No. COA 19-762 TENTH DISTRICT

NORTH CAROLINA COURT OF APPEALS
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JABARI HOLMES, FRED CULP, DANIEL E. SMITH, BRENDON JADEN PEAY, SHAKOYA CARRIE BROWN, *and* PAUL KEARNEY, SR.,

Plaintiffs-Appellants,

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-Appellees.

From Wake County

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LEGISLATIVE DEFENDANTS-APPELLEES' MOTION FOR REHEARING EN BANC

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Pursuant to North Carolina General Statute Section 7A-16 and North Carolina Rule of Appellate Procedure 31.1(d), Appellees Timothy K. Moore, Phillip E. Berger, David R. Lewis, and Ralph E. Hise, in their official capacities ("Legislative Defendants"), file this motion for en banc rehearing.

INTRODUCTION

Over one year ago the people of North Carolina amended the State's Constitution to require voters to provide photographic identification when voting. The amendment directs the General Assembly to enact implementing legislation, which may, *but is not required to*, include exceptions to the voter ID requirement. In December 2018, the General Assembly enacted S.B. 824 to fulfill its constitutional mandate. An African American Democrat, Joel Ford, was one of S.B. 824's three primary sponsors.

S.B. 824 includes a lengthy list of qualifying voter ID and provides voters who lack ID with two free avenues for obtaining one. The General Assembly had good reason to believe that S.B. 824's expansive list of qualifying ID would cover the vast majority of voters, as less than *0.1%* of participants in the March 2016 primary had to vote provisionally because they lacked ID under a prior law's *shorter* ID list. Yet the General Assembly still exercised its discretionary authority to allow exceptions from the constitutional voter ID requirement to ensure that *all registered voters* will be able to vote. Voters lacking ID may cast a reasonable impediment ballot that will be counted unless the declaration underlying the ballot is factually false. There thus

is no category of voter that is even theoretically prohibited from voting by S.B. 824's terms.

Following extensive discovery and a hearing, the three-judge trial court found that Plaintiffs are unlikely to succeed on their racial discrimination challenge to S.B. 824 and declined to enter a preliminary injunction. But in an error-ridden decision that took a one-sided look at the record, a panel of this Court reversed—enjoining S.B. 824's implementation until a decision on the merits is entered in this case.

This Court should order en banc rehearing because this case "involves a question of exceptional importance that can be concisely stated," N.C. R. APP. P. 31.1(a)(2): whether Plaintiffs have demonstrated that they are likely to succeed in proving that S.B. 824 discriminates on the basis of race and therefore violates North Carolina's Equal Protection Clause. In answering this question, the panel made a number of outcome-determinative mistakes. The panel first misapplied the *Arlington Heights* framework in various ways—including by placing the burden of proof on Defendants to demonstrate that S.B. 824 is not racially discriminatory. The panel next failed to give sufficient weight to the voter ID constitutional amendment. And the panel also erred by entering an injunction far broader than necessary to cure Plaintiffs' alleged harms.

There is no question that this case is one of exceptional importance: the validity of a democratically enacted law that was passed pursuant to a constitutional mandate is at issue. And the panel's flawed decision indefinitely bars S.B. 824 from being enforced, ensuring that the North Carolina Constitution's voter ID command cannot

be implemented for the foreseeable future. *Cf. Maryland v. King*, 567 U.S. 1301 (2012) (Roberts, C.J., in chambers) (quotation marks omitted) ("Any time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury."). This is not a run-of-the mill case; instead, it is exactly the sort of "exceptional" case in which en banc review is both appropriate and necessary. *See* N.C. R. APP. P. 31.1(a)(2).

PROCEDURAL HISTORY

Plaintiffs filed this suit in Wake County Superior Court on December 19, 2018, alleging that S.B. 824 violates several provisions in the North Carolina Constitution. (*See* R p 12). Plaintiffs' Complaint named as defendants the State of North Carolina, the North Carolina State Board of Elections ("State Board"), and the Legislative Defendants. Plaintiffs also moved for a preliminary injunction. (*See* R p 67). On March 19, the Chief Justice of the Supreme Court of North Carolina assigned the case to a three-judge panel of the Wake County Superior Court. (R p 123).

On July 19, the trial court panel unanimously dismissed all of Plaintiffs' claims but one: the claim that S.B. 824 intentionally discriminates on the basis of race. (R pp 248–51). A majority of the trial court panel (Judges Rozier and Poovey) found "that Plaintiffs have failed to demonstrate a likelihood of success on the merits of their sole remaining claim" and declined to enter a preliminary injunction. (R pp 249–50).

Plaintiffs filed a notice of appeal to this Court on July 24. (R p 254). On August 30, Plaintiffs filed a petition in the Supreme Court of North Carolina seeking

discretionary and interlocutory review of the preliminary injunction order, which that Court denied on September 25. *Holmes v. Moore*, 832 S.E.2d 708, 709 (N.C. 2019).

