No. COA22-16 TENTH DISTRICT

NORTH CAROLINA COURT OF APPEALS
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JABARI HOLMES, FRED CULP, DANIEL E. SMITH, BRENDON JADEN PEAY, AND PAUL KEARNEY, SR., *Plaintiff-Appellees*, v. TIMOTHY K. MOORE, *in his official capacity as Speaker of the North Carolina House of Representatives*; PHILIP E. BERGER, *in his official capacity as President Pro Tempore of the North Carolina Senate*; DAVID R. LEWIS, *in his official capacity as Chairman of the House Select Committee on Elections for the 2018 Third Extra Session*; RALPH E. HISE, *in his official capacity as Chairman of the Senate Select Committee on Elections for the 2018 Third Extra Session*; THE STATE OF NORTH CAROLINA; and THE NORTH CAROLINA STATE BOARD OF ELECTIONS, *Defendant-Appellants*.	)	From Wake County No. 18 CVS 15292

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BRIEF OF LEGISLATIVE DEFENDANT-APPELLANTS

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BRIEF OF LEGISLATIVE DEFENDANT-APPELLANTS

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ISSUE PRESENTED

I. Whether S.B. 824 violates Article I, Section 19 of the North Carolina Constitution.

INTRODUCTION

This State's Constitution provides that "[v]oters offering to vote in person shall present photographic identification before voting" and that the General Assembly "shall enact general laws governing the requirements of such photographic identification, which may include exceptions." N.C. CONST. art. VI, § 2, cl. 4; *id.* art. VI, § 3, cl. 2. The General Assembly enacted Senate Bill 824 ("S.B. 824") to implement this mandate. Two judges on a divided three-judge Superior Court panel have now permanently enjoined S.B. 824 as a violation of North Carolina's Equal Protection Clause, N.C. CONST. art. I, § 19. But they could do so only by failing to honor the presumption of legislative good faith and by implausibly concluding that a General Assembly bent on entrenching itself through a racially targeted voter-ID law would pass a law that does not prevent anyone from voting and do so with the support of several members of the party allegedly targeted. Plaintiffs' theory of the case does not make sense, and nothing in the Superior Court majority's one-hundred-page opinion salvages it.

Under S.B. 824, voters can present any of a wide array of IDs. But a voter does not need to possess one of these IDs to vote. S.B. 824 also requires every county board of elections in the State to issue a voter ID to any voter who requests one—at no charge and with no documentation needed. And a voter does not even need to obtain one of *those* IDs to vote. If a voter is unable to present an ID, all the voter must do is check a box on a declaration form—which S.B. 824 requires elections officials to provide—indicating a "reasonable impediment" to presenting ID. The voter can then cast a provisional ballot, which the county board must accept unless it unanimously

determines that the declaration is false. Thus, "the word 'provisional' is a bit of a misnomer in this instance," and "the sweeping reasonable impediment provision . . . eliminates any disproportionate effect or material burden that [the voter-ID requirement] otherwise might have caused." *South Carolina v. United States*, 898 F.Supp.2d 30, 40–41 (D.D.C. 2012) (Kavanaugh, J.).

In short, and as S.B. 824 itself commands, "*[a]ll* registered voters will be allowed to vote *with or without a photo ID card*." R S p 2151, § 1.5(a)(10) (emphases added).

Plaintiffs are five North Carolina voters who all have multiple ways to vote under S.B. 824, whether by presenting the qualifying IDs that some Plaintiffs already possess or by using the alternate methods that other Plaintiffs successfully used under the State's prior voter-ID law. They nevertheless allege that the General Assembly passed S.B. 824 to suppress African American voter turnout. More specifically, their theory is that African Americans in North Carolina vote for Democrats in a predictable manner, and that Republican legislators therefore sought to entrench themselves politically by disenfranchising African American voters. The Superior Court majority agreed. *See* R p 1000 ¶ 271.

The Superior Court's judgment must be reversed. Several basic facts refute Plaintiffs' theory:

- S.B. 824 is one of the most generous photo voter-ID laws in the country. If the General Assembly intended to use its constitutional mandate to pass a photo voter-ID law as an opportunity to prevent any group of voters from voting, it is

inconceivable that the General Assembly would have passed a law that allows *any* registered voter to vote with or without qualifying photo ID. It is still more inconceivable that the General Assembly would have made a free form of ID available during one-stop early voting, which African American voters disproportionately use.

- Several Democratic legislators, including several African American Democrats, voted for S.B. 824. And Senator Joel Ford, an African American Democrat, was one of its primary sponsors. In accepting Plaintiffs' theory, the Superior Court necessarily determined that these Democratic legislators voted for a law that was intended to prevent voting by members of their own race and of their own party. The record contains no support for this implausible conclusion.
- The General Assembly neither sought nor obtained data about rates of photo-ID possession by race, and it did not have the (fundamentally flawed) evidence that Plaintiffs have martialed about ID-possession rates here. Plaintiffs themselves lack data about most of the forms of ID that the General Assembly approved for voting use in S.B. 824. The General Assembly thus did not know—and could not have intended—that S.B. 824 would have the disparate impact Plaintiffs allege.
- The General Assembly *did* know that North Carolina's prior voter-ID requirement, which was far stricter, affected few voters when it was in effect for the March 2016 primary election. The General Assembly learned from a

presentation by the then-Executive Director of the State Board of Elections that less than one-tenth of one percent (<0.1%) of ballots were not counted in that election for an ID-related reason. And that election saw record turnout. A legislature intent on disenfranchisement would seek to *increase* the percentage of rejected ballots. The General Assembly instead sought to *decrease* it under S.B. 824 by expanding the reasonable-impediment process, by enabling all voters to obtain free, no-documentation voter IDs, and by ordering the State Board to send every household in the State four separate mailers about S.B. 824's requirements.

- According to Plaintiffs' own evidence, more white voters than African American voters allegedly lack qualifying ID under S.B. 824. Plaintiffs' expert found that 140,000 more white voters than African American voters lack one of the forms of ID he studied. *See* R S p 551–52 ¶ 119 & Table 8. Consequently, even if S.B. 824 were assumed to prevent voters without those IDs from voting (it doesn't—those voters can still vote), then S.B. 824 would affect more white voters than voters of other races. Thus, if voting were as racially polarized in North Carolina as Plaintiffs' theory of the case implies, then Republican legislators in the General Assembly potentially would have been suppressing more of *their own* party's votes than Democratic voters' votes with S.B. 824, an irrational method for legislators facing potentially close elections to try to entrench themselves.

The Superior Court thus lacked any basis to adopt Plaintiffs' theory. And the majority committed other, critical errors of law. Since Plaintiffs have no direct evidence whatsoever of discriminatory intent, they sought to meet their burden of proof with circumstantial evidence under the framework set out by the U.S. Supreme Court in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977). But Plaintiffs failed to meet their burden. And the majority's evaluation of their circumstantial evidence is suffused with a failure to afford the General Assembly a presumption of legislative good faith—the same mistake the Middle District of North Carolina made in enjoining S.B. 824. *See N.C. State Conf. of NAACP v. Raymond*, 981 F.3d 295, 298 (4th Cir. 2020). Not only did the Superior Court fail to mention this presumption, it presumed *bad* faith at every turn, determining that the General Assembly acted with discriminatory intent where nondiscriminatory motives more than equally explained the General Assembly's actions.

The North Carolina Constitution requires the General Assembly to enact a photo voter-ID law. The General Assembly fulfilled this mandate by enacting one of the most generous photo voter-ID laws in the country, and the evidence refutes that it did so with any discriminatory motivation. Plaintiffs' contrary arguments could, if taken to their logical conclusion, prevent the General Assembly from passing *any* photo voter-ID law and thus from ever fulfilling its mandate. The Superior Court erred in accepting those arguments and abused its discretion by enjoining S.B. 824.

Because Plaintiffs have failed to meet their burden to demonstrate that racial discrimination was a substantial or motivating factor behind the enactment of S.B. 824, this Court must reverse and vacate the permanent injunction.

STATEMENT OF THE CASE

In November 2018, the People of North Carolina amended the State's constitution to require that the General Assembly enact a photo voter-ID law. N.C. CONST. art. VI, § 2, cl. 4; *id.* art. VI, § 3, cl. 2. On December 6, 2018, the General Assembly passed S.B. 824, which Governor Cooper vetoed on December 14, 2018. The General Assembly overrode the Governor's veto on December 19, 2018.

