No. 14-780

IN THE
SUPREME COURT OF THE UNITED STATES

STATE OF NORTH CAROLINA, *ET AL.*,

Petitioners,

v.

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

Respondents.

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

BRIEF IN OPPOSITION

DANIEL T. DONOVAN
Counsel of Record
SUSAN M. DAVIES
K. WINN ALLEN
KIRKLAND & ELLIS LLP
655 Fifteenth St., N.W.
Washington, DC 20005
(202) 879-5000
Counsel for the NAACP Respondents

[Additional Counsel Listed on Signature Page]

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INTRODUCTION

The petition for certiorari should be denied. The decision below is interlocutory and will very soon be overtaken by ongoing proceedings in the District Court. And because the petition concerns only two of the seven electoral practices that Respondents have challenged, granting the writ now would entail the kind of piecemeal review this Court typically eschews. Instead of granting interlocutory review of a subset of Respondents' claims, this Court should adhere to its normal practice of awaiting a full record, a trial on the merits, and a final judgment before deciding whether certiorari is warranted.

Petitioners will not be prejudiced by denial of the petition. The preliminary injunction that currently constrains Petitioners' conduct will expire when the District Court enters a final judgment in this case. Because a trial on the merits is scheduled for July 2015, that will occur in fairly short order and well before any election Petitioners would need to administer. If Petitioners are concerned that the District Court may issue a permanent injunction against the challenged electoral practices, this is neither the time nor the place to litigate that concern. Petitioners will have every opportunity to convince the District Court not to enter a permanent injunction at trial this July. And if they are unsuccessful, Petitioners can seek review from the Fourth Circuit and this Court. There is no need for this Court's review at this time.

The Court should also reject Petitioners' invitation to grant the petition, vacate the decision below, and remand for further proceedings ("GVR"). A GVR is appropriate where an intervening event

has occurred that the lower court did not have an opportunity to consider and which might alter its decision. Petitioners identify no such intervening event here; they simply disagree with the Fourth Circuit's decision on the merits. As several members of this Court have explained, disagreement with the lower court's decision on the merits is not a proper basis on which to GVR, and thus Petitioners' invitation to invoke the device for that purpose should be rejected.

Finally, the petition should be denied because the Fourth Circuit's decision is correct on the merits and does not create a Circuit split.

STATEMENT OF THE CASE

These cases, which were consolidated below, arise from the enactment of North Carolina House Bill 589 (2013) ("H.B. 589"). H.B. 589 makes a number of sweeping changes to North Carolina's election laws. Respondents believe that many of H.B. 589's provisions violate federal constitutional and statutory voting-rights protections, and have brought suit to permanently enjoin them.

H.B. 589 was originally a bill concerned almost exclusively with the imposition of new voter-identification requirements. It was passed in that form by the North Carolina House of Representatives in April 2013. *See* Pet. App. 12a. The bill then made its way to the North Carolina Senate's Rules Committee, which took no action on it for over three months. Pet. App. 13a. Then, the day after this Court announced its decision in *Shelby County, Alabama v. Holder*, 133 S. Ct. 2612 (2013), Senator Thomas Apodaca, chair of the Rules Committee, publicly stated, "now we can go with the full bill," the

contents of which were not publicly disclosed. Pet. App. 14a (citation and internal quotation marks omitted).

The new bill was posted online approximately one month later, the night before a scheduled July 23rd Rules Committee meeting and just three days before the end of the legislative session. Pet. App. 14a. The amended H.B. 589 was a 57-page omnibus elections bill containing an expanded list of restrictive voting provisions concerning, among other things, voter registration, early voting, ballot-counting procedures, and poll watchers. Pet. App. 14a. A truncated legislative process ensued, in which only four hours were allocated to debate the bill and to propose amendments on the Senate floor, and during which several Senators criticized the bill as "voter suppression of minorities." Pet. App. 15a (citation and internal quotation marks omitted). H.B. 589 ultimately passed the legislature on July 26th, and was signed into law by the Governor on August 12th, 2013. Pet. App. 15a.

