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

NORTH CAROLINA STATE CONFERENCE OF THE NAACP, et al., Plaintiffs, v. PATRICK LLOYD MCCRORY, in his official capacity as the Governor of North Carolina, et al., Defendants.	**UNITED STATES' MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION FOR A PRELIMINARY INJUNCTION AND FOR THE APPOINTMENT OF FEDERAL OBSERVERS** Civil Action No. 1:13-CV-658
LEAGUE OF WOMEN VOTERS OF NORTH CAROLINA, et al., Plaintiffs, v. THE STATE OF NORTH CAROLINA, et al., Defendants.	Civil Action No. 1:13-CV-660
UNITED STATES OF AMERICA, Plaintiff, v. THE STATE OF NORTH CAROLINA, *et al.*, Defendants.	Civil Action No. 13-cv-861

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UNITED STATES' MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION FOR A PRELIMINARY INJUNCTION AND FOR THE APPOINTMENT OF FEDERAL OBSERVERS

Plaintiff United States of America (the "United States") respectfully submits this memorandum in support of its motion for preliminary injunction, pursuant to 42 U.S.C. § 1973j(d) and Federal Rule of Civil Procedure 65, and for the appointment of federal observers, pursuant to 42 U.S.C. § 1973a(a).

I. INTRODUCTION

In the final days of the 2013 legislative session, the North Carolina General Assembly abruptly enacted an omnibus elections bill that curtailed opportunities for citizens to register, to vote, and to have their ballots counted. Among other things, that law—House Bill 589 ("HB 589")—eliminated a week of one-stop absentee voting ("early voting"), banned same-day registration during the remaining early voting period, and prohibited counties from counting provisional ballots cast outside of a voter's assigned precinct.

African-American voters were significantly more likely than white voters to take advantage of each of the opportunities that HB 589 eliminated. They were disproportionately likely to vote early. They were 35% more likely than white voters to register using the same-day registration process. And they were twice as likely as white voters to cast out-of-precinct provisional ballots. The legislature had before it evidence of the disproportionate racial impact of many of HB 589's provisions, yet it choose to proceed without addressing those concerns.

In 2013, the United States brought this lawsuit against North Carolina, alleging that these three provisions of HB 589, along with its requirement that voters produce one of certain limited forms of photo identification ("ID"), result in African Americans having "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice," in violation of Section 2 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973(b). Because HB 589 was adopted in part for that very reason, it also violates Section 2's prohibition on intentional discrimination. The United States has sought declaratory and injunctive relief against the continued enforcement of HB 589; it has also sought the appointment of federal observers under Section 3(a) of the Voting Rights Act, 42 U.S.C. § 1973a(a), and the imposition of a preclearance requirement for further voting-related changes under Section 3(c) of the Voting Rights Act, 42 U.S.C. § 1973a(c).

Trial in this case is set for July 2015. Before then, however, there will be a general election on November 4, 2014. Because African-American voters will be irreparably denied an equal opportunity to participate in the electoral process, this Court should preliminarily enjoin the offending portions of HB 589 that have already taken effect and should authorize the appointment of federal observers.[1]

[1] Because the most stringent aspects of the voter photo ID provisions do not go into effect until January 2016, the United States is not seeking to enjoin them at this time. Nonetheless, at some points in this memorandum, the United States discusses those requirements to provide context regarding the legislative history of HB 589 and those provisions as to which it is seeking preliminary injunctive relief. In addition, the United States is not seeking relief under Section 3(c) as part of this motion.

II. STATEMENT OF FACTS

Congress has directed courts adjudicating Section 2 claims to conduct "a searching practical evaluation of the 'past and present reality'" of politics within the defendant jurisdiction. S. Rep. No. 97-417, at 30 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 208 ("Senate Report"); *see also Thornburg v. Gingles*, 478 U.S. 30, 45 (1986). With respect to HB 589, that inquiry shows that the bill was calculated to reverse a decade's worth of electoral reforms that had made important strides towards equalizing, after a century of abridgement, African-American citizens' opportunity to participate in the political process.

A. North Carolina's Pre-HB 589 Expansion of the Opportunity to Vote

North Carolina has a long and uncontested history of suppressing African-American voter participation. *See infra* Section III.B.1.e; Joint Appendix[2] (JA) vol. III at 1348-49, 1355-57, 1359-66, 1187-89, 1224-25, 1254-58 (Leloudis at 10-11, 17-19, 21-28; Kousser at 11-13, 48-49; Lawson ¶¶ 12-15); *see also Gingles v. Edmisten,* 590 F. Supp. 345, 359 (E.D.N.C. 1984) (three-judge court) ("Following the emancipation of blacks from slavery and the period of post-war Reconstruction, the State of North Carolina had officially and effectively discriminated against black citizens in matters

[2] A joint appendix accompanies the United States' and the NAACP and League of Women Voters plaintiffs' respective motions. *See generally North Carolina State Conference of the NAACP v.* McCrory, 1:13-cv-658 (M.D.N.C.); *League of Women Voters v. North Carolina*, 1:13-cv-660 (M.D. N.C.). Volume I includes declarations from Plaintiffs, fact witnesses, and transcripts from two depositions. Volumes II & III contain expert and sur-rebuttal expert reports on behalf of Plaintiffs. Volume IV includes exhibits cited in Plaintiffs' briefs. Volume V includes legislative, administrative, and court documents cited in Plaintiffs' briefs.

touching their exercise of the voting franchise for a period of around seventy years. . . ."), *aff'd in relevant part*, 478 U.S. 30, 41 (1986) (describing the district court's finding of a "long history of complete denial of elective opportunities" for African Americans). Although the Voting Rights Act of 1965 made significant headway in dismantling that system, racial disparities in voter registration and turnout rates persisted throughout the twentieth century. *See, e.g.*, *id*. at 359-60; *see also* JA vol. III at 1259, 1197 (Lawson ¶ 16; Kousser at 21, Tbl. 2).

Between 1999 and 2009, the General Assembly made a concerted effort to remedy the situation. Acting to increase opportunities for voter participation among all North Carolinians, it paid particular attention to ensuring that citizens who had historically been marginalized would have a full and equal opportunity to participate effectively. *See* JA vol. I at 238, 300-01, 376, 162 (Adams ¶ 10; Glazier ¶ 9, 10; Kinnaird ¶ 16; H.M. Michaux ¶ 8). As described below, the provisions that HB 589 curtailed were the linchpins of that effort.

1. Early Voting

North Carolina has had some form of in-person absentee voting (as distinguished from absentee voting by mail) since the 1970s. Because this procedure permits voters to simultaneously apply for, mark, and cast an absentee ballot in one trip to their county board of elections office, it came to be known as "one-stop absentee voting" or "early voting." JA vol. I at 138 (Bartlett ¶ 7).

Initially, early voting was available only to voters who satisfied one of a limited number of excuses for being unable to vote in person on Election Day, such as illness or

disability. *Id.* In 1999, the General Assembly eliminated the excuse requirement for early voting in general elections in even-numbered years. N.C.G.S. § 163-226(a1) (1999). It also gave county boards of elections the option to designate additional one-stop voting sites beyond the boards' offices, subject to approval by the State Board of Elections ("SBOE"). N.C.G.S. § 163-227.2(g) (1999); JA vol. III at 1261-62 (Lawson ¶ 18); JA vol. I at 139, 375, 238, 163 (Bartlett ¶ 8; Kinnaird ¶ 12; Adams ¶ 11; H.M. Michaux ¶ 10).

In 2001, the General Assembly expanded no-excuse early voting to cover all elections. N.C.G.S. § 163-226(a) (2012); JA vol. III at 1202-03, 1261-62 (Kousser at 26-27; Lawson ¶ 18); JA vol. I at 238, 139, 375 (Adams ¶ 11; Bartlett ¶ 8; Kinnaird ¶ 13). It set the early voting period at 17 days—from the third Thursday before Election Day until the Saturday before Election Day. N.C.G.S. § 163-227.2(b) (2012); JA vol. III at 1261-62 (Lawson ¶ 18). In addition, it required counties to offer early voting until at least 1:00 p.m. on the final Saturday before the election, and permitted early voting until 5:00 p.m. on that Saturday. Finally, it allowed counties to conduct early voting on evenings and weekends throughout the early voting period. N.C.G.S. § 163-227.2(f) (2012); JA vol. III at 1261-62 (Lawson ¶ 18); JA vol. I at 139, 238, 301, 375-76, 163 (Bartlett ¶¶ 8-9; Adams ¶ 11; Glazier ¶ 11; Kinnaird ¶¶ 13-14; H.M. Michaux ¶ 11).

2. Provisional Ballots

In 2003, responding to the recently enacted Help America Vote Act of 2002 ("HAVA"), North Carolina further refined its election system. One provision of that legislation addressed the counting of provisional ballots cast by Election Day voters

outside their assigned precinct but within their county of residence. N.C.G.S. § 163-166.11(5) (2003); JA vol. III at 1203-04, 1263-64 (Kousser at 27-28; Lawson ¶ 20 & n. 54); JA vol. I at 163 (H.M. Michaux ¶ 11). A provisional ballot can be cast by voters on Election Day where there is a question about their eligibility that cannot be resolved immediately. Such provisional ballots are subject to later verification, such as assurance that the voter is eligible to cast a ballot and has not already cast another ballot in that election. Such provisional ballots are not included in voter totals unless they are later verified. *See* N.C.G.S. § 163-166.11.

Subsequently, the North Carolina Supreme Court interpreted state law to prohibit counting those out-of-precinct provisional ballots in state and local—as opposed to federal—elections. *See James v. Bartlett*, 607 S.E.2d 638 (N.C. 2005); JA vol. III at 1203-04, 1263-64 (Kousser at 27-28; Lawson ¶ 20); JA vol. I at 152, 164 (Bartlett ¶ 47; H.M. Michaux ¶ 15). The General Assembly swiftly responded by enacting a new bill that explicitly directed election officials to count out-of-precinct provisional ballots for all offices for which a voter was entitled to vote, as long as the voter was in the correct county. N.C.G.S. §§ 163-166.11(5), 163-182.2(a)(4) (2012); JA vol. III at 1204-05, 1263-64 (Kousser at 28-29; Lawson ¶ 20); JA vol. I at 164-65 (H.M. Michaux ¶ 16). The bill expressly took "note of the fact that" a "disproportionately high percentage" of the out-of-precinct voters who had cast ballots "were African-American." JA vol. V at 2633, 2635 (S.L. 2005-2).

3. Same-Day Registration

In 2007, the General Assembly further expanded voting opportunities for North Carolina citizens. At the recommendation of the SBOE, it authorized same-day registration during the early voting period. N.C.G.S. § 163-82.6A (2012); JA vol. I at 145-46, 238 (Bartlett ¶¶ 27, 28; Adams ¶ 12); JA vol. III at 1264-65 (Lawson ¶ 21). Previously, aspiring voters had been required to register to vote at least 25 days before Election Day. N.C.G.S. § 163-82.6(c); JA vol. I at 145-46 (Bartlett ¶ 28).

The legislative process leading to the adoption of same-day registration in 2007 stands in sharp contrast to the process in 2013 by which HB 589 abandoned it. Over a five-month period in 2007, the General Assembly held hearings, considered amendments, engaged in lengthy floor debate, and ultimately assigned a conference committee to work out differences between House and Senate versions of the same-day registration bill. JA vol. V at 2641-42 (HB 91 bill history). The General Assembly carefully considered allegations regarding the accuracy of the voter rolls and possible voter fraud, and ultimately concluded that those allegations were unsupported by the evidence. JA vol. III at 1206-09 (Kousser at 30-33).

The result of the enactment was that North Carolina's same-day registration process provided eligible citizens with the opportunity to both register to vote and immediately cast a ballot at any one-stop voting site in their county of residence.[3] *See* N.C.G.S. § 163-82.6A(a) (2012); JA vol. III at 1265-65 (Lawson ¶ 21). Already-

[3] Voters could not, however, use same-day registration on Election Day itself.

registered individuals were similarly able to update their registration information at a one-stop voting site. N.C.G.S. § 163-82.6A(e) (2012).

Aspiring same-day registrants were given a variety of ways to satisfy the requirement for documentary proof of their residence in order to register. They could present a North Carolina drivers' license, another form of photo identification from a government agency, or a current utility bill, bank statement, government check, paycheck, or other official document, so long as the document showed the applicant's current name and residential address. *See* N.C.G.S. §§ 163-82.6A(b)(2), 163-166.12 (2012); JA vol. I at 146 (Bartlett ¶ 29); JA vol. III at 1264-65 (Lawson ¶ 21). They were then permitted to cast a retrievable absentee ballot, which was not counted unless the county board of elections determined that the applicant was qualified to vote.[4] N.C.G.S. § 163-82.6A(c) (2012); JA vol. I at 147 (Bartlett ¶ 36).

As a result of all of these reforms to North Carolina's electoral system, voter registration and participation soared. *See* JA vol. III at 1193-98, 1267-68 (Kousser at 17-22; Lawson ¶ 24). These gains were particularly noticeable among African Americans. Of the 1.46 million voters added to North Carolina's voter rolls between 2000 and 2012, 35% were African American, though African Americans constituted just 20% of the voting-age population in 2000. JA vol. II at 807 (Stewart ¶ 68). Black voter turnout also

[4] Under the same-day-registration law, county boards of elections, working with the SBOE, were required to verify each new registrant's North Carolina driver's license or Social Security number within two business days of the same-day registration transaction. N.C.G.S. § 163-82.6A(d) (2012). Officials also checked each applicant's information against the statewide voter registration list for duplicate records.

surged: in 2008, for the first time in modern history, African Americans turned out to vote at a higher rate than whites. JA vol. III at 1193-97, 1268-69 (Kousser at 17-21 & Tbl. 2; Lawson ¶ 25); JA vol. II at 952 (Stewart Ex. 22, at 71).

B. HB 589

At the beginning of the current decade, North Carolina began efforts to reverse course. While various legislative efforts in 2011 fell short, in 2013, HB 589 effected a wholesale repudiation of the reforms that had equalized black and white registration rates and turnout. JA vol. III at 1271-74, 1210-13 (Lawson ¶¶ 29-35; Kousser at 34-37).

