I'Anson-Hoffman Inn of Court
October 5, 2016

Election Litigation in the Lead Up to November 2016

Selected Readings

NAACP v. McCrory, 2016 WL 4053033 (4th Cir. 2016)(edited, footnotes omitted)

Amy Howe, *North Carolina comes up one vote short for stay in election law case*, SCOTUSBLOG (Aug. 31, 2016)

Ohio Democratic Party v. Husted, 2016 WL 4437605 (6th Cir. 2016)(edited, footnotes omitted)

David Savage, *Court disputes over voting laws often divide justices along party lines*, LOS ANGELES TIMES (September 12, 2016)

Henry Gass, *Why Red State Voting Laws Keep Getting Struck Down*, CHRISTIAN SCIENCE MONITOR (September 9, 2016)

NAACP v. McCrory, 2016 WL 4053033 (4th Cir. 2016)

DIANA GRIBBON MOTZ, Circuit Judge, writing for the court except as to Part V.B.:

These consolidated cases challenge provisions of a recently enacted North Carolina election law. The district court rejected contentions that the challenged provisions violate the Voting Rights Act and the Fourteenth, Fifteenth, and Twenty-Sixth Amendments of the Constitution. In evaluating the massive record in this case, the court issued extensive factual findings. We appreciate and commend the court on its thoroughness. The record evidence provides substantial support for many of its findings; indeed, many rest on uncontested facts. But, for some of its findings, we must conclude that the district court fundamentally erred. In holding that the legislature did not enact the challenged provisions with discriminatory intent, the court seems to have missed the forest in carefully surveying the many trees. This failure of perspective led the court to ignore critical facts bearing on legislative intent, including the inextricable link between race and politics in North Carolina.

Voting in many areas of North Carolina is racially polarized. That is, "the race of voters correlates with the selection of a certain candidate or candidates." Thornburg v. Gingles, 478 U.S. 30, 62, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986) (discussing North Carolina). In Gingles and other cases brought under the Voting Rights Act, the Supreme Court has explained that polarization renders minority voters uniquely vulnerable to the inevitable tendency of elected officials to entrench themselves by targeting groups unlikely to vote for them. In North Carolina, restriction of voting mechanisms and procedures that most heavily affect African Americans will predictably redound to the benefit of one political party and to the disadvantage of the other. As the evidence in the record makes clear, that is what happened here.

After years of preclearance and expansion of voting access, by 2013 African American registration and turnout rates had finally reached near-parity with white registration and turnout rates. African Americans were poised to act as a major electoral force. But, on the day after the Supreme Court issued Shelby County v. Holder, ––– U.S. ––––, 133 S.Ct. 2612, 186 L.Ed.2d 651 (2013), eliminating preclearance obligations, a leader of the party that newly dominated the legislature (and the party that rarely enjoyed African American support) announced an intention to enact what he characterized as an "omnibus" election law. Before enacting that law, the legislature requested data on the use, by race, of a number of voting practices. Upon receipt of the race data, the General Assembly enacted legislation that restricted voting and registration in five different ways, all of which disproportionately affected African Americans.

In response to claims that intentional racial discrimination animated its action, the State offered only meager justifications. Although the new provisions target African Americans with almost surgical precision, they constitute inapt remedies for the problems assertedly justifying them and, in fact, impose cures for problems that did not exist. Thus the asserted justifications cannot and do not conceal the State's true motivation. "In essence," as in League of United Latin American Citizens v. Perry (LULAC), 548 U.S. 399, 440, 126 S.Ct. 2594, 165 L.Ed.2d 609 (2006), "the State took away [minority voters'] opportunity because [they] were about to exercise it." As in LULAC, "[t]his bears the mark of intentional discrimination." Id.

Faced with this record, we can only conclude that the North Carolina General Assembly enacted the challenged provisions of the law with discriminatory intent. Accordingly, we reverse the judgment of the district court to the contrary and remand with instructions to enjoin the challenged provisions of the law.

I.

"The Voting Rights Act of 1965 employed extraordinary measures to address an extraordinary problem." Shelby Cty., 133 S.Ct. at 2618. Although the Fourteenth and Fifteenth Amendments to the United States Constitution prohibit racial discrimination in the regulation of elections, state legislatures have too often found facially race-neutral ways to deny African Americans access to the franchise. See id. at 2619; Johnson v. De Grandy, 512 U.S. 997, 1018, 114 S.Ct. 2647, 129 L.Ed.2d 775 (1994) (noting "the demonstrated ingenuity of state and local governments in hobbling minority voting power" as "jurisdictions have substantially moved from direct, over[t] impediments to the right to vote to more sophisticated devices" (alteration in original) (internal quotation marks omitted)).

To remedy this problem, Congress enacted the Voting Rights Act. In its current form, § 2 of the Act provides:

> No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color.... 52 U.S.C. § 10301(a) (2012) (formerly 42 U.S.C. § 1973(a)).

In addition to this general statutory prohibition on racial discrimination, Congress identified particular jurisdictions "covered" by § 5 of the Voting Rights Act. Shelby Cty., 133 S.Ct. at 2619. Covered jurisdictions were those that, as of 1972, had maintained suspect prerequisites to voting, like literacy tests, and had less than 50% voter registration or turnout. Id. at 2619–20. Forty North Carolina jurisdictions were covered under the Act. 28 C.F.R. pt. 51 app. (2016). As a result, whenever the North Carolina legislature sought to change the procedures or qualifications for voting statewide or in those jurisdictions, it first had to seek "preclearance" with the United States Department of Justice. In doing so, the State had to demonstrate that a change had neither the purpose nor effect of "diminishing the ability of any citizens" to vote "on account of race or color." 52 U.S.C. § 10304 (2012) (formerly 42 U.S.C. § 1973c).

During the period in which North Carolina jurisdictions were covered by § 5, African American electoral participation dramatically improved. In particular, between 2000 and 2012, when the law provided for the voting mechanisms at issue here and did not require photo ID, African American voter registration swelled by 51.1%. J.A. 804[1] (compared to an increase of 15.8% for white voters). African American turnout similarly surged, from 41.9% in 2000 to 71.5% in 2008 and 68.5% in 2012. J.A. 1196-97. Not coincidentally, during this period North Carolina emerged as a swing state in national elections.

Then, in late June 2013, the Supreme Court issued its opinion in Shelby County. In it, the Court invalidated the preclearance coverage formula, finding it based on outdated data. Shelby Cty., 133 S.Ct. at 2631. Consequently, as of that date, North Carolina no longer needed to preclear changes in its election laws. As the district court found, the day after the Supreme Court issued Shelby County, the "Republican Chairman of the [Senate] Rules Committee[ ] publicly stated, 'I think we'll have an omnibus bill coming out' and ... that the Senate would move ahead with the 'full bill.' " N.C. State Conf. of the NAACP v. McCrory, --- F.Supp.3d ----, ----,2016 WL 1650774, at *9 (M.D.N.C. Apr. 25, 2016). The legislature then swiftly expanded an essentially single-issue bill into omnibus legislation, enacting it as Session Law ("SL") 2013–381.[2]

In this one statute, the North Carolina legislature imposed a number of voting restrictions. The law required in-person voters to show certain photo IDs, beginning in 2016, which African Americans disproportionately lacked, and eliminated or reduced registration and voting access tools that African Americans disproportionately used.

Id. at ---- – ----, ----, ----, ----, 2016 WL 1650774, at *9–10, *37, *123, *127, *131. Moreover, as the district court found, prior to enactment of SL 2013–381, the legislature requested and received racial data as to usage of the practices changed by the proposed law. Id. at ---- – ----, 2016 WL 1650774, at *136–38.

This data showed that African Americans disproportionately lacked the most common kind of photo ID, those issued by the Department of Motor Vehicles (DMV). Id. The pre-Shelby County version of SL 2013–381 provided that all government-issued IDs, even many that had been expired, would satisfy the requirement as an alternative to DMV-issued photo IDs. J.A. 2114–15. After Shelby County, with race data in hand, the legislature amended the bill to exclude many of the alternative photo IDs used by African Americans. Id. at ----, 2016 WL 1650774, at *142; J.A. 2291–92. As amended, the bill retained only the kinds of IDs that white North Carolinians were more likely to possess. Id.; J.A. 3653, 2115, 2292.

The district court found that, prior to enactment of SL 2013–381, legislators also requested data as to the racial breakdown of early voting usage. Id. at ---- – ----, 2016 WL 1650774, at *136–37. Early voting allows any registered voter to complete an absentee application and ballot at the same time, in person, in advance of Election Day. Id. at ---- – ----, 2016 WL 1650774, at *4–5. Early voting thus increases opportunities to vote for those who have difficulty getting to their polling place on Election Day.

The racial data provided to the legislators revealed that African Americans disproportionately used early voting in both 2008 and 2012. Id. at ---- – ----, 2016 WL 1650774, at *136–38; see also id. at ---- n. 74, 2016 WL 1650774, at *48 n. 74 (trial evidence showing that 60.36% and 64.01% of African Americans voted early in 2008 and 2012, respectively, compared to 44.47% and 49.39% of whites). In particular, African Americans disproportionately used the first seven days of early voting. Id. After receipt of this racial data, the General Assembly amended the bill to eliminate the first week of early voting, shortening the total early voting period from seventeen to ten days. Id. at ----, ----, 2016 WL 1650774, at *15, *136. As a result, SL 2013–381 also eliminated one of two "souls-to-the-polls" Sundays in which African American churches provided transportation to voters. Id. at ----, 2016 WL 1650774, at *55.

The district court found that legislators similarly requested data as to the racial makeup of same-day registrants. Id. at ----, 2016 WL 1650774, at *137. Prior to SL 2013–381, same-day registration allowed eligible North Carolinians to register in person at an early voting site at the same time as casting their ballots. Id. at ----, 2016 WL 1650774, at *6. Same-day registration provided opportunities for those as yet unable to register, as well as those who had ended up in the "incomplete registration queue" after previously attempting to register. Id. at ----, 2016 WL 1650774, at *65. Same-day registration also provided an easy avenue to re-register for those who moved frequently, and allowed those with low literacy skills or other difficulty completing a registration form to receive personal assistance from poll workers. See id.

The legislature's racial data demonstrated that, as the district court found, "it is indisputable that African American voters disproportionately used [same-day registration] when it was available." Id. at ----, 2016 WL 1650774, at *61. The district court further found that African American registration applications constituted a disproportionate percentage of the incomplete registration queue. Id. at ----, 2016 WL 1650774, at *65. And the court found that African Americans "are more likely to move between counties," and thus "are more likely to need to re-register." Id. As evidenced by the types of errors that placed many African American applications in the incomplete queue, id. at ----, ---- & n. 26, 2016 WL 1650774, at *65, *123 & n. 26, in-person assistance likely would disproportionately benefit African Americans. SL 2013–381 eliminated same-day registration. Id. at ----,

2016 WL 1650774, at *15.

Legislators additionally requested a racial breakdown of provisional voting, including out-of-precinct voting. Id. at ––– – –––, 2016 WL 1650774, at *136–37. Out-of-precinct voting required the Board of Elections in each county to count the provisional ballot of an Election Day voter who appeared at the wrong precinct, but in the correct county, for all of the ballot items for which the voter was eligible to vote. Id. at ––– – –––, 2016 WL 1650774, at *5–6. This provision assisted those who moved frequently, or who mistook a voting site as being in their correct precinct.

The district court found that the racial data revealed that African Americans disproportionately voted provisionally. Id. at ––––, 2016 WL 1650774, at *137. In fact, the General Assembly that had originally enacted the out-of-precinct voting legislation had specifically found that "of those registered voters who happened to vote provisional ballots outside their resident precincts" in 2004, "a disproportionately high percentage were African American." Id. at ––––, 2016 WL 1650774, at *138. With SL 2013–381, the General Assembly altogether eliminated out-of-precinct voting. Id. at ––––, 2016 WL 1650774, at *15.

African Americans also disproportionately used preregistration. Id. at ––––, 2016 WL 1650774, at *69. Preregistration permitted 16- and 17-year-olds, when obtaining driver's licenses or attending mandatory high school registration drives, to identify themselves and indicate their intent to vote. Id. at ––––, ––––, 2016 WL 1650774, at *7, *68. This allowed County Boards of Elections to verify eligibility and automatically register eligible citizens once they reached eighteen. Id. at ––––, 2016 WL 1650774, at *7. Although preregistration increased turnout among young adult voters, SL 2013–381 eliminated it. Id. at ––––, ––––, 2016 WL 1650774, at*15, *69.[3]

The district court found that not only did SL 2013–381 eliminate or restrict these voting mechanisms used disproportionately by African Americans, and require IDs that African Americans disproportionately lacked, but also that African Americans were more likely to "experience socioeconomic factors that may hinder their political participation." Id. at ––––, 2016 WL 1650774, at *89. This is so, the district court explained, because in North Carolina, African Americans are "disproportionately likely to move, be poor, less educated, have less access to transportation, and experience poor health." Id. at ––––, 2016 WL 1650774, at *89.

Nevertheless, over protest by many legislators and members of the public, the General Assembly quickly ratified SL 2013–381 by strict party-line votes. Id. at ––– – –––, 2016 WL 1650774, at *9–13. The Governor, who was of the same political party as the party that controlled the General Assembly, promptly signed the bill into law on August 12, 2013. Id. at ––––, 2016 WL 1650774, at *13.

That same day, the League of Women Voters, along with numerous other organizations and individuals, filed suit. Id. at ––––, 2016 WL 1650774, at *16. These Plaintiffs alleged that the restrictions on early voting and elimination of same-day registration and out-of-precinct voting were motivated by discriminatory intent in violation of § 2 of the Voting Rights Act and the Fourteenth and Fifteenth Amendments; that these provisions had a discriminatory result in violation of § 2 of the Voting Rights Act; and that these provisions burdened the right to vote generally, in contravention of the Fourteenth Amendment. See id.

Also that same day, the North Carolina State Conference of the NAACP, in conjunction with several other organizations and individuals, filed a separate action. Id. They alleged that the photo ID requirement and the provisions challenged by the League of Women Voters produced discriminatory results under § 2 and

demonstrated intentional discrimination in violation of the Fourteenth and Fifteenth Amendments. Id. Soon thereafter, the United States also filed suit, challenging the same provisions as discriminatory in both purpose and result in violation of § 2 of the Voting Rights Act. Id. Finally, a group of "young voters" intervened, alleging that these same provisions violated their rights under the Fourteenth and Twenty-Sixth Amendments. Id.[4] The district court consolidated the cases. Id.

Ahead of the 2014 midterm general election, Plaintiffs moved for a preliminary injunction of several provisions of the law. See N.C. State Conf. of the NAACP v. McCrory, 997 F.Supp.2d 322, 339 (M.D.N.C. 2014). The district court denied the motion. Id. at 383. On appeal, we reversed in part, remanding the case with instructions to issue an order staying the elimination of same-day registration and out-of-precinct voting. League of Women Voters of N.C. v. North Carolina (LWV), 769 F.3d 224, 248–49 (4th Cir. 2014).

Over the dissent of two Justices, the Supreme Court stayed our injunction mandate on October 8, 2014, pending its decision on certiorari. This denial automatically reinstituted the preliminary injunction, restoring same-day registration and out-of-precinct voting pending the outcome of trial in this case

That consolidated trial was scheduled to begin on July 13, 2015. N.C. State Conf., --- F.Supp.3d at ----, 2016 WL 1650774, at *18. However, on June 18, 2015, the General Assembly ratified House Bill 836, enacted as Session Law ("SL") 2015–103. Id. at ----, ----, 2016 WL 1650774, at *13, *18. This new law amended the photo ID requirement by permitting a voter without acceptable ID to cast a provisional ballot if he completed a declaration stating that he had a reasonable impediment to acquiring acceptable photo ID ("the reasonable impediment exception"). Id. at ----, 2016 WL 1650774, at *13. Given this enactment, the district court bifurcated trial of the case. Id. at ----, 2016 WL 1650774, at *18. Beginning in July 2015, the court conducted a trial on the challenges to all of the provisions except the photo ID requirement. Id. In January 2016, the court conducted a separate trial on the photo ID requirement, as modified by the reasonable impediment exception. Id.

On April 25, 2016, the district court entered judgment against the Plaintiffs on all of their claims as to all of the challenged provisions. Id. at ----, 2016 WL 1650774, at *171. The court found no discriminatory results under § 2, no discriminatory intent under § 2 or the Fourteenth and Fifteenth Amendments, no undue burden on the right to vote generally under the Fourteenth Amendment, and no violation of the Twenty-Sixth Amendment. See id. at ---- - ----, ----, ----, ----, 2016 WL 1650774, at *133–34, *148, *164, *167. At the same time, acknowledging the imminent June primary election, the court temporarily extended the preliminary injunction of same-day registration and out-of-precinct voting through that election. Id. at ----, 2016 WL 1650774, at *167. The photo ID requirement went into effect as scheduled for the first time in the March 2016 primary election, and was again in effect during the June primary election. Id. at ----, ----, 2016 WL 1650774, at *19, *171.

Plaintiffs timely noted this appeal. J.A. 24967, 24970, 24976, 24980. They also requested that we stay the district court's mandate and extend the preliminary injunction, which we did pending our decision in this case. Order Extending the Existing Stay, No. 16–1468 (Dkt. No. 122).

On appeal, Plaintiffs reiterate their attacks on the photo ID requirement, the reduction in days of early voting, and the elimination of same-day registration, out-of-precinct voting, and preregistration, alleging discrimination against African Americans and Hispanics. Because the record evidence is limited regarding Hispanics, we confine our analysis to African Americans. We hold that the challenged provisions of SL 2013–381 were enacted with racially discriminatory intent in violation of the Equal Protection Clause of the Fourteenth Amendment and § 2 of

the Voting Rights Act. We need not and do not reach Plaintiffs' remaining claims.

II.

A.

…When considering whether discriminatory intent motivates a facially neutral law, a court must undertake a "sensitive inquiry into such circumstantial and direct evidence of intent as may be available." Arlington Heights, 429 U.S. at 266, 97 S.Ct. 555. Challengers need not show that discriminatory purpose was the "sole[ ]" or even a "primary" motive for the legislation, just that it was "a motivating factor." Id. at 265–66, 97 S.Ct. 555 (emphasis added). Discriminatory purpose "may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another." Davis, 426 U.S. at 242, 96 S.Ct. 2040. But the ultimate question remains: did the legislature enact a law "because of," and not "in spite of," its discriminatory effect. Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 279, 99 S.Ct. 2282, 60 L.Ed.2d 870 (1979).

