STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
18 CVS 15292

JABARI HOLMES, FRED CULP, DANIEL E. SMITH, BRENDON JADEN PEAY, SHAKOYA CARRIE BROWN, 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.*	**PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION**

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

NOW COME Plaintiffs Holmes, Culp, Smith, Peay, Brown, and Kearney, by and through counsel, and respectfully submit this memorandum of law in support of Plaintiffs' Motion for Preliminary Injunction.

TABLE OF CONTENTS

INTRODUCTION

The right to vote on an equal basis in North Carolina is fundamental, and "[n]o right is more precious in a free country than that of having a voice in the election of those who make the laws under which" its "citizens . . . must live." *Blankenship* v. *Bartlett*, 363 N.C. 518, 522, 681 S.E.2d 759, 762 (2009) (internal citation and quotation marks omitted). Senate Bill 824 ("SB 824"), although enacted to implement the constitutional requirement that "[v]oters offering to vote in person . . . present photographic identification before voting," N.C. Const. art. VI, §§ 2, 3, nonetheless critically undermines that fundamental right in violation of numerous provisions of the North Carolina Constitution.

This case is about the right to vote in North Carolina, and what the State can and cannot do to restrict that right. This is not the first time in recent years that courts have been asked to resolve this question, and the historical context matters. Despite virtually no history of allegations—much less evidence—of in-person voter fraud in this State, the General Assembly has twice before enacted voter ID laws that apply to in-person voting. Then-Governor Perdue vetoed the first such law in 2011 because it was discriminatory and would have disenfranchised voters. The second, House Bill 589 ("HB 589"), was enacted in 2013 but struck down by the United States Court of Appeals for the Fourth Circuit because it was enacted with the intent to discriminate against voters of color.

SB 824 is the most recent chapter in the General Assembly's effort to disenfranchise North Carolinians by imposing unnecessary and arbitrary voter ID requirements. Like the 2013 law, SB 824 is unconstitutional because it

intentionally targets voters of color. SB 824 also imposes severe burdens on the right to vote, without any sufficiently compelling justification. For many voters, obtaining compliant ID will be extremely difficult, if not impossible. For the State's less fortunate voters, the cost of obtaining an ID or the documents required to obtain an ID may mean the difference between food on the table and a voice in the political process, deciding who passes the laws that will govern them. And although the law purports to provide "free" forms of ID to any qualified voter, those options are effectively unavailable to many voters with disabilities, voters who lack access to reliable transportation, and working voters.

SB 824 violates the North Carolina Constitution in other ways as well. It unjustifiably creates separate classes of voters, in violation of the Equal Protection Clause, by consigning voters who lack compliant ID to a separate line at the polling place and allowing them to vote only a provisional ballot that may be discarded at the practically unfettered discretion of election officials. The law also imposes a financial cost on voting, in violation of the Free Elections Clause; imposes a property requirement for voting, in violation of the Property Qualifications Clause; and impedes voters' ability to engage in political expression and speech by casting a ballot, in violation of their Right of Assembly and Petition and Freedom of Speech.

Plaintiffs and similarly situated voters all across the State will be irreparably harmed if this Court does not enjoin implementation and enforcement of SB 824. Purported "safety nets" in the law do not alleviate the risk of irreparable harm: voters who lack, and are unable to obtain, qualifying ID prior to Election Day face

disenfranchisement because supposed failsafe measures, such as the option to cast "reasonable impediment" provisional ballot, are likely to be inconsistently applied and inadequately protective—just as they were in 2016 under HB 589. Moreover, confusion stemming from the rushed rollout of SB 824 may cause voters to stay home on Election Day, even if they have compliant ID, or cause pollworkers to erroneously fail to offer provisional ballots to eligible voters lacking ID, just as they did during the March 2016 primary. With the 2020 election rapidly approaching, and State efforts to educate voters and pollworkers on SB 824's requirements barely in their infancy, the equities strongly favor issuing an injunction now to preserve the status quo. That is the only way to guarantee North Carolina voters the opportunity to exercise their fundamental right to vote until the legality of SB 824 can be conclusively resolved.

FACTS AND BACKGROUND

A. History of Discriminatory Voter ID Laws in North Carolina

In 2011 the North Carolina General Assembly first attempted to implement a photo ID requirement for voting. Then-Governor Bev Perdue vetoed the law based on the discriminatory and disenfranchising impact it would have on North Carolina voters. As Governor Perdue stated at the time, the law would have "unnecessarily and unfairly disenfranchise[d] many eligible and legitimate voters." Affidavit of Ivy A. Johnson, Ex. K, *Perdue Votes ID* (hereinafter "Johnson Aff.").

Less than two years later the General Assembly tried again, with House Bill 589 ("HB 589"). When it was introduced in the spring of 2013, HB 589 proposed certain, limited requirements related to voter identification and absentee voting.

N.C. State Conference of the NAACP v. *McCrory*, 831 F.3d 204, 227 (4th Cir. 2016) (hereinafter *"McCrory*"). All that changed, however, in late June 2013, when the Supreme Court issued its opinion in *Shelby County* v. *Holder*, 570 U.S. 529 (2013), striking down the coverage formula for Section 5 of the Voting Rights Act. As of that date, North Carolina no longer needed to preclear changes in its election laws with the U.S. Department of Justice. *Id.* The General Assembly took immediate advantage, swiftly moving to limit permissible forms of identification, eliminating from the list of qualifying ID those that the legislature knew were disproportionately used by African-American and young voters, including state university IDs, community college IDs, and IDs that were issued as part of a government public assistance program. An Act To Restore Confidence In Government of 2013 ("HB 589"), 2013 N.C. Sess. Laws 381 § 2.2. Additionally, the new version of HB 589 reduced or eliminated practices—including same-day registration, out-of-precinct voting, early voting, and pre-registration—which had been specifically introduced to increase voter participation and which were disproportionately used by voters of color as compared to white voters. *McCrory,* 831 F.3d at 215–16. Efforts to amend the law to expand the list of permissible IDs were rejected. *Id.* at 216, 218.

Private parties and the Department of Justice immediately challenged the law, asserting that HB 589 impermissibly discriminated against minority voters. *N.C. State Conference of the NAACP* v. *McCrory*, 182 F. Supp. 3d 320, 348 (M.D.N.C. 2016). On the eve of trial, the Assembly modified HB 589 to include a so-

called "reasonable impediment" exception that would allow a voter to cast a provisional ballot if she swore under oath that a reasonable impediment prevented her from obtaining a qualifying ID. Act of June 22, 2015, 2015 N.C. Sess. Laws 103 § 8(a)-(h). With HB 589 (including the reasonable impediment provision) in place during the State's 2016 primary election, at least 1,432 voters—disproportionately voters of color—were disenfranchised. *See* Affidavit of Christopher Dalton Ketchie, Table 5 (hereinafter "Ketchie Aff."); Johnson Aff., Ex. B, Nov. 26, 2018 Presentation of Kim Strach at 30–31. Indeed, relative to their overall voter registration rates, African-American voters were more likely to complete a reasonable impediment declaration, and more likely not to have their provisional ballots counted during the 2016 primary. Ketchie Aff. ¶ 33.

Even without this damning evidence of the reasonable impediment exception's disproportionate inefficacy before it, the Fourth Circuit nonetheless invalidated HB 589's voter ID requirements, because they "were enacted with racially discriminatory intent in violation of the Equal Protection Clause of the 14th Amendment and § 2 of the Voting Rights Act." *McCrory*, 831 F.3d at 219. As proof of the Legislature's discriminatory intent, the Court cited two key facts. First, the Legislature had used racial data to construct a list of permissible voter IDs that would disproportionately impact African-American voters. *Id.* at 216. Second, HB 589's requirements were insufficiently tailored to achieve the Legislature's stated objectives of identifying voters and combating fraud, because the list of permissible ID excluded perfectly reliable forms of ID, such as state-issued benefits program IDs

held disproportionately by African Americans, while imposing no requirements on absentee ballots, a form of voting used disproportionately by whites. *Id.* at 235–36. All of this, the Court concluded, showed that the Legislature would not have passed HB 589 but for its disproportionate impact on African Americans. *Id.* at 233. And the "reasonable impediment" provision was not an adequate remedy for HB 589's racially discriminatory intent, because it did not eliminate the burdens the law placed on African-American voters, or negate the invidious intent of the Legislature that enacted it. *Id.* at 240–41.

Following the invalidation of HB 589 in July 2016, the State Board of Elections made specific efforts to inform voters and pollworkers that the ID requirement would not apply during the 2016 General Election. Affidavit of Isela Gutierrez ¶ 13 (hereinafter "Gutierrez Aff."). Nevertheless, materials from HB 589's education campaign informing voters that they would need photo ID to vote remained prominently on display in some communities. Affidavit of Kate Fellman ¶ 10 (hereinafter "Fellman Aff."). Additionally, many pollworkers still believed voters were required to show ID in order to vote and relayed that misinformation to voters at the polls, resulting in needless voter disenfranchisement. Gutierrez Aff. ¶¶ 13–14.