The process that produced that constriction of the opportunities to register, to vote, and to have one's ballot counted was unusual in a variety of ways. HB 589 started as a short bill dedicated primarily to voter photo ID. But once the U.S. Supreme Court issued its decision in *Shelby County v. Holder*, 133 S. Ct. 2612 (2013), in June 2013,[5] HB 589's supporters morphed it into an omnibus bill targeting those reforms that had expanded electoral opportunities within the State, especially for black voters, and passed it with virtually no opportunity for real debate or deliberation.

1. The House Adopts a Bill that Addresses Only Voter ID (March 12 to April 24, 2013).

In March and April 2013, the North Carolina House Committee on Elections held public hearings directed at the question of whether the State should adopt a photo ID requirement for voting. JA vol. III at 1279-84 (Lawson ¶¶ 40-45); JA vol. V at 2388-92,

[5] *Shelby County* removed the requirement under Section 5 of the Voting Rights Act that North Carolina demonstrate that any changes in its election law have neither a discriminatory purpose nor a discriminatory effect.

2393, 2417 (3/12/13 Transcript ("Tr."); 3/13/13 Tr.; 4/3/13 Tr.). Of particular salience to the issue now before this Court, the committee heard from Ion Sancho, the supervisor of elections for Leon County (Tallahassee), Florida. In addition to discussing voter photo ID requirements, Sancho described Florida's experience in the 2012 general election after it cut its early voting period from two weeks to eight days. Sancho declared Florida's experience "a nightmare," with "the longest wait times of any state in the nation" and an estimated 225,000 voters unable to cast ballots. JA vol. V at 2422-23, 2420-21 (4/3/13 Tr. at 78:13-25; 79:1-3; 69:3-5, 69:23-70:4); JA vol. I at 437, 444-45 (Sancho ¶¶ 5-9, 24); JA vol. III at 1283-85 (Lawson ¶¶ 45-46).

As introduced in the House, HB 589 was 12 pages long. JA vol. V at 2101-12 (HB 589 filed bill). The bill included provisions that required photo ID for voting and amended some absentee voting procedures. After additional hearings and debate, the bill was amended to expand the acceptable types of photo ID. JA vol. I at 326 (Harrison ¶ 17). No member of the Elections Committee proposed changing North Carolina's early voting, same-day registration, or provisional ballot laws. *Id.* The bill was favorably reported by the House Elections, Finance, and Appropriations Committees.

The House floor debate on HB 589 was informed not only by the committee hearings and debates, but also by a report issued by the SBOE regarding voters' possession of DMV-issued ID. JA vol. I at 148-49 (Bartlett ¶¶ 39-40); JA vol. IV at 1821-30 (SBOE 4/17/13 report); JA vol. IV at 1669-75, 1710-81. The SBOE concluded that 4.9% of all registered voters could not be matched with an entry in the DMV database, indicating that these voters very likely lacked DMV-issued ID. The data

provided by the SBOE revealed that a disproportionate number of these "no match" voters were African-American. JA vol. IV at 1830 (SBOE 4/17/13 report); JA vol. II at 791 (Stewart ¶ 25, n.12).

In late April 2013, HB 589 passed second and third readings on the House floor. JA vol. V at 2354-55 (HB 589 bill history). The vote on the third reading of the bill was 81-36 with all Republicans and five Democrats voting for the bill. JA vol. V at 2370 (4/24/13 House roll call vote). The final House version of HB 589 was 16 pages long. JA vol. V at 2113-28 (HB 589 v. 5). Its voter photo ID requirement provided that acceptable ID would include "[a]n identification card . . . issued by a branch, department, agency, or entity of the United States, this State, or any other state," and it set forth a non-exhaustive, illustrative list of acceptable ID.[6] *Id.* at 2115.

2. The Senate Awaits the Supreme Court's Decision Regarding Preclearance Before Acting on HB 589 (April 25 to July 22, 2013).

On April 25, 2013, the North Carolina Senate received the House version of HB 589, and it was referred to the Committee on Rules and Operations of the Senate ("Rules Committee"). JA vol. V at 2354 (HB 589 bill history). From April 26 to July 22, a period of nearly three months, the Senate took no public action on HB 589. A news account summarized the explanation provided by Senate Rules Committee chair, Senator

[6] Examples of ID that were permitted by this version of the bill but not the version ultimately enacted include employee ID; ID issued by the University of North Carolina or its constituent institutions; ID issued by a North Carolina community college; ID issued to a fireman, EMS or hospital employee, or law enforcement officer; ID issued by a unit of local government, public authority, or special district; and ID issued for a government program of public assistance. JA vol. V at 2115-16 (HB 589 v. 5).

Tom Apodaca: the Senate did not want "the legal headaches of having to go through pre-clearance [under the Voting Rights Act] if it wasn't necessary and having to determine which portions of the proposal would be subject to federal scrutiny." JA vol. IV at 1831; JA vol. III at 1290-91 (Lawson ¶ 54).

On June 25, 2013, that prospect was eliminated. In *Shelby Cnty. v. Holder*, 133 S. Ct. 2612 (2013), the United States Supreme Court invalidated the use of Section 4(b) of the Voting Rights Act to subject jurisdictions to the Section 5 preclearance requirement. As a result, North Carolina was no longer required to prove that changes in its election laws had neither a discriminatory purpose nor a discriminatory effect. Noting that the Court's decision was what he had expected, Senator Apodaca publicly declared, "So, now we can go with the full bill," JA vol. IV at 1831; JA vol. III at 1290-91 (Lawson ¶ 54), a bill whose scope had not yet been publicly disclosed. A Rules Committee hearing on HB 589 was subsequently scheduled for July 23, 2013, only three days before the legislative session adjourned on July 26. JA vol. III at 1290-92 (Lawson ¶¶ 54-55).

3. The Senate Transforms HB 589 Into an Omnibus Bill Filled with Restrictions on Voting (July 23 to 25, 2013).

On the eve of the July 23 Senate Rules Committee hearing on HB 589, members of the Committee received a proposed substitute bill. JA vol. I at 183-84 (Stein ¶ 15). This new bill was 57 pages long and bore little resemblance to the version of HB 589 that the Senate had received from the House. The voter photo ID portion of the bill was now a much more restrictive measure, and it comprised just a small part of a much larger set

of retrenchments on the opportunity to vote.[7] This new version eliminated one week of the early voting period, abolished same-day registration entirely, and prohibited the counting of out-of-precinct provisional ballots. JA vol. V at 2119-85 (HB 589 v.6).

During the July 23 hearing, senators and members of the public presented information showing that provisions of the bill, including the strict voter photo ID requirement, the reduction of early voting, and the elimination of same-day registration, would disproportionately hinder African-American voters. JA vol. I at 184-86, 193, 207-215 (Stein ¶¶ 16, 19, Exs. A, E); JA vol. V at 2460-62, 2050 (7/23/13 Tr. at 41:25-43:2, 54:11-23). Undeterred by these concerns, proponents of the overhauled omnibus bill, including primary sponsor Senator Bob Rucho, claimed that the changes to early voting and same-day registration were intended to add consistency to elections and allow county officials more time to validate voters. JA vol. V at 2037, 2465 (7/23/13 Tr. 41:2-11; 75:13-15). After a short hearing, the Committee adopted the substitute bill on a voice vote and sent it to the Senate floor. JA vol. V at 2466 (7/23/13 Tr. at 76:20-25).

The full Senate debated the new version of HB 589 for only two days—on July 24 and July 25, 2013. Opponents of the substitute bill continued to highlight that the effect of the voter photo ID, early voting, and same day registration provisions would disproportionately deprive African-American voters of the opportunity to participate in

[7] The specific forms of acceptable photo ID were now limited to (1) a North Carolina drivers license; (2) a special (non-operators) ID issued by the North Carolina DMV; (3) a U.S. passport; (4) military ID; (5) veteran's ID; (6) a tribal ID (from a federally or state-recognized tribe); and (7) a driver's license or non-operator ID issued by another state but only if the voter had registered within 90 days of the election. *See* JA vol. V at 2130, (HB 589 v.6, § 2.1).

the political process on the same basis as white voters. With regard to the voter photo ID provision, Senators Stein, Robinson, and McKissick cited data from the SBOE's April 17, 2013 report on the number of registered voters who lacked DMV-issued ID and noted the higher percentage of registered minority voters on that list.[8]

In addition, Senator Stein presented analyses of SBOE data showing that African-American voters were a disproportionately high percentage of the electorate during the first week of early voting, particularly on the first Sunday of early voting.[9] JA vol. V at 2473-74 (7/24/13 Tr. at 17:19-18:10); JA vol. V at 2493 (7/25/13 Sen. Tr. at 34:6-16); JA vol. I at 184, 190, 193 (Stein ¶¶ 16, 27, Ex A). He also emphasized that minority citizens had disproportionately registered and voted using same-day registration in 2012. JA vol. V at 2487, 2493 (7/25/13 Sen. Tr. at 28:5-7, 34:6-16); JA vol. I at 190 (Stein ¶ 28). And he noted the result that restrictions on early voting had had on African-American voters in Florida in 2012. JA vol. V at 2474 (7/24/13 Tr. at 18:10-22).

Proponents of the bill offered no direct responses to this evidence, with Senator Rucho claiming only that he was "never aware" of the statistics presented by Senators Stein and Bryant. JA vol. V at 2481 (7/24/13 Tr. at 108:10-11). And the Senate rejected

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[8] JA vol. V at 2480, 2318-19 (7/24/13 Tr. at 84:2-8 [Robinson], 133:14-134:10 [McKissick]); JA vol. V. at 2491, 2493 (7/25/13 Sen. Tr. 32:5-11, 34:6-16 [Stein]); JA vol. I at 188-89, 381-82 (Stein ¶ 25; Kinnaird ¶ 31).

[9] His data are consistent with an SBOE memorandum issued in 2011 that included statistics showing high voter turnout during the first week of early voting in 2008, and a disproportionate use of early voting by African Americans. The memorandum also concluded that shortening the early voting period would not reduce costs, and would create longer lines and wait times for voters on Election Day. JA vol. IV at 1541-43 (SBOE 5/18/11 Memo); JA vol. III at 1275-76, 1211 (Lawson ¶ 34; Kousser at 35); JA vol. I at 141-42 (Bartlett ¶ 15).

or tabled several amendments designed to temper the effects of the new restrictive provisions. JA vol. V at 2343, 2346, 2347-48, 2349-50 (S. Amends. 2, 7, 8, & 9).[10]

On July 25, the Senate voted to pass HB 589, as amended, with 33 senators voting in favor of the bill and 14 opposed. JA vol. V at 2503 (7/25/13 Sen. Tr. at 100). Every one of the African-American senators voted against the bill. JA vol. V at 2371, 2653-54 (7/25/13 Senate roll call vote; 2013 Senate demographics). This Senate session concluded at 5:24 p.m., and the Senate version of HB 589 returned to the House "for concurrence." JA vol. V at 2503-04 (7/25/13 Sen. Tr. at 100-101); JA vol. V at 2355 (HB 589 bill history). The final Senate version of HB 589 was 56 pages long and included 53 parts that the House had not previously addressed, in addition to major modifications to the House version of the photo ID portion of the bill. JA vol. V at 2186-2241 (HB 589 v. 7).

4. The Omnibus Bill Speeds Through the House (July 25, 2013, 7:45 p.m. to 10:45 p.m.).

About two hours later, and just one day before the legislature adjourned its 2013 session, the House addressed for the first time the Senate's omnibus reconstruction of HB

[10] In addition, Senator Stein offered an amendment (#4) that required each county board of elections to keep early voting sites open for the same total number of hours as in prior federal elections. JA vol. V at 2344-45 (S. Amend. 4). Stein recognized that this requirement would not eliminate the harm of revoking one week of early voting. JA vol. V at 2475-77 (7/24/13 Tr. at 28-30); JA vol. I at 187 (Stein ¶ 22). Although Senator Rucho agreed to support a revised version of this amendment, which ultimately passed, Rucho also tacked on an amendment (#11) that provided county boards of elections the option to apply for an exemption from the early voting minimum hours requirements. JA vol. V at 2485, 2351-52 (7/25/13 Sen. Tr. at 7; S. Amend. 11).

589. JA vol. V at 2506 (7/25/13 House Tr. at 2). Noting that HB 589 had returned from the Senate with "many, many, many changes . . . that ha[d] not been vetted in conference," Rep. Mickey Michaux moved the House to meet as a Committee of the Whole, which would have given the House a fuller opportunity to scrutinize the bill and give members the ability to offer amendments, which they otherwise were not permitted to do on a concurrence vote. JA vol. V at 2507 (7/25/13 House Tr. at 3:3-15); JA vol. I at 167 (H.M. Michaux ¶ 27). Representative Tim Moore—a primary sponsor of the original HB 589—opposed Michaux's motion, stating that such a hearing would be a "waste of time" because the House was already meeting as an entire body. JA vol. V at 2507-09 (7/25/13 House Tr. at 3:18-4:15; 5:6-21). Moore also claimed that the Senate version of the bill "ha[d] gone through the proper committee hearings; . . . through the proper hearings both in this House, both in the Senate committees . . . and is properly before us." JA vol. V at 2508 (7/25/13 House Tr. at 4). Michaux's motion was defeated. JA vol. V at 2510-11 (7/25/13 House Tr. at 6-7); JA vol. V at 2367 (7/25/13 House floor vote).

In describing the bill, Representative Harry Warren, a supporter of the measure, asserted that "[t]he Senate working on the bill made very few substantive changes to the VIVA Act…" JA vol. V at 2517 (7/25/13 House Tr. at 13). Given the changes the Senate had made even just to the voter photo ID portion of the bill, several members of the House described this statement as "untrue" and "incredible." JA vol. I at 307, 347 (Glazier ¶ 31; Goodman ¶ 18). Indeed, the Senate version of HB 589 replaced the House's non-exclusive voter photo ID provision, which had provided that acceptable photo identification was "[a]n identification card . . . issued by a branch, department,

agency, or entity of the United States, this State, or any other state…," including IDs issued by North Carolina's state college system, JA vol. V at 2115-16, with a narrower and exclusive list of only seven acceptable forms of ID, JA vol. V at 2187. Nevertheless, Warren ended his initial summary of the Senate's changes to the voter photo ID provisions of the bill by maintaining that "Other than that— . . . . Everything else is fine." JA vol. V at 2518-19 (7/25/13 House Tr. at 14-15).