The NAACP Respondents and the League Respondents filed separate complaints challenging the law in the United States District Court for the Middle District of North Carolina. Both the NAACP and the League alleged that various provisions of H.B. 589 violate the Fourteenth and Fifteenth Amendments of the Constitution of the United States, as well as Section 2 of the Voting Rights Act of 1965, 52 U.S.C. § 10301 ("Section 2"). Shortly thereafter, the United States (which is not a respondent before this Court) filed a separate suit under Section 2. Pet. App. 87a. The Duke Respondents were subsequently granted permission

to intervene in the League's action, and they too asserted constitutional challenges to various provisions in the newly enacted law. Pet. App. 87a.

Collectively, the three groups of Respondents challenged seven separate provisions of H.B. 589. Those provisions are:

- The imposition of a photo identification requirement;
- The elimination of same-day voter registration ("SDR"), which had allowed voters to register and vote on the same day during the early-voting period;
- The elimination of out-of-precinct ("OOP") voting, which had allowed voters who appeared at the wrong precinct on Election Day to nonetheless vote in all of the elections that would have appeared on their ballots if they had gone to their assigned precincts;
- The shortening of the early-voting period from 17 to 10 days;
- The elimination of pre-registration for 16- and 17-year-olds;
- The removal of discretion from county boards of elections to keep polling locations open an extra hour in extraordinary circumstances; and

- The expansion of the number of poll observers and ballot challengers at election sites.

Pet. App. 86a-88a.

Respondents and the United States conducted limited discovery into their claims and, pursuant to the District Court's scheduling order, Respondents filed a joint motion for a preliminary injunction on May 19th, 2014. That motion asked the court to enjoin six of the seven challenged provisions of H.B. 589. Respondents did not move for a preliminary injunction with respect to the photo-identification requirement because, by its terms, that requirement did not go into effect until November 2016. On the same day, Petitioners filed a cross-motion for judgment on the pleadings with respect to all claims.

The District Court heard testimony and argument on the parties' motions in the course of a four-day evidentiary hearing held in July of 2014. *See* Pet. at 5. On August 8th, 2014, the District Court issued an opinion denying Respondents' motion for a preliminary injunction in all respects. *See* Pet. App. 72a-190a. The District Court also denied Petitioners' motion for judgment on the pleadings in all respects, finding, *inter alia*, that Plaintiffs had "plausibly alleged that the General Assembly was motivated by discriminatory intent," Pet. App. 183a, and deferred final ruling on Respondents' claims until a full trial on the merits, *see* Pet. App. 182a-86a.

Respondents appealed the District Court's denial of their motion for a preliminary injunction to the Court of Appeals for the Fourth Circuit. After expedited briefing and oral argument, that court

affirmed in part and reversed in part. *See* Pet. App. 71a. The Fourth Circuit found that the District Court made "numerous grave errors of law that constitute an abuse of discretion." Pet. App. 36a; *see also* Pet. App. 36a-45a (enumerating eight distinct legal errors in the District Court's analysis). Turning to the challenged provisions of H.B. 589, the Fourth Circuit upheld the District Court's decision in part, finding that "[t]he balance of hardships" did not favor a preliminary injunction with respect to several provisions: the reduction in early-voting days; the elimination of pre-registration for 16- and 17-year olds; the removal of discretion from county boards to keep polls open an extra hour; and the increase in allowable poll observers and ballot challengers. *See* Pet. App. 25a-28a. However, the Fourth Circuit found that Respondents had "satisfied every element required for a preliminary injunction as to their Section 2 claims" challenging the elimination of SDR and OOP voting, and reversed the District Court's judgment with respect to those two provisions. Pet. App. 53a-54a. The Fourth Circuit then remanded with instructions for the District Court to enter a preliminary injunction enjoining those provisions of H.B. 589. *See* Pet. App. 54a-55a, 71a.