On February 18, a three-judge panel of this Court reversed the trial court's decision, finding that Plaintiffs are likely to succeed on the merits of their racial discrimination claim and that the remaining preliminary injunction factors cut in favor of temporary relief. *See* Slip Op. in *Holmes v. Moore*, 19-762 (Feb. 18, 2020) ("Slip Op."). The panel thus preliminarily enjoined S.B. 824's voter ID provisions in their entirety for the duration of this litigation. *Id.* at 45.

STATEMENT OF FACTS

I. The General Assembly Implements a Constitutional Amendment Requiring Voter ID.

On November 6, 2018, a majority of North Carolina voters voted to amend the North Carolina Constitution, requiring that

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

N.C. CONST. art. VI, § 2(4); *see also id.* § 3(2) (same).

Compelled by this mandate, the General Assembly enacted implementing legislation—S.B. 824. The bill was introduced on November 27, 2018, and, following extensive debate in both houses and multiple amendments, the House of Representatives passed a final version of S.B. 824 on December 5, followed by the Senate on December 6. Discussion and debate on S.B. 824 in committee or on the floor of the House alone lasted nearly thirteen hours. And legislative debate could have been even longer if not for the Democratic caucus's strategy of intentionally limiting

debate to avoid compromising litigation challenging S.B. 824. (*See* Doc. Ex. 465). The General Assembly adopted thirteen out of twenty-four proposed amendments, a number of which were proposed by Democrats and made S.B. 824's requirements less stringent. *See, e.g.*, House Amendment No. A11 to S.B. 824, https://bit.ly/2wE47f5 (removing the requirement that certain tribal enrollment cards had to be approved by the State Board before they could be used to vote); (*see also* Doc. Ex. 468 (discussing three amendments proposed by Joel Ford and two other Democratic Senators that the Senate adopted)). Both houses overrode the Governor's veto of S.B. 824.

S.B. 824 has since been amended three times. The first amendment postponed enforcement to the 2020 elections, while providing that "all implementation and educational efforts . . . shall continue." 2019 N.C. Sess. Laws 4, § 1(a), (b). The second increased the time during which educational institutions and government employers can have their ID approved to qualify as voter ID and relaxed certain requirements for approval. *See* 2019 N.C. Sess. Laws 22 §§ 2–5. The second amendment also removed tribal IDs from the expiration date requirements they originally fell under, *see id.* § 1; now, a tribal ID may be used even if it has been expired for over a year or wholly lacks an expiration date, *see* N.C. GEN. STAT. § 163-166.16(a)(2)c. And the third amendment modified the reasonable impediment process for absentee ballots and appropriated additional funding to the State Board to implement voter ID, while also mandating one-stop voting the last Saturday before Election Day. *See* 2019 N.C. Sess. Laws 239.

II. The General Assembly Carefully Crafted S.B. 824 To Fulfill the Constitution's Mandate While Protecting Voter Participation.

S.B. 824 is exceptionally protective of voters and compares favorably with other laws that have been upheld in the face of similar challenges. Any of the following types of ID that are unexpired or have been expired for one year or less qualify as voter ID: (1) a North Carolina driver's license; (2) a Division of Motor Vehicles-issued ID for non-drivers; (3) a United States passport; (4) a *free* North Carolina voter identification card issued by a county board of elections; (5) a qualifying student identification card; (6) a qualifying government employee identification card; and (7) an out-of-state drivers' license if the voter's registration was within ninety days of the election. N.C. GEN. STAT. § 163-166.16(a)(1). Military and veterans' identification cards and tribal enrollment cards issued by a State or federally recognized tribe qualify, even if the card has no date or has been expired for over a year. *Id.* § 163-166.16(a)(2). Finally, if a voter is sixty-five or older, an otherwise qualified but expired identification will suffice if it was unexpired on the voter's sixty-fifth birthday. *Id.* § 163-166.16(a)(3).

S.B. 824 makes ID readily available and enables voters who appear at the polls without ID to cast a ballot. Both the Division of Motor Vehicles ("DMV") and county boards must issue free ID that may be used to vote. *Id.* §§ 163-82.8A, 20-37.7(d). The State must provide the documents necessary to obtain a DMV ID free of charge if the voter does not have a copy of those documents. *Id.* § 161-10(a)(8). And to obtain ID from the county board a voter must provide only his or her name, date of birth, and the last four digits of his or her social security number. *See id.* § 163-82.8A(d)(1); 08

NCAC 17.0107(a), Voter Photo Identification Card. The county boards must issue ID during early voting, N.C. GEN. STAT. § 163-82.8A(d)(2), which allows voters who lack compliant ID to obtain one and immediately vote with it.

