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 adopt the certificates of interested persons of the Appellee and amici and make the following disclosures of interested parties and corporate disclosure statement:

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Alabama Securities Commission, Counsel for the former Defendants Governors Kay Ivey and Robert Bentley

Alabama State Conference of the National Association for the Advancement of Colored People, Plaintiff-Appellant

Ambrosio, Giovana – Plaintiff-Appellant

Bentley, Robert J. – former Defendant in his official capacity as the Governor of the State of Alabama

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Byrne, David B. Jr. – Counsel for the former Defendants Governors Kay Ivey and Robert Bentley in their official capacity

Collier, Spencer – former Defendant-Appellee in his official capacity as the Secretary of Law Enforcement of Alabama

Coogler, Hon. L. Scott – United States District Judge, Northern District of Alabama

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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.

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INTRODUCTION

The Secretary's brief fails to address the core defect in the District Court's Opinion: the improper grant of summary judgment where there were plainly disputed material issues of fact. Plaintiffs presented evidence, including substantial expert evidence, that Alabama's photo ID law ("HB19") was motivated by an intent to undermine Black and Latino voter participation, and that it had that effect. The District Court did not enter any findings undermining the conclusions of Plaintiffs' experts. Plaintiffs' evidence was recited, but not disputed. A trial was required.

Nonetheless, the Secretary repeatedly relies on the possibility of a home visit by a mobile ID-issuing unit as a cure-all. Appellee Br. at 28, 31-32, 36, 39, 41, 52, 55, 57. The Secretary finds it irrelevant that tens of thousands of disproportionately Black and Latino voters do not have photo ID, DE255 at 135; DE266 ¶ 342; that Black and Latino voters without ID disproportionately live over five miles from ID-issuing offices; and that they face poverty and transportation burdens to obtaining ID, DE255 at 85-86 ¶¶ 137-40. In the Secretary's and the District Court's view none of this matters because home visits supposedly can provide ID to every voter who lacks one.

But, there have been a total of only five home visits; the text of HB19 does not contemplate such visits; and, contrary to the Secretary's assertions, they have

not been heavily advertised. It is conjecture to posit that a five visit "program" could be scaled to meet the needs of thousands.

Whatever their relevance might be at trial, these five home visits and the Secretary's representations about future visits do not prove beyond a triable dispute that HB19 places no burden on minority voters. Instead, Plaintiffs' evidence would allow a reasonable factfinder to determine both that HB19 violates Section 2 of the Voting Rights Act (VRA) and that, because the Legislature passed HB19 with discriminatory intent, HB19 violates the Constitution.

The Secretary's remaining arguments fare no better. Relying on dissenting opinions, out-of-circuit precedent, improper inferences, and inapposite comparisons, the Secretary claims that: (a) Section 2 can only be violated if a law, on its face, provides for "unequal treatment"; (b) statistically significant racial disparities and burdens are irrelevant; (c) under Plaintiffs' theory, any voter ID law would fail; (d) this Court should ignore probative evidence of discriminatory intent on summary judgment; and (e) his interpretation of the Positively Identify Provision ("PIP") does not violate the VRA. Precedent compels the rejection of these arguments.

I. A TRIAL IS REQUIRED TO RESOLVE DISPUTED MATERIAL ISSUES REGARDING THE SECTION 2 RESULTS CLAIM.

A. Section 2 Addresses "Discriminatory Results," Not Only "Unequal Treatment."

The Secretary contends that Section 2 can only be violated if the challenged law facially requires racially "unequal treatment," regardless of whether it creates unequal results. Appellee Br. at 38-39. The Secretary misreads Section 2—a long-interpreted, well-settled civil rights statute—in a manner that radically departs from the VRA's fundamental purpose of eliminating facially race-neutral "equal treatment" requirements, like the poll tax, *Johnson v. De Grandy*, 512 U.S. 997, 1018 (1994), and from decades of binding precedent, *Thornburg v. Gingles,* 478 U.S. 30, 69-70 (1986); *McMillan v. Escambia County*, 748 F.2d 1037, 1044 & n.18 (Former 5th Cir. 1984); *United States v. Dallas County Commission,* 739 F.2d 1529, 1538 (11th Cir. 1984) ("*Dallas*"); *United States v. Marengo County Commission,* 731 F.2d 1546, 1567-70 (11th Cir. 1984) ("*Marengo*"); *see also* Douglas et al. Amici Br. at 16-27.

The Secretary's interpretation is not the law. Opening Br. at 13-14; *see also Veasey v. Abbott*, 830 F.3d 216, 246 (5th Cir. 2016) (en banc), *cert. denied* 137 S. Ct. 612 (2017); *Mich. State A. Philip Randolph Inst. v. Johnson*, 833 F.3d 656, 667-68 & n.2 (6th Cir. 2016); *League of Women Voters of N.C. v. North Carolina*, 769

F.3d 224, 248 (4th Cir. 2014) ("*LWV*"); *Farrakhan v. Washington*, 338 F.3d 1009, 1019 (9th Cir. 2003).

