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

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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

Plaintiffs-Appellants

JOHN DOE, *et al.*,

Plaintiffs

v.

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

Defendants-Appellees

(*See inside cover for continuation of caption*)

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

REPLY BRIEF FOR THE UNITED STATES AS APPELLANT

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

Plaintiffs-Appellants

CHARLES M. GRAY,

Intervenor/Plaintiff

LOUIS M. DUKE, *et al.*,

Plaintiffs-Intervenors-Appellants

v.

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

Defendants-Appellees

———————

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

Plaintiffs-Appellants

LOUIS M. DUKE, *et al.*,

Intervenors/Plaintiffs

v.

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

Defendants-Appellees

———————

UNITED STATES OF AMERICA,

Plaintiff-Appellant

v.

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

Defendants-Appellees

CHRISTINA KELLEY GALLEGOS-MERRILL, *et al.*,

Intervenors/Defendants

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INTRODUCTION

The United States' opening brief identifies multiple legal errors in the district court's analysis of the United States' claim under Section 2 of the Voting Rights Act (VRA), 52 U.S.C. 10301. Rather than engage the United States' arguments—many of which this Court had already endorsed in the prior appeal—defendants' response reiterates the analytical mistakes that infected the district court's finding of no Section 2 liability. As defendants would have it, the "essence" of the inquiry under the results prong of Section 2 is not how House Bill

589's (HB 589) restrictions "interact[] with social and historical conditions," *Thornburg* v. *Gingles*, 478 U.S. 30, 47 (1986). Nor, according to defendants, does that inquiry require a "searching practical evaluation of the past and present" political reality for African-American voters, *id.* at 45 (citation and internal quotation marks omitted). Instead, in defendants' view, the results test is essentially a one-element question: what happened to aggregate turnout? But that is not the law.

Likewise, defendants recite the district court's finding regarding discriminatory intent without coming to terms with this Court's prior guidance or meaningfully addressing the legal errors identified in the United States' opening brief. As the United States explained, the district court erred in ignoring a critical component of the United States' discriminatory intent claim—that the legislature was acting against a backdrop of a troubling blend of politics and race. The district court also failed to properly focus on the relevant question at issue—whether a discriminatory purpose was one of the legislature's *actual* motives in dramatically transforming HB 589 and rushing to pass it after *Shelby County* v. *Holder*, 133 S. Ct. 2612 (2013) (*Shelby County*), was decided. Defendants largely fail to respond to this critical omission, adopting wholesale the district court's flawed approach.

As explained in the United States' opening brief, the district court's analysis of the Section 2 claim is tainted by legal error, and thus, this Court should reverse.

ARGUMENT

I

DEFENDANTS CANNOT JUSTIFY THE DISTRICT COURT'S FAILURE TO PROPERLY APPLY THE SECTION 2 RESULTS TEST

A. The District Court Gave Impermissible Weight To 2014 Turnout

Section 2 of the Voting Rights Act requires courts to take account of "the totality of circumstances," 52 U.S.C. 10301(b), to determine whether a challenged practice "interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters" to participate in the political process. *Thornburg* v. *Gingles*, 478 U.S. 30, 47 (1986). In analyzing the political reality for black voters in North Carolina under the cutbacks that HB 589 ushered in, the district court gave impermissible weight to a single piece of evidence—2014 aggregate turnout. Although this is one of the central legal errors in the district court's analysis, defendants' direct response to it is relegated to a footnote. See Resp. Br. 42 n.13. Claiming that "plaintiffs ignore that the burden of proof is on them," Resp. Br. 42 n.13, defendants repeat the district court's error in assuming that depressed aggregate turnout is the only viable way to prove an unlawful result under Section 2. The United States neither claimed that aggregate minority turnout would fall in 2014 as a result of HB 589's restrictions, nor did it need to make such a showing. See U.S. Br. 34-46. Neither defendants nor the district court recognize that minority turnout can increase—particularly as

compared to a single prior election cycle—notwithstanding the imposition of voting restrictions that disparately and materially burden minority voters as compared with white voters. That is legal error.

In asking this Court to affirm the legal reasoning of the district court, defendants ask this Court to create new law holding that increased minority turnout in a single election cycle is an absolute bar to Section 2 results liability. Thus, defendants claim that "turnout in the 2014 election" amounts to "undisputed evidence" that HB 589's elimination of same-day registration (SDR) and out-of precinct (OOP) voting, and its cutbacks to early voting, "had no adverse effect on the ability of African Americans to participate in voting."[1] Resp. Br. 42. Such a legal conclusion flies in the face of reality. African-American voters who cast an OOP ballot that was not counted in 2014 as a result of HB 589 suffered an "adverse effect." Their votes were not counted. So too did every African American who sought to register and vote after the 25-day registration cut-off. Such citizens, who could have otherwise used SDR, could not cast a ballot. Likewise for early voting: the African-American voters who are

[1] In their response brief, defendants do not attempt to defend the district court's erroneous description of the testimony of plaintiffs' experts, including Dr. Charles Stewart, as predicting 2014 turnout. That is unsurprising as there is no basis for the district court's conclusion that the 2014 "turnout numbers are contrary to Plaintiffs' experts' predictions." J.A. 24618; see U.S. Br. 45-46.

disproportionately likely to rely on early voting faced increased congestion and had fewer days on which to vote, including the loss of one of two opportunities for souls-to-the-polls Sunday voting. The evidence also showed that HB 589's challenged cutbacks would disproportionately increase burdens further still for African-American voters more likely to vote in presidential years than in midterms. See U.S. Br. 44.

