

Nos. 16-1468(L), 16-1469, 16-1474, & 16-1529

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NORTH CAROLINA STATE CONFERENCE OF THE NAACP, et al.,

Plaintiffs - Appellants

and

JANE DOE, et al.,

Plaintiffs

v.

PATRICK LLOYD MCCORY, in his Official Capacity as Governor of North
Carolina et al.,

Defendants – Appellees

(Caption and Counsel Continued Inside Cover)

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

**AMICI CURIAE BRIEF OF PEARLEIN REVELS, LOUISE MITCHELL,
ERIC LOCKLEAR, AND ANITA HAMMONDS BLANKS IN SUPPORT OF
PLAINTIFFS – APPELLANTS**

JEANETTE WOLFLEY
Assistant Professor
University of New Mexico School of Law
1117 Stanford N.E.
Albuquerque, NM 87131-0001
(208) 841-7504

ARNOLD LOCKLEAR
Locklear, Jacobs, Hunt & Brooks
203 College Street
P.O. Box 999
Pembroke, NC 28372
(910) 521-3413

Counsel for Amici

LOUIS M. DUKE, et al.,

Intervenors/Plaintiffs-Appellants

and

CHARLES M. GRAY, et al.,

Intervenors/Plaintiffs

v.

STATE OF NORTH CAROLINA, et al.,

Defendant-Appellees

LEAGUE OF WOMEN VOTERS OF NORTH CAROLINA, et al.,

Plaintiffs-Appellants

v.

STATE OF NORTH CAROLINA, et al.,

Defendants-Appellees

UNITED STATES OF AMERICA,

Plaintiff-Appellant

v.

STATE OF NORTH CAROLINA, et al.

Defendants-Appellees

v.

CHRISTINA KELLEY GALLEGOS-MERRILL et al.,

Intervenors/Defendants

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, and

Local Rule 26.1, Amici Curiae hereby disclose the following:

1. No Amici is a publicly held corporation or other publicly held entity.
2. No Amici has any parent corporations.
3. No publicly held company owns 10% or more of the stock of an Amici.
4. No publicly held corporation or other publicly held entity has a direct financial interest in the outcome of the litigation.
5. No Amici is a trade association.
6. The case does not arise out of a bankruptcy proceeding.

TABLE OF CONTENTS

TABLE OF CONTENTSi

TABLE OF AUTHORITIESii

INTEREST OF AMICI CURIAE1

SUMMARY OF ARGUMENT2

ARGUMENT.....4

I. AMERICAN INDIANS HAVE HISTORICALLY FACED VOTER
DISCRIMINATION4

II. AMERICAN INDIANS RESIDE IN RURAL AREAS AND FACE
MANY BARRIERS TO VOTING INCLUDING POVERTY
AND LACK OF TRANSPORTATION9

 A. Economic Disparity between Lumbee Indians and
 Non-Indians in NC.....10

 B. Many Tribal Communities Are Rural and Remote11

III. NORTH CAROLINA’S VOTER ID LAW DENIES LUMBEE
VOTERS THE RIGHT TO VOTE IN VIOLATION OF SECTION 2
OF THE VOTING RIGHTS AND THE EQUAL PROTECTION
CLAUSE.....14

 A. The Voting Rights Act Prohibits an Electoral System That
 Denies Access to the Ballot14

 B. North Carolina’s Voter ID Law18

CONCLUSION23

TABLE OF AUTHORITIES

CASES:	PAGE
<i>ACLU v. Kiffmeyer</i> , No. 04-CV-4653 JMR/FLN, 2004 WL 2428690 (D. Minn. Oct. 27, 2004)	7, 21
<i>Barlett v. Strickland</i> , 556 U.S. 1 (2009)	2
<i>Brooks v. Gant</i> , No. CIV.12-5003-KES, 2012 WL 4482984 (D.S.D. Sept. 27, 2012).....	12
<i>Blackbull v. Dupree Sch. Dist.</i> , No. 86-3012 (D.S.D. May 14, 1986).....	12
<i>Brown v. Post</i> , 279 F. Supp. 60 (W.D. La. 1968)	16
<i>Burton v. City of Belle Grande</i> , 178 F.3d 1175 (11 th Cir. 1999)	16
<i>Chisom v. Roemer</i> , 501 U.S. 380 (1991)	3
<i>Elk v. Wilkins</i> , 112 U.S. 94 (1884)	6
<i>Farrakhan v. Gregoire</i> , 590 F.3d 989 (9 th Cir.), rev'd on other grounds, 623 F.3d 990 (9 th Cir. 2010 (en banc)	15, 16, 17
<i>Locklear et al., v. North Carolina State Bd. of Elections et al.</i> , 514 F.2d 1152 (4 th Cir. 1975)	8
<i>LULAC v. Perry</i> , 548 U.S. 399 (2006)	15
<i>Mississippi State Chapter, Operation PUSH, Inc. v. Mabus</i> , 932 F.2d 400 (5 th Cir. 1991)	15
<i>Navajo Nation et al. v. Brewer et al.</i> , No. 06-1575 (D. Ariz. May 27, 2008)	7, 21
<i>Santa Clara Pueblo v. Martinez</i> , 436 U.S. 49 (1978)	18
<i>Shelby Cnty. v. Holder</i> , 133 S. Ct. 2612, 2631 (2013).	14

Spirit Lake Tribe v. Benson Cnty., No. 2:10-cv-095, 2010 U.S. Dist. LEXIS 116827, at 13-14 (D.N.D. 2010).....12, 16

