No. 14-1845 (L), 14-1856, 14-1859

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

LEAGUE OF WOMEN VOTERS OF NORTH CAROLINA, *et al.*,
Plaintiffs – Appellants,

and

LOUIS M. DUKE, *et al.*,
Intervenors/Plaintiffs – Appellants,

v.

STATE OF NORTH CAROLINA, *et al.*,
Defendants – Appellees.

On Appeal from the U.S. District Court for the Middle District of North Carolina, Case Nos. 1:13-cv-00660 (TDS-JEP), 1:13-cv-00658 (TDS-JEP), 1:13-cv-00861 (TDS-JEP).

MOTION FOR LEAVE OF JUDICIAL WATCH, INC., ALLIED EDUCATIONAL FOUNDATION, AND CHRISTINA KELLEY GALLEGOS-MERRILL TO FILE AN *AMICUS CURIAE* BRIEF IN SUPPORT OF DEFENDANTS-APPELLEES, AND REQUEST TO PARTICIPATE IN ORAL ARGUMENT

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INTRODUCTION

Pursuant to Fed. R. App. P. 27 and 29(b), Judicial Watch, Inc. ("Judicial Watch"), the Allied Educational Foundation ("AEF"), and Christina Kelley Gallegos-Merrill ("Merrill") (collectively "*amici*"), by and through undersigned counsel, respectfully move for leave to file the attached *amicus curiae* brief in support of Defendants-Appellees and affirmation, and request leave to participate in oral argument.[1] Pursuant to Fourth Cir. R. 27(a), all parties to these consolidated appeals have been contacted, but it is not clear that all parties whose consent may be necessary have given their consent to this motion for leave to file an *amicus curiae* brief. No party has been asked for or given consent to proposed *amici's* separate request to participate in oral argument.

IDENTITY AND INTERESTS OF THE *AMICI*

Judicial Watch is a non-partisan, public interest organization headquartered in Washington, D.C. Founded in 1994, Judicial Watch seeks to promote accountability, transparency and integrity in government and fidelity to the rule of law. In furtherance of these goals, Judicial Watch regularly files *amicus curiae* briefs and prosecutes lawsuits on matters it believes are of public importance.

[1] No party or party's counsel authored either this motion or the proposed *amicus curiae* brief in whole or in part, and no party or person other than proposed *amici* contributed money towards the preparation and submission of either this motion or the proposed *amicus curiae* brief.

Judicial Watch has appeared as *amicus curiae* in multiple federal courts on numerous occasions.

Judicial Watch is engaged in a multi-year legal effort to ensure states and counties are conducting elections with integrity as required by federal law, an effort Judicial Watch commenced in 2012[2] and has continued thorough 2014.[3] On behalf of its members, Judicial Watch has recently been engaged in litigation against the State of Indiana over election integrity,[4] and favorably settled a similar lawsuit against the State of Ohio.[5] During this process, Judicial Watch has developed knowledge, expertise, and insight into federal election laws and the careful balance they must strike between ballot access and election integrity. Judicial Watch has already appeared in this case before the lower court, where it

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[2] *See* Press Release, *2012 Election Integrity Project: Judicial Watch Announces Legal Campaign to Force Clean Up of Voter Registration Rolls*, Feb. 9, 2012, available at http://www.judicialwatch.org/press-room/press-releases/2012-election-integrity-project-judicial-watch-announces-legal-campaign-to-force-clean-up-of-voter-registration-rolls/.

[3] *See* Stephen Dinan, *States, D.C. are told to clean up voter rolls or be sued; Judicial Watch counters Obama*, The Washington Times, March 24, 2014, available at http://www.washingtontimes.com/news/2014/mar/24/states-dc-are-told-to-clean-up-voter-rolls-or-be-s/?page=all.

[4] *See* Jae Park, *Indiana Begins Purging Voter Rolls*, Indiana Public Media News, May 27, 2014, available at http://indianapublicmedia.org/news/indiana-begins-purging-voter-rolls-67691/.