Judge Motz dissented. Pet. App. 55a-65a. She did not express disagreement with the majority's enumeration of the District Court's many legal errors. To the contrary, her opinion noted that she too was "troubled" by the record—including the District Court's "failure to consider the cumulative impact of the changes in North Carolina voting law." Pet. App. 60a (Motz, J., dissenting). Nevertheless, "[g]iven the standard of review," and this Court's "teaching on injunctive relief in the weeks before an

election," Judge Motz could not conclude "[a]t this stage" that preliminary relief was warranted. Pet. App. 59a-61a (Motz, J., dissenting).

On October 8th, 2014, this Court stayed the Fourth Circuit's mandate pending the disposition of a petition for a writ of certiorari. *North Carolina v. League of Women Voters of N.C.*, 135 S. Ct. 6 (2014). Petitioners filed their petition on December 30, 2014—a full 90 days after the Fourth Circuit's decision below.

In the meantime, litigation has been proceeding in the District Court. The parties have been taking extensive discovery from one another, including serving and responding to document requests and interrogatories, noticing and taking depositions, and submitting expert reports. Trial before the District Court is set for July 2015.

REASONS FOR DENYING THE WRIT

This Court should deny the petition for four reasons: (1) the petition seeks interlocutory review of only two of the seven provisions of H.B. 589 at issue in this case; (2) Petitioners will suffer no prejudice from awaiting a final judgment before seeking this Court's review; (3) a GVR is not appropriate because there is no intervening change in circumstances that the lower court did not have an opportunity to consider; and (4) the Fourth Circuit's decision was correct on the merits and does not conflict with the decisions of other Circuits.

A. The Petition Seeks Interlocutory Review Of A Subset Of Respondents' Claims.

This Court should deny the petition, first and foremost, because this case is in an interlocutory posture. The Fourth Circuit merely reversed (in part) the denial of a preliminary injunction and remanded the case for further proceedings. *See* Pet. App. 54a-55a. There is no final judgment for this Court to review. To the contrary, the parties are currently engaged in ongoing discovery in the District Court in preparation for a July 2015 trial.

The interlocutory posture of this case "itself alone furnishe[s] sufficient ground for the denial" of the petition. *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916). "[E]xcept in extraordinary cases, [a] writ [of certiorari] is not issued until final decree." *Id.*; *see also Bhd. of Locomotive Firemen v. Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) (per curiam) ("[B]ecause the Court of Appeals remanded the case, it is not yet ripe for review by this Court."); *Va. Military Inst. v. United States*, 508 U.S. 946, 946 (1993) (Scalia, J., concurring in denial of certiorari) ("We generally await final judgment in the lower courts before exercising our certiorari jurisdiction."); Eugene Gressman, *et al.*, *Supreme Court Practice* § 4.18, at 282 (9th ed. 2007) ("[I]n the absence of some . . . unusual factor, the interlocutory nature of a lower court judgment will generally result in a denial of certiorari.").

That general rule against granting certiorari to review interlocutory rulings makes good sense: Awaiting a final judgment avoids the possibility of

piecemeal or premature review, and ensures that any legal issues are evaluated on the basis of a complete record with the benefit of full consideration from the lower courts. Those considerations are fully implicated here. The petition seeks review of only two of the provisions of H.B. 589—the elimination of SDR and the elimination of OOP voting. Respondents, however, are challenging *five other* provisions of H.B. 589 as well, including the imposition of a photo-identification requirement and the shortening of the early-voting period. Respondents also are asserting other legal claims in addition to the Section 2 claims about which Petitioners seek review—including claims under the Fourteenth, Fifteenth, and Twenty-Sixth Amendments. Moreover, the United States is a party to the ongoing proceedings in the District Court, but did not appeal the District Court's decision, *see* Pet. App. 55a, and is not a party currently before the Court. Granting review now would thus be the very definition of piecemeal review: the Court would have only two of seven challenged provisions, one of several claims, and only some of the parties before it.