His position is also atextual. In arguing for an "unequal treatment" approach, the Secretary and supporting amici rely on Section 2(b)'s statement that the statute is violated if voters of color "have less opportunity ... to participate in the political process." Appellee Br. at 30 (quoting 52 U.S.C. § 10301(b)). But, Section 2 was amended in 1982 to make clear that a "discriminatory *result* is all that is required; discriminatory intent is not necessary." *Ga. State Conference of NAACP v. Fayette Cty. Bd. of Comm'rs*, 775 F.3d 1336, 1342 (11th Cir. 2015). The term "opportunity" in the amended Section 2(b) cannot be narrowed to prohibit only "unequal treatment" by ignoring that Section 2(a) explicitly prohibits discriminatory "results." The 1982 amendments would be pointless if Section 2 "encompassed only disparate-treatment claims. If that were the sole ground for liability, the amendments merely restate black-letter law." *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc.*, 135 S. Ct. 2507, 2520-21 (2015) (addressing the Fair Housing Act).

B. The Secretary Misstates the Evidence of the Number of Registered Voters Impacted by HB19.

Beyond arguing for an interpretation of Section 2 that is foreclosed by its text and precedent, the Secretary significantly understates the impact of HB19. Contrary to the Secretary's assertion, the parties do not agree that "almost everyone has [a photo ID]," or that the racial disparities in ID possession are "*de minimis*." Appellee

Br. at 23, 30. Plaintiffs' expert calculated that over 118,000 Alabama registered voters lack a useable HB19-compliant ID, DE255 at 98 ¶ 13; DE266 at 136-37, and that minority voters are approximately twice as likely as white voters to lack that ID, DE255 at 99 ¶ 16. The District Court accepted those estimates as true. DE267 at 46 n.5. Thus, the accepted evidence shows that 3.33% of white, 5.49% of Black, and 6.98% of Latino voters lack useable ID. DE255 at 98-99 ¶ 15.

1. The Court Must Accept Plaintiffs' Expert's Estimate that 118,000 Alabama Registered Voters Lack Useable HB19 IDs.

In suggesting that Plaintiffs' 118,000 estimate is a "gimmick to inflate the numbers," Appellee Br. at 33 n.10, the Secretary invites this Court to engage in impermissible fact-finding at summary judgment, which the District Court properly declined to do.

The Secretary relies on Plaintiffs' lower estimate of voters without any ID to claim that "at most" 50,000 voters lack HB19 IDs. He asks that this Court disregard the additional 68,000 people with "contestable" IDs—IDs that do not match their owners' information as it appears on the voter rolls—because poll workers might permit all of these 68,000 people to vote anyway. *Id.* Yet, he cites nothing in the record for this assumption, and Plaintiffs' evidence suggests otherwise. DE255 at 98 ¶ 10.

Unlike in *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), where the district court rejected the non-movant's expert testimony as

"implausible," *id*. at 594 n.19, here, the District Court leveled no criticisms at Plaintiffs' expert testimony. Instead, the Court *denied as moot* the Secretary's motion to exclude this testimony on "contestable" IDs and "consider[ed] as true" the estimate of 118,000 affected voters.[1] DE267 at 46 n.5.

Because "an issue of fact has been created [by the parties' conflicting and admissible expert testimony over the number of voters that lack ID], its resolution is for the trier of fact." *Newmann v. United States*, 938 F.2d 1258, 1262 (11th Cir. 1991).

2. Plaintiffs' Section 2 Results Claim Only Required a Showing of Statistical Significance—Which Is Undisputed Here.

Even accepting Plaintiffs' lower estimate that 50,000—rather than 118,000—voters lack any ID, there is still a triable issue as to whether HB19 disproportionately burdens Black and Latino voters. As the Secretary's own expert concedes, whatever numbers are used, there is a statistically significant disparity in ID possession.

"An emphasis on showing a statistically significant disparate impact is typical of claims based on discriminatory effect." *Garza v. Cty. of Los Angeles*, 918 F.2d 763, 770 (9th Cir. 1990). The focus is on the affected voters, *cf. Johnson*, 512 U.S.

[1] Plaintiffs' statistical expert identified numerous ways in which the Secretary's expert undercounted the number of impacted voters, including: (1) comparing match lists from different time periods; (2) improperly excluding certain voters from no-match lists; and (3) failing to re-weight the survey after removing individuals from the no-match list. *See* DE252-16 at 100-101; *id*. at 9 ¶ 29.

at 1018-19, not on "absolute" numerical comparisons. *Williams v. City of Dothan*, 818 F.2d 755, 764 (11th Cir. 1987). Disparities of two or three standard deviations establish a prima facie case of discrimination. *Peightal v. Metro. Dade Cty.*, 26 F.3d 1545, 1555-56 & n.16 (11th Cir. 1994). Here, all standard deviations are over 10, and most well over 30.[2] DE255 at 97-99 ¶¶ 8, 17.

