No. 16-393

IN THE

Supreme Court of the United States

GREG ABBOTT, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF TEXAS, *et al.*,

Petitioners,

v.

MARC VEASEY, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Pursuant to Rule 29.6, none of the Plaintiffs filing the Brief in Opposition has a parent corporation or issues stock. The Texas State Conference of NAACP Branches is an affiliate of the national NAACP.

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SUMMARY OF ARGUMENT

The Fifth Circuit, sitting en banc, held that Texas's photo voter identification law, Senate Bill 14 (2011) ("SB14"), violates the "results" test of Section 2 of the Voting Rights Act ("Section 2"). That conclusion, initially reached by the district court, was affirmed by both the three-judge Fifth Circuit panel that considered the appeal and a super-majority of the en banc court. Additionally, prior to *Shelby County v. Holder*, 133 S. Ct. 2612 (2013), a three-judge federal panel in the District of Columbia denied preclearance to SB14 under Section 5 of the Voting Rights Act, finding that its implementation would likely have a retrogressive impact on Black and Latino voters' ability to participate in the political process. Thus, a total of twelve federal judges have reached the same conclusion that SB14—the most stringent photo ID law in the nation—violates the rights of Black and Latino Texan voters.

Significantly, the Fifth Circuit en banc court also held that, while there was some evidence on which the district court should not have relied in finding that SB14 was enacted with discriminatory intent, there was substantial other evidence that could support such a finding. Recognizing that the record allows for more than one possible outcome, the en banc court remanded to the district court to determine whether the remaining evidence supports a finding of intentional discrimination. The Fifth Circuit also remanded for the fashioning of appropriate relief on the results violation. Expedited proceedings are currently under way in the district court consistent with the remand.

Petitioners now seek to circumvent the ongoing proceedings before the district court. None of the reasons Petitioners offer to try to justify this Court's intervention in this case are persuasive. The Court therefore should decline to issue the extraordinary writ.

In addressing the Section 2 results claim, the Fifth Circuit correctly applied the legal standard mandated by this Court's decision in *Thornburg v. Gingles*, 478 U.S. 30 (1986): the totality of circumstances as viewed through application of the Senate Factors. Appropriately applying the "clear error" standard of Federal Rule of Civil Procedure 52(b), the Fifth Circuit affirmed the findings of the district court based on the overwhelming evidence that SB14 placed a disproportionate burden on Black and Latino Texans exercising the right to vote—not only because these voters were less likely than Anglo voters to possess SB14 ID, but also because it was more difficult for these voters than for Anglo voters to obtain SB14 ID. The Fifth Circuit also affirmed the district court's findings, based on equally substantial evidence, that these disproportionate burdens interact with social and historical conditions specific to Texas to cause inequality in the electoral opportunities enjoyed by Black and Latino voters, so as to violate Section 2.

In reaching that conclusion, the Fifth Circuit correctly held that a Section 2 results violation does not require proof of decreased voter turnout or registration. No court has held to the contrary. Further, as the Fifth Circuit explained, such a standard would be unworkable because voter turnout and registration statistics are not necessarily accurate reflections of the burden placed on minority voters by vote suppression measures and

would effectively vitiate pre-enforcement actions to stop discriminatory conduct before it takes effect.

Nevertheless, Petitioners attempt to concoct a circuit split on the issue, claiming that the Sixth, Seventh, and Ninth Circuits require proof of diminished voter turnout or registration as an element of such a claim, while the Fourth and Fifth Circuits do not. What Petitioners mischaracterize as a circuit split is, in fact, the unremarkable result of different circuit courts applying the same standard to different evidence and reaching different conclusions.

Indeed, contrary to Petitioners' argument, the Fourth, Fifth, Sixth, and Ninth Circuits each applied the same legal standard mandated by this Court's decision in *Gingles*, but simply reached different factual conclusions based on their weighing of the specific evidence as presented by the parties before them. This is not a basis for a grant of a writ of certiorari.

To the extent that, as Petitioners argue, some language in the Seventh Circuit's opinion in *Frank v. Walker* suggests a split with the Fifth Circuit's en banc holding, that language does not create the type of clear conflict of law meriting review by this Court. Moreover, the proceedings in the Seventh Circuit remain ongoing, and that circuit should be given the opportunity to clarify its law—consistent with the approach of every other circuit to have addressed the issue—before this Court finds a "split" justifying further review.

Petitioners' argument that upholding the Fifth Circuit's opinion would violate the Constitution and lead

to a parade of horribles, under which widely accepted election procedures would be deemed discriminatory, is based on the same faulty premise that Plaintiffs must show diminished turnout to prevail on a Section 2 results claim. Instead, the "totality of circumstances" test, as properly applied by the Fifth Circuit here, guards against the consequences imagined by Petitioners.

Finally, Petitioners' argument that the Fifth Circuit erred in remanding Plaintiffs' intentional discrimination claim reflects nothing more than a difference between Petitioners' opinion of what the law should be and the court's legally supported application of the settled *Pullman-Standard* doctrine. As detailed by the Fifth Circuit, there is overwhelming evidence to support more than one possible resolution of the issue of intentional discrimination. Therefore, remand was not only appropriate, but mandatory.

The interlocutory posture of this case argues strongly against granting the petition. The district court has set an expedited schedule for resolution of the remaining issues, after which this Court may consider the entire case, with the full benefit of the lower courts' findings and a final judgment fashioning the appropriate relief, rather than engage in the type of disfavored piecemeal review proposed by Petitioners.[1]

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1. Plaintiffs acknowledge that the law disfavoring interlocutory appeals may be subject to different considerations when the exercise of a fundamental right is at stake. However, here, where the state has been allowed continued enforcement of a law that has been held to discriminate against minorities in each of four tribunals to have considered the law under the Voting Rights Act, there is no countervailing harm to favor interlocutory appeal.

I. THE FIFTH CIRCUIT CORRECTLY APPLIED THE SECTION 2 RESULTS TEST

After determining that SB14 disparately burdens Black and Latino voters, the Fifth Circuit properly applied the totality of circumstances analysis, using the Senate Factors adopted in *Gingles* and following more than 30 years of guidance from this Court, to conclude that SB14 abridges Texas minorities' right to vote on account of race or color, thereby violating Section 2.

