No. 18-10151

United States Court of Appeals

for the

Eleventh Circuit

GREATER BIRMINGHAM MINISTRIES, ALABAMA STATE CONFERENCE OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, GIOVANA AMBROSIO, ELIZABETH WARE, SHAMEKA HARRIS,

Plaintiffs-Appellants,

– v. –

SECRETARY OF STATE FOR THE STATE OF ALABAMA,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT OF THE NORTHERN DISTRICT OF ALABAMA IN CASE NO. 2:15-CV-02193-LSC (L. SCOTT COOGLER, U.S. DISTRICT JUDGE)

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PLAINTIFFS-APPELLANTS' CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Under Federal Rule of Appellate Procedure 26.1 and this Court's Local Rule 26.1-1, undersigned counsel for Plaintiffs-Appellants Greater Birmingham Ministries ("GBM"), the Alabama State Conference of the National Association for the Advancement of Colored People ("Alabama NAACP"), Giovana Ambrosio, Shameka Harris and Elizabeth Ware make the following disclosures of interested parties and corporate disclosure statement:

A. Interested Parties

1. Aden, Leah C. – Counsel for Plaintiffs-Appellants
2. Alabama Law Enforcement Agency, Former Defendant
3. Alabama Securities Commission, Counsel for the former Defendants Governors Kay Ivey and Robert Bentley
4. Alabama State Conference of the National Association for the Advancement of Colored People, Plaintiff-Appellant
5. Ambrosio, Giovana – Plaintiff-Appellant
6. Bentley, Robert J. – former Defendant in his official capacity as the Governor of the State of Alabama
7. Buschell, Ryan M. – Counsel for Plaintiffs-Appellants

8. Byrne, David B. Jr. – Counsel for the former Defendants Governors Kay Ivey and Robert Bentley in their official capacity
9. Collier, Spencer – former Defendant-Appellee in his official capacity as the Secretary of Law Enforcement of Alabama
10. Coogler, Hon. L. Scott – United States District Judge, Northern District of Alabama
11. Covington & Burling LLP, Counsel for Plaintiffs-Appellants
12. Davis, James W. – Counsel for Defendant-Appellee
13. Douglas, Scott – Executive Director of Plaintiff-Appellant GBM
14. Drum, Starr Turner – Counsel for the former Defendants Governors Kay Ivey and Robert Bentley in their official capacity
15. Escalona, Prim Formby – Counsel for the former Defendants Governors Kay Ivey and Robert Bentley in their official capacity
16. Fram, Robert D. – Counsel for Plaintiffs-Appellants
17. Geise, John Michael – Counsel for Plaintiffs-Appellants
18. Gonzalez, Joshua A. – Counsel for Plaintiffs-Appellants
19. Greater Birmingham Ministries – Plaintiff-Appellant
20. Greenberg, Michael – former Counsel for Plaintiffs-Appellants
21. Grossman, Joanne B. – Counsel for Plaintiffs-Appellants
22. Harawa, Daniel – Counsel for Plaintiffs-Appellants

23. Harris, Shameka – Plaintiff-Appellant

24. Howell, Laura E. – Counsel for Defendant-Appellee

25. Huang, Sylvia – Counsel for Plaintiffs-Appellants

26. Ifill, Sherrilyn A. – Counsel for Plaintiffs-Appellants

27. Ivey, Kay E. – former Defendant in her official capacity as the Governor of the State of Alabama

28. Johnson, Jr., Herman N. – former Counsel for Plaintiffs-Appellants

29. Laird, Richard J. Jr. – former Counsel for Defendant-Appellee

30. Lee, Wallace J. – former Counsel for Plaintiffs-Appellants

31. Lewis, Aaron – Counsel for Plaintiffs-Appellants

32. Mangan, Mary Kathryn – former Counsel for Defendant-Appellee

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34. Maynard Cooper & Gale PC, Counsel for the former Defendants Governors Kay E. Ivey and Robert J. Bentley in their official capacity

35. Maze, Corey L. – Counsel for Defendant-Appellee

36. McCollum, Carrie E. – Counsel for the former Defendants Governors Kay Ivey and Robert Bentley in their official capacity

37. McGuire, Joseph Mitchell – Counsel for Plaintiffs-Appellants

38. Merle, Natasha C. – Counsel for Plaintiffs-Appellants

39. Merrill, John – Secretary of State for the State of Alabama, Defendant-Appellee

40. Messick, Misty Shawn Fairbanks – Counsel for Defendant-Appellee

41. Montag, Coty R. – Counsel for Plaintiffs-Appellants

42. NAACP Legal Defense and Educational Fund, Inc., Counsel for Plaintiffs-Appellants

43. Neiman, John C. Jr. – Counsel for the former Defendants Governors Kay Ivey and Robert Bentley

44. Nelson, Janai S. – Counsel for Plaintiffs-Appellants

45. Oatis, Richard B. – Counsel for Plaintiffs-Appellants

46. Parker, William G. Jr. – Counsel for Defendant-Appellee

47. Prakash, Swati R. – Counsel for Plaintiffs-Appellants

48. Reese, Elizabeth – former Counsel for Plaintiffs-Appellants

49. Robinson, Michael W. – Counsel for former Defendant Stan Stabler

50. Ross, Deuel – Counsel for Plaintiffs-Appellants

51. Shafroth, Nathan E. – Counsel for Plaintiffs-Appellants

52. Silvers, Debra – former Plaintiff-Appellant

53. Simelton, Benard – President of Plaintiff-Appellant Alabama NAACP

54. Sinclair, Winfield J. – Counsel for Defendant-Appellee

55. Smith, James McCall – Counsel for Plaintiffs-Appellants

56. Spital, Samuel – Counsel for Plaintiffs-Appellants

57. Stabler, Stan – former Defendant-Appellee in his official capacity as the Secretary of Law Enforcement of Alabama

58. Still, W. Edward – former Counsel for Plaintiffs-Appellants

59. Strange, Luther – former Counsel for Defendant-Appellee and former Defendant in his official capacity as the Attorney General of Alabama

60. Swarns, Christina – former Counsel for Plaintiffs-Appellants

61. Tolbert, Corrinda – former Plaintiff-Appellant

62. Ware, Elizabeth – Plaintiff-Appellant

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64. Williams, Edna – former Plaintiff-Appellant

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67. Zaragoza, Liliana – former Counsel for Plaintiffs-Appellants

B. Corporate Disclosure Statement

Counsel for the Appellees further certify that no publicly traded company or corporation has an interest in the outcome of this case or appeal.

STATEMENT REGARDING ORAL ARGUMENT

Plaintiffs-Appellants, pursuant to Federal Rule of Appellate Procedure 34 and Eleventh Circuit Rules 34-3(c) and 34-4, respectfully request oral argument. This case presents important legal and factual issues relating to the fundamental right to vote, the Fourteenth and Fifteenth Amendments to the United States Constitution, and the Voting Rights Act of 1965. Oral argument will assist this Court to analyze the complex record and to resolve these important constitutional and legal issues.

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STATEMENT OF JURISDICTION

This case involves Plaintiffs-Appellants' challenge under the Voting Rights Act of 1965 ("VRA"), 52 U.S.C. §§ 10301, 10501, and the Fourteenth and Fifteenth Amendments of the United States Constitution to Alabama's photo voter ID law, House Bill 19 of 2011, codified at Ala. Code § 17-9-30 ("HB19"). The District Court granted summary judgment in favor of the Defendant Alabama Secretary of State (the "Secretary") on all claims on January 10, 2018. Plaintiffs filed a timely notice of appeal on January 12, 2018. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether the District Court erred in granting summary judgment to the Secretary where Plaintiffs presented triable disputes of material fact as to whether HB19 violates Section 2 of the VRA.

2. Whether the District Court erred in granting summary judgment to the Secretary where Plaintiffs presented triable disputes of material fact as to: (a) whether HB19 has a discriminatory result in violation of Section 2 of the VRA; and (b) whether HB19 was adopted, at least in part, for a racially discriminatory purpose in violation of the Constitution.

3. Whether the District Court erred in denying Plaintiffs' motion for summary judgment and in granting summary judgment to the Secretary where the undisputed facts demonstrated that the Secretary's interpretation of the Positively Identify

Provision in HB19 is a prohibited "test or device" in violation of Sections 201 of the VRA.

STATEMENT OF THE CASE

Efforts to pass a law requiring photo ID to vote began in the Alabama Legislature in the late 1980s, at the height of the selective prosecutions of Black civil rights activists. DE255 at 12 ¶ 2.[1] These efforts intensified in the mid-1990s and corresponded with the initial enforcement of the National Voter Registration Act ("NVRA") in 1995, which was designed to increase voter registration by, *inter alia*, requiring states to register people to vote at motor vehicle and public welfare agencies. *Id.* at 12-13 ¶ 3. The NVRA led to a significant increase in Black voter registration in Alabama. *Id.*

In the wake of the NVRA, numerous white elected officials openly tied the increase in Black registrants to the need for a photo ID law. *Id.* The stated justification for such a law was to "close a potential loophole" that might permit voter fraud. *Id*. at 13-14 ¶ 4. Evidence of voter impersonation fraud in Alabama as a meaningful problem was never presented to support such concerns. *Id.* at 77-78 ¶¶ 105-08. Instead, to the extent voter fraud does exist, it concerns absentee voter fraud, which HB19 is ineffective at preventing. *Id.* at 78-80 ¶¶ 109-18.

[1] References to the district court record are by docket entry ("DE") followed by the relevant docket entry number.

While there is little evidence of voter impersonation, there is ample evidence that HB19 was purposefully passed to harm voters of color. As the District Court stated, "[b]etween 1995 and 2011, Black legislators and other individuals in Alabama argued at length about how requiring photo ID would disfranchise voters who lack access to vehicles and specifically about the anticipated effect of such requirements on Black voters." DE267 at 7. Senator Larry Dixon, the chief sponsor of photo ID bills between 1995 and 2010, recognized as much. He publicly stated that the lack of a photo ID law was "beneficial to the Black power structure." DE266 ¶ 272.

