No. 16-833

In the Supreme Court of the United States

STATE OF NORTH CAROLINA, ET AL., PETITIONERS

v.

NORTH CAROLINA STATE CONFERENCE OF THE NAACP, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly determined that recent changes to North Carolina's election laws were motivated at least in part by a racially discriminatory purpose, in violation of Section 2 of the Voting Rights Act of 1965, 52 U.S.C. 10301(a) and (b) (Supp. II 2014), and that the district court's contrary finding was clearly erroneous.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-78a) is reported at 831 F.3d 204. The opinion of the district court (Pet. App. 79a-532a) is reported at 182 F. Supp. 3d 320.

JURISDICTION

The judgment of the court of appeals was entered on July 29, 2016. On October 14, 2016, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including November 28, 2016. On November 14, 2016, the Chief Justice further extended the time to December 26, 2016, and the petition was filed on December 27, 2016 (a Tuesday following a holiday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 2 of the Voting Rights Act of 1965 (VRA), 52 U.S.C. 10301 *et seq.*,[1] imposes a "permanent, nationwide ban on racial discrimination in voting." *Shelby Cnty.* v. *Holder*, 133 S. Ct. 2612, 2631 (2013). It prohibits any "voting qualification or prerequisite to voting or standard, practice, or procedure" that "results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color." 52 U.S.C. 10301(a).

In 1982, Congress amended Section 2 to make clear that a statutory violation can be established by showing discriminatory intent, a discriminatory result, or both. See *Thornburg* v. *Gingles*, 478 U.S. 30, 34-37, 43-45 (1986); see also 52 U.S.C. 10301(a)-(b); S. Rep. No. 417, 97th Cong., 2d Sess. (1982) (Senate Report). Once a violation is established, the court may enter injunctive or other relief, including relief that "block[s] voting laws from going into effect." *Shelby Cnty.*, 133 S. Ct. at 2619; see 52 U.S.C. 10308(d).

2. Between 2000 and 2012, voter registration in North Carolina soared, driven disproportionately by growth in African-American registration. Pet. App. 18a. In fact, African-American registration increased more than three times faster than white registration. *Ibid.* As a result, by 2008, the percentage of African Americans who were registered to vote surpassed the percentage of whites for the first time since Reconstruction. C.A. App. 807. Turnout increases followed, Pet. App. 18a, and African Americans voted at rates higher than whites in both the 2008 and 2012 presi-

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[1] All references to the VRA are found in the 2014 Supplement of the United States Code.

dential elections, C.A. App. 1193-1197, 1268-1269. "Not coincidentally, during this period North Carolina emerged as a swing state in national elections," Pet. App. 18a, in large part due to the fact that "in North Carolina, African-American race is a better predictor for voting Democratic than party registration," *id.* at 38a (citation omitted).

a. As initially passed by the North Carolina House of Representatives, House Bill 589 (HB 589) was a short bill focused primarily on adopting a photo ID requirement for voting. Pet. App. 42a. It permitted a wide variety of government-issued IDs, allowing any photo ID that was currently valid or had expired within the past ten years and had been "issued by a branch, department, agency, or entity of the United States, this State, or any other state." C.A. App. 2115. The bill provided specific examples of approved IDs, including government employee IDs, public university student IDs, and public assistance IDs. *Ibid.* The bill did not address the other voting practices also at issue here, such as same-day registration, early voting, out-of-precinct provisional ballots, or the preregistration of 16- and 17-year-olds.

Within a day of this Court's decision in *Shelby County*, the chairman of the Senate Rules Committee announced that, instead of the then-current version of HB 589, there would be an "omnibus bill coming out" and that the Senate would move forward with the "full bill." Pet. App. 18a (citation omitted). The new HB 589 included multiple provisions that restricted voting and registration in specific ways, including a far more stringent photo ID requirement. As the bill was being considered, "the legislature requested and received racial data as to usage of the practices changed by the

proposed law." *Id.* at 19a. The data included a breakdown of ownership of DMV-issued IDs by white and African-American North Carolinians. *Ibid.*

b. Passed strictly along party lines, HB 589 "restricted voting and registration in five different ways, all of which disproportionately affected African Americans." Pet. App. 15a.

Voter ID. "[T]he new ID provision retained only those types of photo ID disproportionately held by whites and excluded those disproportionately held by African Americans." Pet. App. 43a. Government employee IDs, student IDs, most expired DMV-issued IDs, and public assistance IDs were all eliminated from the list of approved IDs. *Id.* at 19a-20a; see C.A. App. 24,001-24,003.

Early voting. North Carolina had previously permitted 17 days of early voting. Racial data obtained by the legislature showed that "African Americans disproportionately used the first seven days of early voting" in particular. Pet. App. 20a. "After receipt of this racial data, the General Assembly amended the bill to eliminate the first week of early voting." *Ibid.* That amendment had the consequence of "eliminat[ing] one of two 'souls-to-the-polls' Sundays in which African American churches provided transportation to voters." *Ibid.* (citation omitted).