[5] *See* Sam Howard, *Husted, voting rights groups settle on 'Motor Voter' Act case, Cleveland Plain Dealer*, January 13, 2014, available at http://www.cleveland.com/open/index.ssf/2014/01/husted_voting_rights_groups_se.html.

filed an *amicus curiae* brief supporting North Carolina and opposing the plaintiffs' request for a preliminary injunction.

AEF is a nonprofit charitable and educational foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study. AEF regularly files *amicus curiae* briefs as a means to advance its purpose and has appeared as an *amicus curiae* in federal courts on numerous occasions.

AEF regularly participates in election law matters before federal courts. AEF was granted leave to appear as an *amicus* in two recent election integrity cases in Tennessee and Virginia.[6] AEF has also filed *amicus* briefs in related cases advocating broad protection of citizens' rights to participate in elections and to

[6] *See Amicus Curiae* Brief of Judicial Watch and Allied Educational Foundation, *Democratic Party of Virginia v. Virginia State Board of Elections*, Case No. 1:13-01218 (filed with U.S District Court for the Eastern District of Virginia on October 16, 2013), available at http://alliededucationalfoundation.org/legalbriefs/2013%20Briefs/Democratic%20Party%20of%20VA%20v%20VA%20State%20Board%20of%20Elections%202013.PDF; *see also Amicus Curiae* Brief of Judicial Watch and Allied Educational Foundation, *Lincoln Davis and Tennessee Democratic Party v. Tre Hargett*, Case No. 2:12-00023 (filed with U.S District Court for the Middle District of Tennessee on June 8, 2012), available at http://alliededucationalfoundation.org/legalbriefs/2012%20Briefs/Lincoln%20Davis%20and%20Tennessee%20Democratic%20Party%20v%20Tre%20Hargett%20Tenn%20Sec%20of%20State%20and%20Mark%20Goins%20Tenn%20Coord%20Of%20Elections.PDF.

have their votes counted in ballot initiative and referendum measures.[7] AEF has already appeared in this case before the lower court, joining in an *amicus curiae* brief supporting North Carolina and opposing the grant of a preliminary injunction.

Ms. Merrill is a registered voter and a resident of North Carolina. In 2012, she was a Republican candidate for County Commissioner of Buncombe County, a race which she narrowly lost by 13 votes. Ms. Merrill believes that this loss was due to same-day registration during early voting that resulted in improperly cast ballots. Ms. Merrill is running for Buncombe County Commissioner again in 2014 and wants to ensure that future North Carolina elections are conducted with integrity, so that election results can be easily and reliably verified as accurate.

Based on her direct experience with the electoral process in North Carolina, Ms. Merrill is concerned that a ruling from this Court reversing the repeal of same-day registration during early voting would create the risk of unverifiable (and therefore unchallengeable) adverse election results. Ms. Merrill is also a registered voter of the State of North Carolina, and as such she shares the same concerns of

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[7] *See Amicus Curiae* Brief of Judicial Watch and Allied Educational Foundation, *Citizens in Charge v. Husted*, Case No. 2:13-935 (filed with U.S District Court for the Southern District of Ohio on March 10, 2014), available at http://alliededucationalfoundation.org/legalbriefs/2014%20Briefs/Citizens%20in%20Charge%20v%20Husted.PDF; *see also Amicus Curiae* Brief of Judicial Watch and Allied Educational Foundation, *Schuette v. Coalition to Defend Affirmative Action*, Case No. 12-682 (filed with U.S. Supreme Court on July 1, 2013), available at http://alliededucationalfoundation.org/legalbriefs/2013%20Briefs/shuette%20v%20coalition%20%281%29.PDF.

all North Carolina citizens that a lack of election integrity could lead to fraud and to the dilution or cancelling out of her vote. Merrill previously appeared in this case before the lower court, joining in an *amicus curiae* brief supporting North Carolina and opposing the grant of a preliminary injunction.

