No. 16-1468(L), 16-1469, 16-1474, & 16-1529

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NORTH CAROLINA STATE CONFERENCE OF THE NAACP, et al.,
Plaintiffs - Appellants

and

JANE DOE, et al.
Plaintiffs

v.

PATRICK LLOYD MCCOY, in his Official Capacity as Governor of North Carolina, et al.,
Defendants - Appellees,

LOUIS M. DUKE, et al.,
Intervenors/Plaintiffs - Appellants

and

CHARLES M. GRAY, et al.,
Intervenors/Plaintiffs

v.

STATE OF NORTH CAROLINA, et al.,
Defendants - Appellees

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

v.

STATE OF NORTH CAROLINA, et al.,
Defendants - Appellees

UNITED STATES OF AMERICA,
Plaintiff - Appellant

v.

STATE OF NORTH CAROLINA, et al.,
Defendants - Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA AT GREENSBORO

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION, CENTER FOR EQUAL OPPORTUNITY, AND PROJECT 21 IN SUPPORT OF DEFENDANTS-APPELLEES

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Amicus Project 21, the national leadership network of black conservatives, is an initiative of The National Center for Public Policy Research to promote the views of African-Americans whose entrepreneurial spirit, dedication to family, and commitment to individual responsibility have not traditionally been echoed by the nation's civil rights establishment. Project 21 participants seek to make America a better place for African-Americans, and all Americans, to live and work.

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INTRODUCTION[1] AND SUMMARY OF ARGUMENT

Congress passed the Voting Rights Act of 1965, 52 U.S.C. § 10101 *et seq.*, "to banish the blight of racial discrimination in voting." *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966). It was an overwhelming success. The Department of Justice (DOJ) considers it "the most successful piece of civil rights legislation ever adopted by the United States Congress." Introduction to Federal Voting Rights Laws, U.S. Dep't of Justice, Civil Rights Div.[2] Indeed, "largely because of the Voting Rights Act, voting tests were abolished, disparities in voter registration and turnout due to race were erased, and African-Americans attained political office in record numbers." *Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2628 (2013); *see also Nw. Austin Mun. Utility Dist. No. 1 v. Holder*, 557 U.S. 193, 201 (2009) ("The historic accomplishments of the Voting Rights Act are undeniable.").

All Americans should recognize and applaud the success of the Voting Rights Act. Instead, DOJ and the private plaintiffs in this case are pushing the expansion of the amended Section 2 of the Act beyond its intended scope. Appellants challenge several parts of an omnibus election reform law known as Session Law 2013-381.

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[1] In accordance with Fed. R. App. P. 29(c)(5), Amici Curiae affirm that no counsel for any party authored this brief in whole or in part, no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and no person other than the Amici, their members, or their counsel have made a monetary contribution to this brief's preparation or submission.

[2] http://www.justice.gov/crt/about/vot/intro/intro.php.

Most importantly, Appellants contend that North Carolina violated Section 2 when it adopted a voter identification (ID) requirement (accompanied by a reasonable impediment exception), reduced early-voting days from seventeen to ten (with a requirement that counties offer the same number of hours as the previous comparable election), eliminated same-day registration, and abolished out-of-precinct provisional voting. *N.C. State Conf. of the NAACP v. McCrory*, No. 1:13CV658, 2016 WL 1650774, at *2-6 (M.D.N.C. May 9, 2016). Although these changes bring North Carolina election laws in line with most of the states, Appellants contend that North Carolina violated Section 2 because black voters are more likely to lack identification and were more likely to take advantage of the other voting accommodations. *Id*. at *31, 123, 127. These claims are similar to those made in other recent Section 2 cases challenging voter ID laws or changes to early voting. *Veasey v. Abbott*, 796 F.3d 487 (5th Cir. 2015), *rehearing granted*, 815 F.3d 958 (5th Cir. 2016); *Frank v. Walker*, 768 F.3d 744 (7th Cir. 2014); *Ohio State Conf. of NAACP v. Husted*, 768 F.3d 524 (6th Cir. 2014), *vacated on other grounds*, 2014 WL 10384647 (6th Cir. Oct. 1, 2014).

Appellants' claims should fail, and the decision below should be affirmed. Section 2 protects equality of opportunity, not ultimate outcome. The relevant inquiry is whether, under the current election law, North Carolinians of all races have an equal opportunity to participate in the political process. Section 2 is not a raw disparate impact statute, and thus any remedy requires some proof that the State caused the

racial disparities. Without a robust causation requirement, every State that enacts a new election law could be found in violation of Section 2 based upon ubiquitous socioeconomic disparities. Appellants' view of Section 2 also significantly limits the power of states to address local electoral problems.