Same-day registration. Prior law had permitted voters to register in person at an early voting site and cast their ballots the same day.[2] Racial data obtained

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[2] Under North Carolina law, ballots cast by a same-day registrant can be pulled by election officials and excluded from the vote count if a county election board concludes that the same-day registrant does not meet eligibility requirements. See C.A. App. 20,538.

by the legislature showed that "African American voters disproportionately used same-day registration." Pet. App. 21a (brackets and citation omitted). African-American voters were also more likely to be in the "incomplete registration queue"; "more likely to move between counties" and thus "to need to re-register"; and more likely to benefit from "in-person assistance" in registering, which same-day registration makes available. *Ibid.* (citation omitted). HB 589 eliminated same-day registration. *Ibid.*

Out-of-precinct voting. Prior law had "required the Board of Elections in each county to count the provisional ballot of an Election Day voter who appeared at the wrong precinct, but in the correct county, for all of the ballot items for which the voter was eligible to vote." Pet. App. 21a. Racial data showed that "African Americans disproportionately used * * * out-of-precinct voting." *Id.* at 47a-48a. HB 589 eliminated the counting of out-of-precinct provisional ballots. *Id.* at 22a.

Preregistration. Prior law had permitted 16- and 17-year-olds to preregister, which "allowed County Boards of Elections to verify eligibility and automatically register eligible citizens once they reached eighteen." Pet. App. 22a. Racial data showed that "African Americans also disproportionately used preregistration." *Ibid.* HB 589 eliminated preregistration. *Ibid.*

3. Following HB 589's enactment in August 2013, private plaintiffs and the United States filed suit to challenge the law. The district court denied motions for preliminary relief. *North Carolina State Conference of the NAACP* v. *McCrory*, 997 F. Supp. 2d 322, 334 (M.D.N.C. 2014). On appeal, the Fourth Circuit

found "numerous grave errors of law" in the district court's Section 2 analysis, *League of Women Voters* v. *North Carolina*, 769 F.3d 224, 241 (2014), cert. denied, 135 S. Ct. 1735 (2015), and remanded with instructions to reinstitute same-day registration and the counting of out-of-precinct provisional ballots, *id.* at 248-249. This Court recalled and stayed the mandate, which the court of appeals had issued one month before the 2014 November midterm election. *North Carolina* v. *League of Women Voters*, 135 S. Ct. 6 (2014).

As a result of the stay, HB 589's changes to early voting, and its elimination of same-day registration and out-of-precinct voting, were in place for the 2014 midterm election. (Under HB 589, the voter ID provision was not scheduled to take effect until after the election.) In addition to increasing burdens on voters, those provisions had measurable effects on the counted ballots. "11,993 people registered to vote during the ten-day early-voting period," and thus were unable to vote in the election because HB 589 had eliminated same-day registration. Pet. App 243a. African Americans made up a disproportionate percentage of that group. *Id.* at 244a. In addition, 1387 provisional ballots were not counted during the election because they were out-of-precinct ballots. *Id.* at 255a. "African American voters disproportionately cast [those] ballots" that were not counted. *Ibid.* The preliminary injunction was reinstated after the petition for a writ of certiorari was denied on April 6, 2015. 135 S. Ct. 1735.

4. Approximately three weeks before trial on the merits, the North Carolina General Assembly passed House Bill 836 (HB 836), which substantially modified HB 589's photo ID requirements. See N.C. Gen. Stat.

§§ 163-166.13(c)(2), 163-166.15 (2015). This modification allowed in-person voters without an acceptable photo ID to cast a presumptively valid provisional ballot, so long as they completed a declaration explaining that they have a reasonable impediment to obtaining a qualifying photo ID.

Trial on the merits was bifurcated: The district court addressed all claims except those challenging the voter ID provision in July 2015; it addressed the voter ID claims in January 2016. Following amendment of the voter ID requirements by HB 836, defendants' counsel asserted that they were "not arguing [HB] 836 cured any alleged intent from [HB] 589." 1/28/16 Tr. (Tr.) 77 (P. Strach). The court took note of that concession, stating that "Defendants have just admitted that they are not arguing somehow the passage of [HB] 836 purges any discriminatory intent as to [HB] 589." Tr. 79 (Court).

After trial, on April 25, 2016, the district court entered an opinion and final judgment rejecting all of plaintiffs' claims. Pet. App. 79a-532a.

5. On July 29, 2016, the court of appeals reversed. Pet. App. 1a-78a. To determine whether the challenged provisions of HB 589 were adopted, at least in part, with a race-based motivation, the court examined each of the factors set forth in *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977). Based substantially on "undisputed" facts, Pet. App. 41a, 53a, the court concluded that these provisions were "enacted with racially discriminatory intent," *id.* at 26a. Among other things, the court found:

- "Unquestionably, North Carolina has a long history of race discrimination generally and

race-based vote suppression in particular," *id.* at 33a, including "instances since the 1980s in which the North Carolina legislature has attempted to suppress and dilute the voting rights of African Americans," *id.* at 34a. "Only the robust protections of § 5 and * * * § 2 of the Voting Rights Act prevented those efforts from succeeding." *Id.* at 38a.

- "[R]acially polarized voting * * * remains prevalent in North Carolina," such that, "[a]s one of the State's experts conceded, 'in North Carolina, African-American race is a better predictor for voting Democratic than party registration.'" *Ibid.* (quoting C.A. App. 21,400).
- The legislature "knew that, in recent years, African Americans had begun registering and voting in unprecedented numbers," and that "much of the recent success of Democratic candidates in North Carolina resulted from African American voters overcoming historical barriers" to vote. *Id.* at 39a.
- "[I]mmediately after *Shelby County*, the General Assembly * * * rushed through the legislative process the most restrictive voting legislation seen in North Carolina since enactment of the Voting Rights Act of 1965." *Id.* at 41a. "[U]ndisputed" evidence showed that this process departed from normal procedures in ways that "are devastating" in their "obvious" implications. *Ibid.*
- "[P]rior to and during the limited debate on [HB 589], members of the General Assembly requested and received a breakdown by race

of" voting practices and forms of government-issued ID. *Id.* at 47a.