B. SB 824 Continues the State's Legacy of Discriminatory Voter ID Laws

In the summer of 2018 the General Assembly sought to amend the North Carolina Constitution to require voters to show photo ID when voting in person. The proposal, which passed with 55% of the vote, *see* Johnson Aff. Ex. A, Nov. 6,

2018 Election Results, amended Article VI of the Constitution to require voters "offering to vote in person" to "present photographic identification before voting," and charged the General Assembly with enacting voter ID laws to implement the new requirement. *See* N.C. Const. art. VI, § 2(4), §3(2). The constitutional language approved by voters also explicitly allowed for exceptions to the photo ID requirement. *Id.*

During the same election, Republicans lost their supermajority in the Assembly. Affidavit of Representative Mary "Pricey" Harrison ¶ 9 (hereinafter "Harrison Aff."). But rather than allow the newly-elected legislature, which reflected the will of the voters in 2018, to enact the State's new voter ID law, the lame-duck General Assembly reconvened the 2017-2018 legislative session to rush a bill to the floor. *Id.* ¶ 10. After the bill was approved by the Select Committee on Elections, the Senate had less than 24 hours to review the bill before it was debated on the floor the next day. Affidavit of Senator Mike Woodard ¶ 8 (hereinafter "Woodard Aff."). Senators were forced to cram to learn what was in the bill in an extremely short period of time, with no time to consult the county boards of elections, the state board, and election experts. *Id.* The House similarly failed to give adequate notice, circulating SB 824's proposed language only the night before it was to be debated. Harrison Aff. ¶ 13. Several House members, including Representative Harrison, had to book last minute travel back to Raleigh and cancel other scheduled events and meetings in order to attend. *Id.*

Sixty-one of the legislators who voted in favor of SB 824—including Legislative Defendants—previously voted to enact HB 589's intentionally discriminatory provisions. *Compare* Johnson Aff. Ex. C, July 25, 2013 Senate Roll Call Vote Transcript – HB 589 Third Reading, *and* Ex D, July 25, 2013 House Roll Call Vote Transcript – HB 589 Concurrence Vote with Committee Substitute, *with* Ex. E, Dec. 16, 2018 Senate Roll Call Vote Transcript – SB 824 Veto Override, *and* Ex. F, Dec. 18, 2018 House Roll Call Vote Transcript – SB 824 Veto Override. And, thumbing their noses at the Fourth Circuit's findings, those legislators—including Defendants—chose to enact SB 824 without conducting any new data analysis to determine whether the new law's requirements would ameliorate the discriminatory effects on African-American voters which led the Fourth Circuit to conclude that HB 589 had been passed with discriminatory intent. Affidavit of Senator Ben Clark ¶ 10 (hereinafter "Clark Aff."); Harrison Aff. ¶¶ 16–17; Woodard Aff. ¶¶ 11–12. Instead, the Legislature had before it only outdated data which nonetheless showed that SB 824 would disenfranchise thousands of voters. Harrison Aff. ¶ 18; Woodward Aff. ¶ 11–12.

Just as it had in 2013, the Legislature refused to permit voters to use public assistance ID to prove their identities at the polls, a choice the Fourth Circuit specifically referenced as evidence of the discriminatory intent motivating HB 589. *See McCrory,* 831 F.3d at 236; Harrison Aff. ¶¶ 22, 26. Senate Democrats offered other amendments designed to ameliorate the impact on minority voters and others lacking qualifying ID. Woodard Aff. ¶¶ 14–15. The lame-duck Republicans rejected

each of them, including: an amendment to approve the use of all state government IDs that have an expiration date (Woodard); an amendment to extend the deadline for the county board of elections to offer voter photo identification cards to July 2019 (Van Duyn); an amendment to allow one-stop absentee voting (also known as early voting) on the last day before Election Day (Lowe); and an amendment to delay the rollout of SB 824, to give State officials more time to educate voters and pollworkers alike on the new law's requirements. Woodard Aff. ¶¶ 14–15. Other amendments rejected in the House included a proposal to allow school schedule to be considered a reasonable impediment (Harrison), a proposal that would have allowed a voter to cure their provisional ballot at the polling place with the signature of two witnesses (Jackson), and proposals that would have allowed voters to use a high school ID (Fisher), or a temporary ID issued by the DMV (Harrison). Harrison Aff. ¶¶ 21–27. Tellingly, the General Assembly, as it had with HB 589, also enacted less restrictive requirements for absentee voters, a form of voting which white voters use more frequently than voters of color—another decision which the *McCrory* court pointed to as evidence of discriminatory intent. An Act to Implement the Constitutional Amendment Requiring Photographic Identification to Vote, 2018 N.C. Sess. Laws 144 § 1.2(a)–(i); *see also McCrory*, 831 F.3d at 230.

The ratified bill was presented on December 6, 2018 to Governor Roy Cooper, who vetoed it on December 14. Johnson Aff. Ex. L, SB 824 History. On December 19, the North Carolina General Assembly reconvened and overrode the Governor's

veto and, thus, the bill became law notwithstanding the objections of the Governor. *Id.*

The Legislature did permit, in SB 824, voters to prove their identities using some forms of ID that were not permitted under HB 589, such as college and university IDs, which, if applied universally and without restriction, could in theory reduce the law's impact on certain groups of voters. But SB 824 imposes such a strenuous set of requirements on issuing institutions to have their IDs approved for voting—and provides them with such little time to do so—that permitting these forms of ID is unlikely to significantly change SB 824's impact, as compared to HB 589. Quinn Aff. ¶¶ 40–45. Indeed, over 800 institutions are eligible to have their photo IDs approved for voting, but in practice only 72 have thus far received approval from the State Board of Elections. *Id*; *see also* Johnson Aff. Ex. I, North Carolina Board of Elections Student, Employee and Tribal Identification Approvals. And as of the time of filing of this brief, a bill to somewhat alter SB 824's unnecessarily onerous requirements for student ID approval has stalled in the Senate. *See* Johnson Aff. Ex. M, HB 646 History.

C. SB 824 Imposes Severe Burdens on Voters

SB 824 imposes severe burdens on North Carolina voters. All voters must determine whether they possess ID acceptable for voting purposes. Some North Carolina voters will avoid the polls because they fear they lack acceptable ID. Others will be disenfranchised because they lack acceptable ID and will be unable to obtain it. Still other North Carolina voters who do not possess an acceptable form of ID but nonetheless brave a trip to the polls will find themselves confronted

with confused pollworkers and long waits to cast a provisional ballot, if they are permitted to cast a ballot at all.

In 2015, 5.9% of all North Carolina voters lacked acceptable photo ID under HB 589. Quinn Aff. ¶ 22. And African-American voters were more than twice as likely as white voters to lack qualifying ID. *Id.* All available data in the legislative record indicate that the state of the world in 2019 is no different. *Id.* ¶ 21. Those thousands of North Carolina voters—disproportionately voters of color—who lack an acceptable ID must obtain one or risk losing the right to vote. And the burdens associated with attempting to obtain an ID are significant. According to one study, the cost for all North Carolina voters who lacked acceptable ID under HB 589 to obtain a DMV-issued ID—as measured in the time required to obtain necessary documentation, complete the requisite paperwork, and travel to and from DMV locations—was anywhere from $4.8 million to $9.0 million dollars. Stuart Shapiro & Deanna Moran, *The Burden of Voter Identification Laws: The Case of North Carolina,* 42 T. Marshall L. Rev. 123, 153–54 (hereinafter "Shapiro").

These costs and inconveniences have a real deterrent effect on voters and result in disenfranchisement. For example, Lynda Benson tried to obtain a North Carolina ID when she moved to the State, but was unable to do so because the name on her social security card did not exactly match the name on her California ID. Affidavit of Lynda Benson ¶ 3 (hereinafter "Benson Aff."). Because her birth certificate had been stolen before she moved to North Carolina, Benson expected that she would encounter further difficulties trying to obtain ID. *Id.* ¶ 4. So,

despite wanting to vote in the 2016 primary, Benson stayed home from the polls because she knew there was a voter ID requirement in place, and did not have a North Carolina ID. *Id.* ¶ 5.

And while some voters, like Benson, may be discouraged from voting because of the challenges associated with obtaining ID, others will risk disenfranchisement because they cannot obtain a qualifying ID under any circumstance. Plaintiff Fred Culp is an African-American voter, with a disability, who has lived and voted in North Carolina for decades. Affidavit of Fred Culp ¶¶ 2–6 (hereinafter "Culp Aff."). He does not have and cannot obtain a North Carolina driver's license, because he does not have a copy of his South Carolina birth certificate or social security card. *Id.* ¶¶ 9–11. He has tried to obtain a copy of his birth certificate, but cannot due to a clerical error involving his birth record. *Id.* ¶ 11. As a result, he and others like him who cannot obtain necessary documentation to prove their identities are at risk of being disenfranchised by SB 824.

The two purportedly "free" forms of voter ID provided under SB 824 do not alleviate these severe burdens on voters who lack qualifying ID. Mr. Culp, for example, does not have the necessary documentation required to obtain a free DMV-issued ID, and does not drive, making it burdensome for him to travel to a location where county board of elections IDs are issued. *Id.* ¶¶ 14–16. These logistical challenges to obtaining a "free" ID are not unique to Plaintiff Culp.

To obtain a DMV-issued voting ID, just as with a driver's licenses, a voter must possess specific documents to prove their identity. These documents can be

difficult if not impossible to acquire. Plaintiff Jabari Holmes, for example, has "made several phone calls to the Social Security Administration," with the assistance of his mother, but has been unable to obtain "a copy of his social security card because [he] could not provide enough identifying information." Affidavit of Elizabeth Holmes ¶ 8 (hereinafter "Holmes Aff."). The requisite forms can also be costly to obtain. Voters born in North Carolina can obtain free copies of their birth certificates and marriage licenses, but more than 3 million voters—over 50% of the State's electorate—were born elsewhere and cannot. *See, e.g.*, Culp Aff. ¶ 15 ("[B]ecause I was born in South Carolina, I am not eligible to receive a free birth certificate under the law."); Affidavit of Mina Ezikpe ¶ 2 (hereinafter "Ezikpe Aff."); *see also* Quinn Aff., Table 1. For still other voters, just getting to the DMV may be an insurmountable challenge, as voters without DMV-issued ID are less likely to have access to reliable forms of transportation.

That cost in time and money spent obtaining documents, or traveling to and from the DMV, falls hardest on voters who must travel significant distances to obtain an ID, and on voters of a lower socioeconomic status. Shapiro, *supra*, at 139, 164. Certain groups of voters are disproportionately more likely to bear those burdens. People of color (including African Americans, American Indians, and Latinos) live in poverty in North Carolina at double the rates of white voters. Johnson Aff. Ex. G, Selected Characteristics of People at Specified Levels of Poverty in the Past 12 Months. And North Carolinians with disabilities are nearly twice as

likely to fall below the poverty line as North Carolinians without a disability. *Id.*; *see also, e.g.*, Culp Aff. ¶ 4.

