

STATE OF NORTH CAROLINA IN THE GENERAL COURT OF JUSTICE
COUNTY OF WAKE SUPERIOR COURT DIVISION

2019 MAR 14 P 2:03
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JABARI HOLMES, FRED CULP,
DANIEL E. SMITH, BRENDON
JADEN PEAY, SHAKOYA CARRIE
BROWN, and PAUL KEARNEY, SR.,

Plaintiffs,

v.

AMENDED ORDER

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.

THIS MATTER CAME BEFORE THE Court for hearing on March 4, 2019 pursuant to motions filed by Plaintiffs and Defendants, including Plaintiffs' Motion to Transfer pursuant to N.C. Gen. Stat. Section §1-267.1 and N.C. R. Civ. P. 42(b)(4). Present in the courtroom for Plaintiffs were Allison Riggs, and John Carella. Present in the courtroom for Legislative Defendants was David Thompson. Present for the State of NC was Olga E. Vysotaskaya de Brito.

After considering the pleadings, the Motions by all parties, the briefs submitted by the parties, and the arguments of counsel for all parties, it is hereby ORDERED that Plaintiffs' Motion to Transfer is GRANTED and the Legislative Defendants' Motion to Dismiss pursuant to 12(b)(1) be DENIED as to Claims I and II and GRANTED as to Claim III.

In support of this Order, this Court states as follows:

CASE HISTORY

On December 19, 2018, Plaintiffs Jabari Holmes, Fred Culp, Daniel E. Smith, Brendon Jaden Peay, Shakoya Carrie Brown and Paul Kearney, Sr. ("Plaintiffs") filed their Verified Complaint ("Complaint") against Timothy K. Moore, Phillip E. Berger, David R. Lewis and Ralph E. Hise ("Legislative Defendants") and the State of North Carolina and the North Carolina State Board of Elections ("State Defendants").

Plaintiffs Complaint sought a declaratory judgment and injunction against N.C. Session Law 2018-144, SB 824 {"An Act to Implement the Constitutional Amendment Requiring Photographic Identification to Vote") (the "Act") under the North Carolina Constitution, on the grounds that it:

- I. purposefully discriminates against and disproportionately impacts minority voters in violation of the Equal Protection Clause in Article 1, § 19;
- II. unduly burdens the fundamental right to vote, in violation of the Equal Protection Clause in Article 1, § 19;
- III. creates separate classes of voters, in violation of the Equal Protection Clause in Article 1, § 19;
- IV. imposes a cost on voting, in violation of the Free Elections Clause in Article I, § 10;
- V. imposes a property requirement for voting, in violation of the Property Qualifications Clause in Article I, § 11; and,
- VI. impedes the ability of voters to engage in political expression and speech, in violation of their Right of Assembly and Petition and Freedom of Speech as afforded by Article I, §§ 12 and 14.

(Compl at 45-52)

Plaintiffs alleged that they challenge the Act "both on its face and as-applied to Plaintiffs and those similarly situated North Carolina-qualified, registered voters that lack acceptable photo[.]" (Compl at 52-53) On the cover page of the Complaint, Plaintiffs requested assignment of the case to a three-judge panel pursuant to N.C.G.S. § 1-267.1. Additionally, Plaintiffs filed a motion for preliminary injunction on the same day they filed the Complaint.

On January 22, 2019, the Legislative Defendants filed their Motion to Dismiss pursuant to Rules 12(b)(1) and 12(b)(6) of the North Carolina Rules of Civil Procedure. On February 21, 2019, the State Defendants filed their answer and to the Motion to Dismiss made pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. Legislative Defendants argue that Plaintiffs' claims fail on the merits, and that, contrary to Plaintiffs' assertions, the vast majority of

those challenges are as applied rather than facial challenges to S.B. 824 and focus on the law's application to certain subsets of voters, such as those who do not currently possess a form of voter ID recognized by the statute. In particular, Legislative Defendants direct this Court's attention to Claims II through VI in Plaintiffs' Complaint and contend that this Court must resolve Claims II through VI before transferring Claim I to a three-judge panel and granting Plaintiff's Motion to Transfer.

Additionally, Legislative defendants contend that insufficient facts have been alleged to support certain claims and Plaintiffs should not be allowed to proceed on these claims in part under Legislative Defendants Motion pursuant to 12(b)(1).

