No. _____

IN THE

Supreme Court of the United States

STATE OF NORTH CAROLINA, *ET AL.*,

Applicants,

v.

LEAGUE OF WOMEN VOTERS OF NORTH CAROLINA, *ET AL.*,

Respondents.

and

LOUIS M. DUKE, *ET AL.*,

Intervenors/Respondents

ON APPLICATION FOR STAY FROM THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

RESPONSE TO APPLICANTS' EMERGENCY MOTION FOR RECALL AND STAY OF MANDATE

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INTRODUCTION

"[N]o one doubts" that "voting discrimination still exists," *Shelby County, Alabama v. Holder*, 133 S. Ct. 2612, 2619 (2013). The very day that this Court issued its decision in *Shelby County*, North Carolina initiated dramatic changes to its election laws across a wide range of areas, including registration, ballot counting procedures, and early voting, as well as rules on poll observers, and voter identification requirements.[1] In so doing, the State surgically eliminated the precise forms of registration and voting that had enabled significant expansion of African-Americans civic participation in North Carolina over the previous decade.

In a detailed decision affirming in part and reversing in part the rulings of the district court, the Court of Appeals for the Fourth Circuit held that, although a preliminary injunction was unwarranted with respect to five provisions challenged by Plaintiffs, North Carolina must preserve for the 2014 general election two practices that had been in place for North Carolina's last three general elections. Since 2006, lawfully-registered North Carolina voters who voted at an incorrect precinct within their same county of residence have had their vote counted under a provision of state law requiring the partial counting of lawful ballots regardless of precinct through out-of-precinct voting ("OOP voting"). Since 2008, North Carolina voters have been able to register and vote simultaneously during the State's early voting period using same-day registration ("SDR"). The Fourth Circuit, like the district court, found "unrebutted" evidence indicating that African-American voters use both of these practices at higher rates than white voters, and would be "more

[1] The state law is included in the Appendix.

heavily" burdened by their elimination. Opinon ("Op.") at 46, LWV v. State of N.C., No. 14-1845 (4th Cir. Oct. 1, 2014), ECF No. 80). After carefully weighing the evidence and considering the State's justifications for eliminating these practices, the Fourth Circuit determined that the irreparable harm suffered by voters whose rights would be abridged by the elimination of these practices during the 2014 general election far outweighs any administrative burdens on the State from simply preserving the rules allowing SDR and OOP voting.

This Court should not stay the limited prohibitory injunction entered by the Fourth Circuit. Far from the "massive and unprecedented last-minute change" alleged by North Carolina in its application, *see* Emergency Application ("Appl.") at 2, the Fourth Circuit's order merely maintains two narrow, well-established election practices at times and locations in which polling places will already be open, pending full and final resolution of these cases. Preserving these existing fail-safe provisions, on which tens of thousands of voters have relied for years to ensure their vote will count, will not cause confusion or risk "the possibility that qualified voters might be turned away from the polls". *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (per curiam). Indeed, voters who need not rely on SDR and OOP voting will be entirely unaffected by the injunction, which will merely "act[] as a safety net for voters confused about the effect of House Bill 589 on their right to vote while this litigation proceeds." Op. at 55, fn. 8. It also bears emphasis that in the four days since the Fourth Circuit's decision, North Carolina county election directors have en masse reported that they can implement these two practices without harm to voters. The

Director of Scotland County's elections said, for example, that the injunction will cause "no problems," because "it just takes us back to the procedures we used in 2013." The Director of the largest county – Mecklenburg – stated that there is time to re-institute these practices. North Carolina could not present to the Fourth Circuit, and it has not presented to this Court, any valid justification for eliminating these safeguards during the 2014 general election.

"[A]ny racial discrimination in voting is too much." *Shelby County*, 133 S. Ct. at 2631. The injunction entered by the Fourth Circuit – while narrowly tailored to maintain two pre-existing election practices – is faithful to that admonition. The Fourth Circuit properly rejected an effort by Defendants to "sacrific[e] voter enfranchisement at the altar of bureaucratic (in)efficiency and (under-)resourcing." Op. at 45. Defendants have not met the exceedingly high standard in this Court for securing a stay of the Fourth Circuit's order, and the Court therefore should deny Defendants' application.

STATEMENT OF THE CASE

A. North Carolina's Expansion in Voter Participation

In 1992, North Carolina ranked 46th in the country in voter participation, a number that had crawled to 37th by the 2000 election. *See* JA1196. The State undertook several measures to address the lack of voter participation. First, in 2001, the North Carolina General Assembly passed legislation allowing for 17 days of no-excuse early voting, which was meant to facilitate access to the electoral process for more voters. N.C. Sess. Law 2001-319. The following year, the General

Assembly authorized the counting of so-called "out-of-precinct ballots"—provisional ballots cast by lawfully registered voters outside of their assigned precincts—for all races in which the voters were entitled to vote. That practice, the General Assembly later recognized, was particularly important for African-American voters, a "disproportionately high percentage" of whom had cast out-of-precinct ballots in then-recent elections. N.C. Sess. Law 2005-2 § 1. And in 2007, the General Assembly enacted legislation allowing for same-day registration, whereby an individual could both register to vote and cast an in-person ballot at the same time during early voting, subject to certain heightened security requirements. N.C. Sess. Law 2007-253.

These efforts to expand voting opportunities in North Carolina were particularly critical to increasing the historically depressed registration and turnout of African-American voters in the state. Voter participation among African Americans in North Carolina skyrocketed from 41.9% in 2000 to 68.5% in 2012, *see* JA1197, with African Americans relying disproportionately on no-excuse early voting, *see* JA0842, same-day registration, *see* JA0243, and out-of-precinct provisional ballots, *see* JA0733. By 2012, North Carolina had jumped to 11th overall in voter participation, a remarkable increase in such a short period of time. *See* JA1196.

B. House Bill 589

Despite the success of these measures in increasing voter participation, the State abruptly tried to eliminate these election practices in the 2014 elections. Hours before the end of the 2013 legislative session, the General Assembly engaged

in a massive re-write of North Carolina's election laws, enacting a 57-page statute that affected almost every aspect of state registration and election procedures.

