No. 342PA19-3 TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA
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JABARI HOLMES, FRED CULP, DANIEL E. SMITH, BRENDON JADEN PEAY, 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, *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, *Defendants-Appellants*.	)	From Wake County No. COA 22-16

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LEGISLATIVE DEFENDANTS' SUPPLEMENTAL BRIEF

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LEGISLATIVE DEFENDANTS' SUPPLEMENTAL BRIEF

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ISSUES PRESENTED

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

II. Whether the operation of S.B. 824 is impacted by the pending legal challenge to Article VI, Section 3(2) of the North Carolina Constitution addressed by this Court in *North Carolina State Conference of the NAACP v. Moore*, 382 N.C. 129, 2022-NCSC-99.[1]

[1] Counsel has used universal citation to refer to this Court's prior opinion in this matter and in *Moore* because those opinions were issued during the use of universal citation, which ended with this Court's 13 January 2023 order.

INTRODUCTION

S.B. 824 is one of the most voter-friendly photo voter ID laws in the Nation, and several African American Democrats voted for it in its final form. Yet, the trial court held that S.B. 824 was the product of racial discrimination, on the theory that Republicans in the General Assembly sought to entrench themselves by using race as a proxy for party. Unexplained is why any party seeking to entrench itself would pass such a voter-friendly law or why several Democrats would support them in the effort. The trial court's decision invalidating S.B. 824 is undermined by several flaws, the most fundamental of which is the failure to accord the General Assembly the presumption of good faith. This Court's initial determination of this matter repeated those errors, and the Court should now correct course and reverse the decision below.

In this Court's prior decision, the majority erred in finding that the trial court fulfilled its obligation to accord the General Assembly a presumption of good faith. That presumption requires Plaintiffs to rebut the conclusion that the General Assembly enacted S.B. 824 with nondiscriminatory motives. Instead, the trial court flipped the burden of proof, faulting S.B. 824's design for failing to "evince an intent by the General Assembly to cure racial disparities observed under" the State's prior voter ID law, R p 940, which was held racially discriminatory in *North Carolina State Conference of the NAACP v. McCrory*, 831 F.3d 204 (4th Cir. 2016). The trial court's reliance on *McCrory* is particularly inapt given that same court's *rejection* of the claim that S.B. 824 was racially motivated in *North Carolina State Conference of the*

NAACP v. Raymond, 981 F.3d 295 (4th Cir. 2020). The trial court cited *McCrory* over forty times, while all but ignoring *Raymond*, citing it only once, after it had already determined that S.B. 824 is racially discriminatory and without mentioning *Raymond*'s contrary conclusion. *See* R p 992 ¶ 252. Tellingly, in reversing a preliminary injunction against S.B. 824 in *Raymond*, the U.S. Court of Appeals for the Fourth Circuit faulted the district court for the same error the trial court made here: "reversing the burden of proof and failing to apply the presumption of legislative good faith." 981 F.3d at 298.

Viewed under the proper standard, the record makes clear that the General Assembly acted in good faith and with no discriminatory intent of any kind. Election legislation in North Carolina is often contentious and partisan. But the Republican supermajority worked closely with Senator Joel Ford, an African American Democrat, who co-sponsored the bill; adopted the majority of amendments offered by Democrats; obtained four other Democratic votes for the bill; and otherwise engaged with Democrats every step of the way, garnering thanks even from the bill's opponents.

Plaintiffs, the trial court, and the majority opinion all fail to identify a *single voter* of any race who will not be able to vote under S.B. 824, *see* R p 1096 ¶¶ 77–78 (Poovey, J., dissenting), or any array of IDs that would narrow any purported racial gap in ID possession, T p 807:21–808:2. And any concerns with respect to ID possession are more than remedied by S.B. 824's expansive ameliorative provisions. In holding otherwise, the majority considered these provisions largely beside the point. But any proper analysis of a law's allegedly disparate effect cannot slice and

dice that law to find provisions with a supposed disparate impact while ignoring those provisions that remedy it. When the effect of S.B. 824 is properly assessed, the "factual finding that S.B. 824 will result in disparate impact on the basis of race is wholly without evidentiary support." *Holmes v. Moore*, 2022-NCSC-122, ¶ 131, 881 S.E.2d 486, 519 (Berger, J., dissenting).

Before issuing the momentous conclusion that the General Assembly enacted legislation with racially discriminatory intent, a court must apply the appropriate standard and evaluate the competent evidence in the proper light. The trial court did not do so. Its judgment must be reversed with instructions to dismiss or, at a minimum, vacated and the case remanded for further, and proper, consideration.

Finally, the challenge to Article VI, Section 3(2) that this Court addressed in *North Carolina State Conference of the NAACP v. Moore*, 382 N.C. 129, 2022-NCSC-99, has no bearing on the *operation* of S.B. 824. Even if the voter ID amendment were to be invalidated (by errantly relying on similar misapprehensions of law as the majority did in this case), the operation of S.B. 824 would be unaffected—S.B. 824 would still be a lawful exercise of the General Assembly's plenary power. The people's approval of the amendment did, however, require the General Assembly to exercise that power to enact a photo voter-ID law. And that affirmative call to action motivating the General Assembly in 2018 is not tarnished if years after the fact this Court ultimately determines the amendment to be unconstitutional. But in any event, even if the voter ID amendment were invalid (and it is not; the only way to hold to

the contrary would be to fail to accord the General Assembly the proper presumption of good faith), the operation of S.B 824 would be unaffected.

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 6 December 2018, the General Assembly passed S.B. 824, which Governor Cooper vetoed on 14 December 2018. The General Assembly overrode the Governor's veto on 19 December 2018.

That same day, Plaintiffs commenced this suit.[2] 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 trial court held a three-week trial on the merits. On 17 September 2021, the trial court permanently enjoined S.B. 824's enforcement in a divided opinion. The majority concluded that the General Assembly "was motivated at least in part by an

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

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 and State Defendants timely filed notices of appeal. This Court granted Plaintiffs' petition for discretionary review prior to determination by the Court of Appeals on 2 March 2022, and heard argument on 3 October 2022.

