No. 16-833

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

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COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

In the decision below, the Fourth Circuit applied this Court's settled analysis from *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), and concluded that North Carolina's "very justification for [Session Law 2013-381 ("SL 2013-381")] hinges ***explicitly*** on race—specifically [the] concern that African Americans . . . had too much access to the franchise." App. 40a (emphasis in original). The Fourth Circuit consequently held that SL 2013-381 violates the Fourteenth Amendment and Section 2 of the Voting Rights Act because it was enacted with discriminatory intent.

The following questions are presented:

1. Whether the Fourth Circuit's fact-bound decision—which applied *Arlington Heights* to undisputed facts unique to North Carolina and SL 2013-381 (including the elimination of multiple voting procedures used disproportionately by African Americans)—has broad implications for voting laws in other States.

2. Whether the Fourth Circuit's determination that SL 2013-381 was motivated by racially discriminatory intent conflicts with this Court's decision in *Shelby County*.

3. Whether the Fourth Circuit's finding of discriminatory ***intent*** conflicts with the rulings of other circuits regarding the probative value of statistical evidence for purposes of establishing a violation of the discriminatory ***results*** prong of Section 2 of the Voting Rights Act.

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INTRODUCTION

The petition for certiorari should be denied because the decision below concerns a unique, "omnibus" North Carolina law and is a fact-bound ruling that is consistent with this Court's precedents. Petitioners have identified no conflict among the circuits, but simply disagree with the Fourth Circuit's application of settled law to the facts of this case.

"[I]n the immediate aftermath of unprecedented African American voter participation in a state with a troubled racial history and racially polarized voting," App. 41a, North Carolina intentionally adopted its most "comprehensive set of restrictions" on the franchise since 1965, when Congress passed the Voting Rights Act. App. 33a. The sweeping legislation—North Carolina Session Law 2013-381 ("SL 2013-381")—"target[ed] African Americans with almost surgical precision," App. 16a, imposing a strict voter identification requirement that prohibited voters from relying on many common forms of government-issued photo ID, and abruptly eliminating or curtailing four voting practices—"***all*** of which" reduced or eliminated forms of voting disproportionately used by African Americans. App. 15a (emphasis added). And the legislature did so in a secretive and truncated legislative process, with a bill that "came into being literally within days of North Carolina's release from the preclearance requirements of the Voting Rights Act," and only after it had requested and received "data on the use, by race," of various voting practices. App. 33a.

The Fourth Circuit applied the well-established analysis set forth in *Village of Arlington Heights v.*

Metropolitan Housing Development Corp., 429 U.S. 252 (1977), to these undisputed facts and concluded that SL 2013-381 was enacted with an intent to discriminate against African American voters, in violation of the Equal Protection Clause of the Fourteenth Amendment and Section 2 of the Voting Rights Act. In so ruling, the court unequivocally held that the District Court "clearly erred in finding that the cumulative impact of the challenged provisions of SL 2013-381 does not bear more heavily on African Americans." App. 50a.

The Fourth Circuit did not engage in a retrogression analysis or otherwise contravene this Court's directives in *Shelby County v. Holder*, 133 S. Ct. 2612 (2013). Rather, its determination was based on factors unique to North Carolina and SL 2013-381, including the "omnibus" nature of the law, the hurried process for enacting it mere days after the State's preclearance obligations fell away, the precision with which this specific law targeted African-American voters, and the absence of evidence that the State actually relied on legitimate nondiscriminatory rationales. App. 15a-16a. The Fourth Circuit's ruling thus does not create a "roadmap" for invalidating other States' laws, Pet. 20; indeed, the court was explicit that its holding was focused on the record in North Carolina and that other States need not "forever tip-toe around certain voting provisions disproportionately used by minorities." App. 72a.

Nor does the decision below conflict with any ruling from another court of appeals. There is no pattern of appellate courts misapplying this Court's decision in *Arlington Heights*, and the Fourth

Circuit's intent analysis is consistent with decisions from other courts of appeals that have considered challenges to voting-related legislation. In any event, Petitioners' invocation of a purported split among the circuits on the standard for discriminatory ***results*** in a Section 2 case, Pet. 32-35, does not make the Fourth Circuit's decision—which was based solely on a finding of discriminatory ***intent***—an appropriate vehicle for this Court's review.

Petitioners have failed to present a valid basis for granting review of the Fourth Circuit's fact-bound ruling, particularly given the absence of any split of authority among the courts of appeals on the issues presented. For these reasons, the petition should be denied.

STATEMENT OF THE CASE

A. Session Law 2013-381

"North Carolina has a long history of race discrimination generally and race-based vote suppression in particular." App. 33a. As a result, the State's "African Americans are 'disproportionately likely to move, be poor, less educated, have less access to transportation, and experience poor health'"—a panoply of "socioeconomic factors that may hinder their political participation." App. 22a-23a.

Between 2000 and 2012, however, "African American voter registration swelled by 51.1%," and "African American turnout similarly surged, from 41.9% . . . to . . . 68.5%." App. 18a. "[B]y 2013 . . . African Americans were poised to act as a major electoral force." App. 15a. None of this was a secret

from the North Carolina legislature, which "knew that, in recent years, African Americans had begun registering and voting in unprecedented numbers . . . to a degree unmatched in modern history," and "certainly knew" that voting in North Carolina is racially polarized, with African-American voters tending to favor the Democratic party. App. 39a. Indeed, as "one of the State's experts conceded, 'in North Carolina, African-American race is a better predictor [of voting behavior] than party registration.'" App. 38a.

Against this backdrop, North Carolina enacted House Bill 589 ("HB589"), which became SL 2013-381. "The sequential facts found by the district court are . . . undisputed." App. 41a. HB589 was originally introduced in early 2013, and proposed a voter ID requirement that permitted the use of all forms of government-issued photo ID—including public assistance IDs and student IDs—without making any other significant changes to election laws. After four weeks of consideration—including public hearings and debate in three committees—it passed the House on April 24, 2013. The Senate received the bill the following day, but took no legislative action for two months. App. 42a.

Then, "the day after" this Court decided *Shelby County*, 133 S. Ct. 2612, which relieved North Carolina of its preclearance obligations, the "Chairman of the [North Carolina Senate] Rules Committee[] publicly stated . . . that the Senate would move ahead with [a] 'full bill.'" App. 18a. But "[a]fter that announcement, no further public debate or action occurred for almost a month," until, with two days remaining in the legislative session,

"an expanded bill, including the election changes challenged in this case, was released." App. 42a (citation omitted).