Eligible voters who lack compliant ID may cast a provisional ballot accompanied by an affidavit describing the "reasonable impediment" that prevented them from obtaining a compliant ID. *Id.* § 163-166.16(d)(2). Numerous grounds are explicitly recognized as reasonable impediments, including disability, lack of transportation, work schedule, and family responsibilities, and voters may identify any other reason they subjectively deem reasonable. The only basis for rejecting a reasonable impediment affidavit is falsity. *Id.* § 163-166.16(e).

Voters without ID also may cast a provisional ballot and return to their county board by no later than the end of the day before the county board canvasses—generally ten days after the election—to obtain a free ID and use it to cure their ballot. *Id.* § 163-166.16(c); *see id.* § 163-182.5(b). Voters who simply forget to bring their ID to the polls also may vote provisionally and return to the county board with their ID to cure their ballot.

S.B. 824 treats absentee voting essentially the same as in-person voting. A voter will generally be required to produce a copy of compliant ID in order to vote absentee and can use a process akin to the reasonable-impediment process to vote absentee without compliant ID. *See* 2019 N.C. Sess. Laws 239 § 1.2(b).

III. S.B. 824 Differs Dramatically From Prior Voting Legislation.

S.B. 824 is markedly different from H.B. 589, the omnibus legislation struck down in *North Carolina State Conference of NAACP v. McCrory*, 831 F.3d 204 (4th Cir. 2016). Unlike S.B. 824, H.B. 589 modified many aspects of voting and voter registration in North Carolina beyond voter ID. H.B. 589 (1) reduced the early voting period from seventeen to ten days; (2) eliminated same-day registration and voting; (3) disallowed out-of-precinct voting; and (4) repealed permission for sixteen- and seventeen-year-olds to preregister if they would not be eighteen by election day. 2013 N.C. Sess. Laws 381, §§ 12.1, 16.2–16.8, 25.1, 49.3, 49.4. These provisions were central to *McCrory*, which reasoned that "the sheer number of restrictive provisions in [H.B. 589] distinguishes this case from others." 831 F.3d at 232.

The voter ID provisions in the two bills are also markedly different.

First, S.B. 824 has always contained a reasonable impediment fail-safe. As originally enacted, H.B. 589 did not include such a provision, and although the General Assembly did create a similar exemption in 2015 legislation passed during the litigation over H.B. 589, it prohibited counting reasonable impediment ballots that "merely denigrated the photo identification requirement, or made obviously nonsensical statements." 2015 N.C. Sess. Laws 103, § 8(e). And its implementing regulations did not require a finding to be unanimous; a simple majority of a county board (two members of the then-three-member county board) could decide to not count a ballot. *See N. Carolina State Conference of the NAACP v. McCrory*, 182 F. Supp. 3d 320, 379 (M.D.N.C. 2016), *rev'd in part not relevant*, 831 F.3d 204. By

contrast, S.B. 824 allows county boards to deny a reasonable impediment ballot only if the affidavit is found to be "false"—a finding that by regulation requires a unanimous vote of a bipartisan county board, which today has five members. N.C. GEN. STAT. § 163-166.16(f). The former law's reasonable impediment provision also allowed other voters to challenge reasonable impediment declarations, while S.B. 824 does not. *Compare* 2015 N.C. Sess. Laws 103, § 8(e), *with* N.C. GEN. STAT. § 163-87.

Second, S.B. 824 unlike H.B. 589 extends voter ID provisions to absentee balloting.

Third, S.B. 824 broadened the list of voter ID to include qualifying student and government employee ID.

Fourth, S.B. 824 creates a form of free ID that is issued by the county boards without requiring underlying documentation.

Fifth, unlike H.B. 589, S.B. 824 requires the State Board to make individualized outreach to voters lacking DMV-issued voter ID. *Compare* 2018 N.C. Sess. Laws 144, § 1.5(a)(8), *with* 2013 N.C. Sess. Laws 381, §§ 5.2, 5.3, *and* 2015 N.C. Sess. Laws 103 § 8(g).

Sixth, if the DMV cancels, disqualifies, suspends, or revokes a DMV ID, S.B. 824 requires it to issue "a special identification card to that person *without application*" and mail it to his or her address free of charge—ensuring that the individual will maintain qualifying voter ID. N.C. GEN. STAT. § 20-37.7(d2) (emphasis added). H.B. 589 did not.

Finally, S.B. 824 was enacted pursuant to a mandate that was lacking for H.B. 589: in 2018 fifty-five percent of North Carolina voters adopted a constitutional amendment requiring individuals to present photographic identification when voting. *See* N.C. STATE BOARD OF ELECTIONS, *Official General Election Results – Statewide* (Nov. 6, 2018), https://bit.ly/32rr1SG.

ARGUMENT

The panel made three overarching errors when deciding the exceptionally important question of whether S.B. 824 is racially discriminatory. The panel began by misapplying the *Arlington Heights* framework in numerous ways—most notably, by placing the burden of proof on Defendants to demonstrate that S.B. 824 is not racially discriminatory. Next, the panel failed to give sufficient weight to the constitutional amendment mandating voter ID. And the panel also erred by entering an injunction far broader than necessary to cure Plaintiffs' alleged harms.