Amici's interest in this case is to ensure that North Carolina's elections are conducted with integrity and to ensure that all citizens have confidence in the legitimacy of election results. *Amici* are concerned that the relief requested by Plaintiffs-Appellants' in this case, if granted, would have a chilling effect on voter confidence in the integrity of elections, both in North Carolina and nationwide. If North Carolina is compelled to reinstate same-day registration, to extend the early voting period by a week, and to permit out-of-precinct provisional ballots, many North Carolina citizens could have their votes diluted by unlawful ballots cast in the names of false or duplicate registrations. Furthermore, Plaintiffs-Appellants' requested relief will undermine the confidence in integrity of elections among citizens. As the Supreme Court has noted, public confidence in the integrity of the electoral process encourages citizen participation in the democratic process. *Crawford et al. v. Marion County Election Board*, 553 US 181, 197 (2008). Conversely, a lack of integrity undermines confidence in the electoral system and discourages citizen participation in democracy.

AUTHORITY TO FILE

Courts have recognized that they have broad discretion to permit a non-party to participate as an *amicus curiae*. As explained by then-Judge Alito, "[e]ven when a party is well represented, an amicus may provide important assistance to the court." *Neonatology Assocs., P.A. v. Commissioner of Internal Revenue*, 293 F.3d 128, 132 (3rd Cir. 2002). Indeed, the federal courts regularly permit parties with various interests to appear as *amici*, reasoning that a "restrictive policy with respect to granting leave to file may [] create at least the perception of viewpoint discrimination." *Id.* at 133. Furthermore, in this case, *amici* are raising issues about which they have particular knowledge and which may be helpful to the Court's evaluation of the appeal.

REQUEST FOR LEAVE TO PARTICIPATE IN ORAL ARGUMENT

In addition and separately, proposed *amici* respectfully request leave of the Court to allow *amici's* attorney H. Christopher Coates to present oral arguments to the Court. Mr. Coates is a former Chief of the Voting Section of the Civil Rights Division in the U.S. Department of Justice, and previously presented oral arguments in this case on behalf of *amici* before the District Court. Mr. Coates is a member of the bar of this Court.

CONCLUSION

For the foregoing reasons, proposed *amici* respectfully requests that this Motion be granted.

Dated: September 17, 2014

Respectfully submitted

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CERTIFICATE OF SERVICE AND ELECTRONIC FILING

I hereby certify, pursuant to Fed. R. App. P. 25(d)(2), that I electronically filed the foregoing with the Clerk of the United States Court of Appeals for the Fourth Circuit using the appellate CM/ECF system. I certify that the parties in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF service.

Dated: September 17, 2014 *s/ Bradley J. Schlotzman*

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***AMICUS CURIAE* BRIEF OF JUDICIAL WATCH, INC., ALLIED EDUCATIONAL FOUNDATION, AND CHRISTINA KELLEY GALLEGOS-MERRILL IN SUPPORT OF APPELLEES AND AFFIRMATION**

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Table of Contents

Table of Authorities

Cases

Statutes

Identity and Interests of the *Amici*

Judicial Watch, Inc. ("Judicial Watch") is a non-partisan, public interest organization headquartered in Washington, D.C. Founded in 1994, it seeks to promote accountability, transparency and integrity in government and fidelity to the rule of law. In furtherance of these goals, Judicial Watch regularly files lawsuits as well as *amicus curiae* briefs relating to election integrity and voting. Judicial Watch has developed knowledge, expertise, and insight regarding the balance election laws must strike between ballot access and election integrity.

The Allied Educational Foundation ("AEF") is a nonprofit charitable and educational foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, including electoral law. AEF regularly files *amicus curiae* briefs to advance its purposes. AEF has filed *amicus* briefs in recent election integrity cases in Tennessee and Virginia and in cases supporting citizens' rights to participate and to have their votes counted in elections to decide ballot initiatives and referenda.