The Fifth Circuit adopted a two-part framework to implement this Court's guidance in *Gingles*. Under this framework,

> [1] [T]he challenged standard, practice, or procedure must impose a discriminatory burden on members of a protected class, meaning that members of the protected class have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice, [and]
>
> [2] [T]hat burden must in part be caused by or linked to social and historical conditions that have or currently produce discrimination against members of the protected class.

App. 48a-49a.

As described in *Gingles*, Congress specifically amended the Voting Rights Act to make clear that a Section 2 violation can "be proved by showing discriminatory

effect alone." *Gingles,* 478 U.S. at 35; *see also* 52 U.S.C. § 10301(b). Under *Gingles*, to prove that a law produces discriminatory effects in violation of Section 2, plaintiffs must show not only that the practice has a disparate impact on minority voters, but also that "under the totality of the circumstances, the [practice] results[s] in unequal access to the electoral process," because it "interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives." *Gingles*, 478 U.S. at 46-47. This is precisely what the two-part framework does. First, it requires analysis of the conduct that deprives minority voters of equal opportunity, and second, it requires analysis of the totality of circumstances that provide a causal link to "social and historical conditions that have or currently produce discrimination against members of the protected class." *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 240 (4th Cir. 2014) (internal quotations omitted).

A. The Fifth Circuit Properly Affirmed the District Court's Finding of Causation Based on a Totality of Circumstances Analysis

Petitioners claim that the Fifth Circuit erred by using the Senate Factors to assess causation. Pet. 22-26. Each of their arguments lacks support in the statute or in precedent.

1. The Senate Factors apply in vote denial or abridgement cases.

In assessing the totality of circumstances, courts consider the non-exclusive Senate Factors, derived largely

from this Court's case law and adopted in the Senate Report accompanying the amended Section 2. *Gingles,* 478 U.S. at 43-45, 79; Sen. Rep. No. 97-417, at 28-29 (1982). Contrary to Petitioners' argument (Pet. 23), nothing in the text of Section 2 or its subsequent application by this Court limits the "totality of circumstances" analysis or the accompanying Senate Factors to vote dilution claims. *See, e.g.*, *LULAC v. Perry*, 548 U.S. 399, 426 (2006) ("[T]he Senate Report on the 1982 amendments to the Voting Rights Act [] identifies factors typically relevant to a § 2 claim. . . ."). In crafting Section 2, the Senate offered no alternate test for vote denial or abridgement cases.[2] As a result, in addition to the Fifth Circuit, numerous other courts have considered the Senate Factors when adjudging vote denial and abridgement claims. *See, e.g.*, *Mich. State A. Phillip Randolph Inst. v. Johnson*, 833 F.3d 656, 667 (6th Cir. 2016); *League of Women Voters of N.C.*, 769 F.3d at 240, 245-47; *Gonzalez v. Arizona,* 677 F.3d 383, 405-07 (9th Cir. 2012) (en banc); *Burton v. City of Belle Glade*, 178 F.3d 1175, 1198 (11th Cir. 1999); *Ortiz v. City of Philadelphia*, 28 F.3d 306, 309-12 (3d Cir. 1994); *Roberts v. Wamser*, 679 F. Supp. 1513, 1529-32 (E.D. Mo. 1987), *rev'd on other grounds*, 883 F.2d 617 (8th Cir. 1989).

2. The Senate Factors are relevant to causation.

Petitioners further argue that the Senate Factors are not relevant to proof of causation. Pet. 24. This is

2. Notably, one of this Court's earliest cases under the Voting Rights Act used an examination of the totality of circumstances similar to the Senate Factors analysis to determine whether a literacy test had a discriminatory effect. *See Gaston County v. United States*, 395 U.S. 285, 293 (1969).

contrary to this Court's precedent, which recognizes 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 to elect their preferred representatives." *Gingles*, 478 U.S. at 47 (emphasis added). In other words, causation is determined by whether the law, under the totality of circumstances (guided by the Senate Factors), abridges minorities' right to vote. As this Court has counseled, the determination required under Section 2 "'is peculiarly dependent upon the facts of each case,' and requires 'an intensely local appraisal of the design and impact' of the contested electoral mechanisms." *Id.* at 79 (quoting *Rogers v. Lodge*, 458 U.S. 613, 621-22 (1982)).

The Fifth Circuit's application of the Senate Factors, as directed by Congress and by this Court, ensured that its decision was not based on mere statistical disparate impact, but also on the interaction between SB14 and the historical and social conditions in Texas that exist due to past and continuing racial discrimination. *See* App. 93a-95a. The Fifth Circuit affirmed the district court's findings of a past history of voting discrimination by the state; discrimination in employment and education that make ID possession less likely and more difficult to obtain; racially polarized voting, where different racial groups have different candidate preferences and, thereby, those who possess ID may have an opportunity to participate equally in the political process and elect candidates of choice; a lack of responsiveness and representation in the legislature that led the majority of legislators to ignore concerns of minority citizens; and the lack of any well-founded, well-explained, and non-pretextual rationales

supporting the passage of the strictest photo ID law in the country. *See* App. 76a-95a.

B. The Fifth Circuit Properly Affirmed the District Court's Findings of Fact Regarding Causation Because Those Findings Were Not Clearly Erroneous

Petitioners argue that the application of the Senate Factors does "not show a discriminatory effect on minority voting participation here." Pet. 24. Petitioners ignore that the Fifth Circuit's review was governed by Federal Rule of Civil Procedure 52(a), which prohibits the setting aside of findings of fact "unless clearly erroneous," giving "due regard to the trial court's opportunity to judge the witnesses' credibility." FED. R. CIV. P. 52(a)(6). This rule is strictly applied in this Court, *Anderson v. City of Bessemer City*, 470 U.S. 564, 573 (1985), further suggesting that a grant of certiorari review is inappropriate. Certiorari is "rarely granted when the asserted error consists of erroneous factual findings." U.S. SUP. CT. R. 10; *see Graver Tank & Mfg. Co. v. Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949) ("A court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error.")

