No. _____

In the Supreme Court of the United States

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

v.

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

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI AND VOLUME I OF THE APPENDIX

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QUESTIONS PRESENTED

This case involves a challenge under Section 2 of the Voting Rights Act, 52 USC §10301 ("§2"), and the federal Constitution to North Carolina election reforms—specifically, a photo-ID requirement, a 7-day reduction in early voting, and the elimination of same-day registration, out-of-precinct voting, and pre-registration for 16-year-olds. Following two trials with over 130 expert and fact witnesses, the district court issued a 479-page opinion finding those reforms had neither discriminatory effect nor intent.

Without disturbing those *effect* findings, the Fourth Circuit found the reforms were motivated by discriminatory *intent*. It relied on "evidence" that, *inter alia*, North Carolina enacted its reforms soon after being "release[d]" from preclearance under Section 5 of the Voting Rights Act, 52 USC §10304 ("§5"), by *Shelby County* v. *Holder*, 133 S. Ct. 2612 (2013), App. 33a; that North Carolina had received preclearance objections to election laws over the past three decades; and that legislators knew that African-Americans used some of the eliminated mechanisms at higher rates.

The following questions are presented:

1. Whether a federal court has the authority to re-impose, under §2 of the Voting Rights Act, the same "anti-retrogression" preclearance standard invalidated as to §5 by *Shelby County*.

2. Whether the Fourth Circuit erred in holding that, although the challenged reforms did not adversely *affect* minority voting, the North Carolina

legislature nonetheless *intended* to deny African-Americans the right to vote.

3. Whether statistical racial disparities in the use of voting mechanisms or procedures are relevant to a vote denial claim under §2.

PARTIES TO THE PROCEEDING

Petitioners State of North Carolina; Governor Patrick McCrory; the North Carolina State Board of Elections; Kim Westbrook Strach, in her official capacity as the Executive Director of the State Board of Elections; Joshua B. Howard, in his official capacity as a member of the State Board of Elections; Rhonda K. Amoroso, in her official capacity as a member of the State Board of Elections; Joshua D. Malcolm, in his official capacity as a member of the State Board of Elections; Paul J. Foley, in his official capacity as a member of the State Board of Elections; Maja Kricker, in her official capacity as a member of the State Board of Elections; and James Baker, in his official capacity as a member of the North Carolina State Board of Elections were Defendants in the district court and Appellees in the court of appeals.

Respondents North Carolina State Conference of the NAACP, Rosanell Eaton, Emmanuel Baptist Church, Bethel A. Baptist Church, Covenant Presbyterian Church, Barbee's Chapel Missionary Baptist Church, Armenta Eaton, Carolyn Coleman, Jocelyn Ferguson-Kelly, Faith Jackson, Mary Perry, and Maria Teresa Unger Palmer were Plaintiffs in the district court and Appellants in appeal No. 16-1468. Respondents Louis M. Duke, Josue E. Berduo, Nancy J. Lund, Brian M. Miller, Becky Hurley Mock, Lynne M. Walter, and Ebony N. West were Plaintiffs-Intervenors in the district court and Appellants in appeal No. 16-1469. Respondents the League of Women Voters of North Carolina, the North Carolina A. Philip Randolph Institute, Unifour Onestop Collaborative, Common Cause North Carolina, Goldie Wells, Kay Brandon, Octavia Rainey, Sara Stohler,

and Hugh Stohler were Plaintiffs in the district court and Appellants in appeal No. 16-1474. Respondent the United States was a Plaintiff in the district court and Appellant in appeal No. 16-1529.

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No. _____

In the Supreme Court of the United States

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

INTRODUCTION

This case involves challenges under Section 2 of the Voting Rights Act ("§2") and the federal Constitution to North Carolina election reforms. Those reforms include a photo-ID law more lenient than the one this Court upheld eight years ago, see *Crawford* v. *Marion Cty. Election Bd.*, 553 U.S. 181 (2008), and other voting adjustments that were already in effect during two statewide elections in which African-American participation *increased*. These sensible changes place North Carolina within the majority of current State election practices. The district court found North Carolina's reforms had no discriminatory effect on African-Americans and were enacted with no discriminatory intent. Overriding the district court, however, the Fourth Circuit not only found those reforms motivated by "racially discriminatory intent," but compared them to laws from "the era of Jim Crow." App. 26a, 46a. That extraordinary decision merits review for three separate reasons.

First, the Fourth Circuit's decision effectively nullifies this Court's decision in *Shelby County* v. *Holder*, 133 S. Ct. 2612 (2013), which invalidated the

coverage formula for preclearance under Section 5 of the Voting Rights Act ("§5"). Palpably indignant that North Carolina's reforms were enacted soon after the State's "release from the [§5] preclearance requirements," App. 33a, the Fourth Circuit in essence invented its own preclearance regime under §2. That decision guts *Shelby County*'s basic premise that "history did not end in 1965," 133 S. Ct. at 2628, and that States should therefore be restored to equal sovereignty in regulating elections. Evidently in the Fourth Circuit's eyes, where North Carolina is concerned, it is *always* 1965.

Second, the Fourth Circuit's decision addresses an extraordinarily important question in a way that is egregiously misguided and that threatens numerous State election laws. Simply put, the decision insults the people of North Carolina and their elected representatives by convicting them of abject racism. That charge is incredible on its face given the pains the legislature took to ensure that no one's right to vote would be abridged, and the fact that the reforms align North Carolina with the majority of current State practices. It becomes even more perplexing given that the Fourth Circuit did not disturb the district court's findings that the reforms have no discriminatory *effect*. And it becomes downright absurd given that the Fourth Circuit bluntly overrode the district court's meticulous findings on a classic fact question—intent—reached after weeks of trial. Worst of all, the basis for the Fourth Circuit's decision is not specific to North Carolina. On the contrary, the panel's "evidence" showing discriminatory intent would overturn election laws in numerous States. A federal circuit should not take a step of such enormity without this Court's review.

Third, the decision compounds confusion among federal circuits regarding use of statistical disparities in §2 vote denial claims. Four circuits—the Fifth, Sixth, Seventh, and Ninth—already disagree on whether discriminatory *effect* can be proved solely through racial disparities in the use of particular voting mechanisms. Adding confusion to confusion, the Fourth Circuit has adopted the principle that legislators' mere awareness of such disparities may prove discriminatory *intent*—even where the challenged laws have *no* discriminatory effect.

OPINIONS BELOW

The opinion of the court of appeals is reported at 831 F.3d 204. App. 1a–78a. The opinion of the district court is available at 2016 WL 1650774. App. 79a–532a.