Broadly speaking, the "full bill" transformed the bill passed by the House in April 2013 in two material respects:

First, what had been "an essentially single-issue bill" suddenly reappeared as "omnibus legislation," App. 18a-19a, which, *inter alia*, eliminated (i) one week of early voting, (ii) same-day registration, (iii) out-of-precinct provisional balloting, and (iv) pre-registration.

Second, the bill's voter ID provision was "substantially changed." App. 45a. Whereas the pre-*Shelby County* version of the law provided that all government-issued photo IDs would be valid alternatives to DMV-issued IDs, the "full bill" did not.

Additionally, these changes unfolded in a suspect manner: "prior to and during the limited debate on the expanded omnibus bill," the legislature "requested and received racial data as to usage of the practices changed by the proposed law." App. 47a, 19a. As the Fourth Circuit observed, "[t]his data revealed that African Americans disproportionately used early voting, same-day registration, and out-of-precinct voting, and disproportionately lacked DMV-issued ID." App. 47a-48a. With regard to the voter ID requirement, the data received by the legislature "showed that African Americans disproportionately lacked the most common kind of photo ID, those issued by the [DMV]," yet "the legislature amended the bill to exclude many of the

alternative photo IDs used by African Americans," such as public assistance IDs and student IDs, while it "retained only the kinds of IDs that white North Carolinians were more likely to possess." App. 19a-20a. Additionally, the data "revealed that African Americans did not disproportionately use absentee voting; whites did," and the legislature "exempted absentee voting from the photo ID requirement." App. 47a-48a. "In sum, ***relying on this racial data, the General Assembly enacted legislation restricting all—and only—practices disproportionately used by African Americans***." App. 48a (emphasis added).

The new version of SL 2013-381 was then "rushed through the legislative process" in two days, with little opportunity for public scrutiny, including no public hearing. App. 41a.

B. Proceedings Below

Respondents challenged the law on numerous grounds, including that it was enacted with discriminatory intent against African Americans and had discriminatory results. App. 126a. The District Court ruled for the State on both the results and intent claims, App. 434a-470a, but the Fourth Circuit reversed, holding that, when viewed in the proper legal framework, the undisputed facts compelled the conclusion that SL 2013-381 was passed with discriminatory intent. App. 16a.[1] In particular, the Fourth Circuit held that the District

[1] Because the intent ruling was sufficient to enjoin the law, the Fourth Circuit did not directly address the District Court's ruling regarding discriminatory results. App. 26a.

Court "clearly erred" by considering "each piece of evidence in a vacuum, rather than engaging in the totality of the circumstances analysis required by *Arlington Heights*." App. 54a.

First, while acknowledging that the District Court purported to consider North Carolina's history of discrimination in its analysis of the Plaintiffs' discriminatory ***results*** claim, the Fourth Circuit found that the District Court "inexplicably failed to grapple" with "North Carolina's history of voting discrimination" for purposes of the required discriminatory ***intent*** analysis. App. 34a, 55a. In particular, North Carolina enacted SL 2013-381 against the backdrop of the State's "sordid history" of official racial discrimination "dating back well over a century." App. 299a. In considering this evidence, the Fourth Circuit heeded this Court's instruction that "history did not end in 1965," App. 33a (quoting *Shelby Cty.*, 133 S. Ct. at 2628), but observed that "state officials continued in their efforts to restrict or dilute African American voting strength well after 1980 and up to the present day." App. 37a-38a. Indeed, the court noted that the same legislature that enacted SL 2013-381 "impermissibly relied on race" when adopting North Carolina's post-2010 Census congressional redistricting plan. App. 37a (citing *Harris v. McCrory*, 159 F. Supp. 3d 600 (M.D.N.C. 2016)).

Second, it was undisputed that North Carolina had recently experienced a "surge in African American voting," and that "the legislature[] kn[ew] that African Americans voting translated into support for one party." App. 55a. Armed with that knowledge, and "with race data in hand," the

legislature enacted, on straight party lines, a "number of restrictive provisions," that, at every turn, curtailed or "eliminat[ed] . . . the tools African Americans had used to vote," and "amended the bill to exclude many of the alternative photo IDs used by African Americans." App. 19a, 51a, 55a.

Third, the "full bill" was "rushed through the legislative process" "at the first opportunity" after *Shelby County*. App. 18a, 41a, 55a. In particular, the Fourth Circuit noted that the lengthy bill received a total of only three days of legislative consideration—including a mere two hours in the North Carolina House of Representatives. *See* App. 43a. This hurried procedure, the Fourth Circuit reasoned, "strongly suggests an attempt to avoid in-depth scrutiny." App. 43a-44a.

Fourth, "[t]he only clear factor linking these various 'reforms' [wa]s their impact on African American voters." App. 65a. The Fourth Circuit observed that the legislature's acknowledgement that self-entrenchment was one of its purposes "comes as close to a smoking gun as we are likely to see in modern times, [as] the State's very justification for a challenged statute hinges ***explicitly*** on race—specifically its concern that African Americans, who had overwhelmingly voted for Democrats, had too much access to the franchise." App. 40a. That conclusion flowed from, *inter alia*, the State's admission that it eliminated one of the two days of early voting on Sundays ***because*** "[c]ounties with Sunday voting in 2014 were disproportionately black" and thus voted "disproportionately Democratic." *Id.*

The Fourth Circuit held that these undisputed facts "unmistakably reveal[ed] that the General Assembly used SL 2013-381 to entrench itself" by engaging in a form of "racial discrimination": namely, by "targeting voters who, based on race, were unlikely to vote" for the majority party in the legislature. App. 55a. The court concluded that, "as in *League of United Latin American Citizens v. Perry* (*LULAC*), 548 U.S. 399, 440 (2006), 'the State took away [minority voters'] opportunity because [they] were about to exercise it.'" App. 56a.

The court next turned to the State's proffered rationales for the enjoined provisions (including unfounded allegations of voter fraud, administrative concerns, and more), App. 55a-65a, and found them wanting. The District Court, in sustaining the challenged provisions, had relied on what it described as "at least plausible" justifications for these restrictions, App. 56a (quoting App. 457a), and did not inquire into whether the legislature was ***in fact*** motivated by these "imagined" *post hoc* rationales. *Id.* Indeed, the State offered ***no justification whatsoever*** for certain of the restrictions it imposed, such as its decision to "retain[] only those types of photo ID disproportionately held by whites and exclude[] those disproportionately held by African Americans." App. 43a.