In addition, discovery is ongoing in the District Court regarding all of Respondents' claims, including the Section 2 claim on which Petitioners seek review. The parties are still in the process of producing and reviewing documents, issuing and responding to interrogatories, conducting depositions, and submitting expert reports. Those discovery activities will lead to the ultimate record being presented to the District Court during the July 2015 trial. Any review by this Court now, therefore, would be done

on the basis of an incomplete record, and prior to any resolution of any disputed factual issues.

In short, there is every reason in this case for the Court to adhere to its normal practice of declining to review cases in an interlocutory posture. The case is swiftly approaching trial in the District Court. If Petitioners prevail in those proceedings or on appeal to the Fourth Circuit, they will have no need to seek review from this Court. If they do not prevail, Petitioners can seek this Court's review on a full record at a later date. *See, e.g.*, *Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504, 508 n.1 (2001) (per curiam). In either event, review at this juncture is neither necessary nor desirable.

B. Petitioners Will Suffer No Prejudice From Waiting For A Final Judgment.

This Court's general aversion to engaging in piecemeal, interlocutory review has particular force where, as here, the denial of a petition will result in no prejudice to the Petitioners. Petitioners argue that, unless this Court grants the petition, "the preliminary injunction entered [below] . . . will bar North Carolina from administering its current election laws until it obtains a final judgment that the challenged practices do not violate § 2." Pet. at 3-4; *see also* Pet. at 28-29 ("If this Court declines to issue a writ of *certiorari*, . . . North Carolina will be preliminarily enjoined from administering its current election practices until it obtains a final judgment[.]"). But Petitioners never explain how they could be burdened by that fact. To the contrary, there is every reason to believe that the preliminary injunction of which Petitioners complain will expire

well before any election Petitioners would need to administer.

By its very nature, the preliminary injunction entered by the District Court will expire once that court conducts a trial on the merits and enters a final judgment. That will occur in short order. Trial in this case is set for July 2015—roughly four months from now. *See* Pet. at 5. There are no elections in North Carolina currently scheduled to take place before that time. *See* N.C. Gen. Stat. Ann. § 163-279. The District Court, moreover, is likely to enter final judgment shortly after July 2015; indeed, the District Court took only one month to issue its opinion following the preliminary-injunction hearing in this case. *See* Pet. at 5. Even were the District Court to take double (or triple) that amount of time, a final judgment should be entered in this case by September or October of this year. A final judgment will thus be entered, and the preliminary injunction of which Petitioners complain will expire, well before the "2016 Presidential Election," Pet. at 13, or any other election that Petitioners might need to administer. Granting the petition for certiorari is hardly necessary to ensure that the preliminary injunction does not "bar North Carolina from administering its current election laws." Pet. at 3-4.

To be sure, if Respondents prevail on their claims, the District Court could well replace the preliminary injunction with a permanent injunction barring Petitioners from enforcing certain provisions of H.B. 589. But that fact does nothing to justify this Court's preemptive grant of a petition for certiorari. At this point, it is entirely speculative whether a permanent injunction will be entered and, if so, on what claims

and what grounds. If a permanent injunction is entered, Petitioners will have the opportunity to seek review of that decision from the Fourth Circuit and this Court. Indeed, Petitioners could even seek a stay of the lower court's order pending appeal—as they have successfully done in this case in the past, and could attempt to do in the future. *See* Pet. at 5.

Implicitly recognizing that they will suffer no prejudice from the preliminary injunction in this case, Petitioners resort to attacking the merits of the Fourth Circuit's decision. If the Court does not grant their petition, Petitioners argue, they will be compelled to litigate this case under the Fourth Circuit's interpretation of Section 2 of the Voting Rights Act—with which they disagree on the merits. *See* Pet. at 33 ("[T]he preliminary injunction required by the Fourth Circuit majority requires the State of North Carolina to prove that the challenged laws do not violate § 2 *as § 2 has been interpreted by Plaintiffs and by the Fourth Circuit*, not as it has been interpreted and applied by this Court.").