Appellants' position conflates the Section 2 standard with the "non-retrogression" rule of Section 5. *See Beer v. United States*, 425 U.S. 130, 141 (1976). By inordinately relying on disparate usage of the amended procedures, Appellants have fallen into the trap of comparing the old law to the new law and basing the "results" finding on that comparison. *See Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 478 (1997) ("Retrogression, by definition, requires a comparison of a jurisdiction's new voting plan with its existing plan."). This comparison threatens to gut *Shelby County* by requiring states to satisfy the non-retrogression rule even though the preclearance formula has been invalidated. *Shelby Cnty.*, 133 S. Ct. at 2631. Section 2 is not Section 5, and states should not have to satisfy similar burdens to Section 5 preclearance actions to exercise their power under the Elections Clause. U.S. Const. art. I, § 4, cl. 1.

Finally, the proposed broad reading of Section 2 threatens to render it unconstitutional. The Fourteenth and Fifteenth Amendments prohibit only intentional discrimination. *Washington v. Davis*, 426 U.S. 229, 239 (1976) (Fourteenth Amendment); *City of Mobile v. Bolden*, 446 U.S. 55, 62 (1980), superseded by statute

on other grounds, 52 U.S.C. § 10301 (Fifteenth Amendment). Reading Section 2 to create disparate impact liability for changes in election laws would expand the statute beyond Congress' enforcement powers granted by those amendments. *See City of Boerne v. Flores*, 521 U.S. 507 (1997). Moreover, Appellants' understanding of Section 2 encourages states to make decisions based upon race, exacerbating the conflict between disparate impact and the Equal Protection Clause. *See Ricci v. DeStefano*, 557 U.S. 577, 594-95 (2009) (Scalia, J., concurring).

For the reasons explained below, this Court should affirm the district court's judgment and hold that North Carolina's Session Law 2013-381 does not violate Section 2 of the Voting Rights Act.

ARGUMENT

I

SECTION 2 PROTECTS EQUALITY OF OPPORTUNITY; IT CANNOT BE VIOLATED BY A MERE DISPARATE IMPACT

As enacted in 1965, Section 2 of the Voting Rights Act prohibited only intentional discrimination. *Bolden*, 446 U.S. at 62. In response to the *Bolden* decision, Congress amended the statute in 1982 to incorporate the " 'results test,' applied by [the Supreme Court] in *White v. Regester*, 412 U.S. 755 (1973), and by other federal courts before *Bolden*." *Thornburg v. Gingles*, 478 U.S. 30, 35 (1986) (quoting S. Rep. No. 97–417, 97th Cong. 2nd Sess., at 28 (1982)). The current

version of Section 2 prohibits any "voting qualification or prerequisite to voting or standard, practice, or procedure" applied "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 . . . ." 52 U.S.C. § 10301(a). Subsection (b) serves as an interpretive guide, codifying the equality of opportunity standard. It clarifies that a violation occurs when, "based on the totality of circumstances, it is shown that the political processes leading to nomination or election . . . are not equally open to participation by members of a class of citizens" such 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." *Id*. § 10301(b) (emphasis added).

Most Section 2 cases are "vote dilution" challenges, which contend that a specific structure of government (such as the composition of a district, or the use of single-member vs. multi-member districts) dilutes the power of minority votes. *See*, *e.g*., *Gingles*, 478 U.S. at 34 (multi-member districts); *Holder v. Hall*, 512 U.S. 874, 877 (1994) (plurality opinion) (size of county commission).[3] By contrast, this is a "vote

[3] The *Gingles* Court endorsed nine factors relevant to the outcome of a Section 2 vote-dilution claim from a Senate report, including the history of official discrimination in a state, racial polarization in voting, and the extent to which minority voters in the state "bear the effects of discrimination." *Gingles*, 486 U.S. at 37-38. Many courts have observed that these factors are of limited usefulness in vote-denial cases. *See*, *e.g.*, *Brown v. Detzner*, 895 F. Supp. 2d 1236, 1245 n.13 (M.D. Fla. 2012); *Miss. State Chapter, Operation Push v. Allain*, 674 F. Supp. 1245, 1263 (N.D. Miss. 1987), *aff'd sub nom. Miss. State Chapter, Operation Push, Inc. v. Mabus*, 932 F.2d 400 (5th Cir. 1991).

denial" case. "Vote denial occurs when a state employs a 'standard, practice, or procedure' that results in the denial of the right to vote on account of race." *Johnson v. Gov. of State of Fla.*, 405 F.3d 1214, 1227 n.26 (11th Cir. 2005) (en banc). Thus far, most "vote denial" challenges, including *Johnson*, have involved state felon-disenfranchisement provisions. Daniel P. Tokaji, *The New Vote Denial: Where Election Reform Meets the Voting Rights Act*, 57 S.C. L. Rev. 689, 714 (2006). In fact, "[v]ote-denial claims under Section 2 have thus far been relatively rare, perhaps due in part to the fact that since 1965, many jurisdictions . . . were under federal control and barred from enacting any new voting procedure without first obtaining 'pre-clearance'" from DOJ under Section 5. *N.C. State Conf. of NAACP v. McCrory*, 997 F. Supp. 2d 322, 346 (M.D.N.C. 2014).