Thornburg v. Gingles, 478 U.S. 30, 69 (1986)passim

United States v. Kagama, 118 U.S. 375, 384 (1886)5

United States v. Lara, 541 U.S. 193 (2004)17

United States v. Wheeler, 435 U.S. 313 (1978)18

Veasey v. Perry, 71 F. Supp. 3d 627, 641-645, 664-676 (S.D. Tex. 2014).....14, 20

Wandering Medicine v. McCulloch et al., 544 F. App'x. 699 ((9th Cir. 2013)7

Worcester v. Georgia, 31 U.S. 515 (1832)17

STATUTES:

Indian Citizenship Act, Pub. L. No. 68-175, 43 Stat. 253 (1924) (codified as amended at 8 U.S.C. 1401(b).....5

Lumbee Tribe Enrollment Ordinance, CLLO-2010-0121-0119

North Carolina Voter Information Verification Act, S.L. 2013-381 and S.L. 2015-103passim

Voting Rights Act, 42 U.S.C. 1973(a)passim

S. Rep. No. 97-417, 97th Cong., 2d Sess. 29, n. 114 (1982).....passim

S. Rep. <http://www.indian.senate.gov/sites/default/files/upload/files/Report-111-116.pdf>.....9

OTHER AUTHORITIES:

Brian Smeadley, Unequal Treatment: Confronting Racial & Ethnic Disparities in Health Care (Institute of Medicine, National Academics, 2002)11

Bureau of Indian Affairs, TRANSPORTATION SERVING NATIVE AMERICAN LANDS: TEA-21 REAUTHORIZATION RESOURCE PAPER (2003)14

City Data, www.city-data.com/county/Robeson_County-NC.html.....13

Cohen’s Handbook of Federal Indian Law 134 (Newton, J. ed. 2005)9

Continuing Need for Section 203’s Provisions for Limited English Proficient Voters: Hearings Before the S. Comm. On the Judiciary, 109 Cong. 309 (2006) (letter of Joe Garcia, National Congress of American Indians).....4

Daily North Carolina Gas Prices Information accessed on May 11, 2016 available at <http://www.northcarolinagasprices.com>13

Daniel McCool et al., Native Vote: American Indians, The Voting Rights Act, and the Right to Vote 177-83 (2007).....5

Danna R. Jackson, Eighty Years of Indian Voting: A Call to Protect Indian Voting Rights, 65 Mont. L. Rev. 269 (2004)5

Jeanette Wolfley, Jim Crow Indian Style: The Disenfranchisement of Native Americans, 16 Am. Indian L. Rev. 167 (1991).....5

Jeanette Wolfley, You Gotta Fight for the Right to Vote: Enfranchising Native American Voters, 18 U.Pa. J.Const. L. 265 (2015)6,11

Laughlin McDonald, American Indians and the Fight for Equal Voting Rights (2010)5

Lumbee Tribal Official Website <http://lumbeetribe.com> and www.lumbeetribe.com/#!/government/c165p.....4,13

Malinda Lowery, Lumbee Indians in the Jim Crow South: Race, Identity
 And the Making of a Nation, Chapel Hill: The U. of North Carolina Print,
 20108

North Carolina Policy Watch, <http://pulse.ncpolicywatch.org/2014/01/11/north-carolinas-counties-remain-in-poverty-tight-grip/#sthash.P3mmrKtH.dpuf>.....10

Office of Tribal Services, Bureau of Indian Affairs, U.S. Interior Dept.,
 AMERICAN INDIAN LABOR FORCE REPORT (2003).....4, 9

United States Census, Quick Facts 2010-2014, <http://www.census.gov/quickfacts/table/POP060210/37155>passim

INTEREST OF *AMICI CURIAE*¹

Amici curiae Pearlein Revels, Louise Mitchell, Eric Locklear and Anita Hammonds Blanks, respectfully submit this brief to the court in support of Plaintiffs-Appellants. *Amici* are all members of the Lumbee Tribe and registered voters residing in the North Carolina counties of Robeson, Hoke, Scotland and Cumberland, the Lumbee Tribal homeland. *Amici* file this brief because voting is a fundamental right that should be enjoyed by all Americans under the Constitution, including Native Americans.

Moreover, *Amici* seek to highlight the ongoing voting challenges faced by American Indian populations in jurisdictions across the country, a voice not represented in this case. We wish to illustrate how North Carolina's voter identification law directly conflicts with the established Lumbee Tribal law and the burdens it imposes on Lumbee voters who lack qualifying identification which denies Lumbee voters an equal opportunity to cast a ballot.

There are 55,000 Lumbee Tribal members that comprise a substantial bloc of the voting population in North Carolina. However, Lumbee Tribal members are

¹ No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amici Curiae*, or their counsel made a monetary contribution to its preparation or submission.

often low-income with little or no access to public transportation, computers, or internet access. The increased burden of the state voter identification law disenfranchises this vulnerable tribal community of their legal right to vote, a fundamental right for all Americans.

SUMMARY OF ARGUMENT

As the Supreme Court has noted, “racial discrimination and racially polarized voting are not ancient history.” *Bartlett v. Strickland*, 556 U.S. 1, 25 (2009). Indeed, as evidenced in this case, North Carolina’s electoral strategies and laws still turn on issues of race. Such practices effectively deprive victims of overt past discrimination equality in the exercise of the most fundamental right of citizenship.

The Voting Rights Act has led to measurable progress since 1965 in combatting racial discrimination in voting. These gains, however, are incomplete. Continued protection is critical to ensuring that the nation’s long history of backsliding and retrenchment in the area of voting rights is not repeated.

