Nos. 16-1468, 1469, 1474, 1529

In the United States Court of Appeals for the Fourth Circuit

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

and

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

v.

PATRICK L. MCCRORY, in his official capacity as Governor of North Carolina; KIM WESTBROOK STACH, in her official capacity as a member of the State Board of Elections; JOSHUA B. HOWARD, in his official capacity as a member of the State Board of Elections; RHONDA K. AMOROSO, in her official capacity as a member of the State Board of Elections; JOSHUA D. MALCOLM, in his official capacity as a member of the State Board of Elections; PAUL J. FOLEY, in his official capacity as a member of the State Board of Elections; MAJA KRICKER, in her official capacity as a member of the State Board of Elections; JAMES BAKER, in his official capacity as a member of the State Board of Elections, *Defendants-Appellees*.

On Appeal from the United States District Court for the Middle District of North Carolina, Nos. 1:13-cv-658, 660, 861
(Hon. Thomas D. Schroeder)

BRIEF *AMICUS CURIAE* OF THE CONSTITUTIONAL ACCOUNTABILITY CENTER IN SUPPORT OF PLAINTIFFS-APPELLANTS AND REVERSAL

(caption continued on inside cover)

LEAGUE OF WOMEN VOTERS OF NORTH CAROLINA; NORTH CAROLINA A. PHILLIP RANDOLPH INSTITUTE; UNIFOUR ONESTOP COLLABORATIVE; COMMON CAUSE NORTH CAROLINA; GOLDIE WELLS; KAY BRANDON; OCTAVIA RAINEY; SARA STOHLER; HUGH STOHLER, *Plaintiffs-Appellants*,
and
LOUIS M. DUKE; JOSUE E. BERDUO; NANCY J. LUND; BRIAN M. MILLER; BECKY HURLEY MOCK; LYNNE M. WALTER; EBONY N. WEST, *Intervenors/Plaintiffs-Appellants*
v.
STATE OF NORTH CAROLINA, JOSHUA B. HOWARD, in his official capacity as a member of the State Board of Elections; RHONDA K. AMOROSO, in her official capacity as a member of the State Board of Elections; JOSHUA D. MALCOLM, in his official capacity as a member of the State Board of Elections; PAUL J. FOLEY, in his official capacity as a member of the State Board of Elections; MAJA KRICKER, in her official capacity as a member of the State Board of Elections; PATRICK L. MCCRORY, in his official capacity as Governor of North Carolina, *Defendants-Appellees*.

UNITED STATES OF AMERICA, *Plaintiffs-Appellant*,
v.
STATE OF NORTH CAROLINA; NORTH CAROLINA STATE BOARD OF ELECTIONS; KIM WESTBROOK STACH, *Defendants-Appellees*
and
CHRISTINA KELLEY GALLEGOS-MERRILL; JUDICIAL WATCH, INCORPORATED, *Intervenors-Defendants*

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INTEREST OF THE *AMICUS CURIAE*[1]

Amicus Constitutional Accountability Center (CAC) is a think tank, public interest law firm, and action center dedicated to fulfilling the progressive promise of our Constitution's text and history. CAC works in our courts, through our government, and with legal scholars and the public to improve understanding of the Constitution and to preserve the rights, freedoms, and structural safeguards that our nation's charter guarantees. CAC accordingly has a strong interest in this case and the questions it raises about the scope of the Fifteenth Amendment's protections and the power of Congress to enforce those protections.

INTRODUCTION AND SUMMARY OF ARGUMENT

For the second time in the history of this litigation, the district court has improperly constricted the scope of the results test of the Voting Rights Act. Under Section 2 of the Voting Rights Act, which enforces the Fifteenth Amendment's ban on racial discrimination in voting, the government may not impose arbitrary and discriminatory

[1] *Amicus* states that no counsel for a party authored this brief in whole or in part, and no person other than *amicus* or its counsel made a monetary contribution to the brief's preparation or submission. Counsel for all parties have consented to the filing of this brief.

barriers that make it harder for racial minorities to exercise their constitutionally guaranteed right to vote. The district court, however, upheld North Carolina's voter identification law, H.B. 589, and its elimination of a host of practices that had successfully fostered minority political participation, holding that H.B. 589 does not deny anyone the right to vote. But, as this Court made plain in its first decision in this case, "nothing in Section 2 requires a showing that voters cannot register or vote under any circumstance." *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 243 (4th Cir. 2014). The district court failed to heed this clear instruction.

