Nos. 14-1845, 14-1856, & 14-1859

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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

Plaintiffs-Appellants

v.

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

Defendants-Appellees

(*See inside cover for continuation of caption*)

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

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# STATEMENT OF VIEWS OF THE UNITED STATES IN RESPONSE TO THE COURT'S INVITATION

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(*Continuation of caption*)

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

Plaintiffs-Appellants

LOUIS M. DUKE, *et al.*,

Plaintiff-Intervenors-Appellants

v.

THE STATE OF NORTH CAROLINA, *et al.*,

Defendants-Appellees

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UNITED STATES OF AMERICA,

Plaintiff-Appellant

v.

THE STATE OF NORTH CAROLINA, *et al.*,

Defendants-Appellees

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## INTEREST OF THE UNITED STATES

This brief is submitted in response to the Court's order inviting the United States to file a statement of its views.

## STATEMENT OF THE ISSUE

The United States will address the following issue:

Whether the district court misapplied Section 2 of the Voting Rights Act (VRA), 52 U.S.C. 10301,[1] in assessing the United States' and other plaintiffs' likelihood of success or chance of suffering irreparable harm on their claims that North Carolina's newly enacted voting restrictions violate Section 2 of the VRA.

## STATEMENT OF FACTS

The United States relies on the Statement of Facts in its Memorandum of Law in Support of its Motion for a Preliminary Injunction and for the Appointment of Federal Observers (Doc. 97, at 3-20).[2]

## SUMMARY OF ARGUMENT

The district court fundamentally erred in evaluating the United States' and other plaintiffs' Section 2 claims. The court confused plaintiffs' arguments with

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[1] Effective September 1, 2014, the VRA was moved from Title 42 to Title 52 of the United States Code and was assigned new section numbers. The addendum to this brief contains a chart comparing the old and new section numbers.

[2] "Doc. __" refers to the docket entry number in *United States* v. *North Carolina*, No. 1:13-CV-861 (M.D.N.C.).

the concept of retrogression under Section 5 of the VRA, 52 U.S.C. 10304; overlooked the jurisdiction-specific and context-specific nature of a Section 2 totality-of-circumstances analysis; and failed to analyze the cumulative effect of North Carolina's law. Correction of these errors is necessary not only to ensure that the district court applies the proper legal standards on remand in analyzing the plaintiffs' requests for preliminary relief, but also to ensure correct adjudication of plaintiffs' claims when this case proceeds to trial next year.

## ARGUMENT

## THE DISTRICT COURT'S ANALYSIS OF THE UNITED STATES' AND OTHER PLAINTIFFS' SECTION 2 CLAIMS IS INFECTED WITH MULTIPLE LEGAL ERRORS

The district court erred as a matter of law in analyzing the Section 2 claims in this case. Because the court's multiple legal errors affected its assessment of the United States' and other plaintiffs' requests for preliminary relief, this Court should reverse the judgment below. Rather than the analysis conducted by the district court, the proper legal framework for analyzing Section 2 claims obligated the court to evaluate the totality of the circumstances.

### *A. Section 2 Requires A Jurisdiction-Specific, Totality-Of-Circumstances Analysis*

Section 2 of the VRA prohibits any "voting qualification or prerequisite to voting or standard, practice, or procedure" that "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). Section 2 is violated when, "based on the totality of circumstances," members of a particular racial group "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 52 U.S.C. 10301(b). A court evaluating a Section 2 results claim must engage in a fact-intensive, localized inquiry in assessing the totality of the circumstances. *Thornburg* v. *Gingles*, 478 U.S. 30, 79 (1986).

In its report on the 1982 amendments to Section 2 of the VRA, the Senate Judiciary Committee identified several factors (Senate Factors) that may inform a court's evaluation of whether a challenged practice or procedure denies minority voters, on account of race, an equal opportunity to participate in the political process and to elect representatives of their choice. See S. Rep. No. 417, 97th Cong. 2d Sess. 15, 28-29 (1982) (Senate Report). Senate Factor 1, for example, looks to the jurisdiction's history of official discrimination in voting that affected the rights of minorities to register, vote, and have their ballots counted. Senate Factor 5 requires examination of "the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process." Senate Report 29. Senate Factor 8 asks "whether there is a significant lack of responsiveness on the part of elected

officials to the particularized needs of the members of the minority group." Senate Report 29; see also Doc. 97, at 37-38 n.19 (listing remaining factors).

