IN THE

United States Court of Appeals for the Fourth Circuit

No. 16-1468 (L)

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

Plaintiffs-Appellants

and

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

Plaintiffs

v.

PATRICK L. MCCRORY, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF NORTH CAROLINA; KIM WESTBROOK STRACH, IN HER OFFICIAL CAPACITY AS A MEMBER OF THE STATE BOARD OF ELECTIONS; JOSHUA B. HOWARD, IN HIS OFFICIAL CAPACITY AS A MEMBER OF THE STATE BOARD OF ELECTIONS; RHONDA K. AMOROSO, IN HER OFFICIAL CAPACITY AS A MEMBER OF THE STATE BOARD OF ELECTIONS; JOSHUA D. MALCOLM, IN HIS OFFICIAL CAPACITY AS A MEMBER OF THE STATE BOARD OF ELECTIONS; PAUL J. FOLEY, IN HIS OFFICIAL CAPACITY AS A MEMBER OF THE STATE BOARD OF ELECTIONS; MAJA KRICKER, IN HER OFFICIAL CAPACITY AS A MEMBER OF THE STATE BOARD OF ELECTIONS; JAMES BAKER, IN HIS OFFICIAL CAPACITY AS A MEMBER OF THE NORTH CAROLINA STATE BOARD OF ELECTIONS,

Defendants-Appellees

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

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Intervenors/Plaintiffs-Appellants

and

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

Intervenors/Plaintiffs

v.

STATE OF NORTH CAROLINA; JOSHUA B. HOWARD, IN HIS OFFICIAL CAPACITY AS A MEMBER OF THE STATE BOARD OF ELECTIONS; RHONDA K. AMOROSO, IN HER OFFICIAL CAPACITY AS A MEMBER OF THE STATE BOARD OF ELECTIONS; JOSHUA

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No. 16-1474

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Plaintiffs-Appellants

v.

STATE OF NORTH CAROLINA; JOSHUA B. HOWARD, IN HIS OFFICIAL CAPACITY AS A MEMBER OF THE STATE BOARD OF ELECTIONS; RHONDA K. AMOROSO, IN HER OFFICIAL CAPACITY AS A MEMBER OF THE STATE BOARD OF ELECTIONS; JOSHUA D. MALCOLM, IN HIS OFFICIAL CAPACITY AS A MEMBER OF THE STATE BOARD OF ELECTIONS; PAUL J. FOLEY, IN HIS OFFICIAL CAPACITY AS A MEMBER OF THE STATE BOARD OF ELECTIONS; MAJA KRICKER, IN HER OFFICIAL CAPACITY AS A MEMBER OF THE STATE BOARD OF ELECTIONS; PATRICK L. MCCRORY, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF NORTH CAROLINA

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INTRODUCTION

The undisputed evidence before the District Court confirmed that the election practices (including same-day registration ("SDR"), out-of-precinct ("OOP") voting, early voting, and pre-registration) that Defendants cast as mere "accommodations" or "conveniences" were in fact critical mechanisms that were designed to—and did—enable and increase voter participation amongst African Americans and young voters ***in North Carolina***. Likewise, the District Court observed that, notwithstanding disagreements over the precise number of North Carolina citizens lacking a qualifying Photo ID under HB589, African Americans were much more likely to be among this group than whites.

Unable to dispute the case-critical evidence, Defendants' opposition brief resorts to many of the same errors as the District Court's opinion—improperly comparing North Carolina's elections laws to other states; brushing off the cumulative burdens imposed by HB589's discriminatory provisions; minimizing the effect of several challenged provisions as "only" affecting a few thousand voters; inventing new legal requirements for linking the discriminatory impact of HB589 to North Carolina's history of racial discrimination; and

articulating implausible or *post hoc* justifications for the legislature's actions. This Court already rejected many of these arguments in *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 235 (4th Cir. 2014) ("*LWVNC*"), and should reject the additional arguments as well. In the end, the United States Constitution and the Voting Rights Act safeguard the unabridged right to vote. These guarantees demand reversal of the District Court's judgment.

ARGUMENT

I. Defendants Seek To Apply The Wrong Standard Of Review.

The District Court's findings of fact do not shield its decision from appellate review. As an initial matter, this Court reviews questions of ***law***—including whether the District Court applied the proper legal standards in determining the existence of a Section 2 violation—*de novo*. *See, e.g.*, *Church v. Att'y Gen. of Va.*, 125 F.3d 210, 215 n.5 (4th Cir. 1997); *Rodriguez v. Bexar Cty., Tex.*, 385 F.3d 853, 860 (5th Cir. 2004). Indeed, as the Supreme Court instructed in *Thornburg v. Gingles*, 478 U.S. 30 (1986), a district court's factual findings "do[] not inhibit an appellate court's power to correct errors of law, including those that may infect a so-called mixed finding of law and fact, or a

finding of fact that is predicated on a misunderstanding of the governing rule of law." *Id.* at 79.

Further, this Court may conclude that the District Court's factual findings are clearly erroneous "when, although there is evidence to support it, the reviewing court on the ***entire evidence*** is left with the definite and firm conviction that a mistake has been committed." *LWVNC*, 769 F.3d at 235 (emphasis added). A review of the entire record confirms that several of the District Court's findings were clearly erroneous.

II. Defendants Misapply The *LWVNC* Section 2 Standard.

Nothing in Defendants' brief challenges or undermines the case-dispositive facts pertinent to either prong of the *LWVNC* test. Defendants instead repeatedly misapply the relevant legal standard or seek to impose hurdles found nowhere in the plain language of the statute or this Court's Section 2 jurisprudence.

