IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

Case No. 1:18-cv-01034-LCB-LPA

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

Plaintiffs,

v.

DAMON CIRCOSTA, in his official capacity as Chair of the North Carolina State Board of Elections, et al.,

Defendants.

BRIEF OF AMICI CURIAE PHILIP E. BERGER, IN HIS OFFICIAL CAPACITY AS PRESIDENT PRO TEMPORE OF THE NORTH CAROLINA SENATE, AND TIMOTHY K. MOORE, IN HIS OFFICIAL CAPACITY AS SPEAKER OF THE NORTH CAROLINA HOUSE OF REPRESENTATIVES

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INTRODUCTION[1]

There are two core legal issues in this case. First, whether Plaintiffs have demonstrated that the North Carolina General Assembly enacted S.B. 824 with racially discriminatory intent and racially discriminatory impact, in violation of the Fourteenth and Fifteenth Amendments. Second, whether Plaintiffs have demonstrated that S.B. 824 "results in a denial or abridgement of the right … to vote on account of race or color" in violation of the Voting Rights Act. 52 U.S.C. § 10301(a). Plaintiffs' evidence has never supported either claim, but now recent decisions by the Fourth Circuit and the Supreme Court conclusively foreclose Plaintiffs' claims.

In reversing the preliminary injunction in this case, the Fourth Circuit articulated the appropriate legal standard for Plaintiffs' constitutional claims and applied that standard to the evidence presented by Plaintiffs. *See N.C. State Conf. of the NAACP v. Raymond*, 981 F.3d 295 (4th Cir. 2020). The Fourth Circuit's decision is dispositive here. As State Board Defendants have explained, the record is *unchanged* since the Fourth Circuit's review. *See* State Bd. Defs.' Mem. of Law in Support of Mot. for Summ. J., Doc. 182 at 11 (Oct. 8, 2021) ("State Bd.'s Br."). With the same record, the Fourth Circuit's legal analysis commands the same result—judgment in favor of Defendants.

[1] Legislative Defendants submit this brief with the Court's authorization. *See* Mem. Op. and Order, Doc. 56 at 23 (June 3, 2019); Mem. Op. and Order, Doc. 100 at 9 (Nov. 7, 2019). Pursuant to Local Rule 7.5, no party or party's counsel authored the brief in whole or in part or contributed money that was intended to fund preparing or submitting the brief, and no person other than Legislative Defendants or their counsel contributed money that was intended to fund preparing or submitting the brief.

While the Fourth Circuit did not address Plaintiffs' Section 2 claim, the Supreme Court's decision in *Brnovich v. Democratic National Committee*, 141 S. Ct. 2321 (2021), only strengthens this Court's prior decision that S.B. 824's "anticipated impact, on its own, is not enough to invalidate S.B. 824." *See* Mem. Op., Order, and Prelim. Inj., Doc. 120 at 52–53 (Dec. 31, 2019). *Brnovich* represents the Supreme Court's first assessment of "generally applicable time, place, [and] manner" voting regulations like S.B. 824 and Section 2 of the VRA. 141 S. Ct. at 2338. The Supreme Court articulated "several important circumstances" that courts must consider when evaluating such generally applicable regulations, including whether the regulation burdens voters or is merely an inconvenience, the size of any meaningful disparity in burdens, how prevalent such regulations are across the country, and a State's interest in enacting the regulation. *Id.* at 2338–40. These circumstances favor upholding S.B. 824. "In light of the modest burdens allegedly imposed by" S.B. 824, "the small size of its [alleged] disparate impact," the widespread use of voter ID regulations across the United States, and North Carolina's "justifications" for enacting S.B. 824, "the law does not violate § 2 of the VRA." *Id.* at 2346, 2348.

The Fourth Circuit's decision in this case and the Supreme Court's decision in *Brnovich* establish that Plaintiffs' claims fail as a matter of law. State Board Defendants' Motion for Summary Judgment should be granted. *See* State Bd.'s Br. at 25.

BACKGROUND

I. The General Assembly Implements a Constitutional Amendment Requiring Voter ID.

The People of North Carolina amended their state Constitution in November 2018 to provide that "voters offering to vote in person shall present photographic identification before voting." N.C. CONST. art. VI, § 3(2). To implement the People's command that it "enact general laws governing the requirements of such photographic identification," the General Assembly enacted S.B. 824—one of the most generous photo voter-ID laws in the country.

S.B. 824 is the result of inclusive deliberation and extensive debate in both houses of the North Carolina General Assembly. Joel Ford, an African American Democrat, served as one of the law's primary sponsors. And, overall, five Democrats across the Senate and the House voted for S.B. 824 at different points with four Democrats voting for the bill in its final form.