Ms. Merrill is a resident of North Carolina and a registered voter. In 2012, she was a Republican candidate for County Commissioner of Buncombe County, and lost by only 13 votes. Ms. Merrill believes that this loss was due to same-day registration during early voting that resulted in improperly cast ballots. Ms. Merrill is running for the same office in 2014. As a candidate and also as a

registered voter, Ms. Merrill is concerned that a lack of election integrity under the pre-HB 589 laws could lead to fraud, to the dilution of her vote, and possibly to another unwarranted electoral loss.

Judicial Watch, AEF, and Ms. Merrill previously appeared in this case before the district court, filing an *amicus curiae* brief supporting North Carolina and opposing a preliminary injunction, and counsel for *amici* participated in the oral argument. *See* ECF No. 136 (*Amicus Curiae* Brief in Support of Defendants and in Opposition to Plaintiffs' Motion for Preliminary Injunction). This brief is submitted pursuant to Rule 29(b) of the Federal Rules of Appellate Procedure.[1]

ARGUMENT

THE BURDENS ASSOCIATED WITH HB 589 ARE NOT SUBSTANTIAL AND DO NOT SUPPORT A SECTION 2 "RESULTS" CLAIM OR JUSTIFY THE REQUESTED INJUNCTION.

I. A "Results" Claim Under Section 2 Requires Proof that a Challenged Practice Caused a Substantial Burden on the Right to Vote.

Section 2 of the Voting Rights Act forbids a State to impose or apply voting qualifications, practices, or procedures "in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color . . ." 42 U.S.C. § 1973(a). A violation is established when the

[1] No party's counsel authored the brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and no person other than the *amici curiae* or their counsel contributed money that was intended to fund preparing or submitting the brief.

> political processes leading to nomination or election . . . are not equally open to participation by members of a [protected] class . . . in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. . . .

42 U.S.C. § 1973(b).[2] While Section 2 clearly prohibits intentional discrimination with respect to voting, its language also proscribes discriminatory *results*, or "voting practices that 'operate, designedly or otherwise,'" to deny or abridge voting rights. *United States v. Charleston Cnty.*, 365 F.3d 341, 345 (4th Cir. 2004). The claims against North Carolina include Section 2 "results" claims.

Two other requirements are apparent from the plain text of Section 2. It provides that states may not impose or apply practices "in a manner which results" in a proscribed outcome, which means that a challenged practice must have *caused* the result prohibited by the statute. 42 U.S.C. § 1973(a); *see also Thornburg v. Gingles*, 478 U.S. 30, 47 (1986). Second, it does not proscribe practices that merely *affect* voting, but sets a higher standard. Rather, a violation occurs only where voters in a protected class have less opportunity than other voters "to participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973(b). This necessarily requires an injury to or burden on voters that is sufficiently serious or intractable.

The relevant case law bears out these requirements, both as to claims of

[2] On September 1, 2014, Section 2 of the Voting Rights Act was renumbered in the U.S. Code as 52 U.S.C. § 10301. As it is not yet electronically available on Lexis at that number, *amici* will refer to it throughout by its former designation.

"vote dilution" and "vote denial."[3] In a typical vote-dilution challenge to at-large elections, for example, a racial minority seeks to show that the "white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate." *Gingles*, 478 U.S. at 51. In such a case, the "evidence of racial bloc voting provides the requisite causal link between the voting procedure and the discriminatory result." *United States v. Blaine Cnty.*, 363 F.3d 897, 912 n.21 (9th Cir. 2004). Further, the injury is substantial and beyond the control of minority voters. Where an at-large system is accompanied by racially polarized voting, a minority may never be able to elect a candidate of choice, regardless of minority turnout. The loss of electoral power can be extreme, as the facts in *Blaine Cnty.* amply demonstrate. In that case, despite a Native American population of 45.2% (*id.* at 900), the district court noted that "no Native American [had] served as a County Commissioner in the eighty-six year history of Blaine County." *United States v. Blaine Cnty.*, 157 F. Supp. 2d 1145, 1147 (D. Mont. 2001).