The "free" voter IDs issued by the County Boards of Elections are also burdensome for some voters to obtain, because despite the fact that each county board is required to issue IDs, not all county boards are equally—or easily—accessible. Observing the locations of county boards throughout the State demonstrates that the burden of traveling to obtain an ID will fall disproportionately on voters of color and the State's poorest voters. In 38 counties across the State, voters must travel in excess of the statewide mean of 7.79 miles, each way as the crow flies, in order to obtain an ID from their county board of elections, and in 18 of those counties, the average voter must travel 10 miles or more. Ketchie Aff. ¶ 18. In 16 of those counties, African-American voter registration exceeds the statewide average of 21.86%. *Id.* ¶ 20. Those include four of the seven counties in North Carolina in which the majority of registered voters are African-American. *Id.* Five more of those counties exceed the statewide average for American-Indian voter registration. *Id.* ¶ 21. Further, 19 of the 38 counties have a poverty rate higher than the statewide poverty rate. *Id.* ¶ 22. And to make matters worse, seven of those 38 counties either lack a DMV office entirely, or have a DMV office with only very limited hours—further limiting voters' options for obtaining acceptable ID. *Id.* ¶ 23. In several counties in Eastern North Carolina, voters must deal with a confluence of these factors when attempting to access acceptable ID. *Id.* ¶ 24; Figure 2.

Lack of transportation is a significant barrier to obtaining a county board issued ID, even in counties where voters need not travel in excess of the statewide average. That is because the overwhelming majority of counties have only one board of elections office at which "free" voter photo IDs are available, and many of those office locations are inaccessible by public transportation. For example, Alamance County likely will have the resources to issue free ID at only its main office, located in Graham. Affidavit of Noah Read ¶ 10 (hereinafter "Read Aff."). That office is not served by dedicated public transportation, and, due to its location, Alamance County Board of Elections member Noah Read fears that offering free voter IDs at that location will do little to improve access to ID for Alamance County voters who lack DMV-issued ID. *Id*. ¶¶ 10–11*; see also* Ezikpe Aff. ¶ 6 ("I was a full-time student, without a vehicle, living on campus and it would have been difficult" for me to travel to an office).

Voters with disabilities may be physically unable to obtain such an ID—even if they have access to reliable transportation—because the county board offices are in locations that are not sufficiently accommodating to voters with disabilities. For example, Plaintiff Holmes cannot visit the Wake County Board of Elections to obtain an ID because the office is located in downtown Raleigh, on a busy road without handicapped parking spots. Holmes Aff. ¶¶ 10–11.

Obtaining a county board issued ID is also financially impossible for many North Carolina voters because board offices are open only during limited hours. County board of elections offices are generally open only during weekday business

hours, *see* Johnson Aff. Ex. H, County Boards of Elections Locations and Hours, which means working voters who wish to obtain a voter photo ID from a county board will likely be required to arrange time off from work, in addition to arranging or paying for transportation to otherwise inaccessible County Board office locations. These financial burdens will likely fall even harder on voters residing in those 19 counties in which voters are disproportionately more likely to live below the poverty line *and* must travel greater-than-average distances to get to the county board of elections office. Ketchie Aff. ¶ 22. The Legislature could have reduced this burden by requiring county board offices to open and issue voter IDs at least one Saturday before Election Day, but an amendment proposing that modest solution was rejected without discussion. *See* Harrison Aff. ¶ 24.

The reasonable impediment exception to SB 824 does not cure the law's severe burdens on voters who lack ID. Voters will not have their reasonable impediment provisional ballot counted if their reasonable impediment is not accepted by the County Board of Elections. 2018 N.C. Sess. Laws 144 § 1.2(a). The law does not provide sufficient guidance to instruct election officials on how to assess a voter's reasonable impediment declaration. *Id.* And election officials are not required to provide notice to voters, or an opportunity to present affirmative proof in support of their reasonable impediment, before a provisional ballot is invalidated. *Id.*

Experience during the March 2016 Primary Election reveals that election officials trained by the State Defendants implemented a prior version of the current

law—including provisional ballot and reasonable impediment processes—in an arbitrary and unequal manner that lead to voter disenfranchisement. As noted, African-American voters were disproportionately more likely to complete a reasonable impediment declaration during the 2016 primary, but also disproportionately more likely to have their provisional ballot discounted. Ketchie Aff. ¶ 35. And individual experiences during the 2016 primary further illustrate the haphazard manner in which HB 589's purported fail-safes were improperly and arbitrarily implemented. For example, Plaintiff Paul Kearney fell victim to this arbitrary process when he arrived at his polling place and discovered that he had forgotten his ID. Affidavit of Paul Kearney ¶ 8 (hereinafter "Kearney Aff."). Despite the fact that Mr. Kearney has acceptable ID that he could have used to cure the provisional ballot he was required to cast, the pollworkers failed to inform Mr. Kearney of his obligation to return to the county board of elections with ID in order to do so. *Id.* ¶ 9. Plaintiff Kearney was disenfranchised because pollworkers failed to provide accurate information on a uniform basis. *Id.* Similarly, Plaintiff Daniel Smith tried to vote in 2016 using a DMV-issued temporary driving certificate, but pollworkers refused to accept it. Affidavit of Daniel Smith ¶ 7–8 (hereinafter "Smith Aff."). He felt singled out and embarrassed at his polling station, and frustrated because he did not understand why he was being denied the right to vote. Smith Aff. ¶¶ 6–8. He was not offered a reasonable impediment affidavit or informed that he had the option to complete one. *Id.* ¶ 9. He was instead given a regular provisional ballot, which he voted, but—critically—was not told that he was

required to cure his provisional ballot in order for it to be counted. *Id.* As a result, he was disenfranchised. *Id.* ¶ 10.

Mina Ezikpe also received inaccurate information when she attempted to vote in the 2016 primary. Ezikpe arrived at her polling place with a Georgia driver's license and Duke University ID card, both of which showed her photograph. Ezikpe Aff. ¶¶ 3–5. Because student ID cards were not an acceptable form of ID under HB 589, Ezikpe was told she could not cast a ballot while at the polls. *Id.* ¶ 5. She was not informed that she could cast a provisional ballot, or told about the reasonable impediment process. *Id.* Ezikpe was unable to obtain a North Carolina ID before the election period ended, and as a result she was disenfranchised during the 2016 election. *Id.* ¶¶ 6–8.

Data received from the State Defendants in the early stages of discovery further reveal that even voters who *were* offered reasonable impediment declarations in 2016 were disenfranchised through an inconsistent application of pollworker discretion. Like SB 824, HB 589 required pollworkers to count reasonable impediment provisional ballots unless they had grounds to believe the declaration was "factually false." But, according to a spreadsheet containing the comments of election officials, multiple voters who attested on their reasonable impediment declaration that their college schedule prevented them from obtaining an ID had their ballots discounted by election officials based on a discretionary determination that school schedule was an "invalid" reasonable impediment reason. *See* Johnson Aff. Ex. O, March 2016 Primary Provisional Voter File. Other voters

who indicated they faced a reasonable impediment due to "LOST OR STOLEN ID" had their ballots discounted because, according to the comments, they did not return to the county board of elections with their photo ID prior to canvass—a requirement that applies only if the voter *does not* claim a reasonable impediment. *Id.* These are but a few of the examples of arbitrary and inconsistent treatment reflected in that 2016 data.

The likelihood of similar problems in the implementation of SB 824's reasonable impediment exception is significantly greater. State and county officials had nearly three years to educate voters and polling officials on the requirements of HB 589. SB 824, in contrast, will take effect just over a year after its passage. And with roughly nine months left until SB 824 goes into effect, election officials in several counties have not even begun the process of training pollworkers to implement the new law's requirements.

D. Implementing SB 824 This Close to Upcoming Elections Is Unnecessary and Will Result in Confusion on Election Day and Additional Voter Disenfranchisement

Despite the passage of a constitutional amendment requiring photo ID for voting, State officials are not obligated to rush to immediately implement a voter ID law without adequate time to educate voters, train pollworkers, or ensure that county officials will have the resources they need to carry out the law's requirements. The General Assembly has already admitted as much, by voting to postpone the implementation of SB 824's requirements to the 2020 election and specifically allowing two congressional special elections to proceed without an ID requirement, after initially scheduling SB 824 to take effect this year. They first

did so proactively, when ongoing investigations into election misconduct made it apparent that a special election would need to be held in Congressional District 9, by wholly exempting the CD 9 race from SB 824. *See* An Act to Require a Primary if a New Election is Ordered in Any Election Contest, 2018 N.C. Sess. Laws 146 § 2("Delay Effective Date Part I of SB 824, 2017 Regular Session"). The Legislature later wholesale delayed enforcement of the requirement until 2020 when it became apparent that a new election would also need to be held in CD 3 due to a vacancy. *See* An Act to Delay the Implementation of the Regulatory Requirements of S.L. 2018-144 in Order to Ensure the Efficient Administration of Unexpected Special Elections, 2019 N.C. Sess. Laws 4. If the State is not constitutionally obligated to implement SB 824 immediately, there is no sound reason to rush ahead with a statewide rollout for which county officials are ill-prepared.

Members of various county boards of elections, including John "Jake" Quinn in Buncombe County, Greg Flynn in Wake County, and Noah Read in Alamance County, have expressed concerns regarding their respective boards of elections' ability to comply with SB 824's requirements for photo identification. Affidavit of John Quinn ¶ 6 (hereinafter "J. Quinn Aff."); Affidavit of Greg Flynn ¶ 4 (hereinafter "Flynn Aff"); Read Aff. ¶ 13. Each county board of elections was required to begin offering IDs starting on May 1, 2019. SB 824 § 1.1(b). The county boards have not previously been in the business of providing ID. This new mandate will require the county boards to expend extra resources to perform a function and could hinder their ability to address other pressing election administration

concerns. J. Quinn Aff. ¶ 7. There is concern that insufficient money has been appropriated to assist the county boards with providing voter photo identification cards. *Id.* ¶ 9. And few details as to how the money appropriated in Senate Bill 824 will be allocated have emerged since the law was passed at the end of last year. *Id.* Wake County, for example, estimates that it will cost a one-time sum of $30,000, and an additional $100,000 going forward to offer the IDs. Flynn Aff. ¶ 7. The Wake County Board also estimates that it will need an additional three full-time staff members dedicated to this project, as well as a number of customer service representatives to answer questions, help people with the process, and assist voters with getting to the board office to obtain an ID. *Id.* No one knows whether this funding will be provided.