These standards apply with particular force in this complex and fact-intensive Section 2 case. As discussed above, Section 2 cases are heavily dependent on a fact-driven analysis of the totality of circumstances. *See Gingles*, 478 U.S. at 79. The district court's findings of fact were based on a weighing of the credibility of the live

testimony of 16 expert witnesses and 30 fact witnesses presented by Plaintiffs and the rejection of the testimony of the single expert presented live by Petitioners as "unconvincing" and entitled to "little weight." App. 381a.

There is substantial, indeed overwhelming, evidence in the record to support the Fifth Circuit's affirmance of the district court's finding that SB14 offers less opportunity for 600,000 registered and one million eligible minority voters in Texas to participate equally in the political process on the basis of race or ethnicity. Contrary to Petitioners' argument, the Fifth Circuit's affirmance of the district court's findings regarding the burden on minority voters imposed by Texas's photo ID law was not based merely on ID possession rates. The district court first concluded, based on the evidence of multiple expert witnesses, that 4.5% of registered Texans lack SB14 ID, and that Latino registered voters were 195% more likely, and Black registered voters 305% more likely, than Anglo voters to lack the ID required to vote. App. 61a-63a. The district court also credited evidence that many Texas voters without qualifying photo ID face heavy burdens in obtaining such ID, and that those burdens fall disproportionately on Black and Latino Texans. The Fifth Circuit enumerated burdens ranging from "the cost of underlying documents necessary to obtain [photo ID to vote]," "difficulties with delayed, nonexistent, out-of-state, or amended birth certificates," "long distances and other travel issues," a strict disability exemption," and much more. App. 70a-71a.

The Fifth Circuit also expressly held that "the record evidence disproves the State's claim that 'the plaintiffs have failed to identify a single individual who faces a

substantial obstacle to voting because of SB14.'" App. 72a. Multiple witnesses at trial testified that they lacked ID, leading them to either cast no ballot at all or to cast a provisional ballot that would not count. *Id.* These included Floyd Carrier, who "was completely prevented from voting" because of the "almost impossible bureaucratic morass" that he encountered in attempting to obtain the underlying documents needed to obtain photo ID; Sammie Bates, who lost her right to vote because "she could not afford to purchase her Mississippi birth certificate;" Gordon Benjamin, who was unable to get the so-called "free" ID offered by Texas because "he was unable to get his Louisiana birth certificate for the hefty $81 fee online;" and others. App. 72a-73a.

Having affirmed the district court's finding that SB14 has a disproportionate impact on Black and Latino voters in Texas, the Fifth Circuit then considered the district court's conclusion that the law interacts with social and historical conditions in Texas to cause inequality in the electoral opportunities enjoyed by these voters. After reviewing the district court's analysis of the relevant Senate Factors, the Fifth Circuit determined that the "conditions engendered by current and former state-sponsored discrimination are *sufficiently linked* to the racial disparity in ID possession under SB14" to merit a finding that Section 2 had been violated. App. 77a (emphasis added).

The Fifth Circuit first reviewed the history of official discrimination in Texas (Senate Factor 1) and found a multitude of examples—dating up through this decade—of discrimination at the polls on the basis of race. App. 77a-79a. The court noted that the district court

had found "contemporary examples of state-sponsored discrimination," including two racially discriminatory redistricting plans passed by the very same legislature that passed SB14. App. 77a-78a.[3]

The Fifth Circuit also noted the disparity in health, education, and employment outcomes amongst Texans on the basis of race, all traceable to *state*-sponsored discrimination, and affecting Texans' ability to participate in the political process (Senate Factor 5). App. 80a-87a. This diminished political participation is evidenced by the lower turnout and registration rates of minority voters in Texas as compared to Anglo voters, which the trial court acknowledged. App. 82a, 86a-87a.

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3. Discrimination need not be state-sponsored to be relevant to the impact analysis. *See United States v. Marengo County Comm'n*, 731 F.2d 1546, 1567 n.36 (11th Cir. 1984) (finding that "history of private discrimination" in county was relevant in analyzing Section 2 claim because "such discrimination can contribute to the inability of blacks to assert their political influence and to participate equally in public life") (internal citations omitted); *Gomez v. City of Watsonville*, 863 F.2d 1407, 1418 (9th Cir. 1988) (Senate Factor Five's "language describes the people discriminated against, not the discriminator"); *McIntosh County NAACP v. City of Darien*, 605 F.2d 753, 759 (5th Cir. 1979) ("Although our cases have not been precise about which governmental body must have practiced the pervasive discrimination, the distinction between state and local governments hinted at by the district court is without merit."); *Gingles v. Edministen*, 590 F. Supp. 345, 361-62 (E.D.N.C. 1984), *aff'd sub. nom. Gingles*, 478 U.S. 30 (finding that private and local discrimination were relevant in a Section 2 challenge to state laws). But even if Section 2 could somehow be read to require a showing that the discrimination was state-sponsored, the district court and Fifth Circuit found that the historical and ongoing discrimination in Texas was perpetrated by state actors.

The Fifth Circuit also examined racially polarized voting in Texas (Senate Factor 2), the low representation rates of minority individuals in Texas among elected officials (Senate Factor 7), and the related lack of legislative responsiveness to minority communities' needs (Senate Factor 8), and tied all of them to the well-documented rejection by SB14's supporters of ameliorative amendments to the law that would have decreased the discriminatory impact on Black and Latino Texans. App. 79a-80a, 87a-89a.

Finally, the Fifth Circuit considered the tenuousness of the justifications for SB14 (Senate Factor 9), noting that "the provisions of SB14 fail to correspond in any meaningful way to the legitimate interests the State claims to have been advancing through SB14." App. 90a-91a. The court recounted the state's history of passing laws purportedly aimed at voter fraud as a pretext for imposing obstacles that discriminate against voters on the basis of race. App. 31a-32a. In this case, as the Fifth Circuit concluded, there was "little proven incidence" of fraud at the polls to justify replacing Texas's effective preexisting voter ID regime with the strictest photo ID requirements in the country. App. 91a. Indeed, the circuit court recognized that "in the decade leading up to SB14's passage," there were "only two convictions for in-person voter impersonation fraud out of 20 million votes cast." App. 35a. Meanwhile, the law failed to cover absentee balloting, where some fraud does occur. *See* App. 91a. Additionally, supposed concerns about noncitizen voting were "misplaced" because "undocumented immigrants are unlikely to vote as they try to avoid contact with government agents for fear of being deported." *Id.* Nor would SB14 stop noncitizen voting (even if it were

occurring) because it permits forms of ID that noncitizen persons can legally obtain. App. 91a-92a.