With respect to the various rationales that the State actually did proffer, the Fourth Circuit found that, as a legal matter, the restrictions "constitute inapt remedies for the problems assertedly justifying them and, in fact, impose cures for problems that did not exist." App. 16a. The court further noted that

the State's professed goals of imposing consistency and eliminating confusion "do[] not hold water" in light of the inconsistency and complexity imposed by the bill. App. 61a-65a. The Fourth Circuit therefore concluded that race was "***a*** factor" in the adoption of the voting restrictions at issue. App. 55a.

Given the completeness of the record, App. 57a, and the fact that its determination did not turn on credibility determinations but on the cumulative strength of the undisputed evidence, the Fourth Circuit determined that remand was unnecessary and ordered that the challenged provisions be enjoined in their entirety.[2]

REASONS FOR DENYING THE WRIT

I. The Fourth Circuit's Fact-Bound Ruling Applied the Well-Established *Arlington Heights* Framework and Does Not Warrant This Court's Review.

Petitioners' dire warnings as to the "potential multi-State effects of the Fourth Circuit's decision," Pet. 24-25, are unfounded. The Fourth Circuit faithfully applied the well-established "totality of the circumstances analysis required by *Arlington Heights*" for assessing whether circumstantial

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[2] Judge Motz dissented in part, solely with respect to remedy as to the voter ID requirement. She agreed that the original bill was "enacted [in 2013] with racially discriminatory intent," but would have "temporarily enjoin[ed] the photo ID requirement and remand[ed] the case to the district court to determine if, in practice," the reasonable impediment exception enacted almost two years later (in 2015) "fully remedie[d] the discriminatory requirement or if a permanent injunction is necessary." App. 78a.

evidence indicates that a facially neutral law was motivated by discriminatory intent. App. 54a-55a. Its determination was a quintessentially fact-bound decision dependent on North Carolina's unique circumstances. While the facts of this case are unprecedented, the fact-intensive *Arlington Heights* legal framework applied by the Fourth Circuit is not.

Indeed, Petitioners do not identify an error of law in the Fourth Circuit's decision or dispute the fundamental legal principles on which the Fourth Circuit relied. Nor could they—the Fourth Circuit simply applied the long-settled *Arlington Heights* framework. The petition is, at bottom, a challenge to the Fourth Circuit's application of those principles to the undisputed facts of this case. Such an appeal not only fails to establish grounds for review, *see* S. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law."), it wholly undermines Petitioners' hyperbolic predictions about the nationwide impact of that fact-bound decision.

A. The Fourth Circuit Properly Considered the North Carolina–Specific Context of SL 2013-381.

Consistent with this Court's guidance in *Arlington Heights*, no one factor was dispositive in the Fourth Circuit's analysis. *See* App. 46a. Rather, the decision below rested on the combination of numerous factors that, collectively, are particular to this case. Those factors included:

The Number, Character, and Scope of the Challenged Restrictions. The broad scope of SL 2013-381, and its surgical targeting of voting mechanisms used by African Americans, were critical factors in the decision below, belying Petitioners' prediction that the Fourth Circuit's ruling will "provide[] a roadmap for invalidating election laws in numerous States." Pet. 20, 24. As set forth above, North Carolina did not simply enact a run-of-the-mill voter ID requirement; it enacted one of the strictest voter ID requirements in the nation in addition to a flurry of other restrictions on registration and voting practices all in one fell swoop. As the Fourth Circuit observed, no other "legislature in the Country . . . has ever done so much, so fast, to restrict access to the franchise," with a single bill "restricting all—and only—practices disproportionately used by African Americans." App. 44a, 48a. *See also* Daniel P. Tokaji, "Applying Section 2 to the New Vote Denial," 50 Harv. C.R.-C.L. L. Rev. 439, 457 (2015) ("North Carolina's voting restrictions were more sweeping than those of any other state that changed its voting rules after *Shelby County*.").

Petitioners describe SL 2013-318 as placing North Carolina "in the national mainstream," Pet. 20, but that assertion "misse[s] the forest in carefully surveying the many trees." App. 14a. *First*, the fact that other States maintain certain similar facially-neutral practices cannot save or protect voting restrictions that are adopted with racial intent. *Second*, no other State has simultaneously curtailed four different voting mechanisms disproportionately used by African Americans, while also imposing a strict photo ID requirement that

excludes all forms of government-issued photo ID disproportionately held by African Americans. And with respect to the unique combination of voting practices at issue in this case (same-day registration, out-of-precinct voting, pre-registration, 17 days of early voting, and voting without a strict photo ID requirement), Petitioners' expert conceded that a ***majority*** of states have at least two of those practices; by contrast, after SL 2013-318, North Carolina became one of only eight states to lack all of them. JA21287.

Under the *Arlington Heights* framework, "a court must be mindful of the number, character, and scope of the modifications enacted together in a single challenged law." App. 56a. Here, "the sheer number of restrictive provisions in SL 2013-381" that are targeted at African Americans "distinguishes this case from others." App. 51a-52a.

Sequence of Events Leading to Enactment and Legislative History. This case is also unique because the numerous voting restrictions at issue were "rushed" through the legislative process immediately following this Court's decision in *Shelby County*. App. 41a-42a. Moreover, while testimony from the bill's proponents regarding the express purpose of SL 2013-381 was limited by their invocation of legislative privilege, *see* App. 46a, the Fourth Circuit found key that, during this process, North Carolina lawmakers specifically "requested and received a breakdown by race of DMV-issued ID ownership, absentee voting, early voting, same-day registration, and provisional voting." App. 47a. And it was not until after receiving this data that the legislature enacted a law that—"with almost surgical precision,"

App. 16a—tightened the voter ID portions of the bill and curtailed or eliminated the voting mechanisms used more heavily by African Americans, while exempting absentee voting (which was used more heavily by white voters) from the ID requirement. *See* App. 47a-48a.

The Fourth Circuit acknowledged that "this sequence of events . . . is not dispositive on its own," App. 46a, but concluded that "it provides another compelling piece of the puzzle of the General Assembly's motivation" and "signals discriminatory intent." App. 41a-42a, 46a; *see also Arlington Heights*, 429 U.S. at 267 ("The specific sequence of events leading up [to] the challenged decision . . . may shed some light on the decisionmaker's purposes."). As explained below, *infra* at I.D.1, these are critical factors that a different panel of the Fourth Circuit subsequently found distinguish this case from others, limiting its broader applicability to other States' laws.