Both the Fifteenth Amendment and the Voting Rights Act not only outlaw state voting rules that "deny" the right to vote on account of race, they also expressly outlaw state voting regulations that "abridge" that right. As the text and history of the Fifteenth Amendment show, the Framers of the Fifteenth Amendment recognized that a broad prohibition on all forms of racial discrimination in voting, coupled with a broad legislative enforcement power, were critical to ensuring "the colored man the full enjoyment of his right." Cong. Globe, 41st Cong., 2d Sess. 3670 (1870). The Framers were well aware that "[t]here may

be a hundred prerequisites invented by the States," 41st Cong., 2d Sess. 3658 (1870), "a hundred modes whereby [the colored man] can be deprived of his vote," *id.* at 3657, and wrote the Fifteenth Amendment to prevent all such efforts.

The Fifteenth Amendment's broad scope and its explicit grant of enforcement power to Congress ensure that the right to vote is actually enjoyed by all citizens regardless of race. Indeed, when Congress enacted the results test of the Voting Rights Act to forbid all forms of racial discrimination in voting, whether intentional or not, it was exercising the broad enforcement power it was granted in the Fifteenth Amendment. Under the Fifteenth Amendment and the Voting Rights Act, as this Court held, "even one disenfranchised voter—let alone several thousand—is too many": "what matters . . . [is] simply that 'any' minority voter is being denied equal electoral opportunities." *League of Women Voters*, 769 F.3d at 244. The district court's reasoning cannot be squared with this constitutional text and history or court precedent. Because the district court misunderstood the proper scope of the Voting Rights Act, it erroneously ignored H.B. 589's discriminatory features

and did not require the state to justify them. Its judgment should be reversed.

Enacted against the backdrop of explosive growth in voter registration and turnout by African Americans, H.B. 589 imposes arbitrary and discriminatory burdens on minority voters just at the moment when their votes may have the greatest impact, making it harder for the substantial number of African-American citizens who lack H.B. 589-qualifying identification to cast a ballot and eliminating a host of voting laws that had played a crucial role in fostering minority political participation. *See League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 440 (2006) ("In essence the State took away the [African-Americans'] opportunity because [they] were about to exercise it."). The legislature crafted H.B. 589 to "undermine[] the progress of a racial group that has been subject to significant voting-related discrimination and that was becoming increasingly politically active and cohesive." *Id.* at 439. Indeed, at every turn, the legislature designed H.B. 589's provisions to make it harder for racial minorities to exercise equal political opportunities.

Under a proper Section 2 analysis, H.B. 589 abridges the right to vote on account of race in three different ways. First, H.B. 589's restrictive voter identification provision excludes federal, state, and local government employee photo IDs, student photo IDs from state colleges and universities, and public assistance IDs, forms of identification that are disproportionately held by minority voters, and it prohibits all of these forms of identification even as it allows use of veterans IDs, military IDs, and expired IDs for those over age 70, forms of identification that are disproportionately held by white voters. *See* U.S. Appellant Br. 22 (describing statute's exclusion of these government-issued photo IDs); *see also* J.A. 3698, 8517. The effect of this discrimination is to keep from the polls registered voters—disproportionately minorities—who *have* government-issued photo identification. By denying these groups of registered voters *with photo identification* the ability to exercise their constitutional right to vote, the statute undermines the interests H.B. 589 purports to protect. In fact, since voters who lack H.B. 589 qualifying ID may apply for a "free voter ID" card using the same forms of ID excluded by H.B. 589—such

as government-issued student and employee photo ID cards—the lines drawn by H.B. 589 are positively irrational.

