the bill had sought and obtained information from the SBOE indicating that the challenged provisions repealed practices used disproportionately by African Americans. Indeed, HB 589 specifically targets the very same practices that had been used successfully in the previous decade to drastically increase African-American voter participation. When combined with the rushed and unconventional manner in which HB 589 was enacted, the evidence shows that the law was enacted specifically to make voting harder for African Americans in North Carolina.

1. HB 589 Imposes Disproportionate Burdens on African Americans

The disparate impact that the challenged provisions have on African Americans is strong evidence that the law was enacted with a discriminatory purpose—particularly because the General Assembly was well aware of that disproportionate impact before it enacted the challenged provisions. During the abbreviated debate over HB 589, legislators were presented with substantial evidence—including evidence from the SBOE itself—showing that African Americans disproportionately used the challenged provisions. *See* JA1627 (March 2013 Emails from HB 589 Sponsors); JA1786 (4/1/13

Spreadsheet of Racial Data for Rep. Lewis); JA2492 (7/25/13 N.C. Senate Sess. Tr. at 33:12-35:16) (statement of Sen. Stein); JA1611 (2013 DMV-ID Matching Rpt.); JA1782 (3/13/13 Supplemental Tables to DMV-ID Matching Rpt.); JA1669 (1/7/13 DMV-ID Matching Rpt. and March Supplemental Rpt.); JA1543 (5/18/11 SBOE Mem.); JA1181-82 (Kousser Rpt.); JA188-90, JA193-200 (Stein Decl. ¶¶ 24-28, Ex. A); JA265 (Hall Decl. ¶ 16). The legislature therefore enacted HB 589 with full knowledge that the challenged provisions would impose disproportionate burdens on African-American voters—a fact that is highly "probative" of why the General Assembly decided to enacted the challenged provisions "in the first place." *Reno*, 520 U.S. at 487.

2. The Historical Background of HB 589, and Sequence of Events Prior to Its Passage, Suggest Intentional Discrimination

The historical background of, and sequence of events leading up to, HB 589's enactment strongly suggest intentional discrimination. Because of North Carolina's history of discrimination, African-American turnout lagged behind that of whites for many decades. *See supra* at Section II.A.2.a. Since 2000, however, the implementation of SDR, out-of-precinct voting, and early voting had succeeded in dramatically increasing overall voter turnout in North Carolina, and had increased African-American turnout in particular. JA1196-97 (Kousser Rpt.). This substantial increase in African-American voter participation was not lost on the members of the General Assembly, who were repeatedly made aware that (i) African-American voter participation had increased in the State and (ii) this increase was largely due to the very practices repealed (or sharply curtailed) by HB 589. JA184, JA188-91, JA193-200 (Stein Decl. ¶¶ 16, 23-31, Ex. A);

JA1179 (Kousser Rpt.). When combined with the legislature's lack of any credible, non-discriminatory basis for enacting HB 589, *see supra* at Section II.A.4, that sequence of events strongly suggests that suppressing African-American voter participation was at least one motivating factor for HB 589's enactment.

3. The Legislative History Suggests Intentional Discrimination

The legislative process by which HB 589 was enacted was highly expedited and unorthodox. *See, e.g.*, JA197 (Stein Decl. ¶ 3) (describing the events in the Senate as "irregular for a bill of this magnitude and was abusive of legislative process"); JA241 (Adams Decl. ¶ 22) ("To greatly limit debate and then pass a substantially dissimilar version of a bill on the same day is highly irregular."); JA304 (Glazier Decl. ¶ 18) (explaining that he "cannot overstate how much the legislative process leading to the July 25, 2013 House concurrence vote on the 'full bill' version of HB 589 deviated from standard legislative practice"); JA399 (Martin Decl. ¶ 14); JA271-72 (Parmon Decl. ¶ 4).

The "full version" of HB 589 was unveiled only after *Shelby County* dramatically changed the preclearance landscape for laws that burdened voting rights. *See* JA1234 (Kousser Rpt.) ("Many of the segments of HB 589 that were added to the bare-bones photo ID bill that had passed the House would surely have been deemed retrogressive by DOJ, because it could be easily shown, by the evidence presented above, that African Americans were more likely to vote early, more likely to register using SDR, and more likely to vote out of their precincts."). The law, moreover, was pushed through the General Assembly just two days after it was introduced, without any opportunity for

meaningful legislative debate, public comment, or expert analysis. *See supra* at Section C. That clear "[d]eparture[] from the normal procedural sequence," cuts strongly in favor of finding intentional discrimination. *Arlington*, 429 U.S. at 267.

4. Totality of the Circumstances

As explained, "an invidious discriminatory purpose may often be inferred from the totality of the relevant facts," *Davis*, 426 U.S. at 242, and "discriminatory intent need not be proved by direct evidence," *Rogers*, 458 U.S. at 618. Here, the disparate burdens that HB 589 inflicts on African Americans, the legislature's clear knowledge of those burdens at the time the statute was enacted, the lack of any credible, non-discriminatory basis for the law, and the highly unusual manner in which HB 589 was enacted all lead to the conclusion that at least one motivating purpose behind the law was to make voting more burdensome for African Americans. That analysis is only confirmed by the Senate Factors discussed above, many of which are circumstantial evidence of discriminatory intent. *See id*. at 623 (racially polarized voting patterns (Senate Factor 2) "bear heavily on the issue of purposeful discrimination"); *id*. at 613, 619–20 n.8, 623–24 (recognizing "unresponsiveness of elected officials to minority interests [Factor 8], a tenuous state policy underlying the [challenged practice] [Factor 9], and the existence of past discrimination [Factor 1]," to be "relevant to the issue of intentional discrimination").