JURISDICTION

The court of appeals entered its judgment on July 29, 2016. App. 1a. On October 14, 2016, the Chief Justice extended the time for filing a petition for certiorari to November 28, 2016. No. 16A362. On November 15, 2016, the Chief Justice further extended the time for filing a petition for certiorari to December 26, 2016. *Id.* This Court has jurisdiction under 28 USC §1254(1). The court of appeals had jurisdiction under 28 USC §§1291 and 1331.

STATUTORY PROVISIONS INVOLVED

Section 2 of the Voting Rights Act provides, in relevant part:

> (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 … as provided in subsection (b).
>
> (b) A violation of subsection (a) 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) 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.…

52 USC §10301.

STATEMENT

A. North Carolina's Electoral Reform Laws

In 2013, the North Carolina legislature enacted a package of election reforms known as SL 2013-381. Of the law's 20 measures, App. 105a–107a, only five are relevant here.

Voter ID: Under previous law, poll workers confirmed voter identity through signature attestation. App. 89a. SL 2013-381 improved that antiquated system by requiring in-person voters to present photo ID. Qualifying IDs include a driver's license; a free voter-ID card available from the DMV; a United States passport; a military or veterans ID card; or a tribal enrollment card. App. 120a–121a.

The legislature provided a two-year "soft roll out" before the ID requirement would take effect in 2016, and appropriated about $2 million to educate voters. App. 107a, 133a. The State Board of Elections also undertook "database matching efforts" to assess which voters lacked qualifying ID, and then mailed over 200,000 voters "resources for obtaining free photo ID" and offering assistance through a "postage pre-paid response card." App. 134a–137a.

In 2015, the legislature amended the law to expand qualifying IDs and to establish an exception allowing voters lacking ID to cast a provisional ballot if they declare a "reasonable impediment" to obtaining ID and provide alternative identification. App. 118a–119a, 177a (discussing SL 2015-103). That provisional ballot *must* be counted unless the stated excuse is "factually false, merely denigrating to the ID requirement, or obviously nonsensical." App. 119a, 181a. This exception mirrors a South Carolina law precleared in 2012. *South Carolina* v. *United States*, 898 F. Supp. 2d 30, 40 (D.D.C. 2012); App. 200a–201a.

Early Voting: SL 2013-381 reduced the early-voting period from 17 to 10 days. App. 121a. The first seven days had been the least-used, and the lengthier early-voting period had fostered "political gamesmanship"—in particular, locating early-voting sites in areas favoring only one political party. App. 344a–345a. To preserve early-voting opportunities, however, SL 2013-381 offset the decrease in early-voting *days* with a requirement that aggregate early-voting *hours* equal those in the previous analogous election, thus expanding evening and weekend early-voting opportunities. App. 122a, 224a–225a, 402a–404a. These revisions were scheduled to go into effect

in January 2014. Even after reducing its early-voting period, North Carolina would remain within the mainstream of State early-voting practice. Many States offer no early voting at all, and a supermajority offer no weekend voting. App. 201a–203a; see *infra* at 21.

Out-of-Precinct Voting: In 2005 the North Carolina Supreme Court interpreted State law to require voters to vote in the precinct where they reside. *James* v. *Bartlett*, 607 S.E.2d 638, 642–44 (2005); App. 95a. *James* observed that in-precinct voting makes elections more efficient and prevents fraud. App. 376a–377a. That same year, however, the legislature (then Democrat-controlled) retroactively overruled *James* and allowed voters to vote in the wrong precinct (but the correct county) by casting a provisional ballot. App. 97a. SL 2013-381 restored the pre-2005 system by eliminating out-of-precinct voting. App. 123a–124a. That change was scheduled to take effect in January 2014. By eliminating out-of-precinct voting, North Carolina would join a majority of States that disallow the practice. App. 253a; see *infra* at 21.

Same-Day Registration: North Carolina law allows voters to register up to 25 days before an election. App. 97a–98a. Since 2007, voters could both *register* and *vote* at early-voting sites during the early-voting period. App. 98a. Administrative problems with that regime led to potentially thousands of ineligible voters participating in elections. App. 364a–365a. SL 2013-381 repealed this provision, thus restoring the pre-2007 system. App. 123a. That change was scheduled to take effect in January 2014. By eliminating same-day registration, North Carolina would join a super-

majority of States that do not allow the practice. App. 229a; see *infra* at 21.

Pre-Registration: Since 2009, North Carolina allowed pre-registration by 16-year-olds who would not be 18 before the next general election. App. 99a. Experience showed, however, that pre-registered individuals could become confused about their eligibility to vote. App. 383a. SL 2013-381 therefore ended pre-registration by 16-year-olds, while maintaining it for 17-year-olds who will be 18 on election day. App. 124a. That change was scheduled to take effect in September 2013. By eliminating pre-registration of 16-year-olds, North Carolina would join a super-majority of States that do not allow the practice. App. 259a–260a; see *infra* at 21.

B. Procedural History

On August 12, 2013—the day SL 2013-381 was enacted—the North Carolina Conference of the NAACP and the League of Women Voters challenged the reforms under the federal Constitution and §2 of the Voting Rights Act. On September 30, 2013, the United States brought a challenge under §2. App. 125a. Various proceedings led to a preliminary injunction that eventually went into effect in 2015. App. 129a; see *League of Women Voters of N.C.* v. *North Carolina*, 769 F.3d 224, 242 (4th Cir. 2014) ("*LWV*") (ordering entry of preliminary injunction); *North Carolina* v. *League of Women Voters of N.C.*, 135 S. Ct. 6 (2014) (staying Fourth Circuit mandate pending certiorari); *North Carolina* v. *League of Women Voters of N.C.*, 135 S. Ct. 1735 (2015) (denying certiorari).

Except for the photo-ID requirement (which would not take effect until 2016), the 2014 midterm primary and general elections took place with the SL 2013-381 reforms in effect. During the May 6, 2014 midterm primary, relative to the 2010 midterm, African-American turnout increased from 11.4% to 13.4%. During the subsequent midterm general, again relative to the 2010 midterm, African-American participation again increased—this time from 40.4% to 42.2%. This represented the highest overall turnout increase of any group, a greater increase than white turnout (which increased from 45.7% to 46.8%), and "the smallest white–African American turnout disparity in any midterm election from 2002 to 2014." App. 127a, 130a, 436a.

On June 18, 2015—weeks before trial was to begin—the legislature enacted SL 2015-103, expanding qualifying photo IDs and establishing the reasonable impediment exception. Given that enactment, "the United States … abandoned its discriminatory effect claim to the voter-ID law." App. 126a.