Under the legal reasoning urged by defendants and the district court, none of this harm matters if minority turnout goes up. Indeed, defendants' takeaway principle from the district court's ruling is that "Section 2 of the VRA protects the voting rights of a minority group, not individuals." Resp. Br. 41 n.12. But no Section 2 case stands for such a proposition.[2]

Such single-minded emphasis on aggregate turnout, moreover, would suggest that if enough minority voters successfully navigate the voting restrictions that a state has imposed—where "enough" means that minority turnout does not fall as compared to the last pre-implementation election—there can be no violation of Section 2. See, *e.g.*, Resp. Br. 41 ("[T]he plaintiffs' own evidence demonstrated

[2] The cases defendants cite for this proposition (Resp. Br. 41 n.12) include cases that set limiting principles for vote dilution claims under Section 2 of the Voting Rights Act. *E.g.*, *Bartlett* v. *Strickland*, 556 U.S. 1 (2009). None of the cited vote dilution cases stand for the proposition that the rights protected under Section 2 and relevant here do not belong to individual minority voters.

that well over 90% of African Americans vote in their correct precinct, register within 25 days of an election, and possess acceptable photo identification for voting."); see also J.A. 24621. Contrary to defendants' arguments, no Section 2 vote denial and abridgement case has ever required absolute deterrence of a sufficiently large number of minority voters to depress aggregate turnout. Indeed, such a sweeping rule would flout what this Court has already held—that "what matters for purposes of Section 2 is not how many minority voters are being denied equal electoral opportunities but simply that 'any' minority voter is being denied equal electoral opportunities." *League of Women Voters of N.C.* v. *North Carolina* (*LWV*), 769 F.3d 224, 244 (4th Cir. 2014) (quoting 52 U.S.C. 10301(a)), cert. denied, 135 S. Ct. 1735 (2015).

In arguing to the contrary, defendants also continue to erroneously assume that only outright denial—rather than abridgement of the right to vote—is cognizable under Section 2. Not so. See U.S. Br. 39-40. A law that results in a disparate burden for African Americans is not rendered non-discriminatory simply because of successful and comparatively greater efforts by African-American voters to surmount such obstacles. See, *e.g.*, J.A. 19072-19073 (testimony concerning unprecedented voter mobilization efforts in the African-American community in 2014).

Attempting to defend the district court's analytical approach, defendants also argue that "plaintiffs have taken inconsistent positions on the relevance of turnout," claiming that plaintiffs' emphasis on "increased minority registration and turnout during the 2008 and 2012 election" is somehow inconsistent with faulting the district court for the weight given to the 2014 turnout evidence. Resp. Br. 42. There is no inconsistency. Evidence of increased minority registration and turnout over a number of years—culminating in the historic turnouts for African Americans in 2008 and 2012—is critical evidence for the United States' intent claim, as well as evidence that goes to the tenuousness factor under the results test. Against a backdrop of surging minority political participation and high levels of racially polarized voting, the legislature restricted voting practices disproportionately used by African Americans in an attempt to change the electorate itself—and in particular the electorate in presidential election years. Just as African-American voters experienced a level of political success and power unprecedented in modern North Carolina politics, the majority party in the legislature clamped down on methods of registration and voting disproportionately used by black voters, and did so immediately after being freed from the constraints of Section 5 of the Voting Rights Act. The intent to address a political threat through racial means is the central relevance of the 2008 and 2012 turnout evidence.

Moreover, just as defendants are wrong in asserting that plaintiffs were required to show that HB 589 led to depressed minority turnout in 2014, they are also wrong that plaintiffs were required to show that SDR, OOP voting, or 17 days of early voting "caused the disparate participation rates or increased turnout among African American voters as opposed to non-state factors such as campaign spending and strategy by non-state actors." Resp. Br. 38. Defendants' framing of this issue misses the point.

Plaintiffs are not arguing—and have never argued—that Section 2 affirmatively required North Carolina to adopt OOP voting, SDR, or an early voting period of a particular length in order to foster minority political participation. If a jurisdiction closed polling places located mainly in African-American neighborhoods, and the result was that black voters were required to travel farther than whites in order to vote, no court would require plaintiffs seeking to block such closures under Section 2 to first prove that minority turnout in prior elections was due specifically to the location of the polling place. Nor is such proof required here.