In Arlington Heights, the Court set forth a nonexhaustive list of factors to consider in making this sensitive inquiry. These include: "[t]he historical background of the [challenged] decision"; "[t]he specific sequence of events leading up to the challenged decision"; "[d]epartures from normal procedural sequence"; the legislative history of the decision; and of course, the disproportionate "impact of the official action—whether it bears more heavily on one race than another." Arlington Heights, 429 U.S. at 266–67, 97 S.Ct. 555 (internal quotation marks omitted).

In instructing courts to consider the broader context surrounding the passage of legislation, the Court has recognized that "[o]utright admissions of impermissible racial motivation are infrequent and plaintiffs often must rely upon other evidence." Cromartie I, 526 U.S. at 553, 119 S.Ct. 1545. In a vote denial case such as the one here, where the plaintiffs allege that the legislature imposed barriers to minority voting, this holistic approach is particularly important, for "[d]iscrimination today is more subtle than the visible methods used in 1965." H.R. Rep. No. 109–478, at 6 (2006), as reprinted in 2006 U.S.C.C.A.N. 618, 620. Even "second-generation barriers" to voting, while facially race neutral, may nonetheless be motivated by impermissible racial discrimination. Shelby Cty., 133 S.Ct. at 2635 (Ginsburg, J., dissenting) (cataloguing ways in which facially neutral voting laws continued to discriminate against minorities even after passage of Voting Rights Act).

'Once racial discrimination is shown to have been a 'substantial' or 'motivating' factor behind enactment of the law, the burden shifts to the law's defenders to demonstrate that the law would have been enacted without this factor." Hunter, 471 U.S. at 228, 105 S.Ct. 1916. When determining if this burden has been met, courts must be mindful that "racial discrimination is not just another competing consideration." Arlington Heights, 429 U.S. at 265–66, 97 S.Ct. 555. For this reason, the judicial deference accorded to legislators when "balancing numerous competing considerations" is "no longer justified." Id. Instead, courts must scrutinize the legislature's actual non-racial motivations to determine whether they alone can justify the legislature's choices. See Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 287, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977); cf. Miss. Univ. for Women v. Hogan, 458 U.S. 718, 728, 102 S.Ct. 3331, 73 L.Ed.2d 1090 (1982) (describing "inquiry into the actual purposes underlying a statutory scheme" that classified based on gender (emphasis added) (internal quotation marks omitted)). If a court finds that a statute is unconstitutional, it can enjoin the law. See, e.g., Hunter, 471 U.S. at 231, 105 S.Ct. 1916; Anderson v. Martin, 375 U.S. 399, 404, 84 S.Ct. 454, 11 L.Ed.2d 430 (1964).

B.

In the context of a § 2 discriminatory intent analysis, one of the critical background facts of which a court must take notice is whether voting is racially polarized. Indeed, to prevail in a case alleging discriminatory dilution of minority voting strength under § 2, a plaintiff must prove this fact as a threshold showing. See Gingles, 478 U.S. at 51, 56, 62, 106 S.Ct. 2752. Racial polarization "refers to the situation where different races ... vote in blocs for different candidates." Id. at 62, 106 S.Ct. 2752. This legal concept "incorporates neither causation nor intent" regarding voter preferences, for "[i]t is the difference between the choices made by blacks and whites—not the reasons for that difference—that results" in the opportunity for discriminatory laws to have their intended political effect. Id. at 62–63, 106 S.Ct. 2752.

While the Supreme Court has expressed hope that "racially polarized voting is waning," it has at the same time recognized that "racial discrimination and racially polarized voting are not ancient history." Bartlett v. Strickland, 556 U.S. 1, 25, 129 S.Ct. 1231, 173 L.Ed.2d 173 (2009). In fact, recent scholarship suggests that, in the years following President Obama's election in 2008, areas of the country formerly subject to § 5 preclearance have seen an increase in racially polarized voting. See Stephen Ansolabehere, Nathaniel Persily & Charles Stewart III, Regional Differences in Racial Polarization in the 2012 Presidential Election: Implications for the Constitutionality of Section 5 of the Voting Rights Act, 126 Harv. L. Rev. F. 205, 206 (2013). Further, "[t]his gap is not the result of mere partisanship, for even when controlling for partisan identification, race is a statistically significant predictor of vote choice, especially in the covered jurisdictions." Id.

Racially polarized voting is not, in and of itself, evidence of racial discrimination. But it does provide an incentive for intentional discrimination in the regulation of elections. In reauthorizing the Voting Rights Act in 2006, Congress recognized that "[t]he potential for discrimination in environments characterized by racially polarized voting is great." H.R. Rep. No. 109–478, at 35. This discrimination can take many forms. One common way it has surfaced is in challenges centered on vote dilution, where "manipulation of district lines can dilute the voting strength of politically cohesive minority group members." De Grandy, 512 U.S. at 1007, 114 S.Ct. 2647 (emphasis added); see also Voinovich v. Quilter, 507 U.S. 146, 153–54, 113 S.Ct. 1149, 122 L.Ed.2d 500 (1993). It is the political cohesiveness of the minority groups that provides the political payoff for legislators who seek to dilute or limit the minority vote.

The Supreme Court squarely confronted this connection in LULAC. There, the record evidence revealed racially polarized voting, such that 92% of Latinos voted against an incumbent of a particular party, whereas 88% of non-Latinos voted for him. 548 U.S. at 427, 126 S.Ct. 2594. The Court explained how this racial polarization provided the impetus for the discriminatory vote dilution legislation at issue in that case: "In old District 23 the increase in Latino voter registration and overall population, the concomitant rise in Latino voting power in each successive election, the near-victory of the Latino candidate of choice in 2002, and the resulting threat to the" incumbent representative motivated the controlling party to dilute the minority vote. Id. at 428, 126 S.Ct. 2594 (citation omitted). Although the Court grounded its holding on the § 2 results test, which does not require proof of intentional discrimination, the Court noted that the challenged legislation bore "the mark of intentional discrimination." Id. at 440, 126 S.Ct. 2594.

The LULAC Court addressed a claim of vote dilution, but its recognition that racially polarized voting may motivate politicians to entrench themselves through discriminatory election laws applies with equal force in the vote denial context. Indeed, it applies perhaps even more powerfully in cases like that at hand, where the State has restricted access to the franchise. This is so because, unlike in redistricting, where states may consider race

and partisanship to a certain extent, see, e.g., Miller v. Johnson, 515 U.S. 900, 920, 115 S.Ct. 2475, 132 L.Ed.2d 762 (1995), legislatures cannot restrict voting access on the basis of race. (Nor, we note, can legislatures restrict access to the franchise based on the desire to benefit a certain political party. See Anderson v. Celebrezze, 460 U.S. 780, 792–93, 103 S.Ct. 1564, 75 L.Ed.2d 547 (1983).)

[15]Using race as a proxy for party may be an effective way to win an election. But intentionally targeting a particular race's access to the franchise because its members vote for a particular party, in a predictable manner, constitutes discriminatory purpose. This is so even absent any evidence of race-based hatred and despite the obvious political dynamics. A state legislature acting on such a motivation engages in intentional racial discrimination in violation of the Fourteenth Amendment and the Voting Rights Act.

III.

With these principles in mind, we turn to their application in the case at hand.

A.

Arlington Heights directs us to consider "[t]he historical background of the decision" challenged as racially discriminatory. 429 U.S. at 267, 97 S.Ct. 555. Examination of North Carolina's history of race discrimination and recent patterns of official discrimination, combined with the racial polarization of politics in the state, seems particularly relevant in this inquiry. The district court erred in ignoring or minimizing these facts.

Unquestionably, North Carolina has a long history of race discrimination generally and race-based vote suppression in particular. Although we recognize its limited weight, see Shelby Cty., 133 S.Ct. at 2628–29, North Carolina's pre-1965 history of pernicious discrimination informs our inquiry. For "[i]t was in the South that slavery was upheld by law until uprooted by the Civil War, that the reign of Jim Crow denied African–Americans the most basic freedoms, and that state and local governments worked tirelessly to disenfranchise citizens on the basis of race." Id. at 2628.

While it is of course true that "history did not end in 1965," id. it is equally true that SL 2013–381 imposes the first meaningful restrictions on voting access since that date—and a comprehensive set of restrictions at that. Due to this fact, and because the legislation came into being literally within days of North Carolina's release from the preclearance requirements of the Voting Rights Act, that long-ago history bears more heavily here than it might otherwise. Failure to so recognize would risk allowing that troubled history to "pick[ ] up where it left off in 1965" to the detriment of African American voters in North Carolina. LWV, 769 F.3d at 242.

In considering Plaintiffs' discriminatory results claim under § 2, the district court expressly and properly recognized the State's "shameful" history of "past discrimination." N.C. State Conf., --- F.Supp.3d at ---- - ----, 2016 WL 1650774, at *83–86. But the court inexplicably failed to grapple with that history in its analysis of Plaintiffs' discriminatory intent claim. Rather, when assessing the intent claim, the court's analysis on the point consisted solely of the finding that "there is little evidence of official discrimination since the 1980s," accompanied by a footnote dismissing examples of more recent official discrimination. See id. at ----, 2016 WL 1650774, at *143.

That finding is clearly erroneous. The record is replete with evidence of instances since the 1980s in which the North Carolina legislature has attempted to suppress and dilute the voting rights of African Americans. In some of these instances, the Department of Justice or federal courts have determined that the North Carolina General Assembly acted with discriminatory intent, "reveal[ing] a series of official actions taken for invidious purposes."

Arlington Heights, 429 U.S. at 267, 97 S.Ct. 555. In others, the Department of Justice or courts have found that the General Assembly's action produced discriminatory results. The latter evidence, of course, proves less about discriminatory intent than the former, but it is informative. A historical pattern of laws producing discriminatory results provides important context for determining whether the same decisionmaking body has also enacted a law with discriminatory purpose. See, e.g., Veasey v. Abbott, No. 14–41127, ––– F.3d ––––, 2016 WL 3923868 (5th Cir. July 20, 2016) (en banc) (considering as relevant, in intentional discrimination analysis of voter ID law, DOJ letters and previous court cases about results and intent).

The record reveals that, within the time period that the district court found free of "official discrimination" (1980 to 2013), the Department of Justice issued over fifty objection letters to proposed election law changes in North Carolina—including several since 2000—because the State had failed to prove the proposed changes would have no discriminatory purpose or effect. See U.S. Dep't of Justice, Civil Rights Div., Voting Determination Letters for North Carolina (DOJ Letters) (Aug. 7, 2015), https://www.justice.gov/crt/voting-determination-letters-north-carolina; see also Regents of the Univ. of California v. Bakke, 438 U.S. 265, 305, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978) (referring to objections of the Department of Justice under § 5 as "administrative finding[s] of discrimination").[5] Twenty-seven of those letters objected to laws that either originated in the General Assembly or originated with local officials and were approved by the General Assembly. See DOJ Letters.

During the same period, private plaintiffs brought fifty-five successful cases under § 2 of the Voting Rights Act. Ten cases ended in judicial decisions finding that electoral schemes in counties and municipalities across the state had the effect of discriminating against minority voters.

And, of course, the case in which the Supreme Court announced the standard governing § 2 results claims—Thornburg v. Gingles—was brought by a class of African American citizens in North Carolina challenging a statewide redistricting plan. 478 U.S. at 35, 106 S.Ct. 2752. There the Supreme Court affirmed findings by the district court that each challenged district exhibited "racially polarized voting," and held that "the legacy of official discrimination in voting matters, education, housing, employment, and health services ... acted in concert with the multimember districting scheme to impair the ability" of African American voters to "participate equally in the political process." Id. at 80, 106 S.Ct. 2752.

And only a few months ago (just weeks before the district court issued its opinion in the case at hand), a three-judge court addressed a redistricting plan adopted by the same General Assembly that enacted SL 2013–381. Harris v. McCrory, No. 1:13–CV–949, ––– F.Supp.3d ––––, –––– – ––––, 2016 WL 482052, at *1–2 (M.D.N.C. Feb. 5, 2016), prob. juris. noted, ––– U.S. ––––, ––– S.Ct. ––––, ––– L.Ed.2d ––––, No. 15–1262, 2016 WL 1435913 (June 27, 2016). The court held that race was the predominant motive in drawing two congressional districts, in violation of the Equal Protection Clause. Id. at –––– – ––––, –––– & n. 9, 2016 WL 482052, at *1–2, *17 & n. 9. Contrary to the district court's suggestion, see N.C. State Conf., ––– F.Supp.3d at ––––n. 223, 2016 WL 1650774, at *143 n. 223, a holding that a legislature impermissibly relied on race certainly provides relevant evidence as to whether race motivated other election legislation passed by the same legislature.

The district court failed to take into account these cases and their important takeaway: that state officials continued in their efforts to restrict or dilute African American voting strength well after 1980 and up to the present day. Only the robust protections of § 5 and suits by private plaintiffs under § 2 of the Voting Rights Act prevented those efforts from succeeding. These cases also highlight the manner in which race and party are inexorably linked in North Carolina. This fact constitutes a critical—perhaps the most critical—piece of historical

evidence here. The district court failed to recognize this linkage, leading it to accept "politics as usual" as a justification for many of the changes in SL 2013–381. But that cannot be accepted where politics as usual translates into race-based discrimination.

As it did with the history of racial discrimination, the district court again recognized this reality when analyzing whether SL 2013–381 had a discriminatory result, but not when analyzing whether it was motivated by discriminatory intent. In its results analysis, the court noted that racially polarized voting between African Americans and whites remains prevalent in North Carolina. N.C. State Conf., ––– F.Supp.3d at ––––, ––––, 2016 WL 1650774, at *86–87. Indeed, at trial the State admitted as much. Id. at ––––, 2016 WL 1650774, at *86. As one of the State's experts conceded, "in North Carolina, African-American race is a better predictor for voting Democratic than party registration." J.A. 21400. For example, in North Carolina, 85% of African American voters voted for John Kerry in 2004, and 95% voted for President Obama in 2008. N.C. State Conf., ––– F.Supp.3d at ––––, 2016 WL 1650774, at *86. In comparison, in those elections, only 27% of white North Carolinians voted for John Kerry, and only 35% for President Obama. Id.

Thus, whether the General Assembly knew the exact numbers, it certainly knew that African American voters were highly likely, and that white voters were unlikely, to vote for Democrats. And it knew that, in recent years, African Americans had begun registering and voting in unprecedented numbers. Indeed, much of the recent success of Democratic candidates in North Carolina resulted from African American voters overcoming historical barriers and making their voices heard to a degree unmatched in modern history.

… The court noted repeatedly that the voting mechanisms that SL 2013–381 restricts or eliminates were ratified "relatively recently," "almost entirely along party lines," when "Democrats controlled" the legislature; and that SL 2013–381 was similarly ratified "along party lines" after "Republicans gained ... control of both houses." Id. at ––––, ––––, 2016 WL 1650774, at *2–7, *12.

Thus, the district court apparently considered SL 2013–381 simply an appropriate means for one party to counter recent success by another party. We recognize that elections have consequences, but winning an election does not empower anyone in any party to engage in purposeful racial discrimination. When a legislature dominated by one party has dismantled barriers to African American access to the franchise, even if done to gain votes, "politics as usual" does not allow a legislature dominated by the other party to re-erect those barriers.

The record evidence is clear that this is exactly what was done here. For example, the State argued before the district court that the General Assembly enacted changes to early voting laws to avoid "political gamesmanship" with respect to the hours and locations of early voting centers. J.A. 22348. As "evidence of justifications" for the changes to early voting, the State offered purported inconsistencies in voting hours across counties, including the fact that only some counties had decided to offer Sunday voting. Id. The State then elaborated on its justification, explaining that "[c]ounties with Sunday voting in 2014 were disproportionately black" and "disproportionately Democratic." J.A. 22348–49. In response, SL 2013–381 did away with one of the two days of Sunday voting. See N.C. State Conf., ––– F.Supp.3d at ––––, 2016 WL 1650774, at *15. Thus, in what comes as close to a smoking gun as we are likely to see in modern times, the State's very justification for a challenged statute hinges explicitly on race—specifically its concern that African Americans, who had overwhelmingly voted for Democrats, had too much access to the franchise.[6]

These contextual facts, which reveal the powerful undercurrents influencing North Carolina politics, must be

considered in determining why the General Assembly enacted SL 2013–381. Indeed, the law's purpose cannot be properly understood without these considerations. The record makes clear that the historical origin of the challenged provisions in this statute is not the innocuous back-and-forth of routine partisan struggle that the State suggests and that the district court accepted. Rather, the General Assembly enacted them in the immediate aftermath of unprecedented African American voter participation in a state with a troubled racial history and racially polarized voting. The district court clearly erred in ignoring or dismissing this historical background evidence, all of which supports a finding of discriminatory intent.

B.

[17]Arlington Heights also instructs us to consider the "specific sequence of events leading up to the challenged decision." 429 U.S. at 267, 97 S.Ct. 555. In doing so, a court must consider "[d]epartures from the normal procedural sequence," which may demonstrate "that improper purposes are playing a role." Id. The sequential facts found by the district court are undeniably accurate. N.C. State Conf., ––– F.Supp.3d at ––––, ––––, 2016 WL 1650774, at *8–13. Indeed, they are undisputed. Id. And they are devastating. The record shows that, immediately after Shelby County, the General Assembly vastly expanded an earlier photo ID bill and rushed through the legislative process the most restrictive voting legislation seen in North Carolina since enactment of the Voting Rights Act of 1965. Id. The district court erred in refusing to draw the obvious inference that this sequence of events signals discriminatory intent.

The district court found that prior to Shelby County, SL 2013–381 numbered only sixteen pages and contained none of the challenged provisions, with the exception of a much less restrictive photo ID requirement. Id. at ––––, ––––, ––––, 2016 WL 1650774, at *8, *143–44. As the court further found, this pre-Shelby County bill was afforded more than three weeks of debate in public hearings and almost three more weeks of debate in the House. Id. at ––––, 2016 WL 1650774, at *8. For this version of the bill, there was some bipartisan support: "[f]ive House Democrats joined all present Republicans in voting for the voter-ID bill." Id.

The district court found that SL 2013–381 passed its first read in the Senate on April 25, 2013, where it remained in the Senate Rules Committee. Id. At that time, the Supreme Court had heard argument in Shelby County, but had issued no opinion. Id. "So," as the district court found, "the bill sat." Id. For the next two months, no public debates were had, no public amendments made, and no action taken on the bill.

Then, on June 25, 2013, the Supreme Court issued its opinion in Shelby County. Id. at ––––, 2016 WL 1650774, at *9. The very next day, the Chairman of the Senate Rules Committee proclaimed that the legislature "would now move ahead with the full bill," which he recognized would be "omnibus" legislation. Id. at ––––, 2016 WL 1650774, at *9. After that announcement, no further public debate or action occurred for almost a month. Id. As the district court explained, "[i]t was not until July 23 ... that an expanded bill, including the election changes challenged in this case, was released." Id. at ––––, 2016 WL 1650774, at *144.