That same day, Plaintiffs commenced this suit.[1] Plaintiffs alleged that S.B. 824 facially violates the North Carolina Constitution on six grounds and sought a preliminary injunction.

After a hearing, a three-judge panel of the Wake County Superior Court denied a preliminary injunction and dismissed all Plaintiffs' claims except their claim that the General Assembly enacted S.B. 824 with discriminatory intent in violation of North Carolina's Equal Protection Clause, N.C. CONST. art. I, § 19. The Court of Appeals reversed in part and remanded with instructions to preliminarily enjoin Defendants from implementing or enforcing S.B. 824's voter-ID provisions.

The Superior Court held a three-week remote trial on the merits. On September 17, 2021, the Superior Court permanently enjoined S.B. 824's enforcement

[1] Defendant David R. Lewis is no longer in office and therefore no longer a party to this litigation.

in a divided opinion. The majority concluded that the General Assembly "was motivated at least in part by an unconstitutional intent to target African American voters" in enacting S.B. 824. R p 1000 ¶ 271. Judge Poovey dissented, concluding that the "credible, competent evidence before [the court] does not suggest our legislature enacted this law with a racially discriminatory intent." R p 1003 (Poovey, J., dissenting). Legislative Defendants timely filed a notice of appeal of the Superior Court's judgment on September 24, 2021. State Defendants timely filed a notice of appeal on September 27, 2021. The record on appeal was filed in the Court of Appeals on January 7, 2022, and the appeal was docketed on January 20, 2022. On January 14, 2022, Plaintiffs filed a petition for discretionary review in the Supreme Court, which remains pending.

STATEMENT OF THE GROUNDS FOR APPELLATE REVIEW

The Superior Court's judgment and order permanently enjoining S.B. 824's enforcement is a final judgment, and appeal therefore lies to the Court of Appeals pursuant to N.C.G.S. § 7A-27(b)(1).

STATEMENT OF FACTS

In November 2018, a total of 2,049,121 North Carolina voters, 55.49% of those who voted, adopted a constitutional amendment requiring that "[v]oters offering to vote in person shall present photographic identification before voting." R S p 2133, § 1. The General Assembly enacted S.B. 824 to implement this mandate. But in doing so it offered a central promise to North Carolinians: "*All* registered voters will be allowed to vote with or without a photo ID card." R S p 2151, § 1.5(a)(10) (emphasis added).

The bill that became S.B. 824 emerged from a bipartisan, deliberative, and inclusive process. S.B. 824 was modeled on South Carolina's voter-ID law, which had been precleared under Section 5 of the Voting Rights Act by a three-judge panel of the United States District Court for the District of Columbia. *See* T p 1510:18–1512:20; *South Carolina*, 898 F.Supp.2d 30. A draft of the bill was broadly circulated to legislators a week before its formal introduction, *see* T p 1060:23–1061:9, and in that time the bill underwent twenty-four changes from discussions with Democrats, the Joint Legislative Oversight Committee, the Elections Committee, and the Rules Committee, R S p 8507 at 3:4–13. The bill then 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 considered twenty-four formal amendments. *See* R S p 4848–49. It adopted more than half—thirteen in total—including several amendments proposed by the bill's opponents. R p 1022–24 ¶¶ 91–92, 94–95 (Poovey, J., dissenting). Joel Ford, an African American Democrat, served as one of the law's three primary sponsors. Overall, five Democrats across the House and Senate voted for S.B. 824 at different points, with four Democrats voting for the bill in its final form.

After enacting S.B. 824, the General Assembly passed, and the Governor signed, a series of four amendments to S.B. 824:

(1) Senate Bill 214, passed on March 13, 2019, amended S.B. 824 by postponing enforcement of photo voter ID to the 2020 elections while providing that "all

implementation and educational efforts . . . shall continue." R S p 8796, § 1(b).

(2) House Bill 646, passed on May 28, 2019, increased the time for educational institutions and government employees to have their IDs approved for voting use, and relaxed approval requirements. This bill also removed the expiration-date requirement from tribal IDs: a tribal ID may now be used even if it has been expired for over a year or lacks an expiration date. R S p 6563–68.

(3) Senate Bill 683, passed on October 29, 2019, modified the process to request and vote absentee for those with a reasonable impediment to presenting photocopies of their ID and appropriated additional funding to the State Board of Elections to implement the voter-ID requirement. R S p 8798–814.

(4) House Bill 1169, passed on June 11, 2020, added to S.B. 824's list of qualifying voter IDs an ID card issued by a department, agency, or entity of the United States or of North Carolina for a government program of public assistance. These IDs qualify for voting use regardless of whether they contain a printed issuance or expiration date. R S p 6049–57.

As initially enacted, and as expanded with the amendments above, S.B. 824 allows voters to present an expansive array of photo ID: a North Carolina driver's license; a special non-operator's identification card or other form of non-temporary identification issued by the North Carolina DMV or Department of Transportation; a driver's license or non-operator's identification card issued by another state or the

District of Columbia, so long as the voter registered to vote in North Carolina within 90 days of election day; a U.S. passport; a free voter ID obtainable at any county board of elections; a tribal enrollment card issued by a state or federally recognized tribe, regardless of whether it contains a printed expiration or issuance date; a student identification card that meets certain requirements; an employee identification card issued by a state or local government entity, including a charter school, that meets certain requirements; a U.S. military identification card, regardless of whether it contains a printed expiration or issuance date; a veterans identification card issued by the U.S. Department of Veterans Affairs, regardless of whether it contains a printed expiration or issuance date; and an identification card issued by a department, agency, or entity of the United States government or of North Carolina for a government program of public assistance. *See* N.C.G.S. § 163-166.16(a)(1)–(2). A voter aged 65 or older may present any of these forms of ID, even if expired, so long as the ID was unexpired on the voter's 65th birthday.

S.B. 824 also provides multiple means for those without a qualifying ID to obtain one or otherwise vote. First, S.B. 824 requires county boards of elections to issue voter photo ID cards upon request, without charge, and without any underlying documentation. The voter need only provide the voter's name, date of birth, and the last four digits of the voter's Social Security number. S.B. 824 makes these IDs available during one-stop early voting, on election day, and after election day. Specifically, they "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.G.S. § 163-82.8A(d)(2) (emphasis added). Counties may provide these IDs at multiple sites and the State Board may require counties to do so. Furthermore, S.B. 824 allows the use of a mobile unit to provide these IDs, and the General Assembly recently appropriated funds for that purpose. *See* 2021 N.C. Sess. Laws 180, § 43.2(a); JOINT CONFERENCE COMMITTEE REPORT ON THE CURRENT OPERATIONS APPROPRIATIONS ACT OF 2021 at F65, N.C. GEN. ASSEMBLY (Nov. 15, 2021), https://bit.ly/3LfHsrp.

In addition to the free IDs from the county boards of elections, S.B. 824 also provides for special ID cards from the DMV. *See* N.C.G.S. § 20-37.7. These DMV voting IDs are available to anyone at least 17 years old. Further, when a voter has a valid form of DMV ID seized or surrendered due to cancellation, disqualification, suspension, or revocation, S.B. 824 requires the DMV *automatically* to issue a special identification card to that voter via first-class mail with no application and no charge. *See* N.C.G.S. § 20-37.7(d2).

S.B. 824 provides numerous means for voters who lack photo ID at the polls to vote. Registered voters who have a "reasonable impediment" to "presenting" a qualifying photo ID may cast a provisional ballot. *Id.* § 163-166.16(d)(2). Numerous grounds are recognized as reasonable impediments, and voters may identify any "other" they might have. The State Board properly has interpreted "other" expansively and has identified *nothing* that would not count. R S p 194 at 72:14–25, 73:3–4. The only basis for rejecting a reasonable impediment affidavit is falsity, N.C.G.S. § 163-166.16(f), and county boards of elections—which are statutorily

mandated to be bipartisan, *see id.* at § 163-30(a)—must unanimously find an impediment false in order not to count the ballot, *see* 08 NCAC 17.0101(b). S.B. 824 does not authorize any other voter to challenge the declaration.

Voters who fail to present an ID at the polls may also vote a provisional ballot and return to their county board of elections with an ID by the end of the day before canvassing (generally ten days after the election) to "cure" their ballot. N.C.G.S. § 163-166.16(c); *id.* § 163-182.5(b). Voters without ID can obtain a free ID and use it to cure their ballot on the same trip to the county board.