HB 589 was originally introduced in early April 2013, and initially proposed to institute a voter ID requirement, with no other significant changes to North Carolina's elections laws. *See* JA1214. After four weeks of consideration—including testimony and public hearings before the House Elections Committee and the opportunity for debate and amendment in three committees—the House passed HB 589 on April 24, 2013. *Id*. Although HB 589 was received in the Senate the next day and promptly referred to the Rules and Operations Committee ("Rules Committee"), the measure sat dormant for two months with no meaningful legislative action. *Id*.

Then, on June 25, this Court decided *Shelby County*, which invalidated the formula for determining which jurisdictions were subject to the preclearance requirement of the Voting Rights Act of 1965 ("VRA"). The implications of this change were not lost on the members of the General Assembly: the same day that *Shelby County* was issued, Senator Tom Apodaca, the Chairman of the Rules Committee, told the press, "Now we can go with the full bill." *See* JA182-JA0183; JA0357; JA0166. Only a select few members of the General Assembly, however, were privy to that "full bill," until a mere two days before the end of the legislative session, when the "full bill" version was finally publicly introduced.

That bill converted a 16-page bill devoted exclusively to a voter-ID requirement, into a 57-page bill imposing numerous new restrictions on ballot

access, including more onerous voter-ID provisions, the elimination of same-day registration, and the elimination out-of-precinct voting. *See* JA0165-JA0166; JA0183-JA0184.

Notwithstanding the dramatic expansion in the scope of HB 589, the full bill passed both chambers only two days later, on the last day of the session, despite intense opposition by many who were gravely concerned about the impact it would have on African-American voters. JA0166-JA0167. For a change of this magnitude, the legislative proceedings were highly unusual, rushed, and conducted without input from subject-matter experts or any representatives from the State Board of Elections ("SBOE") or any county boards of elections about the potential impact of HB 589's new voting restrictions. *See* JA0179, JA0186-JA0187; JA0278-JA0279; JA0239. Indeed, even a supporter of the bill acknowledged the flawed nature of the legislative process. *See* JA1887-JA1888 ("I do not agree with every single provision of the election law bill. It was received by the House only at 6:11 p.m. on the last night of the session for concurrence only. I readily admit that is not good practice. That is something we can be justly criticized for doing.")

C. The Challenged Provisions

Plaintiffs challenged many aspects of HB 589, but only the following two provisions are directly at issue as a result of the Fourth Circuit's decision:

Elimination of SDR. Through SDR, qualified voters could register and vote all in one visit to a "one-stop" early-voting polling place. HB 589 eliminated SDR altogether. *See* JA2268-JA2270. Now, voters appearing at early-voting sites can only update an existing registration with intra-county address or name changes.

Elimination of Out-of-Precinct Voting. Before HB 589, a voter who attempted

to vote in a precinct other than the one to which he was assigned (but that was located in his county of residence) was allowed to cast a provisional ballot, which was counted for all of the elections that would have appeared on the voter's ballot if he had gone to his assigned precinct—*e.g.*, statewide, county-wide, and presidential elections. Under HB 589, votes cast outside the voter's assigned precinct will simply not be counted. *See* JA2286-JA2287.

Thousands of voters will likely be affected by these provisions, as demonstrated in the chart below:

	Same-Day Registration	**Out-of-Precinct Voting**
2006 Midterm Election	N/A	3,115 cast, 96.8% counted in whole or in part
2008 Presidential Election	104,387 new voters registered and voted on same day	6,032 cast, 91.7% counted in whole or in part
2010 Midterm Election	21,250 new voters registered and voted on same day	6,052 cast, 95.1% counted in whole or in part
2012 Presidential Election	94,656 new voters registered and voted on same day	7,486 cast, 89.6% counted in whole or in part

It is undisputed that in each of these elections, African Americans relied on these means of participation at far higher rates than white voters. *See* JA0789-JA0091; JA0800.

D. Procedural History

On August 12, 2013, the same day HB 589 was signed by the Governor of the State of North Carolina, the NAACP Plaintiffs and the League Plaintiffs filed their

Complaints[2] in the United States District Court for the Middle District of North Carolina challenging HB 589 on Fourteenth Amendment and Fifteenth Amendment grounds, in addition to alleging violations of the Voting Rights Act of 1965. In December 2013, the Court set a schedule for preliminary injunction briefing, advising the parties that any motions for preliminary injunction would be heard by the Court in July of 2014. The Duke Intervenors were granted permission to intervene in the action on January 27, 2014.

After extensive but necessarily curtailed discovery, the League Plaintiffs, NAACP Plaintiffs, and Duke Intervenors filed a joint motion for preliminary injunction in May of 2014. The district court heard testimony and argument on Plaintiffs' Motion for Preliminary Injunction from July 7-10, 2014. On August 8, 2014, the district court issued an opinion denying that Motion. The League Plaintiffs, NAACP Plaintiffs, and Duke Intervenors timely appealed and moved to expedite the appeal. An expedited briefing schedule was ordered, and the Fourth Circuit heard oral argument on September 25, 2014.

On October 1, 2014, the Fourth Circuit entered its Order, finding that the district court engaged in "numerous grave errors of law that constitute an abuse of discretion." Op. at 36. Specifically, the Fourth Circuit identified eight separate errors of law in the district court's Voting Rights Act analysis that required reversal and entry of a preliminary injunction preserving same-day registration and out-of-precinct voting. Op. at 36-45. But based on its careful balancing of the

[2] The district court granted the Duke Intervenors' Motion to Intervene on January 27, 2014.

equities, including the proximity of the upcoming election, the Fourth Circuit's Order affirmed the district court's denial of Plaintiffs' request for a preliminary injunction as to five other challenged provisions. Op. at 24-28. Although Judge Motz dissented as to whether an injunction is appropriate at this time, *see* Op. at 65, she agreed that the district court's legal analysis was improper. *See* Op. at 65 ("I share some of my colleagues' concerns about the district court's legal analysis…"); *see also* Op. at 63 ("I am troubled by the court's failure to consider the cumulative impact of the changes in North Carolina voting law."). The district court subsequently entered the injunction on October 3, 2014. Order, NAACP v. McCrory, No. 1:13-cv-00658 (M.D.N.C. Oct. 3, 2014), ECF No. 202.