On 16 December 2022, the Court issued a divided opinion affirming the trial court's final judgment and holding that S.B. 824 violates the North Carolina Constitution's Equal Protection Clause. *Holmes v. Moore*, 2022-NCSC-122, 881 S.E.2d 486. Legislative Defendants timely filed a petition for rehearing, which this Court granted on 3 February 2023.

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.

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 v. United States*, 898 F. Supp. 2d 30 (D.D.C. 2012). 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 a majority of amendments proposed by Democrats. 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 13 March 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 28 May 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 29 October 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 11 June 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 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). 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 these features render S.B. 824 vastly different than North Carolina's prior voter-ID requirement, found in H.B. 589, which the Fourth Circuit declared unconstitutional on equal-protection grounds in *McCrory*, 831 F.3d 204. 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. And, unlike S.B. 824, H.B. 589 mandated no "aggressive voter education program."

As a unanimous panel of 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. 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 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.

A. The Trial Court Flipped the Burden of Proof.

Plaintiffs had the burden to prove that the General Assembly passed S.B. 824 with a discriminatory motive. At the outset of the analysis, "the good faith of the state legislature must be presumed." *Abbott v. Perez*, 138 S. Ct. 2305, 2324 (2018). The General Assembly did not lose this presumption because of anything that it or other General Assemblies might have done in the past. There is no such thing as legislative "original sin." *Id.* Nor must the relevant legislature prove that it "purged the bad intent of its predecessor." *Id*. at 2326 n.18. The question is the intent of the legislature which passed the challenged law, the members of which swear an oath to uphold the laws of the State and of the United States and who are presumed to honor that oath. Thus, when considering purported evidence of disparate racial impact, of historical discrimination, or of an unusual legislative history, a court must consider any available inference of <u>non</u>discrimination and ask whether the plaintiff has overcome that inference. That is how the U.S. Supreme Court assessed the evidence offered in *Abbott*. *See id.* at 2327 (finding the evidence "plainly insufficient" to overcome the presumption of good faith and the "entirely reasonable and certainly legitimate" explanation of the legislature's conduct). For only then can the plaintiff truly be said to have borne "the risk of nonpersuasion." *Raymond*, 981 F.3d at 303.

This presumption is vital to a legislature's ability to execute the will of its citizens. The continued failure to apply the presumption in this case improperly has

blocked the operation of the General Assembly's implementation of the voter ID constitutional amendment for years. Avoiding just this result is why the good-faith presumption exists and demands more than "lip service." *Abbott*, 138 S. Ct. at 2329.

But merely describing this standard makes clear that it is not what the trial court applied. The trial court did not even pay lip service to the standard: "The order below does not even *mention* the presumption of legislative good faith, let alone apply it. In fact, one of the order's headings reads: 'The Design of S.B. 824 Does Not Evince an Intent by the General Assembly to Cure Racial Disparities Observed Under H.B. 589.'" *Holmes*, 2022-NCSC-122, ¶ 126, 881 S.E.2d at 518 (Berger, J., dissenting). Thus, "[i]t could not be any clearer—the panel flipped the evidentiary burden on its head by imposing [a] requirement" that Defendants *disprove* discriminatory intent at the first step, "and any assertion to the contrary is plainly wrong." *Id.* ¶ 137, 881 S.E.2d at 520–21 (quoting *Abbott*, 138 S. Ct. at 2325).

The majority asserted to the contrary in this Court's prior decision, and in doing so it repeated the error below. The majority's only basis for concluding that the trial court "applied the correct legal standard" was that "history can be used as one source of evidence to rebut and overcome a presumption of legislative good faith." *Id.* ¶¶ 41–42, 881 S.E.2d at 500–01 (maj. op.). But simply restating the standard from *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), as that sentence does, does not show that the trial court correctly applied that standard. And not only the logic, but even the section headings, of the trial court's opinion shows that it did not. Nor did the majority. Immediately after

restating the *Arlington Heights* standard, the majority proceeded to engage in the type of identity-based reasoning—"penaliz[ing] the General Assembly because of who they were," *i.e.*, many of the same legislators who voted for H.B. 589, "instead of what they did" in passing S.B. 824, *Raymond*, 981 F.3d at 304—that demonstrates a presumption of *bad* faith, as the Fourth Circuit thoroughly explained. *See Holmes*, 2022-NCSC-122, ¶ 41, 881 S.E.2d at 501 (deeming it "proper for the trial court to consider that legislators who previously voted for H.B. 589 . . . would understand that S.B. 824 could likewise disproportionately impact African-American voters").

Although the majority acknowledged that "*Raymond* reviewed the same voter ID law, S.B. 824, and determined the law was not passed with racially discriminatory intent," the majority contended that "*Raymond* is not instructive because . . . it is impossible to know if the Fourth Circuit would have reached the same conclusion with the benefit of the record before the trial court in this case." *Id.* ¶ 40, 881 S.E.2d at 500. The record materials that the majority cited, however, are not any facts about S.B. 824; they are the (incorrect) interpretation of those facts by Plaintiffs' experts, testimony from legislators whose views about S.B. 824 are in the legislative record, and a statement from a defense expert that is taken out of context. *See id.* ¶ 40 n.4, 881 S.E.2d at 500 n.4. As shown throughout Defendants' briefing, the evidence in this case demonstrates only Plaintiffs' inability to rebut the presumption of legislative good faith. And even if it were "impossible to know" how the Fourth Circuit would ultimately rule *on the merits*, there is no question how the Fourth Circuit would assess *the trial court's application of the legal standard*, given that the Fourth Circuit

reversed a lower-court opinion misapplying the standard in the same way as the trial court did. This legal error alone requires reversal here as well.