The district court bifurcated the trial. In July 2015, a three-week trial addressed all challenged reforms except photo-ID. App. 130a–131a. The court heard testimony from 93 fact witnesses and sixteen experts. *Id*.; App. 87a. Subsequently, in January 2016, a six-day trial addressed photo-ID, featuring testimony from a further nineteen fact witnesses and five experts. App. 131a.

1. The District Court's Opinion

On April 25, 2016, the district court issued a 479-page opinion upholding all challenged provisions

under §2 and the Constitution. Appendix B, App. 79a. As to §2, the court found the provisions had no discriminatory impact and were not motivated by discriminatory intent. App. 521a–530a. The voluminous opinion can only be summarized here.

a. No discriminatory impact

To assess discriminatory impact, the district court analyzed whether (1) the challenged practices "impose a discriminatory burden" on African-American voters, and (2) that burden is caused by discriminatory "social and historical conditions." App. 273a (citing *LWV*, 769 F.3d at 242). The court considered the "totality of the circumstances," aided by the nine factors from *Thornburg* v. *Gingles*, 478 U.S. 30 (1986). App. 273a–275a. It concluded that plaintiffs failed to establish that, "under the electoral system established by SL 2013-381 and SL 2015-103, African Americans or Hispanics 'have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.'" App. 435a (quoting 52 USC §10301(b)).

The court found that none of the challenged provisions impeded African-American political participation. For instance, it found that at least 94.3% of registered African-American voters already possessed qualifying photo-ID, App. 164a, and that voters lacking IDs could easily vote under the generous reasonable impediment exception. App. 167a, 397a–399a. It also found that none of the other challenged provisions imposed a discriminatory burden given the "many [remaining] convenient registration and voting mechanisms that … provide African Americans an equal opportunity to participate in the political process." App. 435a. The court

buttressed its conclusion with data from the two 2014 statewide elections showing *increased* African-American participation while the SL 2013-381 reforms were in effect. App. 436a.

The court's meticulous application of the *Gingles* factors strongly favored North Carolina. For instance, the court found that the plaintiffs' expert failed to "catalogue any official discrimination after the 1980s" and that "by the turn of that decade, African-Americans were making significant headway in political strength." App. 305a. The court thus found a clear break separating North Carolina's "shameful past discrimination" from "the past quarter century." App. 307a. Similarly, the court found no link between African-Americans' socioeconomic disadvantages and their "ability … to cast a ballot and effectively exercise the electoral franchise after SL 2013-381," given the "multitude of voting and registration options available in the State[.]" App. 326a–327a. Indeed, of the nine *Gingles* factors, the court found only one—the existence of "racially polarized" voting—unambiguously supported plaintiffs. App. 307a–308a.

Applying the last *Gingles* factor with particular rigor, the court found none of North Carolina's justifications for the reforms was "tenuous." App. 332a. To the contrary, the court found the provisions served legitimate goals such as deterring voter fraud (App. 336–337a, 376a), safeguarding voter confidence (App. 373a, 467a–468a), making early voting fairer, more efficient, and less subject to political gamesmanship (App. 344a), and eliminating administrative problems (App. 353a–359a, 383a–385a).

Finally, the court considered whether, under the "totality of the circumstances," the eliminated mechanisms—the prior early-voting schedule, same-day registration, or out-of-precinct voting—had fostered minority participation. The court found no evidence that they had done so, particularly given figures showing increased minority turnout and registration in the 2014 elections. App. 295a; see also App. 292a (early voting), 378a (out-of-precinct voting), 525a (same-day registration).

b. No discriminatory motive

The district court then analyzed whether SL 2013-381 had been motivated by a racially discriminatory intent. App. 438a. The court applied the factors from *Village of Arlington Heights* v. *Metropolitan Housing Development Corp*., 429 U.S. 252 (1977), and was "not persuaded that racial discrimination was a motivating factor." App. 470a.

First, the court considered whether the law bore more heavily on one race. It considered plaintiffs' "strongest fact" to be that African-Americans had previously used some eliminated mechanisms at rates higher than whites, App. 440a, but concluded that "North Carolina's remaining mechanisms continue to provide African Americans with an equal opportunity to participate in the political process." *Id.*

Plaintiffs also sought to prove discriminatory intent through evidence that some legislators had requested racial data on the use of certain voting practices. But the district court found it impossible to determine, from plaintiffs' evidence, the "character" of much of the data the legislature actually received. App. 442a. Some of the data, particularly as to same-

day registration, was not available to the legislature until after SL 2013-381 had been drafted and debated. App. 444a–445a. Whatever the available data included, however, the district court found that "*[a]ny* responsible legislator" would have needed that type of information. App. 443a (emphasis added). First, because photo-ID laws are regularly challenged on the basis of alleged racial disparities, legislators "would need to know the disparities in order to account for such challenges." *Id.* Second, at the time of the requests, North Carolina was still subject to preclearance, meaning that "evaluating racial impact was a prerequisite to evaluating the likelihood that any voting change would be pre-cleared[.]" *Id.*

Second, the court considered whether the North Carolina legislature had a "consistent pattern" of actions disparately impacting minorities. Referring to its detailed *Gingles* findings, App. 292a–387a, the court found "little evidence of official discrimination since the 1980s." App. 458a.

Third, the court considered the challenged laws' "historical background." The North Carolina legislature had been in the process of developing SL 2013-381 at the time of this Court's decision in *Shelby County* on June 25, 2013; after that decision, the legislature revised and expanded the bill, passing it a month later. App. 104a–117a. Plaintiffs argued that the legislature's expansion of the bill following *Shelby County* showed discriminatory purpose. App. 459a. The district court rejected that argument, finding the more persuasive explanation to be that the end of preclearance simply "altered the burden of proof calculus for North Carolina legislators considering changes to voting laws." App. 461a. The court also

found that "all concede" that the legislature followed all procedural rules in enacting the challenged laws. App. 462a.

Fourth, the court found that no "contemporary statements" by legislators showed discriminatory intent. App. 466a–468a. To the contrary, the court had already found legislators' explanations for the law non-tenuous under *Gingles*. App. 332a–387a.

Finally, the court considered the "cumulative evidence" of intent and found that "[t]he State's proffered justifications for the combined mechanisms under review … are consistent with the larger purpose of achieving integrity, uniformity, and efficiency in the political process." App. 468a.

2. The Fourth Circuit's Opinion

On July 29, 2016, the Fourth Circuit reversed. It left undisturbed the district court's conclusion that the challenged provisions had no discriminatory impact. However, the court rejected as "clearly erroneous" the district court's factual conclusion as to the legislature's *motive* in enacting SL 2013-381. App. 26a. Indeed, the court concluded that the "record 'permits only one resolution'" of the issue, App. 57a–58a: that those provisions were "enacted with racially discriminatory intent in violation of the Equal Protection Clause … and §2 of the [Voting Rights Act]." App. 26a.