C. The Challenged Provisions Unjustifiably Burden The Right To Vote In Violation of the Fourteenth Amendment

Plaintiffs are also likely to prevail on the merits of their claims that the challenged provisions (singularly and in concert) constitute substantial and unjustified burdens on

the right to vote in violation of the Fourteenth Amendment. The Supreme Court has long recognized that the right to vote is one of the most fundamental rights that this country's citizens hold. *McCutcheon*, 134 S.Ct. at 1440-41; *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 670 (1966). Moreover, "[t]he right to vote is protected in more than the initial allocation of the franchise. Equal protection applies as well to the manner of its exercise." *LWV v. Brunner*, 548 F.3d 463, 477 (6th Cir. 2008) (quotations omitted).

Recognizing the precious nature of this fundamental right, but also the need to establish reasonable rules for administering elections, the Supreme Court has developed a balancing test to determine whether rules governing elections violate the Fourteenth Amendment. *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983); *Burdick v. Takushi*, 504 U.S. 428, 434 (1992). In *Burdick*, the Court wrote:

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

504 U.S at 434 (quotations omitted). Especially where challenged provisions have a discriminatory effect, "applying heightened scrutiny helps to ensure that such limitations are truly justified and that the State's asserted interests are not merely a pretext for exclusionary or anticompetitive restrictions." *Clingman v. Beaver*, 544 U.S. 581, 603 (2005) (O'Connor, J., concurring in part).

Importantly, the *Burdick* balancing test does not look at the impact of the challenged provision in isolation, but within the context of the election scheme as a whole. *See Burdick*, 504 U.S. at 438-439. Individual provisions that may not be burdensome standing alone can create unconstitutional burdens when considered in light of other challenged provisions or the broader electoral context. *See Republican Party of Ark. v. Faulkner Cnty.*, 49 F.3d 1289, 1291 (8th Cir. 1995) (invalidating law requiring political parties to conduct and pay for primary elections because the combined effect of those requirements impermissibly burdened plaintiffs' rights); *Woods v. Meadows*, 207 F.3d 708, 713 (4th Cir. 2000) (considering other statutory provisions when analyzing constitutionality of filing deadline). Moreover, "an unjustified burden on some voters will be enough to invalidate a law," even if the law "burdens other voters only trivially." *Frank*, 2014 WL 1775432, at *5.

In the last presidential election cycle, the Sixth Circuit decided a case directly relevant to the restrictions imposed by HB 589. *Obama for Am. v. Husted*, 697 F.3d 423 (6th Cir. 2012). In *OFA*, the district court enjoined a 2012 Ohio law that eliminated the last three days of a 35-day early voting period for non-military voters. *Id*. at 426. The court found that plaintiffs were likely to succeed on the merits, not only because the restrictions created arbitrary distinctions between military and non-military voters, but because of the burden imposed by eliminating early voting opportunities, concluding that "the injury to Plaintiffs is significant and weighs heavily in their favor." *Obama for Am. v. Husted*, 888 F.Supp. 2d 897, 907 (S.D. Ohio 2012). The Sixth Circuit affirmed, finding

that "[p]laintiffs have demonstrated that their right to vote is unjustifiably burdened by the changes in Ohio's early voting regime." 697 F.3d at 430.

1. The Challenged Provisions Impose Material and Undue Burdens on Voters

a. Eliminating SDR Will Unduly Burden the Right to Vote

HB 589's repeal of SDR will completely disfranchise any voter not registered to vote by the close of books. Both the magnitude (*i.e.*, the number of voters affected) and the nature of the burden (*i.e.*, categorical disenfranchisement) render the elimination of SDR constitutionally unacceptable. During early voting in the 2008 presidential election, over 100,000 voters registered to vote using SDR; in the 2010 general election, over 21,000 voters registered via SDR; and in the 2012 general election, nearly 95,000 voters did so. *See* JA620-21, JA630 (Gronke Rpt. ¶¶ 34-35, 48). In every federal election since SDR became available in 2008, 6-10% of all early votes in North Carolina were cast by voters who had used SDR as their means of registration. *See id.* JA629 Ex. 14. With the elimination of SDR, there will be no failsafe for affected voters, who will no longer have the opportunity to correct their registration status during the early voting period. *Compare Crawford v. Marion Cnty. Elec. Bd.*, 553 U.S. 181, 199 (2008) (sustaining a voter identification requirement, in part because voters were afforded an opportunity to "mitigate" the burden on their right to vote by producing ID after the election).

Poverty in North Carolina will magnify the burdens created by eliminating SDR. Poverty rates are higher in North Carolina than in the country as a whole. *See* JA1145 (Duncan Rpt.) (16.8% poverty rate in North Carolina versus 14.7% poverty rate in the

United States). Over 15% of North Carolina's population lived in a different house in 2012 than they did in 2011. *See* JA1158 (Duncan Rpt.). Those living below the poverty line are nearly twice as likely to have moved in the last year, with 29.2% of those poor North Carolinians living in different places in 2012 than in 2011, as compared to 12.4% of non-poor. *Id.* Given that voters who move to a new county within North Carolina must newly register to vote, many of these voters will need to submit new voter registration applications in order to participate in the political process. As veteran community activists have confirmed, without SDR many will be unable to do so in time to register and vote. *See* JA121 (Stohler Decl. ¶ 10); JA7 (Brandon Decl. ¶ 15); JA65 (Montford Decl. ¶ 16); JA114-15 (Rainey Decl. ¶¶ 9-10); JA18-19 (Carrington Decl. ¶¶ 10, 12).

