UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF NORTH CAROLINA

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	No. 1:18-cv-01034

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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STATEMENT OF THE FACTS

Defendants' "Statement of the Facts" does not purport to be a statement of facts not in material dispute and omits numerous facts critical to the disposition of this case. Without providing a comprehensive recital of all facts relevant to Defendants' motion, Plaintiffs set forth the selected facts below as illustrative of significant omissions from the SBOE statement of facts in the record before the court:

- The North Carolina General Assembly approved SB 824 in a lame-duck session held after voters had elected a new General Assembly; one that no longer had a GOP supermajority sufficient to overcome a veto by Governor Cooper. *See* Prelim. Expert Report of Allan J. Lichtman for Purposes of Prelim. Inj. 71, ECF No. 91-1.
- The lame-duck supermajority that enacted SB 824 was the result not only of a racial gerrymander but also the result of the GOP majority actively misleading the court in asserting that its subsequent legislative maps did not rely on racial data, when in fact they did. Lichtman Report 14-17; *see also* Decl. of Floyd B. McKissick Jr. ¶¶ 22-27, ECF No. 91-5.
- SB 824 was enacted on December 6, 2018, just ten days after the lame-duck session convened on November 27, 2018. Lichtman Report 71. The House Committee on Elections reported the bill favorably the day it was released, and the House approved it the same day. The Senate considered and passed it with amendments on November 29. The House adopted amendments on December 5, and both chambers approved the final bill December 6. Lichtman Report 71.

- The General Assembly held only three hearings on the bill, where it gave preference to speakers who supported the bill, when it allowed public comment at all. Decl. of Reverend T. Anthony Spearman ¶ 35, ECF No. 91-8.
- The General Assembly was aware of the racial disparities in possession of DMV-issued forms of ID. Lichtman Report 77. The legislature did not engage in any review or analysis of the impacts of the ID requirements of SB 824 prior to enactment, despite calls from some Democratic legislators to do so. *Id.* at 68-69.
- The General Assembly rejected amendments that would have reduced the racial disparities of SB 824, including amendments allowing non-photo forms of ID; *see id.* at 101-02; allowing use of state or federal public assistance IDs; *id.*, and restoring the last Saturday of early voting. Decl. of Marcia Helen Morey ¶ 16, ECF No. 91-9.
- There was no evidence of widespread voter fraud in North Carolina at the time of enactment of SB 824. The General Assembly was informed that the State's own investigations revealed fewer than a handful of instances of possible in-person voter impersonation in North Carolina over the prior twenty years, a period in which over 40 million votes had been cast. *See* McKissick Decl. ¶¶ 17-18; Lichtman Report 105-08 (describing results of SBOE audits of 2013 and 2017 and General Assembly awareness of same); *see also* Prelim. Expert Report of Lorraine C. Minnite for Purposes of Prelim. Inj. 23-24, ECF No. 91-10 (describing results of SBOE audit from 2000-2012); *id.* at 24 (describing potential in-person voter fraud from 2013-2014); *id.* at 33-35 (describing SBOE analysis of voter fraud in 2016).[1]

[1] Professor Minnite has prepared a Supplemental Expert Report updating her 2019 analysis to address incidents of in-person voter fraud since 2019.

- The same key legislators who led the effort to enact HB 589 were the principal sponsors of SB 824. Lichtman Report 11-12.

ARGUMENT

A motion for summary judgment may only be granted where there is "no genuine dispute as to any material fact and the movant is entitled to judgement as a matter of law." Fed. R. Civ. P. 56. Defendants' motion must be denied because for each of Plaintiffs' claims—brought under Section 2 of the Voting Rights Act and the 14th and 15th Amendments to the Constitution—on dispositive issues, either the undisputed facts favor Plaintiffs or Plaintiffs and Defendants dispute significant material facts that require fact-finding by the court to make determinations based upon a full trial record.