Amici agree that Defendants - Appellees violated Section 2 of the Voting Rights Act and the lower court erred in finding otherwise. The sweeping changes in North Carolina electoral laws disproportionately affect Black American and Latino voters and interact with social and historical conditions tied to race discrimination

to result in less opportunity for minority voters to participate in the political process relative to other voters in North Carolina. Because Black and Latino voters met the standards for asserting a Section 2 claim based on dilution and denial claims under the Voting Rights Act, this Court should reverse the lower court's decision.

The North Carolina laws have also created specific instances of such electoral irregularity affecting Lumbee Tribal members, including material burdens it imposes on Lumbee voters who lack qualifying identification, and result in less opportunity for Lumbee voters to participate in the political process relative to other voters in North Carolina. Importantly, here, the harm from an electoral practice that denies or abridges the equal opportunity to cast a ballot is the *loss of the franchise itself*, not the dilution of the votes in an election. As the Supreme Court has explained, “[a]ny abridgement of the opportunity of members of a protected class to participate in the political process inevitably impairs their ability to influence the outcome of an election.” *Chisom v. Roemer*, 501 U.S. 380, 397 (1991). This case affords the Court the opportunity to correct the lower court, and to protect the Fifteenth Amendment's right to vote, and we ask the court to do so.

ARGUMENT

I. AMERICAN INDIANS HAVE HISTORICALLY FACED VOTER DISCRIMINATION

American Indians “have experienced a long history of disenfranchisement as a matter of law and of practice.” *Continuing Need for Section 2013’s Provisions for Limited English Proficient Voters: Hearings Before the S. Comm. On the Judiciary*, 109th Cong. 309 (2006) (letter of Joe Garcia, National Congress of American Indians). Although the Voting Rights Act (“VRA”), and particularly Section 2, has resulted in great strides forward from Jim Crow-era disenfranchisement, jurisdictions still attempt today to restrict the ability of minority voters to exercise their right to vote. The protections offered by the VRA remain of paramount importance to the ability of Native American communities to exercise the most fundamental of rights offered by a democratic system – that is, to vote, and to have that vote be counted the same as all other participants.

There are approximately 1.9 million tribal members that make up the total enrollment of America’s 567 federally recognized tribes. Office of Tribal Services, Bureau of Indian Affairs, U.S. Interior Dept., AMERICAN INDIAN LABOR FORCE REPORT, at ii (2003). And, there are approximately 55,000 members of the Lumbee Tribe, a state recognized tribe, residing in North Carolina. Lumbee Tribe Official Website <http://lumbeetribe.com>. The overwhelming majority of Lumbee Tribal members reside in their original tribal homeland area,

which today, includes four North Carolina counties – Robeson, Scotland, Hoke, and Cumberland. The town of Pembroke in Robeson County is the headquarters of the Lumbee Tribe. *Id.*

Historically, American Indians have been forced to seek judicial remedies to participate in local, state, and federal elections to challenge burdensome state time, place and manner voting laws that effectively disenfranchised them.² Indeed, state governments and its officials have a history of conflict and antagonism with American Indian tribes, so much so, that the Supreme Court in 1886 summed up the tribal-state political relationship: “[Tribes] owe no allegiance to the states, and receive from them no protection. Because of the local ill feeling, the people of the states where they are found are often their deadliest enemies.” *United States v. Kagama*, 118 U.S. 375, 384 (1886). This hostility persists today in state and federal elections.

It was not until 1924 that all Indians were granted U.S. citizenship in the Indian Citizenship Act. Indian Citizenship Act of 1924, Pub. L. No. 68-175, 43 Stat. 253 (1924) (codified as amended at 8 U.S.C. 1401(b) (2012)). Prior to 1924, Indians

² See Jeanette Wolfley, *Jim Crow Indian Style: The Disenfranchisement of Native Americans*, 16 Am. Indian L. Rev. 167 (1991); Laughlin McDonald, *American Indians and the Fight for Equal Voting Rights* (2010); Daniel McCool et al., *Native Vote: American Indians, The Voting Rights Act, and the Right to Vote* 177-83 (2007); Danna R. Jackson, *Eighty Years of Indian Voting: A Call to Protect Indian Voting Rights*, 65 Mont. L. Rev. 269 (2004).

were denied citizenship and the right to vote, and could only become citizens through naturalization “by and under treaty or statute.” *Elk v. Wilkins*, 112 U.S. 94, 103 (1884). And, notwithstanding the Indian Citizenship Act, some states continued to deny American Indians the right to vote in state and federal elections through the use of poll taxes, literacy tests, and intimidation.

For example, states made five basic arguments in justifying the denial of voting rights to Indians – (1) failure to sever tribal ties made Indians ineligible under certain state constitutions and laws; (2) the phrase “Indians not taxed” was used to deny Indians from participating in revenue bond elections; (3) since Indians were under federal “guardianship” this was used to disqualify Indians as “non compos mentis” or “insane”; (4) Indians living on reservations were not considered “residents” of the state; and (5) Indians do not care or wish to participate in state or local affairs and instead to only participate in tribal affairs. See Jeanette Wolfley, *You Gotta Fight for the Rights to Vote: Enfranchising Native American Voters*, 18 U. Pa. J. Const. L. 265, 279-80 (2015).

The history of discrimination against Native American voters is well-documented in a plethora of cases, congressional hearings to reauthorize the Voting Rights Act, law review articles, and books. *Id.* at 278 n. 76-79. The voting challenges in Indian country range from redistricting plans that dilute Indian voting, lack of minority language assistance, states’ refusal to comply with VRA’s

preclearance provisions, to basic denial of access to exercise one's constitutional right to vote.