Election officials in North Carolina have opined "that same-day registration has enabled thousands, if not tens of thousands, of North Carolina voters to exercise their constitutional right to vote and has fostered greater interest and participation in North Carolina elections." JA147 (Bartlett Decl. ¶ 33). Repeal of SDR will keep "tens of thousands of otherwise eligible voters … from voting because they had not registered in time." JA228 (Gilbert Decl. ¶ 27); *see also* JA1533 (3/31/09 SBOE SDR Rpt.) ("[SDR] enfranchised eligible citizens to participate in the elections process.").

b. The Prohibition on Counting Out-of-Precinct Provisional Ballots Will Unduly Burden the Right to Vote

The prohibition on counting out-of-precinct provisional ballots similarly results in complete disenfranchisement of certain voters. The magnitude of the burden on voting from this change is significant. In the 2012 presidential election, 7,486 out-of-precinct

provisional ballots were cast; in the 2010 general election, 6,052 out-of-precinct provisional ballots were cast; and in the 2008 presidential election, 6,032 out-of-precinct provisional ballots were cast. JA873-74 (Stewart Rpt.). In those three elections, 92.6% of those out-of-precinct provisional ballots were either partially or completely counted. *Id*.

The General Assembly, when it clarified that state law demanded the counting of valid out-of-precinct provisional ballots, made detailed findings about how burdensome and irrational it would be not to count such ballots, given the number of voters who cast ballots out of precinct. *See* JA2635 (S.L. 2005-2 § 1). The magnitude of voters affected by an arbitrary decision to discount out-of-precinct provisional ballots, cast by duly-registered and qualified voters, has not lessened since 2005.

Throwing away out-of-precinct provisional ballots will have a significant impact on voters lacking access to vehicular transportation, who may have trouble traveling to the correct precinct on Election Day (or who discover that they are at the wrong precinct after arranging for transportation to what they thought was the correct precinct). Nearly 15% of North Carolinians live in a household without a car. *See* JA1155 (Duncan Rpt.). Poverty is not the only reason that voters may be unable to get to the correct polling place on Election Day. University students living on campus face similar challenges when they lack access to transportation on Election Day. *See* JA448 (Gould Decl. ¶¶ 4-5).

c. Eliminating 7 Days of Early Voting Will Unduly Burden the Right to Vote

In adopting early voting in 2001, North Carolina established a right to early in-person voting over a 17-day period, and voters have come to rely heavily on that means

of access. By eliminating a week of early voting, HB 589 directly disenfranchises the thousands of voters who would have voted during those eliminated days, and creates longer lines and waiting times to vote for everyone else. *Cf. OFA*, 888 F. Supp. 2d at 907 (establishment of 35 days of early voting in Ohio "granted the right to in-person early voting" throughout that period).

The magnitude of this change to early voting cannot be overstated. HB 589 eliminates early voting days on which a significant percentage of the electorate voted in 2008, 2010 and 2012. In the 2012 general election, 899,083 voters in the state cast their ballot during the seven days eliminated by the new law—over 35% of all the votes cast in the election. *See* JA262 (Gronke Rpt. Ex. 13). That number was over 700,000 in the 2008 general election (over 29% of all votes cast in the election), and over 200,000 in the 2010 general election. *See id*. The number of voters affected here (*i.e.*, the magnitude of the burden) far exceeds the 100,000 voters affected in the *OFA* case, where the elimination of only 3 out of 35 days of early voting was deemed a constitutional violation. *Compare with OFA*, 697 F.3d at 431.

The nature of the burden on the right to vote is also severe, in several respects. *First*, the habitual and sensitive nature of voting is such that disruptions to voting habits raise costs for voters and deter participation. *See* JA1097 (Burden Rpt.); *Frank*, 2014 WL 1775432, at *17 (finding, under a *Burdick* analysis, that Wisconsin's voter ID requirement violated the Fourteenth Amendment because increased costs associated with voting would deter eligible voters). As with the elimination of SDR, this is particularly

true for the 1.5 million North Carolinians living in poverty, who are more likely to have lower educational attainment levels; are less likely to own homes or have access to vehicles; are less likely to be able to arrange for transportation; are more likely to have inflexible work schedules; are generally more overwhelmed by the countless sources of stress that adequate financial resources would ease; and often lack resources necessary to participate in many basic societal activities. *See* JA1146-47 (Duncan Rpt.). Socioeconomic challenges such as those facing North Carolina's 1.5 million poor residents make having one less weekend on which early voting can be accomplished a severe burden, sufficient to establish a constitutional violation. *See OFA*, 697 F.3d at 431 ("Plaintiffs did not need to show that they were legally prohibited from voting, but only that burdened voters have few alternative means of access."); *Frank*, 2014 WL 1775432, at *5 (the Constitution "require[s] invalidation of a law when the state interests are insufficient to justify the burdens the law imposes on subgroups of voters").

Second, individuals with decades of experience in administering elections in North Carolina, including the former Executive Director of the North Carolina SBOE, attest that the loss of a week of early voting will burden voters in many ways, preventing thousands of voters from voting; unnecessarily lengthening lines to vote; overwhelming pollworkers (and rendering them more prone to making mistakes); and ultimately reducing turnout in comparison to comparable elections. *See* JA138, JA142, JA143, JA144 (Bartlett Decl. ¶¶ 6, 16, 22, 25); JA122-22, JA224-25 (Gilbert Decl. ¶¶ 11-12, 18-19). These problems will not be limited to the early voting period—they will spread to Election Day itself and

cause significant burdens for all voters. Indeed, the North Carolina SBOE conducted a 2011 study which "concluded that a cut to early voting would likely increase waiting times for voters during early voting and on Election Day." JA141, JA143 (Bartlett Decl. ¶¶ 15, 22); s*ee also* JA224-25 (Gilbert Decl. ¶ 19) ("Voters will experience longer lines during the shortened early voting period and on Election Day," which "will end up disenfranchising discouraged voters"); JA365-66 (McKissick Decl. ¶¶ 43-45).