As a threshold matter, the court framed its intent analysis against the background of North Carolina's record of racially polarized voting. App. 30a. It found that the legislature knew that African-American voters were "highly likely" to vote for Democrats, and that, "in recent years, African Americans had begun

registering and voting in unprecedented numbers," leading to "much of the recent success of Democratic candidates in North Carolina." App. 39a. That, the Court reasoned, gave the Republican-majority legislature an "incentive for intentional discrimination." App. 31a.

Proceeding to the *Arlington Heights* factors, the court first considered the historical background of the reforms. While conceding that past discrimination has only "limited weight" after *Shelby County*, the court nonetheless stated that the State's "pre-1965 history of pernicious discrimination informs our inquiry." App. 33a. The court also said it could not ignore that the reforms were enacted "within days of North Carolina's release from … preclearance," because otherwise North Carolina could "'pick up where it left off in 1965' to the detriment of African American voters in North Carolina." App. 33a–34a (alteration omitted) (quoting *LWV*, 769 F.3d at 242).

Contrary to the district court's finding, the Fourth Circuit found the record "replete" with instances since the 1980s where "the North Carolina legislature has attempted to suppress and dilute the voting rights of African Americans." App. 34a. Principally, the court pointed to: (1) "over fifty objection letters" sent by the U.S. Department of Justice ("DOJ") between 1980 and 2013 contesting proposed election law changes in North Carolina, App. 35a; and (2) "fifty-five successful cases" brought under §2 during the same period, App. 36a.

Second, the Fourth Circuit considered the sequence of events leading up to enactment of the reforms. The court assigned special weight to the fact that SL 2013-381 followed "immediately" after the

Shelby County decision removed North Carolina from §5 preclearance. *Id*.

Third, the court considered legislative history. While little history existed, the court focused on some legislators' "requests for and use of race data[.]" App. 47a. The court inferred from this that the legislature deliberately targeted practices "disproportionately used by African Americans." App. 48a. The court did not acknowledge or address the district court's contrary findings about this data, including the finding that "[a]ny responsible legislator" would have needed to consider such data in light of North Carolina's still-existing preclearance obligations. App. 443a.

Fourth, the Fourth Circuit thought the challenged laws bore more heavily on African-Americans because those voters "'disproportionately used' the removed voting mechanisms and disproportionately lacked DMV-issued photo ID." App. 48a. The court concluded this was enough to show unequal impact and rejected as irrelevant the district court's finding that the evidence "demonstrated that North Carolina's remaining mechanisms continue to provide African Americans with an equal opportunity to participate in the political process." App. 48a–51a, 440a.

Having concluded that racial discrimination motivated the North Carolina reforms, the Fourth Circuit shifted the burden to the State to prove that the law would have been enacted absent that motive. App. 55a. The court conceded that, "a rational justification can be imagined for … some of the challenged provisions," and also that the district court "addressed the State's justifications for each provision at length." App. 56a. Nonetheless, the Fourth Circuit

independently reviewed the record and concluded that the "evidence plainly establishes race as a 'but-for' cause of SL 2013-381." App. 58a. The panel therefore invalidated the challenged provisions in their entirety. App. 67a, 71a.

REASONS FOR GRANTING THE PETITION

The Court should grant certiorari for three separate reasons. First, the Fourth Circuit's decision effectively nullifies *Shelby County*. Second, it resolves an issue of extraordinary importance—whether a State has *deliberately* structured its election laws to disenfranchise African-Americans—in a way that is profoundly misguided and that threatens numerous State election laws. Third, it exacerbates existing conflict among federal circuits over analysis of §2 vote denial claims.

I. The Fourth Circuit's Decision Effectively Nullifies *Shelby County*.

The Fourth Circuit's decision cannot be reconciled with *Shelby County*, which invalidated the formula for application of §5 of the Voting Rights Act. See 52 USC §§10303, 10304. In particular, the panel restores the §5 preclearance standard—which North Carolina is no longer required to satisfy—by reading it into §2, a separate provision with a different "structure, purpose, and application." *Holder* v. *Hall*, 512 U.S. 874, 883 (1994) (Kennedy, J., joined by Rehnquist, C.J.). This is a sufficient reason to grant certiorari. See S. Ct. R. 10(c) (certiorari appropriate if a federal circuit "has decided an important federal question in a way that conflicts with relevant decisions of this Court").

The purpose of §5 was to prevent States subject to preclearance from enacting "voting-procedure changes … that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Beer* v. *United States*, 425 U.S. 130, 141 (1976). Those States could obtain "preclearance only by proving that the [proposed] change had neither the purpose nor the effect" of retrogression. *Shelby Cty.*, 133 S. Ct. at 2620 (alteration and quotes omitted). Potential retrogression was analyzed by comparing a State's proposed new voting rules to the "baseline" of existing or contemplated rules and determining whether the new rules would "'abridge[ ] the right to vote' relative to the status quo[.]" *Reno* v. *Bossier Par. Sch. Bd.*, 528 U.S. 320, 334 (2000) ("*Bossier II*"); see *Shelby County*, 133 S. Ct. at 2626–27; *Georgia* v. *Ashcroft*, 539 U.S. 461, 482 (2003); *Reno* v. *Bossier Par. Sch. Bd.*, 520 U.S. 471, 478 (1997) ("*Bossier I*"); *Hall*, 512 U.S. at 883. One consequence of the anti-retrogression rule was to establish a one-way ratchet that locked in incremental improvements in minority voting opportunities.

The §2 test is discrimination, not retrogression. In a §2 case, the baseline is not the status quo, but the "hypothetical alternative" of "what the right to vote *ought to be*[.]" *Bossier II*, 528 U.S. at 334; *Hall*, 512 U.S. at 884 ("Unlike in §5 cases … a benchmark does not exist by definition in §2 dilution cases."). If a State's voting rules are discriminatory, "the status quo itself must be changed." *Bossier II*, 528 U.S. at 334; see also *Hall*, 512 U.S. at 880–81. But at the threshold, States subject only to §2 may choose from a wide range of nondiscriminatory voting regulations, as long as they do not act with discriminatory purpose.

While the panel purported to apply §2, in actuality it employed a variant of §5's anti-retrogression analysis. Neither the district court nor the panel found evidence that North Carolina's reforms have *actual discriminatory* effect, or even any direct evidence that they were intended to do so. Instead the panel identified *potentially retrogressive* effect, and inferred discriminatory intent from that.