Voter suppression is alive and well in Indian country. New state identification and registration requirements for voting (as in this case) are the most recent election practices which deny Indians the right to vote. See *ACLU v. Kiffmeyer*, No. 04-CV-4653 JMR/FLN, 2004 WL 2428690 (D. Minn. Oct. 27, 2004) (preliminary injunction issued against state law denying tribal identification and finding that tribal identification cards with reservation addresses were sufficient proof of identity and residency); *Navajo Nation et al. v. Brewer, et al.*, No. 06-1575 (D. Ariz. May 27, 2008) (Tribal voter challenge to Arizona's voter photo ID law resulting in settlement to permit a broad range of IDs.). In addition, states may offer early voting but refuse to establish polling locations on reservations. See *Wandering Medicine, et al. v. McCulloch et al.*, 544 F. App'x. 699 (9th Cir. 2013) (No. 12-35926) (challenge by Native American voters to denial of late registration and early voting sites on reservation).

Like African American and Latino voters in North Carolina, Lumbees have long been the subject of racial discrimination. For example, the North Carolina Constitution of 1835 provided the Lumbees could not bear arms or vote for state legislatures. In 1837-1857, the Lumbees challenged their classification as free persons of color successfully, in court, in the cases of *State v. Oxendine*, 19 N.C. 435

(1837) and *State v. Noel Locklear*, 44 N.C. 205 (1853). The 1875 amendments to the Constitution brought segregated schools, and the Lumbee had a separate school system from whites and black students known as the Coraotan Indian Normal School.³ Historically, the discrimination trends closely track the experience of African Americans, with discrimination shifting from *de jure* to *de facto* over time. In addition, Lumbee Tribal members have challenged various state electoral laws that this court and others have struck down for violating the VRA. See *Locklear et al., v. North Carolina State Bd. of Elections et al.*, 514 F.2d 1152 (4th Cir. 1975) (double voting electoral system).

The Lumbee Tribe is not a federally recognized tribe, which means it does not have a government-to-government relationship with the federal government that imposes on the federal government a fiduciary trust relationship to the tribe and its members. Recognition is also vital in determining eligibility for programs and services created by Congress under its power to legislate for the benefit of tribes. Because the Lumbee are a non-federally recognized tribe they suffer from lack of respect for their sovereignty by the United States, no federal land base, lack of protection from state jurisdiction, lack of access to health, education and other

³ Lowery, Malinda M. *Lumbee Indians in the Jim Crow South: Race, Identity and the Making of a Nation*. Chapel Hill: The U of North Carolina Print, 2010.

financial services, and denial of other benefits available to tribes that enjoy a government-to-government relationship with the United States. See Cohen's *Handbook of Federal Indian Law* 134-144 (Newton ed., 2005). For many years, the Tribe has sought federal recognition, and continues its efforts to gain such recognition.⁴ Because the Lumbee are a state recognized tribe they have ongoing conflicts and disputes with the state and its agencies.

II. NATIVE AMERICANS RESIDE IN RURAL AREAS AND FACE MANY BARRIERS TO VOTING INCLUDING POVERTY AND LACK OF TRANSPORTATION

American Indians continue to face high levels of poverty. According to the 2000 Census, American Indians living on reservation have an average per capita income of \$12,452, drastically lower than the national median income of \$50,054 in all households.⁵ Among tribal members nationwide, living on or near a reservation, forty-nine percent of the available labor force is unemployed.⁶ There is a direct link between depressed socio-economic status and reduced political participation as noted by the Supreme Court: "political participation by minorities tend to be depressed where minority group members suffer effects of prior discrimination such

⁴ See Senate Report, <http://www.indian.senate.gov/sites/default/files/upload/files/Report-111-116.pdf>

⁵ See Wolfley, *supra* at 280 n. 91 and 92.

⁶ Office of Tribal Services, Bureau of Indian Affairs, U.S. Interior Dept., AMERICAN INDIAN LABOR FORCE REPORT at ii (2003), available at <http://www.doi.gov/bia/laborforce/2003LaborForceReport FinalAll.pdf>.

as inferior education, poor employment opportunities, and low incomes.” *Thornburg v. Gingles*, 478 U.S. 30, 69 (1986). Thus, there is no need to prove any causal link between this lower status and Indian political participation. VRA, S. Rep. No. 97-417, 97th Cong., 2d Sess. 29, n. 114 (1982) (Senate Report).

A. Economic Disparity between Lumbee Indians and Non-Indians in NC

Robeson County is the poorest county in North Carolina, “where more than 1 in 3 residents live in poverty. In fact, Robeson County consistently ranks as the poorest county in the state and as one of the poorest in the nation as a whole.”⁷ Statistics show a great disparity between Lumbee and white citizens with regard to every socio-economic indicator studied, i.e., education, income, employment, and poverty level. In Robeson County, the median household income is \$30,581.⁸ The percentage of people living in poverty is 33.1 percent. *Id.*

The percentage of American Indian families throughout North Carolina living below the federal poverty level in 2008 was 21.2 percent, compared to 6.7 percent for whites.⁹ Approximately 29 percent of American Indian family households were

⁷ <http://pulse.ncpolicywatch.org/2014/01/11/north-carolinas-counties-remain-in-povertys-tight-grip/#sthash.P3mmrKtH.dpuf>.

⁸ United States Census, Quick Facts 2010-2014, <http://www.census.gov/quickfacts/table/POP060210/37155>.