ARGUMENT

Defendants cannot demonstrate that they are entitled to a stay from this Court pending the filing and disposition of a petition for a writ of certiorari. The practical effect of the requested stay would be to permit the State to eliminate long-standing voter safeguards in the November 2014 election, rendering the Fourth Circuit's Order meaningless. Once the election occurs, after all, and thousands of North Carolina voters are denied the right to vote, the right cannot ever be recovered. Against this backdrop, the offered justifications for a stay – including administrative burdens that are, as the Fourth Circuit determined, minimal – do not remotely satisfy this Court's exacting standards for securing a stay.

To obtain the extraordinary remedy of a stay, Defendants bear the burden of establishing three threshold elements: "(1) a reasonable probability that four

Justices will consider the issue sufficiently meritorious to grant certiorari; (2) a fair prospect that a majority of the Court will vote to reverse the judgment below; and (3) a likelihood that irreparable harm will result from the denial of a stay." *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (per curiam). In applying this standard, the "judgment of the court below is presumed to be valid," *Wise v. Lipscomb*, 434 U.S. 1329, 1333 (1977) (Powell, J., in chambers), and this Court defers to the judgment of the court of appeals "absent unusual circumstances," *id.* Irreparable harm to the applicant alone is not enough to establish entitlement to a stay. *Curry v. Baker,* 479 U.S. 1301, 1302 (1986) (Powell, J., in chambers) (denying stay where candidate might experience irreparable harm, but case does not meet standards for granting certioriari).

Further, "[t]he conditions that are *necessary* for issuance of a stay are not necessarily *sufficient*." *Barnes v. E-Systems, Inc. Grp. Hosp. Med. & Surgical Ins. Plan*, 501 U.S. 1301, 1304 (1991) (Scalia, J., in chambers). "It is ultimately necessary, in other words, 'to "balance the equities"—to explore the relative harms to applicant and respondent, as well as the interests of the public at large.'" *Id.* at 1305 (quoting *Rostker v. Goldberg*, 448 U.S. 1306, 1308 (1980) (Brennan, J., in chambers) (citations omitted)). "Denial of . . . in-chambers stay applications," pending the filing of a petition for certiorari, "is the norm; relief is granted only in 'extraordinary cases.'" *Conkright v. Frommert*, 556 U.S. 1401 (2009) (Ginsburg, J., in chambers) (quoting *Rostker*, 448 U.S. at 1308). "The party requesting a stay bears the burden of showing that the circumstances justify" such extraordinary

relief. *Nken v. Holder*, 556 U.S. 418, 433-34 (2009). The applicants' failure to meet these requirements for a stay are examined below.

I. APPLICANTS WILL NOT SUFFER IRREPARABLE HARM ABSENT A STAY, AND THE BALANCE OF EQUITIES WEIGHS IN FAVOR OF PRESERVING EXISTING METHODS OF REGISTRATION AND VOTING

On the facts found by the district court, the Fourth Circuit appropriately concluded that the balance of equities weighs decisively in favor of enjoining the elimination of SDR and out-of-precinct provisional voting, which will safeguard the voting rights of tens of thousands of citizens without requiring the State to do anything but maintain registration and ballot-counting practices that have already been in place for years, and at times and polling locations that will already be open for business. Defendants cannot demonstrate irreparable harm absent a stay, and any minor administrative burdens that might fall upon the State pale in comparison to the potential disenfranchisement of tens of thousands.

In the 2010 November election, over 21,000 voters were able to vote because of the availability of SDR.[3] SDR provides a "safety net" for voters who go to the polls during early voting and find that there is a problem with their registration. Op. at 55 fn. 8. Voters disenfranchised in the May 2014 primary—the first election in North Carolina in over six years in which SDR was not available—illustrate why

[3] [3] Notably, the number of voters affected by this case is substantially greater than in the recent Ohio litigation stayed by this Court. Indeed, in the 2010 mid-term election, almost *thirteen times* as many North Carolinians utilized same-day registration (21,250 North Carolinians versus 1,651 Ohioans). The Ohio voting numbers can be found at *Ohio State Conference of NAACP v. Husted*, No. 2:14-cv-404, 2014 WL 4377869, at *4-6 (S.D. Ohio Sept. 4, 2014).

that safety net is necessary. . Craig Thomas of Granville County, for example, came back from an 18-month deployment in Afghanistan and sought to vote, only to be told at his early voting site that there was "no record of [his] registration." *See* Democracy North Carolina, *Be Prepared: Hundreds of Voters Lost Their Votes in 2014 Primary Due to New Election Rules* at 2-3 (Sept. 10, 2014), *available at* http://democracync.org/downloads/DisenfrancVotersPrim2014.pdf (cited by Br. of Amicus Curiae Brennan Center for Justice at N.Y.U. School of Law, in Supp. of Appellants at 6, No. 14-1845 (4th Cir. Sept. 17, 2014), ECF No. 62-1). He had not been notified that his registration was cancelled while he was deployed, and he was therefore unable to vote in the May 2014 primary. *See id.* Similarly, Mark Perry of Franklin County asked the DMV examiner to process his voter registration when he was renewing his driver's license. *See id.* When he went to vote during early voting in May, however, Mr. Perry was told that he was not registered and therefore could not vote. *See id.* Indeed, the uncontested evidence in the district court demonstrated that SDR allowed thousands of qualified North Carolinians to exercise their right to vote during the elections when SDR was in effect.

In November 2010, over six thousand qualified voters had their lawful votes counted because of out-of-precinct voting. These are voters who did everything necessary to exercise their right to vote but, for whatever reason, voted at the wrong location within their county. Absent the injunction, out-of-precinct provisional ballots will be discarded, and these otherwise valid votes will not be counted. Defendants offer no valid justification for the disenfranchisement of these

thousands of voters, and Defendants cannot demonstrate that they will suffer irreparable harm if this Court does not stay the Fourth Circuit's mandate.