The new bill—now fifty-seven pages in length—targeted four voting and registration mechanisms, which had previously expanded access to the franchise, and provided a much more stringent photo ID provision. See 2013 N.C. Sess. Laws 381. Post-Shelby County, the change in accepted photo IDs is of particular note: the new ID provision retained only those types of photo ID disproportionately held by whites and excluded those disproportionately held by African Americans. N.C. State Conf., ––– F.Supp.3d at ––––, ––––, 2016 WL 1650774, at *37, *142. The district court specifically found that "the removal of public assistance IDs" in particular was

"suspect," because "a reasonable legislator [would be] aware of the socioeconomic disparities endured by African Americans [and] could have surmised that African Americans would be more likely to possess this form of ID." Id. at ----, 2016 WL 1650774, at *142.

Moreover, after the General Assembly finally revealed the expanded SL 2013–381 to the public, the legislature rushed it through the legislative process. The new SL 2013–381 moved through the General Assembly in three days: one day for a public hearing, two days in the Senate, and two hours in the House. Id. at ---- – ----, 2016 WL 1650774, at *9–12. The House Democrats who supported the pre-Shelby County bill now opposed it. Id. at ---–, 2016 WL 1650774, at *12. The House voted on concurrence in the Senate's version, rather than sending the bill to a committee. Id. at ----, 2016 WL 1650774, at *12. This meant that the House had no opportunity to offer its own amendments before the up-or-down vote on the legislation; that vote proceeded on strict party lines. Id.; see J.A. 1299; N.C. H.R. Rules 43.2, 43.3, 44. The Governor, of the same party as the proponents of the bill, then signed the bill into law. N.C. State Conf., --- F.Supp.3d at ----, 2016 WL 1650774, at *13. This hurried pace, of course, strongly suggests an attempt to avoid in-depth scrutiny. See, e.g., Veasey, --- F.3d at ----, 2016 WL 3923868, at *12 (noting as suspicious voter ID law's "three-day passage through the Senate"). Indeed, neither this legislature—nor, as far as we can tell, any other legislature in the Country—has ever done so much, so fast, to restrict access to the franchise.

The district court erred in accepting the State's efforts to cast this suspicious narrative in an innocuous light. To do so, the court focused on certain minor facts instead of acknowledging the whole picture. For example, although the court specifically found the above facts, it dismissed Plaintiffs' argument that this sequence of events demonstrated unusual legislative speed because the legislature "acted within all [of its] procedural rules." N.C. State Conf., --- F.Supp.3d at ----, 2016 WL 1650774, at *145. But, of course, a legislature need not break its own rules to engage in unusual procedures. Even just compared to the process afforded the pre-Shelby County bill, the process for the "full bill" was, to say the very least, abrupt.

Similarly, the district court accused Plaintiffs of "ignor[ing] the extensive debate and consideration the initial voter-ID bill received in the spring." Id. at ----, 2016 WL 1650774, at *146. But because the pre-Shelby County bill did not contain any of the provisions challenged here, that debate hardly seems probative. The district court also quoted one senator who opposed the new "full bill" as saying that the legislators had "a good and thorough debate." Id. at ----, ----, 2016 WL 1650774, at *12, *145. We note, however, that many more legislators expressed dismay at the rushed process. Id. at ----, 2016 WL 1650774, at *145. Indeed, as the court itself noted, "[s]everal Democratic senators characterized the bill as voter suppression of minorities. Others characterized the bill as partisan." Id. at ----, 2016 WL 1650774, at *12 (citations omitted). Republican senators "strongly denied such claims," while at the same time linking the bill to partisan goals: that "the bill reversed past practices that Democrats passed to favor themselves." Id.

Finally, the district court dismissed the expanded law's proximity to the Shelby County decision as above suspicion. The Court found that the General Assembly "would not have been unreasonable" to wait until after Shelby County to consider the "full bill" because it could have concluded that the provisions of the "full bill" were "simply not worth the administrative and financial cost" of preclearance. Id. at ----, 2016 WL 1650774, at *144. Although desire to avoid the hassle of the preclearance process could, in another case, justify a decision to await the outcome in Shelby County, that inference is not persuasive in this case. For here, the General Assembly did not simply wait to enact changes to its election laws that might require the administrative hassle of, but likely would pass, preclearance. Rather, after Shelby County it moved forward with what it acknowledged was an

omnibus bill that restricted voting mechanisms it knew were used disproportionately by African Americans, id. at ––––, 2016 WL 1650774, at *148, and so likely would not have passed preclearance. And, after Shelby County, the legislature substantially changed the one provision that it had fully debated before. As noted above, the General Assembly completely revised the list of acceptable photo IDs, removing from the list the IDs held disproportionately by African Americans, but retaining those disproportionately held by whites. Id. at ––––, ––––, 2016 WL 1650774, at *37, *142. This fact alone undermines the possibility that the post-Shelby County timing was merely to avoid the administrative costs.

Instead, this sequence of events—the General Assembly's eagerness to, at the historic moment of Shelby County's issuance, rush through the legislative process the most restrictive voting law North Carolina has seen since the era of Jim Crow–bespeaks a certain purpose. Although this factor, as with the other Arlington Heights factors, is not dispositive on its own, it provides another compelling piece of the puzzle of the General Assembly's motivation.

C.

[18]Arlington Heights also recognizes that the legislative history leading to a challenged provision "may be highly relevant, especially where there are contemporaneous statements by members of the decisionmaking body, minutes of its meetings, or reports." 429 U.S. at 268, 97 S.Ct. 555. Above, we have discussed much of what can be gleaned from the legislative history of SL 2013–381 in the sequence of events leading up to its enactment.

No minutes of meetings about SL 2013–381 exist. And, as the Supreme Court has recognized, testimony as to the purpose of challenged legislation "frequently will be barred by [legislative] privilege." Id. That is the case here. See N.C. State Conf., ––– F.Supp.3d at –––– n. 124, 2016 WL 1650774, at *71 n. 124. The district court was correct to note that statements from only a few legislators, or those made by legislators after the fact, are of limited value. See id. at ––––, 2016 WL 1650774, at *146; Barber v. Thomas, 560 U.S. 474, 485–86, 130 S.Ct. 2499, 177 L.Ed.2d 1 (2010); Hunter, 471 U.S. at 228, 105 S.Ct. 1916.[7]

We do find worthy of discussion, however, the General Assembly's requests for and use of race data in connection with SL 2013–381. As explained in detail above, prior to and during the limited debate on the expanded omnibus bill, members of the General Assembly requested and received a breakdown by race of DMV-issued ID ownership, absentee voting, early voting, same-day registration, and provisional voting (which includes out-of-precinct voting). N.C. State Conf., ––– F.Supp.3d at –––– – ––––, ––––, 2016 WL 1650774, at *136–38, *148; J.A. 1628–29, 1637, 1640–41, 1782–97, 3084–3119.

This data revealed that African Americans disproportionately used early voting, same-day registration, and out-of-precinct voting, and disproportionately lacked DMV-issued ID. N.C. State Conf., ––– F.Supp.3d at ––––, 2016 WL 1650774, at *148; J.A. 1782–97, 3084–3119. Not only that, it also revealed that African Americans did not disproportionately use absentee voting; whites did. J.A. 1796–97, 3744–47. SL 2013–381 drastically restricted all of these other forms of access to the franchise, but exempted absentee voting from the photo ID requirement. In sum, relying on this racial data, the General Assembly enacted legislation restricting all—and only—practices disproportionately used by African Americans. When juxtaposed against the unpersuasive non-racial explanations the State proffered for the specific choices it made, discussed in more detail below, we cannot ignore the choices the General Assembly made with this data in hand.

D.

[19]Finally, Arlington Heights instructs that courts also consider the "impact of the official action"—that is,

whether "it bears more heavily on one race than another." 429 U.S. at 266, 97 S.Ct. 555 (internal quotation marks omitted). The district court expressly found that "African Americans disproportionately used" the removed voting mechanisms and disproportionately lacked DMV-issued photo ID. N.C. State Conf., --- F.Supp.3d at ----, 2016 WL 1650774, at *37, *136. Nevertheless, the court concluded that this "disproportionate[ ] use[ ]" did not "significantly favor a finding of discriminatory purpose." Id. at ----, 2016 WL 1650774, at *143. In doing so, the court clearly erred. Apparently, the district court believed that the disproportionate impact of the new legislation "depends on the options remaining" after enactment of the legislation. Id. at ----, 2016 WL 1650774, at *136. Arlington Heights requires nothing of the kind.

The Arlington Heights Court recognized that "[t]he impact of [a governmental] decision" not to rezone for low-income housing "bear[s] more heavily on racial minorities." 429 U.S. at 269, 97 S.Ct. 555. In concluding that the zoning decision had a disproportionate impact, the Court explained that "[m]inorities constitute[d] 18% of the Chicago area population, and 40% of the income groups said to be eligible for" the low-income housing. Id. The Court did not require those minority plaintiffs to show that the Chicago area as a whole lacked low-income housing or that the plaintiffs had no other housing options. Instead, it was sufficient that the zoning decision excluded them from a particular area. Id. at 260, 265–66, 269, 97 S.Ct. 555; see also City of Memphis v. Greene, 451 U.S. 100, 110, 126, 101 S.Ct. 1584, 67 L.Ed.2d 769 (1981) (indicating that closing a street used primarily by African Americans had a disproportionate impact, even though "the extent of the inconvenience [was] not great").

[20]Thus, the standard the district court used to measure impact required too much in the context of an intentional discrimination claim. When plaintiffs contend that a law was motivated by discriminatory intent, proof of disproportionate impact is not "the sole touchstone" of the claim. Davis, 426 U.S. at 242, 96 S.Ct. 2040. Rather, plaintiffs asserting such claims must offer other evidence that establishes discriminatory intent in the totality of the circumstances. Id. at 239–42, 96 S.Ct. 2040. Showing disproportionate impact, even if not overwhelming impact, suffices to establish one of the circumstances evidencing discriminatory intent.[8]

Accordingly, the district court's findings that African Americans disproportionately used each of the removed mechanisms, as well as disproportionately lacked the photo ID required by SL 2013–381, if supported by the evidence, establishes sufficient disproportionate impact for an Arlington Heights analysis. As outlined above, the record evidence provides abundant support for that holding.

Moreover, the district court also clearly erred in finding that the cumulative impact of the challenged provisions of SL 2013–381 does not bear more heavily on African Americans. See Clingman v. Beaver, 544 U.S. 581, 607–08, 125 S.Ct. 2029, 161 L.Ed.2d 920 (2005) (O'Connor, J., concurring) ("A panoply of regulations, each apparently defensible when considered alone, may nevertheless have the combined effect of severely restricting participation and competition."). For example, the photo ID requirement inevitably increases the steps required to vote, and so slows the process. The early voting provision reduced the number of days in which citizens can vote, resulting in more voters voting on Election Day.[9] Together, these produce longer lines at the polls on Election Day, and absent out-of-precinct voting, prospective Election Day voters may wait in these longer lines only to discover that they have gone to the wrong precinct and are unable to travel to their correct precincts. Thus, cumulatively, the panoply of restrictions results in greater disenfranchisement than any of the law's provisions individually.

The district court discounted the claim that these provisions burden African Americans, citing the fact that similar election laws exist or have survived challenges in other states. But the sheer number of restrictive provisions in SL 2013–381 distinguishes this case from others.

[21]The district court also erred in suggesting that Plaintiffs had to prove that the challenged provisions prevented African Americans from voting at the same levels they had in the past. No law implicated here—neither the Fourteenth Amendment nor § 2—requires such an onerous showing. Emblematic of this error is the almost dispositive weight the court gave to the fact that African American aggregate turnout increased by 1.8% in the 2014 midterm election as compared to the 2010 midterm election. See N.C. State Conf., ---F.Supp.3d at ----, ----, ----, 2016 WL 1650774, at *18, *122, *132. In addition to being beyond the scope of disproportionate impact analysis under Arlington Heights, several factors counsel against such an inference.

First, as the Supreme Court has explained, courts should not place much evidentiary weight on any one election. See Gingles, 478 U.S. at 74–77, 106 S.Ct. 2752 (noting that the results of multiple elections are more probative than the result of a single election, particularly one held during pending litigation). This is especially true for midterm elections. As the State's own expert testified, fewer citizens vote in midterm elections, and those that do are more likely to be better educated, repeat voters with greater economic resources. J.A. 23801–02; cf. League of Women Voters of North Carolina, 135 S.Ct. at 6–7 (Ginsburg, J., dissenting) (noting that midterm primary elections are "highly sensitive to factors likely to vary from election to election," more so than presidential elections).

Moreover, although aggregate African American turnout increased by 1.8% in 2014, many African American votes went uncounted. As the district court found, African Americans disproportionately cast provisional out-of-precinct ballots, which would have been counted absent SL 2013–381. See N.C. State Conf., ---F.Supp.3d at ----, 2016 WL 1650774, at *63. And thousands of African Americans were disenfranchised because they registered during what would have been the same-day registration period but because of SL 2013–381 could not then vote. See id. at ----, 2016 WL 1650774, at *67. Furthermore, the district court failed to acknowledge that a 1.8% increase in voting actually represents a significant decrease in the rate of change. For example, in the prior four-year period, African American midterm voting had increased by 12.2%. J.A. 1197.

In sum, while the district court recognized the undisputed facts as to the impact of the challenged provisions of SL 2013–381, it simply refused to acknowledge their import. The court concluded its analysis by remarking that these provisions simply eliminated a system "preferred" by African Americans as "more convenient." N.C. State Conf., --- F.Supp.3d at ----, 2016 WL 1650774, at *170. But as the court itself found elsewhere in its opinion, "African Americans ... in North Carolina are disproportionately likely to move, be poor, less educated, have less access to transportation, and experience poor health." Id. at ----, 2016 WL 1650774, at *89.

These socioeconomic disparities establish that no mere "preference" led African Americans to disproportionately use early voting, same-day registration, out-of-precinct voting, and preregistration. Nor does preference lead African Americans to disproportionately lack acceptable photo ID. Yet the district court refused to make the inference that undeniably flows from the disparities it found many African Americans in North Carolina experienced. Registration and voting tools may be a simple "preference" for many white North Carolinians, but for many African Americans, they are a necessity.

E.

….Our conclusion does not mean, and we do not suggest, that any member of the General Assembly harbored racial hatred or animosity toward any minority group. But the totality of the circumstances—North Carolina's history of voting discrimination; the surge in African American voting; the legislature's knowledge that African Americans voting translated into support for one party; and the swift elimination of the tools African Americans had used to vote and imposition of a new barrier at the first opportunity to do so—cumulatively and

unmistakably reveal that the General Assembly used SL 2013–381 to entrench itself. It did so by targeting voters who, based on race, were unlikely to vote for the majority party. Even if done for partisan ends, that constituted racial discrimination.

IV.

…Given a state's interest in the fair administration of its elections, a rational justification can be imagined for many election laws, including some of the challenged provisions here. But a court must be mindful of the number, character, and scope of the modifications enacted together in a single challenged law like SL 2013–381. Only then can a court determine whether a legislature would have enacted that law regardless of its impact on African American voters.

In this case, despite finding that race was not a motivating factor for enactment of the challenged provisions of SL 2013–381, the district court addressed the State's justifications for each provision at length. N.C. State Conf., ––– F.Supp.3d at ––––––––, ––––, 2016 WL 1650774, at *96–116, *147. The court did so, however, through a rational-basis-like lens. For example, the court found the General Assembly's decision to eliminate same-day registration "not unreasonable," and found "at least plausible" the reasons offered for excluding student IDs from the list of qualifying IDs. Id. at ––––, ––––, 2016 WL 1650774, at *108, *142. But, of course, a finding that legislative justifications are "plausible" and "not unreasonable" is a far cry from a finding that a particular law would have been enacted without considerations of race. As the Supreme Court has made clear, such deference in that inquiry is wholly inappropriate. See Arlington Heights, 429 U.S. at 265–66, 97 S.Ct. 555 (explaining that because "racial discrimination is not just another competing consideration," a court must do much more than review for "arbitrariness or irrationality").

Accordingly, the ultimate findings of the district court regarding the compelling nature of the State's interests are clearly erroneous. Typically, that fact would recommend remand. But we need not remand where the record provides "a complete understanding" of the merits, Tejada v. Dugger, 941 F.2d 1551, 1555 (11th Cir. 1991) (internal quotation marks omitted), and "permits only one resolution of the factual issue," Pullman–Standard, 456 U.S. at 292, 102 S.Ct. 1781. See also Withrow v. Larkin, 421 U.S. 35, 45, 95 S.Ct. 1456, 43 L.Ed.2d 712 (1975) (declining to remand where Court "doubt[ed] that such action ... would add anything essential to the determination of the merits"). After a total of four weeks of trial, the district court entered a 479-page order based on more than 25,000 pages of evidence. N.C. State Conf., ––– F.Supp.3d at ––––, 2016 WL 1650774, at *2. Although the court erred with respect to the appropriate degree of deference due to the State's proffered justifications, that error affected only its ultimate finding regarding their persuasive weight; it did not affect the court's extensive foundational findings regarding those justifications.

These foundational findings as to justifications for SL 2013–381 provide a more than sufficient basis for our review of that law. For we are satisfied that this record is "complete," indeed as "complete" as could ever reasonably be expected, and that remand would accomplish little. Tejada, 941 F.2d at 1555; see Withrow, 421 U.S. at 45, 95 S.Ct. 1456. And, after painstaking review of the record, we must also conclude that it "permits only one resolution of the factual issue." Pullman–Standard, 456 U.S. at 292, 102 S.Ct. 1781. The record evidence plainly establishes race as a "but-for" cause of SL 2013–381. See Hunter, 471 U.S. at 232, 105 S.Ct. 1916.

[23]In enacting the photo ID requirement, the General Assembly stated that it sought to combat voter fraud and promote public confidence in the electoral system. See 2013 N.C. Sess. Laws 381. These interests echo those the Crawford Court held justified a photo ID requirement in Indiana. 553 U.S. at 194–97, 128 S.Ct. 1610. The State relies heavily on that holding. But that reliance is misplaced because of the fundamental differences between

Crawford and this case.

The challengers in Crawford did not even allege intentional race discrimination. Rather, they mounted a facial attack on a photo ID requirement as unduly burdensome on the right to vote generally. The Crawford Court conducted an "Anderson–Burdick" analysis, balancing the burden of a law on voters against the state's interests, and concluded that the photo ID requirement "impose[d] only a limited burden on voters' rights." Crawford, 553 U.S. at 202–03, 128 S.Ct. 1610 (internal quotation marks omitted). Given that limited burden, the Court deferred to the Indiana legislature's choice of how to best serve its legitimate interests. See id. at 194–97, 203, 128 S.Ct. 1610.