⁹ State Center for Health Statistics and Office of Minority Health and Health Disparities, *North Carolina Minority Health Facts: American Indians* (2010) http://www.schs.state.nc.us/schs/pdf/amerindian_mhfs_web_072210.pdf.

headed by females, compared to 13 percent for white family households. *Id.* The unemployment rate for American Indians was 7.5 percent, compared to 5.4 percent unemployment for whites. *Id.* More than 58 percent of American Indian adults have a high school education or less. *Id.*

Low-income and lower levels of education result in increased health disparities. American Indian mothers are more than twice as likely than white women to have late or no prenatal care. *Id.* American Indian infant mortality is more than twice the rate of whites. *Id.* And, generally, non-whites often receive less adequate medical care from doctors and hospitals in North Carolina and elsewhere.¹⁰

B. Many Tribal Communities are Rural and Remote

Traveling off-reservation to local counties to exercise the franchise assumes that Indian voters have access to a car or public transportation, which is not always the case. Indeed, only about six percent of tribal governments have a public transit system. See Wolfley, *supra*, at 281 n. 97. Access to a car, obtaining a ride from

¹⁰ Brian D. Smedley, *Unequal Treatment: Confronting Racial & Ethnic Disparities in Health Care* 2-3, 44 (Institute of Medicine, National Academies, 2002) (reporting upon a “large body of published research [which] reveals that racial and ethnic minorities experience a lower quality of health services, and are less likely to receive even routine medical procedures than are white Americans,” and specifically noting one study of racial differences in cardiac care in North Carolina teaching hospitals).

someone or the cost of gas to travel by car to a county seat, tribal office, or motor vehicle office (often 50 to 120 miles) to obtain a photo identification, register to vote or vote is enough to discourage tribal members from using early voting mechanisms or acquiring the necessary voting identifications.

In a 2012 Indian voting case in South Dakota, the court held that Indian plaintiffs had “less opportunity than other members of the electorate to participate in the political process” in violation of Section 2 of the Voting Rights Act, based on evidence that voters were required to travel about three hours to exercise their right to vote. *Brooks v. Gant*, No. CIV.12-5003-KES, 2012 WL 4482984, at 6 (D.S.D. Sept. 27, 2012). See also *Blackbull v. Dupree Sch. Dist.*, No. 86-3012 (D.S.D. May 14, 1986) (finding 75-150 miles to vote was violation of VRA).

Often reservation residents lack wireless connectivity, wireless providers, or basic wireline providers. Consequently, while the task of downloading a registration form from the internet, printing it out, completing it, and mailing it in to the county clerk is simple for the majority of voters, that is not the case for American Indians, since many do not have basic broadband connectivity, or the equipment to print a registration or voting form. See Wolfley, *supra*, at 279-80 (2015). Indeed, in *Spirit Lake Tribe v. Benson Cnty.*, No. 2:10-cv-095, 2010 U.S. Dist. LEXIS 116827, at 13-14 (D.N.D. 2010), the North Dakota federal district court found state mail-in ballots unacceptable for tribal voters and required polling places to be established on the

reservation (“poverty and transience of the Reservation makes mail balloting more difficult for tribal members ... creates a disparate impact”).

Lumbee Tribal members reside in four rural counties in North Carolina, their original tribal homeland. They are the largest state recognized Indian tribe in the United States, and do not have a federally reserved land base. However, like tribes with established reservations, the Lumbee Tribe has lived in a concentrated land area for hundreds of years, maintains a tribal government with its tribal headquarters in Pembroke, Robeson County, and has 14 designated Tribal districts in which Tribal members elect 21 Tribal Council members to represent them.¹¹ Robeson County is the largest county by land area in North Carolina, totaling over 949 square miles of land. City-Data, www.city-data.com/county/Robeson_County-NC.html. Tribal members who desire a Tribal enrollment identification card must travel to Pembroke where the Tribal Enrollment Office is located. The travel distance may be over 120 miles roundtrip for those individuals living in Hoke, Cumberland, or Scotland counties.

The ability to access a car, a ride, or cost of gasoline to travel to the Tribal offices in Pembroke or the county seats are factors which may discourage many tribal members from using their Tribal identification cards for voting. The average

¹¹ www.lumbee Tribe.com/#!government/c165p.

price for a gallon of gasoline in North Carolina is \$2.137.¹² The cost of transportation, which may be prohibitive for individuals living in severe poverty or on a fixed income, is compounded for Lumbee Tribal members who live in remote, isolated locations. The 2000 Census indicates that American Indians are twice as likely to have no vehicle available to them – 14 percent, compared to 7 percent in the general population.¹³ These facts coupled with lack of public transit disproportionately burden Lumbee voters. *See Veasey v. Perry*, 71 F. Supp. 3d 627, 641-645, 664-676 (S.D. Tex. 2014).

III. NORTH CAROLINA’S VOTER ID LAW DENIES LUMBEE VOTERS THE RIGHT TO VOTE IN VIOLATION OF SECTION 2 OF THE VOTING RIGHTS AND THE EQUAL PROTECTION CLAUSE

A. The Voting Rights Act Prohibits an Electoral System That Denies Access to the Ballot

Section 2 of the VRA imposes a “permanent, nationwide ban on racial discrimination in voting.” *Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2631 (2013). It prohibits any “voting qualification or prerequisite to voting or standard, practice, or procedure” that “results in a denial or abridgement” of the right to vote “on account of race or color.” 42 U.S.C. 1973(a). The VRA defines the terms “vote” and “voting”

¹² Daily North Carolina Gas Prices Information accessed on May 11, 2016 available at <http://www.northcarolinagasprices.com>.

