NO. COA22-16 TENTH DISTRICT

NORTH CAROLINA COURT OF APPEALS

****

JABARI HOLMES, FRED CULP, DANIEL E. SMITH, BRENDON JADEN PEAY, SHAKOYA CARRIE BROWN, and PAUL KEARNEY, SR.,

Plaintiffs-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,[1] 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 Election for the 2018 Third Extra Session; THE STATE OF NORTH CAROLINA; and THE NORTH CAROLINA STATE BOARD OF ELECTIONS,

Defendants-Appellants.

From Wake County
No. 18 CVS 15292

****

THE STATE OF NORTH CAROLINA &
THE NC STATE BOARD OF ELECTION'S BRIEF

****

[1] David Lewis is no longer a member of the General Assembly.

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ISSUE PRESENTED

I. WHETHER THE SUPERIOR COURT ERRED IN CONCLUDING THAT S.B. 824 VIOLATES THE EQUAL PROTECTION CLAUSE OF THE NORTH CAROLINA CONSTITUTION.

INTRODUCTION

In November 2018, North Carolinians voted to amend the state Constitution to require a photo ID for in-person voting. *See* N.C. Const. art. VI, §§ 2(4), 3(2). That amendment also required the General Assembly to enact a photo-ID law. *Id.* To that end, in December 2018, the General Assembly passed N.C. Session Law 2018-144, "An Act to Implement the Constitutional Amendment Requiring Photographic Identification to Vote" ("Senate Bill 824" or "S.B. 824"). (R9(d)pp. 2141-61)[2]

S.B. 824 is one of the least strict voter ID laws in the country. *See* discussion *infra* pp. 11-18. And, as the law itself declares, it was designed to ensure "[a]ll registered voters will be allowed to vote with or without a photo ID card." S.B. 824 § 1.5(a)(10).

Plaintiffs alleged that S.B. 824 was enacted with the intent to

[2] Documentary exhibits submitted to the Court under Appellate Rule 9(d) are cited as "(R9(d)p. __)."

discriminate against minority voters and sought to enjoin S.B. 824 on the grounds that the statute, as written, violates the North Carolina Constitution's Equal Protection Clause. The majority of the three-judge panel presiding over this case in the Superior Court agreed and permanently enjoined the law. (Rpp. 896-1104) In doing so, the majority relied heavily on historical evidence of past discrimination, including the 2013 passage of a different voter-ID law. That prior voter-ID law was part of legislation which imposed numerous regulations on voting, and which was invalidated by the United States Court of Appeals for the Fourth Circuit in 2016. *See N.C. State Conf. of the NAACP v. McCrory*, 831 F.3d 204 (4th Cir. 2016) (herein after as "*McCrory*, 831 F.3d __").

But the past did not "freeze North Carolina election law in place." *Id.* at 241. And the dissent found in this case that "the totality of the competent evidence presented . . . fails to support a finding that the General Assembly acted with racially discriminatory intent" in passing S.B. 824. (Rp. 1104)

The dissent was correct. S.B. 824 does not violate the North Carolina Constitution. This Court should reverse the trial court's decision to the contrary for the reasons discussed below.

STATEMENT OF THE CASE

Plaintiffs filed a facial challenge to the constitutionality of S.B. 824 in Wake County Superior Court on 19 December 2018. (Rpp. 6-60) Plaintiffs raised several claims, including the equal protection claim at issue in this appeal. (*Id.)* Plaintiffs also moved for a preliminary injunction. (*Id.)*

Defendants Speaker Tim Moore, Senator Philip Berger, then Representative David Lewis, and Senator Ralph Hise ("Legislative Defendants") moved to dismiss Plaintiffs' action on 22 January 2019. (Rp. 89) The State of North Carolina and the North Carolina State Board of Elections ("State Defendants") filed an answer and moved to dismiss on 21 February 2019. (*Id.)*

The matter was transferred to a three-judge panel of superior court judges, pursuant to N.C.G.S. § 1-267.1, in an Amended Order entered 14 March 2019. (Rp. 95) On 19 July 2019, the panel dismissed all claims, except the above-noted equal protection claim, and entered an order denying a preliminary injunction over a dissent. (Rpp. 359-69)

Plaintiffs noticed an appeal from that denial, and on 18 February 2020, this Court reversed the denial order and directed the trial court to issue an

injunction. *See Holmes v. Moore*, 270 N.C. App. 7, 840 S.E.2d 244 (2020). The trial court did so on 10 August 2020. (Rp. 901 ¶ 8)

The three-judge panel held a trial on Plaintiffs' equal protection claim in April 2021. (Rp. 901 ¶ 9) On 17 September 2021, over a dissent, the majority of the panel held S.B. 824 violated the Equal Protection Clause of the North Carolina Constitution and permanently enjoined its enforcement. (Rpp. 896-1104) Legislative and State Defendants noticed appeals to this Court on 24 and 27 September 2021, respectively. (Rpp. 1107-13)

STATEMENT OF THE FACTS

A. Historical Background of North Carolina's Photo Voter-ID Legislation.

The General Assembly first attempted to enact a photo voter ID law more than a decade ago. In March 2011, it filed a bill, later vetoed by then Governor Beverly Perdue, requiring in-person voters to present a valid photo ID to vote. (R9(d)pp. 1198, 2162-63)

In 2013, the General Assembly enacted an "omnibus" election law, N.C. Session Law 2013-381 ("House Bill 589" or "H.B. 589"), which imposed numerous new restrictions on voting including a photo ID requirement. H.B. 589 (available at R9(d)pp. 8747-95); *see McCrory*, 831 F.3d at 214. During the

consideration of H.B. 589, "the legislature requested data on the use, by race, of a number of voting practices." *McCrory*, 831 F.3d at 214. With that data in hand, it "eliminated or reduced registration and voting access tools that African Americans disproportionately used" and instituted a photo-ID requirement that disproportionately burdened them. *Id.* at 216.

In addition to imposing a photo ID requirement for voting, H.B. 589 reduced the number of early voting days. H.B. 589 pts. 25-26. It also eliminated same-day registration, out-of-precinct voting, and pre-registration for voters who would turn eighteen before the next general election. *Id.*, pts. 12, 16 & 49. House Bill 589 included a number of other voting-related provisions that are not relevant here. *Id.* The General Assembly would later amend H.B. 589 to add a "reasonable impediment" exception to the requirement that voters must present photo ID when voting in person. N.C. Sess. Law 2015-103, H.B. 836 § 8(d)–(f) (enacted June 22, 2015) (available at (R9(d)pp. 9729-41). Under the prior law's reasonable impediment provision, a reasonable impediment ballot would be counted only if the voter produced some form of identification, by either: (1) presenting photo ID by noon of the day prior to the election canvass; or (2) presenting another government document showing name and address,

or providing the last four digits of the voter's social security number and date of birth. *Id.* The county board had the authority to reject a reasonable impediment ballot, if it "believe[d] the declaration [was] false, merely denigrated the photo identification requirement, or made obviously nonsensical statements." H.B. 836 § 8(e).

In 2016, the Fourth Circuit invalidated H.B. 589. *McCrory*, 831 F.3d at 214. That court found the legislature enacted the challenged provisions of the law with discriminatory intent. *Id.* at 215. Accordingly, it enjoined several provisions of H.B. 589, including the photo voter ID requirement. *Id.* at 219.

The Fourth Circuit was clear, however, that its decision did not "freeze North Carolina election law in place," and that the North Carolina legislature has the authority under the federal constitution to modify its election laws based on legitimate, nonracial motivations. *Id.* at 241.