That deference does not apply here because the evidence in this case establishes that, at least in part, race motivated the North Carolina legislature. Thus, we do not ask whether the State has an interest in preventing voter fraud—it does—or whether a photo ID requirement constitutes one way to serve that interest—it may—but whether the legislature would have enacted SL 2013–381's photo ID requirement if it had no disproportionate impact on African American voters. The record evidence establishes that it would not have.

The photo ID requirement here is both too restrictive and not restrictive enough to effectively prevent voter fraud; "[i]t is at once too narrow and too broad." Romer v. Evans, 517 U.S. 620, 633, 116 S.Ct. 1620, 134 L.Ed.2d 855 (1996); see Anderson, 460 U.S. at 805, 103 S.Ct. 1564 (rejecting election law as "both too broad and too narrow"). First, the photo ID requirement, which applies only to in-person voting and not to absentee voting, is too narrow to combat fraud. On the one hand, the State has failed to identify even a single individual who has ever been charged with committing in-person voter fraud in North Carolina. See J.A. 6802. On the other, the General Assembly did have evidence of alleged cases of mail-in absentee voter fraud. J.A. 1678, 6802. Notably, the legislature also had evidence that absentee voting was not disproportionately used by African Americans; indeed, whites disproportionately used absentee voting. J.A. 1796–97. The General Assembly then exempted absentee voting from the photo ID requirement. 2013 N.C. Sess. Laws 381, pt. 4. This was so even though members of the General Assembly had proposed amendments to require photo ID for absentee voting, N.C. Gen. Assemb. Proposed Amend. No. A2, H589–AST–50 [v.2] (April 24, 2013), and the bipartisan State Board of Elections[11] specifically requested that the General Assembly remedy the potential for mail-in absentee voter fraud and expressed no concern about in-person voter fraud, J.A. 1678.

The photo ID requirement is also too broad, enacting seemingly irrational restrictions unrelated to the goal of combating fraud. This overbreadth is most stark in the General Assembly's decision to exclude as acceptable identification all forms of state-issued ID disproportionately held by African Americans. See N.C. State Conf., ––– F.Supp.3d at ––––, 2016 WL 1650774, at *142. The State has offered little evidence justifying these exclusions. Review of the record further undermines the contention that the exclusions are tied to concerns of voter fraud. This is so because voters who lack qualifying ID under SL 2013–381 may apply for a free voter card using two of the very same forms of ID excluded by the law. See N.C. State Conf., ––– F.Supp.3d at ––––,2016 WL 1650774, at *26. Thus, forms of state-issued IDs the General Assembly deemed insufficient to prove a voter's identity on Election Day are sufficient if shown during a separate process to a separate state official. In this way, SL 2013–381 elevates form over function, creating hoops through which certain citizens must jump with little discernable gain in deterrence of voter fraud.[12]

The State's proffered justifications regarding restrictions on early voting similarly fail. The State contends that one purpose of SL 2013–381's reduction in early voting days was to correct inconsistencies among counties in the locations and hours of early voting centers. J.A. 3325; 22348–50. See, e.g., J.A. 3325 (senator supporting the law:

"what we're trying to do is put some consistency into the process and allow for the facilities to be similarly treated in one county as in being [sic] all the counties"). In some minor ways, SL 2013–381 does achieve consistency in the availability of early voting within each county. See N.C. Gen. Stat. § 163–227.2(g) (mandating the same days and hours within counties).

But the record does not offer support for the view that SL 2013–381 actually achieved consistency in early voting among the various counties. For example, while the State contends that it meant to eliminate inconsistencies between counties in the availability of Sunday early voting, see, e.g., J.A. 12997–98; 20943–44; 22348–49, SL 2013–381 offers no fix for that. Rather, it permits the Board of Elections of each county to determine, in the Board's discretion, whether to provide Sunday hours during early voting. See J.A. 3325 (senator supporting the law: "[the law] still leaves the county the choice of opening on a Sunday or not opening on Sunday"); cf. N.C. Gen. Stat. § 163–227.2(f) ("A county board may conduct [early voting] during evenings or on weekends...." (emphasis added)). Moreover, as discussed above, the State explicitly and problematically linked these "inconsistencies" in Sunday early voting to race and party. J.A. 22348–49.

In other ways, the challenged provision actually promotes inconsistency in the availability of early voting across North Carolina. SL 2013–381 mandates that County Boards of Elections offer at least the same number of aggregate hours of early voting as offered in 2010 for future non-presidential elections and as offered in 2012 for future presidential elections. See N.C. Gen. Stat. § 163–227.2(g2). If, as the State asserts, the 2010 and 2012 elections saw great disparities in voting hours across county lines, SL 2013–381 in effect codifies those inconsistencies by requiring those same county-specific hours for all future elections.

Moreover, in its quest for "consistency" in the availability of early voting, the General Assembly again disregarded the recommendations of the State Board of Elections. The Board counseled that, although reducing the number of days of early voting might ease administrative burdens for lower turnout elections, doing so for high-turnout elections would mean that "North Carolina voters' needs will not be accommodated." J.A. 1700. The Board explained that reducing early voting days would mean that "traffic will be increased on Election Day, increasing demands for personnel, voting equipment and other supplies, and resulting in likely increases to the cost of elections." J.A. 1700; see also J.A. 1870–72 (reducing early voting days, according to one County Board of Elections, would lead to "increased costs, longer lines, increased wait times, understaffed sites, staff burn-out leading to mistakes, and inadequate polling places; or, in a worst case scenario, all of these problems together").

Concerning same-day registration, the State justifies its elimination as a means to avoid administrative burdens that arise when verifying the addresses of those who register at the very end of the early voting period. These concerns are real. Even so, the complete elimination of same-day registration hardly constitutes a remedy carefully drawn to accomplish the State's objectives. The General Assembly had before it alternative proposals that would have remedied the problem without abolishing the popular program. J.A. 1533–34; 6827–28. The State Board of Elections had reported that same-day registration "was a success." J.A. 1529. The Board acknowledged some of the conflicts between same-day registration and mail verification, J.A. 1533–34, but clarified that "same day registration does not result in the registration of voters who are any less qualified or eligible to vote than" traditional registrants, J.A. 6826, and that "undeliverable verification mailings were not caused by the nature of same day registration," J.A. 6827. Indeed, over 97% of same-day registrants passed the mail verification process. J.A. 6826. The State Board of Elections believed this number would have been higher had some counties not delayed the mail verification process in violation of the law. J.A. 6826–28.

Again, the General Assembly ignored this advice. In other circumstances we would defer to the prerogative of a legislature to choose among competing policy proposals. But, in the broader context of SL 2013–381's multiple restrictions on voting mechanisms disproportionately used by African Americans, we conclude that the General Assembly would not have eliminated same-day registration entirely but-for its disproportionate impact on African Americans.

[Analysis of out-of-precinct and pre-registration omitted]

In sum, the array of electoral "reforms" the General Assembly pursued in SL 2013–381 were not tailored to achieve its purported justifications, a number of which were in all events insubstantial. In many ways, the challenged provisions in SL 2013–381 constitute solutions in search of a problem. The only clear factor linking these various "reforms" is their impact on African American voters. The record thus makes obvious that the "problem" the majority in the General Assembly sought to remedy was emerging support for the minority party. Identifying and restricting the ways African Americans vote was an easy and effective way to do so. We therefore must conclude that race constituted a but-for cause of SL 2013–381, in violation of the Constitutional and statutory prohibitions on intentional discrimination.

V.

As relief in this case, Plaintiffs ask that we declare the challenged provisions in SL 2013–381 unconstitutional and violative of § 2 of the Voting Rights Act, and that we permanently enjoin each provision. They further ask that we exercise our authority pursuant to § 3 of the Voting Rights Act to authorize federal poll observers and place North Carolina under preclearance. These requests raise issues of severability and the proper scope of any equitable remedy. We address each in turn.

A.

When discriminatory intent impermissibly motivates the passage of a law, a court may remedy the injury—the impact of the legislation—by invalidating the law. See, e.g., Hunter, 471 U.S. at 231, 105 S.Ct. 1916; Anderson, 375 U.S. at 400–04, 84 S.Ct. 454. If a court finds only part of the law unconstitutional, it may sever the offending provision and leave the inoffensive portion of the law intact. Leavitt v. Jane L., 518 U.S. 137, 139–40, 116 S.Ct. 2068, 135 L.Ed.2d 443 (1996). State law governs our severability analysis. Id. In North Carolina, severability turns on whether the legislature intended that the law be severable, Pope v. Easley, 354 N.C. 544, 556 S.E.2d 265, 268 (2001), and whether provisions are "so interrelated and mutually dependent" on others that they "cannot be enforced without reference to another," Fulton Corp. v. Faulkner, 345 N.C. 419, 481 S.E.2d 8, 9 (1997).

We have held that discriminatory intent motivated only the enactment of the challenged provisions of SL 2013–381. As an omnibus bill, SL 2013–381 contains many other provisions not subject to challenge here. We sever the challenged provisions from the remainder of the law because it contains a severability clause, see 2013 N.C. Sess. Laws 381 § 60.1, to which we defer under North Carolina law. Pope, 556 S.E.2d at 268. Further, the remainder of the law "can[ ] be enforced without" the challenged provisions. Fulton Corp., 481 S.E.2d at 9. Therefore, we enjoin only the challenged provisions of SL 2013–381 regarding photo ID, early voting, same-day registration, out-of-precinct voting, and preregistration.

WYNN, Circuit Judge, with whom FLOYD, Circuit Judge, joins, writing for the court as to Part V.B.:

As to the appropriate remedy for the challenged provisions, "once a plaintiff has established the violation of a constitutional or statutory right in the civil rights area, ... court[s] ha[ve] broad and flexible equitable powers to fashion a remedy that will fully correct past wrongs." Smith v. Town of Clarkton, 682 F.2d 1055, 1068 (4th Cir.

1982); see Greenv. Cty. Sch. Bd., 391 U.S. 430, 437–39 (1968) (explaining that once a court rules that an official act purposefully discriminates, the "racial discrimination [must] be eliminated root and branch"). In other words, courts are tasked with shaping "[a] remedial decree ... to place persons" who have been harmed by an unconstitutional provision "in 'the position they would have occupied in the absence of [discrimination].' " Virginia, 518 U.S. at 547, 116 S.Ct. 2264 (last alteration in original) (quoting Milliken v. Bradley, 433 U.S. 267, 280, 97 S.Ct. 2749, 53 L.Ed.2d 745 (1977)).

[30]The Supreme Court has established that official actions motivated by discriminatory intent "ha[ve] no legitimacy at all under our Constitution or under the [Voting Rights Act]." City of Richmond v. United States, 422 U.S. 358, 378, 95 S.Ct. 2296, 45 L.Ed.2d 245 (1975). Thus, the proper remedy for a legal provision enacted with discriminatory intent is invalidation. See id. at 378–79, 95 S.Ct. 2296 ("[Official actions] animated by [a discriminatory] purpose have no credentials whatsoever; for [a]cts generally lawful may become unlawful when done to accomplish an unlawful end." (last alteration in original) (internal quotation marks omitted)); see also Hunter, 471 U.S. at 229, 231–33, 105 S.Ct. 1916 (affirming the invalidation of a state constitutional provision because it was adopted with the intent of disenfranchising African Americans); Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457, 466, 470–71, 487, 102 S.Ct. 3187, 73 L.Ed.2d 896 (1982) (affirming a permanent injunction of a state initiative that was motivated by a racially discriminatory purpose); Anderson, 375 U.S. at 403–04, 84 S.Ct. 454 (indicating that the purposefully discriminatory use of race in a challenged law was "sufficient to make it invalid"). Notably, the Supreme Court has invalidated a state constitutional provision enacted with discriminatory intent even when its "more blatantly discriminatory" portions had since been removed. Hunter, 471 U.S. at 232–33, 105 S.Ct. 1916.

[31]Moreover, the fact that the General Assembly later amended one of the challenged provisions does not change our conclusion that invalidation of each provision is the appropriate remedy in this case. Specifically, in 2015, the General Assembly enacted SL 2015–103, which amended the photo ID requirement and added the reasonable impediment exception. See 2015 N.C. Sess. Laws 103 § 8 (codified at N.C. Gen. Stat. §§ 163–82.8, 163–166.13, 163–166.15, 163–182.1B, 163–227.2). Our dissenting colleague contends that even though we all agree that 1) the General Assembly unconstitutionally enacted the photo ID requirement with racially discriminatory intent, and 2) the remedy for an unconstitutional law must completely cure the harm wrought by the prior law, we should remand for the district court to consider whether the reasonable impediment exception has rendered our injunction of that provision unnecessary. But, even if the State were able to demonstrate that the amendment lessens the discriminatory effect of the photo ID requirement, it would not relieve us of our obligation to grant a complete remedy in this case. That remedy must reflect our finding that the challenged provisions were motivated by an impermissible discriminatory intent and must ensure that those provisions do not impose any lingering burden on African American voters. We cannot discern any basis upon which this record reflects that the reasonable impediment exception amendment fully cures the harm from the photo ID provision. Thus, remand is not necessary.

While remedies short of invalidation may be appropriate if a provision violates the Voting Rights Act only because of its discriminatory effect, laws passed with discriminatory intent inflict a broader injury and cannot stand. See Veasey, ––– F.3d at ––––, ––––– n. 66, 2016 WL 3923868, at *36, *36 n. 66 (distinguishing between the proper remedy for a law enacted with a racially discriminatory purpose and the more flexible range of remedies that should be considered if the law has only a discriminatory effect).

Here, the amendment creating the reasonable impediment exception does not invalidate or repeal the photo ID

requirement. It therefore falls short of the remedy that the Supreme Court has consistently applied in cases of this nature.

Significantly, the burden rests on the State to prove that its proposed remedy completely cures the harm in this case. See Virginia, 518 U.S. at 547, 116 S.Ct. 2264 (noting that the defendant "was obliged to show that its remedial proposal 'directly address[ed] and relate[d] to' the violation" (alterations in original) (quoting Milliken, 433 U.S. at 282, 97 S.Ct. 2749)); Green, 391 U.S. at 439, 88 S.Ct. 1689 (placing the burden on the defendant to prove that its plan would effectively cure the violation). Here, nothing in this record shows that the reasonable impediment exception ensures that the photo ID law no longer imposes any lingering burden on African American voters. To the contrary, the record establishes that the reasonable impediment exception amendment does not so fundamentally alter the photo ID requirement as to eradicate its impact or otherwise "eliminate the taint from a law that was originally enacted with discriminatory intent." Johnson v. Governor of Fla., 405 F.3d 1214, 1223 (11th Cir. 2005) (en banc).

For example, the record shows that under the reasonable impediment exception, if an in-person voter cannot present a qualifying form of photo ID—which "African Americans are more likely to lack"—the voter must undertake a multi-step process. N.C. State Conf., --- F.Supp.3d at ----,2016 WL 1650774, at *37. First, the voter must complete and sign a form declaring that a reasonable impediment prevented her from obtaining such a photo ID, and identifying that impediment.[14] N.C. Gen. Stat. § 163–166.15. In addition, the voter must present one of several alternative types of identification required by the exception. Id. § 163–166.15(c). Then, the voter may fill out a provisional ballot, which is subject to challenge by any registered voter in the county. Id. § 163–182.1B. On its face, this amendment does not fully eliminate the burden imposed by the photo ID requirement. Rather, it requires voters to take affirmative steps to justify to the state why they failed to comply with a provision that we have declared was enacted with racially discriminatory intent and is unconstitutional.

In sum, the State did not carry its burden at trial to prove that the reasonable impediment exception amendment completely cures the harm in this case, nor could it given the requirements of the reasonable impediment exception as enacted by the General Assembly. Accordingly, to fully cure the harm imposed by the impermissible enactment of SL 2013–381, we permanently enjoin all of the challenged provisions, including the photo ID provision.

….We therefore reverse the judgment of the district court. We remand the case for entry of an order enjoining the implementation of SL 2013–381's photo ID requirement and changes to early voting, same-day registration, out-of-precinct voting, and preregistration.

REVERSED AND REMANDED

DIANA GRIBBON MOTZ, Circuit Judge, dissenting as to Part V.B.:

We have held that in 2013, the General Assembly, acting with discriminatory intent, enacted a photo ID requirement to become effective in 2016. But in 2015, before the requirement ever went into effect, the legislature significantly amended the law. North Carolina recently held two elections in which the photo ID requirement, as amended, was in effect. The record, however, contains no evidence as to how the amended voter ID requirement affected voting in North Carolina. In view of these facts and Supreme Court precedent as to the propriety of injunctive relief, I believe we should act cautiously.

The Supreme Court has explained that "[a]n injunction is a matter of equitable discretion; it does not follow from success on the merits as a matter of course." Winter v. Natural Res. Defense Council Inc., 555 U.S. 7, 32, 129 S.Ct. 365, 172 L.Ed.2d 249 (2008); see also Weinberger v. Romero–Barcelo, 456 U.S. 305, 102 S.Ct. 1798, 72 L.Ed.2d 91 (1982). Given the "inherent limitation upon federal judicial authority," a court's charge is only to "cure the condition that offends the Constitution." Milliken v. Bradley, 433 U.S. 267, 282, 97 S.Ct. 2749, 53 L.Ed.2d 745 (1977) (internal quotation marks omitted).

If interim events have "cured the condition," id. and a defendant carries its "heavy burden" of demonstrating that the wrong will not be repeated, a court will properly deny an injunction of the abandoned practice. United States v. W.T. Grant, 345 U.S. 629, 630–33, 73 S.Ct. 894, 97 L.Ed. 1303 (1953); see Kohl by Kohl v. Woodhaven Learning Ctr., 865 F.2d 930, 934 (8th Cir. 1989) ("A change in circumstances can destroy the need for an injunction."). Thus, a defendant's voluntary cessation of an unconstitutional practice or amendment of an unconstitutional law fundamentally bears "on the question of whether a court should exercise its power to enjoin" the practice or law. City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283, 288–89, 102 S.Ct. 1070, 71 L.Ed.2d 152 (1982).

The remedy for an unconstitutional law must completely cure the harm wrought by the prior law. But, a superseding statute can have that effect. See id. And, where a governmental body has already taken adequate steps to remedy an unconstitutional law, courts "generally decline to add ... a judicial remedy to the heap." Winzler v. Toyota Motor Sales U.S.A., Inc., 681 F.3d 1208, 1211 (10th Cir. 2012); cf. A. L. Mechling Barge Lines, Inc. v. United States, 368 U.S. 324, 331, 82 S.Ct. 337, 7 L.Ed.2d 317 (1961) ("[S]ound discretion withholds the remedy where it appears that a challenged 'continuing practice' is, at the moment adjudication is sought, undergoing significant modification so that its ultimate form cannot be confidently predicted.").

