No. 342PA19-2 TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

JABARI HOLMES, FRED CULP, DANIEL E. SMITH, JADEN PEAY,[1] and PAUL KEARNEY, SR., *Plaintiffs-Appellees*, v. TIMOTHY K. MOORE *in his official capacity as Speaker of the North Carolina House of Representatives*; PHILLIP 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 Election for the 2018 Third Extra Session*; THE STATE OF NORTH CAROLINA; *and* THE NORTH CAROLINA STATE BOARD OF ELECTIONS, *Defendants-Appellants*.	From Wake County 18-CVS-15292 COA 22-16

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BRIEF OF PLAINTIFFS-APPELLEES

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[1] Plaintiffs-Appellees have separately moved to dismiss Brendon Jaden Peay from this appeal. That motion is currently pending before this Court.

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ISSUE PRESENTED

Whether the trial court's conclusion that Senate Bill 824 violates Article I, Section 19 of the North Carolina Constitution is supported by findings of fact based on competent evidence.

INTRODUCTION

After a three-week trial, a majority of the three-judge trial court below concluded that the photo ID requirements of Senate Bill 824 ("S.B. 824") violate the Equal Protection Clause in Article I, Section 19 of the North Carolina Constitution because they were enacted at least in part with the intent to discriminate against African American voters. The trial court judgment permanently enjoining S.B. 824's implementation rests on extensive findings of fact supported by competent evidence, and is carefully explained in the panel majority's thorough opinion.

On appeal, Defendants-Appellants (the "Legislative Defendants" and "State Defendants," respectively) argue that the trial court erred because it did not give the General Assembly the presumption of legislative good faith discussed in the Supreme Court's decision in *Abbott* v. *Perez*, 138 S. Ct. 2305 (2018). Appellants alternatively argue that the trial evidence does not support the panel majority's ultimate conclusion that S.B. 824 was motivated in part by an unconstitutional intent to discriminate against African American voters. Both arguments fail, and this Court should affirm the trial court's judgment.

Contrary to Defendants-Appellants' suggestion, the trial court applied the correct legal standard in this case, including the presumption that acts of

the General Assembly are constitutional. All parties agree that the question of whether S.B. 824 is intentionally discriminatory and therefore unconstitutional is governed by the analytical framework set forth in *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977). That case establishes a straight forward burden-shifting standard. At the first step, a plaintiff must adduce enough direct or circumstantial evidence to show that the law in question was motivated at least in part by an unlawful discriminatory purpose. And "*Arlington Heights*'s burden-shifting framework is congruent with [this] Court's strong presumption that acts of the General Assembly are constitutional[.]" *Holmes* v. *Moore*, 270 N.C. App. 7, 19 n.7 (2020). Only if a plaintiff carries the initial burden—including overcoming the strong presumption of constitutionality—does the burden of persuasion then shift to the defendant to demonstrate that it would have enacted the same law notwithstanding the discriminatory purpose.

That is the legal standard the trial court applied in this case. The panel majority's opinion repeatedly analyzed whether the evidence presented at trial *by the Plaintiffs* was sufficient to show that S.B. 824 was motivated at least in part by discriminatory intent. And the panel majority made clear that the "deference otherwise accorded to the acts of the North Carolina General Assembly disappears once the law has been shown to be the product of a racially discriminatory purpose"—not before. (R p 991, ¶ 251). Appellants' claims that the trial court "presumed *bad* faith" on the legislature's part, or "shifted the

burden of proof to defendants" is flatly inconsistent with the opinion the panel majority produced and the analysis it actually conducted.

To the contrary, the trial court's analysis and opinion is consistent with *Abbott*. Appellants argue that the trial court erred, and contravened *Abbott*, because it placed too much weight on the finding by the United States Court of Appeals for the Fourth Circuit that the General Assembly previously acted with discriminatory intent in 2013 when it enacted a different voter ID law, H.B. 589. But the *Abbott* Court expressly acknowledged that "the intent of the" prior legislature can be "relevant to the extent [it] naturally give[s] rise to—or tend[s] to refute—inferences regarding the intent of the [later legislature]," and can be "weighed together with any other direct and circumstantial evidence of that [l]egislature's intent." 138 S. Ct. at 2327.

That is what the trial court did here. Rather than simply assuming the legislature acted in bad faith, as Appellants argue, the trial court weighed the historical evidence together with other circumstantial evidence to draw inferences about the intent of the legislature that enacted S.B. 824. For example, the trial court plausibly concluded that the dozens of legislators who considered and voted for H.B. 589 had an understanding of the racial disparities in ID possession rates amongst voters in the State based on information they learned during the debate on H.B. 589. That is not a presumption of bad faith or a supposed "taint," but rather an acknowledgment of the human capacity for memory. The trial court also considered evidence that the same legislators

who voted in favor of H.B. 589 chose to push S.B. 824 through to a vote without further study of the law's impact, despite their colleagues' concerns that the new law would adversely impact African American voters just as H.B. 589 had. Appellants understandably want to ignore these inconvenient facts. But nothing in *Abbott* required the trial court to check its common sense at the courthouse door. Rather, as *Abbott* expressly provides, courts are entitled to consider whether the intent of a prior legislature gives rise to, or refutes, inferences about the intent behind subsequent acts taken by the same legislature. The relationship between H.B. 589 and S.B. 824, and the members of the legislature who voted for both, is thus important historical evidence that the trial court properly evaluated under *Arlington Heights*.

Appellants' alternative argument—that the panel majority misread the trial evidence—also fails. Appellants do not meaningfully challenge the trial court's core findings of fact or assert that those findings are unsupported by competent evidence. As a result, those findings are conclusive and binding on this Court. Instead, Appellants argue the panel majority drew the wrong inference from the trial evidence when it concluded that the Republican supermajority that enacted S.B. 824 intended, at least in part, to entrench itself by enacting a voter ID law that would bear more heavily on reliably Democratic African American voters. But it is not the function of this Court on appeal to reweigh the evidence, and the trial court's conclusions are amply supported by the trial evidence.

Legislative Defendants' own expert witness testified, and the trial court agreed, that "it would be rational to expect a political party to pursue policies that would entrench its own control by targeting African American voters if those voters vote reliably for the opposition party." (R p 917, ¶ 52). Appellants do not dispute, and the trial court correctly found, that African American voters in North Carolina do in fact vote reliably and overwhelmingly for Democrats. And Appellants also do not dispute, because they cannot dispute, North Carolina's "shameful past treatment of its African American citizens" or "that a relevant part of that history is the prior voter-ID law, H.B. 589, which the Fourth Circuit partially invalidated as racially discriminatory" because it was enacted with the intent to target African American voters for political gain. Leg. Defs.' Br. at 28; State Defs.' Br. at 29. There is thus no dispute that there exists a "political payoff for legislators . . . to dilute or limit the minority vote," (R p 906) (quotation marks omitted), and no dispute that the General Assembly in recent years has used election laws, including voter ID laws, to do just that. Appellants instead argue it is implausible to infer that the Republican supermajority did so again when enacting S.B. 824. The evidence adduced at trial shows otherwise.

Appellants maintain the legislature could not have intended for S.B. 824 to bear more heavily on African American voters because the General Assembly did not request data on rates of photo ID possession by race when considering the new law. Appellants also argue that the legislature could not have

intended for S.B. 824 to target African American voters in the manner that H.B. 589 did, because S.B. 824 allows for voting with more forms of ID than H.B. 589 did. But the legislature that enacted H.B. 589 *did* request ID possession data broken down by race and understood that racial disparities in ID possession rates caused H.B. 589 to bear more heavily on African American voters than white voters. Those same facts were raised by opponents of S.B. 824 during legislative debate. Precisely because the legislature did not engage in any new research on the racial impact of the proposed law, the proponents of S.B. 824 had no basis to believe that the additional forms of ID allowed under S.B. 824 would ameliorate the racial imbalances observed under H.B. 589.

Moreover, the legislature once again voted not to include public assistance IDs as an acceptable form of ID for voting, just as it had under H.B. 589, despite the Fourth Circuit's conclusion that doing so was evidence of discriminator intent. And Legislative Defendants' own expert witness testified that the Republican supermajority's decision to rush S.B. 824 through passage during a lame duck session showed that the supermajority did not want to pass a "watered down" voter ID law with Democratic support. All of that evidence supported the trial court's finding that the legislature continued to be motivated, at least in part, by an intent to discriminate against African American voters in order to entrench the Republican majority when it enacted S.B. 824.

