No. 342PA19-2 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' PETITION FOR REHEARING

****

TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

NOW COME 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, and Ralph E. Hise, in his official capacity as Chairman of the Senate Select Committee on Elections for the 2018 Third Extra Session (collectively, "Legislative Defendants")[1] and, pursuant to Rule 31 of the North Carolina Rules of Appellate Procedure, respectfully request that this Court grant this Petition for Rehearing. In support of this Petition for Rehearing, Legislative Defendants show the Court as follows:

INTRODUCTION AND BACKGROUND

The majority's conclusion that the General Assembly enacted S.B. 824 to entrench Republicans by targeting African Americans is without foundation in competent evidence and constructed with legal error. Most egregiously, the majority repeated the mistake of the trial court by failing to accord the General Assembly the presumption of good faith. Instead, the majority opinion tied H.B. 589 and the Fourth Circuit's conclusions about it in *North Carolina State Conference of the NAACP v. McCrory*, 831 F.3d 204 (4th Cir. 2016), like an anchor around the neck of the General Assembly, making it all but impossible for it to enact a photo voter ID law that would pass constitutional muster. If *Holmes* is left uncorrected as *McCrory* was, *see North Carolina v. N.C. State Conf. of NAACP*, 137 S. Ct. 1399, 1400 (2017) (Roberts, C.J.,

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

statement respecting denial of certiorari), the General Assembly will be hamstrung in its constitutionally required obligations going forward from a fundamentally flawed decision.

Under the proper standard, it is readily apparent 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. After the voters adopted a constitutional amendment requiring photo voter ID by a wide margin—55.49% to 44.51%—the General Assembly could have enacted a voter-ID law without a single Democratic vote or any Democratic input whatsoever. But that is not what the General Assembly did with S.B. 824. Instead, 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. The outcome is one of the most voter-protective photo voter-ID laws in the Nation.

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, 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 the expansive ameliorative provisions of S.B. 824. In holding otherwise, the majority opinion held these provisions were largely beside the point. But any proper analysis of the disparate effect of an enactment cannot slice and dice that law

to find provisions with alleged disparate impact while ignoring those provisions that remedy it. As Justice Berger explained, 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 making the momentous conclusion that the General Assembly enacted legislation with discriminatory intent, this Court must be assured that both itself and the trial court applied the appropriate standard and evaluated the competent evidence in the proper light. Rehearing must be granted and remand ordered because the majority opinion failed to do so.

GROUNDS FOR REHEARING

The Court should grant rehearing and withdraw its opinion and judgment. Rule 31 broadly authorizes this Court to rehear a civil action if it "has overlooked or misapprehended" any "points of fact or law." N.C. R. APP. P. 31(a). "That [Rule] is the appropriate method of obtaining redress from errors committed by this Court." *Nowell v. Neal*, 249 N.C. 516, 521, 107 S.E.2d 107, 111 (1959). This Court has previously withdrawn opinions and issued new ones resulting in different case outcomes, *see, e.g.*, *Bailey v. Meadows Co.*, 152 N.C. 603, 68 S.E. 11, 12, *modified on reh'g*, 154 N.C. 71, 69 S.E. 746 (1910); *Clary v. Alexander Cnty. Bd. of Educ.*, 285 N.C. 188, 195, 203 S.E.2d 820, 825 (1974), *op. withdrawn sub nom. Clary v. Alexander Cnty. Bd. of Educ.*, 286 N.C. 525, 212 S.E.2d 160 (1975); *Branch Banking & Tr. Co. v. Gill*, 286 N.C. 342, 352, 211 S.E.2d 327, 335 (1975), *on reconsideration*, 293 N.C.

164, 237 S.E.2d 21 (1977); *Alford v. Shaw*, 318 N.C. 289, 349 S.E.2d 41 (1986), *on reh'g*, 320 N.C. 465, 358 S.E.2d 323 (1987). The majority's opinion is error-laden and warrants rehearing.