S.B. 824 has subsequently been amended four times, each serving to make the law even more protective of voters. *See* 2020 N.C. Sess. Laws 17, § 10(a)(2)(d) (adding public assistance IDs); 2019 N.C. Sess. Laws 239 (mandating, *inter alia*, that one-stop voting be available the last Saturday before election day); 2019 N.C. Sess. Laws 22 §§ 1–5 (relaxing certain approval requirements for educational institutions and government employers); 2019 N.C. Sess. Laws 4, § 1(a), (b) (postponing anticipated enforcement).

Both as initially enacted and subsequently amended, S.B. 824 provides an expansive array of qualifying photo IDs that registered voters can use. *See* N.C. GEN. STAT. § 163-

166.16(a)(1)–(3). For registered voters without a qualifying photo ID, S.B. 824 makes free IDs available. S.B. 824 mandates that county boards of elections issue IDs to any registered voter who requests one, free of charge and with no documentation required. *Id.* § 163-82.8A(d)(1); 08 NCAC 17.0107(a), Voter Photo Identification Card. S.B. 824 provides that these free IDs "*shall* be issued at any time, except during the time period *between* the end of one-stop voting for a primary or election … and election day for each primary and election." N.C. GEN. STAT. § 163-82.8A(d)(2). In addition, S.B. 824 requires the DMV to offer another form of free ID and the DMV must automatically issue a special identification card to a voter, free of charge, if that voter's otherwise valid form of DMV ID is seized or surrendered due to cancellation, disqualification, suspension, or revocation. *See* N.C. GEN. STAT. § 20-37.7(d2).

S.B. 824 also provides numerous means to vote for registered voters who lack photo ID at the polls. Registered voters who have a "reasonable impediment" to "presenting" a qualifying photo ID at the polls may cast a provisional ballot. *Id.* § 163-166.16(d)(2). Numerous grounds are recognized as reasonable impediments and voters may identify *any other reason* that they subjectively deem reasonable. The only basis for rejecting a reasonable impediment affidavit is falsity, *id.* § 163-166.16(f), and a bipartisan county board of elections must *unanimously* vote that a reasonable impediment ballot is false for it not to be counted, *see* 08 NCAC 17.0101(b), Photo Identification.

In addition to the reasonable impediment process, voters who fail to present an ID—either because they do not have one yet or simply forgot it—can vote a provisional ballot

and return to the county board of elections by no later than the end of the day before canvassing (generally ten days after the election). *Id.* § 163-166.16(c); *id.* § 163-182.5(b). They can obtain a free ID on the same trip to the county board or bring another ID and cure their ballot.

II. S.B. 824 Differs Dramatically from Prior Voting Legislation

It bears highlighting just a few of the ways that S.B. 824 materially differs from H.B. 589, both in the sequence of events leading to enactment and in the substance of the laws. S.B. 824 was enacted pursuant to a mandate that was lacking for H.B. 589: in 2018, the people of North Carolina amended the Constitution to require individuals to present photographic identification when voting. H.B. 589 was an omnibus election bill with provisions unrelated to voter ID, such as "the elimination of preregistration" and "same-day registration." *Raymond*, 981 F.3d at 299. S.B. 824 is focused on voter ID. H.B. 589 was passed strictly on party lines; S.B. 824 received bipartisan support. The Fourth Circuit concluded that in the enactment of H.B. 589, the General Assembly relied on "racial data," where the General Assembly "requested and received a breakdown by race of DMV-issued ID ownership, absentee voting, early voting, same-day registration, and provisional voting." *N.C. State Conf. of NAACP v. McCrory*, 831 F.3d 204, 230 (4th Cir. 2016). With S.B. 824, however, the General Assembly requested and relied on *none* of this kind of data. Instead, the General Assembly was informed in a presentation from the State Board of Elections that, in the March 2016 primary in which H.B. 589's voter ID provision was enforced, less than one-tenth of one percent of voters cast provisional ballots because they

lacked ID at the polls, and of these, fewer than half claimed a reasonable impediment to presenting a valid form of ID. *See* Dep. of Kim Westbrook Strach, State Def. Ex. 10, Doc. 97-11 at 52–54 (Jan. 24, 2019); Tr. of Nov. 26, 2018 Joint Elections Oversight Committee, State Def. Ex. 15, Doc. 97-16 at 37:13–38:3 (Oct. 30, 2019) ("Joint Elections Committee Tr."). In enacting S.B. 824, the General Assembly acted to drive that number even lower under S.B. 824 by expanding on the list of IDs, including by adding forms of qualifying ID and by making the reasonable impediment provision more expansive.