"There is no question about the legitimacy or importance of the State's interest in counting only the votes of eligible voters," *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 196 (2008), but, in writing H.B. 589, the North Carolina legislature discriminated against classes of voters—disproportionately racial minorities—that, in fact, possess government-issued photo identification, and made it more difficult for individuals in those classes of voters to exercise their right to vote. A State is surely entitled to "protect[] the integrity and reliability of the electoral process," *id.* at 191, but it may not do so by drawing arbitrary lines that result in racial discrimination, intentionally or otherwise.

Second, while H.B. 589 provides for a "free voter ID," what the legislature gave with one hand, it took away with the other: the North Carolina legislature chose to make the new voter ID card difficult to obtain, opting for a system that perpetuates past discrimination. The "abstract right to vote means little unless the right becomes a reality at the polling place on election day," *Perkins v. Matthews*, 400 U.S. 379, 387 (1971), but the North Carolina legislature made it difficult for those

without qualifying ID to obtain this "free voter ID." *See* Appellants Joint Br. 58-59. The so-called "free voter IDs" are only available from the State's Department of Motor Vehicles, whose offices are only open limited hours and only exist in certain counties, and are difficult to reach for those without a car. Tellingly, there are only 114 DMV offices across the state; 16 of North Carolina's 100 counties do not have their own DMV site. J.A. 24,555-56 (op. at 71-72). Forcing registered voters who lack H.B. 589-qualifying ID—disproportionately racial minorities—to travel substantial distances to obtain this new form of ID in order to exercise their right to vote perpetuates vestiges of discrimination that continue to hamper racial minorities in North Carolina.

Third, at the same time the North Carolina legislature made it harder for racial minorities to exercise the right to vote by imposing the restrictive voter ID requirement, it eliminated or cut back on a long list of practices that racial minorities had disproportionately relied on to enjoy equal political opportunities, elevating administrative convenience over protection of the right to vote for all regardless of race. The North Carolina legislature enacted these cutbacks—not in response to any evidence of voting irregularities or instances of fraud—but

because the Supreme Court in *Shelby County v. Holder*, 133 S. Ct. 2612, 2633 (2013), eliminated North Carolina's legal obligation to prove that changes made to its voting laws did not undermine protections for minority voting rights. As this Court noted, "[i]mmediately after *Shelby County*, i.e., literally the next day, . . . North Carolina rushed to pass House Bill 589, the 'full bill' legislative leadership likely knew it could not have gotten past federal preclearance in the pre-*Shelby County* era." *League of Women Voters,* 769 F.3d at 242. Under the Voting Rights Act, "states cannot burden the right to vote in order to address dangers that are remote and only 'theoretically imaginable,'" *id.* at 246 (citations and internal quotation marks omitted), but that is what the North Carolina legislature did here. *See* Appellants Joint Br. 41-43.

H.B. 589 is a textbook example of a law that "arbitrarily creat[es] discriminatory effects," *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project*, 135 S. Ct. 2507, 2522 (2015), and perpetuates past discrimination, leaving racial minorities with "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 52 U.S.C. § 10301(b). Whether H.B. 589 was enacted with discriminatory intent, as

appellants argue, *see* Appellants Joint Br. 43-50; U.S. Appellant Br. 11-31, or merely reflects "unconscious prejudices," *Inclusive Cmtys.*, 135 S. Ct. at 2522, it violates the Voting Rights Act. The Voting Rights Act "nullifies sophisticated . . . modes of discrimination," *Lane v. Wilson*, 307 U.S. 268, 275 (1939), that "result[] 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). H.B. 589 is such a law.

ARGUMENT

I. THE TEXT AND HISTORY OF THE FIFTEENTH AMENDMENT PROHIBIT LAWS THAT DENY OR ABRIDGE THE RIGHT TO VOTE ON ACCOUNT OF RACE AND GIVE CONGRESS THE POWER TO PREVENT STATES FROM MAKING IT HARDER FOR RACIAL MINORITIES TO EXERCISE THEIR CONSTITUTIONAL RIGHT TO VOTE.

