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 NAACP,

Plaintiffs-Appellees,

v.

KEN RAYMOND, in his official capacity as a member of the North Carolina State Board of Elections; STELLA E. 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-Appellants,

PHILIP E. BERGER, in his official capacity as President Pro Tempore of the North Carolina Senate; TIMOTHY K. MOORE, in his official capacity as Speaker of the North Carolina House of Representatives,

Intervenors.

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

BRIEF OF GOVERNOR ROY COOPER AS *AMICUS CURIAE* SUPPORTING PLAINTIFFS-APPELLEES AND AFFIRMANCE

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Constitutional Provisions

Statutes

Administrative and Executive Materials

Other Authorities

STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

As the chief executive of North Carolina, Governor Cooper has a self-evident interest in ensuring a safe and orderly election and protecting the public health. He writes to ensure that the Court is advised of the significant elections administration, voting rights, and public health issues implicated by this appeal that may not be fully addressed by the parties.

[1] Under Rule 29(a) of the Federal Rules of Appellate Procedure, *amicus* states that all parties consented to the filing of this brief, no party's counsel authored this brief in whole or in part, neither any party nor any party's counsel contributed money intended to fund preparing or submitting this brief, and no person other than *amicus* or his counsel contributed money intended to fund preparing or submitting this brief.

SUMMARY OF ARGUMENT

"To make it hard, to make it difficult
almost impossible for people to cast a vote
is not in keeping with the democratic process."

– John Lewis[2]

Governor Cooper vetoed S.B. 824. As he explained in his veto statement, the photo ID requirement in S.B. 824 is a solution in search of a problem, erects barriers that will confuse citizens and discourage them from voting, and was enacted with discriminatory intent. J.A. 2061. A lame-duck legislative supermajority—itself the product of an extreme racial gerrymander, *see Covington v. North Carolina*, 316 F.R.D. 117 (M.D.N.C. 2016), *aff'd*, 137 S. Ct. 2211 (2017)—overrode the Governor's veto and enacted S.B. 824. Both the district court and the North Carolina Court of Appeals have since vindicated the Governor's assessment by entering or ordering the entry of preliminary injunctions barring North Carolina from implementing or enforcing S.B. 824. Dist. Ct. Order Entering Prelim. Inj. ("PI Order"), J.A. 2621; *Holmes v. Moore*, 840 S.E.2d 244, 266-67 (N.C. Ct. App. 2020). The Governor

[2] Interview by Andrew Cohen, *Rep. John Lewis: 'Make Some Noise' on New Voting Restrictions*, The Atlantic (Aug. 26, 2012).

wholeheartedly agrees with these decisions. He also believes that these preliminary injunctions should be made permanent, and that this unconstitutional law should never go into effect.

But the purpose of this brief is not to address the future. It is to address the present—more specifically, the request by Senate President Pro Tem Philip Berger and House Speaker Tim Moore (the "Legislators") to this Court to lift the preliminary injunction before the November 2020 election. Int. Br. 53. They have requested the same relief in *Holmes*, the parallel state court challenge to S.B. 824. *See* Add. 12. The Legislators thus seek to impose S.B. 824's photo ID requirement on North Carolina voters in the approaching election.

Settled law precludes this result. The Supreme Court has held that, to prevent confusion and avoid disenfranchising voters, federal courts should rarely change the election rules on the eve of an election. *See, e.g.*, *RNC v. DNC*, 140 S. Ct. 1205, 1207 (2020); *Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006).

We are already on the eve of the 2020 general election here. The State Board of Elections recently announced that state and local elections officials "are already well underway with actively preparing to

conduct the November 3, 2020 general election in accordance with state and federal law," and that county boards must submit early voting plans to the State Board by July 31. *See* State Bd., *Emergency Order: Administering the November 3, 2020 General Election During the Global COVID-19 Pandemic & Public Health Emergency* at 5 (July 17, 2020), https://s3.amazonaws.com/dl.ncsbe.gov/State_Board_Meeting_Docs/Orders/Executive%20Director%20Orders/Emergency%20Order_2020-07-17.pdf ("Emergency Order"). Tens of thousands of voters have already requested absentee ballots, and the State must fulfill those requests by early September. *See* Def. Br. 17-18 (noting that absentee ballots must be sent out by September 4 under North Carolina law). In-person voting will then begin in October. *See* State Bd., *Agency Calendar: October 2020*, https://www.ncsbe.gov/Elections/Agency-Calendar (showing One-Stop Early Voting Period beginning October 15, 2020).

There is not enough time remaining to educate the public and implement the photo ID requirement in S.B. 824 before voting begins. The law itself calls for an extended outreach and planning process that would have lasted more than a year—a process that, according to the Legislators, differentiates S.B. 824 from H.B. 589, its unconstitutional

predecessor. *See* Int. Br. 12. But that process has not occurred. In pushing to reinstate S.B. 824 just before the election, the Legislators seek to short-circuit the education and implementation process they themselves designed and rely on to defend the law.

The voter outreach and implementation process was far from complete when the law was enjoined, and it cannot be completed in the midst of the upcoming election. Indeed, the State Board of Elections acknowledged that it needed to restart implementation efforts *by early July* to have any hope of enforcing the photo ID requirement in 2020, Add. 16, and it conceded in the district court that informing voters about photo ID might not be possible if the law was enjoined and later reinstated, J.A. 809. Even in ordinary circumstances, therefore, it would already be too late to roll out S.B. 824 without sowing confusion and disenfranchising voters whom the new photo ID requirement would catch by surprise.

But today's circumstances are far worse than ordinary. We are in the midst of a deadly pandemic, the likes of which have not been seen for more than a century. Attempting to implement a new photo ID requirement in this environment would not only be unwise, but

dangerous. The pandemic presents an enormous challenge for voters and election officials, particularly at the local level. The Governor is committed to ensuring that North Carolinians can cast their votes safely, but it will not be easy.

The risk COVID-19 presents to the election process would be compounded by adding photo ID to the mix at the last minute. Together, these issues would present the largest election administration challenges the State has ever faced—and during a general election with the presidency, a senate seat, and state-government races on the ballot.

Requiring elections officials to shift their focus toward implementing a new photo ID requirement will leave them stuck betwixt and between, undermining the public health effort and exacerbating confusion about S.B. 824. Officials would scramble to train poll workers willing to work in a pandemic on S.B. 824's complex set of rules and procedures. Once voting begins in October, public health measures like social distancing would run headlong into confusion created by trying to cram photo ID education and implementation into a few short weeks.

Voters would be hopelessly confused. Some would rush to the DMV or county boards of elections to obtain IDs before the election—multiplying the person-to-person interactions that public health experts are urging the public to avoid. Others would likely be deterred from voting altogether, especially without the extended outreach effort the Legislators claimed would inform voters about the "reasonable impediment" process for voting without acceptable ID. When the election arrives, voters would face long lines at the polls—particularly those voters who lack IDs and would need to complete reasonable impediment forms—exposing them to increased risks from COVID-19 and accelerating the spread of the virus.

In short, lifting the injunction now would be disastrous. And the brunt would be borne by the same voters whom S.B. 824 targeted for disenfranchisement in the first place: minority voters who are both least likely to possess photo IDs that satisfy S.B. 824 and most vulnerable to COVID-19. Many minority voters would therefore face an intolerable choice: forgo the right to vote, or subject themselves to the prospect of illness or death by attempting to navigate the photo ID requirement in a pandemic.

This year, of all years, is not the year to make it harder to vote. Instead, North Carolina must maintain a single-minded focus on safely conducting a major election in a pandemic, not have its attention diverted by attempting to roll out a new voter ID law at the last minute, and without time to complete the groundwork the law itself requires. As the old adage puts it, he who chases two rabbits catches none. To preserve the voting rights of North Carolinians, prevent irreparable harm, and protect the public interest, this Court should affirm the preliminary injunction entered by the district court.