That is true, but unremarkable. Litigants routinely try cases under legal standards with which they disagree. A defendant that loses a motion to dismiss, for example, often must litigate a case through trial to final judgment—even though it likely disagrees with the legal conclusions reached by the court at the pleadings stage. Our legal system has made the judgment that such a result is better than the alternative of "[p]ermitting piecemeal, prejudgment appeals" that would "undermine[] efficient judicial administration." *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 106 (2009) (citation and internal quotation marks omitted). The same

logic applies here: Interests in finality and avoiding piecemeal appeals counsel in favor of waiting until a final judgment is entered before reviewing any perceived errors in the lower court's analysis.

C. A GVR Is Not Appropriate.

As alternative relief, Petitioners ask the Court to "grant *certiorari*, vacate the decision by the Fourth Circuit, and remand the case for further proceedings." Pet. at 3; *see also* Pet. at 34 (asking the court to "issue a writ of *certiorari* for purposes of reversing *or vacating* the decision below") (emphasis added). That relief would be inappropriate.

A GVR is appropriate when:

> intervening developments, or recent developments that [the Court] ha[s] reason to believe the court below did not fully consider, reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome.

Lawrence v. Chater, 516 U.S. 163, 167 (1996) (per curiam); *see also Wellons v. Hall*, 558 U.S. 220, 225 (2010) (per curiam) (quoting that same language as the controlling "standard" for when a GVR is appropriate); *Youngblood v. West Virginia*, 547 U.S. 867, 874 (2006) (Scalia, J., dissenting).

Here, Petitioners point to no "intervening" or "recent" developments that the Fourth Circuit did not have an opportunity to consider and which might lead it to reconsider its decision. *Lawrence*, 516 U.S. at 167. Instead, Petitioners argue that a GVR is

justified merely because they disagree with the Fourth Circuit's opinion on the merits. *See* Pet. at 6-34. Mere disagreement with the merits of a lower court's decision, however, is not a proper basis for a GVR. *See Wellons*, 558 U.S. at 227 (Scalia, J. and Thomas, J., dissenting) (explaining that a GVR is not appropriate just because the "Court thinks that the [lower court's] merits holding is wrong"); *id.* at 229 (Alito, J. and Roberts, C.J., dissenting) (explaining that a GVR should not be used as a "vehicle for suggesting that the Court of Appeals should reconsider its decision on the merits of petitioner's claim"); *Youngblood*, 547 U.S. at 875 (Kennedy, J., dissenting) (refusing to extend "the GVR procedure well beyond *Lawrence* and the traditional practice of issuing a GVR order in light of some new development).

In short, a GVR is not appropriate here because Petitioners point to no new development or recent event that might change the Fourth Circuit's analysis, but which the Fourth Circuit did not have an appropriate opportunity to consider.

D. The Fourth Circuit's Decision Was Correct On The Merits And Does Not Conflict With Other Circuits.

Finally, the petition should be denied because the Fourth Circuit's decision was correct on the merits and is not in conflict with decisions from other circuits. In ruling that North Carolina's elimination of SDR and OOP voting likely violates Section 2, the Fourth Circuit faithfully applied this Court's holding in *Thornburg v. Gingles* that an electoral practice violates Section 2's results standard if 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." 478 U.S. 30, 47 (1986).

