NO. 342PA19-2 TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

***********************************************

JABARI HOLMES, FRED CULP, DANIEL E. SMITH, BRENDON JADEN PEAY,[1] SHAKOYA CARRIE BROWN, and PAUL KEARNEY, SR.,

Plaintiffs-Appellees,

v.

TIMOTHY K. MOORE in his official capacity as Speaker of the North Carolina House of Representatives; PHILIP E. BERGER in his official capacity as President Pro Tempore of the North Carolina Senate; DAVID R. LEWIS,[2] in his official capacity as Chairman of the House Select Committee on Elections for the 2018 Third Extra Session; RALPH E. HISE, in his official capacity as Chairman of the Senate Select Committee on Election for the 2018 Third Extra Session; THE STATE OF NORTH CAROLINA; and THE NORTH CAROLINA STATE BOARD OF ELECTIONS,

Defendants-Appellants.

From Wake County
No. 18 CVS 15292
COA22-16

***********************************************

# THE STATE OF NORTH CAROLINA & THE NC STATE BOARD OF ELECTIONS' REPLY BRIEF

***********************************************

[1] There is a motion pending to dismiss Jaden Peay as a plaintiff-appellee.

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

## TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES .............................. ii

INTRODUCTION ................................................................. 2

ARGUMENT ........................................................................ 4

I. THE FEDERAL CIRCUIT CASES RELIED UPON BY STATE DEFENDANTS ARE PERSUASIVE, IF NOT HIGHLY PERSUASIVE. ............................................ 4

II. THE FOURTH CIRCUIT'S DECISION IN *RAYMOND* IS PARTICULARLY RELEVANT AND HIGHLY PERSUASIVE, GIVEN THAT IT ANALYZED THE VERY SAME LAW AND WAS BASED UPON A SIMILAR, ALBEIT MORE ABBREVIATED RECORD. 9

III. THE TRIAL COURT ERRED IN SHIFTING THE BURDEN TO DEFENDANTS AND IN NOT AFFORDING THE LEGISLATURE THE PRESUMPTION OF GOOD FAITH ........................... 15

CONCLUSION ..................................................................... 19

CERTIFICATE OF SERVICE ................................................ 21

APPENDIX TO REPLY BRIEF INDEX ...................... App. p. 1

## TABLE OF CASES AND AUTHORITIES

**Cases** **Page(s)**

*Abbott v. Perez*, 138 S. Ct. 2305 (2018) .................................. 15

*Blankenship v. Bartlett*,
363 N.C. 518, 681 S.E.2d 759 (2009) .................................. 5

*Bulova Watch Co. v. Brand Distribs. of N. Wilkesboro, Inc.*,
285 N.C. 467, 206 S.E.2d 141 (1974) .................................. 5

*Harper v. Hall*, ___ N.C. ___, 2022-NCSC-17 .......................... 5

*Holmes v. Moore*,
270 N.C. App. 7, 840 S.E.2d 244 (2020) ........................... 6

*In re B.L.H.*, 376 N.C. 118, 852 S.E.2d 91 (2020) ..................... 6

*Lee v. Virginia State Bd. of Elections*,
843 F.3d 592 (4th Cir. 2016) ............................................ 16

*Miller v. Johnson*, 515 U.S. 900 (1995) .................................. 15

*N.C. State Conf. of the NAACP v. McCrory*,
831 F.3d 204 (4th Cir. 2016) .................................... passim

*N.C. State Conf. of the NAACP v. Raymond*,
981 F.3d 295 (4th Cir. 2020) .................................... passim

*State v. Cooke*, 248 N.C. 485, 103 S.E. 2d 846 (1958) ........... 10

*State v. Watson*, 258 N.C. App. 347, 812 S.E.2d 392, *pet. disc. review dismissed,* 248 N.C. 485, 813 S.E.2d 852 (2018) ... 10

*Stephenson v. Bartlett*,
355 N.C. 354, 562 S.E.2d 377 (2002)..................................5

*Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977) .......................3, 5

**Constitutional Provisions**

N.C. Const. art. I, § 19...........................................................5

N.C. Const. art. VI, § 2(4)..................................................... 8

N.C. Const. art. VI, § 3(2) ..................................................... 8

**Session Laws**

N.C. Session Law 2013-381,
House Bill 589.........................................................passim

N.C. Session Law 2018-144,
Senate Bill 824.........................................................passim

NO. 342PA19-2 TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

*************************************************

| JABARI HOLMES, FRED CULP, DANIEL E. SMITH, BRENDON JADEN PEAY,[3] SHAKOYA CARRIE BROWN, and PAUL KEARNEY, SR.,<br><br>Plaintiffs-Appellees,<br><br>v.<br><br>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,[4] 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,<br><br>Defendants-Appellants. | From Wake County<br>No. 18 CVS 15292<br>COA22-16 |
|---|---|

*************************************************

THE STATE OF NORTH CAROLINA &
THE NC STATE BOARD OF ELECTIONS' REPLY BRIEF

*************************************************

[3] There is a motion pending to dismiss Jaden Peay as a plaintiff-appellee.

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

## INTRODUCTION

State Defendants' arguments in their opening brief showed that North Carolina Session Law 2018-144, Senate Bill 824 ("S.B. 824"). does not violate the North Carolina Constitution. As determined by the dissenting judge on the three-judge panel, "the totality of the competent evidence presented" at the trial below "fails to support a finding that the General Assembly acted with racially discriminatory intent" in passing S.B. 824. (Rp. 1104) This Court should reverse the decision of the trial court majority below.

Plaintiffs' contentions to the contrary are unavailing for the reasons in State Defendants' opening brief. Additionally, in this reply, State Defendants present a concise rebuttal to three of the contentions in Plaintiffs' brief.

First, Plaintiffs are correct that this Court is not bound by United States Supreme Court and federal circuit cases when construing the North Carolina Constitution, even where a state constitutional provision is identical to one in the federal Constitution. However, federal cases are highly persuasive to this Court's decision here. This is especially true since Plaintiffs do not rely upon any cases finding a voter-ID law similar to S.B. 824 unconstitutional. They instead rely on the decision in *N.C. State Conf. of the NAACP v. McCrory*, 831

F.3d 204 (4th Cir. 2016), which concerned North Carolina's prior and very different voter-ID law.

What is more, Plaintiffs and Defendants agree that the determination of the key issue in this case, discriminatory intent, follows the *Arlington Heights* framework. *See Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977). That test was developed by the United States Supreme Court under the federal Constitution and has been routinely applied by the federal courts to claims alleging discrimination in the enactment of election regulations and photo ID laws, in particular. In fact, to the extent this Court agrees with the litigants that *Arlington Heights* applies, Plaintiffs cannot disagree that the Court would need to draw from federal decisions in deciding this case, given the relative paucity of relevant decisions from this Court.

Second and relatedly, the decision of the United States Court of Appeals for the Fourth Circuit in *N.C. State Conf. of the NAACP v. Raymond*, 981 F.3d 295 (4th Cir. 2020), is, although not binding, particularly relevant and highly persuasive, as the court in that case analyzed the very same law at issue in the present case and did so under the applicable analytical framework. Moreover,

despite what Plaintiffs argue, the decision in *Raymond* was not "made based upon an entirely different record." (Pls.' Br. at 49) There was substantial overlap in the evidence, and the differences that did exist were not material.

Finally, contrary to Plaintiffs' argument, the trial court erroneously shifted the burden to Defendants and did not afford the Legislature the presumption of good faith. This is manifest in the examples State Defendants referenced in their opening brief, including in the one cited by Plaintiffs.