First, Defendants cannot establish "irreparable" harm merely on the basis that the State has been enjoined from effectuating a statute that governs the time, place, and manner of elections. Op. at 52. Defendants' proposed rule would deprive the judiciary of the authority ever to enjoin an election-related law, and is plainly at odds with this Court's instruction that, under Section 2, "injunctive relief is available in appropriate cases to block voting laws from going into effect" before an election, *Shelby County*, 133 S.Ct. at 2624 (citing 42 U.S.C. § 1973j(d)). By Defendants' reasoning, the State's inability to implement a law, standing alone, would satisfy the irreparable-harm standard – even if the State's law were substantively invalid. But that logic is circular, and this Court has never adopted it. *See, e.g., Certain Named & Unnamed Non-Citizen Children & Their Parents v. Texas*, 448 U.S. 1327, 1334 (1980) (Powell, J., in chambers) *(*vacating Fifth Circuit's stay and reinstating district court's injunction of Texas statute*)*. Quite the contrary, this Court has consistently reaffirmed the role of the federal judiciary in reviewing legislation that threatens to abridge the right to vote. *See, e.g.*, *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 415 (2006) (Kennedy, J., separate op.) (hereinafter "*LULAC*") ("Although the legislative branch plays the primary role in congressional redistricting, our precedents recognize an important role for the courts when a districting plan violates the Constitution."); *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 217 (1986) ("The power to regulate the time, place,

and manner of elections does not justify, without more, the abridgment of fundamental rights, such as the right to vote . . . ."). Simply put, there is no inherent right of a State to regulate elections in a way that denies the right to vote through discriminatory intent or effect. .

Second, any administrative burdens on the State resulting from the injunction in this case are negligible. The injunction does not affect the length of North Carolina's early voting period; indeed, the Fourth Circuit's decision does not require North Carolina to offer a single minute more of early voting beyond that which the State and County Boards of Elections have already approved. This presents a stark contrast to the *Husted* injunction stayed by this Court, which would have required Ohio to reinstate a week of early voting, and for the county boards of elections to keep their offices open on additional evenings and weekend days for which they had not planned.

Moreover, as the Fourth Circuit concluded, both unrebutted evidence in the record and basic common sense belie Defendants' assertion that implementing SDR and out-of-precinct provisional voting at this time would be impossible. In fact, the counting of out-of-precinct provisional ballots creates no additional administrative burdens for the State at all. Federal law requires that every voter who cannot cast a regular ballot be offered a provisional ballot. Help America Vote Act, 42 U.S.C. § 15482. As counsel for the State acknowledged at oral argument, regardless of the outcome of this case, provisional ballots will be given to voters who go to the wrong precinct, and North Carolina must canvass those provisional ballots by November

14 in order to determine whether those votes should be counted. N.C. Gen. Stat. § 163-166.11. Indeed, North Carolina requires that election officials make a finding as to the validity of each individual provisional ballot. *See id.* § 163-182.2(a)(4) (providing for the counting of ballots by the county boards of elections prior to the canvass based on board's findings on each ballot); *see also id.* § 163-182.5(b) (providing for the canvassing by county boards of elections within seven or ten days after the election or "a reasonable time thereafter" to complete "the initial counting of all the votes").

The practical administrative effect of the injunction on the State with respect to out-of-precinct ballots is thus minimal. After engaging in the otherwise legally-required individualized review of each provisional ballot, the only thing that the preliminary injunction will require of the state is to count that ballot.

As with out-of-precinct provisional voting, the nominal effort required by the State to maintain the status quo on same-day registration is far outweighed by the benefits accrued by voters. The Fourth Circuit, based on evidence in the record, considered and recognized that to revert to the previous procedures, "systems have existed, do exist, and simply need to be resurrected." Op. at 54. Same-day registration, from 2008 until 2013, was performed using a program called SOSA. This program, an application within SEIMS (Statewide Elections Information Management System) allowed poll workers to enter the voter's registration information into SEIMS at the polling place. JA 580-81. That data entry would result in verification mailings being sent to registrants within 48 hours of the

registration. The SOSA application had been used in several major elections, and the "bugs" common to any new computer system had been resolved. JA0580-JA0581. The State argues that SDR will have to be performed manually, as there is not enough time to put SOSA back up and do the necessary quality checks. But the State Board of Elections has over three weeks to conduct its "quality control testing" to ensure that the program as resurrected runs smoothly, and Defendants have offered no specific evidence showing that this program – used during the last three general elections – would not function properly in the next general election.

Moreover, election administrators have already publicly indicated that they are ready and willing to comply with the Fourth Circuit's mandate. All they require is clarity from the Courts. *See, e.g.,* Michael Gordon, *Appeals Court Restores Same-Day Registration in North Carolina but Doesn't Expand Early Voting*, Charlotte Observer, Oct. 1, 2014, *available at* http://www.charlotteobserver.com/2014/10/01/5212815/federal-appeals-court-restores.html#.VDCvnV4pDDc ("Mecklenburg Elections Director Michael Dickerson said Wednesday that the county has enough time to re-institute same-day registration and out-of-precinct voting, as a three-judge panel from the 4th Circuit Court of Appeals ordered on Wednesday."); *see also*, Carter Coyle, *Parts of New Voting Rules Suspended*, Fox 8 WGHP, Oct. 1, 2014, *available at* http://myfox8.com/2014/10/01/parts-of-voter-id-law-suspended/ (Guilford County Board of Election Director Charlie Collicut noting that his county "hadn't done all of our training or printed all of our training materials as early as we may normally have.

