STATE OF NORTH CAROLINA) IN THE GENERAL COURT OF JUSTICE
) SUPERIOR COURT DIVISION
COUNTY OF WAKE)
) CASE NO. 18 CVS 15292
JABARI HOLMES, FRED CULP, DANIEL E. SMITH, BRENDON JADEN PEAY, SHAKOYA CARRIE BROWN, AND PAUL KEARNEY, SR.,

PLAINTIFFS,

vs.

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

LEGISLATIVE DEFENDANTS' MOTION TO REFFRAIN FROM ENTERING OR, ALTERNATIVELY, DISSOLVE THE PRELIMINARY INJUNCTION
N.C. R. Civ. P. 7, 54(b)

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.

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.

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.

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

substantially impacted the number of voters with qualifying ID, much less enough to offset the potential administrative difficulties involved in training poll workers to distinguish between K–12 IDs that have and have not made it through the qualification process.

In sum, North Carolina's voter ID laws now incorporate nearly every "ameliorative" amendment proposed during the sequence of events leading to the passage of S.B. 824. This cuts strongly against a finding a discriminatory intent.

Legislative History. The legislative history analysis has also now flipped, even taken on the Court of Appeals' terms. If the exclusion 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 (ellipsis omitted), then it must follow that the *addition* of public assistance ID is particularly powerful in *defeating* any claim of racial discrimination. Of course, Legislative Defendants dispute that the original decision to not add public assistance IDs evinces racial discrimination, but what is important for purposes of this motion is the effect of H.B. 1169 given the Court of Appeals' reasoning, which found the exclusion of public assistance IDs to be an important factor in evaluating S.B. 824.

Impact of SB 824. Again, taking the analysis on the Court of Appeals' terms, if the exclusion of public assistance IDs was "likely [to] have a negative effect on African Americans because such types of IDs are 'disproportionately held by African Americans'," *id.* at 262, it must follow that the *inclusion* of public assistance IDs will likely have a *positive* effect on African Americans.

2. Because the addition of public assistance IDs undermines Plaintiffs' likelihood of success, it also makes continuing the preliminary injunction wholly inequitable. Without a likelihood of success on the merits, Plaintiffs have *zero* claim to being threatened with irreparable

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.

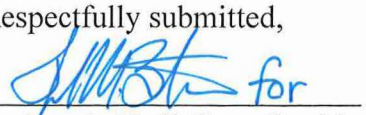
On the other hand, because Plaintiffs are unlikely to succeed on the merits the harm threatened by entering and continuing the preliminary injunction is magnified. "Any time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable 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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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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