This common-sense proposition—that encouraging voters to cast their ballots before Election Day reduces congestion on Election Day itself—is supported by academic work studying the effects of early voting. *See* JA619-20 (Gronke Rpt. ¶ 32); JA835, JA866, JA867 (Stewart Rpt. ¶¶ 132, 207-208, 213). As explained by Plaintiffs' expert witness Dr. Allen, queuing theory—a well-established scientific methodology routinely applied in fields involving operations and logistics—can quantify the increased waiting time that voters can expect with the reduction in early voting. *See* JA1405-18 (Allen Rpt. ¶¶ 12-31). According to Dr. Allen's analysis, if even 3.8% of the voters from the now-eliminated early voting days had attempted to vote on Election Day in 2012, the result would have been to more than double average waiting times to vote; in a worst-case scenario, average waiting times to vote could reach 3 hours. *See id.* JA1416-1418, JA1423-24 ¶¶ 29-31, 42-43. These excessive waiting times rise to the level of a constitutional violation, as "there can come a point when the burden of standing in a queue ceases to be an inconvenience or annoyance and becomes a constitutional violation because it, in effect, denies a person the right to exercise his or her franchise." *NAACP*

State Conference of Pa. v. Cortés, 591 F. Supp. 2d 757, 764 (E.D. Pa. 2008). Dr. Allen's analysis confirms that excessive waiting times in North Carolina have the potential to deter thousands of voters, with a low-end estimate of nearly 18,000 voters being deterred by longer lines. *See* JA1423-25 (Allen Rpt. ¶¶ 43-45); JA866-87 (Stewart Rpt. ¶ 210).

Florida's experience after reducing its early voting period for the 2012 election (while maintaining roughly the same aggregate number of hours) confirms that the early voting cut in North Carolina will significantly burden voters.[4] Election administrators and national news media reported longer lines during early voting and on Election Day (with the last ballot being cast nearly 7 hours after the polls closed) because of the increased volume in voters who could not vote during early voting. JA619-20 (Gronke Rpt. ¶ 32); JA437 (Sancho Decl. ¶¶ 6, 11); JA432 (Sawyer Decl. ¶ 12). According to one estimate, over 200,000 voters ultimately gave up in frustration. JA438 (Sancho Decl. ¶ 11).

d. The Elimination of Pre-Registration Substantially Burdens the Right to Vote

As set forth below, over 160,000 young citizens pre-registered to vote from 2010 to 2013. *See infra* at Section II.D.2. In light of HB 589, young citizens must now find a different way to register to vote, and some of these citizens will surely fail to register by the close of books and therefore be prevented from voting.

[4] As discussed above, the provision of H.B. 589 that purportedly mandates that counties offer the same aggregate number of early voting hours in 2014 as they did in 2010 does not significantly mitigate the burden on voters, in large part because nearly 1.4 million people of voting age reside in the nearly 40 counties that obtained an exemption from complying with that requirement in the May 2014 primary alone. JA1974 (Requests for Reduction of One-Stop Voting Spreadsheet).

e. Removing Discretion from CBOEs to Keep Polling Locations Open for an Extra Hour Also Burdens the Right to Vote

In light of HB 589's potential to create longer lines, the elimination of discretion from CBOEs to keep polling locations open for an extra hour in extraordinary circumstances further burdens the right to vote. This change will burden voters whose polling locations would have been kept open for an extra hour but for the change, as such voters will have a more limited time span in which to vote and will likely have to wait in longer lines (as the votes in the affected precincts will be spread over a shorter period of time). Former Executive Director of the SBOE Gary Bartlett explains that while the discretion to keep the polls open for an extra hour "was an allowance that was rarely needed, … it made a real difference when emergencies happened earlier in the day." JA144 (Bartlett Decl. ¶ 26); *see also* JA365 (McKissick Decl. ¶ 44) (Durham County "has historically had occasional problems with voting machines and, prior to the introduction of early voting, long lines on Election Day," and the removal of discretion to keep polling places open "takes away a means of addressing such Election Day problems"). The elimination of this discretion will therefore have a real, negative impact on voters when such emergencies occur, and will materially burden the right to vote.

f. The Lack of Adequate Public Education on HB 589 Heightens the Burdens Described Above

The burdens on the right to vote described above will be exacerbated because of the marked lack of voter education efforts undertaken by the state to inform voters about the number of ways in which their voting experience will be dramatically different after

HB 589. The July 25, 2013, fiscal note accompanying the full-bill version of HB 589 noted that "[t]here is no designated level of outreach and education required in this bill; therefore, it is assumed that much of it will be provided through the outreach workers and local boards of elections." JA2373 (Leg. Fiscal Note). No new money is appropriated to the CBOEs, which the General Assembly simply assumed would be providing outreach and education to voters. Inadequate voter education, particularly in the light of significant changes in the conduct of elections, will reduce participation. *See* JA294 (Willingham Decl. ¶ 25); JA417-18 (Taylor Decl. ¶ 11); JA125-26 (Stohler Decl. ¶¶ 13-14).

2. The State's Justifications Are Inadequate

Under *Burdick*, the Court must weigh these substantial burdens on the right to vote against the interests put forward by the state. 504 U.S. at 434. The Fourth Circuit has rigorously applied the *Burdick* examination of a state's purported interests, recognizing that "electoral integrity does not operate as an all-purpose justification flexible enough to embrace any burden, malleable enough to fit any challenge and strong enough to support any restriction." *McLaughlin*, 65 F.3d at 1228 (quotations omitted). Here, the state has utterly failed to demonstrate an adequate basis for the challenged restrictions, advancing rationales for these provisions that are tenuous at best. *See supra* at Section II.A.4. Under these circumstances, the challenged provisions, individually and collectively, constitute an undue burden on the right to vote in violation of the Fourteenth Amendment.