The General Assembly mandated that the State Board "establish an aggressive voter education program." R S p 2150, § 1.5(a). S.B. 824 required the Board (among several other things) to train precinct officials to answer voter questions about the law's requirements; to coordinate with county officials, local service organizations, and local media outlets to inform voters of those requirements; to mail *every* voter who lacked a North Carolina driver's license a notice of the requirements no later than S.B. 824's effective date; and to send four mailers to all North Carolina residential addresses—twice in 2019 and twice in 2020—describing forms of qualifying ID and voting options for those who cannot present one. All educational mailers, and all informational posters displayed at one-stop early voting sites and at precincts on election day, must contain a prominent statement explaining the reasonable-impediment option and assuring voters: "All registered voters will be allowed to vote with or without a photo ID card." *See* R S p 2150–51, § 1.5(a)(1)–(11).

All these features render S.B. 824 vastly different than North Carolina's prior voter-ID requirement, found in House Bill 589 ("H.B. 589"), which the Fourth Circuit Court of Appeals declared unconstitutional on equal-protection grounds in *North Carolina State Conference of the NAACP v. McCrory*, 831 F.3d 204 (4th Cir. 2016). H.B. 589 was not enacted pursuant to a constitutional mandate. H.B. 589 was omnibus legislation with various other voting restrictions—*e.g.*, reduced early-voting days—none of which S.B. 824 contains. *See Raymond*, 981 F.3d at 299. This "omnibus" nature of H.B. 589 was central to the Fourth Circuit's ruling invalidating it. *See McCrory*, 831 F.3d at 231–32, 234. H.B. 589 did not approve any student, government-employee, or public-assistance IDs for voting use, and approved more limited tribal IDs than S.B. 824 does. As originally enacted, H.B. 589 offered no reasonable-impediment process. Unlike S.B. 824, the process added by later amendment to H.B. 589 was available only to those with an impediment to *obtaining* (as opposed to merely *presenting*) an ID; allowed county boards of elections to reject reasonable-impediment ballots on subjective grounds (*e.g.*, if they considered the accompanying declaration "obviously nonsensical"); and allowed other voters to challenge the declaration. *Compare* R S p 8066–67, § 8(e), *with* N.C.G.S. § 163-87. And, unlike S.B. 824, H.B. 589 mandated no "aggressive voter education program."

As a unanimous panel of the U.S. Court of Appeals for the Fourth Circuit found in reversing a preliminary injunction in parallel federal proceedings challenging S.B. 824, the facts do not show "the General Assembly acted with discriminatory intent in

passing [S.B. 824]." *Raymond*, 981 F.3d at 305.[2] Instead, by enacting S.B. 824, the General Assembly crafted one of the most generous photo voter-ID laws in the United States. 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.

STANDARD OF REVIEW

This Court reviews the grant of a permanent injunction, including its appropriateness and scope, for abuse of discretion. *See, e.g.*, *Mid-Am. Apartments, L.P. v. Block at Church St. Owners Ass'n, Inc.*, 257 N.C. App. 83, 89, 809 S.E.2d 22, 27 (2017). "A trial court by definition abuses its discretion when it makes an error of law." *State v. Rhodes*, 366 N.C. 532, 536, 743 S.E.2d 37, 39 (2013) (cleaned up).

The specific legal question here is "whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts." *Montessori Children's House of Durham v. Blizzard*, 244 N.C. App. 633, 636, 781 S.E.2d 511, 514 (2016) (cleaned up). "Conclusions of law drawn by the trial court from its findings of fact"—including "determining whether sufficient evidence supports a judgment" and "any determination requiring the exercise of judgment or the application of legal principles"—"are reviewable *de novo*." *In re C.H.M.*, 371 N.C. 22, 28–29, 812 S.E.2d 804, 809 (2018) (cleaned up). "[F]acts found under misapprehension of the law are not binding on this Court and will be set

[2] Incredibly, the Superior Court majority does not mention the parallel federal proceedings challenging *this very law* and cites the Fourth Circuit's decision in *Raymond* only once—on the ninety-third page of its opinion—without explaining that *Raymond* reversed the Middle District of North Carolina's preliminary injunction of S.B. 824. R p 992.

aside . . . ." *Van Hanford v. McSwain*, 230 N.C. 229, 233, 53 S.E.2d 84, 87 (1949). The Court is also not bound by its conclusions at the preliminary injunction stage. *See Precision Walls, Inc. v. Servie*, 152 N.C. App. 630, 636, 568 S.E.2d 267, 271–72 (2002).

ARGUMENT

I. S.B. 824 DOES NOT VIOLATE ARTICLE I, SECTION 19 OF THE NORTH CAROLINA CONSTITUTION.

Plaintiffs had the burden to prove at trial that the General Assembly enacted S.B. 824 with "discriminatory intent." *Raymond*, 981 F.3d at 302; *S. S. Kresge Co. v. Davis*, 277 N.C. 654, 662, 178 S.E.2d 382, 386 (1971). North Carolina's Equal Protection Clause "is functionally equivalent to the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States." *White v. Pate*, 308 N.C. 759, 765, 304 S.E.2d 199, 203 (1983). Consequently, decisions under both clauses are relevant in assessing Plaintiffs' claim. *See Libertarian Party of N.C. v. State*, 365 N.C. 41, 41–44, 707 S.E.2d 199, 200–01 (2011). But one key difference between the State and federal constitutions clarifies the analysis: "The federal constitution does not require voters to show photographic identification when casting their ballots. The North Carolina constitution does." R p 1055 ¶ 8 (Poovey, J., dissenting). Since "[i]t is axiomatic that the terms or requirements of a constitution cannot be in violation of the same constitution," *Leandro v. State*, 346 N.C. 336, 352, 488 S.E.2d 249, 258 (1997), "arguments against voter-ID requirements *in general* are irrelevant," R p 1055 ¶ 8 (Poovey, J., dissenting). "The question is whether S.B. 824" *specifically* "was passed for discriminatory purposes." R p 1055 ¶ 8. It was not.

Under *Arlington Heights*, an equal-protection violation can be shown through either direct evidence—such as statements of discriminatory intent by legislators themselves—or circumstantial evidence. *See* 429 U.S. at 266. "Not one scintilla of evidence was introduced during th[e] trial that any legislator acted with racially discriminatory intent." R p 1003 (Poovey, J., dissenting). Even Representative Pricey Harrison, an avowed opponent of S.B. 824 and Plaintiffs' witness, "*would not* say that racial bias entered into it." T p 1128:13–14 (emphasis added). In fact, none of Plaintiffs' legislative witnesses attested to any racial bias by any legislator. *See* R p 1003, 1031 ¶ 108 (Poovey, J., dissenting).

Plaintiffs therefore relied on the two *Arlington Heights* steps to attempt to prove discrimination through circumstantial evidence. At the first step, Plaintiffs must prove that "racial discrimination was a substantial or motivating factor behind enactment of the law." *Raymond*, 981 F.3d at 303 (cleaned up). Relevant circumstantial evidence includes: (1) whether the law bears more heavily on one race than another, though "impact alone" is normally "not determinative"; (2) the sequence of events leading to the law's enactment, including any departures from normal legislative process; (3) legislative history; and (4) the law's historical background. *Arlington Heights*, 429 U.S. at 266–68.

When reviewing the evidence proffered, courts "*must* afford the State legislature a presumption of good faith." *Raymond*, 981 F.3d at 303; *S. S. Kresge*, 277 N.C. at 662. "[L]egislators . . . are properly concerned with balancing numerous competing considerations," *Arlington Heights*, 429 U.S. at 265, and meanwhile are

assumed to adhere to their oaths as legislators to respect constitutional rights, *see Abbott v. Perez*, 138 S. Ct. 2305, 2324 (2018). Only if a plaintiff proves discriminatory intent—with the presumption of good faith in *full effect*—does a court turn to the second step. *See Raymond*, 981 F.3d at 303.

At this step, the burden shifts to Defendants "to demonstrate that the law would have been enacted without racial discrimination," *id.* (cleaned up)—in other words, that "the same decision would have resulted even had the impermissible purpose not been considered," *Arlington Heights*, 429 U.S. at 270 n.21. Only at this step is "judicial deference to the legislature . . . no longer justified." *Raymond*, 981 F.3d at 303 (cleaned up). If Defendants carry their burden at this step, Plaintiffs "no longer fairly could attribute the injury complained of to improper consideration of a discriminatory purpose," and "there would be no justification for judicial interference with the challenged decision." *Arlington Heights*, 429 U.S. at 270 n.21.