In language "as simple in command as it [is] comprehensive in reach," *Rice v. Cayetano*, 528 U.S. 495, 512 (2000), the Fifteenth Amendment provides that "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." U.S. Const. amend. XV, § 1. "Fundamental in purpose and effect . . . , the Amendment prohibits all provisions denying or abridging the voting

franchise of any citizen or class of citizens on the basis of race." *Rice*, 528 U.S. at 512; *see also Shelby Cnty.*, 133 S. Ct. at 2637 (Ginsburg, J., dissenting) (noting "the transformative effect the Fifteenth Amendment aimed to achieve").

Recognizing that "[i]t is difficult by any language to provide against every imaginary wrong or evil which may arise in the administration of the law of suffrage in the several States," Cong. Globe, 40th Cong., 3d Sess. 725 (1869), the Framers chose sweeping language requiring "the equality of races at the most basic level of the democratic process, the exercise of the voting franchise." *Rice*, 528 U.S. at 512. Thus, the Fifteenth Amendment equally forbids law that deny the right to vote outright on account of race as well as those that abridge it by making it harder for racial minorities to exercise their constitutional right to vote. *See Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 333-34 (2000) (explaining that the "core meaning" of "'abridge'" is "'shorten'" (quoting *Webster's New International Dictionary* 7 (2d ed. 1950))); *Lane*, 307 U.S. at 275 (observing that the Fifteenth Amendment "hits onerous procedural requirements which effectively

handicap exercise of the franchise by the colored race although the abstract right to vote may remain unrestricted as to race").

To make the Fifteenth Amendment's guarantee a reality, the Framers explicitly invested Congress with a central role in protecting the right to vote—a constitutional right that is "preservative of all rights," *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886)—against all forms of racial discrimination. It did so by providing that "[t]he Congress shall have power to enforce this article by appropriate legislation." U.S. Const. amend. XV, § 2. By adding this language, "the Framers indicated that Congress was to be chiefly responsible for implementing the rights created" by the Amendment and that Congress would have "full remedial powers to effectuate the constitutional prohibition against racial discrimination in voting." *South Carolina v. Katzenbach*, 383 U.S. 301, 325-26 (1966). As the Framers of the Fifteenth Amendment recognized, "the remedy for the violation" of the Fifteenth Amendment, like the remedies for violation of the other Reconstruction Amendments, "was expressly not left to the courts. The remedy was legislative, because . . . the amendment itself provided that it shall be

enforced by legislation on the part of Congress." Cong. Globe, 42d Cong., 2d Sess. 525 (1872).

During the debates over the Fifteenth Amendment, the Framers explained that the Amendment's Enforcement Clause gives Congress a broad "affirmative power" to secure the right to vote. Cong. Globe, 40th Cong., 3d Sess. 727 (1869); *id.* at 1625 ("Congress . . . under the second clause of this amendment" has the power to "impart by direct congressional legislation to the colored man his right to vote. No one can dispute this."). Without a broad enforcement power, the Framers feared that the constitutional guarantee would not be fully realized. "Who is to stand as the champion of the individual and enforce the guarantees of the Constitution in his behalf as against the so-called sovereignty of the States? Clearly no power but that of the central Government is or can be competent for their adjustment . . . ." *Id.* at 984; *see United States v. Marengo Cnty. Comm'n*, 731 F.2d 1546, 1561 (11th Cir. 1984) ("The Civil War Amendments granted national citizenship to all blacks and guaranteed their right of access to the voting process. By their very nature they plainly empowered the

federal government to intervene in state and local affairs to protect the rights of minorities newly granted national citizenship.").

In 1870, the same year the Fifteenth Amendment was ratified, Congress invoked the Amendment's Enforcement Clause in support of voting rights legislation, reflecting the Framers' judgment that the Fifteenth Amendment is "ample and full, and clothes Congress with all power to secure the end which it declares shall be accomplished." Cong. Globe, 41st Cong., 2d Sess. 3563 (1870). The Amendment's Enforcement Clause, Senator Oliver Morton explained, "intended to give to Congress the power of conferring upon the colored man the full enjoyment of his right. We so understood it when we passed it. . . . [T]he second section was put there . . . for the purpose of enabling Congress to take every step that might be necessary to secure the colored man in the enjoyment of these rights." *Id.* at 3670; *id.* at 3655 (explaining that the "intention and purpose" of the Fifteenth Amendment's Enforcement Clause was to "secure to the colored man by proper legislation the right to go to the polls and quietly and peacefully deposit his ballot there"); *id.* at 3663 ("Congress has a right by appropriate legislation to prevent any state from discriminating against

a voter on account of his race . . . ."); *see also* 2 Cong. Rec. 4085 (1874) (observing that the Enforcement Clause of the Fifteenth Amendment was added to allow Congress "to act affirmatively" and ensure that "the right to vote, should be enjoyed").