- HB 589 "target[ed] African Americans with almost surgical precision," *id.* at 16a, by restricting each of the mechanisms used "disproportionally" by African Americans, *id.* at 48a.
- In justifying HB 589's photo ID requirement for in-person voting, the State "failed to identify even a single individual who has ever been charged with committing in-person voter fraud in North Carolina." *Id.* at 59a. By contrast, "the General Assembly did have evidence of alleged cases of mail-in absentee voter fraud." *Ibid.* But the legislature knew that, unlike the challenged practices, "African Americans did *not* disproportionately use absentee voting; whites did." *Id.* at 48a. The legislature "then exempted absentee voting from the photo ID requirement." *Id.* at 59a.
- The photo ID requirement contains "seemingly irrational restrictions unrelated to the goal of combating fraud," which is "most stark in the General Assembly's decision to exclude as acceptable identification all forms of state-issued ID disproportionately held by African Americans." *Id.* at 60a. For example, "[t]he district court specifically found that 'the removal of public assistance IDs' in particular was 'suspect.'" *Id.* at 43a (quoting *id.* at 457a).
- The State justified eliminating one of the two early-voting Sundays by explaining that "'counties with Sunday voting in 2014 were disproportionately black' and 'disproportionately Demo-

cratic.'" *Id.* at 40a (brackets omitted) (quoting C.A. App. 22,348-22,349). "Thus, in what comes as close to a smoking gun as we are likely to see in modern times, the State's very justification for a challenged statute hinge[d] *explicitly* on race—specifically its concern that African Americans, who had overwhelming voted for Democrats, had too much access to the franchise." *Ibid.*

- For other challenged provisions, the enacted restrictions revealed a "troubling mismatch with [the State's] proffered justifications." *Id.* at 64a. "The record thus makes obvious that the 'problem' the majority in the General Assembly sought to remedy was emerging support for the minority party. Identifying and restricting the ways African Americans vote was an easy and effective way to do so." *Id.* at 65a.
- "[R]ecord evidence provides abundant support" for the conclusion that HB 589 had a "disproportionate impact" on African-American voters. *Id.* at 50a. And "cumulatively" the challenged restrictions "result[ed] in greater disenfranchisement than any of the law's provisions individually." *Id.* at 51a.
- In the 2014 midterm election, in which HB 589 was in effect, "thousands of African Americans were disenfranchised" and "many African American votes went uncounted" due to the changes made by HB 589. *Id.* at 53a.
- Focusing solely on turnout percentages from the 2014 midterm election would not provide a complete picture. "[F]ewer citizens vote in mid-

> term elections, and those that do are more likely to be better educated, repeat voters with greater economic resources." *Ibid.* Although African-American turnout increased by 1.8% in that election, this was actually "a significant *decrease* in the *rate* of change." *Ibid.*

The court of appeals considered those and other findings to conclude that "the totality of circumstances * * * cumulatively and unmistakably reveal that the General Assembly used [HB 589] to entrench itself * * * by targeting voters who, based on race, were unlikely to vote for the majority party." *Id.* at 55a.

Acknowledging the district court's contrary finding, the court of appeals nonetheless found it to be clearly erroneous. The court of appeals explained that the district court had "missed the forest in carefully surveying the many trees," Pet. App. 14a; had "ignore[d] critical facts," including the "link between race and politics in North Carolina," *ibid.*; and had "considere[d] each piece of evidence in a vacuum, rather than engaging in the totality of the circumstances analysis required by *Arlington Heights*," *id.* at 54a.

The court of appeals also reiterated the importance of viewing the evidence "in context" of North Carolina's unique circumstances. Pet. App. 54a; see *id.* at 28a, 34a-35a, 41a. In light of North Carolina's political and socioeconomic context, the particular sequence of events leading up to the law's passage, and the specific choices made by the legislature in HB 589 itself, the court concluded that, "as in *League of United Latin American Citizens v. Perry* (*LULAC*), 548 U.S. 399, 440 (2006), 'the State took away minority voters' op-

portunity because they were about to exercise it.'" *Id.* at 16a (brackets and citation omitted).

As to the remedy, the court of appeals held that invalidating HB 589's challenged provisions was necessary to "completely cure the harm wrought by" those provisions. Pet. App. 69a. The court also determined that the 2015 amendment, HB 836—which allowed voters without photo ID to cast a provisional ballot with a "reasonable impediment" declaration—was insufficient to "fully cure[] the harm from the photo ID provision." *Ibid.*; see *id.* at 70a (noting the "lingering burden on African American voters"). Judge Motz dissented only as to the remedy for the voter-ID provision. *Id.* at 71a-78a. Given the 2015 amendment, she explained, she "would only temporarily enjoin" that provision until the district court could determine whether "a permanent injunction is necessary." *Id.* at 78a.

The court of appeals issued its mandate on July 29, 2016. Later that day, the district court entered a permanent injunction in accordance with the court of appeals' ruling. Judgment & Inj. at 3-4, *North Carolina State Conference of the NAACP* v. *McCrory*, No. 13-cv-658.