Defendants cite to *Greater Birmingham Ministries* to support their claim that Plaintiffs' challenge to SB 824 is suitable for summary judgment. State Board Defs.' Mem. of Law in Supp. of Mot. for Summ. J. 10-11, Oct. 8, 2021, ECF No. 182 ("Def. Mot."). However, the court in *Greater Birmingham Ministries* noted that summary judgment is not often granted in vote denial lawsuits. *Greater Birmingham Ministries v. Sec'y of State for Ala.* (*Greater Birmingham Ministries II*), 992 F.3d 1299, 1317 (11th Cir. 2021). Crucially, the court relied heavily on 100-plus pages of "Undisputed Material Facts" identified by the parties to make its determination. *Id.* at 1305, 1318. Unlike *Greater Birmingham Ministries*, here, significant disputed issues of material fact remain in relation to every element of the claims in this case.[2]

[2] Defendants also assert that the Alabama photo voter law is "stricter" than SB 824. Defendants provide no support for this bald assertion, which is irrelevant to the localized, totality of the circumstances inquiry of Section 2 It suffices for present purposes to point out that the Alabama voter-ID law included provisions not present in SB 824, such as a mobile SBOE unit which travelled to multiple locations in each county to provide free voter ID cards; *Greater Birmingham Ministries II*, 992 F.3d at 1311-12, 1320. Voters also could request that the mobile unit come directly to their home. *Greater Birmingham Ministries v. Sec'y of State for Ala.* (*Greater Birmingham Ministries I*), 284 F. Supp. 3d 1253, 1263 (N.D. Ala. 2018), *aff'd*, 992 F.3d 1299.

Moreover, contrary to Defendants' assertions, the record the Court is preparing to hear at trial in less than three months is not limited to what Plaintiffs have already established at the Preliminary Injunction phase of this case. Def. Mot. 11. Plaintiffs have continued to acquire documents from Defendants since the Preliminary Injunction hearing under the discovery production agreement detailed to this court in the parties original Rule 26(f) report. *See* Joint Report Pursuant to FRCP 26(f), ECF No. 77. Indeed, a protective order was put in place by SBOE for the precise purpose of providing Plaintiffs an updated voter list from which Plaintiffs' expert will provide an updated analysis—pursuant to Plaintiffs' obligations under Fed. R. Civ. P. 26(e) to update expert reports—of North Carolina voters unmatched to a form of ID allowable under SB 824. *See* Mot. for Protective Order, ECF No. 171. Plaintiffs have notified Defendants of their intention to call expert and fact witnesses at trial and have served Defendants with supplemental expert reports pursuant to Fed. R. Civ. P. 26(e).

I. Discriminatory "Results" Claims Under Section 2 of the Voting Rights Act Are Highly Fact Dependent, and Defendants Have Failed to Demonstrate an Absence of Material Facts in Dispute

Plaintiffs' claims are highly fact-dependent and are not amenable to disposition on summary judgment. Plaintiffs claim that SB 824 violates Section 2 of the Voting Rights Act because it will have a disparate impact on African American and Latino voters and, interacting with existing social and economic conditions, will result in denying African American and Latino voters equal and meaningful access to the political process. *See* Compl. ¶¶ 105-19, ECF No. 1. Discriminatory "results" claims under Section 2 of the Voting Rights Act require a "totality of the circumstances analysis." *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2338 (2021) (quoting § 2(b) of the Voting Rights Act). Indeed, because the nature of impact analysis in a Section 2 claim is necessarily fact-dependent, the Supreme Court in *Brnovich* declined to adopt a uniform standard for evaluating "time, place or manner" voting rules in Section 2 results cases,

and instead chose to "identify certain guideposts" applicable to the specific set of Arizona voting rules at issue in that case. *Id.* at 2336. The Supreme Court emphasized that the "totality of the circumstances" test requires consideration of "any circumstance that has a logical bearing on whether voting is 'equally open' and affords equal 'opportunity.'" Such an analysis is necessarily fact-intensive, requiring a review of the full factual record at trial, and determinations of credibility by the trier of fact. Application of each of these guideposts to SB 824 involves disputed issues of material fact, and where facts are not in dispute, they overwhelmingly support Plaintiffs.

Guidepost 1*: *Size of the Burden Imposed by Photo Voter ID

First, the parties dispute the size of the burden imposed by SB 824's photo ID requirements. *See Brnovich*, 141 U.S. at 2339. Plaintiffs have provided evidence that, as of 2019, over 617,000 North Carolina voters did not possess a valid form of photo ID issued by the N.C. Department of Motor Vehicles. *See* Prelim. Expert Report of Michael C. Herron for Purposes of Prelim. Inj. ¶ 28, ECF No. 91-11. This figure represents an *undercount* of actual voters without eligible DMV-issued photo ID, because it does not count as un-matched voters with licenses that may have been revoked, suspended or terminated, as Plaintiffs' will further illuminate at trial. *See* Lichtman Rebuttal Report 9, ECF No. 108-3.