As a result, the instant case, along with *Veasey*, *Frank*, and *Husted*, is among the first to test the reach of Section 2's equality-of-opportunity provision to race-neutral voter qualification provisions such as voter ID. A circuit split has already developed. In evaluating a Section 2 challenge to Ohio's reduction from 35 to 28 days in early voting, the Sixth Circuit held that "a plaintiff need show only that the challenged action or requirement has a discriminatory effect on members of a protected group." *Husted*, 768 F.3d at 550 (quoting *Moore v. Detroit Sch. Reform Bd.*, 293 F.3d 352, 363 (6th Cir. 2002)). The court found disparate impact solely based upon on the effect of reducing early voting days, then found causation on the basis of decades old discriminatory

practices and current socioeconomic inequities.[4] *Id*. at 555-57. Conversely, the Seventh Circuit found no denial of equal opportunity from Wisconsin's voter ID law, reasoning that "[a]lthough these findings document a *disparate outcome*, they do not show a 'denial' of anything by Wisconsin, as § 2(a) requires; unless Wisconsin makes it needlessly hard to get photo ID, it has not denied anything to any voter." *Frank*, 768 F.3d at 753 (emphasis added).

A. Section 2 Requires Proof of Causation and Does Not Guarantee Any Particular Outcome

The text of Section 2 makes it plain that "a bare statistical showing of disproportionate impact on a racial minority does not satisfy the § 2 'results' inquiry." *Smith v. Salt River Project Agric. Improvement & Power Dist*., 109 F.3d 586, 595-96 (9th Cir. 1997). "If things were that simple, there wouldn't have been a need for *Gingles* to list nine non-exclusive factors in vote-dilution cases." *Frank*, 768 F.3d at 753. Instead, courts must assess the challenged laws to determine whether they permit equal opportunity to individuals of all races. They must also determine if any disparate result was in fact caused by the challenged law.

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[4] The Fifth Circuit in *Veasey* followed a similar pattern. It first concluded that the voter ID requirement disproportionally affects minority voters. *Veasey*, 796 F.3d at 509. Then, it credited the district court's findings that the State's past discrimination was linked to present "disparate educational, economic, and health outcomes." *Id.* at 510-11. In conjunction with the court's finding that the asserted rationales of preventing voter fraud and increasing voter confidence were tenuous, this was enough to invalidate the voter ID law under Section 2. *Id.* at 512-13.

Many earlier Voting Rights Act cases help explain how plaintiffs must prove causation in a Section 2 case. In *Irby v. Virginia State Board of Elections*, 889 F.2d 1352 (4th Cir. 1989), this Court rejected a Section 2 results challenge to Virginia's system of appointing (rather than electing) school board members. It held that even though the plaintiffs showed a racial gap in school board membership, there was "no proof that the appointive process caused the disparity." *Id*. at 1358. Rather, African-American Virginians did not seek school board membership at the same rate as white Virginians. *See id*. Similarly, in *Smith*, the Ninth Circuit sustained an agricultural district's requirement that one own land in the district to be eligible to vote in district elections, holding that "the statistical disparity in African-American and white home ownership does not prove that the District has violated § 2." *Smith*, 109 F.3d at 596. Because the disparity existed independent of the challenged election system, and the election system served a legitimate governmental interest, the system did not violate Section 2. *See id*.

Most similar to this case, in *Ortiz v. City of Philadelphia*, the plaintiffs challenged Philadelphia's implementation of a Pennsylvania statute that purged from the voter rolls everyone who had not voted in the past two years. 28 F.3d 306, 307 (3d Cir. 1993). The purge statute removed nearly a quarter of minority registered voters from the rolls in 1991, compared with only 17% of white voters. *Id*. at 308 n.2. Even though the statute had a clear disparate impact, the Third Circuit found no Section 2 violation

because the plaintiffs did not prove that the disparity was *caused* by the purge. *Id*. at 314. Rather, "registered voters are purged—without regard to race, color, creed, gender, sexual orientation, political belief, or socioeconomic status—because they do not vote, and do not take the opportunity of voting in the next election or requesting reinstatement." *Id*. Only the individual decisions of purged voters could be said to have "caused" the statute's disparate impact.

Notwithstanding Appellants' theory of Section 2 in this case, "a protected class is not entitled to § 2 relief merely because it turns out in a lower percentage than whites to vote." *Salas v. Sw. Texas Jr. Coll. Dist*., 964 F.2d 1542, 1556 (5th Cir. 1992). It is unfortunate that socioeconomic disparities between the races exist. But these disparities exist everywhere and are often caused by cultural discrimination or other factors, not the State. *See Frank*, 768 F.3d at 755 (noting skepticism over proof of causation by linking the law to social and historical discrimination, because this "does not distinguish discrimination by the [State] from other persons' discrimination"). If a Section 2 results claim can be based entirely on disparate impact coupled with socioeconomic disparities, then every voting mechanism is in danger of violating the Voting Rights Act. *See id.,* at 754 (noting the potential for broad disparate impact claims to "dismantle every state's voting apparatus"). Adopting this analysis led the Sixth Circuit to erroneously find Ohio in violation when the State offered 28 days of early voting *and* was never a covered jurisdiction under Section 5. *See Husted*, 768 F.3d at 555-57. Such an overly

broad interpretation of Section 2 invites courts to invalidate even permissive voting laws. *See* National Conference of State Legislatures, *Absentee and Early Voting* (updated August 6, 2015)[5] (noting that the average early-voting period among the states is 19 days and that 13 states have no early voting at all).