B. Election Held with Implementation of H.B. 589.

The March 2016 and June 2016 primaries were the only elections where H.B. 589's photo-ID requirements were implemented. (R9(d)p. 183; Vol. 12 Tp. 2111)

Prior to those elections, the State Board of Elections ("State Board") and

the 100 county boards of elections had worked to prepare poll workers and voters for the photo-ID requirements of the law. This included engaging in an extensive public information campaign and uniform training and reference materials for county boards and poll workers, among other efforts. (Vol. 11 Tpp. 2063-73, 2077-80; Vol. 12 Tpp. 2101-16; R9(d)pp. 8232-53, 8261-89, 8315-23, 8342-56, 10646-72, 11150-51) Poll workers were instructed to ensure (1) no voter was turned away for lack of ID; and (2) any voter lacking ID was presented with options to vote provisionally and execute a reasonable impediment form, or to return with their ID to the county board of elections by the deadline set in the law. (R9(d)pp. 8244-46, 8284, 8288-89, 8336, 8343-50, 11163)

At trial, Plaintiffs presented anecdotal evidence of instances during the March 2016 primary in which a voter may not have been adequately informed of his or her options to vote without ID. (*See, e.g.*, Vol. 1 Tpp. 108-12; Vol. 4 Tpp. 823-25, 822-32, 834-37; Vol. 5 Tpp. 862-68, 871; R9(d)p. 11851) Plaintiffs' expert, political science professor Dr. Ariel White, reported that during North Carolina's implementation of H.B. 589, there was "evidence of confusion and mistakes on the part of polling place workers, as well as local variation and discretionary decision making in the application of the reasonable-

impediment process." (R9(d)p. 7213 ¶ 7). She indicated, however, that she lacked comprehensive data regarding that implementation. (R9(d)pp. 7227 ¶ 34, 7229-31 ¶¶ 39–42)

In North Carolina's March 2016 primary election, 2,332,045 votes were cast. Of those votes, 2,371 voters—or 0.1% of voters—cast a provisional ballot because they lacked acceptable photo ID. And of those 2,371 provisional voters, 1,048 voters completed a Declaration of Reasonable Impediment. (Vol. 6 Tp. 1025; R9(d)pp. 212, 10673-74) A total of 864 of the provisional ballots cast with those declarations counted. (R9(d)p. 10673)

C. Amendment to the North Carolina Constitution.

In June 2018, the General Assembly placed six constitutional amendments on the November 2018 general election ballot, one of which required every voter to show photo identification when voting in person. N.C. Session Law 2018-128, H.B. 1092 (available at R9(d)pp. 2063-64).

On 8 November 2018, the photo-ID constitutional amendment passed with 55.49% of the electorate voting in favor of the measure. (R9(d)p. 9599) As a result, the North Carolina Constitution was amended by adding two new subsections, both reading:

> Voters offering to vote in person shall present photographic identification before voting. The General Assembly shall enact general laws governing the requirements of such photographic identification, which may include exceptions.

N.C. Const. art. VI, §§ 2(4), 3(2).[3]

D. S.B. 824's Enactment.

After the November 2018 election, the General Assembly enacted the law at issue in this appeal, S.B. 824, which implements the above constitutional amendment. (R9(d)pp. 2141-61)

On 27 November 2018, S.B. 824 was filed in the North Carolina Senate. (R9(d)p. 10612) As the bill worked its way through the legislative process, various amendments, offered by both Democrats and Republicans, were adopted. (R9(d)pp. 10615-16, 10631-32) Other amendments were defeated, withdrawn, or tabled. (*Id.*)

On 5 December 2018, S.B. 824, as amended, passed in the North Carolina House, and on 6 December 2018, the Senate voted to concur with the House's

[3] A different three-judge superior court panel later held the North Carolina Constitution was improperly amended. *N.C. State Conf. of the NAACP v. Moore*, 273 N.C. App. 452, 461, 849 S.E.2d 87, 94 (2020), *appeal pending*, No. 261A18-3 (N.C.). This Court reversed that decision over a dissent, and the case has been appealed to the North Carolina Supreme Court, where it remains pending. *Id.*

version of the bill. (R9(d)pp. 10620, 10633) On 14 December 2018, Governor Roy Cooper vetoed S.B. 824. (R9(d)pp. 10621-22) On 18 and 19 December 2018, the Senate and House successfully voted to override the Governor's veto, and S.B. 824 thereby became law. (R9(d)pp. 10623, 10638)

E. S.B. 824's Substantive Provisions.

Generally, S.B. 824 identifies categories of photo IDs permitted for in-person and absentee voting, authorizes the issuance of free photo IDs, provides a number of exceptions to the photo ID requirement, mandates that the State Board engage in a variety of voter outreach and other implementation activities, and funds the statute's implementation. *See generally* S.B. 824 (available at R9(d)pp. 2141-61).

Under S.B. 824, a voter may vote, in person or by absentee ballot, if he or she presents photographic identification falling into one of the following categories:

- NC driver's license
- NC nonoperator's ID
- Passport
- NC voter ID

- Tribal ID
- Approved Student ID issued by private and public colleges, universities and community colleges
- Approved State, local government, and charter school employee ID
- Driver's license and nonoperator's ID issued by another state, for newly registered voters
- Military ID
- Veterans ID

S.B. 824 § 1.2(a); N.C.G.S. § 163-166.16 (2021). S.B. 824 as written did not authorize the use of other federal employee IDs or public assistance IDs for in-person and absentee voting. *Id.* The law has since been amended to allow public assistance IDs with photographs issued by the federal or state government, to the extent such identifications exist. N.C. Sess. Law 2020-17, H.B. 1169 § 10 (available at R9(d)pp. 746-54); *see* N.C.G.S. § 163-166.16(a)(2).

Military, veterans, tribal, and federal or state public assistance IDs may be presented even if the card has no expiration or issuance date. S.B. 824 § 1.2(a); *see* N.C.G.S. § 163-166.16(a)(2). If a voter is sixty-five years old or older, an expired ID is accepted as long as it was unexpired on the voter's sixty-fifth birthday. S.B. 824 § 1.2(a), *see* N.C.G.S. § 163-166.16 (a)(3). The remaining IDs

may be presented if they are unexpired or have been expired for one year or less. S.B. 824 § 1.2(a); *see* N.C.G.S. § 163-166.16(a)(1).

Senate Bill 824 authorizes the State Board to approve of the use of IDs issued by colleges, universities, and state and local government employers based upon certain criteria, and the General Assembly later amended the law to make the approval process less stringent. S.B. 824 § 1.2(b)–(c), *as amended by* N.C. Sess. Law 2019-22, H.B. 649 §§ 4, 6(b) (available at R9(d)pp. 6563-68); N.C.G.S. § 163-166.16(a)(1)g. & h. Before implementation was halted by an injunction, the State Board had approved the use of 118 such student and public employee IDs. (R9(d)pp. 9284-88)

Senate Bill 824 also authorizes and funds the issuance of two different free voter IDs. First, it requires county boards of elections to issue free photo voter ID to registered voters upon request. S.B. 824 § 1.1(a); N.C.G.S. § 163-82.8A(a) (2021). Presenting documentation is not necessary. Voters must merely provide their name, date of birth, and last four digits of their social security number. S.B. 824 § 1.1(a); N.C.G.S. § 163-82.8A(d)(1). Individuals who are not registered to vote may simultaneously register to vote and request a voter ID card. Second, S.B. 824 enables all eligible individuals over the age of

seventeen to receive free nonoperator ID cards from the North Carolina Division of Motor Vehicles ("DMV") which can in turn be used for voting. S.B. 824 § 1.3(a); N.C.G.S. § 20-37.7(d)(2) (2021). The State must also provide, free of charge, the documents necessary to obtain an ID from the DMV. S.B. 824 §§ 3.2(a) & (b); N.C.G.S. §§ 130A-93.1(c) & 161-10(a)(8) (2021).

Senate Bill 824 allows otherwise eligible voters to cast provisional ballots without photo ID in three circumstances, specifically where the voter

- was a victim of natural disaster;
- has religious objections to being photographed; or
- has a reasonable impediment that prevents a voter from presenting a photo ID, including: the inability to obtain ID due to
  - lack of transportation;
  - disability;
  - illness;
  - lack of birth certificate or other documents;
  - work schedule, or family responsibilities;
  - lost or stolen photo identification;
  - photo identification applied for but not yet received; or
  - any "other" reasonable impediment the voter lists.

S.B. 824 § 1.2(a); *see* N.C.G.S. §§ 163-166.16(d), & (e).