On June 9, 2011, Alabama finally succeeded in passing a photo ID law, HB19. Sponsors of HB19 had contemporaneously called Black voters "illiterates" and "aborigines," made public speeches expressing antipathy towards Latino Alabamians, and explicitly tied their political fortunes to manipulating state laws to control the electorate's racial makeup. DE255 at 51-52 ¶¶ 13-14; at 55-56 ¶¶ 27-28; at 57 ¶¶ 34-35.

Every voting Black legislator opposed HB19. *Id.* at 70-72 ¶¶ 81, 84.

In the House, when Black legislators asked for evidence of voter fraud that would be prevented by HB19, its sponsors were silent. *Id.* at 76-77 ¶ 104.

For its part, the Senate literally prevented the Black Caucus from speaking out against the bill by denying them access to the microphone, invoking cloture, and

limiting debate to just 20 minutes. *Id.* at 71-72 ¶ 84. The Black Caucus was not allowed to present amendments that would have mitigated HB19's adverse racial impact. *Id.* at 71 ¶ 82.

Nor were these the only departures from the ordinary process. Even though enacted in 2011, HB19 was not scheduled to go into effect until June 2014. *Id*. at 72 ¶ 86. The Legislature incorporated this provision because it anticipated a "lengthy court battle" with the U.S. Department of Justice (DOJ) over whether HB19 would survive preclearance under Section 5 of the VRA, which prohibited Alabama from enacting laws that worsened the position of voters of color. *Id.*

But Alabama did not submit HB19 for preclearance. *Id.* at 73-74 ¶¶ 92-95. Instead, Alabama did nothing until June 25, 2013, when the U.S. Supreme Court issued its opinion in *Shelby County v. Holder*, 570 U.S. 529 (2013), suspending preclearance. One day later, the Secretary announced that HB19 would be implemented immediately through the issuance of proposed administrative rules. DE266 ¶¶ 328-31.

As expected, HB19 has a disparate impact. Expert evidence shows that between about 50,000 and 118,000 Alabamian registered voters either lack any form of the photo ID required by HB19 ("HB19 ID") or lack a "useable ID." DE267 at 46 & n.5. Using the higher figure, 3.33% of white voters, 5.49% of Black voters, and 6.98% of Latino voters lack a useable ID. DE255 at 98-99 ¶ 15. Even using the lower

figure, Black and Latino voters are about twice as likely as white voters to lack any HB19 ID. DE267 at 47. Further, tens of thousands of voters of color confront the real burdens of poverty, travel, and other impediments that keep them from obtaining HB19 ID. *See, e.g.*, *id.* at 36-38.

This suit was filed on December 2, 2015, by Greater Birmingham Ministries, the Alabama NAACP, and four individual Plaintiffs. All of the Plaintiffs were unable to vote on one or more occasions because they lacked HB19 ID, faced burdens related to poverty, access to transportation, health, or childcare that prevented them from obtaining such ID, and did not personally know two of their poll workers. DE255 at 103 ¶ 39. Even when Plaintiffs and witnesses were able to overcome such burdens to reach ID-issuing offices, election officials still refused to issue them a voter ID card. For example, Plaintiff Elizabeth Ware overcame her significant health and travel burdens to go to the registrar's office, only for the registrar to refuse to provide her with a voter ID card because she previously possessed a driver's license, but had since lost it. DE266 ¶ 53.

The District Court denied Plaintiffs' motion for preliminary injunction on their claim that HB19's "Positively Identify Provision"—which as interpreted by the Secretary requires two poll workers to vouch for a voter who lacks HB19 ID—violates the prohibition on "tests or devices" of Section 201. DE23. The court later granted motions to dismiss as to certain Defendants, but it denied the Secretary's

motion to dismiss. DE157. The court recognized that Plaintiffs had stated a claim for relief under the Constitution and Section 2, specifically explaining that "Plaintiffs have plausibly pled circumstantial evidence of [discriminatory] intent" on behalf of the Legislature. DE165 at 13.

Following discovery, including extensive expert analyses, the court granted summary judgment for the Secretary on January 10, 2018. DE268.

While the District Court's opinion acknowledged much of the above-described evidence of discriminatory intent, the court nonetheless concluded that it was "not necessary" to address whether Plaintiffs had presented a triable issue of discriminatory intent. DE267 at 42-46. The court rested this determination on its view that HB19 "*does not in fact* discriminate on the basis of race." *Id*. at 45-46 (emphasis in original).

The court reached this conclusion even though it acknowledged Plaintiffs' evidence that "Black and Latino registered voters are almost twice as likely as white voters to lack an acceptable photo ID for voting." *Id*. at 47. The court further acknowledged that the Secretary's expert found similar racial disparities as to HB19 ID possession rates. *Id*. But, the court dismissed this evidence as irrelevant because, in its view, "it is so easy to get a photo ID in Alabama," that "*no one* is prevented from voting." *Id*. at 48.

The District Court made these factual findings even though the case was being adjudicated at summary judgment, and even though Plaintiffs presented substantial evidence about the barriers that Black and Latino voters disproportionately face in obtaining HB19 ID. The court concluded that the mere potential for a home visit by an ID-issuing "mobile unit" might overcome the very real burdens faced by thousands of voters. The court reached this conclusion, without a trial, by crediting the speculative assertions of the Secretary about the availability of HB19 ID and ignoring that there have been only five home visits since HB19's enactment. DE224-11 at 69.

Based on this same reasoning, the District Court also concluded that HB19 does not violate Section 2's results test. DE267 at 60-69.

Finally, the District Court concluded that, although the Secretary interprets the Positively Identify Provision as a voucher test, that interpretation does not violate Section 201. According to the court, the Provision is not a "requirement," but rather a "failsafe" that permits some people to vote and that, in any event, voters without HB19 ID have options for obtaining such ID. *Id.* at 66-67.

STANDARD OF REVIEW

This Court reviews the grant of summary judgment *de novo*. *Schwier v. Cox*, 340 F.3d 1284, 1287 (11th Cir. 2003). Any dispute of material fact is sufficient for reversal. *Id*. This is because, under Rule 56(a), a "basic requirement for summary

judgment is that 'there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.'" *Ga. State Conference of NAACP v. Fayette Cty. Bd. of Comm'rs*, 775 F.3d 1336, 1343 (11th Cir. 2015) ("*Fayette*") (quoting Fed. R. Civ. P. 56(a)). Courts must not weigh conflicting evidence, find facts, or make credibility determinations, and "must construe the facts and draw all rational inferences therefrom in the manner most favorable to the nonmoving party." *Id*.

Summary judgment is generally inappropriate in intentional discrimination cases because the "legislature's motivation is itself a factual question," *Hunt v. Cromartie*, 526 U.S. 541, 549 (1999), and in Section 2 cases "due to the fact-driven nature of the legal tests required by the Supreme Court and our precedent." *Fayette*, 775 F.3d at 1348.

SUMMARY OF ARGUMENT

Like most voting rights cases, this case requires a trial. Plaintiffs presented substantial evidence that HB19 was motivated by racial discrimination, including overtly prejudiced statements by legislators, dramatic departures from the ordinary legislative process, an anticipated racially discriminatory impact, and the lack of any evidence to support the stated justification for the law. It is uncontested that Black and Latino Alabamians are significantly less likely than whites to possess HB19 ID, and Plaintiffs also presented evidence that they disproportionately face travel and

financial burdens to obtain HB19 ID. Under these circumstances, a reasonable factfinder could conclude that HB19 violates both Section 2 and the Constitution.

The District Court, however, found that the disparate burdens imposed on Black and Latino voters did not matter under Section 2 because it found, without a trial, that it was not difficult for any voter to obtain HB19 ID. For example, the court assumed that the possibility of a home visit by an ID-issuing mobile unit would erase the very real burdens faced by thousands of voters. But, there have been a total of five such home visits and such visits began only after the filing of this lawsuit. The court could only make such factual findings by crediting the Secretary's evidence, disregarding Plaintiffs' contrary evidence, and drawing contested inferences in the Secretary's favor. That is not appropriate at summary judgment. Further, the court erred as a matter of law by misinterpreting Section 2 as limited to whether all voters have the same procedural opportunities to vote, by ignoring that Section 2 bars any "abridgement" of the right to vote (and not merely vote "denial"), and by failing even to consider the well-established "totality of the circumstances" test.

The District Court compounded its errors by granting summary judgment on Plaintiffs' constitutional claims even though it acknowledged much of Plaintiffs' powerful evidence of discriminatory intent. The court concluded that this evidence did not need to be considered because, in its view, HB19 did not prevent anyone from voting. Here, the court not only disregarded Plaintiffs' evidence in violation of

Rule 56, it misapplied foundational principles of constitutional law. HB19 purposefully imposes disproportionate burdens on Black and Latino voters because they disproportionately lack HB19 ID. That impact, in and of itself, means that HB19 cannot stand if it is intentionally discriminatory regardless of whether Black and Latino voters can successfully overcome the burdens imposed on them. For example, a law designed to make Black voters wait longer in line than whites would be unconstitutional even if every Black voter persevered and voted anyway.

Finally, the District Court erred in holding that the Positively Identify Provision ("PIP") of HB19 did not constitute an illegal "test or device" under Section 201. Not only is the PIP precisely the sort of test or device that this Court, Congress, and the DOJ have held are subject to Section 201's *per se* ban, but it is unquestionably an arbitrary and racially discriminatory prerequisite for thousands of Alabamian voters.

ARGUMENT

I. THERE IS A TRIABLE ISSUE OF FACT AS TO WHETHER HB19 VIOLATES SECTION 2 OF THE VRA.

To establish a Section 2 violation, Plaintiffs "must prove that [HB19] results in a discriminatory effect." *Fayette*, 775 F.3d at 1342. "A discriminatory *result* is all that is required; discriminatory intent is not necessary." *Id*.