The Secretary seeks to avoid this dispositive point by asserting that the racial differences in possession rates are too small to matter. *See, e.g.*, Appellee Br. at 24, 30. But no Circuit has ever required a showing of some minimum number of affected individuals once statistical significance is shown. *Stagi v. Nat'l R.R. Passenger Corp.*, 391 F. App'x 133, 139-40 (3rd Cir. 2010); *see also LWV,* 769 F.3d at 244; *Benson v. Tocco, Inc.*, 113 F.3d 1203, 1209 (11th Cir. 1997).

Even accepting the Secretary's view, Plaintiffs have shown that over 118,000 voters lack useable ID, and that minorities are nearly twice more likely than whites to be affected.[3] These statistics represent thousands of minority voters whose rights

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[2] Under the Secretary's strawman hypothetical—which questions whether HB19 could be invalidated where identical racial possession rates are disrupted by a single Black voter moving away, Appellee Br. at 30-31—no expert could have found statistically significant disparities.

[3] The Secretary argues that representing these racial disparities as a ratio is somehow misleading. Appellee Br. at 24 n.6. It is not. This approach is standard practice in voting cases. *See*, e.g., *Hunter v. Underwood*, 471 U.S. 222, 227 (1985) (Black voters were "at least 1.7 times as likely as whites to suffer disfranchisement"); *Veasey*, 830 F.3d at 251-52 & n.45 (similar).

are impacted by HB19, and "no amount of voter disenfranchisement can be regarded as '*de minimis*.'" *Florida v. United States*, 885 F. Supp. 2d 299, 318 (D.D.C. 2012).

C. The Evidence Regarding the Burdens Entailed in Obtaining ID Should Have Been Tested at Trial.

1. Burdens Are Real and Not Merely a Matter of "Inconvenience."

Plaintiffs have identified numerous non-trivial burdens to obtaining ID that disparately affect voters of color. *See, e.g.*, Opening Br. at 38-43.

a) Distance and Vehicle Ownership

Voters without a useable HB19 ID are less likely to have access to vehicles than voters with ID; and Black voters without HB19 ID are the most impacted. DE267 at 37. For example, 63% of Black voters without *any* HB19 ID live in a household without a working vehicle. DE255 at 140-41; DE252-16 at 17 ¶ 49, 150; DE266 at 93-94 ¶¶ 356-59.

The Secretary argues that minorities "are more likely than white voters to live within five miles of a Board of Registrars' office." Appellee Br. at 36 n.12. That is a red herring because the Secretary's percentages compare voters of a particular race that live close to an ID-issuing office with voters *of that same race* who live far from one. But what matters when measuring disparate impact is a comparison of (1): the percentage of minorities *out of all voters* who lack an HB19 ID and live far from an ID-issuing office, with (2) the overall percentage of minority registered voters. *Cf. Williams*, 818 F.2d at 764.

Using the proper percentages, Black voters are *more likely* to lack any ID and live more than five miles from an ID-issuing office: Black voters make up 34.61% of this group, yet they only comprise 27% of all registered voters. DE252-16 at 2 ¶ 2, 11 ¶ 34. These burdens are starker when vehicle access is considered. Black voters comprise 45.3% of voters who lack usable ID, have no vehicle in their household, and live more than five miles from an ID-issuing office. *Id.* at 15 ¶ 44.

b) Poverty and Related Burdens

Voters of color without usable ID are more likely to: live below the poverty line, DE255 at 90 ¶ 157, live in single parent households, DE255 at 90-91 ¶¶ 157-63, and have trouble taking time off work and arranging for childcare, DE255 at 91 ¶ 162. These factors make it harder to obtain ID.

The Secretary fails to meaningfully address these burdens and instead argues that burdens associated with poverty are "not caused by a person's race, but by a person's means." Appellee Br. at 43. But, here, because racial disparities in poverty "exist due to the vestigial effects of past purposeful discrimination," *Gingles*, 478 U.S. at 69-70; *see* DE255 at 61-63 ¶¶ 50-58, burdens associated with poverty are caused by race for purposes of Section 2, *see League of United Latin American Citizens v. Perry*, 548 U.S. 399, 440 (2006) ("*LULAC*").

c) Penalty of Perjury

Plaintiffs presented evidence that the Secretary's requirement that applicants for voter ID cards attest under penalty of perjury (and a possible felony conviction for an incorrect answer) that they lack any other undefined "valid" ID has a chilling effect on such applicants. Even state officials testified that this is true. DE266 at 123 ¶ 504.

The Secretary contends that Plaintiffs' evidence should be ignored because "[t]he record does not contain a single voter who was unable to get an ID" because of this requirement. Appellee Br. at 32. The Secretary misses the point: the real possibility of felony prosecution may intimidate people from even applying for voter ID cards. DE266 at 123 ¶ 504; *cf. Dallas*, 739 F.2d at 1538 (error for district court not to consider evidence of Black people's fear of visiting the courthouse to register).

2. The Home Visit Program Does Not Remedy the Travel Burden.

Ultimately, the Secretary insists that these disparate burdens do not matter because of the possibility of home visits. Yet, home visits cannot address the chilling effect of the penalty of perjury provision. Nor is there any evidence—much less undisputed evidence—that the home visits have meaningfully addressed the needs of the 118,000 affected voters or eliminated the racial disparities in ID possession.