B. The Fourth Circuit Properly Determined That SL 2013-381 Would Bear More Heavily On African-American Voters.

Petitioners' criticism that the Fourth Circuit, in finding discriminatory intent, "did not disturb the district court's findings" that the challenged restrictions "have no discriminatory effect" is not only incorrect, it is legally irrelevant and does not remotely merit certiorari. Pet. 2. To be sure, Petitioners are correct that the Fourth Circuit did not directly address the District Court's ruling on Respondents' independent discriminatory ***results*** claim under Section 2 of the Voting Rights Act—

because it did not need to do so. Once the court found that SL 2013-381 was enacted with discriminatory ***intent***, it was unnecessary to address the distinct statutory question of discriminatory results, which rests on different factors. *See, e.g.*, *Veasey v. Abbott*, 830 F.3d 216, 244-45 (5th Cir. 2016) (en banc), *cert. denied*, No. 16-393, 2016 WL 5394945 (U.S. Jan. 23, 2017). Indeed, while this Court made clear in *Arlington Heights* that the effect of a law is one factor in the "totality of the circumstances" intent analysis, *see* 429 U.S. at 268, Petitioners themselves have conceded that "a plaintiff does not have to prove that a law has had a discriminatory impact to prove discriminatory intent." Emerg. Appl. to Recall & Stay 22.

In any event, the Fourth Circuit explicitly determined that the District Court "clearly erred in finding that the cumulative impact of the challenged provisions of SL 2013-381 does not bear more heavily on African Americans." App. 50a. While the District Court found that "African Americans disproportionately used each of the removed [voting] mechanisms, as well as disproportionately lacked the photo ID required by SL 2013-381," App. 50a, the Fourth Circuit noted that the lower court "refused to acknowledge the[] import" of these facts for purposes of an ***intent*** analysis. App. 53a. Indeed, the court observed, it is self-evident that the legislature's decision to single out precisely those voting methods used disproportionately by African Americans "bears more heavily" on them. App. 48a (quoting *Arlington Heights*, 429 U.S. at 266).

Finally, in the context of its intent analysis, the Fourth Circuit properly acknowledged—and

rejected—Petitioners' arguments regarding the effect of the challenged provisions, noting that the District Court (like Petitioners here) erroneously accorded "almost dispositive weight" to a modest increase in aggregate turnout between the 2010 and 2014 midterm elections, ignoring this Court's caution against "plac[ing] much evidentiary weight on any one election" when attempting to assess the effect of an electoral practice. App. 52a. In fact, the Fourth Circuit noted, when many of the challenged restrictions were in place during the 2014 election, "thousands of African Americans were disenfranchised" by the challenged provisions, and there was "a significant decrease in the rate" at which African-American participation had been growing before SL 2013-381. App. 53a. These facts, and others, properly supported the Fourth Circuit's finding regarding discriminatory intent.

C. The Fourth Circuit's Reversal of the District Court's Intent Finding Was Well Within Its Authority.

The Fourth Circuit's straightforward application of *Arlington Heights* to the unique facts and context of SL 2013-381 does not break new legal ground for claims based on discriminatory intent. Contrary to Petitioners' assertions, it is not "shocking" for an appellate court to reverse a district court's finding on the issue of discriminatory intent. Pet. 23.

In fact, there are a multitude of cases in which courts of appeals have properly reversed trial court findings related to intentional discrimination (be it a finding of discriminatory intent or a lack thereof). *See, e.g.*, *NAACP v. Gadsden Cty. Sch. Bd.*, 691 F.2d 978, 983-84 (11th Cir. 1982) (reversing district

court's finding that at-large electoral system was not motivated by discriminatory intent); *Rivera v. Nibco, Inc.*, 372 F. App'x 757, 761 (9th Cir. 2010) (reversing district court's finding of no intentional racial discrimination in use of peremptory challenges); *White v. Frank*, No. 92-1579, 1993 WL 411742, at *4 (4th Cir. 1993) (per curiam) ("Although we are reluctant to reverse a district court's finding of intent, we conclude that the court's ultimate determination in the instant case simply is not supported by the record as a whole."); *Walsdorf v. Bd. of Comm'rs for the E. Jefferson Levee Dist.*, 857 F.2d 1047, 1053 (5th Cir. 1988) (reversing district court's finding of no intentional gender discrimination in Title VII employment case brought against municipality board of commissioners).

And while courts of appeals typically "give substantial deference to the district court's evaluation of witness credibility," *Koszola v. FDIC*, 393 F.3d 1294, 1300-01 (D.C. Cir. 2005), here, there were no credibility determinations to defer to because legislative proponents of the bill invoked legislative privilege and refused to testify. Thus, although Petitioners criticize the Fourth Circuit's ruling as unsupported by "direct evidence," Pet. 18, the Fourth Circuit properly relied upon statements in the legislative record regarding the professed purposes of the bill to find that it was, in fact, motivated by race. *See, e.g.*, App. 58a, 61a, 64a-65a. Such evidence is not only more probative of intent than the *post hoc* justifications proffered at trial (by Petitioners' counsel or by witnesses who were not the legislative proponents), it was the only direct evidence available.

In sum, the Fourth Circuit's application of *Arlington Heights* to invalidate facially neutral voting practices as intentionally discriminatory is hardly novel and does not warrant review.

D. The Fourth Circuit's Decision Does Not Call Into Question the Voting Laws of Other States.

1. Petitioners' Predictions About the Impact of the Decision Below Are Incorrect and Have Already Been Disproven.

Petitioners' contention that "[t]he Fourth Circuit's analysis . . . 'would likely invalidate voter-ID laws in any State,'" Pet. 30 (citation omitted), has already been flatly disproven within the Fourth Circuit itself.

On December 13, 2016, the Fourth Circuit applied its decision in this case to ***uphold*** Virginia's photo identification requirement against charges that it was racially discriminatory. *See Lee v. Va. State Bd. of Elections*, 843 F.3d 592 (4th Cir. 2016). That decision belies Petitioners' assertions about the implications of the decision below and underscores the unique nature of North Carolina SL 2013-381 and the exceptional circumstances that surrounded its passage—factors that limit its applicability in future cases.