Moreover, even statutes authorizing liability based upon disparate impact must have some causation requirement connecting the disparity with a challenged practice. In *Texas Department of Housing and Community Affairs v. Inclusive Communities Project*, the Supreme Court held that the Fair Housing Act permits disparate impact liability. 135 S. Ct. 2507 (2015). But it cautioned that if the plaintiff "cannot show a causal connection between the Department's policy and a disparate impact . . . that should result in dismissal." *Id*. at 2524. The Court explained that it would be hard to prove causation when challenging the decision of a private developer to build a house in one location versus another "because of the multiple factors that go into investment decisions about where to construct or renovate housing units." *Id*. The same is true here; many factors affect turnout, so it is difficult to say whether any one policy—say, a voter ID requirement—created a disparate impact, or whether voters simply failed to take advantage of adequate opportunities. *Cf. Ortiz*, 28 F.3d at 314.

Section 2 is not an unqualified disparate impact statute. "The essence of a § 2 claim is that a certain electoral law, practice, or structure interacts with social and

[5] http://www.ncsl.org/research/elections-and-campaigns/absentee-and-early-voting.aspx.

historical conditions to *cause an inequality in the opportunities* enjoyed by black and white voters to elect their preferred representatives." *Gingles*, 478 U.S. at 47 (emphasis added). The statute's text makes clear that "the ultimate right of § 2 is equality of opportunity, not a guarantee of electoral success for minority-preferred candidates of whatever race." *Johnson v. De Grandy*, 512 U.S. 997, 1014 n.11 (1994). This court must assess North Carolina's election laws to determine whether they deprive minority voters of an equal opportunity to participate in the political process. The district court's factual findings establish that the challenged provisions do not deprive anyone of equal opportunity.[6]

B. Section 2 Analysis Must Consider the Countervailing State Interests in Regulating Elections

A disparate impact approach to Section 2 minimizes North Carolina's significant power to regulate State elections. The Constitution's Elections Clause reserves to the states the general power to regulate "[t]he Times, Places and Manner

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[6] Courts may still find a Section 2 violation without a showing of discriminatory intent. For example, in a recent case out of South Dakota, Native American voters alleged a Section 2 violation when a county with an overwhelmingly Native American population offered far fewer early-voting days than other, substantially white counties. *Brooks v. Gant*, No. CIV-12-5003-KES, 2012 WL 4482984, at *1, *6-7 (D.S.D. Sept. 27, 2012). The district court found that the Native Americans plausibly alleged a Section 2 violation because the situation in the almost entirely Native American county was "substantially different from the voting opportunities afforded to the residents of other counties in South Dakota and to the majority of white voters." *Id.* at *7. This is how the Section 2 "results" test can function—by invalidating a government action that is not obviously based on race but "results" in an unequal opportunity for one race.

of holding Elections for Senators and Representatives." U.S. Const. art. I § 4 cl. 1. While the suffrage Amendments (the Fifteenth, Nineteenth, and Twenty-Sixth) limit that power by prohibiting intentional discrimination, they do not limit the power of the states to enforce race-neutral voting qualifications that satisfy legitimate governmental interests. *See Bolden*, 446 U.S. at 62 (Fifteenth Amendment only prohibits intentional discrimination); *Lesar v. Garnett*, 258 U.S. 130, 136 (1922) (the Nineteenth Amendment is "in character and phraseology precisely similar to the Fifteenth"); *Walgren v. Howes*, 482 F.2d 95, 101 (1st Cir. 1973) (the Twenty-Sixth Amendment was patterned after the Fifteenth).

The Voting Rights Act does not deprive states of the ability to regulate elections; it only does so if those mechanisms deny the right to vote "on account of race or color." 52 U.S.C. § 10301(a). "[A]s a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes." *Storer v. Brown*, 415 U.S. 724, 730 (1974). The importance of a State's interest in a particular voting law is helpful in determining if the decision was made "on account of race." States are not forbidden from taking actions that serve legitimate interests even when the result is a racially disparate impact. *Cf. Ortiz*, 28 F.3d at 314 (rebutting a Section 2 results claim in part by noting that "it is well established that purge statutes are a legitimate means by which the State can attempt to prevent voter fraud"). Conversely,

courts may reasonably infer that a law results in discrimination when the State offers no alternative legitimate reason.