Appellants also claim that S.B. 824 could not have been intended to dilute the voting power of African Americans for the political benefit of the Republican majority because the law was co-sponsored by an African American Democrat, Joel Ford, and because Ford joined with the Republican supermajority in voting to enact S.B. 824 over Governor Cooper's veto. But Ford admitted under cross-examination at trial that he was not caucusing with the Democrats when he signed on to co-sponsor S.B. 824 and considered himself a "man without a party." Ford also admitted that he believed S.B. 824 provided for free photo IDs at all early voting sites and all voting sites on Election Day, and that he would not have supported the law if it did not do so. And documentary evidence disclosed at trial showed that Republican staffers knew that Ford was mistaken in that understanding, and failed to alert him. As a result, the panel majority found it was unclear whether Ford would have supported S.B. 824 if he correctly understood its terms. And the trial court credited the testimony of other trial witnesses, including other legislators, who testified that S.B. 824 was not a bipartisan bill produced through a bipartisan process.

Appellants argue it is not plausible that the Republican supermajority intended to entrench itself by targeting African American voters, because Appellees' evidence at trial showed that more white voters than African American voters lack a form of qualifying ID under S.B. 824. Of course, the legislature did not have Appellees' trial evidence before it when it enacted S.B. 824. What the legislature instead knew, as it learned during deliberations over H.B. 589

and as opponents of S.B. 824 noted, was that racial disparities in ID possession rates made it likely that African American voters would disproportionately lack ID compared to white votes. Appellees' trial evidence confirmed just that fact. But Appellants' argument also fundamentally misunderstands racially polarized voting. As one of Appellees' experts explained in written evidence admitted at trial, African American voters are overwhelmingly concentrated in the Democratic party, while white voters are distributed between the Democratic and Republican parties. There is thus no reason to assume that all white voters who lack qualifying ID are Republican, while it is plausible to assume that the overwhelming majority of African American voters without qualifying ID are Democrats. In close elections, a voter ID law that disproportionately saps the voting strength of African American voters can disproportionately harm the electoral prospects of Democrats, even if it also keeps some white Republicans from voting.

Finally, Appellants argue S.B. 824 could not have been intended to dilute African American voting strength because the law permits all voters to cast a reasonable impediment ballot, even if they lack qualifying ID. But the legislature knew that H.B. 589's reasonable impediment provision did not prevent the disenfranchisement of eligible voters, and evidence at trial showed that African American voters were more likely to encounter difficulty voting under H.B. 589's reasonable impediment provisoin. The trial court's finding

that S.B. 824 bears more heavily on African American voters was thus fully supported by the weight of the evidence.

In sum, the circumstantial evidence adduced at trial more than plausibly supports the panel majority's conclusion that the Republican supermajority enacted S.B. 824 at least in part in order to entrench itself by burdening the voting rights of reliably Democratic African American voters. Because Appellants failed to demonstrate at trial, and fail to demonstrate on appeal, that the legislature would have enacted S.B. 824 notwithstanding that discriminatory intent, the trial court correctly determined that S.B. 824 violates the North Carolina Constitution. This Court should affirm the trial court's permanent injunction.

STATEMENT OF THE CASE

The General Assembly enacted S.B. 824 over the veto of Governor Cooper on 19 December 2018. Plaintiffs-Appellees immediately challenged the law, alleging that S.B. 824 violated the Equal Protection Clause in Article I, Section 19 of the North Carolina Constitution because it was enacted with the intent to discriminate against voters of color, including African American voters. The same day, Plaintiffs-Appellees also filed a motion for preliminary injunction seeking to prevent the implementation of S.B. 824.

Legislative Defendants and State Defendants moved to dismiss on 22 January 2019, and 21 February 2019, respectively. On 12 March 2019, Vince M. Rozier, Jr., Presiding Superior Court Judge in Wake County, denied Legis-

lative Defendants' motion to dismiss pursuant to Rule 12(b)(1). The Chief Justice of the Supreme Court of North Carolina then transferred the case to a three-judge panel made up of the Honorable Nathanial J. Poovey, the Honorable Vince M. Rozier, Jr., and the Honorable Michael J. O'Foghludha, to consider Defendants-Appellants' remaining challenges and Plaintiffs-Appellees' request for injunctive relief.

On 19 July 2019, the three-judge panel granted in part the motions to dismiss and denied the motion for a preliminary injunction. The trial court unanimously held that Plaintiffs-Appellees had "made sufficient factual allegations to support" their intentional discrimination claim, but dismissed Plaintiffs-Appellees' remaining constitutional challenges to S.B. 824. (R p 363-364). A two-judge majority denied Plaintiffs-Appellees' request for a preliminary injunction with little explanation. (R p 364-365). Judge O'Foghludha dissented, explaining that a preliminary injunction was warranted because Plaintiffs-Appellees were likely to succeed on the merits of their intentional discrimination claim. (R p 366-368).

Plaintiffs-Appellees appealed the denial of their motion for a preliminary injunction. This Court declined to exercise discretionary review prior to determination by the Court of Appeals. Thereafter, on 18 February 2020, the Court of Appeals issued a unanimous decision reversing the trial court, holding that Plaintiffs-Appellees had shown a clear likelihood of success on the merits of their discriminatory intent claim, and directing the trial court to enter a

preliminary injunction barring the implementation of S.B. 824 until its constitutionality could be determined on the merits. *See Holmes* v. *Moore*, 270 N.C. App. 7 (2020). On 24 March 2020, the Court of Appeals denied the Legislative Defendants' motion for rehearing en banc and remanded the matter back to the trial court. Order, *Holmes* v. *Moore*, No. 19-762 (N.C. App. 2020).

On 10 August 2020, the three-judge panel entered an order in accordance with the decision of the Court of Appeals, preliminarily enjoining S.B. 824. Order, *Holmes* v. *Moore*, No. 18 CVS 15292 (N.C. Super. 2020). The case then proceeded to trial, which was conducted virtually via WebEx in the Wake County Superior Court, over a period of three weeks in April of 2021. On 17 September 2021, the three-judge panel entered its final judgment in this matter in favor of Plaintiffs-Appellees and permanently enjoined S.B. 824 on the grounds that it violates the Equal Protection Clause in Article I, Section 19 of the North Carolina Constitution. (R p 896-1001).

As the majority of the three-judge panel explained in its lengthy and detailed opinion, "the evidence at trial [was] sufficient to show that the enactment of S.B. 824 was motivated at least in part by an unconstitutional intent to target African American voters," even if no member of the General Assembly "harbor[ed] any racial animus or hatred towards African American voters." (R p 1000, ¶ 271). As with North Carolina's prior voter ID law, H.B. 589, the evidence showed that "the Republican majority targeted voters who, based on race, were unlikely to vote for the majority party," when enacting S.B. 824.

(*Id.*) (quotation marks and brackets omitted). "Even if done for partisan ends, . . . [that action] constitutes racial discrimination" in violation of the North Carolina Constitution. (*Id.*) (quotation marks and brackets omitted). Moreover, the panel majority found that Defendants-Appellants "failed to prove, based on the evidence at trial, that S.B. 824 would have been enacted in its present form if it did not tend to discriminate against African American voters." (R p 1000, ¶ 272). Judge Poovey filed his own lengthy dissenting opinion.

Defendants-Appellants timely filed notices of appeal. This Court granted Plaintiffs-Appellees' Petition for Discretionary Review prior to determination by the Court of Appeals on 2 March 2022.

STATEMENT OF FACTS

The panel majority made the following findings of fact after weighing the evidence presented at trial.

A. Voting in North Carolina Is Racially Polarized and History Shows that Election Laws Have Been Used to Target African American Voters.

"[V]oting in North Carolina, both historically and currently, is racially polarized," and that polarization "offers a political payoff for legislators . . . to dilute or limit the minority vote." (R p 906, ¶ 22) (quotation marks omitted). North Carolina also has a "long history of race discrimination generally and race-based voter suppression in particular." (R p 905, ¶ 21) (quotation marks and citation omitted). "When minority citizens have gained political power in North Carolina, the party in power has moved to constrain that political participation, particularly when those minority voters, because of the way they

vote, posed a challenge to the governing party at the time." (R p 905, ¶ 21). "Frequently throughout this history, laws limiting African American political participation have been facially race neutral but have nevertheless had profoundly discriminatory effects." (R p 906, ¶ 23).

In recent years, white voters have favored the Republican Party by a wide margin, while the majority of African American voters have favored the Democratic Party. (R p 909, ¶ 31). African American turnout and registration have increased, and African American electoral participation has posed a threat to Republican electoral prospects, making "access to the ballot box a critical issue." (R p 909-910, ¶¶ 30, 34). During this same period, "the state Republican party continued to attempt to suppress Black voter turnout." (R p 909, ¶ 29).