Defendants do not appear to dispute that a significant number of North Carolina voters lack a valid form of photo ID because they cannot. However, Defendants hypothesize that the impacts of SB 824 will be "extremely limited," Def. Mot. 15, and "small." *Id*. at18. These conclusory assertions rest entirely on Defendants' speculation that Free IDs established in Section 1.1(a) and the Reasonable Impediment Declarations (RID) established in Section 1.2(a) will entirely mitigate the impacts on the hundreds of thousands of voters who lack valid forms of ID.

Facts necessary to resolve this issue are very much in dispute. For example, Plaintiffs have set forth significant evidence that the reasonable impediment declaration process did not address

the racial disparities in ID possession in the 2016 primary (the only election where a photo ID requirement has ever been in effect in North Carolina). *See* Lichtman Report 30, 33-36. Only a small number of voters cast provisional "no-ID" ballots in that election, demonstrating that the RID provision did not come close to addressing the significant number of voters who lacked valid forms of photo ID. The RID process in the 2016 primary election was also improperly and inconsistently implemented, with significant differences among counties as to what did or did not constitute a valid basis for an RID. *Id*. at 33-36; Prelim. Expert Report of Dr. Barry C. Burden for Purposes of Prelim. Inj. 23-26, ECF No. 91-4. While the RID provision in 2016 was in some respects different from the RID provision in SB 824, the 2016 experience is the only record evidence of how an RID in North Carolina will function in practice. These widespread differences in application by counties were not cured—and cannot be cured—by the changes made in SB 824. The RID provision also fails to redress the impacts of SB 824 because the overwhelming majority of voters who lack a qualifying ID are unaware of the reasonable impediment declaration. *See* Prelim. Expert Report of Matthew A. Barreto 19, 29, ECF No. 108-1. Indeed, the RID itself—by requiring a declaration that a false statement on the form is a felony—is likely to deter voters from using the form at all. *See* Burden Report 25-26.

Defendants also overstate the flexibility of the RID. Defendants assert that under the RID "other" category any reason a voter offers for a RID will be accepted provided it is not found to be false. *See* Def. Mot. 6.[3] Defendants' position does not appear in the statute and is a fact in dispute in this case.

[3] Defendants do not cite the precise language of the statute. Defendants assert that an RID is available for "any other reasonable impediment the voter lists." Def. Mot. 6. In fact, SB 824 allows voters to identify "[o]ther reasonable impediment . . . including the option to indicate that State or federal law prohibits listing the impediment." SB 824 § 1.2(a).

Significantly, other language in the statute contradicts Defendants' interpretation. Section 1.2(h) states explicitly that a voter may only identify lack of knowledge of the photo ID requirements of the law as a basis for an RID for elections held in 2019. This provision would be nonsensical if a voter could use lack of knowledge as a basis for completing an RID after 2019. Thus, at least one fairly self-evident rationale for not having an eligible ID is an invalid basis for an RID under the statute irrespective of whether the County Board finds that the voter's rationale was truthful. Additionally, Section 3.1(c) specifically authorizes "any other registered voter of the county" to challenge a voter on the grounds that "[t]he registered voter does not present photo identification in accordance with G.S. 163A-1145.1." This provision of SB 824 may allow individual voters, and not just polling officials, to challenge a voter's RID.

Defendants' interpretation of the RID provision is not supported by any training document or policy guidance published by the SBOE. *See* Suppl. Expert Report of Dr. Barry C. Burden for Purposes of Prelim. Inj. 8-9, ECF No. 108-13. The statute does not require a unanimous finding of falseness by the County Board, and the North Carolina Administrative Regulation that Defendants cite does not require a unanimous decision by the County Board. *See* 08 N.C. Admin. Code 17.0101(b).[4]

Finally, there is ample record evidence that significant numbers of voters—both those without valid forms of photo ID and those that believe they lack valid photo ID—are deterred from voting by the photo ID requirement. *See* Lichtman Report 36-37; Lichtman Rebuttal Report 11-13; Burden Report 33-36. The RID is of little use to voters who are deterred from coming to the polls at all.

[4] The administrative code provision cited by SBOE, Def. Mot. 6, appears to have expired more than a year ago. The present language of the NCAC addresses verification of photo ID at check-in, and contains no provisions related to RIDs. *See* 08 N.C. Admin. Code 17.0101(b), available at http://reports.oah.state.nc.us/ncac/title%2008%20-%20elections/chapter%2017%20-%20photo%20identification/chapter%2017%20rules.pdf.