In this case, North Carolina presented significant evidence that the voter ID, same-day registration, and out-of-precinct provisional ballot provisions serve legitimate state interests. In fact, courts have long accepted that these types of regulations serve important state interests. In *Crawford v. Marion County Election Board*, the Supreme Court found that voter ID laws serve the important interests of preventing voter fraud and safeguarding voter confidence. 553 U.S. 181, 194-97 (2007). That finding is a "legislative fact" that binds this Court, "even if 20 political scientists disagree with the Supreme Court." *Frank*, 768 F.3d at 750. Similarly, a voter registration cutoff "is necessary to permit preparation of accurate voter lists." *Marston v. Lewis*, 410 U.S. 679, 681 (1973). Other courts have made similar findings with respect to the importance of the precinct system. *See Sandusky Cnty. Democratic Party v. Blackwell*, 387 F.3d 565, 569 (6th Cir. 2004) (per curiam).[7]

[7] The Sixth Circuit observed: "The advantages of the precinct system are significant and numerous: it caps the number of voters attempting to vote in the same place on election day; it allows each precinct ballot to list all of the votes a citizen may cast for all pertinent federal, state, and local elections, referenda, initiatives, and levies; it allows each precinct ballot to list only those votes a citizen may cast, making ballots less confusing; it makes it easier for election officials to monitor votes and prevent election fraud; and it generally puts polling places in closer proximity to voter residences." *Id.* The North Carolina Supreme Court relied on these rationales to uphold the State's prior election law that required voting in the proper precinct. *James v. Bartlett*, 607 S.E.2d 638, 644-45 (N.C. 2005).

Like the suffrage amendments, Section 2 limits North Carolina's power to regulate its elections. But this court should not extend its reach so far to invalidate facially race-neutral election regulations that further significant government interests. Otherwise, a mere statistical disparity will threaten to overwhelm many legitimate voting laws. *See Lynch v. Freeman*, 817 F.2d 380, 391 (6th Cir. 1987) (Boggs, J., dissenting) (noting, in the employment context, that "[v]irtually every strenuous, unusual, or dangerous job contains conditions that may have a differential impact on a sex, age group, or race"). Section 2 was intended to root out discrimination in voting, not to prevent the states from addressing legitimate concerns through race-neutral election laws.

C. An Expansive View of Section 2 Would Place the Voting Laws of Many States in Jeopardy

In their attempt to minimize the effects of *Crawford*'s findings on legitimate state interests, Appellants emphasize that Section 2 demands an "an intensely local appraisal" to determine whether a violation has occurred. *Gingles*, 478 U.S. at 78-79. This is true to some extent. For example, unlike laws prohibiting same-day registration and out-of-precinct provisional voting, voter ID laws differ from state to state and these differences are relevant to the burden imposed. *See Frank*, 768 F.3d at 750-51 ("[I]f the burden of getting a photo ID in Wisconsin were materially greater than the burden in Indiana, then Wisconsin's law could indeed be invalid while

Indiana's stands."). But it does not mean that courts should ignore the laws of other states. Taking Appellants' position to its logical conclusion leads to absurd results.

Courts that have found Section 2 violations in the most recent round of election reform have relied mostly on conditions present nationwide. *See Husted*, 768 F.3d at 555-57. Those statistics guarantee that broad Section 2 rulings will be used to justify the invalidation of laws in other jurisdictions. For example, an opinion finding a Section 2 violation for reducing early voting from 35 to 28 days (like *Husted*) could be used to invalidate voting laws in states like New York that do not allow early voting at all. "Extending Section 2 that far could have dramatic and far-reaching effects." *Irby*, 889 F.3d at 1358.

District courts in Florida have grappled with this problem as applied to the number of days of early voting. In *Jacksonville Coalition for Voter Protection v. Hood*, the court observed that "acceptance of Plaintiffs' argument that a Section 2 violation occurs merely because some counties have more early polling sites would have far-reaching implications." 351 F. Supp. 2d 1326, 1335 (M.D. Fla. 2004). It reasoned that "[f]ollowing Plaintiffs' theory to its next logical step, it would seem that if a state with a higher percentage of registered African-American voters than Florida did not implement an early voting program a Section 2 violation would occur because African-American voters in that state would have less of an opportunity to vote than voters in Florida." *Id*. at 1335-36. Moreover, "a Section 2 violation could occur in

Florida if a state with a lower percentage of African-American voters employed an early voting system, as commented on above, that lasts three weeks instead of the two week system currently used in Florida." *Id*. at 1336.

Some states offer lengthy early voting periods, some offer less, and still others do not permit early voting at all. The facts on the ground in these states simply cannot differ enough to justify these wildly varying results. Appellants' theory suffers in that it cannot provide any principled manner to permit the states to maintain different early-voting periods. *See also Brown*, 895 F. Supp. 2d at 1254 ("[A]cceptance of Plaintiffs' argument that the eight days of early voting allowed by the Florida legislature violates Section 2 could have far-reaching implications."); *Florida v. United States*, 885 F. Supp. 2d 299, 332 n.39 (D.D.C. 2012) (DOJ pre-cleared Georgia for a reduction from 45 to 21 days of early voting.).

