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.*,

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

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

THOMAS A. FARR
PHILIP J. STRACH
MICHAEL D. MCKNIGHT
Ogletree Deakins Nash Smoak & Stewart, PC
4208 Six Forks Road
Raleigh, NC 27609

S. KYLE DUNCAN
Counsel of Record
GENE C. SCHAERR
STEPHEN S. SCHWARTZ
Schaerr | Duncan LLP
1717 K St. NW, Suite 900
Washington, DC 20006
202.714.9492
KDuncan@Schaerr-Duncan.com

Counsel for Petitioners

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INTRODUCTION

The Court should grant review where a circuit court convicts a State legislature of seeking to re-inaugurate the "era of Jim Crow," App. 46a; where it invents a judicial version of the pre-clearance standard decommissioned by *Shelby County* v. *Holder*, 133 S. Ct. 2612 (2013); where it finds intentional racial discrimination based on "evidence" that would convict many other States of the same false charge; and where it signals a radical shift in reviewing district court fact finding under the Voting Rights Act. Each of these astonishing steps was taken by the Fourth Circuit panel below in facially invalidating North Carolina's 2013 election reforms, including a photo ID requirement. The Court should grant certiorari and reverse that misguided decision, which usurps North Carolina's sovereign authority to regulate its own elections. Respondents offer no reason to let that decision stand.

REASONS FOR GRANTING THE PETITION

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

The Petition showed that, while the panel "purported" to apply §2 of the Voting Rights Act, "in actuality it employed a variant of §5's anti-retrogression analysis" in contravention of *Shelby County*. Pet. 18, 16–19. Respondents' three objections to that argument hold no water.

First, Respondents note that the panel did not "mention" the §5 standard. NAACP 25; U.S. 14. That misses the point. Petitioners showed that the Fourth Circuit "restore[d]" the now-inapplicable §5 standard "by *reading it into §2*." Pet. 16 (emphasis added). The fact that the panel disguised that obsolete analysis under the veneer of §2 should fool no one.

Second, Respondents defend the panel's heavy reliance on *changes* to North Carolina's election laws—a key focus of the §5 retrogression analysis, Pet. 17–18—as merely considering a law's "historical background" for discriminatory intent. NAACP 26; U.S. 14 (citing *Vill. of Arlington Heights* v. *Metro. Hous. Dev. Corp.*, 429 U.S. 252, 267 (1977)). But under the panel's analysis, *any* change to voting practices used at higher rates by minorities is *presumptively* discriminatory where there is "racial polarization." See App. 30a–33a, 39a–40a. This is an anti-retrogression rule by another name, and effectively places North Carolina *back* under the preclearance regime discarded by *Shelby County*—now administered by courts instead of the Justice Department. Pet. 16–19.

Third, and relatedly, the NAACP asserts the panel did not "*unduly* rely on North Carolina's pre-1965 history of official racial discrimination." NAACP 27 (emphasis added). Even that effectively concedes conflict with *Shelby County*, which taught that "history did not end in 1965." 133 S. Ct. at 2628. If Congress may not burden North Carolina based on "40–year–old facts having no logical relation to the present day," *id.* at 2629, the Fourth Circuit's reliance on "North Carolina's pre-1965 history of pernicious discrimination" to "inform[ ] [its] inquiry" directly repudiates this Court's precedent—especially given the panel's candid statement that North Carolina's "long-ago history bears *more heavily* here than it might otherwise." App. 33a–34a (emphasis added).

If there were doubt that the panel's analysis conflicts with *Shelby County*, its discussion of polarization mirrors passages from the *Shelby County* dissent, see *Shelby County*, 133 S. Ct. at 2643 (Ginsburg, J., dissenting); later cites that dissent as *authority*, see App. 29a (citing *id.* at 2635 (Ginsburg, J., dissenting)); and adopts the reasoning of the very same 2006 Voting Rights Act re-authorization report that *Shelby County* rejected. App. 31a (citing H.R. Rep. No. 109-478, at 35 (2006)). It is fair to say that the Fourth Circuit's opinion reads like a *continuation* of the *Shelby County* dissent.