## ARGUMENT

### I. THE FEDERAL CIRCUIT CASES RELIED UPON BY STATE DEFENDANTS ARE PERSUASIVE, IF NOT HIGHLY PERSUASIVE.

Plaintiffs encourage this Court to ignore federal circuit court cases examining S.B. 824 and similar voter-ID laws in reviewing the trial court's order. They do so by arguing those cases are not binding and by pointing out they analyze those laws under the Equal Protection Clause of the United States Constitution, and not the Equal Protection Clause of the North Carolina Constitution. While not binding, the federal circuit court cases referenced by State Defendants in their brief are persuasive, if not highly persuasive, and should be given due consideration by this Court.

Under the Equal Protection Clause of the North Carolina Constitution,

the State is prohibited from "denying any person equal protection of the law." *Blankenship v. Bartlett*, 363 N.C. 518, 521-22, 681 S.E.2d 759, 762 (2009) (quoting *Stephenson v. Bartlett*, 355 N.C. 354, 377, 562 S.E.2d 377, 393 (2002)); *see also* N.C. Const. art. I, § 19. Even though this clause "mirrors" the Equal Protection Clause in the Federal Constitution, it is this Court which "'ha[s] the authority to construe [the State Constitution] differently from the construction by the United States Supreme Court of the Federal Constitution.'" *Harper v. Hall*, ___ N.C. ___, 2022-NCSC-17, ¶ 143 (citation and internal quotation marks omitted). Nonetheless, this Court has recognized that the meaning the United States Supreme Court gives to a term in the federal Constitution which is identical to a term in the state Constitution is "highly persuasive" authority. *Blankenship*, 363 N.C. at 521-22, 681 S.E.2d at 762 (quoting *Bulova Watch Co. v. Brand Distribs. of N. Wilkesboro, Inc.*, 285 N.C. 467, 474, 206 S.E.2d 141, 146 (1974)).

The analytical framework the United States Supreme Court set forth in *Village of Arlington Heights*, 429 U.S. 252, resulted from the high court giving meaning to the federal Equal Protection Clause in the context of a racial discrimination claim. In accordance with the deference this Court shows to

the United States Supreme Court's decisions interpreting the federal Constitution, this Court should consider *Arlington Heights* highly persuasive here. After all, even Plaintiffs agree with Defendants that the *Arlington Heights* analytical framework is the proper framework to give meaning to the state Equal Protection Clause in determining whether S.B. 824 is intentionally discriminatory. (Pls.' Br. p. 3)

The federal circuit court cases relied upon by State Defendants in their opening brief apply the same analytical framework all parties agree applies here. It follows that federal circuit court cases which have applied *Arlington Heights* to cases where plaintiffs have alleged that different states' photo-voter ID law were racially discriminatory are persuasive, if not highly persuasive. Moreover, despite what Plaintiffs imply, it is of no consequence that in overturning the trial court's order denying the preliminary injunction in *Holmes v. Moore*, 270 N.C. App. 7, 840 S.E.2d 244 (2020), the North Carolina Court of Appeals discounted the value of some of the circuit court voter-ID cases. It is well established that this Court is not bound by the Court of Appeals' characterization or interpretation of those or any other cases, *see In re B.L.H.*, 376 N.C. 118, 126, 852 S.E.2d 91, 97 (2020), and the Court of Appeals'

interpretation of those cases was incorrect.

Plaintiffs do not point to or rely upon *any* cases, from this Court or the federal circuits, supporting some type of modified application of *Arlington Heights* in light of the difference between the protections provided for in the state Constitution and those in the federal Constitution. Nor do Plaintiffs point to any federal circuit court case concluding a state's voter-ID law similar to S.B. 824 violates equal protection principles or, more specifically, fails to pass muster under the *Arlington Heights* framework. This substantially undercuts Plaintiffs' argument that there is no value here in the federal circuit court cases relied upon by State Defendants in their opening brief.

The best examples—for that matter, the only examples—of the application of *Arlington Heights* to claims alleging state voter-ID laws similar to S.B. 824 are intentionally discriminatory are the federal cases cited by State Defendants. And all of those cases support State Defendants' position that North Carolina's voter-ID law does not violate equal protection principles, and that the trial court erred in reaching a conclusion to the contrary.

Tellingly, the only voter-ID case Plaintiffs highlight in supporting their position is *McCrory*, 831 F.3d 204. In fact, Plaintiffs, like the trial court did

below, heavily rely on that decision. (*See, e.g.*, Rpp. 906-17, 975-77)

But, as State Defendants argued at length in their opening brief, the voter-ID law examined in *McCrory*, North Carolina Session Law 2013-381, House Bill 589 ("H.B. 589"), and the process by which it was passed, were vastly different from the law at issue in this case, S.B. 824. (State Defs.' Br. pp. 18-21, 47-52) Indeed, the process of that law's enactment directly involved North Carolina's citizens, who voted to add an amendment to the state Constitution requiring a photo ID for in-person voting, and mandating that the General Assembly enact a photo-ID law. *See* N.C. Const. art. VI, §§ 2(4), 3(2).

More importantly, the very same court which decided *McCrory* went on to hold it was unlikely that the plaintiffs challenging S.B. 824 in federal court would be able to "carry their burden of proving that the General Assembly acted with discriminatory intent in passing [that law]." *Raymond*, 981 F.3d at 310 (reversing preliminary injunction. In doing so, the Fourth Circuit explained that its prior invalidation in *McCrory* of North Carolina's 2013 photo-ID law, H.B. 589, was not dispositive of the question of the legislature's intent in enacting S.B. 824. *Raymond*, 981 F.3d at 303. As the Fourth Circuit

pointed out in *Raymond*, it had in fact "made clear in *McCrory"* that its holding in that case "did not 'freeze North Carolina election law in place.'" *Raymond*, 981 F.3d at 311 (quoting *McCrory*, 831 F.3d at 241). This directive was seemingly ignored by both the trial court majority and Plaintiffs in this case.

Plaintiffs' argument that federal circuit court cases, including the Fourth Circuit's decision in *Raymond*, have no place in this Court's analysis is incorrect.

## II. THE FOURTH CIRCUIT'S DECISION IN *RAYMOND* IS PARTICULARLY RELEVANT AND HIGHLY PERSUASIVE, GIVEN THAT IT ANALYZED THE VERY SAME LAW AND WAS BASED UPON A SIMILAR, ALBEIT MORE ABBREVIATED RECORD.

State Defendants did not argue in their brief that the Fourth Circuit's opinion in *Raymond* controls this Court's decision in the present case. It does not. They did place substantial reliance on that decision, however, asking the Court to follow the conclusions and reasoning of the Fourth Circuit, and justifiably so. As indicated above, in *Raymond*, the Fourth Circuit applied the *Arlington Heights* analytical framework, which is the standard all parties agree should be used here, to analyze the very same law at issue in this case.

Furthermore and as indicated above, the circuit court in *Raymond* undertook that analysis after having examined, under that same framework,

North Carolina's prior voter-ID law, H.B. 589 which it found did violate equal protection principles. *See McCrory*, 831 F.3d at 215.

Plaintiffs are correct that the Fourth Circuit's decision in *Raymond* was based upon a pretrial record, as it resulted from an appeal of the district court's order granting a motion to preliminarily enjoin S.B. 824. *See Raymond*, 981 F.3d at 301. This is no reason for this Court to disregard that decision, however.