To claim one of the three above-noted exceptions, voters must fill out a form affidavit, attesting to their identity and the exception selected. *Id.* Voters

wishing to claim a reasonable impediment as an exception are provided a "Reasonable Impediment Declaration Form," by which they can claim any one of these reasonable impediments by simply checking the corresponding box on the form. *Id.* If voters select "other" impediment, they must provide a reason. *Id.*

The county boards' review and counting of provisional ballots occurs before county canvass, which happens ten days after Election Day. S.B. 824 § 1.2(a); N.C.G.S. §§ 163-182.2(a)(4) & -182.5 (2021). If a voter casts a provisional ballot under one of the three exceptions above, S.B. 824 requires county boards to count that voter's ballot "unless the county board has grounds to believe the affidavit is false." S.B. 824 § 1.2(a); N.C.G.S. § 163-166.16(f). Under a now-expired temporary administrative rule adopted by the State Board, a determination that an affidavit is false must be unanimous among the five-member, bipartisan county board. *See* 08 N.C. Admin. Code 17.0101(b)(3) (effective Aug. 23, 2019; expired June 20, 2020) (available at R9(d)p. 10993)[4]

[4] Due to the preliminary injunctions entered against implementation of S.B. 824, administrative rules, drafted initially as temporary rules, expired without becoming permanent. (S*ee* R9(d)pp. 191-92, 10993-99) If S.B. 824 is no longer enjoined, the State Board would adopt new temporary rules on an expedited

Senate Bill 824 further allows registered voters without acceptable IDs to cast a provisional ballot, and later return to the county board with qualifying ID no later than the end of business on the business day before county canvass, which occurs ten days after the election. S.B. 824 § 1.2(a); *see* N.C.G.S. §§ 163-166.16(c) & 163-182.5(b). The State Board is required to ensure that a provisional ballot voter receives written information listing the deadline to return to the county board and the list of acceptable IDs. *Id.*

The above-detailed ID requirements and exceptions apply largely the same way to absentee voters. S.B. 824 §§ 1.2(d), (e), *as amended by* N.C. Sess. Laws 2019-239, S.B. 683 §§ 1.2(b), 1.3(a), 1.4 (available at R9(d)pp. 8798-8814); *see* N.C.G.S. §§ 163-226(b), -230.1, -230.2, & -229(b) (2021).

In keeping with the above ameliorative provisions, S.B. 824 instructs the State Board to inform voters, through multiple forms of educational materials, that "[a]ll registered voters will be allowed to vote with or without a photo ID card." S.B. 824 § 1.5(a)(10). It further requires the State Board to conduct "an aggressive voter education program concerning the provisions" of the law. *Id.*,

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timeline to re-impose rules previously promulgated to implement S.B. 824. *See* N.C.G.S. § 150B-21.1(a)(11) (2021).

§ 1.5(a). Senate Bill 824 specified this program was to include offering at least two public seminars in each county to educate voters on the law's requirements; mailing notifications of those requirements to all voters who do not have DMV-issued IDs; mailing multiple notifications of the voter-ID requirement to all residences; and training county boards and precinct officials to ensure uniform implementation. *Id.*

The National Conference of State Legislatures ("NCSL") has categorized S.B. 824 as a "non-strict" voter ID law.[5] (R9(d)pp. 9870-71) Such laws are "non-strict" if "[a]t least some voters without acceptable identification have an option to cast a ballot that will be counted without further action on the part of the voter." *Id.* According to the NCSL, a "strict" voter-ID law is one where "[v]oters without acceptable identification must vote on a provisional ballot and also take additional steps after Election Day for it to be counted." *Id.*

[5] The NCSL has since removed North Carolina's voter-ID law from its "non-strict" list based upon the decision of the trial court in this case. *See* NCSL *Voter ID Laws* https://www.ncsl.org/research/elections-and-campaigns/voter-id.aspx (last visited Feb. 5, 2022) (noting that "North Carolina also enacted a photo voter ID law in 2018; it was struck down in 2021 and an appeal is likely. Therefore, these states are not included in this chart of in-force laws").

In addition, because of S.B. 824's measures permitting those without ID to vote, the Fourth Circuit recently concluded S.B. 824 was "more protective of the right to vote than other states' voter-ID laws that courts have approved." *N.C. State Conf. of the NAACP v. Raymond*, 981 F.3d 295, 310 (4th Cir. 2020) (herein after as "*Raymond,* 981 F.3d ___").

F. Differences between S.B. 824 and the Prior Voter-ID Law.

There are several key differences between S.B. 824 and the photo-ID provisions that were part of H.B. 589, the omnibus legislation invalidated by the Fourth Circuit in *McCrory*.

First, under H.B. 589, county boards did not issue free IDs. *See* H.B. 589 (available at R9(d)pp. 8747-95). House Bill 589 did not permit the use of student or government employee IDs. Before obtaining a free ID from the DMV, voters had to fill out a form declaring they were registered to vote but had no other valid ID, and the DMV had to confirm voter registration before issuing free IDs. *Id.*, § 3.1.

Second, the prior law's reasonable impediment exception was less permissive. H.B. 589 did not originally have a reasonable impediment exception, and one was added to the law just weeks before the trial challenging

the law's constitutionality. As noted above, under the prior law's reasonable impediment provision, a reasonable impediment ballot would be counted only if the voter presented photo ID by noon of the day prior to the election canvass; or (2) presented a qualifying document or provided the last four digits of the voter's social security number and date of birth. H.B. 836 § 8(d)–(f).

The falsity limitation for rejecting a reasonable impediment ballot in S.B. 824 is a critical departure from the prior law. H.B. 589 gave the county board wider discretion to reject a reasonable impediment ballot. It could do so for one of three reasons: if the board "believe[d] the declaration [was] false, merely denigrated the photo identification requirement, or made obviously nonsensical statements." H.B. 836 § 8(e). In contrast, S.B. 824 only allows rejection if the board believes the affidavit to be false. N.C.G.S. § 163-166.16(f). Also, unlike S.B. 824, the prior law explicitly permitted any county voter to challenge another voter's reasonable impediment affidavit, terming them "impediment evidentiary challenges." H.B. 836 § 8(e).

Moreover, S.B. 824 does not permit challenges to a reasonable impediment affidavit and limits ballot challenges related to the photo ID law to the failure to present photo ID in accordance with the law. *See* S.B. 824 §§

3.3, 3.1(c); *see also* N.C.G.S. §§ 163-45(a), -87(a)(5). This is because casting a ballot with a reasonable impediment is an express exception to the statute's requirement to "present photo identification." Also, S.B. 824 allows any voter whose ID is challenged to cast a provisional ballot if the voter completes a reasonable impediment affidavit or later cures their failure to present a proper ID.

Third, S.B. 824's photo ID requirement extends to absentee-by-mail voting. S.B. 824 § 1.2(d), (e), *as amended by* N.C. Sess. Laws 2019-239, S.B. 683 §§ 1.2(b), 1.3(a), 1.4; N.C.G.S. §§ 163-226(b), 230.1, -230.2, & -229(b). When invalidating H.B. 589 as discriminatory, the Fourth Circuit found it significant that the data available to the legislature when it enacted that law "revealed that African Americans did not disproportionately use absentee voting; whites did[,]" and that with H.B. 589, the General Assembly drastically restricted all of these other forms of access to the franchise, but exempted absentee voting from the photo ID requirement." *McCrory*, 831 F.3d at 230. Unlike H.B. 589, S.B. 824 now requires absentee voters to present the same types of photo ID or to execute a similar reasonable impediment declaration as in-person voters. N.C.G.S. § 163-230.1.

Fourth, unlike the prior law, S.B. 824 is not an "omnibus" election law. *McCrory*, 831 F.3d at 215, 231. Instead, it is focused on implementing a photo ID requirement. S.B. 824 does not curtail early voting, or eliminate same-day registration, out-of-precinct voting, and preregistration, as the prior law did. *See id.* at 219. Also, H.B. 589 was not introduced per a constitutional amendment. Rather, it was introduced as soon as the United States Supreme Court invalidated a provision of the federal Voting Rights Act requiring certain states, including North Carolina, to "preclear" changes to voting rules. *Id.* at 216–18; *see also Shelby County v. Holder*, 570 U.S. 529 (2013) (removing preclearance provision).

G. Implementation of S.B. 824.

On 31 December 2019, a federal district court entered a preliminary injunction on S.B. 824's implementation in a case challenging the law's constitutionality under the federal Constitution. *See Raymond*, 981 F.3d at 301. Later, the Fourth Circuit would reverse that order, but not before the state trial court imposed an injunction as ordered by this Court. *Id.*; (Rp. 901 ¶ 8). As such, no election has taken place under S.B. 824.