As the debates reflect, the Framers of the Fifteenth Amendment specifically recognized that a broad legislative power to protect the right to vote against all forms of racial discrimination—both denials and abridgements of the right to vote—was critical to ensuring "the colored man the full enjoyment of his right," Cong. Globe, 41st Cong., 2d Sess. 3670 (1870). In the months following ratification of the Fifteenth Amendment, Congress recognized the grim reality that many states would pursue novel methods of disenfranchising African Americans on account of their race. Highlighting the importance of providing "proper machinery . . . for enforcing the fifteenth amendment," Senator William Stewart explained that "it is impossible to enumerate over-specifically all the requirements that might be made as prerequisites for voting, ... The States can invent just as many requirements [for voting] as you have fingers and toes. They could make one every day." Cong. Globe, 41st Cong., 2d Sess. 3658 (1870). He further noted: "There

may be a hundred prerequisites invented by the States," *id.*, "a hundred modes whereby [the colored man] can be deprived of his vote," *id.* at 3657; *see also id.* at 3568 (noting "it is our imperative duty . . . to pass suitable laws to enforce the fifteenth amendment" because, without them, "the fifteenth amendment will be practically disregarded in every community where there is a strong prejudice against negro voting"). The only means to ensure minority voting rights, the Framers of the Fifteenth Amendment recognized, "are to be found in national legislation. This security cannot be obtained through State legislation," where "the laws are made by an oppressing race . . . ." *Id.* at app. 392. The Framers thus granted Congress a significant new power when they enacted the Fifteenth Amendment. As the next Section shows, Section 2 of the Voting Rights Act fulfills the promise of the Fifteenth Amendment by prohibiting any racial discrimination in voting, whether intentional or not.

II. SECTION 2 OF THE VOTING RIGHTS ACT PROHIBITS STATE LAWS THAT MAKE IT HARDER FOR RACIAL MINORITIES TO EXERCISE THEIR RIGHT TO VOTE AS A MEANS OF EFFECTUATING THE FIFTEENTH AMENDMENT'S EQUALITY MANDATE.

The results test of the Voting Rights Act directly fulfills the Fifteenth Amendment's guarantee of equality by prohibiting the enforcement of state laws and policies that "function unfairly to exclude minorities" from the political process—either by denying or abridging their right to vote—"without any sufficient justification." *See Inclusive Cmtys.*, 135 S. Ct. at 2522; *Houston Lawyers' Ass'n v. Attorney Gen. of Tex.*, 501 U.S. 419, 427 (1991). It is well established that, "under the Fifteenth Amendment, Congress may prohibit voting practices that have only a discriminatory effect." *City of Rome v. United States*, 446 U.S. 156, 175 (1980).

Section 2 of the Voting Rights Act—the statute's "permanent, nationwide ban on racial discrimination in voting," *Shelby Cnty.*, 133 S. Ct. at 2631—enforces the Fifteenth Amendment's command of racial equality by prohibiting a state from enforcing a state law that disproportionately denies or abridges the right of racial minorities to vote, perpetuates past discrimination, and rests only on tenuous

justifications. *See Thornburg v. Gingles,* 478 U.S. 30, 47 (1986) ("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."); *League of Women Voters*, 769 F.3d at 240 (holding that Section 2 prohibits a state from imposing "'a discriminatory burden on members of a protected class'" that is linked to "'social and historical conditions' that have or currently produce discrimination against members of the protected class" (citations and internal quotation marks omitted)); *United States v. Charleston Cnty.*, 365 F.3d 341, 345 (4th Cir. 2004) ("Section 2 condemns 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.'" (quoting S. Rep. No. 97-417, at 28, 30 (1982))); *Ohio State Conference of NAACP v. Husted*, 768 F.3d 524, 552 (6th Cir. 2014) ("Section 2 applies to any 'standard, practice, or procedure' that makes it harder for an eligible voter to cast a ballot, not just those that actually prevent individuals from voting."), *vacated on the other grounds*, No. 14-3877, 2014 WL 10384647 (6th Cir.