D. The Challenged Provisions Violate The 26th Amendment

In enacting HB 589, the General Assembly also intentionally discriminated against young North Carolinians. This intent is reflected in HB 589's elimination of pre-registration for 16 and 17 year olds and mandatory high school voter-registration drives—changes that make registering to vote materially more difficult for tens of thousands of young North Carolinians and that were made without any plausible non-discriminatory basis. This intent is also demonstrated by HB 589's inclusion of a voter ID law that permits military IDs, veterans' IDs, and certain types of tribal enrollment cards, *but not college or high schools IDs*, to be used for voter ID, in addition to other provisions in HB 589 that consistently result in disproportionate burdens on young voters. In light of this targeting of young voters, it is no surprise that, just months before HB 589 was enacted, a bill was introduced in the Senate that would have prevented a parent from claiming a tax exemption for a child registered to vote at an address other than the parent's address or that a primary sponsor of that bill stated in an interview that college students "don't pay squat in taxes" and "skew the results of elections in local areas." *See infra* at Section II.D.2. Taken together, these facts show that HB 589 was intended to burden young citizens, in violation of the 26th Amendment.

1. The 26th Amendment Bars Age-Based Discrimination in Voting

The 26th Amendment protects the right to vote of "citizens of the United States, who are eighteen years of age or older," from "deni[al] or abridge[ment] by … any State on account of age." That the text of this amendment tracks that of the 15th and 19th

Amendments, which prohibit the denial or abridgement of voting rights on account of race and sex, respectively, is no accident: "The authors of the [26th] Amendment consciously modeled it after the [15th] and [19th]." Note, Eric S. Fish, *The Twenty-Sixth Amendment Enforcement Power*, 121 Yale L.J. 1168, 1175 (2012).[5] Accordingly, consistent with the 15th and 19th Amendments, the 26th Amendment prohibits age-based discrimination in the voting context. *Accord Walgren v. Howes*, 482 F.2d 95, 101 (1st Cir. 1973) (noting that "the [15th] and [19th] Amendments served as models for the [26th]" and stating that "[m]ost relevant would seem to be the general admonitory teaching of" *Lane*, 307 U.S. 268, a 15th Amendment case).

Like the 15th Amendment, the 26th Amendment prohibits not just age-based denials of the right to vote but also age-based impediments to that right. "[T]he backers of the amendment argued … that the frustration of politically unemancipated young persons, which had manifested itself in serious mass disturbances, occurring for the most part on college campuses, would be alleviated and energies channeled constructively through the exercise of the right to vote." *Walgren*, 482 F.2d at 100-01; *see also Sloane v. Smith*, 351 F.Supp. 1299, 1304 (M.D. Pa. 1972); *Colo. Project-Common Cause v. Anderson*, 495 P.2d 220, 223 (Colo. 1972). Further, "[t]he goal was not merely to

[5]*See also* JA2722 (S. Rep. No. 92-26 at 2 (1971)) (stating the Amendment "embodies the language and formulation of the 19th amendment, which enfranchised women, and that of the 15th amendment, which forbade racial discrimination at the polls"); 117 Cong. Rec. 7533 (1971) (statement of Chairman of the House Judiciary Comm.) (same); *id*. at 7534 (statement of Rep. Richard Poff) (same); *id.* at 7539 (statement of Rep. Claude Pepper) ("What we propose to do in the Federal enfranchisement of those 18, 19, and 20 years of age is exactly what we did in enfranchising the black slaves with the 15th amendment and exactly what we did in enfranchising women in the country with the 19th amendment.").

empower voting by our youths but was affirmatively to encourage their voting, through the elimination of unnecessary burdens and barriers, so that their vigor and idealism could be brought within rather than remain outside lawfully constituted institutions." *Worden v. Mercer Cnty. Bd. of Elections*, 294 A.2d 233, 243 (N.J. 1972).

2. HB 589 Was Intended To Discriminate Against Young Voters

As previously discussed, unlawful discriminatory purpose may be shown by either direct or circumstantial evidence, including that the law places particular burdens on young voters as a group. *See supra* at Section II.B. Here, the evidence establishes that the challenged provisions, both individually and collectively, were motivated, at least in part, by an intent to discriminate against North Carolina's young citizens.

Pre-Registration and Mandatory Voter-Registration Drives. Perhaps most probative of the General Assembly's intent is its elimination of pre-registration for 16 and 17 year olds and mandatory voter-registration drives in high schools. These provisions pertain only to young citizens; the burden from their elimination will be borne entirely by those citizens. And that burden will be significant: over 160,000 citizens pre-registered to vote from 2010 to 2013. JA1433, JA1436 (Levine Rpt.).

Yet, apart from Senator Rucho pointing out that many other states do not offer pre-registration, *see* JA2478 (7 /24/13 N.C. Senate Sess. Tr. at 37:1-7), the sole basis provided for the elimination of pre-registration—which promoted the importance of voting and civic awareness among young citizens, *see* JA243 (Adams Decl. ¶ 29); JA268 (Hall Decl. ¶ 26); JA411 (Martin Decl. ¶ 59); JA174 (H. Michaux Decl. ¶ 51); JA190-91

(Stein Decl. ¶ 29); JA293 (Willingham Decl. ¶ 20)—was Senator Rucho's assertion[6] that there was confusion about it, as evidenced by the situation of his son, who pre-registered and thought he was supposed to vote in the prior election, even though he was not yet eighteen years old at the time of the election. *See also* JA1878 (7/29/13 *Widespread Voter Fruad Not an Issue in NC: Report*). And aside from a single reference to the provision that previously required high school voter-registration drives as "an old provision," Statement of Rep. Lewis, JA2525 (7/25/13 N.C. House Sess. Tr. at 21:13-15), no explanation was given for the elimination of these voter-registration drives.