The text of HB19 nowhere mentions home visits, nor does it create any program for them. There have only been five home visits.[4] Inextricably related to that fact is the factual dispute as to whether this program is adequately advertised. The Secretary asserts that he spent millions to advertise HB19, Appellee Br. at 22, but he testified that he did "not advertise[ ] [home visit] in paid mediums." DE229-1 at 41 (163:13-20). Instead, he merely makes public statements, "tell[ing] [people about the home visit option] everywhere I go." Appellee Br. at 32. This is hardly undisputed evidence supportive of summary judgment. Opening Br. at 42-43. In fact, Plaintiffs showed that people are generally unaware of this program. DE252-19 at 2 ¶ 1; DE252-7 at 4 ¶ 21; DE252-14 at 2 ¶ 4.

3. Lack of ID Does Not Imply Apathy.

The Secretary repeatedly trivializes the burdens minority voters face by suggesting that if a person does not have HB19 ID, they probably do not want one. *See* Appellee Br. at 25, 31. But voter "apathy" cannot be presumed, *Marengo*, 731 F.2d at 1568, and no mere "preference" leads to racial disparities in ID possession. *N.C. State Conference of NAACP v. McCrory,* 831 F.3d 204, 233 (4th Cir. 2016).

[4] While the first home visit occurred in October 2015, Appellee Br. at 33, this was a "one off" attempt to address the repeated requests of a legislator to assist her homebound constituent. DE255 at 93 ¶ 174. The other four visits occurred between June 2016 and March 2017, when, well-after the start of this litigation, the Secretary began publicly promoting that others could receive home visits. DE224-11 at 69-70.

Further, Plaintiffs' evidence is focused only on actual registered voters, i.e., people who presumptively *do* want to vote.[5]

D. The Extensive Turnout Evidence Should Have Been Tested at Trial.

While the Secretary concedes that Plaintiffs' turnout evidence created a factual dispute, he makes the *ipse dixit* argument that this dispute is not "genuine." Appellee Br. at 34-35. The Secretary cannot simply wave off as "not reasonable" Plaintiffs' expert's opinion that HB19 reduced minority turnout. That expert opinion was grounded on sophisticated analyses that controlled for the Secretary's other hypothesized explanations. *See* Opening Br. at 44-45. The question of whether HB19 caused the relative decline in minority turnout should at least be tested at trial.

E. There Is a Triable Issue on the Senate Factors Evidence Regarding Poverty and the Alleged "Voter Fraud" Justification for HB19.

Section 2 reaches voting devices that "interact[ ] with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters." *Gingles*, 478 U.S. at 47. In arguing that the Senate Factors are irrelevant to Plaintiffs' Section 2 claim, the Secretary urges this Court to reject its own precedent.

[5] The Secretary relies on the views of a few probate judges, Appellee Br. at 23, yet ignores contrary testimony from other probate judges and elected officials who opposed HB19. *See*, *e.g.*, DE255 at 103 ¶ 38.

See Johnson v. Governor of Florida, 405 F.3d 1214, 1227 n.26 (11th Cir. 2005) (en banc); *Burton v. City of Belle Glade*, 178 F.3d 1175, 1198 (11th Cir. 1999).

The Secretary and his amici also argue that a causal link between the challenged device and racial discrimination must be established. Plaintiffs agree. But, the Secretary ironically ignores both the causation requirement set forth in the statute itself—which asks whether, given the "totality of circumstances," the device abridges the right to vote on account of race, 52 U.S.C. § 10301(b)—and that this Court has said that discrimination in areas like education and criminal justice may establish the requisite causation under this "totality" inquiry, *Governor of Florida*, 405 F.3d at 1227 n.26; *Marengo*, 731 F.2d at 1559.

A robust "totality of circumstances" inquiry does not threaten all voting or photo ID laws; it *limits* Section 2 by "effectively allow[ing] examination of differing fact patterns." *Veasey*, 830 F.3d at 248. For example, a voter ID law with a reasonable impediment option might be shown not to have violate Section 2. *Id*.

Here, the Senate Factors "properly link the effects of past and current discrimination with the racially disparate effects of the challenged law." *Id*. at 246. Each of the Senate Factors, Opening Br. at 46, including the fifth and ninth factors which the Secretary's brief attacks, support Plaintiffs' Section 2 claim.

1. Factor Five: Whether Minorities Bear the Effects of Discrimination, which may Hinder Their Ability to Participate in the Political Process.

The Secretary does not dispute that this factor favors Plaintiffs. Instead, he dismisses its relevance, stating that "minority poverty rates are an unfortunate sociological fact nationwide." Appellee Br. at 36-37.

But, as stated above at 9, racial discrimination *by Alabama* has resulted in the disproportionate minority poverty here, DE255 at 61-63 ¶¶ 51-58, which limits the ability of impacted minorities to obtain ID, *id*. at 90 ¶ 157. This evidence is relevant in assessing HB19's impact. *Gingles*, 478 U.S. at 69-70.