On the floor, the supporters' description of the additional provisions soft-pedaled their effects. Notably, they omitted any mention of Part 25, which eliminated a full week of early voting. And, when describing Part 49, which prohibits the counting of out-of-precinct provisional ballots, they framed the change as simply "requir[ing] voters to vote in their proper precinct." JA vol. V at 2521-31 (7/25/13 House Tr. at 17-27).

Every African-American member of the House, along with every member of the House's Democratic Caucus who was present, spoke against the Senate version of the bill. Even four of the five Democrats who had voted for the House version of the bill spoke against the Senate version (the fifth member was absent). *See* JA vol. I at 308-09, 341, 348, 329, 404 (Glazier ¶ 35; Goodman ¶ 21; Harrison ¶¶ 7, 28; Martin ¶ 27); JA vol. V at 2369 (7/25/13 House floor vote).

Their presentations were, however, truncated. While Representatives are typically afforded 10 minutes for a first comment on a bill and five minutes for a second comment, Speaker Tillis limited debate in opposition to HB 589 to approximately 100 minutes all told, which worked out to just under two and a half minutes per legislator. JA vol. I at 309, 329, 168, 404-05 (Glazier ¶ 36; Harrison ¶ 29; H.M. Michaux ¶ 28; Martin ¶¶ 27-

28); JA vol. V at 2650-52 (2013 N.C. General Assembly Rules, Rule 10(b)). Compared to past major legislation impacting the right to vote this practice departed from normal legislative procedure. *See infra* Section III.B.2.d.

During their speeches, Representatives Rick Glazier and Mickey Michaux emphasized the barriers the Senate version of the bill imposed on African-American voters. JA vol. V at 2555-62, 2531-39 (7/25/13 House Tr. at 51-58, 27-35). Rep. Glazier explained that HB 589 had been presented as "a hygienic electoral reform measure, but the pathogens [it] seeks to remove are people: African-Americans, Latinos, young voters, and low income folks" and that if legislators would "strip the minority of rights simply by reference to fear, then the foundations of democracy are undermined." JA vol. V at 2561, 2559 (7/25/13 House Tr. at 55, 57). Rep. Michaux compared the House and Senate versions of the bill and noted that after the Supreme Court's decision in *Shelby County v. Holder*, "[t]he 14 pages that we had in voter ID turned into 57 pages of things" that undermined what "we had fought for and had died for and had struggled for." JA vol. V at 2536-37 (7/25/13 House Tr. at 32-33).

House supporters of the Senate substitute bill remained mum during the process; Rep. David Lewis was the only supporter who responded to opponents during the House floor debate. JA vol. V at 2620-24 (7/25/13 House Tr. at 116-120). On July 25, 2013, less than three hours after the debate began, the House voted to concur in the Senate's bill by a vote of 73 to 41; all African-American representatives voted against the bill. JA vol. V at 2372 (7/25/13 House roll call vote); JA vol. V at 2655 (2013 House demographics). Legislators had no opportunity to offer amendments, and no experts or members of the

public were afforded the opportunity to testify on the bill's likely effect on election administration, its fiscal impact, or its impact on minority voters. On August 12, 2013, Governor Pat McCrory signed HB 589 into law.

C. The Provisions of HB 589 for Which the United States Seeks Preliminary Relief

HB 589 eliminates the first seven days of the early voting period, and prohibits counties from offering early voting after 1:00 p.m. on the last Saturday before Election Day. *See* JA vol. V at 2322-23 (HB 589 § 25.1). Early voting now begins on the *second* Thursday before the election (12 days before Election Day) and ends on the last Saturday before the election (3 days before Election Day) at 1:00 p.m. *See* N.C.G.S. § 163-227.2(b) (2014). This change leaves voters with a much shorter 10-day early voting period and eliminates one of the two Sundays previously available for early voting.

HB 589 also abolishes same-day registration. JA vol. V at 2317 (HB 589 § 16.1). As of January 2014, North Carolinians who have not previously registered to vote in a particular county may no longer register and vote during the early voting period. Both aspiring registrants and already-registered voters who have recently moved into a new county are now unable to vote there unless they have registered (or re- registered) at least 25 days before the election. *See* N.C.G.S. §§ 163-54, 163-82.6(c) (2014); JA vol. IV at 1958 (SBOE webpage).[11] Only already-registered voters who have moved within the

[11] A voter who moves within North Carolina within 30 days of an election is, however, eligible to vote at his prior polling place, even if it is in another county. N.C.G.S. § 163-55(a) (2014).

same county retain the ability to update their registration information at one-stop sites. *See* N.C.G.S. § 163-82.6A(e) (2014).

Finally, HB 589 prohibits county boards from counting out-of-precinct provisional ballots. JA vol. V at 2335-36 (HB 589 pt. 49). Under the new law, a provisional ballot will be counted only if it is cast in the voter's assigned precinct, even if the voter is eligible to vote in some or all of the contests appearing on the ballot. *See* N.C.G.S. § 163-166.11(5) (2014). This means, for example, that a registered voter who casts a provisional ballot in a precinct near his or her home that is identical to the ballot that would have been provided at that voter's assigned precinct will not have any office on his or her ballot counted.

III. ARGUMENT

The United States meets the standard for obtaining a preliminary injunction. At trial, the United States is likely to show that HB 589 violates Section 2 of the Voting Rights Act because it will result, and was intended to result, in African-American voters having "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973(b). If HB 589 governs the 2014 election, it will irreparably harm the citizens who are denied the ability to register, to vote, or to have their ballots counted. By contrast, preliminary relief would simply restore the voting regime that North Carolina itself previously adopted, and used successfully, including during the 2008, 2010, and 2012 elections. Thus, the balance of the equities and the public interest cut strongly in favor of granting the United States' motion.

A. Legal Standard for Preliminary Relief

A preliminary injunction prevents the harms that would be caused during the pendency of litigation. *See Rebel Debutante LLC v. Forsythe Cosmetic Grp. Ltd.*, 799 F. Supp. 2d 558, 568 (M.D.N.C. 2011). The standard for granting preliminary relief is well-established: the movant must establish (1) that it "is likely to succeed on the merits," (2) that it "is likely to suffer irreparable harm in the absence of preliminary relief," (3) that "the balance of equities tips in [its] favor," and (4) "that an injunction is in the public interest." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008); *Metro. Reg'l Info. Sys. v. Am. Home Realty Network, Inc.*, 722 F.3d 591, 595 (4th Cir. 2013); *Pashby v. Delia*, 709 F. 3d 307, 320 (4th Cir. 2013). "In each case, courts must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief." *Winter*, 555 U.S. at 24 (internal quotations omitted). The United States has amply met the standard for preliminary relief in this case.

B. The United States Is Likely to Succeed on the Merits.

Section 2 prohibits the use of any "voting qualification or prerequisite to voting" or any voting "standard, practice, or procedure" in a manner that, based on the totality of the circumstances, results in members of a racial or language minority group having "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973(a), (b). "Section 2 prohibits all forms of voting discrimination," *Thornburg v. Gingles*, 478 U.S. 30, 45 n.10 (1986), including practices that interfere with or impair the ability of would-be voters to register and cast a vote, or to have that vote counted on an equal basis with other

members of the electorate.[12] Courts have entertained such claims with respect to a wide range of practices, including restrictive voter ID laws, *Frank v. Walker*, 2014 WL 1775432 (E.D. Wisc. Apr. 29, 2014); unequal access to voter registration opportunities, *Operation PUSH v. Allain*, 674 F. Supp. 1245 (N.D. Miss. 1987), *aff'd sub nom Operation PUSH v. Mabus*, 932 F.2d 400 (5th Cir. 1991); unequal access to polling places, *Spirit Lake Tribe v. Benson Cnty.*, 2010 WL 4226614 (D.N.D. Oct. 21, 2010); *Brown v. Dean*, 555 F. Supp. 502 (D.R.I. 1982); unequal establishment of early voting sites, *Brooks v. Gant*, 2012 WL 4482984 (D.S.D. Sept. 27, 2012); and underrepresentation of minority poll officials, *Harris v. Graddick*, 615 F. Supp. 239 (M.D. Ala. 1985).

Section 2 prohibits "not only voting practices borne of a discriminatory intent, but also voting practices that 'operate, designedly or otherwise,' to deny 'equal access to any phase of the electoral process for minority group members.'" *United States v. Charleston Cnty.*, 365 F.3d 341, 345 (4th Cir. 2004) (quoting Senate Report at 28, 30).[13] Thus, to prevail on its Section 2 claim here, the United States may show that HB 589 was enacted with a discriminatory purpose, that it will have a discriminatory result, or both. *See Chisom v. Roemer*, 501 U.S. 380, 394 & n.21 (1991).

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[12] The Voting Rights Act defines the terms "vote" and "voting" to include "all action necessary to make a vote effective in any primary, special, or general election, including, but not limited to registration, . . . casting a ballot, and having such ballot counted properly and included in the appropriate totals of votes cast." 42 U.S.C. § 1973*l*(c) (internal quotations omitted).

[13] In *Gingles*, the Supreme Court recognized that the Senate Report is "the authoritative source for legislative intent" on the amended Section 2. 478 U.S. at 43 n. 7.

1. The United States Is Likely to Succeed on its Claim that HB 589 Violates the Results Test of Section 2.

The text of Section 2 frames this Court's inquiry: the crucial question is whether, because of the challenged provisions, African Americans will "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973(b). As the Supreme Court has explained, "[t]he essence of a § 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by [minority] and white voters to elect their preferred representatives." *Gingles*, 478 U.S. at 47. Accordingly, the United States need not prove that the challenged provisions of HB 589 result in a complete denial of the right to vote. All it needs to establish is that the challenged practice "result[s] in the denial of equal access to any phase of the electoral process for minority group members." Senate Report at 30. To determine whether it does, this Court must conduct "a searching practical evaluation of the past and present reality" and take a "functional view of the political process." *Gingles*, 478 U.S. at 45 (internal citations and quotation marks omitted).

The United States does not contend that the mere absence of early voting, same-day registration, or out-of-precinct provisional ballots in a state that never adopted such processes would, without more, violate Section 2. *See, e.g.*, *Gingles*, 478 U.S. at 46 ("[E]lectoral devices, such as at-large elections, may not be considered *per se* violative of § 2. Plaintiffs must demonstrate that, under the totality of the circumstances, the devices result in unequal access to the electoral process."). Rather, it contends that HB 589's

particular package of restrictions on the opportunity to vote interacts with social, political, and historical conditions in North Carolina to result in a denial of equal access to the political process for African-American voters and that North Carolina's decision to eliminate the opportunity to use the full period of early voting, same-day registration, and out-of-precinct provisional ballots was tainted by an impermissible discriminatory purpose.

a. HB 589's curtailment of early voting will disproportionately burden African-American voters.

HB 589's curtailment of the one-stop early voting period will disproportionately burden African-American voters, 70% of whom have used early voting in recent presidential elections, JA vol. II at 842 (Stewart ¶ 151), when, of course, many state and local candidates are also on the ballot. SBOE data show that African-American voters have used early voting at significantly higher rates than white voters in every recent federal general election. In 2008, for example, 70% of all African-American voters used early voting, compared to just 51% of white voters. JA vol. II at 975 (Stewart Ex. 39 at 94). These numbers were almost identical in 2012—70% and 52%, respectively. *Id.* Even in a non-presidential year such as 2010, a greater percentage of African-American voters than white voters used early voting. JA vol. II at 842 (Stewart ¶ 151). Moreover, early voting has a different valence for African-American voters in North Carolina than the alternative of absentee voting by mail. According to African-American legislators, voting in person is of great significance to African Americans, in part because of the history of racial discrimination in voting and the long struggle for equal access to the

franchise. *See* JA vol. I at 170, 364 (H.M. Michaux ¶ 35; McKissick ¶ 41). Many black voters use early voting because of lingering "concerns that something could go wrong in their attempts to vote." JA vol. I at 314 (Glazier ¶ 52). Voting early gives them confidence that they will have time to overcome such obstacles. *See* JA vol. I at 364, 314 (McKissick ¶ 41; Glazier ¶ 52).

HB 589's reduction of the early voting period from 17 days to 10 days will impose a substantial burden on voters who rely on early voting—a group that is disproportionately African American. The burdens imposed by HB 589 will be felt in at least two ways. First, it will reduce the options available to citizens who wish to use early voting. They will by definition have fewer days on which they can do so. The State's election data show heavy use of the revoked period of early voting—the week eliminated by HB 589—with nearly 900,000 ballots cast during that period in November 2012. This was approximately 35% of all votes cast in that election. *See* JA vol. II at 845 & 976 (Stewart Tbl. 8 & Ex. 40 at 95). Moreover, in 2008 and 2012, when the overall rate of African-American turnout exceeded white turnout, the gap in early voting usage between African-American and white voters was widest during the two time periods that HB 589 eliminates: the now-revoked first seven days and the last Saturday before Election Day, a day on which HB 589 cuts back permissible early voting hours.[14]

[14] For example, 28.2% of African Americans who voted in the 2012 general election voted during the now-revoked first seven days of early voting, compared to just 17.3% of white voters; and 6.2% of African Americans who voted in 2012, compared to only 3.7% of white voters, cast their ballot on the last Saturday before the election. *See* JA vol. II at 977 (Stewart Ex. 41(a) at 96).

JA vol. II at 846-47, 977 (Stewart ¶¶ 160-161 & Ex. 41(a) at 96); N.C.G.S. § 163-227.2(b) (requiring early voting sites to close at 1:00 p.m. on the last Saturday rather than 5:00 p.m.). These statistical observations are reinforced by the observations of experienced legislators, who predict that "elimination of a week of [early voting] will disproportionately impact many voters, particularly [their] African-American, low-income, and student constituents" because "[t]hese demographic groups in particular have come to rely on early voting to cast a ballot." JA vol. I at 170 (H.M. Michaux ¶ 34); *see also* JA vol. I at 364, 407-08, 333-34 (McKissick ¶¶ 40-41; Martin ¶¶ 41, 44-45; Harrison ¶ 43).