I. The Panel Incorrectly Applied *Arlington Heights.*

North Carolina courts follow precedents from the United States Supreme Court when analyzing challenges to election regulations brought under the North Carolina Constitution's Equal Protection Clause. *See Libertarian Party of North Carolina v. State*, 365 N.C. 41, 42, 707 S.E.2d 199, 200–01 (2011); *see also* Slip Op. at 14 n.5 (recognizing this fact). And as the United States Supreme Court held in *Abbott v. Perez*, 138 S. Ct. 2305, 2324 (2018), "[w]henever a challenger claims that a state law was enacted with discriminatory intent, the burden of proof lies with the challenger, not the State" and "the presumption of legislative good faith [is] not changed by a finding of past discrimination." What is more, a lower court commits

reversible error when it impermissibly forces a legislature to prove that it has "cure[d]' [an] earlier Legislature's 'taint.'" *Id.* at 2325; *see also City of Mobile, Ala. v. Bolden*, 446 U.S. 55, 74 (1980) ("[P]ast discrimination cannot, in the manner of original sin, condemn governmental action that is not itself unlawful.").

When analyzing S.B. 824 under *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), the panel did exactly what *Perez* commands it not to do: it repeatedly placed the burden of proof on Defendants to demonstrate that purported taint from H.B. 589 did not carry over to S.B. 824. And the panel made numerous additional mistakes when applying the *Arlington Heights* factors. In so doing it clearly erred in deciding a question of exceptional importance: whether Plaintiffs are likely to succeed in proving that S.B. 824 was enacted with racially discriminatory intent.

First, the panel ran afoul of *Perez* when considering the very first *Arlington Heights* factor: the historical background of S.B. 824. The panel spent six pages discussing long-distant history and H.B. 589.[1] The panel then misstepped, finding that "[t]he proposed constitutional Amendment, and subsequently S.B. 824, followed on the heels of the *McCrory* decision with little or no evidence on this Record *of any*

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[1] Indeed, the panel got some of this history wrong; it accused the General Assembly of requesting racial data on ID possession *after Shelby County v. Holder*, 570 U.S. 529 (2013), invalidated the Voting Rights Act's preclearance requirements. *See* Slip Op. at 22. But that is wrong; "North Carolina was subject to preclearance under § 5 when the demographic data requests were made." *McCrory*, 182 F. Supp. 3d at 490, *rev'd in part not relevant*, 831 F.3d 204. Under Section 5 of the Voting Rights Act, the General Assembly was required to consider the racial impact of any voting legislation. After *Shelby County*, it is not.

change in . . . racial polarization." Slip Op. at 24 (emphasis added). That flips the inquiry on its head: it was Plaintiffs' burden to prove that any problems with H.B. 589 carried over to S.B. 824—*not* Defendants' burden to prove things had changed since H.B. 589 was enacted. And even if it were appropriate to look extensively at H.B. 589, a comparison between S.B. 824 and H.B. 589 would have revealed that the new law is significantly more protective of the right to vote than the former law. *See supra* Statement of Facts, Section III. But the panel failed to analyze—or even mention—all the ways in which S.B. 824 is more voter-protective than H.B. 589.

And in any event the panel was wrong to rely on racially polarized voting as indicia of discriminatory intent in this context. Courts look to racially polarized voting when considering vote dilution claims under the federal Voting Rights Act, 52 U.S.C. § 10101 *et seq.*—that is, claims alleging that minorities have been deprived of the ability to elect candidates of their choice, *see Thornburg v. Gingles*, 478 U.S. 30, 55 (1986). But it was error to place any weight on purported racially polarized voting here, because the more racially polarized voting is in North Carolina, the more voter ID would hurt *Republicans* (assuming for the moment that Plaintiffs are correct that S.B. 824 burdens voters who lack ID). Plaintiffs' own expert, Dr. Kevin Quinn, found that 205,261 voters who are white and 139,775 voters who are African American lacked ID in 2015. (*See* Doc. Ex. 184). Assuming high levels of polarization—that is, almost all voters who are white would vote for Republicans and almost all voters who are African American would vote for Democrats—more Republican voters would be burdened than Democrats by the passage of S.B. 824. This shows that one cannot

simply infer a racial motivation from the fact of racially polarized voting in this context. And in all events, it is odd to infer racism from a law that on Plaintiffs' own theory of burden in an absolute sense bears more heavily on voters who are white than on voters who are African American at the margin, which is where elections are decided.