II. THE FIFTH CIRCUIT'S DECISION DOES NOT CREATE A CIRCUIT SPLIT ON THE ISSUE OF WHETHER SECTION 2 REQUIRES PROOF OF DECREASED VOTER TURNOUT OR REGISTRATION

Petitioners argue that the Fifth Circuit has created an "exceptionally important circuit split" regarding the appropriate test for a discriminatory results claim under Section 2. Pet. 12. Specifically, Petitioners claim that the Sixth, Seventh, and Ninth Circuits—unlike the Fourth and Fifth Circuits—require a showing that the voter ID law disproportionately impacts minority voter turnout or registration rates. Petitioners mistake different courts' factual conclusions based on their weighing of different evidence as presented by the parties for a dispute about the appropriate legal standard for determining liability under Section 2. Contrary to Petitioners' argument, no circuit court has held that voter turnout or registration is a *sine qua non* of a vote denial or abridgement case. The relative weight that any one of these courts gave to voter turnout or registration was dictated by the way the parties before it chose to present its case and by the courts' weighing of that evidence, not because of any difference between the circuits on the applicable legal standard. To the extent that language in the Seventh Circuit's case law suggests otherwise, that case is still under review in the Seventh Circuit, and this Court should await the Seventh Circuit's resolution of the case before deciding whether there is a conflict among the circuits justifying a grant of certiorari.

A. The Fifth Circuit Correctly Found That Section 2 Does Not Require Proof Of Decreased Voter Turnout or Registration

Petitioners argue that the Fifth Circuit erred by not requiring a showing that SB14 "caused an actual effect on minority voting participation" through demonstration of decreased turnout or registration. Pet. 19, 20-22. But this Court has never imposed such a requirement, which would contravene the express language of Section 2, the guiding principle of the Fifteenth Amendment, and controlling case law.[4]

Section 2 prohibits the "denial *or abridgement*" of the right to vote based on race or color. 52 U.S.C. § 10301(a) (emphasis added). To require a showing that voters were not able to register or vote would limit Section 2 violations to only those that result in a "denial" of the right to vote, and would read "abridgement" out of the statute. The law prohibits more than outright denial of the right to vote. The law is violated when "the political processes leading

4. Indeed, the Senate Report to the 1982 amendments to Section 2 cites two vote denial cases where a Section 2 violation was found, despite that the challenged practices did not necessarily affect turnout or registration. *See* S. Rep. 97-417, at 30, n.119 (citing *Brown v. Post*, 279 F. Supp. 60, 63-64 (W.D. La. 1968) and *United States v. Post*, 297 F. Supp. 46, 50-51 (W.D. La. 1969)). In particular, the court in *Brown* found that the failure to make opportunities for absentee voting equally available to Black and white voters alike violated Section 2, despite "[t]he fact that the outcome of the election would not have been changed." *Brown*, 279 F. Supp. at 64; *see also Post*, 297 F. Supp. at 51 (holding that the distribution of incorrect voting instructions violated Section 2 where it led a number of Black voters to cast effective ballots even though there was no evidence that it affected election results).

to nomination or election . . . are not *equally open* to participation by members of a [protected] class . . . in that its members have *less* opportunity than other members of the electorate to participate in the political process." 52 U.S.C. § 10301(b) (emphasis added). Courts have never required a showing that voting is impossible for those impacted by the challenged practice and therefore that proof of reduced turnout or registration is necessary to establish liability.

Similarly, the Fifteenth Amendment, which together with the Fourteenth Amendment forms the principal constitutional basis for Section 2, *see City of Mobile v. Bolden,* 446 U.S. 55, 60-61 (1980), does not limit its application to voting procedures that result in the wholesale denial of voting. Rather, it prohibits "onerous procedural requirements which effectively handicap exercise of the franchise" by minority voters, even though "the abstract right to vote may remain unrestricted as to race." *Lane v. Wilson,* 307 U.S. 268, 275 (1939).

SB14 violates Section 2 by imposing onerous burdens on minority voters that lessen their opportunity to participate in the electoral process, even if they ultimately manage to overcome these burdens and vote. *See Chisom v. Roemer*, 501 U.S. 380, 408 (1991) (Scalia, J., dissenting) ("If, for example, a county permitted voter registration for only three hours one day a week, and that made it more difficult for blacks to register than whites, blacks would have less opportunity '*to participate* in the political process' than whites, and § 2 would therefore be violated . . . .").

As the Fifth Circuit noted, Petitioners' draconian view of the law would lead to absurd results that are inconsistent with this Court's precedent. *See* App. 85a-86a. Under Petitioners' view, literacy tests (were they not otherwise expressly prohibited) would not violate Section 2, without express proof of decreased voter turnout or registration. *Id.* Poll taxes (again, were they not otherwise prohibited) could pass muster as long as those disproportionately impacted could gather their resources and manage to vote. *Id.*

Further, there are other reasons to reject Petitioners' novel theory. First, adoption of Petitioner's theory would preclude any pre-enforcement challenges because Plaintiffs cannot demonstrate that a challenged practice results in reduced registration or turnout before the law is implemented. *Id.* Second, as also noted by the Fifth Circuit, "turnout itself does not answer the question of a particular voter being denied access: turnout of certain people might increase while turnout of others decreases, leaving overall turnout the same; yet, those denied the right to vote are still disenfranchised." *Id.* Thus, adopting Texas's unsupported view of Section 2 would "unmoor the Voting Rights Act from its history and decades of well-established interpretations about its protections." App. 86a.

B. There Is No Split Among the Fourth, Fifth, Sixth, and Ninth Circuits

The Fourth and Sixth Circuits have expressly agreed on the same two-part framework applicable to Section 2 vote denial and abridgement claims that the Fifth Circuit applied in this case. *See League of Women Voters of N.C.*,

769 F.3d at 240; *Ohio State Conference of NAACP v. Husted*, 768 F. 3d 524, 554 (6th Cir. 2014) *vacated on other grounds*, No. 14-3877, 2014 WL 10384647 (6th Cir. Oct. 1, 2014); *see also Mich. State A. Phillip Randolph Inst.*, 833 F.3d at 667 n.2.