Similarly, SBOE asserts that the Free ID provision in Section 1.1(a) will ameliorate the impact borne by the hundreds of thousands of voters who lack a valid form of photo ID. But the Free ID program, as it was implemented in 2019, did not come close to making up this gap. During the 24-week period between May 1, 2019 and October 21, 2019 (the most recent period for which data is available), the state had issued only 1,720 such IDs. Bell. Aff. ¶ 16, ECF No. 97-9. There is no evidence in the record suggesting that this program can come anywhere close to addressing the needs of the hundreds of thousands of North Carolina voters, disproportionately African American and Latino voters, who lack a valid form of ID; indeed, the evidence demonstrates the opposite.

Defendants argue that the Fourth Circuit's upholding of Virginia's voter ID law supports summary judgment here. Def. Mot. 15 (citing *Lee v. State Bd. of Elections* (*Lee II*), 843 F.3d 592, 603 (4th Cir. 2016)). But the Fourth Circuit upheld the Virginia law only after a fact-intensive analysis of the impacts of that law. Indeed, Defendants here acknowledge several key differences between the laws themselves, including that Virginia allowed more forms of ID, *id.*, and that the Virginia law provided for free ID cards to be issued at "mobile voter-ID stations." *Id.* (citing *Lee II*, 843 F.3d at 595).[5]

The courts in *Lee* performed the fact-finding function to resolve disputed issue of facts that must also be performed here at a full trial. In *Lee,* the Fourth Circuit and the Eastern District of Virginia analyzed the free photo-ID provision's impact—for example, by calculating the number of general registrars' offices across the state and hearing testimony from fact witnesses to confirm the process of obtaining a free photo ID and to understand problems with the mobile units. *Lee II*,

[5] Defendants cite 08 N.C. Admin. Code 17.0107(a) for the assertion that county boards may issue voter IDs at other locations. It is unclear if this rule, as promulgated, is in fact comparable to the Virginia statute, but in any case, this regulation expired in February of 2020 and is not currently in effect.

843 F.3d at 595; *Lee v. State Bd. of Elections* (*Lee I*), 188 F. Supp. 3d 577, 595 (E.D.V.A. 2016), *aff'd*, 843 F.3d 592. Similarly, in determining the burden imposed by the use of provisional ballots for those who lack a valid photo ID, the courts evaluated evidence presented from fact and expert witnesses, who calculated the number of provisional ballots submitted in 2014 and 2015 and the number of ballots that were ultimately cured. *Lee II*, 843 F.3d at 596; *Lee I*, 188 F. Supp. 3d at 581, 595, 604. Thus, a complete assessment of *Lee* confirms that summary judgment is inappropriate here. Indeed, SBOE tacitly acknowledges that the comparison of SB 824 to its Virginia counterpart does not support summary judgment, when it asserts that "direct comparison with *Lee* suggests that the relative burden SB 824 imposes on North Carolina voters without an ID does not support a finding of discriminatory intent." Def. Mot. 16 (emphasis added).

In *Brnovich*, the Supreme Court recognized some normal burdens of travelling to a mailbox or compliance with certain rules may not rise to a burden sufficient to implicate Section 2. But here, at issue is whether non-ID holders will be able to vote at all. Even for voters who can eventually obtain a compliant ID, the additional steps involved in travelling to an election office or the Department of Motor Vehicles to obtain the necessary documents imposes significant costs of time and money. *See, e.g.*, Burden Report 28-30.[6]

Defendants' conclusory statement that the burdens on voters will be "small," based solely on the mere existence of so-called "ameliorative provisions" in SB 824, is insufficient to overcome the significant factual disputes regarding the impacts of SB 824. This issue cannot be resolved at summary judgment.

[6] Professor Burden has provided a Second Supplemental Report offering additional information and analysis on the cost impacts to voters of collecting the necessary documents to apply for and obtain a photo ID.

Guidepost 2: Was Photo ID "Standard Practice" in 1982?

As to the second *Brnovich* guidepost, it is not the case that, in North Carolina, photo ID requirements were "standard practice when Section 2 was amended in 1982." *See Brnovich*, 141 U.S. at 2339. Defendants contort this *Brnovich* guidepost to be satisfied if photo ID requirements are in widespread use in other states, today. *See* Def. Mot. 22. But the Supreme Court made clear that this factor relates to the widespread practice of states in 1982, not in 2021. *Brnovich*, 141 U.S. at 2340. Photographic identification requirements were the law in North Carolina for a single primary election in 2016, before HB 589 was stricken by the Fourth Circuit as violating the Constitution and the Voting Rights Act. *See N.C. State Conf. of the NAACP v. McCrory*, 831 F.3d 204 (4th Cir. 2016). It thus does not have a "long pedigree" in North Carolina and was not "in widespread use" in 1982.

