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 Governor of North Carolina, *et al.*, Defendants.	1:13CV658
LEAGUE OF WOMEN VOTERS OF NORTH CAROLINA, *et al.*, Plaintiffs, *and* LOUIS M. DUKE, *et al.*, Plaintiffs-Intervenors, v. THE STATE OF NORTH CAROLINA, *et al.*, Defendants.	1:13CV660
UNITED STATES OF AMERICA, Plaintiff, v. THE STATE OF NORTH CAROLINA, *et al.*, Defendants.	1:13CV861

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DEFENDANTS' PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

Defendants, by and through undersigned counsel, submit the following proposed findings of fact and conclusions of law under Fed. R. Civ. 52(a) and the Court's Order of June 26, 2015 and oral instructions of July 31, 2015.

This matter arises out of three consolidated actions with four sets of plaintiffs: (1) The United States of America, acting through the United States Department of Justice ("USDOJ") in *United States v. North Carolina*, No. 1:13-CV-861; (2) a group of organizational and individual plaintiffs in *League of Women Voters v. North Carolina*, No. 1:13-CV-660 ("LWV Plaintiffs"); (3) the North Carolina State Conference of the NAACP, several churches, and several individual plaintiffs in *N.C. State Conferences of the NAACP v. McCrory*, No. 1:13-CV-658 ("NAACP Plaintiffs"), and a group of college students and other individual plaintiffs who have intervened in the action by the LWV Plaintiffs ("Intervenors") (collectively referred to as "plaintiffs" unless otherwise noted).

Plaintiffs challenge various provisions of an election law enacted by the North Carolina General Assembly in 2013. The enacted law is 2013 N.C. Sess. Laws 381 ("SL 2013-381") and originated in the North Carolina House of Representatives as House Bill 589 ("HB 589"). Plaintiffs challenge the following sections of SL 2013-381[1]: (1) reduction of the number of days provided for one-stop absentee voting ("early voting" or

[1] Plaintiffs' pleadings contain claims directed at other sections of SL 2013-381 such as the increase in poll observers and transfer of authority to extend polling place hours from county boards of election ("CBE") to the North Carolina State Board of Elections ("SBE"). Other than the four claims mentioned above, and the photo ID claims, plaintiffs presented no evidence on any other claims in the case.

"one-stop absentee voting") from 17 to ten; (2) elimination of out-of-precinct voting; (3) elimination of same-day registration ("SDR"); and (4) elimination of preregistration of 16-year-olds.[2]

Plaintiffs challenge the reduction of early voting days, and the elimination of SDR and out-of-precinct voting on the grounds that these changes constitute an undue burden on the right to vote in violation of the Fourteenth Amendment to the United States Constitution; amount to intentional discrimination against minorities in violation of the Fourteenth and Fifteenth Amendments to the United States Constitution; and are discriminatory in purpose and effect in violation of Section 2 of the Voting Rights Act ("VRA"). Intervenors challenge the repeal of preregistration of 16- and 17-year-olds on the grounds that it constitutes an undue burden on the right to vote and intentionally discriminates against "young" voters in violation of the Fourteenth Amendment to the United States Constitution; and abridges the right to vote in violation of the Twenty-Sixth Amendment to the United States Constitution.

These cases were consolidated for trial by order dated May 5, 2015. (Doc. 252)[3] A bench trial on the merits was held from July 13, 2015, to July 31, 2015. Plaintiffs

[2] Plaintiffs also challenged the parts of SL 2013-381 known as the Voter Information Verification Act ("VIVA") which requires voters to show photo identification at the polls beginning in 2016. In June 2015, the North Carolina General Assembly modified VIVA to allow voters who are unable to obtain acceptable photo identification to vote upon execution of a declaration stating the reason for their inability to obtain the photo ID. 2015 N.C. Sess. Laws 103 ("SL 2015-103"). After the enactment of SL 2015-103, plaintiffs asked the court to defer consideration of their claims challenging VIVA to a later date and the court agreed to consider those claims separately. VIVA will be addressed herein only to the extent that it pertains to plaintiffs' intentional discrimination claims at trial.

presented a total of 93 witnesses. This included 64 fact witnesses, 14 of whom were live, 11 by video presentation, and 39 by deposition designation. This also included 16 expert witnesses, with all but one presenting by live testimony. Defendants presented four expert witnesses live, two fact witnesses live, and counter-designations of plaintiffs' witnesses who testified by video or deposition designation. Following the trial, the parties submitted proposed Findings of Fact and Conclusions of Law.

Pursuant to Federal Rule of Civil Procedure 52(a), the Court enters the following findings of fact — based upon an evaluation of the evidence, including the credibility of witnesses, and the inferences that the Court has found reasonable to draw therefrom — and conclusions of law. To the extent any factual statement is contained in the conclusions of law, it is deemed a finding of fact as well.

I. Findings of Fact

A. North Carolina Election Practices Prior to SL 2013-381

North Carolina's election system has not always included early voting, out-of-precinct voting, SDR, or preregistration of 16-year-olds. While some limited, excuse-only, early voting existed prior to 1982, none of the other challenged practices existed in North Carolina in 1982 when Section 2 of the Voting Rights Act was amended.

B. Early Voting

Prior to 1973, North Carolina required all voters to cast their ballots on Election Day or to apply for an absentee ballot by mail. Mail-in absentee ballots were allowed only when a voter provided a statutorily acceptable excuse for being absent and unable

[3] References to docket entries are all in Case No. 13-861 unless otherwise noted.

to vote in person at the proper polling place on Election Day. *See* 1973 N.C. Sess. Laws 536. In 1973, the General Assembly provided an initial "early voting" accommodation to voters by allowing them to apply for excuse-only absentee ballots and to cast their ballots in person at the board of elections office in the county where the voter resided. 1973 N.C. Sess. Laws 536.

Then, as now, a voter had to register to vote at least 25 days before the day of the primary or general election in which the voter wishes to vote. *See* N.C. Gen. Stat. § 163-82.6(c) (2013). In 1977, the General Assembly first described the in-person excuse-only absentee voting authorized in 1973 as "one-stop" absentee voting because a voter could apply for an absentee ballot at the voter's county board of elections office and return the ballot to the county board office on the same day. 1977 N.C. Sess. Laws 469.

In 1999, the General Assembly expanded one-stop absentee voting by eliminating the requirement of a statutorily acceptable excuse. 1999 N.C. Sess. Laws 455. The General Assembly also authorized CBEs to open more than one site for one-stop voting. *Id.* Additional locations could not be opened unless the local county board of elections unanimously agreed to open more than one site. *Id.*[4] There is no evidence early voting was expanded for the purpose of increasing black turnout. (Tr. Day 6 at 51:5-7; Tr. Day 10 at 39:4-14) Instead, it was likely expanded to make it easier to vote in general. (Tr. Day 6 at 52:2-7)

[4] In 2001, the General Assembly also removed the excuse requirement for mail-in absentee ballots. 2001 N.C. Sess. Laws 337. Since that time, voters have been able to apply for and receive a mail-in absentee ballot for any reason.

In 2000, the General Assembly enacted a provision allowing the SBE to adopt one-stop locations for individual counties when a CBE could not reach a unanimous agreement. 2000 N.C. Sess. Laws 136. The General Assembly granted the SBE authority to establish one-stop locations for a particular county based upon a majority (and not unanimous) vote by the members of the SBE. *See id*. There are three members of every county board of elections. By law, not more than two members may belong to the same political party. N.C. Gen. Stat. § 163-30. Accordingly, two members of each county board typically belong to the same political party as the Governor while the third member generally belongs to the major opposing political party. (Tr. Day 13 at 7:14-8:10) Similarly, there are five members of the SBE and, by law, no more than three members may belong to the same political party. N.C. Gen. Stat. § 163-19. As such, three members typically belong to the same political party as the Governor while the other two members typically belong to the opposing political party. (Tr. Day 13 at 8:11-20) These changes effectively allowed the members of the majority party on the SBE to unilaterally impose an early voting plan on a county. (DX 292)

In 2001, the General Assembly gave county boards the authority to designate a single one-stop location at a place other than the county board office. The General Assembly also reduced the number of days available for voters to participate in one-stop voting to 17 days. 2001 N.C. Sess. Laws 319.[5] There is no evidence that reducing the

[5] Prior to the enactment of SL 2013-381, all counties had the authority to open early voting sites for 17 days but some counties decided to open early voting sites for less than 17 days. County boards were not required by statute to have all early voting sites within their county open for all 17 days.

number of days of early voting in 2001 was controversial or was the subject of a legal challenge. (Tr. Day 6 at 48:11–50:1)

Congress has never enacted legislation that requires states to either establish a process for early voting or that specifies a time frame for early voting. Today, at least sixteen states do not offer any in-person early voting. (Tr. Day 12 at 8, 9; DX 270 at 20-29; Tr. Day 3 at 101; DX 348 at 99)

C. Out-of-precinct Voting

Under the Help America Vote Act of 2002 ("HAVA"), 52 U.S.C.A. §§ 20901-21145 (2015), Congress mandated that states must offer provisional ballots to Election Day voters who moved their residence within 30 days of an election but who failed to report their move to their county board of elections. However, Congress also decreed that any such ballot should be counted only under state law. *See id.* In 2003, the General Assembly enacted legislation designed to bring North Carolina into compliance with HAVA. 2003 N.C. Sess. Laws 226.

After this change in 2003, two Republican candidates challenged a decision by the SBE to count ballots cast by certain Election Day voters in Guilford County who voted in precincts where they did not reside. *James v. Bartlett*, 359 N.C. 260, 263, 607 S.E.2d 638, 640 (2005). The Republican candidates alleged that the counting of these out-of-precinct ballots violated Article VI, Section 2 of the North Carolina Constitution. *Id*. at 266, 607 S.E.2d at 642. The North Carolina Supreme Court avoided the state constitutional issue and ruled instead that the 2003 session law required that voters cast their ballots in the precinct in which they resided. *Id*. at 267, 607 S.E.2d at 642 (citing

N.C. Gen. Stat. § 163-55 (2003)). The North Carolina Supreme Court ruled that the SBE had incorrectly counted non-resident out-of-precinct ballots in these elections, remanding the case for further consideration of the election challenges brought by the Republican candidates. *Id.* at 271, 607 S.E.2d at 645.

The Court in *James* listed the many important policies served by a requirement that Election Day voters cast their ballots in their assigned precincts. The requirement provides protection against election fraud and permits election officials to conduct elections in a timely and efficient manner. *Id.* at 644, 307 S.E.2d at 270. The Court also noted "the advantages of the precinct system are significant and numerous" because "it caps the number of voters attempting to vote in the same place on Election Day; it allows each precinct ballot to list all the votes a citizen may cast for all pertinent federal, state, and local elections, referrals, initiatives, and levies; it allows each precinct ballot to list only those votes a citizen may cast, making ballots less confusing, it makes it easier for election officials to monitor votes and prevent election fraud, and it generally puts polling places in closer proximity to voter residences." *Id.* at 644-45, 307 S.E.2d at 270-71 (quoting *Sandusky Cnty. Democratic Party v. Blackwell*, 387 F.3d 565, 569 (6th Cir. 2014) (per curiam)).

Soon after the decision in *James*, and before further proceedings could take place in the election protests that were the subject of that opinion, the General Assembly enacted a "clarification" of the 2003 session law. This Act was entitled "An Act to Restate and Reconfirm the Intent of the General Assembly with Regard to Provisional Voting in 2004; and to Seek the Recommendations of the State Board of Elections on

Future Administration of Out-of-Precinct Provisional Voting." 2005 N.C. Sess. Laws 2. This Act stated that it had been the intent of the General Assembly that an out-of-precinct ballot cast by a voter in the county of his or her residence be counted for any office for which he or she was otherwise eligible to vote. *Id*. The effect of this session law was to legislatively overrule the decision by the North Carolina Supreme Court in *James* that Election Day voters were required by statute to vote in the precinct where they resided. The Act also provided for retroactive application to the election challenges that had been the subject of the *James* decision.[6] The vote for this provision was strictly upon party lines with Republicans being in the minority. (DX 168; Tr. Day 6 at 61:1-8)

While the Act included prefatory language regarding use by African American voters of out-of-precinct voting in the 2004 election, there is no indication in the Act or in the legislative history that it was enacted to provide African American voters an advantage over other voters in the ability to cast a ballot or as a perceived remedy for black participation rates in North Carolina elections. (Tr. Day 10 at 40:10-12)

Congress has not enacted legislation requiring states to count all out-of-precinct ballots. To the contrary, the only legislation enacted by Congress regarding this issue states that out-of-precinct ballots be counted in accordance with state law. Today at least 31 states do not allow out-of-precinct voting. (Tr. Day 11 at 223-24) Two more states allow out-of-precinct voting only when one or more precincts are located at the same

[6] There is no indication of any further judicial review of the election protests filed in *James* and the North Carolina Supreme Court has never ruled on whether Article VI, Section 2, of the North Carolina Constitution requires that Election Day voters cast their ballots in the precinct where they reside.

polling site (*Id.* at 224-25) Out-of-precinct voting remains available in North Carolina during the early voting period. (Tr. Day 13 at 20:18-24)

D. Same-Day Registration

Until 2007, North Carolina required that all voters be registered to vote at least 25 days before an election. *See* N.C. Gen. Stat. § 163-82.6(c).

In 2007, the General Assembly enacted SDR, which allows an individual to register to vote and vote at the same time during the early voting period. 2007 N.C. Sess. Laws 253. The vote on enacting SDR was largely along party lines with Republicans being in the minority. (DX 169, 170) There is no indication in the legislative record that SDR was enacted to provide African American voters an advantage over other voters in the ability to cast a ballot or as a perceived remedy for black participation rates in North Carolina elections. (Tr. Day 6 at 51:24–52:7; Tr. Day 10 at 41:3-7)

While Congress has decreed that states may close their registration books 30 days before an election or within any shorter period allowed by state law, 52 U.S.C.A. § 20507(a)(1) (2015), federal law does not require that states allow voters who register less than 25 days before an election to be allowed to vote in that election. Today, 36 states do not allow SDR. Three other states allow voters to register on election day but do not allow SDR during early voting. (Tr. Day 12 at 15-17; DX 270 at 29-32; Tr. Day 3 at 100-01, DX 348 at 99)

E. Preregistration

Before 2010, all North Carolina citizens who turned 18 prior to an election were permitted to register and vote as a matter of state law. *See* N.C. Gen. Stat. § 163--

55(a)(1); N.C. Gen. Stat. § 163-59. This law also allowed 17-year-olds to register to vote if they would turn 18 by the time of the election in which they wished to vote.

In 2009, the General Assembly enacted legislation that required each CBE to "preregister" 16- and 17-year-olds to vote even when they would not be 18 years old at the time of the next general election. 2009 N.C. Sess. Laws 541. This legislation, which became effective on January 1, 2010, also required CBEs to conduct voter-registration drives and preregistration drives at public high schools. Congress has not enacted legislation requiring states to "preregister" 16- and 17-year-olds, or requiring boards of election to conduct registration drives at public schools. Today, 40 states do not provide for preregistration of 16 year olds. (Tr. Day 12 at 18; DX 270 at 32)

F. Voter Identification

North Carolina Republicans in the General Assembly first attempted to enact a voter identification provision in 1999. (Tr. Day 1 at 141:23–142:13; DX 217 at 9) Another attempt was made in 2006. (Tr. Day 6 at 43:23–44:1) Both efforts were unsuccessful.

In 2011, the first legislative session after Republicans won control of a majority of the seats in the North Carolina General Assembly, they passed HB 351, a voter identification measure. (DX 218 at 3-4) HB 351, however, was vetoed by the Governor, and did not become law. (*Id.*)

In 2013, after the election of a Republican Governor, the Republican majority in the General Assembly attempted again to enact a voter identification law. In April 2013, Marc Burris, the IT Director for SBE, under the direction of Gary Bartlett, then-SBE

Executive Director, prepared a report attempting to match registered voters in the SBE registration database (SEIMS) with individuals in the database maintained by the North Carolina Department of Motor Vehicles ("DMV") containing individuals with DMV identification (SADLS). (PX 534) This report was an update of a prior report purporting to show the number of registered voters who could not be "matched" to the DMV database. The April 2013 report cautioned that it was not attempting to prove how many registered voters had identification that may be acceptable under a voter identification law, or even how many voters had DMV-issued identification. The SBE verified that it had matched 95% of all registered voters and 97% of those who voted in the high turnout election of 2012. (*Id.*; Tr. Day 5 at 206-08).

SBE cautioned that the no-match list was almost certainly inflated for many reasons including: data entry errors by DMV and CBEs; mistakes by voters or DMV applicants in completing forms; use of different names by persons at the time they registered or applied for a driver's license; name changes caused by marriages; SBE's failure to request registrants to provide a driver's license number until 2004; and no voting history by a disproportionately high number of registered voters who could not be matched to a DMV record. (*Id.*; Tr. Day 5 at 205-12) Unmatched voters in the 2012 general election represented only 2.2% of all registered voters. (*Id.*; Tr. Day 5 at 208)

G. SL 2013-381

SL 2013-381 was enacted on July 26, 2013 and signed by the Governor on August 12, 2013.

While the trial of this matter focused on SDR, out-of-precinct voting, early voting, preregistration and, to a lesser extent, voter identification, those sections of the law constitute only a small fraction of the overall enactment. Of the 57 pages of SL 2013-381, approximately 40 pages contain provisions that are not challenged in these cases.

Many of the unchallenged provisions promote transparency, integrity, and fairness in the elections process. For instance, Part 14 of SL 2013-381 prohibits persons performing voter registration drives from being compensated based on the number of forms they turn in. Part 20 provides that anyone in the State can access the voter registration records of other voters. Part 20.2 provides that any voter in a county can challenge another voter anywhere in the county, not just in that voter's precinct. Part 34 makes changes to the rules for providing assistance to voters at the polling site, particularly assistance to voters adjudged incompetent. Part 47 tightened the laws on lobbyists' bundling of contributions, and Part 31 modified ballot order rules to ensure fairness to each political party.

Other unchallenged provisions of SL 2013-381 make it easier to vote and access the ballot. Part 22 lowers the number of signatures required if a candidate wants to access the ballot by petition instead of paying a filing fee. Part 29 makes it easier to vote by requiring clear language on the ballot. Part 30 requires paper ballots by 2018 to eliminate or reduce lines and confusion caused by electronic voting equipment. (Tr. Day 4 at 148-49; DX 210 at 6)

The challenged provisions are discussed more fully below in connection with a discussion of the HB 589 legislative debate.

H. HB 589 – Legislative Process

The legislative process of HB 589 was not unusual and no legislative rules were violated in the enactment of what became SL 2013-381.[7] While HB 589 was pending in the House, a public hearing was held and the bill was also heard in committee multiple times. (DX 217 ¶ 7) The House Rules did not require a public hearing. (*Id.*) On April 4, 2013, HB 589 "VIVA/Elections Reform" was filed with the House Principal Clerk and was introduced on April 8, 2013 in accordance with House Rule 31.1(d) ("All public bills which would not be required to be re-referred to the Appropriations or Finance Committees under Rule 38. . . must be introduced not later than 3:00 P.M. on Wednesday, April 10, 2013). (*Id.* at ¶ 8)

HB 589 was posted on the North Carolina General Assembly website where it was available to the public. (*Id.* at ¶ 9) Editions 1 through 7 of the bill were posted on the General Assembly's website where they were available to the public. (*Id.*) On April 8, 2013, House Bill 589 was referred to the House Committee on Elections. (*Id.* at ¶ 10) This referral was published on the bill and on the General Assembly's website. (*Id.*) The regular meeting schedule of the House Elections Committee, House Finance Committee and House Appropriations Committee, each of which heard House Bill 589, are all posted on the General Assembly website. (*Id.* at ¶ 11) Additionally, notices of

[7] For example, plaintiffs' expert Dr. Barry Burden agreed that it is not unprecedented for a legislature to pass a bill in only two days when one political party is in control. (Tr. Day 3 at 129)

each meeting were distributed to Committee members and members of the public who have signed up to receive Committee notices via electronic mail, and were announced during open session on the floor of the House. (*Id.*)

On April 17, 2013, at a regularly scheduled meeting of the House Committee on Elections, a public hearing was held regarding a proposed committee substitute to House Bill 589. (*Id.* at ¶ 12) The proposed committee substitute was given a favorable report by the committee. (*Id.*) On April 17, 2013 House Bill 589 was given a serial referral to House Finance and House Appropriations for further public deliberation. (*Id.* at ¶ 13) On April 18, 2013, at a regularly scheduled meeting of the House Finance Committee, a second proposed committee substitute to House Bill 589 was given a favorable report. (*Id.* at ¶ 14) On April 23, 2013, at a regularly scheduled meeting of the House Appropriations Committee, a third proposed committee substitute to House Bill 589 was given a favorable report. (*Id.* at ¶ 15)

On April 23, 2013, House Bill 589 was placed on the House Calendar for public debate on April 24, 2013 pursuant to House Rule 36(b). (*Id.* at ¶ 16) On April 24, 2013, the House held debate for House Bill 589. (*Id.* at ¶ 17) Of ten amendments offered, three were adopted (the sponsors were Reps. Tine, Graham and Fisher – all then-Democrats). (*Id.*) House Bill 589, as amended, passed the House on second and third reading by votes of 80 to 36 and 81 to 36. (*Id.* at ¶ 18) Several Democratic members of the House voted for the bill on both second and third readings. (*Id.*)

On April 25, 2013 the Senate received HB 589 from the House and the bill was referred to the Senate Committee on Rules and Operations of the Senate where it

remained available for public review and comment. (*Id.* at ¶ 19) The Senate Committee on Rules and Operations of the Senate meets upon the Call of the Chair. (*Id.* at ¶ 20) In accordance with N.C. Gen. Stat. § 143-318.14A(b), a July 18, 2013 meeting of the Senate Rules Committee was noticed via electronic mail and the General Assembly website as well as during open session of the Senate. (*Id.*) During the July 18, 2013 meeting, a proposed committee substitute to HB 589 was distributed to members of the committee as well as posted on the General Assembly's website for review by the public. (*Id.*) On July 22, 2013, a second proposed committee substitute to HB 589 was distributed to members of the Senate Rules Committee in accordance with Senate Rule 45.1, which requires distribution of a proposed committee substitute to committee members the night before the committee meeting at which the proposed committee substitute will be considered. (*Id.* at ¶ 21)