Plaintiffs' expert Dr. White reviewed S.B. 824 and the State Board's

implementation plans. Based upon that review and evidence regarding some people's experience with the prior photo ID law, she asserted, "[I]t appear[ed] that the implementation of SB 824 [was] susceptible to similar pitfalls of human discretion and biased decisionmaking" that arose from the implementation of H.B. 589. (R9(d)pp. 7213-14 ¶ 7)

Contrary to Dr. White's suppositions, however, State Board Executive Director Karen Brinson Bell testified elections officials "administer the law as it is written" and she had "no doubt that whatever the law is . . . [they] will administer and implement [it]." (R9(d)p. 212) Her testimony was based not upon speculation, but upon her many years of elections experience. (*Id.*) Moreover, according to Director Bell, the state and county boards of elections were "prepared to implement 824 and offer the training necessary prior to the injunction, and would do so if the injunction were lifted." (R9(d)p. 213)

ARGUMENT

I. THE SUPERIOR COURT ERRED IN CONCLUDING THAT S.B. 824 VIOLATES THE EQUAL PROTECTION CLAUSE OF THE NORTH CAROLINA CONSTITUTION.

Contrary to the majority's conclusion, the evidence presented at trial failed to establish S.B. 824 violates the Equal Protection Clause of Article I, § 19 of the North Carolina Constitution.

A. Standard of Review.

Generally, appellate courts review a challenge to the constitutionality of a statute de novo. *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008).

When challenged on appeal, findings of fact in an order resulting from a bench trial are reviewed to determine if they are supported by competent evidence, but conclusions of law are reviewed de novo. R*eynolds Am. Inc. v. Third Motion Equities Master Fund Ltd.*, ___ N.C. 2021, 2021-NCSC-162 ¶ 9 (Dec. 17, 2021). Findings of fact not challenged on appeal are binding. *Id.* Findings of fact not supported by competent evidence, however, are disregarded. *Id.*

B. Plaintiffs Bear a Heavy Burden in Demonstrating S.B. 824 Violates the State Constitution.

It is well established that statutes enacted by the General Assembly are owed "great deference," and as such, "a statute will not be declared unconstitutional under our Constitution unless the Constitution clearly prohibits that statute." *Rhyne v. K-Mart Corp.*, 358 N.C. 160, 167, 594 S.E.2d 1, 7 (2004) (cleaned up). Facial challenges to statutes, like the one raised by Plaintiffs here, are "of course, the 'most difficult challenge to mount

successfully.'" *State v. Bryant*, 359 N.C. 554, 564, 614 S.E.2d 479, 485 (2005) (citation omitted).

C. Determining Whether S.B. 824 Violates the Equal Protection Clause Requires a Probing Multifactor Analysis.

"No person shall be denied the equal protection of the laws; nor shall any person be subjected to discrimination by the State because of race, color, religion, or national origin." N.C. Const. art. I, § 19. The North Carolina Supreme Court's "analysis of the State Constitution's Equal Protection Clause generally follows the analysis of the Supreme Court of the United States in interpreting the corresponding federal clause." *Blankenship v. Bartlett*, 363 N.C. 518, 522, 681 S.E.2d 759, 762 (2009); *Holmes*, 270 N.C. App. at 16 n.7, 840 S.E.2d at 254 n.7 (noting that it would "utilize decisions under both Constitutions to analyze" Plaintiffs' discriminatory-intent claim).

1. Step 1: Plaintiffs must prove discriminatory intent.

Senate Bill 824 is a facially neutral law that contains no racial classifications. Accordingly, to prevail on a discriminatory-intent claim, Plaintiffs must prove that the circumstances surrounding S.B. 824's enactment and its impacts demonstrate it was motivated by an intent to burden minority

voters. *McCrory*, 831 F.3d at 220.

Discriminatory intent may be "inferred from the totality of the relevant facts." *Id.* at 220 (quoting *Washington v. Davis*, 426 U.S. 229, 242 (1976)). The list of factors relevant to determining discriminatory intent includes, but is not limited to, a law's historical background, any racially disproportionate impact of the law, the sequence of events that led to its enactment, and its legislative history. *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266–67 (1977). These are commonly referred to as the *Arlington Heights* factors.

For a discriminatory-intent claim, "the burden of proof lies with the challenger, not the State." *Abbott v. Perez*, 138 S. Ct. 2305, 2324 (2018). The challenger, here the Plaintiffs, must establish that "a discriminatory purpose was a motivating factor" for the challenged legislation. *Arlington Heights*, 429 U.S. at 265–66. "Although race-based decisionmaking is inherently suspect, until a claimant makes a showing sufficient to support that allegation the good faith of a state legislature must be presumed." *Miller v. Johnson*, 515 U.S. 900, 915 (1995) (citations omitted).

Courts must "heed the presumption of legislative good faith and the

allocation of the burden of proving intentional discrimination" in performing the discriminatory-intent analysis. *Abbott*, 138 S. Ct. at 2326 n.18. In light of the applicable presumption and allocation of the burden of proof, even where a legislature previously passed a similar law which was later determined to be enacted with discriminatory intent, it has no "duty to show that it had purged the bad intent of its predecessor" in defending the current, challenged law. *Id.* at 2326 n.18. This is true, even where the legislature passing the previous law and the legislature passing the current law had similar membership and leadership, and where there is not a substantial gap in time between the prior law and the current, challenged law. *See generally id.* at 2324-27.

The importance of these principles in the *Arlington Heights* analysis was manifested recently, when the Fourth Circuit examined S.B. 824 in the appeal from the federal district court's 31 December 2019 order, referenced above, imposing a preliminary injunction. *See Raymond*, 981 F.3d 295. In reversing the preliminary injunction order, the Fourth Circuit held it was unlikely that the plaintiffs would be able to "carry their burden of proving that the General Assembly acted with discriminatory intent in passing the 2018 Voter-ID Law." *Id.* at 310. Vital to the circuit court's holding was its conclusion that the district

court had ignored the above-discussed presumption of good faith and shifted the burden to the state defendants. *Id.* at 310-11. As the circuit court explained, its prior invalidation in *McCrory* of North Carolina's 2013 photo-ID law, H.B. 589, was not dispositive of the question of the legislature's intent in enacting S.B. 824. *Raymond*, 981 F.3d at 303. To so hold, the court explained, would "improperly flip[] the burden of proof at the first step of its analysis and fail[] to give effect to the Supreme Court's presumption of legislative good faith." *Id.*

2. Step 2: Defendants have an opportunity to establish the law would have been enacted without discrimination.

Only after a plaintiff proves that a law was enacted with a discriminatory purpose does the burden shift to the defendant to prove that "'the law would have been enacted without' racial discrimination." *Raymond*, 981 F.3d at 303 (quoting *Hunter v. Underwood*, 471 U.S. 222, 228 (1985)). "It is only then that judicial deference to the legislature 'is no longer justified.'" *Id.* (quoting *Arlington Heights*, 429 U.S. at 265-66).

D. The Balance of the *Arlington Heights* Factors Weighs in Favor of Concluding S.B. 824 Is Not Intentionally Discriminatory.

It was Plaintiffs' contention that by passing S.B. 824, the Republican majority of our legislature attempted to disenfranchise African Americans, who historically support Democratic candidates, as a mechanism to entrench itself politically. The majority of the three-judge panel in this case agreed and concluded that "the enactment of S.B. 824 was motivated at least in part by an unconstitutional intent to target African American voters." (Rp. 1000 ¶ 271) This conclusion was erroneous. Throughout the majority's analysis, it failed to adhere to the legislative presumption of good faith, shifted the burden of proof to Defendants, relied too heavily upon historical evidence, including North Carolina's prior voter-ID law, and did not adequately support its factual findings with competent evidence.

1. The majority did not weigh the historical background evidence in the proper context.

The majority below first determined "the historical context in which the General Assembly passed S.B. 824 supports Plaintiffs' claim that the legislature intended to discriminate against African American voters." (Rp. 977 ¶ 214)

State Defendants do not dispute North Carolina's long history of racial

discrimination. *See McCrory*, 831 F.3d at 223. They recognize and accept that a relevant part of that history is the prior voter-ID law, H.B. 589, which the Fourth Circuit partially invalidated as racially discriminatory. S*ee id.* They also recognize that, in the more recent past, courts have concluded that considerations of race have predominated in North Carolina's redistricting process. *See, e.g.*, *Harris v. McCrory*, 159 F. Supp. 3d 600 (M.D.N.C. 2016), aff'd, 137 S. Ct. 1455 (2017); *Covington v. North Carolina*, 316 F.R.D. 117 (M.D.N.C. 2016), *aff'd*, 137 S. Ct. 2211 (2017).