Vote-denial claims – like those at issue here – likewise require sufficient showings regarding causation and injury. A number of courts of appeal, including

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[3] A Section 2 "results" claim may involve vote dilution or vote denial. Vote dilution refers to "'practices that diminish minorities' political influence,' such as at-large elections and redistricting plans" that weaken minority voting strength. *Simmons v. Galvin*, 575 F.3d 24, 29 (1st Cir. 2009) (citations omitted). Vote denial, alleged here against North Carolina, "refers to practices that prevent people from voting or having their votes counted," such as, for example, "literacy tests, poll taxes, white primaries, and English-only ballots." *Id*. (citations omitted).

the Fourth Circuit, have emphasized that a vote-denial claim requires proof that a challenged practice *caused* the harm proscribed by Section 2. These same courts repeatedly have stressed that it is not enough merely to show that a challenged practice had a disproportionate impact on a particular race. *See Irby v. Va. State Bd. of Elections*, 889 F.2d 1352, 1358 (4th Cir.1989) (Section 2 challenge to an appointed school board system rejected despite a "significant [racial] disparity" between the population and the school boards, because there was no "causal link between the appointed system and black under-representation."); *Gonzalez v. Ariz.*, 677 F.3d 383, 406 (9th Cir. 2012) (en banc), *aff'd sub nom.*, *Arizona v. Inter Tribal Council of Ariz., Inc*., 133 S. Ct. 2247 (2013) (even though "Latinos had suffered a history of discrimination . . . socioeconomic disparities [and] racially polarized voting," there was "no proof of a causal relationship between [the challenged] Proposition 200 and any alleged discriminatory impact on Latinos."); *Smith v. Salt River Project Agric. Improvement & Power Dist*., 109 F.3d 586, 595 (9th Cir. 1997) ("a bare statistical showing of disproportionate *impact* on a racial minority does not satisfy the § 2 'results' inquiry"), citing *Ortiz v. City of Phila. Office of the City Comm'rs*, 28 F.3d 306, 308 (3rd Cir.1994) (although "African-American and Latino voters are purged at disproportionately higher rates than their white counterparts," plaintiff "failed to prove that the purge statute caused" this disparity). These cases agree that "Section 2 plaintiffs must show a causal

connection between the challenged voting practice and the prohibited discriminatory result." *Ortiz*, 28 F.3d at 312.

In cases that have granted relief for vote denial, the harm caused by the challenged voting practice is usually substantial. For example, in *Brooks v. Gant*, No. 12-5003, 2012 U.S. Dist. LEXIS 139070 at *23 (D.S.D. Sept. 27, 2012), the residents of Shannon County, who were almost all Native Americans, had to travel from one to three hours to another county in order to engage in early voting. The court found that this opportunity "was substantially different from the voting opportunities afforded to the residents of other counties in South Dakota and to the majority of white voters." *See also Spirit Lake Tribe v. Benson Cnty.*, No. 2:10-cv-095, 2010 U.S. Dist. LEXIS 116827 at *9 (D.N.D. Oct. 21, 2010) (closure of 7 of 8 polling sites in a single county with a large Native American population will "have a disparate impact on members of the Spirit Lake Tribe because a significant percentage of the population will be unable" to get to the remaining location); *Brown v. Dean*, 555 F. Supp. 502, 504 (D.R.I. 1982) (move of a single polling site would make it "considerably more difficult" to vote and "would be a substantial deterrent to voting by the members of the plaintiff class"); *see also Brown v. Detzner*, 895 F. Supp. 2d 1236, 1249-50 (M.D. Fla. 2012) (vote denial is based on a denial of "*meaningful* access" to the polls) (emphasis added), citing, *inter alia*, *Osburn v. Cox*, 369 F.3d 1283, 1289 (11th Cir. 2004).