In fact, the pretrial record in *Raymond* was more extensive than Plaintiffs suggest. While certainly not as robust as the record in the present case, the Joint Appendix in *Raymond* was anything but sparse. (*See N.C. State Conf. of the NAACP v. Raymond*, No. 20-1092, Docket Nos. 35-1 to -6 (4th Cir.))[5]

---

[5] North Carolina's appellate courts can take judicial notice of documents, like those in the Fourth Circuit's Joint Appendix from *Raymond*, which are filed in federal court and are publicly available through the Administrative Office of the U.S. Courts' online Public Access to Court Electronic Records database, otherwise known as PACER. *See State v. Watson*, 258 N.C. App. 347, 352, 812 S.E.2d 392, 395 (providing that "North Carolina law clearly contemplates that our courts, both trial and appellate, may take judicial notice of documents filed in federal courts" and noting that the documents about which the court took judicial notice in that case were available on PACER), *pet. disc. review dismissed,* 248 N.C. 485, 813 S.E.2d 852 (2018); *cf. State v. Cooke*, 248 N.C. 485, 493, 103 S.E. 2d 846, 852 (1958) (gleaning some of the facts supporting the decision in that case from a published federal court decision). Those portions

Also, the record in *Raymond* was not, as Plaintiffs describe it, "entirely different" from the record in the present case. (Pls.' Br. p. 49) A review of the content of the Fourth Circuit's opinion in *Raymond* itself makes that evident. *See Raymond*, 981 F.3d 295.

Finally, Plaintiffs provide in their brief a list of evidence which they claim was newly adduced at the trial in the present case, and which they point out was not in the record in *Raymond* for the Fourth Circuit to consider. That may be, but it is not that this was entirely novel evidence as there was similar evidence in the record in *Raymond*, albeit in more abbreviated forms.

For example, Plaintiffs' expert witness Sabra Faires, a previous member of the legislative staff at the General Assembly, testified at trial in the present case regarding, among other things, the 2018 legislative session. (Vol. 2 Tp. 404) In Ms. Faires's opinion, the 2018 legislative session was "aberrational" when compared to the General Assembly's "general practice." (Vol. 3 Tp. 478) As Plaintiffs point out, Ms. Faires's testimony was not in the record considered by the Fourth Circuit in *Raymond*.

---

of the Joint Appendix in *Raymond* referred to here are contained in the Appendix of this Reply Brief.

But there was similar evidence in that record about that same legislative session. In a declaration the plaintiffs in *Raymond* provided to support their motion for a preliminary injunction, North Carolina Senator Teresa Van Duyn declared, "The legislative process relating to S.B. 824 was irregular [and] rushed . . . ." (*Raymond*, No. 20-1092, Docket No. 35-1, JA p. 472 ¶ 15 (App. p. 18)) In his expert report supporting the same filing, political science professor Dr. Allan J. Lichtman opined, among other things, that the General Assembly's enactment of legislation in the 2018 lame-duck session was even more rushed than the passage of H.B. 589 in 2013. (*Id.* at 214)

Moreover, Ms. Faires's assessment that the General Assembly's enactment of S.B. 824 during the 2018 legislative session was "aberrational" when compared to its "general practice" was a non sequitur and would have had no effect on the decision in *Raymond*. (Vol. 3 Tp. 478) The legislature passed other bills during that same 2018 lame-duck legislative session. (R9(d)p. 1003, ¶ 25) And Ms. Faires herself could not articulate any distinction between why the legislature chose to pass S.B. 824 during a lame-duck session and why it also chose to pass other bills during that same session. (Vol. 3 Tpp. 500, 502)

The Fourth Circuit did not have in the record it examined in *Raymond* testimony from Plaintiffs' expert Dr. Kevin Quinn showing what Plaintiffs note in their brief was "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." (Pls.' Br. p. 50) But it did have an expert report from political science professor Dr. Barry C. Burden, who opined that Black and Hispanic voters were less likely to have acceptable forms of photo ID, among other related opinions. (*Raymond*, No. 20-1092, Docket No. 35-1, JA pp. 413-14 (App. pp. 15-16))

Dr. Ariel White's testimony was not included in the record in *Raymond* either. But her testimony did not provide competent evidence to support the trial court's findings. In particular, as explained in detail in the State Defendants' opening brief, those portions of her testimony regarding the impact of potential poor enforcement of S.B. 824 were largely speculative and added little to no actual support for Plaintiffs' position that S.B. 824 would have a disparate impact. (*See* State Defs.' Br. pp. 21-22, 42-46) Also, in *Raymond*, in assessing the potential impact of poor enforcement of S.B. 824, the Fourth Circuit noted correctly that "an inquiry into the legislature's intent

in *enacting* a law should not credit disparate impact that may result from poor enforcement of that law." *Raymond*, 981 F.3d at 310 (emphasis in original). In light of this, assuredly, Dr. White's testimony about a handful of anecdotal accounts related to public officials allegedly failing to discharge their duties in implementing the prior voter-ID law, H.B. 589, in no way shows the enactment of S.B. 824 would lead to disparate impact, much less that such a disparate impact from occasional improper administration was *intended* by the legislature.

Excerpts from a deposition of Senator Ford was also included among the materials before the Fourth Circuit. *Raymond*, No. 20-1092, Docket No. 35-2, JA pp. 668-84 (*See* App. pp. 6, 20) And, somewhat similar to what Plaintiffs point out about his trial testimony in the present case, portions of Senator Ford's deposition testimony in *Raymond* also indicate he possibly had some misunderstanding about when free photo IDs would be provided under S.B. 824. (*See, e.g.*, *id.* at 750, 761, 773 (App. pp. 21-23))

Ultimately, there is simply no reason for this Court to disregard the reasoning in *Raymond*. It analyzed the same law at issue in this case, on a similar albeit abbreviated record, under the same analytical framework all

parties agree reflects the meaning of the state Constitution's Equal Protection Clause pertaining to the claim at issue. It is thus particularly relevant and highly persuasive here, despite Plaintiffs' unconvincing suggestion to the contrary.

## III. THE TRIAL COURT ERRED IN SHIFTING THE BURDEN TO DEFENDANTS AND IN NOT AFFORDING THE LEGISLATURE THE PRESUMPTION OF GOOD FAITH.

For a discriminatory intent claim, "the burden of proof lies with the challenger, not the State." *Abbott v. Perez*, 138 S. Ct. 2305, 2324 (2018). And, "[a]lthough race-based decisionmaking is inherently suspect, until a claimant makes a showing sufficient to support that allegation the good faith of a state legislature must be presumed." *Miller v. Johnson*, 515 U.S. 900, 915 (1995) (citations omitted). Courts must therefore "heed the presumption of legislative good faith and the allocation of the burden of proving intentional discrimination" in performing the discriminatory-intent analysis. *Abbott*, 138 S. Ct. at 2326 n.18.

Contrary to what Plaintiffs contend in their brief, throughout the trial court majority's analysis in this case, it shifted the burden of proof to Defendants and failed to adhere to the presumption of legislative good faith.

State Defendants provided several examples of this in their opening brief. (*See* State Defs.' Br. pp. 32, 49, 51)

In one of those examples, State Defendants noted the majority shifted the burden by faulting defendants for "offer[ing] no evidence that including certain IDs would make a difference to overcome the already existing deficiency." (State Defs.' Br. p. 32 (quoting Rp. 940 ¶ 111)) This portion of the majority's order shows it erroneously shifted the burden to Defendants. Plainly stated, Defendants have no burden to offer such evidence.

Moreover, the majority's assertion in this same portion of its order that evidence showing a lack of disparate impact "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" diverges from *Arlington Height*'s disparate impact analysis, which focuses upon the effects of the law. (Rp. 941, ¶¶ 113-14); *see, e.g., Lee v. Virginia State Bd. of Elections*, 843 F.3d 592, 603 (4th Cir. 2016) (concluding Virginia's voter-ID law went "out of its way to make its impact as burden-free as possible," given "[i]t allowed a broad scope of IDs to qualify; it provided free IDs to those who did not have a qualifying ID; it issued free IDs without any

requirement of presenting documentation; and it provided numerous locations throughout the State where free IDs could be obtained").