Here, Plaintiffs presented evidence that voters of color are significantly less likely than whites to have HB19 ID, *and* that voters of color face disproportionate

burdens to obtain such ID compared to whites. Plaintiffs also presented evidence that the justification for HB19 is tenuous because there is no evidence that voter impersonation fraud has ever been a meaningful problem in Alabama, or that HB19 addresses absentee voter fraud. Thus, Plaintiffs presented material facts justifying a trial as to whether, under the totality of the circumstances, HB19 results in the impermissible denial or abridgment of the right to vote on account of race. *Burton v. City of Belle Glade*, 178 F.3d 1175, 1198 (11th Cir. 1999).

In reaching a contrary result on summary judgment, the District Court made several legal errors and failed to adhere to Rule 56 by prematurely resolving material factual disputes in favor of the Secretary. Any of these errors is a sufficient basis for reversal. *See Wright v. Sumter Cty. Bd. of Elections & Registration*, 657 F. App'x 871, 872 (11th Cir. 2016) (reversing summary judgment where the District Court ignored parts of the plaintiffs' expert's analysis); *Fayette*, 775 F.3d at 1347-48 (same, where the court rejected the conclusions of one party's expert in favor of the other's expert).

First, the District Court incorrectly read Section 2 as an "equal treatment" test, reasoning that, so long as voters all have the same procedural opportunities to obtain ID, then HB19 has no discriminatory result. DE267 at 58-63. That is not the law. Such a test is inconsistent with this Court's precedent and the very purpose of Section 2.

Second, the District Court incorrectly limited Section 2 to cases where a voter is completely prevented from voting, stating "there cannot be a discriminatory impact on voting when the law does not *prevent* anyone from voting." DE267 at 63 (emphasis added). Section 2, however, prohibits laws that result in the "denial *or abridgement*" of the right to vote. 52 U.S.C. § 10301(a) (emphasis added). A photo ID law that "causes a racial disparity in voter ID possession falls comfortably within" the VRA's definition of "abridgment." *Veasey v. Abbott*, 830 F.3d 216, 259-60 (5th Cir. 2016) (en banc).

Third, the District Court's misunderstanding of Section 2 led it to disregard Plaintiffs' evidence that voters of color are significantly more likely to lack HB19 ID, and to lack access to cars or the other material resources needed to obtain ID. DE267 at 63. Contrary to the court's dismissal of such burdens as mere "inconveniences," *Id.* at 49, the evidence overwhelmingly shows that there is a triable issue of fact as to whether HB19 has a discriminatory effect.

Fourth, the District Court erred by crediting the ameliorative measures, such as the potential home visit program, that the Secretary has promised are sufficient to overcome these discriminatory burdens. *Id.* at 51. His promises are speculative and the court should not have made important credibility determinations in favor of the Secretary at summary judgment.

Fifth, the court erred in failing to consider the "Senate Factors" to analyze HB19's impact. *Burton*, 178 F.3d at 1198-99 & n.20. Those factors overwhelming favor Plaintiffs, and established a triable issue as to whether HB19 violates Section 2. *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 240 (4th Cir. 2014) ("*LWVNC*").

A. The District Court Imposed Improper Legal Standards that are Inconsistent with Section 2 and this Court's Precedent.

1. Section 2 Is Not Merely An "Equal Treatment" Requirement.

The District Court mischaracterized the inquiry required by Section 2 as limited to determining whether minority and white voters have the same procedural opportunities to obtain HB19 ID. *See* DE267 at 63 (concluding that all voters "have the same opportunity to get to a registrar's office, and to the extent there is a difference in convenience, they have the same opportunity to request a home visit"). Based on this false premise, the court dismissed Plaintiffs' evidence showing that voters of color disproportionately lack HB19 ID as not "[t]he issue." *Id*. at 62. Similarly, the court disregarded the evidence that voters of color disproportionately face burdens in obtaining HB19 IDs; instead concluded that poor Black and poor white voters have the same procedural options to obtain an HB19. *Id*. at 63.

The District Court erred as a matter of law. By its nature, a "results" test may be violated even when the same procedures are applied to all persons. *See*, *e.g.*,

LWVNC, 769 F.3d at 244-47 (elimination and reduction of certain voting tools that applied to all voters); *Miss. State Chapter, Operation Push, Inc. v. Mabus*, 932 F.2d 400, 412 (5th Cir. 1991) (dual registration requirement for all registrants). "[E]ven a consistently applied practice premised on a racially neutral policy would not negate a plaintiff's showing through other factors that the challenged practice denies minorities fair access to the process." *United States v. Marengo Cty. Comm'n*, 731 F.2d 1546, 1567-71 (11th Cir. 1984) ("*Marengo*") (citation omitted). When facially neutral procedures "interact[] with social and historical conditions" to disproportionately burden voters of color, then the "result" is voting discrimination within the meaning of Section 2. *Thornburg v. Gingles*, 478 U.S. 30, 47 (1986).

In reaching a contrary conclusion, the District Court relied on a Seventh Circuit decision, which erroneously treats Section 2 as limited to "an equal-treatment requirement." *See* DE267 at 62 (quoting *Frank v. Walker*, 768 F.3d 744, 753-54 (7th Cir. 2014) ("*Frank I*")). The Seventh Circuit's reasoning contravenes the law of this Circuit and the VRA's clear language.

In *Marengo*, this Court held that a registrar's short office hours and inconvenient location had a discriminatory effect because these procedures "made it harder for unregistered voters, more of whom are black than white, to register. By meeting only in [the county seat, the registrar] was less accessible to eligible rural voters, who were more black than white." 731 F.2d at 1570. It did not matter that all

voters had the same procedural opportunities to vote, because those procedures disproportionately burdened Black voters. *Id*.

In *United States v. Dallas County*, this Court again expressly rejected a District Court's finding that "inconvenient location and hours of registration" were "reasonable and . . . affected blacks and whites equally." 739 F.2d 1529, 1538 (11th Cir. 1984) ("*Dallas*") (citations omitted). Rather, this Court explained that, "[w]hile being open during the day may seem reasonable on first consideration, the evidence indicate[d] that such hours are inconvenient to those who work, especially those who work in the rural areas of the county." *Id*. Such burdens had a discriminatory effect, even where there was "substantial equality in voter registration of blacks and whites." *Id*. at 1537; *see also Chisom v. Roemer*, 501 U.S. 380, 408 (1991) (Scalia, J., dissenting) (recognizing that Section 2 could be violated 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").

An equal-treatment test asks the wrong question because it focuses solely on whether a law *on its face* treats minorities and whites differently. But, under Section 2, a "discriminatory result is all that is required." *Fayette*, 775 F.3d at 1342. This is because the VRA was enacted to reach laws whereby states would "resort to facially neutral 'tests that took advantage of differing social conditions. Property tests, literacy tests, residence requirements, the poll tax, and disqualification for

conviction of certain crimes all fell into this category.'" *Underwood v. Hunter*, 730 F.2d 614, 619 (11th Cir. 1984) (citation omitted).

2. The District Court Improperly Limited Section 2 to Cases Involving the Complete Prevention of Voting.

The District Court further erred in its understanding of Section 2 and the Constitution by stating that "there cannot be a discriminatory impact on voting when the law does not *prevent* anyone from voting." DE267 at 63 (emphasis added). But, "both the Fifteenth Amendment and Section 2 also explicitly prohibit *abridgement* of the right to vote." *Veasey*, 830 F.3d at 253 (emphasis added) (citing U.S. CONST. amend. XV, 52 U.S.C. § 10301(a)). The "core meaning" of "abridge" is to "shorten." *Reno v. Bossier Par. Sch. Bd.*, 528 U.S. 320, 333-34 (2000). Federal law prohibits all manner of discrimination, not solely laws that "prevent" minorities from voting: "nothing in Section 2 requires a showing that voters cannot register or vote under any circumstance." *LWVNC*, 769 F.3d at 243. And "[a]ny abridgment of the opportunity of members of a protected class to participate in the political process inevitably impairs their ability to influence the outcome of an election." *Chisom*, 501 U.S. at 397.

Therefore, policies that do not prevent people from voting, but that make voting harder for minorities to participate in the political process, may "abridge" their rights. *N.C. State Conference of NAACP v. McCrory*, 831 F.3d 204, 233 (4th Cir. 2016) ("*McCrory*"); *see, e.g.*, *Morse v. Republican Party of Va.*, 517 U.S. 186,

191, 206-07 (1996) (payment of a fee even where it could be waived); *Mich. State A. Philip Randolph Inst. v. Johnson*, 833 F.3d 656, 666 (6th Cir. 2016) (abolition of straight-ticket voting); *Marengo*, 731 F.2d at 1570 (time and place of registration and lack of Black poll officials); *Dallas*, 739 F.2d at 1538 (same); *cf. also Charles H. Wesley Educ. Found., Inc. v. Cox*, 408 F. 3d 1349, 1352 (11th Cir. 2005) ("A plaintiff need not have the franchise wholly denied to suffer injury.").

A finding that HB19 "abridges" the right to vote "falls comfortably within" this schema. *Veasey*, 830 F.3d at 260. This is true even if some voters can overcome the burden of obtaining HB19 ID. *See id*. at 260 n.58 ("some people paid the poll tax or passed the literacy test and therefore voted, but their rights were still abridged").

B. The Court Improperly Dismissed Plaintiffs' Significant Evidence Establishing a Triable Issue of Fact on their Results-Test Claim.

Because it mischaracterized Section 2, the District Court failed to consider the overwhelming evidence that HB19 has a discriminatory effect. That effect begins with the significant racial disparities in HB19 ID possession rates, but it does not end there. A range of other evidence shows that voters of color disproportionately face greater travel, financial, and other socioeconomic burdens to obtaining HB19 ID than whites. This evidence creates a triable dispute as to whether HB19 violates Section 2.

1. Undisputed Disparate ID Possession Rates Supported Plaintiffs' Section 2 Claim.

Plaintiffs' expert estimated that 50,106 registered Alabamian voters do not possess any HB19 ID, and that another 68,000 voters possess HB19 IDs containing such material discrepancies (between the name or other information on the voter roll and that on the ID) that the ID could not reasonably be used at the polls. DE255 at 135; DE266 ¶ 342. Consequently, there are a total of over 118,000 voters who either lack any HB19 ID or lack a "useable ID."[2] DE255 at 98 ¶ 13; DE266 at 136-37.