The substance of S.B. 824—modeled on laws, like South Carolina's, that have been upheld by courts—is dramatically different from H.B. 589 as well. *See* Joint Elections Committee Tr. at 51:16-19. First, S.B. 824 has always contained a reasonable impediment fail-safe. As originally enacted, H.B. 589 did not include such a provision. And although the General Assembly did create an exemption in 2015 legislation passed during the litigation over H.B. 589, that exemption prohibited counting reasonable impediment ballots that "merely denigrated the photo identification requirement, or made obviously nonsensical statements," and it required an impediment to *obtaining* identification, not merely presenting it. 2015 N.C. Sess. Laws 103, § 8(e). The former law's reasonable impediment provision also allowed other voters to challenge reasonable impediment declarations, while S.B. 824 does not. *Compare* 2015 N.C. Sess. Laws 103, § 8(e), with N.C. GEN. STAT. § 163-87. Second, S.B. 824 unlike H.B. 589 extends voter ID provisions to absentee balloting. Third, S.B. 824 broadens the list of voter ID to include qualifying student and government employee ID. Fourth, S.B. 824 creates a form of free ID that is

issued by county boards of election without requiring underlying documentation, and that can be obtained and used to vote in one trip during early voting. Fifth, unlike H.B. 589, S.B. 824 requires the State Board to make aggressive and individualized outreach to voters lacking DMV-issued voter ID. *Compare* 2018 N.C. Sess. Laws 144, § 1.5(a)(8), with 2013 N.C. Sess. Laws 381, §§ 5.2, 5.3, and 2015 N.C. Sess. Laws 103 § 8(g). Sixth, as amended, S.B. 824 lists public assistance ID as qualifying voter ID. H.B. 589 did not.

In enacting S.B. 824, the General Assembly succeeded in crafting a much less strict law than H.B. 589. After years of litigation, Plaintiffs still fail to identify a single registered voter who will be prevented from voting by the terms of S.B. 824.

ARGUMENT

I. S.B. 824 Does Not Violate the Equal Protection Clause of the Fourteenth Amendment or the Fifteenth Amendment.

Plaintiffs bring claims under the Equal Protection Clause of the Fourteenth Amendment and under the Fifteenth Amendment. To prevail on both claims, Plaintiffs must prove that S.B. 824 has a racially discriminatory impact and "racially discriminatory intent or purpose." *See Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977); *City of Mobile v. Bolden*, 446 U.S. 55, 62 (1980); *Greater Birmingham Ministries v. Sec'y of State for State of Ala.*, 992 F.3d 1299, 1321 (11th Cir. 2021) ("If Plaintiffs are unable to establish both intent and effect, their constitutional claims fail.").

Plaintiffs cannot meet their burden. Plaintiffs' case rests on the types of circumstantial evidence that the Supreme Court identified in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977). The relevant

evidentiary factors are: S.B. 824's allegedly disparate racial impact, the sequence of events leading to its enactment, its legislative history, and the historical background of discrimination in North Carolina. When reviewing these factors, this Court "*must* afford the State legislature a 'presumption' of good faith." *Raymond*, 981 F.3d at 303 (quotation marks omitted).

The Fourth Circuit's analysis of these factors is dispositive because the record is unchanged since its review. As the State Board Defendants note, Plaintiffs "failed to conduct discovery" or submit "additional evidence in the record beyond that which Plaintiffs presented at the preliminary injunction phase." State Bd.'s Br. at 11. Accordingly, each of the *Arlington Heights* factors supports granting summary judgment in favor of Defendants.

a. The Court Cannot Draw An Inference of Discriminatory Intent From Alleged Disparate Possession of Qualifying IDs.

Plaintiffs' evidence of disparate impact hinges entirely on alleged disparate rates of ID possession between white voters and racial minorities. But the Court cannot ignore that Plaintiffs' own evidence of disparate impact flatly contradicts their theory of the case. Plaintiffs' theory is that North Carolina is a state with racially polarized voting. Thus, they allege that the General Assembly sought to entrench itself by disenfranchising minority voters so that the General Assembly could win more elections with white voters.

Plaintiffs' theory does not add up. According to Plaintiffs' PI Exhibit 11, the State Board of Elections' analysis (which is overinclusive in any event) found that 6.5% of 5,186,104 white voters and 10.6% of 1,670,793 black voters could not be matched to a

qualifying photo ID. *See* Prelim. Expert Report of Michael C. Herron, Pls.' Ex. 11, Doc. 91-11 at 21 (Oct. 9, 2019). That means approximately 337,096 white voters lacked qualifying ID versus approximately 177,104 black voters. Since elections are decided by absolute margins—not proportions of racial groups—the evidence indicates that at the margins S.B. 824 would affect the white vote more than the black vote. A legislature seeking to entrench itself by means of racially polarized voting would not disenfranchise more white voters than black voters.