We were kind of keeping our options open. So now that we know which way were [sic] going to go, that's easy."); Catherine Kozak, *Both Dare and Hyde Are Ready for Early Voting, Election Day*, Island Free Press, Sept. 30, 2014, *available at* http://www.islandfreepress.org/2014Archives/09.30.2014-BothDareAndHydeAreReadyForEarlyVotingElectionDay.html ("local election officials in Hyde and Dare counties say they are not expecting any problems no matter what is decided"); Brandon Goldner, *Questions Remain Over Court Ruling of NC Voting Law*, WNCT 9, Oct. 1, 2014, *available at* http://www.wnct.com/story/26683194/questions-remain-over-court-ruling-of-nc-voting-law ("Kellie Hopkins of the Beaufort County Board of Elections said these new orders, which come just 34 days before the election, will have little impact on voters' experience. 'It's not something that's foreign to boards of elections across the state so I don't think it will cause anybody any issues,' Hopkins said."); *Little Upheaval from Voting Rule*, Charlotte Observer, Oct. 2, 2014, *available at* http://www.charlotteobserver.com/2014/10/02/5216353/little-upheaval-from-voting-ruling.html#.VDFAk14pDDc ("Gaston Elections Director Adam Ragan told the Observer: 'We've done same-day registration before so we're familiar with the process. We'll be fine.'"); Sue Book, *Courts Tackle Same-Day Registration for Voters*, Sun Journal, Oct. 3, 2014, *available at* http://www.newbernsj.com/news/local/courts-tackle-same-day-registration-for-voters-1.382129 ("'Either way, it's not going to change anything as far as training or conducting elections in Craven County,' said Meloni Wray, elections director. 'We've done both ways.'"); J.L. Pate, *Same-Day*

Registration Restored, Laurinberg Exchange, Oct. 3, 2014, *available at* http://www.laurinburgexchange.com/news/localnews1/150033827/Same-day-registration-restored ("A federal appeals court ruling Wednesday that suspended two key provisions of North Carolina's new voting law less than a month before the Nov. 4 general election 'should cause no problems' for voters or the Scotland County Board of Elections, said Dell Parker, the county elections director. 'We'll keep it rolling,' Parker said Thursday. 'It just takes us back to the procedures we used in 2013.'").[4]

Third, contrary to Defendants' vague and conclusory allegations that enforcing the Fourth Circuit's injunction will cause "voter confusion," a stay by this Court is more likely to cause the type of confusion this Court sought to avoid in *Purcell v. Gonzalez*, 549 U.S. 1 (2006) (per curiam).[5] Maintaining the status quo in

[4] Even election officials who have publicly predicted that changes could involve additional administrative effort for some counties noted the benefits to voters. *See e.g.*, *A Holding Pattern*, Mt. Airy News, Oct. 3, 2014 *available at* http://www.mtairynews.com/news/news/50420300/A-holding-pattern (Elections Director of Surry County, Susan Jarrell, explained, "'[w]hile it would be quite a bit of work, us being a smaller county wouldn't be as affected as some of the larger counties.' . . . Jarrell said during the 2012 presidential election, the county saw 617 same-day registrations. 'That's a lot of people,' she said. 'It's something the voters seem to want.' During the last election [the 2014 May Primary], Jarrell said nine provisional ballots weren't counted due to out-of-precinct voting.")

[5] In *Purcell*, the Ninth Circuit overturned the district court's denial of a preliminary injunction before the district court even issued its opinion. Id. at *3. This Court thus appropriately held that the Ninth Circuit could not have paid the proper deference to the district court's findings of fact, nor could have concluded that the district court erred as a matter of law. Id. at *5 . This case could not be more different. The district court issued a detailed ruling on August 8, 2014. The Fourth Circuit deferred to all of the district court's factual findings, most of which were

November will not confuse voters, who are accustomed to same day registration and out-of-precinct balloting, which have been in effect since 2008 and 2006, respectively. The preservation of these practices will not risk "that qualified voters might be turned away from the polls," *id.* at 4, but rather simply provide a "safety net" with "more opportunity to register and vote" such that "voters who are confused about whether they can, for example, still register and vote on the same day will have their votes counted." Op. at 55 fn. 8. In other words, the only ways that SDR and out-of-precinct voting will affect the voters is to increase access among the voters who need them, without affecting other voters at all. It is for this reason that the Fourth Circuit rejected Defendants' complaints about possible voter confusion: SDR and out-of-precinct voting simply provide voters with more options to ensure that their votes are counted.

II. THE FOURTH CIRCUIT CORRECTLY HELD THAT PLAINTIFFS ARE LIKELY TO PREVAIL ON THE MERITS.

The Fourth Circuit correctly held that Plaintiffs are likely to succeed on their claims that eliminating same-day registration and discarding out-of-precinct provisional ballots discriminates against African Americans in violation of Section 2 of the Voting Rights Act. Op. at 51-52. The Fourth Circuit properly applied the correct standards under the VRA to the facts determined by the district court. The result is a straightforward application of law that would not warrant this Court's certiorari review and that is unlikely to be reversed on the merits.

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undisputed. And the Fourth Circuit articulated, based on the district court's opinion, that at least eight different legal errors that the district court made. Op. at 36-45.

It is important to make clear at the outset what the Fourth Circuit did and did not do in granting the injunction. Following this Court's instruction in *Thornburg v. Gingles*, 478 U.S. 30 (1986), the Fourth Circuit appropriately considered the results of the immediate past system as probative of how African Americans are likely to fare under the new system, considering the interaction of the effects of the State's history of racial discrimination with that new system, under which North Carolina had removed two electoral safeguards upon which African Americans disproportionately relied. The Fourth Circuit decidedly did not, however, import a retrogression standard into Section 2. Nor did the Fourth Circuit inappropriately evaluate the history of voting in North Carolina, stripping out the important causation determination. Rather, as explained below, the Fourth Circuit properly considered whether African Americans "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice," Op. at 46, and determined that North Carolina's decision to eliminate SDR and out-of-precinct voting could not be reconciled with Section 2 of the Voting Rights Act. This holding is well-established in this Court's precedent and the largely unrebutted evidence presented to the district court.

A. The Fourth Circuit Applied Section 2 as Required by this Court's Precedents

Section 2 of the VRA prohibits a State from "impos[ing] or appl[ying]" any electoral practice which "results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color." 42 U.S.C. § 1973(a); *see also* Op. at 29. No showing of discriminatory intent is required: "Congress [has]

made clear that a violation of § 2 c[an] be established by proof of discriminatory results alone." *Chisom v. Roemer*, 501 U.S. 380, 404 (1991); *accord* S. Rep. No. 97-417, 97th Cong. 2nd Sess. 28 (1982). The standard for proving prohibited "discriminatory results" is set out in Section 2(b) of the VRA, which provides:

> A violation of [Section 2] is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by [citizens of protected races] in that [they] have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. 42 U.S.C. §1973(b).[6]

The "question whether the political processes are equally open depends upon a searching practical evaluation of the past and present reality, and on a functional view of the political process." *Gingles*, 478 U.S. at 45.