ARGUMENT

I. Lifting the injunction this close to the election would disorient and disenfranchise North Carolina voters.

The Legislators ask for S.B. 824 to be implemented for the November 2020 election. Int. Br. 53. But that request conflicts with the "*Purcell* principle." Under this principle, "lower federal courts should ordinarily not alter the election rules," including photo ID rules, "on the eve of an election." *RNC*, 140 S. Ct. at 1207 (citing *Purcell*, 549 U.S. 1).

The *Purcell* principle rests on concerns about "judicially created confusion" and the resulting threat that voters will be disenfranchised. *Id.* As the Supreme Court has explained, "[c]ourt orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls." *Purcell*, 549 U.S. at 4-5. "As an election draws closer," the Court has observed, "that risk will increase." *Id.* at 5.

Although *Purcell* itself addressed whether to *impose* an injunction shortly before an election, *see* 549 U.S. at 4-5, the *Purcell* principle also applies when, as here, the question is whether to *lift* an injunction shortly before an election. That conclusion follows from *Frank v. Walker*, 574 U.S. 929 (2014). In *Frank*, a federal district court entered

an order in April 2014 enjoining the enforcement of a Wisconsin photo ID law. *See Frank v. Walker*, 17 F. Supp. 3d 837, 842-43, 880 (E.D. Wis. 2014). About five months later, in September 2014, the Seventh Circuit stayed the injunction. *See Frank v. Walker*, 766 F.3d 755, 756 (7th Cir. 2014). That stay would have permitted the photo ID law to be enforced in the November 2014 election. *Id.*

The Supreme Court vacated the stay and reinstated the injunction against enforcing the photo ID law in the upcoming election based on the *Purcell* principle. *Frank*, 574 U.S. at 929; *see RNC*, 140 S. Ct. at 1207 (identifying *Frank* as applying *Purcell*). Even the dissent observed that "the proximity of the upcoming general election" supplied a basis for the Court's decision, and that it was "particularly troubling" that absentee ballots had already been "sent out without any notation that proof of photo identification must be submitted." *Frank*, 574 U.S. at 929 (Alito, J., dissenting); *see also, e.g.*, *Veasey v. Perry*, 769 F.3d 890, 892-95 (5th Cir. 2014) (discussing *Purcell*'s application in decisions such as *Frank*).

Frank demonstrates that, under the *Purcell* principle, a court of appeals should not disrupt the status quo by lifting a months-old

injunction against a photo ID requirement when an election is imminent—particularly if absentee ballots have already gone out.

It follows that this Court should not lift the preliminary injunction in this case before the upcoming election. There is very little time remaining before the election, and certainly not enough to attempt to roll out a new photo ID law that remains unfamiliar to North Carolina voters and poll workers. Indeed, election preparations are already "well underway," and county boards' voting plans are due on July 31. Emergency Order at 5. Absentee ballots will also have already been mailed out by the time the Court holds oral argument in September. *See* Def. Br. 17-18 (stating that North Carolina law requires the State Board to begin distributing ballots on September 4 and citing N.C. Gen. Stat. § 163-227.10(a)); Dkt. 68.

Additional circumstances of this case confirm that, even now, it is already too late to change to North Carolina's rules on photo ID for the approaching election. Even if this Court disagrees with the district court's injunction, or would have made different findings on these facts, the practical effect of the injunction was to stop all efforts to implement

S.B. 824. In fact, North Carolina voters have been told—multiple times, in a variety of ways—that photo ID would *not* be required to vote.

For the past seven months, North Carolina voters visiting the State Board of Elections' website (https://www.ncsbe.gov) have seen a prominent link: "Photo ID NOT REQUIRED." Clicking this link leads to a statement that "Voters are not required to show photo ID until further order of the courts." State Bd., https://www.ncsbe.gov/Voter-ID. This page also contains links to posters displayed at polling places in the March primary election, which stated, in all caps, in English and Spanish, that a court blocked the photo ID requirement from taking effect and the injunction will remain until further order. The injunction and the state court injunction in *Holmes* also received media coverage across the state, from the Cherokee Scout in Murphy to the Coastland Times in Manteo.[3] Finally, *every residential household in the state* received a postcard in January 2020 explaining the injunction and

[3] *See, e.g.,* Gary Robertson, *Extraordinary North Carolina court review on voter ID sought*, Coastland Times (Mar. 1, 2020), https://www.thecoastlandtimes.com/2020/03/01/extraordinary-north-carolina-court-review-on-voter-id-sought/; Samantha Sinclair, *Photo ID not needed to vote in the primary*, Cherokee Scout (Jan. 9, 2020), https://www.cherokeescout.com/local-news/photo-id-not-needed-vote-primary.

stating that photo ID would not be required to vote pending further court order. Jodie Valade, *NC Board Of Elections: Don't Forget, No Photo ID Required In Primary*, WFAE (Jan. 24, 2020), https://www.wfae.org/post/nc-board-elections-dont-forget-no-photo-id-required-primary#stream/0.

Attempting to reverse this expectation so near the election would cause widespread confusion. The State Board conceded in January that it would be "detrimental to voters" and "extremely difficult, if not impossible, and confusing to the public" to lift the injunction and implement the photo ID requirement so close to the primary in March. Dist. Ct. Dkt. 127 at 2-4. The same timing problem applies here, but in even more serious form.

The Legislators have similarly all but acknowledged that triggering the implementation of S.B. 824 so late in the day would violate the *Purcell* principle. They argue that *Purcell* precluded a change to the law on photo ID in late 2019 because the primary election was approaching. Int. Br. 52. Assuming that argument is correct,[4] it

[4] The Legislators argue that this Court should reverse based on *Purcell* because the preliminary injunction may have created confusion in the primary. Int. Br. 52. But that ship has sailed—there is no way to undo

follows even more strongly that *Purcell* precludes another change to the law on photo ID now, with the general election imminent. Indeed, the Legislators admit that reinstating S.B. 824 as the general election approaches would create "voter confusion," *id.* at 51, which is what the *Purcell* principle is designed to prevent.

There is also the matter of the injunction against S.B. 824 that the North Carolina Court of Appeals ordered to be entered in *Holmes*. The preceding discussion assumed for purposes of argument that the North Carolina courts would grant the Legislators' recent request to forgo or dissolve that injunction, Add. 1-14, and that lifting the preliminary injunction in this case would therefore cause S.B. 824 to go into effect for the November election. But even on the opposite (and more likely) assumption—that the North Carolina courts will block the implementation of S.B. 824 in the upcoming election no matter what this Court does—it would still conflict with *Purcell* for this Court to undo the district court's preliminary injunction before that election.

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any confusion in the primary now. Overturning the preliminary injunction at this point would instead *create* confusion in the general election still to come. In seeking reversal on this ground, the Legislators turn *Purcell* on its head.

As *Purcell* explained, "conflicting orders" in the run-up to elections threaten to confuse voters. 549 U.S. at 4-5. Here, that threat would be acute. Voters would be confused by a decision from this Court *lifting* an injunction against the photo ID requirement in S.B. 824 at the same time North Carolina courts were *imposing* an injunction against the same requirement in the same law.

This confusion would disenfranchise voters by giving them an "incentive to remain away from the polls." *Id.* at 5. That incentive would arise among (1) voters who lack qualifying photo IDs and mistakenly conclude that they will be unable to vote, and (2) voters who are simply discouraged from voting by the confusion itself. *See id.* at 4-5. Thus, even in the likely event that the North Carolina courts enjoin the implementation of S.B. 824, it would inflict irreparable harm and contravene the public interest for this Court to lift the injunction in this case before the November 2020 election.

In sum, the *Purcell* principle serves to protect the settled expectations of the voters. North Carolina voters do not expect that photo ID will be required to vote in the upcoming election. Lifting the

preliminary injunction would therefore contravene the *Purcell* principle and confuse and disenfranchise voters.

II. The Legislators seek to implement S.B. 824 without the voter education and assistance efforts that the law requires and that the Legislators rely on to defend its constitutionality.