B. The District Court Erred In Applying This Court's Two-Element Framework For Vote Denial And Abridgement Claims

1. Defendants And The District Court Erred In Disregarding This Court's Instructions For What Constitutes A "Discriminatory Burden" Under Section 2

Defendants acknowledge (Resp. Br. 36-37) the two-element framework that this Court has adopted for adjudicating vote denial and abridgment claims under Section 2, but nonetheless begin by arguing that HB 589 would pass muster under a different Section 2 results test that has sharply divided the Seventh Circuit.[3] In

[3] In *Frank* v. *Walker*, a Seventh Circuit panel held that unless a state has made it "needlessly hard" to obtain a photo ID as a prerequisite to voting, "it has not denied anything to any voter." 768 F.3d 744, 753 (emphasis omitted), reh'g en banc denied, 773 F.3d 783 (7th Cir. 2014) (Posner, J., dissenting) (noting five-to-five tie on whether to grant en banc rehearing). The panel in *Frank* likewise expressed skepticism about taking account of the effects of non-governmental discrimination under the totality of circumstances. The facts in this case—and this Court's prior test—differ significantly from *Frank*. First, there was no intent claim in *Frank*. Second, there is no basis in the case law for imposing *Frank*'s heightened "needlessly" burden standard. And third, there is no question that North Carolina has a long history of official discrimination on which plaintiffs rely. *LWV*, 769 F.3d at 242.

Defendants likewise question whether the Senate Factors are relevant to a vote denial and abridgement claim. Resp. Br. 38. This Court has already held that they are. *LWV*, 769 F.3d at 240. That conclusion was correct. See, *e.g.*, *Ohio State Conference of the NAACP* v. *Husted*, 768 F.3d 524, 554-555 (6th Cir.), vacated on other grounds, No. 14-3877, 2014 WL 10384647 (6th Cir. Oct. 1, 2014); *Gonzalez* v. *Arizona*, 677 F.3d 383, 405-406 (9th Cir. 2012) (en banc), aff'd on other grounds *sub nom. Arizona* v. *Inter Tribal Council of Ariz., Inc.*, 133 S. Ct. 2247 (2013); *Ortiz* v. *City of Phila. Office of the City Comm'rs Voter Registration Div.*, 28 F.3d 306, 308-310 (3d Cir. 1994); *Mississippi State Chapter, Operation PUSH, Inc.* v. *Mabus*, 932 F.2d 400, 405 (5th Cir. 1991).

any event, like the district court, defendants ignore the corrective instructions that this Court previously gave for applying the controlling framework.

Under the test required in this Circuit, the first element of a Section 2 vote denial and abridgment claim is that "the challenged standard, practice, or procedure must impose a discriminatory burden" on minority voters as compared to the rest of the electorate. *LWV*, 769 F.3d at 240 (citation and internal quotation marks omitted). As this Court found in the prior appeal, plaintiffs can make the required showing by proving that a challenged voting restriction "disproportionately impact[s] minority voters." *Id*. at 245. Such a disproportionate impact takes account both of the likelihood that minority voters are affected and of their relative ability to overcome the burdens that the law imposes.

To start with, defendants double down on the legal error committed by the district court when it again "minimized Plaintiffs' claim as to out-of-precinct voting" based on the number of voters affected. *LWV*, 769 F.3d at 244. Defendants claim that "because over 99% of both black and white voters cast ballots other than OOP ballots, the elimination of OOP voting had no disproportionate impact on African American voters as a group as compared to white voters as a group." Resp. Br. 13 n.4. The fact that provisional ballots are a fail-safe used by a relatively small number of voters (thousands among millions in

statewide elections in North Carolina) does not immunize rules regarding provisional balloting from a Section 2 challenge. Defendants do not and cannot dispute that in multiple recent elections, African-American voters were more than twice as likely to rely on OOP voting to have their votes counted.

Defendants also claim that plaintiffs could not have satisfied this discriminatory burden element because all plaintiffs have shown is disparate use. Plaintiffs are not seeking—and have never sought—to establish a Section 2 violation "based solely on disproportionate use of SDR," early voting, or OOP voting by minority voters. Resp. Br. 10 (emphasis omitted). What plaintiffs have documented repeatedly on this record is not only that minority voters disproportionately used these mechanisms, but also that such voters are disproportionately burdened by the elimination or restriction of these measures.

The elimination of SDR does not result in a discriminatory burden on African-American voters *solely* because of the undisputed evidence showing that in every federal general election from 2002 to 2014 (except 2006) African Americans in North Carolina were more likely to register after the 25-day registration cut-off—before, during and after the time that SDR was available. See

U.S. Br. 41; J.A. 19605-19608.[4] Critically, SDR offered voters with lower literacy the ability to register and vote even if they had failed to correctly submit and fill out a registration application by the voter registration deadline. And "according to North Carolina's own educational statistics * * * there are many more African-American low-literacy voters than there are white low-literacy voters, [by] a ratio of almost three to one." J.A. 19339-19340; see also J.A. 22170-22171. The undisputed evidence from the November 2014 election concretely showed that African Americans were overrepresented among would-be registrants whose non-SDR voter registration applications were rejected because of literacy-related errors. U.S. Br. 55 n.10. This evidence of a discriminatory burden thus goes far beyond mere disparate use.