The Fourth Circuit's analysis followed the two steps outlined by this Court in *Gingles*. First, the Fourth Circuit followed this Court's directive to conduct "an intensely local appraisal of the design and impact of" the challenged practices "in the light of past and present reality," Pet. App. 42a-43a (citation and internal quotation marks omitted), and found that "[t]here can be no doubt that [the elimination of SDR and OOP voting] disproportionately impact[s] minority voters," Pet. App. 45a. That conclusion was compelled by the District Court's "repeated findings that Plaintiffs presented undisputed evidence showing that same-day registration and out-of-precinct voting were enacted to increase voter participation, that African American voters disproportionately used those electoral mechanisms, and that House Bill 589 restricted those mechanisms and thus disproportionately impacts African American voters." Pet. App. 49a.[1]

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[1] Petitioners do not contend that the District Court's factual findings as to the disparate impact of the challenged provisions are clearly erroneous. They instead rely on the results of the November 2014 elections, with untested assertions that have not yet been subjected to the fact-finding process at trial, which only highlights the inappropriateness of this case for review in its present posture. In any event, "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings." Sup. Ct. R. 10.

Petitioners contend that the disproportionate impact of the challenged practices is not actionable under Section 2, which they claim is violated only where the plaintiffs have "no ability" to vote, Pet. at 26, or when a law facially discriminates on the basis of race. *See id.* (arguing that the challenged practices are lawful because they "apply equally to all voters regardless of race"). The Fourth Circuit, however, correctly observed that "nothing in Section 2 requires a showing that voters cannot register or vote under any circumstance." Pet. App. 41a. To the contrary, the statute prohibits practices that "result[] in a denial *or abridgement*" of the right to vote on account of race, 52 U.S.C. § 10301(a) (emphasis added), and defines the terms "vote" and "voting" to encompass "all action necessary to make a vote effective," including "registration, . . . casting a ballot, and having such ballot counted properly and included in the appropriate totals of votes cast," 52 U.S.C. § 10310(c)(1). As this Court has explained, the prohibition on "abridgement" reaches any "cumbersome procedure[s]" and "material requirement[s]" that "erect[] a real obstacle to voting." *Harman v. Forssenius*, 380 U.S. 528, 541-42 (1965).

Section 2 therefore "covers all manner of registration requirements, the practices surrounding registration (including the selection of times and places where registration takes place and the selection of registrars), the locations of polling places, the times polls are open, . . . and other similar aspects of the voting process that might be manipulated." *Holder v. Hall*, 512 U.S. 874, 922 (1994) (Thomas, J., concurring). This includes facially neutral practices that, like the challenged

practices here, cause minority voters to have "less opportunity" to vote compared to white voters. 52 U.S.C. § 10301(b); *see also 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, . . . [Section] 2 would . . . be violated.").[2]

Second, the Fourth Circuit evaluated the "totality of the circumstances," *Gingles*, 478 U.S. at 43, and found that the disproportionate impact of the enjoined provisions is not the result of chance, but rather is "caused by or linked to 'social and historical conditions' that have or currently produce discrimination against members of the protected class." Pet. App. 46a (citations and internal quotation marks omitted).

The Fourth Circuit pointed to a number of the "Senate Factors" that this Court has deemed relevant to liability under Section 2, *see Gingles*, 478 U.S. at 44-45, including the District Court's finding that North Carolina suffers from an "unfortunate

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[2] Other Courts of Appeals have also held that voting practices that make it harder to register or cast a ballot can violate Section 2, even if they do not prevent voting entirely. *See Stewart v. Blackwell*, 444 F.3d 843, 877-79 (6th Cir. 2006), (disparate impact of punch-card ballots on minority voters could violate Section 2), *vacated as moot* by 473 F.3d 692 (6th Cir. 2007); *Sw. Voter Registration Educ. Project v. Shelley*, 344 F.3d 914, 918 (9th Cir. 2003) (per curiam) (same); *Miss. State Chapter, Operation Push v. Allain*, 674 F. Supp. 1245, 1262-68 (N.D. Miss. 1987) (dual registration system and limitation on satellite registration locations violated Section 2), *aff'd sub nom. Miss. State Chapter, Operation PUSH, Inc. v. Mabus*, 932 F.2d 400 (5th Cir. 1991).