In addition to violating *Purcell*, implementing S.B. 824 at the last minute would violate S.B. 824 itself. S.B. 824 prescribes numerous measures that must be taken over an extended time period to educate voters and help them comply with the photo ID requirement before it is enforced. These include efforts to publicize the reasonable impediment process to ensure that voters know they can still vote without ID, programs to educate voters about the law, and mechanisms to ensure that voters without an acceptable form of ID can obtain one. But it is now too late to carry out those measures before the approaching election.

Enforcing the photo ID requirement without these measures would also compound the discriminatory impact of the law on minority voters. The Legislators argue that S.B. 824 will not have any discriminatory effects. But that argument is premised on the steps that were supposed to be completed before the law went into effect. Int.

Br. 24-27. For example, in response to the district court's factual finding that the photo ID requirement in S.B. 824 would deter minorities from voting, the Legislators argue that minorities would not be deterred from voting "because the General Assembly required that ***every voter in the State*** be told that they could vote ***with or without ID***" by submitting a reasonable impediment affidavit. Int. Br. 27 (emphasis in original).

The problem with this argument is that every voter in the State has *not* been told they can vote under the new law with or without ID. Indeed, there is no reason to think voters even know this reasonable impediment process exists, because the "aggressive voter education program" required by Section 1.5 of S.B. 824 never happened.

By its own terms, S.B. 824 required a public education and outreach effort that was to include:

- four separate mailings to every residential address in North Carolina, two in 2019 and two in 2020, S.B. 824 § 1.5.(a);
- posting information in conspicuous locations, *id.* § 1.5.(a)(1);
- training officials to answer voter questions, *id.* § 1.5.(a)(2);
- disseminating information regarding changes to elections before the law went into effect, *id.* § 1.5.(a)(3);
- coordinating with local and service organizations to put on information seminars at a local or statewide level, *id.* § 1.5.(a)(6);

- posting information on the State Board's website, *id.* § 1.5.(a)(7a); and

- placing prominent notices on all voter education materials regarding the photo ID requirement and reasonable impediment process, *id.* § 1.5.(a)(10).

This outreach process has not been completed; in fact it had barely started when the district court enjoined S.B. 824. *See* PI Order, J.A. 2675-76 (finding no evidence of some crucial outreach efforts required by the law). For example, only one 2019 mailing went out, and neither 2020 mailing has been sent.[5] It may be possible for elections officials to scramble to implement some of these steps, but any rushed, last-minute effort could not approach what S.B. 824 requires: repeated outreach to voters over an extended period of time.

The State Board and the Legislators are well aware that it is too late to begin educating voters now. Indeed, the difficulty of putting voter education and outreach processes back in place at the last minute

[5] *See* J.A. 35 (docket entry advising that the district court would be entering an injunction before the "very large statewide mailing" planned for December 31, 2019); State Bd., Numbered Memo 2020-01 at 1 (Jan. 3, 2020), https://s3.amazonaws.com/dl.ncsbe.gov/sboe/numbermemo/2020/Numbered%20Memo%202020-01_Preliminary%20Injunction%20of%20Photo%20ID.pdf (stating that the State Board has "stopped the statewide mailing scheduled for delivery to all North Carolina households").

was made clear last October. In an affidavit submitted to oppose Plaintiffs' preliminary injunction motion, the executive director of the State Board stated that, "[i]f the injunction was later lifted, it might not be possible to complete all educational and outreach activities that were required by the Photo ID Law." Affidavit of Kristen Brinson Bell ¶ 41 (Oct. 30, 2019), J.A. 809. This statement was made in the context of a potential injunction, with the March primary four months away. It is even clearer now that voters would not receive the education the law promised to provide if the injunction were lifted.

Without these outreach efforts, the argument that provisions such as the reasonable impediment process will prevent disparate impact becomes nonsensical. If this Court reverses the district court's injunction, it will generate headlines and public conversation about enforcing the new "photo ID law" in the 2020 election. Many voters without ID (a disproportionate number of whom are minority voters) will hear these reports and reasonably conclude they cannot vote. Even if the "aggressive voter education program" promised by the law's drafters *would* have been effective, it could not happen before the general election, and these voters will remain unaware of the process

the Legislators claim will prevent them from being stripped of their right to vote.

The Legislators also rely on provisions making free photo IDs available under certain conditions. Int. Br. 2, 24-25. The district court was not persuaded that these and other efforts were on track. But regardless of whether implementation efforts prior to the injunction were "lackluster," PI Order, J.A. 2676, it is undisputed they have now stopped entirely. Indeed, the State Board acknowledged in a state court filing this spring that it needed to restart implementation efforts by early July to have any hope of enforcing the photo ID requirement in the general election, Add. 16.

Since the entry of the injunction, the situation has therefore gone from one where "the bulk of the work still remains undone," PI Order, J.A. 2677, to a scenario where it *cannot* all be done. For example:

- S.B. 824 requires county boards of elections to issue free voter ID cards. But the State Board ordered county boards to stop issuing these cards on January 3, 2020. State Bd., Numbered Memo 2020-01. Accordingly, most of the lengthy period the law required to allow voters to obtain free ID has been lost, and very few voters will have obtained free IDs before the election. *See* J.A. 800-01 (stating that only 1,720 voters had gotten voter ID cards as of October 2019).

- The planned implementation of S.B. 824 was supposed to include information about photo ID on absentee ballot request forms. *See* State Bd., Numbered Memo 2019-08 at 2-3 (Nov. 8, 2019), https://s3.amazonaws.com/dl.ncsbe.gov/sboe/numbermemo/2019/Numbered%20Memo%202019-08%20Photo%20ID%20Implementation%20Preparations.pdf. But the State's forms do not currently include that information—and voters had filled out nearly 70,000 of the requests by July 13. *See* Dr. Michael Bitzer, *An Estimate of Where NC Stands in Absentee-by-Mail Ballot Requests*, Old N. State Politics (July 13, 2020), www.oldnorthstatepolitics.com/2020/07/NC-july-ABM-requests-estimates.html.

- S.B. 824 required the State to provide people who lost their drivers' licenses with free ID cards. S.B. 824 § 1.3.(a). The district court found no evidence this process had begun, PI Order, J.A. 2677, and there is no indication in the record that the DMV could instantly provide these cards to every North Carolinian with a driver's license seized or surrendered since May 1, 2019.

- As written, S.B. 824's photo ID requirement would have been applied in municipal elections in 2019 and in the primary elections in 2020, giving the State two test drives before the 2020 general election. But those test drives never happened. If the injunction is lifted now, S.B. 824 would be implemented in a general election with millions more voters, and under a national spotlight focused on North Carolina's role as a potential swing state for the Senate and the presidency.

The Legislators have argued that S.B. 824 was "carefully crafted" to avoid barring or deterring minority voters from voting. Int. Br. 7; *see also id.* at 7-9, 20-27. But even assuming that any of the tools within the law could have prevented those results, they have not been implemented, and Legislators would leave them by the wayside in their

rush to foist a photo ID requirement on unsuspecting North Carolinians in the November 2020 election.

In pushing to implement the photo ID law despite the fact that their own voter education and implementation plans are in tatters, the Legislators would forgo the process ostensibly aimed at ensuring voters without ID can vote, enabling a smooth implementation of the law, or instilling voter confidence in the electoral system. They would implement the law without the "aggressive voter education effort," without the alternative IDs, without the changes to absentee ballot forms, without the repeated mailings to every residence, and in conflict with consistent and widespread statements by the State that photo ID will not be required. And they would do so in a presidential election, in the midst of the worst pandemic in living memory. Far from instilling voter confidence in the elections process, the purported non-discriminatory justification for the law, this approach would leave voters more confused and skeptical than ever before.

III. It would be particularly problematic to trigger a complicated implementation process for photo ID in the midst of COVID-19.