There has been a similar lack of communication regarding the locations at which IDs can be provided by the county boards. *Id.* ¶ 8. Jake Quinn has expressed a desire to offer identification cards at several locations, J. Quinn Aff. ¶ 10, an option that would enhance voter access to necessary ID. It is unclear at which alternative locations elections staff is permitted to produce IDs for voters, and whether county boards will be reimbursed if they purchase multiple machines in order to do so. *Id.* ¶¶ 8–9. County boards also fear they will bear the brunt of training staff on using the voter photo identification card equipment, without adequate funding or resources to do so. *Id.* ¶ 12.

Due to a lack of coordinated communication between state and local election officials since SB 824's passage, voters also lack clear guidelines on when the photo

ID requirement will go into effect and what forms of ID will be acceptable. Fellman Aff. ¶ 12. Students are particularly vulnerable to disenfranchisement due to confusion about the law's requirements, in large part because student ID compliance under SB 824 is unsettled. *Id.* ¶¶ 13–14. To try to address this confusion, citizen voting advocacy groups such as You Can Vote have been forced to expend and divert resources away from their traditional voter registration activities to update voters on SB 824's ever-changing requirements and status. *Id.* Indeed, post-enactment changes required due to the rushed and haphazard manner in which SB 824 was originally enacted have only deepened confusion about the law's requirements and required You Can Vote to expend even more resources to try to inform the electorate. *Id.* ¶¶ 15–28.

Implementing SB 824 now, while its constitutionality is still being litigated, raises additional risks of confusion and resulting voter disenfranchisement. Changes to ID requirements made near in time to an election lead to confusion amongst voters and pollworkers. Isela Gutiérrez and Democracy North Carolina oversaw a statewide poll monitoring project in 2016. Gutierrez Aff. ¶ 6. During the 2016 General Election, which occurred months after the Fourth Circuit invalidated North Carolina's most recent voter ID law, many pollworkers still believed that voters were required to show photo ID in order to vote and relayed that misinformation to voters at the polls. *Id.* ¶¶ 13–14. This occurred even though the State made efforts to distribute information and training materials regarding the invalidation of the prior law. *Id.* ¶ 13. If the State Board of Elections begins disseminating information and training materials about SB 824's requirements now, while

the law's constitutionality is still in question, that information will be difficult to correct, and will likely lead to confusion, as in 2016, if the law is ultimately invalidated. *Id.* ¶¶ 18–20; *see also* Fellman Aff. ¶ 10 (explaining that after HB 589 was invalidated by the Fourth Circuit, voting advocates found flyers publicly posted incorrectly telling voters they would need an ID to vote in the 2016 General Election). If education efforts are allowed to continue and SB 824 is ultimately invalidated, the same disenfranchising confusion will result.

ARGUMENT

I. Standard of Review

A preliminary injunction is warranted if "(1) [] a plaintiff is able to show likelihood of success on the merits of his case and (2) [] a plaintiff is likely to sustain irreparable loss unless the injunction is issued, or if, in the opinion of the Court, issuance is necessary for the protection of a plaintiff's rights during the course of litigation." *A.E.P. Indus., Inc.* v. *McClure*, 308 N.C. 393, 401, 302 S.E.2d 754, 759–60 (1983); *see also* N.C.G.S. § 1-485. In cases like this one, where voting rights are at risk, a preliminary injunction is warranted not only to preserve ballot access, but to ensure the smooth administration of elections. *Cf. Crookston* v. *Johnson*, 841 F.3d 396, 399 (6th Cir. 2016) (considering the importance of "holding orderly elections" in determining whether to grant a preliminary injunction, and explaining that such injunctions should be requested early, before the training of poll works has occurred).

The movant must show only a "reasonable" probability of success on the merits. *A.E.P. Indus., Inc.*, 308 N.C. at 404, 302 S.E.2d at 761; *cf. Conestoga Wood*

Specialities Corp. v. *Sec'y of U.S. Dep't of Health & Human Servs.*, 2013 WL 1277419, at *7 n.6 (3d Cir. Feb. 8, 2013) (explaining that "likelihood of success on the merits" does not mean "more likely than not," but rather that the probability of winning is "reasonable" by embodying the "prospect" or "promise" of success); *Pashby* v. *Delia*, 709 F.3d 307, 321 (4th Cir. 2013) (clarifying that there is no need to "show a certainty of success" to meet the preliminary injunction standard). And the court may consider a broad range of evidence, including "affidavits, exhibits and pleadings," to determine whether success is likely. *Schultz* v. *Ingram*, 38 N.C. App. 422, 427, 248 S.E.2d 345, 349 (1978) (explaining that, for purposes of a preliminary injunction, affidavits need not meet the same standards for admissibility as affidavits in support of a motion for summary judgment); *see also State ex rel. Morgan* v. *Dare To Be Great, Inc.*, 15 N.C. App. 275, 276, 189 S.E.2d 802, 804 (1972) (holding that, under N.C.G.S. § 1-485 and the North Carolina Rules of Civil Procedure, "it was and is proper for the court to consider evidence by affidavits in show cause hearings for injunctions").

II. Plaintiffs Are Likely to Succeed in Showing SB 824 Violates Art. I, § 19 Because It Was Enacted with Discriminatory Intent

Like its federal counterpart, the North Carolina constitution guarantees all persons equal protection of the laws, and further provides that no person shall be "subjected to discrimination by the State because of race, color, religion, or national origin." *See* N.C. Const. art I, § 19. Senate Bill 824 violates that constitutional guarantee because it was enacted with the discriminatory intent to exclude voters of color from the electoral process.

A seemingly neutral law like SB 824 is facially invalid if its enactment was motivated by intentional invidious discrimination. *S.S. Kresge Co.* v. *Davis*, 277 N.C. 654, 660–62, 178 S.E.2d 382, 385–87 (1971); *Vill. of Arlington Heights* v. *Metro Hous. Dev. Corp.*, 429 U.S. 252, 264–66 (1977); *see also Libertarian Party* v. *State*, 365 N.C. 41, 47, 707 S.E.2d 199, 203 (2011) ("When interpreting the Constitution of North Carolina, we are not bound by federal court rulings, so long as our decision comports with the United States Constitution.") Evidence of discriminatory purpose "may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another." *Washington* v. *Davis*, 426 U.S. 229, 242 (1976). Determining whether a discriminatory purpose was a motivating factor in the enactment of a challenged law "demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Arlington Heights*, 429 U.S. at 266; *State* v. *Jackson*, 322 N.C. 251, 261, 318 S.E.2d 838, 843–44 (1988) (Frye, concurring). Factors relevant to that analysis include: (1) the impact of the law and whether it bears more heavily on one race than another, (2) the law's historical background, (3) the specific sequence of events and legislative history leading to the law's enactment, and (4) departures from the normal legislative process. *Arlington Heights*, 429 U.S. at 266–68. Because Plaintiffs can show that these factors weigh heavily in support of their claims, they are likely to succeed on the merits of their intentional discrimination claim.

First, SB 824's requirements will have a drastic and disproportionate effect on voters of color as compared to white voters. African Americans are more than twice as likely to lack qualifying identification as white voters. Quinn Aff. ¶ 29. Those voters will be forced to obtain compliant ID or risk losing their right to vote. And the burdens of obtaining ID—even the purportedly "free" forms of ID provided by SB 824—fall disproportionately on voters of color. People of color are more likely to live in poverty than white voters, and the cost of obtaining ID falls hardest on voters with lower socioeconomic status. Johnson Aff. Ex. J, North Carolina Poverty Statistics; Shapiro at 139. For example, the County Boards of Elections offices that issue "free" ID are often inaccessible by public transportation and open only during business hours. Read Aff. ¶¶ 10-11; Patterson Aff. ¶¶ 9–10. And many of the counties in which voters must travel farthest to obtain a county board issued ID are disproportionately African-American in population. Ketchie Aff. ¶ 20.

Second, SB 824 is part of a well-documented history of racially discriminatory voting laws in North Carolina, and voter ID laws in particular. "A historical pattern of laws provides important context for determining whether the same decisionmaking body has also enacted a law with discriminatory purpose." *McCrory*, 831 F.3d at 223–24. In North Carolina, this history runs deep. For a ninety-year period of the 20th century, "the one constant in North Carolina congressional politics was the triumph of white supremacy." *See* A. Leon Higginbotham, Jr., Gregory A. Clark, and Marcella David, *Shaw v. Reno: A Mirage of Good Intentions with Devastating Racial Consequences*, 62 Fordham L. Rev. 1593,

1598 (1994). Since 1980, "the Department of Justice [has] issued over fifty objection letters to proposed election law changes in North Carolina—including several since 2000—because the State had failed to prove the proposed changes would have no discriminatory purpose or effect." *McCrory*, 831 F.3d at 224 (discussing the extensive history of voter suppression against African Americans in North Carolina).

The State's "'shameful' history of 'past discrimination,'" *McCrory*, 831 F.3d at 223, extends into the present, particularly with respect to voter ID. The General Assembly first passed a voter ID law, HB 351, in 2011. Before it became law, however, then-Governor Bev Perdue vetoed HB 351 based on the potentially discriminatory and disenfranchising impact it would have had on North Carolina voters. In a public statement, Governor Perdue specifically cited to North Carolina's troubled history of discrimination as a reason for vetoing HB 351, stating, "There was a time in North Carolina history when the right to vote was enjoyed only by some citizens rather than by all. That time is past, and we should not revisit it." Johnson Aff. Ex. K. And a federal appeals court specifically found that HB 589, the immediate predecessor to SB 824, was motivated by the General Assembly's racially discriminatory intent to suppress African-American voters and would not have been enacted at all but for its disproportionate impact on African-American voters. *McCrory*, 831 F.3d at 235. That historical backdrop strongly supports a conclusion that the General Assembly enacted SB 824 with discriminatory intent.