A. Defendants Improperly Rely On Voting Practices In Other States.

Defendants' repeated reliance—in nearly every subsection of its brief, *see, e.g.*, Defs. Br. 1, 6, 8, 12, 14, 25, 34, 45, 50, 55—on the electoral practices of other states commits the same sin as the District

Court's opinion: it ignores this Court's clear direction that Section 2 mandates "an intensely local appraisal." *LWVNC,* 769 F.3d at 243. "The focus [in a Section 2 claim] is on the internal processes of a single State . . . and the opportunities enjoyed by that particular electorate." *Ohio State Conference of NAACP v. Husted*, 768 F.3d 524, 559 (6th Cir. 2014) ("*Husted*"), *vacated on other grounds*, 2014 WL 10384647 (6th Cir. Oct. 1, 2014).[1] Thus, it is ***North Carolina's***—and ***only*** North Carolina's—practices that are "centrally relevant" and "a critical piece of the totality-of-the-circumstances analysis Section 2 requires." *LWVNC*, 769 F.3d at 242; *see Husted,* 768 F.3d at 560 ("There is no reason to think our decision here compels any conclusion about the [] voting practices in other states, which do not necessarily share Ohio's particular circumstances."). This is especially true here where many of the challenged practices, such as SDR, have been implemented to

[1] Defendants wrongly proclaim the "significan[ce]" of the vacating of *Husted*. This Court's *LWVNC* decision post-dated the Sixth Circuit's vacating of *Husted*—yet this Court nonetheless chose to apply a similar Section 2 standard. And even after *Husted* was vacated, courts continue to apply its standard. *See, e.g.*, *The Ohio Organizing Collaborative v. Husted*, No. 2:15-cv-01802-MHW-NMK (S.D. Ohio May 24, 2016), ECF No. 117 ("*OOC*, Slip Op."); *Ne. Ohio Coal. for the Homeless v. Husted*, No. 2:06-CV-896, 2016 WL 3166251, at *48 & n.2, *50-53 (S.D. Ohio June 7, 2016) ("*NEOCH*").

address and molded to specific characteristics of the North Carolina electorate. The District Court's (and Defendants') "failure to understand the local nature of Section 2 constitute[s] grave error." *LWVNC*, 769 F.3d at 243.

Moreover, Defendants' (improper) comparisons to other states are themselves erroneous. Defendants repeatedly conflate North Carolina's ***elimination*** of voting and registration mechanisms in place for multiple election cycles with states that never had these practices in the first place. But eliminating provisions on which voters have come to rely creates a burden not present in states that never had those mechanisms. *See, e.g.*, JA1097; JA19396-97; JA19624; JA19781; *see also Florida v. United States*, 885 F. Supp. 2d 299, 332 (D.D.C. 2012) ("it is not methodologically sound to assume that there will . . . be little or no impact on overall turnout when voters (who have habituated to early in-person voting) face a ***loss*** of previously available voting days") (emphasis added).

B. Prong One: The Challenged Provisions Impose A Discriminatory Burden.

1. The Evidence Of Burden Exceeds Disparate Use.

Defendants do not, and cannot, dispute the evidence regarding African-American voters' disparate use of the affected voting and registration mechanisms. As set forth in the District Court's opinion:

- SDR: "[I]t is indisputable that African American voters disproportionately used SDR when it was available . . . ." JA24647 (Op. 163).

- OOP Voting: "African American voters were disproportionately more likely than whites to cast an OOP provisional ballot in the elections [before HB589]." JA24663 (Op. 179).

- Early Voting: In 2008 and 2012, over 70% of black voters voted early compared to just over 50% of white voters, and African Americans disproportionately used the first seven days of early voting. JA18042 n.64; JA24616 (Op. 132).

- Photo ID. "[W]hatever the true number of individuals without qualifying IDs, African Americans are more likely to be among this group than whites." JA24585-86 (Op. 101-02).

- Pre-registration: In 2012, 30% of pre-registrants were African American, compared to 22% of all registered voters. JA24669-70 (Op. 185-86).

Unable to refute these facts, Defendants misrepresent Plaintiffs' contentions—and more importantly, the relevant evidence—in arguing that a Section 2 claim cannot be based on "disparate use alone." Defs. Br. 38. But Plaintiffs have consistently contended not only that African

Americans disproportionately used these mechanisms, but also that African Americans will be disproportionately burdened by their elimination or reduction. Evidence of the real-life burdens on voters is set forth extensively in Plaintiffs' opening brief (as well the United States' briefs). *See* Opening Br. 24-36. Indeed, in addition to identifying the burdens imposed by each of the challenged provisions independently, Plaintiffs highlighted HB589's cumulative burden. *See* Opening Br. 34-36. Defendants (like the court below) have no answer to the Plaintiffs' cumulative burden argument. *See infra* § IV.A. Plaintiffs' identification of these burdens—which fall disproportionately on African Americans—goes far beyond evidence of mere disparate use.

2. The Challenged Provisions Affect Thousands Of Voters.

Defendants improperly minimize HB589's burden by arguing that certain provisions do not affect a large number of voters. For instance, Defendants attempt to minimize the effect of eliminating OOP voting by arguing that over 99% of African Americans have not voted OOP in

recent elections, and that "only .33%" of African Americans voted OOP in 2012. Defs. Br. 41.[2]

This misses the point: *First*, Defendants concede that African Americans voted OOP (and, thus, are more likely to be burdened by its repeal) disproportionately to their white counterparts. *See* Defs. Br. 13. *Second,* the .33% of African-American voters that Defendants would cast aside translates to ***thousands*** of individuals who would have their ballots rejected under HB589. This Court has already concluded that such disenfranchisement violates Section 2. *See LWVNC*, 769 F.3d at 244.[3] At bottom, Defendants' arguments challenge VRA's results test, not that they dispute that African Americans and Latinos are burdened by HB589.[4]

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[2] It is undisputed that other provisions—including SDR and early voting—affect tens of thousands of voters.