Recent history shows that the Republican legislative majority has used election laws to target African American voters. In 2013, the legislature enacted H.B. 589, which included a voter ID requirement. In crafting the bill, "staff for Republican legislators of the General Assembly sought data on voter turnout during the 2008 election, broken down by race." (R p 912, ¶ 39). And the bill ultimately included approved forms of photo ID that African American voters disproportionately lacked, as well as other provisions that bore more heavily on African American voters. (R p 912-913, ¶¶ 41-42). In 2016, the United States Court of Appeals for the Fourth Circuit concluded, based on the

evidence presented during trial, that H.B. 589 had been enacted with the unconstitutional discriminatory intent to target African American voters because they were unlikely to vote for the Republican legislative majority. (R p 913-915, ¶¶ 43-48) (citing *North Carolina State Conference of the NAACP* v. *McCrory*, 831 F.3d 204 (4th Cir. 2016)). During roughly the same period, the legislature also committed "among the largest racial gerrymanders ever encountered by a federal court." (R p 916, ¶ 51) (quoting *Covington* v. *North Carolina*, 270 F. Supp. 3d 881, 884 (M.D.N.C. 2017)).

"Race is still a dominant consideration for the North Carolina General Assembly, particularly when it converges with politics." (R p 916, ¶ 51). And, according to the testimony of Legislative Defendants' own expert witness, which the trial majority credited, "it would be rational to expect a political party to pursue policies that would entrench its own control by targeting African American voters if those voters vote reliably for the opposition party." (R p 917, ¶ 52).

B. The Legislative History of S.B. 824 and Sequence of Events That Led to Its Enactment Support a Finding of Discriminatory Intent.

Following the conclusion of litigation over H.B. 589, Republican legislative leadership vowed to "continue fighting to . . . implement[] the commonsense requirement to show a photo ID" for voting, but the legislature took no immediate action to enact a replacement voter ID law. (R p 917, ¶ 53). One year later, after the Supreme Court's final decision in *Covington* confirmed that North Carolina's racially gerrymandered legislative districts would need

to be redrawn, the Republican leadership placed on the ballot for the upcoming 2018 general election a proposed constitutional amendment requiring photo ID for voting ("H.B. 1092"). (R p 917-918, ¶¶ 54-55). Eliminating the racially gerrymandered districts was likely to harm Republican electoral prospects and "[p]assing H.B. 1092 in the immediate aftermath of the *Covington* decision show[ed] an effort and intent by the legislature to alter the State's Constitution [in order to allow] their racially gerrymandered supermajority to implement their legislative goals." (R p 918, ¶ 56).

The process that led to the ratification of H.B. 1092 was unusual and deviated from normal procedure. (R p 918, ¶ 57). Among other things, the bill was enacted much more quickly than other bills proposing constitutional amendments and was not accompanied by the implementing legislation that would have been required if the amendment was adopted by the voters. (R p 919-920, ¶¶ 58-59, 61). Concurrent release of implementing legislation helps educate voters on the significance and impact of a proposed constitutional amendment. Because none was provided, voters considering the constitutional voter ID amendment did not know what kind of identification would be acceptable for voting if the amendment passed, suggesting an effort by the legislature to avoid voter scrutiny. (R p 920-922, ¶¶ 61-62).

During the November 2018 election, North Carolina's voters approved the constitutional amendment requiring voter ID, but did not vote to approve any specific form of voter ID legislation—much less S.B. 824. The same voters

also elected enough Democrats to the General Assembly to break the Republican supermajority. (R p 922-923, ¶¶ 65-66). Rather than wait for the duly elected General Assembly to be seated, however, the Republican supermajority enacted S.B. 824 over Governor Cooper's veto "during an unprecedented November 2018 Lame Duck Regular Session, which violated the norms and procedures of the North Carolina General Assembly in several ways." (R p 923, ¶ 67). As the trial court found, "[t]here was no need for the General Assembly to reconvene in the post-election lame duck to enact S.B. 824," and legislation enacting other constitutional amendments approved by the voters during the November 2018 election was not passed until 2019, after the new legislature had been seated. (R p 925, ¶ 71). The actions of the Republican supermajority during the lame duck session are "consistent with the hypothesis that the Republican supermajority did not want to pass a 'watered down' voter ID law" during the next legislative session "that would have been more flexible and included more forms of qualifying ID." (R p 925, ¶ 72).

Other aspects of S.B. 824's legislative history were also unusual and deviated from legislative norms. The bill was enacted through an "extremely rushed" process (R p 928, ¶ 82) that did not allow adequate time for consideration of "concerns raised by legislators that S.B. 824 would disproportionately burden and disenfranchise African American voters, just as H.B. 589 had done" (R p 930, ¶ 86). Even though the legislature was "on notice" that African Amer-

ican voters were likely to disproportionately lack certain forms of ID as compared to white voters (*id.*), the General Assembly "moved hastily to pass S.B. 824 without first obtaining updated demographic information regarding the number and demographic composition of voters who still lacked" certain forms of ID, and conducted no analysis of "what impact S.B. 824 would have on African American voters or other voters of color." (R p 933, ¶ 94).

The Republican supermajority also rejected proposed amendments "that would reasonably have been expected or understood to decrease the disparate impact of S.B. 824 on African American voters," including an amendment to add public assistance IDs to the list of qualifying IDs acceptable for voting. (R p 936-938, ¶¶ 100-107). The trial court found the legislature's decision to reject the public assistance ID amendment "telling, in light of the [federal] court's finding during the H.B. 589 litigation that the decision to remove public assistance IDs was particularly suspect because legislators could have reasonably surmised that those forms of ID would be held disproportionately by African American voters." (R p 938, ¶ 107).

In testimony credited by the panel majority, Democratic opponents of S.B. 824 explained that the legislative process leading to the law's enactment was not bipartisan in any meaningful sense of the word. (R p 946-947, ¶¶ 126-128). The same witnesses explained that Senator Joel Ford's sponsorship of the bill was not an indication of bipartisan support, because Senator Ford was no longer caucusing with the Democrats when he made the decision to sponsor

and vote for S.B. 824. (R p 944-945, ¶ 124). And Senator Ford's own testimony revealed that he misunderstood the extent to which S.B. 824 provided voters with access to "free ID"—a key factor in his decision to support the bill. (R p 945-946, ¶ 125). Based on that testimony, the trial court concluded it was possible Senator Ford would not have supported S.B. 824, had his Republican colleagues corrected his misunderstanding—of which they were themselves aware, but about which they said nothing. (*Id.*)

Governor Cooper vetoed S.B. 824 on the grounds that it was designed to suppress the rights of minority, poor, and elderly voters. The Republican supermajority then voted to override Governor Cooper's veto. (R p 935, ¶ 98). Setting aside the changes in party membership due to retirements and deaths, the Republican legislators who voted in favor of H.B. 589 also voted in favor of S.B. 824. (R p 935-936, ¶¶ 98-99).

C. S.B. 824 Bears More Heavily on African American Voters

Although S.B. 824 included more forms of ID acceptable for voting than H.B. 589 did, the trial court concluded the evidence did not show those changes "would have any impact on the racial disparities in ID possession rates that had been documented during the H.B. 589 litigation." (R p 940, ¶ 110). And methodologically sound expert analysis and testimony confirms that African American voters in North Carolina are 39% more likely to lack a form of qualifying ID under S.B. 824 than white voters, with active African American voters more than twice as likely as active white voters to lack a qualifying form of ID. (R p 948-949, ¶¶ 130-131). The new forms of qualifying ID added to S.B.

824 that were not included under H.B. 589 covered only a "miniscule" number of voters who did not already possess a qualifying ID and were unlikely to alleviate the racial disparities observed under H.B. 589. (R p 950, ¶ 133). Legislative Defendants' attempt to rebut this expert analysis and testimony with their own expert critique was "unconvincing and not credible." (R p 954, ¶ 140).

"Because African American voters are more likely than white voters to lack a form of qualifying ID under S.B. 824, it follows that they are also more likely to have to take steps to obtain a qualifying ID if they wish to vote in person using a regular, non-provisional ballot." (R p 955, ¶ 142). As the trial court found, however, "[a]vailable data shows that the burdens of obtaining a qualifying ID are also likely to fall more heavily on African American voters than on white voters." (*Id.*) For example, African Americans in North Carolina are more likely than whites to live in poverty, lack access to private transportation, or be employed in a job that does not allow time off during the normal business hours when government offices that issue IDs are open. (R p 955-957, ¶¶ 142-149). And data from the March 2016 primary, when H.B. 589 was in effect, show that voters who cast provisional ballots using a "reasonable impediment" process similar to the one included in S.B. 824, and whose votes were *not counted*, were "much more likely to be Black than the electorate as a whole." (R p 960-961, ¶¶ 157-161).