On July 23, 2013 the Senate Rules committee held a meeting to deliberate regarding the proposed committee substitute to HB 589. (*Id.* at ¶ 22) Of three amendments offered, three were adopted. (*Id.*) The sponsors of those amendments were Sen. Apodaca, a Republican, and Sen. Clark, a Democrat. (*Id.*) The proposed committee substitute, as amended, was given a favorable report. (*Id.*)

Many of the provisions added to the proposed committee substitute by the Senate Rules committee were pending in bills introduced earlier in the 2013 session. (*Id.* at ¶ 23) For example, HB 451, filed March 27, 2013, proposed to shorten early voting, eliminate Sunday voting, and eliminate SDR. (*Id.*) HB 913, filed April 11, 2013, proposed to eliminate SDR and enhance election observer rights. (*Id.*) Senate Bill 428,

filed March 26, 2013, proposed to eliminate SDR and shorten the early voting period. (*Id.*) In addition, SB 666, filed on April 2, 2013, proposed to enhance observer rights, repeal SDR, and limit early voting to ten days. (*Id.*) Of course, the concept of photo identification to vote was well known because it had been extensively debated during the prior session when HB 351 was passed by the legislature but ultimately vetoed by the Governor. (*Id.*)

On July 24, 2013 HB 589 appeared on the Senate calendar in the ordinary course of business. (*Id.* at ¶ 24) Of ten amendments offered, three were adopted. (*Id.*) The amendment sponsors were Sen. Stein, a Democrat, Sen. Apodaca, a Republican, and Sen. Rucho, a Republican. (*Id.*) HB 589 passed second reading in the Senate by a vote of 32 to 14. (*Id.*) No points of order were pursued by any member of the Senate. (*Id.*) Senator Apodaca, Republican, objected to third reading to provide additional time for review, debate and deliberation on a separate legislative day. (*Id.*)

On July 25, 2013 two amendments were adopted. (*Id.* at ¶ 25) The amendment sponsors were Sen. Blue, a Democrat, and Sen. Rucho, a Republican. (*Id.*) HB 589, as amended, passed third reading by a vote of 32 to 14. (*Id.*) The bill was sent back to the House for concurrence. (*Id.*)

On July 25, 2013 the House received HB 589, as amended by the Senate, and concurred in the Senate's changes by a vote of 73 to 41. (*Id.* at ¶ 26) It is not unusual and is fully consistent with the rules of each chamber for one chamber to concur in changes made to the bill by the other chamber without referring the bill back to committee or forming a Committee of the Whole. (*Id.*)

The legislative process by which HB 589 became law was not unusual. (*Id.* ¶ 30) Many high profile or controversial bills have followed a similar process. (*Id.*) For example, in 2003 the legislature was tasked with adopting a new legislative redistricting plan after several previous plans had been struck down by the courts. (*Id.* ¶ 31) The plan was introduced on November 24, 2003 as HB 3 and was immediately calendared for consideration on the House floor that day. (*Id.*) The Speaker of the House did not allow amendments to the plan and did not refer the bill to committee. (*Id.*) The bill was passed by the House and immediately sent to the Senate the same day. (*Id.*) In the Senate, the bill was referred to the Senate Redistricting Committee. (*Id.*) That committee met the same day and proposed a committee substitute. (*Id.*) No amendments offered by Republican Senators were adopted. (*Id.*) The Senate committee substitute made significant changes to the bill. (*Id.*) In addition to adding new Senate districts, the committee substitute created a three-judge panel of the Superior Court of Wake County for redistricting cases and dramatically altered how redistricting challenges are handled by the courts. (*Id.*) The committee substitute was adopted by the Senate Redistricting Committee the next morning, November 25, 2003. (*Id.*) It was then calendared for immediate consideration by the full Senate. (*Id.*) The Senate adopted the committee substitute and sent it to the House for immediate consideration the same day. (*Id.*) When the House received it, it did not refer the bill to committee and it did not form a Committee of the Whole. (*Id.*) Instead, the House concurred in the Senate committee substitute. (*Id.*) During the final debate in the House on the bill, several Republican members of the House attempted to be recognized to debate the bill but were

not recognized by the Speaker. (*Id.*) After the House concurred in the Senate committee substitute, the 2003 redistricting plan was immediately ratified and then signed by the Governor on November 25, 2003. (*Id.*; *see also* DX 167)

Other election-related bills have been enacted late in the session. (DX 217 ¶ 32) For example, during the 1999 Session, SB 568 was introduced. (*Id.*) SB 568 removed the excuse requirement from absentee ballots cast at one-stop voting sites during general elections in even-numbered years. (*Id.*) The legislation also allowed a county board to provide more than one site for one-stop voting, so long as a unanimous vote of all of the members of the county board approved such action. (*Id.*) This legislation also included language regarding challenges against voters at one-stop sites. (*Id.*) The bill was introduced in March 1999 and first passed the Senate on April 21, 1999. (*Id.*) The House did not take it up until nearly three months later when it passed an amended version of the bill on July 13, 1999. (*Id.*) A conference committee was formed, during which a voter identification requirement that had been added to the bill was removed. (*Id.*) The bill, as proposed by the conference committee was passed by the Senate and House on July 19 and July 20, respectively, was ratified on July 21, 1999, the last day of the Session. (*Id.*)

In addition, during the 2005 Session of the North Carolina General Assembly, SB 133, ultimately enacted as SL 2005-2, was a very controversial bill. (*Id.* ¶ 33) The bill required the counting of out-of-precinct votes in the disputed election for State Superintendent of Public Instruction race the previous November. (*Id.*) That election was subject to pending election protests regarding the counting of out-of-precinct ballots.

(*Id.*) The bill was introduced on February 14, 2005 and was enacted and ratified approximately two weeks later. (*Id.*) The final votes in the House and Senate on the bill were split along party lines. (*Id.*)

Also, in 2002, SB 1054 was enacted. (*Id.* ¶ 34) SB 1054 created a system of public financing for appellate judicial elections and was ultimately enacted along mostly partisan lines. (*Id.*) After passing the Senate, the House proposed a committee substitute which passed the House on September 26, 2002. (*Id.*) The Senate then voted to concur with the House committee substitute without referring the committee substitute to committee. (*Id.*) The bill was enacted just a few days prior to the adjournment of that session. (*Id.*) Relatedly, in 2007, a controversial bill creating a system of public financing for Council of State members was enacted. (*Id.* ¶ 35) The bill, HB 1517, was filed on April 17, 2007, but did not pass the House until July 28, 2007, near the end of that session. (*Id.*) The Senate passed the bill on August 1, 2007, and the bill was ratified on the same day that the session was adjourned. (*Id.*)

During the 2013 session, HB 522 began as a bill regarding "master meters" for electric service. (*Id.* ¶ 36) It passed the House on May 20, 2013. (*Id.*) In the Senate, the bill was changed entirely to a bill regarding the application of foreign law in certain cases under state law. (*Id.*) The Senate passed its committee substitute on July 19, 2013. (*Id.*) The House then concurred in the Senate committee substitute on July 24, 2013, the day before the 2013 session adjourned. (*Id.*; *see also* Tr. Day 8 at 41:11-44:3) Similarly, HB 74, a regulatory reform bill, passed the House on May 13, 2013. (DX 217 ¶ 37) The Senate then proposed a committee substitute which made significant changes

to the bill. (*Id.*) The committee substitute passed the Senate on July 19, 2013. (*Id.*) The House then failed to concur and a conference committee was formed. (*Id.*) The conference committee report was adopted by both chambers on the very last day of the session, July 26, 2013. (*Id.*) Finally, the Racial Justice Act, a highly controversial bill (SB 461) was adopted during the 2009 session. (*Id.*) Similar to the legislative route taken by HB 589, the Racial Justice Act was passed first by the Senate, then by the House with a committee substitute, which the Senate then concurred in without referring the matter to any committee or a Committee of the Whole. (*Id.*)

It is not unusual for any bill, including elections bills, to be referred to the House or Senate Rules Committee for consideration. (Tr. Day 6 at 54:17–55:25) During the 2013 session of the North Carolina legislature, several elections bills were referred to the Rules Committee of one or the other chamber. (Tr. Day 6 at 62:8-16; Day 7 at 209:6-25) During the current session of the legislature, there are numerous elections bills pending in the Senate Rules Committee. (Tr. Day 6 at 62:17-20)

It is also not unusual for bills, including elections or other controversial bills, to be enacted on a motion to concur without the formation of a conference or other committee prior to final passage. (DX 217; Tr. Day 6 at 57:3-15) Under legislative rules, when one chamber receives a substitute version of a bill which originated in that chamber, that chamber must first vote on a motion to concur or a motion not to concur before a conference committee may be formed. (Tr. Day 6 at 46:7-25) On such a motion, each member is free to decide how to vote and whether they are comfortable

enough with the other chamber's substitute bill to pass it without a conference committee. (Tr. Day 6 at 47:5-48:8)

I. HB 589 – Legislative Debate

The challenged provisions of SL 2013-381 were debated primarily in the Senate where they were initially proposed as part of the Senate's changes to HB 589. The Senate debate took place over three days (a Senate Rules Committee debate, and two days of floor debate) and included opportunities for public comment. Many of the arguments being made in these cases were discussed at one point or another in the course of the debate.

During the course of the debate, legislators, including members of the majority party, addressed voter identification, SDR, early voting, and preregistration. During the Rules Committee hearing, the changes to out-of-precinct voting were described as a return to the law as it existed prior to 2005. (PX 202 at 12) No member of the public and no Senator or House member, Republican or Democratic, voiced any opposition to the elimination of out-of-precinct voting. In addition, as discussed in more detail below, the Republican majority accepted several amendments from members of the minority party, including some from African American members of the Democratic Party. Finally, several African American Senators and other Democratic Senators went to lengths not to ascribe improper or race-based motives on the majority. Senator Nesbitt characterized the debate as "healthy," "good," and "thorough." (PX 549 at 135:19-136:1; PX 550 at 90:22-25) He also pointed out that just because someone accuses you of hurting a group it "doesn't mean you have a bad heart." (PX 549 at 136:24-137:1) Senator Graham, an

African American Democrat, acknowledged that "two senators can take a look at the same bill, read every word that are the same and interpret it differently." (PX 550 at 46:21-47:3)

1. Early Voting Debate

SL 2013-381 reduced the number of early voting days from 17 to ten and requires the number of hours offered by CBEs for early voting to match the number of early voting hours from a comparable election. As originally proposed, however, HB 589 simply reduced the number of days from 17 to ten. During the debate, Senators described the need for consistency in the treatment of early voting sites within counties. (PX 202 at 30:5-31:3; PX 550 at 55:10-57:7, 74:8-76:8) They noted that with 17 days of early voting, many days in the 17-day cycle were not used by voters as other days. They believed shortening the number of days would encourage counties to open more sites (and help alleviate long lines) and reduce the distance early voters would need to travel to vote, and it would leave the discretion with the county as to whether to open on Sunday. (*Id*.; *see also* PX 549 at 4:11-5:9, 11:1-25) Senators also thought that 2014 would be a good test "run" for this idea which could be changed if necessary before the 2016 Presidential election. (PX 202 at 35:11-14) They also thought that under the existing system, there were opportunities for political "gamesmanship" with sites that would be ameliorated by HB 589. (*Id*. at 74:19-75:15) Some Senators also believed it

would "probably" be a cost savings to reduce the number of days, but the bulk of the debate centered on issues other than cost. (*Id*. at 30:5-15)[8]

During the Senate floor debate, Senator Stein, a Democrat, proposed the hours matching requirement. He agreed that if CBEs increased the number of early voting sites and increased the number of hours, it would "mitigate" the harm he perceived without such an amendment.[9] (PX 549 at 16:30-30:25, 59:7-11) The majority agreed to consider Senator Stein's amendment. As a result, Senator McKissick, a black Democrat, agreed to temporarily displace one of his proposed amendments which addressed the same issue. (PX 549 at 35:14-36:3) Ultimately, the majority agreed with Senator Stein's amendment and it passed by a wide margin. Later in the debate, Senator Rucho proposed a mechanism by which a CBE could obtain a waiver from the matching requirement with the unanimous support of all members of the CBE and the SBE. Senator Stein voted for this amendment. (Tr. Day 7 at 201:5-7) He also testified that requiring the unanimous approval for each CBE and the SBE was his idea. (Tr. Day 7 at 211:11-14) Stein agreed that under his amendment, CBEs would have to add new sites

[8] Senators also stated that the polls needed to close at 1:00 pm on the last Saturday of early voting to complete lists of those who had already voted and begin preparing for logistics of Election Day. (PX 202 at 57:17-58:12)

[9] At trial, Senator Stein testified that he provided data on black participation rates in early voting to his fellow Senators on a computer "dashboard" available to each Senator. This contention was not contained in the declaration submitted by Senator Stein in support of plaintiffs' motion for a preliminary injunction. (PX 18) In any event, Senator Stein admitted that he cannot be sure that each Senator, much less those in the majority, reviewed the information on the dashboard. (Tr. Day 7 at 195:14-198:12) To the extent that any Senator did review the dashboard they were likely to see the chart attached to Senator Stein's declaration as Exhibit A and marked at trial as PX 717. Senator Stein agreed that one possible inference from a review of the chart is that white voters use early voting in much higher numbers than black voters. (Tr. Day 7 at 198:13-22)

and/or add hours to existing sites. (PX 549 at 46:9-22) The majority supported Senator Stein's amendment because they viewed it, in conjunction with the reduction to ten days, as providing expanded opportunities for early voting as compared to prior law while achieving the consistency within counties they desired. (PX 549 at 33:18-35:6)

Finally, the majority also accepted two amendments from Senator Clark (an African American Democrat) to facilitate use of absentee voting during the early voting period. One was to allow voters to complete a mail-in absentee ballot and return it directly to the early voting site rather than by mail. The other amendment facilitated this process by allowing mail-in absentee voters to substitute a notary public for two witness exchanges, and provided that the notary public could not charge for this service. Both amendments passed easily. (PX 202 at 23:5-29:6)

2. SDR Debate

SL 2013-381 eliminated SDR and returned to the requirement that individuals must register to vote at least 25 days before the election. Senators explained that SDR did not give the CBEs enough time to properly verify each registration. (PX 202 at 41:2) They also noted that repealing SDR would ensure accuracy of the voter rolls. (PX 549 at 5:9-11) Senator Rucho also noted that the vast majority of states did not have SDR and that registered voters could still update their registration during early voting. (PX 549 at 37:4-5, 39:1-3) No Senators refuted the issues raised by the majority regarding the challenges of verifying same-day registrants.

3. Preregistration Debate

SL 2013-381 repealed the requirement that CBEs and SBE hold the registration applications of 16-year-olds until a date on which the application could be processed as an eligible registration application. One Senator stated that his son was unable to vote because of confusion caused by his preregistration status. He received a letter from a CBE that confused him further, prompting the Senator himself to ask the CBE for clarification. (PX 202 at 22:3-23) Returning to the prior rule would provide certainty on when the 16-year-old could register and still allow 17-year-olds to register when they would turn 18 on or before the general election. (*Id.; see also* PX 549 at 6:24-7:6) Senators also noted that the vast majority of states did not offer preregistration for 16-year-olds. (PX 549 at 37:5-7)

4. Voter Identification Debate

Senators repeatedly expressed their skepticism at the characterization of the 2013 SBE matching report by the political minority as indicating over 300,000 voters lacked acceptable identification.[10] (PX 549 at 86:2-87:1, 90:18-92:6) To the extent there were voters who might lack identification, the majority specifically pointed to the long rollout period as giving the public time to learn the requirement and obtain identification as well as the requirement that DMV provide free identification for voting purposes. (PX 202 at 15:9-23, 36:21-37:1, 39:13-18, 75:23-76:18); *see also* SL 2013-381, Pt. 6.2 Senators

[10] Much of this skepticism likely came from portions of the HB 589 debate and public hearings held in the House. (PX 543 (testimony of Francis De Luca [pp. 910-918] and Hans von Spakovsky [pp. 935-947]); PX 546 (comment by Rep. Samuelson [pp. 1280-1281]); PX 542 (testimony of public citizens Oaks [pp. 762-765] and Ms. Chiavetta [pp. 768-770]))

also noted that in Georgia, a matching study predicted that over 600,000 voters did not have identification but that only 29,611 identifications had in fact been issued, and turnout had increased.[11] (PX 549 at 86:5-87:1)

Senators stressed their belief that the identification requirements would increase integrity and perceived confidence in the election system. One Senator noted his experience of voters not being able to vote because they were told someone had already voted in their name when arriving at the polls. (PX 202 at 37:2-6) They expressed concern about allowing college identification because in North Carolina there is inconsistency in the issuance and standards for identification among colleges and universities. (PX 202 at 68:18-69:2; PX 549 at 91:18-92:5) They believed that voters would have more confidence if they knew that there was a uniform list of clearly valid identification. (PX 202 at 68:18-69:2; PX 549 at 94:1-5, 95:23) This renewed public confidence was, in their view, borne out by the polling data which showed that over 70% of North Carolinians supported an identification requirement.[12] (PX 549 at 3:15-18; PX 550 at 52:1-7, 100:2-9)

Senators also noted several times that North Carolina was the last state in the Southeast to adopt an identification requirement and that the majority of other states have an identification requirement. (PX 202 at 67:25-68:6)

Senators also expressed concerns about fraud. Senators clearly believed that the explanation for the small number of reported fraud cases was that election fraud was not

[11] These points had also been raised in the proceedings in the House on HB 589. (PX 543 (testimony of Francis De Luca [pp. 910-918] and Hans von Spakovsky [pp. 935-947])
[12] (PX 543 (testimony of Francis De Luca [pp. 910-918])

being adequately investigated, if at all. (PX 549 at 78:4-6) One Senator stated that in his area of the state "fraud happens" and that ballot boxes had been retrieved from the river. (PX 549 at 95:1-23) Another Senator had also experienced voter fraud in his county. (PX 550 at 76:3-8)

II. Evidence of Justifications for Challenged Provisions

In addition to the information relayed by members of the legislature during the debate on HB 589, other evidence supports the justifications proffered by defendants for the challenged provisions.

A. Early Voting

During the legislative debate on HB 589, there was a clear concern expressed about political gamesmanship with hours and locations of early voting sites and a desire for more consistency within the county. The evidence in the case supports these concerns.

Only twenty-one counties had Sunday voting during the 2012 general election (Tr. Day 12 at 142-43) Counties with Sunday voting had a black voting age population in the range of 26.72% to 28.9%. (Tr. Day 12 at 147; Tr. Day 10 at 102) In contrast, the black voting age population in counties without Sunday voting was in the range of 15.81% to 18.37%. (Tr. Day 12 at 147) Counties with Sunday voting in 2014 were disproportionately black. In contrast, counties without Sunday voting in 2014 were disproportionately white. (Tr. Day 12 at 145-46; Tr. Day 10 at 103)

Similarly, census tracts with Sunday voting centers were disproportionately black (33.5% as compared to 21.2% in census tracts without a Sunday voting center). Census

tracts without Sunday voting centers were disproportionately white (68.6% compared to 54% in census tracts with a Sunday early voting center). (Tr. Day 10 at 104) Counties with census tracts with Sunday voting were disproportionately Democratic while counties with census tracts without Sunday voting were disproportionately Republican. (Tr. Day 10 at 104)

Voters in counties with Sunday voting in 2012 voted 56.60% for Obama in 2008 while voters in counties without Sunday voting cast 42.57% of their vote for Obama in 2008. (Tr. Day 12 at 147, 148) Voters in counties without Sunday voting in 2012 cast 56.41% of their vote for McCain while voters in counties with Sunday voting in 2012 only cast 43.35% of their vote for McCain. (*Id*.) Thus, voters in counties with Sunday voting voted disproportionately for the Democratic candidate while voters in counties without Sunday voting voted disproportionately for the Republican candidate.

These same trends combined in Wake County in 2012 regarding the location of early voting centers that were open 120 hours versus the location of early voting centers that were only open for 82 hours. Persons living within 3 miles of centers that were open for 120 hours were disproportionately black and disproportionately voted for Obama. Voters located within 3 miles of centers that were only open for 82 hours were disproportionately white and disproportionately voted for McCain. (Tr. Day 12 at 152-61)

Senators also expressed a desire for more early voting sites spread throughout the counties to make it more convenient for all voters, not just certain voters. In the 2014 primary election, after the enactment of HB 589, there were more early voting sites than

in the 2010 primary election. In the 2014 general election there were more early voting sites than in the 2010 general election and the 2012 Presidential election. A consequence of Senator Stein's amendment was that CBEs opened more sites and/or increased hours at existing sites. There were far more weekend and evening hours in the 2014 general election than in the 2010 general election. (Tr. Day 12 at 205:15-25)

The changes to early voting by SL 2013-381 have expanded early voting access rather than shrinking it.[13] Plaintiffs' expert, Dr. Paul Gronke testified that early voting participation rates, not overall turnout, are the proper metric for determining the impact on early voters of North Carolina's decision to reduce the number of days of early voting from 17 to 10. (Tr. Day 5 at 59) Black participation in early voting in 2014 increased by 44% from 2010 to 2014. White participation in early voting increased by 12.8%. Thus, black participation in early voting in 2014 increased at a rate three times higher than that of whites as compared to 2010. (*Id.* at 63, 64)

Plaintiffs' expert Dr. Charles Stewart confirmed Dr. Gronke's testimony. According to Dr. Stewart, in 2010, 33.1% of white voters voted early as compared to 35.5% in 2014 for an increase of 2.4%. In 2012, 36% of black voters used early voting. In 2014, 45% of black voters used early voting for an increase of 9%. Thus, the

[13] To the extent that legislators cited cost savings in support of the early voting changes, it is not possible to know whether the original proposal to simply cut the early voting period from 17 days to ten without the matching hours requirement would have saved costs. Obviously cost became less of an issue once the majority accepted Senator Stein's matching hours amendment. It would be disingenuous to criticize the cost saving rationale initially offered where some of the hoped-for savings might have been reduced because the political majority was willing to compromise with the political minority. Regardless, the record is devoid of evidence on whether the costs for early voting in 2014 increased or decreased compared to 2010.

percentage of black voters who used early voting in 2014 increased from 2010 at a rate that was three times higher than whites. (Tr. Day 5 at 97-99) Defendants' expert Dr. Janet Thornton also confirmed that in 2014, black voters increased their use of early voting at a rate that was three times the increased use of early voting by white voters. (Tr. Day 10 at 112, 113, 116-17)

Moreover, regarding the availability of early voting, as compared to 2010, the total number of sites increased from 296 to 368 (+72). (DX 13) In addition, as compared to 2010, early voting in 2014 became more accessible for those wanting to vote during evening hours (after 5:00 p.m.). The total number of evening hours increased from 2161.5 to 3720.65 (+1559.25). (DX 18; Tr. Day 4 at 132; PX 242, App. AA, DX 355, App. AA) The number of cumulative hours available for weekend voting also increased in 2014 as compared to 2010, as did the number of days for Saturday and Sunday early voting, and the number of counties that held Saturday or Sunday voting. (DX 13)

Plaintiffs' expert, Dr. Charles Stewart, confirmed that for every single hourly increment for early voting, a greater number of people voted in 2014 as compared to 2010. (Tr. Day 4 at 135) Despite the reduction in the number of week days available for early voting, 142,784 more people voted during weekdays in 2014 than in 2010. (Tr. Day 4 at 136) Further, despite the reduction of the number of days for early voting, 49,105 more people voted on weekends in 2014 than in 2010. (Tr. Day 4 at 136)

Plaintiffs claim that black voters are "habituated" to 17 days of early voting and will not be able to adjust to a reduction of the days for early voting from 17 to 10 days.