Guidepost 3: Disparate Impact on Black and Latino Voters

As to the third *Brnovich* guidepost, Plaintiffs have set forth extensive evidence of significant disparate impacts on Black and Latino voters. *Brnovich*, 141 U.S. at 2339. Plaintiffs' expert Dr. Michael Herron identified a no-match rate in DMV-issued ID possession of 10.6% for Black voters, and only 6.5% for white voters. Herron Report 21. Similarly, Dr. Herron found a no-match rate of 11.1% for Hispanic voters and a no-match rate of 5.7% for non-Hispanic voters. Herron Report 25. This analysis likely undercounts the actual no-match rate in DMV-issued ID possession, since it does not remove from the no-match rate drivers licenses that have been terminated, revoked, or suspended which, under SB 824, cannot be used for voter identification purposes. *See SB* 824 § 1.2(a) (allowing only a "valid" NC driver's license to serve as photo ID

for voting); Lichtman Rebuttal Report 9.[7] Significantly, the overall magnitude of the disparate impacts of SB 824 are far greater than the impacts at issue in *Brnovich.* The Supreme Court found that the difference between the impact of the challenged Arizona law on white and minority voters was a difference between 1% and 0.5%. *Brnovich*, 141 U.S. at 2345. Here, the differences in ID possession are far more significant.

Defendants' sole response to these significant disparities is that they will somehow be cured by SB 824's RID and Free ID provisions. Def. Mot. 23. As discussed above, the efficacy of these measures in reducing the disparate impacts of ID possession is highly disputed between the parties and cannot be resolved at the summary judgment stage.

Guidepost 4: Opportunities Provided by North Carolina's Entire System of Voting

Fourth, the "opportunities provided by [North Carolina's] entire system of voting" do not reduce the burdens imposed by SB 824. *Brnovich*, 141 U.S. at 2339. The photo ID requirements of SB 824 apply to early voting, mail voting and in-person election day voting. Unlike the Arizona voting practices reviewed in *Brnovich*, there are no alternative methods of voting that escape the burdens imposed by SB 824's photo ID requirements. In *Brnovich,* the court found the requirement to vote in the assigned precinct to be mitigated by the fact that individuals could still vote by mail or drop off their early ballots at any polling place or vote early at an early voting location. *Id.* at 2344. By contrast, SB 824's photo ID requirements apply to all methods of voting in North Carolina. And, as noted above, whether the so-called "ameliorative provisions" of SB 824 reduce the burdens of the photo ID requirements is rife with disputed issues of fact which are unfit for summary judgment.

[7] Plaintiffs have served supplemental expert reports by Allan Lichtman and Barry Burden which address the impact of suspended and revoked licenses on photo ID non-possession rates in greater detail. Additionally, Plaintiffs' Expert Michael Herron is reviewing data recently provided by the SBOE and the North Carolina DMV to perform an updated no-match analysis that will address the issue of suspended, revoked and or terminated licenses.

Guidepost 5: Strength of State Interest

Finally, the strength of the state interest in SB 824 is very much in dispute and, where the facts are undisputed, they strongly favor Plaintiffs. Defendants assert that "proponents of SB 824 believed that the legislation would promote voter confidence in elections." Def. Mot. 18. However, Plaintiffs have provided extensive evidence that the kind of in-person voter fraud that could be addressed by photo identification is exceedingly rare in North Carolina, *see* Minnite Report 1; and that the legislature was fully aware of the very low incidence of in-person voter fraud. *See* Lichtman Report 105-08. Also, enactment of photo ID laws makes no appreciable difference in enhancing voter integrity in state election systems. *See id*. at 11-13; Lichtman Rebuttal Report 21-23; Burden Report 31-33. Additionally, the sponsors of SB 824 made numerous other statements regarding the purpose of SB 824, including their interest in continuing the policies embodied in HB 589, which had been found to be in violation of the Constitution and the Voting Rights Act. *See* Lichtman Report 9-11.