The confusion caused by attempting to roll out S.B. 824 at the last minute, without the outreach and planning efforts that the law itself requires, would be aggravated by the COVID-19 pandemic. State officials are now focused on safely conducting the 2020 general election during a public health emergency, and they must maintain that focus. If they are forced to divert attention and resources to implementing S.B. 824 at the same time, both efforts will suffer. The consequences would fall most heavily on minority voters who are doubly vulnerable—most at risk of being impacted by S.B. 824's photo ID requirement, and most susceptible to the dangers of the pandemic.

A. A rushed and inadequate implementation of S.B. 824's photo ID requirement would cause even more problems in the context of the COVID-19 pandemic.

As explained above, there is not enough time before the 2020 election for North Carolina to implement S.B. 824's photo ID requirement. Doing so would create confusion among voters about whether they need a photo ID, how to get one, and whether they can vote without one, discouraging them from voting altogether and

potentially leading to thousands of votes being rejected for failure to fully comply with S.B. 824's complex and technical provisions. The COVID-19 pandemic exacerbates these problems.

First, the pandemic would make it harder for voters who lack photo ID to get an ID from a county board of elections or DMV office in time to cast a ballot. Some DMV offices have closed during the pandemic. N.C. Dep't of Motor Vehicles, *NCDMV Services in Response to COVID-19*, https://www.ncdot.gov/dmv/offices-services/locate-dmv-office/Pages/dmv-offices-closed.aspx. Others have implemented appointment-only visits and limited building capacity. *Id.* County boards across the state have also limited citizens' access. *E.g.*, Caldwell Cty. Bd. of Elec., https://www.caldwellcountync.org/elections; Dare Cty. Bd. of Elec., https://www.darenc.com/departments/board-of-elections/. These efforts to protect State and county employees and reduce the spread of COVID-19 limit when and where voters can get an ID.

Second, requiring individuals to travel and enter public spaces to obtain an ID would undermine the State's efforts to mitigate the spread of COVID-19. If voters hurry to their local DMV or county board to get

IDs before the election, it could create crowds and long waits in confined spaces, increasing the risk of COVID-19 transmission.

Third, requiring compliance with S.B. 824's technical requirements for absentee voters would further complicate absentee voting during the pandemic. The State Board anticipates a 30-40% increase in the number of voters who cast their ballots by mail in November 2020. State Bd., *CARES Act Request & Clarification to Recommendations to Address Election-Related Issues Affected by COVID-19* (Apr. 22, 2020), https://s3.amazonaws.com/dl.ncsbe.gov/Outreach/Coronavirus/State%20Board%20CARES%20Act%20request%20and%20legislative%20recommendations%20update.pdf. Many absentee voters will be voting by mail for the first time and may be unfamiliar with the processes for doing so—particularly with the complex processes for which S.B. 824 provides, such as including a copy of the voter's photo ID with the absentee ballot. S.B. 824 § 1.2(d). And delays in mail delivery during the pandemic may result in voters' absentee ballots not being received on time and, therefore, not being counted. *E.g.*, Alexa Corse, *D.C. Lets Voters Submit Ballots by Email After Mail Problems*, Wall St. J. (June 3, 2020),

https://www.wsj.com/articles/d-c-letsvoters-submit-ballots-by-email-after-mail-problems-11591211518.

Fourth, S.B. 824's voter ID requirement would expose voters to greater risk of contracting the virus. As noted above, S.B. 824 requires absentee voters to submit copies of their photo IDs along with their ballots. J.A. 642. Some voters may not have access to photocopiers or similar technology at home and may have to venture out to make copies. Additionally, voters would likely face longer lines and wait-times at the polls—made even longer by the anticipated shortage of poll workers and insufficient time to train them regarding acceptable ID and the reasonable impediment process. State Bd., *Recommendations to Address Election-Related Issues Affected by COVID-19* at 4 (Mar. 26, 2020), https://s3.amazonaws.com/dl.ncsbe.gov/sboe/SBE%20Legislative%20Recommendations_COVID-19.pdf. And once voters are inside their polling places, S.B. 824 would require them to remove their face coverings (which are required in public spaces where social distancing is not possible, Exec. Order No. 147, § 2 (June 24, 2020)) to allow poll officials to confirm their identities.

In these ways, COVID-19 would make it more difficult for voters to comply with S.B. 824, and would increase their risk of contracting the virus in the process. Faced with that prospect, many voters may conclude that the risk is not worth it, and thus be deterred from voting at all.

B. The State must remain focused on successfully and safely conducting a major election during a pandemic.

Mitigating the risk of voting during the pandemic is an issue that requires the State's sustained attention. Elections in other states have highlighted the unique challenges of voting during a pandemic. Poll workers—many of whom are elderly and at higher risk from COVID-19—have declined to work, leading to poll closures and long lines. Michael Wines, *From 47 Primaries, 4 Warning Signs About the 2020 Vote,* N.Y. Times (June 27, 2020), https://www.nytimes.com/2020/06/27/us/2020-primary-election-voting.html (recounting poll worker shortages in Kentucky, where nearly 9 in 10 poll workers refused to work, and Washington, D.C., where numbers dropped from around 2,000 to 300). As a result, voters have faced lengthy wait times at the polls. Nick Corasaniti & Michael Wines, *Beyond Georgia: A Warning for November as States Scramble to Expand Vote-by-Mail*, N.Y. Times

(June 10, 2020), https://www.nytimes.com/2020/06/10/us/politics/voting-by-mail-georgia.html.

In light of these and other challenges, North Carolina is modifying ordinary voting practices to safely achieve the "public interest [in] permitting as many qualified voters to vote as possible." *Obama for Am. v. Husted*, 697 F.3d 423, 437 (6th Cir. 2012). The State's efforts have included increasing funding for early and absentee voting, broadening the mechanisms for requesting and submitting absentee ballots, loosening restrictions on assisting voters with absentee ballot requests, and reducing the number of witnesses required for absentee ballots. N.C. Sess. L. 2020-17. The State has also increased funding for poll-worker recruitment efforts and incentive compensation. *Id.*

This work is not finished. North Carolina districts that have conducted elections during the pandemic have called for increased funding "for sanitation supplies, cleaning crews, curtains and plexiglass shields, masks, signage," and similar materials, as well as "to educate voters about all the ways they can register and vote in these challenging times"—just a few of the countless issues that local elections officials of both parties agree must be addressed to promote

voter confidence in casting ballots during a pandemic. Joey Miller & Julia Tipton, *June runoff election in western NC previews voting problems the state will face in November*, Raleigh News & Observer (May 18, 2020), https://www.newsobserver.com/article242767616.html.

As the State Board recently observed, "the COVID-19 pandemic is disrupting and will continue to disrupt the normal schedule for this election cycle in every county in the state, and has impaired critical components of election administration." Emergency Order at 5. Overcoming those disruptions and conducting the election safely and efficiently in the midst of the pandemic demand the full attention of the responsible public officials. Rushing to implement a photo ID requirement would unjustifiably divert valuable time and resources from this critical effort.

C. Minority voters—the same voters who bear the discriminatory brunt of S.B. 824's photo ID requirement—are most likely to be harmed by implementing voter ID during the pandemic.

Finally, implementing S.B. 824 during the pandemic would exacerbate the disparate impact that, as the district court concluded, the law would have on minority voters.