The majority was similarly dismissive of the several federal appellate decisions upholding voter-ID laws even stricter than S.B. 824, stating simply that "under *Arlington Heights* it matters not if other laws have been upheld in other jurisdictions and in other circumstances." *Id.* ¶ 24, 881 S.E.2d at 497. That misses the point. The majority did not dispute that all these laws *are* more restrictive than S.B. 824. Yet all have been upheld despite claims of disparate impact. That the trial court found S.B. 824 unconstitutional—without any evidence that any voter will be unable to vote under the facial terms of S.B. 824—is yet another indication that it did not properly presume legislative good faith.

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

Plaintiffs fail to make an initial showing that S.B. 824 was passed with a discriminatory motive. Indeed, even if legislative good faith were *not* presumed, Plaintiffs would still fail and the decision below would still require reversal. The trial court's findings must be supported by "competent evidence." Review for competent evidence is less deferential to the trial court than federal court review for clear error. *See Beroth Oil Co. v. N.C. Dep't of Transp.*, 367 N.C. 333, 338 & n.3, 757 S.E.2d 466, 471 & n.3 (2014). Both the trial court and the majority relied heavily on *McCrory*, which reversed findings in support of the State's prior voter-ID law under the already deferential clear-error standard. *See McCrory*, 831 F.3d at 219–20. As Defendants have explained, S.B. 824 is materially different from that prior law. But unless this

Court intends to endorse different standards of review for decisions upholding and decisions invalidating voting laws, the decision below must be reversed, too. After all, the same court that issued *McCrory* held in *Raymond* that S.B. 824 was likely constitutional. And here, the trial court committed obvious factual errors that affected its analysis. For example, the court discounted the ameliorative impact of the free voter IDs that S.B. 824 makes available, which the court said were "designated with a one-year expiration term." R p 940 ¶ 111. In fact, these IDs are valid for ten years, plus the year of validity that applies to all expired forms of ID. *See* N.C.G.S. §§ 163-82.8A(a), 163-166.16(a)(1). A majority of this Court repeated the error in its prior opinion. *See Holmes*, 2022-NCSC-122, ¶ 67, 881 S.E.2d at 507 ("[F]ree NC Voter IDs had a one-year expiration date.").

The trial court's evidentiary errors would thus be grounds for reversal even if this Court were not to address the fundamental legal error below. But that legal error must be addressed. It is a serious matter for the General Assembly to be accused of racial discrimination, and more serious still for a court to agree. Legislative good faith must be presumed in order to protect the people's representatives from being improperly tarnished for their service to the State. And with that presumption correctly in place, it is even more clear that Plaintiffs cannot prove their accusation. None of their evidence supports an inference of discriminatory intent, and much of their evidence contradicts their own theory of the case.

1. Plaintiffs Offered No Credible Evidence of Disparate Impact.

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). In order to hold otherwise, the trial court (and the majority in this Court's prior decision) misapprehended the governing standard and overlooked key facts.

There is no evidence anywhere in the record that any voter of any race will be denied the opportunity to vote because of the enactment of S.B. 824. There is thus no credible evidence of disparate impact. That is the end of this case. "[A] plaintiff must show discriminatory intent as well as disparate effect." *Irby v. Va. State Bd. of Elections*, 889 F.2d 1352, 1355 (4th Cir. 1989); *see also Davis v. Bandemer*, 478 U.S. 109, 127 (1986) ("[P]laintiffs were required to prove both intentional discrimination against an identifiable political group and an actual discriminatory effect on that group."); *Greater Birmingham Ministries v. Sec'y of State for State of Ala.*, 992 F.3d 1299, 1321 (11th Cir. 2021); *Hand v. Scott*, 888 F.3d 1206, 1209 (11th Cir. 2018) ("[I]n [*Hunter v. Underwood*, 471 U.S. 222 (1985)], the Supreme Court made it clear that a state's method for reenfranchising a convicted felon would violate equal protection if the scheme had *both* the purpose and effect of invidious discrimination."); *Hayden v.*

County of Nassau, 180 F.3d 42, 48 (2nd Cir. 1999); *Harness v. Watson*, 47 F.4th 296, 312–13 (5th Cir. 2022) (Ho, J., concurring) ("I have found no governing precedent holding a law unconstitutional based on discriminatory intent alone, in the absence of discriminatory effect.").

It is important to recall Plaintiffs' theory of the case. As Plaintiffs' own witnesses conceded they did not believe racial animus led to the enactment of S.B. 824, Plaintiffs have litigated this case on the following theory: African Americans in North Carolina vote for Democrats in a predictable manner, and Republican legislators therefore sought to entrench themselves politically by disenfranchising African American voters. But, as noted, there is no evidence of any disenfranchisement of any kind. Absent evidence that S.B. 824 actually prevents individuals from voting in a racially disparate way, Plaintiffs' theory of the case falls apart. What is more, Plaintiffs' own expert, who the trial court relied on, found that 140,000 more white voters than African American voters lack one of the forms of qualifying ID permitted by S.B. 824 that he analyzed. R S p 551–52 ¶ 119 & Table 8. Even on the assumptions that S.B. 824 would prevent voters without qualifying IDs from voting (it does not), and that voting is as racially polarized as Plaintiffs' theory suggests, S.B. 824 may suppress more Republican than Democratic votes. No legislature intent on entrenchment would enact such a law because elections are won and lost based on the actual numbers of voters. Under Plaintiffs' evidence, the General Assembly suppressed the very party that was supposed to be entrenched. Moreover, the General Assembly did *not* have Plaintiffs' expert's data when

considering S.B. 824. *See* R p 933 ¶ 95, 935 ¶ 97, 984 ¶ 231. As the trial 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.