In 2015, two years after the enactment of the photo ID requirement, but prior to its implementation, the General Assembly added the reasonable impediment exception to the photo ID requirement. See 2015 N.C. Sess. Laws 103 § 8. The exception provides that a voter without qualifying photo ID may cast a provisional ballot after declaring under penalty of perjury that he or she "suffer[s] from a reasonable impediment that prevents [him] from obtaining acceptable photo identification." N.C. State Conf., --- F.Supp.3d at ----, 2016 WL 1650774, at *36 (internal quotation marks omitted). No party in this case suggests that the legislature acted with discriminatory intent when it enacted the reasonable impediment exception.

The majority maintains, however, that the reasonable impediment exception does not fully remedy the impact of the photo ID requirement. Perhaps not. But, by its terms, the exception totally excuses the discriminatory photo ID requirement.[1] Of course, in practice, it may not do so. But on this record, I believe we cannot assess whether, or to what extent, the reasonable impediment exception cures the unconstitutional 2013 photo ID requirement.

Because the district court failed to find discriminatory intent, it did not consider whether any unconstitutional effect survived the 2015 amendment. Instead, it focused on whether the law, as amended in 2015, burdened voters enough to sustain claims under a § 2 results or an Anderson–Burdick analysis. Id. at ----, ----, 2016 WL 1650774, at *122, *156. Of course, this is not the standard that controls or the findings that bear on whether a court should enjoin an unconstitutional racially discriminatory, but subsequently amended, law.[2]

Moreover, additional information now exists that goes directly to this inquiry. For after trial in this case, the State implemented the reasonable impediment exception in primary elections in March and June of 2016. The parties

and amici in this case have urged on us anecdotal extra-record information concerning the implementation of the exception during the March election. For example, Amicus supporting the Plaintiffs reports that, in the March 2016 primary election, poll workers gave reasonable-impediment voters incorrect ballots and County Boards of Elections were inconsistent about what they deemed a "reasonable" impediment. See Br. of Amicus Curiae Democracy North Carolina in Support of Appellants at 8–32, N.C. State Conf., ---F.3d ---- (4th Cir. 2016) (No. 16–1468). In response, the State maintains that "the vast majority" of these criticisms "are inaccurate or misleading," in part because Amicus completed its report before the State conducted its final vote count. Appellee's Resp. in Opp'n. to Mot. for Stay of J. and Inj. Pending Appeal at 3–5, N.C. State Conf., --- F.3d ---- (4th Cir. 2016) (No. 16–1468). Of course, these submissions as to the March election do not constitute evidence and we cannot consider them as such. Witters v. Washington Dep't of Servs. for the Blind, 474 U.S. 481, 488 n. 3, 106 S.Ct. 748, 88 L.Ed.2d 846 (1986). And for the June election, we do not even have anecdotal information.

Thus, we are faced with a statute enacted with racially discriminatory intent, amended before ever implemented in a way that may remedy that harm, and a record incomplete in more than one respect. Given these facts, I would only temporarily enjoin the photo ID requirement and remand the case to the district court to determine if, in practice, the exception fully remedies the discriminatory requirement or if a permanent injunction is necessary. In my view, this approach is that most faithful to Supreme Court teaching as to injunctive relief.

[Citations Omitted]

Amy Howe, *North Carolina comes up one vote short for stay in election law case*, SCOTUSBLOG (Aug. 31, 2016)

A closely divided Court today denied North Carolina's request to allow the state to enforce three provisions of its controversial 2013 election law when voters go to the polls for this fall's general elections. The state needed five of the eight Justices to agree to halt a lower court's ruling that blocked the law, but it came up one short – illustrating the impact of the death of Justice Antonin Scalia, who likely would have joined the Court's other conservative Justices in voting for the state.

The North Carolina legislature enacted the law in the wake of the Court's 2013 ruling in *Shelby County v. Holder*, which struck down the federal formula used to determine which state and local governments must obtain advance approval for any changes to their voting rules. The law would require North Carolina voters to show a government-issued photo ID, reduce the number of days for early voting, and eliminate out-of-precinct voting, same-day voter registration, and preregistration for young voters.

A federal trial court upheld the law against claims that it was racially discriminatory. But in late July of this year, a federal appeals court barred the state from enforcing the law. The court of appeals rejected the state's explanation that the law was intended to combat voter fraud and "promote public confidence in the election system." Rather, the court of appeals concluded, the law "hinges explicitly on race—specifically its concern that African Americans, who had overwhelmingly voted for Democrats, had too much access to" voting.

On August 15, North Carolina asked the Supreme Court to step in and allow the state to enforce three of the law's provisions – the voter ID requirement, the reduction in early voting days, and preregistration for young voters – during the upcoming elections. Doing so, the state told the Justices, would stave off the "voter confusion" that might ensue if the state were not allowed to use the same procedures (including the voter ID requirement) that it used in the March 2016 elections. But the federal government and civil rights groups challenging the law countered that a ruling for the state would actually increase the likelihood of "mistake and confusion," because the state had already made plans for the November election to go forward under the terms of the appeals court's order blocking the law.

Today's one-page order gave no explanation for the Court's ruling. However, Chief Justice John Roberts and Justices Anthony Kennedy and Samuel Alito indicated that they would have granted the state's request and allowed it to enforce the voter ID requirement and reduction in early voting; Justice Clarence Thomas would have granted the request in its entirety. Notably, on August 3 Justice Stephen Breyer joined his more conservative colleagues in voting to block a federal district court order that would have required a Virginia school board to allow a transgender student who identifies as a boy to use the boys' bathroom when school resumes last week; Breyer indicated that he did so "as a courtesy." Breyer did not do so today.

With today's order, the Court ruled only on North Carolina's request to enforce the three provisions during the upcoming election; it did not weigh in on the merits of the lower court's ruling striking down the law. The state can still ask the Supreme Court to review the dispute, but even if it agrees to do so, the Court would not normally hear oral argument and issue an opinion until well after the November election. (Although the state could ask for expedited briefing and oral argument, it would be a long shot given today's denial of a stay.) And challenges to the decisions about early voting made by local election boards – which have themselves been characterized as discriminatory – could also percolate up to the Court on an emergency basis.

Ohio Democratic Party v. Husted, 2016 WL 4437605, (6th Cir. 2016)

McKEAGUE, Circuit Judge.

This case presents yet another appeal (there are several pending in the Sixth Circuit alone) asking the federal courts to become entangled, as overseers and micromanagers, in the minutiae of state election processes. No one denies that our Constitution, in defining the relationship between the people and the government, establishes certain fundamental rights—including the right to vote—that warrant vigilant enforcement. But our Constitution also defines the relationship between spheres of government, state and federal, and their responsibilities for protecting the rights of the people. The genius of this balance of power is no less deserving of vigilant respect.

Ohio is a national leader when it comes to early voting opportunities. The state election regulation at issue allows early in-person voting for 29 days before Election Day. This is really quite generous. The law is facially neutral; it offers early voting to everyone. The Constitution does not require *any* opportunities for early voting and as many as thirteen states offer just one day for voting: Election Day. Moreover, the subject regulation is the product of a bipartisan recommendation, as amended pursuant to a subsequent litigation settlement. It is the product of collaborative processes, not unilateral overreaching by the political party that happened to be in power. Yet, plaintiffs complain that allowance of 29 days of early voting does not suffice under federal law. They insist that Ohio's prior accommodation—35 days of early voting, which also created a six-day "Golden Week" opportunity for same-day registration and voting—established a federal floor that Ohio may add to but never subtract from. This is an astonishing proposition.

Nearly a third of the states offer no early voting. Adopting plaintiffs' theory of disenfranchisement would create a "one-way ratchet" that would discourage states from ever increasing early voting opportunities, lest they be prohibited by federal courts from later modifying their election procedures in response to changing circumstances. Further, while the challenged regulation may slightly diminish the convenience of registration and voting, it applies even-handedly to all voters, and, despite the change, Ohio continues to provide generous, reasonable, and accessible voting options to all Ohioans. The issue is not whether some voter somewhere would benefit from six additional days of early voting or from the opportunity to register and vote at the same time. Rather, the issue is whether the challenged law results in a cognizable injury under the Constitution or the Voting Rights Act. We conclude that it does not.

Federal judicial remedies, of course, are necessary where a state law impermissibly infringes the fundamental right to vote. No such infringement having been shown in this case, judicial restraint is in order. Proper deference to state legislative authority requires that Ohio's election process be allowed to proceed unhindered by the federal courts. Accordingly, and for the reasons more fully set forth below, we REVERSE the decision of the district court insofar as it declared the subject regulation invalid and enjoined its implementation.

I. BACKGROUND

…**B. Voting in Ohio**

A brief review of recent voting regulation history in Ohio provides context. In 2004, Ohio permitted absentee ballots only if registered voters asserted one of several "excuses." *See* Ohio Rev. Code § 3509.02(A)(1)–(8) (2004). The timeline for voting by absentee ballot was generous: a voter could pick up a ballot 35 days before Election Day, the first five of which extended into Ohio's voter registration period (which ended 30 days before an election). Thus, Ohio maintained a five-day overlap of its registration period and its absentee voting period,

allowing residents armed with a proper excuse to both register and vote (absentee) on the same day. This "same-day registration" window became known in Ohio as "Golden Week." R. 117, Opinion at 34, Page ID 6156.

The 2004 presidential election brought special challenges to Ohio's general voting apparatus. Among other problems, Ohio voters "faced long lines and wait-times that, at some polling places, stretched into the early morning of the following day." *Obama for America v. Husted*, 697 F.3d 423, 426 (6th Cir. 2012). Largely in response to this experience, Ohio refined its absentee voting system in 2005 to permit early voting without need of an excuse. *Id.* Ohio residents enjoying the freedom of this "no-fault" or "no-excuse" system could vote absentee by mail or in person ("early in-person" or "EIP" voting) at their convenience. Ohio retained its preexisting absentee voting time frame.

Until 2012, each of Ohio's 88 county boards of elections retained the discretion to implement its own schedule for early in-person absentee voting. Varying schedules resulted. To remedy the inconsistencies, a task force from the Ohio Association of Election Officials (OAEO), a bipartisan association of election officials, proposed adoption of a uniform 21-day early in-person voting schedule, under which the period for "early" or "absentee" voting would start nine days *after* the end of the voter registration period.

In 2012, Ohio passed a law based on the OAEO recommendation, but repealed it after the law became subject to a referendum. In 2013, another bipartisan task force recommended that absentee voting not be allowed until the day after the registration period closed, establishing an early voting time frame of 29 days instead of the previously recommended 21 days. On February 19, 2014, Ohio passed S.B. 238, amending Ohio Rev. Code § 3509.01 to make the first day of early absentee voting—whether early in-person or by mail—the day after the close of voter registration. This amendment effectively eliminated Golden Week and the possibility of same-day registration.

Shortly before the 2014 election, the NAACP and other groups challenged S.B. 238, alleging that it disproportionally affected African Americans, thereby (1) violating the Equal Protection Clause of the Fourteenth Amendment by burdening African Americans' fundamental right to vote; and (2) violating Section 2 of the Voting Rights Act of 1965 by burdening African-American voters' ability to participate effectively in Ohio's political process. Though a panel of this court upheld a preliminary injunction preventing implementation of the law, *see Ohio State Conference of NAACP v. Husted*, 768 F.3d 524, 529 (6th Cir. 2014) (hereinafter "*NAACP*"), the Supreme Court stayed the injunction, *Husted v. Ohio State Conference of NAACP*, --- U.S. ----, 135 S.Ct. 42, 189 L.Ed.2d 894 (2014), and the panel subsequently vacated its decision for mootness. *Ohio State Conference of NAACP v. Husted*, 2014 WL 10384647, at *1 (6th Cir. Oct. 1, 2014). Thus, the 2014 election took place with S.B. 238 in full effect. After the election, the parties to *NAACP* reached a settlement under which Ohio added another Sunday of early in-person voting as well as additional evening hours, and the plaintiffs voluntarily dismissed their claim challenging the 29-day voting period.[1]

This brings us to the present action. After *NAACP* settled, plaintiffs in this action, the Ohio Democratic Party, the Democratic Party of Cuyahoga County, the Montgomery County Democratic Party, and three individuals (collectively referred to as "plaintiffs" or the "Democratic Parties"), evidently finding the settlement negotiated by the NAACP to be unsatisfactory, challenged S.B. 238 (as modified per settlement) and other Ohio laws as violating the Equal Protection Clause and Section 2 of the Voting Rights Act, 52 U.S.C. § 10301.[2] Despite subsequently acknowledging that "Ohio's national leadership in voting opportunities is to be commended," R. 125, Stay Order, Page ID 6302, the district court held that S.B. 238 violated the Equal Protection Clause and the

Voting Rights Act based largely on what it called the "highly persuasive" reasoning of this court's since-vacated ruling upholding a preliminary injunction in *NAACP*. *See* R. 117, Opinion at 35–36, Page ID 6156–57.

Regarding plaintiffs' equal protection challenge, the district court concluded that S.B. 238 imposed a "modest" (i.e., "more than minimal but less than significant") disparate burden on African Americans. The "numerous opportunities to cast a ballot in Ohio, including vot[ing] by mail, in person on Election Day, and on other EIP voting days" were deemed insufficient to mitigate the burden. *See* R. 117, Opinion at 34–36, 42–43, Page ID 6156–58, 6164–65. Although Ohio allows numerous and convenient registration options (including registration by mail), more than four weeks of absentee voting, and more than three weeks of early in-person voting, the district court acknowledged that there are minimal postage costs associated with voting by mail and accepted what it characterized as "anecdotal evidence" that "African Americans are distrustful of voting by mail" to conclude that voting by mail may not be a suitable alternative to early in-person voting for many African-Americans. *Id*. at 43–44, Page ID 6165–66. The court concluded that, despite Ohio's generous voting options, S.B. 238's modification of Ohio's early voting schedule resulted in a disparate burden on some African-American voters. And despite accepting the legitimacy of Ohio's asserted interests (preventing fraud, decreasing costs, reducing administrative burdens, and enhancing voter confidence, *id.* at 49–57, Page ID 6171–79), the court held they did not justify the modest burdens imposed by the law.

The court then turned to the Democratic Parties' Voting Rights Act claim and held that S.B. 238 violated Section 2 of the Voting Rights Act as it "interacts with the historical and social conditions facing African Americans in Ohio to reduce their opportunity to participate in Ohio's political process relative to other groups of voters[.]" *Id.* at 107, Page ID 6229.

II. EQUAL PROTECTION

A. Framework

…When a constitutional challenge to an election regulation calls us to resolve a dispute concerning … competing interests, we apply the so-called *Anderson-Burdick* framework, an analysis arising from the Supreme Court's holdings in *Anderson v. Celebrezze*, 460 U.S. 780, 103 S.Ct. 1564, 75 L.Ed.2d 547 (1983), and *Burdick v. Takushi*, 504 U.S. 428, 112 S.Ct. 2059, 119 L.Ed.2d 245 (1992). The *Anderson-Burdick* framework involves the following considerations:

> [T]he court must first consider the character and magnitude of the asserted injury to the rights protected by the [Constitution] that the plaintiff seeks to vindicate. Second, it must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. Finally, it must determine the legitimacy and strength of each of those interests and consider the extent to which those interests make it necessary to burden the plaintiff's rights.

Green Party of Tennessee v. Hargett, 791 F.3d 684, 693 (6th Cir. 2015) (internal quotation marks and citations omitted). Though the touchstone of *Anderson-Burdick* is its flexibility in weighing competing interests, the "rigorousness of our inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights." *Burdick*, 504 U.S. at 434, 112 S.Ct. 2059. This flexible balancing approach is not totally devoid of guidelines. If a state imposes "severe restrictions" on a plaintiff's constitutional rights (here, the right to vote), its regulations survive only if "narrowly drawn to advance

a state interest of compelling importance." *Id.* On the other hand, "minimally burdensome and nondiscriminatory" regulations are subject to a "less-searching examination closer to rational basis" and " 'the State's important regulatory interests are generally sufficient to justify the restrictions.' " *Ohio Council 8 Am. Fed'n of State v. Husted*, 814 F.3d 329, 335 (6th Cir. 2016) (citing *Hargett*, 767 F.3d at 546, and quoting *Burdick*, 504 U.S. at 434, 112 S.Ct. 2059). Regulations falling somewhere in between—i.e., regulations that impose a more-than-minimal but less-than-severe burden—require a "flexible" analysis, "weighing the burden on the plaintiffs against the state's asserted interest and chosen means of pursuing it." *Hargett*, 767 F.3d at 546.

Because plaintiffs have advanced a broad attack on the constitutionality of S.B. 238, "seeking relief that would invalidate the statute in all its applications, they bear a heavy burden of persuasion." *Crawford*, 553 U.S. at 200, 128 S.Ct. 1610 (Stevens, J., op.). Because we conclude that S.B. 238 results, at most, in a minimal disparate burden on some African Americans' right to vote, and because the State's legitimate interests are "sufficiently weighty" to justify this minimal burden, S.B. 238 easily survives plaintiffs' equal protection challenge. *See id.* at 190, 128 S.Ct. 1610.

…The district court placed inordinate weight on its finding that some African-American voters *may prefer* voting on Sundays, or avoiding the mail, or saving on postage, or voting after a nine-to-five work day. To the extent S.B. 238 may be viewed as impacting such preferences, its "burden" clearly results more from a "matter of choice rather than a state-created obstacle." *Frank*, 768 F.3d at 749. The Equal Protection Clause, as applied under the *Anderson-Burdick* framework, simply cannot be reasonably understood as demanding recognition and accommodation of such variable personal preferences, even if the preferences are shown to be shared in higher numbers by members of certain identifiable segments of the voting public.

We also conclude that the elimination of same-day registration and the resulting need for Ohioans to register and vote on separate occasions is, at most, minimally burdensome. Like voting before Election Day, Ohio also makes registration easy. Registration forms are conveniently distributed throughout its communities at the 88 boards of elections offices as well as many other locations, including "local libraries, at many of the municipal city halls, high schools"—and can even be printed from county websites. R. 97, Perlatti Tr., Page ID 4067.[4] And if this isn't enough, the Secretary of State mailed absentee ballot applications to almost every registered voter in the state in the past two elections and plans to do so in the 2016 election. *Id.* Thus, even without Golden Week, Ohio's registration and voting processes afford abundant opportunity for all Ohio voters, of whatever racial or ethnic background, to register and exercise their right to vote.