Two recent district court cases do support the plaintiffs' position in accepting that no showing that the challenged procedures caused a denial of the equal opportunity to participate or to elect candidates of choice. In *Frank v. Walker*, Nos. 11-cv-01128, 12-cv-00185, 2014 U.S. Dist. LEXIS 59344 (E.D. Wis., Apr. 29, 2014), *injunction stayed*, Nos. 14-2058, 14-2059, 2014 U.S. App. LEXIS 17653 (7th Cir., Sept. 12, 2014),[4] the court, in considering a photo ID requirement (not at issue in this appeal), held that "Section 2 protects against a voting practice that creates a barrier to voting that is more likely to appear in the path" and that has a "disproportionate impact" on minority voters. *Id.* at *93. The *Frank* court added that it would have enjoined even a "minimal" burden that had that effect. *Id.* at *108. In *Ohio State Conf. of the NAACP v. Husted*, No. 14-cv-404, 2014 U.S. Dist. LEXIS 123442 at *6-9 (S.D. Ohio, Sep. 4, 2014), the court enjoined the elimination of seven of 35 days (and other changes) to Ohio's early voting laws, as this would "burden the voting rights of African Americans because they use [early voting] at higher rates than other groups of voters."[5]

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[4] Importantly, the Seventh Circuit stayed the lower court's injunction in *Frank*, based on its view that Wisconsin's "probability of success on the merits of this appeal is sufficiently great." 2014 U.S. App. LEXIS 17653 at *1.

[5] *Ohio State Conf. of the NAACP* involved a factually dense record that differs significantly from the record here. For example, the court credited testimony about "subtle or direct racial appeals" in recent elections, and noted that "African Americans are significantly underrepresented" in elective offices. 2014 U.S. Dist. LEXIS 123442 at *110. By contrast, there were no findings that racial appeals had

Amici curiae respectfully submit that these cases were wrongly decided and are contrary to the law in this and other circuits. A voting procedure that may "appear in the path" of minority voters is simply not the same as one that actually causes a denial of the equal opportunity to participate and to elect representatives of choice. *Ohio State Conf. of the NAACP*, moreover, would render any voting practice unrepealable under if minority voters utilized it "at higher rates." Both decisions erred by failing to apply the causation requirement set forth in Section 2. *See Irby*, 889 F.2d at 1358; *Smith*, 109 F.3d at 595 ("a bare statistical showing of disproportionate *impact* on a racial minority does not satisfy the § 2 'results' inquiry"). Plaintiffs are asking this Court to commit the same error.

II. The District Court Correctly Determined that the Insignificant Burdens Imposed by HB 589 Do Not Support Either a Section 2 "Results" Claim or the Requested Injunction.

HB 589 places insignificant burdens on the voters of North Carolina. First, it requires voters to register 25 days in advance of an election. As the District Court noted, this actually extends the registration cut-off authorized by Congress by an additional five days. *N.C. State Conf. of the NAACP v. McCrory*, Nos. 13cv658, 13cv660, 13cv861, 2014 U.S. Dist. LEXIS 109626 at *67-68 & n.35 (M.D.N.C., Aug. 8, 2014). Second, under HB 589, North Carolina voters may not

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been used in recent North Carolina elections, and the plaintiffs' own witnesses testified that "blacks in North Carolina have been elected to political office at levels that now 'approach [] parity' with their prevalence in the electorate." *N.C. State Conf. of the NAACP*, 2014 U.S. Dist. LEXIS 109626 at *58.

utilize same-day registration. In this regard, their circumstances are like those of the voters of 36 other states. *Id.* at *66-67 n.34. Third, North Carolina voters must "early vote" during the adjusted ten-day period. Of course, many states do not offer *any* early voting, and the United States has conceded that the failure to offer it does not, in itself, violate Section 2. *Id.* at *130-31 n.61. The Justice Department, moreover, has precleared state law changes significantly restricting early voting. *Id.* Fourth, under HB 589, North Carolina voters must vote in their own precinct – as must the voters in a majority of other states. *Id.* at *115 n.54. In each instance, the prospect of successfully registering and voting remains comfortably within the control of individual voters.