Left without evidence of disparate effect on voting, Plaintiffs and the trial court relied on statistical sleight of hand, stating that African American voters are 39% more likely than white voters to lack forms of ID qualifying under S.B. 824. Not only does this rely on incomplete evidence of qualifying IDs, *see* R p 1065–69 ¶¶ 28–34 (Poovey, J., dissenting), but this reflects an *actual* disparity of about 2 percentage points in ID possession between white voters and African American voters. In particular, Plaintiffs' expert failed to match 7.61% of African American voters to qualifying ID, versus 5.47% of white voters. *See* Br. of Leg. Def.-Appellants at 27–28 (Feb. 7, 2022). Plaintiffs' expert was only able to spin this 2.14 percentage point gap into a 39% difference by dividing 7.61% by 5.47%. This is a "highly misleading" use of statistics to make large that which is "small in absolute terms." *Brnovich*, 141 S. Ct. at 2344–45. In fact, neither Plaintiffs nor the trial court have ever identified a potential array of photo IDs that would result in a smaller disparity than the one they claim that S.B. 824 creates. This is unsurprising, as S.B. 824 is one of the most voter-protective photo ID statutes ever enacted.

The trial court compounded its improper reliance on a small percentage difference in qualifying ID possession by failing to adequately account for S.B. 824's ameliorative provisions. For example, S.B. 824 mandates that county boards provide a free voter ID to any voter that wants one. Plaintiffs asserted that these IDs are not in fact free but 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 (Poovey, J., dissenting). 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 C*rawford 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.). "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.

Further undermining the alleged cost of free IDs is the fact that they are available during early voting. Thus, during the multi-week early voting period a voter may visit the county board of elections, obtain a free, no-documentation ID, and vote, all in one trip. This accommodation can be expected to disproportionately *benefit* African Americans, since early voting is disproportionately used by African American

voters. *See* R p 1045 ¶¶ 162–164 (Poovey, J., dissenting). A General Assembly intent on discriminating against African Americans would not make free, no-documentation IDs available at the site of a voting method used disproportionately by African Americans.

When S.B. 824's burden is properly assessed, the trial court's "factual finding that S.B. 824 will result in disparate impact on the basis of race is *wholly* without evidentiary support." *Holmes*, 2022-NCSC-122, ¶ 131, 881 S.E.2d at 519 (Berger, J., dissenting) (emphasis added).

Lacking credible data or other competent evidence of disparate effect, the trial court relied on the individual difficulties faced by Plaintiffs to obtain ID or vote under H.B. 589 in the past. But "any difficulties they are assumed to have encountered occurred under a *prior* law." *Id.* ¶ 133, 881 S.E.2d at 520 (emphasis added). And even setting that fact aside, "the purported challenges" faced by Plaintiffs "were not attributable to race," and Plaintiffs had no evidence that they were. *Id.* "[R]egardless of their race, *all* of these plaintiffs can vote under S.B. 824 without identification." *Id*.

Having run out of any evidence at all, the trial court offered only speculation about the disparate impact from incidental burdens of obtaining an ID or utilizing the reasonable impediment process. But any burdens from obtaining ID "'arise[ ] from life's vagaries' and 'are neither so serious nor so frequent as to raise any question about the constitutionality of S.B. 824.'" *Id.* (quoting *Crawford*, 553 U.S. at 197). Moreover, as Judge Poovey found, "[t]here is no credible evidence that obtaining a form of qualifying ID . . . entails significant financial cost." *Id.* ¶ 134, 881 S.E.2d at

520 (quoting R p 1046 ¶ 169 (Poovey, J., dissenting)). There is no substantial basis in this record for upholding a finding of disparate effect.

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

a. Historical Background.

As noted, the trial court relied on history not just to find discriminatory intent, but also to impose a presumption of discrimination that Defendants were required to dispel. The former was no less an error than the latter.

The crux of the trial court's historical analysis was the invalidation of H.B. 589 in *McCrory*. *See* R p 977 ¶ 213. But as explained, "past discrimination" never "flips the evidentiary burden on its head." *Abbott*, 138 S. Ct. at 2325. Of course, past discrimination can be *considered* as part of the "historical background" under *Arlington Heights*, 429 U.S. at 267, but it cannot alone overcome the presumption of good faith. Indeed, if it could that presumption would be of little import. And here, the full historical context precludes any finding of discriminatory intent because the constitutional amendment requiring the General Assembly to pass a voter-ID law severed S.B. 824 from any past discriminatory act. "Because the amendment 'served as an independent intervening event between the General Assembly's passage of the 2013 Omnibus Law and its enactment of the 2018 Voter-ID Law,' article VI, section 2(4) of [the North Carolina] Constitution undercut" the "tenuous 'who' argument" employed by the district court in *Raymond* and by the trial court here. *Holmes*, 2022-NCSC-122, ¶ 113, 881 S.E.2d at 516 (Berger, J., dissenting) (internal brackets omitted) (quoting *Raymond*, 981 F.3d at 305).

The majority rejected this conclusion, again in direct conflict with *Raymond*, but it did not offer a relevant response. According to the majority, "there is no evidence the voters intended for the law to be passed in its current form." *Id.* ¶ 39, 881 S.E.2d at 500 (maj. op.). True, but what the voters did do was charge the General Assembly with the directive to enact a photo voter-ID law. The lack of precise specifications in the Constitution's text in fact endowed the General Assembly with the discretion to fill in the details of the photo voter-ID requirement. The voters of this State, in the words of the State Constitution, have chosen to require that "[v]oters offering to vote in person shall present photographic identification before voting" and have ordered the General Assembly to "enact general laws governing the requirements of such photographic identification, which may include exceptions." N.C. CONST. art. VI, § 2(4). If anything, this language reflects an expectation that voters offering to vote generally will be required to present some form of photo ID, which they need not do under S.B. 824. *See Holmes*, 2022-NCSC-122, ¶ 97 n.3, 881 S.E.2d at 513 n.3 (Berger, J., dissenting). Regardless, the Constitution's plain text gives the General Assembly discretion over the details of a voter-ID law, but it does not give the General Assembly discretion *not* to pass a voter-ID law.