Other states' elections have shown that the pandemic poses a particular threat to minority voters' ability to vote safely and effectively. The pandemic has already decreased minority voters' in-person turnout. Poll worker shortages in Wisconsin necessitated a reduction in the number of polling places for the state's April primary. Kevin Morris, *Did Consolidating Polling Places in Milwaukee Depress Turnout?*, Brennan Ctr. for Justice (June 24, 2020), https://www.brennancenter.org/our-work/research-reports/did-consolidating-polling-places-milwaukee-depress-turnout. The reduction was particularly extreme in Milwaukee, where the number plummeted from 182 in November 2016 to 5 in April 2020. *Id.* These closures contributed to a 10% reduction in black voter turnout, as compared to an 8.5% decline in white voter turnout. *Id.*

Voters who have chosen to vote by mail during the pandemic have also faced confusion and delay as states work rapidly to expand mail-in voting. For example, some voters in Pennsylvania received the wrong party's primary ballot, and certain Georgia voters never received their requested mail-in ballots. Corasaniti & Wines, *supra* at 27. Mail-in voting during the pandemic also poses unique challenges for minority

voters, who have traditionally preferred in-person voting, may be casting an absentee ballot for the first time, and may be unfamiliar with absentee voting requirements. *See* Enrijeta Shino, Mara Suttmann-Lea & Daniel A. Smith, *Here's the problem with mail-in ballots: They might not be counted.*, Wash. Post (May 21, 2020), https://www.washingtonpost.com/politics/2020/05/21/heres-problem-with-mail-in-ballots-they-might-not-be-counted/. Their ballots, therefore, may be deemed defective and go uncounted.

As these issues demonstrate, minority voters are already disproportionately likely to be dissuaded from or to encounter issues while voting during the pandemic. If North Carolina were to implement a photo ID requirement before November 2020, minority voters—the very voters whose rights S.B. 824 "was designed to suppress," J.A. 2061—would face even greater obstacles.

These disparate effects would begin before the election. S.B. 824, like its predecessor, "primarily [allows voters to use those] IDs which minority voters disproportionately lack, and leaves out those which minority voters are more likely to have." PI Order, J.A. 2649. These voters are disproportionately likely to need to obtain a "free ID" from a

county board or DMV. Even outside the context of the present pandemic, "these forms of ID are not entirely 'free' to those who need them most," PI Order, J.A. 2651, and the costs have increased during the pandemic. Many poor and minority voters are dependent on public transportation or obtaining rides from others, which may increase their risk of COVID-19 exposure. And once they arrive at a county board or DMV (if that office is even open), they face the obstacles and risks noted above. *Supra* at 23-26.

S.B. 824's photo ID requirement would also impose special burdens on minority voters at the polls. Because minority voters are more likely to vote in person, *N.C. State Conf. of NAACP v. McCrory*, 831 F.3d 204, 230 (4th Cir. 2016), they are disproportionately likely to experience the delays and long lines that would result from poll officials' hurried implementation of the photo ID requirement and the resulting increased potential for exposure to COVID-19. *Supra* at 23-26.

Poor and minority voters who lack photo ID are also more likely to be required to go through S.B. 824's reasonable impediment process, PI Order, J.A. 2654-55, which would require them to remain in extended close contact with other voters and election officials while waiting in

long lines and completing a written declaration. *Supra* at 26. And at the end of the day, despite facing increased risks in an effort to exercise their right to vote, these voters still face a disproportionate likelihood that their provisional ballots will go uncounted. PI Order, J.A. 2654-55.

These discriminatory effects are further compounded by the disparate impact COVID-19 has on communities of color, which face an outsized risk of becoming infected with, being hospitalized for, and dying from COVID-19. CDC, *Who Is at Increased Risk for Severe Illness?* (June 25, 2020), https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-at-increased-risk.html; CDC, *Coronavirus Disease 2019, Racial & Ethnic Minority Groups* (June 25, 2020), https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/racial-ethnic-minorities.html.

North Carolina has experienced this unfortunate reality firsthand. As of June 5, 2020, African Americans made up 22% of North Carolina's population, yet accounted for 30% of positive COVID-19 cases and 34% of COVID-19 deaths. Exec. Order No. 143 at 2 (June 4, 2020), https://files.nc.gov/governor/documents/files/EO143-Addressing-the-Disproportionate-Impact-of-COVID-19-on-Communities-of-Color.pdf.

Latino and Hispanic people represented about 10% of the State's population, but accounted for 39% of COVID-19 infections. *Id.* The Governor has taken strong public health measures to combat these disparities. *See id*. But the fact remains that the pandemic presents unique challenges to voters of color. The new risks posed by COVID-19—combined with the "distrust, mistrust and apathy" that "the frequent alterations to North Carolina's voting requirements over the past decade" have created among minority voters—are likely to further dissuade minority voters "from even *attempting* to vote" in November. PI Order, J.A. 2656-57.

CONCLUSION

If S.B. 824 is allowed to go into effect now—despite Supreme Court precedent, without the voter education and outreach the law itself promised, and in the midst of a pandemic—it will write another chapter in North Carolina's regrettable history of failing to protect the voting rights of its African-American and minority citizens. To ensure that the "right of citizens of the United States to vote shall not be denied or abridged . . . on account of race, color, or previous condition of servitude," U.S. Const. amend. XV, this Court should affirm the district court's preliminary injunction against S.B. 824.

Dated: July 20, 2020

Respectfully submitted,

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
Effective 12/01/2016

No. 20-1092 **Caption:** NC NAACP State Conference v. Ken Raymond

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(s) /s/ Robert E. Harrington

Party Name Governor Roy Cooper

Dated: July 20, 2020

ADDENDUM

Page

ADDENDUM 1

STATE OF NORTH CAROLINA COUNTY OF WAKE JABARI HOLMES, FRED CULP, DANIEL E. SMITH, BRENDON JADEN PEAY, SHAKOYA CARRIE BROWN, AND PAUL KEARNEY, SR., PLAINTIFFS, vs. TIMOTHY K. MOORE *in his official capacity as Speaker of the North Carolina House of Representatives;* PHILIP E. BERGER *in his official capacity as President Pro Tempore of the North Carolina Senate;* DAVID R. LEWIS, *in his official capacity as Chairman of the House Select Committee on Elections for the 2018 Third Extra Session;* RALPH E. HISE, *in his official capacity as Chairman of the Senate Select Committee on Elections for the 2018 Third Extra Session;* THE STATE OF NORTH CAROLINA; *and* THE NORTH CAROLINA STATE BOARD OF ELECTIONS, DEFENDANTS.	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION CASE NO. 18 CVS 15292 **LEGISLATIVE DEFENDANTS' MOTION TO REFFRAIN FROM ENTERING OR, ALTERNATIVELY, DISSOLVE THE PRELIMINARY INJUNCTION** **N.C. R. Civ. P. 7, 54(b)**

ADDENDUM 2

Legislative Defendants, pursuant to Rules 7 and 54(b) of the Rules of Civil Procedure, hereby move the Court to refrain from entering a preliminary injunction in this case or, alternatively, to dissolve that injunction if entered by the time the Court decides this motion.[1] In support of this motion, Legislative Defendants state as follows.

INTRODUCTION

Regardless of the outcome of this lawsuit, there will be a photo voter ID requirement in the State of North Carolina. That is because the State's Constitution requires that "voters offering to vote in person shall present photographic identification before voting." N.C. CONST. art. VI, §§ 2(4), 3(2). To be sure, the Constitution also directs the General Assembly to "enact general laws governing the requirements of such photographic identification, which may include exceptions." *Id.* And S.B. 824, the implementing legislation the General Assembly enacted in December of 2018 to satisfy this mandate, currently is set to be preliminarily enjoined following the decision of the Court of Appeals. *See Holmes v. Moore*, 840 S.E.2d 244 (Ct. App. 2020).

But the rationale for the Court of Appeals' judgment has now been undermined. Key to the court's decision was the General Assembly's rejection of public assistance IDs as valid voter ID in S.B. 824. Indeed, the General Assembly's rejection of public assistance IDs pervaded the *Arlington Heights* analysis the Court of Appeals performed to find that S.B. 824 likely was motivated by racial discrimination. While Legislative Defendants disagree with the Court of Appeals' decision, even taken on its own terms that decision requires that the preliminary injunction in this case be dissolved for one compelling reason: the General Assembly has now

[1] As of the date of this motion, the Court has not yet entered a preliminary injunction following the Court of Appeals' decision. But whether the Court has done so by the time it decides this motion should not affect the analysis. For convenience this motion generally discusses dissolving the injunction, but that is meant to encompass both dissolving the injunction and not entering it in the first place for the same reasons.

passed by a 142–26 margin, and the Governor signed into law, H.B. 1169, which adds to the list of qualifying voter ID "an identification card issued by a department, agency, or entity of the United States government or this State for a government program of public assistance." 2020 N.C. Sess. Laws 17 § 10. With the enactment of H.B. 1169, the General Assembly has adopted nearly every "ameliorative" amendment proposed by S.B. 824's opponents during the legislative process, and it also has addressed the key shortcoming identified by the Court of Appeals.