These circuits agree that the framework for evaluating Section 2 vote denial and abridgement claims is the "totality of circumstances," and that the Senate Factors identified in *Gingles* may also be relevant. App. 49a-50a; *Mich. State A. Phillip Randolph Inst.*, 833 F.3d at 667 n.2; *Ohio Democratic Party v. Husted*, 834 F.3d 620, 638 (6th Cir. 2016); *League of Women Voters of N.C.*, 769 F.3d at 240.

Ninth Circuit law appears consistent with this approach. Indeed, in *Gonzalez v. Arizona*, which Petitioners cite in arguing that a circuit split exists, the Ninth Circuit explained that a vote denial or abridgement claim is "intensely fact-based and localized" and requires a "searching practical evaluation of the 'past and present reality,'" guided by the Senate Factors, to determine whether "the challenged voting practice results in discrimination on account of race." 677 F.3d at 405-07 (internal quotations omitted).

1. The circuits agree that a statistical disparity alone is insufficient to establish a Section 2 violation.

Petitioners mischaracterize the test employed by the Fifth Circuit en banc court in arguing that the court created a circuit split. Petitioners claim, for example, that the Fifth Circuit held that "any law

that disparately impacts poor voters" is "necessarily" racially discriminatory. Pet. 17. This is wrong. The Fifth Circuit explicitly stated that "the district court's findings . . . rest on far more than a statistical disparity," and that the district court instead "relied on concrete evidence regarding the excessive burdens faced by Plaintiffs." App. 70a. Petitioners also mischaracterize Fourth Circuit case law, claiming that *North Carolina State Conference of NAACP v. McCrory* held that "'slow[ing] the [voting] process' alone is sufficient to establish § 2 liability." Pet. 18. But the relevant passage in *McCrory*, which concerned a discriminatory purpose (rather than results) claim, explained that "the panoply of restrictions" at issue, including a voter ID provision that slows the voting process, "results in greater disenfranchisement than any of the law's provisions individually." 831 F.3d 204, 231 (4th Cir. 2016). In other words, the Fourth and Fifth Circuits did not rely solely on any one factor to analyze the relevant laws' disenfranchising effect, but—consistent with the other circuits—looked at all the relevant facts and circumstances to reach their conclusions.

2. The circuits agree that proof of reduced voter turnout or registrations is not a requirement of a Section 2 violation.

Petitioners also wrongly assert that the Sixth and Ninth Circuits have held as a matter of law that a plaintiff *must* show evidence of reduced voter turnout or registration to succeed on a discriminatory-results claim under Section 2. A brief analysis of the case law in these circuits belies this assertion.

In *Michigan State A. Philip Randolph Inst. v. Johnson*, the Sixth Circuit, in granting a preliminary injunction, held that, "[i]f black voters in Michigan disproportionately use straight-party voting, and the absence of straight-party voting in Michigan will increase wait times, then [the challenged law, which eliminated straight-ticket voting,] may interact with the racial polarization of communities in Michigan to cause an inequality because African-American communities will likely face longer wait times." 833 F.3d at 668-69 (internal alterations and quotations omitted). The court held that these wait times were likely to violate Section 2. *Id.* at 669. A requirement of decreased voter turnout or registration would be irreconcilable with the result reached by the Sixth Circuit at that pre-enforcement posture.

Moreover, although the Sixth Circuit in *Ohio Democratic Party v. Husted* focused on registration and voting rate statistics in analyzing whether the elimination of early registration violated Section 2, this is because the only evidence that the parties presented was evidence of registration and voting rates. The claim failed because plaintiffs produced "no contrary statistical evidence showing a disparate impact." 834 F.3d at 639. The Sixth Circuit has never ruled that decreased voter turnout or registration is a required element of a Section 2 results claim.

Nor has the Ninth Circuit. Contrary to Petitioners' argument, nowhere in *Gonzalez v. Arizona* did the court require evidence of decreased voter turnout or registration. The court in *Gonzalez* simply applied Rule 52's "clear error" standard in ruling that, unlike the significant evidence adduced by Plaintiffs in this

case—that one million eligible Black and Latino voters and 600,000 Black and Latino registered voters were less likely to possess SB14-photo ID and more likely to be burdened in obtaining it—the *Gonzalez* plaintiffs "produced *no evidence supporting* [disproportionate possession]." 677 F. 3d at 407 (emphasis added).

3. Seventh Circuit law regarding discriminatory results claims under Section 2 is ambiguous and evolving.

The Seventh Circuit is the only colorable outlier on the issue. In *Frank v. Walker*, 768 F.3d 744 (7th Cir. 2014) (*Frank I*), the Seventh Circuit upheld Wisconsin's voter ID law against Section 2 and constitutional challenges. In so doing, the court appeared to place more emphasis than the other circuits on evidence of voter turnout and registration and found the Senate Factors to be "unhelpful." 768 F.3d at 754.[5] However, the court further explained that a range of evidence could be relevant to evaluating a law's discriminatory impact, an approach that the Fifth Circuit in this case described as "not inconsistent with our own." *Id.* at 753 ("To the extent outcomes help to decide whether a state has provided an equal opportunity, we must look not at [the challenged law] in isolation but to the entire voting and registration system."); App. 57a.

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5. There is also ambiguous language in the opinion that could be construed as importing an intent requirement into the Section 2 results analysis. Such an approach would not only be in conflict with the other circuits, but also with this Court's precedent interpreting Section 2, as well as the text and purpose of the law itself. *Gingles*, 478 U.S. at 35; *see also* 52 U.S.C. § 10301(b). That language is not the basis of Petitioners' circuit split argument here.