As to early voting, plaintiffs presented extensive evidence showing how the elimination of seven days of early voting specifically impacts low-income black voters. Such voters are more likely to have inflexible work schedules, and also to

[4] Defendants' characterization of the small number of SDR registrants who do not pass mail verification as "illegal voter[s]" whose votes have been "illegally counted" is contrary to the record and applicable state law. Resp. Br. 11. Defendants acknowledged at trial that failing mail verification does not mean that a registrant was ineligible. J.A. 20544-20547. In making this illegal voter characterization now, defendants ignore the separate statutory requirement that SDR applicants present in-person documentary proof of residence to an election official at the polling place. J.A. 24792 (citing 2007 N.C. Sess. Law 253, § 1 (codified at N.C. Gen. Stat. § 163-82.6A (2008))).

have relied on opportunities to vote including through souls-to-the-polls campaigns that made voting more accessible for those who would otherwise have been intimidated by the experience. J.A. 22161-22163; 22218-22219; see also J.A. 19728-19736. In addition, plaintiffs presented quantitative evidence regarding the likelihood of increased lines and congestion during the constricted early voting period, particularly in higher turnout presidential election years. J.A. 22219-22222. These burdens would be disproportionately placed on African-American voters so long as they continue to vote during the early voting period at a rate higher than whites, as they did even under HB 589's cutbacks in November 2014. J.A. 22217.

The same is true with respect to the elimination of OOP voting. For example, plaintiffs showed not just disparate use, but also that the travel burden would fall more heavily on black voters than on white voters given racially disparate rates of access to transportation and the distances that many OOP voters would be required to travel in order to get to their correct precinct. J.A. 20163-20172 (noting that OOP voters in Wake and Mecklenberg Counties would be required to travel 6.8 and 6.6 miles on average, respectively, to reach their correct precinct).

These examples, which are hardly exhaustive, demonstrate that plaintiffs' showing on the first element of this Court's test far exceeded defendants'

characterization of it as "disparate use alone." Resp. Br. 38. Defendants are wrong in arguing that, "by definition," this mountain of evidence "cannot by itself constitute a discriminatory burden" simply because aggregate turnout went up in 2014. Resp. Br. 39. Indeed, the only conclusion supported by the record as a whole is that plaintiffs have satisfied the required showing for the discriminatory burden element.

2. Defendants, Like The District Court, Urge Adoption of An Unwarranted Causation Standard For Proving That A Discriminatory Burden Is In Part Caused By Or Linked To The Social And Historical Legacy Of Race Discrimination

The second step of this Court's test for vote denial and abridgment claims asks whether the burdens experienced by minority voters are "in part caused by or linked to social and historical conditions that have [produced] or currently produce discrimination against members of the protected class." *LWV*, 769 F.3d at 245 (citation and internal quotation marks omitted). Defendants mischaracterize this element as requiring plaintiffs to show that there is "a *connection* between the socioeconomic disparities and the disparate use of the election practices." Resp. Br. 40. That is not the standard. What is required is to link the "burden" that the challenged law imposes to social and historical conditions that have produced or currently produce discrimination. The challenged practice here is HB 589's elimination and restriction of particular voting and registration methods. Thus, plaintiffs were not required to prove that the socioeconomic effects of historical

discrimination affirmatively caused black voters to utilize early voting, SDR, or OOP voting. Instead, this element required plaintiffs to establish a link between the harm to African-American voters caused by *eliminating* these procedures and the legacy of race discrimination.

Plaintiffs provided an abundance of such evidence and satisfied this element. The evidence presented shows that SDR is a particularly important fail-safe for African-American voters because of factors including higher residential mobility and racial disparities in literacy. The evidence presented at trial showed that racial disparities in educational achievement contribute to a disproportionate likelihood that African Americans will submit a voter registration application after the 25-day deadline for voter registration, J.A. 22154-22155, and that black voters were disproportionately likely to face delays and problems registering without SDR because of submitting a voter registration form with missing information, an issue that would not occur with the assisted registration process used during SDR. J.A. 22210-22212.

The same is true with respect to early voting. Voters of lower socioeconomic status—who are disproportionately African American as a result of North Carolina's history of discrimination—are more likely to have inflexible work hours and transportation difficulties. Because of such difficulties, the fewer the days of early voting, the more likely that such voters will have obligations or

face obstacles on the remaining days such that participation is effectively impossible. J.A. 22218. Witnesses at trial who do get-out-the-vote work with historically disenfranchised minority communities testified that they are less likely to be able to serve as many people during the compressed early voting period. J.A. 22218-22219.