But even if some lawmakers had made public statements about their purported interest in preventing fraud or enhancing voter integrity, the strength of that interest must be weighed against the actual facts related to fraud. *See Washington v. Davis*, 426 U.S. 229, 253 (1976) (Stevens, J., concurring) ("Frequently the most probative evidence of intent will be objective evidence of what actually happened."). Where there is demonstrably little risk of the kind of fraud photo ID would be designed to prevent, and where—as here—the legislature was fully aware of the data showing an absence of voter impersonation, the rationale offered by the state provides little weight to the state's interest.[8]

[8] Lawmakers also asserted that "restoring confidence in government" was a motivation behind HB 589, which the Fourth Circuit in *McCrory* concluded was unconstitutional and violated the Voting Rights Act. *See* Prelim. Expert Report of James L. Leloudis II for Purposes of Prelim. Inj. 63, ECF No. 91-2.

Significantly, *Brnovich* involved a challenge under the "results" prong of Section 2 of the Voting Rights Act, and not a claim of discriminatory intent, and thus does not govern this court's analysis of Plaintiff's claims that SB 824 was the product of intentional discrimination. Whether the statements in the record do or do not evince a discriminatory intent requires a complete review of the record, including witness testimony as to the sequence of events leading to the enactment, and the legislators' actual conduct and contemporary statements made by the legislature in enacting SB 824 in 2018, as detailed below. Indeed, Defendants appear to concede that this is not an issue ripe for summary judgement, since SBOE asserts only that "the record contains evidence" of non-racial motivations for SB 824's enactment and that "there is sufficient evidence of the legislature's non-racial motivation." Def. Mot. 18. Whether this evidence is sufficient to justify the state's interest in enacting a racially discriminatory photo ID law is necessarily an issue for trial.

The Remaining Senate Factors Favor Denial of Summary Judgment

The SBOE fails to even address other factors critical to an analysis of the Section 2 results test. The Supreme Court in *Brnovich* explicitly allowed that certain of the traditional Senate Factors continue to be relevant to guiding the "totality of the circumstances" analysis. *Brnovich*, 141 U.S. at 2340. In particular, the Supreme Court explicitly acknowledged the applicability of Senate Factor 1 (showing "that minority group members suffered discrimination in the past") and Senate Factor 5 ("that effects of that discrimination persist") in assessing the "totality of the circumstances" in a Section 2 results analysis. *Id.* Plaintiffs have produced significant evidence on both of these points, *see* Leloudis Report; Burden Report 8-18, which Defendants do not appear

to dispute. *See* Def. Mot. 12-13. Thus, summary judgment on the Section 2 results claim should be denied.[9]

II. Plaintiffs' Claims of Discriminatory Intent Cannot be Resolved on a Motion for Summary Judgment

Plaintiffs allege that the North Carolina legislature enacted SB 824 with the intent to discriminate against Black and Latino voters in violation of the racial intent prong of Section 2, as well as the Fourteenth and Fifteenth Amendments to the U.S. Constitution.

Questions of intent are, generally, ill-suited for disposition at the summary judgment phase. *See, e.g., Penn Nat'l Mut. Cas. Ins. Co. v. Viking Pizza, Inc.*, No. 17CV1155, 2020 WL 4288280, at *8 n.8 (M.D.N.C. Jan. 11, 2020) (citing *Morrison v. Nissan Co.*, 601 F.2d 139, 141 (4th Cir. 1979)) ("Federal courts regularly decline to resolve issues of intent . . . on summary judgment."); *Hanna v. Silencio Global, Inc.*, No. 20-CV-00144, 2020 WL 7427740, at *1 (W.D.N.C. Dec. 18, 2020) (quoting *Blue Ridge Pub. Safety, Inc. v. Ashe*, 712 F. Supp. 2d 440, 446 (W.D.N.C. 2010)) ("Summary judgment 'is also inappropriate when issues such as motive, intent, and other subjective feelings and reactions are material . . . .'").[10]

The record in support of the preliminary injunction motion contains ample evidence that the General Assembly acted with discriminatory intent. *See, e.g.,* Lichtman Report (providing

[9] The remaining Senate Factors continue to be applicable in vote denial claims. *See League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 240 (4th Cir. 2016). Evidence presented on all of these factors supports Plaintiffs' claims. *See* Burden Report 8-36.