Among several other errors, the Superior Court failed to afford a presumption of good faith. This error "fatally infected its finding of discriminatory intent. And when that finding crumbles, the [permanent] injunction falls with it." *Raymond*, 981 F.3d at 303. Properly assessed, Plaintiffs' "mostly uncredible and incompetent evidence" is wholly "insufficient . . . to suggest that [the General Assembly] acted with a racially discriminatory intent." R p 1003–04 (Poovey, J., dissenting).

A. The Evidence Does Not Support an Inference of Discriminatory Intent.

The Superior Court did not afford the General Assembly the presumption of good faith that the Equal Protection Clause requires. Given that presumption, "[a]

legislature's past acts do not condemn the acts of a later legislature," and "a finding of past discrimination neither shifts the 'allocation of the burden of proof' nor removes the 'presumption of legislative good faith.'" *Raymond*, 981 F.3d at 298, 303 (quoting *Abbott*, 138 S. Ct. at 2324). Evidence of "past discrimination cannot, in the manner of original sin, condemn governmental action that is not itself unlawful." *City of Mobile v. Bolden*, 446 U.S. 55, 74 (1980). S.B. 824 must therefore be considered on its own terms, with the General Assembly presumed to have acted in good faith.

The U.S. Supreme Court corrected a failure to apply that presumption in *Abbott*. A three-judge district court had found that the 2013 Texas Legislature acted with discriminatory intent in passing a new redistricting plan after 2011 Legislature's plan was denied preclearance under the Voting Rights Act. *See Abbott*, 138 S. Ct. at 2324–27. Admonishing that courts must do more than "pay[ ] only the briefest lip service" to the presumption of legislative good faith, *id*. at 2329, the Supreme Court held that the district court had impermissibly relied on "what it perceived to be the 2013 Legislature's duty to show that it had purged the bad intent of its predecessor," *id.* at 2326 n.18. What mattered was "the intent of the 2013 Legislature," which had considered a "complex interplay of forces" and was presumed to have done so in good faith. *Id*. at 2324–25. That presumption could not be undone by a past legislature's acts.

The Superior Court committed the same error here, and more starkly. The court did not even pay lip service to the presumption of legislative good faith, failing to mention that presumption *anywhere* in the entirety of its one-hundred-page

opinion. The majority referred only to a vague "deference" owed to legislative acts, and only in the context of *not* affording such deference at the second step of *Arlington Heights*. R p 903 ¶ 15.

What the surface of the opinion suggests, the substance confirms. Instead of requiring Plaintiffs to "overcome" a presumption of good faith, *Abbott*, 138 S. Ct. at 2325, the majority presumed bad faith at every turn, impermissibly penalizing legislators who voted for S.B. 824 "because of who they were"—*i.e.*, Republicans who had also voted for H.B. 589—"instead of what they did," *Raymond*, 981 F.3d at 304. For example, when assessing the sequence of events leading to S.B. 824's enactment, the Superior Court discounted all the indicia that S.B. 824 went through a normal deliberative legislative process to focus on *who* drafted and passed the law. *See, e.g.*, R p 984 ¶ 231 ("62 members of the legislature who voted for H.B. 589 also voted for S.B. 824."). The majority's explicit presumption was that these legislators "under[stood] the potential that S.B. 824 would disproportionately impact African American voters, just as H.B. 589," a materially different law, was found to have done. R p 984 ¶ 231. This bad-faith presumption is all the more apparent because the majority ignores the substantial overlap between legislators who voted for both S.B. 824 and for H.B. 1169, which approved public-assistance IDs for voting use, and for the other amendments loosening S.B. 824's already generous requirements. *See, e.g.*, R S p 12333. If *who* supported S.B. 824 were relevant (it is not), then a court must consider the whole picture, including those legislators' later, related actions. The majority instead zeroed in only on a prior law, and thus did exactly what the U.S.

Supreme Court has said courts cannot do: "condemned" the General Assembly based on the past. *Raymond*, 981 F.3d at 304; *see Abbott*, 138 S. Ct. at 2324.

This focus on "who" was hardly a "stray" error; it was "central to the court's analysis." *Raymond*, 981 F.3d at 304. Turning to S.B. 824's legislative history, the majority simply assumed that the racial data about ID possession that the 2013 General Assembly had requested—as the Voting Rights Act required at the time but not when S.B. 824 was introduced, *see Georgia v. United States*, 411 U.S. 526, 538 (1973); *Shelby County v. Holder*, 570 U.S. 529 (2013)—remained in legislators' minds. *See* R p 930 ¶ 86, 932–33 ¶¶ 92–95. Thus, the majority found a "taint of the prior law," *Raymond*, 981 F.3d at 305, even if it avoided saying so outright. The majority compounded its errors in its assessment of the bill that put the photo voter-ID amendment on the ballot. That bill is not at issue in this litigation, and the voter-ID amendment is relevant only as an "intervening event": when 55% of North Carolinian voters adopted the amendment, they conclusively severed "the General Assembly's passage of [H.B. 589] and its enactment of [S.B. 824]." *Raymond*, 981 F.3d at 305; *see Abbott*, 138 S. Ct. at 2325. Yet, the Superior Court focused extensively on the legislative history of the proposed amendment itself and, again, on who voted to place that amendment on the ballot. *See* R p 918–22 ¶¶ 55–65, 978–79 ¶¶ 217–219. Even if relevant, none of this evidence would support any inference of discrimination. *See* R p 1074–75 ¶¶ 41–42 (Poovey, J., dissenting). But by focusing on this evidence, the majority disregarded the presumption of legislative good faith that attaches to the law actually at issue, S.B. 824. *See Greater Birmingham Ministries v. Sec'y of State*

for Ala., 992 F.3d 1299, 1324 (11th Cir. 2021) (faulting plaintiffs for relying on evidence "unconnected to the passage of the actual law in question").

The Superior Court's failure to apply that presumption is reversible legal error in its own right. And it exacerbates the Superior Court's overarching legal error: its holding that Plaintiffs carried their burden to prove discriminatory intent. Plaintiffs' evidence does not support that holding, even apart from the presumption of legislative good faith.

1. Plaintiffs Offered No Credible Evidence of Disparate Impact.

To succeed in their equal protection claim, Plaintiffs were required to prove disparate racial impact. *See Irby v. Va. State Bd. of Elections*, 889 F.2d 1352, 1355 (4th Cir. 1989). Plaintiffs' evidence of disparate racial impact hinges entirely on alleged disparate rates of ID possession between white and minority voters, and largely on one form of ID in particular: driver's licenses. That evidence is of little value. It would be illogical for S.B. 824 *not* to include driver's licenses since that is the form of ID most commonly held among registered voters and included in all state voter-ID laws. *See* T p 1406:16–25. Indeed, viewed in the most favorable light to Plaintiffs, Plaintiffs' evidence **contradicts** their theory that Republican legislators drafted the list of qualifying IDs with an eye toward entrenching themselves politically. According to Plaintiffs' expert, Professor Kevin Quinn, **140,000 more white voters than African American voters** lack one of the forms of qualifying ID that he studied. R S p 551–52 ¶ 119 & Table 8. Thus, even assuming that S.B. 824 prevented voters without qualifying IDs from voting (it does not), and that voting is

as racially polarized in North Carolina as Plaintiffs' theory of the case demands, Republican legislators would have suppressed more Republican than Democratic votes by passing S.B. 824. Since elections are decided by absolute margins—not proportions of racial groups—this would be an irrational way for legislators facing potentially close elections to entrench themselves.

Moreover, the General Assembly did *not* have Quinn's data when considering S.B. 824. *See* R p 933 ¶ 95, 935 ¶ 97, 984 ¶ 231. As the Superior Court acknowledged, the General Assembly "did not consider any updated racial demographic data prior to the enactment of S.B. 824." R p 941 ¶ 114. Critically, if the General Assembly did not consider such data, then it could not have known that S.B. 824 would disparately impact voters of any race; and if the alleged impact was not known, then it is impossible to infer that the General Assembly intended that impact. Regardless, any such inference is refuted by the evidence that the General Assembly *did* have in front of it. From a presentation by the then-Director of the State Board of Elections, Kim Strach, the General Assembly learned that a **minuscule** portion of voters (less than one-tenth of one percent) cast a provisional ballot due to lack of qualifying ID in March 2016, when H.B. 589 was in effect. The General Assembly responded to this data by making S.B. 824 substantially more voter friendly than H.B. 589. And Plaintiffs' own evidence shows that the General Assembly succeeded: Quinn found that "more North Carolinian voters who are African American have Qualifying ID under S.B. 824 than [he] found under HB 589." R p 1064 ¶ 25 (Poovey, J., dissenting); *see* T p 717:23–718:8. No legislative body bent on entrenching itself would do so by

adopting a law that would have a minuscule effect and was among the most voter friendly voter-ID laws in the Nation.