Shelby County freed former preclearance States like North Carolina to legislate without "long-ago history"—however shameful—forever besmirching the motives of today's legislators. At a minimum, the decision *must* mean that those States may adjust voting procedures as they choose—potentially in ways

§5 would have blocked—provided they satisfy §2. *Bartlett* v. *Strickland*, 556 U.S. 1, 23 (2009) (explaining §2 "is not concerned with maximizing minority voting strength"). But it *cannot* be consistent with a judicial approach like the Fourth Circuit's which—openly disdainful of *Shelby County*'s result—smuggles §5 preclearance into §2. The Court should grant certiorari to resolve the conflict with *Shelby County*.

II. The Panel's Extraordinary Decision Provides A Roadmap For Invalidating Many State Election Laws.

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

This Court should grant review where a circuit court finds a State has deliberately structured its election laws to disenfranchise minority voters. Pet. 20–24. That is especially true here—where the Fourth Circuit hyperbolically concluded that a slate of mainstream election reforms heralded a new "era of Jim Crow," App. 46a, overriding page after page of contrary district court findings on the paradigmatic fact question of discriminatory intent. Pet. 22–23. The Fourth Circuit's extraordinary decision merits review for those reasons alone. Respondents' opposition only strengthens that conclusion.

1. Respondents do not contest that North Carolina eliminated voting practices that a majority (and in some cases a *super*-majority) of States *already* disallow. Pet. 21. No matter, say Respondents, because North Carolina eliminated them "simultaneously" and "with racial intent." NAACP 12.

But the first argument proves little (why should it matter whether the practices were eliminated together or piecemeal?), and the second is question-begging, premised on the panel's tendentious re-weighing of the evidence. See *infra* 7–11. Respondents are thus left arguing that North Carolina is racist for adopting reforms that "leave it with a voting system in the national mainstream and, indeed, one more open than many other States." Pet. 20.

Respondents wrongly characterize North Carolina's Voter ID law as "one of the strictest … in the nation." NAACP 12. They conveniently overlook numerous vote-maximizing features of the 2013 voter ID law—such as its *two-year* roll out, the millions spent on voter education and the drive to distribute free IDs, not to mention the expansion of qualifying IDs and the generous "reasonable impediment" exception later enacted in 2015. Pet. 5, 22. Respondents also fail to explain how a similar South Carolina ID law could have been precleared in 2012 under the stricter §5 standard. *Id.* at 5 (citing *South Carolina* v. *United States*, 898 F. Supp. 2d 30, 40 (D.D.C. 2012)).

2. Nor do Respondents identify a single case reversing a district court's finding of no discriminatory intent without also finding discriminatory *effect*. See U.S. 22; NAACP 16–17; *cf.* Pet. 22–23. The closest they come, *NAACP* v. *Gadsden County School Board*, 691 F.2d 978, 981–82 (11th Cir. 1982), is factually far afield (it involved a pre-Civil Rights at-large voting scheme that replaced an all-white primary and diluted African-American votes), and also legally inapposite (it involved a claim of vote dilution, not vote denial).

NAACP 16. Respondents' inability to find an analogous decision underscores how epochal the Fourth Circuit's decision is—and thus deserving of review.

Respondents paper over the lack of discriminatory effect in two ways. First, they repeat the panel's conclusion that North Carolina's reforms "bear more heavily" on African-American voters. U.S. 21; NAACP 15. That is misleading. By "bear more heavily," the panel meant a *hypothetical* burden based on African-Americans' use of some eliminated mechanisms at *slightly* higher rates than whites. See App. 48a–50a. Respondents ignore the district court's *additional* finding—undisturbed by the panel—that African-American access to the ballot is still guaranteed by the "many [remaining] convenient registration and voting mechanisms that … provide African Americans an equal opportunity to participate in the political process." App. 435a; Pet. 9.

Second, Respondents assert that elimination of same-day registration and out-of-precinct voting had a discriminatory effect. NAACP 16; U.S. 6, 21. They fail, however, to acknowledge the undisturbed district court findings squarely rejecting their characterization. Respondents' own expert calculated the difference between African-American and white same-day registration rates to be *less than two-tenths of a percent*, App. 244a–45a, "at best weak evidence that the elimination of [same-day registration] caused African Americans to be affected disproportionately." App. 245a–46a. As for out-of-precinct voting, the district court found most of Respondents' trial witnesses whose votes were disqualified "had made

no effort whatsoever to determine the location of their assigned precinct," App. 258a, and did not credit Respondents' expert testimony that African Americans were disproportionately burdened. App. 321a.