[10] *See also Dill v. Lake Pleasant Cent. Sch. Dist.*, 205 F. Supp. 2d 24 (N.D.N.Y. 2002) (citing *Gelb v. Bd. of Elections of N.Y.*, 224 F.3d 149, 157 (2d Cir. 2000)) (denying the defendant's summary judgment motion on the plaintiff's § 1983 claim, in part, because issues of discriminatory intent are "generally inappropriate" for summary judgment); *Creek v. Vill. of Westhaven*, No. 83 C 1851, 1992 WL 80959, at *10 (N.D. Ill. Apr. 15, 1992) (explaining that "questions of motivation or intent are particularly inappropriate for summary judgment" in denying defendant's motion for summary judgment on the plaintiff's § 1985 claim while considering the *Arlington Heights* factors); *Daniels v. Fowler*, No. 88-cv-970, 1991 WL 332702, at *6 (N.D. Ga. Jan. 3, 1991) (denying the defendant's motion for summary judgment on the plaintiff's Title VII claim, in part, because "[q]uestions of motive and intent are particularly inappropriate for summary judgment"); *R.I.S.E., Inc. v. Kay*, 768 F. Supp. 1141, 1144 (E.D. Va. 1991) ("The existence of factual disputes regarding the critical issue of intent renders summary judgment on the Equal Protection Clause of the Fourteenth Amendment count inappropriate.").

exhaustive evidence that the enactment of SB 824 meets the *Arlington Heights* factors for intentional discrimination); Minnite Report (documenting the absence of evidence of in-person voter fraud, which was the stated basis for enactment of SB 824); McKissick Decl. (describing the rushed and irregular process used by the legislature to enact SB 824); Decl. of Robert T. Rieves II, ECF No. 91-6 (recounting the misleading and inaccurate statements by state legislative leaders regarding their motivations in implementing a racially discriminatory gerrymander of state legislative districts). In light of this evidence alone, Defendants may not plausibly claim that the undisputed facts require summary judgment on Plaintiffs' intent claim. If anything, the balance of the evidence shows that Defendants most certainly acted with racial intent. Plaintiffs will set forth additional fact and expert testimony on the elements of intent at trial.[11]

The Fourth Circuit considers the *Arlington Heights* factors in analyzing discriminatory intent, including: (1) the historical background prior to the law's passage; (2) the specific sequence of events leading to the law's enactment, including any departures from the normal legislative process; (3) the law's legislative history; and (4) whether the law "bears more heavily on one race than another." *Raymond*, 981 F.3d at 303 (quoting *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265-69 (1977)).

For each of these factors, there is significant record evidence establishing discriminatory intent, and more than sufficient evidence to defeat summary judgment. Defendants essentially concede the first factor. *See* Def. Mot. 12-13 (acknowledging "North Carolina's long history of racial discrimination," noting that "there have even been many 'instances since the 1980s in which

[11] Plaintiffs recognize that the Fourth Circuit reversed this Court's preliminary injunction finding a likelihood of success on the merits of Plaintiffs' claim on intentional discrimination. *See N.C. State Conf. of NAACP v. Raymond*, 981 F.3d 295 (4th Cir. 2020). This decision at the preliminary injunction stage is not dispositive of the conclusions to be reached by the finder of fact based on an intensive review and proper weighing of the full evidence available to this court at trial.

the North Carolina legislature has attempted to suppress and dilute the voting rights of African Americans,'" recognizing "that another relevant part of that history is HB 589, which was partially invalidated for having been enacted with the purpose of burdening African American voters," and acknowledging that "unconstitutional considerations of race have also recently predominated North Carolina's redistricting process" (quoting *McCrory*, 831 F.3d at 223).

On the sequence of events leading up to enactment of SB 824, Plaintiffs further have identified significant evidence of procedural irregularities, including: the rushed and irregular process for enacting both HB 1092 (the Constitutional Amendment) and SB 824; the failure of the sponsors of SB 824 to conduct any analysis of the impact of the law, particularly since the sponsors asserted they were making changes to the law purportedly to address the racially discriminatory impacts of HB 589; and the fact that the lame-duck legislature that enacted SB 824 was the result of an unconstitutional racial gerrymander. *See, e.g.*, Lichtman Report 68-81; Lichtman Rebuttal Report 18-21.[12] At trial, Plaintiffs will provide witness testimony from individuals involved in the enactment of SB 824 who will offer further evidence of procedural irregularities and departures from the normal process that marked SB 824.