This also demonstrates yet another way the majority erred by not evaluating the evidence in accordance with the presumption of legislative good faith. As State Defendants pointed out in their opening brief, findings like the one noted above leave the legislature in a quandary, given that in *McCrory*, the Fourth Circuit had previously rebuked the North Carolina legislature for requesting such data before passing H.B. 589. *See McCrory*, 831 F.3d at 214. The majority cannot have it both ways. It cannot impute knowledge of racial data possessed by the 2013 legislators to the 2018 legislators to conclude that the 2018 legislators knew how to act with racial intent, and at the same time conclude the 2018 legislators were prohibited from asserting a lack of disparate impact because they failed to request the same data.

And the majority's assertion that Defendants "offer[ed] no evidence that including certain IDs would make a difference to overcome the already existing deficiency" is incorrect. (Rp. 940 ¶ 111) For example, Defendants offered testimony that pursuant to S.B. 824, a number of the IDs which were

considered qualifying were "more likely to be held by African Americans . . . than by whites or in some cases more likely to be held by racial minorities generally than by white voters." (Vol. 8 Tp. 1407) In fact, testimony from Plaintiffs' own expert, Dr. Kevin Quinn, showed more African-American North Carolinian voters had IDs qualifying under S.B. 824 than under H.B. 589. (Vol. 4 Tpp. 717-18) Specifically, according to his testimony, "the percentage of African American voters who lacked ID went down from 9.6 percent to 7.61 percent under SB 824." (*Id.* at 718)

For the reasons discussed in State Defendants' opening brief, it was Plaintiffs, not Defendants, who failed to meet their burden of proof under the *Arlington Heights* framework. Tellingly, as the dissent points out, Plaintiffs failed to establish any of the Plaintiffs would be unable to vote under S.B. 824, and in fact, the evidence at trial showed they would have multiple ways to vote under S.B. 824. (Rpp. 1048-50 ¶¶ 178-97) Even more telling, as the dissent also points out, they have never identified a form of ID, or any combination of IDs for that matter, which would create a lesser disparate impact than S.B. 824. (Rp. 1003 ¶ 91) In Plaintiff's view, no form of voter ID law, no matter how ameliorative, would ever be acceptable to them. This evinces a fundamental

flaw with Plaintiffs' position, given the legislature is under a constitutional mandate to pass a voter-ID law.

The trial court majority shifted the burden of proof to Defendants and failed to adhere to the presumption of legislative good faith. This is legal error that requires reversal on appeal. *See generally Raymond*, 981 F.3d 295.

**CONCLUSION**

For the reasons discussed above and in State Defendants' opening brief, North Carolina's voter-ID law does not violate the Equal Protection Clause of the North Carolina Constitution. State Defendants therefore respectfully request that the Court reverse the trial court's judgment.

Electronically submitted this the 28th day of March, 2022.

JOSHUA H. STEIN
ATTORNEY GENERAL

Electronically Submitted
Terence Steed
Special Deputy Attorney General
N.C. State Bar No. 52809
Email: tsteed@ncdoj.gov

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

Laura McHenry
Senior Deputy Attorney General
N.C. State Bar No. 45005
Emails: lmchnenry@ncdoj.gov

Mary Carla Babb
Special Deputy Attorney General
N.C. State Bar No. 25731
Email: mcbabb@ncdoj.gov

N.C. Department of Justice
P.O. Box 629
Raleigh, N.C. 27602
Phone: (919) 716-6820

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day served the foregoing BRIEF upon the parties to this action by electronic mail, addressed as follows:

**Counsel for the Plaintiffs:**

Allison J. Riggs
Jeffrey Loperfido
Southern Coalition For Social Justice
1415 W. Highway 54, Suite 101
Durham, NC 27707
allisonriggs@scsj.org
jeff@southerncoalition.org

Andrew J. Ehrlich*
Paul D. Brachman
Jane B. O'Brien
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON, LLP
1285 Avenue of the Americas
New York, NY 10019-6064
aehrlich@paulweiss.com
pbrachman@paulweiss.com
jobrien@paulweiss.com

**Counsel for Legislative Defendants:**

Nathan A. Huff
Phelps Dunbar LLP
GlenLake Four
4140 ParkLake Avenue, Suite 100
Raleigh, NC 27612
Nathan.Huff@phelps.com

COOPER & KIRK LLP
Nicole Jo Moss
David Thompson*
Peter Patterson*
Haley N. Proctor*
Joseph Masterson*
John Tienken*
Nicholas Varone*
1523 New Hampshire Ave., N.W.
Washington, DC 20036
nmoss@cooperkirk.com
dthompson@cooperkirk.com
ppatterson@cooperkirk.com
hproctor@cooperkirk.com
jmasterman@cooperkirk.com
nvarone@cooperkirk.com
jtienken@cooperkirk.com

Electronically submitted this the 28th day of March, 2022.

Electronically Submitted
Mary Carla Babb
Special Deputy Attorney General

# APPENDIX TO REPLY BRIEF

## INDEX

Excerpts from Joint Appendix in
*N.C. State Conf. of the NAACP v. Raymond*,
No. 20-1092, Docket Nos. 35-1 to -6 (4th Cir.)

Joint Appendix Volume I ..... App. p. 2

Joint Appendix Table of Contents ..... App. p. 5

Excerpt from Preliminary Expert Report
of Allan J. Lichtman ..... App. p. 12

Excerpt from Preliminary Expert Report
of Dr. Barry C. Burden ..... App. p. 14

Excerpt from Declaration of
Teresa Van Duyn ..... App. p. 17

Joint Appendix Volume II ..... App. p. 19

Excerpt from Deposition of Joel Ford ..... App. p. 20

No. 20-1092

In the
United States Court of Appeals
for the Fourth Circuit

NORTH CAROLINA STATE CONFERENCE OF THE NAACP; CHAPEL HILL – CARRBORO NAACP; GREENSBORO NAACP; HIGH POINT NAACP; MOORE COUNTY NAACP; STOKES COUNTY BRANCH OF THE NAACP; WINSTON SALEM – FORSYTH COUNTY NAACP,

*Plaintiffs–Appellees,*

v.

KEN RAYMOND, in his official capacity as a member of the North Carolina State Board of Elections; STELLA ANDERSON, in her official capacity as Secretary of the North Carolina State Board of Elections; DAMON CIRCOSTA, in his official capacity as Chair of the North Carolina State Board of Elections; JEFFERSON CARMON, in his official capacity as a member of the North Carolina State Board of Elections; DAVID C. BLACK, in his official capacity as a member of the North Carolina State Board of Elections,

*Defendants–Appellant*s.

On Appeal from the United States District Court
for the Middle District of North Carolina

**Joint Appendix Index – Volume I**

March 9, 2020 (counsel listed on reverse)

John C. Ulin
ARNOLD & PORTER KAYE SCHOLER LLP
777 S. Figueroa St., 44th Floor
Los Angeles, CA 90017-5844
(213) 243-4228
john.ulin@arnoldporter.com

James W. Cooper
Jeremy C. Karpatkin
Andrew T. Tutt
Stephen K. Wirth
ARNOLD & PORTER KAYE
SCHOLER LLP
601 Massachusetts Ave., NW Washington, DC 20001
(202) 942-5000
james.cooper@arnoldporter.com

Irving Joyner
P.O. Box 374
Cary, NC 27512
(919) 319-8353
ijoyner@nccu.edu

Penda D. Hair
FORWARD JUSTICE
P.O. Box 42521
Washington D.C. 20015
(202) 256-1976 phair@forwardjustice.org

Caitlin A. Swain
FORWARD JUSTICE
400 W. Main St., Suite 203
Durham, NC 27701
(919) 323-3889
cswain@forwardjustice.org

*Counsel for Plaintiffs-Appellees North Carolina State Conference of the NAACP, Chapel Hill-Carrboro NAACP, Greensboro NAACP, High Point NAACP, Moore County NAACP, Stokes County Branch of the NAACP, Winston Salem-Forsyth County NAACP*

JOSHUA H. STEIN
ATTORNEY GENERAL

Amar Majmundar
Senior Deputy Attorney General
amajmundar@ncdoj.gov
Olga E. Vysotskaya de Brito
Special Deputy Attorney General
ovysotskaya@ncdoj.gov
Paul M. Cox
Special Deputy Attorney General
pcox@ncdoj.gov
N.C. DEPARTMENT OF JUSTICE
Post Office Box 629
Raleigh, NC 27602
(919) 716-0185

*Counsel for State Board Defendants-Appellants*

# TABLE OF CONTENTS

**Record Materials** **Page(s)**

**Vol. I**

District Court Docket Sheet (retrieved March 6, 2020) ............................... JA 1

Complaint, Doc. 1 (Dec. 20, 2018) ............................................................ JA 38

State Bd. Defs.' Answer to Compl., Doc. 59 (July 16, 2019) ........................ JA 75

Pls.' Mot. for Prelim. Inj.,
Doc. 91 (Oct. 9, 2019) ............................................................................ JA 93

Pls.' Exs. in Support of Mot. for Prelim. Inj.