It is clear that total denial of the right to vote is not necessary to make out a successful Section 2 claim: the statute, by its terms, also prohibits the "abridgement" of access to the franchise on account of race or color. See 52 U.S.C. 10301(a). The relevant question is whether minority voters have "*less* opportunity" relative to white voters "to participate in the political process and to elect representatives of their choice." 52 U.S.C. 10301(b) (emphasis added). Thus, to prevail under Section 2, all a plaintiff need establish is that the challenged practice "result[s] in the denial of *equal access* to *any phase* of the electoral process for minority group members." Senate Report 30 (emphasis added).

*B. The District Court Committed At Least Three Legal Errors In Analyzing The Section 2 Claims*

*1. The Court Erroneously Confused The United States' And Other Plaintiffs' Section 2 Arguments With Section 5's Retrogression Standard*

In their briefs supporting the motion for preliminary injunction, and at the evidentiary hearing, the United States and the other plaintiffs offered evidence showing that the electoral reforms instituted prior to HB 589 had a positive effect on African-American voter registration and turnout and that those voters would be disproportionately affected by the elimination of these reforms. See Doc. 97, at 30-31, 33, 35. The court accepted the accuracy of some of this evidence. See Doc.

171, at 44, 83. The court also acknowledged North Carolina's "unfortunate history of official discrimination in voting and other areas that dates back to the Nation's founding," and accepted that racial discrimination has resulted in current socioeconomic disparities. Doc. 171, at 40; see also Doc. 171, at 82-83.

Despite citing this evidence, and despite the clear Supreme Court precedent establishing its relevance to the Section 2 analysis (see, *e.g.*, *Reno* v. *Bossier Parish School Board*, 528 U.S. 320, 333-334 (2000); *League of United Latin American Citizens* v. *Perry*, 548 U.S. 399, 439 (2006) (*LULAC*)), the court criticized the United States and the other plaintiffs for relying on the prior electoral system in North Carolina to emphasize the lack of equal participation opportunities for minority voters under current law. Claiming that the plaintiffs were improperly trying to import a Section 5 retrogression standard into a Section 2 claim, the court discounted the significance of the State's decision to reverse earlier electoral practices that had enabled African Americans to make substantial progress toward achieving equal opportunity. Doc. 171, at 46, 48 (discussing the elimination of same-day registration); Doc. 171, at 82-86 (out-of-precinct ballots). In the district court's view, the rollback of the earlier system on which African Americans had relied so heavily "does not affect the ultimate inquiry under Section 2." Doc. 171, at 85. According to the court, "[a] contrary interpretation would import the retrogression standard of Section 5 into Section 2 cases." Doc. 171, at 85-86.

The court was wrong. As the Supreme Court held in *Bossier Parish*, 528 U.S. at 333-334, the impact of alternative voting procedures is highly relevant in assessing whether an existing practice violates Section 2. "It makes no sense to suggest that a voting practice 'abridges' the right to vote without some baseline with which to compare the practice." *Id.* at 334. Thus, in Section 2 cases, which can involve "not only changes but (much more commonly) the status quo itself, the comparison must be made with a hypothetical alternative: If the *status quo* 'results in [an] abridgement of the right to vote' or 'abridge[s] [the right to vote]' relative to what the right to vote *ought to be*, the status quo itself must be changed." *Id*. at 334 (citation omitted). A State's previous voting practices are undoubtedly relevant in determining whether a less discriminatory alternative exists. This is especially true when the previous practices constitute a potential remedy a State may develop to address a Section 2 violation – a point recognized in *Gingles*'s discussion of causation. See 478 U.S. at 50 n.17 (explaining that plaintiffs in a vote dilution Section 2 case must show that there is some alternative to the challenged practice that *would* provide them with more equal electoral opportunity). The logic of looking at previous practices is consistent with guidance from Congress and the Supreme Court that courts adjudicating Section 2 claims are to conduct "a searching practical evaluation of the '*past* and present

reality'" of the political process within the defendant jurisdiction. See Senate Report 30 (emphasis added); accord *Gingles*, 478 U.S. at 44-45.

North Carolina's previous voting practices are relevant under Section 2 also because they are critical to the "totality of circumstances" analysis required by the statute. By failing to understand the importance under Section 2 of the elimination of voting procedures that were successful in fostering equal minority political participation, the district court committed a legal error that thoroughly infected its analysis of the plaintiffs' requests for preliminary relief.