On the law's legislative history, for example, Plaintiffs have provided significant evidence of rejected amendments that could have mitigated some of the racial impact of the law, *see* Lichtman Report 100-01; statements by legislators indicating their intent to continue the policies of the invalidated HB 589, *id.* at 9-11; statements by legislators indicating that their underlying purpose in enacting SB 824 was not to cure the photo voter ID law of its discriminatory features, but to avoid potential legal challenges; *id.*; and evidence that the same legislative leaders who

[12] Professor Lichtman has provided a Supplemental Expert Report that provides additional evidence of procedural irregularities in the enactment of SB 824, and evidence of ongoing instances of the General Assembly's discriminatory intent following enactment of SB 824.

backed HB 589 were responsible for SB 824. *Id.* House Speaker Tim Moore, one of the principal sponsors of SB 824, asserted in 2018 that photo voter ID was unnecessary to address any legitimate concerns of deterring fraud and enhancing election integrity, and explicitly endorsed a non-photo voter ID law. *See id*. at 100. At trial, Plaintiffs will provide additional fact and expert witness testimony about the legislative history demonstrating a racially discriminatory intent. The court must assess this additional evidence to make requisite inferences and credibility determinations based on a full, fact-intensive record including historical and statistical analysis, legislative process, and real-world conditions and voter experiences. Accordingly, summary judgment would be improper for Plaintiffs' claims.

Finally, as to the impact of the law on Black and Latino voters, Plaintiffs incorporate by reference the analysis of impact of the law in Section I above. Plaintiffs have raised significant issues of fact as to whether any of the "ameliorative provisions" relied upon by Defendants will actually reduce the disparities in ID possession by Black and Hispanic voters. At trial, Plaintiffs will provide additional fact and expert witness testimony about the racially disparate impact of SB 824 on Black and Latino voters statewide, the legislature's knowledge of this impact, and the fact that the "ameliorative provisions" cannot sufficiently address or cure these disparities. Since Defendants' argument as to the absence of impact of SB 824 rests entirely on the efficacy of these provisions, Defendants cannot prevail on summary judgment on this factually disputed issue.

III. Plaintiffs' Claims on the Poll Observer Provision and the Challenge Provision Cannot Be Resolved on Summary Judgment

Defendants assert that the provision of SB 824 allowing the Chair of each political party to appoint an additional 100 at-large poll observers will not, in fact, increase the number of poll observers who can be present at any voting location throughout the state. Def. Mot. 18-19. This argument is inconsistent with the plain language of the text of SB 824, which authorizes 100 poll

watchers in addition to the ten at-large observers who must be residents of the County where they seek to observe voting. But even under Defendants' reading of the statute, there is no question that SB 824 allows political parties to increase the presence of poll-watchers at locations throughout the state; the change in law at the very least enables political parties to ensure a constant presence of poll watchers statewide, including authorizing a new role for individuals from across the state rather than only those individuals who are from the county where they seek to observe. Similarly, Section 3.1 of SB 824 expands the scope of the grounds for challenging voters to encompass photo ID requirements, and Section 1.2(a) allows precinct officials to challenge a voter where the precinct official disputes that "the photograph contained on the required identification is the person presenting to vote . . . ."

Actual experience in recent elections shows that poll watchers engage in intimidating and threatening behavior, which is disparately impacting Black and Latino voters. As Plaintiffs will demonstrate at trial, regulations on the activities of poll watchers have not prevented a slew of reports of intimidation; either because these regulations are inadequate or because they are not being followed. These reports are consistent with both historic and more recent efforts to intimidate voters, efforts that appear to be specifically focused on Black voters. *See* Leloudis Report 62-63.

Plaintiffs will present evidence at trial demonstrating, cumulatively with the photo ID requirements of SB 824, a disparate impact on Black and Latino voters, in violation of Section 2 of the Voting Rights Act, resulting from the increase in the presence of poll watchers and the expansion of the scope of challenges authorized in SB 824. Similarly, Plaintiffs incorporate by reference the arguments related to intentional discrimination underlying SB 824 in Section II above. The legislature's discriminatory intent in implementing the photo ID provisions of SB 824

cannot be surgically separated from the expansion of poll observers and the scope of challenges, particularly in light of the long history of voter intimidation in North Carolina. *See, e.g.*, Leloudis Report 17-18, 62-63.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the court deny Defendants' motion for summary judgment.

Respectfully submitted this 8th day of November 2021.

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CERTIFICATE OF WORD COUNT

The undersigned counsel hereby certifies that the foregoing brief complies with the word limit in Local Rule 7.3(d)(1), as measured by Microsoft Word.

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CERTIFICATE OF SERVICE

I hereby certify that on this date I electronically filed the foregoing PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT with the Clerk of Court using the CM/ECF system which will send notification of such to all counsel of record in this matter.

Dated: November 8, 2021

/s/ James W. Cooper
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