Over and over again, the panel returned to the fact that North Carolina had *changed* its law to remove voting mechanisms that had existed before. App. 33a, 50a-52a, 54a–55a. It accused the legislature of "re-erect[ing] … barriers" to minority electoral participation that previous legislatures had lowered. App. 39a–40a. It gave little weight to the fact that—as the district court observed—SL 2013-381 and SL 2015-103 simply aligned North Carolina with election laws in other States, many of which do not offer early voting, same-day registration, out-of-precinct voting, or preregistration. See App. 51a–52a, 201a, 229a, 253a, 259a. Instead, the panel asserted instead that "removing voting tools … meaningfully differs from not initially implementing such tools." App. 52a. That analysis plainly derives not from §2 but §5, the provision "which uniquely deal[t] only and specifically with *changes* in voting procedures[.]" *Bossier II*, 528 U.S. at 334. And that reasoning also effectively restores a version of the previous preclearance regime by enjoining the reforms based on their *potential* effects alone. Considering the panel's indignation that North Carolina enacted its reforms on the heels of *Shelby County*—which, as the panel put it, "release[d]" the State from preclearance, App. 33a, 41a–42a, 45a—that appears exactly what the panel had in mind.

The panel also contradicted *Shelby County* in a deeper sense. If *Shelby County* stands for anything, it means that even in States with shameful histories of discrimination, "history did not end in 1965." 133 S. Ct. at 2628. The Constitution does not allow the sins of Civil Rights-era legislators to be visited on their grandchildren and great-grandchildren. *Id.* at 2929. Nor does it permit Congress to perpetually assume that former §5 jurisdictions maintain minority voting rights purely under threat. *Id.* at 2627.

But in the eyes of the panel, where North Carolina is concerned, it is *always* 1965. The Fourth Circuit's opinion conjures a menacing world where "race and politics" are "inextricab[ly] linked," App 14a, where "powerful undercurrents" tempt legislators to racial warfare, App. 40a, and where the current majority targets its racial opponents with "almost surgical precision," App. 16a. In sum, the Fourth Circuit barely attempted to hide its view that North Carolina's Republican legislators—having been vexed for six decades by §5—itched to "pick up where [they] left off in 1965" as soon as they were given the opportunity. App. 33a–34a (quotes and alteration omitted). That rule of decision, however, comes not from *Shelby County* but from William Faulkner: "The past is never dead. It's not even past."

The Court should grant certiorari to resolve the conflict between the Fourth Circuit's decision and *Shelby County*.

II. By Inappropriately Convicting North Carolina Of Deliberate Racial Discrimination, The Fourth Circuit Provides a Roadmap For Invalidating Many State Election Laws.

A second reason to grant certiorari is that the Fourth Circuit has decided an extraordinarily important question in a way that is egregiously misguided and that threatens numerous State election laws. See S. Ct. R. 10(a), 10(c). There is no worse charge against a State than deliberate racial discrimination, especially in how the State governs elections. This Court's decisions wisely limit such a charge to the clearest-cut cases. Yet the Fourth Circuit did not hesitate to level it here: It accused and convicted the North Carolina legislature of *deliberately designing* its laws not just to disenfranchise African-Americans, but to usher in a new "era of Jim Crow." App. 46a. That decision is an affront to North Carolina's citizens and their elected representatives and provides a roadmap for invalidating election laws in numerous States.

A. The Fourth Circuit's Intent Analysis Is Egregiously Misguided.

Two things in particular demonstrate how extraordinary the Fourth Circuit's decision is, how far it goes beyond this Court's precedents, and why it calls out for review.

1. First, the notion that *these* election laws are reminiscent of "the era of Jim Crow" is ludicrous. To the contrary, North Carolina's reforms leave it with a voting system in the national mainstream and, indeed, one more open than many other States.

Three practices eliminated by North Carolina's reform—same-day registration, out-of-precinct voting, and pre-registration—are *already* disallowed by most States. A supermajority of States disallows same-day registration and pre-registration of 16-year-olds (38 and 40, respectively), and a majority does not count out-of-precinct ballots (26).[1] See also, *e.g.*, *Ohio Democratic Party* v. *Husted*, 834 F.3d 620, 628–29 (6th Cir. 2016). A fourth practice—early voting—was not eliminated but shortened from 17 to 10 days, while maintaining aggregate voting hours from prior elections. App. 343a. Again, this puts North Carolina in the mainstream: 37 States offer early-voting periods ranging from four to 45 days, and North Carolina remains one of only 22 States to offer weekend early voting.[2] By making these sensible reforms, North Carolina was not receding into the racist past; it was aligning with *current* State practices.

Nor is North Carolina's photo-ID law a reversion to the "Jim Crow" past. As this Court held in *Crawford*, such laws constitutionally further "weighty" interests in "preventing voter fraud" and promoting "public

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[1] See generally NATIONAL CONFERENCE OF STATE LEGISLATURES, ELECTION LAWS AND PROCEDURES OVERVIEW (Aug. 19, 2016) ("NCSL Overview") (cataloguing election practices), www.ncsl.org. The district court noted that accurately counting State election practices is "subject to interpretation and coding," App. 229a, so its figures are marginally different from the NCSL's. App. 201a–203a, 229a, 253a, 259a.

[2] See NCSL Overview. North Carolina also continues to be one of 27 States to offer no-excuse absentee voting, see *id.*, a practice whose availability mitigates any effects from reducing early-voting days.

confidence in the integrity of the electoral process." *Crawford*, 553 U.S. at 191, 197. And compared to the law upheld in *Crawford*, North Carolina's law has far more features designed to maximize the right to vote, including:

- its lengthy implementation period, App. 164a, 454a;
- the $2 million the legislature set aside to educate voters about the ID requirement, App. 133a;
- the State's efforts to identify voters who lack qualifying ID and provide means for them to obtain a free one, App. 136a;
- the legislature's expansion of the list of qualifying IDs before the requirement's effective date, App. 117a; and
- the lenient "reasonable impediment exception" that allows voters lacking ID to cast a provisional ballot. App. 118a, 529a; *South Carolina*, 898 F. Supp. 2d 30) (preclearing identical requirement).

Under *Crawford*, it is hard to imagine any but the most draconian photo-ID laws being invalidated as purposefully discriminatory. The panel's decision to invalidate *this* lenient law on that basis—while equating it with "Jim Crow," App. 46a—shows that something has gone badly awry.

2. Second, to the best of our knowledge, the Fourth Circuit's decision marks the first time in history that an election law has been invalidated as purposefully discriminatory without *either* discriminatory effect *or* direct evidence of discriminatory intent. Such a

dramatic step beyond this Court's precedents warrants review.