Oct. 1, 2014); *see also Chisom v. Roemer*, 501 U.S. 380, 408 (1991) (Scalia, J., dissenting) ("If . . . a county permitted voter registration for only three hours one day a week, and that made it more difficult for blacks to register than whites, . . . § 2 would therefore be violated . . . .").

Laws—such as H.B. 589—that impose on racial minorities discriminatory barriers to access to the political process, and that cannot be adequately justified, run the "serious risk . . . of causing specific injuries on account of race." *Schuette v. Coal. to Defend Affirmative Action*, 134 S. Ct. 1623, 1633 (2014) (Kennedy, J., plurality opinion). Using its authority to enforce the Fifteenth Amendment, Congress determined that, whether intentional or not, "any racial discrimination in voting is too much." *Shelby Cnty.*, 133 S. Ct. at 2631.

Congress enacted Section 2's results test against the backdrop of a long history and continuing use by state and local governments of "[m]anipulative devices and practices," including race-neutral measures, "to deny the vote to blacks," *Rice*, 528 U.S. at 513, or to "reduce or nullify minority voters' ability, as a group, 'to elect the candidate of their choice.'" *Shaw v. Reno*, 509 U.S. 630, 641 (1993) (quoting *Allen v. State Bd. of Elections*, 393 U.S. 544, 569 (1969)). The

Act's broad focus on discriminatory results helps to ensure that, regardless of the motives of lawmakers, no "hurt or injury is inflicted on racial minorities by the encouragement or command of laws or other state action." *Coal. to Defend Affirmative Action*, 134 S. Ct. at 1637; *see League of United Latin Am. Citizens,* 548 U.S. at 439 (finding that, despite political motivation, state had "undermined the progress of a racial group that ha[d] been subject to significant voting-related discrimination"); *Gingles*, 478 U.S. at 44 n.9 (explaining that "'voting practices and procedures that have discriminatory results perpetuate the effects of past purposeful discrimination'" (quoting S. Rep. No. 97-417, at 40 (1982))); *League of Women Voters*, 769 F.3d at 246 (stressing "Congress's directive to view current changes to North Carolina's voting laws against the mire of its past").

Aiming to redress "current conditions" that offend the Fifteenth Amendment's guarantee of equality, *see Shelby Cnty.*, 133 S. Ct. at 2629, Section 2 requires courts to carefully review state laws to ensure that they do not unfairly constrict equal access to the political process, demanding an "'intensely local appraisal of the design and impact,'" *Gingles*, 478 U.S. at 79 (quoting *Rogers v. Lodge*, 458 U.S. 613, 622

(1982)), of challenged state laws and practices, paying close attention to whether the "effect of the[] [State's] choices" is to "deny[] equal opportunity" to minority voters. *League of United Latin Am. Citizens,* 548 U.S. at 441-42; *see also Johnson v. De Grandy*, 512 U.S. 997, 1018 (1994) (explaining that "[t]he need for such 'totality' review springs from the demonstrated ingenuity of state and local governments in hobbling minority voting power"). In this respect, the results test, like other kinds of disparate impact liability analysis, "permits plaintiffs to counteract unconscious prejudices and disguised animus that escape easy classification as disparate treatment." *Inclusive Cmtys.*, 135 S. Ct. at 2522.

The district court in this case departed from these principles by constricting the scope of the Act's protections. As the next section shows, the district court erred by upholding H.B. 589 in its entirety on the ground that it does not deny anyone the right to vote. In doing so, the district court ignored H.B. 589's discriminatory features and erroneously failed to require the state to justify them.

III. THE DISTRICT COURT IGNORED THE VOTING RIGHTS ACT'S PROHIBITION ON LAWS THAT RESULT IN A DISCRIMINATORY ABRIDGEMENT OF THE RIGHT TO VOTE.