Under North Carolina law, the decision whether to dissolve a preliminary injunction "is addressed to the discretion of the trial court." *Barr-Mullin, Inc. v. Browning*, 108 N.C. App. 590, 598 (1993). The Court should exercise that discretion to dissolve the preliminary injunction (or not enter it in the first place) now that the law has been amended to address the Court of Appeals' chief concern.

BACKGROUND

1. In 2013, the General Assembly passed, and former Governor McCrory signed into law, H.B. 589, an omnibus bill that changed numerous aspects of North Carolina election law, including: (1) shortening the early voting period; (2) eliminating same-day registration; (3) eliminating out-of-precinct voting; (4) eliminating pre-registration for 16 and 17-year-olds; and (5) adding a voter ID requirement. The United States Court of Appeals for the Fourth Circuit struck down these provisions of H.B. 589, reasoning that the General Assembly had acted with racially discriminatory intent by "restrict[ing] voting and registration in five different ways, all of which disproportionately affected African Americans." *North Carolina State Conference of NAACP v. McCrory*, 831 F.3d 204, 214 (4th Cir. 2016). The Fourth Circuit did not hold that the voter ID provision would have been unconstitutional had it been enacted as a standalone bill. It did, however, reason that the failure to include "public assistance IDs" in the list of qualifying voter

ID "in particular was suspect, because a reasonable legislator would be aware of the socioeconomic disparities endured by African Americans and could have surmised that African Americans would be more likely to possess this form of ID." *Id.* at 227–28 (quotation marks omitted, brackets deleted).

The State initially sought Supreme Court review of the *McCrory* decision, but while the cert petition was pending Governor Cooper and Attorney General Stein took office and sought to dismiss the petition. *See North Carolina v. North Carolina State Conference of NAACP*, 137 S. Ct. 1399 (2017) (Roberts, C.J., respecting denial of certiorari). The Supreme Court thereafter denied certiorari, and the Fourth Circuit's decision therefore escaped review and remained undisturbed.

2. Following the *McCrory* decision, the General Assembly once again took up voter ID. But it did not simply enact new voter ID legislation. Instead, it sought the views of the People of North Carolina, placing a constitutional amendment relating to photo voter ID on the November 2018 ballot. *See* 2018 N. C. Sess. Laws 128. The measure passed with 55% of the vote, *see Official General Election Results – Statewide,* N.C. STATE BOARD OF ELECTIONS (Nov. 6, 2018), https://bit.ly/3iKqUcC, and as a result the North Carolina Constitution now provides: "Voters offering to vote in person shall present photographic identification before voting. The General Assembly shall enact general laws governing the requirements of such photographic identification, which may include exceptions." N.C. CONST. art. VI, §§ 2(4), 3(2).

On November 27, 2018, in accord with this constitutional mandate, S.B. 824 was introduced in the Senate. Its primary sponsors were Senators Ford, Krawiec, and Daniel, a Democrat and two Republicans. During the legislative process, twenty-four proposed amendments were introduced, two of which were withdrawn before they could be acted on. Of the twenty-two

remaining amendments, thirteen were adopted, seven of which were proposed by Democrats. Nine amendments either were tabled or failed. Six of those were introduced by Democrats. Thus, a majority of the amendments (7 of 13) proposed by Democrats were accepted. The details of the six Democratic amendments that failed are as follows:

First, Senator Clark sought to strike the requirement that free county board of elections IDs be used only for voting purposes and to add them to the list of items that could be used to show residency for purposes of obtaining a DMV ID. *See* North Carolina General Assembly Amendment A6, Senate Bill 824, https://bit.ly/3eRCkJq.

Second, Senator Van Duyn sought to (a) delay the date on which free county board of elections IDs would be available from May 1 to July 1, 2019, and (b) extend the provision expressly providing that not knowing about the voter ID requirement or failing to bring photo ID to the polling place would be a reasonable impediment for elections held in 2019 to also cover elections held in 2020. *See* North Carolina General Assembly Amendment A7, Senate Bill 824, https://bit.ly/3gh5vFV.

Third, Senator Lowe sought to extend the one-stop early voting period to include the last Saturday before an election. *See* North Carolina General Assembly Amendment A8, Senate Bill 824, https://bit.ly/3dTCi2B. While this amendment was tabled, in November 2019 the Governor signed into a law a bill that passed the General Assembly by a 160–1 margin extending one-stop early voting to include the last Saturday before an election. *See* 2019 N.C. Sess. Law. 239 § 2(a).

Fourth, Senator Woodard sought to expand the list of voter ID by amending the provision allowing qualifying state or local government employee ID to instead allow qualifying federal, state, or local government ID. *See* North Carolina General Assembly Amendment A9, Senate Bill 824, https://bit.ly/38mp7pG.

ADDENDUM 6

Fifth, Representative Fisher sought to add qualifying K–12 ID to the list of voter ID. *See* North Carolina General Assembly Amendment A9, Senate Bill 824, https://bit.ly/2BPVSPK.

Sixth, Representative Richardson sought to add to the list of voter ID "an identification card issued by a branch, department, agency, or entity of the United States or this State for a government program for public assistance." *See* North Carolina General Assembly Amendment A13, Senate Bill 824, https://bit.ly/3ePUPOg. H.B. 1169, which passed the General Assembly by a vote of 142–26, adopted this proposal almost verbatim, adding in the same statutory location "an identification card issued by a department, agency, or entity of the United States Government or this State for a government program of public assistance." 2020 N.C. Sess. Laws 17 § 10. Governor Cooper signed the bill into law on June 12, 2020.

The General Assembly passed S.B. 824 on December 6, 2018. The Governor vetoed the bill December 14, and the General Assembly overrode the veto on December 19.

3. Plaintiffs filed this lawsuit on December 19, 2018, the same day the General Assembly enacted S.B. 824 into law. Plaintiffs' complaint included six claims for relief, alleging that S.B. 824 violated the North Carolina Constitution by: (1) intentionally discriminating on the basis of race in violation of Article I, § 19; (2) unduly burdening the right to vote, in violation of Article I, § 19; (3) creating unlawful classifications with respect to the right to vote, in violation of Article I, § 19; (4) infringing on the right to participate in free elections, in violation of Article I, § 10; (5) conditioning the right to vote on the possession of property, in violation of Article I, § 10; and (6) infringing on the rights of petition, assembly, and free speech, in violation of Article I, §§ 12 and 14.

ADDENDUM 7

Plaintiffs moved for a preliminary injunction, and Legislative Defendants moved to dismiss. On July 19, 2019, this Court denied Plaintiffs' preliminary injunction motion and granted Legislative Defendants' motion to dismiss as to all claims except the racial discrimination claim.

Plaintiffs appealed the denial of the preliminary injunction on their racial discrimination claim, and the Court of Appeals reversed. The court reasoned that, given the "initially tainted policy" of H.B. 589, the General Assembly should "bear the risk of nonpersuasion with respect to [the General Assembly's] intent" in enacting S.B. 824. *Holmes v. Moore*, 804 S.E.2d 244, 261 (N.C. Ct. App. 2020). And the court further concluded that the General Assembly had not done enough to sever the link between H.B. 589 and S.B. 824. Key to this conclusion was the General Assembly's failure to include public assistance ID in the list of valid voter ID, despite being criticized for the same exclusion in the H.B. 589 litigation. Indeed, the Court of Appeals relied on this failure at every step of the intentional discrimination analysis under *Arlington Heights v. Metro. Hous. Corp.*, 429 U.S. 252 (1977).