Second, as North Carolina legislators were aware from the testimony they received about the experience in Florida, truncating the early voting period will increase wait times during the remaining days of early voting and on Election Day. This first consequence will place an additional burden on early voters, a group that is disproportionately African American. *See* JA vol. I at 140-143 (Bartlett ¶ 9, 11, 15, 22-23). North Carolina early voting sites are already congested. In recent presidential elections, reported wait times to cast an in-person early vote in North Carolina have far exceeded national averages and raised concerns among state election officials. JA vol. II at 851-53 (Stewart ¶¶ 171-177).[15] In an October 22, 2012 memorandum, the SBOE

[15] On the basis of this survey data, Dr. Stewart concluded that "many early voting centers in North Carolina are already congested in presidential election years, producing waiting times to vote that go beyond the thirty-minute standard recently proposed by the bipartisan Presidential Commission on Election Administration." JA vol. II at 853 (Stewart ¶ 176).

found that wait times at some early voting sites were "as long as 2 hours" and therefore directed county boards of elections to "take immediate steps to alleviate these delays and facilitate a more efficient voting process for North Carolina voters." JA vol. IV at 1545 (SBOE 10/22/12 Memo); *see also* JA vol. IV at 1547 (SBOE 10/23/12 Memo). In 2012, "North Carolina early voting centers were among the most congested in the nation." JA vol. II at 851 (Stewart ¶ 171). Indeed, Senator Rucho, one of the sponsors of HB 589, has acknowledged that in Mecklenburg County, "many times during presidential years we have two and three hour waits." [16] JA vol. V at 2472 (7/24/13 Tr. at 11:10-13). Those problems will only get worse if aspiring early voters have fewer days on which to vote.

County election officials' views on shortening the early voting period reinforce the conclusion that constriction of early voting opportunities will undermine effective access to voting. In June 2013, the SBOE surveyed county board of elections officials regarding the potential impact of shortening the early voting period. Of the 78 responding counties, 47.1% predicted that losing a week of early voting would reduce turnout. JA vol. IV at 1833, 1836. In open-ended comments, many county officials expressed concerns relating to the likelihood of longer lines at the polls, negative impacts because voters and election officials were accustomed to the 17-day early voting period, the need to split precincts to accommodate an expected increase in Election Day voters, and the need to expend additional resources on staff or equipment to compensate for HB 589's reduction of the

[16] Mecklenburg County has the largest population in the state, *see* JA vol. II at 857 (Stewart ¶ 187), and also has a large African-American population.

preexisting early voting period. JA vol. IV at 1840-67; *see also* JA vol. IV at 1870 (Pitt County analysis predicting "a detrimental effect on the voting process for both the public and government agencies"); JA vol. I at 221-22, 141-43 (Gilbert ¶ 11; Bartlett ¶¶ 15-22).

Expert testimony in this case indicates that increased congestion will suppress turnout, particularly among early voters. As Dr. Ted Allen explained, long lines deter voters: "[T]here appears to be a direct relationship between waiting times to vote and voter turnout." JA vol. III at 1419-20 (Allen ¶¶ 34-36). This is consistent with voting patterns researchers observed in Florida in 2012, where many people who voted near the end of the early voting period in 2008 were deterred from voting altogether in 2012 out of fear that the lines to vote would be unreasonable. JA vol. II at 864-65 (Stewart ¶¶ 203-205); *see infra* note 16.

HB 589's requirement to maintain the same number of early voting hours in federal elections is at best a cosmetic way to try to mask the effects of stripping seven days from the early voting period. The analysis by Dr. Charles Stewart, the United States' expert, of both survey data and North Carolina elections data shows that "early voting is a middle-of-the-day activity." JA vol. II at 854-55, 979-80 (Stewart ¶¶ 180-182, Fig. 18, Ex. 43 at 98-99). "[T]he core time-of-day for early voting starts at 11:00 a.m. and ends at 5:00 p.m." JA vol. II at 854-55 (Stewart ¶ 182). Most of the State's 100 counties will be unable to meet the hours requirement by adding more midday hours because they are already providing early voting during that time slot. *See* JA vol. II at 857, 981-83 (Stewart ¶ 186 & Ex. 44 at 100-102).

The alternatives of adding early or late hours at existing early voting sites are unlikely to alleviate the problem since these new hours are not the hours voters want to use. Nor is it attractive for counties to add additional sites, since this will entail extra costs that financially strapped jurisdictions can ill afford. JA vol. I at 221-24, 143-44 (Gilbert ¶¶ 11-16; Bartlett ¶ 24); JA vol. II at 836 (Stewart ¶ 135); JA vol. IV at 1842 & 1856 (Caswell County); *cf.* JA vol. I at 313 Glazier ¶ 48 (Cumberland County). Indeed, for the May 2014 primary election, 38 counties sought and received waivers of the hours requirement, with many pointing to costs as an obstacle. JA vol. I at 479 (Strach 30(b)(6) Tr. at 106:14-17); JA vol. IV at 1976-78 (list of waiver requests); JA vol. III at 1222-23, 1316-17 (Kousser at 46-47; Lawson ¶ 89 n. 211).

The legislature was warned that the changes it was adopting were strikingly similar to Florida's disastrous cutback of early voting days in 2012, when that state reduced the number of early voting days from 14 to 8, while permitting counties to retain the same total number of hours of early voting as in previous elections. The result was a "nightmare" for voters. JA vol. V at 2422-23 (4/3/13 Tr. at 78-79); JA vol. I at 437, 444-45 (Sancho ¶¶ 8, 24). By overwhelming majorities, the Florida legislature overturned the changes in 2013 after public outcry over the long wait times during early voting and on Election Day in 2012.[17] JA vol. II at 861 (Stewart ¶ 196); JA vol. I at 430-31, 432-33 (Sawyer ¶¶ 7, 13-14).

[17] A detailed study of Florida's experience in 2012 leads to three conclusions regarding the likely effects of HB 589 in North Carolina: "First, the earliest early voters from 2012 are likely to continue voting early in 2016. However, they will be forced to vote within a narrow window that will now need to accommodate both their desire to vote early, *and*

In short, because early voters are disproportionately African American, they will bear more of the effects of "greater congestion at the polls, longer waits, and a reduction in voting, especially in the 2016 presidential election[,]" as a result of HB 589. JA vol. II at 866, 977 (Stewart ¶ 208 & Ex. 41(a) at 96). The reductions in opportunities for early voting "creat[e] a barrier to voting that is more likely to appear in the path of a voter if that voter is [African American] than if he or she is not."[18] *Frank*, 2014 WL 1775432, at *25.

b. HB 589's elimination of same-day registration will disproportionately harm African Americans as compared to white voters.

African Americans in North Carolina have also heavily used same-day registration during the early voting period and will be disproportionately burdened by its elimination. During the 2012 general election, African Americans were over 35% more likely than white voters to register to vote using same-day registration. The elimination of same-day

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the desire of those who would have voted in the latter part of the period any way. Second, some will be deterred from voting altogether in 2016, out of fear that the lines to vote will be unreasonable." JA vol. II at 865 (Stewart ¶ 206). Third, "the elimination of a week of early voting in North Carolina will increase congestion at the polls on *Election Day*." JA vol. II at 866 (Stewart ¶ 207).

[18] In the context of an Equal Protection claim, in 2012, the Sixth Circuit affirmed a preliminary injunction blocking cutbacks to early voting in Ohio based on the district court's conclusion that the cutbacks would substantially burden voters. *Obama for Am. v. Husted*, 697 F.3d 423, 431 (6th Cir. 2012) (finding that the district court's determination that, as a result of the reductions, "thousands of voters . . . will not be able to exercise their right to cast a vote in person" was not clearly erroneous), *aff'g* 888 F. Supp. 2d 897, 907 (S.D. Ohio); *see also* 697 F.3d at 442 (White, J., concurring in part and dissenting in part) (concluding that eliminating early voting options "relied on by substantial numbers of voters" created a burden that outweighed the state's "legitimate regulatory interests").

registration threatens to undo North Carolina's recently-achieved parity between white and African-American registration rates. *See* JA vol. II at 800-01 (Stewart ¶¶ 51-53).

North Carolina's voter rolls have grown dramatically in recent years, driven disproportionately by a growing registration rate among African Americans. *See supra* Section II.A.3; JA vol. II at 807 (Stewart ¶ 68). Same-day registration contributed to this increase. While 81% of eligible African Americans were registered in 2000, that percentage jumped to 95% at the time of the 2008 general election, the first statewide general election for which same-day registration was available. JA vol. II at 807 (Stewart Tbl. 3). HB 589 eliminates the means of registration and participation used by many African-American voters.

North Carolina's voter registration data show that African-Americans used same-day registration at a significantly higher rate than white voters in each statewide general election where it has been available. *See, e.g.*, JA vol. II at 965 (Stewart Ex. 31 at 84). While only 26% of the 1.76 million people who registered to vote were African American during the four-year period between when regular registration closed in 2008 and the close of the early voting period in 2012, 36% of the registrants using same-day registration in 2008 were African American, and 32% of the same-day registrants in 2012 were African American. JA vol. II at 823-25 (Stewart ¶¶ 100, 106 & Tbl. 7). By contrast, although white voters were 63% of the registrants during that same period, only 55% of the registrants using same-day registration in 2008, and 51% in 2012, were white. *Id*.

These data demonstrate that same-day registration is preferred by a significantly higher percentage of black voters than white voters, and as a result, "the most likely effect of ending same-day registration will be the erection of a barrier to voting that is higher for blacks than it is for whites." JA vol. II at 825 (Stewart ¶ 108).

Several North Carolina legislators, based on their experience observing elections, reached the same conclusion. Senator McKissick explains that "[t]he elimination of same day registration will disproportionately harm working class communities, who move more frequently, have lower rates of home ownership, and are disproportionately African American." JA vol. I at 367 (McKissick ¶ 52). Senator Glazier states that "[t]he elimination of same-day registration will have a devastating impact on transient communities. . . . In particular, African Americans, low-income, military, and young voters are more likely to move." JA vol. I at 316 (Glazier Decl. ¶ 63); *see also* JA vol. I at 172, 334-35 (H.M. Michaux ¶ 42; Harrison ¶¶ 46-47).

Over time, the elimination of same-day registration risks re-creating the racial disparities in registration rates that plagued North Carolina until the past decade. It is important to understand that same-day registration is not a one-time phenomenon—many voters can expect to use same-day registration more than once as they move from one residence to another. Thus, the gains achieved over the past several years are not permanent. For example, nearly 30% of voter registration records in North Carolina changed in some way during the two-year period leading up to the 2012 general election, JA vol. II at 808 (Stewart ¶ 69), and half of the state's registered voters in 2012 had registered since 2000, JA vol. II at 810 (Stewart ¶ 74). Moreover, because North

Carolina has established the county as the basic unit of registration, voters who move between counties in North Carolina must re-register with their new county before they can vote. JA vol. II at 808 (Stewart ¶ 70). As a result, "the composition of the registration rolls can change quickly as a state's demographics change[,]" and "these changes can be amplified or dampened by the particularities of voter registration laws and regulations." JA vol. II at 808 (Stewart ¶ 69). African Americans in North Carolina are more likely to move between counties than white residents, increasing the likelihood that they will find themselves needing to re-register. JA vol. II at 808-09 (Stewart ¶ 71 n.37). Moreover, the record shows that many North Carolinians do not realize that same-day registration will no longer be available during early voting. *See* JA vol. I at 382-83 (Kinnaird ¶ 34). The risk of voter confusion is particularly great because HB 589 revokes a practice on which prospective voters in North Carolina, particularly African-American voters, have come to rely. *See NAACP-Greensboro Branch v. Guilford Cnty. Bd. of Elections*, 858 F. Supp. 2d 516, 526 (M.D.N.C. 2012) (noting risk of voter confusion if challenged electoral change was not enjoined).

Finally, studies of voter turnout show that same-day registration and Election Day registration increase turnout. JA vol. II at 831-32, 626-28 (Stewart ¶¶ 122-123; Gronke ¶¶ 42-43). As Dr. Stewart points out, same-day registrants "vote at almost 100% levels," while other registrants do not. JA vol. II at 831-32 (Stewart ¶ 122). The SBOE's own report on the use of same-day registration in the 2008 general election concluded that "[m]ore people were able to successfully vote because they had the chance to take care of registration issues during the one-stop voting periods." JA vol. IV at 1528, 1531 (SBOE

3/31/09 Report); *see also* JA vol. I at 147 (Bartlett ¶ 33) (20-year director of SBOE describing same-day registration as a "success").

The elimination of same-day registration, an option disproportionately used by African Americans, will accordingly disproportionately harm African Americans and afford them less opportunity than other members of the electorate to participate in the political process. *See* JA vol. II at 825-26 (Stewart ¶¶ 108-109); *Johnson v. Halifax Cnty.*, 594 F. Supp. 161, 171 (E.D.N.C. 1984).

c. HB 589's prohibition on counting of out-of-precinct provisional ballots will disproportionately harm African-American voters.

Finally, HB 589's prohibition on the counting of out-of-precinct provisional ballots will create additional obstacles to equal political participation by African-American voters in North Carolina. SBOE data show that African Americans are twice as likely to cast an out-of-precinct provisional ballot as white voters. JA vol. II at 868 (Stewart ¶ 217). In 2012, for example, 2,236 of 289,854 (0.77%) of African-American Election Day voters cast out-of-precinct provisional ballots, whereas only 3,992 of 1,370,990 (0.29%) of white Election Day voters cast such ballots. JA vol. II at 876 (Stewart Tbl. 14). Similarly, in 2010, the numbers were 0.74% of African-American voters and 0.19% of white voters. *Id*. Indeed, when the General Assembly passed legislation to clarify the law regarding out-of-precinct voting, it included a specific finding noting this racial disparity. *See supra* Section II.A.2; JA vol. V at 2635 (S.L. 2005-2); JA vol. III at 1205-06, 1263-64 (Kousser 29-30; Lawson ¶ 20).