This Court has admonished that "discriminatory purpose" means "more than intent as volition or intent as awareness of consequences." *Pers. Adm'r of Mass.* v. *Feeney*, 442 U.S. 256, 279 (1979) (citing *United Jewish Orgs. of Williamsburgh, Inc.* v. *Carey*, 430 U.S. 144, 179 (1977) (Stewart, J., concurring)). Rather, it means a decision-maker acted "'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Id.* It is deeply implausible that North Carolina's ID law was enacted "because of" its *potential* impact on African-American voters when the legislature actively ensured it would *not* adversely affect that group, see App. 117a, 118a, 133a, 136a, and where not a shred of legislative history suggests such intent.

It is even more shocking for a court of appeals to override a district court's finding on a paradigmatic fact question—legislative motive—based on a paper record. The district court's finding that "racial discrimination was [not] a motivating factor" in SL 2013-381, App. 470a, derived from a meticulous examination of a more than 25,000-page record that features the testimony of 21 expert and 112 fact witnesses across two trials spanning 21 days. App. 87a. Nonetheless, based on its own evaluation of the evidence, the Fourth Circuit announced that this massive record "'permits only one resolution,'" namely that "race [was] a 'but for' cause of SL 2013-381." App. 57a–58a (quoting *Pullman-Standard* v. *Swint*, 456 U.S. 273, 292 (1982)).

Furthermore the panel cited only one case in which an appellate court reversed a district court's finding

and rendered its own finding of intentional racial discrimination: *Hunter* v. *Underwood*, a case where Alabama *conceded* that the century-old law at issue was motivated by discriminatory intent, and where the law's "disparate effect persists today." 471 U.S. 222, 227, 229, 231 (1985). App. 27a. In less flagrant situations, however, this Court has found "error" when a district court "resolve[s] the disputed fact of [discriminatory] motivation at the summary judgment stage." *Hunt* v. *Cromartie*, 526 U.S. 541, 552–53 (1999). And that rule has even greater force, as here, where a court of appeals reviews the district court's resolution of fact questions after lengthy trial proceedings involving live witnesses. In that situation, even if a reviewing court is convinced the lower court erred, "the court of appeals is not relieved of the usual requirement of remanding for further proceedings to the tribunal charged with the task of factfinding in the first instance." *Pullman-Standard*, 456 U.S. at 293.

The panel's decision casts a pall over every electoral measure the North Carolina legislature may pass in the future, and on the weakest possible factual and legal grounds. The Court should grant review and reverse it.

B. The Fourth Circuit's Intent Analysis Provides A Roadmap For Invalidating Election Laws In Numerous States.

Respondents will likely try to characterize the Fourth Circuit's decision as fact-bound and affecting only North Carolina. The opposite is true. Most of the "evidence" the Fourth Circuit relied on to find discriminatory intent could readily be deployed to invalidate the election laws of numerous States. The potential multi-State effects of the Fourth Circuit's

decision thus furnish an independent reason for granting certiorari.

1. The Fourth Circuit's principal theory for identifying discriminatory intent was that "racially polarized" voting in North Carolina provided an incentive for Republicans to discriminate against African-Americans as reliable Democratic voters. App. 33a, 39a–40a. The court's opinion hammers this theme repeatedly. App. 14a, 30a, 32a, 38a.

It is hard to imagine a more destabilizing addition to the §2 vote denial analysis than "racial polarization." Polarized voting, after all, "is not a problem unique to the South." *Nw. Austin Mun. Util. Dist. No. One* v. *Holder*, 557 U.S. 193, 228 (2009) ("*NAMUDNO*") (Thomas, J., concurring). African-American voters typically favor the Democratic Party—by forty points or more—in every part of the Nation,[3] both in States formerly subject to §5 preclearance and in States that were not.[4] If polarized voting implies discriminatory targeting whenever

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[3] See Kristen Clarke, *The Obama Factor: The Impact of the 2008 Presidential Election on Future Voting Rights Act Litigation*, 3 Harv. L. & Pol'y Rev. 59, 71–72 Table 2 (2009).

[4] 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 (2013); see also John M. Powers, *Note: Statistical Evidence of Racially Polarized Voting in the Obama Elections, and Implications for Section 2 of the Voting Rights Act*, 102 Geo. L.J. 881, 892 (2014) (noting "courts have recently found racial bloc voting patterns in Section 2 cases litigated against jurisdictions in Wyoming, New York, and Ohio").

election laws are reformed, *any* new voting regulation proposed by Republicans in *any* State would be suspect *by definition*. The partisan toxicity that wrongheaded standard would introduce into the Voting Rights Act can scarcely be imagined.

Moreover, making a vote denial analysis turn on racial polarization fits badly with this Court's precedents. Even in the context of vote *dilution*, where polarization has been a part of this Court's analysis since *Gingles*, see 478 U.S. at 48, courts have not yet resolved what polarization *is*, how to identify it, and how much of it is enough to matter. See Powers, *supra*, at 888–89. Transposing polarization into vote *denial* cases, as the Fourth Circuit has done here, is hardly a promising idea.

Moreover, the Fourth Circuit's polarization analysis again conflicts with *Shelby County*. To be sure, the *dissent* in that case—in terms strikingly similar to the Fourth Circuit's—thought polarization incentivizes racial discrimination and thus justifies preclearance. *Shelby Cty.*, 133 S. Ct. at 2643 (Ginsburg, J. dissenting). But the majority disagreed, sharply distinguishing such "second-generation barriers" as involving "vote dilution," not "access to the ballot." *Id.* at 2629. And elsewhere this Court has cautioned that "racially polarized voting is not evidence of unconstitutional discrimination." *NAMUDNO*, 557 U.S. at 228 (Thomas, J., concurring) (citing *City of Mobile, Ala.* v. *Bolden*, 446 U.S. 55, 71 (1980)); see also *Rogers* v. *Lodge*, 458 U.S. 613, 623–24 (1982) (rejecting inference based on polarization but affirming finding of discrimination on other grounds). Indeed, the Fourth Circuit virtually *conceded* as

much, see App. 31a, but drew the inference anyway. Its willingness to open that door for the first time should not go unreviewed.

2. The panel's supposed historical evidence of official discrimination in North Carolina, moreover, could be used to strike down voting laws in any former preclearance State. The Fourth Circuit identified as key evidence "over fifty [DOJ] objection letters" sent under §5 of the Voting Rights Act from 1980 to 2013. App. 35a. But if having received such letters over the past three decades shows *present* discriminatory intent, then numerous former §5 States are in even greater jeopardy of having election changes invalidated under §2—such as Alabama (64 objection letters since 1980), Mississippi (125), Georgia (97), Louisiana (100), Texas (134), and South Carolina (76). See *Section 5 Objection Letters*, https://www.justice.gov/crt/section-5-objection-letters. The Fourth Circuit insisted this reasoning would not "freeze [ ] election law in place as it is today," App. 72a, but why wouldn't such a freeze be the *inevitable* result of the Fourth Circuit's guilt-by-past-conduct standard?