2. Factor Nine: The Secretary Fails to Acknowledge the Tenuousness of Any Voter Fraud Justification for HB19.

With one exception, all of the Secretary's evidence of alleged voter fraud concerns *absentee* voter fraud. But, Plaintiffs dispute that HB19 deters absentee voter fraud. Opening Br. at 20. Because "there cannot be a total disconnect between the State's announced interests and the statute enacted," *Veasey*, 830 F.3d at 262, Plaintiffs properly objected to the evidence of absentee voter fraud as irrelevant, *see, e.g.*, DE255 at 14-15 ¶¶ 7-21.

Plaintiffs also dispute the Secretary's claim, Appellee BR. at 29, that HB19 deters absentee fraud. People have, for instance, committed absentee voter fraud in Alabama simply by requesting and photocopying photo IDs of voters and turning in those photocopies with absentee ballots. DE229-27 at 14-15, 17; *see* DE253-11. The

evidence regarding the ease of forging photo IDs was also disputed.[6] DE232-19 at 9.

The Secretary speculates that HB19 *might* be useful in preventing absentee voter fraud because some voters submit their absentee ballot in person; and some photo IDs have signatures. Appellee Br. at 26. But, an absentee ballot, whether mailed or dropped off in-person, is submitted in a *sealed envelope*. *See* Ala. Code § 17-11-9. HB19 does not require (and there is no evidence showing) that election officials compare the faces of people who submit their absentee ballots in-person with the photocopied IDs inside that envelope. Further, it is undisputed that absentee election managers are not tasked with comparing signatures on ballots with signatures on IDs. DE255 at 80 ¶ 118. Finally, while the Secretary asserts that having photocopies of IDs could be useful in future investigations, he does not explain why this would be true or how it would deter fraud. These are triable factual disputes.

F. A Reasonable Impediment Remedy Appropriately Addresses Plaintiffs' Results Claim.

The Secretary concedes, by his silence, that the District Court had the authority to impose a "reasonable impediment" remedy for a Section 2 violation. But, the Secretary does assert a policy argument about the "inappropriateness" of

[6] When asked if being required to send in a photocopy of a photo ID prevents voter fraud, one of the Secretary's witnesses testified, "no ... I don't believe it does." DE232-19 at 10. Another of the Secretary's witnesses testified that, like utility bills, photocopies of photo IDs can also be mass produced. DE229-5 at 13.

this remedy. He contends that individuals seeking to commit fraud could abuse a reasonable impediment option. Appellee Br. at 42. Yet he ignores the fact that such an option (or non-photo ID) is permitted in most other voter ID states, including Indiana, Florida, and all of the amici states, except Kansas,[7] Indiana Amici Br. at 9, and that courts regard it as a valid remedy, *see, e.g.*, *McCrory*, 831 F.3d at 240; *Veasey*, 830 F.3d at 268-70; *Frank v. Walker*, 819 F.3d 384, 386-87 (7th Cir. 2016). Clearly, such states and courts have determined that a reasonable impediment option can be implemented without corrupting the election process. Any dispute on this issue could be tested at trial.

II. A TRIAL IS REQUIRED TO RESOLVE DISPUTED MATERIAL ISSUES REGARDING PLAINTIFFS' CONSTITUTIONAL CLAIM.

A. The Secretary Conflates the Evidence Plaintiffs Needed to Offer for their Constitutional Claim and Section 2 Claim.

While Plaintiffs have satisfied Section 2, the Constitution does not require the same proof of impact as Section 2. *McCrory*, 831 F.3d at 231; *see also* ACLU Amici Br. at 31 (collecting cases). This is because, once unconstitutional discrimination is shown, HB19 must be treated like an express racial classification, which is subject to strict scrutiny. *Hunt v. Cromartie*, 526 U.S. 541, 546 (1999). Any outstanding

[7] Wendy Underhill, National Conference of State Legislatures: Voter Identification Requirements, http://www.ncsl.org/research/elections-and-campaigns/voter-id.aspx (Jan. 5, 2018).

discriminatory effect must then be eliminated. *See* ACLU Amici Br. at 25 n.3 (citing *Stout v. Jefferson Cty. Bd. of Educ.*, 882 F.3d 988, 1015 (11th Cir. 2018)).

For example, in *City of Richmond v. United States*, the Supreme Court found that the challenged annexation did not violate the effects prong of the VRA. 422 U.S. 358, 371-72 (1975). But, it remanded the case to the district court to decide whether the annexation had a discriminatory purpose. *Id.* at 378-79. The Secretary attempts to distinguish *Richmond* by arguing that the Court's holding was limited to Section 5 cases. Appellee Br. at 48. But the Court's reasoning did not rest on Section 5's text. Rather, the Court expressly relied on the Constitution, stating "[a]n official action, whether an annexation or otherwise, taken for the purpose of discriminating ... on account of ... race has no legitimacy at all under our Constitution." *City of Richmond*, 422 U.S. at 378.