However, in making its factual findings and conclusions of law about the historical evidence, the majority neglected to weigh that evidence in its proper context and therefore erred in concluding it evinced discriminatory intent. Without overlooking the State's troubled history of racial discrimination, the "ultimate question" for the trial court was whether Plaintiffs established there was discriminatory intent in the passage of the law challenged *in this particular case*. *See Abbott*, 138 S. Ct. at 2324-25. It is well established that "[p]ast discrimination cannot, in the manner of original sin, condemn governmental action that is not itself unlawful." *Abbott,* 138 S. Ct. at 2324 (citations omitted). It follows that the past did not "freeze North Carolina

election law in place." *McCrory,* 831 F.3d at 241.

Large portions of the majority's findings upon which it based its determination that S.B. 824 was passed with discriminatory intent concerned the passage of the prior voter-ID law, H.B. 589, and the case in which it was found unconstitutional, *McCrory*. (Rpp. 906-17, 975-77) Moreover, the majority relied on findings about a 2017 case in which the U.S. Supreme Court affirmed a lower court decision concluding certain districts in North Carolina's house and senate districting plan, passed the same year as H.B. 589, were the product of racial gerrymandering, *Covington*, 137 S. Ct. 2211. (*See, e.g.*, Rpp. 916 ¶ 51, 917-18 ¶¶ 54-55)

More fundamentally, the majority failed to recognize the context in which S.B. 824 arose was much different than the context for H.B. 589. S.B. 824 was enacted pursuant to the passage of a constitutional amendment through which the people of North Carolina explicitly *required* the General Assembly to pass a photo voter-ID law. *See* N.C. Const. art. VI, § 2(4), 3(2). Plaintiffs do not challenge the validity of North Carolina's voter-ID constitutional amendment in this lawsuit.

As the dissent properly recognized below, the amendment to the North

Carolina Constitution, voted upon and approved by North Carolina's citizens, marks a "significant" intervening circumstance that breaks the link between North Carolina's history of discrimination, which included the passage of the prior photo-ID law, and the photo-ID law challenged in this action. (Rp. 1074 ¶ 41) This is consistent with the Fourth Circuit in *Raymond,* which recognized the interceding constitutional amendment altered the discriminatory-intent analysis significantly. 981 F.3d at 305. Here again, that is not to say that the history of prior laws is not relevant, only that it is but one portion of the historical background factor, is not dispositive on its own, and was not properly weighed or considered by the majority, particularly in light of the constitutional amendment. *See id.* It was likewise not properly weighed considering there are many significant distinctions between H.B. 589 and S.B. 824, as discussed *supra* on pages 18-21.

Finally, a finding that there was discrimination by a State in the past does not change "[t]he allocation of the burden of proof and the presumption of legislative good faith." *Abbott*, 138 S. Ct. at 2324. In other words, to prevail, a defendant is not required to prove that a new law "cleanse[d] the discriminatory taint" of a different, prior law that was invalidated based upon

a finding of discriminatory intent. *Raymond*, 981 F.3d at 304.

But this is exactly what the majority required defendants to establish about S.B. 824. In summarizing its findings in a heading, the majority explicitly asserted, "The Design of S.B. 824 Does Not Evince an Intent by the General Assembly to Cure Racial Disparities Observed Under H.B. 589." (Rp. 940) The majority's opinion is replete with findings indicating it erroneously shifted the burden of proof to defendants. (*See, e.g.*, Rp. 940 ¶ 111 (faulting defendants for "offer[ing] no evidence that including certain IDs would 'make a difference to overcome the already existing deficiency'"); 942 ¶ 114 (rebuking defendants for not rebutting a certain assertion by Plaintiffs))

As noted above, "[p]ast discrimination cannot, in the manner of original sin, condemn governmental action that is not itself unlawful." *Abbott*, 138 S. Ct. at 2324 (citation omitted). The majority's erroneous view of the historical evidence undoubtedly evinced a misapprehension of this and other essential principles of the applicable discriminatory-intent analysis.

2. S.B. 824 does not disparately impact African-American voters.

Despite what the majority found and concluded, at trial Plaintiffs did not and could not show S.B. 824 will result in a disparate impact on African-American

voters. This is primarily because of one simple fact: S.B. 824 goes "out of its way to make its impact as burden-free as possible." *Lee v. Virginia State Bd. of Elections*, 843 F.3d 592, 603 (4th Cir. 2016). In fact, it was undisputed below that Plaintiffs failed to identify a single voter who would be prevented from voting under S.B. 824 Any inconvenience for voters without identification to vote, including inconveniences related to obtaining a qualifying free ID or simply the process of filling out a form, would be minor, at best, and is legally insufficient to show a disparate impact.

As explained below, several courts have concluded the operation of a photo-ID law's provisions, especially those ensuring voters of all races can vote even without ID, is critical to the discriminatory-intent analysis. The majority overlooked the persuasiveness of these decisions and instead relied too heavily on theoretical harms.

When examining S.B. 824 recently, the Fourth Circuit accepted the federal district court's finding that minority voters disproportionately lack qualifying IDs. *Raymond*, 981 F.3d at 309. Nonetheless, the court found it highly relevant that S.B. 824 "contains three provisions that go 'out of [their] way to make its impact as burden-free as possible.'" *Id.* (citation omitted). In

light of those provisions, the Fourth Circuit concluded North Carolina's "2018 Voter-ID Law is more protective of the right to vote than other states' voter-ID laws that courts have approved." *Id.* at 310.

In a case relied upon by *Raymond*, *Lee*, 843 F.3d 592, the Fourth Circuit upheld a finding that the burdens imposed by Virginia's similar photo-ID law were not suggestive of discriminatory intent. Under Virginia's law, like North Carolina's, local elections officials were required to issue free voter-ID cards to registered voters with no showing of documentation required. *Id.* at 595. Local officials could also provide such cards at "mobile voter-ID stations." *Id.*

S.B. 824 offers these types of measures as well. For example, prior to the time S.B. 824 was enjoined, the State Board had promulgated a now-expired administrative rule that permitted county boards to issue voter IDs not simply at their own offices, but also at other locations. [6] *See* 08 N.C. Admin. Code 17.0107(a) (effective Apr. 29, 2019; expired June 20, 2020) (available at R9(d)pp. 10996-97).

[6] Following the trial in this case, the General Assembly passed the State's 2021 appropriations act, wherein it provided $5 million dollars for a mobile program to assist those who need photo IDs to vote in person. N.C. Sess. Law 2021-180, S.B. 105 § 43.2(a) & Joint Conf. Comm. Rpt. p. F-65.

Virginia's list of qualifying IDs was admittedly longer than North Carolina's, but Virginia had fewer exceptions to its photo-ID requirement. *See Lee*, 843 F.3d at 594. Most notably, Virginia's law did not have a reasonable impediment provision that waives the photo-ID requirement entirely. *Id.*

The Fourth Circuit in *Lee* acknowledged that white Virginians possessed IDs that could be used for voting at higher rates than Black Virginians, and that obtaining an ID required some effort from voters. 843 F.3d at 597–98, 600. But, to assess whether Virginia's law was enacted with discriminatory intent, the Fourth Circuit focused on the provisions of the law that minimized the burden imposed on voters *without an ID*. *Id.* at 600–01, 03. In light of these provisions, the *Lee* Court concluded "the Virginia legislature went out of its way to make its impact as burden-free as possible." *Id.* at 603.

Direct comparison with *Lee* suggests that any burden S.B. 824 imposes on North Carolina voters without an ID is not sufficient to support a finding of discriminatory intent. Registered voters can receive free voter-ID cards without needing to provide identification documents.[7] If registered voters arrive without qualifying ID, they may vote provisionally, and their vote will

[7] Unless otherwise stated, citations are to the Statement of Facts.

count if they return later with their qualifying ID. Voters with a reasonable impediment may cast a provisional ballot after only affirming their identity and the reason for not producing ID.

Finally, S.B. 824 requires no additional identification documentation once a voter fills out the reasonable impediment form, does not allow any voter to challenge another voter's reasonable impediment, and requires the voter's ballot to be counted unless the county board has grounds to determine the voter's affidavit is false.