3. Finally, the NAACP defends the panel's discriminatory intent finding as based on undisputed facts rather than determinations of witness credibility. NAACP 17, 32–33. That theory contradicts the record, which teems with credibility assessments. App. 88a, 137a, 159a, 170a, 225a–26a, 237a, 269a, 306a, 313a, 315a–16a, 325a, 361a, 456a, 493a, 517a. Incredibly—in the face of a massive record involving hundreds of witnesses, Pet. 8–9—the panel flatly declared that the record 'permits only one resolution of the factual issue'" of intent. App. 58a (quoting *Pullman-Standard* v. *Swint*, 456 U.S. 273, 292 (1982)). That stunning decision merits review.

B. The Fourth Circuit's Reasoning Would Overturn Numerous State Election Laws.

Respondents also fail to disprove that the factors the panel relied on to find intentional discrimination "could readily be deployed to invalidate the election laws of numerous States." Pet. 24.

1. Respondents concede that the panel relied heavily on the theory that racial "polarization" in voting incentivizes Republican-controlled legislatures to suppress the votes of Democrat-supporting minorities. NAACP 23; U.S. 24; see App. 14a, 30a–40a. And they do not contest that such polarization is nationally widespread. Pet. 25; *Nw. Austin Mun. Util. Dist. No. One* v. *Holder*, 557 U.S. 193, 228 (2009)

(Thomas, J., concurring). The upshot is inescapable: if racial polarization implies discriminatory intent, and if such voting patterns appear everywhere, then courts are to view virtually *every* Republican election reform as presumptively designed to suppress minorities. Pet. 25–26. Since Republicans control the legislatures of 32 States today, and have unified control of the government in 25, the panel's presumption shadows at least half the Nation. The panel's interpretation also contradicts *Shelby County*, which rejected the theory that incentives supposedly created by polarization justify inferring discriminatory motive. See 133 S. Ct. at 2626; *cf. id.* at 2643 (Ginsburg, J. dissenting); Pet. 26.

2. Respondents defend the panel's historical evidence supposedly showing North Carolina's legislators sought to suppress African-American voters, but they scarcely engage Petitioners' arguments that this "evidence" proves nothing. Pet. 27–29. For example, the NAACP asserts that the handful of DOJ §5 letters sent to North Carolina meant something more than determinations that the State had not met its burden to prove non-retrogression. NAACP 30. That is wrong. See generally *Georgia* v. *United States*, 411 U.S. 526 (1973); 28 CFR §51.52. Now that *Shelby County* has decommissioned preclearance, such letters mean little. Both oppositions also cite two §2 cases against North Carolina now before this Court. U.S. 28; NAACP 26. Neither case has been decided, however. One—*Covington* v. *North Carolina*—struck down the State's effort to "*increase*, significantly, the number of majority-black General Assembly districts," and in

any event its implementation has since been stayed by this Court. 316 F.R.D. 117, 134 (M.D.N.C. 2016) (emphasis added), *jurisdictional statement filed* (Nov. 14, 2016) (No. 16-649), *stayed* (Jan. 10, 2017) (No. 16A646).

More importantly, Respondents do not disagree that DOJ's use of §5 objection letters was widespread outside of North Carolina before *Shelby County*, Pet. 27, or that many States (and State subdivisions) have been sued successfully under §2 over the past decades, *id.* at 28. Respondents also do not claim that North Carolina's record in either regard is unusual. If a few §5 letters and §2 lawsuits spread over decades can evidence discriminatory intent today, there is no denying that the panel's reasoning would throw many States' election laws into doubt.

3. As for the photo ID requirement, Respondents reiterate a series of discredited canards. One is that after requesting data on possession of given forms of identification by minority groups, the North Carolina legislature eliminated "only" the forms of ID African Americans disproportionately possess. NAACP 6. Leaving aside the innocent explanation for the request that the district court credited, App. 443a, Respondent's story is false. As the district court found, there is no evidence that the legislature knew that all the forms of ID it eliminated are held by African Americans. App. 456a. There *was* evidence, instead, that legislators were told one form of eliminated identification—student IDs—is held disproportionately by *white* voters. App. 457a.

Respondents have no response, furthermore, to the district court's conclusion—which credited Plaintiffs' own expert—that *no combination* of "acceptable photo IDs … will make these disparities go away." App. 448a. Respondents thus also cannot disagree that reliance on ID-possession disparities "would likely invalidate voter-ID laws in any State where they are enacted, regardless of the assortment of IDs selected." *Id.*

Respondents claim that North Carolina discriminated by *not* imposing an ID requirement for absentee voting, where fraud has been documented but which whites use disproportionately. U.S. 9, 16, 27; NAACP 6, 14. Respondents neglect to inform the Court that North Carolina *did* take measures to improve the security of absentee voting. App. 342a (describing new requirements for absentee voting). Nothing undermines Petitioners' showing that if North Carolina's ID law is suspect, so is virtually every other State's.