[3] For the same reason, Defendants' recitation of the fact that "over 94% of all registered African American voters" can be matched to Photo ID, Defs. Br. 18, is not helpful; it concedes that 6% of registered African-American voters—literally tens of thousands of voters—cannot be matched (to say nothing of citizens who are not yet registered to vote).

[4] Plaintiffs' Section 2 claims regarding Latino voters should have succeeded as well. While North Carolina has fewer Latinos than African Americans, Plaintiffs proved all the elements of a Section 2 claim: Latinos use SDR, OOP voting, and pre-registration more heavily than whites, and their registration and turnout rates lag far behind

C. Prong Two: The Discriminatory Burdens Are Linked To Social And Historical Conditions.

Nowhere in their opposition do Defendants dispute the case-critical evidence regarding the disparate social and historical conditions facing North Carolina's African-American population—evidence similar to the "unchallenged statistics" that this Court already found in *LWVNC*. *See* 769 F.3d at 246 (addressing poverty, unemployment, education, vehicle access, and home ownership).

Instead, Defendants improperly attempt to avoid this undisputed evidence—and its link to the disproportionate impact of the challenged provisions—by distorting the relevant legal standard and ignoring the well-settled Senate Factors.

1. Defendants Apply The Wrong Legal Standard For Linkage.

In an attempt to evade the clear linkage between the disproportionate impact of the challenged provisions and North Carolina's social and historical conditions, Defendants seek to impose

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those of whites. JA1100, JA4611-12, JA3488, JA3565, JA3571-72, JA19418. Plaintiffs also proved a history of discrimination against Latinos, and that Latinos suffer socioeconomic disadvantages that impact their ability to register and vote. JA1212, JA1239, JA3492, JA3503, JA3534, JA3618.

additional hurdles on Plaintiffs that have no basis in the law. For one, Defendants—like the District Court—ignore this Court's direction that the disparate impact of an election law need only be linked "***in part***" to social and historical conditions. *LWVNC*, 769 F.3d at 240. This is important: Plaintiffs need not show that the disparate impact is ***solely*** attributable to those conditions. *Id.*; *see also Farrakhan v. Washington*, 338 F.3d 1009, 1018 (9th Cir. 2003) ("[D]emanding 'by itself' causation would defeat the interactive and contextual totality of the circumstances analysis repeatedly applied by our sister circuits in Section 2 cases[.]"). Accordingly, the fact that factors other than North Carolina's history of discrimination—including campaign strategies—***also*** encouraged the use of the affected voting and registration mechanisms is legally irrelevant.[5] This makes sense given Congress's

[5] The relevant question is not whether a particular candidate encouraged African Americans to use the affected provisions, but rather whether African Americans responded to such encouragement due to social and historical conditions. On that question, the answer is clearly yes. Based on undisputed evidence, African Americans ***in North Carolina*** would not, for instance, have responded in the same manner to encouragement to use mail-in absentee voting in light of resource constraints, and enhanced pride and confidence in in-person voting. Efforts by outside groups to encourage SDR and early voting were successful precisely because they addressed African-American voters' needs stemming from the State's history.

intention to give the Voting Rights Act "the broadest possible scope." *Allen v. State Bd. of Elections*, 393 U.S. 544, 567 (1969).

Moreover, Defendants improperly call upon Plaintiffs to show that the specific individuals impacted by HB589 are the same individuals burdened by discrimination. *See, e.g.*, Defs. Br. 3. But Plaintiffs are not required to prove that every minority voter suffering from socioeconomic disparities is entirely blocked from voting by HB589. As Plaintiffs explained in their opening brief, because Section 2 bars practices that both deny ***and abridge*** the right to vote, the fact that some voters are able to cast a ballot notwithstanding social and historical conditions does not mean burdens on the franchise are legally permissible. *See* Opening Br. 16-19.[6]

2. Plaintiffs Established The Requisite Link.

Applying the proper standard, there is little doubt that Plaintiffs satisfied the second prong of *LWVNC*. Contrary to Defendants' assertion that Plaintiffs "merely juxtapos[ed] disparate use statistics with evidence of socioeconomic disparities," Defs. Br. 40, 43, even the

[6] Plaintiffs need not show that every individual impacted by HB589 faces insurmountable hurdles caused (at least in part) by social and historical conditions. Defendants fails to identify any legal support for such an untenable requirement, and indeed none exists.

District Court observed that "African Americans experience socioeconomic factors that may hinder their political participation generally," and these "socioeconomic disparities experienced by African Americans can be linked to the State's disgraceful history of discrimination." JA24727 (Op. 243).

A summary of the undeniable links between North Carolina's history of discrimination and the burdens imposed by each of the challenged provisions bears repeating.[7] Indeed, this Court has already found that "the disproportionate impact of eliminating [SDR] and [OOP] voting are ***clearly linked*** to relevant social and historical conditions." *LWVNC*, 769 F.3d at 245 (emphasis added). The evidence—ignored by Defendants—confirms the requisite link for each challenged provision:

SDR. Absent SDR, African Americans, who have disproportionately lower levels of education, income, and access to transportation, have more difficulty navigating the otherwise separate registration process without the assistance of pollworkers who can help reduce registration errors. *See, e.g.*, JA7750; JA22211-12. For example, the District Court confirmed that it is "easy to see a connection between

[7] *See also generally* UNC Center of Civil Rights Amicus Br.; Stacey Stitt, et al. Amicus Br.

certain reasons for ending up in the incomplete registration queue and literacy." *See* JA24828 (Op. 344).