¹³ Bureau of Indian Affairs, TRANSPORTATION SERVING NATIVE AMERICAN LANDS: TEA-21 REAUTHORIZATION RESOURCE PAPER (2003).

to encompass “all action necessary to make a vote effective,” including “casting a ballot, and having such ballot counted properly and included in the appropriate totals of votes cast.” 42 U.S.C. 1973 (b).

In 1982, Congress amended Section 2 to make clear that a statutory violation can be established by showing discriminatory intent, a discriminatory result, or both. See *Thornburg v. Gingles*, 478 U.S. 30, 34-37, 43-45 & nn.8-9 (1986); 52 U.S.C. 10301(a) and (b); (Senate Report). The “essence” of a Section 2 results claim is that the challenged practice “interacts with social and historical conditions” linked to race discrimination “to cause an inequality in the [electoral] opportunities enjoyed by [minority] and white voters.” *Gingles*, 478 U.S. at 47.

The Supreme Court has emphasized that Section 2 requires an “intensely local appraisal of the design and impact of the contested electoral mechanisms” in light of a jurisdiction’s “past and present reality.” *Gingles*, 478 U.S. at 78-79 (citations omitted). To that end, courts evaluating the “totality of circumstances” rely on a non-exhaustive list of objective factors to examine social, historical, and political conditions within the jurisdiction. See Senate Report 28-29; *LULAC v. Perry*, 548 U.S. 399, 426 (2006); *Gingles*, 478 U.S. at 44-45, 79; *Mississippi State Chapter, Operation PUSH, Inc. v. Mabus*, 932 F.2d 400, 405-406 (5th Cir. 1991).

Claims brought under Section 2 are generally categorized as either “vote denial” or “vote dilution” claims, although Section 2’s text makes no distinction

between such claims. “Vote denial” includes claims alleging unequal access to voting opportunities, and often refer to practices and procedures that interfere with votes being counted. *Farrakhan v. Gregoire*, 590 F.3d 989, 998 n. 13 (9th Cir.) (*Farrakhan II*), rev’d on other grounds, 623 F.3d 990 (9th Cir. 2010) (*en banc*); see also 42 U.S.C. 19731(c). Historically, these types of claims challenged practices such as literacy tests, poll taxes, white primaries, and English-only ballots. *Ibid*. More recent claims have challenged a group’s unequal access to voting practices and procedures, such as exclusionary candidate qualifications, see *Mississippi State Chapter of Operations Push, Inc. v. Allain*, 674 F. Supp. 1245 (N.D. Miss. 1987), aff’d, 932 F.2d 400 (5th Cir. 1991), and unequal access to polling places, *Spirit Lake Tribe v. Benson County*, No. 2:10-cv-095, 2010 WL 4226614 (D.N.D. Oct. 21, 2010); *Brown v. Dean*, 555 F. Supp. 502 (D.R.I. 1982). See also *Jacksonville Coal. for Voter Protection v. Hood*, 351 F. Supp. 2d 1326 (M.D. Fla. 2004) (unequal access to early voting sites); *Brown v. Post*, 279 F. Supp. 60 (W.D. La. 1968) (unequal access to absentee voting opportunities). “Vote dilution,” in contrast, often results from at-large elections and similar practices that dilute the value of votes cast by minority votes in places where they are able to cast a ballot. *Burton v. City of Belle Grande*, 178 F.3d 1175, 1198 (11th Cir. 1999).

Individuals bringing vote denial claims do not allege that their cast ballots have less value or force than those cast by white voters as in dilution cases. Rather,

plaintiffs bringing vote denial claims allege that their equal opportunity to participate in the political process has been denied or abridged in *the first instance*. See, e.g., *Farrakhan v. Gregoire*, 590 F.3d 989, 1006 (9th Cir.), rev'd on other grounds, 623 F.3d 990 (9th Cir. 2010) (*en banc*).

Studies show that minority citizens are statistically less likely than whites to possess the necessary identification required by voter-identification laws. While only eight percent of white voters do not possess current, government-issued photo identification, sixteen percent of Hispanics and twenty-five percent of African Americans do not possess this form of identification. Discrimination is compounded by the fact that, in states with voter-identification requirements, poll workers are more likely to request identification from minority voters than from white voters.¹⁴

Generally, American Indian voters are in the same situation as other minority voters, but differ slightly in that they usually possess an identification card issued by their tribal government pursuant to tribal law, like the *Amici*. Tribal governments consistently have been recognized by the United States, as “distinct, independent political communities,” *Worcester v. Georgia*, 31 U.S. 515, 559 (1832), “capable of managing its own affairs and governing itself.” *United States v. Lara*, 541 U.S. 193,

¹⁴ Americans from the Ballot Box, People for the American Way, <http://www.pfaw.org/rww-in-focus/the-right-to-vote-under-attach-the-campaign-to-keep-millions-of-americans-from-the-ballot> (last visited May 12, 2016).

204-205 92004) (quoting *Cherokee Nation v. Georgia*, 30 U.S. 1 (1832)). Perhaps the most basic principle of federal Indian law is that the powers lawfully vested in Indian tribes are not, delegated powers granted by express acts of Congress, but rather “inherent powers of a limited sovereignty what has never been extinguished.” *United States v. Wheeler*, 435 U.S. 313, 322-323 (1978). Each tribe, like the Lumbee Tribe, has the power to determine its own tribal membership. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978). And, administratively, issue tribal enrollment cards to its members.