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

In any event, Plaintiffs have not shown that S.B. 824 "bears more heavily on one race than another." *Arlington Heights*, 429 U.S. at 266. With S.B. 824's wide array of qualifying IDs and the multiple voting options it offers voters who fail to present qualifying ID at the polls, S.B. 824 "generally makes it very easy to vote." *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2330 (2021). Indeed, S.B. 824's provisions "go out of their way to make its impact as burden-free as possible." *Raymond*, 981 F.3d at 309 (cleaned up). Two provisions in particular debunk Plaintiffs' theory.

First is the reasonable-impediment provision. All Plaintiffs have to contest this provision's ameliorative effect are speculative concerns about implementation, which the Superior Court credited, and which are entirely unfounded. *See* R p 1069–73 ¶¶ 35–39 (Poovey, J., dissenting). More importantly, "an inquiry into the legislature's intent in *enacting* a law should not credit disparate impact that may result from poor *enforcement* of that law." R p 1070 ¶ 35. "For implementation errors to be relevant, the General Assembly would have had to have somehow intended for implementation errors to disproportionately affect African Americans"—a "notion" supported by *zero* evidence and belied by S.B. 824's "numerous mandatory education and training steps." R p 1070 ¶ 35. Indeed, "[e]very election official who testified" at trial made clear that "the State Board and County Boards will do everything in their power to ensure that S.B. 824's fair and evenhanded implementation." R p 1043 ¶ 152; *see*

T p 2111:4–15 (former State Board Director Kimberly Strach); R S p 212–13 at 154:15–155:1, 155:19–25 (Director Bell); T p 592:20–593:1, 594:20–23 (Noah Read).

As the three-judge district court explained when upholding South Carolina's voter-ID law (on which S.B. 824 was modeled), the reasonable-impediment provision "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." *South Carolina*, 898 F.Supp.2d at 45. The provision thus "eliminate[d] any disproportionate effect or material burden that South Carolina's voter ID law otherwise might have caused," even though the South Carolina legislature "no doubt knew" that ID possession varied by race based on data it had obtained. *Id*. at 40, 44. S.B. 824's reasonable-impediment provision is even more sweeping: whereas South Carolina offered the reasonable-impediment process only to voters unable to obtain a photo ID, S.B. 824 extends it to those with an impediment to *presenting* one (*e.g.*, who leave their ID at home); and whereas South Carolina permitted other voters to challenge an impediment declaration, S.B. 824 does not. *Compare id.* at 34, 36–37, *with* R p 1007–08 ¶¶ 13, 15 (Poovey, J., dissenting). If South Carolina's provision eliminated any potential disparate impact, S.B. 824's necessarily does, too.

Second is S.B. 824's mandate that county boards provide a free voter ID to any voter that wants one. Plaintiffs will undoubtedly reprise their assertion that these IDs are not in fact free, for which they have offered absolutely no proof. Their "only evidence that obtaining these IDs entails any financial cost—which they offered through a historian, Professor Leloudis—[was] disclaimed by Professor Leloudis

himself." R p 1063 ¶ 23. At any rate, the alleged burden of traveling to a county board of elections to obtain one of these IDs is "at most . . . the same kind of minimal burden associated with obtaining a voter ID that the Supreme Court" has already "held insufficient to sustain a facial challenge." *Raymond*, 981 F.3d at 309. Indeed, the free IDs provided by the Indiana law upheld in *Crawford v. Marion County Election Board* required documentation, which S.B. 824's free IDs do not. *See* 553 U.S. 181, 198 n.17 (2008) (plurality op.). S.B. 824 also makes free IDs available during one-stop early voting, which is disproportionately used by African American voters. *See* R p 1045 ¶¶ 162–164 (Poovey, J., dissenting). "So for those who vote early at their county board of elections, the marginal cost of obtaining a qualifying ID is negligible . . . . Those voters must do no more than they did previously—show up to vote." *Raymond*, 981 F.3d at 309.

Thanks to these and other mitigating provisions—including the cure period, during which S.B. 824 also makes free IDs available—S.B. 824 is demonstrably more voter-friendly than other voter-ID laws that courts have approved alongside Indiana's and South Carolina's. In *Veasey v. Abbott*, 888 F.3d 792 (5th Cir. 2018), the Fifth Circuit upheld a Texas law that did not provide for free, no-documentation voter IDs. And in *Lee v. Virginia State Board of Elections*, 843 F.3d 592 (4th Cir. 2016), *Common Cause/Ga. v. Billups*, 554 F.3d 1340 (11th Cir. 2009), and *Greater Birmingham Ministries*, 992 F.3d 1299, the courts upheld laws in Virginia, Georgia, and Alabama, respectively, that contained no reasonable-impediment process. No voter-ID law that

provides both a free, no-documentation ID and a reasonable-impediment process has ever ultimately been invalidated by the courts.

Mitigating provisions aside, the Superior Court also erred by relying on Plaintiffs' evidence of ID-possession rates. Because voting under S.B. 824 is not dependent on ID possession, ID-possession rates alone cannot show disparate impact in ability to vote—which is key to Plaintiffs' legislative entrenchment theory. Moreover, in doing so, the majority engaged in the "highly misleading" use of statistics that the U.S. Supreme Court recently admonished courts for using to distort disparities that are "small in absolute terms." *Brnovich*, 141 S. Ct. at 2344–45. In *Brnovich*, the Ninth Circuit had concluded that because 99% of Hispanic, African American, and Native American voters in Arizona cast their ballots in the correct precinct, whereas 99.5% of non-minority voters did so, "minority voters . . . cast out-of-precinct ballots at twice the rate of white voters." *Id.* at 2345 (cleaned up). The Supreme Court criticized this simplistic equation ("1.0 ÷ 0.5 = 2") as "statistical manipulation." *Id*. "Properly understood, the statistics show only a small disparity that provides little support for concluding that Arizona's political processes are not equally open" despite the state's rule against out-of-precinct voting. *Id*.

The same criticism applies to Quinn's analysis, on which the Superior Court relied. *See* R p 949 ¶ 131, 988 ¶ 242. Quinn found that 7.61% of "no-matches"—*i.e.*, registered voters he could not match to an entry in the North Carolina DMV database—were African American, whereas 5.47% were white. R S p 551–52 ¶ 119 & Table 8. These findings are themselves flawed. *See* R p 1062–69 ¶¶ 21–34 (Poovey,

J., dissenting). But then Quinn simply divided those percentages to conclude that "African American voters are nearly 1.4 times more likely to be without the forms of Qualifying ID examined here than are white voters," because 7.61 ÷ 5.47 = 1.39. R S p 552 ¶ 120. The manipulation can be shown by instead dividing the percentage of whites *with* qualifying ID by the percentage of African Americans with the same, or 95.53 ÷ 92.39, to find that whites are only 1.03 times more likely to have qualifying ID than African Americans. Manipulation aside, Quinn's statistics show only a 2.14 percentage point difference in African American and white no-matches. The difference is even narrower for active voters: 1.42%, indeed, only 5.42% of active African American voters lack ID in Quinn's analysis. R S p 554–55 ¶ 125 & Table 10. Even if Quinn's findings were reliable, therefore, it was legally impermissible to present those findings with a ratio that distorted the small difference in possession rates for the IDs he examined. The Superior Court's unquestioning reliance on this statistical manipulation was error.

3. Plaintiffs' Remaining Evidence Supports Upholding S.B. 824.

The Court can stop there, because neither Plaintiffs' theory nor the Superior Court's ruling can stand without proof of disparate impact. Nevertheless, Plaintiffs' other circumstantial evidence is only more proof that racial discrimination was not a substantial or motivating factor behind S.B. 824's enactment.

a. Historical Background.

No party denies North Carolina's shameful past treatment of its African American citizens. Yet, courts must be "mindful of the danger of allowing the old,

outdated intentions of previous generations to taint . . . legislative action forevermore on certain topics." *Greater Birmingham Ministries*, 992 F.3d at 1325. Under the law, "past discrimination" does not linger like "original sin." *Abbott*, 138 S. Ct. at 2324 (cleaned up). Here, past discrimination can suggest that S.B. 824 is "itself unlawful"—*i.e.*, motivated by discrimination—only if it somehow carried over to the enactment of S.B. 824. *Id*. (cleaned up).