Although the number of voters who cast an out-of-precinct provisional ballot in any given election is relatively small, *see* JA vol. II at 872-73 (Stewart ¶¶ 227-228 & Tbl. 11 & 12), because these ballots are counted—either fully or partially—at a much higher rate than other provisional ballots, out-of-precinct voting can have a significant impact on elections. JA vol. II at 872-74, 877-78 (Stewart ¶¶ 228-230 & Tbl. 12 & 13, ¶¶ 237, 240-241).

Election Day voters appear at polling places other than their assigned precinct for a variety of reasons—sometimes because they mistook a nearby early voting site for their Election Day site or because their precinct changed through redistricting. JA vol. I at 318-19, 380-81 (Glazier ¶ 71; Kinnaird ¶ 30). Whatever the reasons, when a voter appears to vote on Election Day at a precinct that is not the precinct to which he or she has been assigned, the options for resolving the situation can be limited, particularly for poorer voters who have few transportation options or restricted time to take off from work. JA vol. II at 868 (Stewart ¶ 216); JA vol. I at 153, 336, 410-11 (Bartlett ¶ 48; Harrison ¶¶ 52-53; Martin ¶¶ 53, 57). Further, as with same-day registration, out-of-precinct voting is particularly beneficial for more transient communities, and African Americans in North Carolina are more likely to move than white residents. JA vol. II at 808-09 (Stewart ¶ 71 n. 37); JA vol. I at 318-19, 335 (Glazier ¶ 73; Harrison ¶ 51); *see also* JA vol. I at 410 (Martin ¶ 55).

Because African Americans disproportionately cast out-of-precinct provisional ballots in North Carolina, ending the practice of counting these ballots is likely to reduce the voting strength of African Americans at a disproportionate rate. *See* JA vol. II at 876-

79 (Stewart ¶¶ 235-236, 244); JA vol. I at 152 (Bartlett ¶ 47); JA vol. V at 2633 (S.L. 2005-2).

d. The cumulative effect of the challenged provisions of HB 589 exacerbates the burden for African-American voters.

With HB 589, North Carolina adopted a package of changes that can also be evaluated "as a single and unified whole." *City of Rome v. United States*, 472 F. Supp. 221, 247 (D.D.C. 1979) (three judge court), *aff'd* 446 U.S. 156, 186-87 (1980). North Carolina has placed a series of obstacles before voters attempting to cast an effective ballot, each one of which falls disproportionately on African Americans. These voting changes "have an indivisible cumulative impact on black voting strength." *Id.* "Had HB 589 been in effect for the 2012 [general] election, over 30,000 African Americans who registered during the same-day registration period would have been unable to register during that period, almost 300,000 [black] early voters would have been shoehorned into more congested early voting and Election Day voting sites, and at least 2,000 African-American voters would have had their out-of-precinct votes left uncounted." JA vol. II at 879-80 (Stewart ¶ 247); *see also id.* at 789, 977 (Stewart ¶ 19, Ex. 41 at 96).

Implementation of the challenged provisions of HB 589, both individually and combined, is likely to diminish African-American participation in the electoral process. "[D]enial of equal access to the electoral process discourages future participation by voters." *United States v. Berks Cnty.*, 250 F. Supp. 2d 525, 540 (E.D. Pa. 2003). This package of changes disproportionately targets the practices African Americans have used over the past decade to overcome generations of restricted electoral participation, expand

their access to the franchise, and increase their influence over the local political process. JA vol. II at 879-80 (Stewart ¶¶ 246-248); JA vol. III at 1311-12 (Lawson ¶ 83); JA vol. I at 319-20, 349 (Glazier ¶ 75; Goodman ¶ 23); *see also* JA vol. I at 383, 181-82, 191 (Kinnaird ¶ 35; Stein ¶¶ 11, 32). Particularly when minority voters have been "becoming more politically active, with a marked and continuous rise in . . . voter registration," *LULAC v. Perry*, 548 U.S. 399, 438-39 (2006), it violates Section 2 for a state to alter the very elements of the election system they rely on and to place new obstacles in their way. Under these circumstances, the challenged provisions of HB 589 violate Section 2.

e. The totality of the circumstances in North Carolina reinforces the conclusion that HB 589 undermines the ability of African-American voters to participate equally in the political process.

The Senate Report that accompanied the 1982 amendments to Section 2 codified the results test and identified several "[t]ypical factors" that may inform a court's evaluation of the totality of circumstances (the "Senate Report factors").[19] Although the

[19] The factors are:

> 1. the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;
>
> 2. the extent to which voting in the elections of the state or political subdivision is racially polarized;
>
> 3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;
>
> 4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process;

Report lays out a list, it also emphasizes that no one factor is dispositive of a Section 2 claim, and that "there is no requirement that any particular number of factors be proved, or that a majority of them point one way or the other." Senate Report at 29; *see also Gingles*, 478 U.S. at 43.[20] The Senate Report factors are not an "all or nothing test." *PUSH v. Allain*, 674 F. Supp. at 1263; *Gingles*, 478 U.S. at 45. Rather, they guide courts in evaluating whether "the political, social, and economic legacy of past discrimination . .

> 5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;
>
> 6. whether political campaigns have been characterized by overt or subtle racial appeals; . . .
>
> 7. the extent to which members of the minority group have been elected to public office in the jurisdiction[;]
>
> [8.] whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group[; and]
>
> [9.] whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous.

Gingles, 478 U.S. at 36-37; Senate Report 28-29.

[20] *Gingles* itself involved a claim of group vote dilution, not a claim of voter access. There, the Supreme Court held that when plaintiffs are advancing "a claim of vote dilution through submergence in multimember districts," they must satisfy a three-prong threshold test. *Gingles*, 478 U.S. at 48. While the Court later held that the *Gingles* test should also govern vote dilution claims involving challenges to single-member district plans, *see Growe v. Emison*, 507 U.S. 25, 40 (1993), it has cautioned that "the *Gingles* factors cannot be applied mechanically and without regard to the nature of the claim." *Johnson v. De Grandy*, 512 U.S. 997, 1007 (1994) (internal quotations omitted). To the best of United States' knowledge, no court has ever required that plaintiffs satisfy the *Gingles* preconditions in a claim that did not allege illegal vote dilution.

. hinder[s a minority group's] ability to participate effectively in the political process." *LULAC*, 548 U.S. at 440 (internal citations and quotations omitted). Here, an examination of the Senate Report factors most relevant to a case about voter access supports the conclusion that the United States is likely to prevail at trial.

The First Senate Report Factor: History of Official Discrimination. North Carolina has a well-documented and undeniable history of official discrimination in voting that has "touched the right of" minorities "to register, to vote, or otherwise participate in the democratic process." Senate Report at 29; *Gingles*, 478 U.S. at 36, 44; JA vol. III at 1351-57 (Leloudis at 13-19); JA vol. III at 1184-1192, 1224-25, 1254-61 (Kousser at 8-6; 48-49; Lawson at ¶¶ 12-17); *see also Gingles*, 590 F. Supp. at 359-60.

That history is one of expansion of the franchise followed by backlash. *See, e.g.*, JA vol. II at 802-03 (Stewart ¶¶ 56-57). Shortly after ratification of the Fourteenth and Fifteenth Amendments, North Carolina experienced its first brief period of increased minority voter participation. JA vol. III at 1185-86, 1254-56 (Kousser at 9-10; Lawson ¶ 12); JA vol. III at 1345 (Leloudis at 7). During this time, black voters had a substantial impact on the outcome of elections. JA vol. III at 1185-88, 1254-56, 1350 (Kousser at 9-12; Lawson ¶ 12; Leloudis at 12). By 1898, however, racial appeals, violence, and other efforts to disfranchise black voters reached an apex, and included the legislature's enactment of laws designed both subtly and overtly to undermine black voting strength. *See, e.g.*, JA vol. III at 1187-89, 1254-56, 1351-56 (Kousser at 11-13; Lawson ¶¶ 12-13; Leloudis at 13-18). By 1900, North Carolina's constitution included amendments

adopting a poll tax, literacy test, and grandfather clause.[21] *See Gingles*, 590 F. Supp. at 359-60; JA vol. III at 1188-89, 1254-56, 1356-57 (Kousser at 12-13; Lawson ¶ 12; Leloudis at 18-19). Although the poll tax and grandfather clause were eliminated before 1965, North Carolina continued to impose a literacy test, notwithstanding the Fourteenth and Fifteenth Amendments and the test's effect on black voter registration and turnout, until Congress banned it from doing so. *See Lassiter v. Northampton Cnty. Bd. of Elections*, 360 U.S. 45 (1959) (rejecting a facial challenge to North Carolina's literacy test); *Gaston Cnty. v. United States*, 395 U.S. 285, 293-95 (1969) (sustaining a district court's finding that a North Carolina county's "use of the literacy test, coupled with its racially segregated and unequal school system, discriminatorily deprived Negroes of the franchise" and "perpetuated inequities"); *Gingles*, 590 F. Supp at 360.

The long-term racial implications of North Carolina's first legislative backlash against African-American voter participation were devastating. *See Gingles*, 590 F. Supp. at 360; JA vol. III at 1188-90, 1254-56 (Kousser at 12-14; Lawson ¶¶ 12-13). Even after the literacy test and poll tax were removed as official barriers, "their chilling effect . . . persisted . . . as at least one cause of continued relatively depressed levels of black voter registration." *Gingles,* 590 F. Supp. at 360, 363; JA vol. III at 1188-91, 1254-56, 1259-60 (Kousser at 12-15; Lawson ¶¶ 12, 16). Ultimately, the State's continued use of the literacy test and the substantially depressed percentage of registered voters in the

[21] "Grandfather clauses" were used to permit poor white voters to continue to vote despite barriers such as literacy tests placed in the way of African-American voters. JA vol. III at 1188 (Kousser at 12); *see also Gingles*, 590 F. Supp. at 359.

1964 presidential election led to the coverage of forty North Carolina counties under Section 5 of the Voting Rights Act of 1965. *See* JA vol. V at 2656-57, 2696, 2710-11 (30 Fed. Reg. 9897 (Aug. 7, 1965); 31 Fed. Reg. 19 (Jan 4, 1966); 31 Fed. Reg. 3317 (Mar. 2, 1966); 31 Fed. Reg. 5080 (Mar. 29, 1966)); JA vol. IV at 1962, 1966-67 (McCrary ¶ 4 & Att. A).

The Voting Rights Act has led to notable improvements for black voters in North Carolina. Slowly, for the first time since Reconstruction, voters again elected African Americans to local governments and the North Carolina General Assembly.[22] *See, e.g.*, JA vol. I at 169 (H.M. Michaux ¶ 32); JA vol. III at 1190-91, 1259-60 (Kousser at 14, 15; Lawson ¶ 16). But barriers to equal political participation persisted. *See, e.g.*, *Gingles*, 590 F. Supp. at 360. After the 1982 reauthorization of the Voting Rights Act, a series of lawsuits challenged electoral structures in North Carolina that had the effect of preventing black voters from participating in the political process and electing candidates of choice on an equal basis as white voters. *See, e.g.*, *Gingles*, 478 U.S. 30; JA vol. III at 1367 (Leloudis at 29); *United States v. Onslow Cnty*., 683 F. Supp 1021 (E.D.N.C. 1988); *Halifax Cnty*., 594 F. Supp. 161. In addition, pursuant to Section 5 of the Voting Rights Act, the federal government blocked numerous attempts by North Carolina and its covered political subdivisions to implement discriminatory election laws. *See, e.g.*, JA vol. III at 1259-60, 1367 (Lawson ¶ 16; Leloudis at 29); JA vol. IV at 1963, 1969-75

[22] African-American party affiliation also began to shift in the mid-20th century from the Republican Party to the Democratic Party. *See, e.g.*, JA vol. III at 1180-81; 1269-71 (Kousser at 4-5; Lawson ¶¶ 26-28).

(McCrary ¶ 5 & Att. B); JA vol. V at 2739-44, 2751-55 (examples of Section 5 objections). In all, prior to the Supreme Court's decision in *Shelby County*, 133 S. Ct. 2612 (2013), the Department of Justice objected to over 60 voting changes in North Carolina. JA vol. IV at 1969-75 (McCrary Att. B); JA vol. III at 1259-60 (Lawson ¶ 16).

However, enforcement of Sections 2 and 5 did not eliminate the lingering racial disparities in voter registration and turnout rates, which persisted into the twenty-first century. Official action to unravel the effects of racial discrimination in voter registration and turnout was limited. *See Gingles*, 590 F. Supp. at 361. In 1980, only 51.3% of the black voting age population was registered to vote compared to 70.1% of the white voting age population. *Id*. at 360-61. In 1990, 63% of the black voting age population was registered to vote compared to 69% of the white voting age population. *See* JA vol. III at 1259-60 (Lawson ¶ 16). Although overall registration increased over the next decade, the gap between black and white registration rates was actually larger in 2000 than it had been in 1990. *See id.*; JA vol. II at 807 (Stewart Tbl. 3) (in 2000, 81.1% of North Carolina's voting age blacks registered to vote, compared to 90.2% of voting age whites).

The racial disparity in voter turnout rates persisted as well. During the 1996 election, for example, North Carolina ranked 43rd in the nation for voter turnout of the voting eligible population; 48.3% of North Carolina's white voting-age population voted that year but only 36.9% of the black voting-age population voted. JA vol. I at 162 (H.M. Michaux ¶ 8); JA vol. III at 1196-97 (Kousser at 20-21, Tbl. 1 & 2). The disparity persisted through the 2000 election. JA vol. III at 1196-97 (Kousser at 20-21). Low

levels of black voter participation in the late 1990s and early 2000s were compounded by election administration problems, including long lines, which the SBOE found had "a chilling effect on voter participation." *See* JA vol. IV at 1468 (SBOE 2/13/97 Memo); JA vol. I at 171, 139 (H.M. Michaux ¶ 37; Bartlett ¶ 8).

The developments that most effectively overcame the lingering effects of past official discrimination touching the right to vote were the institution of early voting and same-day registration. Those are precisely the practices that HB 589 targets.

HB 589 threatens to rekindle the lingering effects of historical discrimination by erecting new barriers and targeting the methods of voting that African Americans have found most effective in overcoming disparities in political participation.