OOP Voting. African Americans—who have less access to economic resources and transportation, and are more likely to move—find it more difficult to identify and travel to their assigned precinct, and thus disproportionately use OOP voting. *See* JA19019-22; JA19308-10; JA24849 (Op. 365).

Early Voting. African Americans and Latinos have more difficulty voting during a compressed timeframe due to inflexible work schedules, fewer resources, and less access to transportation. JA19019-22; JA19296-310.

Photo ID. Given disparities in income, poverty, and vehicle access, African Americans are twice as likely as whites to lack qualifying ID. Additionally, in light of less flexible work and family schedules, and lesser access to education, transportation, and underlying required documents, the burden of obtaining such ID falls disproportionately on these individuals, as does the burden of navigating the reasonable impediment provisional ballot. *See* Opening Br. 31-33. Furthermore, Defendants cannot hide behind South

Carolina's use of reasonable impediment declarations to alleviate the burdens of North Carolina's Photo ID requirement. Defs. Br. 23. For one, this again violates Section 2's mandate to perform a "local appraisal." *See supra* § II.A. More importantly, South Carolina makes qualifying Photo IDs more accessible to its citizens, including making them available at any board of elections office and with less onerous requirements than North Carolina. *See South Carolina v. United States*, 898 F. Supp. 2d 30 (D.D.C. 2012). This explains why South Carolina issued more than 31,000 "no-fee" voter IDs in the first two years after such IDs were available, compared to just 2,139 issued by North Carolina in its first two years. JA24812 (Op. 328). Defendants' response ignores these undisputed facts.[8]

Pre-Registration. Like SDR, pre-registration helps African Americans overcome educational and transportation barriers to registration. *See* JA3505; JA19881-82; JA20797-98; JA19113-14.

[8] Although the timing of the District Court's trial regarding the Photo ID requirement preceded the March 2016 primary first deploying the requirement, evidence from the March primary confirms that the reasonable impediment process is riddled with problems. *See* Democracy NC Amicus Br. 8-27.

3. The Senate Factors Confirm The Requisite Linkage.

The linkage between the impact of the challenged provisions and North Carolina's social and historical conditions is confirmed by the Senate Factors, which the Supreme Court and other courts have recognized are "typically relevant" to a Section 2 claim. *See, e.g.*, *LULAC v. Perry*, 548 U.S. 399, 426 (2006); *Gingles*, 478 U.S. at 44-45. Indeed, this Court confirmed in *LWVNC* that "[t]hese factors may shed light on whether the two elements of a Section 2 claim are met." 769 F.3d at 240.

Defendants nonetheless question the applicability of these factors and largely ignore Plaintiffs' evidence regarding the Senate Factors, choosing only to contest whether the State's policy underlying changes in its voting practices was "tenuous." But the District Court already agreed that Factors One (history of official discrimination), Five (continuing effects of discrimination in education, employment, and health), Two (racially polarized voting), and Seven (lack of minority electoral success) favor Plaintiffs. And, the District Court's findings with regard to several other factors were clearly erroneous. *See* Opening Br. 37-41.

And with regard to tenuousness, Defendants' explanations—generated largely during this litigation—fall short with regard to each of the challenged provisions:

SDR. This Court has already rejected Defendants' proffered rationale for eliminating SDR: to prevent counting votes by registrants who had not yet "passed" a mail verification program. *See LWVNC*, 769 F.3d at 244. It remains unpersuasive for several reasons:

- *First*, Defendants do not identify any evidence to "suggest[] that any of [the 'unverified' SDR votes] were fraudulently or otherwise improperly cast." *Id.* at 246.

- *Second*, as this Court noted in *LWVNC*, the House leadership asked for information on mail-verification rates only ***after*** the Senate's passage of HB589 in a last-minute effort to identify a plausible *post hoc* rationale. *See id.* at 232.

- *Third*, Defendants' purported concern with mail verification for SDR voters is inconsistent with its continued allowance of thousands of unverified ballots in other, non-SDR circumstances (including for voters who register too close to the election or who vote provisionally because of an unreported move). Indeed, the District Court found that in the 2012 election, North Carolina counted almost an equal number of votes by same-day registrants (2,361) prior to mail verification as non-same-day registrants (2,306)—and unlike SDR voters, non-SDR voters cast irretrievable ballots. JA24778 (Op. 295.)

- *Finally*, even if securing mail verification prior to counting a ballot was a legitimate goal, the General Assembly was aware of several obvious less discriminatory alternatives to eliminating SDR altogether. *See, e.g.*, JA96-110, JA5052-53.

> When an alternative means would have achieved the stated goal with less discriminatory impact, the means chosen is tenuous. *Husted*, 768 F.3d at 556-57.

OOP. Legislators offered no actual reason for eliminating OOP voting. The SBOE's claim that it was justified due to administrative burden is both unacceptable *post hoc* rationalization and is not even supported by the record. The ***only*** evidence offered on this point was SBOE Director Kim Strach's description of the process of counting OOP ballots—she never testified that OOP voting resulted in long lines or created meaningful burdens on CBOEs. *See LWVNC*, 769 F.3d at 244 (warning against "rationaliz[ing] election administration changes that disproportionately affected minority voters on the pretext of procedural inertia and under-resourcing"). Moreover, it is difficult to see how OOP ballots cause an administrative headache where, according to the District Court, they "constitute only a fraction of a sliver of the total ballots cast." JA24663 (Op. 179).