In judging whether H.B. 589 comports with the requirements of the Voting Rights Act, the district court asked the wrong question, focusing on whether H.B. 589's provisions prevented racial minorities from exercising their right to vote. *See* J.A. 24,809-23 (op. at 325-39) (upholding voter identification law based on existence of "reasonable impediment" exception, which allows registered voters who lack an ID an opportunity to cast a provisional ballot); *id.* at 24,858-59 (op. at 374-75) (rejecting other challenges to H.B. 589 because "there are simply very many easy ways for North Carolinans to register and vote" and that "African Americans are equally as capable as all other voters of adjusting" to the law's requirements). This was error.

The "'right' Section 2 inquiry," as this Court made clear in its first decision in this case, "'is whether as a result of the challenged practice or structure plaintiffs do not have an equal opportunity to participate in the political process and to elect candidates of their choice.'" *League of Women Voters*, 769 F.3d at 238 (quoting *Gingles*, 478 U.S. at 44) (internal quotation marks omitted). If "'any' minority voter is being

denied equal electoral opportunities," *id.* at 244 (quoting 52 U.S.C. § 10301(a)), the Voting Rights Act has been violated.

The Voting Rights Act not only outlaws state voting rules that "deny" the right to vote on account of race, it also expressly outlaws state voting regulations that "abridge" that right. Fulfilling the promise of the Fifteenth Amendment, the Voting Rights Act ensures that the right to vote is actually enjoyed by all regardless of race by eliminating any "contrivances by a state to thwart equality in the enjoyment of the right to vote by citizens of the United States regardless of race or color," *Lane*, 307 U.S. at 275, whether they deny the right to vote outright (as some provisions of H.B. 589 do, *see* U.S. Appellant Br. 48), or simply abridge the right. Under the Act, "[a] law that adopts a 'death by a thousand cuts' approach to voting rights is no more valid than a law that constricts one aspect of the voting process in a particularly onerous manner." *League of Women Voters,* 769 F.3d at 253 (Motz, J., dissenting). Turning a blind eye to the Act's plain language and broad reach, the district court's analysis effectively excludes discriminatory abridgements from the scope of the Voting Rights Act and contradicts this Court's express holding that "nothing in

Section 2 requires a showing that voters cannot register or vote under any circumstance," *id.* at 243.

Because the district court failed to ask whether H.B. 589 abridges the right to vote on account of race, it ignored the discriminatory features of H.B. 589. The North Carolina legislature went out of its way to write a voter identification law that unfairly excludes racial minorities from the political process, preventing federal, state, and local government employees, students attending state colleges and universities, and those on public assistance—disproportionately racial minorities—from exercising their constitutional right to vote even though these individuals all possess government-issued photo identification. The State then chose to create a "free voter ID" card to safeguard the right to vote, but designed the program in a way that forces the state's most disadvantaged citizens—disproportionately minorities—to travel significant distances to obtain such a card in order to preserve their right to vote. *Cf. Perkins*, 400 U.S. at 387, 388 (observing that the "accessibility, prominence, facilities, and prior notice of the polling place's location all have an effect on a person's ability to exercise his franchise" and that "there inheres in the determination of

the location of polling places an obvious potential for 'denying or abridging the right to vote on account of race or color.'" (quoting 42 U.S.C. § 1973c (1964 ed.))). "Under § 2, the State must be accountable for the effect of these choices in denying equal opportunity to [African-American and] Latino voters." *League of United Latin Am. Citizens,* 548 U.S. at 441-42. States have significant authority to ensure "the integrity and reliability of the electoral process," *Crawford*, 553 U.S. at 191, but they may not use means—as H.B. 589 does—that result in racial discrimination, intentional or otherwise.