These justifications are not only unsubstantiated—SBOE Executive Director Strach testified that she had never heard of any confusion regarding pre-registration, JA529 (Strach Dep. Tr. 307:14-308:10); *see also* JA230 (Gilbert Decl. ¶ 35)—they are patently unreasonable. If a young person pre-registered to vote and mistakenly attempted to cast a ballot at the polls, election officials would realize that the voter was not registered and not permit him to cast a ballot. *See* JA529 (Strach Dep. Tr. at 307:14-308:10). Adults mistakenly appear at the polls believing they are registered in every election, *id*. JA529 (at 308:11-25), but that is no reason to make it *more difficult* for them to register. Far more plausible than these unsupportable and illogical explanations is the conclusion that pre-registration and mandatory voter-registration drives were eliminated to reduce the registration rate and turnout of young voters. *Cf. Church of the Lukumi*

[6]*See* Statement of Sen. Rucho, JA2455 (7/23/13 N.C. Senate Sess. Tr. at 22:3-23); Statement of Sen. Rucho, JA2470 (7/24/13 N.C. Senate Sess. Tr. at 6-7).

Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 538 (1993) ("It is not unreasonable to infer, at least when there are no persuasive indications to the contrary, that a law which visits 'gratuitous restrictions' on religious conduct seeks not to effectuate the stated governmental interests, but to suppress the conduct because of its religious motivation.").

Egregiously, the State is also using HB 589 as a justification to erect an additional barrier to registration for young voters. In deposition testimony, Strach—a close personal associate of one of the architects of HB 589, JA547 (Strach Dep. at 17:19-18:7)—confirmed that the SBOE issued a directive to the DMV to stop registering 17 year olds who will turn 18 by the general election, despite the fact that they are indisputably eligible to register and vote in that election. *Id*. JA531, JA1891 at 314:21-316:21, Ex. 59; *see also id*. at JA530, JA1891 at 310:16-311:125, Ex. 57; JA1895 (2013 VIVA Update to Elections Directors). This directive is not required by HB 589's elimination of pre-registration, as Strach conceded, since these 17 year olds are not pre-registrants but, instead, are no different from all other eligible voters. *Id.* JA530, JA1880, JA1891 at 309:1-311:125, Exs. 56, 57. Yet, Strach admitted, no other class of eligible voters is prohibited from registering at the DMV. *Id.* JA531-34, JA534-35, JA1892 at 316:22-326:25; 328:6-330:22, Ex. 60. Even more remarkably, Strach explained that SBOE issued the directive specifically to the DMV in order to maximize the effect of the directive, explaining that "there's a lot of voter registration activity that goes on [at the DMV]." *Id.* JA534 at 325:2-3. As a result, one of the most commonly used methods for registering to vote—which North Carolina is required to offer under the National Voter Registration

Act, 42 U.S.C. § 1973(gg)—is unavailable to young voters. No other class of voters faces this impediment to registration; by its own admission, SBOE has singled out 17-year-old voters. JA535 (Strach Dep. Tr. at 330:-18-22).

SDR. SDR "made it much easier for students and other first time voters to participate in the electoral process as they were not required to master the nuances of [North Carolina] electoral law regarding absentee ballots or the date by which they must register in order to participate in the upcoming election." JA409 (Martin Decl. ¶ 50); *see also* JA335 (Harrison Decl. ¶ 49); JA317 (Glazier Decl. ¶ 64); JA172 (H. Michaux Decl. ¶ 43); *cf.* JA 1441-42 (Levine Rpt.) (explaining that "[m]issing the deadline for registration is an especially important problem for young voters," who are more likely than older citizens to be unregistered and to move); JA227, JA231 (Gilbert Decl. ¶¶ 25, 38); JA267 (Hall Decl. ¶ 23). Predictably, SDR has a positive effect on youth turnout, both in absolute and relative terms.[7] In North Carolina in the 2012 presidential election, "young people were 2.6 times more likely to utilize [same-day] voter registration than older voters." JA1438-39 (Levine Rpt.); *see also* JA335 (Harrison Decl. ¶ 49); JA382 (Kinnaird Decl. ¶ 33). The elimination of SDR therefore burdens young voters in particular and will likely result in a reduction in their share of the vote.

As set forth above, the justifications provided for the elimination of SDR are not defensible and, it follows, likely pretextual. *See supra* at Section II.A.4. Indeed, some

[7]*See* Levine Rpt. at 13 (states with SDR saw an increase in 18-24-year-old turnout of 5.9% and a significant, but weaker, effect for older voters); *id.* at 12 (noting another study that concludes that SDR raises turnout by roughly four percent and that "18 to 21 year olds benefit most").

senators indicated that they supported the elimination of SDR, at least in part, because they wanted to make it more difficult for individuals to register to vote. *See id*. Given that unregistered eligible voters are disproportionately young and that young voters disproportionately utilized SDR in North Carolina, as well as the other evidence of discriminatory intent discussed herein, it is reasonable to conclude that the General Assembly eliminated SDR, at least in part, to suppress the youth vote.