Early Voting. Proponents of eliminating seven days of early voting claimed it would promote uniformity in early voting schedules, and the District Court credited the General Assembly's purported motive to correct "political gamesmanship." JA24761 (Op. 277). This

was clearly erroneous. For one, the goal of achieving greater uniformity in no way required the elimination of seven days of early voting. JA1222-23; JA3749-50. In any event, by freezing in place existing discrepancies in aggregate early voting hours across counties as well as allowing partisan-controlled CBOEs to obtain waivers of the hours requirement and alone determine the distribution of early-voting locations, HB589 undermines both of its purported rationales. JA2322-23.

Photo ID. Defendants failed to produce any evidence of voter fraud or that requiring Photo ID increases voter confidence. Even the District Court accepted Plaintiffs' testimony that voter fraud is "statistically nonexistent." *See* JA24751 (Op. 267). And the General Assembly's decision to carve out an exception to the Photo ID requirement for mail-in absentee ballots—a mechanism used disproportionately by whites—is inconsistent with the stated rationale of combatting voter fraud. *See* JA3743-44.

Pre-registration. Defendants suggest that eliminating pre-registration is justified because it eliminates voter confusion—an explanation that even the District Court refused to credit and which is

inconsistent with Director Strach's testimony regarding the "complicated" nature of the *post*-HB589 registration regime for 17-year olds. JA24801-02 (Op. 317-18); JA20636-38**.**

III. Defendants Fail To Refute The General Assembly's Racially Discriminatory Intent.

The evidence in the record below, viewed in its entirety, compels the conclusion that HB589 was enacted with a racially discriminatory purpose. Contrary to Defendants' representations, Plaintiffs' intentional discrimination claim does not rest on evidence of disproportionate usage alone; rather, Plaintiffs have always urged this Court to analyze all of the *Arlington Heights* factors. Opening Br. 43-51. The disproportionate impact of the law is just one of these factors—albeit one that clearly weighs heavily in Plaintiffs' favor. When viewed together, all of the *Arlington Heights* factors point to discrimination on the basis of race as a primary motivation behind the bill.[9]

Defendants concede that the legislature had before it evidence of racially-disparate effect, yet try to diminish the significance of that evidence by emphasizing that an opposing Senator did not introduce

[9] Defendants do not contend that HB836's adoption cures the original discriminatory intent motivating HB589. JA23585-90.

such evidence with respect to SDR and early voting until the final legislative debates, suggesting that the General Assembly eliminated SDR and reduced the number of early voting days "despite the evidence of disparate use . . . by minorities, not because of that disparate use." Defs. Br. 46. But the record is clear that the State had data on racial disparate usage of each of the provisions prior to enactment. *See* JA24895 (Op. 411). Moreover, to the extent the timing of the introduction of such data into the legislative record is relevant, that factor weighs ***against*** the State with respect to Photo ID and OOP voting—where the disparate racial effects of those provisions had been in the legislative record for ***years***. JA1538-40; JA2633-40.

Furthermore, the timing of HB589 on the heels of *Shelby County v. Holder*, 133 S. Ct. 2612 (2013), confirms the State well knew the law's likely impact on minority voters, and Defendants' responses on this point strain credibility. *See LWVNC*, 769 F.3d at 242-43. Defendants' assertion that it was "reasonable to delay enactment of HB589 until *Shelby* clarified the General Assembly's remaining obligations, if any, under Section 5," Defs. Br. 49, misrepresents the record: the General Assembly did not sit on HB589 until after the *Shelby* ruling simply to

avoid the administrative hassle of having to submit it for preclearance; rather, it dramatically ***expanded*** the scope of the bill—in Defendants' words, "scaling back [] accommodations to voters," Defs. Br. 35—in direct response to the ruling. Every "accommodation" scaled back was disproportionately used by minority voters. JA24895 (Op. 411).

Defendants rely heavily on the vacated Fifth Circuit opinion in *Veasey v. Abbott*, which remanded a finding that Texas's voter ID law was enacted with an intent to discriminate. 976 F.3d 487, 502-04 (5th Cir. 2015). Even if this Court found that analysis persuasive, Plaintiffs have proven such intent here. The Fifth Circuit instructed on remand that the district court should not rely heavily on evidence of Texas's history of discrimination and statements of individual legislators. *Id.* at 503-04. Here, there is more than a mere history of discrimination; there is ample ***modern day*** evidence suggesting that HB589 was modified to increase its detrimental effect on voters of color. JA1179-82; JA1307-17; JA3755-57. Likewise, while the statements of legislators opposing HB589 certainly provide strong evidence of pretext, *see, e.g.*, JA20399-401, JA17186-90, they are not necessary to reach a conclusion that racial intent was at play.

Defendants' argument relating to procedural and substantive departures from the legislative rules sets up a straw man. *Arlington Heights* does not require that a legislative body violate its own rules to give rise to an inference of discriminatory intent. Rather, it provides that "[d]epartures from the normal procedural sequence . . . might afford evidence that improper purposes are playing a role." *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 267 (1977). Whether or not it violated the General Assembly's rules, the introduction of such substantial changes to HB589—affecting almost every aspect of how elections are conducted—just days before the end of session, is not the norm, JA17183-86, JA20457-66, and strongly suggests improper motivations.