The majority was also incorrect that "the analysis described in *Arlington Heights* required the trial court to . . . consider S.B. 824's historical background *independent* of any constitutional amendment that may have required the law's passage." *Id.* ¶ 39, 881 S.E.2d at 500 (maj. op.) (emphasis added). Nothing in *Arlington Heights* requires such a blinkered approach; *Arlington Heights* simply lists

the types of circumstantial evidence that plaintiffs may offer to prove discriminatory intent. And it makes little sense to consider the historical background of S.B. 824 "independent of" the most salient background fact, namely, that the people of the State directed the General Assembly to enact such a law. Nor did the majority itself assess S.B. 824 "independent of" the constitutional voter-ID amendment: speculation about voter expectations for that amendment was the majority's sole basis for discounting the amendment's importance to the intent analysis.[3] While that speculation is not relevant, the fact of the amendment certainly is. Whatever the General Assembly's motives in passing H.B. 589 absent a constitutional mandate, the General Assembly was in a different position when passing S.B. 824—and in that position, the General Assembly passed one of the most voter-friendly photo voter-ID laws in the country. The intent behind S.B. 824 must be assessed in light of that changed position. *See Abbott*, 138 S. Ct. at 2325 ("[W]hat matters . . . is the intent of the [relevant] Legislature."). And the presumption of legislative good faith requires Plaintiffs to rebut the obvious inference that the General Assembly's motive in passing a law to implement the constitutional voter-ID amendment was *to implement*

[3] The majority credits the trial court's "findings of fact that because no implementing legislation accompanied the amendment voters did not know the specifics of how the law would be implemented." *Holmes*, 2022-NCSC-122, ¶ 39, 881 S.E.2d at 500. In fact, the record shows that constitutional amendments are usually not accompanied by implementing legislation, *see* R p 1018–19 ¶¶ 72–74 (Poovey, J., dissenting); R S p 1072 ¶ 34; T p 515:18–516:1, 516:11–14, and Plaintiffs presented no evidence of any voter's expectation. But this point remains irrelevant because the amendment is not at issue.

that amendment. Plaintiffs presented no evidence rebutting that inference. The trial court's reliance on *McCrory* in the face of this amendment was error.

Even putting the importance of the amendment aside, history shows only further that the General Assembly did not act with discriminatory intent here. The General Assembly did not look at the mistakes of the past and repeat them. As explained in Defendants' briefing, the General Assembly did the opposite, passing a meaningfully different law than that of H.B. 589, even though the voter ID amendment permitted legislative discretion to enact an even stricter law. *See* Br. of Leg. Def.-Appellants at 10–14 (Feb. 7, 2022).

Rather than attempt to explain how these alterations comport with an intent to repeat past discrimination, the trial court, and in turn the majority, credited the theory of Plaintiffs' experts that S.B. 824 fits a general "pattern" of discrimination. *See* R p 908 ¶ 28. But this is a pattern in which S.B. 824 clearly does not fit. For the reasons above, H.B. 589 serves only as a contrast to S.B. 824. And otherwise, this "pattern" is composed of incidents, many over a century old, with no relation to S.B. 824 or even to the General Assembly. *See Holmes*, 2022-NCSC-122, ¶¶ 32, 36, 881 S.E.2d at 498–99 (discussing actions by the State Republican party). Literacy tests, poll taxes, at-large multimember districts, "single-shot" voting prohibitions—these were entirely different laws with entirely different effects. Literacy tests and poll taxes did not, as the majority said, "resul[t] in the disenfranchisement of *many* African-American North Carolinians," *id.* ¶ 30, 881 S.E.2d at 498 (emphasis added);

they reduced African American turnout by *one hundred percent*. There is no evidence that S.B. 824, by its terms, will prevent a single African American voter from voting.

Nothing in this generalized "pattern" conflicts with the inference, consistent with the presumption of good faith, that in passing S.B. 824 the General Assembly intended to implement the constitutional voter ID amendment in a nondiscriminatory way. Drawing the opposite inference—that the General Assembly must have intended to reduce African American turnout through S.B. 824 because that is just how the "pattern" works—is no different from flipping the burden of proof. For it requires *assuming*, no matter the evidence to the contrary, that the General Assembly acted on the same motives as General Assemblies of the past. That is the opposite of presuming good faith, and in any event such an inference has no basis in the historical evidence.

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.

To hold otherwise, the trial court committed at least five errors. First, the trial court concluded 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. Reasoning otherwise fails to "properly consider and credit the crucial importance of the voter-ID amendment" and the voters' decision to "create[ ] a positive constitutional duty for the General Assembly to pass a voter-ID law." *Holmes*, 2022-NCSC-122, ¶ 130, 881 S.E.2d at 519 (Berger, J., dissenting).

But, in all events, the enactment of H.B. 1092, when assessed through the presumption of legislative good faith, provides no competent evidence of racial discrimination. The trial court relied on procedural minutiae, such as the fact H.B. 1092 was enacted in a short session, rather than a long session, it was unaccompanied by implementing legislation, and it was one of six session laws proposing a constitutional amendment enacted in the same session. But the "brevity of the legislative process" does not "give rise to an inference of bad faith." *Abbott*, 138 S. Ct. at 2328–29. The lack of implementing legislation could fairly be considered by the voters—and they overwhelmingly approved the voter ID amendment. And the voters also approved the other constitutional amendment, Marsy's Law, which lacked implementing legislation as well during the same 2018 election. Further underlining that these critiques of H.B. 1092's enactment fail to "spark suspicion," *Arlington Heights*, 429 U.S. at 566, is Plaintiffs' expert's own inability to distinguish the

General Assembly's purpose in proposing H.B. 1092 from its purpose in proposing the five other constitutional amendments put on the ballot at the same time. T p 500:19–501:8. In other words, Plaintiffs have provided no basis to conclude that H.B. 1092 was racially discriminatory, while the other five enactments passed at the exact same time in a similar manner were not. Moreover, Plaintiffs did not put forth any evidence of a disparate impact attributable to H.B 1092 or the voter ID amendment. Nor could they—the amendment, on its own without implementing legislation, imposes no enforceable requirements on voters. "There is nothing to suggest that the [General Assembly] proceeded in bad faith—or even that it acted unreasonably—"in enacting H.B. 1092 and sending the proposed constitutional amendment to the voters. *Abbott*, 138 S. Ct. at 2329.