And so too with respect to OOP voting: the burden that black voters suffer when, under the rules established in HB 589, they are not allowed to cast an OOP ballot, is connected to the legacy of race discrimination. This is so given that black voters presenting at an unassigned precinct are more likely than white voters to have a harder time traveling to another voting location because of a lack of transportation and job inflexibility, factors that are linked to historical discrimination.[5] J.A. 22228-22229 (collecting testimony from individual voters regarding the impact of socioeconomic factors such as residential instability, limited vehicle access, and employment inflexibility on their ability to appear on Election Day at their assigned precinct).

[5] There is no basis in case law for defendants' assertion that, under Senate Factor 5, plaintiffs were required to prove that each African-American voter who attempted to cast a ballot in his non-assigned precinct is of lower socioeconomic status. Resp. Br. 3. Such a finely grained evidentiary standard is unworkable and unnecessary. *League of United Latin Am. Citizens, Council No. 4434* v. *Clements*, 999 F.2d 831, 860 (5th Cir. 1993) (en banc), cert. denied, 510 U.S. 1071 (1994).

It is simply not true that plaintiffs' showing on this element was limited to "juxtaposing disparate use statistics with evidence of socioeconomic disparities." Resp. Br. 43. If that were so, plaintiffs could have moved for summary judgment on the basis of uncontested census data and election statistics. As the extensive record in this case demonstrates, that is not the case that plaintiffs presented.

Nor is it true that plaintiffs' theory of proof in this case will mean that every voting rule will fall simply because of a bare showing of disparate use combined with lower socioeconomic status for racial minorities. The totality of circumstances demands a local link to discrimination, and considers, among other factors, social and political context and potential for discriminatory pretext. Contrary to defendants' example (Resp. Br. 43-44), an existing statute that requires counting only the provisional ballots of registered voters is of an entirely different character with respect to the tenuousness factor than North Carolina's decision to repeal OOP voting as part of an omnibus assault on methods of voting and registration disproportionately used by black voters, and for which there was no contemporaneously asserted rationale. Requiring citizens to register in order to vote advances decidedly non-tenuous goals. On this record, in which plaintiffs have presented strong evidence of multiple factors under *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), the same cannot be said of the legislature's decision to roll back OOP voting as part of

HB 589. See *Terrazas* v. *Clements*, 581 F. Supp. 1329, 1345 n.24 (N.D. Tex. 1984) (three-judge panel) ("The principal probative weight of a tenuous state policy is its propensity to show pretext.").

In sum, and as with the first element, the only conclusion supported by application of the correct legal standard to the record as a whole is that plaintiffs have satisfied the required showing of linkage between the burdens that HB 589's restrictions impose on black voters and historical and social conditions relating to discrimination.

II

THE DISTRICT COURT'S FINDINGS REGARDING DISCRIMINATORY INTENT CANNOT STAND BECAUSE THEY ARE INFECTED BY SEVERAL ERRORS OF LAW

Defendants continue to repeat the errors that infected the whole of the district court's discriminatory intent analysis, without engaging with this Court's prior guidance or the United States' arguments identifying the legal errors in that analysis. Significantly, defendants fail to respond to a critical omission by the district court—that it ignored the central thesis of the United States' discriminatory intent claim. That premise was that given the strong correlation between race and politics in North Carolina, when the African Americans of the presidential electorate began showing signs of political success after a long history of voting suppression, the legislative majority adopted the challenged provisions of HB 589

in part because it felt its continued control of the legislature was at risk. See U.S. Br. 11-12, 14-16.

The district court also erred in focusing on possible explanations to justify the challenged provisions of HB 589 instead of addressing the question at issue—whether a discriminatory purpose was one of the legislature's *actual* motivations in transforming HB 589 right after *Shelby County* to include the provisions challenged here and rushing to enact them. Defendants, likewise, fail to conduct the correct inquiry. Instead, defendants rely on the district court's findings that are infected with legal error and dismiss relevant evidence by simply characterizing it as irrelevant. But as the district court's "findings are infirm because of an erroneous view of the law," they cannot stand. *Pullman-Standard* v. *Swint*, 456 U.S. 273, 292 (1982).

A. The District Court Erred In Ignoring The Context Of The Legislature's Actions Within A Troubling Blend Of Race And Politics, And Defendants Fail To Dispute This Error

As the United States explained (U.S. Br. 13-19), the legislative actions at issue must be analyzed in the context of the high levels of racially polarized voting in North Carolina, where many elections are sensitive to even slight shifts in voting. But the district court's analysis improperly ignored this significant component of the United States' discriminatory intent claim. In their response, however, defendants conspicuously do not dispute this critical omission by the

district court. Nor do they dispute the applicability of the Supreme Court's guidance in *League of United Latin Am. Citizens* v. *Perry* (*LULAC*), 548 U.S. 399 (2006), to this case.