…Considering the generally applicable and non-discriminatory nature of S.B. 238 in light of Ohio's generous absentee voting system, a system which provides extensive opportunities for all voters, including African Americans, to cast their ballots short of coming out on Election Day, we hold that S.B. 238 results only in a minimal burden on African Americans' right to vote. *See Burdick*, 504 U.S. at 434–37, 112 S.Ct. 2059 (assessing Hawaii's ban on "write-in" votes for candidates in light of the State's otherwise "easy access to the ballot"); *Ohio Council*, 814 F.3d at 335 (holding that ballot restrictions on judicial candidates imposed only minimal burdens on political parties because Ohio law gave parties "many other opportunities to champion [their] nominee[s]"). We therefore reject the district court's conclusion that S.B. 238 imposes a "modest" burden. We next look to the State's interests in adopting the regulation. *See Crawford*, 553 U.S. at 190, 128 S.Ct. 1610 (Stevens, J., op.).

C. State's Interests

Because S.B. 238 is minimally burdensome and nondiscriminatory, we apply a deferential standard of review akin

to rational basis and Ohio need only advance "important regulatory interests" to satisfy the *Anderson-Burdick* analysis. *See Burdick*, 504 U.S. at 434, 112 S.Ct. 2059; *Ohio Council*, 814 F.3d at 338 (plaintiffs bear a "heavy constitutional burden" to demonstrate that a state's minimally burdensome law is unconstitutional). Here, the interests advanced by the State are analogous to, and even better substantiated than those accepted as sufficient in *Crawford*. It follows that the State's present interests pass muster under *Anderson-Burdick*: they justify the minimal burden potentially visited on some African-American voters as a result of S.B. 238. However, even if we were to accept the district court's characterization of the burden as "modest," which may conceivably trigger a slightly less deferential review under the "flexible" *Anderson-Burdick* framework, Ohio's proffered interests are still "sufficiently weighty" to justify it.

[5]Ohio contends S.B. 238 serves four legitimate interests: "(1) preventing voter fraud; (2) reducing costs; (3) reducing administrative burdens; and (4) increasing voter confidence and preventing voter confusion." R. 117, Opinion at 49, Page ID 6171. The district court rejected Ohio's justifications, noting that "while they may be legitimate," the State's "insufficient evidence" shows they are "minimal, unsupported, or not accomplished by S.B. 238." *Id.* at 56, Page ID 6178. The district court demanded too much. For regulations that are not unduly burdensome, the *Anderson-Burdick* analysis never requires a state to actually *prove* "the sufficiency of the 'evidence.' " *Munro v. Socialist Workers Party*, 479 U.S. 189, 195, 107 S.Ct. 533, 93 L.Ed.2d 499 (1986) (explaining that a contrary rule would "would invariably lead to endless court battles over the sufficiency of the 'evidence' "). Rather, at least with respect to a minimally burdensome regulation triggering rational-basis review, we accept a justification's sufficiency as a "legislative fact" and defer to the findings of Ohio's legislature so long as its findings are reasonable. *See Frank*, 768 F.3d at 750; *see also Munro*, 479 U.S. at 195–96, 107 S.Ct. 533.

Voter Fraud and Public Confidence. Ohio first justifies S.B. 238 by asserting that it decreases the opportunity for voter fraud arising from same-day registration during Golden Week. The district court discounted Ohio's interest in combating potential fraud because, "while the general opinion evidence [showed] that Golden Week increases the opportunity for voter fraud ... actual instances of voter fraud during Golden Week are extremely rare" and "[t]his very limited evidence of voter fraud is insufficient to justify the modest burden imposed by S.B. 238." R. 117, Opinion at 49, Page ID 6171–72. But we do not "require elaborate, empirical verification of the weightiness of the State's asserted justifications

…Here, Ohio offers inconclusive, but concrete evidence of voter fraud during Golden Week's same-day registration period. Under *Crawford*'s teaching, working to achieve that goal is a "sufficiently weighty" interest to justify the minimal burden experienced by some African-American voters. *Crawford*, 553 U.S. at 191, 128 S.Ct. 1610 (Stevens, J., op.). Running in tandem with the State's interest in preventing voter fraud is its closely related, but independently significant justification for eliminating same-day registration: safeguarding public confidence by eliminating "even appearances of fraud." The *Crawford* court accepted this justification as practically self-evidently true, observing that a state's "electoral system cannot inspire public confidence if no safeguards exist to deter or detect fraud or to confirm the identity of voters." *Crawford*, 553 U.S. at 197, 128 S.Ct. 1610 (Stevens, J., op.). Unlike the district court, we adhere to *Crawford*'s approach and conclude that the State's purpose of preventing potential fraud and promoting public confidence is in furtherance of legitimate and important regulatory interests.

The district court was not only dissatisfied with Ohio's evidence, but also with Ohio's method of combatting potential fraud. Part of the State's fraud-based rationale arose from the bipartisan OAEO recommendation that early voting begin only after the close of registration, because overlapping registration and voting periods were

deemed to constitute "the greatest time for voter fraud to occur." R. 103, Ward Tr., Page ID 5329; R. 104, Damschroder Tr., Page ID 5448 (explaining that Golden Week "presented a unique risk for voter fraud where a person could, at one event, at one moment, both register to vote, request an absentee ballot and cast an absentee ballot and then disappear"). S.B. 238 addressed this concern by eliminating Golden Week's same-day registration. The district court, again relying on our vacated decision in *NAACP*, 768 F.3d at 547, attacked the efficacy of eliminating same-day registration in targeting potential fraud by pointing to a hypothetical voter who could still register to vote 30 days before the election and then return to cast an early in-person ballot on the 29th day before the election—in theory, voting before the board of elections completed its mail verification process. R. 117, Opinion at 51, Page ID 6173.

Yet, our task (especially with respect to minimally burdensome laws) is neither to craft the "best" approach, nor "to impose our own idea of democracy upon the Ohio state legislature." *Libertarian Party*, 462 F.3d at 587; *see also Crawford*, 553 U.S. at 196, 128 S.Ct. 1610 (Stevens, J., op.) ("While the most effective method of preventing election fraud may well be debatable, the propriety of doing so is perfectly clear.").[6] Rather, we simply call balls and strikes and apply a generous strike zone when the state articulates legitimate and reasonable justifications for minimally burdensome, non-discriminatory election regulations.[7] Given the weight afforded to State measures targeting potential fraud (even without evidentiary support) in *Crawford*; and given the Court's hesitation to scrutinize the regulation's fraud-fighting effectiveness, we accept Ohio's goal of reducing potential voter fraud as an "important regulatory interest" sufficient to justify the minimal burden identified in this case. *See Ohio Council*, 814 F.3d at 338. Moreover, Ohio offers additional justifications.

III. VOTING RIGHTS ACT

A. Section 2

The district court also held that S.B. 238 violates § 2 of the Voting Rights Act, 52 U.S.C. § 10301. As originally passed, the Voting Rights Act ("VRA") was interpreted to prohibit only intentional discrimination. *City of Mobile v. Bolden*, 446 U.S. 55, 60–61, 100 S.Ct. 1519, 64 L.Ed.2d 47 (1980) (plurality op.). However, Congress amended the law in 1982 to add a "results" test, making a showing of intentional discrimination unnecessary. *See Moore v. Detroit Sch. Reform Bd.*, 293 F.3d 352, 363 (6th Cir. 2002). As amended, Section 2(a) prohibits a state from "impos[ing]" or "appl[ying]" any "voting qualification or prerequisite to voting or standard, practice, or procedure ... which *results in* a denial or abridgement of the right of any citizen of the United States to vote on account of race or color[.]" 52 U.S.C. § 10301(a) (emphasis added). The statute explains in Section 2(b) that a voting prerequisite, standard, practice, or procedure is deemed to "result in such a denial or abridgment of the right ... to vote on account of race or color" if:

> [B]ased on the totality of circumstances, it is shown that **the political processes** leading to nomination or election in the State or political subdivision **are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice**. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

52 U.S.C. § 10301(b) (bold emphasis added). The text therefore retained a prohibition against intentional

discrimination under § 10301(a), but added Section 2(b) to cover unequally open political processes. *See Baird v. Consol. City of Indianapolis*, 976 F.2d 357, 359–60 (7th Cir. 1992). As it currently stands, Section 2(b) encompasses two types of claims: a "vote-dilution" claim, which alleges that a districting practice denies minorities an equal opportunity "to elect representatives of their choice," and a "vote-denial" claim,[9] which alleges the denial of opportunity to "participate in the political process." *See* 52 U.S.C. § 10301(a)–(b).

The majority of cases interpreting Section 2 arose in the vote-dilution context, epitomized by the Supreme Court's decision in *Thornburg v. Gingles*, 478 U.S. 30, 47–52, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986) (establishing a framework for evaluating claims that a jurisdiction's use of an at-large or multimember electoral system or redistricting plan diluted minority votes, thereby diminishing the ability of minority groups to elect representatives of their choice). While vote-dilution jurisprudence is well-developed, numerous courts and commentators have noted that applying Section 2's "results test" to vote-denial claims is challenging, and a clear standard for its application has not been conclusively established. *See Veasey v. Abbott*, ---F.3d ----, ----, 2016 WL 3923868 at *17 (5th Cir. July 20, 2016) (en banc) ("[T]here is little authority on the proper test to determine whether the right to vote has been *denied* or *abridged* on account of race"); *see also Simmons v. Galvin*, 575 F.3d 24, 42 n.24 (1st Cir. 2009) ("While *Gingles* and its progeny have generated a well-established standard for vote dilution, a satisfactory test for vote denial cases under Section 2 has yet to emerge.... [and] the Supreme Court's seminal opinion in *Gingles* ... is of little use in vote denial cases." (internal quotation marks omitted)); *NAACP*, 768 F.3d at 554 ("A clear test for Section 2 vote denial claims ... has yet to emerge."); Daniel P. Tokaji, *The New Vote Denial: Where Election Reform Meets the Voting Rights Act*, 57 S.C. L. Rev. 689, 709 (2006) (same).

The district court evaluated plaintiffs' vote-denial claim by relying on a framework first articulated in our now-vacated NAACP decision. In that case, the panel viewed the "text of Section 2 and the limited relevant case law as requiring proof of two elements to make out a vote denial claim":

> First ... the challenged standard, practice, or procedure must impose a discriminatory burden on members of a protected class, meaning that members of the protected class have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice; [and]
> Second ... that burden must in part be caused by or linked to social and historical conditions that have or currently produce discrimination against members of the protected class.

NAACP, 768 F.3d at 554 (internal citations and quotation marks omitted). This framework is helpful in evaluating Section 2 vote-denial claims, but warrants clarification.[10]

The first step essentially reiterates Section 2's textual requirement that a voting standard or practice, to be actionable, must result in an adverse disparate impact on protected class members' opportunity to participate in the political process. But this formulation cannot be construed as suggesting that the existence of a disparate impact, in and of itself, is sufficient to establish the sort of injury that is cognizable and remediable under Section 2. *See* 52 U.S.C. § 10301 (a)–(b). We know this is true because "a showing of disproportionate racial impact alone does not establish a per se violation" of Section 2. *Wesley v. Collins*, 791 F.2d 1255, 1260 (6th Cir. 1986); *see also Gonzalez v. Arizona*, 677 F.3d 383, 405 (9th Cir. 2012) (en banc) ("[A] § 2 challenge based purely on a showing of some relevant statistical disparity between minorities and whites, without any evidence that the challenged voting qualification causes that disparity, will be rejected." (internal quotation marks and citation omitted)); *Frank*, 768 F.3d at 753 (Section 2 "does not condemn a voting practice just because it has a disparate effect on minorities. (If things were that simple, there wouldn't have been a need for *Gingles* to list nine non-exclusive

factors in vote-dilution cases.)"). Accordingly, proof of a disparate impact—amounting to denial or abridgement of protected class members' right to vote—that *results from the challenged standard or practice* is necessary to satisfy the first element of the test, but is not sufficient to establish a valid Section 2 vote-denial-or-abridgement claim. We therefore emphasize that the first element of the Section 2 claim requires proof that the challenged standard or practice causally contributes to the alleged discriminatory impact by affording protected group members less opportunity to participate in the political process.

[8]If this first element is met, the second step comes into play, triggering consideration of the "totality of circumstances," potentially informed by the "Senate Factors" discussed in *Gingles*.[11] This inquiry, as the *Gingles* Court explained, is designed to restore the "results test," whereby a challenged law or structure—albeit not designed or maintained for a discriminatory purpose—can be deemed to deny or abridge the right to vote if *the law or structure* has the effect, as *it* interacts with social and historical conditions, of causing racial inequality in the opportunity to vote. *Gingles*, 478 U.S. at 43–47, 106 S.Ct. 2752. In other words, a facially neutral, nondiscriminatory standard or practice that results in a disparate impact, but would not otherwise be actionable as an impermissible denial or abridgment of the right to vote, *becomes* actionable as an impermissible denial or abridgment pursuant to Section 2(b) where, in response to the step two inquiry, a disparate impact in the opportunity to vote is shown to result not only from operation of the law, but from the interaction of the law *and* social and historical conditions that have produced discrimination.

As formulated in *NAACP*, the second step asks whether the alleged disparate impact is "in part caused by or linked to 'social and historical conditions' that have or currently produce discrimination against members of the protected class." *NAACP*, 768 F.3d at 554. Read in isolation, this formulation of the second step could be erroneously understood to mean that an alleged disparate impact that is linked to social and historical conditions makes out a Section 2 violation. But if the second step is divorced from the first step requirement of causal contribution by the challenged standard or practice itself, it is incompatible with the text of Section 2 and incongruous with Supreme Court precedent. Thus, the second step asks not just whether social and historical conditions "result in" a disparate impact, but whether the challenged *voting standard or practice* causes the discriminatory impact as *it* interacts with social and historical conditions. *See* 52 U.S.C. § 10301(a)–(b) (providing that, to be actionable, a voting standard or practice must "result in" (i.e., *cause*) a discriminatory impact on the opportunity of protected class members to "participate in the political process"); *see also Gingles*, 478 U.S. at 47, 106 S.Ct. 2752; *League of United Latin Am. Citizens, Council No. 4434 v. Clements*, 999 F.2d 831, 867 (5th Cir. 1993) ("[S]ocioeconomic disparities and a history of discrimination, without more" are insufficient to establish Section 2's causal nexus).

The foregoing construction of Section 2 is not only faithful to the statutory text and legislative history referred to in *Gingles*, but also makes practical sense. Conversely, to apply Section 2 to invalidate a State's innocuous voting regulation based solely on evidence that social and historical conditions resulted in a disparate impact would impermissibly punish a state for the effects of private discrimination. *Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc.*, ––– U.S. ––––, 135 S.Ct. 2507, 2523, 192 L.Ed.2d 514 (2015) (explaining that that state entities should not be "held liable for racial disparities they did not create"); *see also Milliken v. Bradley*, 418 U.S. 717, 94 S.Ct. 3112, 41 L.Ed.2d 1069 (1974). We therefore clarify that S.B. 238 is actionable as a Section 2 violation only if it is shown to causally contribute, as it interacts with social and historical conditions that have produced discrimination, to a disparate impact on African Americans' opportunity to participate in the political process. *See* 52 U.S.C. § 10301(a)–(b).

B. Disparate Impact

[9]The district court paid little attention to the disparate impact element of the first step, referring simply to its prior *Anderson-Burdick* analysis to conclude that S.B. 238 "imposes a burden on the rights of African Americans to vote" and assuming that conclusion was sufficient to establish that S.B. 238 disparately impacted African Americans in a manner cognizable under Section 2. R. 117, Opinion at 98, Page ID 6220. But this hasty conclusion neglected the first step of our inquiry: whether S.B. 238 actually disparately impacts African Americans by resulting in "less opportunity [for African Americans] than other members of the electorate to participate in the political process." 52 U.S.C. § 10301(b).

In fact, when compared to other members of the electorate, the statistical evidence in the record clearly establishes that Ohio's political processes are equally open to African Americans. In 2008, 2010, 2012, and 2014, African Americans registered at higher percentages than whites, and both groups' registration numbers are statistically indistinguishable in every federal election since 2006. R. 127-18, Hood Rebuttal, Page ID 7366–67 (noting that African-American voter turnout "either exceeds or is the same as white turnout in Ohio"). Moreover, plaintiffs do not dispute the evidence that all voters who used Golden Week in 2010, regardless of race, were just as likely to vote in 2014 without Golden Week. R. 98, McCarty Tr., Page ID 4141–42 (explaining that "those people who voted on an eliminated day were no less likely to vote in 2014 than someone who had voted on a preserved day").

.... We therefore hold that plaintiffs have failed to meet the first step in establishing a vote denial or abridgement claim under Section 2 of the Voting Rights Act. They have failed to establish a cognizable disparate impact. Consequently, the second step inquiry regarding the causal interaction of S.B. 238 with social and historical conditions that have produced discrimination is immaterial. Plaintiffs have failed to establish a violation of Section 2 of the Voting Rights Act. The district court's contrary conclusion is in error and must be reversed.

IV. CONCLUSION

Accordingly, we conclude that S.B. 238, affording abundant and convenient opportunities for all Ohioans to exercise their right to vote, is well within the constitutionally granted prerogative and authority of the Ohio Legislature to regulate state election processes. It does not run afoul of the Equal Protection Clause or the Voting Rights Act, as those laws have been interpreted and applied to voting regulations in the most instructive decisions of the Supreme Court. The district court's award of declaratory and injunctive relief invalidating and enjoining enforcement of S.B. 238 must be **VACATED** and its judgment must be, to this extent, **REVERSED**.

STRANCH, Circuit Judge, dissenting.

The majority opinion today overturns a decision in which the district court conducted a 10-day bench trial considering the testimony of more than 20 witnesses, including at least 8 experts. It ultimately penned 120 pages dismissing all of Plaintiffs' challenges to S.B. 238 except its elimination of Golden Week (reducing early in-person (EIP) voting and eliminating same day registration (SDR)), which it enjoined. In reversing this decision, the majority opinion employed an incorrect standard of review and created and applied new tests, unadorned by precedent, instead of those that we and our sister Circuits have found applicable to voter denial cases such as this one. I therefore respectfully dissent.