Third, the unusual sequence of events leading to the passage of the challenged law, including the General Assembly's extreme departures from its normal procedures when enacting SB 824, also suggests the law was motivated by an improper discriminatory intent. As discussed above, the lame duck Republican super-majority, including Legislative Defendants, rushed SB 824 to a vote in a special session—so that they could enact the law over the Governor's veto—before a new legislature which would have been unable to override the Governor's veto could be seated. Harrison Aff. ¶¶ 9–10. The General Assembly also imposed artificial process limitations on the passage of SB 824 that gave limited opportunity for deliberation or public comment and deviated from the normal procedure for a bill of this magnitude that affects fundamental rights. Harrison Aff. ¶¶ 12–19. The General Assembly's willingness to engage in such extreme machinations to ensure SB 824's enactment strongly suggests Legislative Defendants were motivated by an improper purpose—namely, suppressing voters of color.

Finally, the legislative history of SB 824 clearly demonstrates that the law was enacted with discriminatory intent. As explained above, the *McCrory* court concluded that HB 589 was motivated by racially discriminatory intent based in significant part on the fact that the General Assembly requested racial data on the usage of different photo IDs, and then used that data to exclude from the list of acceptable ID those the Legislature knew were disproportionately used by African Americans, while retaining those IDs that African Americans disproportionately lack. *See* 831 F.3d at 216–18, 227–30, 236. Yet the General Assembly that enacted

SB 824 failed to conduct new data analysis when designing the law's ID requirements, choosing instead to rely on outdated data they knew would disenfranchise thousands of voters, Clark Aff. ¶ 10; Harrison Aff. ¶¶ 17–18; Woodard Aff. ¶ 11, and enacted a set of ID requirements similar to the ones the Fourth Circuit struck down as discriminatory in *McCrory*. *See* 831 F.3d at 216–18, 227–30, 236.

Some legislators offered amendments that would have ameliorated SB 824's disproportionate effects on African Americans, but the General Assembly rejected the vast majority of them. Harrison Aff. ¶¶ 20–28; Woodard Aff. ¶¶ 13–15. And there is no doubt that the Legislature knew exactly the impact SB 824 would have. Kim Strach, then-Director of the North Carolina State Board of Elections, delivered a presentation to the Joint Legislative Elections Oversight Committee providing uncontroverted evidence to legislators that SB 824 was likely to disenfranchise thousands of voters because that is precisely what a nearly identical law did in the March 2016 primary. Clark Aff. ¶ 10, Woodard Aff. ¶ 11. So the members who voted in favor of SB 824, including many of the same members of the Republican-controlled Assembly who voted on the 2013 law, were well aware that they were enacting a set of restrictions that would disproportionately impact voters of color. Woodard Aff. ¶ 14; Harrison Aff. ¶18. With that knowledge, the General Assembly nevertheless enacted the bill. Harrison Aff. ¶ 18; Woodard Aff. ¶ 14. There can hardly be stronger evidence of the General Assembly's improper discriminatory intent.

III. Plaintiffs are Likely to Succeed in Showing SB 824 Severely Burdens Voting Rights Without Adequate Justification

Even assuming SB 824 was not enacted with discriminatory intent, as plainly it was, Plaintiffs are likely to succeed in showing that SB 824 violates Article I, § 19 of the North Carolina Constitution because the law imposes severe burdens on voters without a sufficiently compelling justification. *See Libertarian Party* v. *State,* 365 N.C. 41, 47-48, 707 S.E.2d 199, 203-04 (2011) (embracing the US Supreme Court's balancing test in *Burdick* v. *Takushi*, 504 U.S. 428, 433 (1992), in a ballot access case).

The North Carolina Supreme Court has called voting "one of the most cherished rights in our system of government." *Blankenship* v. *Bartlett*, 363 N.C. 518, 522, 681 S.E.2d 759, 762 (2009). Though the North Carolina Supreme Court is "not bound by federal court rulings" when interpreting the North Carolina Constitution, it has nonetheless adopted the United States Supreme Court's *Anderson/Burdick* balancing test for evaluating state laws that burden the right to participate in the political process. *Libertarian Party,* 365 N.C. at 47, 707 S.E.2d at 203. Under that framework, courts "weigh[] the character and magnitude of the burden the State's rule imposes on" the right to participate in the political process "against the interests the State contends justify that burden." *Id.* at 47, S.E.2d at 204 (quoting *Timmons* v. *Twin Cities Area New Party,* 520 U.S. 351, 364 (1997)).

A state law that severely burdens voting rights "must be strictly scrutinized to determine whether" it is "'narrowly tailored and advance[s] a compelling state interest'" *Id.* (quoting *Timmons*, 520 U.S. at 358). Courts measure the relevant

burdens by asking whether "persons who are eligible to vote but do not possess [] photo identification" will face difficulty obtaining identification due, in part, to "economic or other personal limitations." *Crawford* v. *Marion Cty. Election Bd.*, 553 U.S. 181, 198–99 (2008). And even state laws that do not severely burden the right to vote may still be subject to heightened scrutiny and may be accordingly found unconstitutional. *Burdick*, 504 U.S. at 434 ("[T]he rigorousness of our inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens" constitutional rights).

A. SB 824 Severely Burdens the Right to Vote

Although the North Carolina Constitution's Equal Protection and Free Speech and Association clauses provide greater protection than their federal counterpart, suggesting that strict scrutiny is always the appropriate standard for restrictions placed on a voter's right to cast a ballot, *see infra* 40–41, the burdens imposed by SB 824 on North Carolina voters are nonetheless severe enough to invoke strict scrutiny. The nearly 6% of all North Carolina voters who likely lack acceptable ID—tens of thousands of them—must either obtain compliant ID or risk losing the right to vote. But the law's requirements for acceptable ID, and the processes voters must go through to obtain one, erect burdensome if not insurmountable barriers for many voters.

As detailed above, *supra* 10–19, obtaining a DMV-issued license or a passport requires a fee that North Carolina's poorest voters may not be able to afford. And even the so-called "free" ID available through the DMV is costly or impossible to acquire for voters who cannot obtain necessary proof of identity. *See* Culp Aff. ¶ 15;

Ezikpe Aff. ¶ 2. Transportation barriers make DMV-issued, as well as county board issued IDs, unavailable to many voters as well. *See, e.g.*, Holmes Aff. ¶¶ 10–11; Read Aff. ¶¶10–11. This burden is likely to fall disproportionately on minority voters, voters with disabilities, student voters, voters in poverty, and elderly voters, who as groups are more likely to lack access to a reliable form of transportation than the rest of the population. *See* Ketchie Aff. ¶¶ 18–23. Requiring any voter, but particularly the State's poorest voters, to take time away from work, forego compensation, arrange to pay for transportation, or pay to retrieve necessary documents, imposes severe if not insurmountable burdens on the right to vote.

B. The Reasonable Impediment Exception Does Not Sufficiently Alleviate the Law's Severe Burdens

SB 824 permits a voter to cast a provisional ballot if she swears that a "reasonable impediment" prevented her from obtaining compliant ID. But this purported virtue of SB 824 does not alleviate the unconstitutional burdens the law imposes.

Reasonable impediment provisional ballots will not be counted if election officials do not accept the voter's declared justification. And the law provides an insufficiently concrete standard of proof by which election officials are required to assess a voter's reasonable impediment declaration, leaving voters' rights at the whim of local officials, who may apply divergent standards not subject to review. The evidence from 2016, *supra* 16–19, shows that local officials did, in fact, apply significantly disparate standards when evaluating reasonable impediment explanations. And in the March 2016 election, conducted under a similar

"reasonable impediment" regime, 184 of the 1,048 reasonable impediment ballots cast were not counted—a rate of disenfranchisement over 17%. Ketchie Aff., Table 5.

Worse still, some voters will never even have the opportunity to cast a reasonable impediment ballot because election officials fail to advise them of their right to do so. Plaintiff Smith, who had only a temporary ID, cast a provisional ballot but was not informed of the reasonable impediment option, Smith Aff. ¶ 9, and Plaintiff Holmes was initially told that he could not cast a ballot at all, before following up with a second pollworker. Holmes Aff. ¶ 9. Similarly, when Mina Ezikpe showed up to vote with an out-of-state driver's license and a university student ID, not only did pollworkers fail to inform her of the reasonable impediment process, but she was incorrectly told that her only options were to "come back and bring a passport or go to the North Carolina Department of Motor Vehicles (DMV)." Ezikpe Aff. ¶ 5; *see also* Affidavit of Noah Van Hook ¶ 6 (hereinafter "Van Hook Aff.").

SB 824 does nothing to reduce the likelihood of similarly inconsistent applications of the reasonable impediment exception in future elections. If anything, SB 824's implementation is likely to result in even more confusion and disenfranchisement because training and education efforts have been impeded by the significantly shorter overall rollout period and uncertainty about the law's requirements. *See, e.g.*, Flynn Aff. ¶ 7; Fellman Aff. ¶ 28.

C. SB 824 Is Insufficiently Tailored To Survive Strict Scrutiny

To survive, SB 824 must be "narrowly drawn to advance a state interest of compelling importance." *Burdick*, 504 U.S. at 434. "A statute is narrowly tailored if it targets and eliminates no more than the exact source of the 'evil' it seeks to remedy." *Frisby* v. *Schultz,* 487 U.S. 474, 485 (1988); *see also Lloyd* v. *Babb,* 296 N.C. 416, 440, 251 S.E. 2d 843, 859 (1979) (noting that requirements restricting the right to vote must be "*appropriately defined* and *uniformly applied*" (emphasis in original)). The State's articulated objectives in passing SB 824 are "to implement the constitutional amendment requiring photographic identification to vote" and "to confirm the person presenting to vote is the registered voter on the voter registration records." SB 824 § 1.2(a). The Fourth Circuit explained in *McCrory* that HB 589's restrictions were insufficiently tailored because other reliable forms of government-issued photo ID were sufficient to achieve the State's purposes. *See McCrory*, 831 F.3d at 235. The same is true here.