Under the Supreme Court's guidance in *LULAC*, the evidence here showed that race was used to achieve partisan goals in a way that "[bore] the mark of intentional discrimination," and defendants failed to rebut this inference of discrimination. 548 U.S. at 440; cf. *Miller* v. *Johnson*, 515 U.S. 900, 914 (1995) (noting that the Constitution prohibits the "use of race as a proxy"). Specifically, as discussed in the United States' opening brief (at 3-5, 15-16, 18), the evidence demonstrated that when African Americans in North Carolina began showing signs of increased political participation after a long history of discrimination, the legislative majority viewed this as a political threat to its control of the legislature and reacted by enacting HB 589 "[i]mmediately after *Shelby County*." *LWV*, 769 F.3d at 242.

The district court, however, erred in failing to consider this backdrop of a "troubling blend of politics and race." *LULAC*, 548 U.S. at 442. This context explained the legislature's actions in enacting the challenged provisions of HB 589, and showed that, as in *LULAC*, "[i]n essence the State took away the [minority group members'] opportunity because [they] were about to exercise it." 548 U.S. at 440. As the Supreme Court recognized, such evidence "bears the mark

of intentional discrimination." *Ibid.* But defendants ignore this legal error by treating race and politics as mutually exclusive. They highlight only the partisan nature of the legislature's actions and completely mischaracterize plaintiffs' claim as arguing that "intentional discrimination can be established merely from evidence of disproportionate use of the [challenged] practices," which plaintiffs have never argued. Resp. Br. 6; see also J.A. 24862.

Instead of addressing the court's legal error, defendants seek to justify the legislature's adoption of the challenged provisions by comparing the district court's decision here with the Fifth Circuit's vacated opinion in *Veasey* v. *Abbott*, 796 F.3d 487 (5th Cir. 2015), reh'g en banc granted, 815 F.3d 958 (5th Cir. 2016). Defendants point to the court's observation in *Veasey* that Texas's "stated purpose in passing" its voter identification (ID) law was "centered on protection of the sanctity of voting, avoiding voter fraud, and promoting public confidence in the voting process." *Veasey*, 796 F.3d at 499. They suggest (Resp. Br. 52-55) that these same rationales rebut the presence of a discriminatory purpose here. But defendants fail to point to any evidence in this case supporting the assertion that the legislature, in fact, had these purported purposes. Nor do defendants come to terms with *this* Court's guidance in *this* case explaining that nothing in the district court's review of an extensive record at the preliminary injunction stage suggests

that "North Carolina['s] assert[ed] goals of electoral integrity and fraud prevention" are "anything other than merely imaginable."[6] *LWV*, 769 F.3d at 246.

B. The Question At Issue In A Discriminatory Intent Claim Is Actual Motive, Not A Legislature's Authority To Enact A Law With A Rational Basis, And The District Court Erred In Failing To Meaningfully Analyze The Former

Defendants assert (Resp. Br. 35 n.9) that, as a general rule, a statute is presumed valid and must be upheld if it is rationally related to a legitimate state interest. In seeking to justify HB 589, defendants direct their arguments at affirming the legitimacy of the challenged practices in the abstract. See Resp. Br. 45, 49-52, 54. But defendants' focus on rationalizations for the challenged provisions misses the point.

No one disputes that states are entitled to adopt voter registration requirements and voting practices to protect the integrity and reliability of the electoral process. The discriminatory intent claim at issue here, however, challenges a voting bill based on the *reasons* that the specific bill was adopted—*i.e.*, that one of the reasons was a discriminatory purpose. Thus, as the United States explained in its opening brief (at 19-20), the relevant inquiry is of the actual motive in adopting that particular bill. The district court erred in failing to

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[6] In applying the *Veasey* court's treatment of evidence of historical discrimination here, defendants also ignore this Court's prior guidance requiring more adequate consideration of "North Carolina's history of voting discrimination." *LWV*, 769 F.3d at 242; see Resp. Br. 53.

properly conduct this inquiry and, instead, engaging in a "rational-basis" type review of possible motivations. See *Village of Arlington Heights* v. *Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 265-266 (1977) (recognizing general judicial deference to legislative decisions absent a showing of irrationality, except "[w]hen there is a proof that a discriminatory purpose has been a motivating factor in the [legislature's] decision").

By adopting the district court's flawed approach, defendants rely on the district court's findings that failed to properly account for key evidence. This includes the timing of the "full bill" immediately after *Shelby County*, the proactive role legislators played in seeking racial data related to the challenged practices, the unexplained suspect nature of some of the specific legislative choices, and expert testimony of discriminatory intent and historical voting discrimination.