6. On August 15, 2016, petitioners filed in this Court an application to recall and stay the mandate of the court of appeals pending disposition of a petition for a writ of certiorari. After requesting a response, this Court denied the application on August 31. The 2016 general election proceeded without the challenged provisions of HB 589 in effect.

ARGUMENT

The court of appeals correctly held, based largely on undisputed evidence, that the challenged provisions

of HB 589 were enacted at least in part for a discriminatory purpose, and that the district court's contrary finding was clearly erroneous. In reaching that conclusion, the court faithfully followed well-settled precedent, and its fact-bound conclusion does not warrant this Court's review. Contrary to petitioners' assertions, the decision below does not conflict with any decision of this Court or of another court of appeals.

1. Petitioners first contend (Pet. 16) that the decision below "cannot be reconciled" with this Court's decision in *Shelby County* v. *Holder*, 133 S. Ct. 2612 (2013), which held that Section 4(b) of the VRA may not be used to require preclearance under Section 5. *Id.* at 2631. Petitioners acknowledge (Pet. 18) that the court of appeals "purported to apply §2," which forbids any racially motivated denial or abridgement of the right to vote. Petitioners nevertheless allege (*ibid.*) that "in actuality [the court] employed a variant of §5's anti-retrogression analysis." Petitioners' argument is without merit.

As an initial matter, petitioners do not claim—nor could they—that *Shelby County* altered the standard for evaluating Section 2 claims. Statutes that abridge the right to vote "on account of race or color" remain just as unlawful as they were before *Shelby County*. 52 U.S.C. 10301(a). Indeed, this Court twice reiterated in *Shelby County* itself that the decision "in no way affect[ed] the permanent, nationwide ban on racial discrimination in voting found in § 2." 133 S. Ct. at 2631; see *id.* at 2619 ("Section 2 is permanent, applies nationwide, and is not at issue in this case."). And in this case, the court of appeals relied exclusively on principles that *Shelby County* left untouched: After exhaustively reviewing the record, see pp. 7-11, *supra*,

the court found, based on factors set forth in *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), that intentional racial discrimination "constituted a but-for cause of" HB 589, in violation of Section 2. Pet. App. 65a. At no point did the court so much as mention "retrogression," much less adopt retrogression as the standard for a Section 2 violation.

For their contention that the court of appeals *sub silientio* reimposed a non-retrogression requirement, petitioners primarily rely (Pet. 18) on portions of the decision in which the court observed "that North Carolina had *changed* its law to remove voting mechanisms that had existed before." Petitioners focus specifically on the court of appeals' statement that "*removing* voting tools that have been disproportionately used by African Americans meaningfully differs from not initially implementing such tools." Pet. App. 52a. That statement, however, is fully consistent with this Court's guidance for evaluating legislative purpose: *Arlington Heights* explicitly instructs courts to consider the "historical background" and "[t]he specific sequence of events leading up to the challenged decision" as factors that may "shed some light on the decisionmaker's purposes." 429 U.S. at 267. Those factors invite courts to consider the extent to which a challenged law departs from prior law as a factor bearing on discriminatory intent.

Indeed, in finding an absence of discriminatory intent in *Arlington Heights*, where a city refused to allow the building of multi-family, low-income housing units, the Court deemed it significant that the area involved had always been zoned for single-family use (R-3) rather than multiple-family use (R-5). 429 U.S.

at 267. If the area "always had been zoned R-5 but suddenly was changed to R-3," the Court concluded, "we would have a far different case." *Ibid.* In other cases, the Court has similarly taken into account the relationship between a challenged law and prior law as a factor bearing on the discriminatory-intent inquiry. See, *e.g.*, *Hunter* v. *Underwood*, 471 U.S. 222, 226-227 (1985) (finding that new voter disqualification offenses were more frequently committed by blacks); *Reitman* v. *Mulkey,* 387 U.S. 369, 373 (1967) (finding that intent of constitutional provision was to overturn state laws prohibiting private housing discrimination). As these cases illustrate, the context in which a change to voting laws was adopted, including its relationship to prior law, can provide a clue about the reasons behind the change. See *League of United Latin Am. Citizens* v. *Perry*, 548 U.S. 399, 440 (2006) (*LULAC*) ("In essence *the State took away* the Latinos' opportunity because Latinos were about to exercise it.") (emphasis added).

The court of appeals did not, however, determine that the change to North Carolina's laws was alone sufficient to support a finding of discriminatory intent. Petitioners are therefore simply wrong in asserting that the court of appeals "effectively restored a version of the previous preclearance regime." Pet. 18. Indeed, had the court of appeals truly reinstated a non-retrogression requirement, as petitioners claim, then almost *none* of its extensive analysis would have been necessary. The court could simply have observed that several changes adopted by HB 589 left North Carolina's African-American voters with less opportunity than they previously enjoyed. It would

not have been necessary for the court to establish, as it did in detail:

- the strong connection in North Carolina between race and voting patterns, see Pet. App. 37a-38a;
- the recent success of African-American mobilization and the perceived electoral threat it posed to the dominant political party, *id.* at 39a;
- the unprecedented procedural tactics employed by the legislature "in an attempt to avoid in-depth scrutiny," *id.* at 44a; see *id.* at 41a-44a;
- the legislature's request of statistics breaking down, by race, ownership of DMV-issued IDs and all other challenged voting practices, *id.* at 48a;
- the legislature's removal, from the list of approved photo IDs, *only* of the forms of ID used disproportionately by African-American voters, *id.* at 19a-20a, 48a;
- the legislature's simultaneous exemption from the photo ID requirement of absentee voting, despite significant evidence of absentee-voting fraud, *id.* at 48a;
- the legislature's "explicit[ ]" reliance, in cutting back on early voting, on the impact it would have on African-American voters, *id.* at 40a ("smoking gun");
- the State's failure "to identify even a single individual who has ever been charged with committing in-person voter fraud in North Carolina," *id.* at 59a;

- the State's self-contradictory, *id.* at 64a, demonstrably false, *id.* at 66a, 68a, and post-hoc, *id.* at 67a, justifications for HB 589.