Expert Report of Allan Lichtman, Ex. 1 to Am. Prelim. Inj.
Mem., Doc. 91-1 (Oct. 9, 2019) ................................................. JA 139

Expert Report of Jim Leloudis, Ex. 2 to Am. Prelim. Inj. Mem.,
Doc. 91-2 (Oct. 9, 2019) ........................................................... JA 290

Decl. of Henry M. Michaux, Ex. 3 to Am. Prelim. Inj. Mem.,
Doc. 91-3 (Oct. 9, 2019) ........................................................... JA 375

Expert Report of Barry C. Burden, Ex. 4 to Am. Prelim. Inj.
Mem., Doc. 91-4 (Oct. 9, 2019) ................................................. JA 385

Decl. of Floyd McKissick, Jr., Ex. 5 to Am. Prelim. Inj. Mem.,
Doc. 91-5 (Oct. 9, 2019) ........................................................... JA 442

Decl. of Robert Reives II, Ex. 6 to Am. Prelim. Inj. Mem.,
Doc. 91-6 (Oct. 9, 2019) ........................................................... JA 456

Decl. of Teresa Van Duyn, Ex. 7 to Am. Prelim. Inj. Mem.,
Doc. 91-7 (Oct. 9, 2019) ........................................................... JA 467

Decl. of Rev. T. Anthony Spearman, Ex. 8 to Am. Prelim. Inj. Mem., Doc. 91-8 (Oct. 9, 2019) .......... JA 478

Decl. of Marcia Helen Morey, Ex. 9 to Am. Prelim. Inj. Mem., Doc. 91-9 (Oct. 9, 2019) .......... JA 500

**Vol. II**

Expert Report of Lorraine C. Minnite, Ex. 10 to Am. Prelim. Inj. Mem., Doc. 91-10 (Oct. 9, 2019) .......... JA 508

Expert Report of Michael C. Herron, Ex. 11 to Am. Prelim. Inj. Mem., Doc. 91-11 (Oct. 9, 2019) .......... JA 564

Decl. of Courtney Patterson, Ex. 12 to Am. Prelim. Inj. Mem., Doc. 91-12 (Oct. 9, 2019) .......... JA 619

Decl. of Kate Fellman, Ex. 13 to Am. Prelim. Inj. Mem., Doc. 91-13 (Oct. 9, 2019) .......... JA 623

Defs.' Exs. in Opp'n to Mot. for Prelim. Inj.

Sess. Law 2018-144 (Senate Bill 824), Ex. 1 to Resp. to Pls.' Mot. for Prelim. Inj., Doc. 97-2 (Oct. 30, 2019) .......... JA 637

Sess. Law 2019-4 (Senate Bill 786), Ex. 2 to Resp. to Pls.' Mot. for Prelim. Inj., Doc. 98-1 (Oct. 31, 2019) .......... JA 655

Sess. Law 2019-22 (Senate Bill 646), Ex. 3 to Resp. to Pls.' Mot. for Prelim. Inj., Doc. 97-4 (Oct. 30, 2019) .......... JA 658

Sess. Law 2018-12 (Senate Bill 1092), Ex. 4 to Resp. to Pls.' Mot. for Prelim. Inj., Doc. 97-5 (Oct. 30, 2019) .......... JA 665

Excerpts from Dep. of Joel Ford, Ex. 5 to Resp. to Pls.' Mot. for Prelim. Inj., Doc. 97-6 (Oct. 30, 2019) .......... JA 668

Cert. of N.C. Const. Amends., Ex. 6 to Resp. to Pls.' Mot. for Prelim. Inj., Doc. 97-7 (Oct. 30, 2019) ...................... JA 785

N.C. State Bd. of Elections Webpage, Ex. 7 to Resp. to Pls.' Mot. for Prelim. Inj., Doc. 97-8 (Oct. 30, 2019) ...................... JA 792

Aff. of Karen Brinson Bell and Aff. Exhibits, Ex. 8 to Resp. to Pls.' Mot. for Prelim. Inj., Doc. 97-9 (Oct. 30, 2019) ............. JA 795

**Vol. III**

Sess. Law 2013-381 (House Bill 589), Ex. 9 to Resp. to Pls.' Mot. for Prelim. Inj., Doc. 97-10 (Oct. 30, 2019) ................... JA 990

Excerpts from Dep. of Kim Strach, Ex. 10 to Resp. to Pls.' Mot. for Prelim. Inj., Doc. 97-11 (Oct. 30, 2019) ........................... JA 1042

Senate Bill 824 (Introduced Draft), Ex. 11 to Resp. to Pls.' Mot. for Prelim. Inj., Doc. 97-12 (Oct. 30, 2019) ........................... JA 1051

Excerpts from Dep. of Allan Lichtman, Ex. 12 to Resp. to Pls.' Mot. for Prelim. Inj., Doc. 97-13 (Oct. 30, 2019) ........... JA 1068

Carter-Baker Report, Ex. 13 to Resp. to Pls.' Mot. for Prelim. Inj., Doc. 97-14 (Oct. 30, 2019) ............................ JA 1101

Nat'l Conf. of State Legis., Voter Identification Requirements | Voter ID Laws, Ex. 14 to Resp. to Pls.' Mot. for Prelim. Inj., Doc. 97-15 (Oct. 30, 2019) ............................................ JA 1214

N.C. Gen. Assemb. Consolidated Hearing Trs., Ex. 15 to Resp. to Pls.' Mot. for Prelim. Inj., Doc. 97-16 (Oct. 30, 2019) (pages 1 – 257) ......................................................... JA 1244

**Vol. IV**

N.C. Gen. Assemb. Consolidated Hearing Trs., Ex. 15 to Resp. to Pls.' Mot. for Prelim. Inj., Doc. 97-16 (Oct. 30, 2019) (pages 258-711)........................................................................ JA 1501

**Vol. V**

Order, N.C. State Bd. of Elections (Mar. 3, 2019), Ex. 16 to Resp. to Pls.' Mot. for Prelim. Inj., Doc. 97-17 (Oct. 30, 2019) .......JA 1955

Aff. of Kory Goldsmith and Aff. Exhibits, Ex. 17 to Resp. to Pls.' Mot. for Prelim. Inj., Doc. 97-18 (Oct. 30, 2019)...........JA 2002

Aff. of Joel Ford, Ex. 18 to Resp. to Pls.' Mot. for Prelim. Inj., Doc. 97-19 (Oct. 30, 2019)....................................................JA 2067

N.C. Senate Roll Call Vote Tr. #811, Ex. 19 to Resp. to Pls.' Mot. for Prelim. Inj., Doc. 97-20 (Oct. 30, 2019)..................JA 2080

N.C. Senate Roll Call Vote Tr. #1324, Ex. 20 to Resp. to Pls.' Mot. for Prelim. Inj., Doc. 97-21 (Oct. 30, 2019) ..................JA 2082