The District Court acknowledged this evidence. DE267 at 46 & n.5. Yet, focusing solely on the 50,000 voters who lacked any HB19 ID, the court stated that the "discrepancy in photo ID possession rates among white, Black, and Hispanic registered voters in Alabama is miniscule." DE267 at 47.

In fact, under either measure, the disparities are clear and significant. Under the 118,000 estimate, 3.33% of whites, but 5.49% of Black voters, and 6.98% of Latinos lack useable ID. DE255 at 98-99 ¶ 15. Under the 50,000 estimate, 1.37% of whites, but 2.44% of Black voters and 2.29% of Latino voters, lack any HB19 ID. These possession disparities are statistically and legally significant because they represent standard deviations over 10, and in most cases well over 30. *Id.* at 97 ¶ 8;

[2] In the record in this case, HB19 IDs with material discrepancies are sometimes called "contestable" IDs. Here, "useable IDs" are those HB19 IDs that do *not* contain material discrepancies (i.e., are *not* contestable).

at 99 ¶ 17; *see Peightal v. Metro. Dade Cty.*, 26 F.3d 1545, 1555-56, n.16 (11th Cir. 1994) (holding that standard deviations between two and three are sufficient to show "a prima facie case of a constitutional or statutory violation"); *Powers v. Ala. Dep't of Educ.*, 854 F.2d 1285, 1298 & n.21 (11th Cir. 1988). Such large standard deviations show that these racial disparities do not occur by chance. *Peightal*, 26 F.3d at 1555-56.

These disparate possession rates mean that, even if the burdens of obtaining ID were the same for voters of all races, the fact remains that voters of color will much more frequently bear the burdens of acquiring IDs. DE255 at 138; at 86-87 ¶ 141. As such, these disparities strongly support Plaintiffs' claims that HB19 violates Section 2. *See Veasey*, 830 F.3d at 250; *see also Marengo*, 731 F.2d at 1570 ("By holding short hours the Board made it harder for unregistered voters, more of whom are black than white, to register.").

The District Court also suggested that these disparities are not significant by asserting that "few registrants of *any* racial group [were] affected by the Photo ID Law." DE267 at 47. But "[t]he right to vote is personal and is not defeated by the fact that 99% of other people can secure the necessary credentials easily." *Frank v. Walker*, 819 F.3d 384, 386 (7th Cir. 2016) ("*Frank II*"). Moreover, the denial or abridgment of the rights of 50,000 (much less 118,000) voters is hardly trivial. The court's contrary suggestion ignores the "basic truth that even one disenfranchised

voter—let alone several thousand—is too many." *LWVNC*, 769 F.3d at 244. "[W]hat matters for purposes of Section 2 is not how many minority voters are being denied equal electoral opportunities but simply that 'any' minority voter is being denied equal electoral opportunities." *Id*. (quoting 52 U.S.C. § 10301(a)).

Indeed, in *Underwood*, this Court found a "disparate effect" where Black voters were "at least 1.7 times as likely as whites to suffer disfranchisement." 730 F.2d at 620. This was based on data showing that, in the years preceding trial, the challenged law had disfranchised 606 voters. Appellants' Br., *Underwood*, 730 F.2d 614 (No. 82-7011), 1982 WL 1037553, at *7; *cf. also Gomillion v. Lightfoot*, 364 U.S. 339, 341 (1960) (state law prevented 400 Black people from voting in city elections).

2. The Evidence of Disparate Burdens Supported Plaintiffs' Section 2 Claim.

The District Court failed to consider the extensive evidence that Plaintiffs presented to establish that there is a triable dispute as to whether voters of color bear a heavier burden than whites to obtaining HB19 ID. DE255 at 83-95 ¶¶ 132-87. Travel disparities, socioeconomic disparities, and the lack of Spanish-language materials all disproportionately affect voters of color.

First, voters without useable ID are less likely to have access to vehicles than voters with ID, with Black voters lacking access at even greater rates than whites: "12.08% of Black voters without a useable photo ID have no vehicle nor live in a

household with a vehicle, compared to 5.71% of whites." DE267 at 37. These figures likely overstate vehicle access. DE255 at 140; DE252-16 at 150. The adjusted results of Plaintiffs' expert's survey found that 51% of voters without HB19 ID (42% of whites and 63% of Blacks) live in a household without a working vehicle. DE266 ¶¶ 356-59; DE252-16 at 17 ¶ 49.

Additionally, Plaintiffs' expert estimated the number of voters by race that (a) lived more than five miles from an ID-issuing office, (b) did not have a useable ID, and (c) did not have access to a vehicle. The results show that Black voters are over twice as likely as white voters to be among this extremely burdened group. DE255 at 86-87 ¶ 141.[3]

Second, in addition to these travel burdens, voters of color without useable ID are more likely to live below the poverty line, thus making it more difficult to obtain ID. DE255 at 90 ¶ 157. Voters of color also are more likely to face the challenges of taking time off from work and arranging for childcare to obtain HB19 ID. For instance, almost 90% of Latino and half of Black voters without *any* HB19 ID are responsible for a child, whereas only about 14% of white voters without HB19 ID

[3] Even if contestable IDs are not considered, the racial disparity is just as stark, i.e., Black voters are 2.7 times more likely to lack *any* HB19 ID, live more than five miles from an ID-issuing office, and not live in a household with a vehicle. DE255 at 86-87 ¶ 141.

are responsible for a child. DE255 at 91 ¶ 162. The challenges are particularly burdensome in single parent households.[4]

These socioeconomic disparities show why the burdens that HB19 creates for voters of color "may not be rebutted under Section 2 by positing that this unequal opportunity may be overcome if individuals devote sufficient resources to the task or by positing that the unequal opportunity is somehow a product of individual 'choice.'" *Veasey v. Perry*, 71 F. Supp. 3d 627, 693 n.497 (S.D. Tex. 2014) (citing *Teague v. Attala Cty.*, 92 F.3d 283, 293-95 (5th Cir. 1996); *Kirksey v. Bd. of Supervisors*, 554 F.2d 139, 145, 150 (5th Cir. 1977) (en banc); *Marengo*, 731 F.2d at 1568-69; *Major v. Treen*, 574 F. Supp. 325, 351 n.31 (E.D. La. 1983)), *aff'd in part, rev'd in part*, 830 F.3d 216; *see also McCrory*, 831 F.3d at 233 ("Nor does preference lead African Americans to disproportionately lack acceptable photo ID.").

Finally, the record further indicates that the Secretary did not translate HB19 educational materials into Spanish and rejected requests from the NAACP to do so. DE255 at 94 ¶¶ 182-84; at 31-32 ¶¶ 214-15. Plaintiffs translated materials about HB19 into Spanish themselves to assist the 37.1% of Latino Alabamians who speak English "not well" or "not at all." *Id.*; *see also* DE252-9 at 117 ¶ 236. Contrary to

[4] Plaintiffs' expert's survey indicates significant racial disparities among people without HB19 ID who live below the poverty line and are in single-parent households. DE255 at 90-91 ¶¶ 157-63.

the District Court's suggestion that such evidence of unresponsiveness is irrelevant, DE267 at 63 n.13, this "cultural and language barrier . . . makes [the] participation [of Spanish-speaking voters] in community processes extremely difficult." *White v. Regester*, 412 U.S. 755, 768 (1973); *see also Veasey*, 71 F. Supp. 3d at 649 n.114.

These numerous material factual disputes obligated the District Court to deny summary judgment.

C. The Secretary's Allegedly Ameliorative Steps Cannot, on Summary Judgment, Be Deemed Per Se Sufficient to Eliminate HB19's Discriminatory Effect.

Rather than meaningfully engage with Plaintiffs' evidence showing HB19's discriminatory effect, the District Court asserted that "it is so easy to get a photo ID in Alabama [that] *no one* is prevented from voting." DE267 at 48. To reach that conclusion, the court resolved disputed facts and drew inferences in the Secretary's favor.

This was inappropriate given Plaintiffs' record evidence showing that the Secretary's ameliorative efforts are ineffective. Such disputes should have been resolved at trial.

1. The Alabama Voter Card

Contrary to the District Court's suggestion, the existence of a nominally "free" photo voter ID card does not immunize HB19 from challenge. *See McCrory*,

831 F.3d at 236*; Veasey*, 830 F.3d at 256. As discussed above at pp. 20-23, voters without HB19 ID face material burdens related to obtaining the voter ID card.

Voters who apply for a voter ID card must also sign, under penalty of a felony conviction, a confusing declaration stating that they do not already have a valid HB19 ID—a class of ID that the declaration does not definitively define. DE255 at 93 ¶ 176. The Secretary emphasizes this intimidating fact in public presentations. DE255 at 93-94 ¶¶ 176-77, 179; at 143. And the Secretary's former Chief Legal Advisor and other witnesses acknowledged that it may have a chilling effect on voter ID applicants. DE266 ¶ 504; *cf. Dallas*, 739 F.2d at 1538 (finding error in the district court's failure to consider evidence of Black voters' sense of intimidation).

2. The Mobile Unit and Potential Home Visit Program

At the outset, in finding that the mobile unit and home visit programs are sufficient to overcome any discriminatory effect, the court relied entirely on the Secretary's unfounded statement that, if any voter needed a home visit, that voter would receive one. DE267 at 51 ("nonetheless, Secretary Merrill has made clear that if the voter says he has no one to give him a ride, the voter is taken as his word"). The court's reliance on this material disputed fact at summary judgment was error.

It was wholly speculative for the District Court to assume at summary judgment that "potential home visit[s]," could meet the needs of *thousands* of voters who face substantial burdens to obtaining HB19 ID. *See supra* at 18. The court

acknowledged that "fewer than ten," DE267 at 51 (in actuality, five),[5] such home visits had taken place as of the close of evidence on July 13, 2017. There was no evidence that these rare visits could be scaled to serve thousands, or even that they were adequately publicized. DE252-19 ¶ 1; DE252-7 ¶21; DE252-14 ¶ 4. Moreover, no mobile unit visited anyone's home until after Plaintiffs initiated litigation, and nothing requires the Secretary to continue offering such visits after this lawsuit ends. *Cf. Gingles*, 478 U.S. at 71 (holding that, in examining the impact of a challenged law, courts should "consider to what extent the pendency of . . . litigation might have worked a one-time advantage" for voters of color) (citation omitted).