The court's reliance on those and other factors refutes petitioners' assertion (Pet. 18) that the court merely "identified *potentially retrogressive* effect, and inferred discriminatory intent from that."

Finally, petitioners point (Pet. 18-19) to various other statements, made by the court of appeals in its decision, which supposedly demonstrate the court's view that, "where North Carolina is concerned, it is *always* 1965." Pet. 19. Several of the identified quotations are merely factual statements—and indisputably accurate ones at that. See, *e.g.*, Pet. App. 14a ("race and politics" are "inextricabl[y] link[ed]" in North Carolina); *id.* at 16a (HB 589 targeted African-American voters "with almost surgical precision"); *id.* at 33a (*Shelby County* "release[d]" North Carolina from preclearance requirements). Others are quoted out of context. Compare Pet. 19 ("[T]he Fourth Circuit barely attempted to hide its view that North Carolina's Republican legislators—having been vexed for six decades by §5—itched to 'pick up where [they] left off in 1965.'"), with Pet. App. 34 ("Failure" by the court to ascribe any weight to North Carolina's past discrimination "would risk allowing that troubled history to pick up where it left off in 1965 to the detriment of African American voters.") (brackets and internal quotation marks omitted). Nothing the court actually said, and none of the analysis on which it relied, conflicts with *Shelby County*.

2. Petitioners offer a grab-bag of other arguments purporting to show that the court of appeals' analysis

was misguided. Those fact-bound contentions are without merit.

a. Petitioners first contend that the court of appeals unfairly accused North Carolina of "usher[ing] in a new 'era of Jim Crow.'" Pet. 20 (quoting Pet. App. 46a). But the court of appeals did no such thing. Rather, the court said that the legislature had used unprecedented procedural tactics to "rush through the legislative process the most restrictive voting law North Carolina has seen *since the era of Jim Crow*." Pet. App. 46a (emphasis added). That factual claim is accurate, and petitioners do not argue otherwise.

Petitioners also contend that the court of appeals' intent finding is invalid because North Carolina's voting system falls within the mainstream of state electoral practices. But as the court found, "the sheer number of restrictive provisions [in HB 589] * * * distinguishes this case from others." Pet. App. 51a. In any event, the relevant question is not whether other States have adopted laws that are similar in some respects. The question in this case is *why* HB 589 was adopted—in that particular form, at that particular time, by that particular State. As this Court has recognized, an otherwise lawful voting practice may be unlawful if adopted for racially discriminatory reasons. See *Hunter*, 471 U.S. at 227-228. That is why it has instructed courts to undertake "a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Arlington Heights*, 429 U.S. at 266. The court of appeals scrupulously followed those instructions. See Pet. App. 33a-65a (examining each of the *Arlington Heights* factors).

Petitioners also err in seeking (Pet. 21-22) to establish a conflict between the decision below and this

Court's decision in *Crawford* v. *Marion County Election Board*, 553 U.S. 181 (2008). In *Crawford*, this Court upheld Indiana's voter ID law against a facial challenge alleging that the law unduly burdened the plaintiffs' right to vote under the balancing test established in *Anderson* v. *Celebrezze*, 460 U.S. 780 (1983), and *Burdick* v. *Takushi*, 504 U.S. 428 (1992). That test asks whether the "burden that a state law imposes" is "justified by relevant and legitimate state interests sufficiently weighty to justify the limitation." *Crawford*, 553 U.S. at 191 (opinion of Stevens, J.) (citation and internal quotation marks omitted). Applying this "balancing analysis" to the broad facial attack on the Indiana law, this Court concluded that "on the basis of the evidence in the record it [was] not possible to quantify * * * the magnitude of the burden on th[e] narrow class of voters" in Indiana who lacked access to the voting ID deemed acceptable by Indiana. *Id.* at 200 (opinion of Stevens, J.).

Crawford has little to do with this case. *Crawford* did not involve an allegation of racial discrimination, much less an allegation of *intentional* racial discrimination. Nor did *Crawford*, which was a facial challenge, analyze the sort of context-specific evidence of discriminatory intent that the court of appeals relied on in this case. See 553 U.S. at 201 (noting the lack of "any concrete evidence of the burden imposed on voters"); see also Pet. App. 58a (noting "the fundamental differences between *Crawford* and this case"). Accordingly, *Crawford* casts no doubt on the correctness of the intent decision below.