The same is true for voter ID, same-day registration, and out-of-precinct voting. The majority of states do not allow same-day registration and do not count ballots cast in the wrong voting precinct. *See McCrory*, 997 F. Supp. 2d at 351, 367 nn.34, 54. Under Appellants' theory, all of these states could be found in violation of Section 2 for not having adopted those changes in the first instance. After all, if North Carolina's failure to count out-of-precinct votes leads to an inequality of opportunity for minority voters, why would the same not be true in other states with similar socioeconomic disparities? The distinction cannot be based solely on decades-old

official discrimination that exists in some states and not others. *See Shelby Cnty*., 133 S. Ct. at 2628 ("[H]istory did not end in 1965.").

Simply put, "[f]unctionally identical laws cannot be valid in Indiana and invalid in Wisconsin (or the reverse), depending on which political scientist testifies, and whether a district judge's fundamental beliefs . . . are more in line with the majority on the Supreme Court or the dissent." *Frank*, 768 F.3d at 750. While different states can impose disparate burdens with their voter ID laws, "North Carolina's reasonable impediment exception makes its ID requirement less burdensome than either Indiana's or Wisconsin's." *McCrory*, 2016 WL 1650774, at *99. Only a perverse interpretation of Section 2 could render North Carolina in violation while Wisconsin and Indiana (not to mention the nearly two-dozen other states with voter ID laws) are not.

Proper application of the causation requirement and the equality of opportunity standard of Section 2 avoids these concerns. It prevents the federal courts from treating states differently on matters integral to State sovereignty. *See Shelby Cnty*., 133 S. Ct. at 2634 (recognizing the principle and noting the problem under Section 5 preclearance that "[w]hile one State waits months or years and expends funds to implement a validly enacted law, its neighbor can typically put the same law into effect immediately, through the normal legislative process"). This Court should apply Section 2 in a manner that results in a consistent nationwide standard of equality of opportunity in voting.

II

SECTION 2'S EQUALITY OF OPPORTUNITY STANDARD IS NOT SECTION 5'S NON-RETROGRESSION STANDARD

Non-retrogression was the standard that "covered" states had to satisfy under Section 5 of the Voting Rights Act, and it prohibited any change that would make minority voters worse off as compared to white voters. States were required to get voting changes "precleared" by DOJ or a three-judge panel of the United States District Court in Washington, D.C. *Beer*, 425 U.S. at 141. Application of the non-retrogression standard inevitably required "a comparison of a jurisdiction's new voting plan with its existing plan." *Reno*, 520 U.S. at 478. Thus, unlike Section 2, Section 5 *is* an unadulterated disparate impact statute. Its retrogression analysis was based solely on the racially disparate impact of a voting change. *See* Nicholas O. Stephanopoulos, *The South After Shelby County*, 2013 Sup. Ct. Rev. 55, 123 (2013). If a new voting law had a disparate impact on minority voters (as compared with the prior law), federal law prevented it from going into effect. But in *Shelby County*, the Supreme Court invalidated the coverage formula used to determine which jurisdictions were subject to preclearance requirements. If Congress seeks to retain preclearance, it must draft a coverage formula using data reflecting current conditions that justifies federal review of state election laws.

The Supreme Court has held that retrogression is not the proper inquiry with respect to Section 2 vote dilution claims. *Holder*, 512 U.S. at 884. Accordingly, *Shelby County* did not affect Section 2, which is different from Section 5 in both purpose and scope. *See Reno*, 520 U.S. at 477-80; *Holder*, 512 U.S. at 883. The inordinate reliance on the effect of new laws (such as the cutback of early-voting days in *Husted*) threatens to conflate the two standards. Cases taking this expansive view "concoct a version of Section 2 that mirrors the retrogression standard in Section 5 and mobilizes Section 2 to undertake what *Shelby County* ended, except nationwide." J. Christian Adams, *Transformation: Turning Section 2 of the Voting Rights Act Into Something It Is Not*, 31 Touro L. Rev. 297, 325 (2015).

Many recent decisions improperly applied the non-retrogression standard to Section 2 claims. For example, the *Husted* decision invalidating Ohio's decision to scale back early voting from 35 to 28 days makes little sense unless dispositive factor is the *cutback* itself. Indeed, the court found disparate impact based on the effect of *reducing* early voting days, and relied on an omnipresent mix of decades-old discrimination and socioeconomic disparities to prove causation. *Husted*, 768 F.3d at 555-57. Without the cutback, it is difficult to see how the Sixth Circuit could have found a Section 2 violation. In other words, would Ohio still be in violation of Section 2 if it had increased early voting from 21 to 28 days? If the answer is no, then

the court has applied a retrogression analysis. *Cf. Holder*, 512 U.S. at 884 ("[A] benchmark does not exist by definition" in Section 2 cases.).

The return of retrogression is a significant curtailment of the constitutional power of states to regulate their own elections. If "[i]t is impossible to avoid *some* disparate impact on some racial subgroup every time the law is changed[,]" every law that is changed in a manner deemed unfavorable to a protected class will be invalidated. Adams, *supra*, at 322. This leads to a "one-way ratchet where federal voting law may be used to block any election change that hurts racial minorities."[8] *Id*. at 325.