1. Analysis Of The Intent Evidence, Including The Enactment Process, Must Account For The Transformation And Timing Of HB 589 After Shelby County

In the prior appeal, this Court observed that "[i]mmediately after *Shelby County*," the legislature "rushed to pass House Bill 589, the 'full bill' legislative leadership likely knew it could not have gotten past federal preclearance in the pre-*Shelby County* era." *LWV*, 769 F.3d at 242. This Court also explained that "[i]t appear[ed] that Section 5 * * * was the only reason House Bill 589's sponsors did not reveal the 'full bill' to the public until after the *Shelby County* decision

came down." *Id.* at 239. Despite this Court's prior decision, defendants nonetheless assert (Resp. Br. 4) that the fact that HB 589 was changed after *Shelby County* "is a thin reed" on which to base a discriminatory intent claim. Defendants point to the district court's finding that it was "reasonable" to delay enactment of HB 589 until *Shelby County* clarified the legislature's obligations under Section 5. Resp. Br. 49.

Defendants' assertions are not only inconsistent with this Court's prior decision but are also unsupported by the record. They are irrelevant to the inquiry of actual motive. The district court's finding that "[i]t would not have been unreasonable" for the legislature to wait to pass the "full bill" until *Shelby County* because of the administrative and financial costs of seeking preclearance answers the wrong question. J.A. 24885-24886. Defendants point to no evidence showing that this was *in fact* the reason for the legislature's actions rather than simply one of an endless list of *possible* motivations that a legislature could assert to immunize itself from discriminatory purpose challenges.

A proper analysis into actual motivations must account for the timing and transformation of HB 589 from primarily a voter identification bill pre-*Shelby County* to an omnibus elections bill that eliminated or cut back on voting measures (including incremental forms of identification) that were disproportionately used by African Americans. And the district court's rationalization for the legislature's

actions post-*Shelby County* fails to explain why the legislature transformed the bill in the way that it did or why it did not "reveal the 'full bill,'" until *Shelby County* and then "rushed" to pass it. *LWV*, 769 F.3d at 239, 242; see also J.A. 1291; 1831-1832; 20378-20379.

Defendants also ignore the overarching context of the timing and transformation of the bill after *Shelby County* in asserting that the legislative process to enact HB 589 was not "shortchanged or unusual." Resp. Br. 50. For example, even though election bills are typically first sent to a committee with the relevant substantive background, the "full bill," as described by Senator Tom Apodaca, was sent to the committee he chaired—the Senate Rules Committee, which was known for "quickly passing politically sensitive bills." J.A. 182-183; see also J.A. 358; 1831; 4117-4118; 20378. And contrary to defendants' suggestion, that one senior legislator stated that "we've had a good and thorough debate on this bill over two days" while seeking to change the minds of his colleagues, J.A. 17060, or that some purportedly ameliorative amendments were accepted, does not show that the legislature followed all of its typical rules and practices. Resp. Br. 50-51. There were procedural irregularities in the Senate's review and adoption of the transformed version of HB 589 post-*Shelby County*.

And the post-*Shelby County* legislative process in the House was similarly rushed and "atypical." J.A. 17351.[7]

2. That Key Legislators And Staff Proactively Sought Racial Data Regarding The Challenged Provisions And Waited To Enact Those Provisions Until After Shelby County *Is Clearly Relevant To Intent*

By negating the significance of the role that legislators and staff played in actively seeking racial data related to the challenged provisions, defendants rely on the district court's flawed approach of analyzing the evidence in isolation to argue that the challenged provisions in HB 589 were enacted in spite of their disparate impact, instead of because of it. Defendants' argument fails for the same reasons given in the United States' opening brief (at 25-28). Defendants' piecemeal analysis fails to consider the overarching context and timing in which the legislature actively sought racial data.

Defendants seek to downplay the significance of the legislative requests for racial data regarding the challenged provisions by describing them "simply" as "a few members of the General Assembly" inquiring "of the [State Board of

[7] In the Senate, for example, members of the Rules Committee were not provided a copy of the "full bill" until after 9 p.m. the night before committee consideration. J.A. 20379-20380. This was "quite irregular" because the changes to HB 589 were not small changes on a previously reviewed issue—they were a "dramatic rewrite" of the bill. J.A. 20380. Likewise, the House adopted the transformed "full bill" within "several hours," without the usual form of conference process given to bills with such substantial changes. J.A. 17347; see also J.A. 306-307; 17353-17354.

Elections] for demographic information on voters who used SDR or voted by provisional ballots." Resp. Br. 46. As explained in our opening brief (at 26-28), however, these requests were probative of the legislature's discriminatory purpose because the racial data sought by the legislature were not used, for example, to mitigate the disparate impact of a proposed voting change. Instead, HB 589 remained primarily a voter identification law until *Shelby County*, when the "full bill" suddenly included complete repeals of same-day registration and out-of-precinct voting, which were related to the racial data requested and linked to efforts to increase African-American turnout. See, *e.g.*, J.A. 73-75; 17135; 19738; 24867. Moreover, these "few members" were in fact key legislative proponents and staff who proactively sought this particular racial data.