First, notwithstanding Petitioners' assertion that the "Virginia photo-ID law [is] quite similar to North Carolina's," Pet. 35, the laws and the circumstances surrounding their passage are quite different. Most obviously, the Virginia voter ID law was passed as a single-issue bill, while North Carolina enacted—in "one statute"—a sprawling "array of electoral

'reforms,'" uniform only in their disproportionate impact on African Americans. App. 65a, 19a. Even looking at just the voter ID provisions, the Fourth Circuit found that the laws are highly distinguishable: Virginia's law allows a broad scope of qualifying IDs, including student IDs from Virginia's public and private universities. *Lee*, 843 F.3d at 603-04. Virginia also allows individuals who need to obtain a free ID to do so without the cost and burden of obtaining various underlying documents—a provision the court found was adopted specifically to mitigate potential burdens on poor and minority voters. *Id.* at 603. By contrast, North Carolina's SL 2013-381 lacked these mitigating provisions, and was instead modified prior to its enactment to retain "only those types of photo ID disproportionately held by whites and [to] exclude[] those disproportionately held by African Americans" (including student and public assistance IDs). App. 43a.[3]

Moreover, the Fourth Circuit in *Lee* found that the "facts in *McCrory* are in no way like those found in Virginia's legislative process." 843 F.3d at 604. For one thing, the Virginia "legislature did not call for, nor did it have, the racial data used in the North Carolina process described in *McCrory*." *Id.* at 604.

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[3] While North Carolina—on the eve of trial in 2015—amended its voter ID requirement to incorporate a reasonable impediment exception, Petitioners expressly waived any argument that this amendment implicated Plaintiffs' discriminatory intent claim (which was based on conduct in 2013), *see* 1/28/16 Tr. 79, and the Fourth Circuit found that this belated amendment did not "fully cure[] the harm from the photo ID provision," and thus did not cleanse the initial enactment of its discriminatory intent. App. 69a.

Thus, while North Carolina, "with race data in hand," tightened its ID requirements to exclude forms of ID that the legislature knew were more likely to be held by African Americans, App. 19a, and restricted multiple voting mechanisms that it "knew were used disproportionately by African Americans," App. 45a-46a, the court found there was no evidence that happened in Virginia. While Petitioners assert that "'[a]ny responsible legislator' would have needed to consider such data in light of North Carolina's still-existing preclearance obligations" at the time (early 2013), Pet. 15, it is telling that the Virginia legislature, which was similarly subject to preclearance when it enacted its law, did not require such data.[4]

Lastly, whereas Virginia enacted its less restrictive voter ID law while *Shelby County* was pending, *Lee*, 843 F.3d at 604, North Carolina moved at the "first opportunity" on "the day after" it was relieved of its preclearance obligations to substantially tighten its ID requirements, and to add sweeping restrictions to what had been a single-issue voter ID bill. App. 55a, 15a. It then "rushed [the full bill] through the legislative process" in a mere "three days," a "hurried pace" that "strongly suggests an attempt to avoid in-depth scrutiny." App. 43a-44a. By contrast, the Fourth Circuit found that the Virginia ID law was "passed as part of Virginia's standard legislative process, following full and open

[4] Neither did the Texas legislature, which was also subject to preclearance at the time it adopted its voter ID law. *See* Pet. for Writ of Cert. 32-33, *Abbott v. Veasey*, No. 16-393 (U.S. Sept. 23, 2016).

debate," "[u]nlike the departure from the normal legislative process that occurred in North Carolina." *Lee*, 843 F.3d at 604.

In sum, the Fourth Circuit's decisions in the North Carolina and Virginia cases underscore the unique factual nature of the North Carolina case and its limited influence on future cases affecting other states.[5]

2. A Finding That SL 2013-381 Was Enacted with Discriminatory Intent Does Not Render Suspect Other Voting Laws Enacted Under Different Circumstances.

Given the fact-bound nature of the decision below, it does not render suspect other voting laws, as Petitioners predict. Rather, in its focus on the particular facts at hand, the decision below is consistent with this Court's decisions invalidating facially-neutral and otherwise constitutionally permissible voting procedures as intentionally discriminatory—decisions that have not had broad reverberations beyond the individual cases at hand.

For example, *Hunter v. Underwood*, 471 U.S. 222, 226-29 (1985)—which affirmed the Eleventh Circuit's

[5] Petitioners argue that the Fourth Circuit's decisions in these two cases have "deepened" the "confusion" over the legal analysis that applies in photo ID cases, Pet. 35, but the Fourth Circuit clearly and exhaustively explained why the two laws were different. And even if there were an intra-Circuit conflict between the Fourth Circuit's decisions in these two cases, intra-Circuit conflicts are not grounds for this Court's review, given the possibility of *en banc* review—which North Carolina did not seek here.

reversal of a district court's opinion on the issue of intent—struck down Alabama's felon-disenfranchisement law as intentionally discriminatory based on the particular history of that law. Nonetheless, lower courts have sustained other felon disenfranchisement laws untainted by intentional discrimination. *See, e.g.*, *Farrakhan v. Gregoire*, 623 F.3d 990, 994 (9th Cir. 2010) (en banc) ("no evidence of intentional discrimination"); *Simmons v. Galvin*, 575 F.3d 24, 32 (1st Cir. 2009) ("no allegation of intentional discrimination"). Indeed, notwithstanding *Hunter*, 48 states still have felon disenfranchisement laws.[6]

Similarly, *Rogers v. Lodge*, 458 U.S. 613 (1982), applied *Arlington Heights* and invalidated a particular at-large electoral scheme as intentionally discriminatory. But lower courts have sustained other at-large electoral schemes against claims of intentional discrimination. *See, e.g.*, *Askew v. City of Rome*, 127 F.3d 1355, 1374, 1385 (11th Cir. 1997) (Rome's at-large "electoral systems were not established and are not maintained for discriminatory purposes"). And most municipalities continue to utilize at-large elections in some form.[7]

Notwithstanding these cases, Petitioners argue that the Fourth Circuit's consideration of racial polarization evidence in its intent analysis was error,

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[6] *See* Nat'l Conference of State Legislatures, Felon Voting Rights (Sept. 29, 2016), http://www.ncsl.org/research/elections-and-campaigns/felon-voting-rights.aspx.

[7] Nat'l League of Cities, Municipal Elections, http://www.nlc.org/build-skills-and-networks/resources/cities-101/city-officials/municipal-elections (last visited Jan. 27, 2017).

and will have the wide-ranging effect of rendering "suspect by definition" any new voting restrictions "in any State." Pet. 25-26. The legal and factual premises of that contention are incorrect.

As a legal matter, the Fourth Circuit's consideration of racial polarization in its intent analysis is nothing new and conforms to this Court's guidance. In *Rogers*—which Petitioners mischaracterize as "rejecting [an] inference [of intent] based on polarization," Pet. 26—this Court made clear that "bloc voting along racial lines," is a factor that "bear[s] heavily on the issue of purposeful discrimination." 458 U.S. at 623. This is in part because "[v]oting along racial lines allows those elected to ignore black interests without fear of political consequences." *Id.* at 623-24. It is also because racial polarization "provide[s] an incentive for intentional discrimination in the regulation of elections," insofar as "[u]sing race as a proxy for party may be an effective way to win an election." App. 31a-32a. The Fourth Circuit found that this is precisely what happened here.