It is well established that, in assessing the totality of circumstances under Section 2 using the Senate Factors, a court must examine, among other things, a jurisdiction's history of voting discrimination and minority participation in the electoral process. See Section A, *supra*. The decision by a State with a significant history of official voting discrimination to abrogate voting procedures that had benefitted minority voters undoubtedly bears on the totality-of-circumstances analysis guided by these Senate Factors. Cf. *LULAC*, 548 U.S. at 439 (finding a Section 2 violation based in part on the fact that the voting changes in question had "undermined the progress of a racial group that has been subject to significant voting-related discrimination and that was becoming increasingly politically active and cohesive"). For decades, minority voters in North Carolina lagged behind white voters in registration and turnout. Statistical evidence shows that the pre-HB

589 electoral system increased minority voter registration and turnout in the State. The same socioeconomic factors that previously hindered minority voters' registration and turnout in North Carolina – *e.g.*, lower income, educational, and employment levels; less access to vehicles; and a more transient population – persist in the State today and present obstacles to equal minority participation. Thus, evidence that the pre-HB 589 system brought about more equality of opportunity for minority participation over multiple election cycles helps answer the question of whether minority voters, in the present day, have less opportunity than white voters to participate in the political process.

The recent district court decision granting a preliminary injunction against Ohio's revised voting statute recognizes precisely these factors. See *Ohio State Conference of the NAACP* v. *Husted*, No. 2:14-cv-404, 2014 U.S. Dist. LEXIS 123442 (S.D. Ohio Sept. 4), stay denied, No. 14-3877, 2014 U.S. App. LEXIS 17681 (6th Cir. Sept. 12, 2014). Similar to the district court's holding here, defendants argued in *Husted* that it "is improper under a § 2 analysis for the Court to compare the schedule for [early] voting imposed by [Ohio's new voting law] to the voting opportunities from previous elections" because "such a comparison improperly grafts a § 5 'retrogression' analysis onto a § 2 claim." See *id.* at *105. The *Husted* court's response is instructive. Recognizing the Supreme Court's holding that a Section 2 proceeding compares the current law to what "the right to

vote *ought to be*," the *Husted* court held that "a comparison between past and current [early] voting days and hours is relevant to the totality of the circumstances inquiry that the Court must conduct and to the ultimate question of whether the voting rights of African Americans in Ohio have been abridged." *Id*. at *105-106 (quoting *Bossier Parish Sch. Bd.*, 528 U.S. at 333-334).

The district court here, however, failed to apply such an analysis. Having discounted the significance, for Section 2 purposes, of North Carolina's decision to rescind its previous, successful voting tools, the court was unable to properly analyze the barriers to effective minority participation under current law.

*2. The Court Incorrectly Assumed That Finding A Section 2 Violation In This Case Would Call Into Question Other States' Laws*

The language of Section 2, the Senate Report, and Supreme Court precedents all make clear the jurisdiction- and context-specific nature of a Section 2 analysis. As the statute states, Section 2 is violated if "based on the totality of circumstances," political processes are not "equally open to participation" to minority voters in a particular "State or political subdivision." See 52 U.S.C. 10301(b); see also Senate Report 28-29 (calling for an analysis of conditions in the "state or political subdivision" or "jurisdiction"); *Gingles*, 478 U.S. at 44-45 (discussing the Senate Report).

Nevertheless, in the process of individually reviewing each provision of North Carolina's voting law, the district court here repeatedly expressed a concern

that any finding that North Carolina had violated Section 2 would necessarily call into question the legality of other States' laws. For instance, during its discussion of same-day registration (SDR), the court stated that "because Section 2 does not incorporate a 'retrogression' standard, the logical conclusion of Plaintiffs' argument would have rendered North Carolina in violation of the VRA before adoption of SDR simply for not having adopted it." Doc. 171, at 46. The court noted, however, that "neither the United States nor the private Plaintiffs have ever taken the position that a jurisdiction was in violation of Section 2 simply for failing to offer SDR." Doc. 171, at 46. The court concluded that "extending Section 2 that far could have dramatic and far-reaching effects, placing the laws of at least 36 other states which do not offer SDR in jeopardy of being in violation of Section 2." Doc. 171, at 46 (alterations, citation, and internal quotation marks omitted). Again, when discussing out-of-precinct balloting, the court stated that: "a determination that North Carolina is in violation of Section 2 merely for maintaining a system that does not count out-of-precinct provisional ballots could place in jeopardy the laws of the majority of the States, which have made the decision not to count such ballots." Doc. 171, at 85.