history of official discrimination in voting and other areas," and a "legacy of overtly discriminatory practices," which "justif[y] North Carolinians' skepticism of changes to voting laws." Pet. App. 46a-47a (citation and internal quotation marks omitted). The Fourth Circuit also relied on the District Court's finding that African Americans "lag behind whites in several key socioeconomic indicators, including education, employment, income, access to transportation, and residential stability," Pet. App. 48a (citation and internal quotation marks omitted), which is precisely why they have come to rely disproportionately on the eliminated modes of participation. The Fourth Circuit then concluded that, "when viewed in the context of relevant 'social and historical conditions' in North Carolina," the enjoined provisions present a "textbook example" of a Section 2 violation. Pet. App. 49a (quoting *Gingles*, 478 U.S. at 47).[3]

In reaching that conclusion, the Fourth Circuit did not, as Petitioners assert, employ a Section 5-style retrogression analysis. *See* Pet. at 14-17. The Court's ruling did not turn on how minority voters fared under the pre-existing system as compared to the challenged one (which would have been a retrogression inquiry, *see Beer v. United States*, 425 U.S. 130, 141 (1976)), but rather on the District Court's determination that the enjoined practices are

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[3] Petitioners complain that the Fourth Circuit's decision was based on only "some" of the Senate Factors, Pet. at 26-27, but this Court has made clear that, under Section 2, "there is no requirement that any particular number of factors be proved, or that a majority of them point one way or the other," *Gingles*, 478 U.S. at 45 (citation and internal quotation marks omitted).

disproportionately more burdensome "for blacks . . . than [for] whites." Pet. App. 33a (quoting *Chisom*, 501 U.S. at 408 (Scalia, J., dissenting)); *see* Pet. App. 45a-46a. To be sure, in making that assessment the Fourth Circuit considered, as part of its analysis, the pre-existing electoral system in North Carolina. But the mere consideration of past practices among the totality of the relevant circumstances does not transform the Fourth Circuit's decision into a retrogression analysis. *See Georgia v. Ashcroft*, 539 U.S. 461, 478 (2003) ("[S]ome parts of the § 2 analysis may overlap with the § 5 inquiry[.]"). To the contrary, this Court itself recognized in *Gingles* that resolving a Section 2 claim requires "a searching and practical evaluation of past and present reality." 478 U.S. at 65.

Indeed, a challenged practice that allegedly abridges voting rights in violation of Section 2 cannot be viewed in a vacuum—its effect on protected voters can be fully understood only in light of the electoral system in which voters have participated in the past. As this Court has explained, "[t]he term 'abridge,' . . . whose core meaning is 'shorten,' . . . necessarily entails a comparison. It makes no sense to suggest that a voting practice 'abridges' the right to vote without some baseline with which to compare the practice." *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 333-34 (2000) (citations omitted).

Furthermore, contrary to Petitioners' arguments, the practices of other states are irrelevant under Section 2's "intensely local appraisal," which is "peculiarly dependent upon the facts of each case." *Gingles*, 478 U.S. at 78-79 (citations and internal quotation marks omitted). Other states' practices

have no bearing on whether the elimination of SDR and OOP voting *by North Carolina* "interacts with social and historical conditions" *in North Carolina* "to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives" *in North Carolina*. *Id.* at 47. Nothing in the Fourth Circuit's ruling mandates that other jurisdictions offer SDR or OOP voting. *See* Pet. App. 116a ("[N]either the United States nor the private Plaintiffs have ever taken the position that a jurisdiction was in violation of Section 2 simply for failing to offer SDR."). Nor does the court's decision prohibit a state that currently offers those practices from repealing or amending them, if doing so would not have a racially discriminatory effect. Indeed, this Court has explained that, under Section 2, the same electoral practice may be permissible in some contexts but not others. *See Gingles*, 478 U.S. at 46 ("[E]lectoral devices, such as at-large elections, may not be considered *per se* violative of § 2," because liability depends on "the totality of the circumstances," which may vary in different jurisdictions.).