After refusing to recognize the significance of the legislature's request for racial data, defendants point to the fact that Senator Joshua Stein presented evidence of African Americans' disparate use of early voting and SDR, but not of OOP voting, during the legislative debates to argue that the legislature acted despite evidence of these disparities, not because of it. Resp. Br. 46. This argument fails because the narrow focus on only Senator Stein fails to account for the legislature's request for racial data on SDR and provisional ballots before HB 589 had been presented for debate. Moreover, defendants' reference to the lack of OOP voting data (Resp. Br. 46) ignores the fact that the legislature already knew of

African Americans' disproportionate use of OOP voting based on a 2005 legislative finding. See J.A. 24867-24868.

Defendants also attempt to undermine the probative value of evidence showing disproportionately higher rates of African-American voters who could not be matched with DMV-issued IDs, with a discourse on the reliability and accuracy of the matching analyses. See Resp. Br. 16-23, 47; see also J.A. 24869-24870. Defendants criticize the matching analyses conducted by plaintiffs' expert Dr. Stewart and the State Board of Elections (SBOE), whose April 2013 report was presented to legislators. Resp. Br. 19-24, 47. By challenging the list of unmatched voters as inflated, defendants assert that legislators' knowledge of these racial disparities "cannot constitute evidence of discriminatory intent." Resp. Br. 47. This assertion is incorrect for two reasons.

First, regardless of the accuracy of SBOE's analysis, it is clearly relevant evidence of intent because key legislators were intimately involved in crafting the criteria SBOE used in its April 2013 report. J.A. 22193-22194. The legislators' efforts to refine this criteria decreased the magnitude of unmatched voters who were estimated to lack qualifying identification. J.A. 22193-22194; 24401. This indicates not only that legislators believed that the analysis was sufficiently reliable but also that they had a particular interest in or purpose for it. Indeed, in approving the final matching report, counsel to the Speaker of the House announced that the

analysis "hit the nail on the head." J.A. 4836. Second, as the district court found, the racial disparities challenged by defendants—*i.e.*, that African-American voters were more likely to lack HB 589-qualifying IDs—were confirmed by other evidence, including Dr. Stewart's matching analysis.[8] See J.A. 24584-24585; see also J.A. 24401-24402.

In sum, the nature and circumstances of the legislature's requests for racial data clearly provide probative evidence that it adopted the challenged provisions in HB 589 *because* of their disparate impact, not *in spite* of it.

3. Use Of Expert Testimony To Shed Light On Discriminatory Intent Of A Decision Of A Particular Jurisdiction Is Consistent With The Purposes Of Rule 702

As explained in the United States' opening brief (at 30-31), the district court improperly discounted historians' expert testimony concerning discriminatory purpose and the history of voting discrimination, and defendants fail to explain otherwise. Instead, defendants simply recite (Resp. Br. 48) the district court's

[8] The database matching methodology that Dr. Stewart used is consistent with scientific practice in the field of political science and has been relied upon in other voting rights cases. See, *e.g.*, J.A. 24414-24417; *Veasey* v. *Perry*, 71 F. Supp. 3d 627, 659-660 (S.D. Tex. 2014), aff'd in relevant part *sub nom. Veasey* v. *Abbott*, *supra*. Defendants' criticisms (Resp. Br. 19-24) of Dr. Stewart's analysis are replete with inaccuracies. Compare, *e.g.*, Resp. Br. 24 (false positives), and Resp. Br. 17-18 (databases compared), with, *e.g.*, J.A. 24576, and J.A. 4408-4409. And these criticisms do not undermine the reliability of his methodology or cast doubt on his conclusion that was adopted by the district court, which confirmed the racial disparities found by the SBOE. See J.A. 24418-24427; 24585-24586.

rejection of expert testimony by Drs. Steven Lawson, Morgan Kousser, and Allan Lichtman as an attempt to decide the ultimate issue for the court. Defendants also *incorrectly* imply that the district court found these experts' reports not credible. Compare Resp. Br. 48, with J.A. 24876 (discounting expert testimony by Drs. Kousser and Lawson based on determinations unrelated to credibility).

Use of such experts in voting cases, however, is routine and consistent with the purposes of Federal Rule of Evidence 702 to "help the trier of fact to understand the evidence." Fed. R. Evid. 702(a); see U.S. Br. 30. Their expertise in analyzing legislative and historical records helps shed light on the discriminatory intent of a decision by a particular jurisdiction, which may have a complicated political and historical background. The district court, however, erred in improperly disregarding their testimony.

CONCLUSION

This Court should reverse the district court's judgment dismissing the United States' claims under Section 2 of the Voting Rights Act.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify, pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), that the attached REPLY BRIEF FOR THE UNITED STATES AS APPELLANT:

(1) contains 6,928 words; and

(2) complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Word 2007, in 14-point Times New Roman font.

s/ *Christine H. Ku*
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Attorney

Dated: June 14, 2016

CERTIFICATE OF SERVICE

I hereby certify that on June 14, 2016, I electronically filed the foregoing REPLY BRIEF FOR THE UNITED STATES AS APPELLANT with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

I further certify that on June 15, 2016, I will cause four paper copies of this brief to be sent by Federal Express overnight to the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit.

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