Moreover, a large number of the justifications for the challenged provisions were never articulated by any proponent legislator, but instead developed by counsel during this litigation. Beyond the fact that such *post hoc* rationalizations are not probative of intent under *Arlington Heights*, *see, e.g.*, *Barber v. Thomas*, 560 U.S. 474, 485-86 (2010), the dearth of legislators speaking to their motivations is itself grounds for concern regarding improper intent. Indeed, Defendants'

strategic use of legislative privilege to both avoid producing evidence relating to the last *Arlington Heights* factor—legislative history including contemporaneous statements by legislators, 429 U.S. at 269—and then fault Plaintiffs for lacking "smoking gun" evidence of racially discriminatory intent, *see* Defs. Br. 4; JA24892-93 (Op. 408-09), is flatly improper.[10] It is well settled that "[a] party may not use a privilege . . . as a shield during discovery and then hammer it into a sword for use at the trial." *United States v. Duke Energy Corp.*, 208 F.R.D. 553, 558 (M.D.N.C. 2002). Because privilege assertions interfere with judicial truth-seeking functions, courts prevent litigants from using them as "a tool for selective disclosure"—where the party asserting the privilege selectively offers only those facts "helpful to his cause" and then asserts privilege to avoid its opponent testing the truthfulness of the party's selective storytelling. *Computer Network Corp. v. Spohler*, 95 F.R.D. 500, 502 (D.D.C. 1982). Here, Defendants have gone even further: first shielding themselves from any discovery regarding contemporaneous motives, then faulting Plaintiffs for failing to uncover that direct evidence, and finally conjuring *post hoc* rationalizations to

[10] To be sure, direct evidence is not required to establish discriminatory intent. *Arlington Heights*, 429 U.S. at 266.

fill the evidentiary void. While asserting privilege may be legislators' right, the result here is a one-sided record that compels a finding of racial intent.[11]

Because the weight of the evidence as a whole demands a contrary conclusion, the District Court erred in holding that the legislature did not intend to discriminate against minority voters in enacting HB589.

IV. Defendants Fail To Refute A Fourteenth Amendment Violation.

Defendants' brief replicated the legal errors of the District Court's decision: like the court below, Defendants recite the *Burdick* standard applicable to Fourteenth Amendment challenges, but then, misconstruing as a matter of law what constitutes a burden on the right to vote, they argue that only rational basis review, instead of heightened scrutiny, is applicable here. Defs. Br. 29-35. Defendants also repeatedly assert that if there is no federal statute ***requiring*** a particular election administration practice, then the State has unfettered discretion to ***eliminate*** it.

[11] If this Court concludes that current evidence of racial intent is insufficient, Plaintiffs ask this Court to review and reverse the privilege ruling and grant Plaintiffs a new trial after further discovery from legislators.

That is simply not the law. Rather, the relevant question is whether North Carolina, having previously found it necessary to provide the eliminated voting opportunities to address its historically dismal rates of voter participation, has now imposed an undue burden on its voters by ***repealing*** the very voting processes on which those voters have come to rely. *See, e.g.*, *OOC*, Slip Op. 31-32 (citing *Husted*, 768 F.3d at 542 n.4) ("[H]aving once granted the right to vote on equal terms—such as expanding early voting opportunities—the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another—for example, by making it substantially harder for certain groups to vote than others.").

Defendants further distort the legal standard by criticizing Plaintiffs for not articulating a "limiting principle" for their *Burdick* claims. Defs. Br. 34. But Defendants' insistence on bright-line rules ignores the balancing test the law demands. "There is no 'litmus test' to separate valid from invalid voting regulations; courts must weigh the burden on voters against the state's asserted justifications and 'make the 'hard judgment' that our adversary system demands.'" *Obama for Am. v. Husted*, 697 F.3d 423, 429 (6th Cir. 2012) (quoting *Crawford v.*

Marion Cty. Election Bd., 553 U.S. 181, 190 (2008)). Defendants replicate the District Court's legal errors in skirting that "hard judgment" altogether in favor of rational basis review.

A. Defendants Improperly Downplay HB589's Burdens

The undisputed evidence demonstrated that thousands of voters used the eliminated voting mechanisms. Specifically, in 2012, approximately 900,000 voters availed themselves of the eliminated week of early voting; 100,000 registered using SDR; 50,000 pre-registered; and 7,500 cast OOP ballots. The evidence further demonstrated that hundreds of thousands of voters lack acceptable Photo ID. JA19760-70; JA630-31; JA3906; JA873; JA9957-85. And when SDR and OOP voting were reinstated by this Court's order for the March 2016 election, those trends continued: 22,855 voters used SDR in order to cast a ballot in the primary, and over 6,300 voters had their OOP ballots counted. *See* Democracy NC Amicus Br. 6.[12] In short, voting mechanisms that Defendants wave away as mere temporary

[12] Defendants also concede that at least 184 votes were not counted because the voter's reasonable impediment declaration was not accepted. Defs. Br. 17. But even that figure is misleading, as it ignores voters who were deterred from attempting to vote in the first place and the 1,419 voters who cast Photo ID-related provisional ballots that were not counted in that same election. Democracy NC Amicus Br. 9.

"accommodations" or "conveniences" quickly became critical means of exercising the franchise for large swaths of voters.

Additionally, the restrictions in HB589 not only create a substantial burden on all voters, they impose heavier burdens on several subgroups of voters, including African Americans, voters who lack access to transportation or housing, and young voters, among others.[13] Such burdens on subgroups constitute a basis for invalidating voting restrictions under *Burdick*. *See, e.g.*, *OOC*, Slip Op. 39 (striking down law repealing SDR and reducing early voting, particularly because of burden on African-American voters), and *NEOCH*, 2016 WL 3166251, at *17-18 (citing burden on illiterate and homeless voters as basis for invalidation).[14] In both cases, the number of voters affected by the challenged provisions was smaller than the number of voters

[13] Defendants erroneously contend that Justice Stevens's opinion that subgroup impact can be grounds for invalidation is non-controlling dicta. Defs. Br. 30 n.7. Justice Stevens's opinion is controlling because it provides the narrowest rationale, *see Marks v. United States*, 430 U.S. 188, 193 (1977), whereas Justice Scalia's view that "individual impacts" are "[ir]relevant to determining the severity of the burden," *Crawford*, 553 U.S. at 205, was rejected by a majority of the *Crawford* Court. *See id.* at 190-191 (Stevens, J.); *id.* at 211-14 (Souter, J., dissenting); *id.* at 238-39 (Breyer, J., dissenting).