Plaintiffs argue that because blacks disproportionately experience lower economic status and educational attainment, and North Carolina's past official history of discrimination, blacks will be less able to navigate changes in election laws. Plaintiffs' expert, Dr. Paul Gronke, coined the term "habituation." (Tr. Day 5 at 64) Dr. Gronke said that the term habituation applies to individuals and not a group. (*Id.* at 65) Neither Dr. Gronke nor any other expert studied specific voters from 2006 to 2014 to determine if they, as opposed to blacks as a group, have become so habituated to early voting that they are unable to adjust to changes in the early voting schedule. (*Id.* at 66, 67) Yet Dr. Gronke admits that 26.5% of black one-stop voters in 2012 voted on Election Day in 2014 and that this constitutes evidence that these specific black voters are not, in fact, habituated to early voting or unable to adapt to changes in the early voting schedule. Further, Dr. Gronke admits that 33.64% of 2012 early voters who voted sometime during the 17-day period in 2012 were able to navigate the process and vote early during the ten-day early voting process in 2014. (*Id*. at 66-69; PX 234 at 12)

Plaintiffs offered the testimony of Dr. Gronke for purposes of showing that more blacks who voted early in 2012 failed to vote in 2014 as compared to white early voters. Dr. Gronke testified that out of 2012 black early voters, 33.34% voted early in 2014, 26.5% voted on Election Day and 39.41% did not vote in 2014. Thus, Dr. Gronke reported that the drop off rate for 2012 black early voters (39.41%) was 7.55% higher than the drop off rate for 2012 white early voters (31.88%). (*Id*. at 68, 69; PX 234 at 12) But, Dr. Gronke admitted that he did not compare the drop off rate for 2008 early voters who did not vote in 2010 or the drop off rate of 2012 Election Day voters who did not

vote in 2014. (*Id*. at 70, 71) When these comparisons are made, the facts show that the drop off rate for black Election Day voters in 2008 who did not vote in 2010 was significantly higher than the drop off rate calculated by Dr. Gronke for 2012 black early voters. Thus, for African Americans who voted early in 2008, 29.9% voted early in 2010, 33% voted on Election Day in 2010, and 41.18% did not vote in 2010. While 39.41% of 2012 black early voters did not vote in 2014, 41.29% of 2008 black early voters did not vote in 2010. (Tr. Day 10 at 116, 117) Moreover, the drop off rate for 2008 black early voters in 2008 who did not vote in 2010 (41.18%) was 8.04% higher than the percentage of white 2008 early voters who did not vote in 2010 (33.14%). Thus, 2012 black early voters were better able to "overcome burdens" and "navigate the process" and vote in 2014 than were 2008 black early voters in the 2010 general election. The evidence also shows that the disparity between drop off rates for black and white early voters decreased in 2014. Of course, in 2010, North Carolina continued to have 17 days of early voting, used SDR, and allowed out-of-precinct voting.

Moreover, for black Election Day voters in 2012, 7% voted early, 39.3% voted on Election Day, and 53% did not vote in 2014. Election Day voters in 2012 were not directly affected by any of the changes resulting from HB 589. But the drop off rate for 2012 black Election Day voters who did not vote in 2014 (53%) was substantially higher than the drop off rate for 2012 black voters who did not vote in 2014 (39.41%). (Tr. Day 10 at 119-21; Tr. Day 12 at 220-22)

In 2014, North Carolina only allowed 10 days of early voting as opposed to prior elections where 17 days had been permitted. In 2008, 70.8% of all early voters and

67.3% of black early voters voted during the last 10 days of early voting. In 2010, 77.1% of all early voters and 81.3% of black early voters voted during the last 10 days. In 2012, 64.8% of all early voters voted and 59.9% of black early voters voted in the last 10 days. (Tr. Day 10 at 134-141; DX 362) This evidence shows that early voting centers prior to 2014 were underutilized during the first 7 days of early voting as compared to the last 10 days.

The cumulative total of early voters in 2014 equaled the cumulative total of early voters in 2010 by the fifth day of early voting in 2014 (equivalent to 12 days in 2010). (DX 268, Figure 4, p. 41) In contrast, the cumulative total of black early voters in 2014 equaled the cumulative total of black early voters in 2010 by the second day of early voting in 2014 (equivalent to 10 days in 2010). (DX 268 at 43, Figure 6) After the fifth day of early voting in 2014, the cumulative total of early voters exceeded the cumulative total of early voters in 2010 for all of the remaining days of early voting in 2014. (DX 768 at 41, Figure 4) Similarly, after the second day of early voting in 2014, the cumulative total of black early voters exceeded the cumulative total of black early voters in 2010 for all of the remaining days of early voting in 2014. (DX 268 at 43, Figure 6)

Finally, early voters who in 2008, 2010, and 2012 who voted in the first seven days of early voting were equally or more likely to vote in subsequent elections than voters who voted during the last 10 days of early voting in any of those elections. (Tr. Day 10 at 134-141; DX 362) For example, 70.8% of blacks who voted during the first seven days of early voting in 2012, voted in 2014. This compares to 57.5% of blacks who voted in the last 10 days of early voting in 2012 who voted in 2014. (*Id.* at 141; DX

362) There is no evidence that eliminating the first seven days of early voting in 2014 disproportionately burdened black voters, including those who have previously voted in the first seven days of early voting, or that black voters were less able to navigate this change in election laws than white voters.

In his 2015 report, plaintiffs' expert Dr. Gronke reported that early voting in North Carolina has had a positive impact on black turnout. (PX 234 at 5-8) Dr. Gronke's report does not support plaintiffs' claims and otherwise should not be credited.

First, Dr. Gronke included the election results for 2014 as part of his analysis. To the extent his opinion on one-stop voting should be given any weight, his report shows that one-stop voting continues to have a positive effect on African American turnout despite the reduction of the number of days for early voting from 17 to 10 days. (PX 234 at 8) Nothing in Dr. Gronke's report shows that the drop in the number of early voting days has negatively impacted black turnout. Nor has Dr. Gronke shown how factors such as: the total number of early voting centers, the number of centers per county, the number of early voting hours available to the public, the type of voting equipment used, the physical size and capacity of early voting centers, the availability of parking, the number of voting machines, the size of the ballot, the number of poll workers, or how North Carolina compares to other states like Florida, might impact early voting. (Tr. Day 5 at 73-77)

Dr. Gronke's testimony is suspect because of other incorrect testimony he has given to the Court. Dr. Gronke admitted at trial that he had incorrectly equated SDR with Election Day registration when he told the Court in 2014 of the alleged academic

consensus that same-day registration had a positive impact on turnout. (Tr. Day 5 at 58-59) Dr. Gronke also attempted to convince the Court that the elimination of seven days of early voting caused black early voters in 2012 to drop off and not vote in 2014 at a higher rate than white early voters in 2012. (*Id.* at 67-69) Dr. Gronke admitted that he did not study the drop off rate of black election day voters in 2012 who did not vote in 2014 or the drop off rate of black early voters in 2008 who did not vote in 2010. (*Id.* at 70, 71) At trial, Dr. Gronke did not dispute that when these comparisons were made by defendants' experts, the evidence shows that the drop off rate for black Election Day voters in 2012 who did not vote in 2014 was higher than the drop off rate for black early voters in 2012; and that the drop off rate for black early voters in 2008 who did not vote in 2010 (before HB 589 was enacted) was higher than the drop off rate for black early voters in 2012 (after HB 589 was enacted). (*Id.*)

In 2014, Dr. Gronke also predicted that black voters would not be able to adjust to a reduction by 40% of the number of early voting days and that the elimination of same day registration would suppress black turnout. (*Id.* at 59, 63-64, 72) These predictions of dire consequences were completely dispelled by the results of the 2014 general election. Moreover, in prior studies, Dr. Gronke has opined that early voting does not have a positive effect on turnout. (DX 2, Ex. 12 at 26) ("The research thus far has already disproved one commonly made assertion, that early voting increases turnout. It does not.")

Nor is there any evidence that changes to early voting caused "long lines" at elections in 2014 in North Carolina. The SBE conducted a survey of county election

directors to solicit their feedback on whether voters were subjected to long lines during the 2014 general election. The SBE has never before conducted a survey of this nature. (Preliminary Injunction Tr., Vol. 2 (July 8, 2014) at 173:21-24) Feedback from county directors was based upon their memory of any lines that developed during early voting or Election Day. No county board of elections systematically studied voting lines. Despite these limitations, county directors reported relatively few instances where voters had to wait longer than an hour to vote. (Tr. Day 29 at 23-26; DX 210 at 1-5) As in past elections, longer lines of more than one hour occurred at the beginning and the end of early voting. This phenomenon is attributable to voters being excited to vote when early voting opens or waiting until the last second to appear for early voting. (DX 210 at 2; Preliminary Injunction Tr., Vol. 2 (July 8, 2014) at 173:25-174:2) Some problems associated with early voting were caused by DRE voting machines which operate like an iPhone screen. It is generally accepted that precincts that use DRE equipment are more likely to experience longer lines than precincts that use paper ballots which are scanned by an optical scanning device. (Tr. Day 4 at 148-49; DX 210 at 6) SL 2013-381 mandates that DRE machines no longer be used by the time of the 2018 elections. SL 2013-381, pt. 30.8.

Plaintiffs offered two expert witnesses on the issue of long lines in voting, Dr. Theodore Allen and Dr. Charles Stewart. Neither expert personally observed voting in North Carolina. Dr. Allen's opinion is based upon his evaluation of voting in Franklin County, Ohio and a mathematical theory used by industrial engineers to evaluate lines. Dr. Stewart's testimony is based upon an internet survey organized by Dr. Stewart.

Dr. Allen's mathematical theory for predicting wait times has never been accepted by a court in a case involving lines for voting. Dr. Allen has testified in a case involving waiting times for voting in which he opined that the main cause of voting lines is the number of voting stations available at a precinct. (Tr. Day 7 at 83:20-84:3) Dr. Allen's report omits any comparison of the number of voting stations available in North Carolina, Franklin County, Ohio, or any county in Florida that experienced a long line in 2012. (Tr. Day 7 at 88) Nor does Dr. Allen's report include a comparison of how many early voting locations were offered to North Carolina voters as compared to Franklin County, Ohio or Florida. Nor does Dr. Allen's report include any comparisons on the number of poll workers, the procedures used for check-in of voters, whether North Carolina or other states used an electronic poll book, the physical capacities of early voting centers, parking facilities, or the length of ballots offered to voters. (Tr. Day 7 at 87-90) All of these factors and many more not examined by Dr. Allen can contribute to wait times for voting. (Testimony of Dr. Charles Stewart, Preliminary Injunction Tr., Vol. 3 (July 9, 2014) at 66-67; DX 8 at 4)

Dr. Stewart selected and approved all of the questions asked of respondents in his internet survey. (Tr. Day 4 at 138-39) Respondents to the survey received "points" which they can redeem for prizes. (*Id*. at 139) Dr. Stewart's report did not include a racial analysis of his respondents. (PX 242 at 84-86, ¶¶ 189-194) Dr. Stewart intended that this survey reflect North Carolina's underlying demographics. (Tr. Day 4 at 139) Dr. Stewart conducted two samples for North Carolina voters in 2014. In both samples 72% to 74% of the respondents claimed that they had voted. Dr. Stewart admitted that

black respondents generally over-report whether they have voted in a survey. Only 38.47% of North Carolina's citizen age voting population actually voted in 2014. (*Id.* at 142-47) Dr. Stewart admitted that his 2014 survey over-represented the percentage of actual voters. (*Id.* at 147)

Dr. Stewart admitted that he did not confirm whether respondents to his survey actually voted. (*Id.* at 144-45) He did not analyze counties for the voters who reported even though many counties have multiple voting centers. He did not report the specific early voting centers that allegedly experienced long lines. He did not ask voters to report the type of equipment they used even though DRE voting numbers are often the cause of long lines. He did not hire an industrial engineer with experience in studying long lines to help him formulate the questions asked of respondents. He agreed that voters are distracted when they are waiting to vote and that respondents were not told before the elections to monitor their waiting times. He does not know the length of time that elapsed before the time each respondent voted and when they responded to the internet questions. He admitted that his survey reported longer lines during early voting than on Election Day and that despite this report African American voters' usage of early voting increased by 44.7% from 2010 to 2014. (*Id.* at 147-51) Dr. Stewart also admitted that longer, more complex ballots can cause long lines and that the ballot in certain counties in Florida in 2012 was longer and more complex than ballots used in North Carolina in 2010 and 2012. (Preliminary Injunction Tr., Vol. 3 (July 9, 2014) at 68:1-71:7)

Neither Dr. Allen nor Dr. Stewart made any attempt to compare the number of voters per early voting center in North Carolina versus Florida. The evidence shows that

in 2014, North Carolina had one early voting center per 7,600 votes cast and that Florida had one early voting center for every 34,700 votes cast. (Tr. Day 11 at 11; DX 270 at 36, ¶ 136) Neither Dr. Stewart nor Dr. Allen compared North Carolina and Florida for each state's number of early voting centers, the number of early voting hours made available to voters, or the actual dates on which early voting was offered. (Tr. Day 4 at 129-31; Tr. Day 7 at 87-90)

Plaintiffs' fact witnesses were similarly unhelpful on this issue. Both plaintiffs and fact witnesses admitted that they had experienced similar lines in elections prior to 2014 when SL 2013-381 took effect and that causes of lines at a polling place were either unknown or the result of factors other than changes made to North Carolina law by SL 2013-381.

Plaintiff Armenta Eaton had concerns about long lines being a problem in 2014, however, Ms. Eaton admitted that she did not have to wait in a line to vote in either the 2014 primary or general election and that she estimated the longest line she saw as a poll observer in Franklin County occurred on Saturday, Nov. 1, the last day of early voting, and did not exceed 25 minutes. (PX 783 at 31:15-24, 32:14-18) Similarly, Plaintiff Mary Perry testified that she waited "about 10 minutes" to vote in 2014 and "about ten" minutes to vote in 2012 before SL 2013-381 became law. (PX 795 at 11:23-25, 13:21-23; 14:3-5, 26:8-14, 48:23-49:6) She concluded that the lines she experienced both years were "not so long." (*Id.* at 48:23-49:6)

Fact witness Lynne Walter believed the voting changes would cause longer lines at polling places but acknowledged that there had been long lines at polling places

during the 2012 elections, prior to SL 2013-381's enactment. (PX 772 at 45:20-46:7) Ms. Walter admitted that she did not know, in comparison to 2012, how long it took her or others to vote in 2014. (*Id*. at 47:16-23)

Fact witnesses Marcia Pleasant and Doris Burke both testified that there were lines at their polling places in Raleigh and Durham. Ms. Burke testified that she felt lines were longer at her precinct in 2014 because they did not have as many poll workers as they had in past years on Election Day. (PX 808 at 22:5-16) Ms. Pleasant attributed the line at her precinct to the "cramped" space at the polling place where she successfully voted. (PX 769 at 28:20-23; 30:17-22)

Fact witness Tawanda Pitt claimed that the cut to the number of days of early voting made by SL 2013-381 contributed to a line she testified that she experienced at her precinct on Election Day, but admitted that her precinct which normally had four of five computers operating on Election Day only had two computers operating at the times she attempted to vote. (PX 798 at 19:4-21; 29:15-19) Ms. Pitt admitted that she could not say how much either factor influenced the length of the line she experienced. (*Id*. at 19:20-22)

B. SDR

Prior reports by SBE regarding SDR warned that ballots were cast by SDR registrants before the registrant's residence could be verified through the statutorily-mandated mail verification process. For instance, in a 2009 SBE report, it was noted that CBEs "found that there was not enough time between the end of [early] voting (and SDRs) and the canvass date to ensure that verification mailings completed the mail

verification process." (PX 56 at 5) The report also noted that CBEs often had trouble processing the applications in a timely manner. (*Id.*) The 2009 report even recommended that legislation be enacted to address same-day registrants whose residence could not be verified before their vote was counted. (*Id.* at 7-8)[14] In a report issued in 2013, SBE reported that 1,236 SDR voters with a status of "inactive" had failed mail verification after their ballots were counted in the 2012 general election. (PX 68A at 6; Preliminary Injunction Tr., Vol. 2, at 163, 164) While the report also stated that SDR registrants passed mail verification at a higher rate than non-SDR registrants, that finding was based on using "proxies" for verification in the North Carolina voter registration database and not the voter's actual verification history.

Information regarding the verification status and history of voters is contained in the SBE's data base known as SEIMS. SEIMS contains information on multiple verification processes, including the initial mail verification (which all registration applicants must complete), national change of address verification process, administrative mailing verification process, voter change verification process, and list maintenance. (Tr. Day 13 at 183-86) The 2013 SBE report did not distinguish among the many mail verification processes tracked by SEIMS. (*Id*.) The only mail verification process that every applicant must go through to become a registrant is the initial mail

[14] It does not appear that this recommendation was addressed by pre-HB 589 legislatures. The mail verification statute, N.C. Gen. Stat. § 163-82.7, was last amended in 1999, well before the enactment of SDR. The SDR statute, N.C. Gen. Stat. § 163-82.6A, was amended in 2009 but not to address mail verification. (2009 Sess. Laws 541, § 11)

verification process. (*Id*.) It is the only process for which an applicant can be "denied" registration.

In October 2014, SBE hired data analyst Brian Neesby. Reviewing and analyzing data contained in SEIMS is part of Neesby's job responsibilities. Neesby was asked to review the 2012 SBE report on SDR verification rates. Neesby found that a more accurate indicator of whether a voter passed the initial mail verification process existed in SEIMS – the verification logs which track each voter's verification history. Neesby used the verification logs to conduct another comparison of SDR and non-SDR registrants from the 2012 primary and general elections. A June 2015 SBE report reported that the data showed that in 2012 95.6% of non-SDR registrants voted after their eligibility was confirmed through the statutory mail verification process but that 96.2% of SDR registrants voted before their eligibility could be confirmed. The data also demonstrated that SDR voters in 2012 elections were anywhere from seven to 36 times more likely to vote and later fail mail verification than non-SDR voters. (DX 16 at 4-7; Tr. Day 13 at 14:3-22)[15]

There was no non-speculative, competent evidence at trial that the repeal of SDR affected the ability of voters to participate in the electoral process. While 96,529 voters

[15] The report notes that 96% of SDR voters do not complete mail verification by Election Day, that SDR ballots are not retrievable unless challenged on Election Day, and that no statutory authority exists to retrieve ballots cast by voters who later fail mail verification. In addition, since most SDR registrants who fail mail verification do so after the county canvass, there is little to no opportunity for other voters to challenge the ballots. (DX 16 at 7; Tr. Day 13 at 19:1-12)

used SDR in the 2012 general election, only 818 voters[16] cast provisional ballots during early voting in the 2014 general election because they were not registered to vote. (PX 689; Tr. Day 13 at 15:1-16:23) In 2010, a total of 9,927 provisional ballots were cast because of no record of registration. In 2014, only 7,765 such ballots were cast even though turnout was higher in 2014 than in 2010. (*Id*.) This is strong evidence that voters who wished to participate in the election were able to comply with the existing 25-day registration deadline.

In addition, data from SBE demonstrates that blacks remain registered to vote at higher rates than white voters. The repeal of SDR has not negatively impacted actual black registration rates. Black turnout in both the primary and general election of 2014 also increased, and in the general election, at a rate higher than white voters. This is consistent with an opinion offered in a peer-reviewed article by one of plaintiffs' experts, Dr. Barry Burden.[17] In his 2014 article, Dr. Burden concluded that early voting tends to suppress turnout and stated that the "depressant effect" of early voting "upends the

[16] Even this low number could have been inflated by a tactic suggested by Rev. William Barber at the NC NAACP Freedom Fund Banquet just prior to the opening of early voting for the 2014 general election. According to a transcript of the meeting, Rev. Barber encouraged the hundreds of guests to take individuals to the polls even if they were not registered and demand that elections officials give them a provisional ballot so they could develop a list of names for use in this litigation. (DX 67 at 37-38)

[17] As it relates to young voters, Intervenors' experts Drs. Levine and Kawashima-Ginsburg report that 45.4% of young people nationally in states with same-day registration registered at the polling location when voting. However, they included states that have Election Day registration in the category of "same-day registration," despite that fact that North Carolina has never had Election Day registration. They did not examine how many of the 45.4% of young people they cite registered using same-day registration during early voting and how many registered using Election Day registration. (Tr. Day 6 at 133:6-134:20)

conventional view that anything that makes voting easier will raise turnout." (Tr. Day 3 at 108; DX 348 at 96, 108) Dr. Burden also opined that longer early voting periods have a higher depressive effect than shorter early voting periods. (*Id*.) In his article, Dr. Burden concluded that neither SDR nor SDR combined with early voting has a positive effect on turnout. Dr. Burden opined that early voting may lessen the turnout stimulating event of Election Day, particularly for the "peripheral voter." (Tr. Day 3 at 97-98) Dr. Burden also opined that neither SDR nor SDR combined with early voting has a positive effect on turnout. (*Id.* at 102-107) Dr. Burden further opined that only Election Day registration, a practice never used in North Carolina, has been shown to have a positive impact on turnout. (*Id.* at 107)

During the preliminary injunction stage, plaintiffs' expert, Dr. Paul Gronke, incorrectly advised the Court that "the long standing academic consensus" is "that same-day registration has a positive impact on turnout." (PX 40 at 53) Dr. Gronke also incorrectly advised the Court that the academic literature had found that "early voting plus same-day registration – comparable to North Carolina – was associated with higher turnout." (PX 40 at 13, ¶ 20) In support of this argument, Dr. Gronke cited to Dr. Burden's 2014 article and a report by Laroca and Klemeski (2011). (*Id.*) During trial, Dr. Gronke testified that he had been one of the academics selected to peer review Dr. Burden's article. (Tr. Day 5 at 50) In truth, and as explained above, Dr. Burden found that Election Day registration, not SDR, had a positive effect on turnout. (Tr. Day 5 at 50-52) At trial Dr. Gronke also admitted that Laroca and Klemeski had reached similar conclusions as Burden regarding Election Day registration, and that they had not opined

that SDR had been shown to have a positive impact on turnout. (*Id.* at 55-58; DX 346) At trial, when presented with copies of the 2014 Burden article and the publication by Laroca and Klemeski, Dr. Gronke admitted that he had inaccurately represented to the court that either of these publications had opined that SDR has a positive effect on turnout.