Further, the District Court demonstrated at length in its opinion that the provisions of HB 589, considered in the larger context of North Carolina's electoral system as a whole, do not impose burdens on voters that warrant Section 2 relief. Discussing same-day registration, the District Court noted that the plaintiffs' experts confirmed that black registration in North Carolina exceeds that of whites. *Id.* at *58. In addition, the plaintiffs failed to show that black voters "currently lack [] an equal opportunity to easily register to vote," given the alternative possibility of registering by mail; the voter registration services offered by numerous State agencies; the lenient laws concerning voter registration drives; and even the option to update certain registrations within the 25-day cut-off. *Id.* at

*62-64. In light of all of these facts and options, the lack of same-day registration was not an actionable burden. As correctly determined by the District Court, "[t]hat voters *preferred* to use SDR [same-day registration] over these methods does not mean that without SDR voters lack equal opportunity." *Id.* at *64.

In the same vein, the District Court analyzed changes to the number of days (but not hours) of early voting by conducting a detailed examination of both the law and the facts on the ground, including a county-specific assessment of Sunday voting and a review of organized voter registration efforts. *Id.* at *124-41. Noting, among other things, that "no witness testified that he or she will not be able [to] adjust operations readily to fit the new early-voting period," the District Court ultimately concluded that any claim of irreparable harm was speculative. *Id.* at *139-40. The District Court also concluded that the totality of circumstances, including "the minimal usage of out-of-precinct ballots" and the "ready availability of other methods of voting – including early voting and mail-in absentee balloting – without regard to precinct," showed that the plaintiffs were not likely to succeed on the merits of their challenge to HB 589's out-of-precinct procedure. *Id.* at *118.

The District Court's broad approach, considering all available facts within the context of a "totality of circumstances" analysis, is the proper one for a Section 2 claim. It contrasts sharply with the restrictive and incorrect approach advanced by the plaintiffs.

III. The Plaintiffs' Theory of Section 2 Liability is Fundamentally Flawed.

The plaintiffs relied below on a theory of Section 2 liability that is contrary to the governing law. The basic premise of the plaintiffs' case is that a greater proportion of black voters use same-day registration, early voting, and out-of-precinct voting. *See, e.g.*, ECF No. 113 at 24, 30, 34; ECF No. 98-1 at 17-20. However – mindful perhaps of the long line of circuit court cases holding that "a bare statistical showing of disproportionate *impact* on a racial minority does not satisfy the § 2 'results' inquiry" (*Smith*, 109 F.3d at 595) – the plaintiffs have elaborated that Section 2 causation is established by showing that such a disparate impact arises from an "interaction" between a challenged practice and social, economic, and historical factors. ECF No. 98-1 at 28; ECF 113 at 23-24.

The plaintiffs have misapplied the governing law. The plaintiffs are ostensibly relying on the *Gingles* Court's statement that the "essence of a § 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives." 478 U.S. at 47. But *Gingles* did not hold that *any* inequality will support a Section 2 claim. Rather, the Court's language makes clear that the inequality must implicate Section 2's core requirement that members of a protected class "have less opportunity than other [voters] to participate in the political process and to elect representatives of their

choice." 42 U.S.C. § 1973(b).

Failing to acknowledge this requirement, the plaintiffs contend that, once any racial disparity is shown to affect voters' preferences regarding, for example, same-day registration, a Section 2 violation has been established. But the plaintiffs' focus is too narrow. Showing that there is such a disparity, even one shaped by an interaction with history, is not the same as making the required showing that minority voters cannot participate equally in the political process and elect candidates of their choice.