Second, the panel again misapplied *Arlington Heights* when considering the sequence of events factor, making at least three mistakes. As an initial matter, the panel relied on the fact that sixty-one legislators who voted in favor of S.B. 824 had previously voted to enact H.B. 589 to require the "[General Assembly] [to] bear the risk of nonpersuasion with respect to intent." Slip Op. at 28–29 (first alteration in original; quotation marks omitted). The panel did not attempt to square this approach with *Arlington Heights* or *Perez*, instead citing to a concurrence from Justice Thomas in *United States v. Fordice*, 505 U.S. 717 (1992). But that concurrence—which was not cited by Plaintiffs—is irrelevant to this case: it concerned a State's burden to dismantle a prior system of *de jure* segregation in higher education. *See id.* at 746–47 (Thomas, J. concurring). Whatever *Fordice* says about a State's burden in that context, it is irrelevant in this much different context. What is more, the General Assembly was *required* to enact legislation to implement the Constitution's voter ID command; it makes no sense to interpret the Constitution to subject the ensuing legislation to a presumption of unconstitutionality.

The panel also failed to consider—and, in fact, completely failed to mention—the fact that, unlike H.B. 589—or, for that matter, *any* law in North Carolina history

that has been struck down as motivated by discrimination against African Americans—S.B. 824 had an African American as a primary sponsor: Democratic Senator Joel Ford. This fact certainly cuts against the panel's concerns regarding the makeup of the legislature that adopted S.B. 824. And Senator Ford was not the only African American Democrat to support S.B. 824—Senator Davis, another African American Democrat, also voted to pass the bill. While he opposed the veto override, nothing in the bill changed on its being returned from the Governor, of course, so he clearly did not believe the substance of the bill was racially discriminatory. A third African American Democrat, Senator Clark, voted for the bill the first time it was in front of the Senate. (He was absent from the vote to pass the bill coming back from the House and voted against the veto override.) The panel's failure to even grapple with Senator Ford's sponsorship or the additional support S.B. 824 obtained from African American lawmakers is indicative of the panel's one-sided approach to considering the indicia of legislative intent.

And the panel incorrectly treated the question of whether S.B. 824's passage was unusual as solely a battle between the testimony of two legislators: Senator Ford and Representative Pricey Harrison. *See* Slip Op. at 25–28, 29. The panel completely ignored the only expert offered by either party on this subject: Professor Keegan Callanan. Professor Callahan found that there was nothing unusual about S.B. 824's enactment in a post-election session. The practice of holding post-election sessions is common in both the U.S. Congress and the States, and the General Assembly has held four such sessions since North Carolina's governor was granted the veto power

in 1996. (Doc. Ex. 571–79). Similarly, the General Assembly gave as much if not more consideration to S.B. 824 as it has given to other bills, including those of similar magnitude. (Doc. Ex. 467). The time that the General Assembly devoted to S.B. 824 was also well within the norm even for bills passed in longer sessions. (Doc. Ex. 465–66, 581). What is more, Senator Ford testified that the Democratic *opponents* of the bill intentionally limited debate to improve their hand in litigation. (Doc. Ex. 465). By blinding itself to this expert testimony—indeed, completely failing to mention or address it—the panel erred.

Third, the panel misapplied *Arlington Heights* and *Perez* when determining whether S.B. 824's legislative history was indicative of discriminatory intent, again making at least two serious errors. The panel began by faulting the General Assembly for purportedly considering data about ID possession under H.B. 589. *See* Slip Op. at 30. The basis for this contention—nothing is clearly singled out by the panel—appears to be the presentation offered to the Joint Legislative Elections Oversight Committee by Kim Strach, then the State Board's Director. (*See* Doc. Ex. 255). That presentation, to be sure, indicates that two separate database matching analyses in 2015 each failed to find valid ID for over 200,000 voters. (*See* Doc. Ex. 272, 274). But the presentation went on to *undercut* those figures as reliable for analyzing voters who would be affected by a voter ID law. As the presentation indicates, the State Board of Elections sent mailers to everyone on both lists and, of those who responded, 91% and 76%, respectively, stated that they in fact *had* valid ID. (Doc. Ex. 273–74). The presentation also reports that when H.B. 589 was in effect for the March 2016

primaries, only *2,296* voters—less than 0.1% of the electorate—cast a provisional ballot because they lacked ID at the polls. (*See* Doc. Ex. 284–85). The presentation thus indicates that database-matching analyses finding hundreds of thousands of registered voters without valid ID are wholly unreliable for purposes of discerning a voter ID law's impact in the real world, and the General Assembly therefore had no reason to perform yet another such analysis before enacting S.B. 824. What the presentation showed is that only a very small number of voters would be required to cast provisional ballots under S.B. 824, and the General Assembly worked to address even that reality by (A) expanding the list of acceptable ID, (B) making it easier for voters to cure provisional ballots by making free ID available at the county boards of elections offices where voters would go to cure the ballots, and (C) limiting to falsity the reason for not accepting a reasonable impediment ballot and therefore ensuring that such ballots would not be improperly rejected. These are not the acts of a racist legislature. The panel failed to acknowledge these realities.