At trial, Dr. Gronke also explained a calculation he had performed in his sur-rebuttal report of March 24, 2014. (PX 247) In footnote 12 on page 5 of this report, Dr. Gronke cites to another study by Leighley and Nagler on the turnout effects of election laws. In his report of March 24, 2015, Dr. Gronke combined all of the election laws that were found by Leighley and Nagler to have a positive effect on turnout and opined that election laws can increase turnout by no more than 10%. Leighley and Nagler reported that the only practices that had a positive effect on turnout were laws that closed registration 30 days before an election, laws that allowed mail-in absentee voting, and laws that provided for Election Day registration. Dr. Gronke admitted he did not include SDR in his calculation of election laws reported by Leighley and Nagler as having a positive effect on turnout, that he is fairly confident that Leighley and Nagler reported on the effect of SDR on turnout, and that Dr. Gronke would have included SDR in his compilation of practices with a positive effect on turnout if Leighley and Nagler had reported that SDR had a positive effect on turnout. (Tr. Day 5 at 42-47)

Thus, contrary to the statement by Dr. Gronke made in his preliminary injunction reports, none of the academic literature presented in this case or cited by plaintiffs'

experts stands for the proposition that early voting or same-day registration has a positive impact on turnout.

Despite the consensus in the academic literature cited by plaintiffs that early voting and SDR have not been shown to have a positive impact on turnout, during the preliminary injunction stage plaintiffs' experts predicted dire consequences if any of the challenged provisions of HB 589 were allowed to be implemented for the 2014 general election. Dr. Charles Stewart avoided precise predictions on how black turnout or registration might change but warned of the dire impact to black voters if SDR was eliminated and the number of days of early voting was reduced. Dr. Stewart opined that the elimination of SDR would cause more black voters to be unable to vote than white voters. (PX 42 at 53-55, ¶¶ 122-28) Stewart also predicted that reducing the days for early voting would result in more congested voting lines that would disproportionately impact black voters. (*Id.* at 89, ¶¶ 211-14)

Dr. Burden testified that "voter participation" is measured by comparing registration and voting rates. (Tr. Day 3 at 118) During the preliminary injunction stage, Dr. Burden opined that, if implemented, SL 2013-381 will "have a disproportionate impact on voting participation by blacks and Latinos" because blacks and Latinos have fewer of the socioeconomic resources needed to "navigate" restrictions imposed by a voting practice. (Tr. Day 3 at 111-12, 114-15)

Dr. Paul Gronke echoed the predictions of Stewart and Burden. Dr. Gronke testified that he was aware of no "empirical argument" by which one could conclude that African American voters could successfully adjust to 40% fewer early voting days,

regardless of the possibility of longer hours. (Tr. Day 5 at 59-60; PX 40, ¶ 520) Dr. Gronke also predicted that the elimination of SDR will "lower turnout" and have a disparate impact on blacks because they have "taken advantage" of SDR at a higher rate. (Tr. Day 5 at 72; PX 40, ¶ 54) Dr. Gronke admitted at trial that in 2014 he predicted that turnout would drop because of SL 2013-381 and that he did not qualify his opinion based upon whether the 2014 general election included "competitive" races. (Tr. Day 5 at 72)

During the preliminary injunction stage, defendants' expert Sean Trende opined that election and campaign affects drive turnout, not election laws. The first part of his opinion was based on his extensive experience as an elections analyst. Trende opined that the increase in black turnout was part of a national trend. According to Trende, other states, like Mississippi and Virginia had experienced similar increases in black participation rates even though those states have not adopted early voting, SDR, out-of-precinct voting or preregistration. Trende opined that black turnout in both North Carolina and Virginia in 2008 and 2012 had been driven primarily because of the excitement in the black community over the candidacy of Barack Obama, the resources poured into both states by the Obama campaign, and the Obama campaign's decision to target early voting in North Carolina as a method for turning out Obama supporters. (Tr. Day 12 at 22-24; DX 270 at 40-62, ¶¶ 134-215; DX 7; Tr. Day 11 at 174, 176-78, 180-86, 189-90) In forming his opinion, Trende relied upon his own experience as an election analyst and statements by senior members of the Obama campaign team. (*Id.*) Trende's opinion was fully supported by Mr. John Davis, a long time expert in North

Carolina elections. Mr. Davis detailed the unprecedented "Get Out The Vote" effort by the Obama campaign in North Carolina in 2008 and 2012 and that the Obama campaign targeted minority voters and young voters. Davis also supported Trende's opinion that in North Carolina the Obama campaign focused its turnout efforts on early voting and SDR. (DX 326)

Trende also performed a cross-state regression analysis of the practices at issue in this case and concluded that there was no statistical evidence of a causal link between turnout and the election practices. (Tr. Day 11 at 45-52; DX 270 at 62-73) Even though Trende's conclusion was consistent with all the scholarly literature cited by the plaintiffs, plaintiffs attacked Trende's regression analysis and his qualifications to perform a regression analysis as well as his methodology. Plaintiffs ignored Trende's opinion as a political analyst that campaign efforts have a greater impact on turnout than election laws.

At trial, plaintiffs continued to attack Trende's qualifications. However, in light of the evidence showing that black turnout and registration rates in 2014 increased as compared to 2010 and that black turnout and registrations increased at higher rates than whites, plaintiffs' experts now argue that the reason for these increases was the competitive nature of the Tillis-Hagan senate race. Plaintiffs have also argued that black voters turned out only because they were angry about the election law changes required by SL 2013-381. None of plaintiffs' experts have done any cross-state or statistical test to prove either of these theories. Nor have any of plaintiffs' experts performed any test to show how much higher black turnout of registration rates would have been if SL

2013-381 had not been enacted. (Tr. Day 4 at 151-52, 159; Tr. Day 3 at 88, 90, 96) Finally, plaintiffs' experts concede that the Obama campaign and its "Get Out The Vote" strategies played a significant role in black turnout for the 2008 and 2012 general elections. (Tr. Day 3 at 90, 91; Tr. Day 4 at 158)

C. Out-of-precinct voting

SL 2013-381 repealed out-of-precinct voting by most voters who cast their ballots in a precinct other than the precinct of their residence. SL 2013-381, pt. 49; N.C. Gen. Stat. § 163-55(a). On Election Day, voters now must cast their ballots in the precincts where they reside. The purpose of this amendment was to restore the long-standing practices on out-of-precinct voting affirmed by the North Carolina Supreme Court in *James*.[18]

The evidence shows that political groups intentionally transported voters on Election Day to precincts without determining to which precinct voters had been assigned. (Prelim. Inj. Tr., Vol. I, at 78 (testimony of Melvin Montford); PX 811 at 46:10-23) This practice caused burdens for poll workers and county board officials. (Tr. Day 8 at 227:18-228:12; Tr. Day 13 at 22:11-23:5; DX 817 at 43:22-46:22; DX 220 at ¶ 5)

Precincts provide a way for CBEs to manage elections on Election Day by knowing how many voters to plan for, what materials, facilities or equipment will be needed for those voters and how many poll workers will be required. Out-of-precinct

[18] However, out-of-precinct voting is still allowed during early voting.

provisional balloting could have a negative impact on this planning if large numbers of people show up unexpectedly at a polling place on Election Day. This can result in longer lines at the voting place. (Tr. Day 13 at 21:3–22:10)

The repeal of out-of-precinct voting ensures that eligible voters are fully enfranchised as to all ballot contests for which they are eligible. Under prior law, an out-of-precinct voter would lose the right to vote in contests for which he was not eligible in the precinct where he voted. Allowing voters to cast out-of-precinct ballots may have changed election results in prior elections. (DX 132, ¶ 5) Now such voters are instructed as to their correct precinct so that their entire ballot may be counted.

Plaintiffs' expert Dr. Charles Stewart agreed that both the number of black voters who cast out-of-precinct ballots and the percentage of out-of-precinct ballots represented by the total vote by African Americans declined from 2010 to 2014. (Tr. Day 4 at 101-04) In the 2014 general election, over 99.9% of both African American and white voters cast ballots in ways other than out-of-precinct ballots. (*Id*. at 106-08) The number of out-of-precinct ballots cast in 2014 dropped by 4,400 from 2010 to 2014. (*Id*. at 109) From 2006 through 2014, out-of-precinct ballots represented the lowest percentage of total votes cast in the 2014 general election and the second lowest percentage was 2006. SDR was not in place in either of these elections. In contrast, out-of-precinct ballots reached the highest percentage of the total votes cast in 2010 which, like 2014 and 2006, was a mid-term election, described by plaintiffs' expert as the type of election involving more experienced voters and therefore voters who would be less likely to cast out-of-precinct ballots. (Tr. Day 4 at 75)

Using Dr. Stewart's data, defendants' expert Dr. Janet Thornton calculated the percentage of out-of-precinct ballots counted as a percentage of total votes for elections in 2006 through 2014 for general elections. (Tr. Day 10 at 126, 127) The percentage of out-of-precinct ballots of total vote ranges from 0.06% (2014) to 0.22% in 2010. (*Id*. at 127) Out-of-precinct ballots represented the highest percentage of the total vote in 2010, which was a mid-term election. (*Id*. at 127). The lowest percentage of out-of-precinct ballots as a percentage of total vote was in 2014 when SDR was not in place. (*Id*. at 128-29, 131-33) The lowest percentage for provisional ballots cast for no record of registration was in 2014 (0.26%) with 2006 being the second lowest (0.34%). SDR was not in place for either election. (*Id*. at 130, 131)

D. Preregistration

SL 2013-381 repealed the requirement that CBEs hold registration applications for 16-year-olds until they are eligible to register to vote. The law did not repeal the right to register of 17-year-olds who will turn 18 by the date of the general election. (Tr. Day 8 at 203:5–23)

Despite the existence of preregistration, SBE data shows that turnout of young voters (measured as a percentage of all young voters who were registered to vote) declined in 2012 from 2008 (even though there was a slight increase in registrations). (DX 344) There was also a decrease from 2012 as compared to 2008 of young voters who voted as a percentage of all voters in those elections. (*Id.*)

Despite the repeal of preregistration, more young voters voted in 2014 as compared to 2010 as a percentage of all young voters registered to vote. In addition,

there was an increase in the percentage of young voters who were registered to vote. And there was an increase in 2014 as compared to 2010 of young voters who voted as a percentage of all voters in those elections. (*Id.*) These statistics are unchallenged.[19]

Preregistration carried with it a possibility of confusion for young voters. If a 16-year-old preregistered at one address, but subsequently moved (for example, to attend college), that young person would be registered to vote at the original address where he resided when he preregistered. If that young person decided that he was a resident in the location of his college, he would be registered at the wrong address and would not be able to vote. Indeed, fact witness Nadia Cohen, who complained about her inability to vote in 2014 due to missing the 25-day registration cutoff, testified at trial that she still had not registered because she planned to do so after moving to start school at UNC-Chapel Hill in the fall. (Tr. Day 3 at 172:5-8)

The likelihood of this confusion is borne out by the mail verification rates of those who preregistered. According to SBE data, preregistrants are 60% more likely to fail mail verification than regular registrants. (Tr. Day 13 at 219:9-20; 221:7-14; BN 3)

E. Overall Turnout

Overall turnout increased from 2010 to 2014 by approximately 8.9%. (DX 345; Tr. Day 4 at 95) Black voter turnout in 2014 increased by 15.6% in 2014 as compared to

[19] Drs. Levine and Kawashima-Ginsburg were not able to draw any conclusions about the long-term effects of preregistration in North Carolina because it had been in effect in North Carolina for such a short period of time. (Tr. Day 6 at 134:23–135:3) Indeed, Drs. Levine and Kawashima-Ginsburg ultimately concluded that the statistical models they created cannot predict the long-term effects of provisions adopted in North Carolina since 2012. (PX 236 at 39; Tr. Day 6 at 143:8–17)

2010. White voter turnout increased by 5.3%. Thus, black turnout in 2014 increased at a rate that was three times higher than white turnout. (Tr. Day 4 at 100, 101)

Black turnout in 2014 as a percentage of black voting age population increased by 2.3% as compared to 2010. (*Id*. at 114) In contrast, white turnout as a percentage of citizen voting age population dropped by 0.6%. Measured against voting age population, black turnout in 2014 was 3% higher than whites. (*Id*. at 114, 115) Black and Hispanic turnout in 2014 increased at a higher rate than whites as compared to 2010. (Tr. Day 10 at 109-12; DX 309, Tables 4-8 pp. 61-66)

F. Overall Registration

Black voters continued to be registered at a higher rate than whites. For example, as of 2014 91.2% of black voting age population is registered as compared to 83.4% of the white voting age population. (PX 684) The percentage of black citizen voting age population registered increased from 2010 to 2014 by 2.1% (89.1% to 91.2%). In contrast, the percentage of white citizen voting age population registered decreased from 2010 to 2014 by 2.9% (86.5% to 83.4%). (Tr. Day 4 at 117; PX 684)

The percentage of black voting age population registered decreased from 2012 to 2014 by 4.1% (95.3% to 91.27%). In contrast, the percentage of white citizen voting age population registered decreased from 2012 to 2014 by a higher percentage, 4.4% (87.8% to 83.47%). (Tr. Day 4 at 117, 118; PX 684)

While the registered black percentage of voting age population dropped by 4.1% from 2012 to 2014, from 2008 to 2012 it dropped by a higher percentage of 5.8% (94.9% to 89.1%). SDR was in place in 2010 but not in 2014. (Tr. Day 4 at 118; PX 684)

The disparity between black and white registration rates measured against voting age population increased for 2014. Thus, in 2008 registered black voting age population was 4.2% higher than whites and in 2010 that difference dropped to 2.6%. In 2012 the difference increased to 7.5%. In an off-year election in 2014, the difference between registered black voting age population and registered white voting age population increased from 2012 to 2014 to 7.8%. (Tr. Day 4 at 119-20; PX 684)

Despite the elimination of SDR, in 2014, blacks who are eligible to vote remain registered at a higher rate than whites who are eligible to vote by a margin of 7.8%. (Tr. Day 4 at 119-20) Moreover, the percentage of registered voters who are black (22.51%) is higher than the percentage of citizen voting age population that is black (21.88%). (DX 246 at 76, 77, Tables 9, 10) In addition, despite the elimination of SDR in 2014, the percentage of new registrants added from 2012 to 2014 was higher than the percentage of new registrants added from 2008 to 2010. (Tr. Day 10 at 123-25; DX 359)

The Court does not credit Dr. Charles Stewart's testimony about registrations "lost" because of the elimination of SDR in 2014. Dr. Stewart purported to analyze the number of registration applications submitted by voters in 2014 after North Carolina closed the books for registration 25 days before the general election. (Tr. Day 4 at 121) The period evaluated by Dr. Stewart therefore included a few days after the books closed and before the former time frame of 17 days of early voting would have commenced, the period of time encompassed by the former 17-day period for early voting, and a few days after the former 17-day period for early voting would have ended through Election Day. (*Id.* at 121-22) Dr. Stewart does not know how these voters registered, such as by mail,

at the Division of Motor Vehicles, or at early voting centers. (*Id.* at 123) Nor did he attempt to determine the number of voters who cast provisional ballots for no record of registration at early voting centers. (*Id.*) Dr. Stewart does not know if the date he used for each registration application represented the date the form was signed by each applicant or the date the form was processed by the county board of elections. (*Id.* at 121-22) Nor did Dr. Stewart report the number of voters who registered during the same time frame in 2010 by methods other than same day registration.

For each of the days evaluated by Dr. Stewart, he did not report the actual number of applications filed by black or white applicants. (*Id.* at 124) Instead, Dr. Stewart compared the total number of registrations filed by blacks and whites for a two-year period ending in 2014 against the number of black or white registration applications filed on each of the days he evaluated. He then reported the percentage of registration applications filed by black and white applicants as a daily percentage of the total number of registrations filed during the two-year period. (*Id.*) Based upon this metric, Dr. Stewart reported that the number of black applicants in 2014 who registered after the books closed represented a higher percentage of all black applicants during the two-year period (2.06%) than the percentage of white applicants in 2014 who registered after the books closed as compared to the total number of white applicants for the two-year period (1.90%). (*Id.*; PX 242, Tables W and X)

During his cross examination, Dr. Stewart admitted that he could calculate the actual numbers of blacks and whites who registered after the books closed by multiplying the total number of black registrants for the two-year period (136,113) by

2.06. After making this calculation, Dr. Stewart agreed that 2,813 blacks registered after the books closed in 2014. Dr. Stewart then agreed that he could determine the percentage of blacks in the group of voters who attempted to register after the books closed in 2014 by dividing 2,813 by the total number of persons who registered after the books closed (12,983). In making these calculations, Dr. Stewart agreed that blacks represented only 21.7% of the registration applicants after the books closed in 2014. (Tr. Day 4 at 125-27) Thus, the percentage of voters who attempted to register after the books closed in 2014 was less than the percentage of registered voters who are black (22.5%) and the percentage of the black voting age population that is registered (21.88%). (DX 309 at 76, 77, Tables 9 and 10)

Dr. Stewart's own report explains that blacks remain registered at a higher rate of voting age population than whites and that in fact this disparity in favor of black registration increased after the 2014 general election. (Tr. Day 4 at 115-20; PX 684) There is no evidence that black registration rates were suppressed after the implementation of SL 2013-381 or that blacks were disproportionately represented in the number of persons who attempted to register after the registration books closed in 2014. (*Id*. at 128)

Similarly, Dr. Lichtman's testimony on "lost registrations" should not be credited. Lichtman admits that his opinion is based upon Dr. Stewart's flawed testimony regarding registration applications filed after the books closed before the 2014 general election. (Tr. Day 5 at 222) Relying upon Dr. Stewart's calculations, Dr. Lichtman opined that 11,993 persons submitted new registrations after the closing of the

registration books in 2014 and that 1,057 of those were processed for potential voting in 2014 (representing registration forms mailed by overseas military or other overseas residents). (PX 245 at 18) After he subtracted overseas applications, Dr. Lichtman concluded that 10,936 persons who submitted registrations after the books were closed were "lost" voters. (*Id.*) While Dr. Stewart admitted at trial that these "lost" voters were not disproportionately black, Dr. Lichtman did not do a racial analysis of these voters.

Dr. Lichtman also admits that he is not certain whether the dates for these applications reported by him represent the dates they were submitted or processed. (Tr. Day 5 at 222) Dr. Lichtman did not determine the number of registration applications submitted during the same time frame in 2010 in ways other than SDR such as registration by the North Carolina Division of Motor Vehicles or mail-in registration. (*Id.* at 221, 222) Therefore, neither Dr. Stewart nor Dr. Lichtman know or can opine whether the number of registrations submitted after the books closed in 2010 (other than those submitted during SDR in 2010) was higher or lower than the number of registrations submitted after the books closed in 2014.

Dr. Lichtman also speculates that the number of "lost" registrations was probably higher than 10,936 simply because 21,432 people used SDR in 2010. (PX 245 at 18) However, Dr. Lichtman does not even attempt to account for the possibility that voters who might have used SDR in 2014, if it had been available, adjusted to the closing of books requirement and registered before the books closed in 2014.

Dr. Lichtman does not account for Dr. Stewart's testimony that black registration in 2014 increased at a higher rate than white registration, that a higher percentage of

blacks of voting age are registered than whites of voting age, and that the discrepancy between the percentage of blacks of voting age who are registered versus whites grew after the 2014 general election. (Tr. Day 4 at 115-20; PX 684)

Nor does Dr. Lichtman account for the fact that the percentage of registered voters who are black remains higher than the percentage of North Carolina's citizen age voting population that is black. (DX 309 at 76, 77, Tables 9 and 10)

G. Election Integrity

In enacting SL 2013-381, legislators expressed a concern about increasing the integrity of elections and ensuring that only eligible voters vote.

Legislators were concerned enough about this issue that they directed SBE to enter into a data sharing program with other states that would allow SBE to better detect and investigate double voters and other perpetrators of election fraud. SL 2013-381, Pt. 18. SBE then entered into a program known as the Kansas "crosscheck." In 2014, legislators provided additional election investigators to ensure that data from the crosscheck could be investigated. (Tr. Day 13 at 45:20-46:7, 47:12-48:14)

There is clearly evidence both prior and subsequent to the enactment of SL 2013-381 that supports legislators' concern about election integrity.[20] In a letter issued March 11, 2013, the then-Executive Director of SBE listed non-citizens voting and double voting as two of the "[g]reatest opportunities for voting inaccuracies in the state." (PX

[20] Indeed, one of the plaintiffs, NC NAACP is concerned enough about the integrity of its own elections that it requires valid identification to vote. (Tr. Day 1 at 136:15–141:7; DX 34) It is difficult to imagine why such a concern would not be heightened in the elections of public officials.

71) In a March 2013 report issued by SBE, a chart documented hundreds of cases of what SBE considered voter fraud referrals to prosecutors. (PX 565 at 4) These matters were referred even though for much of the last decade, the State Board of Elections had only one full-time investigator. A new chief investigator was hired in June 2014, and a full investigative team of five investigators has been in place since March 2015. Four of the five investigators have law enforcement backgrounds, including two retired Federal Bureau of Investigations agents. (Tr. Day 13 at 45:20–47:8) Moreover, SBE had reported thousands of votes cast by SDR voters who later failed mail verification and were therefore ineligible.