Assuming they are probative at all, the §5 letters show nothing like the pervasive intentional discrimination suggested by the Fourth Circuit. To begin with, the vast majority focuses on purported disparate effects rather than purposeful discrimination. See, *e.g.*, DOJ Ltr. of Apr. 11, 1986. Eleven of the fifty were subsequently *withdrawn* by DOJ. See *Objection letter table*, https://www.justice.gov/crt/voting-determination-letters-north-carolina. Of the thirty-nine remaining objections, only *ten* actually concerned the *State* as

opposed to a municipality, county, or school board. Finally, contrary to the Fourth Circuit's suggestion that "several [letters] since 2000" concerned "North Carolina," App. 35a, no letter concerned the State, as opposed to a locality, after 1996. In other words, the State went from 1996 to 2013—*seventeen* years—without receiving a §5 letter from DOJ.

Finally, a §5 objection does not equate to a *finding* of anything. It means only that the recipient government has not carried its burden to show that a proposed change lacks discriminatory purpose or effect. See *Georgia* v. *United States*, 411 U.S. 526 (1973); 28 CFR 51.19. App. 35a. If a court can infer discriminatory intent by North Carolina on that basis, it can do so in any former preclearance jurisdiction.

3. The same is true of the Fourth Circuit's use of §2 lawsuits against North Carolina. App. 36a. In past decades §2 lawsuits have challenged election laws in many States, many successfully. See, *e.g.*, Robert A. Kengle, *Voting Rights in Georgia: 1982–2006*, 17 S. Cal. Rev. L. & Soc. Just. 367, 402 (2008) (discussing dozens of §2 cases in Georgia). Are courts to infer that any election law enacted *today* by any State that lost a §2 lawsuit in the past is motivated by discriminatory intent? The Fourth Circuit's standard plainly suggests the answer is yes.

Furthermore, when one considers the "evidence" the Fourth Circuit cited, it is obvious why the mere existence of prior §2 lawsuits does not reliably indicate intentional discrimination. Relying on a law review article, the court purported to identify "fifty-five successful" §2 lawsuits in North Carolina since 1980. See App. 36a (citing Anita S. Earls, Emily Wynes, LeeAnne Quatrucci, *Voting Rights in North Carolina:*

1982–2006, 17 S. Cal. Rev. L. & Soc. Just. 577 (2008)). Even a cursory review of that article shows the Fourth Circuit was mistaken. While the article *surveys* fifty-five lawsuits, see *id.* (App. B), not every one concerned intentional discrimination.[5] Many of the cases were resolved in favor of the defendant. See, *e.g.*, *Gause* v. *Brunswick County*, 92 F.3d 1178 (4th Cir. Aug. 13, 1996) (table); *Lewis* v. *Alamance*, 99 F.3d 600 (4th Cir. 1996). Only a small number involved *legislative* action. See, *e.g.*, *Gingles*, 478 U.S. 30; *Haith* v. *Martin*, 618 F. Supp. 410 (E.D.N.C. 1985) (enjoining election of judges under non-precleared laws). And only a handful involved the *State*, as opposed to a local government body. Finally, the surveyed cases do not contain one relevant and successful suit after 1997—sixteen years before North Carolina enacted the reforms under review.[6] If this is enough to support an inference of intentional discrimination by North Carolina, few States are safe.

4. The Fourth Circuit also relied on evidence that African-Americans in North Carolina

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[5] See, *e.g.*, *Bartlett* v. *Stephenson*, 535 U.S. 1301 (2002) (addressing whether whole county provision in state constitution was voided by §2); *Lake* v. *N.C. State Bd. of Elections*, 798 F. Supp. 1199 (M.D.N.C. 1992) (unsuccessful lawsuit challenging extension of election hours).

[6] Of the four after 1997, two are irrelevant. See *Bartlett*, 535 U.S. 1301 (whole county provision in state constitution not voided by §2); *Kindley* v. *Bartlett*, No. 5:05-cv-00177 (E.D.N.C. 2005) (county chairman challenged non-precleared provisional ballot law). The other two did not turn out favorably for the plaintiff. See *Sample* v. *Jenkins*, No. 5:02-cv-00383 (E.D.N.C. 2002) (dismissed following preclearance approval); *White* v. *Franklin County*, No. 5:03-cv-00481 (E.D.N.C. 2004) (mooted by intervening events).

disproportionately lack "DMV-issued ID"; that African-American voters use some mechanisms restricted by SL 2013-381 at rates higher than whites; and that the legislature was aware of those figures when enacting the law. App. 47a–48a. Using this sort of evidence to show discriminatory intent, however, would leave many States' election laws vulnerable as well.

For instance, as the district court pointed out, plaintiffs' own expert testified that "ID possession disparities exist nationwide" and that he could not "find a combination of acceptable photo IDs that will make these disparities go away." App. 448a; see also, *e.g.*, *Husted*, 834 F.3d at 631 (noting "evidence that African Americans may use early in-person voting at higher rates than other voters"). The Fourth Circuit's analysis, therefore, "would likely invalidate voter-ID laws in any State where they are enacted, regardless of the assortment of IDs selected." App. 448a.

As for the legislature's awareness of those statistical differences, the district court pointed out that "[a]ny responsible legislator would need to know" about such data to account for inevitable legal challenges to election laws—particularly considering that the allegedly suspect requests occurred when North Carolina was still under preclearance. App. 443a. In other words, the Fourth Circuit based its finding on actions *any* legislator should have taken to evaluate the potential racial impact of an election change—*especially* in a State then subject to preclearance.

5. Inevitably, respondents will point to the Fourth Circuit's supposed "smoking gun," in which the State supposedly conceded that it "did away with one of the

two days of Sunday voting"—*i.e.*, when shortening the early-voting period—because "'[c]ounties with Sunday voting in 2014 were disproportionately black.'" App. 40a (quoting Defs.' Prop. Findings of Fact and Conclusions of Law); App. 711a. In fact, that "smoking gun" is just smoke and mirrors.