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.

As the majority acknowledges, 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." *Holmes*, 2022-NCSC-122, ¶ 16, 881 S.E.2d at 494 (cleaned up) (quoting *Abbott v. Perez*, 138 S. Ct. 2305, 2324 (2018)). The General Assembly did not lose this presumption because of anything that other General Assemblies might have done in the past. There is no such thing as legislative "original sin." *Abbott*, 138 S. Ct. at 2324. 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* 138 S. Ct. 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." *N.C. State Conf. of NAACP v. Raymond*, 981 F.3d 295, 303 (4th Cir. 2020).

This presumption is vital to a legislature's ability to execute the will of its citizens. The continued failure to apply this presumption in this case has prevented the General Assembly from implementing a 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. As Justice Berger notes, 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 asserts to the contrary, and in doing so it repeats the error below. The majority's only basis for concluding that the trial court "applied the correct legal standard" is that "history can be used as one source of evidence to rebut and overcome a presumption of legislative good faith." *Holmes*, 2022-NCSC-122, ¶¶ 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 Corporation*, 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 does the majority. Immediately after restating the *Arlington Heights* standard, the majority proceeds 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 acknowledges that "*Raymond* reviewed the same voter ID law, S.B. 824, and determined the law was not passed with racially discriminatory intent," the majority contends 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 cites, 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 is 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 does 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 rely 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). Legislative Defendants' counsel pointed out this error at oral argument, but the majority did not correct it. The majority repeated it. *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 legislators 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 majority 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 should have been 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."). The majority held otherwise, claiming that disparate impact is not a "prerequisite." *Holmes*, 2022-NCSC-122, ¶ 26 n.3, 881 S.E.2d at 497 n.3. In doing so, the majority seriously misapprehended the law and the governing standard it claimed to be applying. Moreover, this assertion, if not addressed on rehearing, will effectively gut one of the principal elements of the *Arlington Heights* analysis, empowering litigants to ask courts to enjoin the enactments of the General Assembly without claims or evidence of any disparate effect of any kind. This would mark a dramatic and unwarranted departure from standard equal protection principles.

Yet, the majority opinion's attempt to argue that no disparate impact was necessary is implicit recognition that Plaintiffs' lack any competent evidence. 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 majority opinion otherwise credited the trial court for relying 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. The majority opinion does not grapple with this evidence or its fatal effect on Plaintiffs' theory.

Left without evidence of disparate effect on voting, the majority opinion repeated the trial court's reliance on an alleged difference in the rates of qualifying ID possession by voters in North Carolina. In doing so, the majority opinion relies on the same statistical sleight of hand embraced by Plaintiffs and the trial court. The majority opinion found "[e]specially pertinent" Plaintiffs' statistic that "African-American voters are approximately 39% more likely than white voters to lack forms of ID qualifying under S.B. 824." *Holmes*, 2022-NCSC-122, ¶ 18, 881 S.E.2d at 495. Not only does this rely on incomplete evidence of qualifying IDs, but this reflects an

actual difference of less than 2% disparity in ID possession between white voters and African American voters. The 39% figure comes from dividing one small percentage by another. *See* Br. of Leg. Def.-Appellants at 27–28 (Feb. 7, 2022). The majority opinion thus doubled down on 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, nor the majority opinion 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 majority compounded its improper reliance on a small percentage difference in qualifying ID possession by holding that S.B. 824's other "ameliorative" provisions were largely beside the point. *Holmes*, 2022-NCSC-122, ¶ 18, 881 S.E.2d at 495. The majority upheld the trial court's holding that "determining whether portions of the law had an ameliorative effect and reduced S.B. 824's impact on African-American voters was the incorrect standard to apply." *Id.* This cannot be the law. In order to determine if a challenged enactment "bears more heavily" on a certain race, a court must evaluate the enactment's actual burden, *Arlington Heights*, 429 U.S. at 266. The majority opinion instead would allow courts in the future to slice and dice a statute, focusing on provisions that allegedly have a disparate effect, while largely ignoring the ameliorative effect of other provisions. *That* is the incorrect standard to apply.