This analysis was flawed. Because a Section 2 analysis must be highly context-specific, a finding of a violation in one State does not automatically call into question the legality of voting practices in different States. See *Gingles*, 478

U.S. at 78; see also *Husted*, 2014 U.S. Dist. LEXIS 123442, at *105 ("[W]hile the Defendants have sought to compare Ohio's voting scheme to those of other states, the evaluation of a § 2 claim 'require[s] an intensely local appraisal of the design and impact of the challenged electoral practice.'") (citations and internal quotation marks omitted). Moreover, because Section 2 demands a totality-of-circumstances approach, there is no particular formula for determining whether a voting practice that violates Section 2 in one jurisdiction also will violate Section 2 in another jurisdiction, or, conversely, that the failure to establish a Section 2 violation in one jurisdiction will preclude finding a Section 2 violation elsewhere. Contrary to the court's suggestion, a plaintiff in a jurisdiction that limits the opportunity to cast a ballot to a single day is not precluded as a matter of law from bringing a Section 2 case alleging that the jurisdiction violated Section 2 for, say, failing to offer early voting. Whether the plaintiff then could prove such a violation would depend upon a court's examination of the relevant Senate Factors – *e.g.*, the history of discrimination in that jurisdiction, coupled with an analysis of present voting opportunities, and the socioeconomic circumstances of minority and non-minority voters attributable to the effects of racial discrimination. See *Gingles*, 478 U.S. at 44-45. It is equally true that, depending on the particular facts, a jurisdiction might do away with early voting entirely without violating Section 2. It is thus simply wrong to say – as the district court did – that any particular Section 2 argument

places other States' laws "in jeopardy." See Doc. 171, at 46; see also Doc. 171, at 85.

*3. Throughout Its Analysis, The District Court Erred By Failing To Examine The Cumulative Impact Of The Provisions In Question*

Finally, the court erred by failing to consider the cumulative impact of the more restrictive voting practices North Carolina imposed under HB 589. Instead, the court analyzed each portion of the law in isolation, failing entirely to examine the effect of the law as a whole on minority voters.

Contrary to the court's analysis, and consistent with Section 2, the United States has consistently pointed to the *package of restrictions* in North Carolina as amounting to a Section 2 violation. In its complaint, the United States alleged that the implementation and enforcement of the various provisions of HB 589 "will individually *and collectively* interact with economic, historical, and on-going social conditions in North Carolina – including poverty, unemployment, lower educational attainment, and lack of access to transportation – to result in a denial or abridgement of equal opportunities for African-American voters to participate in the political process, in violation of Section 2." Doc. 1, at 30 ¶ 98 (emphasis added). Consistent with its complaint, the United States contended in its motion for preliminary relief that "HB 589's *particular package of restrictions on the opportunity to vote* interacts with social, political, and historical conditions in North Carolina to result in a denial of equal access to the political process for

African-American voters," and "that North Carolina's decision to eliminate the opportunity to use the full period of early voting, same-day registration, and out-of-precinct provisional ballots was tainted by an impermissible discriminatory purpose." Doc. 97, at 23-24 (emphasis added).

The court appears to have disregarded this argument, focusing on each of the voting changes in isolation but failing to also consider them collectively. The court's confusion is evident in the weight it put on the fact that the United States has "never previously taken the position that a State was in violation of Section 2 for failing to have any, much less a particular number of, days of early voting," and that "it has previously pre-cleared states for significant reductions in early-voting periods." Doc. 171, at 96 n.61. But those facts only underscore the nature of the United States' claim in this case: the United States not only alleges that the individual challenged provisions of HB 589 violate Section 2, but also contends that, *taken together*, the provisions of North Carolina's law present an unacceptable and illegal barrier to equal minority participation in the political process. Cf. *Clingman* v. *Beaver*, 544 U.S. 581, 607-608 (2005) (O'Connor, J., concurring) ("A panoply of [electoral] regulations, each apparently defensible when considered alone, may nevertheless have the combined effect of severely restricting participation and competition."). For example, reducing the number of days of early voting and eliminating same-day registration during the early voting

period – both of which are disproportionately relied upon by African-American voters – increases the likelihood that minority voters will not be able to overcome any problems with their registration status that would prevent them from casting a ballot. See JA Vol. II at 825, 842, 879-880 (Stewart ¶¶ 108, 151, 246-248). Funneling more voters onto Election Day because of a shortened early voting period also increases the likelihood that voters will end up in a non-assigned precinct and cast an out-of-precinct provisional ballot, which will no longer count for any office. Thus, the level of out-of-precinct ballots pre-HB 589 is not a failsafe guide to the risk of out-of-precinct voting post-HB 589. See PI Hearing Tr. Vol. II 34:2-24 (Gilbert), 133:7-14 (Bartlett); PI Hearing Tr. Vol. III 9:15-19 (Stewart). The court's failure to understand this synergistic relationship among the provisions of HB 589 prevented it from reaching an accurate decision about that law's overall effect on minority voters relative to other members of North Carolina's electorate.