The proper equality of opportunity standard avoids this slippery slope. As *Brown* noted, the court was "not comparing the new statute against the old," but rather evaluating whether the "Early Voting Statute serves to deny African American voters

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[8] The United States admitted as much in the preliminary injunction hearing in this case. *See* Doc. 180 in 13cv658 (M.D.N.C.) at 13:19-20. Judge Schroeder first commented: "So the Government's position sounds like that in any state that does not have same-day registration, that the Government does not contend that violates Section 2, but that if you decide to offer same-day registration, and then later reduce or eliminate it, that if the social conditions indicate that that's going to have a disproportionate effect on a certain race, then that's a Section 2 violation?" *Id.* at 13. The United States responded that "it could be" depending on the other circumstances. *Id.* Later, recognizing that no court had ever found the simple failure to offer same-day registration violative of Section 2, the government attorney nevertheless said "I think this goes back to the point about taking away something is different than having never offered it in the first place." *Id.* at 19. It is difficult to conceive of any voting change North Carolina could have enacted that would have been denied preclearance under Section 5 but satisfied Appellants' Section 2 standard.

equal access to the political process." 895 F. Supp. 2d at 1251. The Seventh Circuit applied this standard to properly separate the statistical disparity in ID possession—a retrogression inquiry—from the opportunity to vote provided under the new system —the correct Section 2 analysis:

> Act 23 does not draw any line by race, and the district judge did not find that blacks or Latinos have less "opportunity" than whites to get photo IDs. Instead the judge found that, because they have lower income, these groups are less likely to *use* that opportunity. And that does not violate § 2.

Frank, 768 F.3d at 753 (emphasis in original). This Court should similarly avoid falling into the trap of comparing the old law and rendering Section 2 equivalent to Section 5. *See Georgia v. Ashcroft*, 539 U.S. 461, 478 (2003) ("We refuse to equate a § 2 vote dilution inquiry with the § 5 retrogression standard.").

III

A BROAD READING OF SECTION 2 WOULD CREATE CONSTITUTIONAL CONFLICTS

A version of Section 2 that reaches far enough to enjoin a law permitting 28 days of early voting on the basis of retrogression raises two significant constitutional issues: (1) the potential that Congress exceeded its authority under the enforcement provisions of the Fourteenth and Fifteenth Amendments, and (2) the encouragement of race-based decision making in violation of the Equal Protection Clause. The Court can avoid both of these problems by adopting the equality of opportunity standard. *U.S. ex rel. Att'y Gen. v. Delaware & Hudson Co.*, 213 U.S. 366, 408 (1909) ("[W]here a statute is

susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter.").

A. If Section 2 Proscribes Any Election Change with a Disparate Impact on Protected Classes, It Would Exceed Congress' Authority Under the Fourteenth and Fifteenth Amendments

The Fourteenth and Fifteenth Amendments only proscribe intentional discrimination. Both Amendments include sections that grant Congress "power to enforce, by appropriate legislation, the provisions of this article." U.S. Const. amend. XIV, § 5; U.S. Const. amend. XV, § 2. In *City of Boerne*, the Supreme Court recognized important limits on the enforcement power under the Reconstruction Amendments. There, the Court held the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb *et seq.*, was an unconstitutional exercise of Congressional power under the enforcement clause of the Fourteenth Amendment. 521 U.S. at 536. Because the enforcement provision is remedial—and not substantive—it cannot be used to "decree the substance of the Fourteenth Amendment's restrictions on the States." *Id*. at 519. "Legislation which alters the meaning of [a constitutional clause] cannot be said to be enforcing [that] Clause. Congress does not enforce a constitutional right by changing what the right is." *Id*. Were it otherwise, the power would be virtually unlimited and Congress could enact its policy views under the guise of enforcing the guarantee of equal protection. *See id*.

The *City of Boerne* Court explained that "[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *Id*. at 520. It used the Voting Rights Act as the prime example of a law passed using the enforcement power. Unlike the adoption of the Voting Rights Act in 1965, "RFRA's legislative record lack[ed] examples of modern instances of generally applicable laws passed because of religious bigotry." *Id*. at 530. Rather than being "remedial, preventive legislation," RFRA was a congressional attempt to broaden constitutional protections. *Id*. at 532. It was therefore an invalid exercise of the enforcement power.

Section 2 of the Voting Rights Act, if read as proposed by Appellants, presents similar problems as the RFRA. There is no doubt that, at the time it was enacted, the Voting Rights Act was necessary remedial legislation. *Katzenbach*, 383 U.S. at 313-14 (noting the ineffectiveness of case-by-case litigation to protect voting rights in the South). Even so, the Court at that time "indicated that the Act was 'uncommon' and 'not otherwise appropriate,' but was justified by 'exceptional' and 'unique' conditions." *Shelby Cnty*., 133 S. Ct. at 2630 (quoting *Katzenbach*, 383 U.S. at 334-35). Those conditions no longer prevail. *See id.* at 2626 ("[T]here is no denying that, due to the Voting Rights Act, our Nation has made great strides."). Accordingly, the Court struck down the 40-year-old coverage formula that required certain jurisdictions to go through

federal preclearance under Section 5. *Id*. at 2631. Appellants cannot use Section 2 to accomplish the purpose of Section 5.