Furthermore, it is too early to declare that Seventh Circuit law regarding discriminatory result claims conflicts with the law in other circuits. The proceedings in *Frank v. Walker* are ongoing. *Frank I* was followed by a second district court opinion, resulting in a second Seventh Circuit opinion, 819 F.3d 384 (7th Cir. 2016) (*Frank II*), followed by a third district court opinion, No. 11-c-1128, 2016 WL 3948068 (E.D. Wis. July 19, 2016), the appeal from which is awaiting oral argument before the Seventh Circuit. Another, separate challenge to Wisconsin's voter ID law is also on appeal to the Seventh Circuit. *See One Wisconsin Inst., Inc. v. Thomsen*, No. 15-CV-324, 2016 WL 4059222 (W.D. Wis. July 29, 2016). Given these unique postures, and the ambiguity in *Frank I,* there is no clear conflict between the Seventh Circuit and the other circuits on the applicable standard for Section 2 results claims.

III. REFUSAL TO GRANT CERTIORARI WILL NOT LEAD TO PETITIONERS' PARADE OF HORRIBLES

Petitioners' argument about the alleged parade of horribles that could flow from the Fifth Circuit's decision on the discriminatory result of SB14 is misguided and does not merit granting certiorari. Contrary to Petitioners' argument, a finding that SB14 has a discriminatory result does not endanger valid laws which, unlike SB14, do not impermissibly discriminate on the basis of race. The fact-bound and local nature of Section 2's totality of circumstances analysis effectively and appropriately cabins the law.

As discussed above, appellate courts in at least five circuits have previously applied the totality of

circumstances analysis to Section 2 cases involving allegations of vote denial or vote abridgement, and states in these circuits still maintain voter registration requirements, assign voters to particular precincts to vote, and set regular hours and days for voting. Under this multi-factor analysis, some voting laws have been struck down as discriminatory under the Section 2 results test, *see, e.g.*, *LULAC v. Perry*, 548 U.S. 399 (2006), while many challenges to voting laws have failed because the analysis revealed no discriminatory results, *see, e.g.*, *Johnson v. DeGrandy*, 512 U.S. 997 (1994).[6]

The Senate Factors enable courts to distinguish valid election laws that unavoidably impose some burdens on voters because those laws are necessary to assure the efficiency and integrity of elections, from those laws—like Texas's stringent photo ID law—which, for pretextual reasons, impose excessive burdens that discriminate against hundreds of thousands, if not millions, of minority voters on account of race or color.

6. Texas's argument that the Fifth Circuit's reasoning invites attack on many voting restrictions on the basis of socioeconomic inequality alone is unavailing for the same reason. It underestimates the importance of the fact-bound inquiry demanded by Section 2, in which a court must consider the precise requirements imposed by a policy as they relate to and interact with a multitude of factors, including socioeconomic status, that are specific to the jurisdiction imposing the policy.

IV. THE FIFTH CIRCUIT'S INTERPRETATION OF SECTION 2 FITS SQUARELY WITHIN CONGRESS'S POWER UNDER THE FIFTEENTH AMENDMENT

Petitioners further argue that the Fifth Circuit's "expansive" interpretation of Section 2 is not congruent and proportional under the Fifteenth Amendment and would lead to the subordination of "race-neutral" principles and to "racial considerations" in violation of the Fourteenth Amendment. Pet. 27-29. These arguments may be disposed of summarily.

First, every court to consider the issue has held that the Section 2 results test is constitutional, and the Court itself has operated under the assumption that the statute is constitutional. *See Bush v. Vera*, 517 U.S. 952, 990-91 (1996) (O'Connor, J., concurring) (collecting Supreme Court cases assuming Section 2's constitutionality and lower court cases universally affirming its constitutionality); *see also Jordan v. Winter*, 604 F. Supp. 807, 811 (N.D. Miss. 1984) (three-judge panel), *sum. aff'd sub nom.*, *Mississippi Republican Exec. Comm. v. Brooks*, 469 U.S. 1002 (1984) (holding that the results standard is within Congress's enforcement power granted by the Fifteenth Amendment). Indeed, the Court has "compared Congress' Fifteenth Amendment enforcement power to its broad authority under the Necessary and Proper Clause." *Lopez v. Monterey County*, 525 U.S. 266, 294 (1999) (citing *City of Rome v. United States*, 446 U.S. 156, 175 (1980) and *South Carolina v. Katzenbach*, 383 U.S. 301, 326 (1966)). Numerous lower courts have upheld the constitutionality of the results standard. *See, e.g.*, *United States v. Blaine County*, 363 F.3d 897, 903-09 (9th Cir. 2004); *Marengo*

County Comm'n, 731 F.2d at 1556-63; *Jones v. City of Lubbock*, 727 F.2d 364, 373-75 (5th Cir. 1984); *see also Major v. Treen*, 574 F. Supp. 325, 342-49 (E.D. La. 1983).

Second, contrary to Petitioners' argument, the Fifth Circuit's impact analysis raises no constitutional concerns of incongruence and disproportionality. In *City of Boerne v. Flores*, 521 U.S. 507 (1997), the Supreme Court held that, when Congress enacts legislation pursuant to its Fourteenth Amendment enforcement authority, "[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *Id.* at 520. However, Congress's enforcement powers are "not confined to the enactment of legislation that merely parrots the precise wording of the Fourteenth Amendment." *Kimel v. Florida Bd. Of Regents*, 528 U.S. 62, 81 (2000). "Legislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional . . . ." *Boerne*, 521 U.S. at 518. Furthermore, "[i]t is for Congress in the first instance to determin[e] whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment, and its conclusions are entitled to much deference." *Kimel*, 528 U.S. at 80–81 (internal quotations omitted).

The Court has no reason to depart from the overwhelming and longstanding precedent upholding the constitutionality of Section 2, particularly in light of this deferential standard. Section 2 does not simply ban all laws that have any adverse impact on minority voters. *See DeGrandy*, 512 U.S. at 1011-12. Instead, Section 2 asks courts to evaluate election laws and practices on

a case-by-case basis, examining a set of factors that are also relevant to proving discriminatory intent by circumstantial evidence. This narrow focus helps the law prohibit only those discriminatory devices that are either the result of purposeful discrimination or perpetuate the effects of past purposeful discrimination. *See Blaine County*, 363 F.3d at 909 (describing Section 2 as "self-limiting"); S. Rep. 97-417, at 43 (explaining that Section 2 "avoids the problem of potential over-inclusion entirely by its own self-limitation").