The Court of Appeals' reliance on the failure to include public assistance IDs is particularly pronounced in its discussion of S.B. 824's legislative history, one of the four *Arlington Heights* factors. "*McCrory* recognized," the Court of Appeals reasoned, "as particularly relevant to its discriminatory-intent analysis, the removal of public assistance IDs in particular was suspect, because a reasonable legislator could have surmised that African Americans would be more likely to possess this form of ID." *Holmes*, 840 S.E.2d at 261 (quotation marks omitted, brackets and ellipsis deleted). "[A]n amendment to S.B.824 that would have enabled the recipients of federal and state public assistance to use their public assistance IDs for voting purposes," the court continued, "was also rejected." *Id.* (quotation marks omitted, brackets and ellipsis deleted). "In light of the express language in *McCrory* and at this stage of the proceeding," the court concluded,

"the inference remains the failure to include public-assistance IDs was motivated in part by the fact that these types of IDs were disproportionately possessed by African American voters." *Id.*

Discussion of the exclusion of public assistance IDs also pervaded the court's discussion of the other three *Arlington Heights* factors. First, with respect to S.B. 824's historical background, the Court of Appeals explained that a pre-*Shelby County* version of H.B. 589 included "public-assistance IDs," while those IDs were absent from the "final versions of both H.B. 589 and S.B. 824." *Holmes*, 840 S.E.2d at 258. Second, with respect to the sequence of events leading to S.B. 824, the Court of Appeals stated that "Plaintiffs' forecasted evidence demonstrates a number of amendments seeking to ameliorate the impacts of S.B. 824 were . . . rejected." *Id.* at 261. Of course, the rejection of public assistance IDs was a key part of Plaintiffs' "forecasted evidence." *See id.* (discussing affidavit of Representative Harrison regarding amendment to add public assistance IDs). Third, with respect to the impact of S.B. 824, the Court of Appeals reasoned that "the General Assembly's decision to exclude public-assistance and federal-government-issued IDs will likely have a negative effect on African Americans because such types of IDs are disproportionately held by African Americans." *Id.* at 262 (quotation marks omitted).

As a result of its *Arlington Heights* analysis the Court of Appeals held that Plaintiffs were likely to succeed on the merits, and as a result of this holding the court further held that Plaintiffs had established a threat of irreparable harm from "the denial of equal treatment in voting . . . based on a law allegedly motivated by discriminatory intent." *Id.* at 266. The Court of Appeals therefore remanded the case to this Court with instructions to enter a preliminary injunction against the voter ID provisions of S.B. 824. *Id.* at 266–67.

ADDENDUM 9

ARGUMENT

Under settled equitable principles, the preliminary injunction issued in this case should be dissolved (or not entered in the first place). As an interlocutory ruling, a preliminary injunction "is subject to revision at any time before the entry of final judgment." N.C. GEN. STAT. § 1A-1, 54. "The question presented by the motion to dissolve is whether the injunction should continue in effect," *Shishko v. Whitley*, 64 N.C. App. 668, 672 (1983), and the decision whether "to dissolve a temporary injunction is addressed to the discretion of the trial court," *Barr-Mullin, Inc. v. Browning*, 108 N.C. App. 590, 598 (1993). As courts sitting in equity have recognized, "an injunctive order may be modified or dissolved in the discretion of the court when conditions have so changed that it is no longer needed or as to render it inequitable." *Tobin v. Alma Mills*, 192 F.2d 133, 136 (4th Cir. 1951). Indeed "a court errs when it refuses to modify an injunction . . . in light of such changes." *Agostini v. Felton*, 521 U.S. 203, 215 (1997).

1. The amendment of North Carolina law to include public assistance IDs in the list of valid voter ID severs the final thread tying *McCrory*'s holding of racial discrimination to S.B. 824, and it undermines the Court of Appeals' holding that Plaintiffs are likely to succeed on the merits of their claim that S.B. 824 was enacted with racially discriminatory intent. This is demonstrated by a review of the *Arlington Heights* factors in light of the addition of public assistance IDs.

Historical Background. The Court of Appeals emphasized the General Assembly's decision to drop public assistance IDs from the list of approved voter ID in H.B. 589 in the wake of the Supreme Court's decision in *Shelby County* and the continued exclusion of public assistance IDs in S.B. 824. *See Holmes*, 840 S.E.2d at 258. To the extent these decisions evinced an intention to discriminate on the basis of race (which, to be clear, Legislative Defendants dispute), the decision to *add* public assistance IDs must evince a *lack* of racially discriminatory intent.

Sequence of Events. The Court of Appeals' analysis of the sequence of events leading to S.B. 824 led it to flip the burden of persuasion to the General Assembly, relying on the fact that "sixty-one of the legislators who voted in favor of S.B. 824 had previously voted to enact H.B. 589." *Id.* at 260. The Court of Appeals further reasoned that the "Plaintiffs' forecasted evidence demonstrates a number of amendments seeking to ameliorate the impacts of S.B. 824 were also summarily rejected." *Id.* at 261.

The Court of Appeals' conclusion that a finding of past discrimination required the General Assembly to disprove present discrimination was wrong. *See Abbott v. Perez*, 138 S. Ct. 2305, 2325 (2018). But even if that were not the case, the enactment of H.B. 1169 decisively broke from H.B. 589. The Court of Appeals found it significant that sixty-one legislators voted for both H.B. 589 and S.B. 824. If that fact is significant, it must also be significant that *every single legislator* who voted for S.B. 824 and was present for the vote on H.B. 1169 voted for the bill and its addition of public assistance IDs. On the Court of Appeals' reasoning, the votes of these legislators to add public assistance IDs are strong evidence against racially discriminatory intent.

The passage of H.B. 1169 also means that North Carolina's voter ID law now incorporates *nearly every amendment offered* to "ameliorate the impacts of S.B. 824." *Holmes*, 840 S.E.2d at 261. As recounted above, Democrats offered thirteen non-withdrawn amendments during the legislative debates over S.B. 824. Seven were adopted into S.B. 824 and included in the bill as originally enacted. Several of the non-adopted amendments would have done nothing to "ameliorate the impacts" of S.B. 824's voter ID provisions on voting—or would have done the opposite. Senator Clark's proposed amendment dealt with the use of free county board of elections voter IDs for non-voting purposes. Senator Van Duyn's amendment would have *delayed* the date on which free county board IDs were available, making things worse for voters. It also would have

specified that not knowing about the voter ID requirement or failing to bring photo ID to the polling place would be a reasonable impediment for elections held in 2020, but that amendment would not have changed the impact of S.B. 824 because a declared reasonable impediment must be accepted unless *it is false*. *See* N.C. GEN. STAT. § 163-166.16(f). Elections officials have no authority to second-guess the reasonableness of the claimed impediment.

Others of the proposed amendments have now been adopted into North Carolina law. Senator Lowe sought to extend one-stop early voting to include the last Saturday before an election, and that has now been accomplished. *See* 2019 N.C. Sess. Law 239 § 2(a). And Representative Richardson's public assistance ID amendment was adopted nearly verbatim in H.B. 1169.

That leaves only the amendments proposed by Senator Woodard and Representative Fisher. Both dealt with the types of IDs that could be used as valid voter ID after going through a legislatively prescribed qualification procedure. Senator Woodard's amendment would have expanded the category of state or local government employee IDs to include all federal, state, or local government IDs. And Representative Fisher would have expanded the category of student IDs to include K–12 in addition to college IDs. Apart from federal and state public assistance IDs—which now are included *without having to go through a qualifying process*—it is unclear what types of additional IDs would have been included under Senator Woodard's amendment. Federal employee IDs are one possibility, but there is no evidence that federal agencies would submit to the qualification process Senator Woodard proposed that they would need to satisfy. There also is no reason to believe that a substantial proportion of federal employees lack other qualifying ID such as a drivers' license, or at a minimum the ready means to obtain such ID. There also is a dearth of evidence that Representative Fisher's amendment to add K–12 IDs would have

harm. In the view of the Court of Appeals, the key harm Plaintiffs were threatened with was being subject to a voter ID law that was motivated by racially discriminatory intent. *See id.* at 266. If Plaintiffs are unlikely to succeed on the merits of their racial discrimination claim, that threatened harm evaporates.