D. The Specific Provisions of S.B. 824 Are Not Justified by Nonracial Motivations

The majority of the three-judge panel concluded that the passage of S.B. 824 could not be explained by Appellants' proffered nonracial motivations. The law, as enacted, was not necessary to implement the constitutional amendment requiring voter ID and was not sufficiently tailored to deter voter fraud. (R p 968-971, ¶¶ 185-194). In fact, there was "insufficient evidence to conclude that the desire to combat voter fraud was an actual motivation for the legislature in passing S.B. 824" and there was "no evidence that voter identification laws actually bolster overall confidence in elections or that they make people less concerned about voter fraud." (R p 970-971, ¶¶ 194-195). To the contrary, as Legislative Defendants' own expert witness admitted under cross-examination, "a voter ID law that intentionally targets one group of voters in a discriminatory manner," like S.B. 824, "would reduce, rather than enhance, public confidence in election integrity." And the trial court credited additional testimony confirming that "Black community leaders . . . expressed concerns" that S.B. 824 would "decreas[e] voter confidence in the electoral system in North Carolina." (R p 968-971, ¶¶ 196-197).

STANDARD OF REVIEW

"In a bench trial in which the superior court sits without a jury, the standard of review is whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts." *Montessori Children's House of Durham* v. *Blizzard*, 244

N.C. App. 633, 636 (2016). "[W]here the trial court's findings of fact are supported by competent evidence, and the findings of fact, in turn, support the trial court's conclusions of law, the decision of the trial court will be affirmed." *Kabasan* v. *Kabasan*, 257 N.C. App. 436, 440 (2018) (quoting *Pegg* v. *Jones*, 187 N.C. App. 355, 358 (2007)).

"[T]he trial court's findings of fact have the force and effect of a jury verdict and are conclusive on appeal if there is competent evidence to support them, even though the evidence could be viewed as supporting a different finding." *In re Skinner*, 370 N.C. 126, 139 (2017); *Scott* v. *Scott*, 336 N.C. 284, 291 (1994) ("The well-established rule is that findings of fact by the trial court supported by competent evidence are binding on the appellate courts even if the evidence would support a contrary finding."). "Unchallenged findings of fact are presumed correct and are binding on appeal." *In re Schiphof*, 192 N.C. App. 696, 700 (2008). "Questions of credibility and the weight to be accorded the evidence remain in the province of the finder of fact," *Scott*, 336 N.C. at 291, and in reviewing the evidence, this Court must "defer to the trial court's determination of witnesses' credibility and the weight to be given their testimony." *In re Adoption of Shuler*, 162 N.C. App. 328, 331 (2004).

The trial court's decision to permanently enjoin S.B. 824 and the scope of its injunction are reviewed for abuse of discretion. *Kinlaw* v. *Harris*, 364 N.C. 528, 533 (2010).

ARGUMENT

I. S.B. 824 VIOLATES ARTICLE I, SECTION 19 OF THE NORTH CAROLINA CONSTITUTION

A. The Trial Court Applied the Correct Legal Standard.

All parties agree that the relevant test for analyzing whether S.B. 824 was motivated by an unconstitutional discriminatory purpose is the burden-shifting framework set forth in *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977). *See also Holmes* v. *Moore*, 270 N.C. App. 7, 16, 840 S.E.2d 244, 254 (2020). Under that standard, Plaintiffs-Appellees' bore at trial the initial burden to show that S.B. 824 was motivated by racial discrimination. Plaintiffs-Appellees "need not show that discriminatory purpose was the 'sole[]' or even a 'primary' motive for the legislation, just that it was 'a motivating factor.'" *Holmes*, 270 N.C. App. at 16–17 (quoting *Arlington Heights*).

Factors that may show the law was motivated by discriminatory purpose include (1) the law's historical background, (2) the specific sequence of events leading to the law's enactment, including any departures from the normal procedural sequence, (3) the legislative history of the decision, and (4) the impact of the law and whether it bears more heavily on one race than another. *Arlington Heights*, 429 U.S. at 266–68. There is no need to show that "any member of the General Assembly harbored racial hatred or animosity toward any minority group" in order for Plaintiffs-Appellees to prevail on their intentional discrimination claim. *See N.C. State Conf. of NAACP* v. *McCrory*, 831 F.3d

204, 233 (4th Cir. 2016). "Using race as a proxy for party may be an effective way to win an election. But intentionally targeting a particular race's access to the franchise because its members vote for a particular party, in a predictable manner, constitutes discriminatory purpose," even in the absence of "any evidence of race-based hatred." *Id.* at 222–23.

The *Arlington Heights* "burden-shifting framework is congruent with [this] Court's strong presumption that acts of the General Assembly are constitutional[.]" *Holmes*, 270 N.C. App. at 19 n.7 (quotation marks omitted). A "plaintiff must first show discriminatory intent motivated the challenged act" despite the ordinary presumption of constitutionality. *Id.* Only after "this initial burden has been overcome, [is] judicial deference is no longer justified." *Id.* (quotation marks omitted). In *Abbott* v. *Perez*, the Supreme Court of the United States similarly explained that, at the first step in the burden-shifting analysis, the "good faith of [the] state legislature must be presumed." 138 S. Ct. 2305, 2324 (2018) (quotation marks omitted). The party challenging a legislative act must overcome the presumption of good faith by showing that discriminatory purpose factored into the legislature's motivation. *Id.* at 2325.

"Once racial discrimination is shown to have been a substantial or motivating factor behind enactment of the law," however, "the burden shifts to the law's defenders to demonstrate that the law would have been enacted without this factor." *Holmes*, 270 N.C. App. at 19. As noted, "deference [to the legislature] is not warranted when the burden shifts to a law's defender after

a challenger has shown the law to be the product of a racially discriminatory purpose or intent." *Id.* (quotation marks and citations omitted). Instead, the law's defenders must "demonstrate that the law would have been enacted without" discrimination as a motivating factor. *Id.* at 33 (quoting *McCrory*, 831 F.3d at 221). And, "[b]ecause racial discrimination is not just another competing consideration," a reviewing court must "scrutinize the legislature's actual non-racial motivations to determine whether they alone can justify the legislature's choices"—post hoc justifications do not suffice. *Id.* (quotation marks omitted).

Appellants argue the trial court committed legal error because it failed to afford the legislature the ordinary presumption of constitutionality and good faith, instead flipping the burden of proof at the initial stage. Leg. Defs.' Br. at 18; State Defs.' Br. at 28. That is incorrect. The trial court faithfully applied the legal standard described above. It made clear in its opinion that "Plaintiffs ha[d] the burden of showing that the challenged law was passed with a discriminatory purpose," and acknowledged that deference to the legislature would end only if the "burden shift[ed] to [S.B. 824's] defender after a challenger has shown the law to be the product of a racially discriminatory purpose or intent." (R p 903-904, ¶¶ 15-17). Appellants nevertheless claim that the trial court improperly disregarded the presumption of good faith by analyzing the history of racially discriminatory voting laws (including H.B. 589) enacted by prior legislatures, and considering the extent to which legislators involved

in enacting those prior laws were also involved in enacting S.B. 824. *See* Leg. Defs.' Br. at 21; State Defs.' Br. at 30-32.

But *Abbott* does not preclude a court from considering a prior legislature's history of intentional discrimination in the manner the trial court did here. The *Abbott* Court expressly acknowledged that history remains a relevant consideration in the *Arlington Heights* analysis, and that historical evidence can rebut and overcome the presumption of legislative good faith. 138 S. Ct. at 2334 (citing *Arlington Heights*). And the Court carefully explained that it was *not* holding that the intent of a prior legislature was *irrelevant* to evaluating discriminatory intent, as Appellants suggest. *See id.* at 2337 ("[W]e do not suggest either that the intent of the 2011 Legislature is irrelevant or that the plans enacted in 2013 are unassailable because they were previously adopted on an interim basis by the Texas court."). Instead, the *Abbott* Court expressly acknowledged that "the intent of the" prior legislature can be "relevant to the extent [it] naturally give[s] rise to—or tend[s] to refute—inferences regarding the intent of the [later legislature]," and can be "weighed together with any other direct and circumstantial evidence of that [l]egislature's intent." 138 S. Ct. at 2327.

That is all the trial court did here. The panel majority did not assume that legislators who voted for H.B. 589 necessarily had the same intent when voting on S.B. 824. Instead, as *Abbott* directs, the trial court focused on the extent to which the intent of the H.B. 589 legislature gave rise to inferences

regarding the intent of the S.B. 824 legislature, and evaluated the relevant evidence. For example, because members of the legislature who considered and voted on H.B. 589 were aware of evidence showing racial disparities in ID possession rates, the trial court reasoned it was implausible that those same legislators would not understand the possibility that S.B. 824 could also disproportionately impact African American voters. (R p 984, ¶ 231). The court did not presume bad intent, but rather acknowledged the unremarkable fact that members of the legislature may have learned facts about the racial distribution of ID possession rates in 2013 that were relevant to their consideration of the likely impact of S.B. 824 in 2018. Nothing about that observation "flipped the burden of proof," or required Appellants to carry the initial burden of proving the absence of discriminatory intent.