The Fifth Senate Report Factor: Socio-Economic Disparities That Hinder Political Participation: Census data provides ample evidence of socio-economic disparities between minority voters and white voters in North Carolina "in such areas as education, employment, and health, which hinder [minority citizens'] ability to participate effectively in the political process." *Gingles*, 478 U.S. at 45.

The poverty rate among African Americans in North Carolina is more than twice that of whites: 26.6%, as opposed to 11.9%. *See* JA vol. III at 1145-46 (Duncan at 4-5, Figure 1). Also, the unemployment rate for African Americans was almost twice the rate for white residents (16.9% to 8.6%). JA vol. III at 1153 (Duncan at 12). With respect to educational attainment, black North Carolina residents are less likely to have a high school diploma than white residents. JA vol. III at 1150-52 (Duncan at 9-11) (only 10.1% of non-Hispanic whites over 25 have less than a high school diploma, compared to

15.7% of African Americans). And educational attainment affects black and white North Carolinians differently. In North Carolina, blacks without a high school diploma are much more likely to be poor: approximately 40% of blacks without a high school diploma are poor, compared to just 25.7% of whites. JA vol. III at 1152 (Duncan at 11, Figure 5).

African Americans in North Carolina continue to be more transient, poorer, and less educated than their white counterparts, all of which can impact the right to vote. Poverty interacts with HB 589 directly because poor African Americans "lack the resources necessary to permit participation in the activities" that other Americans routinely undertake. *Id.* The poor may work two jobs to survive, "either a day job and an evening job or a workweek job and a weekend job." JA vol. III at 1153 (Duncan at 12). They "struggle to make ends meet, living paycheck to paycheck." JA vol. III at 1154 (Duncan at 13).

Moreover, the disparities in how poverty impacts racial groups in North Carolina are stark. For instance, in North Carolina, "15 percent of the poor live in homes without access to a vehicle" but only 8.8% of poor non-Hispanic whites lack access to a car compared to 27% of non-Hispanic blacks. JA vol. III at 1155 (Duncan at 14). And only 13.6% of non-Hispanic whites live in a different house than they did last year as compared with 18.5% of non-Hispanic blacks. JA vol. III at 1158 (Duncan at 17).

Because courts have recognized that "disproportionate educational, employment, income level and living conditions arising from past discrimination tend to depress minority political participation," Section 2 plaintiffs "need not prove any further causal

nexus between their disparate socio-economic status and the depressed level of political participation." Senate Report at 29 n.114 (citing *White v. Regester*, 412 U.S. 755, 768 (1973)). Nonetheless, it is easy to see how logistical obstacles will fall most heavily on North Carolina's African-American citizens. Obstacles that will be entirely manageable to a person who receives a salary create barriers for hourly employees who do not have flexibility or who have to work two jobs to make ends meet. For the poor, who in North Carolina are disproportionately African-American, the flexibility provided by an additional seven days of early voting matters more than for those of greater means. *See* JA vol. III at 1146-48 (Duncan at 5-7) ("Poverty is about . . . families that are cut off from the kind of everyday living that those in the middle class take for granted."). Moreover, within the group of those who are poor, African Americans are more likely to move and less likely to own a vehicle. JA vol. III at 1155, 1158 (Duncan at 14, 17). They are often dependent on friends, family members, or other community resources for a ride to the polling place. *See* JA vol. III at 1154-55 (Duncan at 13-14); JA vol. I at 364-65, 56-58 (McKissick ¶ 42; R. Michaux ¶¶ 12-13, 16). And they need to reregister in order to vote more often than their white counterparts. *See supra* Section III.B.1.b.

Thus, it is no surprise that a larger percentage of voters who cast out-of-precinct ballots in elections from 2006 to 2012 were African American. JA vol. II at 876 (Stewart ¶ 235, Tbl. 14). For these voters, volleying between polling places to cast a valid ballot can present an insurmountable hurdle. Similarly, the loss of same-day registration will have a greater impact on African Americans than other voters because registered voters

who move between counties (or move to North Carolina from other states) must re-register before they can vote. JA vol. II at 808-09 (Stewart ¶ 71 & n.37).

Moreover, in North Carolina, the disparity in black and white educational attainment, *see* Duncan 10-11, creates different voting patterns as Election Day approaches. *See* JA vol. II at 830-31 (Stewart ¶¶ 120-121). Fewer blacks have a post-high school education than whites. JA vol. II at 830-31 (Stewart ¶ 121 & n. 76). For those with less formal education, interest in registering to vote may occur closer to Election Day. *See* JA vol. II at 830 (Stewart ¶ 120). And indeed, once same-day registration became available in 2008, African Americans disproportionately relied on it to register to vote. *See supra* Section III.B.1.b.

Thus, before HB 589, the 17-day early voting period, same-day registration, and the availability of out-of-precinct provisional voting worked together to ameliorate some of the barriers to full participation posed by lingering socioeconomic disparities. By contrast, HB 589 reinstitutes those very barriers.

The Final Senate Report Factor: The Tenuousness of the Ostensible State Policies Underlying HB 589. "[O]fficials acting in their official capacities seldom, if ever, announce on the record that they are pursuing a particular course of action because of their desire to discriminate against a racial minority." *Smith v. Town of Clarkton*, 682 F.2d 1055, 1064 (4th Cir. 1982). Although supporters of HB 589 offered some rationales for the curtailment of the early voting period, the elimination of same-day registration, and the prohibition on counting of out-of-precinct provisional ballots, those rationales are

not supported by the evidence.[23] Indeed, they are so unpersuasive as to suggest that they are pretextual. But even if they are not pretextual—an issue to which we return in the section of this brief dealing with the United States' intent claim, *see infra* Section III.B.2—they are "tenuous" within the meaning of the final Senate Report factor.

Transcripts of the legislative debates surrounding the expanded version of HB 589 shed little light on any legitimate policies that could have undergirded the provisions at issue here. When Senator Rucho initiated the debate in the Senate Rules Committee, he asserted that the bill was "a reform of an outdated and archaic form of State Election Code that hasn't been adjusted in many years, at least three decades." JA vol. V at 2453 (7/23/13 Tr. at 2:17-19). That claim is simply false: major provisions repealed or cut by HB 589 had all been adopted and adjusted within the preceding decade. The early voting statute had been revised in recent years to expand the availability of early voting, the same-day registration statute was first enacted in 2007, and the law regarding out-of-precinct provisional ballots was changed in 2005. *See supra* Section II.A.

Senator Rucho went on to claim several broad goals for the bill—"transparency to the election process," the elimination of "political gamesmanship," "ensuring . . . integrity" of the election process, and "re-establish[ing] a confidence in the electoral process." JA vol. V at 2453-54 (7/23/13 Tr. at 2:20, 23-24; 3:1, 3-4). But he and other

[23] During the abbreviated process that followed the unveiling of the expanded version of HB 589 in the Senate, supporters of the bill said very little about the provisions at issue here, directing most of their focus to arguments relevant only to voter photo ID, the primary focus of the House version of HB 589. *See* JA vol. IV 1873, 1874, 2099 (press releases); *see supra* Section II.B.

supporters of the bill failed to explain how these broad goals were advanced by the cuts to the early voting period, the elimination of same-day registration, or the prohibition on counting out-of-precinct provisional ballots.

Supporters of HB 589 offered a series of conclusory justifications for reducing the early voting period. One constellation invoked ideals of "consistency," asserting that the restrictions would "set[] an equal footing in every one of the counties" and combat "abuse," "gamesmanship," and "partisan advantage." JA vol. V at 2456-57, 2465 (7/23/13 Tr. at 30:6-9, 30:24-31:3, 75:10-15); JA vol. V at 2469 (7/24/13 Tr. at 5:3-9). A second constellation rested on the idea that cutting the early voting period would require counties to provide additional hours outside of normal working hours and set up additional early voting sites. JA vol. V at 2500-01 (7/25/13 Sen. Tr. at 55:22-56:3); JA vol. V at 2468-69 (7/24/14 Tr. at 4:11-5:3). A third set paradoxically claimed that diminishing the availability of early voting would somehow reduce long lines at polling places. JA vol. V at 2468, 2472 (7/24/13 Tr. at 4:20-22, 11:5-13).

None of these purported justifications for the early voting provisions is supported by the evidence. While HB 589 does require that all satellite early voting sites within each county must be open on the same days and during the same hours, JA vol. V at 2273-74 (HB 589 § 25.1), there is no logical connection between requiring consistency in how a county treats its early voting sites and reducing the length of the early voting period. In any event, the bill did nothing to address any alleged abuse in the selection of early voting sites (nor does it explain how channeling hundreds of thousands of voters into fewer days of voting prevents "gamesmanship" or benefits voters). If anything,

dramatically cutting the availability of the method of voting used by 70% of African-American voters in 2008 and 2012 would appear to be the very definition of "gamesmanship."

As discussed above, the reduction of seven days of early voting will lead to longer lines at the polls even if the same number of hours are retained, JA vol. II at 866 (Stewart ¶ 208), and many jurisdictions will likely seek and have sought to avoid the costs involved in equipping additional sites. JA vol. II at 836 (Stewart ¶ 135); JA vol. I at 142-43, 442-45 (Bartlett ¶¶ 16-21; Sancho ¶¶ 21-22, 24); *see also supra* Section II.B.1.a. Further, two SBOE reports provided to the legislature include data showing that, for high-turnout elections, reducing early voting will not save jurisdictions money and in fact will likely increase costs. JA vol. IV at 1541-43 (SBOE 5/18/11 Memo); JA vol. IV at 1677, 1701-02 (SBOE 3/11/13 Memo).

The justifications offered for eliminating same-day registration were equally conclusory. One argument claimed that same-day registration leads to "mobs and mobs of people up there that have never bothered to register in a huge election and they want to come in on election day and register to vote," which "creates havoc," JA vol. V at 2479 (7/24/13 Tr. at 78:6-12). A second suggested that "if you don't think enough about voting and wait to register until you get there on election day," then "it doesn't mean very much to you to say, oh, I didn't register," JA vol. V at 2495 (7/25/13 Sen. Tr. at 45:19-23). A third asserted that "there's no simple way to validate" same-day registrants, and eliminating same-day registration "allows time . . . to verify voters' information" and will

"ensure accuracy," JA vol. V at 2460 (7/23/13 Tr. at 41:2-11); JA vol. V at 2469 (7/24/13 Tr. at 5:9-14).

These rationales are as unsupported by the record as those advanced to justify the cutbacks in early voting. First, the legislature had no evidence that same-day registration in North Carolina created any "havoc." To the contrary, the SBOE's report regarding implementation of same-day registration in 2008 concluded that the project was a success. JA vol. IV at 1528, 1531. What the legislature *did* have before it was evidence that the people characterized as "mobs and mobs" of same-day registrants were disproportionately African American. Second, the argument that a voter who misses the registration deadline does not deserve to be able to vote begs the question: same-day registration meant that voters who used the one-stop process had *met* the deadline. *Cf. United States v. Texas*, 252 F. Supp. 234, 252 (W.D. Tex. 1966) (describing, before rejecting, the argument that people who did not care enough to pay a poll tax well in advance of the election were "not intelligent enough or competent enough to manage the affairs of the government") (internal quotations omitted), *aff'd*, 384 U.S. 155 (1966) (per curiam). Finally, all the available evidence showed that the prior process was working smoothly and was appropriately determining registrants' eligibility before counting their ballots. JA vol. I at 146-47, 226 (Bartlett ¶¶ 29-32; Gilbert ¶ 24); JA vol. IV at 1621 (SBOE 2/11/13 Report).

Moreover, the same-day registration statute that HB 589 abrogated contained several safeguards to verify voter identity and protect against fraud, and the evidence shows that these safeguards had worked well. The same-day registration process

required two types of verification: (1) electronic verification involving comparison of the registrant's personal information with state databases, to be completed within 48 hours of submission of the same-day registration application, and (2) a mail verification to begin within 48 hours of submission of the same-day registration application. N.C.G.S. § 163-82.6A(d) (2012) (repealed by HB 589, § 16.1). Same-day registrants were required to show valid proof of address to election officials as a prerequisite to registering. *Id.* at §§ 163-82.6A(b)(2), 163-166.12(a) (2012); JA vol. IV at 1544 (SBOE 8/28/12 Memo). And unlike Election Day voters, same-day registrants cast retrievable ballots; if a problem came to light with a voter's registration, that voter's one-stop ballot could be retrieved and excluded from the vote count. N.C.G.S. §§ 163-82.6A(c), 163-227.2(e1) (2012).

Indeed, the evidence shows that same-day registration is more accurate than regular registration. SBOE data for 2012 indicate that the rate at which mail verifications sent to same-day registrants came back as undeliverable was very low, and considerably lower than that for regular registrants. For same-day registrants during the 2012 primary, the undeliverable rate was 1.15%, and for same-day registrants during the 2012 general election, the rate was 1.30%. JA vol. IV at 1621 (SBOE 2/11/13 Report). By contrast, for the remainder of the year, the undeliverable rate was significantly higher—ranging from 1.99% to 4.38%. *Id.* An analysis conducted by the former Guilford County election director George Gilbert reached the same conclusion. *See* JA vol. I at 225-27 (Gilbert ¶¶ 22-24).

Of particular significance to this case, supporters of HB 589 failed to address the racial impact of these changes. Prior to the introduction of the bill, legislative supporters asked the State Board of Elections for data on the racial impact of voter identification.[24] That data indicated a disparate racial impact. *See supra* Section II.B.1; JA vol. IV at 1669-75, 1710-81. Furthermore, opponents of the bill discussed the harmful impact that the photo ID, early voting, and same-day registration provisions would have on African-American voters. *See supra* Section II.B.3. In light of these facts, the refusal by supporters of the bill to address the racially disproportionate effects of their proposal is telling, and provides strong circumstantial evidence that key supporters knew that HB 589 would present obstacles to the ability of African Americans to participate in the political process. *See infra* Section III.B.2; *McMillan v. Escambia Cnty.*, 748 F.2d 1037, 1046-47 (5th Cir. 1984).

The tenuousness of supporters' policy justifications is an additional factor bolstering the conclusions that the challenged provisions of HB 589 violate Section 2.