That *any* amount of disparate impact is sufficient to show that an intentionally discriminatory law violates the Constitution has long been recognized in voting cases. *See, e.g.*, *City of Pleasant Grove v. United States*, 479 U.S. 462, 471-72 & n.11 (1987); *City of Port Arthur v. United States*, 459 U.S. 159, 168 (1982); *Anderson v. Martin*, 375 U.S. 399, 403-04 (1964); *Dillard v. Crenshaw Cty.*, 649 F. Supp. 289, 297 (M.D. Ala. 1986); *see also LULAC*, 548 U.S. at 438-40 ("Even if [the challenged plan's] disproportionality were deemed insubstantial, that consideration would not overcome the other evidence of vote dilution," including

evidence that bore "the mark of intentional discrimination"); *Miss. Univ. for Women v. Hogan,* 458 U.S. 718, 723 n.8 (1982) (a single-sex school had a disparate impact where the plaintiff's sole burden was the "inconvenience" of traveling to a nearby coed school); *Griffin v. Cty. Sch. Bd. of Prince Edward Cty.*, 377 U.S. 218, 230-31 (1964) (enjoining the closure of all schools because it was intended to discriminate).

B. Plaintiffs' Evidence of the Disproportionate Burdens Imposed by HB19 Requires a Trial on Their Constitutional Claims.

The above makes clear that the Secretary's arguments about the supposed lack of burden imposed by HB19 are even weaker with respect to Plaintiffs' constitutional claims. Where, as here, there is evidence of intentional discrimination, "the burden rests on the State to prove that its proposed remedy completely cures" all harm, such that HB19 "no longer imposes any lingering burden." *McCrory*, 831 F.3d at 240; *accord Stout*, 882 F.3d at 1014. As discussed, the five home visits upon which the Secretary heavily relies do not relieve the lingering burden on minorities.

Indeed, it is undisputed that when the Legislature passed HB19, voters of color were (and are) less likely to possess photo ID. Unlike voters who already had IDs, HB19 required those disproportionately minority voters without ID to obtain one before voting. Thus, HB19 "inevitably increases the steps required [for minorities] to vote." *McCrory*, 831 F.3d at 231; *see id.* at 240-41 (enjoining an intentionally discriminatory photo ID law, even where a later ameliorative amendment provided voters without ID a method of voting, because it still required the targeted minorities

"to take affirmative steps ... to comply with a provision that ... was enacted with racially discriminatory intent"); *see also* ACLU Amici Br. at 32-33. The Legislature's intentional imposition of this disparate burden is a redressable injury. *Cf. Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 666 (1993) ("When the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group, a member of the former group seeking to challenge the barrier need not allege that he would have obtained the benefit but for the barrier ....").

Indeed, despite the Secretary's purported efforts over the years, minorities still disproportionately lack ID, proving that his efforts have not completely remedied HB19's intended disparate impact. *See Hunter*, 471 U.S. at 227-28 (holding a law unconstitutional because of its discriminatory intent and because, despite ameliorative changes, its disparate effect "persist[ed]"); *Dillard v. Crenshaw Cty.*, 831 F.2d 246, 250 (11th Cir. 1987).

The cases cited by the Secretary to argue that *some* discriminatory effect is required are not to the contrary. *See* Appellee Br. at 46 (citing *Shaw v. Hunt*, 517 U.S. 899, 923 (1996) (Stevens, J., dissenting); *Davis v. Bandemer*, 478 U.S. 109, 127 (1986); *Palmer v. Thompson*, 403 U.S. 217, 224 (1971)). Plaintiffs' position is not that HB19 lacks any impact, but that the evidence needed to prove disparate

impact under Section 2 is different than under the Constitution. *See McCrory*, 831 F.3d at 231 & n.8.

The Secretary's cases are also inapposite here. In *Palmer*, the Court simply held that, whatever the effect, there was no discriminatory intent. *See Washington v. Davis*, 426 U.S. 229, 242-43 (1976) (discussing *Palmer*). The Court has expressly held that *Bandemer*, a partisan gerrymandering case, is inapplicable to intentional racial discrimination claims. *See Shaw v. Reno*, 509 U.S. 630, 650-51 (1993). Most telling is the Secretary's citation to the *dissent* in *Shaw v. Hunt*, where Justice Stevens argued that white voters could not attack a racial gerrymander without proving its dilutive effect. 517 U.S. at 921. But, the Court had previously rejected this position and held that racial gerrymanders "receive close scrutiny even when they may be said to burden or benefit the races equally." *Reno*, 509 U.S. at 651; *see also* SPLC Amici Br. at 36-38.

C. Plaintiffs' Extensive Evidence of Discriminatory Intent Precluded Summary Judgment.

Lacking any persuasive argument that HB19 has—beyond triable dispute—eliminated *any* disparate impact on minorities, the Secretary reaches beyond the grounds on which the District Court decided this case. Although the District Court acknowledged that Plaintiffs had presented evidence of discriminatory intent underlying HB19, DE267 at 42-44, the Secretary attacks that evidence, focusing on the alleged difficulty in proving the "sole purpose" of the Legislature. Appellee Br.

at 48-49. But, Plaintiffs need not prove that "racial discrimination was a 'dominant' or 'primary' motive, only that it was a motive." *Dallas*, 739 F.2d at 1541 (citation omitted). And Plaintiffs presented extensive evidence that the Legislature was motivated, in part, by discrimination. The Secretary's attacks on the relevance or significance of this evidence simply create triable disputes. *Hunt*, 526 U.S. at 549.