Second, the trial court concluded that the enactment of S.B. 824 was a "rushed process." R p 926 ¶ 74. But that is simply not supported by competent evidence. A draft of S.B. 824 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 (Poovey, J., dissenting), and twenty-four amendment proposals (which were on top of changes from the committee stage), R p 1022 ¶ 91, 1023 ¶ 94 (Poovey, J., dissenting); T p 1062:22–24, 1092:17–1093:9. Thus, while the trial court claimed no other State's experience was relevant, North Carolina's own experience shows how different S.B.

824's passage was from H.B. 589. 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 (quotation marks omitted).

Third, the trial court relied on further picayune procedural distinctions with respect to S.B. 824. The trial court faulted the General Assembly for holding a "reconvened Regular Session" rather than an "extra" session. R p 923 ¶ 68, 979–80 ¶¶ 219–220 (maj. op.). This 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 trial court 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.

Fourth, the trial court concluded that the sequence of events leading to the passage of S.B. 824 was problematic merely because it had not happened before. But this misapprehends the inquiry. The relevant inquiry is not precedence for the sake of precedence, but rather whether the sequence of events "shed[s] some light on the

decisionmaker's purposes" and "sparks suspicion." *Arlington Heights*, 429 U.S. at 269. A process of enacting legislation in the lame-duck or overriding the veto of a Governor of the opposite party cannot spark suspicion when such practices are routine throughout the several states and Congress, R S p 1062 ¶ 9; T p 1391:2–8.[4] And even if such practices could spark suspicion, this is certainly not enough to overcome the presumption of good faith the trial court was obliged to apply. *Abbott*, 138 S. Ct. at 2328. For one, 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. *Id*. at 2329. For another, as Plaintiffs' own legislative witness acknowledged, the General Assembly made the procedural decisions it did because the State Constitution required S.B. 824 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 General Assembly is allowed to pursue constitutionally mandated legislation, consistent with policy priorities, without sparking suspicion that it did so for improper purposes.

Fifth, the trial court 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

[4] 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.

motivations of the mapmakers and the legislators to whom they answered." *Raymond*, 981 F.3d at 306 n.4. They do not tell us about the motivations of the legislators *elected* from those districts. 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. Even in *Moore*, this Court agreed with this general principle barring "ex post facto collateral attack" for "ordinary legislation." 382 N.C. at 160, 2022-NCSC-99, ¶ 60. The question remains what those legislators did, not who they were or how they got into office. 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.

Viewed under the proper presumption of legislative good faith, S.B. 824's legislative history evidences an inclusive, deliberative, bipartisan process that does not indicate that the General Assembly intended to target African American voters to entrench the Republican majority. First, the process to enact S.B. 824 was bipartisan in the sense that S.B. 824 was supported by both Republicans and Democrats and that even Democrats who opposed the bill were actively involved in the process and had many of their amendments accepted. 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]." *Raymond*, 981 F.3d

at 306; *see* T p 1583:3–7. Although the majority affirmed the trial court's finding that Senator Ford may not have supported the bill if he had known it may not have required election officials to provide free photo IDs at all voting sites on Election Day, *Holmes*, 2022-NCSC-122, ¶ 71, 881 S.E.2d at 507–08, this finding was not made by applying the presumption of legislative good faith. Instead, the court presumed that Senator Ford was ignorant of the bill that he was co-sponsoring. And even when confronted with the different interpretation of S.B. 824 during examination, Senator Ford testified that he still believed that S.B. 824 is "a reasonable way to secure one person one vote and to do it in a respectful, safe manner that all North Carolinians can be proud of." T p 1582:2–7. Senator Ford never recanted his support but instead gave emotional testimony in support of the bill and voter ID. *See, e.g.*, T p 1580:10–25, 1582:2–7. (Of course, since African Americans disproportionately use early voting, if free IDs are available during early voting and not on election day that would in fact disproportionately favor African Americans.)

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. The majority and the trial court, however, had no answer for why five Democrats would vote for a bill meant to entrench Republicans. Indeed, neither even *mentioned* support by Democrats other than

Senator Ford. Multiple Democrats voting for S.B. 824 is entirely incompatible with Plaintiffs' theory of the case.

"[T]he Republican supermajority had the votes necessary to pass the bill *without* any Democratic support." R p 1022 ¶ 90 (Poovey, J., dissenting) (emphasis added). But they did not do so. Instead, the process behind this voter-ID law was comparably or more bipartisan than those that other courts have considered bipartisan. *See Lee v. Va. State Bd. of Elections*, 843 F.3d 592, 603 (4th Cir. 2016); *McCrory*, 831 F.3d at 227; *South Carolina*, 898 F. Supp. 2d at 44.

Furthermore, at the end of the General Assembly's deliberations, even S.B. 824's opponents praised the process that created the bill. 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 majority and the trial court discounted the import of these comments, *see* R p 946–47 ¶¶ 127–128, but that ignores the presumption of legislative good faith. Similar kind words for Republicans for H.B. 589 were completely lacking 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 different the S.B. 824 process was from that resulting in H.B. 589. The majority and trial court also chose to focus on the testimony of Plaintiffs' witnesses, including Senator Robinson and Representative Harrison, who testified that S.B. 824 was not bipartisan, *see Holmes*, 2022-NCSC-122, ¶¶ 70–73, 881 S.E.2d at 507–08, but this choice is emblematic of the legally impermissible decision to ignore the presumption of legislative good faith. The trial court and the majority credited testimony against bipartisanship instead of the clear evidence in favor of bipartisanship. And in any event whether or not S.B. 824 was "bipartisan" in some technical sense is irrelevant; rather, the fact that *multiple* Democrats voted for a bill allegedly intended to entrench Republicans is fundamentally incompatible with Plaintiffs' theory of the case.