As an example of the trial court's supposed burden flipping, State Defendants point to the panel majority's observation that there was no "evidence that including certain IDs" in S.B. 824 would "make a difference to overcome the already existing" racial gap in ID possession rates observed under H.B. 589. *See* State Defs.' Br. at 32. That example shows why the panel majority's analysis was entirely appropriate. At trial, Defendant-Appellants argued, just as they do on appeal, that the addition of new forms of qualifying ID to S.B. 824 was evidence that the legislature was committed to ensuring that voters, including African American voters, would not be disenfranchised by the new law. Legislative Defendants' expert witness, Professor Callanan, likewise

opined that the design of S.B. 824 did not reflect an intention to favor forms of ID disproportionately possessed by white voters. As the trial court correctly noted, however, those assertions could provide insight into the legislature's motivations only if the legislature had some empirical understanding of the rates at which different races possessed the forms of ID in question. (R p 941, ¶¶ 113-114). By observing that the law's defenders had offered no such evidence at trial, the panel majority was simply noting the limits of the legislature's evidence—not inferring bad faith. Appellants were entitled—though not required—to offer evidence purporting to show that the legislature had undertaken to remediate the racial disparities in ID possession rates observed under H.B. 589, and the trial court was entitled to evaluate that probity of that evidence. Doing so did not contravene *Abbott*'s presumption of good faith or constitute legal error.

B. The Trial Court's Findings of Fact Support the Conclusion that S.B. 824 Violates Article I, Section 19 of the North Carolina Constitution.

Appellants frame the issue on appeal as whether S.B. 824 violates Article I, Section 19 of the North Carolina Constitution. *See* Leg. Defs.' Br. at 1 ("Whether S.B. 824 violates Article I, Section 19 of the North Carolina Constitution."); State Defs.' Br. at 2 ("Whether the Superior Court erred in concluding that S.B. 824 violates the Equal Protection Clause of the North Carolina Constitution."). Where, as here, Appellants challenge only the trial court's legal conclusion regarding the constitutionality of an act of the legislature, and not the Superior Court's underlying findings of fact, this Court "adopt[s] in full . .

. the . . . factual findings of the trial court." *Harper* v. *Hall*, No. 413PA21, 2022 WL 496215 at *43 (N.C. Feb. 14, 2022); *see also In re Schiphof*, 192 N.C. App. 696, 700 (2008) ("Unchallenged findings of fact are presumed correct and are binding on appeal."). The question for this Court to decide, then, is whether the trial court's findings of fact as to the *Arlington Heights* factors support the conclusion that S.B. 824 was motivated in part by discriminatory intent and, if so, whether the legislature's actual non-racial motivations for enacting the challenged law alone can justify the legislature's choices. N.*C. State Conference of the NAACP* v. *Raymond*, 981 F.3d 295, 303 (4th Cir. 2020) (citing *McCrory*, 831 F.3d at 221).

The evidence adduced at trial and the facts found by the panel majority show that S.B. 824 was motivated in part by discriminatory intent and that Appellants' proffered non-racial motivations alone do not justify the features of S.B. 824. Accordingly, this Court should affirm the trial court's conclusion that S.B. 824 violates the Equal Protection Clause of the North Carolina Constitution.

1. The History of Discrimination in North Carolina Supports an Inference of Discriminatory Intent.

"The historical background of [a] decision is one evidentiary source [relevant to proving intentional discrimination], particularly if it reveals a series of official actions taken for invidious purposes." *Arlington Heights*, 429 U.S. at 267. "A historical pattern of laws producing discriminatory results provides important context for determining whether the same decision-making body

has also enacted a law with discriminatory purpose." *McCrory*, 831 F.3d at 223–24; *see also Holmes*, 270 N.C. App. at 20 (citing *McCrory*).

The trial court correctly concluded that the historical context in which the General Assembly passed S.B. 824 gave rise to an inference that the legislature intended to discriminate against African American voters. (R p 975-977, ¶¶ 207-214). That holding was based on a number of factual findings supported by evidence Plaintiffs-Appellees adduced at trial. Based on extensive testimony from Plaintiffs-Appellees expert historians, the panel majority found that there is a recurring historical pattern in North Carolina in which the expansion of voting rights and ballot access for African Americans is followed by the enactment of facially neutral laws that are intended to, and have the effect of, diluting African American voting power. (R p 975-976, ¶¶ 208-209).

The trial court found that pattern continues into the present day, and that recent expansions of African American political participation have been met with facially neutral laws enacted by Republican majorities and designed to constrain African American political power. (R p 910, ¶ 35). Among the laws the panel majority considered typical of this historical pattern were H.B. 589, which the Fourth Circuit held in *McCrory* had been enacted by the North Carolina General Assembly with discriminatory intent (R p 913-915, ¶¶ 44-48), as well as the racially gerrymandered legislative districts invalidated in *Carolina* v. *Covington*, 137 S. Ct. 2211 (2017) (R p 916, ¶ 51).

The pattern of expansion and backlash described above is motivated in part by the fact that voting in North Carolina remains racially polarized, which creates an incentive for the party in power to target African American voters if they reliably vote against the party in power. (R p 976-977, ¶ 212). Indeed, Legislative Defendants' own expert witness testified that it would be rational to expect a political party to pursue policies that would entrench its own control by targeting African American voters if those voters vote reliably for the opposition party. (R p 917, ¶ 52).

The panel majority concluded that the enactment of S.B. 824 fit within this historical context and pattern of intentional discrimination in voting laws. Specifically, the trial court found that voting remained racially polarized, as it had been prior to the enactment of H.B. 589, meaning that the General Assembly continued to have a powerful incentive to enact laws targeting African American voting strength. (*See* R p 977, ¶¶ 213-214). And the legislature's decision to pursue the constitutional amendment requiring voter ID followed on the heels of the *Covington* decision, and the anticipated shift in power away from Republicans and towards Democrats that would result—a textbook example of the historical pattern that Plaintiffs-Appellees' expert historian documented throughout the State's history. (*See* R p 978, ¶ 217).

Appellants do not dispute "North Carolina's shameful past treatment of its African American citizens," Leg. Defs.' Br. at 28, and concede that "a relevant part of that history is the prior voter-ID law, H.B. 589, which the Fourth

Circuit partially invalidated as intentionally discriminatory," State Defs.' Br. at 29. State Defendants also acknowledge that, "in the more recent past, courts have concluded that considerations of race have predominated in North Carolina's redistricting process." *Id.* But Appellants argue the trial court should nevertheless have ignored this "series of official actions taken for invidious purposes," *Arlington Heights*, 429 U.S. at 267, and "historical pattern" showing that the General Assembly has consistently enacted laws "with discriminatory purpose," *McCrory*, 831 F.3d at 223–24, because S.B. 824 was enacted in immediate response to the passage of the constitutional amendment requiring photo ID for voting. In Appellants' view, that amendment created an "undisputed obligation to enact a photo voter-ID law" that "breaks the link between North Carolina's history of discrimination" and S.B. 824. *See* Leg. Defs.' Br. at 29-30; State Defs.' Br. at 31.

This Court should reject that argument for two reasons. First, the constitutional photo voter ID amendment does not change the fact that the General Assembly pursued voter ID legislation, H.B. 589, with the intent to discriminate against African American voters just five years before S.B. 824 was enacted. The amendment did not and could not erase the recent history of a Republican majority of the General Assembly, incentivized by racially polarized voting, using a voter ID law to target reliably Democratic African American voters for political gain. And the amendment did not eliminate the incentive for the Republican supermajority in the General Assembly to do the same

again in crafting S.B. 824. Under *Arlington Heights*, H.B. 589 and other contemporaneous examples of race-driven election laws enacted by the General Assembly still provide "context for determining whether the same decisionmaking body has also enacted a law with discriminatory purpose." *McCrory*, 831 F.3d at 223–24; *see also Holmes*, 270 N.C. App. at 20 (citing *McCrory*). Particularly where, as here, 62 members of the legislature that voted in favor of H.B. 589 also voted in favor of S.B. 824. To be sure, the overlap in who voted for the two laws does not, in itself, constitute evidence that the legislature was motivated by discriminatory intent when it enacted S.B. 824. But it remains important context that the trial court properly considered, within the totality of the circumstances, in concluding that S.B. 824 was motivated in part by discriminatory purpose.