[14] Both courts ruled on the *Burdick* constitutional claims despite also finding that the challenged provisions violated Section 2. *OOC*, Slip Op. 93, 107-08; *NEOCH*, 2016 WL 3166251, at *46-53.

affected by the provisions challenged here. *OOC*, Slip Op. 35-36; *NEOCH*, 2016 WL 3166251, at *6-8.

Defendants not only discount the burdens imposed by individual provisions, they further ignore the cumulative impact of the challenged provisions. Making the same mistake as the District Court, Defendants conclude that because, in their view, each individual portion of the law does not create an undue burden, the provisions cumulatively do not. This is error. Even assuming *arguendo* that each individual provision of HB589 is not unconstitutionally burdensome standing alone—and Plaintiffs contend otherwise—unconstitutional burdens may still exist when provisions are considered in combination with each other. *See LWVNC*, 769 F.3d at 251 (Motz, J. dissenting) ("the burden imposed by one restriction could reinforce the burden imposed by others"); *see also Republican Party of Ark. v. Faulkner Cty.*, 49 F.3d 1289, 1291 (8th Cir. 1995) (invalidating election law where "combined effect" impermissibly burdened plaintiffs' rights).

Rather than confront these real burdens, Defendants instead posit dire predictions about the potential impact of a ruling here in other states. Defs. Br. 49-51. But this again ignores this Court's admonition

that "[t]here is no reason to think [a] decision here compels any conclusion about the early-voting [or other voting] practices in other states." *LWVNC*, 769 F.3d at 244; *see also OOC*, Slip Op. 33 ("How Ohio's early-voting system compares to that of other states is not relevant under the *Anderson-Burdick* balancing test.").

Finally, the cases relied upon by Defendants to justify the repeal of SDR are inapposite. *Marston v. Lewis*, 410 U.S. 679 (1973), and *Burns v. Fortson*, 410 U.S. 686 (1973), which upheld Arizona's and Georgia's 50-day voter registration requirements, did not involve the repeal of a previous, more accessible registration practice, upon which thousands of voters have come to rely. Where, as here, a state has instituted certain modes of participation, and those practices are heavily used by voters, they become woven into the fabric of the electoral system, such that the modification or retraction of those modes of participation must comport with the guarantees of the Fourteenth Amendment. *Cf. Obama for Am. v. Husted*, 888 F. Supp. 2d 897, 910 (S.D. Ohio 2012) ("*OFA I*") (elimination of early voting opportunities must comport with Equal Protection requirements), *aff'd*, 697 F.3d 423 (6th Cir. 2012). This is not to say that, once a state adopts a voting

practice, the state is forever foreclosed from modifying or eliminating that practice, but rather that the *Burdick* framework applies to any laws that impose burdens on voting—long-standing or new—which trigger a more searching inquiry than mere rubber stamp rational basis review.

B. Defendants Fail To Identify Sufficient Justifications.

Nor do Defendants identify sufficient justifications to overcome HB589's burdens. Critically, Defendants replicate the District Court's erroneous interpretation of *Crawford*. In *Crawford*, the Supreme Court applied a form of rational basis review to Indiana's voter ID law because there was no evidence of any voters actually burdened by it. 553 U.S. at 200. Given the absence of evidence on one side of the balancing test, the state's invocation of a legitimate state interest—*i.e.*, preventing voter fraud—was deemed sufficient in that case. *Id.* at 204.

That is a far cry from this case. The "election integrity" justification that sufficed in *Crawford* rings hollow here, where there is ample evidence that the challenged provisions impose a substantial burden on voters, *see* Opening Br. 54-62, and little actual evidence supporting the State's purported justifications, JA24751 (Op. 267); *see*

also, e.g., *OOC*, Slip Op. 50 ("This very limited evidence of voter fraud is insufficient to justify the modest burden imposed by" the challenged law).[15] On this record, simply asserting a state interest is insufficient to justify HB589. Rather, *Burdick* demands more rigorous scrutiny of the State's proffered interests. And under that heightened scrutiny, the State's other unsupported justifications do not outweigh the substantial burdens faced by the tens of thousands of voters impacted by the challenged provisions. *See* Opening Br. 41-43, 64-66.

V. Defendants Fail To Refute Plaintiffs' Twenty-Sixth Amendment Claim.

Defendants do not so much as address—let alone dispute—Plaintiffs' arguments and evidence demonstrating that HB589 intentionally burdens the ability of young people to register and vote. Nor do they dispute that:

- young voters were disproportionately more likely to take advantage of SDR, OOP voting, and the final day of early voting, JA24655, JA24668 n.117, JA24944 (Op. 171, 184 n.117, 460);

[15] This Court, applying *Burdick*, has recognized that "electoral integrity does not operate as an all-purpose justification flexible enough to embrace any burden, malleable enough to fit any challenge and strong enough to support any restriction." *McLaughlin v. N.C. Bd. of Elections*, 65 F.3d 1215, 1228 (4th Cir. 1995).

- young voters are less likely to possess qualifying voter ID, JA24944 (Op. 460); and

- pre-registration "increases youth turnout," JA24933 (Op. 449).