Boerne and its progeny in fact "strengthen[] the case for section 2's constitutionality" because the Voting Rights Act "stands out as the prime example of a congruent and proportionate response to well documented violations of the Fourteenth and Fifteenth Amendments." *Blaine County*, 363 F.3d at 904; *see also City of Rome*, 446 U.S. at 173 ("[T]he prior decisions of this Court foreclose any argument that Congress may not, pursuant to § 2 [of the Fifteenth Amendment], outlaw voting practices that are discriminatory in effect."); *Lopez*, 525 U.S. at 283 ("[U]nder the Fifteenth Amendment, Congress may prohibit voting practices that have only a discriminatory effect.") (internal quotations omitted).

Finally, as discussed above, Petitioners misleadingly claim that the Fifth Circuit's decision was based solely on racially disparate rates of ID possession. Petitioners argue that, should this non-existent holding be upheld, states would be forced to calculate statistical disparities between the races at every turn, infecting decision-making with proscribed "racial considerations." Pet. 29. However, this Court has for over three decades followed Congress's direction and used the multi-factor totality of circumstances analysis in adjudicating vote dilution claims

under Section 2—and yet, for example, the vast majority of jurisdictions manage to draw district lines that do not discriminate on the basis of race. The carefully-crafted totality of circumstances standard has throughout this time stood as sufficient and constitutional guidance for courts in Section 2 cases. There is no reason to upend it now.

V. THE FIFTH CIRCUIT'S REMAND OF THE DISCRIMINATORY INTENT CLAIM DOES NOT MERIT REVIEW BY THIS COURT

Petitioners argue that review by this Court is merited because the Fifth Circuit "contravened multiple precedents of this Court by remanding the discriminatory-purpose claim after recognizing that the district court's finding was infirm." Pet. 11, 30-35. Nowhere do Petitioners explain precisely which "multiple precedents" were "contravened." Rather, they simply disagree with the Fifth Circuit's application of the settled rule of *Pullman-Standard v. Swint*, 456 U.S. 273 (1982), in which this Court held that remand is inappropriate only if "the record permits only one resolution of the factual issue." *Id.* at 292. The Fifth Circuit expressly applied the *Pullman-Standard* test and gave no fewer than 13 separate record facts upon which a finding of discriminatory intent could be based. *See* App. 30a-41a. Indeed, in light of the Fifth Circuit's conclusion that "there remains evidence to support a finding of discriminatory intent," it would have been error for the Fifth Circuit *not* to have remanded the discriminatory intent issue.[7] App. 42a. Petitioners' disagreements with

7. Private Plaintiffs maintain that the district court correctly applied the *Arlington Heights* test to the ample evidence of intentional discrimination.

the Fifth Circuit's application of *Pullman-Standard* and its assessment of the factual record are not grounds for the grant of a writ of certiorari. *See* U.S. Sup. Ct. R. 10.

Petitioners misleadingly assert that the Fifth Circuit held the district court's finding of discriminatory intent to be "infirm." Pet. 30. In fact, the Fifth Circuit found that only "some" of the evidence underlying the district court's ultimate conclusion of discriminatory intent was "infirm," App. 42a, and nowhere near all of the evidence at that.[8] While the Fifth Circuit devoted approximately six pages of its opinion to discussing the evidence upon which it believed the district court had placed too much weight, the court devoted more than twice that space to discussing the "evidence that could support a finding of discriminatory intent." App. 26a. This evidence included: (1) the "seismic demographic shift" of an increased Latino and Black population that motivated the party in power, facing a declining voter base, to change the law, App. 41a; (2) contemporary examples of state-sponsored discrimination, including that the same legislature that passed SB14 passed two other laws ruled to have been

8. The Fifth Circuit described the district court's analysis of discriminatory intent as containing "some legal infirmities." App. 26a. For example, it said that the district court relied "too heavily" or "disproportionate[ly]" on older history of State-sponsored discrimination, App. 19a-20a, and that "several" more contemporaneous examples of discrimination were "limited in their probative value." App. 21a. The court also noted that the district court "mistakenly relied in part on speculation by [SB14's] opponents," and "placed inappropriate reliance upon the type of post-enactment testimony which courts routinely disregard as unreliable," while recognizing that even that testimony was "probative in theory." App. 24a-25a.

enacted with discriminatory purpose, App. 39a-40a; (3) proponents' awareness of SB14's probable disparate impact on minorities, App. 30a; (4) the tenuousness of the legislature's stated purpose of preventing voter fraud, App. 31a-32a; (5) shifting rationales for the law, App. 40a; (6) Texas's history of justifying voter suppression efforts with the supposedly race-neutral reason of promoting ballot integrity, App. 31a-32a; (7) the radical and unprecedented deviation from normal legislative procedures, App. 32a-37a; (8) the law's author's stated belief that the Voting Rights Act had outlived its usefulness, App. 31a; (9) the law's author's dismissive responses to questions about possible disparate impact, *id.*; (10) the tabling of numerous ameliorative amendments, App. 31a; (11) proponents' refusal to explain the rejection of those amendments, App. 40a; (12) that the bill did nothing to combat the actual problem of mail-in ballot fraud, App. 35a-36a; and (13) that the bill's proponents touted it as following Indiana's voter ID law, but removed all of the ameliorative provisions of that law, App. 36a.

All of these facts go directly to the non-exhaustive factors laid out in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), to determine discriminatory intent: (1) the historical background of the decision, (2) the specific sequence of events leading up to the decision, (3) departures from the normal procedural sequence, (4) substantive departures, and (5) legislative history, especially where there are contemporary statements by members of the decision-making body. *Id.* at 266-68.

Petitioners ignore the Fifth Circuit's detailed analysis altogether, instead resting virtually their entire

argument on the false proposition that "direct evidence" of discriminatory intent is required because Plaintiffs took discovery of legislative material and deposed legislators. Pet. 30, 32-35. First, no court has ever held that only so-called "direct" evidence can support a finding of discriminatory intent. In fact, the law is to the contrary: "[D]iscriminatory intent need not be proved by direct evidence." *Rogers*, 458 U.S. at 618. "Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial *and* direct evidence of intent as may be available." *Arlington Heights*, 429 U.S. at 266 (emphasis added); *see United States v. Brown*, 561 F.3d 420, 433 (5th Cir. 2009) ("To find discriminatory intent, direct or indirect circumstantial evidence, including the normal inferences to be drawn from the foreseeability of defendant's actions may be considered." (emphasis added) (internal quotations omitted)).