Nor does the mobile unit program more generally overcome the disparate impact imposed by HB19. The mobile unit program entails the Secretary's staff visiting a public location in each county at least once a year. DE267 at 48-49, 51. In 2016, no mobile units were deployed before the presidential primary. *See* DE224-11 at 61-62. The mobile unit has only provided roughly 850 IDs since 2014. DE266 ¶ 374. But, again, tens of thousands of Alabamians remain without HB19 ID.[6]

At minimum, this evidence established a triable dispute of material fact as to whether the mobile unit program adequately addresses HB19's disparate impact.

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[5] See DE224-11 at 69; DE266 ¶ 370.

[6] The individual plaintiffs had to contend with these substantial burdens, as set forth in DE266 at ¶¶ 9-11, 24, 30, 44, 56; DE255 at 33-38 ¶¶ 224, 225, 229, 231, 232, 233, 236-38, 241, 243, 244, 246. The District Court improperly dismissed those burdens.

D. Section 2 Does Not Require Proof of Declines in Minority Turnout or Proof That Minorities Are Prevented from Voting, but Plaintiffs Proved That As Well.

While Plaintiffs were not required by Section 2 to do so, *Veasey*, 830 F.3d at 260, they also showed that HB19 negatively impacted Black voter turnout and prevented thousands of disproportionately Black people from voting. That Plaintiffs offered evidence beyond what is necessary further underscores the inappropriateness of summary judgment. Yet, the District Court did not even mention this evidence.

First, the District Court failed to mention that Plaintiffs' expert, Dr. Zoltan Hajnal, demonstrated the disparate impact of HB19 on Black voter turnout in Alabama. *See* DE255 at 100 ¶ 22. Dr. Hajnal found that in his comparisons of elections and turnout in majority-minority counties versus overwhelmingly white counties from before and after implementation of HB19, the relative declines in turnout in majority-minority counties were much more pronounced in Alabama than in Southern states without strict ID laws.[7] These differences were statistically significant. DE252-8 at 30, 31, 47-49.

Dr. Hajnal also performed a regression analysis on data from all counties in the United States. DE255 at 101 ¶¶ 30-31. He found that the turnout of minorities—

[7] The relative decline in turnout in majority-minority counties, as compared to overwhelmingly white counties, was 3.4 percentage points greater in Alabama than in Southern non-strict ID states between the 2012 and 2016 presidential elections, and 7.8 percentage points greater between the 2010 and 2014 general elections. DE255 at 100 ¶¶ 23-24; at 101 ¶¶ 28-29.

relative to whites—declined significantly more from 2012 to 2016 in Alabama than in other states. DE255 at 101 ¶ 32. All else equal, turnout in the most racially diverse counties in Alabama declined by almost 5 percentage points, while turnout in the least diverse counties increased by a similar amount. In other states, by contrast, racial diversity plays a far more minor role in predicting changes in turnout. DE255 at 102 ¶¶ 33-35. Dr. Hajnal concluded that this difference between Alabama and the rest of the country is statistically significant. DE255 at 102 ¶ 36.

Second, it is undisputed that at least 2,197 otherwise eligible voters cast provisional ballots that were rejected solely for failing to provide HB19 ID. DE234 ¶ 18. Black voters were 4.58 times more likely than whites to have such ballots rejected. *Id.*; *cf. LWVNC*, 769 F.3d at 244. This data is incomplete and does not represent the entirety of the tens of thousands affected by HB19 as many voters were not offered a provisional ballot or decided not to cast one, DE234 at 17-18 ¶¶ 19-20, but it nonetheless constitutes further evidence of HB19's disparate impact.

E. The District Court Improperly Ignored the Senate Factors-Based Evidence.

The District Court was required to analyze whether HB19 violates Section 2 by examining the nine Senate Factors. *Burton*, 178 F.3d at 1198-99 & n.20 (listing the Senate Factors). In failing to conduct this analysis, the court made a legal error, and ignored critical evidence of HB19's discriminatory effect. *Id.*

The Senate Factors overwhelmingly support Plaintiffs' claim. Yet, with one exception (discussed below at pp. 30-32), the District Court did not even address them.

As to the first Senate Factor, it is undisputed that Alabama has a history of voting-related discrimination, DE267 at 42. There is also no dispute that Alabama elections are racially polarized (Factor 2), *id.* at 7, 10-11, which provided the Legislature an incentive to discriminate against voters of color. *Infra* at 38-43.

Regarding Senate Factor 3, Plaintiffs' offered evidence, including the expert testimony of Dr. Lonna Rae Atkeson, showing that the Positively Identify Provision ("PIP"), and the administrative decisions of the Secretary and Governor have "enhance[d] the opportunity for discrimination" against voters of color. *Gingles*, 478 U.S. at 36. The Secretary instructs election officials *not* to rely on objective criteria (such as non-photo ID) in deciding whether to allow a voter to use the PIP, resulting in a subjective process that is "easily capable of being manipulated." *Davis v. Zant*, 721 F.2d 1478, 1484 (11th Cir. 1983), *aff'd in relevant part* 752 F.2d 1515, 1516 (11th Cir. 1985) (en banc) (finding a juror selection process discriminatory because a portion of jurors were chosen through a voucher test). Dr. Atkeson testified that 57% of white voters without driver's licenses know their check-in poll workers, but almost no Black voters do. DE255 at 106 ¶¶ 50-51. Black voters constitute 40% of

voters without HB19 ID, but, in the November 2016 election, Black voters were only 23.1% of those voters who used the PIP to vote. *Id.* at 106-08 ¶¶ 52-57.

Likewise, the Governor's decision to partially close the driver's license-issuing offices in eight of the eleven majority-Black counties in Alabama for the entire of the 2016 election season was a policy that enhanced HB19's discriminatory effect. DE255 at 62-63 ¶ 56. The U.S. Department of Transportation found that the driver's license office closures and reductions in services had a disparate impact on Black people in violation of Title VI of the Civil Rights Act of 1964. *Id*.

Senate Factor 5 was not seriously disputed insofar as voters of color bear the effects of discrimination, DE255 at 61-63 ¶¶ 52-58; which results in them being poorer than white voters, and increases the barriers to acquiring HB19 ID, *see supra* at 20-23.

Finally, Plaintiffs' evidence showed that racial appeals (Factor 6) were used to stir support for HB19 and other discriminatory voting devices, *see, e.g.*, DE255 at 44-47 ¶¶ 20-22; *see infra* at 38-43; that voters of color are underrepresented in the State Legislature (Factor 7), DE255 at 54-55 ¶¶ 20-22, which limited their influence in the legislative process that led to HB19's passage, *id.* at 71 ¶ 82; and that the Legislature was unresponsive to the particularized needs of voters of color (Factor 8) in, for example, not considering amendments to HB19. *See infra* at 45.

The Senate Factors strongly support Plaintiffs' claims.

F. The District Court Erred in Crediting Pretextual Justifications for HB19.

The only Senate Factor that the District Court did address was Factor 9, i.e., the tenuousness of the State's justification for the voter law. The court found that HB19 was justified by "important regulatory interests" to "combat voter fraud, increase confidence in elections, and modernize election procedures." DE267 at 55. The court stated that it did not matter that there is little evidence of voter impersonation fraud, and that the Secretary was not actually required "to prove voter fraud exists . . . , that the Photo ID Law helps deter voter fraud, or that the law increases confidence in elections." *Id*.

This is incorrect on both the law and the facts.

Prevention of voter fraud is a valid government interest. However, contrary to the District Court's conclusion, *Crawford v. Marion County Election Board*, 533 U.S. 181 (2008), does not stand for the proposition that a state merely need refer to a legitimate interest to overcome a challenge to its photo ID law. *See* DE267 at 55. "[T]he articulation of a legitimate interest is not a magic incantation a state can utter to avoid a finding of disparate impact." *Veasey*, 830 F.3d at 262. Rather, there must be some connection between the state's advanced interests and the law at issue. *Id*.

Here, the evidence shows a material dispute of fact as to whether any such connection exists.

The Secretary has never presented evidence that the kind of voter fraud that HB19 might prevent actually exists in Alabama. When asked by opponents to provide evidence of fraud, sponsors of HB19 could not do so. DE255 at 76-77 ¶ 104. It is that record, and not the Secretary's "hypothesized or invented post-hoc" rationale for HB19, which matters. *Glenn v. Brumby*, 663 F.3d 1312, 1321 (11th Cir. 2011); *Underwood*, 730 F.2d at 620-21.

Further, HB19 is both too broad and too narrow to address Alabama's "interest" in addressing voter fraud. DE267 at 55.

HB19 is too broad because, while a photo ID law might be useful in blocking in-person impersonation fraud, sponsors of HB19 admitted that they knew of no such fraud. DE255 at 76-77 ¶ 104. Indeed, there has been only one known conviction for in-person voter impersonation fraud in Alabama's history, which occurred in 2002. DE267 at 3, 55.

While there is evidence of absentee voter fraud, DE267 at 3, 44, 55, HB19 is too narrow insofar as it is ineffective at preventing any existing absentee fraud. DE255 at 78-79 ¶¶ 109-16. Although HB19 requires absentee voters to mail in photocopies of their IDs along with their absentee ballots, there is no way for election officials to determine whether the mailed-in ID in fact belongs to the voter, since that voter is never required to present her/his face to officials for a comparison with the photo ID. *Id*. Indeed, the Secretary's witnesses admitted that an absentee photo

ID requirement is not a meaningful deterrent to absentee voter fraud. DE255 at 79 ¶ 116. For example, persons seeking to commit fraud can and do simply request photo IDs from voters (e.g., under the guise of assisting them), photocopy those IDs, and mail them in with the fraudulently marked absentee ballots. DE255 at 78 ¶ 110.