Other Relevant Senate Report Factors: Several of the other Senate Report factors address the extent to which politics within North Carolina divides along racial lines. The

[24] Defendants have actively fought against producing most of the relevant communications between legislators and the SBOE relating to HB 589 and its impact, *see*, *e.g.*, ECF No. 57, 97 (13-cv-861), even though requiring production of documents showing communications with outside parties "is not unduly burdensome or invasive of the legislative process," ECF 94 at 7. The correspondence from Rep. Warren requesting racial data relating to voters and whether they possess DMV-issued ID is publicly available on the SBOE's website. JA vol. IV at 1629. The production of all such communication would identify the full scope of information used by HB 589's supporters.

relevance of these factors to cases like this is that such a division can explain why government decision-makers are willing—indeed, sometimes eager—to disregard the effects of the challenged practices on minority citizens. As the Supreme Court pointed out in *Rogers v. Lodge*, 458 U.S. 613, 623 (1982), "[v]oting along racial lines allows those elected to ignore black interests without fear of political consequences." *Id.*; *see also Gingles*, 478 U.S. at 48 n.14 (quoting *Rogers*).

North Carolina's politics suffers from these fault lines. Its elections have long been characterized by overt and subtle racial campaign appeals—the sixth Senate Report Factor. *See* JA vol. III at 1102-03 (Burden at 8-9); JA vol. III at 1351-54, 1361-63, 1368-70 (Leloudis at 13-16, 23-25, 30-32). For example, during the 2012 election, news outlets captured effigies of the President and state political figures hanging from nooses, and a contributor to an influential website in state politics complained of "African-American political control." JA vol. III at 1369-1370 (Leloudis at 31-32). And Defendants have already conceded the existence of the second Senate Report factor: "Defendants admit that past court decisions in the area of voting rights speak for themselves and that racially polarized voting continues to exist in North Carolina." ECF No. 19 at ¶ 79, 13-cv-861 (Answer to United States' Complaint); JA vol. III at 1267-68, 1270-71 (Lawson ¶¶ 24, 28). Because African-American and white voters often prefer different candidates—the definition of racially polarized voting—nonminority politicians may have a motive to minimize African-American turnout.[25] The next section of this

[25] In addition, North Carolina has used a wide range of voting practices "designed to minimize and cancel the potential voting strength of black citizens (Senate Factor 3).

Memorandum explains why the United States will likely be able to show at trial that such was the case with respect to HB 589.

2. The United States Is Likely to Show that HB 589 Violates Section 2 Because the Provisions at Issue Were Motivated by a Discriminatory Purpose.

The Section 2 standard for determining discriminatory intent tracks that used in cases under the Equal Protection Clause of the Fourteenth Amendment. *See Charleston Cnty.*, 316 F. Supp. 2d at 272 n.3 ("Claims of intentional discrimination under Section 2 are assessed according to the standards applied to constitutional claims of intentional racial discrimination in voting."); *see also Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977). Thus, the United States may prove that HB 589 violates Section 2 by showing that racial discrimination was a motivating factor "behind the enactment or maintenance" of HB 589, and that minority voters will be or have been injured as a result of the challenged action. *Dillard v. Baldwin Cnty. Bd. of Educ.*, 686 F. Supp. 1459, 1467-68 (M.D. Ala. 1988).[26] The case law establishes that electoral practices violate Section 2 even if racial discrimination is but "one purpose, and not even a primary purpose," behind them. *United States v. Brown*, 561 F.3d 420, 433 (5th Cir.

Gingles, 590 F. Supp. at 360; *Halifax Cnty.*, 594 F. Supp. at 170; JA vol. IV at 1962-63 (McCrary ¶ 4); JA vol. V at 2739-44, 2751-55 (examples of objection letters). Likewise, for decades, African Americans struggled to achieve success at the ballot box (Senate Factor 7). JA vol. III at 1107 (Burden at 13); JA vol. III at 1229-30 (Kousser at 53-54).

[26] Indeed, in the Voting Rights Act context, one court has observed that "the showing of injury in cases involving discriminatory intent need not be as rigorous as in effects case. . . ." *Garza v. Cnty. of Los Angeles*, 918 F.2d 763, 771 (9th Cir. 1990).

2009); *see also Arlington Heights*, 429 U.S. at 265-66 (same). And "[o]nce intent is shown, it is not a defense under the Voting Rights Act that the same action would have been taken regardless of the racial motive." *Askew v. City of Rome*, 127 F.3d 1355, 1373 (11th Cir. 1997).

Moreover, the case law also clarifies that discriminatory purpose is not the same thing as racial animus. *Garza v. Cnty. of Los Angeles*, 918 F.2d 763, 778-79 & n.1 (9th Cir. 1990) (Kozinski, J., concurring and dissenting in part). Thus, for example, while incumbency protection can be a legitimate goal in certain circumstances, lawmakers cannot deliberately minimize minority participation in order to achieve it. *See Garza*, 918 F.2d at 771 (opinion of the court).

"Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Arlington Heights*, 429 U.S. at 266. In *Arlington Heights*, the Supreme Court set forth a non-exhaustive list of relevant evidentiary factors, including (1) whether the impact of the decision bears more heavily on one racial group than another; (2) the historical background preceding the passage of the challenged law; (3) the sequence of events leading up to passage of the bill; (4) whether passage of the bill departed, either procedurally or substantively, from the normal practice; and (5) the legislative history, including contemporaneous statements and viewpoints held by the decision makers. *Id.* at 266-68; *see also* Senate Report at 27 n. 108.

In this case, the evidence gathered so far with respect to each of the evidentiary factors articulated in *Arlington Heights* suggests that HB 589 was enacted for invidious reasons.

a. The Impact of HB 589 on Minority Voters

Courts analyzing Section 2 intent claims should make "the normal inferences to be drawn from the foreseeability of defendant's actions." *McMillan*, 748 F.2d at 1046-47 (quoting Senate Report at 27 n.108); *see also Washington v. Davis*, 426 U.S. 229, 253 (Stevens, J., concurring) ("[N]ormally the actor is presumed to have intended the natural consequences of his deeds.").

As detailed in the United States' discussion of its Section 2 results claim, the fact that each of the challenged provisions of HB 589, both standing alone and taken together, "bears more heavily" on African-American voters as a group than on white voters was entirely foreseeable. This case is thus a textbook example of the "important starting point" in the intent inquiry. *Arlington Heights*, 429 U.S. at 266 (citing *Washington*, 426 U.S. at 242). African-American voters have used early voting at substantially higher rates than white voters, have made significantly greater use of same-day registration than white voters, and are more likely to have their vote counted because of the out-of-precinct provisional ballot practice than are white voters. Thus, the implementation of HB 589's challenged provisions in upcoming and future elections will predictably disproportionately burden African-American voters.[27] *See supra* Section III.B.1.

[27] *See, e.g.*, JA vol. II at 788, 800-01, 833, 845-46, 849-50, 874, 877-80 (Stewart ¶¶ 17, 52-53, 128, 157-159, 167, 231, 238-239, 244-248); JA vol. III at 1112 (Burden at 18).

Crucially, the legislature clearly foresaw HB 589's disproportionate burden on African Americans, and the fact that it proceeded anyway knowing of the disparate impact and without any actual countervailing interests is evidence that the legislature was motivated by a discriminatory purpose. *See supra* Section III.B.1.e.

b. Historical Background

As the United States has already explained, *see supra* Section III.B.1.e, this was not the first time increased black political participation in North Carolina triggered a legislative backlash. Indeed, that has been a repeated pattern in the State. *See* JA vol. III at 1184-89, 1250-56 (Kousser at 8-13, 17; Lawson ¶¶ 9-13); JA vol. II at 802-03 (Stewart ¶¶ 56-57); *see also Gingles*, 590 F. Supp. at 359-60. HB 589 is only the most recent example. *See supra* Section III.B.1.e; JA vol. III at 1341-70 (Leloudis at 3-32).

c. Sequence of Events

The sequence of events surrounding the passage of HB 589 also demonstrates that the challenged provisions were adopted with a discriminatory purpose. After a decade of dramatically increased African-American participation in the electoral process, and the successful implementation of reforms that expanded opportunities to vote, the legislature—with minimal debate or public input—adopted a package of election changes that undercut or eliminated methods of voting disproportionately used by hundreds of thousands of African Americans. The challenged provisions to HB 589 were a direct response to the reforms adopted from 1999 to 2007 that had produced significant increases in African-American voter registration and participation. JA vol. III at 1181, 1193, 1271-75, 1290-93 (Kousser at 5, 17; Lawson ¶¶ 29-33, 54-56). When politicians

who were not supported by black voters gained legislative control, they acted to cement their advantage by stripping away election procedures that might otherwise produce a significant African-American electorate that could dislodge them.

Between 2000 and 2012, against the backdrop of election reform, voter registration rates among African Americans in North Carolina finally matched and then outpaced white voter registration rates. *See supra* Sections II.A; III.B.1.b; JA vol. II at 804, 806-07 (Stewart ¶¶ 61, 66-67, Tbl. 3). Similarly, black voter turnout also surged. JA vol. III at 1193-94, 1197, 1261-62, 1268-69, 1277 (Kousser at 17-18 & Tbl. 2; Lawson ¶¶ 18, 25, 37). In 2008, a record 72% of registered black voters turned out, compared to 69% of registered white voters, the first time in modern history in the State that African-American turnout outperformed white turnout. JA vol. III at 1268-69 (Lawson ¶ 25); JA vol. II at 952, 807 (Stewart Ex. 22 at 71 & Tbl. 3 at 29); JA vol. III at 1193-94, 1197 (Kousser at 17-18, 21, Tbl. 2). This trend continued in 2012, when 70.2% of registered black voters voted in that year's elections, compared to 68.6% of registered white voters. JA vol. III at 1277 (Lawson ¶ 37); JA vol. II at 952, 807 (Stewart Ex. 22 at 71, Tbl. 3 at 29). This marked upward trend in black voter registration and turnout was well-known and widely discussed by local media sources and in public hearings of the House Elections Committee, as well as documented in SBOE data, and thus would have been well-known to any legislator considering the restrictions imposed by HB 589. JA vol. III at 1193-94 (Kousser at 17-18 & n. 41); JA vol. I at 376-77 (Kinnaird ¶ 17); JA vol. II at 952 (Stewart Ex. 22). Indeed, in early 2013, before introducing the original House version of HB 589, its sponsors requested and received data from the SBOE on the

racial impact of their proposed ID law, a request entirely consistent with an awareness that the law might have a disparate racial impact. JA vol. IV at 1669-75, 1710-81.

After 2010, as at the turn of the twentieth century, the North Carolina legislature responded to the growing minority electorate with measures that restricted access to the ballot. JA vol. III at 1253-54 (Lawson ¶ 11). These attempts were unsuccessful in 2011 because of the then-governor's veto and concerns over the State's obligation to submit election changes for preclearance under Section 5. *See* JA vol. III at 1271-76, 1210-15 (Lawson ¶¶ 29-35; Kousser at 34-39). Prior to 2013, legislators knew that Section 5 would prevent them from adopting election laws that had a retrogressive effect on African-American voters. 42 U.S.C. § 1973c; *see also Reno v. Bossier Parish*, 520 U.S. 471, 478-79 (1997). Given black North Carolinians' reliance on early voting and same-day registration, HB 589 could not remotely have met this standard.

But as soon as the State thought itself free to adopt retrogressive laws, it did so. Within a month of the Supreme Court's decision in *Shelby County v. Holder*, 133 S. Ct. 2612 (2013), the legislative majority responded to the removal of Section 5's preclearance requirement by rewriting HB 589 into a package of changes that curtailed or eliminated methods of voting used disproportionately by black voters, with no plausible, non-discriminatory justification. Senate leaders directly tied their decision to proceed with an omnibus elections bill to the removal of Section 5's preclearance requirement. *See supra* Section II.B.2; JA vol. III at 1290-91, 1214-15 (Lawson ¶ 54; Kousser at 38-39 & n.109); JA vol. I at 357, 361 (McKissick ¶¶ 17, 29).

The enactment of HB 589 impeded needlessly the ability of African Americans to participate equally in the political process, just as their registration and participation rates reached parity with those of white voters. *Cf. Gomillion v. Lightfoot*, 364 U.S. 339 (1960) (violation of Fifteenth Amendment where city of Tuskegee, Alabama, responded to black voter participation by redrawing the city's boundaries to exclude virtually all black voters from city elections).

d. Procedural and Substantive Departures from Normal Legislative Practice

HB 589's passage through the North Carolina General Assembly was secured by a number of highly atypical legislative procedures, further suggesting an invidious intent. *Arlington Heights*, 429 U.S. at 267. Most significantly, the process by which the final, "full bill" version of HB 589 passed the General Assembly allowed neither the House nor the Senate sufficient time or opportunity to assess, on the record, the likely impact of the bill. *See supra* Section II.B; JA vol. I at 183-84, 377-78, 165, 357-58 (Stein ¶ 15; Kinnaird ¶ 21; H.M. Michaux ¶ 20; McKissick ¶¶ 19-20). As one Senator put it, "This was a process designed to short-circuit the typical deliberative process." JA vol. I at 378-79, 356, 360, 304, 101 (Kinnaird ¶ 24; McKissick ¶¶ 13, 27; Glazier ¶ 18; Phillips ¶ 15).

Opponents of the Senate substitute bill were not only constrained by a lack of committee process and the time limits on debate, particularly in the House, JA vol. I at 377, 378-379, 183-84, 166-67 (Kinnaird ¶¶ 20, 23-26; Stein ¶ 15; H.M. Michaux ¶¶ 24-25), but they were also faced with the impending close of the legislative session. All of this occurred despite assurances early in the legislative session from key House sponsors

that the process of passing HB 589 would be transparent and allow for careful deliberation. JA vol. III at 1279-80, 1285-86, 1213-14 (Lawson ¶¶ 40, 47; Kousser at 37-38).