Moreover, the General Assembly *did not have* this data. All agree that the General Assembly did not have specific knowledge that S.B. 824 would disparately impact voters of any particular race. *See Raymond*, 981 F.3d at 308–09. If the impact is not known, then it is hard to infer intent from the impact. It is harder still to infer discriminatory intent when the Court considers the evidence that the General Assembly did have. Before the General Assembly enacted S.B. 824, then-director of the State Board of Elections Kim Strach gave a presentation which showed that a minuscule portion of voters (less than one-tenth of one percent) had to a cast a provisional ballot for lack of qualifying ID under H.B. 589 in March 2016. *See* Joint Elections Committee Tr. 37:13–38:3. The General Assembly took this data and responded by making S.B. 824 substantially more voter friendly than H.B. 589 in numerous ways. A legislature seeking to entrench itself would not see that only 0.1 percent of voters lacked qualifying ID and make it *even* easier to vote.

b. S.B. 824 Guarantees All Races Equal Voting Rights.

In all events, Plaintiffs have not shown that S.B. 824 "bears more heavily on one race than another." *Arlington Heights*, 429 U.S. at 266. That is because the General Assembly fulfilled S.B. 824's basic promise that "*[a]ll* registered voters will be allowed to vote *with or without a photo ID card*." 2018 N.C. Sess. Laws 144, § 1.5 (a)(10). S.B. 824 allows for an expansive array of existing qualifying photos IDs: driver's licenses, nonoperator's DMV IDs, U.S. passports, tribal IDs, student IDs, state- and local-government employee IDs, certain out-of-state driver's licenses and nonoperator's IDs, veteran's IDs, military IDs, and public assistance IDs. And, if an individual voter forgets to bring a qualified photo ID to the polls, that registered voter can vote provisionally.

But a voter does not even need one of those IDs to vote. S.B. 824 requires every County Board of Elections in North Carolina to issue a voter ID to any voter who requests one, free of charge and free of any documentation. These IDs are to be available during early voting, allowing voters at one-stop early voting to get their ID and vote in one trip. A voter can even vote provisionally on election day, pick up a free voter ID in the days after voting, and if he returns to the county board of elections by the day before canvassing, cure his ballot and have his vote counted. And a voter need not even do that because of S.B. 824's sweeping reasonable impediment provision. If a voter declares a reasonable impediment, then that provisional ballot must be accepted by the bipartisan county board of elections unless the board *unanimously* believes the voter's declaration is false. In this

way, "the word 'provisional' is a bit of a misnomer in this instance." *South Carolina v. United States*, 898 F. Supp. 2d 30, 41 (D.D.C. 2012).

With the array of qualifying IDs and the multiple means of mitigating the circumstances when a voter fails to present an ID at the polls, it simply cannot be disputed that S.B. 824 "generally makes it very easy to vote." *Brnovich*, 141 S. Ct. at 2330. Even if the Plaintiffs' analysis of disparate ID possession rates was reliable (it is not), the Fourth Circuit has established Plaintiffs' evidence is beside the point. The relevant question is whether S.B. 824 disparately burdens voters' ability to vote, and S.B. 824's mitigating provisions "go 'out of [their] way to make its impact as burden-free as possible.'" *Raymond*, 981 F.3d at 309 (quoting *Lee v. Va. State Bd. of Elections*, 843 F.3d 592, 603 (4th Cir. 2016)).

Start with S.B. 824's reasonable impediment provision. The only evidence that Plaintiffs have to contest this provision's burden-reducing effect are speculative concerns about implementation. This evidence was soundly rejected by the Fourth Circuit as irrelevant. "[A]n inquiry into the legislature's intent in *enacting* a law should not credit disparate impact that may result from poor *enforcement* of that law." *Raymond*, 981 F.3d at 310. The Fourth Circuit relied, in part, on the three-judge district court decision in *South Carolina*, that precleared South Carolina's voter ID law. The court explained that even though South Carolina's legislators and Governor "no doubt knew" that ID possession varied by race, South Carolina's law was not racially discriminatory. 898 F. Supp. 2d at 44–45. The "sweeping reasonable impediment provision … eliminate[d] any

disproportionate effect or material burden that South Carolina's voter ID law otherwise might have cause." *Id.* at 40. The reasonable impediment provision prevented disparate impact because it "ensures that all voters of all races … continue to have access to the polling place to the same degree they did under pre-existing law." *Id.* at 45. S.B. 824's reasonable impediment provision, which is even more sweeping than South Carolina's, will do the same, thus eliminating any disparate impact.