Thus, any discriminatory impact resulting from S.B. 824 is substantially mitigated by the law's three ameliorative provisions—free IDs; the broad exceptions to the requirement to present ID, including relying upon a reasonable impediment; and the ability for voters to cure their lack of qualifying ID by casting a provisional ballot and returning to the county board with their ID. The majority's conclusion to the contrary that the existence of some inconvenience in the voting process necessarily proves discriminatory impact or intent is legally unsupported. (*See* Rp. 991 ¶ 248); *cf. Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 198 (2008) (plurality) (holding in a non-discriminatory-intent case, inconveniences like making a trip to the DMV do

not "qualify as a substantial burden on the right to vote"); *see also Frank v. Walker*, 768 F.3d 744, 748-49 (7th Cir. 2014).

In another important case, a three-judge panel of the District of Columbia Circuit Court upheld, under Section 5 of the Voting Rights Act, South Carolina's voter-ID law, which included provisions for free IDs and a reasonable-impediment procedure very similar to North Carolina's. *South Carolina v. United States*, 898 F. Supp. 2d 30, 32 (D.D.C. 2012). S.B. 824 was in fact modeled after South Carolina's voter-ID law. (Vol. 7 Tpp. 1510–1512)

The panel in *South Carolina* focused on the provisions in the law which ensured that people who lacked ID could still vote. 898 F. Supp. 2d at 39. These included a list of acceptable IDs that is shorter than North Carolina's; free voter IDs from county elections boards and the DMV, just like in North Carolina; and a reasonable impediment provision that is substantially the same as our state's. *Id.* Also, the court there acknowledged a racial disparity in the possession rate of photo IDs among South Carolina voters. *Id.* at 40. But, despite this disparity, and despite the potential burdens associated with obtaining a free ID, the court held the law's "sweeping" reasonable

impediment provision "eliminate[ed] any disproportionate effect or material burden that South Carolina's voter ID law otherwise might have caused." [8] *Id.*

In another similar case, the Eleventh Circuit upheld Alabama's voter-ID law which provided free IDs and had a cure mechanism, but lacked a reasonable-impediment exception. *Greater Birmingham Ministries v. Sec'y of State for Alabama*, 992 F.3d 1299, 1327–28 (11th Cir. 2021).

In *Veasey v. Abbott*, the Fifth Circuit reversed a preliminary injunction against a Texas voter-ID law where the federal district court, in finding discriminatory purpose, had failed to account for that law's reasonable impediment provision. 888 F.3d 792, 804 (5th Cir. 2018). As here, the Texas legislature enacted its voter-ID law after an earlier, stricter law had been

[8] In this Court's prior opinion reversing the trial court's denial of the preliminary injunction, the Court concluded the *South Carolina* decision was distinguishable and inapplicable because that court was analyzing a claim brought under the Voting Rights Act. *Holmes*, 270 N.C. App. at 32, 840 S.E.2d at 264. The majority below discounted the *South Carolina* opinion for similar reasons. (Rpp. 989-90 ¶ 246). While it is true that the claim in *South Carolina* was a Section 5 Voting Rights Act claim, the *South Carolina* court used the *Arlington Heights* factors to guide its analysis. *See South Carolina,* 898 F. Supp. 2d at 38 & 43. More importantly, since this Court issued its decision in *Holmes*, the Fourth Circuit has since concluded in *Raymond* that the laws analyzed in *South Carolina* and other similar cases were analogous, and, thus, supported its determination that S.B. 824 lacks a discriminatory impact. *Raymond*, 981 F.3d. at 306, 309-10.

declared invalid, and the new law sought to address problems that the court had identified in the earlier law. *Id.* at 796–97. The court held that Texas's reasonable impediment provision, which was much less permissive than S.B. 824, minimized any disparate impact that a strict photo-ID requirement could impose on minority voters. *Id.* at 803. Due to the measures allowing voters to obtain IDs, and thereby comply with the law, the court in *Veasey* held the photo-ID requirement imposed a mere "inconvenience" on voters, was not "needlessly hard," and did not rise to the level of a constitutionally significant burden. *Id.* at 748 & 753.

Similarly, the Seventh Circuit reversed an injunction against Wisconsin's photo-ID law, even though that law provided *no* reasonable impediment alternative, and despite evidence showing disparate rates of ID possession. *Frank*, 768 F.3d at 746.

In all relevant aspects, S.B. 824 is effectively identical to or more permissive than the laws upheld by the panels in *Lee*, *Greater Birmingham Ministries*, *Veazey*, *Frank*, and *South Carolina*. The weight of authority demonstrates that voter-ID laws with ameliorative provisions similar to S.B. 824's reduce any potentially disparate impact sufficiently to overcome claims

of discriminatory intent. Accordingly, S.B. 824, analyzed in accordance with these decisions, does not bear more heavily on minority voters.

For the most part, the trial court majority overlooked and minimized the above-noted authority to conclude that Plaintiffs had indeed established disparate impact. Instead, it either failed to give proper weight to S.B. 824's ameliorative provisions or relied upon theoretical harms stemming from S.B. 824's implementation to dismiss them.

Unlike the courts referenced above, the majority below gave no weight to evidence concerning the free-ID provisions of S.E. 824. It minimized the provisions' significance by first pointing to evidence from Plaintiffs' expert, Dr. Kevin Quinn, that the addition of free IDs yielded "[o]nly 205 new [voter ID] matches." (Rp. 950 ¶ 133 (citing (Vol. 4 Tp. 278; R9(d)p. 549)) But Dr. Quinn's analysis was fundamentally flawed. This is because, among other reasons, there have been no free IDs available since S.B. 824 was enjoined by the federal district court. (Vol. 4 Tpp. 475-76) Dr. Quinn even admitted he could not quantify the number of free IDs the county boards of election would be issuing when S.B. 824 is fully implemented. (*Id.* at 749-50)

Second, rather than crediting the obvious mitigating value of the free-

ID provision, the majority reasoned that the provision actually created a disparate impact. According to the majority, this was because the burden of obtaining the free ID would fall more heavily on African-American voters, since they were less likely to have qualifying IDs, and would therefore have to take steps to obtain one. (Rpp. 955-64 ¶¶ 142-77, 989 ¶¶ 244-45) It found something similar about the reasonable impediment provision. *Id.*)

The Fourth Circuit rejected this same reasoning in *Raymond*. 981 F.3d at 309. The court found the reasoning was flawed specifically because, "[f]or most voters who need them, the inconvenience of making a trip to the [DMV], gathering the required documents, and posing for a photograph surely does not qualify as a substantial burden on the right to vote, or even represent a significant increase over the usual burdens of voting." *Raymond*, 981 F.3d at 309 (quoting *Crawford*, 553 U.S. at 198).

Raymond and other decisions analyzing ameliorative provisions in analogous laws are highly persuasive. The majority should have followed the analysis in those decisions to conclude S.B. 824's ameliorative provisions substantially mitigate any disparate impact. *See Frank*, 768 F.3d at 750 ("Functionally identical laws cannot be valid in [one state] and invalid in

[another], depending on which political scientist testifies . . . ."). Instead, in its findings of fact, the majority relied in error on speculation from Plaintiffs' expert Dr. White about S.B. 824's potential for poor enforcement to conclude the opposite. (*See* Rp. 989 ¶ 245) That part of Dr. White's assessment of S.B. 824 cited by the majority was grounded in experiences with the prior voter-ID law, H.B. 589. (*See Id.)* More specifically, according to Dr. White, when H.B. 589 was in effect during the March 2016 election, African Americans were more likely to encounter difficulties. (*Id.)* Dr. White's assessment was based primarily about anecdotal reports. (R9(d)pp. 7229-31 ¶¶ 39–42)

The relevance of anecdotal experiences with H.B. 589 and their reliability in predicting the impact of S.B. 824 is questionable at best considering the substantial differences between the two laws' reasonable impediment provisions. As the comparison between the laws in the Statement of the Facts demonstrates, the majority's assessment that they are "similar" is not supported by competent evidence or the statutes as written. (Rp. 989 ¶ 246) For instance, under S.B. 824 and the rules promulgated by the State Board, the grounds for rejecting a vote cast per a reasonable impediment affidavit are strictly limited to a bipartisan, unanimous agreement among the

elections board that there are "grounds to believe" the voter's affidavit is "false."[9] S.B. 824 § 1.2(a); N.C.G.S. § 163-166.16(f); 07 N.C. Admin. Code 17.0101(b). Under H.B. 589, however, a partisan simple majority of the elections board could discount a reasonable-impediment ballot for such undefined and vague reasons as the affidavit was "nonsensical" or because it "merely denigrated" the voter-ID requirement. H.B. 589 § 8(e).