In enacting SB 824, the General Assembly rejected several forms of government-issued IDs without legitimate rationale. For example, the General Assembly rejected the use of photo IDs provided by public housing authorities, even though such IDs are issued by local governmental entities that receive State funding. *See* Woodward Aff. ¶ 16. The Legislature also rejected the use of federal employee photo IDs, a particularly arbitrary choice given the fact that SB 824 permits the use of State and local employee IDs, as well as other forms of federally issued IDs, such as Untied States passports, military ID cards, and Veterans ID cards. SB 824 § 1.2(a). And the legislature rejected the use of public high school

photo IDs, despite permitting the use of some college and university issued IDs. *See* Harrison Aff. ¶ 22. These arbitrary restrictions, unrelated to the State's interests, were explained during the legislative process by nothing more than one legislator's flippant statement that the list of acceptable IDs was already "long enough." Compl. ¶ 165.

D. SB 824 Is Distinguishable from the Law Upheld in *Crawford*

The burdens imposed by SB 824 distinguish this case from the Supreme Court's decision in *Crawford*—a case on which Defendants will surely rely. To begin with, *Crawford* was decided on the basis of federal law, and so does not bind this Court. *See Libertarian Party*, 365 N.C. at 47, 707 S.E.2d at 203. In any event, it is factually distinguishable.

The voter ID law at issue in *Crawford* was found not to impose a substantial burden on the right to vote because there was no evidence presented establishing that even a single voter would be unable to cast a ballot. *See Crawford*, 553 U.S. at 188, 202 (limiting its holding to the "record that ha[d] been made" in that case, in which there was no "evidence of a single, individual Indiana resident who [would have been] unable to vote as a result of [the challenged law] or who [would] have his or her right to vote unduly burdened by its requirements."). Here, however, Plaintiffs are able to demonstrate that they, and thousands of similarly situated North Carolina voters, will be unable to vote under SB 824 because they lack a qualifying ID and lack the means to obtain a qualifying ID; because their provisional ballots are at risk of being discarded due to the arbitrary implementation of SB 824's reasonable impediment exception; or because an

inadequate rollout and education period raises the risk that eligible voters will not be offered a reasonable impediment or provisional ballot at all. Accordingly, Plaintiffs are likely to succeed in showing that SB 824 imposes severe burdens on the right to vote, and *Crawford* has no relevance here.

IV. Plaintiffs Are Likely to Succeed in Showing that SB 824 Violates Art. I, § 19 by Drawing Impermissible Distinctions Between Voters

SB 824 is also facially unconstitutional because it draws distinctions between similarly situated voters that result in unequal treatment at the polls. *See* N.C. Const. art. I, § 19.

The North Carolina Supreme Court has long recognized that the state Equal Protection Clause requires all persons similarly situated be treated alike. *Blankenship* v. *Bartlett,* 363 N.C. 518, 521, 681 S.E.2d 759, 762 (2009). North Carolina Courts utilize a two-tier analysis in evaluating claims under that provision. *White* v. *Pate,* 308 N.C. 759, 766, 304 S.E.2d 199, 204 (1983). Ordinarily, a governmental classification is "entitled to a presumption of validity" and need only "bear some rational relationship to a conceivable legitimate interest of government." *Id.* at 767, 304 S.E.2d at 204. However, where, as here, a governmental classification "impermissibly interferes with the exercise of a fundamental right," *id.* at 766, 304 S.E.2d at 204, such as the right to vote, North Carolina courts are required to evaluate the classification with strict scrutiny. *Stephenson* v. *Bartlett,* 355 N.C. 354, 378, 562 S.E.2d 377, 393 (2002); *see also Lloyd* v. *Babb,* 296 N.C. 416, 440, 251 S.E.2d 843, 859 (1979) ("[S]tate laws which have the effect of denying certain classes the right to vote must have a compelling

justification."). That is, the government bears the burden of demonstrating that "the classification it has imposed is necessary to promote a compelling governmental interest." *Pate*, 308 N.C. at 766, 304 S.E.2d at 204.

The creation of different classes of voters "necessarily implicates the fundamental right to vote on equal terms, and thus strict scrutiny is the applicable standard." *Stephenson,* 355 N.C. at 378, 562 S.E.2d at 393; *see also Town of Beech Mountain* v. *Cty. of Watauga,* 324 N.C. 409, 413, 378 S.E.2d 780, 783 (1989) (noting that strict scrutiny is required where statutory classification so burdens the fundamental right that it effectively operates as a penalty). SB 824 creates two different classes of voters by drawing a distinction between those constitutionally eligible voters who present to vote with an acceptable photo ID and those who present without an ID defined as acceptable by the statute. Voters who do not produce a photo ID are prohibited by SB 824 from casting a regular ballot. These voters are offered, at best, the opportunity to cast a retrievable provisional ballot that may be discounted subject to the discretion of election administrators. They will have to leave the line to obtain that provisional ballot, which will significantly prolong their overall time spent at the polls. *See, e.g.* Holmes Aff. ¶ 9. The experience of the 2016 Primary Elections demonstrates that, in all likelihood, many of these voters will either have to endure a substantially longer wait, have their provisional ballot discounted, or be turned away from the polls entirely. *See supra* 16–19. Voters who present themselves to vote with a statutorily acceptable ID will have an entirely different voting experience—they will cast a regular ballot in the

regular voting line. This classification "necessarily implicates the fundamental right to vote on equal terms," *Stephenson,* 355 N.C. at 378, 562 S.E.2d at 393, and therefore Defendants must satisfy strict scrutiny in order for SB 824 to stand.

To reiterate, the stated interests for enacting SB 824 contained in the text of the bill are twofold: first, to effectuate the constitutional amendment passed in 2018 which requires photographic identification to vote, with exceptions, and second, "to confirm the person presenting to vote is the registered voter on the voter registration records." SB 824 § 1.2(a). While these may be compelling governmental interests, the State may not pursue those interests in a way that tramples on other constitutional provisions. The fundamental problem is that SB 824 is not narrowly tailored to serve the interests the State claims to be pursuing. As noted, a "statute is narrowly tailored if it targets and eliminates no more than the exact source of the 'evil' it seeks to remedy," *Frisby*, 487 U.S. at 485. The restrictions that SB 824 places on the ability of voters to access a regular ballot are not necessary to ensure either that the constitutional provision is effectuated or to confirm that a registered voter reporting to the polls is who she claims to be.

Nothing in the text of the constitutional provision that the General Assembly sought to implement requires that voters presenting to vote without ID be denied a regular ballot, and several less-restrictive alternatives are available. In fact, the constitutional provision explicitly allows for exceptions, meaning the provision contemplates at least some voters without ID being able to cast a ballot on the same terms as those with ID. *See* N.C. Const. art. VI, § 2(4) ("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."). If a voter presents without a statutorily-acceptable photo ID, the constitutional text would explicitly allow for other non-photo identification to be provided by the voter to confirm, upon attestation, that voter's identity and allow the voter to cast a regular ballot. Such documents could include the numerous documents currently acceptable to prove identity for registration under the Help America Vote Act. *See* 42 U.S.C. § 15483(b)(2)(A). Similarly, it defies reason that the law allows a registered voter to obtain a voter photo ID (with which she could vote a regular ballot) simply by providing the last four digits of her social security number and date of birth, but does not allow a voter to use this same identifying information in conjunction with an attestation under penalty of perjury to obtain a regular ballot at the polling place. Should voters face challenges to their assertions of identity in the polling place, North Carolina law already provides a mechanism whereby those voters can cast ballots that may be identified for subsequent investigation—and this mechanism, unlike the purely discretionary provisional ballot process, provides the voters notice and opportunity to be heard. *See* N.C. Gen. Stat. §§ 163A-911-919. (describing the procedure for challenging a voter's ballot on both election day and during the early voting period, and providing for notice and hearing with respect to the challenges).

Because the constitutional requirement that voters present photo ID when reporting to vote in person could have been carried out without creating this harmful distinction, and because SB 824 unnecessarily restricts the means by which voters may prove to election administrators that they are who they say they are, *see supra* 8–10, SB 824 does not satisfy strict scrutiny review, and must be invalidated.

V. Plaintiffs are Likely to Succeed in Showing that SB 824 Violates Article I, §§ 12 and 14 of the North Carolina Constitution

SB 824 deprives North Carolina citizens of speech and assembly rights protected by Article I, §§ 12 and 14 of the North Carolina Constitution without valid justification, and Plaintiffs are likely to succeed on the merits of this claim.

Voting is a form of speech protected by the United States and North Carolina Constitutions. "When interpreting the Constitution of North Carolina, [the North Carolina Supreme Court] is not bound by federal court rulings, so long as [its] decision comports with the United States Constitution." *Libertarian Party* v. *State,* 365 N.C. 41, 47, 707 S.E.2d 199, 203 (2011). Thus, the protections of the First Amendment provide a constitutional floor in North Carolina, but our State Constitution grants citizens additional protections. *See State* v. *Jackson*, 348 N.C. 644, 648, 503 S.E.2d 101, 103 (1998).

The U.S. Supreme Court often refers to the act of voting as the extension of an individual's expressive voice. *See, e.g.*, *Reynolds* v. *Sims*, 377 U.S. 533, 565 (1964) ("Full and effective participation by all citizens in state government requires, therefore, that each citizen have an equally effective voice in the election of his state

legislature."). Accordingly, courts consistently apply the federal First Amendment's protections against laws abridging the freedom of speech in the electoral context. *See Citizens United* v. *Fed. Election Comm'n*, 558 U.S. 310, 365 (2010) (independent spending on electioneering communications); *John Doe No. 1* v. *Reed*, 561 U.S. 186, 194 (2010) (signing referenda petitions); *Chandler* v. *City of Arvada*, 292 F.3d 1236, 1244 (10th Cir. 2002) (circulating electoral petitions); *Rideout* v. *Gardner*, 123 F. Supp. 3d 218, 235 (D.N.H. 2015) (ballot selfies), *aff'd*, 838 F.3d 65 (1st Cir. 2016). The United States Supreme Court has also struck down laws that penalize a group on the basis of their party affiliation or support. *See Rutan* v. *Republican Party*, 497 U.S. 62, 64–65 (1990) (holding unconstitutional several "political patronage practices" related to government employees). These protections apply full force under the North Carolina Constitution as well.