This case presents an archetypal violation of Section 2 under the Court's precedent in *Gingles* and *LULAC*. This Court has instructed that "[t]he essence of a § 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters." *Gingles*, 478 U.S. at 47. Applying that standard, the Fourth Circuit reviewed the two requirements for proving a Section 2 violation. Op. at 33-34. *First*, a plaintiff must show that a challenged electoral practice

[6] In evaluating the social and historical conditions relevant to a Section 2 claim, courts have looked to a nonexclusive list of factors found in the Senate Report that accompanied the 1982 amendments to the VRA. Op. at 34-35; *Gingles*, 478 U.S. at 44-45 (citing S. Rpt. No. 97-417, at 28-29 (1982)). "'[T]here is no requirement that any particular number of factors be proved, or that a majority of them point one way or the other.'" *Id.* at 45 (quoting S. Rpt. No. 97-417, at 29).

disproportionately impacts minority voters. *Id. Second*, a plaintiff must show that a challenged electoral practice interacts with historical and social conditions to cause an inequality in the opportunities of minorities to participate in the political process. *Id.*

On the record established in the district court, Plaintiffs proved these elements. First, the district court found that African-American voters use same-day registration and out-of-precinct voting at about twice the rate of white voters. *N.C. State Conference of NAACP v. McCrory*, 997 F. Supp. 2d 322, 348-49 (M.D.N.C. 2014). The Fourth Circuit compared the situation of African Americans to whites, as is required under Section 2, rather than asking whether the situation of African Americans has been made worse, which is the Section 5 standard. Op. at 49. As the district court found, elimination of same-day registration would "bear more heavily on African-Americans than whites," 997 F. Supp. 2d at 355-56, and "the prohibition on counting out-of-precinct provisional ballots will disproportionately affect [African American] voters," *id.* at 366 (quoted in Op. at 47).

The Fourth Circuit also appropriately assessed causation by reviewing the reasons why African Americans use same-day registration and out-of-precinct voting at a higher rate than Whites. Again, relying on the district court's factual findings, the Fourth Circuit determined that "the disproportionate impacts of eliminating same-day registration and out-of-precinct voting are clearly linked to relevant social and historical conditions." Op. at 47. The district court specifically found that "North Carolina's history of official discrimination against blacks has

resulted in current socioeconomic disparities with whites," 997 F. Supp. 2d at 366, and cited African American disadvantages "in several key socioeconomic indicators, including education, employment, income, access to transportation, and residential stability," *id.* at 348. The district court noted particularly that higher mobility rates and less access to transportation affected African American's need for out-of-precinct ballots. *Id.* The uncontested record includes extensive evidence on how the state's history of racial discrimination and current socioeconomic conditions impact African Americans' ability to register and vote and how same-day registration and partial counting of out-of-precinct ballots help African Americans overcome barriers created by these conditions. For example, same-day registration provides an opportunity for voters who cannot read and write fluently to obtain assistance in filling out the registration paperwork and for voters who have inflexible job schedules or limited access to transportation to accomplish registration and voting at the same time.[7]

This case perfectly illustrates the essence of a Section 2 violation in the context of vote denial. As the Fourth Circuit explained, "this looks precisely like the textbook example of Section 2 vote denial Justice Scalia provided…" Op. at 51 (citing *Chisom*, 501 U.S. at 408) (Scalia, J., dissenting) (issue under Section 2 is whether enactment "ma[kes] it more difficult for blacks to register [or vote] than

[7] See, e.g., See, e.g., Carolyn Coleman testimony, Hearing Transcript volume I p. 63,67; Hill testimony, Hearing Transcript volume I p. 148, 151053; Burden testimony, Hearing Transcript volume III p. 130-31; Stewart Report at 31-32.

whites."). In addition, plaintiffs introduced strong evidence on the Senate Report "totality of the circumstances" factors and, most of this evidence was uncontested.[8]

This case also illustrates the principle set out in *LULAC v. Perry*, 548 U.S. 399 (2006), that structural impediments to voting may violate Section 2. In *LULAC*, the State of Texas created a district, Latinos mobilized in that district and the State then changed the district lines in a way that prevented Latinos who were on the verge of electing the candidate of their choice from realizing their political power. *See generally id.* *LULAC* found a Section 2 violation because "the State took away the Latinos' opportunity because Latinos were about to exercise it" in a situation where "a racial group that has been subject to significant voting-related discrimination . . . was becoming increasingly politically active and cohesive." *Id.* at 439-40. Here, the North Carolina General Assembly did the same thing: it set up voting structures, which African Americans used to mobilize and build their voting culture. Then, when African Americans started to realize significant political influence, the General Assembly went into the election code and extracted with precision those very mechanisms – and only those mechanisms –that were put in place to increase voter participation and remove barriers to the vote for African Americans. Not surprisingly, then, these mechanisms, when restricted,

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[8] *See, e.g.,* JA1101-JA1103, JA1224-JA1225, JA1340 (factor 1); JA1101, JA1225-JA1226 (factor 2); JA340, JA1103, JA1190 (factor 3); JA1192, JA1229, JA1340 (factor 6); JA1107, JA1347 (factor 7); JA1108, JA1230-JA1232, JA1340, JA1371 (factor 8).

disproportionately impact African Americans as opposed to white voters and result in unequal opportunity to participate in the political process. Op at 50.

B. The Fourth Circuit Correctly Found that the District Court Made Numerous Legal Errors

The Fourth Circuit's close attention to this Court's instructions regarding the vitality of a Section 2 claim stands in stark contrast to the district court's "numerous grave errors of law," each compelling the District Court's reversal. Each of them illuminates an important feature of Section 2 law. Op. at 36, 38-45. The eight errors of law committed by the district court were:

- Disregarding the impact of voting practices used immediately prior to HB 589, incorrectly opining that considering such evidence would import a non-retrogression standard. Op. at 36.
- Considering each challenged voting practice separately, and not as an overall system abridging the right to vote for persons of color. Op. at 38.
- Failing to adequately consider the state's racial discrimination record, past and present. Op. at 48; 39-40.
- Using the 30 day permissible voter registration deadline of the National Voter Registration Act as an absolute bar to challenges of shorter registration deadlines. Op. at 40-41.
- Requiring Plaintiffs to prove that African Americans will find it impossible to register to vote under the new regime. Op. at 41-42.