In any event, petitioners' effort to compare North Carolina's law to the law upheld in *Crawford* is misguided. In attempting to show that North Carolina's

voter ID law "has far more features designed to maximize the right to vote" than the voter ID law challenged in *Crawford*, petitioners point to "the lenient 'reasonable impediment exception' that allows voters lacking ID to cast a provisional ballot." Pet. 22 (citing *South Carolina* v. *United States*, 898 F. Supp. 2d 30, 46 (D.D.C. 2012)). But that argument conflates the passage in 2013 of HB 589 with the passage in 2015 of HB 836. Not only was HB 836 adopted two years later, it was enacted on the eve of trial. An after-the-fact amendment, adopted in the midst of litigation, hardly bears on the question whether HB 589 had been passed with discriminatory intent two years beforehand. And petitioners expressly waived any argument that the 2015 legislation had removed the taint of discriminatory intent from HB 589. See Tr. 79 (Court) ("Defendants have just admitted that they are not arguing somehow the passage of [HB] 836 purges any discriminatory intent as to [HB] 589."); see also p. 7, *supra*.

b. Petitioners next argue (Pet. 22) that the decision below "marks the first time in history that an election law has been invalidated as purposefully discriminatory without *either* discriminatory effect *or* direct evidence of discriminatory intent." Petitioners base this argument on their repeated assertion that the court of appeals "did not disturb" the district court's findings as to discriminatory impact. Pet. 2; see, *e.g.*, Pet. 3, 13, 18, 22, 32. That assertion is demonstrably false.

The court of appeals found "abundant support" for the conclusion that HB 589 disproportionately impacts African-American voters, Pet. App. 50a, a conclusion it drew almost entirely from "undisputed facts," *id.* at 53a. Such facts included "the district court's findings

that African Americans disproportionately used each of the removed mechanisms, as well as disproportionately lacked the photo ID required by [HB 589]." *Id.* at 50a. The court of appeals also pointed to evidence showing "the cumulative impact of the challenged provisions." *Ibid.*; see *id.* at 51a ("Together, these produce longer lines at the polls on Election Day, and absent out-of-precinct voting, prospective Election Day voters may wait in these longer lines only to discover that they have gone to the wrong precinct."); see also *id.* at 244a (African-American voters were disproportionately affected by the elimination of same-day registration); *id.* at 255a (African-American voters disproportionately cast uncounted provisional out-of-precinct ballots). Those and other facts conclusively established that the challenged provisions made voting more difficult for African Americans: that is, that they "bear[] more heavily" on African-American voters, *Arlington Heights*, 429 U.S. at 266 (citation omitted), which added to an inference of discriminatory intent. See Pet. App. 49a-50a. But as the court of appeals explained, the district court "simply refused to acknowledge the[] import" of those undisputed facts. *Id.* at 53a.

The premise of petitioners' argument also appears to be that a court may only find discriminatory intent based on direct rather than circumstantial evidence. But "discriminatory intent need not be proved by direct evidence." *Rogers* v. *Lodge*, 458 U.S. 613, 618 (1982); see *Arlington Heights*, 429 U.S. at 266; see also Senate Report 27 n.108. Indeed, this Court has cautioned that direct evidence of discriminatory purpose will rarely exist, as "[o]utright admissions of impermissible racial motivation are infrequent and plain-

tiffs often must rely upon other evidence." *Hunt* v. *Cromartie*, 526 U.S. 541, 553 (1999). And, when the circumstantial evidence is as powerful as it was here, the absence of direct evidence is irrelevant.

c. Petitioners claim (Pet. 23) that the decision below is somehow suspect because it reversed the district court's finding of no intentional discrimination. In fact, this Court has previously affirmed such reversals, including in the voting-rights context. See *Hunter*, 471 U.S. at 229 (affirming court of appeals' reversal of district court's finding of no discriminatory intent as to state constitutional provision disfranchising persons convicted of crimes of moral turpitude); see also *Dayton Bd. of Educ.* v. *Brinkman*, 443 U.S. 526, 539-540, 542 (1979) (affirming court of appeals' reversal of district court's finding of no intentional discrimination). Moreover, there is nothing remarkable about a court of appeals reversing such a finding. See, *e.g.*, *Taylor* v. *Howe*, 225 F.3d 993, 996 (8th Cir. 2000); *Adams* v. *Nolan*, 962 F.2d 791, 796 (8th Cir. 1992); *Sumner* v. *United States Postal Serv.*, 899 F.2d 203, 211 (2d Cir. 1990); *Legrand* v. *Trustees of Univ. of Ark. at Pine Bluff*, 821 F.2d 478, 481-482 (8th Cir. 1987), cert. denied, 485 U.S. 1034 (1988); *Bishopp* v. *District of Columbia*, 788 F.2d 781, 786 (D.C. Cir. 1986); *Diaz* v. *San Jose Unified Sch. Dist.*, 733 F.2d 660, 663-664 (9th Cir. 1984) (en banc), cert. denied, 471 U.S. 1065 (1985).

Petitioners further contend (Pet. 24) that the court of appeals erred by declining to remand. Petitioners point to one instance in which this Court reversed a lower court's resolution of a discriminatory-intent claim and returned the matter to the district court. See *ibid.* (citing *Cromartie*, *supra*). The unstated

premise of petitioners' argument seems to be that, where discriminatory intent is disputed or there has been a long trial, a reviewing court must remand for further proceedings.