While evidence of racially polarized voting is "insufficient in [itself] to prove purposeful discrimination absent other evidence," *Rogers*, 458 U.S. at 624, the Fourth Circuit did not suggest otherwise. It merely found that the District Court "clearly erred in ignoring or dismissing" North Carolina's "troubled racial history and racially polarized voting," and should have considered the fact that legislators knew that African Americans tended to vote for Democratic candidates and that increasing African-American participation threatened their incumbency, as a part of the

"totality of . . . circumstances," particularly given that SL 2013-318 was enacted "in the immediate aftermath of unprecedented African American voter participation." App. 41a, 54a. That determination was wholly consonant with this Court's holding in *LULAC*, that Texas's redistricting plan, which diluted Latino voting power against a backdrop of racial polarization and in the wake of "growing participation" by Latinos, "b[ore] the mark of intentional discrimination that could give rise to an equal protection violation." 548 U.S. at 427, 439-40.

II. The Fourth Circuit's Decision Does Not Conflict with *Shelby County*.

Petitioners' claim that the decision below conflicts with *Shelby County*, *see* Pet. 16-19, is demonstrably false and, in fact, was the basis for an earlier petition in this dispute, which this Court denied. *See* Pet. for Writ of Cert., *North Carolina v. League of Women Voters of N.C.*, No. 14-780 (2014), *cert. denied*, 135 S. Ct. 1735 (2015). Here, Petitioners' argument is even more inapt, because the decision at issue was grounded in a finding of intentional discrimination under *Arlington Heights*. The court said nothing about an anti-retrogression principle; did not restore preclearance in North Carolina; did not rely unduly on North Carolina's history of voting rights discrimination; and did not in any way implicate *Shelby County*'s holding that the 2006 reauthorization of the Section 4(b) coverage provision of the Voting Rights Act violated the "fundamental principle of equal sovereignty" of the States. 133 S. Ct. at 2624. Indeed, this Court emphasized in *Shelby County* that that "decision in no way affects the permanent, nationwide ban on racial

discrimination in voting found in § 2" or the Fourteenth Amendment. 133 S. Ct. at 2631. That prohibition remains vital where, as here, a legislature impermissibly relies on race in its voting laws.

A. The Fourth Circuit Did Not Employ a Section 5 Retrogression Standard.

Petitioners misrepresent the Fourth Circuit's opinion in contending that it "employed a variant of §5's anti-retrogression analysis." Pet. 18. The Fourth Circuit did not even mention retrogression, much less rest its intentional discrimination finding on the fact of retrogression. Far from employing the Section 5 retrogression standard for discriminatory ***results***, the Fourth Circuit simply applied the long-established *Arlington Heights* standard for ***intentional*** discrimination claims to the circumstances surrounding the passage of SL 2013-381. *See, e.g.*, App. 54a ("In sum, assessment of the *Arlington Heights* factors requires the conclusion that, at least in part, discriminatory racial intent motivated the enactment of the challenged provisions in SL 2013-381."). These considerations are squarely within the province of a discriminatory intent inquiry, even after *Shelby County*. *See Arlington Heights*, 429 U.S. at 267.

Petitioners claim to divine that preclearance was "exactly what the panel had in mind," pointing to the Fourth Circuit's use of phrases such as "re-erect[ing] . . . barriers" to voting. Pet. 18 (quoting App. 39a-40a). But there is nothing inappropriate about the panel's focus on North Carolina's elimination of existing voting mechanisms used more heavily by African Americans. A barrier to voting can be

created by either (a) adding a new voting requirement, or (b) by "removing voting tools," *id.* (quoting App. 52a). If motivated by improper discriminatory motive, either legislative act can be unconstitutional: "[I]f the purpose of repealing legislation is to disadvantage a racial minority, the repeal is unconstitutional . . . ." *Crawford v. Bd. of Educ. of L.A.*, 458 U.S. 527, 539 n.21 (1982).

The fact that the Fourth Circuit noted the purposeful elimination of voting practices disproportionately used by African Americans as one element in its ***intent*** inquiry under Section 2 (and the Constitution) does not mean that it somehow *sub silentio* applied Section 5's retrogression standard for discriminatory ***results***.[8] A court engaging in an intent analysis may reference past electoral practices as part of the "historical background" and the "specific sequence of events leading up" to the passage of a challenged enactment. *Arlington Heights*, 429 U.S. at 267. Given that the legislature here eliminated existing voting mechanisms only after receiving data showing that they were disproportionately used by African Americans, it made perfect sense for the Fourth Circuit to consider those historical facts.

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[8] In discussions of the "results" prong of Section 2, this Court has explained repeatedly that "some parts of the § 2 analysis may overlap with the § 5 inquiry." *Georgia v. Ashcroft*, 539 U.S. 461, 478 (2003), *superseded by statute on other grounds* (citing *Holder v. Hall*, 512 U.S. 874, 883 (1994) (plurality opinion)). This conclusion about overlapping evidence across distinct legal standards is equally true in an intent case.

The Fourth Circuit was clear that its opinion "does not freeze North Carolina election law in place as it is today," or as it was when *Shelby County* was decided. App. 72a. Indeed, the Fourth Circuit was explicit that States need not "forever tip-toe around certain voting provisions disproportionately used by minorities"—only that election laws enacted by the legislature must be supported by legitimate, non-discriminatory justifications. *Id.* The decision was tied to the record in this case and is in no way inconsistent with *Shelby County*.

B. The Fourth Circuit Did Not Unduly Rely on North Carolina's Pre-1965 History of Official Racial Discrimination.

Nor did the Fourth Circuit flout *Shelby County* "in a deeper sense" by according undue weight to what Petitioners concede is North Carolina's "shameful histor[y] of discrimination." Pet. 19. The Fourth Circuit took great pains to make clear that it was ruling on the basis of the cumulative evidence on the record and not on the basis of pre-1965 discrimination. Indeed, the court explicitly recognized the "limited weight" of "North Carolina's pre-1965 history of pernicious discrimination," explaining that it merely "informs our inquiry." App. 33a (citing *Shelby Cty.*, 133 S. Ct. at 2628-29). This discussion of historical discrimination is not erroneous. Quite the contrary, it is expressly called for by *Arlington Heights* which directs courts to consider "[t]he historical background of the decision" challenged as racially discriminatory. 429 U.S. at 267. Just as "history did not end in 1965," it did not start then either; the Fourth Circuit's

acknowledgement of pre-1965 history was entirely appropriate.