N.C. House Roll Call Mot. to Concur Vote Tr. for Roll Call #819, Ex. 21 to Resp. to Pls.' Mot. for Prelim. Inj., Doc. 97-22 (Oct. 30, 2019) ..................................................JA 2084

N.C. House Roll Call Mot. to Concur Vote Tr. for Roll Call #1324, Ex. 22 to Resp. to Pls.' Mot. for Prelim. Inj., Doc. 97-23 (Oct. 30, 2019) ..................................................JA 2086

N.C. House Roll Call Mot. to Concur Vote Tr. for Roll Call #824, Ex. 23 to Resp. to Pls.' Mot. for Prelim. Inj., Doc. 97-24 (Oct. 30, 2019) ..................................................JA 2088

Univ. of N.C. School of Gov't, Legis. Reporting Serv., Bill Summaries: S824 Implementation of Voter ID Const. Amendment, Ex. 24 to Resp. to Pls.' Mot. for Prelim. Inj., Doc. 97-25 (Oct. 30, 2019) .......................................... JA 2090

N.C. Dep't of Health and Human Servs. Letter and Supporting Data, Ex. 25 to Resp. to Pls.' Mot. for Prelim. Inj., Doc. 97-26 (Oct. 30, 2019) ....................................................JA 2103

Ex. 6 to Allan Lichtman's Dep., Ex. 26 to Resp. to Pls.' Mot. for Prelim. Inj., Doc. 97-27 (Oct. 30, 2019) ........................... JA 2110

Excerpts to Dep. of Courtney Patterson, Ex. 27 to Resp. to Pls.' Mot. for Prelim. Inj., Doc. 97-28 (Oct. 30, 2019).................. JA 2116

Aff. of Brian Neesby and Aff. Exhibits, Ex. 28 to Resp. to Pls.' Mot. for Prelim. Inj., Doc. 97-29 (Oct. 30, 2019)..................JA 2122

Excerpts and Exhibits to Dep. of Barry C. Burden, Ex. 29 to Resp. to Pls.' Mot. for Prelim. Inj., Doc. 97-30 (Oct. 30, 2019).......JA 2137

N.C. Off. of State Human Res. Letter and Supporting Data, Ex. 30 to Resp. to Pls.'Mot. for Prelim. Inj., Doc. 97-31 (Oct. 30, 2019) .................................................... JA 2164

Excerpts from Dep. of Kathryn Fellman in *Holmes v. Moore*, Ex. 31 to Resp. to Pls.' Mot. for Prelim. Inj., Doc. 97-32 (Oct. 30, 2019) ..........................................................JA 2173

Excerpts from Dep. of Kevin Quinn, Ex. 32 to Resp. to Pls.' Mot. for Prelim. Inj., Doc. 97-33 (Oct. 30, 2019) ................. JA 2194

Decl. of Olga Vysotskaya de Brito, Ex. 33 to Resp. to Pls.' Mot. for Prelim. Inj., Doc. 97-34 (Oct. 30, 2019)..................JA 2206

<u>Pls.' Exs. in Reply in Support of Mot. for Prelim. Inj.</u>

Prelim. Report of Matthew A. Barreto, Ex. A to Pls.' Reply in Support of Mot. for Prelim. Inj., Doc. 108-1 (Nov. 15, 2019) ........ JA 2210

Decl. of Floyd McKissick, Jr., Ex. B to Pls.' Reply in Support of Mot. for Prelim. Inj., Doc. 108-2 (Nov. 15, 2019) ........ JA 2283

Expert Rebuttal Report of Allan Lichtman, Ex. C to Pls.' Reply in Support of Mot. for Prelim. Inj., Doc. 108-3 (Nov. 15, 2019) ........ JA 2287

Decl. of Kathleen Roblez, Ex. D to Pls.' Reply in Support of Mot. for Prelim. Inj., Doc. 108-4 (Nov. 15, 2019) ........ JA 2313

Expert Rebuttal Report of Michael C. Herron, Ex. E to Pls.' Reply in Support of Mot. for Prelim. Inj., Doc. 108-5 (Nov. 15, 2019) ........ JA 2328

Decl. of Alice Carter, Ex. F to Pls.' Reply in Support of Mot. for Prelim. Inj., Doc. 108-6 (Nov. 15, 2019) ........ JA 2359

Decl. of Jeanette Dumas, Ex. G to Pls.' Reply in Support of Mot. for Prelim. Inj., Doc. 108-7 (Nov. 15, 2019) ........ JA 2365

Decl. of Crysten Pickney, Ex. H to Pls.' Reply in Support of Mot. for Prelim. Inj., Doc. 108-8 (Nov. 15, 2019) ........ JA 2369

Decl. of Erin Thompson, Ex. I to Pls.' Reply in Support of Mot. for Prelim. Inj., Doc. 108-9 (Nov. 15, 2019) ........ JA 2372

Decl. of Steve Schewel, Ex. J to Pls.' Reply in Support of Mot. for Prelim. Inj., Doc. 108-10 (Nov. 15, 2019) ........ JA 2376

Excerpts to Dep. of Barry C. Burden, Ex. K to Pls.' Reply in Support of Mot. for Prelim. Inj., Doc. 108-11 (Nov. 15, 2019) ........ JA 2380

Decl. of Thomas Lopez, Ex. L to Pls.' Reply in Support of Mot. for Prelim. Inj., Doc. 108-12 (Nov. 15, 2019) ................. JA 2387

Supplemental Expert Report of Barry C. Burden, Ex. M to Pls.' Reply in Support of Mot. for Prelim. Inj., Doc. 108-13 (Nov. 15, 2019) ..................................................... JA 2439

**Vol. VI**

Transcript of Prelim. Inj. Hearing, Doc. 119 (Dec. 9, 2019) ..................... JA 2449

Mem. Op. and Order, Doc. 120 (Dec. 31, 2019) ........................................ JA 2621

State Bd. Defs.' Notice of Appeal, Doc. 123 (Jan. 24, 2020) ..................... JA 2681

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE MIDDLE DISTRICT OF NORTH CAROLINA**

| | |
|---|---|
| NORTH CAROLINA STATE CONFERENCE OF THE NAACP, *et al.*,<br><br>*Plaintiffs*,<br><br>v.<br><br>ROY ASBERRY COOPER III, in his official capacity as the Governor of North Carolina, *et al.*,<br><br>*Defendants*. | No. 1:18-cv-01034 |

**PRELIMINARY EXPERT REPORT OF ALLAN J. LICHTMAN FOR PURPOSES OF PRELIMINARY INJUNCTION**

inform voters about the specifics of a photo voter ID law and that "we are asking voters to approve a substantial change without providing them with enough information to make an informed decision" The proposal, she added, was "nothing more than an end run around" the prior court decision. A WRAL editorial stated that, the various amendments proposed by the General Assembly in 2018 "were concocted in secret. There's been too little time for public examination, distribution of information and debate of changes that carry such permanence… These amendments have worked their way through the legislative process in a flash--less than 14 days. None of these involve ANY emergency. There is no indication from anyone that there would be ANY immediate harm if these amendments just disappeared."[74]

### D. Rushed and Restricted Process for Enacting Implementing Legislation on Voter Photo ID

The General Assembly enacted implementing legislation in the lame duck session in the fall of 2018 after voters had elected a new assembly under district maps adopted to remedy the unconstitutional racial gerrymander. The process was even more rushed than the implementation of the 2013 VIVA legislation. The General Assembly enacted the legislation on December 6, 2018, just 10 days after the lame duck session convened on November 27, 2018 and just 17 days after it first released draft legislation on November 20. The House Committee on Elections reported the bill favorably on November 27, the day it was released, rushed Senate Bill 824 through the General Assembly, and the Senate Rules Committee reported it favorably on the following day, November 28. The Senate adopted a series of amendments on November 28 and passed it on third reading on the following day, November 29. The House adopted amendments on December 5 and passed it that day on third reading. The final vote on the amended bill occurred in both chambers on December 6. There was very limited time and notice for public comments and no calling of expert witnesses as in the pre-*Shelby* process in 2013. The Republican super-majority in the General Assembly ignored Democratic calls to delay the process at least until a thorough review of alleged absentee ballot fraud in Congressional District 9 could be completed.[75]