Despite the Superior Court's extended discussion of past North Carolina voting laws, *see* R p 905–17 ¶¶ 21–52, 975–77 ¶¶ 207–214, nothing connects those laws, or the motives of those who voted for them, with S.B. 824 or the motives of those who voted for it, *see* R p 1050–51 ¶¶ 198–199 (Poovey, J., dissenting). In general, those laws long predate S.B. 824 and they ultimately exemplify the evidence Plaintiffs lack. To take Plaintiffs' main historical example, the literacy test and poll tax adopted in 1900 reduced African American voter turnout by *one-hundred percent* and were justified by explicit racial appeals—by contrast, here, Plaintiffs have not been able to identify a single voter in the state of any race who will not be able to vote under S.B. 824. *See* R p 1096 ¶¶ 77–78.

The only prior law with any potential relevance to S.B. 824 is H.B. 589. But in declaring H.B. 589 unconstitutional, the Fourth Circuit made clear that it was not "freez[ing] North Carolina election law in place." *McCrory*, 831 F.3d at 241. And S.B. 824 originates not from H.B. 589, but from the intervening constitutional amendment adopted by the People of North Carolina. That amendment gave the General Assembly an undisputed obligation to enact a photo voter-ID law that the General

Assembly did not have when it passed H.B. 589. The General Assembly fulfilled that duty by enacting a law far more generous than H.B. 589.

In holding that "historical context"—namely H.B. 589—"support[ed]" an inference of discriminatory intent, R p 977 ¶¶ 213–14, the Superior Court treated the injunction of H.B. 589 as precluding any later voter-ID law, contrary to the presumption of legislative good faith and to the *McCrory* opinion that the majority relied on so heavily. This was another legal error. The comparison between H.B. 589 and S.B. 824 serves only to show the General Assembly's efforts to *break* from discrimination found in the past.

Finally, the same court that held that H.B. 589 was racially discriminatory also held that the federal district court abused its discretion in finding that S.B. 824 likely was as well. *See Raymond*, 981 F.3d at 298.

b. Sequence of Events.

Under *Arlington Heights*, "[t]he specific sequence of events leading up to the challenged decision also may shed some light on the decisionmaker's purposes." 429 U.S. at 267. "Departures from the normal procedural sequence" can "afford evidence that improper purposes are playing a role," *id.*, though again they must "give rise to an inference of bad faith . . . that is strong enough to overcome" the presumption of legislative *good* faith, *Abbott*, 138 S. Ct. at 2328–29. S.B. 824's legislative sequence shows that legislators' aim was to fulfill their constitutional mandate, not to discriminate against African Americans.

The Superior Court found S.B. 824 to be the result of a "rushed process." R p 926 ¶ 74. But the majority failed to mention that a draft was broadly circulated—and received extensive input and revision—a week before the bill was formally introduced. T p 1060:17–1061:10; R S p 8507 at 3:4–13. The bill then went through multiple rounds of committee review, R S p 8507 at 3:4–13, public comment, T p 1106:15–1109:20, five days of legislative debate, R p 1080–81 ¶ 49 (Poovey, J., dissenting), multiple floor readings, R p 1030 ¶¶ 101–104, and twenty-four amendment proposals (which were on top of changes from the committee stage), R p 1022 ¶ 91, 1023 ¶ 94; T p 1062:22–24, 1092:17–1093:9. This "was not the abrupt or hurried process that characterized the passage of [H.B. 589]," which was passed immediately after the end of the preclearance regime with, among other limitations, no chance for House members to propose amendments. *Raymond*, 981 F.3d at 306.

To be sure, the General Assembly enacted S.B. 824—along with much other business—in a lame-duck session after the November 2018 election. Yet, as Plaintiffs' own legislator witnesses acknowledged, the General Assembly did so not because (as with H.B. 589) they were finally uninhibited from enacting a voter-ID law, but because the State Constitution requires it and Republican legislators would soon lose the supermajority necessary to overcome a veto of implementing legislation. *See* T p 1102:1–11 (Rep. Harrison). The legislative timeline supports no inference of discriminatory intent.

Nor did the Superior Court identify any credible "procedural irregularities" in S.B. 824's enactment. *Raymond*, 981 F.3d at 305. As the majority acknowledged, the

General Assembly did not violate its own rules in enacting S.B. 824. R p 978 ¶ 215. The majority still found the process irregular. This finding rests on several errors.

First, the majority lacked any basis to find that the lame-duck session was "unprecedented" and "violated the [General Assembly's] norms and procedures." R p 923 ¶ 67. The General Assembly faced unprecedented circumstances. For the first time in State history, a party had lost a legislative supermajority while the opposition party held the governor's seat with veto authority. T p 477:13–16**.** The record does not indicate that Governor Cooper would have signed any voter-ID law, and his own veto statement for S.B. 824 indicates that he would not. *See* R S p 6953. It was simply rational legislative practice to convene a lame-duck session and ensure that the Constitution's mandate was fulfilled.

Moreover, a lame-duck session cannot "spark suspicion," *Arlington Heights*, 429 U.S. at 269, when "[l]egislative action in the lame duck period . . . is normal throughout several state legislatures of the United States and in the United States Congress," R S p 1062 ¶ 9; T p 1391:2–8. Congress has called a lame-duck session *every time* there has been a power-shifting election since 1954 and in *every* lame-duck period since 1998. R S p 996 ¶ 11, 1062 ¶ 9. Against this history, it would have been unusual for the General Assembly *not* to act as a lame duck: "[f]rom the perspective of political science, there is no need to reach for nefarious or unusual explanations to account for the General Assembly's decision to do what American legislatures commonly do in like circumstances." R S p 1063 ¶ 10. Indeed, the U.S. Supreme Court

has already rejected the contrary argument, concluding that convening in a "special session" does not create an inference of bad faith. *See Abbott*, 138 S. Ct. at 2329.

The remaining bases for the majority's finding are picayune. The Superior Court faulted the General Assembly for holding a "reconvened Regular Session" rather than an "extra" session. R p 923 ¶ 68, 979–80 ¶¶ 219–220. This parliamentary minutia is irrelevant: Plaintiffs' own legislative expert conceded that there is no "substantive distinction in the authority of what the General Assembly can do" in either type of session. T p 522:17–23. The majority also faulted the General Assembly because the resolution establishing the lame-duck session did not limit the matters to be considered. R p 924 ¶ 70. Yet, in June 2018, when the resolution passed, the General Assembly did not know what the outcome of the November 2018 election would be, so it did not know whether legislative action to implement the photo voter-ID amendment would be necessary. And as it turned out, the General Assembly acted on 35 other bills and resolutions, passing 10 in total. *See* R S p 1063 ¶ 11.

Second, the Superior Court's treatment of "unprecedented" legislative conduct is self-defeating. The majority accepted Plaintiffs' contention that, "if something happens that is different from what's happened before," it is unprecedented. T p 488:11–14. In that case, an "unprecedented" act yields no inference whatsoever. For example, this definition cannot distinguish between Democrat and Republican actions in the S.B. 824 process: it was unprecedented for the Democrats to try to table S.B. 824 and for Governor Cooper to veto S.B. 824, neither of which had "happened before." *See* T p 494:14–18; 508:4–10. Nor can the definition distinguish S.B. 824 from

any other bill or resolution passed during the 2018 lame-duck session, because *anything* passed during that session was, under the definition, unprecedented. *See* T p 502:1–5. Tellingly, Plaintiffs' own legislative expert admitted that her analysis failed to "provide any basis to distinguish the General Assembly's purposes in passing SB 824 from its purposes in enacting any of the other bills that passed in the lame-duck session" and did not address "whether SB 824 was passed with intentional racial discrimination." *See* T p 500:2–6, 476:15–20.

And third, the Superior Court gave irrelevant factors substantial weight. This error starts at the very beginning of the analysis, where the majority concludes that the General Assembly departed from normal procedure "with the timing and passage of the constitutional amendment requiring voter photo ID, H.B. 1092." R p 978 ¶ 217; *see also* R p 918–22 ¶¶ 55–65, 979 ¶¶ 218–219. Neither H.B. 1092 nor the constitutional amendment are at issue. In any event, the People of North Carolina cut any tie to H.B. 1092's legislative process by adopting the constitutional amendment and requiring the General Assembly to begin a new process to enact S.B. 824.