Plaintiffs' expert Dr. Burden agreed that a photo ID requirement can deter persons from committing voter fraud. (Tr. Day 3 at 133-34) Plaintiffs' expert Lorraine Minnitte also agreed that what constitutes "voter fraud" in the mind of one person may or may not be fraud in the mind of another. Different people perceive voter fraud in different ways. (Tr. Day 9 at 65:12-66:1) Any irregularity is a cause for concern in an election system, especially where it impacts the results of an election, no matter how small. (Tr. Day 12 at 210:14–23, 211:6–212:22, 214:6–21; Tr. Day 9 at 57:8-15)

Based on her experience as executive director, Ms. Strach testified that there is a public perception that there is voter fraud. The SBE receives calls regularly from people who are concerned about the possibility of voter fraud or who believe that voter fraud is actually occurring. Based on her experience as executive director, Ms. Strach believes that this affects confidence in the accuracy and the integrity of elections. (Tr. Day 13 at 44:20-45:18)

In addition, evidence occurring since the enactment of SL 2013-381 supports legislators' concerns about election integrity. In the 2013 election for Pembroke Town Council, several college basketball players who were not residents of the town attempted to register and vote in the election using SDR. The SBE held a hearing and ordered a new election, in substantial part because of this issue. The SBE found that there was an orchestrated attempt to use SDR to allow ineligible voters to vote. (PX 580 at 58-59, 77, 80)

In April 2014, SBE announced preliminary results of the crosscheck between North Carolina and voter rolls in other states. SBE reported that hundreds of individuals had been identified who may have voted in multiple states.[21] (DX 231 at ¶ 24) SBE reported that it would be investigating the results and requested additional resources to do so. Additional investigators were provided by the legislature later that year. The investigators were hired and in place as of March 2015. Between March 2015 and the trial of this matter, SBE referred over thirty cases of possible voter fraud to local prosecutors. (Tr. Day 13 at 52:1-6) Many of these involved double voting and voter impersonation. (*Id*.)

In addition, prior to the November 2014 general election, SBE became aware of possible non-citizens voting in that election. SBE provided instructions to CBEs on how to handle voters identified as possible non-citizens. At least ten individuals presented to vote who were likely non-citizens. (Tr. Day 13 at 55:15–21)

[21] What at first blush may appear to be a case of double voting may in fact be a case of voter impersonation. (PX 816 144:20-145:9)

H. National Context

While not dispositive of any issue in this case, it cannot be disputed that the election practices of other States – all of whom must comply with federal law and the United States Constitution – inform the context in which the Court must decide this case.

All of the practices implemented by SL 2013-381 that were the subject of the trial in this matter represent the majority rule for all other states in the United States.

Thirty-one states, including North Carolina, do not accept ballots cast in the wrong precinct. (Tr. Day 11 at 223-24; DX 270 at 18) Two more states, New York and Missouri, allow out of precinct votes to be cast only when multiple precincts are located at the same location. (Tr. Day 4 at 224-25; DX 270 at 18) Two more states, Connecticut and Massachusetts, allow voters to cast ballots in the wrong precinct but only when they are cast in the same city or town. (*Id*.)

Sixteen states do not allow any form of in-person early voting. (DX 270 at 20) Including states that do not allow for in-person early voting, the median number of days for the early voting period in all states is 14. (*Id.*) However, the number of days allowed for an early voting period is only one of the many factors needed to be analyzed to determine the accessibility of early voting. These factors include the number of early voting centers and early voting hours that are available to the voters. (Tr. Day 4 at 129-30) For example, Ohio offers more days of early voting but only opens one early voting center per county. (Tr. Day 12 at 10) While some states may have a longer period of time for early voting, eleven states do not allow for weekend voting. Another eleven states do not offer Sunday voting. (*Id.*) Counting only the dates on which early voting is

actually scheduled, the median number of days for early voting among the fifty states is eleven. (Tr. Day 12 at 11; DX 270 at 23) Thus, following the enactment of SL 2013-381, North Carolina is closer to the median for the actual number of days on which early voting actually is scheduled (10 versus 11) than North Carolina's allotted days for early voting prior to SL 2013-381 (17 versus 11).

North Carolina is one of 36 states that do not offer Election Day registration or SDR. Three other states (Connecticut, Idaho, and New Hampshire) allow Election Day registration but do not offer SDR. (Tr. Day 12 at 15-17; DX 270 at 29-32)

Finally, only 10 states, including the District of Columbia, offer preregistration to 16- and 17-year-olds. (Tr. Day 12 at 18; DX 270 at 32) States that allow preregistration of 16- and 17-year-olds include Colorado, Delaware, the District of Columbia, Florida, Hawaii, Massachusetts, Maryland, North Dakota and Rhode Island. (*Id*.)

North Carolina's practices on out-of-precinct voting, SDR, and preregistration of 16- and 17-year-olds all are followed by a majority of the other states. While the number of days available for early voting is one below the median for days in which early voting actually takes place, the fact that North Carolina allows for weekend and Sunday voting places it well within the national mainstream for early voting.

III. Conclusions of Law

A. Legal Standard

In August 2014 this Court denied a motion for preliminary injunction in a written Memorandum Order and Opinion. (Mem. Op. and Order, Thomas D. Schroeder, District Judge, Aug. 8, 2014) That order was reversed in part in an opinion by a majority of a

panel of the Fourth Circuit Court of Appeals.[22] *League of Women Voters of N.C. v. N.C.*, 769 F.3d 224 (4th Cir. 2014). This Court then entered the injunction as directed by the Fourth Circuit decision and that injunction was subsequently stayed by the Supreme Court. *N.C. et al. v. League of Women Voters of N.C. et al.*, 135 S. Ct. 6 (Mem) (2014). That stay was lifted on April 6, 2015 when the Supreme Court denied defendants' petition for a writ of *certiorari* of the Fourth Circuit decision. *N.C., et al. v. League of Women Voters of N.C., et al.*, 135 S. Ct. 1735 (2015). This procedural history raises the issue of the proper legal standard for this Court to apply now after a full trial on the merits.

There is a strong argument that this Court is not bound by the decision of the appellate panel on the issue of a motion for preliminary injunction. The Supreme Court has ruled that "the findings of fact and conclusions of law made by a court granting a preliminary injunction are not binding at trial." *Univ. of Texas v. Camenisch*, 451 U.S. 390, 395 (1981). Some circuit courts have recognized a narrow exception to the general rule. In *Sherley v. Sebelius*, 689 F.3d 776 (D.C. Cir. 2012), the Court held a preliminary injunction can become law of the case if the preliminary injunction "was established in a definitive, fully considered legal decision based on a fully developed factual record and a decision making process that included full briefing and argument without unusual time constraints." *Id.* at 185-86. Even when a circuit court grants a preliminary injunction motion that is fully briefed and argued during normal time constraints, it does not

[22] That decision was limited to plaintiffs' claims under the Voting Rights Act. The decision did not address any of plaintiffs other legal theories.

become law of the case where the factual record materially changes following a full trial. *Ctr. for Biological Diversity v. Salazar*, 706 F.3d 1085, 1091 (9th Cir. 2013).

Here, this Court's decision denying plaintiffs' motion for a preliminary injunction was issued on August 8, 2014. While the United States did not appeal this ruling, the other plaintiffs did so. On September 25, 2014, the Fourth Circuit granted appellants' motion to expedite and proceed on the original record. No doubt, the motion to expedite the appeal was granted because of the time constraints imposed by the upcoming November election. The Fourth Circuit relieved appellants of their normal obligation to serve appellees with an appendix with their opening brief and instead granted appellants' motion to proceed on the original record. Rules 30(a)(3) and 30(f), FED. R. APP. P. The Court also dispensed with the normal briefing schedule under which appellants must file a brief 40 days after the record is filed and appellees have 30 days after they have received and reviewed appellants' brief to file their response. Rule 31(a), FED. R. APP. P. Instead, appellees were required to file their brief at the same time as appellants and the briefing was limited to fifteen pages. The Fourth Circuit entered its ruling on October 1, 2014, less than a week after the oral argument. Clearly, the process ordered by the Fourth Circuit for the appeal did not "include full briefing and argument without unusual time constraints." *Sherley*, 689 F.3d at 185-86.

The main focus of the Fourth Circuit majority was to maintain what it perceived to be the status quo pending a full trial on the merits. *League of Women Voters v. North Carolina*, 769 F.3d 224, 235-36 (4th Cir. 2014) (hereinafter "*LWV*"). To the extent the Fourth Circuit majority analyzed the applicable law, its opinion rests solely on its

preliminary interpretation of Section 2. The Fourth Circuit majority made no other legal ruling, definitive or otherwise, about any of plaintiffs' other legal theories. In finding that plaintiffs were likely to succeed on their Section 2 claims, the Fourth Circuit majority relied on a circuit court decision by the Sixth Circuit and a district court decision by a Wisconsin district court. *Id.* at 238 (citing *Ohio State Conference of NAACP v. Husted*, 43 F. Supp. 3d 808 (S.D. Ohio 2014), *aff'd*, 768 F.3d 524 (6th Cir. 2014), *stayed* 135 S. Ct. 42 (2014), *vacated*, No. 14-3877 (6th Cir. Oct. 1, 2014) (copy of unreported order vacating judgment located at ECF Doc. No. 53-1)); *Frank v. Walker*, 17 F. Supp. 3d 837 (E.D. Wis. 2014), *rev'd* 768 F.3d 744 (7th Cir. 2014), *cert. denied* 135 S. Ct. 1551 (2015). The circuit court decision was vacated by the Sixth Circuit. *Husted*, *supra*. The district court decision relied upon by the Fourth Circuit was reversed. *Frank*, 768 F.3d at 744. Thus, the legal landscape regarding the interpretation of Section 2 has substantially changed since the Fourth Circuit majority issued its opinion. The factual landscape has also changed. The results of the 2014 general election are consistent with the results of the 2014 primary which the Fourth Circuit discounted apparently because it was not a general election. But, following the 2014 general election, African American participation in the electoral process increased despite the implementation of all SL 2013-381 provisions other than photo ID.

Under all of these circumstances, this Court believes that the general rule followed by the Supreme Court in *Camenisch* would apply and this Court would therefore be free to apply the applicable legal standards as it sees fit. Nonetheless, the Court concludes that it would reach the same result even if it applies the legal standards

as outlined by the Fourth Circuit panel. Moreover, as it relates to plaintiffs' Section 2 claims, the court concludes that applying even the higher retrogression standard of Section 5 of the VRA would also yield the same result.

B. Plaintiffs' Anderson-Burdick Claims

1. Legal Standard

Voting is fundamentally significant "under our constitutional structure." *Ill. Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979). However, the right to vote in any manner is not "absolute." *Munro v. Socialist Workers Party*, 479 U.S. 189, 193 (1986). Under the Elections Clause, states retain "the power to regulate [their own] elections." *Sugarman v. Dougall*, 413 U.S. 634, 647 (1973). "Common sense, as well as constitutional law, compels the conclusion that government must play an active role in structuring elections . . ." *Burdick v. Takushi*, 504 U.S. 428, 433 (1992). There "must be a substantial regulation of elections . . . if some sort of order, rather than chaos, is to accompany the democratic process." *Storer v. Brown*, 415 U.S. 724, 730 (1974).

Election laws will always impose some type of burden on a voter. *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983). Requiring "strict scrutiny" for every election regulation "would tie the hands of States seeking to assure that elections are operated equitably and efficiently." *Burdick*, 504 U.S. at 433. Instead, a "more flexible standard applies." *Id.* at 434. When the right to vote is subjected to "severe" restrictions, "the regulation must be 'narrowly drawn to advance a state interest of compelling importance.'" *Id.* (quoting *Norman v. Reed*, 502 U.S. 279, 289 (1992)). "But when a state election law provision imposes only 'reasonable, non-discriminatory restrictions'

upon the First and Fourteenth Amendment rights of voters, 'the State's important regulatory interests are generally sufficient to justify' the restrictions." *Id.* (quoting *Anderson*, 460 U.S. at 788 and n. 9).

In *Crawford v. Marion Cnty. Elections Bd.*, 553 U.S. 181 (2008), in rejecting a Fourteenth Amendment challenge to Indiana's voter identification requirement, the Court held that "even-handed restrictions that protect the integrity and reliability of the electoral process itself are not invidious" regulations subject to strict scrutiny.[23] *Id.* at 189-90. Instead, in reviewing non-invidious election laws, a court is required to "weigh the asserted injury to the right to vote against the 'precise interests put forward by the state as justification for the burden imposed by its rule.'" *Id.* at 190 (quoting *Burdick*, 504 U.S. at 434).

The *Crawford* Court accepted as justifications for the election law changes that: the NVRA, 42 U.S.C. § 1973gg *et seq.* (2012), transf. to 52 U.S.C.A. § 20501 *et. seq.* (2015), has had the effect of inflating the lists of registered voters; that the federal HAVA statute imposes identification requirements on all states and voters in some circumstances; and that voter fraud occurs and can affect close elections. The Court found that the State of Indiana had rational and legitimate reasons to adopt its photo

[23] The actual holding of *Crawford* is the following: "When we consider only the statute's broad application to all Indiana voters we conclude that it 'imposes only a limited burden on voters' rights.' The 'precise interests' advanced by the State are therefore sufficient to defeat petitioners' facial challenge to SEA 483." *Crawford*, 553 U.S. at 202-03 (internal citations and quotations omitted). The foregoing statement received the support of six Justices. To the extent that the opinion of Justice Stevens addressed the impact of election laws on classes or subgroups of voters, that language was plainly dicta and not controlling.

identification requirement, even in the absence of any evidence of voter fraud "actually occurring in Indiana at any time in its history." *Id.* at 195. The Court noted that photo identification advances the "interest in orderly administration and accurate record keeping and provides a sufficient justification for carefully identifying all voters participating in the election process." *Id.* at 196. The Court also found that Indiana's photo identification requirement had the general effect of protecting "public confidence 'in the integrity and legitimacy of representative government.'" *Id.* at 197 (citations omitted). In contrast to these legitimate public interests, the *Crawford* Court held that any burdens on voters resulting from Indiana's photo identification requirement were "neither so serious nor so frequent as to raise any question about the constitutionality" of the statute. *Id.*

2. Application to Challenged Provisions

There are no material differences between the important public interests served by Indiana's identification requirement and the election changes challenged by plaintiffs. Under this standard, none of the long-standing election law practices historically followed by the State of North Carolina and reinstated by SL 2013-381 imposes severe restrictions on the right to vote.

There is nothing in the Constitution, or any law passed by Congress, requiring states to allow "early voting" prior to Election Day or to allow new voters to register and vote at the same time during an early voting period. To the contrary, the Supreme Court has held that states may close registration at a reasonable time before an election. *Marston v. Lewis*, 410 U.S. 679, 681 (1973); *Burns v. Fortson*, 410 U.S. 686 (1973).

This is because closing registration before an election serves an important state interest "in accurate voter lists." *Burns*, 410 U.S. at 687 (quoting *Marston*, 410 U.S. at 681). Congress has also recognized the important state interest in legislation that permits a state to close its registration books up to 30 days before an election. *See* 52 U.S.C.A. § 10502(d) (2015) ("[E]ach state shall provide by law for the registration or other means of qualification of all duly qualified residents of such State, who apply, not later than thirty days immediately prior to any presidential election, for registration or qualification to vote…"); 52 U.S.C.A. § 20507(a)(1) ("In the administration of voter registration for Federal office, each state shall – (1) ensure that any eligible applicant is registered to vote in an election . . . (c) . . . not later than the lesser of 30 days, or the period provided by State law, before the date of election . . ."). Thus, there can be no dispute that, under the Elections Clause and federal law, North Carolina has the legal authority to close registration up to 30 days before an election.

These same principles apply to early voting. No Supreme Court decision, and no act of Congress, requires *any* type of early voting. Early voting is an accommodation to voters, not a constitutional or fundamental right. North Carolina would be within its constitutional authority if it eliminated all forms of "early voting" and require voters to cast excuse-only absentee ballots or vote only on Election Day, subject to Congressional mandates for overseas and military voters. *See* The Uniformed and Overseas Citizens Absentee Voting Act, 52 U.S.C.A. §§ 20301 – 20311. Instead, North Carolina has elected to continue its early voting accommodation to voters through no-excuse absentee voting by mail and no-excuse, in-person, one-stop voting for a ten-day period.

Moreover, plaintiffs offer no guidelines on what would constitute a legally sufficient number of days for "early voting" versus an illegal reduction. While 45 days of early voting – or even the 60 days North Carolina allows for no-excuse absentee voting by mail – might be *preferable* to only 17 days, plaintiffs cannot claim that North Carolina *must* expand the days for early voting over and above 17 days. The amount of time a state decides to provide voters for an early-voting accommodation is a policy decision left to state legislatures under the Elections Clause. Under SL 2013-381, "any burden on voters' freedom of choice and association is borne only by those who fail" to apply for and cast a no-excuse, mail-in absentee ballot or who fail to appear and vote during the ten-day period of one-stop voting that now may be scheduled by each county board of elections. *Burdick*, 504 U.S. at 436-37. In short, under SL 2013-381, voters still retain many options that allow them to vote at times other than on Election Day under the laws that apply to all voters equally regardless of race or any other personal characteristic.

These same principles also apply to the requirement that voters cast their ballots in the precinct where the voter resides. Congress has directed that voters who cast out-of-precinct ballots shall have their votes counted in accordance with state law. 52 U.S.C.A. § 21082(a)(4). Prior to 2005, North Carolina's General Statutes precluded voters from voting in a precinct where they have never resided. *See James*, 359 N.C. at 267, 607 S.E.2d at 642. This requirement did not violate federal law when it was in effect. Requiring voters to cast their ballots in the precinct where they reside promotes sound election administration and avoids disputes over the offices for which an out-of-precinct voter is eligible to vote. Requiring Election Day voters to vote in their assigned

precinct also means that fewer voters will be disenfranchised because only when voters vote in their assigned precinct are they assured of having the opportunity to vote for *all* of the legislative or local races for which they are eligible to vote.[24]

Furthermore, as with early voting, plaintiffs again fail to explain any limiting principles on the "right" to vote out-of-precinct. For example, logically extending plaintiffs' legal theory, why should a resident of Guilford County not be allowed to vote in Wake County on Election Day and at least have his or her ballot counted for all statewide offices since the voter would be eligible to vote in those contests? If there is no rational reason for requiring voters to vote in the precinct of their residence, there can be no rational reason for making voters vote in the county of their residence. Clearly, such an argument would be just as baseless as plaintiffs' contentions that the Fourteenth Amendment bars a state from requiring Election Day voters to vote in the precinct of their residence.

Just like the number of days established for early voting, and the provisions allowing for SDR during early voting, the decision by the 2005 General Assembly to allow voters within a county to vote in a precinct other than the one in which they resided was an accommodation to voters, albeit one with a substantial administrative burden on election officials; it was not required by the United States Constitution. Requiring all Election Day voters to vote in the precinct of their residence, a rule

[24] This restriction does not apply to voters on Election Day who have not reported a change of their residence outside of the 30-day period prior to a general election. These voters will continue to be allowed to vote using a provisional ballot.

authorized by Congress and followed by a majority of the states, does not create a "severe burden" on the right to vote.

These same principles apply to preregistration of 16- and 17-year-olds. This, too, was an accommodation provided by the General Assembly. While opinions may differ as to whether it has any merit as public policy, it is not required by the Fourteenth Amendment, so long as the State retains voting regulations that allow new voters to register and vote in time for any general election that is held after they turn 18 years old. Nothing in SL 2013-381 can be construed as denying voters who will be 18 years of age at the time of the next general election from registering to vote and from voting in that election.

Finally, taking all of these changes into account cumulatively does not produce a different result. The photo identification requirement in *Crawford* was an affirmative restriction on the ability to cast a ballot. The provisions of SL 2013-381 challenged here are not. Rather, at most they can be characterized as the scaling back of accommodations to voters in the number of extra opportunities to vote and register to vote. This case does not involve a State's attempt to rollback opportunities to register and to vote below the floor established by Congress or the practices that were in existence for decades prior to the advent of early voting.

Indeed, numerous plaintiffs and fact witnesses admitted they were extensively involved with voter registration and "Get Out the Vote" activities. However, most witnesses could not specifically identify a single individual that they were aware of who

was unable to vote as the result of the changes made to North Carolina law by SL 2013-381.

Fact witness Kathleen Kennedy was a Democratic Party representative at several Forsyth County precincts in 2014. (PX 762 at 6:19-7:17) Despite claiming that "numerous" people were unable to vote at precincts she was observing as the result of the elimination of out-of-precinct voting, Ms. Kennedy could not specifically identify these individuals and had no knowledge of whether these alleged individuals were later able to vote in their correct precinct. (*Id*. at 14:1-9, 15:5-13)

Fact witness Nancy Lund is an active member of several partisan organizations with ties to the Democratic Party. (PX 791 at 26:8-13, 38:12-40:21, 43:7-21, 44:7-13, 45:17-46:7, 46:11-47:4, 48:1-49:25, 60:4-11) Despite her belief that several provisions of SL 2013-381 would negatively impact North Carolina elections, Ms. Lund could not name a single individual who was prevented from registering or voting in 2014 because of the law's enactment. (*Id*. at 27:7-22, 35:21-36:3, 37:21-24, 37:6-16, 39:9-12, 40:3-21, 65:7-66:6)

Fact witness Doris Burke was a poll worker at the Chavis Heights precinct in Wake County during the 2014 elections. Despite her claim that people were "turned away" for attempting to vote out-of-precinct, she could not specifically identify any individual who was actually unable to vote because of the law. (PX 808 at 16:7-20, 30:5-22)

Fact witness Helen Compton participates in volunteer voter registration activities in local high schools and opposes SL 2013-381's elimination of preregistration for

sixteen-year-olds. (Tr. Day 9 at 124:10-19) However, Ms. Compton could not identify any specific students that were negatively impacted by the law's elimination of preregistration. (*Id*. at 132:7-10)

Fact witness Mary Perry, who served as the President of the Wake County NAACP for 41 years, could not recall the specific number, or names, of individuals she believed were unable to vote in 2014 as the result of SL 2013-381. (PX 795 at 20:1-13, 36:3-4, 14:22-15:8) In fact, Ms. Perry admitted that she did not know any specific reasons why the unnamed individuals she cited in her testimony were allegedly unable to vote. (*Id*. at 16:4-7)

Plaintiffs Brian Miller, Pastor Lonnie Gene Hatley, and Louis Duke likewise could not identify any individuals who were unable to vote in 2014 because of the changes SL 2013-381 made to North Carolina election law. (PX 794 at 22:16-25, 24:7-10, 24:13-20; PX 786 at 37:2-11, 40:10-17, 41:12-17; Tr. Day 6 at 82:23-83:3)

Plaintiff Reverend Jimmie Hawkins, who is heavily involved in "Get Out the Vote" and voter registration activities, claimed that his brother was unable to vote as a result of the changes enacted by SL 2013-381. (PX 787 at 12:13-13:3; DX 23, Interrogatory 24) However, Reverend Hawkins later admitted that his brother's lack of "organizational skills and his follow through, remembering the need to do it," is what caused him to not register to vote in Durham County after he moved there, not the passage of SL 2013-381. (PX 787 at 59:3-60:20)

Fact witness Josue Berduo, a student at N.C. State University who has been involved in voter registration activities, could not name anyone who was unable to vote

in the 2014 election cycle because of SL 2013-381. (Tr. Day 6 at 84:12-17, 87:3-13, 92:3-5)

Finally, fact witness Ebony West is a student at East Carolina University who had extensive involvement in voter education, voter registration, and "Get Out the Vote" activities, including interacting with at least 2,000 prospective voters during the 2014 election cycle. (Tr. Day 7 at 113:17-25, 130:11-24) Despite this extensive involvement with voting activities, Ms. West could not name a single person who was unable to vote because of any provision of SL 2013-381. (*Id*. at 130:25-131:22)

Plaintiffs have cited no authority for the proposition that a State is obligated under the Fourteenth Amendment to provide more opportunities to register and vote for its citizens than other States. Nor have they cited any authority for the proposition that a State is obligated under the Fourteenth Amendment to provide opportunities to register and vote that exceed the minimum floor established by Congress. This is particularly true where the reduction of conveniences is supported by legitimate state justifications. Accordingly, plaintiffs' Fourteenth Amendment claims are dismissed.