- Declaring that a practice must be discriminatory on a nationwide basis to violate Section 2. Op. at 42-43.
- Rejecting the Section 2 claim on the grounds that the disenfranchisement of a small number of African Americans is permissible. Op. at 43-44.
- Giving greater weight to "bureaucratic (in)efficiency and (under-) resourcing" than to "voter enfranchisement." Op. at 44-45.

Applicants fault the Fourth Circuit's correction of these errors, but it is Applicants who are wrong.

1. The Fourth Circuit's Section 2 Analysis Did Not Incorporate a Retrogression Standard

The Fourth Circuit correctly analyzed the impact of the new voting system on African Americans compared to whites, as required by Section 2. Op. at 46. This is not a retrogression analysis, as applicants contend, but rather a proper application of Section 2, which considers the relative burdens that a challenged measure imposes on minority voters as compared to white voters. See, e.g., Chisom, 501 U.S. at 408 (Scalia, J., dissenting). That comparison establishes a Section 2 violation here, because under the totality of the circumstances African-American voters will be disproportionately burdened by the elimination of SDR and OOP resulting in unequal opportunity to the political process. Section 5, by contrast, focused solely on the effect of a change in law on minority voters, comparing the relative position of minority voters under a proposed voting practice with an existing one (the Section 5 "benchmark"). Section 2 claims are made not by comparing the old system to the

new one, but rather, as the Fourth Circuit did here, by examining the comparative effect of the new measures on African-American and white voters. Op. at 46-52. And here, in order to make an assessment of the impact of these changes, the Fourth Circuit naturally turned to evidence concerning how African Americans have relied on these opportunities as compared to whites in the past. Merely considering this clearly probative evidence does not convert the Fourth Circuit's analysis into a "retrogression" inquiry. As this Court explained in *Holder*, the effect of a challenged voting practice under Section 2 "can be evaluated by comparing the system with that rule to a system without that rule," *Holder*, 512 U.S. at 880-81. *See also Georgia v. Ashcroft*, 539 U.S. 461, 478 (2003) (observing that "some parts of the § 2 analysis may overlap with the § 5 inquiry."). Indeed, that evidence is the most reliable indicator for assessing the likely impact of the challenged voting restrictions on minority voters as compared to whites.

Applicants' position would preclude courts from even considering the racial impact of the state's past practices in assessing whether the current system provides equal access. This contravenes Section 2's emphasis on "a searching practical evaluation of the 'past and present reality.'" Senate Report 30 (emphasis added); *accord Gingles*, 478 U.S. at 44-45. In addition, Applicants' position would make it impossible for plaintiffs to challenge changes to the status quo under Section 2. Yet, this Court in *Shelby County* made clear that Section 2 remains as a remedy for voting discrimination that previously might have been stopped under Section 5, if that same change also meets the criteria for a Section 2 violation. 133

S. Ct. at 2631 (decision "in no way affects the permanent, nationwide ban on racial discrimination in voting found in § 2"; under § 2, "any racial discrimination in voting is too much"); *see also id.* at 2619 (Section 2 "is not at issue in this case.").

Given that Section 5 and Section 2 were both designed to prevent racial discrimination in voting, it is not a surprise that some changes to the status quo would have violated both. And, the Court has left no doubt that Section 2 can apply to changes to the status quo, as well as longstanding practices. *Reno v. Bossier Parrish*, 528 U.S. at 334.

Applicants further complain that the Fourth Circuit did not compare the effects of the challenged practices "against a hypothetical and objective alternative which represents the way things "ought to be" to ensure equal opportunity in voting. *Bossier II*, 528 U.S. at 334 (emphasis in original); see also *Holder*, 512 U.S. at 880 (quoting *Gingles*, 478 U.S. at 88). Applicants fail to recognize that the benchmark does not have to be "hypothetical" and that the immediate past practice can appropriately serve as the "benchmark" that demonstrates that a less discriminatory alternative is feasible. This Court in *Reno v. Bossier Parish* made clear that where a Section 2 claim challenges a change to status quo, the status quo itself can be the benchmark. 528 U.S. at 334. Indeed, the fact that the state successfully used SDR and OOP voting over several election cycles makes the results under this system a highly appropriate benchmark.

2. The Fourth Circuit's Analysis Demonstrated Causation

Applicants' also contend that the Fourth Circuit failed to assess "causation," arguing that plaintiffs showed only "a bare statistical disparity," and that Section 2 is violated only where "the impacted plaintiff has no ability to influence the adverse impact." Appl. at 15-17. Applicants misapprehend the standard for liability under Section 2, which, as this Court has explained, requires that the plaintiff establish that a challenged law "interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by" minority voters. *Gingles*, 478 U.S. at 47. And, as explained above, the Fourth Circuit properly followed that guidance, finding that "the disproportionate impacts of eliminating same-day registration and out-of-precinct voting are clearly linked to relevant social and historical conditions," including discrimination and severe socioeconomic disparities across a wide range of areas, which render African Americans more likely than white voters to rely on both SDR and OOP ballots. Op at 47.

In contending that SDR and OOP are mere "preferences" over which African American voters exercise "control," Applicants ignore that this Court has held that the prohibition against "abridg[ing]" the right to vote includes "onerous procedural requirements which effectively handicap exercise of the franchise by voters of color." Lane v. Wilson, 307 U.S. 268, 275 (1939); see also Harman v. Forssenius, 380 U.S. 528, 541-42 (1965)(prohibition against "abridg[ing]" the right to vote includes a "cumbersome procedure" or "material requirement" that "erects a real obstacle to voting"). If African Americans can only achieve equal participation by overcoming significant barriers to voting that fall disproportionately on them, a Section 2

violation may be found, provided a less discriminatory alternative practice is available. Indeed, if a voter's ability to exercise some "control" over the burden barred a Section 2 claim, poll taxes and literacy tests would pass muster.