Representative Harrison noted in her affidavit procedural deviation of significance: "I also re-introduced during technical corrections the amendment to allow for a student's school schedule, in addition to work schedule, to be listed as a reasonable impediment to obtaining a voter ID. Though this amendment passed with bipartisan support in the House, it was removed from the Conference Report that was ultimately adopted by both chambers." She further relates that "House leadership was aware that Democratic House members intended to propose additional ameliorative amendments during third reading, and members attempted to object to third reading to do so, but

---

[74] David Sinclair, "Lawmakers, Opponents Weight in on Voter ID," *The Pilot*, 26 June 2018, https://www.thepilot.com/news/lawmakers-opponents-weigh-in-on-voter-id/article_2a889e3a-7970-11e8-ba8b-9f81b015d13b.html; Editorial, "Voters Need to Reject Rushed, Fatally Flawed Constitutional Amendments," WRAL, 28 June 2018, https://www.wral.com/editorial-voters-need-to-reject-rushed-fatally-flawed-constitutional-amendments/17660738/.

[75] N.C. Gen. Assemb., H D Bill Draft 2017-Bk-23 [V.1] (This Is A Draft And Is Not Ready For Introduction) 11/20/2018 03:44:55 PM, https://www.ncleg.gov/documentsites/committees/JLElectionsOC/2017-2018/11-26-2018/Voter%20ID%20Draft.pdf; S.B. 824/2018-144, 2017-2018 Gen. Assemb., (N.C. 2018) https://www.ncleg.gov/BillLookup/2017/S824 "North Carolina Voter Id Bill Passes, Heads to Gov. Cooper," *ABC11*, 6 December 2018, https://abc11.com/politics/north-carolina-voter-id-bill-passes-heads-to-gov-cooper/4845626/.

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE MIDDLE DISTRICT OF NORTH CAROLINA**

NORTH CAROLINA STATE CONFERENCE OF THE NAACP, *et al.*,

*Plaintiffs*,

v.

ROY ASBERRY COOPER III, in his official capacity as the Governor of North Carolina, *et al.*,

*Defendants*.

No. 1:18-cv-01034

**PRELIMINARY EXPERT REPORT OF**
**DR. BARRY C. BURDEN**
**FOR PURPOSES OF PRELIMINARY INJUNCTION**

Absentee ballots comprise a small share of voting activity in North Carolina. Data from the Election Assistance Commission (EAC) indicate that absentee ballots accounted for only 2.6% of ballots cast in 2018 and 3.8% of ballots cast in 2016.[104]

For the small number of voters who consider using absentee ballots because they lack ID to vote in person, the administrative burdens are significant. Once an absentee ballot is received, the voter must return it for counting. Ensuring the completion and return of the absentee ballot requires additional actions on the part of the voter. Absentee ballots are less likely to be counted than those cast in person.[105] Voters also rightly have less confidence that absentee ballots will be counted as they intended and might be dissuaded from using this option.[106] Moreover, minority voters in North Carolina are more likely to vote in person and are less likely than white voters to cast absentee ballots.[107] As a result of these limitations, the absentee ballot provision requiring that the voter either attach a copy of an acceptable voter ID or obtain, fill out, sign and attach a copy of a reasonable impediment declaration does not substantially ameliorate the disparate impact of the photo ID requirement.

*(4) Blacks and Hispanics Are Less Likely Than Whites to Possess Acceptable Photo ID*

I have already noted in this report that whites in North Carolina are more likely than blacks and Hispanics to possess acceptable ID for voting under S.B. 824. Despite using different methodologies, the expert reports of Allan Lichtman in this case and the declaration of Kevin Quinn in *Holmes v. Moore* both demonstrate the disparity in ID possession, as does an expert report by Charles Stewart in a prior case concerning H.B. 589 and an analysis by the state Board of Elections.

Two studies by the North Carolina State Board of Elections indicate that blacks are less likely than whites to possess the required ID. Whereas blacks comprise about 22% of registered voters, the two SBOE analyses found that they comprise 31% to 34% of those who could not be

---

[104] These statistics were computed based on data in "Overview Table 2" in the 2016 and 2018 Election Administration and Voting Survey (EAVS) reports produced by the Election Assistance Commission.

[105] *See also* Charles Stewart (2011), "Adding Up the Costs and Benefits of Voting by Mail," *Election Law Journal* 10:297-301.

[106] Barry C. Burden and Brian J. Gaines (2015), "Absentee and Early Voting: Weighing the Costs of Convenience," *Election Law Journal* 14:32-37. Paul Gronke (2015), "Voter Confidence as a Metric of Election Performance," in *The Measure of American Elections*, ed. Barry C. Burden and Charles Stewart III, New York, NY: Cambridge University Press.

[107] *See* PX0242 at App. S, Tables 2 and 3 (Charles Stewart (February 18, 2015 & June 2, 2015), *Declaration of Charles Stewart III,, Ph.D. (Amended)*, U.S.C.A. (4th Cir.), Record Nos. 16-1468(L), 16-1469, 16-1474 & 16-1529), Vol. 8, PX0242:4391-4566); *see also* PX0231 at 144-148 (Allan J. Lichtman (February 12, 2015), *Expert Report of Allan J. Lichtman, Ph.D.*, U.S.C.A. (4th Cir.), Record Nos. 16-1468(L), 16-1469, 16-1474 & 16-1529), Vol. 6, PX0231:3600-3780), PX0229 at 23 (Barry C. Burden (February 12, 2015), *Expert Report of Barry C. Burden, Ph.D.*, U.S.C.A. (4th Cir.), Record Nos. 16-1468(L), 16-1469, 16-1474 & 16-1529), Vol. 6, PX0229:3480-3531).

matched with Department of Motor Vehicle records, and are thus more apt to lack ID.[108] When compared to their shares of registered voters, this implies that registered blacks are twice as likely as whites to lack proper ID.

These data showing differential possession of ID for voting are consistent with other facts. Blacks and Hispanics are less likely to possess the IDs needed to vote as a result of other activities in their lives such as driving, flying, or banking. These activities that have been mentioned by photo ID proponents to argue that requiring ID to vote does not impose much additional burden. When it comes to driving, a recent national study by AAA shows that while 79% of whites aged 18 to 20 have driver's licenses, only 55% of blacks and 57% of Hispanics do.[109] There is little reason to believe that these disparities would differ significantly in North Carolina or have been alleviated in the six years since the report was published.

In terms of flying, one national academic survey indicates that 46% of whites had flown by plane in the past 12 months, but only 30% of blacks had done so.[110] A more recent media poll also asked a sample of Americans about air travel. The survey indicates that while 23% of whites had never flown, 28% of Hispanics and 36% of black had not done so.[111]

Finally, a recent report by the Federal Deposit Insurance Corporation (FDIC) found that 5.8% of North Carolina households are "unbanked," that is, they lack both savings and checking accounts.[112] However, the rate is a mere 2.6% for whites but is 12.4% for blacks.[113] Because blacks and Hispanics in North Carolina are less likely than whites to use banks, they are less likely to have a need for an ID that might be required in a banking transaction.