### *C. Because The District Court's Legal Errors Infected Its Analysis, This Court Should Reverse The Judgment Below And Remand For Application Of Correct Legal Standards*

"The abuse-of-discretion standard does not preclude an appellate court's correction of a district court's legal or factual error." *Highmark Inc.* v. *Allcare Health Mgmt. Sys., Inc.*, 134 S. Ct. 1744, 1748 n.2 (2014). On the contrary, "[a] district court would necessarily abuse its discretion if it based its ruling on an

erroneous view of the law or on a clearly erroneous assessment of the evidence." *Ibid.* (quoting *Cooter & Gell* v. *Hartmarx Corp.*, 496 U.S. 384, 405 (1990)).

As the discussion above makes clear, the district court repeatedly erred in its analysis of the United States' and other plaintiffs' Section 2 claims. Because these legal errors infected the entirety of the court's assessment of the plaintiffs' requests for preliminary relief, this Court should reverse the district court's judgment and remand for reconsideration under the correct standards.

## CONCLUSION

This Court should reverse the district court's judgment and remand for further proceedings consistent with this Court's opinion.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

I certify that the attached STATEMENT OF VIEWS OF THE UNITED STATES IN RESPONSE TO THE COURT'S INVITATION complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Word 2007, in 14-point Times New Roman font.

I further certify that the attached STATEMENT OF VIEWS OF THE UNITED STATES IN RESPONSE TO THE COURT'S INVITATION complies with the 15-page limit established by this Court's order of September 9, 2014.

s/ Holly A. Thomas
HOLLY A. THOMAS
Attorney

Date: September 17, 2014

## CERTIFICATE OF SERVICE

I certify that on September 17, 2014, I electronically filed the foregoing STATEMENT OF VIEWS OF THE UNITED STATES IN RESPONSE TO THE COURT'S INVITATION with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system. On September 17, 2014, eight copies of the same were sent by Certified Mail to the Court.

I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Holly A. Thomas
HOLLY A. THOMAS
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# ADDENDUM

**Section 2 of the Voting Rights Act (52 U.S.C. 10301). Denial or abridgement of right to vote on account of race or color through voting qualifications or prerequisites; establishment of violation**

(a) 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, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.

(b) A violation of subsection (a) of this section is established if, based 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) of this section 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.

# Voting Rights Act of 1965

| Act Section | Former US Code Citation | | | New US Code Citation | |
|---|---|---|---|---|---|
| | Title | Sec | | Title | Sec |
| 1 | 42 | 1971 nt | | 52 | 10101 nt |
| 2 | 42 | 1973 | | 52 | 10301 |
| 3 | 42 | 1973a | | 52 | 10302 |
| 4 | 42 | 1973b | | 52 | 10303 |
| 5 | 42 | 1973c | | 52 | 10304 |
| 6 | 42 | 1973d | Rep. | | |
| 7 | 42 | 1973e | Rep. | | |
| 8 | 42 | 1973f | | 52 | 10305 |
| 9 | 42 | 1973g | Rep. | | |
| 10 | 42 | 1973h | | 52 | 10306 |
| 11 | 42 | 1973i | | 52 | 10307 |
| 12 | 42 | 1973j | | 52 | 10308 |
| 13 | 42 | 1973k | | 52 | 10309 |
| 14 | 42 | 1973*l* | | 52 | 10310 |
| 15 | 42 | 1971 | | 52 | 10101 |
| 16 | 42 | 1973m | Elim. | | |
| 17 | 42 | 1973n | | 52 | 10311 |
| 18 | 42 | 1973*o* | | 52 | 10312 |
| 19 | 42 | 1973p | | 52 | 10313 |
| 20 | 42 | 1973q | | 52 | 10314 |
| 201 | 42 | 1973aa | | 52 | 10501 |
| 202 | 42 | 1973aa-1 | | 52 | 10502 |
| 203 | 42 | 1973aa-1a | | 52 | 10503 |
| 204 | 42 | 1973aa-2 | | 52 | 10504 |
| 205 | 42 | 1973aa-3 | | 52 | 10505 |
| 206 | 42 | 1973aa-4 | | 52 | 10506 |
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| 208 | 42 | 1973aa-6 | | 52 | 10508 |
| 301 | 42 | 1973bb | | 52 | 10701 |
| 302 | 42 | 1973bb-1 | | 52 | 10702 |
| 303 | 42 | 1973bb-2 | Rep. | | |
| 304 | 42 | 1973bb-3 | Rep. | | |
| 305 | 42 | 1973bb-4 | Rep. | | |