The majority also emphasized that the U.S. Supreme Court had "affirm[ed] a federal court finding that several General Assembly districts were unlawful racial gerrymanders." R p 917 ¶ 54. If not for those gerrymanders, the majority said, Republicans would have lacked the supermajorities necessary to enact S.B. 824. *See* R p 925–26 ¶ 73. "At most," however, "racially gerrymandered maps tell us about the motivations of the mapmakers and the legislators to whom they answered."

Raymond, 981 F.3d at 306 n.4. As "courts have uniformly held," therefore, "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); *accord Raymond*, 981 F.3d at 306 n.4. The question remains what those legislators did, not who they were. Here, the General Assembly passed S.B. 824 through a process remarkable only in its thoroughness and inclusivity given the unprecedented circumstances that the General Assembly faced. This sequence of events sparks no suspicion of discriminatory intent.

c. Legislative History.

S.B. 824's legislative history further evinces an inclusive, deliberative, bipartisan process.

First, the legislative history offers no sign that any legislator intended to disenfranchise voters of any race. The legislative record is devoid of racial appeals. *See Raymond*, 981 F.3d at 309. And the race-neutral data that the General Assembly considered makes this case unlike *McCrory*, where the Fourth Circuit invalidated H.B. 589 in part because the General Assembly had requested data "on the use, *by race*, of a number of voting practices," 831 F.3d at 214 (emphasis added). Instead, this case is like *Lee*, where the Fourth Circuit held that discrimination did not motivate Virginia's voter-ID law in part because "the legislature did not call for, nor did it have, [such] racial data." 843 F.3d at 604.

The General Assembly's lack of up-to-date racial data was nevertheless one of the Superior Court's primary bases for concluding that discrimination motivated S.B.

824. *See* R p 937–38 ¶ 105, 970 ¶ 192, 985 ¶ 233. Any legislator, however, could have sought this data—even the bill's opponents. *See* T p 2266:10–18. The majority failed to explain why this lack of data yields an inference of discrimination against only those who voted *for* S.B. 824. Either it impugns every legislator or it impugns none. Logic, and the requisite presumption of legislative good faith, point to the latter. Whereas the Fourth Circuit found that the General Assembly had used racial data to target minority voters "with almost surgical precision" in H.B. 589, *McCrory*, 831 F.3d at 214, the General Assembly made targeting impossible for itself by not using such data this time around. Of course, the old H.B. 589 data still existed. But that data did not bear on the potential impact of S.B. 824. As seen, the General Assembly responded to Director Strach's presentation about the H.B. 589 experience by approving *more* IDs and voting methods than H.B. 589 did—and by requiring the State Board to contact every voter who could not be matched to the DMV database. *See* R S p 2151, § 1.5(a)(8). Indeed, compiling new racial data would merely have wasted public resources: given S.B. 824's free-ID and reasonable-impediment provisions, any voter of any race can vote without photo ID. What is more, the data from the 2016 primary that the General Assembly was shown demonstrated that the number of voters on "no-match" lists vastly outstrip the number of voters who present to vote without ID and therefore have minimal probative value in assessing the effect of a voter-ID law. In particular, the Strach presentation indicated that while matching analyses conducted in connection with H.B. 589 failed to match hundreds of thousands of voters to qualifying voter ID, only 2,296 out of more than two million

voters cast a provisional ballot because they lacked an acceptable ID under H.B. 589 in 2016. *See* R S p 10661, 10663, 10673–74. The Superior Court thus had no basis to fault the General Assembly for not doing what another court had faulted it for doing before.

Second, though voter ID is a contentious issue in North Carolina, the process to enact S.B. 824 was bipartisan under any normal understanding of that term. Senator Ford, an African American Democrat, was a primary sponsor of S.B. 824, and "[h]is input in its drafting and his votes to pass the bill" cannot be "discount[ed]," notwithstanding the frankly offensive evidence offered in an effort to do so. *Raymond*, 981 F.3d at 306; *see* T p 1583:3–7. In all, five Democrats across the Senate and the House, including three African American Democrats, voted for S.B. 824 at different points, with four voting for the bill in its final form: Senator Ford, Senator Don Davis, Representative Duane Hall, and Representative Goodman. These other legislators' votes cannot be discounted, either. *See Raymond*, 981 F.3d at 306.

"[T]he Republican supermajority had the votes necessary to pass the bill *without any* Democratic support." R p 1022 ¶ 90 (Poovey, J., dissenting). But they did not do so. Instead, the process behind this voter-ID law was markedly more bipartisan than those that other courts have considered bipartisan. *See Lee*, 843 F.3d at 603; *McCrory*, 831 F.3d at 227; *South Carolina*, 898 F.Supp.2d at 44.

The Superior Court did not even mention the Democrats who joined Senator Ford in voting for S.B. 824. This neglect led the majority to an implausible conclusion: that five Democratic legislators voted at some stage in support of a law intended to

entrench Republicans. The majority failed to reference this inconvenient, incontrovertible fact because it sinks Plaintiffs' entire theory of the case.

And third, in addition to the input and numerous revisions the bill received before its formal introduction, S.B. 824 was amended multiple times by legislators on both sides of the aisle. Out of the twenty-four amendments it considered, the General Assembly adopted more than half (13). And more than half of those (7) were proposed by Democrats, which comprised a majority of the amendments that Democrats had proposed and not withdrawn. *See* R p 1022–27 ¶¶ 91–97 (Poovey, J., dissenting). An additional amendment was formally proposed by Senator Daniel, a Republican, but offered as a result of discussions with Democratic Senator McKissick. T p 2384:3–9; R S p 6647. No legislator who testified for Plaintiffs identified any amendment that Democrats wanted but failed to propose. *See* R p 1028 ¶ 98 (Poovey, J., dissenting).

Several adopted amendments made S.B. 824 even more voter friendly. For example, Democratic Senator Ford's amendment required county boards of elections to offer free IDs during one-stop early voting, R S p 6648, and Democratic Representative Charles Graham's amendment added to the list of qualifying photo IDs a tribal-enrollment card issued by a state or federally recognized tribe, R S p 6617. Again, the Republican supermajority did not need to accept any Democrat's amendment. According to Senator McKissick, Plaintiffs' own witness, that would have been the norm. *See* T p 2354:15–18. But that is not what happened here.

The Superior Court instead emphasized the rejection of one proposed amendment—to add public-assistance IDs to the list of qualifying IDs—concluding that "it is reasonable to infer that legislators who voted against adding public assistance IDs could have surmised that public assistance ID was likely to be held disproportionately by African Americans" and thus that this rejection indicates discriminatory intent. R p 985 ¶ 233. Not at all. As articulated by Representative Lewis, the concern was that the General Assembly could not ensure that federal public-assistance IDs would conform to S.B. 824's requirements for acceptable IDs. R S p 8653–54 at 101:15–102:12. Representative Richardson, who had proposed the amendment, "underst[ood]" and "accept[ed]" this nondiscriminatory explanation. R S p 8654 at 102:22–103:2. The amendment was then put to a vote, and failed, as amendments often do. T p 1066:19–23. This episode "does nothing to suggest that the amendment failed due to discriminatory intent." *Raymond*, 981 F.3d at 308.

In any case, public-assistance IDs are included in the law that the Superior Court has enjoined. And the majority itself accepted Plaintiffs' about-face trial argument that, despite their own complaints about the amendment's initial failure, the inclusion of these IDs enables *no additional voters* to comply with S.B. 824. *See* R p 938 ¶ 107 n.3. "[T]he failure to adopt a meaningless amendment cannot support finding discriminatory intent." *Raymond*, 981 F.3d at 308.

The Superior Court also noted that the amendment to require that early-voting sites be open on the last Saturday before the election was ruled out of order, finding this ruling "suspect." R p 939 ¶ 108. But as the majority did not dispute, the

amendment was not germane to the voter-ID bill under consideration and thus was out of order under House rules. *See* T p 1102:14–16. And instead of reducing early voting days like H.B. 589, S.B. 824 ensured that free IDs were available during early voting. The General Assembly also thereafter enacted a bill mandating last-Saturday early voting. R S p 8806, § 2(a).