Consider also S.B. 824's mandate that county boards provide free IDs. The Fourth Circuit found this provision "*at most*," imposed the same kind of "minimal burden" that the Supreme Court upheld as permissible in *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008) (plurality opinion) (emphasis added). The Supreme Court explained that "[f]or most voters who need them, the inconvenience of making a trip to the [DMV], gathering the required documents, and posing for a photograph surely does not qualify as a substantial burden on the right to vote, or even represent a significant increase over the usual burdens of voting." 553 U.S. at 198; *accord Brnovich*, 141 S. Ct. at 2338. Of course, the voter ID provision in *Crawford* required documentation, which S.B. 824's free IDs at county boards of elections do not. Any "minimal burden" is even less here, if not de minimis. That is particularly true "[f]or those who vote early at their county board of elections" because "the marginal cost of obtaining a qualifying ID is negligible … they can obtain a free voter ID and vote in a single trip. Those voters must do no more than they did previously—show up to vote." *Raymond*, 981 F.3d at 309.

With S.B. 824's mitigating provisions, the Fourth Circuit was right to conclude that S.B. 824 is "more protective of the right to vote than other states' voter-ID laws that courts have approved." *Id.* at 310. Consider the Virginia voter-ID law at issue in *Lee*. There, Virginia made "free voter IDs available without corroborati[on] … and provisional voting subject to cure." *Id.* (citing *Lee*, 843 F.3d at 594). But Virginia lacked any reasonable impediment provision. It was upheld. *Id.* The South Carolina voter-ID law lacked provisional voting subject to cure as is available under S.B. 824 and had a shorter list of qualifying ID, and the law was precleared as not having discriminatory effect on racial minorities. *Id.* at 43. And just this year, the Eleventh Circuit considered Alabama's voter-ID law on summary judgment in *Greater Birmingham Ministries*. The Eleventh Circuit upheld the law, despite the fact it lacked a reasonable impediment provision, and Alabama's free IDs required corroborating documents. 992 F.3d at 1327. "Given these cases, it is hard to say that the 2018 Voter-ID Law does not sufficiently go 'out of its way to make its impact as burden-free as possible.'" *Raymond*, 981 F.3d at 310 (quoting *Lee*, 843 F.3d at 603.).

c. The Remaining *Arlington Heights* Factors Support Upholding S.B. 824.

The Court need not consider any additional *Arlington Heights* factors because "to establish an equal protection violation, a plaintiff must show … disparate effect," *Irby v. Va. State Bd. of Elections*, 889 F.2d 1352, 1355 (4th Cir. 1989), but Plaintiffs have not done so. *See Palmer v. Thompson*, 403 U.S. 217, 224 (1971) ("[N]o case in [the Supreme] Court has held that a legislative act may violate equal protection solely because of the

motivations of the men who voted for it."). Nevertheless, to the extent the Court considers the remaining *Arlington Heights* factors, they also cut against Plaintiffs.

i. The relevant historical background does not indicate discrimination.

North Carolina has treated its African American citizens shamefully in the past, as no party denies. Yet history that long predates voter ID or is unrelated to voter ID is largely beside the point. The Court must be "mindful of the danger of allowing the old, outdated intentions of previous generations to taint [North Carolina's] legislative action forevermore on certain topics." *Greater Birmingham Ministries*, 992 F.3d at 1325. As the Supreme Court has made repeatedly made plain, "past discrimination cannot, in the manner of original sin, condemn governmental action that is not itself unlawful." *Abbott v. Perez*, 138 S. Ct. 2305, 2324 (2018) (cleaned up).

Despite Plaintiffs' rhetoric, nothing in S.B. 824 connects it to past discrimination. Moreover, as the Fourth Circuit explained, S.B. 824 is not yoked to the flaws of the General Assembly's prior enactment in H.B. 589. Instead, the origins of S.B. 824 are in the constitutional amendment adopted by the People of North Carolina. "Fifty-five percent of North Carolinian voters constitutionally required the enactment of a voter-ID law and designated to the General Assembly the task of enacting the law." *Raymond*, 981 F.3d at 305 (citing N.C. CONST. ART. VI, § 2(4)). The amendment is thus an "independent intervening event" between H.B. 589 and S.B. 824 that severs S.B. 824 from that past legislation. *Id.* In fact, the *McCrory* court made explicit that its decision to invalidate H.B. 589 should not be understood to forever stain North Carolina's General Assembly. Instead,

its decision invalidating H.B. 589 did not purport to "freeze North Carolina election law in place as it is today" because the Constitution does not "bin[d] the State's hands in such a way." *McCrory*, 831 F.3d at 241. After the voters of North Carolina spoke, the General Assembly enacted a far different and more generous voter-ID law in S.B. 824. And Plaintiffs have not shown how past discriminatory intent related to past legislation carries over to S.B. 824.

ii. S.B. 824's enactment followed a normal sequence of events and an inclusive process.