And in any event the General Assembly was under no obligation to generate and consider new data when enacting S.B. 824; as Senator Ford explained, "there was no need for the General Assembly to look at data on individuals who currently lack compliant ID when considering S.B. 824" because of the free ID provisions and the reasonable impediment option. (Doc. Ex. 471).

The panel also faulted S.B. 824 for not allowing a voter to use a public assistance ID to vote. But S.B. 824's legislative history refutes any notion that public assistance ID were not included for racial reasons. Representative Richardson offered

an amendment in the House that would have added federal or state public-assistance ID to the list of acceptable voter ID. Representative Lewis opposed the amendment, offering the following explanation:

> We have listed formats that IDs need to conform to in order to be accepted in this bill. As you know, through the Supremacy Clause, we have no way to impose our standards on the federal government. Now some may say, but wait, you're taking military IDs and veterans IDs, and that's because those are uniformly published and established what they look like and how they work. There is no provision of this amendment that would even require the ID to have a picture.
>
> I would say that I'm very sympathetic and very concerned about the people that Representative Richardson speaks of, and that is why I believe the reasonable impediment language would provide a way for them to vote without having to go through the inconveniences that she referred to. So for that reason, I would ask you to please vote down this amendment.

Debates on S.B. 824 on the House Floor, N.C. GEN. ASSEMBLY at 2:17:08–18:09 (daily ed. Dec. 5, 2018), https://bit.ly/2OJlz8F. Representative Richardson then responded, "I understand your justification, *and I accept the justification that you gave*. But if we were to take federal out and just deal with the state agencies, would that be more affable to your accepting this amendment?" *Id.* at 2:18:24–42 (emphasis added). Lewis responded that "we certainly could consider that on [the] third [reading of the bill in the House], if the state IDs were to conform the same way the other state IDs in the bill need to," and Richardson replied, "I appreciate that, and we will work with you." *Id.* at 2:18:42–57. But the third reading came and went, and the House passed the bill, without a further amendment being offered.

What this exchange shows, then, is that Representative Lewis expressed concerns about the public-assistance ID amendment as drafted, and the proponent of

the amendment *recognized the legitimacy of those concerns*. There is absolutely no basis for inferring racial discrimination from this exchange.

Fourth, the panel erred when finding "some evidence" that S.B. 824 will have a disparate impact. *See* Slip Op. at 39. The panel began by relying on the affidavit of Dr. Quinn, Plaintiffs' expert. But the panel never considered—let alone mentioned—the evidence that Defendants offered in opposition to Dr. Quinn from experts Dr. Janet Thornton and Dr. Trey Hood. *See id.* at 32–33. As explained in detail to the trial court, Dr. Quinn did not analyze whether *any* registered North Carolina voter currently lacks ID that complies with S.B. 824, instead relying on his analysis of H.B. 589. (*See* Doc. Ex. 388–98). That analysis—about a different law at a different point in time that accepted different ID—tells the Court nothing about voter ID possession at the present time. (And, in any event, Dr. Quinn's analysis about H.B. 589 suffered from numerous flaws. (*See* Doc. Ex. 389–92).) As it relates to disproportionate impact, Dr. Quinn's analysis suffers a still more glaring flaw: he did not consider the reasonable impediment provision's effect. (*See* Doc. Ex. 133). His opinion therefore says nothing about the legally relevant burden of S.B. 824 or whether it will have a disproportionate impact. (*See* Doc. Ex. 617–18, 627–28). Nor did Dr. Quinn address the undisputed fact that 99.9% of those who went to the polls under the prior regime in 2016 had valid ID. The panel thus erred by unquestioningly relying on Dr. Quinn's analysis.

The panel next found that the availability of free ID from county boards "does little to alleviate the additional burdens of S.B. 824," Slip Op. at 35, relying on

statements in affidavits from two county boards of elections members, *see id.* at 34. But those two lay witnesses had no idea how many individuals might lack acceptable ID in their respective counties or might lack transportation to their county boards. (*See, e.g.*, Doc. Ex. 851–52). Indeed, Plaintiffs offered no evidence that *any* registered voter without ID lacks transportation or lives prohibitively far from a county board, and the expert evidence from Dr. Thornton in fact suggests the opposite. (*See* Doc. Ex. 491–92, 503–05). In any event, lack of transportation will be an explicitly listed option on the reasonable impediment declaration, which means that a voter who lacks transportation to obtain a free ID will still be able to vote.