Applicants allege that the Fourth Circuit "cherry-picked" certain Senate Factors, Appl. at 15, and "endorsed Plaintiffs' selective use of some of the *Gingles* factors as a central justification for ordering a preliminary injunction." Appl. at 18. Although the Fourth Circuit correctly highlighted those factors that most directly show the "essence" of a Section 2 claim under *Gingles*, it is clear that the Fourth Circuit properly weighed the entire totality of circumstances. Under the "results test," the court must assess the impact of the challenged practice "on the basis of objective factors," which will vary depending on the kind of rule, practice, or procedure called into question. S. REP. NO. 97-417, at 27-28. "[T]here is no requirement that any particular number of factors be proved or that a majority of them point one way or the other," *id*. at 29. Tailoring Section 2 analysis to the particular voting discrimination under challenge is what the Court has instructed. See *Gingles*, 478 U.S. at 45 & n.10; *accord* S. REP. NO. 97-417, at 29-30.

3. Applicants' Other Contentions Are Equally Erroneous

Applicants also complain that the Fourth Circuit gave insufficient weight to the state's interests in repealing SDR and OOP. But the Fourth Circuit simply corrected legal errors and gave the proper legal significance to the factual findings of the District Court. For example, while the district court noted that same-day registrants' ballots were occasionally counted before the registrant had been

verified, the Fourth Circuit appropriately found that any problem with verifying registrants is rooted "largely in boards of elections own procedures." Op. at 44. Furthermore, the District Court erred as a matter of law by concluding that unverified voters are ineligible voters. *See Fla. State Conf. of NAACP v. Browning*, 569 F. Supp. 2d 1237, 1244 (N.D. Fla. 2008) ("The reason that the record is unverified may be because there was a typographical error in the data entry, or because the applicant made a mistake when filling out the voter registration application."). In fact, the state election board report concerning voter verification cited by the District Court also found that the majority of the unverified voters were eligible military members and students whose voter registration verification mailings were returned because they had moved *after* properly voting. JA1528-JA1536.[9] Given the district court's misapprehension of the law regarding voter eligibility, it is not surprising that the Fourth Circuit found clear error in the district court's ruling on tenuousness.

With regard to OOP voting, the District Court erred as a matter of law by relying on the "state justifications" articulated by the North Carolina Supreme Court in *James v. Bartlett*, 607 S.E.2d 638 (N.C. 2005). Any concerns that counting such ballots could result in chaos or would burden elections officials has been

[9] *See McCrory*, 997 F. Supp. 2d at 353 (citing 2009 report by former State Election Director Gary Bartlett). That report finds that "undeliverable verification mailings are not caused by SDR. Rather they are caused by the highly mobile nature of some segments of NC's citizenry." JA1528-JA1536.

completely disproven by the experience of every election in North Carolina since 2006, in which OOP ballots have been counted without causing any problems whatsoever On all of the state justifications, the Fourth Circuit deferred to the findings of the court below and afforded those findings the proper legal significance.

Lastly, Applicants' assertion that the Fourth Circuit's decision was erroneously "based upon" *Husted*, App. 2, is also flatly incorrect. The Fourth Circuit's opinion and mandate were both issued *after* this Court issued its order granting the State of Ohio's motion to stay the preliminary injunction at issue in that case. The Fourth Circuit was aware of this development when it issued its opinion and mandate[10]—indeed, its opinion expressly notes this Court's stay order in that case. *See* Op. at 30. Further, the Fourth Circuit rejected the argument again that this Court's stay of the preliminary injunction in *Husted* undermines the Fourth Circuit's decision here when it denied Applicants' motion for recall and stay of mandate filed with that court on October 1, 2014. *See* Defs.' Mot. for Recall and Stay of Mandate, LWV v. State of N.C., No. 14-1845 (4th Cir. Oct. 1, 2014), ECF.No. 83; see also Order, LWV v. State of N.C., No. 14-1845 (4th Cir. Oct. 2, 2-14), ECF No. 85 (denying motion for recall and stay). This Court should do the same.

CONCLUSION

The Fourth Circuit's ruling temporarily restores two safeguards that are easily administered and will prevent the disenfranchisement of North Carolina voters in the November 2014 general election. For these and all the reasons

stated above, Plaintiffs respectfully urge this Court to deny the extraordinary relief sought by Defendants.

Dated: October 5, 2014

Respectfully submitted,

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JA2633 - JA2640	North Carolina Session Law 2005-2 (Senate Bill 133) (March 2, 2005)
JA2645 - JA2647	North Carolina Session Law 2007-253 (House Bill 91) (July 27, 2007) (K. Strach Deposition Exhibit 43)

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 14-1845

LEAGUE OF WOMEN VOTERS OF NORTH CAROLINA; A. PHILIP RANDOLPH INSTITUTE; UNIFOUR ONESTOP COLLABORATIVE; COMMON CAUSE NORTH CAROLINA; GOLDIE WELLS; KAY BRANDON; OCTAVIA RAINEY; SARA STOHLER; HUGH STOHLER,

Plaintiffs,

and

LOUIS M. DUKE; CHARLES M. GRAY; ASGOD BARRANTES; JOSUE E. BERDUO; BRIAN M. MILLER; NANCY J. LUND; BECKY HURLEY MOCK; MARY-WREN RITCHIE; LYNNE M. WALTER; EBONY N. WEST,

Intervenors/Plaintiffs – Appellants,

v.

STATE OF NORTH CAROLINA; JOSHUA B. HOWARD, in his official capacity as a member of the State Board of Elections; RHONDA K. AMOROSO, in her official capacity as a member of the State Board of Elections; JOSHUA D. MALCOLM, in his official capacity as a member of the State Board of Elections; PAUL J. FOLEY, in his official capacity as a member of the State Board of Elections; MAJA KRICKER, in her official capacity as a member of the State Board of Elections; PATRICK L. MCCRORY, in his official capacity as Governor of the state of North Carolina,

Defendants – Appellees.

UNITED STATES OF AMERICA,

Amicus Curiae,