The normal process for bills of such magnitude would have included deliberations by standing committees in the House and Senate with substantive background and expertise on voting and elections, such as the Senate Judiciary I Committee and the House Elections Committee. JA vol. I at 358-59, 306-08, 183 (McKissick ¶¶ 22, 25; Glazier ¶¶ 28-33; Stein ¶ 14). These committees would have developed a thorough record concerning the impact that the Senate substitute bill would have on minority voters and on the administration of elections. That was, after all, the process the legislature used when it adopted same-day registration in 2007. JA vol. I at 186-87, 379, 359 (Stein ¶ 20 (noting the lack of public input or opportunity to hear from elections officials); Kinnaird ¶ 25; McKissick ¶ 25); *see supra* Section II.A.3 (describing public hearings, committee and floor debates, and multiple amendment processes).

A substantively appropriate standing committee, however, never vetted the Senate's substitute version of HB 589. Instead, just hours after the unveiling of the extensively overhauled HB 589, the Senate Rules Committee conducted one short hearing with severely constrained public comment and without considering amendments. *See supra* Section II.B.3; JA vol. I at 377, 183, 186-87, 358-59 (Kinnaird ¶ 20; Stein ¶¶ 14, 20; McKissick ¶¶ 22-23). HB 589 was then sent to the Senate floor where it passed two days later, on July 25, 2013. That same day, the House adopted the Senate's version of HB 589 through a concurrence vote rather than referring the bill to committee.

Rushing a bill of this nature and magnitude through a concurrence vote was also atypical procedure. Normally, when the Senate has made major changes to a House bill, the bill would either be referred to the House committee from which it originated (which would recommend concurrence or non-concurrence on the bill to the full House), or the entire House would vote not to concur in the bill and then refer it to a conference committee made up of House and Senate members. JA vol. I at 306-07, 359 (Glazier ¶ 29; McKissick ¶ 25). In the case of HB 589, legislators ignored these well-established norms of House procedure. JA vol. I at 306-07, 310 (Glazier ¶¶ 29, 40); *Major v. Treen*, 574 F. Supp. 325, 352 (E.D. La. 1983) (noting that bypass of "routine mechanism of the conference committee" supported finding a Section 2 violation).

Despite the massive changes made in the Senate, there was no real House debate or deliberation on the bill's provisions. Indeed, even the short description of the Senate's substitute bill given by Representatives Warren and Lewis was rife with misstatements and omissions. *See supra* Section II.B.4.

Concerns over process were not confined to the bill's opponents. Representative John Blust, a Republican from Guilford County and a supporter of the final bill, complained that the Senate's substitute bill "was received by the House at 6:11 p.m. on the last night of the session for concurrence only. I readily admit this is not a good practice." JA vol. III at 1299-1300 (Lawson ¶ 65); JA vol. I at 310 (Glazier ¶ 41).

The passage of HB 589 also reflects numerous substantive deviations from legislative standards. *See Arlington Heights*, 429 U.S. at 267. Principally, the absence of empirical or even consistent anecdotal evidence before the legislature that the challenged

provisions of HB 589 would actually address any apparent problems in the State's election administration indicates that the purposes articulated in public by the legislators were either pretextual or were insufficient to justify the urgency placed on passing the bill before the end of the legislative session. The Supreme Court has found that "[t]he factfinder's disbelief of the reasons put forward . . . (particularly if disbelief is accompanied by a suspicion of mendacity)" supports a finding of discriminatory purpose. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 511 (1993); *see* JA vol. III at 1310-11, 1296-98 (Lawson ¶¶ 81-82, 62-64). Justifications put forth by supporters for reducing the early voting period and eliminating same day registration were wholly without support and contradicted by arguments and data supplied by the state agency most responsible for overseeing elections, the SBOE. *See supra* Section III.B.1.e; *see also* JA vol. I at 146, 140-41, 184, 191 (Bartlett ¶¶ 31, 12-13; Stein ¶¶ 16, 31); *Arlington Heights*, 429 U.S. at 267 (inference of discriminatory purpose may be found where "factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached").

Opponents informed supporters that HB 589 would reduce opportunities for African Americans to register and vote to a much greater degree than white voters, *see supra* Section II.B.3, but proposed amendments designed to ameliorate the bill's disproportionate impact on African-American voters were rejected, *see supra id.*; JA vol. III at 1288-89, 1294-96 (Lawson ¶¶ 52, 59-60). Supporters of the bill refused to address the concerns of legislators who identified the harm the bill would cause to minority voters. *See supra* Section II.B.; JA vol. III at 1294-98 (Lawson ¶¶ 59-60, 62-63).

The North Carolina General Assembly passed HB 589 knowing that its major provisions would disproportionately burden African-American voters, resulting in their inability to participate equally in the political process, and did not come close to offering a rationale that justified this burden. That such a law was rushed through the state legislature, which cast aside typical procedural processes and offered no legitimate explanation for key provisions, strongly indicates that it was passed with a discriminatory purpose. *See Treen*, 574 F. Supp. at 352 (procedural irregularities and absence of "cohesive [policy] goals" supported finding a Section 2 violation).

C. Without a Preliminary Injunction, African-American Voters Will Suffer Irreparable Harm.

"The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government." *Reynolds v. Sims*, 377 U.S. 533, 555 (1964). The Fourth Circuit has recognized that violation of a constitutional right constitutes irreparable harm. *See, e.g.*, *Ross v. Meese*, 818 F.2d 1132, 1134 -35 (4th Cir. 1987); *Johnson v. Bergland*, 586 F.2d 993, 995 (4th Cir. 1978). Discriminatory voting procedures, in particular, are "the kind of serious violation of the Constitution and the Voting Rights Act for which courts have granted immediate relief." *United States v. City of Cambridge*, 799 F.2d 137, 140 (4th Cir. 1986); *see also Cannon v. North Carolina State Bd. of Educ.*, 917 F. Supp. 387, 391 (E.D.N.C. 1996) (in a vote dilution case, concluding that absent a preliminary injunction, "plaintiffs' constitutional rights would be placed in great jeopardy, and the likelihood of irreparable harm would thus be quite high"); *United States v. Vill. of Port Chester*, 2008

WL 190502, at *1 (S.D.N.Y. Jan. 17, 2008) (conducting election under "structural framework that violated the Voting Rights Act" would cause irreparable harm). Violations of the right to vote are also not compensable with monetary damages, further justifying injunctive relief. *See NAACP-Greensboro Branch*, 858 F. Supp. 2d at 526; *Berks Cnty.*, 250 F. Supp. 2d at 540.

Without a preliminary injunction preventing Defendants from implementing the challenged provisions of HB 589, African Americans in North Carolina are likely to suffer substantial and disproportionate impairment of their right to vote. Moreover, any impairment is likely to have a ripple effect, because "denial of equal access to the electoral process discourages future participation by voters" as well. *Berks Cnty.*, 250 F. Supp. 2d at 540; *see also* JA vol. I at 162 (H.M. Michaux Decl. ¶¶ 29-33).

The United States thus easily satisfies the irreparable injury prong of the preliminary injunction test.

D. The Balance of Equities Weighs in Favor of Granting Preliminary Relief.

On balance, the United States' interest in protecting the voting rights of eligible citizens and prohibiting the use of voting practices or procedures that will violate the Voting Rights Act outweighs Defendants' interest in reducing the number of days for early voting, eliminating same day registration, and prohibiting the acceptance of provisional ballots cast in a precinct other than the voter's home precinct. *See United States v. Metro. Dade Cnty.*, 815 F. Supp. 1475, 1478 (S.D. Fla. 1993) (finding that the

harm to voters protected by Section 203 of the Voting Rights Act outweighed the harm to the County in complying with court-ordered relief).

Because Defendants' articulated interest in the "integrity" of their elections is unrelated to the subject matter of the challenged practices, and black voters face as severe a set of burdens on their ability to participate in the electoral process, the State's unsupported interest must yield to the public's overriding interest in preventing the use of racially discriminatory electoral mechanisms and procedures. *See Arlington Heights*, 429 U.S. at 265 ("racial discrimination is not just another competing consideration"); *see also Independence Inst. v. Beuscher*, 718 F. Supp. 2d 1257, 1278 (D. Colo. 2010) (finding "little in the way of equitable force behind the State's position" when it was unable to prove that the relevant statute served its interest in "'preserving the integrity of its electoral system'") (internal citations omitted).

Permitting North Carolina's 2014 elections to move forward with the challenged provisions in place would unfairly place the burden of additional litigation and delay squarely on those whom Congress sought to protect under Section 2 of the Voting Rights Act: citizens subject to a long history of racial discrimination in voting. Whatever burden Defendants may bear because of preliminary relief can fairly be attributed to the State's adoption and implementation of discriminatory election procedures. And any burden of preliminary relief on Defendants cannot compare to the irreparable harm that will be borne by African-American voters in North Carolina. *See e.g., Halifax Cnty.*, 594 F. Supp. at 171 (finding that the administrative and financial burdens on defendant were

not undue in light of irreparable harm caused by unequal opportunity to participate in county election); *NAACP-Greensboro Branch*, 858 F. Supp. 2d at 526.

In fact, a preliminary injunction will simply require North Carolina to continue using an election system *the State itself* developed and used successfully in the decade preceding the enactment of HB 589. That system imposes no hardship on the State.

E. The Public Interest Cuts in Favor of Issuing a Preliminary Injunction.

When the United States sues to enforce the Voting Rights Act, it does so for the benefit of all citizens and in the public interest. *See City of Cambridge*, 799 F.2d at 141. To that end, "Section 2 is a national public directive for immediate removal of all barriers to equal participation in the political process." *Harris v. Graddick*, 593 F. Supp. 128, 136 (M.D. Ala. 1984); 42 U.S.C. § 1973j(d) (authorizing the Attorney General to seek preliminary relief to prevent a violation of the Voting Rights Act). As detailed above, HB 589 was adopted with a racially discriminatory purpose and will result in African-American voters having less opportunity to participate equally in the political process, in contravention of Section 2. *See* 42 U.S.C. § 1973. The public has an interest in ensuring that elections are conducted in a manner that comports with fundamental fairness. *See Newsome v. Albermarle Cnty. Sch. Bd.*, 354 F.3d 249, 261 (4th Cir. 2003) ("Surely, upholding constitutional rights serves the public interest."); *Stuart v. Huff*, 834 F. Supp. 2d 424, 433 (M.D.N.C. 2011) ("[I]t is in the public interest for statutes that likely violate fundamental constitutional rights be to enjoined from being enforced."). Granting an injunction would advance the public interest by preventing implementation of a law that violates Section 2. *See Halifax Cnty.*, 594 F. Supp. 161; *Dillard v. Crenshaw Cnty.*, 640

F. Supp. 1347, 1363 (M.D. Ala. 1986) (granting preliminary injunction in Section 2 case and reasoning that "when Section 2 is violated the public as a whole suffers irreparable injury [and] . . . [t]he public interest, therefore, mandates the relief afforded").

F. Because of Defendants' Violations of Section 2, the Court Should Authorize the Assignment of Federal Observers.

In addition to seeking preliminary injunctive relief to enjoin the challenged provisions of HB 589, the United States also seeks relief in this proceeding under Section 3(a) of the Voting Rights Act, which allows a court to authorize the appointment of federal observers "as part of any interlocutory order if the court determines that the appointment of such observers is necessary to enforce" the voting guarantees of the Fourteenth and Fifteenth Amendments. 42 U.S.C. § 1973a(a). "[T]he Attorney General or an aggrieved person" can seek such relief when they institute "a proceeding under any statute to enforce the voting guarantees of the fourteenth or fifteenth amendment in any State or political subdivision."[28] *Id.*

Under the Voting Rights Act, when a jurisdiction is subject to the assignment of federal observers, the Office of Personnel Management ("OPM") provides observers who can enter and attend any place where elections are administered. 42 U.S.C. § 1973f(a) & (d). The federal observers produce reports documenting their observations to the

[28] By the terms of Section 3(a), the standard for ordering observers as part of an interlocutory or preliminary order, *see* 42 U.S.C. § 1973a(a) ("if the court determines that the appointment of such observers is necessary to enforce such voting guarantees"), is less stringent than the standard for ordering observers as part of a final order ("if the court finds that violations of the fourteenth or fifteenth amendment justifying equitable relief have occurred").

Department of Justice, and when authorized by court order, the Department files those reports with the federal district court. *Id.* § 1973f(e).

Since 1965, federal courts have routinely authorized the assignment of federal observers, most recently in the City of Evergreen, Alabama. JA vol. V at 2748 (Order, *Allen v. City of Evergreen*, 13-cv-107 at 4 (S.D. Ala. Jan. 13, 2014)); *see also* JA vol. V at 2768-69 (Consent Decree, Judgment, and Order, *United States v. Alameda Cnty.*, 11-cv-3262, ¶¶ 28-29 (N.D. Cal. Oct. 19, 2011)). Courts have also authorized federal observers in providing relief for violations of Section 2 and other provisions of the Voting Rights Act in the context of a preliminary injunction motion. *See Berks Cnty.*, 250 F. Supp. 2d at 543.

Defendants' adoption of HB 589, despite repeated warnings of the harmful effects of the challenged provisions on African-American voters, creates needless obstacles to minority voters' ability to cast a ballot. An order from this Court authorizing the assignment of federal observers to monitor future elections in North Carolina, including the November 2014 general election, will not only provide a safeguard against additional violations of the Voting Rights Act, but will also provide reassurance to minority voters that independent, outside monitors will be documenting their ability to cast their ballots. In light of provisions of HB 589 that expanded the ability of partisan groups to send monitors to the polls and to challenge voters, *see, e.g.*, JA vol. V at 2313 (HB 589, § 11.1) (allowing 10 additional at-large observers in a county), the presence of neutral observers from OPM will have a calming effect. Accordingly, the United States asks the

Court, pursuant to Section 3(a), to authorize the assignment of federal observers in North Carolina.

IV. CONCLUSION

For the foregoing reasons, the United States' Motion for a Preliminary Injunction and for the Appointment of Federal Observers should be granted.

Dated: May 19, 2014

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 19, 2014, I electronically filed the foregoing **United States' Memorandum of Law in Support of Its Motion for a Preliminary Injunction and for the Appointment of Federal Observers,** using the CM/ECF system in case numbers 1:13- cv-658, 1:13- cv-660, and 1:13-cv-861, which will send notification of such filing to all counsel of record.

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