Indeed, the Secretary does not dispute that Plaintiffs' evidence includes overt racial statements and contemporary discrimination by the legislators who passed HB19.[8] This pattern of discriminatory actions by the Legislature as a whole, and by HB19's sponsors in particular, requires "no psychoanalysis or dissection." *Glassroth v. Moore*, 335 F.3d 1282, 1296 (11th Cir. 2003). Yet, the Secretary argues that this is irrelevant because aspects of HB19—such as the availability of certain HB19-compliant IDs—mean that the Legislature could not have discriminated.

This is incorrect.

First, the contemporaneous, and nearly contemporaneous, statements and actions of legislators are highly relevant and cannot be dismissed at summary judgment. *See* Opening Br. at 21, 55-56, 59. For example, although Senator Dixon

[8] The Secretary disputes Plaintiffs' characterization of some evidence, like HB19's historical background. Appellee Br. at 16-17. But, this Court found a prima facie case of selective prosecution, based in part on direct evidence, *United States v. Gordon*, 817 F.2d 1538, 1040-41 (11th Cir. 1987), and the "two people" who tied the National Voter Registration Act to photo ID laws were exceptionally influential: Senator Dixon and the Chair of Alabama's Republican Party. DE255 at 12-13 ¶¶ 2-3.

retired shortly before HB19 was enacted, he was still considered a leader on photo ID issues by Secretary of State Beth Chapman, herself a chief architect of HB19 in 2011, and he previously worked directly with Representative Kerry Rich, HB19's lead sponsor. DE255 at 52 ¶ 15; at 64-65 ¶¶ 61-64. It is reasonable to infer that HB19's sponsors in 2011 shared or were influenced by Senator Dixon's discriminatory intent. *Cf. Stout*, 882 F.3d at 1007 (recognizing that private citizens' statements of discriminatory intent are probative of a government body's intent where there is evidence that those citizens influenced the government body). Indeed, the Secretary himself recognizes that the prior deliberations on photo ID laws are relevant. He claims that no debate on HB19 was necessary in 2011 because "the Legislature had debated the issue for decades," Appellee Br. at 20, i.e., the period when Senator Dixon led efforts to pass photo ID bills. The pertinence of Senator Dixon's views is at least a triable dispute.

Rather than acknowledge that the legislators who sponsored HB19 in 2011 also called Black voters "aborigines" and made prejudiced comments about Latinos, Opening Br. at 21, the Secretary focuses on the work of the Democracy Defense League (DDL)—"citizen activists" whom he claims were concerned about voter fraud and lobbied for HB19. Appellee Br. at 50. But, Plaintiffs presented evidence that, whatever the efforts of DDL, the Legislature in 2011 was not in fact aware of any alleged fraud. DE255 at 76-77 ¶ 104. Further, the motives of DDL's leaders are

suspect, as their testimony suggests that they accept the racist stereotype that Black Alabamians are more likely to commit fraud than whites. DE255 at 82 ¶¶ 127-29. Thus, the Secretary's assertions that legislators were influenced by the DDL provides another reason why a factfinder might reasonably infer discriminatory intent. *See Stout*, 882 F.3d at 1007.

Contrary to the Secretary's assertions, Appellee Br. at 50, record evidence also suggests that the Legislature *believed* that voters of color were less likely to possess HB19-compliant ID. Representative Rich anticipated that preclearance of HB19 would result in a "lengthy court battle." Opening Br. at 62-63. If he sincerely believed HB19 was nondiscriminatory, Representative Rich would have no reason to believe it would result in a preclearance objection. Similarly, Secretary Chapman testified that pro-HB19 legislators had failed to pass similar bills because they believed such bills violated Section 5. *Id*. A factfinder could reasonably infer from this that legislators believed in 2011 that HB19 had a discriminatory effect. This is not "post-enactment" evidence. Appellee Br. at 51. That state officials believed in 2011 that HB19 would be denied preclearance is contemporaneous evidence that they believed it was discriminatory.

Also incorrect is the Secretary's claim that the Legislature could not have intended to discriminate because HB19 accepts IDs that are "disproportionately held by minorities," Appellee Br. at 50, specifically "military, government employee, and

student IDs," *id*. at 20. Yet, there is no record evidence that clearly supports this proposition: the Secretary simply relies on demographic data for some (but not all) Alabama agencies and colleges.

In fact, Plaintiffs offered evidence that minorities statewide are less likely to possess student IDs, DE252-9 at 121-22 ¶ 247, and that Representative Rich declined to include some IDs that minorities are more likely to possess, such as Medicaid or food stamp cards. DE255 at 70 ¶¶ 78-79.

Plaintiffs are not required to prove that the Legislature took the most discriminatory approach. *Cf. McCrory*, 831 F.3d at 240-41. Whatever the effect of the Legislature's individual decisions about which IDs to accept, both parties' experts indisputably found that, as a whole, Alabamians of color are less likely than whites to possess HB19-compliant IDs. *Supra* at 5.