B. North Carolina’s Voter ID Law

North Carolina’s Voter Information Verification Act (“VIVA”), S.L. 2013-381, and S.L. 2015-103, was passed by the North Carolina General Assembly on July 29, 2013 and June 22, 2015, respectively, and signed into law by the Governor on August 12, 2013 and June 22, 2015. It generally requires in-person voters to present one of eight specified government-issued photo ID. Section 163-166.13(e). It became effective on January 1, 2016. Section 163-166.13(e) and subsection (e)(7) of VIVA establish additional qualifications on the Lumbee because they are a “tribe recognized by the state.” North Carolina will only accept a Lumbee Tribal ID card if it: (1) comports with the cards issued by the Division of Motor Vehicles, (2) is signed by an elected official of the tribe, and (3) has a printed expiration date and shall be unexpired. Section 163.166.13(e)(7) and Section 163.166.13(e). No such

requirements are mandated for individuals holding a military card, Veterans card or a tribal enrollment card issued by a federally recognized tribe (applies to Eastern Cherokee Tribe). Sections 163-166.13 (e)(4-6) and Section 163.166.13(e).

In 2010, prior to passage of VIVA, the Lumbee Tribal government enacted a new Enrollment Ordinance and began issuing photo identification card to Tribal members at a cost of \$5.00. CLLO-2010-0121-01 Lumbee Tribal Enrollment Ordinance, enacted January 21, 2010, amended August 18, 2011. For Tribal members who are under the age of 55 the photo identification has an expiration date.¹⁵ However, under Tribal law, photo identification cards issued to Lumbee Tribal members over 55, like all the *Amici*, do not have an expiration date. This law is to prevent elderly Lumbee Tribal members,¹⁶ many who do not drive or have limited access to transportation and resources, like *Amici*, from having to travel to obtain a photo identification card in the future. This has been the standard practice of the Lumbee Tribe now and before VIVA was passed.

The 2015 VIVA requirements conflict with the established Lumbee ID cards issued to the Tribal members and *Amici* over the age of 55 years. There are hundreds

¹⁵ Section 5(f)3 provides: “Applicants who meet the membership criteria shall be certified as eligible by the Office of Enrollment and Records and the member shall be duly enrolled into the Lumbee tribe by: . . . [a]ssignment of an expiration date which shall be seven (7) years from date of enrollment.”

¹⁶ Section 6(a): “Members who are fifty-five (55) years or older shall not be required to update once every seven (7) years, provided they are holding active (i.e. updated) membership at age fifty-five (55).”

of Tribal members over the age of 55, and who do not have ID cards with an expiration date. To meet the requirements of North Carolina law Section 163.166.13(e)(7) and Section 163.166.13(e), the Lumbee Tribe is required to comply with state law, amend its Enrollment law and seek to replace the previous aged 55+ ID cards with new cards with an expiration date. The Tribe will be obligated to invest significant time and expenses to accomplish this feat. Like many governments, the Tribe works within a finite budget. For every dollar spent providing new enrollment cards for *Amici* and others over 55 years, there is one less dollar that can be spent on offering valuable health, education, and human services to Tribal members. Indeed, Tribal services are critically needed for its members because the poverty level in Robeson County is the highest in the state.

Moreover, *Amici* and other Tribal members over 55 will be required to pay for a new card and find transportation to Pembroke to obtain a new one, all to meet the requirements of the VIVA. Unlike other North Carolina voters, the Lumbee must take extraordinary efforts to obtain qualifying ID under VIVA. Political science principles establish that increases to voting costs, both monetary and non-monetary, decrease turnout. See *Veasey, supra*, 71 F. Supp. 3d at 665-666.

At least a dozen states with large Indian populations have enacted laws that recognize and accept tribal IDs, including Arizona, Colorado, South Dakota, Utah, Washington, and Wisconsin for registering and voting. See *Wolfley, supra*, at 301.

None of these states set additional conditions on the acceptance of the tribal IDs as North Carolina does. This is particularly true after the challenges to voter ID laws in Minnesota and Arizona by tribal voters. See *ACLU v. Kiffmeyer, supra*; *Navajo Nation v. Brewer, supra* at 1-2.¹⁷

By its terms, Section 2 requires plaintiffs to show only that, as a result of a challenged practice, minority voters have “less opportunity” to participate relative to other voters, not that they have “no” such opportunity. 52 U.S.C. 10301(b); see 52 U.S.C. 10301(a) (prohibiting a “denial or abridgement” of voting rights.) VIVA creates and places disproportionate and material burdens on Lumbee Tribal voters in obtaining an acceptable photo identification card to enable them to vote.

Lumbee Tribal voters disproportionately lack VIVA IDs and face disparate and material burdens in obtaining such IDs, but also VIVA interacts with social and historical conditions tied to racial discrimination *to cause* unequal electoral opportunities for minority voters. Many Lumbee voters over 55+ years lack the

¹⁷ The Navajo Nation did not issue photo ID cards. In the settlement that was reached in the *Navajo Nation* case, the state of Arizona agreed to accept: (1) tribal identification or enrollment card issued under the authority of a federally recognized Indian tribe, nation, community, or band, a tribal subdivision or the Bureau of Indian Affairs; or (2) a Certificate of Indian Blood issued to a tribal member under the authority of a tribe or by the Bureau of Indian Affairs; or (3) a voter registration card for tribal elections issued under the authority of a tribe; or (4) a home site assignment lease, permit or allotment issued under the authority of a tribe, tribal subdivision, or by the Bureau of Indian Affairs; or (5) a grazing permit or allotment issued to a tribal member under the authority of a tribe, tribal subdivision, or by the Bureau of Indian Affairs.

resources necessary to travel long distances and the funds to purchase a new Tribal Enrollment Card, thus making it more difficult to participate in the political process than non-minority voters. The history of discrimination against Lumbee Indians, coupled with the highest poverty rates, unemployment and limited access to vehicles has caused a prohibited discriminatory result, in that it results in Lumbee Indian voters having less opportunity than white voters to participate in the political process. VIVA therefore “results in a denial or abridgement” of the right to vote “on account of race or color.” 52 U.S.C. 10301(a).