Every other failed Democratic amendment similarly was rejected for readily discernible, plainly nondiscriminatory reasons. For example, Senator Van Duyn offered an amendment to delay the start date for county boards of elections to issue free voter IDs, R S p 6642, thereby reducing the time for voters without ID to obtain one before the next election. Even Senator McKissick (an opponent of S.B. 824 and one of Plaintiffs' witnesses) voted to table this amendment. R S p 6730. Senators also tabled Senator Lowe's amendment to provide an extra day of early voting, R S p 6640, and Senator Clark's amendment to allow the free voter IDs to be used for purposes other than voting, R S p 6643, neither of which were germane to implementing the constitutional amendment. It is also not surprising that the Senate tabled Senator Woodard's amendment to allow all types of state and federal government-issued IDs to be used for voting, R S p 6638, or that the House rejected Representative Fisher's amendment to allow high-school IDs to be used for voting, R S p 6632. Plaintiffs have no evidence that the General Assembly knew how many IDs these amendments would have added to the pool—or to rebut the possibility that they would also have increased the potential administrability issues Plaintiffs themselves allege—and no evidence of how many minority voters these amendments might have enabled to vote.

Indeed, Plaintiffs (and their expert) have not identified *any array* of ID that they claim would result in a narrower disparity in ID possession by race than they claim for S.B. 824. T p 807:21–808:2. And it is not as if the General Assembly automatically accepted all *Republican* amendments. Several that Democrats opposed were rejected. *See, e.g.*, R S p 6616, 6620 (Rep. Pittman), 6624 (Rep. Warren).

At the end of the General Assembly's deliberations, even S.B. 824's opponents praised the process that created it. On the House floor, Representative Harrison "want[ed] to start by thanking Chairman Lewis," who had helped shepherd the bill, because she thought "he's done a really terrific job working with us to help improve the bill." R S p 8657 at 116:20–117:2. In the other chamber, Senator McKissick thanked Republican Senators "for their work on the bill and for being open and inclusive in listening to us on the other side of the aisle in trying to come up with something that is reasonable in terms of its approach." R S p 8533 at 3:3–8. Representative Harrison and Senator McKissick were not alone in their positive statements about the S.B. 824 process. *See, e.g.*, R S p 8517 at 44:16–19 (Sen. Smith); R S p 8520 at 55:1–6 (Sen. Van Duyn); R S p 8510 at 17:16–20 (Sen. Woodard). The Superior Court considered these statements mere acts of decorum, *see* R p 946–47 ¶¶ 127–128, entirely ignoring the complete lack of similar kind words for Republicans or H.B. 589 during that bill's consideration. Instead, for example, Senator McKissick decried H.B. 589 as a bill that "greatly, greatly concern[ed] and disappoint[ed]" him and, in his view, "basically reverse[d] decades of progressive legislation . . . that have increased voter participation." R S p 5931 at 39:19–23. These words speak volumes

about how inclusive the S.B. 824 process was, and how different S.B. 824 is from H.B. 589.

B. S.B. 824 Serves Nondiscriminatory Purposes.

Even if Plaintiffs had proven any discriminatory motivation, the question would 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. Nondiscriminatory motives explain the enactment of S.B. 824. The General Assembly was constitutionally required to enact a photo voter-ID law and, in doing so, sought to instill voter confidence and to prevent voter fraud.

Multiple legislators—including those who voted for S.B. 824 and those who voted against it—cited the constitutional mandate as the reason for convening to enact S.B. 824. *See, e.g.*, R S p 8641 at 50:16–19 (Speaker Moore); R S p 8457 at 3:9–11 (Rep. Lewis); R S p 8507 at 2:16–19 (Sen. Krawiec); R S p 8516 at 38:8–10 (Sen. Tillman); R S p 8510 at 16:17–20 (Sen. Woodard); R S p 8533 at 3:9–12 (Sen. McKissick).

Implementing a constitutional provision is not itself a violation of the Equal Protection Clause. The Constitution is not at war with itself. *See Leandro*, 346 N.C. at 352, 488 S.E.2d at 257–58. Thus, this explicit motivation alone shows that the General Assembly would have passed S.B. 824 even without the discriminatory intent that Plaintiffs have tried, and failed, to conjure.

Multiple legislators—including Senator Ford, a primary sponsor of S.B. 824—identified still other nondiscriminatory motivations, namely, protecting the integrity

of elections and public confidence in election results. R S p 97 ¶ 24. Among these legislators were, again, those who voted for S.B. 824, *see* R S p 8507 at 2:20–3:3 (Sen. Krawiec); R S p 8516 at 38:11–39:2 (Sen. Tillman); R S p 8603 at 96:12–15 (Rep. Warren); R S p 8608 at 114:1–17 (Rep. Blust); R S p 8723 at 14:1–22 (Rep. Lewis), and those who voted against it, *see* R S p 8510 at 16:21–17:4 (Sen. Woodard). The U.S. Supreme Court has consistently confirmed that a state's tandem interests in instilling voter confidence and preventing voter fraud are "strong," "entirely legitimate," and "indisputably . . . compelling." *Brnovich*, 141 S. Ct. at 2340, 2347 (cleaned up).

The Superior Court, on the other hand, concluded that these interests cannot justify S.B. 824 because "voter fraud in North Carolina is almost nonexistent." R p 971 ¶ 193. This conclusion was legal error because the premise does not support the conclusion. In *Crawford*, the U.S. Supreme Court upheld 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 (plurality op.) (emphases added). Whether or not a state has been struck by voter fraud, "[t]here is no question about the legitimacy or importance of the State's *interest* in counting only the votes of eligible voters." *Id.* at 196 (emphasis added). Besides, the Court added in *Brnovich*, "it should go without saying that a State may take action to prevent election fraud without waiting for it to occur and be detected within its own borders." 141 S. Ct. at 2348.

But North Carolina has been struck by voter fraud. As the Superior Court majority failed to mention, a ballot-harvesting scheme in 2018—which had come to light by the time the General Assembly was considering S.B. 824, *see* T p 2175:12–2176:10—caused the Ninth Congressional District election to be invalidated. *See* R p 1039 ¶ 131 (Poovey, J., dissenting). A photo voter-ID requirement would have made this scheme more difficult to achieve. *See* T p 2178:2–7. And Plaintiffs' own expert admitted that dozens of aliens voted illegally in the 2016 general election. R S p 7420–21. It was reasonable for legislators to conclude that S.B. 824 could help elections officials prevent this fraud and thereby preserve voter confidence. After all, such laws are now in effect in thirty-five other states (up one since trial), *see Voter ID Laws*, NAT'L CONF. OF STATE LEGISLATURES (Jan. 7, 2022), https://bit.ly/3AH48Mm; T p 1400:20–25, and a much stricter voter-ID law was recommended by a bipartisan commission co-chaired by former President Jimmy Carter, *see* R S p 11400–03. As the commission concluded, "fraud" and "multiple voting . . . both occur" and "could affect the outcome of a close election." R S p 11400. "The electoral system cannot inspire public confidence if no safeguards exist to deter or detect fraud or to confirm the identity of voters." R S p 11400. Indeed, a large majority of Americans support requiring voters to show photo ID to vote. *See, e.g.*, *Public Supports Both Early Voting and Requiring Photo ID to Vote*, MONMOUTH U. (June 21, 2021), https://bit.ly/3orykWK (poll finding 80% support); *NPR/PBS NewsHour/Marist Poll*, MARISTPOLL (July 2, 2021), https://bit.ly/3sAgORJ (poll finding 79% support). Whether a court agrees with a legislature's chosen policy is beside the point: since

voter fraud can "undermine public confidence in the fairness of elections and the perceived legitimacy of the announced outcome," a state's interest in avoiding such crises is unassailable. *Brnovich*, 141 S. Ct. at 2340.

CONCLUSION

For the foregoing reasons, the judgment must be reversed and the injunction vacated.

Respectfully submitted, this the 7th day of February, 2022.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 28(j) of the North Carolina Rules of Appellate Procedure and the Court's January 19, 2022 Order, the undersigned counsel certifies that the foregoing Brief of Legislative Defendant-Appellants, which was prepared using a 12-point proportionally spaced font with serifs, is less than 12,000 words (excluding covers, captions, indexes, tables of authorities, counsel's signature block, certificates of service, this certificate of compliance, and appendixes) as reported by Microsoft Word.

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CERTIFICATE OF SERVICE

I do hereby certify that I have on this 7th day of February, 2022, pursuant to Rules of Appellate Procedure 13 and 26, served a copy of the foregoing Brief of Legislative Defendant-Appellants on the following counsel for the parties at the following addresses by electronic mail.

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