That argument lacks merit. The Court in *Cromartie* did not purport to create a special rule for appellate review of discrimination claims. Rather, the Court "decide[d] only that th[e] case was not suited for summary disposition." 526 U.S. at 554. This case, by contrast, was decided on a complete record after trial. Nor does a trial's length, or the fact that an election law is at issue, immunize a case from normal appellate review. Indeed, this Court in *Hunter* described the application of such appellate review to a state election law:

> [T]he District Court * * * found that the [challenged provision] was not enacted out of racial animus, only to have the Court of Appeals set aside this finding. In doing so, the Court of Appeals applied the clearly-erroneous standard of review required by Federal Rule of Civil Procedure 52(a), see *Pullman-Standard* v. *Swint*, 456 U.S. 273, 287 (1982), but was "left with a firm and definite impression of error . . . with respect to the issue of intent."

471 U.S. at 229 (citation omitted). Here, as there, "the Court of Appeals was correct." *Id.* at 227.

d. Petitioners claim (Pet. 24) that certiorari review should be granted because the court of appeals' decision "could readily be deployed to invalidate the election laws of numerous States." That is so, petitioners argue, because certain facts that the court of appeals relied upon are common to many States. In particular, petitioners point (Pet. 25) to four types of evi-

dence that, if relied upon, will "destabiliz[e]" future analysis in Section 2 cases more broadly. But petitioners simply mischaracterize and misconstrue the ruling below, attacking a decision other than the one actually written.

First, contrary to petitioners' suggestion (Pet. 25-27), there is nothing erroneous or anomalous about considering evidence of racially polarized voting. The court of appeals correctly acknowledged that "[r]acially polarized voting is not, in and of itself, evidence of racial discrimination." Pet. App. 31a. Instead, the court correctly explained that minority voting cohesion can nonetheless provide an incentive for intentional discrimination as "the political cohesion of the minority groups * * * provides the political payoff for legislators who seek to dilute or limit the minority vote." *Ibid.* That observation is not novel. Indeed, it flows squarely from this Court's decision in *LULAC*, *supra*.

In that case, the legislature saw that Latino voters were "becoming increasingly politically active and cohesive." *LULAC*, 548 U.S. at 439. "In response," the state legislature redrew a district to divide the community, whose "growing participation * * * threatened [a Representative's] incumbency." *Id.* at 442. Based on that and other evidence, the Court concluded that "[i]n essence the State took away the Latinos' opportunity because Latinos were about to exercise it. This bears the mark of intentional discrimination that could give rise to an equal protection violation." *Id.* at 440. Just as in *LULAC*, the court of appeals here recognized that when a minority group votes cohesively against an incumbent party, that can motivate "politicians to entrench themselves through

discriminatory election laws." Pet. App. 32a.[3] And petitioner certainly points to no decision from this Court or another court of appeals suggesting that racially polarized voting should be *irrelevant* to a claim of intentional discrimination. The court of appeals was thus correct to rely on racially polarized voting as one piece of evidence under "the totality of the circumstances analysis required by *Arlington Heights*." *Id.* at 54a.

Second, the court of appeals did not hold, as petitioners claim (Pet. 27), that North Carolina's receipt of Section 5 objection letters from the Department of Justice was "key evidence" that "shows *present* discriminatory intent." The court pointed to those letters in explaining that the district court had incorrectly characterized the record as containing "little evidence of official discrimination since the 1980s." Pet. App. 34a (citation omitted); see *id.* at 35a-36a. The court of appeals also pointed to numerous successful Section 2 challenges, *id.* at 36a-37a, and to other evidence "that state officials continued in their efforts to restrict or dilute African American voting strength well after 1980 and up to the present day," *id.* at 37a-

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[3] Petitioners seem (Pet. 2) to conflate intentional race discrimination with race-based animus (*i.e.*, hatred of a group). Proving a racially discriminatory intent does not require a showing of racial animus. See *Garza* v. *County of L.A.*, 918 F.2d 763, 778 n.1 (9th Cir. 1990) (Kozinski, J., concurring and dissenting in part), cert. denied, 498 U.S. 1028 (1991); cf. *id.* at 778 ("When the dust has settled and local passions have cooled, this case will be remembered for its lucid demonstration that elected officials engaged in the single-minded pursuit of incumbency can run roughshod over the rights of protected minorities.").

38a. Petitioners do not—and cannot—dispute that factual conclusion.[4]

There was nothing improper, moreover, in the court of appeals considering recent historical evidence. This Court and other courts have done so, and no court has categorically declared that such evidence is irrelevant. See, *e.g.*, *LULAC*, 548 U.S. at 439-440; *McMillan* v. *Escambia Cnty.*, 748 F.2d 1037, 1044 (5th Cir. 1984) ("A history of pervasive purposeful discrimination may provide strong circumstantial evidence that the present-day acts of elected officials are motivated by the same purpose, or by a desire to perpetuate the effects of that discrimination.") (quoting *United States* v. *Marengo Cnty. Comm'n*, 731 F.2d 1546, 1567 (11th Cir.), appeal dismissed and cert. denied, 469 U.S. 974 (1984)). Indeed, this Court recognized the particular relevance of prior VRA litigation and Section 5 objections in *LULAC*, when analyzing whether a jurisdiction has a relevant history of discrimination against racial minorities. 548 U.S. at 440.