The Fourth Circuit looked well beyond 1965 and specifically found that "[t]he record is replete with evidence of instances since the 1980s" where North Carolina "has attempted to suppress and dilute the voting rights of African Americans," and that "state officials continued in their efforts to restrict or dilute African American voting strength . . . ***up to the present day***." App. 34a-35a, 37a-38a (emphasis added). For example, the Fourth Circuit noted that, just last year, "a three-judge court addressed a redistricting plan adopted by the same [North Carolina] General Assembly that enacted SL 2013-381," and held that "race was the predominant motive in drawing two congressional districts, in violation of the Equal Protection Clause." App. 37a (citing *Harris v. McCrory*, 159 F. Supp. 3d 600, 603-04 (M.D.N.C. 2016)); *see also Covington v. North Carolina*, 316 F.R.D. 117 (M.D.N.C. 2016) (state legislative redistricting plans similarly tainted by impermissible racial considerations).

The Fourth Circuit also did not, as Petitioners assert, accuse North Carolina of trying to "usher in a new 'era of Jim Crow.'" Pet. 20. To the contrary, the Fourth Circuit was careful to note that it did "not suggest[] that any member of the General Assembly harbored racial hatred or animosity toward any minority group," App. 54a-55a, but found that the broader context of racially polarized voting suggested that "the State took away [minority voters'] opportunity because [they] were about to exercise it," App. 16a (quoting *LULAC*, 548 U.S. at 440). Such a finding of "intentional discrimination" need not be

"based on any dislike, mistrust, hatred or bigotry against" minorities, but rather can be premised, as here, on a finding that "elected officials engaged in the single-minded pursuit of incumbency" have intentionally "run roughshod over the rights of protected minorities." *Garza v. Cty. of L.A.*, 918 F.2d 763, 778 (9th Cir. 1990) (Kozinski, J., concurring in part and dissenting in part). *Cf. Ketchum v. Byrne*, 740 F.2d 1398, 1408 (7th Cir. 1984) ("We think there is little point for present purposes in distinguishing discrimination based on an ultimate objective of keeping certain incumbent whites in office from discrimination borne of pure racial animus.").

Rather than meaningfully grapple with the reality of recent discrimination in North Carolina, Petitioners quibble with some of the individual examples from the large body of evidence of discrimination "since the 1980s" cited by the Fourth Circuit. *See* Pet. 14, 27-29. Beyond misunderstanding the relevance of this evidence, Petitioners are largely wrong on the facts.

As to the record of 55 Section 2 lawsuits in North Carolina since 1980, Petitioners protest that "not ***every*** one concerned intentional discrimination," while conceding that "relevant" and "successful" Section 2 suits against North Carolina were brought as recently as 1997. Pet. 29 (emphasis added). In considering intent claims, this Court has relied on evidence of discrimination dating back several decades before a challenge. *See, e.g.*, *Rogers*, 458 U.S. at 624-25. And while many of these cases resulted in settlement, the majority of suits "voluntarily terminated when the parties reached an agreement to change the [discriminatory] voting

system." Anita S. Earls et al., *Voting Rights in North Carolina: 1982-2006*, 17 S. Cal. Rev. L. & Soc. Just. 577, 587 (2008). This hardly renders them "unsuccessful." Pet. 29 n.5. The Fourth Circuit properly assessed those cases as evidence that North Carolina's history of voting discrimination persisted into modern times. App. 36a.

Indeed, as recently as 2012, the Department of Justice cited *Arlington Heights* in objecting to the General Assembly's modification of school board election procedures under Section 5's intent prong. *See* Letter from U.S. Dep't of Justice to Pitt Cty., N.C. (Apr. 30, 2012), *available at* https://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/l_120430.pdf. Contrary to Petitioners' assertion that Section 5 objection letters "do[] not equate to a ***finding*** of anything," Pet. 28 (emphasis in original), this Court has long recognized that such objections constitute "administrative ***finding[s]*** of discrimination" and are probative of racial discrimination in voting. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 305 (1978) (emphasis added); *see also United Jewish Orgs. of Williamsburgh, Inc. v. Carey*, 430 U.S. 144, 156-57 (1977). The Fourth Circuit rightly considered this evidence as part of its analysis of North Carolina's all-too-recent history of voting discrimination.

III. The Fourth Circuit's Decision Does Not Conflict with the Decision of Any Other Court of Appeals.

Finally, the Fourth Circuit's finding of discriminatory intent is consistent with how other circuits have applied *Arlington Heights*, including the Fifth Circuit in *Veasey*. In an attempt to

manufacture a circuit split, Petitioners purport to identify confusion regarding the use of "statistical disparities" in the context of discriminatory ***results*** claims. Pet. 32-35. Even assuming that such confusion exists (and it does not), it does not implicate the Fourth Circuit's ***intent*** decision or justify certiorari here.

A. The Decision Below is Consistent with the Fifth Circuit's Decision in *Veasey*.

The Fourth Circuit's analysis is entirely consistent with the Fifth Circuit's application of the *Arlington Heights* standard in *Veasey*, 830 F.3d at 230-34. There, the Fifth Circuit reversed the district court's finding of intentional discrimination for weighing two particular factors too heavily in its *Arlington Heights* analysis. *First*, the *Veasey* court held that the Texas district court placed too much weight on distant historical evidence of official discrimination. 830 F.3d at 232. *Second*, the Fifth Circuit criticized the district court for relying on tenuous, post-enactment speculation as to legislative intent by ***opponents*** of the challenged legislation. *Id.* at 233-34. Although the Fifth Circuit reversed, it also expressly acknowledged that the record in that case did contain evidence that ***could*** support a finding of discriminatory intent, and remanded the matter back to the district court to re-weigh the evidence. *Id.* at 234-43.

Nothing in the Fourth Circuit's decision here conflicts with *Veasey*. The Fourth Circuit did not rely upon any post-enactment speculation by the bill's opponents as to legislative intent. *See* App. 46a ("The district court was correct to note that

statements . . . made by legislators after the fact[] are of limited value."). Nor did it place undue emphasis on distant historical evidence. Rather, as explained above, the court focused on the cumulative weight of all the evidence, including emphasizing more recent acts of official discrimination and finding that the District Court clearly erred in "finding that 'there is little evidence of official discrimination since the 1980s.'" App. 34a (quoting App. 458a).