1. Legislative Defendants argue that the Court must dismiss Claim I to the extent that it purports to state claims on behalf of Native Americans because no Plaintiff has alleged that he or she is Native American.
2. In Claim II, Legislative Defendants argue that Plaintiffs' allegations of "longer lines" and "undue delay" are not concrete and that the terms are vague and undefined—and do not invoke legally protected interests. Legislative Defendants argue the court must dismiss a "portion of" Plaintiffs' second claim for relief, because the allegations in the Complaint that voters will be unduly burdened are too speculative. (Leg. Defs.' Br. 19–20.)
3. Legislative Defendants additionally contend that the Court must dismiss the portion of Claim III that purports to bring a claim on behalf of voters under sixty-five for lack of subject matter jurisdiction, because no Plaintiff has standing to bring this claim. Legislative Defendants argue that Plaintiffs' Count III claim that S.B. 824 draws impermissible classifications between younger and older voters, must be dismissed either because Plaintiffs under 65 have suffered no injury in fact, or because their claims are not yet ripe.

On February 7, 2019, all parties were informed by the Wake County Trial Court Administrator of the necessity to provide information regarding the case and to complete a Status Request addressing assignment to a three-judge panel pursuant to Wake County's internal procedures. On February 12, following a request from the Trial Court Administrator, the parties filed a Joint Status Report, in which the parties addressed whether this Court must review and

resolve any as-applied challenge before transferring the matter to a three-judge panel. *See* Parties' Joint Status Report at 2–9.

ANALYSIS:

PLAINTIFFS' MOTION TO TRANSFER

1. “It has long been understood that it is the duty of the courts to determine the meaning of the requirements of our Constitution.” *See, e.g., Mitchell v. N.C. Indus.* [***10] *Dev. Fin. Auth.*, 273 N.C. 137, 144, 159 S.E.2d 745, 750 (1968); *Ex parte Schenck*, 65 N.C. 353, 367 (1871); *Bayard v. Singleton*, 1 N.C. 5, 6-7 (1787).
2. “When a government action is challenged as unconstitutional, the courts have a duty to determine whether that action exceeds constitutional limits.” *See Maready v. City of Winston-Salem*, 342 N.C. 708, 716, 467 S.E.2d 615, 620 (1996)
3. “An individual challenging the facial constitutionality of a legislative act ‘must establish that no set of circumstances exists under which the act would be valid.’” *Salerno*, 481 U.S. at 745, 95 L. Ed. 2d at 707. The fact that a statute “might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid.” *State v. Thompson*, 349 N.C. 483
4. In addressing facial challenges to the validity of an act of the N.C. General Assembly, the relevant text of N.C.R. Civ. P. 42(b)(4) provides that:

“Pursuant to G.S. 1-267.1, any facial challenge to the validity of an act of the General Assembly . . . shall be heard by a three-judge panel in the Superior Court of Wake County if a claimant raises such a challenge in the claimant's complaint or amended complaint . . .”
5. The North Carolina Supreme Court has provided clear guidance on analyzing statutory language. “When the language of a statute is clear and without ambiguity, it is the duty of this Court to give effect to the plain meaning of the statute, and judicial construction of legislative intent is not required.” *In re R.L.C.*, 361 N.C. 287, 292, 643 S.E.2d 920, 923 (2007).
6. This Court determines that the plain and unambiguous meaning of the term “raises” is “initiates.” Plaintiffs raise a facial challenge in the Complaint as to each claim.
7. Plaintiffs have chosen to label their challenges to the Act as both facial and as-applied. However, rather than solely asking the Court to prevent application of “the Act” to themselves, Plaintiffs

seek a statewide injunction to allow all "qualified, registered voters without acceptable photo ID at the polls to cast regular ballots." (Compl at 53)