4. Unable to cabin the panel's reasoning, Respondents dredge up various theories that supposedly confirm intentional discrimination. Space is too limited to address them all. In each case, however, the best response is simply to look at the underlying facts, which paint a strikingly different picture.

One example is Respondents' repeated assertion that North Carolina enacted its reforms in the dead of night, without necessary process or debate. U.S. 16 (alleging "unprecedented procedural tactics employed … 'in an attempt to avoid in-depth scrutiny'"); NAACP

6, 8, 13, 21. That would surely surprise Respondents' trial witnesses, "all" of whom "concede[d] that the General Assembly acted within all the procedural rules," App. 462a, and the Senate Minority leader, who declared that "'we've had a good and thorough debate on this bill over two days. … I think we've reviewed the bill in great detail. I think everyone in the room knows what we're doing now.'" App. 463a. Another example is the NAACP's assertion that the panel "relied upon statements in the legislative record regarding the professed purposes of the bill to find that it was, in fact, motivated by race." NAACP 17 (citing App. 58a, 61a, 64a–65a). *None* of the cited passages refers to race; each refers to the neutral goals of fair and orderly elections.

As anticipated, Respondents brandish the vaunted "smoking gun" that supposedly proves discriminatory intent, but only repeat the panel's distortion of the State's language. U.S. 9–10, 16, 27–28; NAACP 8; see Pet. 30–32. The United States fails even to read the State's words in context; they accuse Petitioners of manufacturing a *post hoc* explanation that was "not the reason provided by the State" at the time, U.S. 28, but overlook that the State *did* provide that very reason. App. 717a.

III. The Fourth Circuit's Decision Exacerbates Conflicts Over The Use Of Statistical Evidence.

The panel's reliance on statistical disparities to evidence discriminatory intent—in the absence of discriminatory effects—conflicts with decisions of the Sixth, Seventh, and Ninth Circuits holding that such evidence does not demonstrate discriminatory effects.

Pet. 32–34. It is also in tension with a Fifth Circuit decision indicating that such evidence can demonstrate intent where discriminatory effect is proven. Pet. 34. Here again, Respondents fail to rebut that showing.

Respondents stress that the contrary circuit cases concern discriminatory effects rather than intent. U.S. 28–29; NAACP 35–36. Not only did Petitioners make that clear all along, Pet. 32, but the distinction matters little. Section 2 does not distinguish between "effects" and "intent": it forbids voting laws that "result[ ] in" voting denial or abridgment on account of race. 52 USC §10301. When circuits treat the same evidence in different ways under §2, it is no answer to split hairs between "effect" and "intent." Besides, if statistical disparities do not evidence discriminatory effect, why should they evidence intent to create those (nonexistent) effects?

Lastly, Respondents defend the panel's decision to find discriminatory intent without remand, contrary to decisions of this Court and the Fifth Circuit. The NAACP seeks to distinguish *Veasey* v. *Abbott*, 830 F.3d 216 (5th Cir. 2016), NAACP 31–33, but cannot avoid the fact that in two complex voting rights cases where circuit courts disagreed with district courts' weighing of evidence, one circuit remanded while the other resolved the facts on its own. The United States, in contrast, characterizes this case as *sui generis*, citing the Fourth Circuit's later analysis in *Lee* v. *Virginia State Board of Elections*, 843 F.3d 592 (4th Cir. 2016); U.S. 29, but its distinctions are largely contradicted by the record in this case. The panel

plainly pushed its resolution of factual questions beyond the bounds of appellate review.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

THOMAS A. FARR
PHILIP J. STRACH
MICHAEL D. MCKNIGHT
Ogletree Deakins Nash Smoak & Stewart, PC
4208 Six Forks Road
Raleigh, NC 27609

S. KYLE DUNCAN
Counsel of Record
GENE C. SCHAERR
STEPHEN S. SCHWARTZ
Schaerr | Duncan LLP
1717 K St. NW, Suite 900
Washington, DC 20006
(202) 714-9492
KDuncan@Schaerr-Duncan.com

Counsel for Petitioners