The Fourth Circuit cited precisely the types of circumstantial evidence that the Fifth Circuit in *Veasey* identified as appropriate under *Arlington Heights*, including: the emerging political power of the targeted minority group, legislators' awareness of the likely disproportionate effect on minority voters, failure to modify the law in ameliorative ways, shifting public rationales (and the pretext underpinning those rationales), departures from normal legislative procedures, and the enactment of other racially discriminatory laws by the same legislature. *Compare Veasey*, 830 F.3d at 235-41, *with* App. 33a-55a. The Fourth Circuit's *Arlington Heights* analysis thus creates no conflict with the Fifth Circuit's decision in *Veasey*.

Finally, while the Fifth Circuit in *Veasey* remanded the case to the district court to re-weigh the evidence for a new determination on intent, the Fourth Circuit's entry of judgment here was proper for at least two reasons:

First, the nature of the evidence in *Veasey* was qualitatively different from that presented here. The district court in *Veasey* was presented with testimony from legislative proponents of the bill and

was able to make credibility assessments about their intent. Here, proponents cloaked themselves in legislative privilege and gave no evidence or testimony that required credibility assessments. App. 46a-47a. Remand is unnecessary where, as here, "the key evidence consisted primarily of documents and expert testimony" and "[c]redibility evaluations played a minor role." *Easley v. Cromartie*, 532 U.S. 234, 243 (2001).

Second, while the Fifth Circuit in *Veasey* explicitly found that the record permitted more than one resolution of the factual issue, *Veasey*, 830 F.3d at 241, the Fourth Circuit found that the record here "permits only one resolution of the factual issue," App. 57a-58a (citation omitted). All of the facts on which the Fourth Circuit based its decision are undisputed—there was nothing left for the District Court to re-assess. The Fourth Circuit therefore appropriately decided to enter judgment rather than remand. There is no dissonance with *Veasey* that warrants this Court's review.

B. The Fourth Circuit's Decision Does Not Create "Confusion" about the Relevance of "Statistical" Evidence.

Petitioners also assert that the decision below creates "confusion" about "whether statistical racial disparities in the use of particular voting mechanisms can prove discriminatory effect under §2." Pet. 32-35. That contention misrepresents both the decision below and the case law governing discriminatory results under Section 2, and once again does not warrant certiorari over the Fourth Circuit's ***intent*** decision.

Petitioners have failed to identify an actual circuit split with respect to "whether statistical racial disparities in the use of particular voting mechanisms can prove discriminatory effect[.]" Pet. 32. No court of appeals has held that evidence of racial disparities is irrelevant to assessing a law's discriminatory effect, and neither the Fourth Circuit nor any other court of appeals has held that racially disparate usage of electoral practices is, without more, sufficient to prove a Section 2 violation.

Quite the contrary, every court of appeals to find liability under Section 2's results prong in a vote denial case has required the plaintiffs to establish additional factors beyond racial disparities. *See, e.g.*, *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 240 (4th Cir. 2014) (two prong test for liability), *cert. denied*, 135 S. Ct. 1735 (2015); *Veasey*, 830 F.3d at 244 (same). Those rulings are therefore entirely consistent with the decisions cited by Petitioners, which have held that "statistical racial disparities," by themselves, "are insufficient to prove a §2 vote denial claim." Pet. 32-34 (citing *Gonzalez v. Arizona*, 677 F.3d 383, 407 (9th Cir. 2012) (en banc); *Frank v. Walker*, 768 F.3d 744, 752-53 (7th Cir. 2014); *Ohio Democratic Party v. Husted*, 834 F.3d 620, 627-28, 639 (6th Cir. 2016) ("*ODP*")). The Sixth, Seventh, and Ninth Circuits have never suggested (much less held) that evidence of racial disparities is irrelevant.

In any event, this case would be a poor vehicle for addressing any supposed "confusion" on this issue, because the Fourth Circuit's decision here rested solely on ***intent*** grounds, and therefore cannot pose a conflict with the cases from other circuits cited by

Petitioners, all of which were decided on ***results*** grounds. *See Gonzalez*, 677 F.3d at 390-97, 405-10 (NVRA preemption, Fourteenth Amendment and Section 2 results, Twenty-Fourth Amendment, and poll tax claims only); *Frank*, 768 F.3d at 749-54 (undue burden and Section 2 results claims only); *ODP*, 834 F.3d at 626-27 (considering plaintiffs' undue burden and Section 2 results claims only). To the extent that any confusion exists among the circuits about the use of statistical evidence in assessing Section 2 results claims, there are several cases—including *Veasey* itself—that would be a more appropriate vehicle for this Court to address that question. It would make little sense to review an intent case in order to address purported confusion about discriminatory results jurisprudence.

Moreover, Petitioners have again conflated the test for discriminatory ***results*** under Section 2 with the framework for analyzing a claim of discriminatory ***intent***. While a court may consider whether "the law bears more heavily" on minorities as relevant circumstantial evidence in an intentional discrimination case, App. 28a, 33a-34a, such evidence is not required; indeed, as noted, Petitioners conceded earlier in this proceeding that a State's "failure to achieve discriminatory effects is no excuse for a law that truly is enacted with discriminatory intent." Emerg. Appl. to Recall & Stay 31; *see also Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 277 (1979) ("Invidious discrimination does not become less so because the discrimination accomplished is of a lesser magnitude. Discriminatory intent is simply not amenable to calibration. It either is a factor that has influenced the legislative choice or it is not.").

Thus, while a law's effects are relevant to an intent claim, they are not necessarily outcome-determinative, as in a Section 2 results case. And here, data regarding African Americans' disproportionate use of the eliminated voting practices was only one factor on which the Fourth Circuit relied in determining intent. Therefore, granting review in this case to address the probative value of racial disparity statistics would require deciding the issue in the abstract and would not affect the disposition of this case, which found intentional discrimination based on several additional grounds.[9]

CONCLUSION

Ultimately, Petitioners simply take umbrage with the outcome of the Fourth Circuit's fact-bound decision, which is not a basis for certiorari. For this, and the foregoing reasons, this Court should deny the Petition.

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[9] A final reason to deny review is that reversal would not conclusively resolve this case. Respondents raised numerous claims beyond the intentional discrimination claim that formed the basis for the decision below. But because the Fourth Circuit resolved the appeal on discriminatory intent grounds, it did not reach the issue of discriminatory results under Section 2, or Respondents' other constitutional claims. *See* App. 23a-26a.

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