The district court upheld H.B. 589's voter identification law even though it recognized that the exclusion of public assistance photo IDs was "somewhat suspect," J.A. 24,882 (op. at 398), and did not identify any rationale for why registered voters who possess government-issued photo identification from their government employer should not be entitled to use that ID to cast a ballot. The only justification offered by the district court for H.B. 589's discrimination against certain forms of government-issued photo ID was that there are seventy-five different public colleges in North Carolina, including seventeen universities within the University of North Carolina system, and that it would be

unduly burdensome on poll workers to have to verify these government-issued student IDs. *Id.* at 24,945 (op. at 461 n.243). This is a tenuous justification for making it harder for racial minorities and others to exercise their constitutional right to vote. As this Court held in its first review of H.B. 589, "Section 2 does not prescribe a balancing test under which the State can pit its desire for administrative ease against its minority citizens' right to vote." *League of Women Voters*, 769 F.3d at 244. In any event, as the district court noted, J.A. at 24,554-55 (op. at 70-71), North Carolina accepts any college or student ID as an acceptable form of ID for the purpose of applying for a "free voter ID" card. The State cannot have it both ways.

In upholding H.B. 589's voter identification requirement, the district court significantly relied on the fact that the statute contains a "reasonable impediment" exception that allows a voter to cast a *provisional* ballot if he or she can present a reasonable excuse for not having a photo identification. But the statute's exception cannot justify the North Carolina legislature's decision to draw a voter identification law that results in racial discrimination, excluding government issued photo IDs disproportionately held by minority voters while permitting

photo IDs disproportionately held by white voters. A system that allows white voters to cast a regular ballot on Election Day, while relegating racial minorities to provisional ballots, which are subject to challenge, more prone to poll-worker error, and less likely to be counted, does not comport with the Voting Rights Act's command of equal political opportunity. *See* Appellants Joint Br. 32-33; c*f. Hunter v. Hamilton Cnty. Bd. of Elections*, 635 F.3d 219, 238 (6th Cir. 2011) (noting that failure to properly count provisional ballots may lead to "discriminatory disenfranchisement" of "voters who may bear no responsibility for the rejection of their ballots").

Finally, in upholding H.B. 589's elimination of a host of voting mechanisms that had helped bolster minority political participation, the district court gave little weight to the fact, recognized by this Court in the first appeal in this case, that these mechanisms "were enacted to increase voter participation, that African American voters disproportionately used those electoral mechanisms, and that House Bill 589 restricted those mechanisms and thus disproportionately impacts African American voters." *League of Women Voters*, 769 F.3d at 246; Appellants Joint Br. 6, 21. By eliminating practices that helped

African Americans—who, because of past discrimination, are more likely to be poor, more likely to be uneducated, more likely to move, and less likely to have access to transportation—enjoy equal political opportunities, North Carolina "undermined the progress of a racial group that has been subject to significant voting-related discrimination and that was becoming increasingly politically active and cohesive," *League of United Latin Am. Citizens,* 548 U.S. at 439, and perpetuated vestiges of discrimination that still hamper racial minorities. *See* Appellants Joint Br. 22-29; U.S. Appellant Br. 52-56.

The district court ignored entirely that the North Carolina legislature enacted this wide range of cutbacks—not in response to any showing of state need—but simply because *Shelby County* had weakened the protections of the Voting Rights Act. *See* U.S. Appellant Br. 3 (observing that the "bill was passed following significant increases in voter registration and turnout by African Americans, and one month after *Shelby County* left those African American voters newly vulnerable"). "Section 2 does not prescribe a balancing test under which the State can pit its desire for administrative ease against its minority citizens' right to vote," but here the state "rationalized election

administration changes that disproportionately affected minority voters on the pretext of procedural inertia and under-resourcing," *League of Women Voters*, 769 F.3d at 244, ignoring alternatives that would not have imposed such disproportionate burdens on African American voters. *See* Appellants Joint Br. 41-43; U.S. Appellant Br. 56-57. This is the very definition of a tenuous election law that abridges the right to vote on account of race.

CONCLUSION

For all the foregoing reasons, the judgment of the district court should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and Fed. R. App. P. 29(d) because it contains 5,507 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

I further certify that the attached brief *amicus curiae* complies with the typeface requirements of Fed. R. App. P. 32(a)(5)and the type-style requirements of Fed. R. App. P. 32(a)(6), because it has been prepared in a proportionally spaced typeface using Microsoft Word 14-point Century Schoolbook font.

Executed this 26th day of May, 2016.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system on May 26, 2016.

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