Moreover, Dr. White's assessment was based upon incomplete information and speculation about S.B. 824's potential enforcement. She opined that the discretion involved in implementing a law like a photo-ID requirement "*can* yield biased outcomes" (R9(d)pp. 7213-14 ¶ 7 (emphasis added)) Relying on evidence about H.B. 589's implementation and the State Board's implementation plan for S.B. 824, she asserted "it *appears* that the implementation of SB 824 is susceptible to similar pitfalls of human discretion and biased decision making." (*Id.* (emphasis added)) Not only are these assessments speculative, in making them, Dr. White did not rely upon all materials that were key to understanding H.B. 589's implementation,

[9] The majority's finding that there is no "articulable standard" governing the bipartisan committee's decision is not supported by competent evidence, as the statute plainly provides one. (*See* Rp. 942 ¶ 117); *see* N.C.G.S. § 163-166.16(f).

including some of the State Board's most important training materials. (*Id.* at 7241; Vol. 7 Tpp. 1295-1306) Dr. White also indicated in her report she lacked comprehensive data regarding implementation of H.B. 589, which "ma[d]e it harder to fully understand how [that law] was implemented[.]" (R9(d)p. 7227 ¶ 34) In the absence of such comprehensive data, she relied on statements of four voters to attempt to bolster her theoretical conclusions about how the current law will be implemented. (*Id.* at 7229-31 ¶¶ 39–42) Certainly, those statements and the few examples of potentially mistaken poll workers implementing the prior photo-ID law in the March 2016 primary do not support a finding of discriminatory intent.

As the court said in *Raymond*, absent clear evidence to the contrary, courts should presume that public officers properly discharge their official duties. *Id.*; *see also Gregg v. Commissioners*, 162 N.C. 479, 484, 78 S.E. 301, 302 (1913) (acknowledging there exists a presumption of legality applicable to public officials). The majority's predictions about S.B. 824's ill effects are not enough to invalidate the law on a facial challenge—particularly because there is little evidence of these ill effects. This is because with those challenges a court is required to assume that a law will be carried out according to its plain

text, not based on "hypothetical or imaginary cases." *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449–50 (2008) (cleaned up).

The Fifth and Seventh Circuits found error under circumstances that are similar to the situation presented by the instant case. In *Veasey*, the Fifth Circuit faulted the trial court for relying on "wholly speculative" concerns regarding Texas's reasonable impediment provision. 888 F.3d at 802 n.7, 803. And in *Frank*, the Seventh Circuit admonished the trial court for "mak[ing] predictions about the effects of requiring photo ID," noting that "the predictions cannot be compared with results." 768 F.3d at 747.

At bottom, the majority relied upon theoretical harms, based upon scant evidence and a very different prior law, to find that S.B. 824 will be applied in a discriminatory manner. Like the trial courts in *Veasey* and *Frank*, the majority's predictions based on statistically insignificant evidence are insufficient to support its finding that S.B. 824 would likely have a discriminatory effect.

In any regard, other evidence was presented suggesting that, as a general matter, the State and county boards of elections, along with county poll

workers, will carry out S.B. 824 in an even-handed, nondiscriminatory manner. That evidence included the myriad measures that the State Board was putting in place to minimize any confusion.

In contrast to Dr. White's theoretical conclusions, State Board Director Bell testified that the state and county boards of elections were "prepared to implement 824 and offer the training necessary prior to the [federal preliminary] injunction, and would do so if the injunction were lifted." (R9(d)p. 38) In fact, at the time the federal district court entered its preliminary injunction on 31 December 2019, the State Board had already undertaken a series of actions to implement S.B. 824, and was set to finalize its preparations to enforce the law in the March 2020 primary. (R9(d)p. 759 ¶ 6)

These S.B. 824 implementation activities included multiple training events for county board members and staff; promulgating administrative rules; distributing multiple mass mailings about the voter-ID requirements, including mailers to every registered voter who may not possess a DMV-issued IDs; distributing posters and informational handouts in both English and Spanish; creating a dedicated webpage about photo IDs; developing training

materials for poll workers; two public seminars in each county to educate voters on the law's requirements; approving the college and university student IDs and state and local government employee IDs; and making voter ID-related modifications to the elections-management database used by state and county elections staff for checking in voters at the polls, and processing absentee and provisional ballots. (R9(d)pp. 759-71 ¶¶ 8–40)

In sum, the majority's determination that S.B. 824 was likely to have a discriminatory impact was made in error.

3. The sequence of events around the passage of S.B. 824 does not show discriminatory purpose.

The evidence of the events surrounding the enactment of S.B. 824 fails to show a discriminatory purpose. The majority's findings and conclusions of law to the contrary are incorrect, because they do not fully take into account applicable case law and the full scope of evidence. (*See* Rpp. 917-26 ¶¶ 53-73, 978-82 ¶¶ 215-26)

To evince discriminatory intent in the sequence of a law's enactment, a legislature need not "break its own rules to engage in unusual procedures." *McCrory*, 831 F.3d at 228. Evidence surrounding that sequence must, however, create "an inference that is strong enough to overcome the presumption of

legislative good faith." *Abbott*, 138 S. Ct. at 2328-29.

Drastic and unprecedented changes in the legislative procedure may, under some circumstances, be sufficient to overcome the good-faith presumption. *See Arlington Heights*, 429 U.S. at 267. For example, the Fifth Circuit found a number of "unprecedented" and "drastic" procedural departures on the part of the Texas legislature when it enacted its initial photo-ID law. *Veasey v. Abbott*, 830 F.3d 216, 238 (5th Cir. 2016). Those departures included suspension of the two-thirds rule on the number of votes required for enactment, and the absence of a required fiscal note for the bill enacting the law. *Id.* at 238.

In *McCrory*, the Fourth Circuit characterized the legislative sequence leading up to the 2013 enactment of H.B. 589 as a "suspicious narrative." *McCrory*, 831 F.3d at 228. Before H.B. 589 was passed, a much more modest voter-ID bill went untouched for months until the U.S. Supreme Court decided *Shelby County*, a case which freed the North Carolina legislature from the preclearance requirement of the Voting Rights Act. *McCrory*, 831 F.3d at 227. Then, the law's size swelled from sixteen to fifty-seven pages, and became an "omnibus" elections bill. *Id.* That bill was "rushed" through the

legislature—the House did not even send the bill to a committee and offered no opportunity for amendments before a vote. *Id.* at 227-28. It was ratified in three days. *Id.* at 228. And the "vote proceeded on strict party lines." *Id*.

Even the majority's findings of fact in this case regarding the sequence of S.B. 824's passage do not recount events that give rise to "an inference that is strong enough to overcome the presumption of legislative good faith." *Abbott*, 138 S. Ct. at 2328-29; (*See* Rpp. 922-26 ¶¶ 66-72). For example, the majority characterized the sequence as a "rushed process," found that such a process and the use of the lame-duck session "departed sharply from normal procedure," and provided strong circumstantial evidence of discriminatory intent. (Rpp. 925, 926 ¶ 74, 978 ¶ 216) But the U.S. Supreme Court has recognized that "brevity of the legislative process" does not necessarily "give rise to an inference of bad faith." *See Abbott*, 138 S. Ct. at 2328-29.

The record of S.B. 824's passage features no evidence of severe departures from the ordinary legislative procedure or any unparalleled legislative maneuvering. As the dissent pointed out, a version of S.B. 824 was released to the public on 20 November 2018; filed in the Senate on 27 November, after twenty-four changes; was passed in the House on 5

December; sent to Governor Cooper on 6 December; and enacted by overriding his veto on 19 December. (Rp. 1081 ¶ 49) This month-long process was preceded by years of debate on photo voter IDs, including the public debate surrounding the constitutional amendment that was on the ballot earlier that year. (*Id.*) The legislative leadership specifically instructed members to follow a regular timeframe in passing S.B. 824, and public stakeholders were allowed to speak during committee hearings. (R9(d)pp. 10018, 10085-609)

The majority also ignored many of the General Assembly's actions demonstrating an absence of discriminatory intent. *Arlington Heights* instructs that evidence indicating "improper purposes are playing a role" can be considered in determining whether the sequence of events shows discriminatory intent. 429 U.S. at 267. By the same token, evidence of a proper purpose can show the lack of that intent.