8. As part of the Joint Status Report submitted on February 12, 2019, Plaintiffs indicated that they "pleaded this action as a facial challenge to the constitutionality of Senate Bill 824, S.L. 2018-144, under several different provisions of the North Carolina Constitution. *See* Pls.' Compl. ¶ 3-6." (Joint Status Report ("JSR") at 2)
9. A facial challenge asserts that an enacted statute "on its face" contravenes a provision of the North Carolina Constitution. *N.C. State Bd. of Educ. v. State*, 371 N.C. 170, 190, 814 S.E.2d 67, 80 (2018) (holding that "the enactment of Session Law 2016-126 does not, at least on its face, contravene ... the Constitution of North Carolina).
10. Plaintiffs here have pleaded that SB 824 is unconstitutional because it
 - I. "purposefully discriminates" against minority voters, (Compl at 45 ¶ 174);
 - II. "creates an undue burden on the fundamental right to vote," (Compl at 48 ¶ 183);
 - III. treats "persons similarly situated differently with respect to the exercise of their fundamental right to vote," (Compl at 48 ¶ 185);
 - IV. "imposes on voters costs" violating the Free Elections Clause, (Compl at 50 ¶ 190-191);
 - V. subjects voters to "an unconstitutional property requirement[.]" (Compl at 51 ¶ 196); and
 - VI. violates constitutional free speech guarantee of minority and young voters, (Compl at 52 ¶¶ 200-201).
11. The nature and the breadth of these challenges, each of which seeks invalidation of SB 824 in its entirety, strongly indicates that Plaintiffs' action is a facial challenge.
12. "[A]s-applied challenges represents a plaintiff's protest against how a statute was applied in the particular context in which plaintiff acted or proposed to act, while a facial challenge represents a plaintiff's contention that a statute is incapable of constitutional application in any context." *Town of Beech Mt. v. Genesis Wildlife Sanctuary, Inc.*, 247 N.C. App. 444, 462, 786 S.E.2d 335, 347 (2016), *aff'd per curiam*, 369 N.C. 722, 799 S.E.2d 611 (2017) (citing *Frye v. City of Kannapolis*, 109 F. Supp. 2d 436, 439 (M.D.N.C. 1999)).
13. "Generally, as-applied challenges question the manner with which a defendant may apply the otherwise constitutional statute, to the claimant's constitutional rights. *See Id.* (citing *Cornell Cos., Inc. v. Borough of New Morgan*, 512 F. Supp. 2d 238, 256 (E.D. Pa.2007)). Here, Plaintiffs neither allege that SB 824 is constitutional under some circumstances, nor argue that they only challenge the application of SB 824 to themselves.

14. Although denominated, in part, as an "as-applied" challenge, Plaintiffs attack SB 824's application not only to themselves, but to all similarly situated voters who lack acceptable photo ID. (Compl at 53)
15. Although these claims include both a facial and an as applied challenge, each must be referred to a three-judge panel for consideration.

MOTION TO DISMISS PURSUANT TO 12(b)(1)

CLAIM I

16. "A court must dismiss a claim under Rule 12(b)(1) when the court '[l]ack[s] . . . jurisdiction over the subject matter,' N.C. R. CIV. P. 12(b)(1), including when the plaintiffs lack standing or the issues are not ripe for review. 'As the party invoking jurisdiction, plaintiffs have the burden of proving the elements of standing.'" *Neuse River Found., Inc. v. Smithfield Foods, Inc.*, 574 S.E.2d 48, 51 (N.C. Ct. App. 2002); *see Munger v. State*, 689 S.E.2d 230, 235 (N.C. Ct. App. 2010).
17. "The general rule is that 'a person who is seeking to raise the question as to the validity of a discriminatory statute has no standing for that purpose unless he belongs to the class which is prejudiced by the statute.' 16 Am. Jur. 2d, Constitutional Law, § 123 (1964). One recognized exception to this rule allows an affected party to allege discrimination when no member of a class subject to the alleged discrimination is in a position to raise the constitutional question." *In re Appeal of Martin*, 286 N.C. 66, 75, 209 S.E.2d 766, 773 (1974) citing *Quong Ham Wah Co. v. Industrial Acc. Com.*, 184 Cal. 26, 192 P. 1021 (1920), writ dismissed, 255 U.S. 445, 65 L.Ed. 723, 41 S.Ct. 373 (1921); *cf. State v. Mems, supra*.
18. Here, "[o]nly injunctive relief is sought, and for that only one plaintiff with standing is required." *Crawford v. Marion County Election Bd.*, 553 U.S. 181
19. The absence from the Complaint of an American-Indian plaintiff does not bar Plaintiffs from pursuing their claim in Count I that S.B. 824 intentionally discriminates against African-American and American-Indian voters.