III. THE POSITIVELY IDENTIFY PROVISION IS A FORBIDDEN "TEST OR DEVICE."

The Secretary's interpretation of the PIP is prohibited by Section 201 of the VRA. *See* Opening Br. at 64-70. The Secretary interprets the PIP as a "voucher" test insofar as a registered voter without ID can vote only if two election officials are acquainted with that voter and attest to that voter's identity.[9] DE234 at 12 ¶ 8.

[9] The Secretary suggests that his interpretation of the PIP does not resemble "the outlawed devices used in the Jim Crow era." Appellee's Br. at 58. But this Court enjoined a voucher test, which required a witness to "affirm that he is acquainted

The Secretary responds that the PIP is not a "requirement" or "qualification," and that Plaintiffs seek an improper remedy. Appellee Br. at 53-62. His contentions are meritless.

A. For People without ID, the PIP is a "Prerequisite," "Requirement" or "Qualification."

Those registered voters without ID who arrive at the polls on Election Day have only one option if they wish to leave having cast a regular ballot: hope two poll officials will exercise their "virtually uncontrolled discretion" to vouch for them. *Louisiana v. United States*, 380 U.S. 145, 150 (1965). This is a very real "requirement" for people like Giovanna Ambrosio, Christopher Cameron, Jewel Castophney, Josh Wahl, Edna Williams, and the other tens of thousands without ID.[10] The Secretary asserts that the PIP is not a "requirement" because "[a]ny voter who does not have a photo [ID] can get one," Appellee Br. at 57, but this is contradicted by, among other things, the undisputed record of provisional ballots rejected for lack of ID, *see* Opening Br. at 45, 69.

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with the applicant" for voter registration. *United States v. Logue*, 344 F.2d 290-91 (5th Cir. 1965).

[10] The Secretary claims that "it is not believable" that Ms. Ambrosio's school obligations prevented her from obtaining ID. Appellee Br. at 55. But, Ms. Ambrosio indisputably stated so under oath. She also testified to the danger of walking to the registrar and burdens associated with familial obligations. DE255 at 37-38 ¶¶ 243-44. And Ms. Castophney twice went to a mobile unit seeking ID and twice left without one. *See* DE266 at 97-98 ¶ 383.

The Secretary also says that a "requirement" under Section 201 must apply to every voter. His argument "relie[s] too greatly on semantics." *Dent v. Duncan*, 360 F.2d 333, 336 (5th Cir. 1966) (Rives, J., concurring).

Section 201's text is not so constrained. Rather, Section 201 is a "potent weapon," *United States v. Board of Commissioners of Sheffield*, 435 U.S. 110, 121 (1978), that must "be interpreted in a manner that provides the broadest possible scope in combating racial discrimination," *Chisom v. Roemer*, 501 U.S. 380, 403 (1991) (quotation marks and citation omitted). The Secretary's interpretation conflicts with precedent holding that "requiring any applicant" to "comply with any ... test or device" violates Section 201.[11] *United States v. Clement*, 358 F.2d 89, 92-93 (5th Cir. 1966). The U.S. Attorney General, "whose interpretation of the [VRA] is entitled to considerable deference," *Pleasant Grove*, 479 U.S. at 468, has also rejected this narrow construction of Section 201. *See* Opening Br. at 68.

The PIP also *is* a "qualification." Voters without ID must rely on the voucher of officials as proof of identity. Proof of identity is a "qualification" in Alabama and that might prove other qualifications like age. As the Secretary concedes, precedent, *United States v. Ward*, 349 F.2d 795 (5th Cir. 1965), also "lump[ed] proof of identity together with [other] qualifications." Appellee Br. at 58.

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[11] *Clement*, wherein "some," but not all, Black voters, required a voucher as proof of their identity, 231 F. Supp. 913, 916 (W.D. La. 1964), is cited by Congress as an example of prohibited practices. S. Rep. 89-162, 1965 U.S.C.C.A.N. 2508, 2549.

B. The Secretary's Argument Regarding the Remedy is Premature.

Plaintiffs accept that the Secretary should get "the first pass" at interpreting the PIP to comport with Section 201. Opening Br. at 70. Thus, the Secretary's assertion that the remedy Plaintiffs seek "is improper," Appellee Br. at 60, is premature.

Plaintiffs *did* suggest that former Secretary Chapman's interpretation of the PIP—which allows voters to use non-photo ID—does not violate Section 201. *See* Opening Br. at 70. The Secretary responds that the Legislature never would have intended this. Appellee Br. at 61. But, Secretary Chapman was Secretary of State when HB19 was passed, helped create HB19, and was responsible for its initial interpretation. DE234 at 13-14 ¶ 11. She plainly would know what the Legislature intended.

CONCLUSION

Plaintiffs respectfully request that this Court reverse and remand their Section 2 and constitutional claims for trial, and grant Plaintiffs summary judgment on the Section 201 claim.

Respectfully submitted on April 13, 2018.

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