Second, although the constitutional amendment created an obligation for the legislature to enact a voter ID law, the Peoples' vote in favor of the amendment did not prescribe the content of S.B. 824. Had the legislature placed S.B. 824 (or another proposed voter ID law) on the ballot along with the constitutional amendment, a vote by a majority of the North Carolina electorate to adopt its terms would have more plausibly constituted an intervening act. As the trial court correctly found, however, the "General Assembly's seeming unwillingness to present the voters with the substance of the voter ID bill that would be needed to implement the constitutional amendment . . . suggests an effort by the legislature to avoid voter scrutiny." (R p 921, ¶ 62). Because

the content and design of the new ID law was left to the discretion of the General Assembly, the recent history of the legislature enacting a voter ID law intended to discriminate against African American voters for political gain remains important and relevant context for the trial court's determination that S.B. 824 was also motivated, in part, by the Republican majority's discriminatory intent to taret reliably Democratic African American voters.

2. The Sequence of Events Leading to S.B. 824's Enactment Support an Inference of Discriminatory Intent.

Appellants acknowledge that, under *Arlington Heights*, "[t]he specific sequence of events leading up to the challenged decision may also shed some light on the decisionmaker's purposes." 429 U.S. at 267. "Departures from the normal procedural sequence" can be "evidence that improper purposes are playing a role," *id.*, and the legislature need not "break its own rules to engage in unusual procedures." *McCrory*, 831 F.3d at 228.

Here, like the Court of Appeals in *Holmes*, the trial court found that "the fact that S.B. 824 was passed in a short timeframe by a lame-duck Republican supermajority," before Republicans were due to lose their supermajority status, "shows an intent to push through legislation" intended to entrench the Republican majority by targeting African American voters who reliably support Democratic candidates. (R p 982, ¶ 226 (citing *Holmes*, 270 N.C. App. at 26-27)). The panel majority found the following facts regarding the sequence of events that led to the enactment of S.B. 824 that supported an inference of intentional discrimination.

First, the Republican supermajority took steps to place the constitutional amendment requiring voter ID on the ballot immediately after learning that racially gerrymandered legislative districts would be redrawn, threatening the Republican's supermajority status. (R p 917-918, ¶¶ 54-56). Second, the ballot measure proposing the constitutional voter ID amendment, H.B. 1092, was passed through a rushed process, during a short session, that allowed less time for consideration and was passed along with five other session laws proposing constitutional amendments. Third, H.B. 1092 was not accompanied by proposed implementing legislation. As Plaintiffs-Appellees' legislative process expert explained, that too was an unusual departure from normal procedure, and meant that voters considering the constitutional amendment did not know what kinds of identification would be acceptable if the amendment passed or what form the law would take. (R p 918-920, ¶¶ 59-61). As the Superior Court found, the most plausible inference of the legislature's failure to pass implementing legislation was an effort by the legislature to avoid voter scrutiny and retain maximum flexibility for the Republican supermajority to enact its preferred voter ID law. (R p 921, ¶ 62). In fact, the legislature did not clearly explain to the voters that implementing legislation would be required, further suggesting an attempt by the Republican supermajority to avoid voter scrutiny. (R p 921-922, ¶ 63).

After the People of North Carolina approved the constitutional amendment, the Republican supermajority continued its departures from normal process by enacting S.B. 824 during a lame duck session, before it lost the ability to override the Democratic Governor's veto. (R p 922-924, ¶¶ 66-69). The trial court found there was no need for the legislature to enact S.B. 824 during the lame duck session, and observed that the legislature did *not* pass implementing legislation for other constitutional amendments approved by the voters during the 2018 election until after the new legislature had been seated. (R p 924-925, ¶¶ 70-71). Legislative Defendants' own expert witness testified that the decision to enact S.B. 824 was consistent with the hypothesis that the Republican supermajority did not want to pass a "watered down" voter ID law that would have been more flexible and included more forms of qualifying ID than S.B. 824. (R p 925, ¶ 72).

Appellants do not dispute any of the facts just described. Instead, they argue these departures are not sufficiently dramatic to overcome the presumption that the legislature was acting in good faith, that any irregularities with respect to the constitutional amendment process are irrelevant because the voters of North Carolina ultimately voted in favor of the amendment, and that the enactment of S.B. 824 during the lame duck is not suspicious because other legislatures frequently conduct business during lame duck sessions. *See* Leg. Defs.' Br. at 31-32; State Defs.' Br. at 49.

To begin with, the norms of other legislatures are not relevant here. The Court in *Arlington Heights* looked at the practices of the specific zoning board for a specific village that enacted the policy in issue. *See Arlington Heights*, 429 U.S. at 269. In a more recent case, *Veasy* v. *Abbott*, the Fifth Circuit looked at the *Texas legislature's* normal practices, not any other body. 830 F.3d 216, 238 (5th Cir. 2016). Here, expert testimony credited by the Superior Court established that convening a lame duck legislative session to enact a law implementing a constitutional amendment over the Governor's veto, after the majority party had lost its supermajority, was unprecedented in North Carolina. (R p 923, ¶¶ 67-69). And, as noted, even Appellants' own expert confirmed that the sequence of events that led to S.B. 824's enactment showed the Republican supermajority's desire to implement its own preferred, stricter voter ID law. (R p 925, ¶ 72). Those facts more than adequately support the panel majority's conclusion that the legislature intended to entrench itself by enacting S.B. 824 in the manner that it did. And the additional fact that the entire process was set in motion after the Republicans learned they were likely to lose their supermajority when racially gerrymandered legislative districts were redrawn provides a sufficient basis for the trial court's conclusion that legislature intended to entrench itself by targeting reliably Democratic African American voters. (R p 925-926, ¶ 73).

Appellants alternatively argue that the trial court erred because the Fourth Circuit in *Raymond* reached the opposite conclusion in reversing a preliminary injunction blocking S.B. 824 in federal court. But, as discussed below, *infra* Section I.B.6, *Raymond* does not control this Court's analysis. And, importantly, the *Raymond* court did not have before it the extensive expert testimony regarding North Carolina legislative norms and practices that Appellees presented to the Superior Court. Accordingly, the panel majority's conclusion that the sequence of events leading to the enactment of S.B. 824 supports an inference of discriminatory intent is adequately supported by the Superior Court's factual findings and should be affirmed.

3. The Legislative History of S.B. 824 Supports an Inference of Discriminatory Intent.

Appellants argue the legislative history of S.B. 824 does not support an inference of discriminatory intent because the law attracted some degree of bipartisan support, because the legislature did not consider any new data on ID possession by race, and because the Republican supermajority adopted some amendments proposed by Democratic legislators. *See* Leg. Defs.' Br. at 35-41; State Defs.' Br. at 53-55. Those arguments failed to persuade the majority of the Superior Court, and for good reason.

First, the evidence at trial severely undermines Appellants' assertions of bipartisanship. Appellants claim it is implausible that S.B. 824 was intended to entrench Republicans by targeting African American voters, because one of the law's co-sponsors, Joel Ford, is an African American Democrat, and

other African American Democrats voted in favor of the bill at various points during the legislative process. *See* Leg. Defs.' Br. at 37-38. But Appellants fail to mention Ford's admissions under cross-examination that he was not caucusing with Democrats at the time he co-sponsored this legislation, and that he was more accurately a "man without a party." (R p 943-944, ¶¶ 122-123). Ford also testified that he agreed to support S.B. 824 because he believed it would provide free IDs at all early voting sites and at all polling places on Election Day. (R p 945, ¶ 125). As the Superior Court explained, "[n]either is true, thus it appears plausible that Senator Ford himself may not have supported S.B. 824 had his Republican colleagues informed him that the bill did not provide free IDs in the manner he expected." (R p 986, ¶ 235). And Appellants' other supposed evidence of bipartisanship—comments made by Democratic legislators thanking their Republican colleagues after S.B. 824 was passed—were expressly disclaimed by the several Democratic legislators who testified at trial. (R p 987, ¶¶ 238-239). Indeed, Representative Harrison and Senator McKissick each explained that offering words of thanks to colleagues is a standard courtesy in the legislature. (*Id.*) "And both, along with Senator Robinson, testified clearly that they did not view S.B. 824 as a bipartisan bill, did not believe the legislature gave adequate consideration to the bill's effects on minority voters, and did not support the bill in its final form." (R p 987, ¶ 238) The panel majority credited that testimony in concluding that the process that led to S.B. 824's enactment was not truly bipartisan. This Court should not

second-guess the credibility determination of the trial court that heard that testimony.