CLAIM II

20. "The Supreme Court has rejected the argument that an injury must be 'significant' a small injury, 'an identifiable trifle,' is sufficient to confer standing. *United States v. Students Challenging*

Regulatory Agency Procedures (SCRAP), 412 U.S. 669, 689 n.14, 93 S. Ct. 2405, 2417 n.14, 37 L. Ed. 2d 254 (1973).

21. Long lines and undue delay caused by the implementation of SB 824 are facts alleged by Plaintiffs as part of a claim that Plaintiffs ultimately will have the opportunity and burden to prove; they form no free-standing “portion” of a claim that can be dismissed under Rule 12(b)(1).

CLAIM III

22. The N.C. Supreme Court analyzed the question of standing in *Stanley v. Department of Conservation and Dev.*, 284 N.C. 15, 199 S.E.2d 641 (1973). The Court stated:

“Under our decisions ‘[o]nly those persons may call into question the validity of a statute who have been injuriously affected thereby in their persons, property or constitutional rights.’ . . . The rationale of this rule is that only one with a genuine grievance, one personally injured by a statute, can be trusted to battle the issue. ‘The ‘gist of the question of standing’ is whether the party seeking relief has ‘alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentations of issues upon which the court so largely depends for illumination of difficult constitutional questions.’”

23. “A party who is not personally injured by a statute is not permitted to assail its validity,” *Yarborough v. Park Commission*, 196 N.C. 284, 288, 145 S.E. 563.

24. Four of the Plaintiffs in this case (Plaintiffs Holmes, Smith, Peay, and Brown) have alleged that they are under sixty-five. (Compl. ¶¶ 10, 18, 20, 23.) None of them have alleged that they possess an in-state ID that has been expired for over a year—and thus would qualify them to vote *if* they were sixty-five or older. None of them have alleged that they possess an in-state ID that has been expired for over a year—and thus would qualify them to vote *if* they were sixty-five or older.

25. The Court considers as suggestive authority *Northeast Ohio Coalition for the Homeless v. Brunner*, 652 F. Supp. 2d 871, in its discussion of *Common Cause/Georgia v. Billups*, 554 F.3d 1340 (11th Cir. 2009). In *Northeast*, the court directed that:


“to demonstrate standing [Plaintiffs] had to plead or otherwise to establish that at least one of their members fell within the category of voters who were potentially affected by the alleged lack of uniformity. . . Plaintiffs had not ‘identified any of their members who would be affected by the disparate identification [requirements] of the Voter ID Law’ . . . [and] had not claimed ‘that any of their members would have attempted to use any of the categories of identification that were alleged to be defined [as unequal.]”

26. When plaintiffs “[fail] to allege or show that any of their members [fall] within the category of voters who [are] potentially affected by the alleged lack of uniformity. . . [T]he Court’s dismissal for lack of standing [is] proper.” “Even assuming (without deciding) that [the allegation] causes injury . . . [Plaintiffs] have pointed to no evidence tending to show that they have suffered that injury.” *United States v. Hays*, 515 U.S. 737, 745, 115 S. Ct. 2431, 132 L. Ed. 2d 635 (1995)
27. The Court must dismiss this claim because no Plaintiff has personally been injured by this provision or is a member of an injured under sixty-five classification.

BASED UPON THE FOREGOING, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that:

1. Legislative Defendants’ Motion to Dismiss Claim I in part pursuant to 12(b)(1) is DENIED.
2. Legislative Defendants’ Motion to Dismiss Claim II in part pursuant to 12(b)(1) is DENIED.
3. Legislative Defendants’ Motion to Dismiss Claim III pursuant to 12(b)(1) is GRANTED.
4. Plaintiffs’ Motion to Transfer is GRANTED.
5. Legislative Defendants’ Motion to Dismiss pursuant to 12(b)(6) shall be heard by the assigned three-judge panel.

SO ORDERED, this the 14th day of March, 2019.



Vince M. Rozier, Jr.
Superior Court Judge Presiding

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing document was served on the following persons by electronic mail, and by depositing a copy of the same in the United States mail, postage prepaid, and properly addressed, as follows:

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This the 14th day of March, 2019.



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