The majority further rejected Defendants' reliance on decisions from other courts examining other voter ID laws and upholding them where there was less opposing party support. *Id.* ¶ 72, 881 S.E.2d at 508. The majority concluded that these decisions were irrelevant because under *Arlington Heights*, what matters is the trial court's findings of fact regarding what is typical for the North Carolina General Assembly, not for any other state's legislature. *Id.* But as explained above, these decisions from other jurisdictions are relevant and do provide support for Defendants'

arguments that Democratic support for and involvement in the process of enacting S.B. 824 counsels against a finding of discriminatory intent.

Second, in addition to the input and numerous revisions the bill received before its formal introduction, S.B. 824 was amended numerous times by legislators from both parties. Out of the twenty-four amendments it considered, the General Assembly adopted more than half (13). And more than half of those amendments (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).

The majority determined that the trial court's finding that the 13 adopted amendments were merely "technical" in nature, whereas the 11 tabled amendments were substantive, was supported by competent evidence. *Holmes*, 2022-NCSC-122, ¶ 73, 881 S.E.2d at 508. As an initial matter, the nature of an amendment to a bill is a legal question, not a factual one. And the trial court's "finding" was fatally infected by a failure to afford the General Assembly the presumption of good faith that the Equal Protection Clause requires, a "fundamental[ ] flaw" that entails the factual finding "cannot stand." *Abbott*, 138 S. Ct. at 2326. The adopted amendments, viewed under the proper lens, were substantive and made S.B. 824 even more voter friendly,

and the tabled amendments, which were both technical and substantive, were rejected for legitimate, non-discriminatory reasons. 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. Senator Daniel's amendment provided greater specificity regarding the circumstances and standards under which a voter without an acceptable photo ID could sign a reasonable impediment declaration. R S p. 6647. Democratic Representative Floyd's amendment made S.B. 824's photo ID requirements applicable to absentee ballot requests and absentee ballots. R S p 6628. By contrast, Democratic Senator Van Duyn's amendment would have *delayed* the date by which the county boards of elections were required to make free photo voter IDs available, R S p 6642, and even Senator McKissick voted to table it, R S p 6730. The Republican supermajority did not need to accept this or any other 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 majority and the trial court instead focused on the rejection of two proposed amendments—an amendment to add public assistance IDs to the list of qualifying IDs and a requirement that early voting sites be open on the last Saturday before the election. *Holmes*, 2022-NCSC-122, ¶ 66, 881 S.E.2d at 506. The majority accepted the trial court's conclusions, based on *McCrory*, that the General Assembly's

rejection of public assistance IDs was "particularly telling" because a reasonable legislator would supposedly have surmised that African Americans would be "more likely to possess" the IDs, and that the General Assembly's rejection of the Saturday early voting amendment was suspicious because the Fourth Circuit in *McCrory* had found that a reduction in early voting days bore more heavily on African American voters in North Carolina. *Id.* But both of these amendments were rejected for nondiscriminatory reasons. As articulated by Representative Lewis, the concern with the public assistance ID amendment 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. T p 1066:19–23. This episode thus "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 current law. And the trial court 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.

As for the Saturday early voting amendment, whatever the policy benefits or detriments of expanding early voting, the topic is plainly not directly related to

implementing a photo-ID requirement. 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 was similarly rejected for readily discernable, plainly nondiscriminatory reasons. The Senate tabled Senator Clark's amendment to allow the free voter IDs to be used for purposes *other than* voting, R S p 6643, which is not pertinent to requiring ID *for voting*. 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. Neither the majority nor the trial court pointed to 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 never identified *any array* of IDs 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 the General Assembly did not automatically accept all *Republican* amendments. Several that Democrats opposed were rejected. *See, e.g.*, R S p 6616, 6620 (Rep. Pittman), 6624 (Rep. Warren).

Third, 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 majority accepted the trial court's finding that "S.B. 824 did not demonstrate an intent by the General Assembly to cure the racial disparities observed under H.B. 589." *Holmes*, 2022-NCSC-122, ¶ 67, 881 S.E.2d at 506. According to the majority and the trial court, because the General Assembly did not request updated data on ID possession rates disaggregated by race, the inclusion of new qualifying IDs in S.B. 824 as compared to H.B. 589 was "arbitrary" because there was allegedly no evidence that these additional forms of ID would "overcome the existing deficiency." *Id.*, 881 S.E.2d at 507. And the reasonable impediment provision did not show an "intent by the legislature to reduce the burden on voters without a qualifying ID" because under H.B. 589's reasonable impediment process, some voters were nevertheless purportedly excluded from political participation. *Id.* ¶ 69, 881 S.E.2d at 507. As explained above, these purported "faults" entirely misunderstand

the relevant caselaw and erroneously place the burden on Legislative Defendants instead of Plaintiffs.

Any legislator could have sought updated racial 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 claimed that the General Assembly had used racial data to target minority voters 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 contrary to the majority's view, that data did not bear on the potential impact of S.B. 824. 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). The data that the General Assembly did have 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 (less than one-tenth of one percent) cast a provisional ballot because they lacked an acceptable ID under H.B. 589 in 2016. *See* R S p 10661, 10663, 10673–74. This minuscule number of voters who voted provisionally for lacking qualifying ID undermines the reliability of no-match analyses as providing any useful information about S.B. 824's actual effects on voters.

Moreover, the State Board sent a mailing to the voters identified by the matching analyses as failing to match to qualifying voter ID, and the vast majority of those who responded indicated that they did possess qualifying ID. R S p 10662–63. The majority thus had no basis to fault the General Assembly for not doing what another court had faulted it for doing before.

Consequently, the majority, like the trial court, burdened the General Assembly with the faults of H.B. 589—because the General Assembly had previously passed H.B. 589, it was "on notice" about potential disparate impacts to African Americans, and therefore the General Assembly's failure to request new racial data for S.B. 824 was "indicative of intent." *Holmes*, 2022-NCSC-122, ¶ 74, 881 S.E.2d at 508. In reaching this conclusion, however, the majority entirely discounts the expanded list of qualifying IDs and sweeping reasonable impediment provision.