The North Carolina Constitution's protections under Article I, § 14 go even further. That Section declares, "Freedom of speech and of the press are two of the great bulwarks of liberty and therefore shall never be restrained, but every person shall be held responsible for their abuse." N.C. Const. art. I, § 14. Our Supreme Court has held that this sweeping language establishes freedom of speech as "one of the fundamental cornerstones of individual liberty and one of the great ordinances of our Constitution." *Corum* v. *University of North Carolina*, 330 N.C. 761, 782, 413 S.E.2d 276, 289 (1992). "The words 'shall never be restrained' are a direct personal guarantee of each citizen's right of freedom of speech." *Id.* at 781, 413 S.E.2d at 289. The North Carolina Supreme Court has recognized that "political advocacy" is

a form of "pure speech," and that restrictions on such pure speech "must pass strict scrutiny"—that is, "the government must show a compelling interest in the regulation, and the regulation must be narrowly tailored to achieve that interest." *Hest Techs., Inc.* v. *State ex rel. Perdue*, 366 N.C. 289, 298, 749 S.E.2d 429, 436 (2012). In *State* v. *Petersilie,* the Court held that when a "statute expressly regulates political speech, it is content-based" and must be subjected to "exacting scrutiny." 334 N.C. 169, 184, 432 S.E.2d 832, 840 (1993). Article I, § 14 thus provides a direct personal guarantee of the right to engage in the most basic form of political advocacy—casting a ballot.

The right of assembly enshrined in Article I, § 12 of the North Carolina Constitution also protects the right to vote. That separate provision gives citizens the right "to instruct their representatives, and to apply to the General Assembly for redress of grievances." N.C. Const. art I, § 12. The ancient right to instruct representatives, at one time enforceable by other means, today necessarily includes the right to cast a ballot during elections. *See* John V. Orth & Paul Martin Newby, *The North Carolina State Constitution* 58 (2nd ed., 2013) ("As a practical matter, instructions may be issued, but there is no way to see that they are obeyed. Representatives willing to risk defeat at the next election are free to vote as they see fit."). The right to vote thus receives a double protection under the North Carolina Constitution, and is subject to strict scrutiny.

For the reasons discussed above, *supra* 34–35, 38–40, SB 824 cannot pass that exacting test because its restrictions on the franchise are not necessary to

implement SB 824's objectives. Senate Bill 824, which threatens to push thousands of North Carolina voters into lengthy provisional ballots that may not be counted, and to deny others access to any ballot at all, is not necessary to comply with the photo ID provision now enshrined in the North Carolina constitution. N.C. Const. art. VI, § 2(4). The options before the General Assembly included an alternative bill that would have allowed voters without ID a means to cast a regular ballot, Woodard Aff. ¶ 13, as well as numerous amendments that would have made SB 824 less restrictive, *see supra* 8–10. The regime established by the General Assembly, where many student and employee identifications will be unacceptable, Johnson Aff. ¶ 13, where "free" identification will be available only at a remote board of elections office, Read Aff. ¶¶ 10–11; Patterson Aff. ¶¶ 9–10), and where voters who may be unable to obtain ID must cast (at best) provisional ballots, erects numerous barriers to the right to vote that are not necessary to meet the general requirement set forth in the few words of Article VI, § 2(a).

SB 824 also receives (and fails) strict scrutiny for another reason: the law's restrictions on speech are content-based. As discussed above, SB 824 was designed to disenfranchise voters of color. *See supra* 24–30. Those voters overwhelmingly support Democratic candidates. Compl. ¶ 200. When a law places restrictions "on the espousal of a particular viewpoint" or "expressly regulates political speech, it is content-based," and therefore subject to strict scrutiny. *Petersilie*, 334 N.C. at 183–84, 432 S.E.2d at 840. SB 824, which advances both partisan and racially-

discriminatory ends, constitutes a content-based restriction on political speech, and cannot survive strict scrutiny.

VI. Plaintiffs Are Likely to Show SB 824 Violates the Free Elections Clause

SB 824 violates the North Carolina Constitution's guarantee that "[a]ll elections shall be free." N.C. Const. art. I, § 10. While North Carolina courts have not expressly interpreted the meaning of the term "free" in this provision, the provision's text is consistent with other free-election clauses in state constitutions across the Nation. At least thirteen other states have similar language mandating that "[e]lections shall be free and equal; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage."[1] These states interpret their free-election provisions to prohibit burdensome regulations that inhibit voter participation. The Supreme Court of Oklahoma, for instance, has interpreted a similar clause to mean "no impediment or restraint of any character shall be imposed upon [a voter], either directly or indirectly, whereby he shall be hindered or prevented from participation at the polls." *Richardson* v. *Gregg*, 105, 290 P. 190, 193 (Okla. 1930); *see also State Bd. of Elections* v. *Snyder*, 76 A.3d 1110, 1128 (Md. 2013) ("In accordance with this Article, in cases involving voting rights . . . , we construe the relevant constitutional provisions in relation to their purpose of

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[1] Pa. Const. art. I, § 5; *see also* Arizona, Ariz. Const. art. II, § 21; Arkansas, Ark. Const. art. 3, § 2; Delaware, Del. Const. art. I, § 3; Illinois, Ill. Const. art. III, § 3; Indiana, Ind. Const. art. 2, § 1; Kentucky, Ky. Const. § 6; Oklahoma, Okla. Const. art. III, § 5; Oregon, Or. Const. art. II, § 1; South Dakota, S.D. Const. art. VI, § 19; Tennessee, Tenn. Const. art. I, § 5; Washington, Wash. Const. art. I, § 19; and Wyoming, Wy. Const. art. I, § 27.

providing and encouraging the fair and free exercise of the elective franchise."); *League of Women Voters* v. *Commonwealth*, 178 A.3d 737, 812 (Pa. 2018) ("The Free and Equal Elections Clause was specifically intended to equalize the power of voters in our Commonwealth's election process . . . ."). The expansive interpretations states have applied to their free-elections clause provide guidance for this court in interpreting the analogous provision in the North Carolina Constitution.

To take just one example, the Missouri Supreme Court recently determined that a voter ID law violated the state's free-elections clause by imposing a heavy burden on the right to vote and forcing the State's most vulnerable voters to navigate bureaucracies in order to vote, in a manner that was not narrowly tailored to meet a compelling state interest. *Weinschenk* v. *State*, 203 S.W.3d 201, 221–22 (Mo. 2006). Missouri is not alone. *See League of Women Voters* v. *Commonwealth,* 178 A.3d 737, 821 (Pa. 2018) (concluding that the State's partisan gerrymanders violated the State Constitution's free and equal elections clause by "undermin[ing] the voters' ability to exercise their right to vote in free and 'equal' elections if the term is to be interpreted in any credible way."); *Young* v. *Red Clay Consol. Sch. Dist.*, 159 A.3d 713, 799 (Del. Ch. 2017) (finding that the School District violated the free and equal elections clause by hosting events at polling places to garner favor with voters thought likely to support a tax increase, while avoiding communications with demographics that likely opposed the tax increase); *Applewhite* v. *Commonwealth*, No. 330 MD 2012, 2014 Pa. Commw. Unpub. LEXIS 756, at *52–66 (Pa. Commw. Ct. Jan. 17, 2014) (unpublished) (holding that because

the state constitution requires free and fair elections, a voter ID law infringed on the fundamental right to vote because it was not narrowly tailored to achieve a compelling governmental interest).

Senate Bill 824 is just as problematic as other laws that other state courts have struck down as violative of free elections clauses. In particular, SB 824 ensures that elections are *not* open to otherwise qualified voters by making voting more difficult for voters that do not have sufficient ID while providing easy access to the polls for those that have compliant ID. The law also forces voters without ID to navigate a series of bureaucratic hurdles to obtain ID, all of which require voters to expend time, money, or both. Those who are not able to obtain ID are forced to a cast a provisional ballot and make a second trip to the county board of elections to provide sufficient ID to cure that ballot, or risk completing a reasonable impediment declaration, which experience shows may be discounted without notice for one of any number of arbitrary reasons. Thus, Senate Bill 824 places unnecessary burdens on otherwise qualified North Carolina voters that do not have compliant ID and prevents voters from participating in a free electoral process in violation of the North Carolina Constitution's guarantee that "[a]ll elections shall be free. N.C. Const. art. I, § 10.

VII. Plaintiffs Are Likely to Show SB 824 Violates the Constitution by Mandating a Property Requirement to Vote

SB 824 violates Article I, § 11 of the North Carolina Constitution by establishing a property requirement for North Carolinians to cast a vote. In North Carolina, "political rights and privileges are not dependent upon or modified by

property, no property qualification shall affect the right to vote or hold office." N.C. Const. art. I, § 11.

Section 11's prohibition on property qualifications applies to both personal and real property. *Cf. Texfi Industries, Inc.* v. *Fayetteville*, 44 N.C. App. 268, 273, 261 S.E.2d 21, 24–25 (1979) (construing § 11 and rejecting corporation's argument that payment of both real and personal property taxes creates voting rights). And money is a form of personal property recognized under the North Carolina constitution. For example, the word "property" is used in Article I, § 25, which states that there is a right to a jury trial "[i]n all controversies at law respecting property." Courts have interpreted the meaning of "property" in § 25 broadly, to include both personal property and the right to recover monetary damages. *Rhyne* v. *K-Mart Corp.*, 358 N.C. 160, 175–76, 594 S.E.2d 1, 12 (2004) (explaining that "'[p]roperty,' as used in Article 1, Section 25, and its similarly worded predecessors, has been defined by this Court as 'embrac[ing] everything which a man may have exclusive dominion over'") (quoting *Wilson* v. *City of Charlotte*, 74 N.C. 748, 756 (1876)).