Out-of-Precinct Voting. "Many college students are registered to vote at their family's home address," and "young people are less likely to have a license or to drive than older people," meaning that "getting to home precincts may pose a hardship for college students." JA1455 (Levine Rpt.); *see also* JA1524 (7/14/08 Ltr. from S. Lawrence) (noting that freshman at Fayetteville State University were prohibited from having vehicles on campus); JA333, JA333-34 (Harrison Decl. ¶¶ 40, 43). Indeed, young voters nationally who did not vote were more likely than older voters to say that they could not vote because they were out of town. JA1455 (Levine Rpt.). In addition, students and other transient individuals "are less likely to be familiar with their voting places than those who have lived in a community for years." JA410 (Martin Decl. ¶ 55); *see also id.* JA411¶ 56; JA318 (Glazier Decl. ¶ 70); JA374-74, JA380-81 (Kinnaird Decl. ¶¶ 11, 30). Thus, it is no surprise that "younger voters [in North Carolina] are more likely than older voters to attempt to vote in the incorrect precinct or not report a move." JA1455 (Levine Rpt.); *see also* JA380-81 (Kinnaird Decl. ¶ 30). Nor is it a surprise that out-of-precinct voting, which offsets these issues by permitting many voters who are

away from home or vote at the wrong precinct to have their votes counted, "has been much more important for young voters than for older voters." JA1453 (Levine Rpt.). It follows that the repeal of out-of-precinct voting will disproportionately burden, and in many cases effectively disenfranchise, young voters.

Notwithstanding this impact on young citizens, the General Assembly provided no explanation for the elimination of out-of-precinct voting. The General Assembly's decision to eliminate out-of-precinct voting thus provides strong evidence that in enacting HB 589, it intended to discriminate against young voters.

Early Voting. There is evidence suggesting that reductions in early voting periods are likely to penalize young voters disproportionately. *See* JA1443 (Levine Rpt.). HB 589's reduction in early voting is particularly likely to burden young voters because it removes discretion from CBOEs to permit early voting from 1:00 p.m. to 5:00 p.m. on the Saturday before an election, a time when young voters are especially likely to vote. *See* JA1444-45 (Levine Rpt.). As with other changes effected by HB 589, the legislative record contains no defensible explanation for the reduction in early voting hours. This absence of a reasonable explanation, in conjunction with the disproportionate impact this change is likely to have on young voters, supports an inference that the General Assembly curtailed early voting to make it more difficult for young citizens to vote.

Voter ID. The enactment of strict voter ID requirements further reflects an intent to discriminate against young voters.[8] Among provisional voters who showed ID to vote in North Carolina in the 2012 presidential election, young voters were 14% less likely than older voters to use a North Carolina driver's license and 178% more likely than older voters to use an ID categorized as "other government document." JA1455 (Levine Rpt.) (pattern persisted in 2008 presidential, 2010 general, and 2012 primary and presidential elections). Indeed, in North Carolina in 2013, over 14% of registered voters aged 18 to 25 "may not have [had] a state ID or driver's license." *Id.* at 20; *see also* JA1612 (2013 DMV-ID Analysis) (no match to DMV records provided to SBOE in December 2012 could be found for 89,964 voters under age 26 registered in North Carolina as of January 1, 2013). Further, as the SBOE recognized in 2012, "[c]ollege students who live in dormitories or other campus residences may have difficulty producing a document that lists their campus address." JA1544 (8/28/12 SBOE Mem.)

Nonetheless, HB 589 does not permit high school or university IDs to be used as voter IDs. The bill does, however, permit military IDs, veteran's IDs, and certain types of tribal enrollment cards to be used as voter IDs. § 2.1. The General Assembly's decision to permit some exceptions to its generally strict limitations on the types of ID that can be

[8]Because the voter ID requirement does not go into effect until 2016, Plaintiffs are not seeking to enjoin the implementation of that requirement at this time (although certain Plaintiffs are seeking to enjoin the "soft rollout" that will take place in 2014). Nonetheless, HB 589's voter ID requirement is highly relevant here, because discriminatory purpose may be inferred from the totality of the facts, *Davis*, 426 U.S. at 242, and the General Assembly's intent in passing the voter ID provisions is plainly probative of its intent in passing other HB 589 provisions.

used for voting, but not to make an exception for high school or college IDs, is strong evidence that the legislature *wanted* to make it difficult for young citizens to vote.

Moreover, the legislative history confirms that the General Assembly purposefully omitted college and high school IDs from the list of approved forms of ID. While the original version of HB 589 was being considered in the House, legislators repeatedly asserted that in determining what types of voter ID would be acceptable, they were drawing the line at "government-issued IDs."[9] Even then, however, the legislative intent to discriminate against particularly young voters was evidenced by the House Elections Committee's rejection of a proposal to include public high school IDs in the bill's list of examples of government-issued IDs that could be used for voter ID, even though such IDs are government issued. *See* JA2439-43 (4/17/13 N.C. House Elections Comm. Tr. at 62:19-66:6); *see generally Arlington Heights*, 429 U.S. at 267 ("Substantive departures too may be relevant, particularly if the factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached.").

Further, although HB 589 as initially passed by the House would have permitted voters to identify themselves with IDs issued by public universities, *see* JA2115, Fifth Ed. of HB 589 § 4, at 3, the full bill does not. Thus, the House jettisoned the distinction it had drawn between government-issued and private IDs, specifically to the detriment of

[9]*See* Statement of Rep. Murry 4/10/13 N.C. House Elections Comm. Tr. at 39:10-39:17; 41:5-9; Statement of Rep. Samuelson 4/24/13 N.C. House Sess. Tr. at 84:20-25; Statement of Rep. Samuelson 4/17/13 N.C. House Elections Comm. Tr. at 33:9-17; Statement of Rep. Warren 4/17/13 N.C. House Elections Comm. Tr. at 19:19-23; Statement of Rep. Stam 4/23/13 N.C. House Appropriations Comm. Tr. at 35:13-19..

young voters. There is only one plausible explanation for the decision of the House (which, unlike the Senate, had extensively examined the topic of voter ID) to defer to the Senate on this matter: this change makes it harder for young voters to vote. *See* JA347-48 (Goodman Decl. ¶ 20); *see also* Gov 1287, 1297 (containing written comments by member of Governor McCrory's staff that demonstrate that the Governor's own staff could not identify a basis for this "controversial" decision). Thus, the passage of the voter ID provisions at issue and the relevant legislative history further establish that HB 589 was intended to discriminate against young citizens.