By structuring the Section 2 inquiry incorrectly as they have done, the plaintiffs shut off the appropriate inquiry too soon. Their arguments slight the pertinent questions regarding trade-offs, alternatives, and mitigating factors that one would want to know under a totality of circumstances analysis – and that the District Court carefully examined – in order to determine whether racial groups can participate equally in the political process. For example, how hard is it *in general* to register? How many different options are there for would-be registrants other than same-day registration? How many Sunday voting hours will actually be lost? How hard is it to start a registration drive now, and how could organizers adapt to the new rules? How hard is it for voters to vote in-precinct, or, for that matter, by absentee ballot? *See N.C. State Conf. of the NAACP*, 2014 U.S. Dist. LEXIS 109626 at *62-64, 118, 132-33, 138-39. The District Court has made the

proper "totality of the circumstances" inquiry that addresses all of these issues. The plaintiffs' incorrect approach has avoided doing so.

The plaintiffs' failure to adopt the correct standard is reflected in their approach to turnout data. In May 2014, a primary election was held in North Carolina. It was the first election of any kind held pursuant to the provisions of HB 589. Notwithstanding 900 or so pages of plaintiffs' expert reports forecasting that HB 589 would inflict numerous burdens on North Carolina's voters, voter turnout actually increased in the May 2014 primary over the previous midterm primary in May 2010 – and, by every measure, *black turnout increased faster* than general turnout. *See* ECF 136 at 2-4 and Ex. 1.

In response, the plaintiffs argued in part that the increase in turnout data "does not explain the persistent racial disparities in the *mode* of voting across multiple elections," and that, because "turnout can vary for a number of reasons, the best evidence for determining whether HB 589 has racially disparate effects is the undisputed fact that African Americans disproportionately relied on the eliminated practices for multiple election cycles." ECF No. 153 at 10. They argued, in other words, that the disparate use of same-day registration, early voting, and out-of-precinct voting is determinative of their claim and that actual

turnout data are not.[6]

This is exactly backwards. The only reason to assess racially disparate use of "modes" of voting is to determine whether factors that vary by race will, at some point, depress a metric of political participation like turnout or registration. The plaintiffs, however, maintain that a Section 2 violation is established *by* the racially disparate preference for modes of voting changed by HB 589 – and not, as would comport with Section 2, by the effect that such disparate use has on a minority's opportunity "to participate in the political process and to elect representatives of their choice." Note that, by this logic, *even if it were undisputed that black turnout and registration will increase in November 2014 faster than white turnout and registration under the challenged provisions of HB 589*, Section 2 would still be violated because more black voters than white prefer same-day registration, early voting, and out-of-precinct voting.

The plaintiffs are wrong to think that the Section 2 violation *consists of* the racially disparate preference for same-day registration, early voting, or out-of-precinct voting. In fact, those disparities are only relevant to a Section 2 claim

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[6] The court in *Ohio State Conf. of the NAACP* makes this same error, stating that, while changes to early voting may not reduce turnout, "§ 2 is not necessarily about voter turnout but about opportunity to participate in the political process compared to other groups." 2014 U.S. Dist. LEXIS 123442 at *114. As explained in the accompanying text, turnout, rather than the disparate use of early voting by minority voters, is the correct measure of the opportunity to participate and to elect candidates of choice guaranteed by Section 2.

insofar as an analysis of the totality of circumstances shows that they impair a minority's opportunity to participate in the political process and elect candidates of choice. The plaintiffs' flawed approach to Section 2 explains why they should lose this appeal, and their lawsuit.

Conclusion

For the foregoing reasons, *amici* respectfully urge the Court to confirm the District Court's denial of the plaintiffs' motion for a preliminary injunction.

Dated: September 17, 2014

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CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of September, 2014, I transmitted the foregoing document to the parties by means of an electronic filing pursuant to the ECF system.

s/ Bradley J. Schlozman
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