Second, although it is true that the Republican supermajority accepted some amendments from Democrats, the Superior Court found that "the most salient ameliorative amendments that would have been reasonably understood to benefit African American voters were not" accepted. (R p 985, ¶ 233). Two prominent examples support the inference that S.B. 824 was motivated by discriminatory intent. First, the Republican supermajority rejected a proposed amendment to expand early voting to the last Saturday before the election, a day that Senator Robinson testified was important to the African American community. (R p 285-986, ¶ 234). Second, S.B. 824's proponents again refused an amendment to include public assistance IDs amongst the set of qualifying ID for voting. As the court in *McCrory* recognized, "the removal of public assistance IDs" was particularly suspect because "a reasonable legislator . . . could have surmised that African Americans would be more likely to possess this form of ID." 831 F.3d at 227–28 (citation and quotation marks omitted). The Superior Court found that repeating that choice again, despite the *McCrory* court's admonition, was particularly "telling and provides additional evidence of discriminatory intent." (R p 985, ¶ 233 (citing *Holmes*, 270 N.C. App. at 28)). And worse, after litigation over S.B. 824 began, the Republican majority agreed to add public assistance IDs to the list of qualifying ID for

voting, but no such IDs exist. (R p 938-939, ¶ 107 n.3). That about-face exemplifies the cynical approach to public assistance IDs by S.B. 824's proponents and underscores the inference that the law was intended to bear disproportionately on African American voters.

Third, the Republican supermajority's failure to evaluate the effects that S.B. 824 would have on African American voters is a vice, not a virtue. There is a difference between not considering race, and not considering data on race. As discussed, a substantial number of legislators who voted in favor of S.B. 824 also deliberated over and voted in favor of H.B. 589. It is more than plausible, as the Superior Court concluded, that those legislators learned in the course of considering H.B. 589—when the legislature *did* consider ID possession rates broken down by race—how voter ID laws disproportionately burden African American voters. (R p 984, ¶ 231). Even if they did not recall, testimony at trial established that Democratic opponents of S.B. 824 reminded their Republican colleagues during the legislative process of the extent to which the prior voter ID law had burdened African American voters, and expressed concern that the rushed enactment of S.B. 824 had not allowed for adequate consideration of whether the new law would impose the same types of burdens. (R p 930-931, ¶¶ 86-90). The most plausible inference from the evidence presented at trial is thus that the proponents of S.B. 824 understood the risk that the new law would bear disproportionately on African American voters, but re-

fused to consider steps to investigate or remedy those concerns. As the Superior Court correctly determined, the legislative process evidence supports an inference of discriminatory intent.

4. S.B. 824 Bears More Heavily on African American Voters.

Appellants assert the trial evidence was insufficient to support the Superior Court's ruling that S.B. 824 bears more heavily on African American voters. But that argument is belied by the evidence and conflicts with well-settled law.

Plaintiffs-Appellees' expert, Dr. Kevin Quinn, conducted a "no-match" analysis which showed that African American voters were more likely than their white counterparts to lack a form of qualifying ID acceptable for voting under S.B. 824. (R p 948-949, ¶¶ 130-131). Dr. Quinn's analysis also showed that the forms of ID the Republican supermajority included in S.B. 824 that were not acceptable for voting under H.B. 589 had no meaningful impact. (R p 950, ¶ 133). The Superior Court credited both findings, despite extensive cross-examination by Appellants, and also rejected the criticisms of Dr. Quinn's work made by Defendants-Appellants' expert witnesses. (R p 953-954, ¶¶ 139-141). The disparities in ID possession rates Dr. Quinn found are sufficient to establish that S.B. 824 bears more heavily on African American voters. Indeed, the *McCrory* court made clear that plaintiffs need not show that a challenged law will result in lower voter turnout and specifically held that a showing of disparate ID possession rates can raise an inference of discriminatory

intent under the *Arlington Heights* framework. 831 F.3d at 231 ("[T]he district court's findings that African Americans . . . disproportionately lacked the photo ID required by [H.B. 589], if supported by the evidence, establishes sufficient disproportionate impact for an *Arlington Heights* analysis."); *see also id.* at 232 ("The district court also erred in suggesting that Plaintiffs had to prove that the challenged provisions prevented African Americans from voting at the same levels they had in the past.").

Unable to show any error in the panel majority's conclusion that Dr. Quinn's data showed a disparity in ID possession rates, Appellants instead suggest that those disparities are mitigated by the availability under S.B. 824 of "free ID" and reasonable impediment voting. But the Superior Court correctly credited evidence adduced at trial which shows that the burdens of obtaining an ID—even the so-called "free" ID—fall harder on African American voters in North Carolina due to deeply entrenched socioeconomic disparities, many of which are themselves the product of systemic discrimination. (R p 955-957, ¶¶ 142-149). Indeed, the trial court credited testimony that African Americans in the State are more likely to live in poverty than whites, less likely to have access to private transportation, and more likely to be employed in jobs that make it impossible to visit a County Board of Elections office or other "free ID" distribution sites when those IDs are made available. (*Ibid.*; *see also* R p 959, ¶¶ 155-156 (discussing the scarcity of free ID printers)).

Likewise, the trial court credited the testimony of Plaintiffs-Appellees' expert, Dr. Ariel White, regarding the disparate impact that reasonable impediment voting had on African American voters during the March 2016 primary conducted under H.B. 589, as well as her expert testimony regarding the limits of the reasonable impediment process to prevent disenfranchisement of voters who lack ID. (R p 989, ¶ 245). Appellants dismiss Dr. White's testimony as anecdotal and its applicability to S.B. 824 as speculative, but the trial court rejected those criticisms and concluded that the supposedly mitigating features of S.B. 824 do not erase the racial disparity that Dr. Quinn documented. (*Id.*)

Legislative Defendants alternatively assert that Plaintiffs-Appellees' proof of disparate impact does not support the theory that the Republican supermajority intended to entrench itself by targeting African American voters. This is so, Legislative Defendants argue, because the total number of white voters on Dr. Quinn's no-match list is greater than the total number of African American voters who likely lack qualifying ID. That criticism, which the panel majority rejected, misunderstands polarized voting and the incentives for discrimination it creates. As another of Plaintiffs-Appellees' experts explained in written testimony accepted by the trial court, African Americans have supported Democratic candidates by as much as 95% in recent elections, and the Republican party nationwide is only 2% African American. (R S p 7408.) In contrast, although white voters tend to favor Republican candidates, a solid majority of Democrats are also white. (*Id.*) Thus, when a law like S.B. 824

burdens African American voters, the burden falls all but exclusively on voters who support Democrats, while any burden on white voters is more distributed between Democratic and Republican voters. In close elections—such as President Obama's 2008 victory in North Carolina by 14,171 out of over 4.2 million ballots cast—the ability to reliably burden even a small number of solidly Democratic African American voters can make all the difference. (R S p 7407).

In view of the totality of the evidence, the Superior Court correctly determined that S.B. 824 bears more heavily on African American voters than on white voters, and that conclusion provides important support for the majority's conclusion that the law was motivated in part by discriminatory intent. This Court should affirm that trial court's well-supported and sound conclusion.

* * *

In sum, the trial court correctly concluded that evidence adduced at trial as to each of the *Arlington Heights* factors plausibly suggests that S.B. 824 was motivated at least in part by discriminatory intent. Accordingly, this Court should affirm the Superior Court's holding that Plaintiffs-Appellees carried their initial burden of persuasion.

5. S.B. 824 Would Not Have Been Enacted Without Racial Discrimination.

With the presumption of legislative good faith stripped away, the Superior Court evaluated the Defendants-Appellees non-discriminatory justifications for S.B. 824 and concluded that they alone could not justify the specific provisions of S.B. 824.

As they do here, Appellants argued to the trial court that S.B. 824 was justified by the need to implement the constitutional voter ID amendment, or by the legislature's legitimate interest in deterring voter fraud and enhancing voter confidence.

But, as the Superior Court correctly held, the constitutional amendment "alone" did not obligate the Republican supermajority to enact a burdensome voter ID law like S.B. 824 that bears more heavily on African American voters. The panel majority thus agreed with the Court of Appeals that the Republican supermajority's choice to enact an ID law that would disproportionately burden African American voters speaks more to a desire to target African American voters than a desire to comply with the amendment in a fair way. (R p 993-994, ¶¶ 254-256 (citing *Holmes*, 270 N.C. App. at 34)).

Likewise, the Superior Court held that the specific features of S.B. 824 did not prevent fraud or enhance confidence in ways that a law that did not bear as heavily on African American voters would not. (R p 995-996, ¶¶ 259-260). In an attempt to carry their burden of showing non-racial justifications for S.B. 824, Legislative Defendants tendered Kim Strach as an expert on the administration of elections in North Carolina, the implementation of election laws in North Carolina, voter fraud in North Carolina, and methods of detecting, investigating and preventing voter fraud in North Carolina. But the trial court ruled Ms. Strach was not qualified to testify as an expert (*see* T p 2056:8-11), and Legislative Defendants have not challenged that decision. On the

other hand, the trial court credited the testimony of Legislative Defendants' expert, Dr. Callanan, who admitted under cross-examination that a law that targets a particular race group of voters would be expected to decrease, not increase, voter confidence in elections. (R p 996, ¶ 260). As a result, based on the evidence adduced at trial, the panel majority correctly concluded that fraud prevention and enhancing voter confidence "alone" could not justify S.B. 824. Those conclusions were all amply supported by the trial court's findings of fact and should be affirmed.