A simple solution to all this would be for North Carolina to accept Lumbee Tribal photo identification cards just as other states do and just as they accept federally recognized Indian tribal cards, military cards and Veterans cards. There is no rationale or compelling reason for North Carolina to treat state Indian tribal governments differently. Equally, there is no basis for North Carolina to not recognize the laws of the Lumbee Tribal government and accept the Tribal identification cards without demanding additional qualifications. Until North Carolina revises its voter ID law, or unless this Court provides a remedy, it remains in violation of the Voting Rights Act and the Equal Protection Clause of the Fourteenth Amendment.

The stakes in this case for *Amici* and other minority voters in North Carolina, and for the fundamental right to cast a ballot, could not be higher. The Court should

not permit North Carolina's laws to deprive the voters of access to the ballot box. We understand that federal courts should stand vigilant to ensure that the Voting Rights Act tool protects voters from abuses. We await the day when such tools will no longer be needed. At present, however, we know of no effective, tailored alternative.

CONCLUSION

For the reasons stated, this Court should hold that the district committed error in evaluating Plaintiffs' Section 2 denial and dilution claims and reverse the decision. It should also consider the North Carolina's adverse impacts on Indian voters.

Respectfully submitted,

/s/ Arnold Locklear

Arnold Locklear

N.C. State Bar No. 5720

Locklear, Jacobs, Hunt & Brooks

203 College Street

P.O. Box 999

Pembroke, NC 28372

(910) 521-3413

Jeanette Wolfley

Assistant Professor

University of New Mexico School of Law

1117 Stanford N.E

Albuquerque, NM 87131-0001

(208) 841-7504

Counsel for *Amici Curiae*

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Nos. 16-1468(L), 16-1469, 16-1474, 16-1529 Caption: North Carolina State Conference of the NAACP, et al. v. Patrick Lloyd McCrory et al.

CERTIFICATE OF COMPLIANCE WITH RULE 28.1(e) or 32(a)

I hereby certify, pursuant to Federal Rule of Appellate Procedure that the attached *AMICI CURIAE* BRIEF OF PEARLEIN REVELS, LOUISE MITCHELL, ERIC LOCKLEAR, AND ANITA HAMMONDS BLANKS IN SUPPORT OF PLAINTIFFS – APPELLANTS :

1. Complies with the type-volume limitations of Fed. R. App. P. 28.1(e)(2) or and 32(a)(7)(B) because this brief contains 5,340 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B); and
2. Complies with the typeface requirements of Fed. R. App. Pl 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word, in 14-point New Roman font.

/s/Jeanette Wolfley

JEANETTE WOLFLEY

Attorney for Amici Curiae

Dated: May 26, 2016

CERTIFICATE OF SERVICE

I hereby certify that on this May 26, 2016, the foregoing *AMICI CURIAE* BRIEF OF PEARLEIN REVELS, LOUISE MITCHELL, ERIC LOCKLEAR, AND ANITA HAMMONDS BLANKS was filed with the Clerk of the Court of the United States Court of Appeals for the Fourth Circuit through the CM/ECF System and on counsel who are registered CM/ECF users.

I further certify that on this May 27, 2016, I caused four paper copies of this brief to be sent certified U.S. Mail, postage prepaid, to the Clerk of the Court and will serve one paper copy to be mailed to the following counsel by certified U.S. mail, postage prepaid.

H. Christopher Coates
Law Office of H. Christopher Coates
934 Compass Point
Charleston, SC 29412

Christopher A. Fedeli
Judicial Watch
425 3rd Street, SW
Washington, DC 20024-0000

Gene B. Johnson
Johnson Law Firm, PA
P.O. Box 1288
Arden, NC 28704

Laughlin McDonald
ACLU Voting Rights Project
2700 International Tower
229 Peachtree Street, NE
Atlanta, GA 30303

Amy M. Pockington
Ogletree Deakins Nash Smoak & Stewart, PC
901 East Byrd Street
Richmond, VA 23219

/s/ Arnold Locklear
Counsel for Amici Curiae

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
APPEARANCE OF COUNSEL FORM

BAR ADMISSION & ECF REGISTRATION: If you have not been admitted to practice before the Fourth Circuit, you must complete and return an Application for Admission before filing this form. If you were admitted to practice under a different name than you are now using, you must include your former name when completing this form so that we can locate you on the attorney roll. Electronic filing by counsel is required in all Fourth Circuit cases. If you have not registered as a Fourth Circuit ECF Filer, please complete the required steps at Register for eFiling.

THE CLERK WILL ENTER MY APPEARANCE IN APPEAL NO. _____ as

[]Retained []Court-appointed(CJA) []Court-assigned(non-CJA) []Federal Defender []Pro Bono []Government

COUNSEL FOR: _____

_____ as the
(partly name)

appellant(s) appellee(s) petitioner(s) respondent(s) amicus curiae intervenor(s) movant(s)

(signature)

Name (printed or typed)

Voice Phone

Firm Name (if applicable)

Fax Number

Address

E-mail address (print or type)

CERTIFICATE OF SERVICE

I certify that on _____ the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

Signature

Date