Plaintiffs' evidence "of the legislative process … fails to 'spark suspicion' of impropriety in [S.B. 824's] passage." *Raymond*, 981 F.3d at 305 (quoting *Arlington Heights*, 429 U.S. at 269). The bill went through multiple rounds of committee review, "five days of legislative debate," and multiple floor readings. Time was permitted for public comment, and the General Assembly took the time to consider 24 amendments. *See* S.B. 824 / SL 2018-144, N.C. GENERAL ASSEMBLY, https://bit.ly/2BQ9EOX. This "enactment was not the 'abrupt' or 'hurried' process that characterized the passage of [H.B. 589]." *Raymond*, 981 F.3d at 306 (quoting *McCrory*, 831 F.3d at 228).

S.B. 824's enactment was also the culmination of an inclusive legislative process. Of the 24 amendments that the General Assembly considered, it adopted more than half (13), including amendments proposed by the bill's opponents. Several made S.B. 824's requirements more voter friendly; for example, Senator Ford introduced—and the General Assembly adopted—the amendment that required county boards of elections to offer free IDs during early voting. *See* Senate Amendment No. A1 to S.B. 824, N.C. GEN. ASSEMBLY

(2018), https://bit.ly/39BqjW4; Aff. of Joel Ford, State Def. Ex. 18, Doc. 97-19 at 9 (Oct. 30, 2019). And some of the adopted amendments that made S.B. 824 more voter-friendly were even offered by opponents of the bill. *See, e.g.*, House Amendment No. A11 to S.B. 824, N.C. GEN. ASSEMBLY (2018), https://bit.ly/2TKUX8p (proposed by Democrat Representative Graham and adopted, removing the requirement that certain tribal enrollment cards had to be approved by the State Board before they could be used to vote); *see also* Doc. 97-19 at 9–10 (describing additional amendments that were adopted and why other amendments were appropriately not adopted). With this inclusive legislative process, it is not surprising that even Senator McKissick—a staunch opponent of S.B. 824—admitted that S.B. 824 was "an *earnest effort* to try and expand … significantly beyond what it was when the last voter ID bill came before us" and "appreciate[d] the fact that this bill is far more broad and far more expansive." Joint Elections Committee Tr. at 48:13–18. And Representative Pricey Harrison, another opponent, stated on the House floor that she "want[ed] to start by thanking Chairman Lewis because I think he's done a really terrific job *working with us* to help improve the bill." Tr. of December 5, 2018 House Floor, 2nd and 3rd Reading of S.B. 824, State Defs.' Ex. 15, 97-16 at 116:20–22 (Oct. 30, 2019) (emphasis added).

In its final form, S.B. 824 "also enjoyed bipartisan support: four Democratic legislators joined their Republican colleagues in voting for [S.B. 824]." *Raymond*, 981 F.3d at 306; *see supra* S.B. 824 / SL 2018-144, https://bit.ly/2BQ9EOX. Senator Ford, in particular, "was a black Democrat who sponsored [S.B. 824]. His input in its drafting and

his votes to pass the bill" cannot be "discount[ed]." *Raymond*, 981 F.3d at 306. Nor can the votes of "the three other Democrats that voted for the bill." *Id.* If the General Assembly's goal were to prevent certain groups from voting on the assumption that they vote for Democrats, it is implausible that any registered Democrat would have voted for S.B. 824 at any stage of the process. But they did.

The Fourth Circuit's decision that Plaintiffs' evidence failed to "spark suspicion" of invidious discriminatory intent was fully in line with its past decision in *Lee v. Virginia State Board of Elections*, in which the court affirmed the district court's findings that "the evidence failed to show any departure from normal legislative procedures." 188 F. Supp. 3d 577, 610 (E.D. Va. 2016), *aff'd*, 843 F.3d 592. Although the bill "ultimately pass[ed] on a near-party-line vote, the bill was subject to robust debate from all sides." *Id.* This was true even though only one Democrat and one Independent voted for Virginia's law. *See* 843 F.3d at 603. But as laid out above four Democrats voted for S.B. 824 at in its final form—which surpasses the breakdown in *Lee.*

Further, the Fourth Circuit explained that the fact that a legislature was found to have been elected under racially gerrymandered maps "sheds little light on the motivations of those … legislators." *Raymond*, 981 F.3d at 306, n.4. The Fourth Circuit thus implicitly joined with the weight of authority, which holds "that otherwise valid enactments of legislatures will not be set aside as unconstitutional by reason of their passage by a malapportioned legislature." *Dawson v. Bomar*, 322 F.2d 445, 447–48 (6th Cir. 1963).