Third, petitioners are wrong to claim (Pet. 30) that the decision below rests on a bare disparity by race in ID possession that may exist generally across many States. Instead, the evidence in this case was that the General Assembly, which requested and reviewed breakdowns by race of possession rates of various forms of ID, "completely revised the list of acceptable

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[4] Petitioners neither mention nor challenge the court of appeals' additional reliance on a three-judge district court decision that the same General Assembly that passed HB 589 also violated the Equal Protection Clause by drawing two congressional districts based predominantly on race without furthering any compelling interest. See *Harris* v. *McCrory*, 159 F. Supp. 3d 600 (M.D.N.C. 2016), appeal pending, No. 15-1262 (argued Dec. 5, 2016).

photo IDs, removing from the list the IDs held disproportionately by African Americans, but retaining those disproportionately held by whites." Pet. App. 45a; see *id.* at 53a ("'[T]he removal of public assistance IDs' in particular was 'suspect.'") (quoting *id.* at 457a). At the same time, having received data indicating that white voters disproportionately use absentee voting, the State "exempted absentee voting from the photo ID requirement," despite significant evidence of absentee-voter fraud. *Id.* at 48a. And when asked why it chose to write the ID law in the manner it did, the State was unable to provide a coherent explanation. See *id.* at 59a-60a. Those troubling facts are not about disparities in ID possession generally; they are specific to this law, this State, and this record.

Fourth, petitioners are wrong to accuse (Pet. 30) the court of appeals of "grossly distort[ing]" the State's acknowledgment that race played a role in the decision to cut back the number of early voting days. When asked why the State cut back on the first week of early voting, the State explained that "counties with Sunday voting in 2014 were disproportionately black and disproportionately Democratic." Pet. App. 40a (brackets and internal quotation marks omitted) (quoting *id.* at 711a-712a). The court relied on that admission as one piece of evidence that HB 589 was enacted, at least in part, for a racially discriminatory purpose. *Ibid.* In response, petitioners claim (Pet. 31) that the State's decision could not have been discriminatory because the first Sunday of early voting, which HB 589 eliminated, had not been available in the 2010 midterm. Yet the State's obvious concern was that voting on that first Sunday might *become* available in 2014—a concern to legislators only because it would

have led to increased African-American turnout. Petitioners also note (Pet. 31) that all voters "were more likely to vote during the *last* ten early-voting days than during the first seven." Yet that is not the reason provided by the State, which expressed concern about early voting by "disproportionately black and disproportionately Democratic" voters. Pet. App. 40a. The court did not err in taking the State at its word.

3. Petitioners contend (Pet. 35) that this Court should grant review "to resolve th[e] conflict over the relevance of statistical racial disparities in the application of [Section] 2 of the Voting Rights Act." No such conflict exists or is implicated by this case.

First, petitioners assert (Pet. 32) that the courts of appeals "disagree on whether statistical racial disparities in the use of particular voting mechanisms can prove discriminatory effect under §2." But the decisions cited by petitioners (Pet. 32-34) all involve discriminatory-*results* claims. See *Ohio Democratic Party* v. *Husted*, 834 F.3d 620, 636-640 (6th Cir.), stay denied, 137 S. Ct. 28 (2016); *Veasey* v. *Abbott*, 830 F.3d 216, 243-244 (5th Cir. 2016) (en banc), petition for cert. pending, No. 16-393 (filed Sept. 23, 2016); *Frank* v. *Walker*, 768 F.3d 744, 751-754 (7th Cir. 2014), cert. denied, 135 S. Ct. 1551 (2015); *Gonzalez* v. *Arizona*, 677 F.3d 383, 405-407 (9th Cir. 2012) (en banc), aff'd *sub nom. Arizona* v. *Inter Tribal Council of Ariz., Inc.*, 133 S. Ct. 2247 (2013). The decision below, by contrast, addressed an allegation that North Carolina acted with a discriminatory *purpose*. That type of claim requires a different analysis, including application of the *Arlington Heights* factors. The decision below therefore does not—and could not—conflict

with the cases cited by petitioners. In any event, for the reasons stated by the Government in its brief opposing certiorari in *Veasey*, *supra*, no conflict exists even as to the use of statistical evidence in discriminatory-results claims. See Br. in Opp. at 21-26 (No. 16-393).

Second, petitioners allege (Pet. 34) that the decision below "confused the standard of review for district court findings." As evidence of that asserted confusion, petitioners point (Pet. 35) to the court's opinion in *Lee* v. *Virginia State Board of Elections*, 843 F.3d 592 (4th Cir. 2016), which distinguished the decision below in affirming a finding that the plaintiffs there had failed to establish that a Virginia bill had been enacted for a discriminatory purpose. See *id.* at 603-604. Far from showing inconsistency or error in the decision below, the different outcomes in *Lee* and in this case merely show that different factual records matter. See Pet. App. 35a (pointing out that Virginia's bill was adopted before *Shelby County*); *ibid.* (noting that Virginia's legislators did not ask for or possess the same type of racial data requested here); see also *Lee*, 843 F.3d at 604 ("Unlike the departure from the normal legislative process that occurred in North Carolina, SB 1256 passed as part of Virginia's standard legislative process, following full and open debate."); *ibid.* ("[T]he provisions included in SB 1256 did not target any group of voters, let alone target with surgical precision."); *ibid.* ("SB 1256 requires photo identification for all voters and allows the use of photo IDs provided by Virginia's public and private universities, which are, according to plaintiffs' own witnesses, disproportionately possessed by young people and African Americans."). If anything, the

contrast between this case and *Lee* further confirms the fact-bound nature of the decision below.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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