Therefore, at trial, a reasonable factfinder could infer that the voter fraud justification is tenuous and pretextual. *Cf. McCrory*, 831 F.3d at 235. Indeed, just like in Texas, Alabama has a long history of "justifying voter suppression efforts such as the poll tax and literacy tests with the race-neutral reason of promoting ballot integrity." *Veasey*, 830 F.3d at 237; *see also* DE252-9 at 96 ¶ 192.

G. The Court Ignored the Prevalence of Less Discriminatory Alternatives.

Finally, the District Court stated that, if Plaintiffs were successful in this case, any law imposing a "disparate inconvenience" would be invalid under Section 2. DE267 at 61-62. For the reasons stated above, that is incorrect. This case is not about a mere "disparate inconvenience." It is about the concrete ways in which a reasonable factfinder could conclude that Black and Latino voters face disproportionate and substantial barriers to exercising their fundamental right to vote because of HB19.

Nor does this case call into question the validity of photo ID laws generally. Unlike Alabama, in Indiana, Florida, South Carolina, and at least nine other states with photo ID laws, voters who face some "reasonable impediment" to obtaining

photo ID may submit affidavits or non-photo ID and cast an effective ballot. Alabama has no such objective process for voting without showing HB19 ID.

Indeed, Plaintiffs recognize that, should they succeed solely on their Section 2 claim, they would only be entitled to a narrow remedy, like permitting those voters who face reasonable impediments to obtaining HB19 to sign affidavits, "seeking for [Alabama] the sort of safety net that Indiana [and Florida] ha[ve] had from the outset." *Frank II*, 819 F.3d at 387.

II. THE DISTRICT COURT IMPROPERLY IGNORED MATERIAL FACTS DEMONSTRATING THAT HB19 WAS ENACTED FOR A DISCRIMINATORY PURPOSE, THEREBY REQUIRING A TRIAL ON PLAINTIFFS' CONSTITUTIONAL CLAIMS.

While proof of discriminatory intent is not required under Section 2, it is required for Plaintiffs to succeed on their constitutional claims. *Hunter v. Underwood*, 471 U.S. 222, 225 (1985). On the other hand, once Plaintiffs establish that a law has a discriminatory purpose, any relevant evidence of disparate impact, "even if not overwhelming impact," is sufficient to state a constitutional claim. *McCrory*, 831 F.3d at 231. This is because "official actions motivated by a discriminatory purpose have no legitimacy at all under our Constitution. Acts generally lawful may become unlawful when done to accomplish an unlawful end."[8]

[8] To the extent the District Court relied on *Palmer v. Thompson*, 403 U.S. 217 (1971), DE267 at 40, 45-46 & n.4, this Court has recognized that "*Palmer*'s holding simply has not withstood the test of time." *Church of Scientology Flag Serv. Org. v. City of Clearwater*, 2 F.3d 1514, 1529 (11th Cir. 1993).

Stout v. Jefferson Cty. Bd. of Educ., No. 17-12338, 2018 WL 827855, at *19 (11th Cir. Feb. 13, 2018) (internal alterations and citations omitted); *see also id.* at *9 (finding a discriminatory effect even where the effect "may seem insignificant at first blush").

In other words, a constitutional challenge to an intentionally discriminatory law requires a lesser showing of discriminatory impact than is required under Section 2. *See McCrory*, 831 F.3d at 231 n.8 (explaining that "plaintiffs must make a greater showing of disproportionate impact" under Section 2 than under the Constitution, and that to require a "more onerous impact showing would eliminate the distinction between discriminatory results claims . . . and discriminatory intent claims").

Determining whether a law was motivated, at least in part, by discriminatory intent "demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Young Apartments, Inc. v. Town of Jupiter*, 529 F.3d 1027, 1045 (11th Cir. 2008) (citing *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977)). Because "racial animus and intent to discriminate are not synonymous," proof of "ill will, enmity, or hostility are not prerequisites of intentional discrimination." *Ferrill v. Parker Grp., Inc.*, 168 F.3d 468, 472-73 & n.7 (11th Cir. 1999). And Plaintiffs "do[ ] not have to prove that racial discrimination was a 'dominant' or 'primary' motive, only that it was a motive." *Dallas*, 739 F.2d at 1541.

Here, there is abundant evidence that the Legislature enacted HB19, at least in part, for a discriminatory purpose. But, the District Court decided that it was "not necessary" to engage with that evidence, DE267 at 45, because HB19 supposedly had no discriminatory impact.

That was clearly wrong.

Even if Plaintiffs had not presented sufficient evidence under Section 2 (which they did), the racial disparities in HB19 ID possession alone are sufficient evidence of disparate impact to support Plaintiffs' constitutional claims. Moreover, "evidence that a voting device was intended to discriminate is circumstantial evidence that the device has a discriminatory result." *Marengo*, 731 F.2d at 1571.

A. The District Court Committed Errors of Law in Concluding that There was Insufficient Evidence of a Discriminatory Effect.

The impact of HB19 "may provide an important starting point" for an intent analysis. *Arlington Heights*, 429 U.S. at 266. But, contrary to the District Court's holding, it is not the lone factor in that analysis. *See* DE267 at 45 (holding Plaintiffs have failed to "show that the law in fact discriminates" and thus an analysis of the overwhelming evidence is "not necessary"). "When plaintiffs contend that a law was motivated by discriminatory intent, proof of disproportionate impact is not 'the sole touchstone' of the claim. Rather, plaintiffs asserting such claims must offer other evidence that establishes discriminatory intent in the totality of the circumstances." *McCrory*, 831 F.3d at 231 (citations omitted). Given this, "the standard the district

court used to measure impact required too much in the context of an intentional discrimination claim." *Id.*

A showing that Black voters "disproportionately lacked the photo ID required by [law], if supported by the evidence, establishes sufficient disproportionate impact for an *Arlington Heights* analysis." *Id.*; *see also Reno*, 528 U.S. at 332 n.1 (stating that "it may *sometimes* be" easier to prove intent than effect).

It is undisputed that Plaintiffs made that showing: Black and Latino voters are significantly more likely than whites to lack HB19 ID. *See supra* at 18-19. The court dismissed this evidence by reasoning that the burdens required to obtain HB19 ID for those who do not already have it are mere "inconveniences." DE267 at 49. That is factually wrong, *see supra* at 20-23, but it is also legally irrelevant to Plaintiffs' constitutional claims. *Crawford*'s holding that "merely inconvenient" burdens are ordinarily not subject to strict scrutiny does not apply when, as here, there is "proof of discriminatory intent." 553 U.S. at 205, 207 (Scalia, J., concurring in the judgment). This is because "[w]hen there is a proof that a discriminatory purpose has been a motivating factor . . . judicial deference [to even legitimate interests] is no longer justified."[9] *Arlington Heights*, 429 U.S. at 265-66. Indeed, should HB19

[9] In *Hunter*, the Supreme Court held that the plaintiffs presented sufficient evidence of a disparate impact where a law was enacted to disproportionately disqualified Black voters convicted of crimes, it had that impact when enacted, and that impact "persist[ed] today." 471 U.S. at 227. Like this case, Alabama had argued that its law

ultimately be found unconstitutional, the entirety of the law, and *any* burdens imposed by it, must be eliminated. *McCrory*, 831 F. 3d 240-41.

In sum, the evidence of disparate ID possession rates, alone or in combination with various other evidence discussed above at pp. 20-29, is sufficient for the discriminatory purpose claims to survive summary judgment. *McCrory*, 831 F.3d at 231 & n.8.

B. The District Court Erred in Failing to Conduct a Fact Intensive Analysis of Plaintiffs' Evidence of the *Arlington Heights* Factors.

The remaining question, which the District Court did not reach, is whether Plaintiffs presented sufficient evidence of discriminatory intent to require a trial. The following non-exhaustive factors help to guide the sensitive inquiry into direct and circumstantial evidence of legislative intent: (1) the impact of the challenged law; (2) the historical background; (3) the specific sequence of events leading up to its passage; (4) procedural and substantive departures; (5) the contemporary statements and actions of key legislators; (6) the foreseeability of the disparate impact; (7)

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did not prevent the plaintiffs from voting, but rather that plaintiffs had "refused to utilize th[e] simple procedure" of obtaining a pardon to restore their rights. Appellants' Br., *Hunter*, 471 U.S. 222 (No. 84-76), 1984 WL 565799, at *9. But, the Court did not deem this argument relevant to its disparate impact analysis. *See Hunter*, 471 U.S. at 227 ("we can find no evidence . . . in the briefs . . . that would undermine th[e] finding [that the law's disparate impact persists]").

knowledge of that impact, and (8) the availability of less discriminatory alternatives. *See Jean v. Nelson*, 711 F.2d 1455, 1486 (11th Cir. 1983).

Plaintiffs provided significant and compelling direct and circumstantial evidence, which clearly established a triable dispute of fact on the issue of discriminatory intent. This was more than sufficient to meet their minimal burden at summary judgment. *See Lewis v. City of Union City*, 877 F.3d 1000, 1018 (11th Cir. 2017) ("plaintiff will always survive summary judgment if he presents a convincing mosaic of circumstantial evidence that would allow a jury to infer intentional discrimination").

1. The Legislators Who Enacted HB19 Made Contemporaneous Statements Revealing an Intent to Discriminate Against Black and Latino Voters and Passed Other Discriminatory Voting Laws.

Although "smoking gun" evidence is unusual, *Rogers v. Lodge*, 458 U.S. 613, 618 (1982), Plaintiffs presented it here. Plaintiffs also presented evidence of overt racial appeals and contemporaneous discrimination in voting by the same legislators who passed HB19. This pattern of discriminatory actions and statements by the same legislators who enacted HB19 is "relevant to drawing an inference of purposeful discrimination." *Id*. at 625. Such evidence "can be very significant if it is present." *Marengo*, 731 F.2d at 1571.

Senator Larry Dixon served from 1995 until his retirement in 2010 as the chief sponsor of photo ID bills like HB19. DE266 at 65 ¶ 229. While leading the

Legislature's efforts to enact photo ID bills, Senator Dixon twice *publicly* revealed the bills' discriminatory intent, stating that the lack of a photo ID law was "beneficial to the Black power structure" and "benefits Black elected leaders" in 1995 and 2001, respectively. *Id*. at 71 ¶¶ 272-73.