Second, there is no support for the proposition that "circumstantial evidence" is any less probative than "direct evidence." Again, the law is to the contrary: "Circumstantial evidence in this respect is intrinsically no different from testimonial evidence. Admittedly, circumstantial evidence may in some cases point to a wholly incorrect result. Yet this is equally true of testimonial evidence." *Holland v. United States*, 348 U.S. 121, 140 (1954).

Third, simply because Plaintiffs were afforded some discovery of the legislative process does not mean that it was expected that they would unearth so-called "direct evidence" of discriminatory intent. The expectations of our courts are to the contrary: "[O]fficials acting in their

official capacities seldom, if ever, announce on the record that they are pursuing a particular course of action because of their desire to discriminate against a racial minority." *Smith v. Town of Clarkton*, 682 F.2d 1055, 1064 (4th Cir. 1982). There is seldom a "smoking gun" in litigation of this sort and therefore "[c]learly, the right to relief cannot depend on whether or not public officials have created inculpatory documents." *Lodge v. Buxton*, 639 F.2d 1358, 1363 n. 8, 1373 (5th Cir. 1981), *affirmed sub nom.*, *Rogers v. Lodge*, 458 U.S. 613.

Finally, the discovery permitted to Plaintiffs *did* uncover important evidence upon which the Fifth Circuit based its decision that a remand pursuant to *Pullman-Standard* was required. This includes an email from top legislative aide Bryan Hebert warning staffers that SB14 would fail preclearance under Section 5 of the Voting Rights Act and suggesting that the bill's list of acceptable IDs be expanded, and another email from Mr. Hebert undercutting proponents' public position that SB14 was modeled on Indiana's law. App. 30a, 36a. In addition, the depositions of the legislators produced key testimony from the bill's sponsors, who were unable to explain their rejection of ameliorative amendments or the unprecedented deviations from normal legislative procedure.

As the Fifth Circuit recognized repeatedly, it is the context in which the various *Arlington Heights* factors interact that is decisive, and findings in that regard are rightly made in the first instance by the trial court. It would have been reversible error for the Fifth Circuit to not remand the intent issue to the district court, and review by this Court of the decision to remand is unwarranted.

VI. THE REMAND FOR DECISION ON REMAINING ISSUES MILITATES AGAINST REVIEW AT THIS TIME

The petition for certiorari should be denied for an additional reason: there are proceedings under way in the district court that are intrinsically connected with the issues raised in the petition. The Fifth Circuit remanded for further fact-finding on the issue of discriminatory intent under Section 2 and the Fourteenth Amendment.[9] Additionally, the Fifth Circuit acknowledged that, following the decision on intentional discrimination, the district court will fashion an appropriate remedy. There is no justification for this Court to review the case in this unfinished posture.

This Court has routinely denied petitions for certiorari when the decision below remanded all or part of the case or was otherwise in an interlocutory posture. Such delays allow the Court the benefit of the fact-finder's determinations on remand and avoid piecemeal review and appeals. *See, e.g.*, *Mount Soledad Mem'l Ass'n v. Trunk*, 132 S. Ct. 2535, at 2535-36 (2012) (certiorari denied because circuit court remanded case to district court for consideration of remedy). This general rule against interlocutory review by this Court has been applied even where a "square conflict has emerged" among the circuit courts, *see Michael v. United States*, 454 U.S. 950, 951 (1981) (White, J., dissenting from denial of certiorari),

9. The parties have already submitted their initial briefs and proposed findings of fact to the district court on the issue of discriminatory intent. Oral argument is scheduled for January 24, 2017.

and where fundamental constitutional rights are involved, *see, e.g.*, *Mount Soledad Mem'l Ass'n.*, 132 S. Ct. at 2535-36 (Alito, J., respecting denial of certiorari) (discussing Establishment Clause claims).

Furthermore, the Court particularly disfavors the taking of interlocutory appeals where the inconvenience and costs of piecemeal review outweigh any prejudice from delay. *See Gillespie v. U.S. Steel Corp.*, 379 U.S. 148, 152-53 (1964) (applying this standard in context of whether a case is "final" for purposes of 28 U.S.C. § 1291). Here, granting interlocutory review before the completion of the proceedings below would delay a final judgment and remedy for violations of the fundamental right to vote, now confirmed by twelve judges across four different courts that have considered Plaintiffs' challenges to Texas's strict photo ID law in litigation spanning almost five years.

While the Fifth Circuit ordered Texas to implement an interim remedy on the "results" violation in time for the 2016 election, even that remedy proved imperfect. *See* Jim Malewitz, *Amid early voting rush, Texas sees voter ID hiccups*, Texas Tribune (Oct. 25, 2016), *available at* https://www.texastribune.org/2016/10/25/amid-early-voting-rush-texas-sees-voter-id-hiccups/ (reviewing widespread instances of incorrect voter ID posters and misinformation by pollworkers). Elections are held in Texas throughout the year, so further delay on a final judgment and remedy below will have a concrete impact on Texas's minority voters. Texas Secretary of State, *Important 2017 Election Dates*, *available at* http://www.sos.state.tx.us/elections/ voter/2017-important-election-dates.shtml (listing elections throughout 2017 with early voting for uniform elections beginning on April 24, 2017).

In contrast, Petitioners will suffer no prejudice if their petition is denied. Their only claim of prejudice is based on the incorrect premise that, if the Court were to overturn the Fifth Circuit's discriminatory result finding, "that would avoid unnecessary proceedings on the discriminatory-purpose claim." Pet. 36-37. Petitioners are wrong. While discriminatory impact is relevant for both a results and an intent claim, the elements of the claims are different. A reversal of the results holding on any of the bases set forth in the petition would have no impact on the viability of the intent claim, which is governed by the above discussed *Arlington Heights* test. Accordingly, even were this Court to reverse the "results" decision, the district court would still have to adjudicate the discriminatory intent claim.

CONCLUSION

For the reasons stated above, the Petition for Certiorari should be denied.

Date: November 28, 2016 Respectfully submitted,

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