As Justice Berger explained, 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 majority opinion looked to the evidence of the individual experiences of the Plaintiffs. For instance, the majority and trial court relied on the individual difficulties faced by Plaintiffs to obtain ID or vote under H.B. 589 in the past. But, as Justice Berger explained, "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 majority upheld the trial court's speculation about the disparate impact from incidental burdens of obtaining an ID or utilizing the reasonable impediment process. As Justice Berger explained, 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 v. Marion Cnty. Election Bd.*, 553 U.S. 181, 197 (2008)). Moreover, as Judge Poovey found at the trial court, "[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. As Justice Berger explained, "[b]ecause 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 rejects this conclusion, again in direct conflict with *Raymond*, but it does 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." *Holmes*, 2022-NCSC-122, ¶ 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 Constitution's failure to provide precise specifications for the details of the law 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, this operative constitutional language plainly 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 is 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." *Holmes*, 2022-NCSC-122, ¶ 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 does the majority itself assess S.B. 824 "independent of" the constitutional voter-ID amendment: speculation about voter expectations for that amendment are the majority's sole basis for discounting the amendment's importance to the intent analysis.[2] 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 lenient 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*

[2] 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; 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 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, making numerous meaningful changes to H.B. 589 even though the voter-ID amendment would have permitted an even stricter law.

Rather than attempt to explain how these alterations comport with an intent to repeat past discrimination, the trial court, and in turn the majority, credit 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 says, "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 resolve the issues identified in *McCrory*. 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 majority opinion committed several errors. First, the majority opinion focuses heavily on the trial court's findings with respect to the process of enacting H.B. 1092, the bill proposing the photo voter ID constitutional amendment. But this evidence is irrelevant. In this litigation, neither H.B. 1092 nor

the constitutional amendment are at issue. As Justice Berger explained, this 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). The People of North Carolina cut any tie to H.B. 1092's legislative process.

Second, the majority opinion upheld the trial court's conclusion that the enactment of S.B. 824 was "hasty," but that is simply not supported by competent evidence. A draft was broadly circulated—and received extensive input and revision—a week before the bill was formally introduced. T p 1060:17–1061:10; R S p 8507 at 3:4–13. The bill then went through multiple rounds of committee review, R S p 8507 at 3:4–13, public comment, T p 1106:15–1109:20, five days of legislative debate, R p 1080–81 ¶ 49 (Poovey, J., dissenting), multiple floor readings, R p 1030 ¶¶ 101–104, and twenty-four amendment proposals (which were on top of changes from the committee stage). R p 1022 ¶ 91, 1023 ¶ 94; T p 1062:22–24, 1092:17–1093:9. Thus, while the majority opinion 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 majority seemingly upheld the trial court's conclusion that the sequence of events leading to the passage of S.B. 824 was problematic merely because it had not happened before. *Holmes*, 2022-NCSC-122, ¶ 50, 881 S.E.2d at 502. 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, and when the situation faced by the General Assembly here (an outgoing supermajority facing the looming prospect of an effective veto by a governor of the opposing party) was unique in the history of the State. And even if such practices could spark suspicion, this is certainly not enough to overcome the presumption of good faith the majority opinion (and trial court) were obliged to apply. *Abbott*, 138 S. Ct. at 2328. For one, the 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. The sequence of events supports no inference 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 under any normal understanding of that term. Senator Ford, an African American Democrat, was a primary sponsor of S.B. 824, and "[h]is input in its drafting and his votes to pass the bill" cannot be "discount[ed]." *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, 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.

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 markedly 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 v. United States*, 898 F. Supp. 2d 30, 44 (D.D.C. 2012).