Gerrymandered maps "do not dictate a later General Assembly's intent in passing different legislation." *Raymond*, 981 F.3d at 306, n.4.

iii. S.B. 824's legislative history does not suggest discriminatory intent.

The legislative history of S.B. 824 is "otherwise unremarkable. Nothing here suggests that the General Assembly used racial voting data to disproportionately target minority voters 'with surgical precision.'" *Raymond*, 981 F.3d at 308–09 (quoting *McCrory*, 831 F.3d at 214, 216–17). Just the opposite. As Senator Ford explained, S.B. 824's free ID and reasonable impediment provisions meant that it was unnecessary to even consider data on individuals who lacked compliant ID because "[i]f an individual does not have compliant ID, they will still be able to vote." Doc. 97-19, ¶ 28; *see also South Carolina*, 898 F. Supp. 2d at 44–45. And, in all events, "neither party … has brought … attention [to] any discriminatory remarks made by legislators during or about the legislation's passage." *Raymond*, 981 F.3d at 309.

d. S.B. 824 is Supported By Numerous Non-Racial Motivations.

If Plaintiffs have proved discriminatory intent (they have not), *Raymond*, 981 F.3d at 311, the question would then become whether "the same decision would have resulted even had the impermissible purpose not been considered." *Arlington Heights*, 429 U.S. at 270, n.21. Numerous non-racial motivations explain the General Assembly's enactment of S.B. 824. The General Assembly was required to fulfill the mandate of the North Carolina constitution to pass a voter ID law, wanted to instill voter confidence, and sought to prevent voter fraud. *See, e.g.*, 2018 N.C. Sess. Laws 144 (stating that the S.B. 824 is "an act to

implement the constitutional amendment requiring photographic identification to vote" (stylization omitted)); Doc 97-16 at 9:1–16:20 (statement of Representative Lewis explaining that the General Assembly had a constitutional duty to enact a voter ID law and discussing the fraud and voter confidence rationales).

The Supreme Court has already confirmed that the interests in instilling voter confidence and preventing voter fraud are significant. In *Brnovich*, the Supreme Court explained that preventing voter fraud is a "strong and entirely legitimate state interest." *Brnovich*, 141 S. Ct. at 2340. This accords with the Supreme Court's statements in *Crawford* more than a decade ago in assessing Indiana's voter-ID law. Even though that law addressed only in-person fraud and even though "[t]he record contain[ed] no evidence of any such fraud actually occurring in Indiana at any time in its history," 553 U.S. at 194 (op. of Stevens, J.), there was "no question about the legitimacy or importance of the State's interest in counting only the votes of eligible voters," *id.* at 196. In other words, the Supreme Court found that an anti-fraud rationale is legitimate, regardless of whether voter fraud has been proven.

The Supreme Court's conclusion that voter ID laws instill public confidence in elections is a legislative fact that binds lower federal courts. *Frank v. Walker*, 768 F.3d 744, 750 (7th Cir. 2014). And the Supreme Court's conclusion is correct: such laws are widespread and recommended by a bipartisan commission headed by former President Jimmy Carter and James Baker, among others. *See Building Confidence in U.S. Elections*,

COMM'N ON FED. ELECTION REFORM, at 18–21 (Sept. 2005), https://bit.ly/3eU0IK7. S.B. 824 thus was motivated by valid rationales.

II. S.B. 824 Does Not Violate Section 2 of the Voting Rights Act

This summer in *Brnovich*, the Supreme Court set out, for the first time, a set of guideposts for courts to use when considering whether "generally applicable time, place, or manner voting rules" violated Section 2 of the Voting Rights Act ("VRA"). 141 S. Ct. at 2333. While not offering an exhaustive list of the "totality of circumstances" analysis that the VRA requires, the Court did provide "important circumstances" with direct relevance to the VRA inquiry. *Id.* at 2338. These circumstances include "the size of the burden imposed by a challenged voting rule," the opportunities to vote under the State's entire system of voting, "the degree to which a challenged rule has a long pedigree or is in widespread use in the United States," a "meaningful comparison" of "any disparities in a rule's impact on members of different racial or ethnic groups," and finally "the strength of the state interests served by a challenged voting rule." *Id.* at 2338–40. Each of these "circumstances" cut in favor of upholding S.B. 824.