Discretion to Extend Polling Hours. The removal from CBOEs of discretion to keep the polls open for an extra hour also supports the conclusion that HB 589 was intended to discriminate against young voters. The elimination of this discretion will likely result in longer lines at the polls, as the ability of CBOEs to alleviate long lines (often caused by unexpected failures of equipment or higher than anticipated voter turnout) will be reduced. *See* JA365 (McKissick Decl. ¶ 44) (explaining that Durham County, where Duke and North Carolina Central are located, "has historically had occasional problems with voting machines and, prior to the introduction of early voting, long lines on Election Day," and that HB 589, which removed discretion from the CBOE to keep polling places open for an additional hour if necessary, "takes away a means of addressing such Election Day problems"). Because young voters are disproportionately low-propensity voters, *see* JA1443 (Levine Rpt.), they are more likely than older voters to be deterred from voting, and their share of the vote will thus be reduced, by such lines.

Given that the legislative record contains no explanation for removing this discretion from CBOEs, as well as the other evidence discussed that the General Assembly acted with discriminatory purpose in passing HB 589, an inference should be drawn that this change too was motivated by an intent to reduce the youth vote.

Other Proposed Legislation. Defendants have objected to every attempt to obtain discovery from members of the General Assembly as to their intent, claiming a broad "legislative immunity." Despite this evasion, the legislative record contains important and compelling circumstantial evidence that a particular focus of the General Assembly in 2013 was to make voting more difficult for young North Carolinians. Specifically, Senate Bill 667 ("SB 667"), which was introduced in 2013 and sponsored by six senators who later voted for HB 589, *see* SB 667, Ed. 1, at 1, would have prevented a parent from claiming a tax exemption for a child registered to vote at an address other than the parent's address. *Id*. at 1, lns. 1-4, § 1(a). SB 667, in short, would have imposed a voter-registration tax on college students, and the parents of college students, who lawfully registered to vote at their college addresses. *Cf. United States v. Texas*, 445 F. Supp. 1245 (S.D. Tex. 1978), *aff'd mem. sub nom. Symm v. United States*, 439 U.S. 1105 (1979). And a primary sponsor of the bill left no doubt about its discriminatory purpose by stating, in an interview three days after the introduction of the bill, that college students "don't pay squat in taxes" and "*skew the results of elections* in local areas."JA1818 (4/10/13 *NC Bills Could Cut Early Voting, Affect College Students*) (emphasis added); *see also* JA1808 (4/3/13 *Bill Cook Seeks to Put Integrity Back In Our Elections Procedures*)

(statement by Executive Director of the Voter Integrity Project of North Carolina, that "[w]e've gotten a bill into the Senate" and that, "[i]f other states pick up this legislation, it will shift the landscape of college town voting all across the nation").

The introduction of SB 667 and contemporaneous statements of its supporters thus provide strong evidence that as of April 2013, members of the Senate were seeking to pass legislation that punished young voters for registering at their college addresses. It is not plausible that just months later, these same senators voted for HB 589 (as all of the SB 667 sponsors did), JA2371 (HB589 Senate Roll-Call Tr.), a bill that heavily burdens young voters, without the intent to prevent such voters from "skew[ing] the results of elections" by having their votes counted. *See Arlington Heights*, 429 U.S. at 267 (evidence of decisionmaker's purpose may include historical background of and sequence of events leading up to challenged decision). Indeed, the same sentiments offered as support for SB 667 were later echoed by a sponsor of HB 589. *See* JA1886 (8/21/13 *Blust says Voting Changes are Meant to Strike a "Proper Balance"*) (claiming to "have for years heard complaints that college students ought to vote in their home towns").

Totality of the Relevant Facts. In enacting HB 589, the General Assembly passed two provisions that exclusively, and several provisions that disproportionately, burden the voting rights of young citizens. In some cases no rationale was given for these provisions; in others, the explanation does not withstand scrutiny. *Cf. Busbee v. Smith*, 549 F.Supp. 494, 517 (D.D.C. 1982) ("The absence of a legitimate, non-racial reason for a voting change is probative of discriminatory purpose, particularly if the factors usually

considered by the decision makers strongly favor a decision contrary to the one reached.") (quotations omitted). Moreover, these provisions were enacted through an extraordinary process. Viewing all of the circumstances as a whole, it is clear that the challenged provisions were passed, at least in part, with the intent to discriminate against young voters. *See Walgren*, 482 F.2d at 102 ("'Fencing out' from the franchise a sector of the population because of the way [its members] may vote is constitutionally impermissible."); *see generally Davis*, 426 U.S. at 242 ("[A]n invidious discriminatory purpose may often be inferred from the totality of the relevant facts."). Plaintiffs are therefore likely to succeed on the merits of their 26th Amendment claim.[10]

CONCLUSION

For these reasons, Plaintiffs respectfully request that the Court preliminary enjoin implementation of the challenged provisions pending the outcome of this litigation.

[10]The 15th Amendment's proscription of race-based discrimination in the voting context is absolute. *Rice v. Cayetano*, 528 U.S. 495, 512 (2000); *Prejean v. Foster*, 227 F.3d 504, 519 (5th Cir. 2000). It follows that the 26th Amendment's proscription of age-based discrimination in voting is also absolute. And even if it were not, because the challenged provisions fail to satisfy the *Burdick* test, *see supra* at Section II.C.2, they cannot withstand strict scrutiny.

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