Before addressing the governing law in light of the extensive record before us, I need to address the assumptions that frame the majority's opinion. This case is portrayed as an improper intrusion of the federal courts "as overseers and micromanagers, in the minutiae of state election processes." (Maj.Op. at ----) I disagree. In *Veasey*

v. Abbott, --- F.3d ----, ----, 2016 WL 3923868, at *44 (5th Cir. July 20, 2016) (en banc) (Higginson, J., concurring), the Fifth Circuit provides a fitting answer to this charge. It explains why it is healthy to scrutinize the river of State voting regulations that has flowed in the wake of *Shelby County v. Holder*, --- U.S. ----, 133 S.Ct. 2612, 186 L.Ed.2d 651 (2013): "Such scrutiny should be seen not as heavy-handed judicial rejection of legislative priorities, but as part of a process of harmonizing those priorities with the fundamental right to vote—a topic with which over a quarter of our Constitution's amendments have dealt in one way or another, and an individual right that cannot be compromised because an adverse impact falls on relatively few rather than many."

This explanation grows from advances in both our social and legal systems. Take the example of states that required literacy tests to vote, a practice our Supreme Court refused to challenge the "wisdom" of in the 1950s, on the basis that, "Literacy and intelligence are obviously not synonymous. Illiterate people may be intelligent voters. Yet in our society where newspapers, periodicals, books, and other printed matter canvass and debate campaign issues, a State might conclude that only those who are literate should exercise the franchise." *Lassiter v. Northampton Cty. Bd. of Elections*, 360 U.S. 45, 50–53, 79 S.Ct. 985, 3 L.Ed.2d 1072 (1959). By the 1960s, the Court recognized that "[w]hen a State exercises power wholly with in the domain of State interest, it is insulated from Federal judicial review. But such insulation is not carried over when State power is used as an instrument for circumventing a federally protected right." *Gomillion v. Lightfoot*, 364 U.S. 339, 347, 81 S.Ct. 125, 5 L.Ed.2d 110 (1960). In 1965, the men and women the American people elected to Congress passed the Voting Rights Act (VRA) expressly providing for oversight of state voting regulations and outlawing literacy tests. Testimony by Attorney General Nicholas Katzenbach during the passage of the Act explained why:

> Whether there is really a valid basis for the use of literacy tests is ... subject to legitimate question. But it is not for this reason that the proposed legislation seeks to abolish them in certain places. Rather, we seek to abolish these tests because they have been used in those places as a device to discriminate against Negroes ...
> Our concern today is to enlarge representative government. It is to solicit the consent of all the governed. It is to increase the number of citizens who can vote. What kind of consummate irony would it be for us to act on that concern—and in so doing reduce the ballot, to diminish democracy? It would not only be ironic; it would be intolerable.

Voting Rights: Hearings on H.R. 6400 Before the H. Comm. on the Judiciary, 89th Cong. 16–17 (1965) (statement of Nicholas deB. Katzenbach, Attorney General of the United States).

Our social and legal advances as a society are reflected in the Supreme Court's decisions during the 1960s that accepted a searching review and scrutiny of voting regulation as necessary. "The Voting Rights Act was aimed at the subtle, as well as the obvious, state regulations which have the effect of denying citizens their right to vote because of their race." *Allen v. State Bd. of Elections*, 393 U.S. 544, 565, 89 S.Ct. 817, 22 L.Ed.2d 1 (1969). Following the 1982 amendments to the VRA, the Court explained both the fullness of the review required and the reason why such scrutiny is essential:

> The need for such "totality" review springs from the demonstrated ingenuity of state and local governments in hobbling minority voting power, *McCain v. Lybrand*, 465 U.S. 236, 243–246[, 104 S.Ct. 1037, 79 L.Ed.2d 271] (1984), a point recognized by Congress when it amended the statute in 1982: "[S]ince the adoption of the Voting Rights Act, [some] jurisdictions have substantially moved from direct, over[t] impediments to the right to vote to more sophisticated devices that dilute minority voting strength," Senate Report 10 (discussing § 5). In modifying § 2, Congress thus endorsed our view in *White v. Regester*, 412 U.S. 755[, 93 S.Ct. 2332, 37 L.Ed.2d

314] (1973), that "whether the political processes are 'equally open' depends upon a searching practical evaluation of the 'past and present reality,' " Senate Report 30 (quoting 412 U.S. at 766, 770, 93 S.Ct. 2332).

Johnson v. De Grandy, 512 U.S. 997, 1018, 114 S.Ct. 2647, 129 L.Ed.2d 775 (1994).

As numerous cases recognize, those who seek to discriminate against a segment of the population do not trumpet their intentions—or do not do so publicly. The 2006 amendments to the VRA identified our progress as well as this continuing problem, noting that "vestiges of discrimination in voting continue to exist as demonstrated by second generation barriers constructed to prevent minority voters from fully participating in the electoral process." H.R. Rep. No. 109-478, at 2 (2006), *as reprinted in* 2006 U.S.C.C.A.N. 618.

While our case law has struggled to articulate how judges can practically and should appropriately review state laws governing the fundamental right to vote, we have steadily progressed beyond a standard that refused to review the wisdom of a State's choice to employ procedures, such as literacy tests, that function to disenfranchise selected voters. I do not think that it is federal intrusion or micromanaging to evaluate election procedures to determine if discrimination lurks in an obvious rule or in a subtle detail. Our recent jurisprudence does not shy away from the scrutiny that is essential to protection of the fundamental right to vote, though it recognizes the difficulty of the task. "Rather than applying any 'litmus test' that would neatly separate valid from invalid restrictions, we concluded that a court must identify and evaluate the interests put forward by the State as justifications for the burden imposed by its rule, and then make the 'hard judgment' that our adversary system demands." *Crawford v. Marion County Election Bd.*, 553 U.S. 181, 190, 128 S.Ct. 1610, 170 L.Ed.2d 574 (2008). I turn to the case before us to explain why my view of the hard judgment here differs from that of my colleagues.

I. DISTRICT COURT RECORD AND DECISION

…The court's review of the record evidence evincing these disparities led it to conclude,

> that the cost of voting is therefore generally higher for African Americans, as they are less likely to be able to take time off of work, find childcare, and secure reliable transportation to the polls. Moreover, greater levels of transience may result in more frequent changes of address, which in turn requires individuals to update their registration more frequently. SDR [same-day registration] provided an opportunity to do so and vote at the same time. As such, African Americans disproportionately make up the group that benefits the most from SDR, and the elimination of that opportunity burdens their right to vote.

(*Id.* at PageID 6163–64) The district court relied on this evidence and numerous other expert reports and testimony from lay witnesses that it found credible to support its conclusions that the reduction in EIP voting time, and the elimination of Golden Week specifically, imposes a modest burden on the right to vote of African Americans citizens of Ohio.

A great deal of work underlies the district court's conclusion on this important subject. Both that work and the substantial support found in the record stand in opposition to the majority opinion's blithe assertion "that it's easy to vote in Ohio. Very easy, actually." (Maj.Op. at 10) This assertion is problematic for another reason—the district court's finding that Ohio law imposes some burden on the right of African Americans to vote in Ohio indicates that how "easy" it is to vote under Ohio's new regime bears some small but definable relationship to the

color of your skin. This burden is the fact-bound conclusion that we address on appeal.

I begin my analysis of the appropriate tests and application to the facts from the record with the equal protection claim.

II. EQUAL PROTECTION

This analysis must start with the correct standard of review. The majority argues that de novo review applies to the district court's conclusion that elimination of Golden Week imposes a "modest" burden on the right of African American's to vote. (Maj. Op. at ----) Neither our precedent nor that of our sister Circuits supports this argument.

In *Obama for America v. Husted*, 697 F.3d 423, 431 (6th Cir. 2012) (*OFA*), we applied clear error review to a district court's determination that an Ohio law restricting early in-person voting placed a "burden on Plaintiffs [that] was 'particularly high' because their members, supporters, and constituents represent a large percentage of those who participated in early voting in past elections." We held that "[b]ased on the evidence in the record, this conclusion was not clearly erroneous." *Id. OFA* involved an appeal from a district court's grant of a preliminary injunction and, accordingly, we reviewed the court's legal conclusions de novo and its factual determinations for clear error. *See id.* at 428. The same standard applies where, as here, a party appeals following a bench trial. *See Pressman v. Franklin Nat'l Bank*, 384 F.3d 182, 185 (6th Cir. 2004). Consequently, it is clear error review we must apply to the district court's finding that the elimination of Golden Week imposes a more than minimal but less than significant burden on African Americans' right to vote in Ohio. *See OFA*, 697 F.3d at 431; *see also Ohio State Conference of the NAACP v. Husted*, 768 F.3d 524, 532–37 (6th Cir. 2014) [hereinafter "*NAACP*"] (reviewing for clear error district court's determination that reductions in early voting would disproportionately and negatively impact African Americans), *vacated on other grounds by* No. 14–3877, 2014 WL 10384647, at *1 (6th Cir. Oct. 1, 2014).

The majority opinion cites four cases to support its proposed substitution of de novo review. None of those cases governs here. The first, *Bright v. Gallia County*, 753 F.3d 639, 652 (6th Cir. 2014), was an appeal from a district court's dismissal of a claim pursuant to Federal Rule of Civil Procedure 12(b)(6), which is a procedural posture that calls for de novo appellate review. *Bright* was not a voting case, or even an election law case, and its procedural posture makes its standard inapplicable here. Thus, it does not stand for the proposition that the district court's post-trial, fact-bound finding regarding the burden S.B. 238 places on African Americans' right to vote is subject to de novo review. The remaining three cases, *Williams v. Mehra*, 186 F.3d 685, 689 (6th Cir. 1999) (en banc); *Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579, 583 (6th Cir. 2006), and *Green Party of Tennessee v. Hargett*, 767 F.3d 533, 542 (6th Cir. 2014), are similarly inapposite. These cases were appeals from summary judgment orders rendering them subject to de novo appellate review. *Libertarian Party* and *Green Party*, moreover, concerned associational rights—specifically, ballot access—not the right to vote. *See Libertarian Party*, 462 F.3d at 585 ("[W]e are cognizant that 'the state laws place burdens on two different, although overlapping, kinds of rights—the right of individuals to associate for the advancement of political beliefs and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively.' " (quoting *Williams v. Rhodes*, 393 U.S. 23, 30, 89 S.Ct. 5, 21 L.Ed.2d 24 (1968))); *Green Party*, 767 F.3d at 545 (recognizing that while "[a]ssociational rights and voting rights are closely connected ... [s]till, states may impose reasonable restrictions on ballot access"). *Libertarian Party* firmly grounded its burden analysis in the associational rights context, explaining that "[t]he key factor in determining the level of scrutiny to apply is the importance of the associational right burdened[,]" 462 F.3d at 587, and *Green Party* in turn relied on that analysis, *see* 767 F.3d at 547 (citing *id.*).

None of the cases cited by the majority dictates our standard of review here. Rather, as in *OFA* (and *NAACP*), we are limited to reviewing for clear error the district court's finding based on record evidence that S.B. 238's "elimination of Golden Week imposes a modest burden—which the Court defines as a more than minimal but less than significant burden—on the right to vote of African Americans." (R. 117, PageID 6156–57). Our sister Circuits agree. The Fourth and Fifth Circuits have applied clear error review to the findings made by district courts in similar challenges under the Fourteenth Amendment and Section 2 of the Voting Rights Act.[1]…

Applying the correct standard reveals that the district court's finding of a modest burden under the *Anderson-Burdick* test is more than plausible—it is well-supported by the record. (*See* R. 117, PageID 6153–70) The district court extensively reviewed and relied upon expert and anecdotal evidence in the record before concluding that "this evidence of the effects of the reduction in EIP voting days and the elimination of SDR demonstrates that S.B. 238 imposes a modest, as well as a disproportionate, burden on African Americans' right to vote." (*Id.* at PageID 6164; *see also id.* at 6156–57)

In arguing under the standard it proposes, the majority seeks to rely on voting systems in other states as an important "contextual basis" (Maj.Op. at ----) for determining whether the burden of S.B. 238 falls disproportionately on African Americans. But the usefulness of that contextual information depends on whether the many variable methods for voting in each system line up. Certain types of voting processes, like early voting, "do [ ] not necessarily play the same role in all jurisdictions in ensuring that certain groups of voters are actually able to vote" and as a result, "the same law may impose a significant burden in one state and only a minimal burden in the other." *NAACP*, 768 F.3d at 546. Simply stating that Ohio's early voting system is "one of the more generous in the nation" (Maj.Op. at ----) provides little helpful information. It fails, for example, to account for the rate at which early voting is actually used by different populations, let alone how the voting options in other states might impact the comparison. In most respects, this issue is local and dependent on the particular circumstances of Ohio's law and its population. Analysis of the burden that S.B. 238 places on Ohio voters thus necessarily entails engaging with the factual record. The majority opinion fails to perform that essential work.

The majority opinion next seeks to recast African American voters' reliance on EIP and SDR as mere "personal preference." (Maj.Op. at ----) This is based on surmise, not record evidence. So, too, is its conclusory assertion that "[a]t worst," the elimination of Golden Week "represents a withdrawal or contraction of just one of many conveniences that have generously facilitated voting participation in Ohio." (*Id.* at ----) The record in this case shows that the State of Ohio instituted no fault early voting in 2005 not as a generous convenience but as a necessary tool "to remedy the manifold problems experienced during the 2004 election," (R. 117, PageID 6156) "including extremely long lines at the polls" and other "election administration problems." (*Id.* at 6144) As the Fourth Circuit recently concluded in a similar vote denial case and as this record supports, "socioeconomic disparities establish that no mere 'preference' led African Americans to disproportionately use early voting[and] same-day registration [.]" *McCrory*, --- F.3d at ----, 2016 WL 4053033, at *17. "Registration and voting tools may be a simple 'preference' for many white [voters]," the Fourth Circuit recognized, "but for many African Americans they are a necessity." *Id.*

The majority opinion again relies on assumptions about voting preferences to conclude that the record evidence that African Americans use early voting at higher rates than other voters may make them "theoretically disadvantaged" (Maj.Op. at ----) by reductions in early voting. There is nothing theoretical about the disadvantage found by the district court. Using an extensive record, the district court determined that S.B. 238's

changes to early voting and same day voter registration impose a modest and disproportionate burden on African Americans' right to vote. The majority points to no clear error by the district court on the record. I would affirm its finding because it satisfies the correct standard of review.

The majority opinion, however, rejects the district court's decision that S.B. 238 imposes a "modest" burden and, based on its chosen standard of de novo review, concludes that it is a "minimal burden." (Maj.Op. at ---- – ----) Building on that error, it applies a deferential standard of review akin to rational basis and presumes that *Crawford* both applies and resolves this case. (Maj.Op. at ---- – ----)

This series of conclusions relies on standards of review not applicable to this case. First, *Crawford* arose in a different context because it was an appeal from a summary judgment order, not a bench trial. Second, the case is factually distinct in essential ways because there the Court "held only that the lower courts 'correctly concluded that the evidence in the record [was] not sufficient to support a facial attack on the validity of the entire statute' under the constitutional *Anderson*-*Burdick* framework….

Here, by contrast, the record is replete with specific evidence supporting the plaintiffs' claims and the district court's conclusion regarding the amount of burden imposed by the elimination of Golden Week. (*See* R. 117, PageID 6153–70) Over the course of a ten day bench trial, the district court weighed evidence from eight expert witnesses and nineteen lay witnesses, from statistical analyses to testimony of Get Out the Vote efforts, ultimately making determinations of credibility that led to its conclusion that S.B. 238 disproportionately burdens African Americans. (*See id.* at 6128–44) The record in this case provides ample evidence by which the district court could "quantify ... the magnitude of the burden" on African American voters. *Crawford*, 553 U.S. at 200, 128 S.Ct. 1610. I would also affirm the district court's application of *Anderson*-Burdick balancing and the court's resulting conclusion that the State has failed to present sufficient evidence to show that its specific (as opposed to abstract) interests justify the burden that eliminating Golden Week imposes on African American voters. (*See* R. 117, PageID 6170–79)

The majority opinion argues that the overarching question with respect to plaintiffs' equal protection claim in this case is whether Ohio may experiment with expanding and contracting voting regulations. Of course it may. The question is whether it may do so in a way that disparately impacts a protected group without sufficient justification by a relevant and legitimate state interest. Because I agree with the district court that Ohio's revised S.B. 238 improperly burdens the right to vote of African American citizens of Ohio and constitutes a violation of equal protection, I respectfully dissent.

III. THE VOTING RIGHTS ACT

The majority acknowledges the test for vote denial claims under Section 2 of the VRA that we laid out two years ago in *NAACP* but suggests that it warrants clarification. (Maj.Op. at ---- – ----) This clarification, however, leads it to apply an inappropriately strict threshold for Section 2 claims. I would remain faithful to our original *NAACP* framework, as adopted and applied by the Fourth and Fifth Circuits, and as correctly applied by the district court.

NAACP concerned a plaintiff's request for a preliminary injunction in advance of the 2014 election, and was vacated as moot following that election. *See Ohio State Conference of the NAACP v. Husted*, No. 14–3877, 2014 WL 10384647, at *1 (6th Cir. Oct. 1, 2014). Nonetheless, it remains persuasive authority, that has been subsequently adopted by another panel of this court. *See Mich. State A. Philip Randolph Inst. v. Johnson*, --- F.3d ----, ----n.2,

2016 WL 4376429, at *7 n.2 (6th Cir. Aug. 17, 2016). Drawing on the text of Section 2 itself and the guidance in *Thornburg v. Gingles*, 478 U.S. 30, 47, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986), *NAACP* laid out a two-part framework for assessing vote-denial claims: first, "the challenged standard, practice, or procedure must impose a discriminatory burden on members of a protected class, meaning that members of the protected class have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice," and second, "that the burden must in part be caused by or linked to social and historical conditions that have or currently produce discrimination against members of the protected class." *NAACP*, 768 F.3d at 544 (quotation marks omitted). In *NAACP,* this court also explicitly found the nine factors laid out in *Gingles* to be relevant to the second part of this analysis and encouraged their consideration. *Id.*

Both the Fifth Circuit sitting en banc and the Fourth Circuit have adopted and applied our *NAACP* test in full. *See Veasey*, --- F.3d at ----, 2016 WL 3923868, at *17 ("We now adopt the two part framework employed by the Fourth and Sixth Circuits to evaluate Section 2 'results' claims."); *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 240–41 (4th Cir. 2014) (adopting Sixth Circuit test for Section 2 vote-denial claims). These courts acknowledged that Section 2 jurisprudence had primarily developed in the vote-dilution context and a clear standard for vote-denial claims had not previously been settled. Then both explicitly adopted *NAACP*'s two-part framework and incorporated the *Gingles* factors. *See Veasey*, --- F.3d at ----, 2016 WL 3923868, at *18 ("As did the Fourth and Sixth Circuits, we conclude that the *Gingles* factors should be used to help determine whether there is a sufficient causal link between the disparate burden imposed and social and historical conditions produced by discrimination."); *League of Women Voters of N.C.*, 769 F.3d at 240 ("These [*Gingles*] factors may shed light on whether the two elements of a Section 2 claim are met.").