To hypothesize that North Carolina intended to keep African-Americans from voting by eliminating only the first of two Sunday early-voting days is absurd. "[I]n 2010, *no* African American voted on the first Sunday of early voting" in North Carolina, because no county *offered* voting on that day. App. 218a. All voters, furthermore—white and African-American alike—were more likely to vote during the *last* ten early-voting days than during the first seven. App. 208a. The panel's interpretation thus implies that North Carolina intended to disenfranchise African-Americans by eliminating a voting day that *not a single African-American voter had actually used* during the previous midterm general election, while not only retaining voting on the days that African-Americans use most, but *increasing* the voting hours on those days. App. 224a–225a (describing increase in early voting availability, including Sunday voting, between 2010 and 2014); App. 402a–404a. The argument defeats itself.

The Fourth Circuit also grossly distorts what North Carolina actually stated. App. 711a. The State's proposed findings included racial statistics to illustrate how the then-Democrat-controlled board of elections ensured that Sunday voting would be available in heavily Democrat and/or African-American counties but not in counties more likely to

vote for Republicans. See *id.*; see also App. 344a–345a (finding such manipulation had occurred). North Carolina cannot be faulted for making that point, nor for its response—namely, to "make [early voting] more convenient for *all* voters" by concentrating early voting on the days all voters are likeliest to use. App. 712a (emphasis added). As the State explained, those efforts led to an *increase* in "the number of days for Saturday and Sunday early voting, and the number of counties that held Saturday or Sunday voting." App. 224a–225a, 402a–404a. There is no "smoking gun" here—only more evidence of the care and evenhandedness that went into these sensible electoral reforms.

III. The Fourth Circuit's Decision Exacerbates Circuit Confusion About The Relevance Of Statistical Disparities In §2 Claims.

A third reason to grant certiorari is that the Fourth Circuit's decision adds another layer of conflict to the already muddled approach of federal circuits to statistical evidence in §2 claims. Four circuits—the Fifth, Sixth, Seventh, and Ninth—already disagree on whether statistical racial disparities in the use of particular voting mechanisms can prove discriminatory effect under §2. The Fourth Circuit's holding—that legislators' awareness of statistical disparities may prove discriminatory *purpose* even in the absence of discriminatory effect—complicates matters still further. The Court should grant certiorari to clarify that mere disparities in the use of voting mechanisms are insufficient to prove discriminatory purpose or effect under §2.

The Ninth and Seventh Circuits have held that statistical racial disparities in possession of required

voter-ID are insufficient to prove a §2 vote denial claim. In *Gonzalez* v. *Arizona*, the Ninth Circuit affirmed the district court's conclusion that Arizona's photo-ID law did not violate §2 solely because "Latinos, among other ethnic groups, are less likely to possess the [required] forms of identification[.]" 677 F.3d 383, 407 (9th Cir. 2012) (internal quotations omitted), *aff'd on other grounds sub nom. Arizona* v. *InterTribal Council of Arizona, Inc.*, 133 S. Ct. 2247 (2013). Instead, the court required "evidence that Latinos' ability or inability to obtain or possess identification for voting purposes … *resulted in* Latinos having less opportunity to participate in the political process and to elect representatives of their choice." *Id.* (emphasis added). Similarly, in *Frank* v. *Walker*, the Seventh Circuit rejected the district court's conclusion that disparities in African-Americans' possession of qualifying IDs established a §2 denial claim. 768 F.3d 744, 752–53 (7th Cir. 2014), *cert. denied*, 135 S. Ct. 1551. The Seventh Circuit concluded that those findings "do not show a 'denial' of anything" under §2, which, instead, requires showing that minority voters "have less 'opportunity' than whites to get photo IDs." *Id.* at 753.

In *Ohio Democratic Party* v. *Husted*, the Sixth Circuit followed the same approach in rejecting the claim that Ohio's six-day reduction in its early-voting period violated §2 or the Equal Protection Clause. 834 F.3d 620. The court reversed the district court's inference of a discriminatory burden from the mere fact that "African Americans have shown a preference for voting [during the eliminated period] at a rate higher than other voters." *Id.* at 627–28. In the Sixth Circuit's view, this analysis begged the pertinent §2 question, which is whether the voting change "*actually*

disparately impacts African Americans" by giving them "less opportunity" than others to participate. *Id.* at 639 (emphasis added).

The Fifth Circuit has taken a different approach. In *Veasey* v. *Abbott*, a fractured en banc court relied in part on statistical disparities to conclude that a Texas voter-ID law "disparately impacts African-American and Hispanic registered voters[.]" 830 F.3d 216, 251, 264 n.61 (5th Cir. 2016), *pet. for certiorari filed*, Sept. 23, 2016. With respect to the discriminatory *purpose* inquiry, the court "remand[ed] for a reweighing of the evidence." *Id.* at 231, 230 (plurality) (quoting *Pullman-Standard*, 456 U.S. at 292). Nonetheless, the court added that the "circumstantial" evidence supporting discriminatory intent included the fact that "drafters and proponents of [the Texas ID law] were aware of the likely disproportionate effect of the law on minorities." *Id.* at 236.

The Fourth Circuit's decision in this case further muddies the standards for §2 vote denial claims in two respects. First, the Fourth Circuit has adopted yet a *third* approach to statistical racial disparities in the use of voting mechanisms. Unlike the Sixth, Seventh, and Ninth Circuits—but like the Fifth—the Fourth Circuit considers such disparities as highly probative that minorities have been denied voting opportunities under §2. But unlike the Fifth Circuit, which considered such disparities as to both discriminatory impact *and* purpose, the Fourth Circuit considers them as to *purpose* even when the challenged laws lack discriminatory impact.

Second, the Fourth Circuit has confused the standard of review for district court findings. Whereas the Fifth Circuit followed this Court's "usual

requirement" of ordering remand instead of re-weighing intent evidence, see *Pullman-Standard*, 456 U.S. at 292, the Fourth Circuit declared that the massive district court record permitted only one factual conclusion—namely that the North Carolina legislature acted with racially discriminatory intent. App. 57a–58a.

The confusion has been deepened still further by the Fourth Circuit's decision in *Lee v. Virginia State Board of Elections*, in which a different panel upheld a Virginia photo-ID law quite similar to North Carolina's. See __ F.3d __, 2016 WL 7210103 (4th Cir. Dec. 13, 2016). The *Lee* panel was bound by the decision under review here but sought to distinguish it on various minor grounds—*e.g.*, that the Virginia legislature acted before *Shelby County* was decided, that no racial data had been reviewed by the legislature, and so on. See *id.* at *9–10. That reasoning only illustrates that the Fourth Circuit's analysis does not lead to predictable resolutions of photo-ID cases, even within the same circuit.

The Court should grant certiorari to resolve this conflict over the relevance of statistical racial disparities in the application of §2 of the Voting Rights Act.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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