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 concluded that these positive comments were meaningless and incongruent with the legislators' true views of the process, 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 inclusive the S.B. 824 process was, and how different S.B. 824 is from 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, 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' argument that decisions from other courts examining other voter ID laws and upholding them where there was less opposing party support than that demonstrated here as sufficient to demonstrate a

lack of discriminatory intent. 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. But as explained above, these decisions from other jurisdictions are relevant and do provide support for Defendants' arguments on bipartisanship.

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. But 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. But both of these amendments were in fact rejected for non-discriminatory 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. *Holmes*, 2022-

NCSC-122, ¶ 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." In reaching this conclusion, however, the majority entirely discounts the expanded list of qualifying IDs and sweeping reasonable impediment provision. *Holmes*, 2022-NCSC-122, ¶ 74, 881 S.E.2d at 508.

Taken together and viewed with the proper presumption of legislative good faith, the evidence rebuts 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 grant rehearing, vacate its opinion and that of the trial court, and remand for application of the proper standard.

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.

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– 1512:30; *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 (Oct. 18, 2022), https://bit.ly/3AH48Mm; T p 1400:20–25, and a much stricter voter-ID law was recommended by a bipartisan commission co-chaired by former President Jimmy Carter, *see* R S p 11400–03. As the commission concluded, "fraud" and "multiple voting . . . both occur" and "could affect the outcome of a close election." R S p 11400. "The electoral system cannot inspire public confidence if no safeguards exist to deter or detect fraud or to confirm the identity of voters." R S p 11400. Indeed, a large majority of Americans support requiring voters to show photo ID to vote. *See, e.g.*, *Public Supports Both Early Voting and Requiring Photo ID to Vote*, MONMOUTH 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). 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. As the dissent recognized, "[r]easonable 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).

REQUESTED RELIEF

The Court should grant rehearing in *Holmes*, withdraw its opinion, vacate the trial court's opinion, and remand for application of the correct legal standard in this case.

Respectfully submitted, this the 20th day of January, 2023.

/s/ Nicole J. Moss

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N.C. R. App. P. 33(b) Certification: I certify that all of the attorneys listed below have authorized me to list their names on this document as if they had personally signed it.

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CERTIFICATE OF SERVICE

I do hereby certify that I have on this 20th day of January, 2023, pursuant to Rules of Appellate Procedure 13 and 26, served a copy of the foregoing Petition for Rehearing of Legislative Defendant-Appellants on the following counsel for the parties at the following addresses by electronic mail.

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No. 342PA19-2 TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA
****

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

****

APPENDIX

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Certificate of Josh Howard.....App. 2

Certificate of Luke J. Farley .....App. 6

No. 342PA19-2 TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA
****

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

****

CERTIFICATE OF JOSH HOWARD IN SUPPORT OF LEGISLATIVE DEFENDANTS' PETITION FOR REHEARING PURSUANT TO RULE 31(A) OF THE NORTH CAROLINA RULES OF APPELLATE PROCEDURE

****

TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

Pursuant to Rule 31(a) of the North Carolina Rules of Appellate Procedure, the undersigned respectfully submits this Certificate in Support of Legislative Defendants' Petition for Rehearing.

1. I have been licensed to practice law in the State of North Carolina and have been a member of the North Carolina Bar at all times since 1999.

2. I graduated from the University of North Carolina School of Law with honors in 1999. Since then I have more than twenty years of experience as a defense attorney, corporate ethics officer, in-house counsel, and senior federal prosecutor. I clerked in the Middle District of North Carolina for United States District Judge William L. Osteen, Sr., and then served as an Assistant United States Attorney in the Western District of North Carolina. After working in the United States Department of Justice's Office of Legal Policy in Washington, D.C., I returned to serve as Deputy Criminal Chief in the United States Attorney's Office for the Eastern District of North Carolina in 2006.

3. Presently, I am a partner at Gammon, Howard & Zeszotarski, PLLC.

4. In addition to my legal practice, I previously served as Chairman of the State Board of Elections (2013-2016) and a member of the Wake County Board of Elections (2012-2013).