6. The Fourth Circuit's Decision in *Raymond*, and Other Federal Court Decisions, Do Not Control the Outcome of this Case.

Appellants repeatedly assert that the trial court erred because its conclusions regarding S.B. 824's constitutionality differ from those reached by the Fourth Circuit in *Raymond*, or by other federal courts analyzing different voter ID laws from other states. None of those cases, including *Raymond*, is controlling here.

To be sure, federal court decisions can be persuasive authority, but the North Carolina Supreme Court has repeatedly stressed—including most recently in *Harper* v. *Hall*, No. 413PA21, 2022 N.C. LEXIS 166, at *103-04 (Feb. 14, 2022)—that questions concerning the interpretation and application of the Constitution of North Carolina can be answered with finality only by North Carolina courts. *State ex rel. Martin* v. *Preston*, 325 N.C. 438, 449 (1989) (citing *State* v. *Arrington*, 311 N.C. 633, 643 (1984). North Carolina courts "have

the authority to construe our own constitution differently from the construction by the United States Supreme Court of the Federal Constitution, as long as our citizens are thereby afforded no lesser rights than they are guaranteed by the parallel federal provision." *Harper*, 2022 N.C. LEXIS 166, at *113 (quoting *Stephenson*, 355 N.C. at 381). And only North Carolina courts can provide conclusive guidance on the legal standards to be applied in analyzing questions under the North Carolina Constitution. *See Evans* v. *Cowan*, 122 N.C. App. 181 (1996).

North Carolina courts may "grant relief under the state constitution 'in circumstances under which no relief might be granted' under the federal constitution." *Evans*, 122 N.C. App. at 184 (quoting *Lowe* v. *Tarble*, 313 N.C. 460 (1985)); *see also Holmes*, 270 N.C. App. at 15 (requiring our state courts to make an "independent determination" of a plaintiff's claims under the North Carolina Constitution) (quoting *Evans*, 122 N.C. App. at 183-84). This is especially the case with legislation implicating voting rights, because this Court has made clear that the North Carolina "constitution provides greater protection of voting rights than the federal Constitution." *Harper*, 2022 N.C. LEXIS 166 at *113 (quoting *Blankenship* v. *Bartlett*, 363 N.C. 518, 522-24 (2009); *Stephenson*, 355 N.C. at 376, 380-81, 381 n.6); *cf. Harper*, 2022 N.C. LEXIS at *169 (discussing the "dispositive strength of the [North Carolina] Free Elections Clause" in preventing legislative action that places inhibitions or constraints on electoral contests) (Morgan, J., concurring).

For those reasons, the *Raymond* court's conclusion that, for example, racial disparities in ID possession rates under S.B. 824 are mitigated by the law's reasonable impediment provision or "free ID" offerings, do not control here. To the contrary, as the Court of Appeals acknowledged when interpreting the North Carolina Constitution at an earlier stage in this case, S.B. 824 bears more heavily on African American voters than white voters, because those voters are more likely than white voters to have to take extra steps to obtain an ID, complete a reasonable impediment ballot, or risk voting by provisional ballot. The federal courts, including *Raymond*, may consider those additional barriers between a voter and the ballot box too *de minimis* to give rise to constitutional injury or an inference of discriminatory intent, but North Carolina courts do not. *See Holmes*, 270 N.C. App. at 30-32. Indeed, the *Holmes* court distinguished a number of federal decisions on which Appellants again rely in reaching its conclusion that S.B. 824 would bear more heavily on African American voters than on white voters who lack a qualifying ID. *Id.* (distinguishing *Lee* and *South Carolina*).

The *Raymond* court's holdings, in particular, are distinguishable because they were made based on an entirely different record, and in a different procedural posture from this case. *Raymond* is based on a preliminary, pretrial record. *Raymond*, 981 F.3d at 301. The trial court's ruling, by comparison, was based on a full and final record assembled through substantial dis-

covery and a three-week bench trial including the testimony of multiple witnesses and hundreds of exhibits. Evidence adduced at trial in this case that was not before the *Raymond* court includes (but is by no means limited to):

- The expert testimony of Sabra Faires concerning the aberrational legislative processes that led to the enactment of S.B. 824. As a result, the *Raymond* court was not informed of the myriad ways that the sequence of events leading to S.B. 824's passage, and its legislative history, were unusual.
- The expert testimony of Dr. Kevin Quinn showing the disproportionate rates at which African American voters lack qualifying ID compared to white voters, and the extent to which the forms of ID added to S.B. 824 failed to remediate that disparity. The *Raymond* court thus did not know the true impact of S.B. 824's ID requirements, or the extent to which the law would disproportionately place additional barriers between African American voters and the ballot box, as compared to white voters.
- The expert testimony of Dr. Ariel White concerning the disproportionate impact that reasonable impediment provisions like S.B. 824's have had and can have on African American voters—testimony that the trial court credited, and which undermines the *Raymond* court's

conclusion that S.B. 824's reasonable impediment provision remediates any disparate impact caused by racial disparities in ID possession rates.

- Documents initially withheld by Legislative Defendants on grounds of legislative privilege, and testimony from multiple legislator witnesses, including supporters and opponents of S.B. 824. Without this evidence, the *Raymond* court was unaware that Legislative Defendants' star witness, former Senator Joel Ford, did not understand key provisions in the bill that were critical to his decision to sponsor S.B. 824, and did not know that Senator Ford's Republican colleagues failed to alert him to his misunderstanding, despite recognizing it themselves. The *Raymond* court likewise did not have before it the testimony of Democratic members of the legislature who testified in clear and certain terms that the process that led to S.B. 824's enactment was not bipartisan in any meaningful sense of the term. All of that evidence badly undermines the Fourth Circuit's conclusion that the legislative history of S.B. 824 points away, rather than towards, a finding of discriminatory intent.
- Admissions, wrought through the cross-examination of Appellants' expert trial witness, Dr. Callanan, confirming (i) that the Republican supermajority acted during the lame-duck session in order to avoid passing a "watered down" version of voter ID—i.e., to pass a law that

> would restrict access to the ballot more than a law passed by a truly bipartisan legislature; (ii) that it would be rational to expect a party in power to attempt to entrench itself by enacting laws targeting African American voters, if those voters reliably cast ballots for the opposition; and (iii) that a voting law intended to target one racial group would undermine, rather than enhance, voter confidence. That testimony, unavailable to the *Raymond* court, obliterates Appellants' assertions that the process leading to S.B. 824's enactment was unexceptional or that the law would serve legitimate ends.

Finally, *Raymond* is fundamentally distinguishable because the trial court did not "improperly flip[] the burden of proof at the first step of its analysis" by requiring Appellants to bear the risk of non-persuasion at the first step of the *Arlington Heights* process. *See* 981 F.3d at 303. As discussed above, the majority in reaching its decision correctly applied the two-step burden-shifting framework established by *Arlington Heights*, consistent with the Fourth Circuit's discussion of that standard and that of this Court in *Holmes*. *See Raymond*, 981 F.3d at 303; *Holmes*, 270 N.C. App. 7 at 16-20.

In light of these many distinctions, it is hardly surprising that the *Raymond* court reached a different conclusion than the trial court in this case. The task for this Court, then, is not to blindly defer to *Raymond* (or any other federal decision analyzing a different law, based on a different record), but to evaluate the findings of fact made by the trial court and determine whether they

support the conclusion that S.B. 824 was enacted in part because of an impermissible intent to target African American voters for political gain. For all of the reasons discussed above, the answer to that question is "yes," and this Court should affirm the trial court's judgment.

CONCLUSION

The Superior Court's judgment and injunction barring the implementation of S.B. 824 should be affirmed.

Respectfully submitted, this the 9th day of March, 2022.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 28(j) of the North Carolina Rules of Appellate Procedure and the Court's 28 February 2022 Order, the undersigned counsel certifies that the foregoing Brief of Plaintiffs-Appellees, which was prepared using a 12-point proportionally spaced font with serifs, is less than 15,000 words (excluding covers, captions, indexes, tables of authorities, counsel's signature block, certificates of service, this certificate of compliance, and appendixes) as reported by Microsoft Word.

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CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing Petition for Discretionary Review Prior to Determination by the Court of Appeals was served upon all parties by electronic mail addressed to the following:

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