For instance, the Fourth Circuit in *Lee* found it significant in concluding there was no discriminatory intent for passing the Virginia voter-ID law that the legislature in that case "did not call for, nor did it have, [] racial data[.]" *Lee*, 843 F.3d at 604. But, in *McCrory*, the court supported its finding of

discriminatory intent with evidence that, before passing H.B. 589, "the legislature requested data on the use, by race, of a number of voting practices." 831 F.3d at 214.

The majority below correctly observed that the evidence showed our legislature, like the one in *Lee*, did not request racial data before enacting S.B. 824, as it had with H.B. 589. (Rp. 935 ¶ 97) However, the majority failed to evaluate that evidence in accordance with the presumption of legislative good faith. Rather, it viewed the lack of racial data as "suggesting" that "the Republican supermajority intended to push S.B. 824 through with limited analysis and scrutiny." (*Id.*) Such a finding leaves the legislature in a paradoxical situation, given that in *McCrory*, the Fourth Circuit had previously rebuked the North Carolina legislature for requesting such data before passing H.B. 589. *See McCrory*, 831 F.3d at 214.

Finally, the majority erred in relying so heavily on the sequence of events relating to the passage of the bill which placed the voter-ID constitutional amendment on the November 2018 ballot. (Rpp. 917-22 ¶¶ 53-63, 978 ¶ 217-18) The relevance of that sequence is marginal at best. Plaintiffs have not challenged the propriety of that bill or the resulting constitutional

amendment in this case, and more importantly, its passage was (as argued above and concluded by the Fourth Circuit in *Raymond*) a significant intervening event.

Notably, the majority's determination that S.B. 824's sequence of events showed discriminatory intent was directly contrary to what the Fourth Circuit concluded in *Raymond*. There, the federal court of appeals found that nothing regarding the sequence of events leading to the enactment of S.B. 824 supported the conclusion that the law was enacted with discriminatory intent. *Raymond*, 981 F.3d at 305. Specifically, the court found that "there were no procedural irregularities in the sequence of events leading to the enactment of the 2018 Voter-ID Law." *Id.* at 305. Even the federal district court that granted a preliminary injunction against the law acknowledged the lack of procedural irregularities in S.B. 824's passage. *Id.* The Fourth Circuit added, "the remaining evidence of the legislative process otherwise fails to 'spark suspicion' of impropriety in the 2018 Voter-ID Law's passage." *Id.* (quoting *Arlington Heights*, 429 U.S. at 269).

For the reasons discussed above, the majority's findings and conclusions of law about the sequence of S.B. 824's passage are erroneous.

4. S.B. 824's legislative history does not support a finding of discriminatory intent.

The legislative history of S.B. 824 weighs against finding discriminatory intent for several reasons.

First, while largely opposed by the Democrats, S.B. 824 had some bipartisan support. (*See* Rpp. 844 ¶ 120; 986 ¶ 235; 987 ¶ 239); *see Lee*, 843 F.3d at 603 (indicating bipartisan support is a factor that can be considered in evaluating legislative history). It was co-sponsored by a Democrat, Senator Joel Ford; three Senate Democrats voted for S.B. 824 on its second reading; it was supported by two Democrats in the Senate on its third reading; two House Democrats then voted for S.B. 824 in the House; and one Democrat in each legislative chamber voted to override the veto. (Vol. 6 Tp. 1135; R9(h)pp. 6649-63, 6712-17) The support for S.B. 824 revealed by its legislative history stands in stark contrast to what is revealed by the legislative history of H.B. 589, which garnered no support from Democrats. *See McCrory*, 831 F.3d at 228.

The majority's findings about the lack of bipartisan support ignored decisions from other courts, in which those courts have found less support from an opposing party was sufficient to demonstrate a lack of discriminatory intent. *See, e.g.*, *Lee*, 843 F.3d at 603 ("While there was a substantial party split

on the vote enacting the law, two non-Republicans (one Democrat and one Independent) voted for the measure as well."). And, as the Fourth Circuit held in *Raymond,* "[w]hatever one thinks of the weight of bipartisanship," it is error to do what the majority did here, which was to "discount[] Senator Ford and ignor[e] the other supporting Democrats." *Id.*

Secondly, the amendment process for S.B. 824 shows a lack of discriminatory intent. *See McCrory*, 831 F.3d at 228 (considering the amendment process when assessing legislative history in the *Arlington Heights* analysis). Twenty-four amendments were offered to S.B. 824, with thirteen of those being adopted before enactment. (R9(d)pp. 4848-49, 6612-48) Many of the amendments came from Democratic legislators opposing the law. (*Id.*) Examination of the amendments reveals, contrary to what the majority asserted, they did not only address "technical points," nor were they insignificant. (Rp. 837 ¶ 105; R9(d)pp. 6612-48)

When reviewing S.B. 824's legislative history, the Fourth Circuit found it was "unremarkable" and concluded it did not reveal discriminatory intent. *Raymond*, 981 F.3d at 308-09. As noted by the Fourth Circuit, unlike with H.B. 589, "[n]othing here suggests that the General Assembly used racial voting

data to disproportionately target minority voters 'with surgical precision[.]'" *Id.* at 308-09 (quoting *McCrory*, 831 F.3d at 214, 216-17).

This Court should reach the same conclusion as the Fourth Circuit.

* * *

For the foregoing reasons, Plaintiffs did not carry their burden of proving S.B. 824 was enacted with an intent to discriminate.

E. The Legislature's Nonracial Motivations Justify the Enactment of S.B. 824.

At the second step of the discriminatory-intent analysis, courts are required to "scrutinize the legislature's *actual* non-racial motivations to determine whether they *alone* can justify the legislature's choices." *McCrory*, 831 F.3d at 221 (emphasis in original).

In the present case, even if this Court determines the majority did not err in determining there was discriminatory intent, it should nonetheless conclude the majority erred in determining S.B. 824 violated equal protection. The record contains substantial evidence of non-racial motivations for the enactment of S.B. 824. Most obvious among those motivations, legislators from both parties recognized S.B. 824 was required to implement the state constitution's mandate that voters present a photo ID to vote. (*See* R9(d)pp.

9903-04, 9967, 10213) Likewise, the proponents of S.B. 824 asserted the legislation was needed to ensure voter confidence in elections. (R9(d)pp. 10211, 10233-35, 10240-42, 10252-53, 10390-91, 10420-21, 10425, 10430)

The majority refused to credit the General Assembly's interest in promoting voter confidence as an actual nonracial motivation. In support, it cited the rarity of prosecutable cases of voter impersonation in this State and the lack of record evidence that a voter-ID law will enhance public confidence in elections. (Rp. 970 ¶¶ 189-97) But the majority's findings in this regard are erroneous. The Fourth Circuit and other courts, including the U.S. Supreme Court, have recognized that safeguarding voter confidence is a valid justification for voter ID requirements. *See Crawford*, 553 U.S. at 197, 204; *see also Lee*, 843 F.3d at 602, 606–07; *Frank*, 768 F.3d at 750; *Greater Birmingham*, 992 F.3d at 1326-27.

In sum, the evidence of the legislature's non-racial motivations "justif[ied] the legislature's choices" in enacting S.B. 824. *McCrory*, 831 F.3d at 221. Thus, even if this Court determines the majority did not err in concluding S.B. 824 was passed with discriminatory intent, it should conclude the majority erred in determining the law violated the Equal Protection Clause of

the North Carolina Constitution.

CONCLUSION

The State Defendants respectfully request that the Court reverse the trial court's order.

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

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CERTIFICATE OF COMPLIANCE WITH RULE 28 (j)(2)

Undersigned counsel certifies that the forgoing Brief is in compliance with Rule 28(j)(2) of the North Carolina Rules of Appellate Procedure and the Court's order expanding the word count, in that it is printed in fourteen-point Constantia font and the body of the brief, including footnotes and citations, and contains no more than 12,000 words as indicated by MS Word, the program used to prepare the brief.

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

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CERTIFICATE OF SERVICE

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