If Section 2 is as broad as Appellants contend, it proscribes every voting change that has some disparate impact on a protected group. And if it were that broad, it would exceed the enforcement power by changing the fundamental guarantees of the Reconstruction Amendments, which prohibit only disparate treatment. Just like Congress could not use Section 5 of the Fourteenth Amendment to overrule *Employment Division v. Smith*, 494 U.S. 872 (1990), and install broader protections for religious liberty, it cannot abrogate *Washington* and *Bolden* by using enforcement provisions to proscribe facially neutral voting regulations that do not deprive minorities of the opportunity to vote. *See City of Boerne*, 521 U.S. at 519.[9]

[9] Indeed, the RFRA is somewhat analogous to disparate impact liability. Congress passed the statute to reverse the result in *Smith*, wherein the Supreme Court held that the Free Exercise Clause does not require an exemption from a "neutral law of general applicability" on the ground that following such a law would violate one's religion. *Smith*, 494 U.S. at 879-80; *City of Boerne*, 521 U.S. at 512. Under the *Smith* rule, only statutes that facially discriminate against religious practice violate the Free Exercise Clause, while the RFRA applies strict scrutiny to religious freedom claims even if a statute is facially neutral. *See Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2760-61 (2014). *City of Boerne* recognized that Congress could not impose the RFRA standard on the States without more evidence of unconstitutional religious discrimination. *Id*. at 2761. Applying the same standard here should lead to a limiting construction of Section 2. The broad reading Appellants propose would exceed Congress' enforcement powers by enlarging the scope of liability beyond constitutional bounds without accompanying evidence.

B. A Broad Reading of Section 2 Would Encourage Race-Based Decisionmaking in Violation of the Equal Protection Clause

Not only does Appellants' position contradict the plain text of Section 2, but it also expands disparate impact liability—in a very high-profile manner—at a time when some have begun to recognize the conflict between disparate impact and the Constitution's guarantee of equal protection. *Texas Dep't of Housing*, 135 S. Ct. at 2522 ("[D]isparate-impact liability has always been properly limited in key respects that avoid the serious constitutional questions that might arise under the [Fair Housing Act], for instance, if such liability were imposed based solely on a showing of a statistical disparity."); *Ricci*, 557 U.S. at 594 (Scalia, J., concurring). Like *Ricci*, the disparate impact provisions in voting rights statutes encourage government actors to make race-conscious decisions in order to avoid liability. *See* Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 Harv. L. Rev. 493, 564 (2003) ("Disparate impact doctrine's operation requires people to be classified into racial groups, and liability hinges on a comparison of the statuses of those groups."). Courts should discourage the expansion of disparate impact into voting rights law by limiting the reach of Section 2.

Just as in employment law, a disparate impact provision in voting rights law encourages legislators to make race-conscious decisions at the expense of relying on relevant, race-neutral considerations. *See Ricci*, 557 U.S. at 594 (A disparate impact provision "not only permits but affirmatively requires" race-conscious decision making

"when a disparate-impact violation would otherwise result."). Recent cases show that legislatures are already often consumed with speculation about racial impact when debating new election laws. *See*, *e.g.*, *Veasey*, 796 F.3d at 498 n.8 (noting comments by legislators that the Texas voter ID law would disproportionally impact minorities and the poor); *McCrory*, 997 F. Supp. 2d at 357-58 (noting comments during North Carolina Senate debate that various voting changes would have a disproportionate impact on minorities). This will only increase if Section 2 prohibits more and more laws because of disparate impact. Section 2 should prevent states from passing laws that affect *opportunity*, not *outcome*.

As Justice Scalia warned, "disparate-impact provisions place a racial thumb on the scales, often requiring" state governments "to evaluate the racial outcomes of their policies, and to make decisions based on (because of) those racial outcomes." *Ricci*, 557 U.S. at 594. This Court should not force disparate impact analysis onto the reluctant text of Section 2. Doing so will only exacerbate the inevitable conflict between these provisions and the Equal Protection Clause.

CONCLUSION

North Carolina's SL 2013-381 (as amended by the reasonable impediment exception to the voter ID requirement) satisfies Section 2's "results" test. Section 2 should not prohibit every voting change that has a retrogressive or disparate effect on minorities, as measured by their use of the removed procedure or their current possession

of valid ID. It should stop states from passing laws that result in an inequality of opportunity to participate in the political process. As the district court properly held, North Carolina's election laws, which are consistent with those of most other states, do not deprive anyone of equal opportunity to vote. The judgment below should be affirmed.

DATED: June 16, 2016.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Nos. 16-1468(L), 16-1469, 16-1474, 16-1529; Caption: *USA v. State of North Carolina, et al.*

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