C. Plaintiffs' Section 2 Claims

1. Legal Standard

Plaintiffs argue that SL 2013-381 creates a disparate impact because prior to 2014 black voters disproportionately used early voting, SDR and out-of-precinct voting. However, all voters, regardless of their race, retain the ability to decide whether they will register 25 days before an election, vote during early voting or an Election Day, and vote on Election Day in their assigned precinct. In any case, a disparate impact alone is not

sufficient to state a vote denial claim under Section 2. *Irby v. Va. State Bd. of Elections*, 889 F.2d 1352, 1353 (4th Cir. 1989); *Johnson v. Governor of State of Fla.*, 405 F.3d 1214, 1228 (11th Cir. 2005) ("Despite its broad language, Section 2 does not prohibit all voting restrictions that may have a racially disproportionate effect."). Indeed, this is clear from the cases involving the actual denial of the right to vote. Despite the disproportionate impact of felony disenfranchisement laws on minorities, they are routinely upheld despite Section 2. *See Simmons v. Galvin*, 575 F.3d 24, 30-42 (1st Cir. 2009); *Johnson*, 405 F.3d at 1227-32; *Wesley v. Collins*, 791 F.2d 1255, 1260-62 (6th Cir. 1986).

More recently, in *Frank v. Walker*, 768 F.3d 744 (7th Cir. 2014), the Seventh Circuit dismissed plaintiffs' challenge to Wisconsin's photo ID law. The Court refused to find a violation of Section 2 based upon plaintiffs' expert testimony that minorities are disproportionately poor, less educated, and lack photo IDs needed for voting in Wisconsin.[25] The Court noted that, under Section 2, "units of government are responsible for their own discrimination but not for rectifying the effects of other persons' discrimination." *Id.* at 753. The Seventh Circuit found that plaintiffs were obligated to prove "that the challenged 'standard, practice, or procedure' [imposes] a discriminatory burden on members of the protected class, meaning that members of the protected class 'have less opportunity than other members of the electorate to participate in due political process and to elect representatives of their choice.'" *Id.* at 754-55

[25] The Wisconsin statute did not have a reasonable impediment option now available to North Carolina voters under North Carolina's photo ID requirement, as amended. *See* SL 2015-103.

(citations omitted). Based upon arguments similar to those made by the defendants here, the Seventh Circuit concluded that plaintiffs could not prove a violation of Section 2 "because in Wisconsin everyone has the same opportunity to get a qualifying ID." *Id.* at 755.

Unlike North Carolina, the Seventh Circuit did not have the factual history of turnout rates following the implementation of the challenged Wisconsin statute. Because African American turnout increased after the implementation of SL 2013-381, under the Seventh Circuit's interpretation of Section 2, there is even a stronger basis for dismissing all of plaintiffs' claims. As admitted by plaintiffs' experts, all voters have the same opportunities to vote under the challenged requirements of SL 2013-381. (Tr. Day 3 at 110-11) Plaintiffs offered no evidence that these provisions will be selectively enforced because of race. Moreover, the factual history of the 2014 elections show that alleged burdens theorized by plaintiffs' academicians did not prevent African American voters from voting at a higher rate than they did in 2010.

In *LWV*, the Fourth Circuit majority characterized the Section 2 "effects" test differently than the Seventh Circuit in *Frank*. It stated the test as follows in the vote denial context:

> • First, "the challenged 'standard, practice, or procedure' must impose a discriminatory burden on members of a protected class, meaning that members of the protected class 'have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.' " *Husted,* 768 F.3d at 553, 2014 WL 4724703, at *24 (quoting 42 U.S.C. § 1973(a)-(b));
>
> • Second, that burden "must in part be caused by or linked to 'social and historical conditions' that have or currently produce discrimination against members of the protected class." *Id.* (quoting *Gingles,* 478 U.S. at 47, 106 S. Ct. 2752).

LWV, 769 F.3d at 240.

The *LWV* court also stated that the following factors from *Gingles* may "shed light" on the required "totality of the circumstances" analysis:

• The history of voting-related discrimination in the pertinent State or political subdivision;

• The extent to which voting in the elections of the pertinent State or political subdivision is racially polarized;

• The extent to which the State or political subdivision has used voting practices or procedures that tend to enhance the opportunity for discrimination against the minority group, such as unusually large election districts, majority vote requirements, and prohibitions against bullet voting;

• The exclusion of members of the minority group from candidate slating processes;

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

• The use of even subtle racial appeals in political campaigns;

• The extent to which members of the minority group have been elected to public office in the jurisdiction;

• Evidence demonstrating that elected officials are unresponsive to the particularized needs of the members of the minority group; and

• The extent to which the policy underlying the State's or the political subdivision's

use of the contested practice or structure is tenuous.

Id. (citing *Gingles*, 478 U.S. at 44-45).

As acknowledged by the Seventh Circuit's opinion in *Frank*, the Supreme Court has not permitted proof of the Senate Factors as a substitute for demonstrating state action which causes a discriminatory burden. Indeed, in vote denial cases, it is not established that these "Senate Factors" are applicable. Those factors were developed in the vote dilution context, specifically redistricting cases. However, assuming without deciding that the Senate Factors are relevant to a claim for vote denial under Section 2, and that the standard from *Frank* is not applicable, the challenged provisions of SL 2013-381 still do not have a discriminatory effect.

2. Discriminatory "Burden"

As noted above in the Equal Protection discussion, none of the challenged provisions individually or collectively impose a burden on voters. Indeed, it is hard to fathom how majority-rule practices that survive scrutiny under the *Crawford* test for alleged violations of the Fourteenth Amendment could simultaneously constitute illegal burdens under Section 2. Regardless, the evidence demonstrated that the provisions simply scaled back accommodations that provided extra ways to register and vote. In the case of early voting, the evidence demonstrates that SL 2013-381 actually increased opportunities to use this accommodation.

Plaintiffs failed to produce any evidence demonstrating how the post-SL 2013-381 electoral system does not provide equal opportunity for voters to register and vote, including minority voters. On the other hand, defendants demonstrated that in both the

primary and general election in 2014, minority turnout increased. Moreover, minority registration continues to exceed that of white voters. Plaintiffs failed to counter this evidence with evidence of what the turnout would have been had SL 2013-381 not been enacted.

Instead of attempting to establish how the post-SL 2013-381 electoral system actually harmed minority voters, plaintiffs' evidence repeatedly boiled down to one fact: that minorities used SDR, out-of-precinct voting, early voting, and preregistration at higher rates than white voters. While the court considers past use of these practices in its Section 2 analysis, plaintiffs cannot prevail on that claim on this one fact alone. While the *LWV* court opined that higher past use was "centrally relevant," that court did not state that past use alone could amount to a violation of Section 2. That would reduce the Section 2 inquiry to solely a retrogression inquiry which the United States Supreme Court has not permitted.[26] Moreover, it would take the shield Section 2 provides against laws that deprive voters of equal opportunity and turn it into a sword to demand election law affirmative action in the form of election law conveniences.

[26] Even several of plaintiffs' witnesses referred to HB589 as "retrogressive," such as former United States Attorney and current legislator Rep. Michaux. (Tr. Day 8 at 27:24-28:3, 57:21-23) In addition, plaintiffs' expert Dr. Morgan Kousser testified that plaintiffs' claims are based on "a comparison between the status quo and what was adopted; and when you are looking at intent, that's the commonsensical standard. You could call that a retrogression standard if you wanted to, but you always have to ask, when you are trying to figure out why something was passed, what the baseline is, and the natural baseline for determining what – why a law was changed is the previous law." (Tr. Day 2 at 84:5-17)

To the extent that there is any burden caused by SL 2013-381 outside of the bare fact of prior disparate use of repealed practices by minorities, plaintiffs failed to demonstrate that any such burden is discriminatory. Plaintiffs contend, for instance, that Section 2 requires a "failsafe" such as SDR to ensure that voters who for whatever reason are unable to get registered by the normal deadline can register prior to voting. However, plaintiffs have not demonstrated that the need for a "failsafe" bears more heavily on minority voters. Indeed, many of the individual voters plaintiffs presented at trial who could have benefited from a "failsafe" were white. In addition, given that registration of blacks exceeds that of whites, it would appear that any failsafe would be more necessary for white voters.[27] In light of the persistent increased turnout for

[27] Dr. Lichtman, who admittedly has no prior experience in performing or evaluating registration practices by social service agencies, relied upon reports filed by the SBE with the federal government to conclude that blacks have been disproportionately denied opportunities to register at these agencies. The Court does not credit this testimony.
First and foremost, and as explained above, Dr. Lichtman provided no evidence that black registration rates as reported by the SBE have declined in any respect. Blacks continue to be registered at a higher percentage of their voting age population than whites and the discrepancy between black and white registration rates grew following the 2014 general election. Second, neither the plaintiffs nor Dr. Lichtman cited a single example or offered any witnesses during the trial of this case who provided testimony that he or she had been denied registration opportunities by a social service agency. *See* 52 U.S.C. § 21510(b) (granting private right of action only to person who provides ninety days of notice of an alleged violation). Other than Dr. Lichtman's testimony, plaintiffs offered no evidence of any violations of the NVRA by the State of North Carolina. Dr. Lichtman's testimony is also suspect to the extent a third party, and not Dr. Lichtman, reviewed the data allegedly relied upon by Dr. Lichtman. That person, Mr. David Ely, was not available for cross examination at trial. Dr. Lichtman admits to several other flaws in his report including: (1) his report does not include people who declined registration; (2) he does not know whether the volume of in-person traffic at social services offices has declined because of the rollout of two new web-based application opportunities available to persons applying for benefits on-line (North Carolina's NC Fast or the Affordable Care Act); (3) he does not know the source codes for registration

minority voters even after the adoption of SL 2013-381, the same is true for access to early voting, out-of-precinct voting, and preregistration.[28] Thus, plaintiffs have failed to establish that SL 2013-381 imposes a discriminatory burden under Section 2.

3. Causation/Baseline Analysis

Under Supreme Court precedent, which this Court is of course bound to follow, the threshold question in any case alleging a discriminatory "result" under Section 2 of the VRA is: Compared to what? If the challenged procedure is a *qualification* for participating in the relevant activity—here, voting—the answer is straightforward: compared to the minority opportunity that would result if the state-imposed barrier (*e.g.*, a literacy test) were eliminated. *Holder v. Hall*, 512 U.S. 874, 880-81 (1994) (in such

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applications included in the reports reviewed by Mr. Ely or whether there are other SBE source codes for registration applications not included in the reports that may have originated from a social services agency or website; (4) neither Dr. Lichtman nor Ely evaluated benefit applications filed by persons applying for assistance under the Energy Assistance Program, Pregnancy Services, Work First Family Assistance, Women Infants and Children or persons applying for Medicaid; and (5) neither Mr. Ely nor Dr. Lichtman account for registration applications that have been or are currently being offered by social services agencies with source codes that are different from those compiled by the State in its federal reports. (*But see* Tr. Day 13 at 37:13-44:5, 186:4-199:22)

[28] At trial, plaintiffs attributed the high turnout for minorities in 2014 to the increased turnout attributed to the contest for United States Senate in 2014. There are several problems with this argument. First, it contradicts plaintiffs' argument that the repealed election practices caused increased participation and turnout by minorities from 2006 to 2012 as opposed to high profile campaigns that occurred during that time such as the candidacy of Barack Obama. Plaintiffs cannot have the turnout argument both ways and not even plaintiffs' experts testified that turnout based on campaign effects could be isolated from turnout based on election laws. No witness could provide an estimate of what percentage of turnout for any election was caused by campaign effects versus the election system in place at the time. Further, there is no evidence that the race for United States Senate would have increased minority turnout at a higher rate than white turnout. Presumably, such a high profile race would affect all voters and so it cannot serve as an explanation for a higher increase in minority turnout, as compared to white turnout.

cases, the "effect . . . [is] evaluated by comparing the system with the rule to the system without the rule.").[29] A discriminatory result is shown if the additional qualification barrier that disproportionately excludes minority voters results in providing them less opportunity than non-minority voters, and if eliminating the barrier redresses that unequal opportunity.

In cases that do not involve exclusionary qualifications to vote (or vote dilution cases), there is no acceptable or "objective benchmark" by which to measure disproportionate harm to minorities, and thus no cognizable argument that the state's voting procedure results in the denial of equal opportunity to minority voters. *Holder*, 512 U.S. at 880-81. To be sure, in such cases plaintiffs can always *hypothesize* alternatives that eliminate or reduce disproportionate outcomes—*i.e.*, a system where the times and circumstances for voting are less restrictive than the challenged system and therefore may increase minority participation. But the *availability* of such minority-enhancing alternatives does not suggest that the present system results in an election process that is not equally open to minority voters. This is so for two related reasons.

Because plaintiffs can always hypothesize fewer restrictions on the manner of voting that could increase minority opportunities or participation rates, the choice of a Section 2 "benchmark" by which to measure disproportionate harm is inherently "standardless" and provides no "objective," "acceptable principles" for measuring

[29] The *LWV* court did not address the requirement for an objective benchmark set forth in *Holder*. This Court declines to assume that the *LWV* majority intended its decision to be read as excluding a requirement imposed by the Supreme Court in analyzing Section 2 claims.

discrimination. *Holder*, 512 U.S. at 885. For example, plaintiffs could hypothesize a system where registration and voting could be done at home, without the "burden" of going to a public facility to register or vote, by sending registration forms and ballots to voters through the mail or electronically.

More important, a maximizing alternative is not only a "standardless" benchmark, but it is legally irrelevant. The availability of such maximizing alternatives does not suggest that the challenged system denies the equal opportunity guaranteed by Section 2, but only that the State has not maximized minority participation or achieved equal outcomes, neither of which is required by Section 2. That is, the question under Section 2 is not whether the state's procedures provide minorities less opportunity than a plaintiff's *proposed alternative*, but less opportunity than that provided to *non-minority voters*. Moreover, Section 2 does not prohibit an election process that results in disproportionate or unequal *outcomes*. Instead, it proscribes only state-imposed procedures that result in diminution of minority *opportunities* relative to the opportunities afforded non-minority voters.[30]

[30] Under plaintiffs' theories, the Fourteenth Amendment and Section 2 of the VRA are both violated if the State fails to retain practices that provide proportional or higher than proportional participation rates by African Americans. This same argument, in the context of redistricting litigation, has been expressly rejected by the Supreme Court. *See League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 445 (2006) ("*LULAC*") (requiring states to draw districts giving minorities political influence "would unnecessarily infuse race into virtually every redistricting, raising serious constitutional questions"); *Johnson v. De Grandy*, 512 U.S. 997, 1014-16 (requiring states to enact districting plans that ensure proportional representation or plans that create the maximum number of minority districts in excess of proportionality "causes" constitutional challenges that "are not to be courted"). Further, Congress itself prohibited Section 2 from being interpreted in a manner that protected or guaranteed "proportional

If the challenged voting procedure, such as a literacy test, limits who is qualified or eligible to vote, then the procedure's disproportionate exclusion of minorities from the electorate *does* result in less opportunity for minority voters to vote than it does for non-minority voters. But where, as here, the State allows all qualified residents to vote (and plaintiffs, of course, do not challenge those basic minimum-age and residency requirements), it does not impose any voting procedure that *limits* minority opportunities. Even assuming black turnout or registration rates had declined in 2014, any past statistical disparity in the rate of minority participation in repealed practices is not the result of state-imposed limits on who may vote, but simply the result of minority voters' choices, for whatever reasons, to not take advantage of the equally open voting and registration process to the same extent as non-minority voters.

Section 2 claims are therefore only viable where the challenged voting practice can be compared against an objective alternative benchmark. *Holder*, 512 U.S. at 880 (Kennedy, J.); *id.* at 884 ("[W]ith some voting practices, *there in fact may be no appropriate benchmark* to determine if an existing voting practice is dilutive under § 2.") (emphasis added); *id.* at 885 ("[T]he wide range of possibilities [for alternative schemes] makes the choice inherently standardless."); *id.* at 889 (opinion of O'Connor, J.) (same).

The facts of *Holder v. Hall* are instructive. In that case, the Supreme Court rejected a Section 2 "results" challenge to the size of a government commission. Prior to

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representation" in any voting practice or procedure. *See De Grandy*, 512 U.S. at 1014 n.11. Plaintiffs have no grounds for seeking an order from this Court mandating that the State of North Carolina adopt voting practices or rules to ensure proportional representation or minority participation in excess of proportionality.

1985, Bleckley County, Georgia, had a form of government in which one county commissioner exercised all legislative and executive power for the county. In 1985, the state legislature enacted legislation that would allow the voters of Bleckley County to adopt by referendum a system with a five-member board of county commissioners elected from single-member districts and a chairman elected at large. The voters of the county defeated the referendum. The plaintiffs claimed that electing a single commissioner resulted in dilution of their voting power, because an alternative plan of having five commissioners would allow minorities to elect at least some members of the commission. Notably, boards of county commissioners comprising five commissioners were quite common in the state, and the county had moved from a single superintendent of education to a school board comprising five members. *Id*. at 876–77, 881.

The court rejected the Section 2 claim, holding that there was no objective, non-arbitrary benchmark for determining how many commissioners there should be. Plaintiffs could always claim that more would be better; why wouldn't six, or seven or eight commissioners be more appropriate? This lack of a limiting principle demonstrates that Section 2 applies only when the effect of a challenged law can be measured against an *objective* benchmark of voter opportunity. To show a lack of opportunity to vote or elect candidates of their choice, plaintiffs must be able to point to some objective benchmark that would enhance equal voting opportunity, not merely an alternative benchmark that is chosen simply *because* it enhances minority voting. The Court emphasized that "it does not matter . . . how popular" or "quite common" the proposed alternative is. *Id.* at 881. Although a five-commissioner system enhanced minority

voting strength, there was "no principled reason why [that size] should be picked . . . as the benchmark" because enhancing minority voting power is not a principled reason for judicial imposition of the maximizing alternative. *Id.* It was irrelevant that *Section 5* would have required *maintaining* a five-member commission because "retrogression is not the inquiry in § 2 . . . cases." *Id.* at 883-84. [31]

[31] In fact, even in a Section 5 case, whether a law would have a so-called "disparate impact" is not sufficient in a case involving ballot access issues such as this one. The court in *Florida v. United States*, 885 F. Supp. 2d 299, 312 (D.D.C. 2012) (three-judge court) put it this way:

> [A] change is not retrogressive simply because it deals with a method of voting or registration that minorities use more frequently, or even because it renders that method marginally more difficult or burdensome. Rather, to be retrogressive, a ballot access change must be sufficiently burdensome that it will likely cause some reasonable minority voters not to register to vote, not to go to the polls, or not to be able to cast an effective ballot once they get to the polls.

Id. at 312. Plaintiffs in the instant case have not even satisfied this standard, where the burden is much higher on the state, much less the more difficult standard for plaintiffs under Section 2, where the burden rests squarely on plaintiffs. In *Florida*, the court refused to preclear under Section 5 reductions in early voting days that did not also guarantee a particular number of hours of early voting that would be offered during the shortened early voting period. When the state of Florida agreed to provide an early voting plan that offered the same number of hours as under prior law, USDOJ precleared the statute, thus mooting that issue. *See Brown v. Detzner*, 895 F. Supp. 2d 1236, 1241-42 (M.D. Fla. 2012).

In *Brown*, the court considered the same statute under Section 2 of the VRA. Significantly, that court held that the reduction in early voting days did not violate Section 2. The court emphasized that it was "not conducting a 'retrogression' analysis." *Brown*, 895 F. Supp. 2d at 1251. The court explained that the "important distinction between a Section 5 and a Section 2 claim play[ed] a significant role in the Court's decision." *Id.* Here, as in *Brown*, plaintiffs are continuing to invite the Court to use the retrogression standard from Section 5 under the guise of Section 2 vote denial language. The well-reasoned opinion in *Brown* thoroughly rejected the invitation in that case.

If Section 2 allowed plaintiffs to bring challenges without showing a deprivation of voting opportunity as measured against an objective benchmark, plaintiffs could bring an endless parade of Section 2 challenges based on hypothetical alternative voting laws that would be ever more favorable to them. Section 2 would thus be redirected to require every state to maximize the electoral prospects of minority voters.

In the present case, plaintiffs' claims fail for the same reason they did in *Holder v. Hall*. Namely, plaintiffs fail to provide any objective benchmark to measure whether a Section 2 violation has occurred. There is no objective, non-arbitrary benchmark to determine how many early-voting days and hours there should be. Why not 30 days? Why not 60? Why not 90? Under their theory, plaintiffs could have challenged the former 17-day period as having a discriminatory "result" compared to a theoretical 24-day period. A *more* objective benchmark than 17 days is *one* day of voting on Election Day, since that is still common, and was universally used, with the exception of absentee voters who established that they could not present themselves at their polling place on Election Day, in 1982 – when Congress added the "effects" test to Section 2. Under this benchmark, ten-day early voting significantly *expands* voting opportunities, including minority voting opportunities. This demonstrates how arbitrary it is to use plaintiffs' proposed alternative as the benchmark for measuring discriminatory result. It is irrelevant whether plaintiffs prefer a 17-day system over a ten-day system because Section 2 forbids providing minority voters less opportunity than non-minorities, not less opportunity than the prior system or a maximizing alternative.