Burden. S.B. 824 does not impose anything more than "the usual burdens of voting." *Id.* at 2344. The touchstones of the Section 2 of the VRA are "[t]he concepts of 'open[ness]' and 'opportunity'" meaning a state's voting system should be free "of obstacles and burdens that block or *seriously hinder* voting." *Id.* at 2338 (emphasis added). "After all, every voting rule imposes a burden of some sort," thus the VRA "tolerate[s] the 'usual burdens of voting.'" *Id.* (quoting *Crawford*, 553 U.S. at 198). As discussed above, the

Fourth Circuit has found that S.B. 824 only imposes a minimal burden because, as in *Crawford*, registered voters who lack ID only need to seek out free IDs at either the county board of elections or the DMV, which does not "even represent a significant increase over the usual burdens of voting." *Raymond*, 981 F.3d at 309 (quoting *Crawford*, 553 U.S. at 198). These registered voters face "[m]ere inconvenience[s]" which are not "enough to demonstrate a violation of § 2." *Brnovich*, 141 S. Ct. at 2338; *Lee*, 843 F.3d at 600–01 ("[P]laintiffs have to make an unjustified leap from *the disparate inconveniences* that voters face when voting to *the denial or abridgement of the right to vote*.").

Context. Any minimal burdens associated with acquiring an ID under S.B. 824 "are also modest when considering [North Carolina's] 'political processes' as a whole." 141 S. Ct. at 2344. That is because North Carolina offers "easy ways" to vote with or without prior possession of a photo ID, namely one-stop early voting, provisional balloting, and the reasonable impediment declaration. *Id.* As the Fourth Circuit found, the provision of IDs at one-stop early voting enables voters to "do no more than they did previously—show up to vote." *Raymond*, 981 F.3d at 309. Provisional balloting can enable a voter to obtain an ID even *after* Election Day. And the reasonable impediment provision effectively eliminates any burden. *See Raymond*, 981 F.3d at 309; *cf. South Carolina*, 898 F.Supp.2d at 41 ("[T]he process of listing the reason and filling out the form will not constitute a material burden for purposes of [Section 5 of] the Voting Rights Act.").

Alleged Disparity. "[T]he mere fact there is some disparity in impact does not necessarily mean that a system is not equally open or that it does not give everyone an

equal opportunity to vote. The size of any disparity matters." *Brnovich*, 141 S. Ct. at 2339. This Court already determined that S.B. 824's "anticipated impact, on its own, is not enough to invalidate S.B. 824—at least not according to the evidence currently in the record." Doc. 120 at 52–53. The record has not changed. This Court's prior evaluation of caselaw on disparities under Section 2 is only reaffirmed by *Brnovich*'s admonition that "[s]mall disparities are less likely than large ones to indicate that a system is not equally open." 141 S. Ct. at 2339.

Widespread Use. Brnovich held that courts should "take[] into account" whether a rule "is in widespread use in the United States." *Id*. As the State Board Defendants' brief explains, voter ID is widespread in the United States. As of 2021, 35 states (not including North Carolina) had laws requesting or requiring voters to show some form of identification at the polls; "17 states ask for a photo ID and 19 states also accept non-photo IDs." *Voter ID Requirements*, NCSL, available at https://bit.ly/3FqAM6J.[2] Among voter ID laws, S.B. 824 was considered non-strict because of its sweeping reasonable impediment provision. *See* 2019 NCSL at 4–5 & n.5. And no other law that provides free IDs, needing no corroborating documentation, and that has a reasonable impediment process has been invalidated.

State's Interest. The People of North Carolina voted to add a photo voter ID requirement to the State Constitution. Accordingly, the General Assembly has a strong and

[2] This link is to an updated version of the NCSL classification that is already in the record. State Def. Ex. 14, Doc. 97-15 at 4 (Oct. 30, 2019) ("2019 NCSL").

unavoidable interest in enacting photo voter ID in North Carolina. Further, preventing fraud and preserving the "integrity of its election process," *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (per curiam), are important State interests. In fact, "a State may take action to prevent election fraud without waiting for it to occur and be detected within its own borders." *Brnovich*, 141 S. Ct. at 2348. "Section 2's command that the political processes remain equally open surely does not demand that a State's political system sustain some level of damage before the legislature [can] take corrective action." *Id.* (quotation marks omitted). Thus, as discussed above, North Carolina's interests to prevent the "real risk" of fraud "suffice to avoid § 2 liability." *Id.* at 2347–48.

CONCLUSION

For the foregoing reasons, State Board Defendants' motion for summary judgment should be granted.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that, on October 8, 2021, I electronically filed the foregoing brief with the Clerk of the Court using the CM/ECF system, which will send notification of such to all counsel of record in this matter.

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CERTIFICATE OF WORD COUNT

Pursuant to Local Rule 7.3(d)(1), the undersigned counsel hereby certifies that the foregoing brief contains 6,249 words (including headings and footnotes) as measured by Microsoft Word.

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