Instead, Defendants take the position that any intentional discrimination against young voters is of no legal consequence, so long as 18-year-olds are not deprived of their right to vote. Defs. Br. 55. Neither the constitutional text nor legal precedent supports such a narrow reading.

The Twenty-Sixth Amendment "embodies the language and formulation of . . . the 15th amendment, which forbade racial discrimination at the polls." S. Rep. No. 92-26 at 2 (1971), *reprinted in* 1971 U.S.C.C.A.N. 931. The framers of the Twenty-Sixth Amendment used those amendments as models because, beyond simply granting the right to vote to citizens ages 18 to 21, they sought to ensure "that citizens who are 18 years of age or older shall not be discriminated against on account of age" in the voting context. 117 Cong. Rec. 7534 (1971). The Amendment's text serves that broad anti-discriminatory purpose by proscribing not only the denial but also the ***abridgement*** of the right to vote. *See Jolicoeur v. Mihaly*, 5 Cal. 3d 565, 571 (1971)

("The word 'abridge' means diminish, curtail, deprive, cut off, reduce."). Defendants' insistence that HB589 withstands a Twenty-Sixth Amendment challenge simply because it does not bar 18-year-olds from voting altogether, therefore, grossly misunderstands the legal standard.[16]

Here, the General Assembly hardly masked its intent to "curtail" the ability of young voters to participate in the political process. On its face, HB589 targets young voters by repealing pre-registration and mandatory voter-registration drives in high schools, and by affirmatively omitting student IDs from the list of acceptable voter IDs. *See* Opening Br. 68. The only logical conclusion is that the General Assembly meant to (1) discourage young people's interest in the political process; (2) make it harder for young voters to register; and (3) deter voting by college students.

[16] Defendants' contention that young voters are no worse off than they were before these voting mechanisms were instituted is inaccurate, as young voters have come to rely on these mechanisms, and fundamentally misapprehends the constitutional inquiry. HB589 violates the Twenty-Sixth Amendment not because that Amendment requires certain voting mechanisms, but because HB589 was enacted with the intent to suppress youth voting.

Indeed, Defendants fail to provide any other plausible explanation for these provisions. The record is devoid of any rationale for eliminating high school voter-registration drives. The House provided no explanation for silently striking college IDs from the list of permissible voter IDs after expressly supporting their inclusion. Opening Br. 70. And the General Assembly's purported "voter confusion" justification for eliminating pre-registration was too farfetched for the District Court to credit. *See* JA24801-02, JA24804 (Op. 317-18, 320); *cf.* Defs. Br. 31-34 (proffering no justification for repeal of pre-registration). The rationales (if any) provided for disproportionately burdening young voters fall far short of a "substantial justification" for the challenged provisions. *Walgren v. Bd. of Selectmen of Amherst*, 519 F.2d 1364, 1367-68 (1st Cir. 1975).

The discriminatory intent behind HB589 is further demonstrated by the General Assembly's "animus generally" toward young voters. *See* JA20826. The same General Assembly that enacted HB589 considered precursor legislation that would have imposed a tax penalty on parents whose children registered to vote at other addresses. *See* Opening Br. 72-73; *see also United States v. Texas*, 445 F. Supp. 1245, 1260 (S.D.

Tex. 1978) (voter-registration practice making it more difficult for college students to register was unconstitutional), *aff'd sub nom. Symm v. United States*, 439 U.S. 1105 (1979); *Jolicoeur*, 5 Cal. 3d at 575 (refusal to register unmarried minors at addresses other than their parents' "violate[d] the letter and spirit of the Twenty-Sixth Amendment"). And the General Assembly's political incentive for stifling the fast-growing youth vote was no secret. *See* JA3623; JA2563 ("But every member in this chamber knows that young voters are much more likely to vote Democratic."); *see also Texas*, 445 F. Supp. at 1260 ("'Fencing out' from the franchise a sector of the population because of the way they may vote is constitutionally impermissible.").

In sum, Defendants' paltry argument echoes the District Court's legal errors and misses the mark entirely. The evidence shows that HB589 intentionally targets young voters and "'serve[s] to dissuade them from participating'" in the franchise, *Jolicoeur*, 5 Cal. 3d at 575 (quoting S. Rep. No. 92-26, 1971 U.S.C.C.A.N. 931), precisely *because* the now-repealed provisions had so effectively "empower[ed]" and "affirmatively [] encourage[d]" young voters, "through the elimination of unnecessary burdens and barriers," *Worden v. Mercer Cty. Bd. of*

Elections, 61 N.J. 325, 345 (1972), to exercise their Twenty-Sixth Amendment rights.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully urge this Court to (i) enter judgment in favor of Plaintiffs, and (ii) enter an order requiring North Carolina, under Section 3(c) of the Voting Rights Act, to obtain preclearance for any voting law changes for a period no less than 10 years.[17]

[17] The Court should reject Defendants' request that it "be given the first opportunity to remedy any violations" should this Court reverse the District Court's order. Defs. Br. 55 n.16. Respectfully, the State has had ample opportunity to cure the discriminatory effect of HB589. To the extent this Court wishes to give the state yet another opportunity to do so, it should only be after the November 2016 election.

This 14th day of June, 2016.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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

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Dated: 6/14/2016

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 14th day of June, 2016, I caused this Joint Reply Brief of Plaintiffs-Appellants to be filed electronically with the Clerk of the Court using the Court's CM/ECF system, which will send notice of such filing to all counsel of record. I further certify that on this 14th day of June, 2016, I arranged for the required copies of this Joint Reply Brief of Plaintiffs-Appellants to be delivered to the office of the Clerk of the Court in accordance with Local Rule 25(a)(1)(B).

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