Regarding plaintiffs' claim that elimination of same-day registration violates Section 2, plaintiffs offer no objective benchmark for determining how long the wait should be between voting and registration. The evidence shows that the number of voters who cast provisional ballots for "no record of registration" on Election Day in 2014 (6,790) is small and slightly disproportionately black (1685 or 24.8%). (PX 689) Thus, under plaintiffs' theory, the old system could have been challenged because it prohibited same-day registration on *Election Day*. Congress plainly did not intend to eliminate *every* state's practice in 1982 simply because of an alleged gap between black and white voters in registration and voting.

Regarding plaintiffs' challenge to the elimination of out-of-precinct provisional ballots, plaintiffs offer no objective benchmark to determine how many polling places should be required to accept ballots of voters who go to the wrong polling place. For example, should North Carolina be ordered to adopt the New York model that allows out-of-precinct voting but only when multiple precincts are located at the same poll location? Should plaintiffs be allowed to bring Section 2 claims if voters are not allowed to cast their ballots at any polling place in counties that adjoin their home county or anywhere in the entire state? The failure of plaintiffs to provide the Court with anything other than standardless benchmarks renders the Section 2 effects claims without merit.

4. Totality of the Circumstances/Senate Factors

In any event, plaintiffs' Section 2 challenges fail when considering the totality of the circumstances. As noted earlier, even under a totality of the circumstances analysis,

plaintiffs' Section 2 evidence repeatedly relied on and returned to one fact: prior disparate participation by minorities in the repealed practices.

Plaintiffs' claims fare no better when considering them cumulatively and in the context of the Senate Factors.

While North Carolina's history of official discrimination is undeniable, plaintiffs have failed to point to any such official discrimination since the *Gingles* case in the 1980s. This is particularly true in the vote denial context. Of the 65 objections lodged by USDOJ under Section 5 in North Carolina, almost all of them were not in the vote denial context. (Tr. Day 6 at 52:17-53:6) In addition, the use of voting practices by North Carolina that tended to enhance the opportunity for discrimination against minorities, such as majority vote requirements and prohibitions on single-shot voting, ended decades ago and have not been re-established. Nor is there any evidence that minorities have been excluded from "candidate slating processes."

Presumably because of the lack of evidence of official discrimination, plaintiffs and their experts rely more heavily on alleged use of racial appeals in political campaigns. But most of that evidence is also old and primarily relates to various campaigns by former Senator Jesse Helms. (PX 238 at 5-16) The more recent incidents alleged by plaintiffs for the most part were perpetrated not by campaigns or candidates but individual citizens. (PX 238 at 17-19) In any event, there is no evidence that the state itself has encouraged, condoned or sponsored any use of racial appeals, and certainly not recently.

Plaintiffs' evidence also falls short regarding 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." *LWV*, 769 F.3d at 240. First, while plaintiffs submitted much evidence on the issue of disparities between minorities and whites in various socioeconomic categories, none of their experts made a connection between those disparities and the minority group's "ability to participate effectively in the political process." Indeed, many of plaintiffs' experts expressly disclaimed that they were making such a connection. (Tr. Day 2 at 142:9–143:9; Tr. Day 3 at 36:18–38:6; Tr. Day 9 at 90:22-91:19; PX 681 at 27, 29-33) This Senate Factor itself makes clear that the socioeconomic status alone of a voter or group of voters does not entitle the voter or group to election conveniences or accommodations, or special protection from the repeal of such accommodations. The socioeconomic factors must be shown to "hinder their ability" to participate in the political process. The *LWV* majority's test also requires a connection between the minority group's ability to participate in the political process and socioeconomic factors. *LWV*, 769 F.3d at 240. Rather than prove such a connection, plaintiffs attempted to prove the existence of the socioeconomic disparities, and then assume a connection exists between those disparities and minorities' ability to register and vote. In doing so, plaintiffs would read out of the factor, and the *LWV* court's test, the language "which hinder their ability to participate effectively in the political process" which this Court will not do. Disparities alone, however, do not permit litigants to demand affirmative election conveniences from the State.

Moreover, the objective evidence at trial tends to show that minorities have not been hindered in their ability to participate effectively in the political process. Even after implementation of SL 2013-381 minorities have registered and voted at higher rates than whites. Whatever the cause of that higher participation may be, it is persuasive evidence that the socioeconomic status of minorities in North Carolina is not hindering their ability to register and vote. This is in contrast to the case recently decided by the Fifth Circuit Court of Appeals, *Veasey v. Abbott*, ___ F.3d ___, No. 14-41127, 2015 WL 4645642 (5th Cir. Aug. 5, 2015). In *Veasey*, the court held that the Texas photo identification requirement violated the effects test of Section 2. *Veasey*, 2015 WL 4645642, at *17. There, unlike here, there was no evidence that minority turnout or registration rates increased after implementation of the challenged practice. There, unlike here, there was specific expert testimony that the socioeconomic disparities hindered the ability of minorities to participate in the political process. This expert testimony in *Veasey* relied upon evidence that minorities "register and turn[]out for elections at rates that lag far behind Anglo voters." *Id.* at *15. The *Veasey* court said this was "significant" because "the inquiry in Section 2 cases is whether the vestiges of discrimination act in concert with the challenged law to impede minority participation in the political process." *Id.* In this case, the "significant" evidence is just the opposite – minorities register and turnout at rates higher than white voters. While evidence of minorities' higher turnout in 2014 is not dispositive of plaintiffs' Section 2 claims, or even the analysis of this Senate Factor, plaintiffs failed to carry their burden of explaining away the turnout or otherwise demonstrating that, despite the turnout,

minorities as a group have been hindered by their socioeconomic status from participating effectively in the political process.

Next, it is not clear that plaintiffs met their burden on the issue of the effects of past discrimination in areas such as education, employment, and health. While past discrimination is undeniable, plaintiffs' evidence on its present effects was inconclusive at best. For instance, while plaintiffs' expert Dr. Vernon-Feagans testified that minorities are generally poorer and less literate than whites, her research was based on a study limited to "non-urban" African Americans in only three counties. (PX 681 at 28-29) And while the results of Dr. Vernon-Feagan's study could possibly be extrapolated to other non-urban African Americans, she admitted it excluded African Americans in North Carolina's urban areas. (*Id.*) As such, it is hardly useful for making broad generalizations about the socioeconomic state of blacks in general in North Carolina.[32] Similarly, Dr. Kathleen Summers testified that African Americans are less literate than whites, but her research was based on a non-random sample of twenty African Americans from Baltimore, Maryland, and none from North Carolina.[33] (Tr. Day 3 at 38:7–39:10)

As to educational achievement, plaintiffs' expert Dr. Clotfelter testified about the intergenerational effects of past discrimination in funding of public schools. However,

[32] As noted in the report of another one of plaintiffs' experts, Dr. Cynthia Duncan, a significant percentage of blacks in poverty live in central cities, and, to a lesser extent, the suburbs. (PX 45 at 19)

[33] Interestingly, of the 20 participants, 19 either had a photo identification currently or in the past, 19 were registered to vote, and 17 had voted in the prior non-Presidential year election, despite the fact that Maryland does not allow same-day registration. (Tr. Day 3 at 44:14–45:15)

his research excluded private schools and homeschooled children and is therefore limited in scope. (Tr. Day 2 at 143:10–144:2) He also admitted that to the extent he has been able to connect disparities in school resources and racial gaps in education achievement, such a connection is a correlation and not a causal relationship. (Tr. Day 2 at 144:13–146:3) He also conceded that public schools are no longer funded on the basis of race and that funding disparities disappeared decades ago.[34] (Tr. Day 2 at 147:1–148:2) More significantly, Dr. Clotfelter admitted that minority teacher salaries began to overtake salaries of white teachers as early as 1959. (Tr. Day 2 at 148:3-23) In addition, historical official discrimination is not necessarily an adequate explanation for modern disparities. For example, Hispanics have a significantly lower high school diploma rate than African Americans, even though African Americans have endured much more past official discrimination. Asian students had higher test scores on the NAEP test even though a history of official discrimination exists against Asians that does not exist for whites. (Tr. Day 2 at 151:3–152:15) Dr. Clotfelter also agreed that he did not attempt to determine whether educational achievement by African Americans is explained by racial issues or income. The "multicollinearity" between race and income make it very difficult to determine the true explanation. (Tr. Day 2 at 152:23–153:17) Dr. Clotfelter also agreed that there has been no action taken by the state in modern times to discriminate against minorities or cause racial disparities in public education. (Tr. Day 2 at 157:2–159:3)

[34] At an earlier period in history when education spending between black and white students was equitable, black voting participation was higher than white voting participation. (Tr. Day 2 at 146:4-25)

As to poverty, plaintiffs' expert Cynthia Duncan conceded in her report that poverty persists not solely from past discrimination but also from "cultural factors such as failure to stay in school, having children young and out of wedlock, or getting involved with drugs and criminal activity." (PX 45 at 3) This is consistent with information in her report showing that the smallest differences in child poverty between black and white families are in families led by a married couple. (PX 45 at 9) In addition, the report indicates that there is a relatively small difference in the percent of whites 25 years or older with less than a high school degree and the percent of blacks in that category. (PX at 10; Tr. Day 9 at 93:17-21) Dr. Duncan goes on to report that "[s]tatistically speaking, poor non-Hispanic blacks are no less likely than non-Hispanic whites to have less than a high school degree, a high school degree or GED, or have some college experience." (PX 45 at 11-12) This is important because there was no testimony by any expert that the ability to navigate the post-SL 2013-381 process to register and vote would take more than a high school level of education. Moreover, Dr. Duncan demonstrated that non-Hispanic whites and non-Hispanic blacks living in households receiving certain government benefits are "statistically equally likely to be poor." (PX 45 at 15) Plaintiffs have simply not met their burden of demonstrating that this Senate Factor weighs in their favor on the Section 2 claims.

Another such factor, the extent to which minorities have been elected to public office, is also inconclusive at best. When looking at all available public offices in North Carolina, both state and municipal, African Americans have not yet reached parity with whites. However, it is undisputed that, despite the continued existence of racially

polarized voting in North Carolina, blacks have made steady progress since *Gingles* in electing candidates to public office. Moreover, in the legislature, it is undisputed that African Americans have essentially reached parity with whites in election to legislative seats based upon redistricting plans enacted by the Republican-controlled General Assembly in 2011. (Tr. Day 3 at 144-46; DX 15 at Ex. 1, Ex. 2)[35] Several witnesses in this case have also testified about the significant progress made by African Americans. (Tr. Day 8 at 34:18-35:20) For instance, Senator Dan Blue was the first African American ever elected to be Speaker of the North Carolina House of Representatives. (*Id.*) And Representative Mickey Michaux controlled the powerful House Appropriations Committee as Chairman for several terms in the North Carolina House. (*Id.*)

Similarly, there was little to no evidence that elected officials have been unresponsive to the particularized needs of members of the minority group. One of plaintiffs' experts, Dr. James Leloudis, a historian, agreed that policy disagreements do not by themselves reflect racial antipathy. (Tr. Day 10 at 36:17-21, 37:20-25, 38:6-11) Aside from policy disagreements over issues that affect all North Carolinians, not just minorities, plaintiffs presented no evidence of unresponsiveness to the *particularized* needs of African Americans.

[35] Section 2 provides that the extent to which the minority group has elected its members to public office is part of the totality of circumstances test. The Court has been unable to locate a case where a minority group had achieved parity in a state's legislative chambers and neutral election regulations such as those challenged in this case were declared in violation of Section 2.

Finally, plaintiffs have not carried their burden of demonstrating that the State's justification for the challenged provisions of SL 2013-381 is tenuous. To the contrary, the persuasive evidence supports defendants' justifications. For instance, as to early voting, defendants produced uncontested evidence that during the 17-day period, early voting sites were not being used at the same rates. There was also uncontested evidence that within counties sites with longer hours were being placed in areas for political advantage, and that Sunday voting sites were placed in areas to benefit the Democratic Party and one race. While plaintiffs' evidence on whether the 10-day period ended up costing more money is thin if not non-existent, it is undisputed that it was the amendment of a Democratic Senator, accepted by the majority, that effectively required counties to open more sites or stay open more hours.

As to SDR, SBE data conclusively establishes what legislators feared: that SDR registrants were able to vote before their eligibility to vote could be verified. SDR voters were not only much more likely than non-SDR registrants to be able to cast a ballot while unverified, SDR registrants were also much more likely to subsequently fail mail verification. Thus, thousands of individuals were casting ballots despite not being eligible to vote. The evidence also shows that this was not a function of under-resourcing of CBEs but a function of the amount of time that it takes to complete the mail verification process.

While plaintiffs produced several fact witnesses who contended they had problems registering to vote at DMV, these witnesses were a cross-section of voters and none provided any evidence that the issues they experienced were deliberate or that they were

caused by their race or ethnicity.

For example, Elizabeth Gignac, a white, unaffiliated voter residing in Cumberland County, testified that after moving to North Carolina in 2014, she visited a DMV office on or about August 26, 2014, and stated that she answered "yes" when asked if she wanted to register to vote. (PX 758 at 14:20-24, 21:11-13, 22:4-6) Although she intended to register to vote, Ms. Gignac testified that she was not offered a voter registration form, did not review any such form, and did not know if she signed anything related to voter registration during her DMV visit. (*Id*. at 14:25-15:14) Following her visit to DMV in August 2014, Ms. Gignac did not receive a voter registration card in the mail as she had when she previously registered to vote in other states. (*Id.* at 15:25-16:21) Prior to the November 4, 2014 general election, Ms. Gignac learned that she was not, in fact, registered to vote. (*Id.* at 16:11-19:12)

Ms. Gignac testified the issue with her registration was an "error" by DMV but admitted that it was an error that could happen to anyone regardless of their race. She also admitted that she had no reason to believe she had been personally targeted for any reason by anyone at DMV or the board of elections. (*Id.* at 20:12-22:3) After discovering this issue, Ms. Gignac successfully registered to vote through DMV and received a voter registration card in the mail. (*Id.* at 25:10-16) She has no concerns about being able to vote in future elections in North Carolina. (*Id*. at 25:22-26:6)

Isabel Najera is a Hispanic voter residing in Salemburg. (Tr. Day 2 at 105:11-24) She believed she registered to vote at the DMV office in Clinton, North Carolina on October 7, 2014 when she went to get a commercial driver's license. (*Id*. at 109:2-14)

SEIMS database records, however, indicate that Ms. Najera answered "no" to all three of the registration questions. (Tr. Day 13 at 206:4-23) When Ms. Najera went to vote during early voting on October 29, 2014, she had to vote a provisional ballot because she was not on the voter rolls. (*Id.* at 110:13-35) Ms. Najera does not believe that the fact that she is Hispanic had anything to do with the issue she had in registering to vote at DMV. (*Id.* at 114:15-18)

Carlton Jordan is an African American resident of Carteret County. On February 27, 2014, Mr. Jordan visited a DMV office to update the address on his driver's license because he had moved from Carteret County to Craven County in June 2013. (PX 788 at 16:22-17:2, 25:6-16, 27:5-11) Based upon the fact that he had registered to vote in Onslow County through DMV in the 1990s while updating his driver's license there, Mr. Jordan believed that he would "automatically" be registered to vote in Craven County by updating the address on his driver's license during his visit in February 2014. (*Id.* at 34:7-25)

Mr. Jordan testified that he did not recall signing a voter registration form or having any conversations with anyone at the DMV office about registering to vote. (*Id.* at 33:12-16, 35:1-4) No one at DMV told him that he was, in fact, registered to vote or that he would be able to vote in the 2014 election during his visit. (*Id.* at 35:5-8) Mr. Jordan testified that his experience at DMV was something that "could happen to anybody, I just wasn't expecting it to happen to me." (*Id.* at 35:13-19) Although Mr. Jordan testified that he had moved from Craven County to Carteret County in late November or early December of 2014, he had not yet updated his voter registration. (*Id.*

at 9:13-16, 28:7-16) Mr. Jordan testified that he planned to do so that day and that he had no concerns about using DMV to update his registration. (*Id.* at 28:7-18)

Other voters testified that they had successfully used DMV to register to vote or to update their voter registrations. (*See* Tr. Day 2 at 181:13-182:5 (Terrilin Cunningham, African American voter in Cabarrus County); Tr. Day 4 at 167:22-168:3; 170:24-171:13) (Amber Alsobrooks, white voter in Orange County))

In any event, evidence of errors by the DMV in registering voters or erroneous instructions by elections officials do not prove violations of the Constitution or Section 2 of the Voting Rights Act where, as here, there is no evidence that any mistakes were purposeful or systemic. *United States v. Jones*, 57 F.3d 1020, 1023-24 (11th Cir. 1995) ("We have found no case holding that an inadvertent error can constitute a standard, practice, or procedure under Section 2. As the district court correctly noted, the text of the act contains no reference to inadvertent error."); *Gamza v. Aguirre*, 619 F.2d 449, 454 (5th Cir. 1981) ("In the absence of evidence that the alleged maladministration of the local election procedures was attended by the intention to discriminate against the affected voters or motivated by a desire to subvert the right of the voters to choose their school board representative, we cannot conclude that the error constituted a denial of equal protection of the laws."); *Harris Co. Dept. of Educ. v. Harris Co.*, No. H-12-2190, 2012 WL 3886427, at *6 (S.D. Tex. Sept. 6, 2012) ("But no facts have been alleged or identified that would tend to support an inference that Harris County's actions were anything more than an inadvertent mistake. . . . The [plaintiff] alleges a single instance of a failure to use the correct map lines in a primary election, possibly affecting the

outcome of one race. The correct map was otherwise used. Such an allegation of isolated, inadvertent error is insufficient to state a Fourteenth Amendment one-person, one-vote claim."); *Vallejo v. City of Tucson*, No. CV 08-500 TUC DCB, 2009 WL 1835115, at *3 (D. Ariz. June 26, 2009) (dismissing plaintiff's Section 2 claim because the plaintiff "offers no facts to show that the Defendants committed anything more than an inadvertent error. The City's 'standard, practice, or procedure' was to follow state law. This includes allowing persons such as [plaintiff] with insufficient identification to vote using a provisional ballot. The Court finds the failure to issue [plaintiff] a provisional ballot was an isolated incident and in no way affected the standard, practice, or procedure of the election."); *Coleman v. Bd. of Educ.*, 990 F. Supp. 221, 227 (S.D.N.Y. 1997) ("[A] 'standard, practice, or procedure' must be more than a 'run-of-the-mill mistake' that one would expect in the normal course of an election") (quoting *Jones*, 57 F.3d at 1023).

At best, the errors alleged by plaintiffs and their fact witnesses in this case—to the extent errors occurred at all—were spread among different counties and affected voters of different races.

As to out-of-precinct voting, defendants established that voting out-of-precinct effectively disenfranchises a voter from voting in local contests and also increased the possibility of errors because of the way the CBE must review and count the races for which the voter was eligible. Under current law, voters will be informed to vote in their current precinct, which will result in full enfranchisement of that voter. Of course, voters still retain the option of voting out-of-precinct during the early voting period. In

addition, if voters move within the county, the changes to SL 2013-381 will pose no obstacle to voting.

Despite claims by plaintiffs that hundreds of voters were disenfranchised by the elimination of out-of-precinct voting, plaintiffs' witnesses admitted that they did not know how many voters they allegedly saw "turned away" later voted in the correct precinct. Moreover, testimony by plaintiffs' fact witnesses demonstrates that the effect of the elimination of out-of-precinct voting was to fully enfranchise voters who went to or were taken to the wrong precinct on Election Day.

Fact witness Susan Schaffer served as a poll observer for advocacy group Democracy North Carolina at a polling site at Precinct 54 in Durham on Election Day, November 4, 2014. (PX 796 at 14:22-15:13; 20:9-21:7) Democracy North Carolina was attempting to measure the impact of provisions of SL 2013-381 in the 2014 general election. (*Id*. at 6:14-20) Ms. Schaffer compiled a list of individuals who she contended were "turned away" and unable to vote at Precinct 54 on Election Day because they were not registered in that precinct. (*Id.* at 20:9-21:7) Ms. Schaffer admitted that she did not know how many of the voters listed on her report as not voting later voted at another polling place. (*Id.* at 58:6-12)

SBE Business Systems Analyst Brian Neesby conducted an analysis of the voters that Ms. Schaffer listed in her report as being "turned away" and was able to identify 52 of the 59 voters on Ms. Schaffer's list. (Tr. Day 13 at 206:24-208:18; DX 343) Among the 52 voters Mr. Neesby was able to positively identify, 49 of these voters—94.2%—later voted in their correct precinct. (*Id.*)

Fact witness Doris Burke was a poll worker at the Chavis Heights precinct in Wake County in 2014. Ms. Burke believes her precinct had to "send away" people who were trying to vote out-of-precinct on Election Day. (PX 808 at 16:7-20) However, she admitted that her precinct was able to provide these voters with directions to their correct precinct. (*Id*.) She testified that, despite being offered rides to their correct precinct, some voters chose not to go and admitted that she could not specifically identify any of the alleged people she believes were "sent away." (*Id*. at 30:5-22)

Durham County resident Gwendolyn Farrington testified that she was unable to vote during early voting because of "fatigue" she attributed to her work schedule. (Tr. Day 1 at 58:23-59:4) Ms. Farrington cast a provisional ballot out-of-precinct because she did not feel that she had time to make it to her assigned polling place when she got off of work on Election Day. (*Id*. at 59:5-60:3) However, Ms. Farrington acknowledged that part of the reason why she would not have time to vote at her precinct was because she "had" to pick up her "children," who are 18 and 22 years old respectively. (*Id*. at 59:25-60:7; 66:17-67:10) Ms. Farrington was assigned to a precinct based on her parents' address where she has not resided since 2010. (*Id*. at 60:20-61:5; 65:25-66:16) Ms. Farrington left her parents' address as her "residence," for purposes of voting, because she had "moved so much in the past" and it was "more stable" for a permanent address. (*Id*.)

On the day of the 2014 general election, fact witness Victoria Banks attempted to take two residents of the nursing home where she worked to vote at the Perquimans County Courthouse. (PX 778 at 11:23-12:15, 14:22-15:4, 16:12-21) After arriving at

the courthouse, Ms. Banks learned that one resident was assigned to vote at a school that she admitted was closer to the nursing home than the courthouse. (*Id.* at 16:5-11, 45:20-47:12) Ms. Banks had made no effort to determine where the resident was supposed to vote before taking him to the courthouse. (*Id.* at 35:3-17, 39:16-18, 40:25-41:25)

Ms. Banks drove the resident to the school where he was assigned to vote where he successfully voted. (*Id.* at 18:9-22, 19:20-21, 47:13-17) Had she not been required to drive the resident to his correct polling place on Election Day because of the elimination of out-of-precinct voting by SL 2013-381, the resident could have been disenfranchised with respect to some elections on his ballot because Ms. Banks failed to determine where he was supposed to vote before driving him to the polls.