Taken together and viewed with the proper presumption of legislative good faith, the evidence does not support the claim that the General Assembly passed S.B. 824 with a discriminatory intent. Because the trial court applied an improper legal standard in making its factual findings and the majority affirmed, this Court should vacate its opinion and reverse the judgment below.

C. S.B. 824 Serves Nondiscriminatory Purposes.

Even if the majority's affirmance of the trial court's conclusion that Plaintiffs had proven discriminatory motivation were correct (and it is not), Defendants satisfied their burden to demonstrate that "the same decision would have resulted even had the impermissible purpose not been considered." *Arlington Heights*, 429 U.S. at 271 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, interests that are "strong," "entirely legitimate," and "indisputably . . . compelling." *Brnovich*, 141 S. Ct. at 2340, 2347 (cleaned up).

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 v. State*, 346 N.C. 336, 352, 488 S.E.2d 249, 257–58 (1997). 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.

The majority disagreed and affirmed the trial court's finding that even though the constitutional amendment required the General Assembly to pass a voter ID law, nothing in the amendment required passing *this* law, one that was allegedly disproportionately burdensome on African American voters. *Holmes*, 2022-NCSC-122, ¶ 76, 881 S.E.2d at 508. As the dissent emphasized, this reasoning fails to properly consider and credit the crucial importance of the voter-ID amendment. *Id.* ¶ 130, 881 S.E.2d at 519 (Berger, J., dissenting). Moreover, S.B. 824 is not H.B. 589 by another name. The General Assembly modeled S.B. 824 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. It was entirely reasonable for North Carolina to model its voter-ID law on a neighboring state's law that had been approved in federal court because it had no discriminatory effect. What is more, the General Assembly made multiple changes from this baseline to make the law even more voter-protective than South Carolina's. Moreover, Plaintiffs have identified no array of qualifying IDs that would result in a narrower gap of ID possession rates than they alleged. They have not attempted to quantify the effects of S.B. 824's free-ID provision or reasonable-impediment process. Nor have they identified any additional ameliorative provision that would have measurably improved voter access beyond the existing provisions.

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 majority and the trial court, on the other hand, concluded that these interests cannot justify S.B. 824 because "voter fraud in North Carolina is almost nonexistent." *Holmes*, 2022-NCSC-122, ¶ 78, 881 S.E.2d at 509. 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 majority and trial court 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. 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, *see Voter ID Laws*, NAT'L CONF. OF STATE LEGISLATURES (Jan. 25, 2023), 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.[5] 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. "Reasonable regulations which are designed to protect election integrity . . . not only deter unscrupulous individuals from taking advantage of the abundant opportunities that exist to abuse the system, but they also promote public confidence in election outcomes." *Holmes*, 2022-NCSC-122, ¶ 142, 881 S.E.2d at 521 (Berger, J., dissenting).

[5] Indeed, a large majority of Americans support requiring voters to show photo ID to vote. *See, e.g.*, *Eight in 10 Americans Favor Early Voting, Photo ID Laws*, GALLUP (Oct. 14, 2022) (79% of Americans are in favor of "[r]equiring all voters to provide photo identification at their voting place in order to vote"), https://bit.ly/3lzLHG5; *Public Supports Both Early Voting and Requiring Photo ID to Vote*, MONMOUTH UNIV. (June 21, 2021), https://bit.ly/3orykWK (poll finding 80% support); *NPR/PBS NewsHour/Marist Nat'l Poll*, MARISTPOLL (July 2, 2021), https://bit.ly/3sAgORJ (poll finding 79% support).

II. THE PENDING LEGAL CHALLENGE TO ARTICLE VI, SECTION 3(2) OF THE NORTH CAROLINA CONSTITUTION HAS NO BEARING ON THE OPERATION OF S.B. 824.

The pending legal challenge to Article VI, Section 3(2) of the North Carolina Constitution addressed by this Court in *North Carolina State Conference of the NAACP v. Moore*, 382 N.C. 129, 2022-NCSC-99, has no bearing on the operation of S.B. 824. Even if the voter ID amendment were to be erroneously invalidated the operation of S.B 824 would be unaffected. S.B.824 would still be a lawful exercise of the General Assembly's plenary power. Because our Constitution "is in no matter a grant of power" to the General Assembly, *McIntyre v. Clarkson*, 254 N.C. 510, 515, 119 S.E.2d 888, 891 (1961), the citizens did not need to grant the General Assembly authority to enact voter-ID legislation by adopting Article VI, Section 3(2). The General Assembly had the power to enact S.B. 824 regardless of the constitutional amendment, so even if the amendment were invalidated—and, as explained above, it should not be, for Plaintiffs put forth no competent evidence to support a finding that the constitutional amendment was discriminatory in either intent or effect[6]—the operation of S.B. 824 would not be affected. By adopting the constitutional provision, however, the people did mandate that the General Assembly, in its discretion, enact implementing legislation. Even if the amendment were later invalidated, it would not

[6] The pending legal challenge to the amendment raises similar questions of legislative intent as does the challenge to S.B. 824. *Compare Moore*, 382 N.C. at 134, 2022-NCSC-99, ¶ 6 (noting the court should examine whether a constitutional amendment "constitute[s] intentional discrimination"), *with Holmes*, 2022-NCSC-122, ¶ 4, 881 S.E.2d at 491 (concluding that S.B. 824 "was motivated by a racially discriminatory purpose"). It therefore is critical that the analysis in both cases be conducted with the presumption of legislative good faith firmly in place.

change that S.B. 824 was enacted for the purpose of implementing the amendment.

CONCLUSION

For the foregoing reasons, the Court should withdraw its opinion, reverse the judgment below, and remand with instructions to dismiss the case. In the alternative, the Court at a minimum should withdraw its opinion, vacate the trial court's judgment, and remand for application of the correct legal standard in this case.

Respectfully submitted, this the 17th day of February, 2023.

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I do hereby certify that I have on this 17th day of February, 2023, pursuant to Rules of Appellate Procedure 13 and 26, served a copy of the foregoing Supplemental Brief of Legislative Defendant-Appellants on the following counsel for the parties at the following addresses by electronic mail.

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