The panel also found that the reasonable impediment option was "still one more obstacle to voting" because the reasonable impediment ballot is "a *provisional* ballot, which is subject to rejection if the county board believes the voter's affidavit and reasonable impediment are false." Slip Op. at 36–37. But the reasonable impediment process is no obstacle: S.B. 824 states that a reasonable impediment ballot *must* be counted unless the county board finds that the affidavit is *false*, and implementing regulations require this finding to be a unanimous decision by the bipartisan county board of elections. 08 NCAC 17.0101(b). The county board cannot second guess the voter's subjective determination of reasonableness, and no voter may challenge another voter's reasonable impediment ballot. And neither the panel nor Plaintiffs were able to find evidence that the reasonable impediment process will burden voters in a cognizable way.

Last of all, the panel failed to adequately distinguish North Carolina's voter ID law from Virginia's and South Carolina's laws—which were upheld despite the fact that both laws are stricter than North Carolina's in many respects. In *South Carolina v. United States*, 898 F. Supp. 2d 30, 44–45 (D.D.C. 2012), the court found that even though the legislators and Governor "no doubt knew" that ID possession varied by race, South Carolina's law was not racially discriminatory—in large part because there was a "sweeping reasonable impediment provision." North Carolina has a much longer list of acceptable ID than South Carolina—and a markedly similar reasonable impediment provision. But instead of following *South Carolina*'s lead, the panel decided that that case did not apply because it involved analysis under the Voting Rights Act—which the panel found "requires a greater showing of disproportionate impact than a discriminatory intent claim." Slip Op. at 38. But the *South Carolina* court did not even find that there was some disproportionate impact; instead, it found that the reasonable impediment provision "*ensures that all voters of all races* . . . continue to have access to the polling place *to the same degree they did under pre-existing law*." 898 F. Supp. 2d at 45 (emphases added). The same is true in North Carolina, so the panel should have upheld the decision below. And similarly the panel failed to take account of the fact that in *Lee v. Virginia State Board of Elections*, 843 F.3d 592, 603 (4th Cir. 2016), the Fourth Circuit found "racially discriminatory intent . . . lacking" when "in enacting a photo identification requirement, the Virginia legislature went out of its way to make its impact as burden-free as possible"—even though Virginia's law does not contain a reasonable

impediment exception and provides a shorter period of time for validating provisional ballots, *see id.* at 594–95. Indeed, in Virginia, unlike in North Carolina, there is *no* provision made for a voter who does not have photo ID and is unable to obtain one within a few days of an election: such a voter simply cannot vote. In North Carolina, by contrast, there is no hypothetical class of voters not accounted for: everyone is able to vote and have their vote counted, regardless of whether they have photo ID.

The panel's final error in its discriminatory impact analysis was finding that Plaintiffs need not prove both discriminatory impact and intent to make out an equal protection violation. *See* Slip Op. at 17. But both the United States Supreme Court and this Court have rejected that approach. *See Palmer v. Thompson*, 403 U.S. 217, 224 (1971) (explaining that the United States Supreme Court has never "held that a legislative act may violate equal protection solely because of the motivations of the men who voted for it"); *see also State v. Burroughs*, 196 N.C. App. 178, 674 S.E.2d 480 (2009); *Stephens v. City of Hendersonville*, 128 N.C. App. 156, 158, 493 S.E.2d 778, 780 (1997); *Town of Hudson v. Martin-Kahill Ford Lincoln Mercury, Inc.*, 54 N.C. App. 272, 277, 283 S.E.2d 417, 420 (1981) (all indicating that both discriminatory intent and impact are necessary to prove an equal protection violation). The panel thought that later cases had undermined *Palmer*. *See* Slip Op. at 17–18 n.6. But this is not so; as to *Palmer*'s clear holding that a plaintiff must prove both discriminatory intent and impact, "the Supreme Court has never invalidated *Palmer* and indeed, has continued to require actual discrimination to be shown in equal protection cases."

Greater Birmingham Ministries v. Merrill, 284 F. Supp. 3d 1253, 1274 n.4 (N.D. Ala. 2018).

The panel thus erred in its *Arlington Heights* analysis, incorrectly found that Plaintiffs are likely to prove that S.B. 824 is racially discriminatory, and wrongly decided a question of exceptional importance.

II. The Panel Impermissibly Failed To Give the Constitutional Amendment Requiring Photo ID Sufficient Weight.

The constitutional amendment requiring voter ID provides that "[v]oters offering to vote in person *shall* present photographic identification before voting" and the General Assembly's implementing legislation "*may* include exceptions." N.C. CONST. art. VI, § 2(4) (emphases added). In other words, the Constitution requires the presentation of ID, and the General Assembly was not required to include exceptions. But the General Assembly opted to create an exceptionally voter-protective voter ID law, recognizing a lengthy list of ID for voting, creating two free forms of ID that any voter can obtain, and adopting a reasonable impediment provision under which "[*a*]*ll* registered voters will be allowed to vote *with or without a photo ID card*." 2018 N.C. Sess. Laws 144, §1.5 (a)(10) (emphases added).