As to preregistration, the evidence established that it was confusing to some voters (including the son of a State Senator) and some county elections officials. Moreover, it created the possibility of confusion where a preregistered 16-year-old would leave for college and then fail mail verification at his parent's address. Indeed, the evidence showed that preregistrants were more likely to fail mail verification than non-preregistrants.

5. Retrogression Analysis

The court finds that even applying a retrogression standard to plaintiffs' claims would not result in a violation of Section 2. Under the retrogression standard, the fact that a law has an alleged "disparate impact" is not sufficient to find a violation. *Florida v. United States*, 885 F. Supp. 2d 299, 312 (D.D.C. 2012) (three judge court). "[A] change is not retrogressive simply because it deals with a method of voting or

registration that minorities use more frequently, or even because it renders that voting method marginally more burdensome." *Id.* For an election change to be retrogressive it "must be sufficiently burdensome that it will likely cause some reasonable voters not to register to vote, not to go to the polls, or not be able to cast an effective ballot once they get to the polls." *Id.* None of plaintiffs' experts attempted to quantify what the turnout "would have been" in the absence of SL 2013-381. Rather, based upon African American turnout results, all of the challenged provisions of SL 2013-381 would be precleared if Section 5 remained in effect. Plaintiffs have not cited, and the court has not found, any authority in which the evidence showed that a voting change would result in increased turnout by a racial minority and the change was not precleared. Indeed, it would seem extremely unlikely that the United States Attorney General would even interpose an objection to any such law.

D. Plaintiffs' Intentional Discrimination Claims

Plaintiffs bring claims under Section 2, the Fourteenth Amendment, and the Fifteenth Amendment alleging that SL 2013-381 was enacted with a racially discriminatory purpose.[36] These claims are without merit.

There is no direct evidence of discrimination by the North Carolina General Assembly in enacting SL 2013-381, so plaintiffs therefore must attempt to prove discriminatory intent pursuant to the standards established in *Arlington Heights v.*

[36] Under Article III, a plaintiff must suffer an injury to have standing to pursue any federal claim. Thus, under both Section 2 and the United States Constitution, a finding of intentional discrimination is not enough to strike down an election law. There must also be a finding of discriminatory effect. *City of Mobile v. Bolden*, 446 U.S. 55 (1980).

Metropolitan Housing Development Corp., 429 U.S. 252 (1977). Plaintiffs' attempt to prove discriminatory intent based on circumstantial evidence fails.

Allegations of discriminatory intent based on evidence before the General Assembly showing that African Americans disproportionately participated in early voting, SDR, and out-of-precinct voting or that the General Assembly was aware of a report by the SBE showing that African Americans were disproportionately represented in the group of voters for whom matches could not be made by comparing the State's list of registered voters against DMV records, are insufficient.[37] Because of the requirements of the Fourteenth Amendment and the VRA, any change in election law is made with a consciousness of race. *See Bush v. Vera*, 517 U.S. 952, 958 (1996). In redistricting cases, the Supreme Court has held that a plaintiff's burden of proving intentional discrimination is "demanding." *Easley v. Cromartie*, 532 U.S. 234, 241 (2001). The fact that evidence regarding African American participation rates in early voting and SDR, and a report of unmatched voters produced by the SBE was submitted to the General Assembly cannot, by itself, raise an inference of intentional discrimination. *Bush*, 517 U.S. at 958. Indeed, it can just as easily raise an inference of intent to *avoid* discrimination.

Moreover, the "appropriate inquiry is not whether legislators were aware of [the challenged law's] racially discriminatory effect, but whether the law was passed *because of* that disparate impact." *Veasey*, 2015 WL 4645642 at *5 (citing *Pers. Adm'r of Mass.*

[37] As noted above, there is no evidence that members of the General Assembly actually reviewed the information provided by Senator Stein on the Senate Chamber dashboard. Even if such evidence existed, it would not prove intentional discrimination.

v. Feeney, 442 U.S. 256, 278-79 (1979)) (emphasis in original). In *Feeney*, female plaintiffs brought suits alleging the Massachusetts veterans' preference statute unconstitutionally discriminated against them because of their sex. The Court acknowledged that in enacting the statute, the legislature was aware that most veterans were men and that the adverse impact on non-veterans, who were likely disproportionately women, was foreseeable. However, while the foreseeability of the consequences of a neutral rule can be an inference of discriminatory intent, that inference is "a working tool, not a synonym for proof." *Feeney*, 442 U.S. at n. 25. But "when, [as in *Feeney*] the impact is essentially an unavoidable consequence of legislative policy that has in itself always been deemed legitimate, and . . . the statutory history and all of the available evidence affirmatively demonstrate[s] the opposite, the inference simply fails to ripen into proof." *Id.* Similarly, here the North Carolina legislature was returning to election practices that in themselves have "always been deemed legitimate," not only in North Carolina but also in a majority of other states. Moreover, all of the available evidence, including specifically the actual effect of the challenged law which was to increase minority turnout, demonstrates "the opposite" of the inference plaintiffs would like the Court to draw. *See Sylvia Dev. Corp. v. Calvert County Md.*, 48 F.3d 810 (4th Cir. 1995); *Brown v. Detzner*, 895 F. Supp.2d 1236 (M.D. Fla. 2012); *see also Palmer v. Thompson*, 403 U.S. 217, 228 (1971) (Black, J., concurring) ("To hold, as plaintiffs would have us do, that every public…service, once opened, constitutionally locks in the public sponsor so that it may not be dropped would plainly discourage the expansion and enlargement of needed services in the long run.")

Plaintiffs also argue that the General Assembly waited to enact SL 2013-381 until receiving notice of the decision in *Shelby Cnty., Ala. v. Holder*, 133 S. Ct. 2612 (2013). However, there is no actual evidence this is true. Plaintiffs grasp at straws when they take one hearsay statement in a news article attributed to one legislator to ascribe such intent for the entire legislature. *See Jones v. Lubbock*, 727 F.2d 364, 371 n.3 (5th Cir. 1984) (refusing to "judge intent from the statements [made by] a single member" of the legislature); *see also United States v. O'Brien*, 391 U.S. 367, 383–84 (1968); *Shell Oil Co. v. Iowa Dep't of Revenue*, 488 U.S. 19, 29 (1988) ("Shell, however, is unable to point to any other reference in the legislative history to corporate income taxes beyond this one remark by a vocal opponent of the OCSLA. This Court does not usually accord much weight to the statements of a bill's opponents. " '[T]he fears and doubts of the opposition are no authoritative guide to the construction of legislation.' " (citing *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 483 (1981)); *Roy v. Cnty. of Lexington, S.C.*, 141 F.3d 533, 539 (4th Cir. 1988) ("The remarks of individual legislators, even sponsors of legislation, however, are not regarded as a reliable measure of congressional intent."). Moreover, that one statement – about proceeding with the "full bill" is completely without context (other than the fact that it was allegedly the day after *Shelby County* was decided, although not even that is clear) and there is no competent evidence providing the context. In any event, assuming without deciding that the legislature waited to enact SL 2013-381 until after *Shelby County* was decided, it is not evidence of intentional discrimination. Plaintiffs cite no case in which intentional discrimination was found as a result of the timing of the enactment of a bill. In addition, plaintiffs' expert

Dr. Steven Lawson admitted that the burdens on a covered jurisdiction to obtain preclearance under Section 5 are far different from the standards applicable to claims under the Fourteenth Amendment or Section 2 of the VRA. (Tr. Day 6 at 38:11-41:14) Dr. Lawson further conceded that it would not be surprising for a legislature to take the legal standard in account when enacting a new law. (Tr. Day 6 at 41:15-25) Waiting on a decision by the United States Supreme Court which was obviously anticipated by lawyers and court observers of all types and which would have the effect of clarifying the states' obligations under the Voting Rights Act would be prudent, not indicative of discriminatory intent.

Next, any inference of intentional discrimination from the legislative process followed by the General Assembly is completely without merit. While plaintiffs may dislike or misunderstand the legislative process that resulted in the enactment of SL 2013-381, no witness has testified that the General Assembly violated its rules when enacting the law. (Tr. Day 7 at 193:11-23; Tr. Day 8 at 37:16-38:1) Moreover, the evidence overwhelmingly shows that the procedure followed by HB 589 is common in the legislature, even for important elections bills such as redistricting plans. During the 2003 special session of the General Assembly to enact redistricting plans, for instance, Representative Michaux gave an impassioned speech decrying the process followed for that legislation. (Tr. Day 8 at 45:11–52:22) Representative Glazier also testified that the 2003 bill was crafted in secret and pushed through the legislature in less than two days. (DX 371) The Senate version of HB 589 was in contrast available to the public more than a week, and received several hours of debate in the Senate Rules Committee and

two days of debate on the Senate floor with no restrictions on the debate. Moreover, unlike the 2003 redistricting plan, numerous amendments from the minority party were accepted for HB 589. Plaintiffs have not cited a single case where purposeful discrimination was found where the majority party in the legislature agreed to such a significant amendment.

Also unlike the 2003 redistricting plan, numerous provisions in the Senate version of the bill were already pending in other bills that had been filed that session. In 2003, most members had not seen the redistricting bill at all and were given only about one hour to review the entire bill before proceeding to debate it. Finally, numerous other elections bills have passed through the House or Senate Rules Committee and have been passed on a motion to concur rather than being submitted to a conference committee. In short, in enacting SL 2013-381, the evidence demonstrates that the legislature did not violate their procedural rules or otherwise depart from standard legislative practices.

Next, the testimony by plaintiffs' expert Dr. Lichtman of evidence allegedly showing discriminatory intent by the General Assembly is not credible. Dr. Lichtman's testimony regarding legislative intent is mainly based upon Dr. Lichtman's analysis of registered voters who could not be matched with records at the North Carolina Division of Motor Vehicles. Dr. Lichtman primarily relied upon his analysis that many voters that were matched by the SBE have a driver's license that is either expired or canceled, and that African Americans disproportionately hold expired or canceled driver's licenses. (PX 231 at 33-49) The version of HB 589 originally passed by the House allowed an exception for expired driver's licenses. This exception was eliminated by the

Senate and was not included in the enacted version of SL 2013-381. (Tr. Day 5 at 191:11-20) Dr. Lichtman has admitted that his report was not before the General Assembly when it enacted SL 2013-381 and that there is no evidence that the General Assembly was aware of evidence that African Americans disproportionately possessed expired or canceled driver's licenses. (Tr. Day 5 at 182:3–183:12)

Dr. Lichtman also infers discriminatory intent because the Senate eliminated provisions in the enacted bill that would have allowed certain student IDs or certain government IDs. (PX 231 at 50-53) Dr. Lichtman does not attempt to address concerns by legislators that unlike an ID issued by the DMV, student IDs were not uniform and could cause confusion for election officials. (Tr. Day 5 at 197:15–198:9) Nor does Dr. Lichtman point to any evidence before the General Assembly showing that African Americans disproportionately possessed student or government IDs.

Dr. Lichtman argues that discriminatory intent may be inferred because the General Assembly included U.S. passports as a form of acceptable photo. (PX 231 at 92; Tr. Day 5 at 114:23–116:23) Dr. Lichtman bases his argument on an analysis by him showing that whites disproportionately possess passports. Again, Dr. Lichtman points to no evidence that the General Assembly was aware of this alleged disparity.

Dr. Lichtman argues that discriminatory intent may be inferred because matching reports prepared by the SBE attempted to match registered voters with the DMV database for persons who have been issued a driver's license. The SBE report shows that it was unable to match registered black voters at a rate that was disproportionately higher than white voters. (Tr. Day 5 at 198:20, 203:11-14) Dr. Lichtman ignored that

the SBE described its April 2013 report as its most accurate report. Dr. Lichtman also ignored SBE's caution that its April 2013 no-match list was inflated because of clerical errors, errors by persons when filling out voter registration or DMV forms, and use of different names by persons completing registration and DMV forms. (Tr. Day 5 at 204:10–210:14) Dr. Lichtman also ignored that the SBE also cautioned that many unmatched registered voters had never voted in any North Carolina election, or had not voted in several recent federal elections, and therefore may no longer be qualified to vote in North Carolina. (*Id.* at 201, 210:15-24, 211:18–212:10)

Dr. Lichtman ignored that despite the problems involved in trying to match persons in two large databases, the SBE had reported to the General Assembly that it had been able to match 95% of all registered voters and 97% of those persons who had voted in the high turnout 2012 general election. (*Id.* at 205:24–206:7) Dr. Lichtman also ignored that persons who voted in 2012 represented only 2.2% of all registered voters, a significant figure in light of SBE's warning that its no-match list of registered voters was likely inflated. (*Id.* at 207:1–208:3)

In making his intent analysis, Dr. Lichtman purported to compare VIVA's requirement for photo ID cards versus the ID requirement in other states. (Tr. Day 5 at 185:1–185:5) Yet, Dr. Lichtman failed to compare North Carolina's decision to delay the enforcement of its photo ID requirement for almost 2.5 years with any rollout periods adopted in other states. (*Id.* at 191:21–192:14) Nor did Dr. Lichtman compare North Carolina's voter education campaign designed to advise voters of the photo ID

requirement for the 2016 general election against educational campaigns required by other states.

Dr. Lichtman admitted that the legislature did not violate any of its rules of procedure when it enacted SL 2013-381, and that he did not study how the legislative procedures were applied or followed for any other bills or pieces of legislation. (*Id.* at 215:21–218:8)

Dr. Lichtman cherry picked those features of SL 2013-381which would tend to support his advocacy that the statute was passed for a discriminatory purpose and ignored other features. For example, VIVA provides for an exception from its ID requirement for voters who vote curbside ballots. *See* G.S. 163-166.13(a)(1). Dr. Stewart testified that in the 2014 general election, 17,415 black voters cast curbside ballots – constituting a disproportionate share (46.6%) of such ballots. (Tr. Day 4 at 109, 110:11–111:24) During his testimony about an alleged decline in persons registering at social service agencies, Dr. Lichtman opined that because of an alleged decline in registration forms submitted to SBE by social services agencies, 4,567 more blacks and 870 more Hispanics, "net the increase in white registrations," would have registered in a three-year period. (Tr. Day 7 at 159-60) Yet, when asked why he did not calculate the racial composition of voters who voted curbside, Dr. Lichtman stated that it was irrelevant because the number of blacks who cast curbside ballots (17,415 just in 2014) was so "small." (Tr. Day 5 at 184:9 - 22)

While Dr. Lichtman compared selected aspects of the photo ID requirements established by VIVA to other states' ID laws, he did not compare any of the other

practices implemented by SL 2013-381 (such as early voting, registration requirements, or out-of-precinct voting) to similar practices followed in other states. (Tr. Day 5 at 185:6–186:25) Thus, while Dr. Lichtman argued that intent was evidenced by the "strict" nature of the photo ID requirement established by VIVA as compared to other states, he gave North Carolina no credit on the issue of intent as it related to practices adopted by North Carolina that represent the majority rule for all other states.

Dr. Lichtman argued that only race, and not politics, motivated the General Assembly when it enacted SL 2013-381. But Dr. Lichtman admitted that Democratic-controlled General Assemblies established early voting, out-of-precinct voting, SDR, and preregistration of 16-year-olds, and that a Republican-controlled General Assembly repealed these practices. (*Id.* at 194:7–195:5)

While Dr. Lichtman claimed that eliminating SDR was evidence of discriminatory intent, he did not consider evidence from the legislative record that SDR voters could not be verified before their votes were counted, that following the 2014 general election, blacks remain registered at a higher percentage of the voting age population than whites, and that this disparity in favor of black registration increased after the 2014 general election. (Tr. Day 4 at 119:21–120:15; PX 684)

Nor does the Court credit Dr. Burden's report as evidence of purposeful discrimination by the General Assembly.

The facts of the 2014 general election demonstrates that past disparities in usage rates by black voters of early voting, SDR, out-of-precinct voting, or preregistration did not result in SL 2013-381 having "a disproportionate impact on voting participation by

blacks and Latinos" in the 2014 general election as predicted by Dr. Burden. (Tr. Day 3 at 114:1–115:1)

Dr. Burden did not study the General Assembly's legislative rules, whether the General Assembly violated any of its rules, or how the General Assembly has handled prior legislation. (*Id.* at 128:11-17) Yet he admitted that it is not unprecedented for a legislature to enact a law even within a two-day time frame if the legislature is controlled by one party. (*Id.* at 128:25–129:3)

While Dr. Burden gave testimony on the racial percentages of North Carolina voters who allegedly possess an expired driver's license, he did not analyze the racial percentages of persons who utilize curbside voting – a group that is exempt from VIVA's photo ID requirement. (*Id.* at 129:4–130:3)

Dr. Burden cited no authority to support his opinion that "minority voters are warier of intersecting with the election system." (*Id.* at 130:7-17)

He also admitted that other states, including Wisconsin, have larger disparities in income and educational attainment than North Carolina. (*Id.* at 130:19–131:16; *see also* DX 268 at 48-50, ¶¶ 100-108)

Dr. Burden admits that the highest number of black representatives to the General Assembly have been elected under plans enacted in 2011 by the same Republican-controlled General Assembly that enacted SL 2013-381 in 2013, and that African Americans have achieved parity in the number of elected black senators and are near parity in the number of elected black house members. (Tr. Day 3 at 144:8–146:9)

Dr. Burden admits that he has never been responsible for investigating claims of voter fraud, that voter fraud has occurred, that requiring a photo ID for purchasing alcohol "probably" helps in enforcing the law, and that North Carolina's decision to require photo ID might therefore deter persons from committing voter fraud. (*Id.* at 122:9–123:7, 133:23–134:6)

In sum, Dr. Burden's testimony provides no basis to support a finding that the General Assembly engaged in purposeful discrimination when it enacted SL 2013-381.

Finally, the testimony of plaintiffs' expert Morgan Kousser does not support a finding of purposeful discrimination. In 2014, Dr. Kousser predicted that black turnout would be suppressed if any of the provisions of SL 2013-381 were implemented. (Tr. Day 2 at 85:5-86:11) Dr. Kousser admits that he relied heavily on newspaper reports for his expert report (*Id.* at 76:20-77:2) and that he is an advocate for the practices that were eliminated by SL 2013-381. (*Id.* at 78:3-10) Dr. Kousser also admits that changes in election laws from the 1990s to the current decade could be attributable to many factors, including policy differences. (*Id.* at 82:10-18) Dr. Kousser has no knowledge of the process for verifying registration applications or whether there were problems verifying SDR registrations at a higher rate than those who registered 25 days before the election. (*Id.* at 88:5-89:24)

Furthermore, Dr. Kousser admits that he cannot point to a single legislator that had discriminatory intent, and he acknowledges that he did not find any "smoking guns." (*Id.* at 83:13-20) Dr. Kousser also admits that no Democratic legislator raised a point of order during the legislative process, that there is no evidence that either the Senate or the

House violated their rules of procedure, and that amendments from the minority party were accepted. (*Id.* at 94:14-95:23) Dr. Kousser did not do any sort of cross-state analysis to determine the effect of turnout on practices like early voting or same-day registration or out-of-precinct voting. (*Id.* at 86:12-16, 89:12-24) And as far as Dr. Kousser knows, North Carolina had the longest rollout period and the longest educational campaign for photo ID than any of the other states. (*Id.* 92:17-93:25)

E. Twenty-Sixth Amendment Claim

The Twenty-Sixth Amendment to the United States Constitution states very simply:

Section 1. The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age.

Section 2. The Congress shall have the power to enforce this article by appropriate legislation.

U.S. Const., Amend. XXVI.

Plaintiffs' Twenty-Sixth Amendment claims ignore one basic fact: nothing in SL 2013-381 can reasonably be construed as denying citizens who are at least 18 years of age, or who will be 18 years of age at the time of the next election, from registering to vote and from voting in that election. As a matter of law, the clear language of SL 2013-381 establishes that the law does not deprive any 18-year-old citizen of the right to vote. Moreover, no one, including the plaintiffs, has argued that the election practices in place prior to the enactment of SDR, out-of-precinct voting, 17-day early voting, and pre-

registration violated the Twenty-Sixth Amendment. In fact, Intervenor-Plaintiff Josue Berduo, who has participated in efforts to register student voters in the past, admitted at trial that nothing in SL 2013-381 would prohibit him from registering people to vote who will be 18 by the time of the next general election. (Tr. Day 6 at 91:14-17)

Moreover, a majority of the states did not have these practices. The enactment of SL 2013-381 simply returned North Carolina to practices that formerly existed, represent the majority rule in states, and have never been considered to violate the Twenty-Sixth Amendment. The claims under the Twenty-Sixth Amendment are baseless. *See Gaunt v. Brown*, 341 F. Supp. 1187 (S.D. Ohio 1972) (three-judge court) (holding that statute preventing 17-year-old plaintiff who would be 18-years-old at the time of the general election from voting in primary election did not deny plaintiff due process or equal protection and finding that the Twenty-Sixth Amendment "simply bans age qualifications *above* 18") (emphasis added), *aff'd* 409 U.S. 809 (1972).

F. Plaintiffs' claims regarding poll observers and the authority of the SBE to extend polling hours.

Under SL 2013-381, each political party is now able to appoint ten additional observers at large who may observe voting in any precinct within their county. SL 2013-391 Part 11, N.C. Gen. Stat. § 163-45. Also, under SL 2013-381, the authority to extend polling hours on Election Day has been transferred from county board of election to the SBE. SL 2013-381 Part 33, N.C. Gen. Stat. § 163-166.01. Plaintiffs have offered no evidence showing how these changes impose unreasonable burdens on voters in violation of the Fourteenth Amendment, deprive minorities of equal opportunity in violation of

Section 2, or constitute purposeful discrimination in violation of the Fourteenth and Fifteenth Amendments. The only evidence plaintiffs offered with respect to at-large poll observers demonstrates that this change is beneficial. Plaintiff Armenta Eaton, who served as a roving poll observer for the Democratic Party for six days during the 2014 general election, admitted that the ability to serve as a roving poll observer helped her "move faster" amongst polling sites and observe voting at more sites because, under the old law, "you'd have to be in one poll for four hours or leave and not return." (PX 783 at 32:17-18, 33:1-9, 34:14-21, 35:1-18) Accordingly, these claims are dismissed.

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This the 17th day of August, 2015.

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General Information

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