5. I have no legal interest in this action and have not at any time represented any party to the action now before this Court.

6. I have carefully examined the appeal in this case, including the majority and dissenting opinions in this Court's 16 December 2022 decision.

7. I consider the Court's decision to be in error with respect to the following holdings of the majority opinion in this matter:

a. That the superior court properly applied the presumption of good faith when reviewing the actions of the General Assembly in the enactment of S.B. 824;

b. That demonstrating disparate impact is not a prerequisite to proving intentional racial discrimination under the governing *Arlington Heights* framework;

c. That the superior court's findings are supported by "competent evidence."

8. In my opinion, the above holdings are in error for the reasons stated in Legislative Defendants' Petition for Rehearing, which I have reviewed in detail.

Therefore, it is respectfully submitted that the Court should grant rehearing in this appeal, withdraw its opinion, vacate the trial court's opinion, and remand for the application of the correct legal standard in this case.

Respectfully submitted, this the 19th day of January, 2023.

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SWORN TO AND SUBSCRIBED BEFORE ME
This the 19th day of January, 2023.

Kate Taylor
Notary Public
My Commission Expires: 5/11/2024

KATE TAYLOR NOTARY PUBLIC WAKE COUNTY, NC

No. 342PA19-2 TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA
****

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,	)	From Wake County No. COA 22-16
Defendants-Appellants.	)	

****

CERTIFICATE OF LUKE J. FARLEY IN SUPPORT OF LEGISLATIVE DEFENDANTS' PETITION FOR REHEARING PURSUANT TO RULE 31(A) OF THE NORTH CAROLINA RULES OF APPELLATE PROCEDURE

****

TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

Pursuant to Rule 31(a) of the North Carolina Rules of Appellate Procedure, the undersigned respectfully submits this Certificate in Support of Legislative Defendants' Petition for Rehearing.

1. I have been licensed to practice law in the State of North Carolina and have been a member of the North Carolina Bar at all times since August 27, 2010.

2. I graduated from the Wake Forest University School of Law in 2010. Since then I have more than a decade of litigation experience, focusing on complex, multi-party construction contract disputes, state and federal Miller Act claims, and mechanics' liens. In addition, I assist clients with contract review and negotiation, licensing and certification, OSHA citations, and guidance on troubled construction projects.

3. Presently, I am a partner at a law firm in Raleigh, North Carolina.

4. In addition to my legal practice, I am or have been involved in several industry and professional organizations, including the Associated Builders and Contractors of the Carolinas, the American Bar Association Forum on Construction Law, and the North Carolina Bar Association Construction Law Section.

5. I have no legal interest in this action and have not at any time been counsel to any party to the action now before this Court.

6. I have carefully examined the appeal in this case, including the majority and dissenting opinions in this Court's 16 December 2022 decision.

7. I respectfully consider the Court's decision to be in error with respect to the following holdings of the majority opinion in this matter:

a. That the superior court properly applied the presumption of good faith when reviewing the actions of the General Assembly in the enactment of S.B. 824;

b. That demonstrating disparate impact is not a prerequisite to proving intentional racial discrimination under the governing *Arlington Heights* framework;

c. That the superior court's findings are supported by "competent evidence."

8. In my opinion, the above holdings are in error for the reasons stated in Legislative Defendants' Petition for Rehearing, which I have reviewed in detail.

Therefore, it is respectfully submitted that the Court should grant rehearing in this appeal, withdraw its opinion, vacate the trial court's opinion, and remand for the application of the correct legal standard in this case.

Respectfully submitted, this the 19th day of January 2023.

Luke J. Farley

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SWORN TO AND SUBSCRIBED BEFORE ME
This the 19th day of January 2023.

Kristiana Davis

Notary Public
My Commission Expires: 6/27/2027

KRISTIANA N. DAVIS NOTARY PUBLIC WAKE COUNTY, N.C. MY COMMISSION EXPIRES 6/27/2027