The Ninth and Eleventh Circuits have also expressed approval for considering the *Gingles* factors in the vote-denial context. *See, e.g.*, *Gonzalez v. Arizona*, 677 F.3d 383, 405–06 (9th Cir. 2012) (en banc) (explaining that "courts should consider" the *Gingles* factors in vote-denial cases); *Johnson v. Governor of Fla.*, 405 F.3d 1214, 1227 n.26 (11th Cir. 2005) (recognizing that the *Gingles* factors apply to vote-denial cases); *Smith v. Salt River Project Agric. Improvement & Power Dist.*, 109 F.3d 586, 596 n.8 (9th Cir. 1997) (rejecting the argument that the *Gingles* factors "apply only to 'vote dilution' claims").

The district court acknowledged that the vacated opinion in *NAACP* was not "binding," but that nonetheless, it was "free to find the reasoning therein persuasive" (R. 117, PageID 6152.) I agree. The two-part framework as articulated in *NAACP* is both reasonable and appropriate to use when evaluating a Section 2 vote-denial claim, and the district court did not err in its decision to do so here, or in its application.

The Supreme Court has repeatedly instructed that "[t]he Voting Rights Act was aimed at the subtle, as well as the obvious, state regulations which have the effect of denying citizens their right to vote because of their race," *Allen v. State Bd. of Elections*, 393 U.S. 544, 565, 89 S.Ct. 817, 22 L.Ed.2d 1 (1969), and "should be interpreted in a manner that provides 'the broadest possible scope' in combating racial discrimination," *Chisom v. Roemer*, 501 U.S. 380, 403, 111 S.Ct. 2354, 115 L.Ed.2d 348 (1991) (quoting *Allen*, 393 U.S. at 567, 89 S.Ct. 817). "The essence of a § 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives." *Gingles*, 478 U.S. at 47, 106 S.Ct. 2752.

The Senate Report accompanying the 1982 amendments to the VRA "emphasize[d] repeatedly" that the " 'right' question" in a Section 2 analysis is "whether 'as a result of the challenged practice or structure plaintiffs do not

have an equal opportunity to participate in the political processes and to elect candidates of their choice.'

…Rather than following the Supreme Court's guidance to interpret the VRA with the "broadest possible scope," 501 U.S. at 403, 111 S.Ct. 2354, the majority adds to the first part of *NAACP* a narrow threshold inquiry, thereby allowing it to brush aside the district court's analysis of the *Gingles* factors in the second part of the *NAACP* framework. The majority creates a test that requires as a threshold step "proof that the challenged standard or practice causally contributes to the alleged discriminatory impact." (Maj.Op. at 23) This extra requirement is unnecessary. As the text of Section 2 states, a voting standard or practice may only be invalidated under Section 2 if it results in less opportunity for members of a protected class to participate in the political process than others. *See* 52 U.S.C. § 10301. The existing test is true to this text and contains the necessary causal linkage between an electoral regulation and its interaction with social and historical conditions. The second part of the *NAACP* analysis addresses whether the law interacts with social and historical conditions to cause a disparate burden. *See Veasey*, --- F.3d at ----, 2016 WL 3923868, at *17. The *Gingles* factors provide context and guidance for whether the causal link between the disparate burden and the social and historical conditions produced by discrimination is sufficient to show a Section 2 violation. *See id.* at ----, 2016 WL 3923868 at *18. The inquiry is "flexible [and] fact-intensive," and requires an examination of the record evidence. *Gingles*, 478 U.S. at 46, 106 S.Ct. 2752. Both parts of the proper framework were mirrored in the district court's application below, and by the Fourth and Fifth Circuits when they adopted our framework. *See Veasey*, --- F.3d at ---- – ----, 2016 WL 3923868, at *21–*33; *League of Women Voters of N.C.*, 769 F.3d at 241 ("Clearly, an eye toward past practices is part and parcel of the totality of the circumstances.")

In finding that S.B. 238 imposes a disparate burden on African Americans, the district court referred to the evidence used in its Equal Protection Clause analysis showing that the law "results in less opportunity for African Americans to participate in the political process than other voters." (R. 117, PageID 6220) This evidence, based on expert analysis as well as lay witness testimony, showed that African Americans utilize EIP voting in higher rates, face higher costs of voting, and disproportionately make up the group that benefits the most from SDR. (*Id.* at 6158–64) The district court found that together, the reduction of EIP and the elimination of SDR would impose a "modest, as well as a disproportionate, burden on African Americans' right to vote." (*Id.* at 6164)

The majority dismisses this conclusion as "hasty," (Maj.Op. at ----) and once again refuses to accept the factual findings made by the district court. Instead, the majority selects two items from the record to support its conclusion that the political process in Ohio is "equally open to African Americans," (*id.*) including a reference to a rebuttal report by Defense expert Dr. Hood. In so doing, the majority ignores the credibility determinations made by the district court, ….

The majority says that the statistical evidence "runs directly contrary" to the district court's conclusions, and that such evidence "rather clearly shows" (*id.*) that S.B. 238 does not have a disparate impact on African American participation. The majority does not, however, provide support in the record for what statistical evidence it relies on for these statements, or precisely how they run contrary to the district court's conclusions. …

I would also hold that the district court's analysis of the second step of the Section 2 framework, including its application of the *Gingles* factors, was proper. The court found that the plaintiffs had established factors one, two, three, five, and nine, and that factors five and nine were particularly relevant. (*See* R. 117, PageID 6224–28) Factor five assesses "[t]he extent to which members of the minority group ... bear the effects of discrimination in areas such as education, employment and health, which hinder their ability to participate effectively in the political

process." *Gingles*, 478 U.S. at 45, 106 S.Ct. 2752. The district court determined that the plaintiffs had "adduced evidence indicating that African Americans in the state of Ohio bear the effects of discrimination in areas such as employment and education." (R. 117, PageID 6226) In coming to this conclusion, the court weighed evidence indicating that, relative to whites, African Americans are "less likely to work in professional and managerial jobs, are more likely to work in service and sales jobs, including hourly wage jobs; have lower incomes; are nearly three times more likely to live in poverty" and are more likely to live in neighborhoods where others live in poverty. (R. 117, PageID 6162) The court found this evidence, based on Timberlake's expert testimony and considered against Hood's report, credible. (*See id.* at 6134, 6163, 6226)

Factor nine assesses the tenuousness of the policies underlying the law. *Gingles*, 478 U.S. at 45, 106 S.Ct. 2752. The district court determined that the "justifications offered in support of the elimination of Golden Week," including preventing voter fraud or confusion, reducing costs and administrative burdens, and increasing voter confidence, "were either not supported by evidence or did not withstand logical scrutiny." (R. 117, PageID 6228) The State's asserted interests are legitimate, and Ohio is "entitled to make policy choices about when and how it will address various priorities." *Veasey*, --- F.3d at ----, 2016 WL 3923868, at *31; *see also Crawford*, 553 U.S. at 191, 128 S.Ct. 1610. But where the district court has credited testimony showing "very limited" or "minimal" evidence to actually connect these justifications with the enacted law, the assertion of even legitimate interests may not automatically win the day. (R. 117, PageID 6172, 6174) Determining whether the political process is "equally open" to all voters requires a "searching practical evaluation of the past and present reality and ... a functional view of the political process." *Gingles*, 478 U.S. at 45, 106 S.Ct. 2752. The district court performed such an inquiry.

Based on its findings that S.B. 238 imposes a disproportionate burden on African Americans, and that the law was linked to social and historical conditions of discrimination that diminish the ability of African Americans to participate in the political process, the district court concluded that S.B. 238 has a discriminatory effect in violation of Section 2 of the Voting Rights Act. I would hold that the district court properly applied our preexisting test for Section 2.

IV. CONCLUSION

I would affirm the very limited injunction issued by the district court on the basis that S.B. 238's elimination of Golden Week, reducing early in-person voting and same day registration, is a violation of equal protection and Section 2 of the Voting Rights Act of 1965. The district court applied the correct constitutional and statutory tests and its decision is fully supported by the extensive record resulting from its ten day bench trial. The charge that this appeal—and apparently many others—intrude upon the right of the states to run their own election process is both unfounded and antiquated. Our American society and legal system now recognize that appropriate scrutiny is essential to protection of the fundamental right to vote. The scrutiny applied by the district court was proper and in accord with governing precedent. I therefore respectfully dissent.

[Footnotes omitted]

David Savage, *Court disputes over voting laws often divide justices along party lines*, LOS ANGELES TIMES (September 12, 2016)

It's no secret that partisan state legislators, once in power, frequently try to alter voting laws to give their party an advantage.

But increasingly, when those laws are challenged in federal court, the outcome appears to turn on whether the judges or justices hearing the case were appointed by Republicans or Democrats.

Last month, North Carolina's Republican leaders were blocked from enforcing several new restrictions on voting that had been adopted over the fierce opposition of Democrats. They included less time for early voting and a requirement that a registered voter show one of several specific types of photo ID cards.
A federal judge appointed by former President George W. Bush had upheld the full law in April, deciding the regulations were reasonable.

They were struck down in late July by a panel of three judges of the 4th Circuit Court of Appeals, all of them Democratic appointees, who said the new rules violate the federal Voting Rights Act because they "target African Americans with almost surgical precision."

They noted the law would allow people to vote by showing a military or veterans ID, but not if they had photo IDs showing they worked for a city or a state agency, were enrolled in a state university or received public assistance. More whites than blacks rely on mail-in ballots, and these were "exempted" from the photo ID rule, the appeals court noted.

When the state's Republican governor appealed to the Supreme Court, he lost when the justices split 4-4. The high court's four Republican appointees voted to restore the GOP-backed rules, while the four Democratic appointees refused.

Three years ago, the high court split 5-4 to weaken part of the Voting Rights Act that had prevented Southern states and counties from making changes in their voting rules without clearing them with the U.S. Justice Department. The court's five Republican appointees voted to strike down this part of the law, while the four Democratic appointees dissented.

Election-law experts and voting-rights advocates say they are dismayed to see the partisan divide over election rules reflected in the courts.

"I wasn't surprised North Carolina's appeal was turned down. They had a very weak argument, but I am surprised it got four votes," said Daniel Tokaji, who teaches election law at the Ohio State University. "I don't think the current Supreme Court can be relied upon to protect the right to vote, even when there is evidence of intentional discrimination like we saw in North Carolina."

UC Irvine Law Professor Richard Hasen points out the partisan judicial divide is hardly a new phenomenon. In the Bush vs. Gore decision in 2000, the court's five most conservative justices, all Republican appointees, voted to halt the ballot recount in Florida, thereby preserving George W. Bush's narrow victory.

But prior to 2010, the court had two liberal-leaning Republican appointees in Justices John Paul Stevens and David Souter. And not all lower courts judges are predictable when confronting new election regulations.

"But partisanship is still a pretty good predictor of how judges will vote in these 'voting wars' cases, and it is not because the judges are consciously trying to help their political parties," Hasen said. "It is that Democrats and Republicans tend to see these issues differently, with Democrats believing these laws present a greater danger of

suppressing votes, and Republicans believing these laws are still necessary for anti-fraud purposes or to promote public confidence."
And sometimes, there are exceptions.

Michigan's Republicans lost last week when they tried to end the state's 125-year-long practice of allowing straight-ticket voting. With Donald Trump at the top of ticket, they worried many voters might check the box for a straight Democratic vote and thereby hurt GOP candidates running for local, state or federal offices.

A federal judge appointed by President Obama agreed with civil rights lawyers who said this change could cause confusion and longer lines at polling places, particularly in the Detroit area. He blocked the changes from taking effect, and a three-judge panel, all Democratic appointees, upheld his decision in August.

Michigan's Republican attorney general asked to the Supreme Court to revive the law, but fell short. Justices Clarence Thomas and Samuel A. Alito Jr., both Republican appointees, said they would grant the appeal. The other six justices said nothing, but the outcome suggests Chief Justice John G. Roberts Jr. and Justice Anthony M. Kennedy agreed with liberals to reject the appeal.

In a pending case from Ohio, the court will consider whether the state may cut back on the number of days for early voting.

Ohio adopted early voting after an election-day debacle in 2004 in which some voters waited hours in line to cast a ballot. Since then, African Americans have been more likely than whites to vote in the period before election day.

Ohio wants to eliminate its first week of early voting, a time when voters can re-register and cast at a ballot at the same time. Republicans who sponsored the change say the state would still offer 23 days for early voting, among the most generous in the nation.

Democrats oppose the reductions, saying more than 80,000 voters cast ballots in 2012 during this first week of early voting. They noted, too, that each county offers early voting at only one polling place.
In May, U.S. District Judge Michael Watson, a Bush appointee, agreed with Democrats that the state did not have a good reason for reducing the days for early voting, and he blocked the change.

But in August, the 6th Circuit Court of Appeals, in 2-1 ruling, reversed his decision. Two Republican appointees said judges should not "become entangled, as overseers and micro-managers, in the minutiae of the state election process." The dissenter, a Democrat, said minority voters in Ohio's largest cities took advantage of the opportunity to re-register and vote during one trip to the county election office.
The Ohio Democrats appealed to the Supreme Court last week, urging the justices to restore the full period for early voting.

But it takes a majority of five justices to issue such an order, so the Democrats cannot win without support from at least one of the court's Republican appointees.

"In the Ohio case, I expect that we won't see more than two votes in favor" of the appeal, Hasen said, citing Justices Ruth Bader Ginsburg and Sonia Sotomayor. "So that may show it is not a complete partisan divide."

A decision is expected this week [NOTE: The Supreme Court rejected Democrats' emergency motion on the day this article went to press, September 12, 2016]

Henry Gass, *Why Red State Voting Laws Keep Getting Struck Down*, CHRISTIAN SCIENCE MONITOR (September 9, 2016)

The United States Supreme Court on Friday provided further evidence that – for now – concerns about minority communities voting rights are making it harder for Republican-led states to tinker with election laws.
The court declined to take up a case involving a new Michigan law that bans "straight-ticket voting" – the practice of allowing voters to vote for all the candidates of one party with a single selection. Michigan has allowed straight-ticket voting since 1891.

A federal court had stuck down the law, saying it would disproportionately affect black communities, where voting lines are already long and straight-ticket voting is common and saves time. The Supreme Court's decision not to take action Friday means the lower court ruling stands.

This follows other decisions this year by the US Fifth and Fourth Circuit Courts of Appeal overturning voter identification laws in Texas and North Carolina, respectively. Both cited the potential negative effect on minority voters.

Partisan legislative efforts to manipulate the vote have existed since the nation began – more often that not involving subtle, granular tweaks to voting procedure that could have small, but significant, effects on voter participation.

What appears to be different now is that lower courts are paying closer attention to legislators' intent and the impact behind changing election laws.

"What [courts] are trying to do is ask whether the state is changing things to make it harder for a population to vote relative to some baseline of difficulty to vote," says Steven Schwinn, a professor at the John Marshall School of Law in Chicago.

To some, this represents progress. To others, it is evidence of the influence of President Obama's judicial appointees.

For now, however, any movement within the lower courts is unlikely to be given a stamp of approval from the Supreme Court. Shorthanded and ideologically split, the high court is merely putting out fires as the election approaches.

But the lower courts' rulings show some trends.

Big data comes to court

For one, challenges have turned more to hard data and expert testimony to sway judges of the laws' discriminatory effect – and that appears to be working.

"That's all about the proof and evidence that lawyers are able to put into the record," says Professor Schwinn. "You have to look at who votes, how, and how it impacts certain voters."

Moreover, race and ethnicity track partisan voting tendencies so closely that laws that potentially boost Republicans almost inevitably affect minorities adversely.

Some 71 percent of Hispanics, 73 percents of Asians, and 93 percent of African-Americans voted for Mr. Obama in 2012, according to the Roper Center. Four in 10 voters in the Democratic primaries were nonwhite, while only 7 percent of blacks and 12 percent of Hispanics identified as Republicans in a July poll from The Wall Street

Journal.

Most attempts to manipulate voting access are "likely to impact the [minority] population disproportionately," adds Schwinn, "and that's the illegal part."

The Supreme Court rejected the Michigan case without comment, but Federal District Court Judge Judge Gershwin Drain said in July that the law placed "a disproportionate burden on African-Americans' right to vote." The data showed that "there are 'extremely high' correlations between the size of the African-American voting population within a district and the use of straight-party voting in that district," he added.

The circuit court decisions overturning voter identification laws in Texas and North Carolina earlier this year made similar arguments.

"The district court found that multiple plaintiffs were turned away when they attempted to vote," the Fifth Circuit wrote in its opinion.

The North Carolina law, meanwhile, "targeted black voters with almost surgical precision," the Fourth Circuit wrote.

Conservatives argue that the laws are necessary to prevent voter fraud, and they say the federal courts have shifted leftward under Obama. Obama has appointed six of the 15 judges on the Fourth Circuit bench, which was once considered one of the more conservative appeals courts in the country.

After the Supreme Court refused, in a 4-to-4 vote, North Carolina's appeal to freeze the Fourth Circuit's ruling pending an appeal, Gov. Pat McCrory (R) blamed the court's "four liberal justices [who] blocked North Carolina protections afforded by our sensible voter laws," according to the Post.

More data, better rulings?

Yet not every lower court has ruled against conservatives.

The Ohio Democratic Party, for example, has asked the justices to suspend a US Sixth Circuit Court of Appeals ruling upholding a state law that would trim the number of "golden week" early voting days – in which a person could both register to vote and cast a ballot on the same day from – from 35 days to 29. The Democrats argue that black voters make disproportionate use of the golden week and that shortening the period would amount to racial discrimination.

In upholding the law, the Sixth Circuit noted that even with the reduction, Ohio would have one of the longest early voting spans in the country, the Economist reported. Thirteen states, including New York and Pennsylvania, don't have early voting at all.

The Supreme Court could make a ruling on the appeal soon. Elena Kagan, the justice responsible for the Sixth Circuit, has asked the state to respond to the appeal by Thursday.

While it appears that the debate around these laws has become increasingly science-based, it is still unclear if that is resulting in more informed judicial decisions.

The election laws are "sometimes enacted with the hope of suppressing democratic turnout, but it's not always clear they have those effects," says Rick Hasen, an election law expert at the University of California, Irvine. "Both sides can cherry pick studies and data to make their points."

And while the Supreme Court delivered a degree of clarity last week with its North Carolina decision, those

expecting similar clarity on other election laws are likely to be disappointed.

"Cases that would ordinarily be promising for Supreme Court review might not be," says Professor Hasen, given the 4-to-4 split among the justices.

"When courts decide emergency cases, it doesn't really set a lot of precedent," he adds. "So it's going to take a full hearing further down the line to provide more clarity on the rules."