Finally, contrary to Petitioners' suggestions, the Fourth Circuit's straightforward application of Section 2 does not create a "serious conflict" with the decisions of the Seventh and Ninth Circuits. Pet. at 6-7 (citing *Gonzalez v. Arizona*, 677 F.3d 383, 405 (9th Cir. 2012) (en banc), *aff'd sub nom. Arizona v. Inter Tribal Council of Ariz., Inc.*, 133 S. Ct. 2247 (2013); *Frank v. Walker*, 768 F.3d 744, 753 (7th Cir. 2014)). *Gonzalez* and *Frank* concerned a different type of electoral practice—voter identification requirements—than the ones at issue in this petition for certiorari. And Petitioners' reliance on these

voter identification cases only underscores the inappropriateness of this case for review in its present posture. As the State of Wisconsin recently noted in its brief opposing certiorari in *Frank*, "North Carolina's defense of its voter photo ID law in the face of a Section 2 claim is at a very early stage; the case has not even gone to trial. . . . There is no Fourth Circuit decision on the merits of North Carolina's voter photo ID law . . . ." Br. in Opp'n to Pet. for Writ of Cert. at 12, *Frank v. Walker*, No. 14-803 (U.S. Feb. 6, 2015).

In sum, the Fourth Circuit correctly determined that "Plaintiffs have satisfied every element required for a preliminary injunction as to their Section 2 claims relating to same-day registration and out-of-precinct voting," Pet. App. 53a, and that decision is not in conflict with those of the Seventh and Ninth Circuits. Certiorari is therefore unwarranted.

CONCLUSION

For the foregoing reasons, this Court should deny the petition for a writ of certiorari.

March 6, 2015

Respectfully submitted,

PENDA D. HAIR
EDWARD A. HAILES
DENISE LIEBERMAN
DONITA JUDGE
CAITLIN SWAIN
ADVANCEMENT PROJECT
1220 L Street NW,
Suite 850
Washington, DC 20005
(202) 728-9557

DANIEL T. DONOVAN
Counsel of Record
SUSAN M. DAVIES
K. WINN ALLEN
KIRKLAND & ELLIS LLP
655 Fifteenth St., N.W.
Washington, DC 20005
(202) 879-5000

Counsel for the NAACP Respondents

DALE E. HO
JULIE EBENSTEIN
STEVEN R. SHAPIRO
SEAN J. YOUNG
SOPHIA LIN LAKIN
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
125 BROAD STREET
NEW YORK, NY 10004
(212) 549-2693

ANITA S. EARLS
ALLISON J. RIGGS
GEORGE EPPSTEINER
SOUTHERN COALITION FOR
SOCIAL JUSTICE
1415 HIGHWAY 54
SUITE 101
DURHAM, NC 27707
(919) 323-3380 EXT. 115

CHRISTOPHER BROOK
ACLU OF NORTH
CAROLINA LEGAL
FOUNDATION
P.O. BOX 28004
RALEIGH, NC 27611-8004
(919) 834-3466

Counsel for the League of Women Voters Respondents

MARC E. ELIAS
JOHN M. DEVANEY
ELISABETH C. FROST
JOSEPH P. WENZINGER
PERKINS COIE LLP
700 13TH STREET N.W.
SUITE 600
WASHINGTON, D.C. 20005
(202) 654-6200

JOSHUA L. KAUL
PERKINS COIE LLP
1 EAST MAIN STREET
SUITE 201
MADISON, WI 53703
(608) 294-4007

EDWIN M. SPEAS, JR.
JOHN W. O'HALE
CAROLINE P. MACKIE
POYNER SPRUILL LLP
P.O. BOX 1801
301 FAYETTEVILLE ST.
SUITE 1900
RALEIGH, NC 27601
(919) 783-6400

Counsel for Duke Plaintiff-Intervenors