Until his retirement in 2010, Senator Dixon worked with Representative Kerry Rich, Senator Scott Beason, former Secretary of State Beth Chapman, a chief architect of HB19, and the other Senate sponsors of HB19 on past photo ID bills. DE255 at 52 ¶ 15; at 64-65 ¶¶ 61-64. By their own accounts, they considered him a leader on the photo ID issue. *Id.* at 52 ¶ 15. A reasonable inference from these facts is that, in 2011, the sponsors of HB19 carried forward Senator Dixon's intent. *See Miller-El v. Dretke*, 545 U.S. 231, 263-66 (2005) (finding that former prosecutors' statements about a prosecutor's office's policy of racial discrimination in the 1960s and 1970s, were evidence that that office had intentionally discriminated in 1986). At the very least, the pertinence of Senator Dixon's openly discriminatory views should have been resolved at trial and not on summary judgment.

This conclusion is reinforced by the fact that taped recordings from 2010 revealed that Senator Dixon, Senator Beason, and *six other* Senate sponsors of HB19 had candid conversations about their plan to suppress the Black vote in the 2010 elections where some legislators made "racist statements (referring to Black voters as 'illiterates' and 'aborigines')." DE267 at 42; *see also* DE255 at 51-52 ¶ 14.

Moreover, Representative Rich, the sole sponsor of HB19 in the House, also made "prejudiced comments about Latino citizens" in his speech introducing the notorious anti-immigration House Bill 56 of 2011 ("HB56"). DE267 at 43. HB56 and HB19 were passed within days of one another, and Rep. Rich sponsored both bills. DE266 at 66-67 ¶¶235-36, 244-45. Further, HB56 also includes a voter identification requirement for first-time registrants that, like HB19, bears more heavily on Latino voters. DE255 at 58-59 ¶ 39.

These overt statements of racial bias against voters of color powerfully support the inference that HB19 had a discriminatory purpose. As this Court has held, a reasonable factfinder can infer from such overt statements that legislators intended to "discriminate against black voters in any voting legislation before the [Legislature] in that session." *Carrollton Branch of NAACP v. Stallings*, 829 F.2d 1547, 1552 (11th Cir. 1987) (reversing summary judgment because discriminatory intent could be inferred from the fact that the sponsor of the challenged law had in the past made a racist speech about a different voting bill); *see also Cooper v. Harris*, 137 S. Ct. 1455, 1468-69 (2017) (finding that the statements of key decision-makers, such as the challenged law's sponsors, are indicative of intent); *Stout*, 2018 WL 827855, at *13; *Quigg v. Thomas Cty. Sch. Dist.*, 814 F.3d 1227, 1242 (11th Cir. 2016).

In 2017, in discussing a proposed amendment to add a religious exemption to HB19, Representative Rich also stated: "Some people have said it might apply to Muslims . . . . It would not apply to Muslims." DE252-9 at 91 ¶ 182. The Secretary's own expert admitted that this statement is indicative of "anti-Muslim sentiment." DE235-19 at 65, 255:6-257:1. The statement is also indicative of anti-Black bias: Muslim people in America are disproportionately Black, and former Secretary of State Nancy Worley observed that "[i]f you refer to the Muslim religion, people in Alabama associate that with blacks." DE231-3 at 25, 98:21-98:23; *see also* DE252-9 at 91 ¶ 182.

Evidence of contemporaneous discrimination was not limited to the disturbing statements of HB19's sponsors. The same Legislature that enacted HB19 passed other laws that were found unconstitutional because of their racial purpose. *Ala. Legislative Black Caucus v. Alabama*, 231 F. Supp. 3d 1026 (M.D. Ala. 2017) (3-judge court) (state reapportionment laws were predominately motivated by race); *Cent. Ala. Fair Hous. Ctr. v. Magee*, 835 F. Supp. 2d 1165, 1182 (M.D. Ala. 2011) (HB56 likely intentionally discriminatory), *vacated as moot* No. 11-16114-CC, 2013 WL 2372302 (11th Cir. May 17, 2013);[10] s*ee also Hispanic Interest Coal. of Ala. v. Gov. of Ala.*, 691 F.3d 1236, 1244-49 (11th Cir. 2012) (HB56 unconstitutionally

[10] "[T]he opinion was not vacated on the merits and remains factually relevant as a contemporary example of State-sponsored discrimination." *Veasey*, 830 F.3d at 257 n.54.

discriminates against the children of undocumented immigrants). The Legislature's "prior doing of other similar acts, whether clearly a part of a scheme or not, is useful as reducing the possibility that the act in question was done with innocent intent." *Keyes v. Sch. Dist. No. 1*, 413 U.S. 189, 207 (1973) (citation omitted); *see also McCrory*, 831 F.3d at 225; *Veasey*, 830 F.3d at 240.

Likewise, the 2010 Republican platform—which all the legislators who voted in favor of HB19 were elected on—connected the purported need for stricter voting laws to unfounded concerns that "illegal immigrants and their allies are working to gather political power and influence." DE255 at 51 ¶ 12. In a 2011 speech, Senator Beason, a Senate sponsor of HB19, explained the basis for this concern. He said that "Democrats do not want to solve the illegal immigration problem because they know, this is a fact, that when more illegal immigrants move into an area, when their children grow up and get the chance to vote, they vote for Democrats." *Id*. at 51 ¶ 13. Senator Beason later testified that Latino Americans are the voters he believes will "grow up" to become Democrats. *Id*. This is significant as the Legislature's stated purpose for HB56 was to drive such "illegal aliens" and their "anchor babies," *Magee*, 835 F. Supp. 2d at 1182, 1189-90 & n.20—i.e., supposedly future Latino Democrats—out of Alabama. The use of such racial appeals are compelling evidence of discriminatory intent. *See Stout*, 2018 WL 827855, at *6; *Meek v. Metro. Dade Cty.*, 985 F.2d 1471, 1487 (11th Cir. 1993).

These statements must be understood in the context of intense racially polarized voting in Alabama, DE267 at 7, the fact that, after 2011, "67% of the remaining Democrats were Black Legislators who represented Black districts," *id.*; as well as the significant rises in Black political participation, and Latino population growth at the time of HB19's enactment. DE266 at 80 ¶ 302.

"In an environment characterized by racially polarized voting, politicians can predictably manipulate elections . . . to 'minimize or cancel out minority voters' ability to elect their preferred candidates.'" *United States v. McGregor*, 824 F. Supp. 2d 1339, 1346 (M.D. Ala. 2011) (quoting *Gingles*, 478 U.S. at 48). That is, racial polarization "provide[s] an incentive for intentional discrimination in the regulation of elections." *McCrory*, 831 F.3d at 222.

This is all strong evidence that legislators were motivated by a desire to curb the rising electoral influence of voters of color.

2. Plaintiffs Offered Detailed Circumstantial Evidence of Intent.

Circumstantial evidence of discriminatory intent includes, but is not limited to, legislators' departures from past procedures, their foreknowledge of disparate impact, and their rejection of less discriminatory alternatives. *Jean*, 711 F.2d at 1486.

Procedural Departures. When HB19 was passed in 2011, "the Legislature invoked cloture and truncated debate during the passage of the law," DE267 at 43-

44, including holding the microphone so that the Black Caucus could not speak out against the bill. DE255 at 71-72 ¶ 84. And, despite requests, HB19's sponsors were unable to provide opponents with any evidence of voter fraud. *Id.* at 76-77 ¶ 104.

After 2011, state officials departed from past practices in refusing for two years to submit HB19 for preclearance, DE255 at 73-74 ¶¶ 92-95, suggesting that they knew that HB19 would not survive the then extant requirement. *Cf. McCrory*, 831 F.3d at 215-16 (the State's decision to hold a photo ID bill until after *Shelby County* was indicative of discriminatory intent); *Wyche v. Madison Par. Police Jury*, 635 F.2d 1151, 1160 (5th Cir. 1981) (finding that the fact that a change was made "without the approval required under the [VRA]" revealed the parish's discriminatory intent).

Foreknowledge. The Legislative Black Caucus had warned for years that a photo ID requirement would have a disparate impact and, according to former Secretary Chapman, these concerns were "common knowledge" amongst the chief proponents of HB19. DE255 at 73 ¶ 89. The record refutes the District Court's statement that "there is no evidence that Legislators supporting [HB19] believed that [it] would have [a disparate] impact." DE267 at 45.

For example, in 2011, Representative Rich testified that he believed that Latinos in Alabama do not possess driver's licenses, the most common HB19 ID. DE266 at 69 ¶ 254. He also anticipated that HB19's preclearance would result in a

"lengthy court battle and review by the U.S. Justice Department to see if the legislation complies with the 1965 Voting Rights Act." *Id*. at 81 ¶ 307; at 82 ¶ 317. This is the reason that HB19 contains a three-year roll out period. DE255 at 72 ¶ 86. Likewise, former Secretary Chapman testified that previous photo ID bills had failed because the Legislature knew that such bills would not be precleared by the DOJ. DE255 at 73 ¶ 88. A clear inference from this record is that, in 2011, proponents believed that HB19 would have a discriminatory effect in violation of Section 5 of the VRA. At a minimum, this is a reasonable inference, which precluded summary judgment.

Less Discriminatory Alternatives. Finally, HB19's proponents failed to include options, such as a reasonable impediment provision, which would have reduced the law's discriminatory impact. *See supra* at 32-33. Nor did they permit its opponents to introduce any such amendments. *See Veasey*, 830 F.3d at 237.

* * *

Even while failing to analyze the *Arlington Heights* factors, the District Court asserted that the "record in this case is very different" than that in *McCrory*. DE267 at 56-58. But, the evidence of intentional discrimination here is comparable to, or stronger, than it was in *McCrory*.