The panel erred by refusing to give the constitutional amendment sufficient weight. *See* Slip Op. at 39–41. It is clear that the General Assembly was motivated by the Constitution's command that it "shall enact" laws governing the photo ID requirement, N.C. CONST. art. VI, § 2(4), when adopting S.B. 824; indeed, any legislature intending to discriminate would not enact such a lenient law, particularly where the Constitution did not require them to do so. *Cf. South Carolina*, 898 F. Supp.

2d at 45. And the panel not only erred when finding discriminatory intent; it also erred by failing to read the North Carolina Constitution's Voter ID Amendment and Equal Protection Clause in a way that avoided conflict. *See Stephenson v. Bartlett*, 355 N.C. 354, 378 (2002) (stating that "[a] constitution cannot be in violation of itself" and "all constitutional provisions must be read *in pari materia*"); *Town of Boone v. State,* 369 N.C. 126, 132, n.5, 794 S.E.2d 710, 715 n.5 (2016) ("Following well-established principles of construction, one amendment cannot be read to eliminate the other, and the one more recent in time is given its full application.").

III. The Scope of the Panel's Preliminary Injunction Is Impermissibly Broad.

The panel enjoined the entirety of S.B. 824's voter ID provisions. Slip Op. at 45. But that was an error of law; if a preliminary injunction is appropriate—which it is not—it does not follow that S.B. 824's voter ID provisions should be enjoined in full. "[I]njunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979); *see Appeal of Barbour*, 112 N.C. App. 368, 373–74, 436 S.E.2d 169, 173–74 (1993). The only permanent injunctive relief that Plaintiffs have requested is an injunction making the votes of those who lack ID regular rather than provisional. (*See* R p 64 (Plaintiffs' complaint, requesting "[a]n injunction allowing qualified, registered voters without acceptable photo ID at the polls to cast regular ballots.")); (*see also* T p 117, line 3–5 (App. 2) (Plaintiffs' counsel: "we're not saying that no voter should be asked for ID; we are saying that the ones who present without ID should be able to cast a regular ballot.")). Because no broader remedy is necessary to cure

Plaintiffs' alleged equal protection harm, and because Plaintiffs have conceded that this is all the relief they seek, the panel erred in enjoining all of S.B. 824's voter ID provisions. Of course, no injunction should have issued at all, but assuming that one is in place it should be no broader than necessary.

CONCLUSION

For these reasons, the Court should grant en banc rehearing.

Dated: February 25, 2020

Respectfully submitted,

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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 25th day of February, 2020, served a copy of the foregoing Legislative Defendants-Appellees' Motion for Rehearing En Banc, by electronic email and by United States mail, postage prepaid, to counsel for Plaintiffs and Defendants at the following addresses:

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APPENDIX

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Excerpt from Transcript of Proceedings on Plaintiffs' Motion for Preliminary Injunction, Legislative Defendants' Motion to Dismiss, and State Defendants' Motion to Dismiss (June 28, 2019) ....App. 1

NORTH CAROLINA GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
COUNTY OF WAKE
18 CVS 15292

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

Plaintiffs,

vs.

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; RALPH E. HISE, in his official capacity as chairman of the Senate Select Committee on Elections for the 2018 Third Extra Session; DAVID R. LEWIS, in his official capacity as chairman of the House Select Committee on Elections for the 2018 Third Extra Session; THE STATE OF NORTH CAROLINA; and THE NORTH CAROLINA STATE BOARD OF ELECTIONS,

Defendants.

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Friday, June 28, 2019
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Honorable Nathaniel J. Poovey, Judge Presiding
Michael J. O'Foghludha, Judge Presiding
Vince M. Rozier, Jr., Judge Presiding

Proceedings

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1 I agree with Mr. Patterson, if you look at our
2 complaint on page 53, our prayer for relief -- for relief
3 number two, we're not saying that no voter should be asked
4 for ID; we are saying that the ones who present without ID
5 should be able to cast a regular ballot. That was the
6 requested relief in our case.
7 Very quickly, to this idea that there's not been
8 any racially disparate effect thus far is -- is totally
9 wrong. Of these provisional ballots that weren't offered a
10 reasonable impediment, one of those is Mr. Kearney, our
11 plaintiff. He didn't choose not to go back. He was not
12 told he had to go back to the County Board of Elections.
13 There was no choice made there. There was no -- and Mr.
14 Smith is one of these folks. He, again, should have been
15 offered a reasonable impediment and didn't have an ID in
16 time to cure. Didn't know he needed to cure. This isn't a
17 choice.
18 And then if you look at the African-Americans who
19 cast a reasonable impediment but then had their reasonable
20 impediment counted, there's a difference of 75. I did the
21 math real quick.
22 JUDGE ROZIER: Where is that?
23 MS. RIGGS: Where is it? It was -- this is page
24 17 of Catchy's affidavit, page 17 of Catchy's affidavit, 304
25 minus 229 is 75, divided by 184 is 40.8 percent