On the other hand, because Plaintiffs are unlikely to succeed on the merits the harm threatened by entering and continuing the preliminary injunction is magnified. "Any time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *Maryland v. King*, 567 U.S. 1301 (2012) (Roberts, C.J., in chambers) (quotation marks omitted). The irreparable injury inflicted on North Carolina is particularly grave here, because the preliminary injunction prohibits state officials from giving effect not only to S.B. 824 but also to the constitutional voter ID mandate that statute seeks to implement. Every election in which S.B. 824 continues to be enjoined is one in which the North Carolina Constitution's requirement that "[v]oters offering to vote in person shall present photographic identification before voting" is frustrated. N.C. CONST. art. VI, §§ 2(4), 3(2). Now that the Court of Appeals' principal concern with S.B. 824 has been remedied, equity demands that the preliminary injunction in this case be dissolved.

CONCLUSION

For the foregoing reasons, this Court should refrain from issuing or dissolve the preliminary injunction.

Dated: July 9, 2020

Respectfully submitted,

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ADDENDUM 14

CERTIFICATE OF SERVICE

I do hereby certify that I have on this 9th day of July, 2020, served a copy of the foregoing Legislative Defendants' Motion to Refrain from Entering or, Alternatively, to Dissolve the Preliminary Injunction by email to counsel for Plaintiffs and Defendants at the following addresses:

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ADDENDUM 15

STATE OF NORTH CAROLINA WAKE COUNTY	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 18 CVS 15292
JABARI HOLMES, FRED CULP, DANIEL E. SMITH, BRENDON JADEN PEAY, and PAUL KEARNEY, SR., Plaintiffs, 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.	**STATE DEFENDANTS' RESPONSE TO LEGISLATIVE DEFENDANTS' MOTION FOR ENTRY OF A CASE MANAGEMENT ORDER**

Defendants the State of North Carolina and the North Carolina State Board of Elections (the "State Defendants") hereby respond to the Legislative Defendants' Motion for Entry of a Case Management Order, which was served on the parties and emailed to the Trial Court Administrator on April 10, 2020.

The State Defendants defer to the Court's discretion as to whether an expedited pretrial schedule is appropriate. Below, the State Defendants highlight a number of considerations that impact the potential implementation of S.B. 824 and its photo ID requirement before the 2020 general election, including considerations arising from the current public health emergency. The State Defendants have discussed these considerations with counsel for the Legislative

Defendants and the Plaintiffs.

The Legislative Defendants propose a trial schedule with the hope of allowing enough time after final decision—if S.B. 824 is upheld and the current injunction is lifted—to apply its provisions to the November 2020 general election, for which voting is scheduled to begin on September 4, 2020, less than 5 months from now.

As the Legislative Defendants note (Mot. at 6), in early March 2020, in the federal case challenging the photo ID requirement, the State Defendants informed the Fourth Circuit Court of Appeals that the elections boards would need to restart photo ID implementation activities—which had been suspended in December 2019 pursuant to the federal court's order—well in advance of the start of absentee voting on September 4, 2020. The State Defendants have since determined with more specificity that, without factoring in the likelihood of additional delays resulting from the effects of the pandemic, which are discussed below, implementation activities would need to begin by early July. This estimate is based solely on accommodating the State Board's activities in logistically preparing to administer an election with the new photo ID requirement. It does not take into account voter-education activities that would also need to take place to inform voters that the photo ID law that was enjoined for the primary election in March would be enforced in the general election in November.

The early July estimate also does not take into account any measures that may be necessary to deal with the reality that the State now faces in trying to prepare for and carry out an election amid the disruption to regular activities that the COVID-19 pandemic has caused. At present, it is unclear how long the social distancing requirements, limits on mass gatherings, and other public health-related restrictions ordered or recommended by state, local, and federal authorities will last, or in what ways they might be reduced over time. Agencies involved in

election administration, including the State and county boards and the Division of Motor Vehicles (DMV), must begin consideration and planning now for administering the upcoming general election consistent with some or all of these public health restrictions, while allowing for the possibility of new or modified restrictions over time.

One challenge for local elections boards is ensuring that they will have enough poll workers. The average age of poll workers in the state is 70, meaning that most poll workers are in the category of individuals most at risk from the COVID-19 virus. Because of this and because of the uncertainty associated with the ongoing public health emergency, elections boards must work to identify and train alternate poll workers in the event that some poll workers opt out or are directed to avoid the potential exposure that could come from working at polling sites. The State Board must begin now to plan to reconfigure thousands of polling sites statewide to allow for adequate distancing, sanitization, and minimal contact with surfaces that would increase the chances of virus transmission, to protect both poll workers and voters. This will require significant preparation, training of employees and volunteers, and procurement of supplies to support these procedures.

State and county elections boards must also plan now for an expected massive increase in the number of voters who may cast their votes by absentee ballot. The State Board estimates that 40% or more of the state's voters may cast their vote by absentee ballot—in comparison to the approximately 4% of voters who have done so in election cycles in the recent past. To prepare for an increase in absentee ballots of this magnitude, State and county elections boards need to ensure the availability of absentee ballots, coordinate with postal services, including by potentially establishing designated drop-off points for ballots to be mailed, and create new processes to open, count, audit, and report election results for this volume of absentee ballots.

Implementing a photo ID requirement in the midst of the evolving public health emergency would require the State and county boards to undertake additional measures. Restarting implementation of S.B. 824 would require meeting voters' requests for free IDs and documentation needed to obtain those IDs. However, the State Board, many county boards, and other federal, state, and local government agencies are currently closed to the public or are operating with reduced hours and staff. The same is true for DMV offices, which issue the most common form of photo identification in the state.

In addition, public health requirements that may be in place would compel State and county boards to undertake extra planning and training to implement the photo ID requirement during in-person voting, which begins in mid-October. For example, if social-distancing and face-mask requirements are in effect during in-person voting, State and county boards of elections will need to have planned and trained for effective procedures to verify photo IDs, provide assistance to voters lacking photo IDs, and assist voters in filling out provisional voting applications and reasonable impediment affidavits, while abiding by the public health requirements.

Prior to the public health emergency, the State Board had been planning to conduct in-person training for county boards and staff during its August conference. The county boards and their staff would then provide in-person training to their poll workers in the weeks following the State Board's conference. This kind of in-person training will be particularly critical if S.B. 824 is in effect because it imposes administratively complex requirements on poll workers and elections-board staff. The State Board is not aware of poll worker training having been conducted remotely by any county board before, and is unsure of the efficacy of such remote training—particularly in light of the fact that many communities and poll workers will face

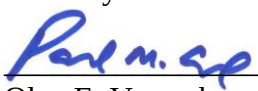
technical hurdles to remote training. If social-distancing guidelines are in effect in the summer and fall, the State Board will not be able to conduct in-person training during its August conference and county staff will not be able to train poll workers in-person in September and October.

In sum, the State and local boards are working to address a number of uncertainties and logistical challenges associated with administering the November 2020 elections amidst the COVID-19 pandemic. Implementing a photo ID requirement would add to these. The State Defendants defer to the Court's discretion on the trial schedule and stand ready to continue to update the Court with any additional information requested.

If the Court orders an accelerated discovery and trial schedule similar to the one proposed by the Legislative Defendants, the State Defendants request that the Court's order provide flexibility to account for the current and any subsequent orders of the North Carolina courts that govern the use of remote hearings, depositions, and testimony.

Respectfully submitted this the 14th of April, 2020.

JOSHUA H. STEIN
Attorney General



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The undersigned certifies that the foregoing was served upon all parties by electronic mail, by consent, addressed to the following:

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Respectfully submitted this the 14th day of April, 2020.

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