First, despite the District Court denying Plaintiffs discovery from HB19's proponents, DE158, the record here, unlike in *McCrory*, 831 F.3d at 229, includes

overt statements by legislators reflecting their intent to racially discriminate in voting. *See supra* at 38-43. Second, when the North Carolina legislature considered the photo ID bill in the 2013, it held multiple public hearings, *McCrory*, 831 F.3d at 227-28, but there were no such public hearings in Alabama. Third, just as there was a "rush" to get North Carolina's law passed, *id*., HB19's proponents also rushed it through the Legislature by using cloture and preventing opponents from even speaking. Fourth, the North Carolina law included a reasonable impediment option for voters without ID, *id*. at 240, which Alabama's law does not. This means that, contrary to the District Court's suggestion, DE267 at 46, 56, the North Carolina law was *less restrictive* than Alabama's law. Finally, in both cases, proponents anticipated their laws would likely not be precleared under Section 5, and implemented them only in the wake of *Shelby County*. *McCrory*, 831 F.3d at 228-29.

III. THE POSITIVELY IDENTIFY PROVISION IS A "TEST OR DEVICE" FORBIDDEN BY SECTION 201 OF THE VRA.

The Positively Identify Provision ("PIP") in HB19 allows a voter without HB19 ID to vote if she or he is "positively identified" by two election officials. Ala. Code § 17-9-30(e). The Secretary interprets the PIP to mean that a person without HB19 ID may vote only if election officials, at their discretion, vouch for that person's identity based solely upon personal acquaintance. DE234 12-13 ¶¶ 7-10. If the election officials decline to vouch for a person, that person may cast a provisional

ballot, which will only be counted if the voter returns within three days with HB19 ID. *Id.*

The Secretary's interpretation of the PIP runs afoul of Section 201, which states that "[n]o citizen shall be denied, because of his failure to comply with *any* test or device, the right to vote." 52 U.S.C. § 10501(a) (emphasis added). This prohibition expressly includes "any requirement that a person as a prerequisite for voting . . . prove his qualifications by the voucher of registered voters or members of any other class." *Id*. § 10501(b)(4). The Supreme Court has also held that Section 201 is to be broadly construed in light of "the fact that a 'test or device' may be employed by any official with control over *any aspect* of an election."[11] *United States v. Bd. of Comm'rs of Sheffield*, 435 U.S. 110, 120 (1978) (emphasis added).

Because it is undisputed that the Secretary interprets the PIP as a voucher test, the District Court should have held that the Secretary's interpretation violates Section 201 and granted Plaintiffs' motion for summary judgment. *Cf. Schwier v. Cox*, 439 F.3d 1285, 1286 (11th Cir. 2006) (granting summary judgment for the plaintiffs on a claim brought pursuant to a similar categorical prohibition in the VRA). Instead the court granted the Secretary's cross-motion for summary judgment, reasoning that "no one in Alabama is '*required*' to rely on the positively

[11] The Supreme Court and this Court in the cases cited herein are construing Section 4 of the VRA, not Section 201; but the sections are essentially identical. *Compare* Section 4(a) (52 U.S.C. § 10303(a)(1)), *with* Section 201(a) (52 U.S.C. § 10501(a)).

identify provision because they have the option of acquiring a photo ID with little to no effort and no costs." DE267 at 66-67.

The court's strained reasoning is inconsistent with the plain text of Section 201, and with precedent. Indeed, under the District Court's reasoning, Alabama would be permitted to enact laws that give voters the "choice" between showing photo ID or passing a literacy test. That is not, and cannot be, the law.

A. Text and Precedent Establish that the Secretary's Interpretation of the PIP is a Prohibited Test or Device Because It Is a "Requirement" For Voters Without HB19 ID.

For voters without HB19 ID, the PIP is a voting "requirement" under any ordinary understanding of the word, because it is a "prerequisite for voting" that they must surmount before casting a regular ballot. And Section 201 expressly prohibits "*any* requirement that a person as a prerequisite for *voting*" satisfies a voucher test. 52 U.S.C. § 10501(b)(4) (emphasis added); *see also Arcia v. Fla. Sec'y of State*, 772 F.3d 1335, 1344 (11th Cir. 2014) ("when Congress does not add any language limiting the breadth of that word, 'any' means all"); 52 U.S.C. § 10310(c)(1) (defining "voting" in the VRA to "include all action necessary to make a vote effective").

It does not matter whether those voters could have complied with an alternative voting qualification. In *United States v. Clement*, 231 F. Supp. 913, 916 (W.D. La. 1964), *rev'd as to remedy*, 358 F.2d 89, 93 (5th Cir. 1966), this Court

considered a Louisiana law that required all applicants to provide proof of identity. However, the law allowed applicants to obtain the voucher of two registered voters if the registrar had "reasonable grounds" to challenge the applicant's identity. In enjoining that law, this Court did not treat the use of voucher tests for only "some" voters as acceptable, as the District Court held here. *Id.* Instead, this Court twice held that "requiring *any* applicant" to "comply with *any* . . . test or device" violates the VRA. *Clement*, 358 F.2d at 92-93 (emphases added); *United States v. Ward*, 352 F.2d 329, 331-32 (5th Cir. 1965).

Similarly, the Supreme Court has enjoined a law whereby voters could comply with either a literacy test or a then-valid property qualification.[12] *South Carolina v. Katzenbach*, 383 U.S. 301, 319 (1966). And, the Court has explained that the VRA "bars certain types of voting tests and devices altogether," even if a state "intended [a test or device] to permit" more people to vote. *Reno*, 528 U.S. at 338 n.6.

The District Court's contrary ruling here fails to recognize the context in which the VRA was enacted. When Congress enacted the VRA, tests or devices often contained or were employed as "failsafe" alternatives to other requirements, whose application "assure[d] that illiterate whites were not disenfranchised." S. Rep.

[12] Property qualifications are not per se unconstitutional, *Ball v. James*, 451 U.S. 355, 371 (1981), and the first property qualifications were not struck down until three years later. *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621 (1969).

No. 89-162 (1965), *as reprinted in* 1965 U.S.C.C.A.N. 2508, 2542-43. Far from making those tests or devices more palatable, Congress clearly intended to ban *any* test or device. *Id.*; *see also Katzenbach*, 383 U.S. at 310-11.

Finally, the U.S. Attorney General has also consistently understood the VRA to forbid even those tests that constitute one option for voting among many.[13] In 1992, Mississippi began offering mail-in registration, but required that mail-in registrants comply with a voucher test. Mississippi, like the Secretary, argued that this law did not violate the VRA because it "allow[ed] for an alternative means of registration that [did] not include this voucher requirement—i.e., registration in person." Letter from U.S. Asst. Atty. Gen. John Dunne to Spec. Asst. Atty. Gen. Giles Bryant (May 1, 1992), at 2-3, http://tiny.cc/DOJMS92. The Attorney General rejected this interpretation, and explained that there is "no basis in the [VRA] for concluding that use of a 'test or device' is permissible if limited to one aspect of the voter registration system." *Id*. at 3; *see also* Letter from U.S. Assist. Atty. Gen. Jerris Leonard to Ala. Atty. Gen. MacDonald Gallion (Mar. 13, 1970) http://tiny.cc/DOJAL70 (objecting to a literacy test that applied only to certain mail-in registrants).

[13] The District Court noted that a similar provision was precleared by the DOJ in 2003. DE267 at 67. But that is irrelevant to Plaintiffs' Section 201 claim. Preclearance had "limited meaning" and did "*not* represent approval of the voting change." *Reno*, 528 U.S. at 335. Even a law that the DOJ did not object to under Section 5 could still be "attacked through the normal means." *Id*.

B. A Prohibited "Test or Device" Cannot Be Used in a Proper Manner.

The District Court compounded its errors by suggesting that, even if the voucher test were a voting requirement, it would only be invalid if it were used in an "improper manner." DE267 at 67. But, Section 201's ban on tests or devices is categorical—it does not permit inquiry into whether a test or device has a discriminatory purpose or effect. *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 198 (2009).

In any event, the undisputed expert evidence, described above at 28-29, confirms that the PIP in fact has a significant discriminatory impact.

In addition, from 2014 to 2016, there is undisputed evidence that people without HB19 ID were required to either comply with a voucher test or be prevented from voting. For example, hundreds of in-person voters cast provisional ballots because no election official vouched for them and those ballots were ultimately rejected solely because the voter never presented HB19 ID. DE234 at 17 ¶ 18.

Several Plaintiffs and witnesses who lacked HB19 ID were *required* to comply with the PIP to vote or, because they did not know their poll workers, were not able to vote. DE255 at 103-04 ¶¶ 39-42.

Further, the District Court acknowledged there was evidence that voters were not allowed to vote because the poll worker erroneously applied the PIP, DE267 at 67-68, but it dismissed this evidence as "human error." *Id.* at 68. But such "human

error" is exactly what the VRA was designed to prevent. *See Oregon v. Mitchell*, 400 US 112, 216 (1970) (Op. of Harlan, J.) ("[The forbidden] tests unduly lend themselves to discriminatory application, either conscious or unconscious").

C. The Proper Remedy: An Alternate Interpretation of the PIP

To be clear, the text of the PIP does not violate Section 201; rather the Secretary's interpretation of it as a voucher test is the problem. DE234 at 12 ¶ 8. The remedy for this violation is to strike that interpretation and leave the PIP itself intact. On remand, the Secretary should get "the first pass at devising remedies for [the] violation[]." *Veasey*, 830 F.3d at 270 (citation omitted); *see United States v. Atkins*, 323 F.2d 733, 742 (5th Cir. 1963) (affording Alabama the opportunity to "adopt uniform objective standards" to save its literacy test prior to the VRA).

Former Secretary Chapman already interprets the PIP to allow people to use non-photo ID. DE234 at 13 ¶ 11; at 18 ¶ 20. That interpretation would remedy the Section 201 violation because, under it, the PIP would no longer serve as a voucher test.

CONCLUSION

For the foregoing reasons, the January 10, 2018 order granting summary judgment for the Secretary on all claims should be reversed, Plaintiffs' motion for partial summary judgment should be granted, and the remaining issues should be remanded for trial.

Respectfully submitted on February 21, 2018.

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