While the large majority of North Carolina residents are likely to possess acceptable ID for voting under S.B. 824 as a result of activities in their lives such as driving, flying, and banking, a notable number of potential voters do not have ready access to these forms of ID. Blacks and Hispanics bear a heavier burden than whites to meet the voter ID requirements of S.B. 824 both because they are less likely to possess acceptable government IDs in the first place and because they face more costs and less ability to pay them in order to procure IDs.

*(5) The Costs of Obtaining Acceptable Photo ID Are Significant*

---

[108] *See* summary in Table 6 in Herron and Smith (2016). The Board of Elections reports did not provide data for Hispanics.

[109] AAA Foundation for Traffic Safety, "Timing of Driver's License Acquisition and Reasons for Delay among Young People in the United States, 2012," July 2013, Timing of Driver's License Acquisition and Reasons for Delay among Young People in the United States, 2012 (last visited September 13, 2019).

[110] Analysis of the American National Election Study 2008-2009 Panel Study.

[111] Analysis of the Associated Press-NORC Summer Vacation Survey, June 2017.

[112] *See* https://www.economicinclusion.gov/surveys/2017household/documents/tabular-results/2017_banking_status_North_Carolina.pdf (last visited September 13, 2019).

[113] The FDIC report does not include the most recent data for Hispanics, but students from prior years suggest that the unbanked rate is even higher among Hispanics than among blacks.

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
CIVIL ACTION NO. 1:18-cv-01034

NORTH CAROLINA STATE CONFERENCE OF THE NAACP, et al.

Plaintiffs,

v.

ROY ASBERRY COOPER III, in his official capacity as the Governor of North Carolina; et al.

Defendants.

**DECLARATION OF TERESA VAN DUYN**

15. The legislative process relating to S.B. 824 was irregular, rushed, and conducted in a manner that appeared to prioritize preservation of a Republican majority rather than addressing actual issues affecting the electoral process. The legislative process included few hearings and no expert witnesses, notwithstanding the complex, scientific nature of the alleged voter fraud.

16. S.B. 824 was enacted after voters passed the constitutional amendment, which did not include any information about what limitations on the types of photo identification for voting might be imposed. S.B. 824 was also enacted despite the fact that Republicans had lost their supermajorities in each chamber of the General Assembly for the legislative session beginning in January 2019.

17. Specifically, S.B. 824 was taken up by the Senate Elections Committee during the evening of November 26, 2018, minutes after it was filed. At that time, I argued that the timeline for implementing the photo identification law by May 2019 was "aggressive." Notwithstanding this argument, the majority Republican committee quickly reported it favorably.

18. It was apparent that the majority Members were not concerned about the details or nuances of a voter ID law, but rather were concerned with passing the legislation in any form as quickly as possible. It is my belief that the majority took this approach because they knew the bill, in whatever form, would have a disproportionate effect on voters who were more inclined to vote for Democratic candidates, and most particularly African American voters.

Lack of Evidence of Voter Impersonation in North Carolina

19. I spoke in opposition to the constitutional amendment, H.B. 1092, and the implementing legislation, S.B. 824, on several occasions. As one example, on June 28, 2018, I argued that, notwithstanding Democrats' and Republicans' shared concern for protecting the integrity of our elections, enshrining voter ID in North Carolina's constitution was not an effective

No. 20-1092

In the
United States Court of Appeals
for the Fourth Circuit

NORTH CAROLINA STATE CONFERENCE OF THE NAACP; CHAPEL HILL – CARRBORO NAACP; GREENSBORO NAACP; HIGH POINT NAACP; MOORE COUNTY NAACP; STOKES COUNTY BRANCH OF THE NAACP; WINSTON SALEM – FORSYTH COUNTY NAACP,

*Plaintiffs–Appellees,*

v.

KEN RAYMOND, in his official capacity as a member of the North Carolina State Board of Elections; STELLA ANDERSON, in her official capacity as Secretary of the North Carolina State Board of Elections; DAMON CIRCOSTA, in his official capacity as Chair of the North Carolina State Board of Elections; JEFFERSON CARMON, in his official capacity as a member of the North Carolina State Board of Elections; DAVID C. BLACK, in his official capacity as a member of the North Carolina State Board of Elections,

*Defendants–Appellant*s.

On Appeal from the United States District Court
for the Middle District of North Carolina

**Joint Appendix Index – Volume II**

March 9, 2020 (counsel listed on reverse)

1
2 STATE OF NORTH CAROLINA
3 COUNTY OF WAKE
4 IN THE GENERAL COURT OF JUSTICE
5 SUPERIOR COURT DIVISION
6 -----------------------------X
7 JABARI HOLMES, FRED CULP,
DANIEL E. SMITH, BRENDON JADEN
8 PEAY, SHAKOYA CARRIE BROWN, and
PAUL KEARNEY, SR.,
9
Plaintiffs,
10
v. Case No.
11 18 CVS 15292
12 TIMOTHY K. MOORE, in his official
Capacity as Speaker of the North
13 Carolina House of Representatives;
et al.
14 Defendants.
15 -----------------------------X
16
17
18 Deposition of Joel Ford
Thursday, June 20, 2019
19 Charlotte, North Carolina
At 1:30 p.m.
20
21 Reported By LeShaunda Cass-Byrd, CSR, RPR
22 TSG Job No. 163053
23
24
25

1 Joel Ford
2 A. Yes. You see this says and election day.
3 Q. Between the end of one-stop voting and
4 election day, which I understand to mean after the end
5 of one-stop voting, you could no longer --
6 A. And I thought it was election day.
7 Q. Okay.
8 A. And as in plus.
9 Q. Understood.
10 So if we were to look at the legislative
11 text and it were to say that you cannot obtain a photo
12 ID --
13 A. A free.
14 Q. A free photo ID on election day?
15 A. I would believe the text.
16 Q. Would that be -- would that miss -- have
17 missed your intention in proposing this amendment?
18 A. Unintentionally.
19 Q. Was it important for you to have free photo
20 IDs available on election day?
21 A. Early-stop voting was the primary.
22 Q. Are you aware of the fact that the current
23 general assembly -- so since you've left your
24 service -- has delayed implementation of some parts of
25 the voter ID bill?

1 Joel Ford
2 A. I'm not sure.
3 Q. Do you know -- I'm sorry.
4 A. No, I'm not sure.
5 Q. You are not sure. So you write in
6 paragraph 23: People can vote even if they have lost
7 or never had valid photo ID.
8 Do you agree with that statement?
9 A. You are looking at?
10 Q. Paragraph 23, page 10.
11 A. People can vote, even if they have lost or
12 never had valid photo ID. I agree with that
13 statement.
14 Q. Right. And that is through the -- the fail
15 safe provisions we were just talking about?
16 A. Yes.
17 Q. But it's not the case that all people will
18 have their vote counted, given the current iterations
19 of the bill, due to the fact that one cannot obtain a
20 free photo voter ID on election day, right?
21 MR. PATTERSON: Objection. Again,
22 lack of foundation.
23 But you can answer if you are able.
24 THE WITNESS: I don't -- I don't
25 know.

1 Joel Ford
2 A. In 2013.
3 Q. As an alternative?
4 A. As an alternative to the previous bill.
5 Q. And your bill at that time would have
6 allowed receipt of the free ID on site on any day
7 where voting was permitted?
8 A. That is correct.
9 Q. The current bill does not do that, right?
10 MR. PATTERSON: Objection. Asked and
11 answered several times.
12 THE WITNESS: Okay. Yeah.
13 MR. PATTERSON: You can answer.
14 THE WITNESS: Whatever my previous
15 answer was. So...
16 BY MR. LOPERFIDO:
17 Q. It doesn't?
18 A. Okay.
19 Q. You state that you disagree that Republican
20 sponsors had racist motivations, which has become the
21 unfortunate narrative -- I disagree that the
22 Republican sponsors had racist motivations, which has
23 become the unfortunate narrative in the year since.
24 I mean, there was some basis for that
25 narrative, for example, the federal court saying