SB 824 plainly requires North Carolinians to spend money to obtain qualifying ID, and, therefore, it places an impermissible property requirement on the right to vote. *See supra* 11. Indeed, as noted, the total cost to obtain ID for all North Carolina voters who lacked qualifying ID under HB 589 was estimated at millions of dollars. *See* Shapiro, *supra*, at 153–54.

Furthermore, the imposition of burdensome requirements to obtain ID in lieu of a direct monetary condition on the right to vote does not cure the constitutional harm. As the Supreme Court recognized in *Harman* v. *Forssenius*, 380 U.S. 528, 540–41 (1965), forcing voters to choose between paying a poll tax, on one hand, and adhering to a burdensome scheme in lieu of a poll tax, on the other, provides no constitutionally permissible choice at all. The same is true here. The State cannot circumvent the protections of Article I, § 11 by offering "free" ID through a process that is cumbersome and costly as applied to vulnerable groups of voters. *Cf. Weinschenk*, 203 S.W.3d at 215 (citing *Harman* and invalidating a Missouri voter ID law that imposed cumbersome procedures on securing a qualifying photo ID). By forcing voters to spend money to obtain ID, or to navigate a burdensome scheme to obtain a "free" ID, SB 824 violates Article I, § 11 of the North Carolina Constitution.

VIII. A Preliminary Injunction is Necessary to Protect the Constitutional Rights of Plaintiffs and All North Carolina Voters, Who Will Suffer Irreparable Harm if SB 824 Is Implemented

When, as here, plaintiffs have demonstrated a likelihood of success on the merits, a court should exercise its discretion to grant a preliminary injunction if "a plaintiff is likely to sustain irreparable loss unless the injunction is issued, or if, in the opinion of the court, issuance is necessary for the protection of a plaintiff's rights during the course of litigation." *A.E.P. Indus., Inc.* v. *McClure,* 308 N.C. 393, 401, 302 S.E.2d 754, 759–60 (1983) (quoting *Investors, Inc.* v. *Berry*, 293 N.C. 688, 701, 239 S.E.2d 566, 574 (1977)). That standard is satisfied here.

A. A Preliminary Injunction Is Warranted Because SB 824 Infringes on Plaintiffs' Fundamental Rights

As discussed, the right to vote on equal terms, free from arbitrary classification, intentional discrimination, or undue burden and expense is a fundamental right. *Stephenson* v. *Bartlett*, 355 N.C. 354, 378, 562 S.E.2d 377, 393 (2002). And casting a ballot, as a form of political advocacy, is "pure speech" afforded the utmost protection under the North Carolina Constitution. *Hest Techs., Inc.* v. *State ex rel. Perdue*, 366 N.C. 289, 298, 749 S.E.2d 429, 436 (2012). The mere fact that SB 824 on its face offends these fundamental constitutional rights of Plaintiffs and other North Carolina voters is sufficient to justify the preliminary injunction that plaintiffs seek—that is, irreparable harm *per se*. *See High Point Surplus Co.* v. *Pleasants*, 264 N.C. 650, 653, 142 S.E.2d 697, 700 (1965) ("[E]quity jurisdiction will be exercised to enjoin the threatened enforcement of a statute or ordinance which contravenes our Constitution, where it is essential to protect . . . the rights of persons against injuries otherwise irremediable.").

Additionally, where a case involves a fundamental constitutional right, "which must be carefully guarded against infringement by public office holders," and a plaintiff has demonstrated a likelihood of success, "injunctive relief is clearly appropriate." *Elrod* v. *Burns,* 427 U.S. 47, 373 (1976). Evidence suggests that nearly 6% of North Carolina voters could be denied their fundamental rights because they lack a photo ID. Quinn Aff. ¶¶ 21–22. Moreover, in a previous election where a similar ID law was in place, at least 1,432 voters were denied their fundamental right to vote, Ketchie Aff., Table 5, and Defendants have no evidence

to suggest that these voters were in any way ineligible to vote. *See* Johnson Aff., Ex. B, Ex. O. Indeed, Plaintiffs Kearney and Smith were eligible voters denied their equal protection and free speech rights under that previous and similar law. *See supra* 16–19. Because an injunction is necessary in order to protect Plaintiffs and North Carolinians from the ongoing affront to their fundamental rights that SB 824 presents during the pendency of this litigation, this Court need not look further to justify Plaintiffs' request for an injunction.

B. Widespread Voter and Pollworker Confusion, and the Resulting Voter Disenfranchisement, Are Irreparable Injuries for Which There Is No Adequate Remedy at Law

Enjoining the implementation of SB 824 is also necessary to prevent the widespread voter and pollworker confusion, and resultant voter disenfranchisement, that will occur if SB 824 is rushed into effect before the fast-approaching 2020 primary.

Courts have held that the voter confusion that results from a failure to provide adequate voter outreach and education can lead to a substantial risk of disenfranchisement sufficient to constitute irreparable harm, and therefore justifies the entry of a preliminary injunction. *See Caruso* v. *Yamhill Cnty.,* 2004 U.S. Dist. LEXIS 18371, at *17 (D. Or. Jan. 14, 2004), *rev'd on other grounds,* 422 F.3d 848 (9th Cir. 2005) (noting that "[t]he irreparable harm of voter confusion . . . cannot be corrected through legal remedies," making "injunctive relief . . . proper" under such circumstances); *see also United States* v. *West Virginia*, 2014 WL 7338867, at *7 (S.D.W. Va. Dec. 22, 2014) (entering injunctive relief ordering state to count ballots where voters "received conflicting information about their obligation to vote a

corrected ballot"). This is because, as a general matter, "voter confusion" can lead voters "to remain away from the polls." *Purcell* v. *Gonzales,* 549 U.S. 1, 4–5 (2006). For instance, in *Georgia Coalition for People's Agenda, Inc.* v. *Kemp*, the court found irreparable harm and issued a preliminary injunction after determining that "misleading information . . . on the secretary of State's website about how to prove citizenship at the polls . . . could lead to [eligible voters] not being able to cast a vote in the upcoming election." 347 F. Supp. 3d 1251, 1268 (N.D. Ga. 2018).

Further, in *Applewhite* v. *Commonwealth,* the trial court experienced first-hand the adverse impact that failing to enjoin the outreach and education provisions of a voter ID law can have on voters. No. 330 M.D. 2012 at 3 (Pa. Commw. Ct. Aug. 16, 2013) (unpublished) (attached as Johnson Aff. Ex. N). Finding that the hastily implemented voter ID law was likely to disenfranchise voters, the trial court originally enjoined only the law's enforcement and allowed for pollworkers to inform voters that they would be required to show ID in the next election. However, there were unforeseen delays in reaching the merits of the case, and the injunction remained in place for *three* elections. *Id.* The court, in finally deciding to enjoin the education efforts for the remainder of the litigation, explained:

> There is no value in inaccurate information, and the Court does not deem inaccurate information "educational." It is not a matter of confusion—it is a matter of accuracy. This Court and election officials have a duty to provide correct information at the polls to qualified electors who exercise their vested right to vote. Regardless of whether a request for photo ID causes confusion, telling a qualified elector that he or she will not have the right to vote in future

> elections if he or she does not obtain compliant photo ID, when that information has been erroneous at best, deceptive at worst, will not be continued. Not when this Court has witnessed two prior injunctions where the information, in effect, misled qualified electors.

Id. at 7. The court ultimately invalidated the state's voter ID law. *Applewhite*, 2014 Pa. Commw. Unpub. LEXIS 756 (Pa. Commw. Ct. Jan. 17, 2014). As in Pennsylvania, waiting to enjoin the State from enforcing SB 824 until after the trial would similarly lead to needless confusion that would harm Plaintiffs and all North Carolina voters.

But this Court need not rely on the experience of voters in other states in order to conclude that North Carolina voters face a substantial risk of disenfranchisement because of voter and pollworker confusion and their deterrent, disenfranchising effect. In the March 2016 primary election, after a three-year roll-out period and eight months following the passage of a reasonable-impediment exception, at least 1,432 otherwise constitutionally eligible North Carolina voters without acceptable ID cast provisional ballots that ultimately were not counted. Ketchie Aff., Table 5. The disenfranchisement of these eligible North Carolina voters demonstrates that even where voters unable to present ID were undeterred from exercising their right to vote, the provisional ballot alternatives were nonetheless inadequate to prevent irreparable harm.

The provisional ballot options intended to ensure that eligible voters who present without ID can nonetheless make their voices heard rely on the properly exercised discretion of election administrators. The experience in the 2016 primary

makes plain that unclear guidance and an insufficient implementation period leading to inadequate training of election administrators can undermine the efficacy of the State's back-up plan. Even after a longer overall implementation and training period than that at issue here, pollworkers provided incorrect or incomplete guidance to voters presenting without acceptable ID regarding their provisional ballot options, which prevented them from exercising their most fundamental right. Some voters, like Mina Ezikpe were not even offered an alternative provisional ballot option by pollworkers, but rather were instructed that they needed to obtain ID before they would be offered a ballot. Ezikpe Aff. ¶ 5. Other voters, like Noah Van Hook and Plaintiff Smith, lacked an acceptable ID, should have been offered a reasonable impediment declaration, and were not, ensuring that their provisional ballots would not be counted. Van Hook Aff. ¶¶ 6–7; Smith Aff. ¶¶ 9–10.

Even voters who managed to obtain a reasonable impediment declaration saw their votes arbitrarily discounted. *See supra* 16–20. Still other voters, like Plaintiff Paul Kearney, who presented at the polls only to find that they had forgotten the ID that they needed to vote a regular ballot, were not adequately informed of the steps necessary to cure their provisional ballot and were disenfranchised as a result. Kearney Aff. ¶¶ 8–9. And despite the State's attempts at voter outreach, other North Carolina voters without acceptable ID were wholly deterred from the polls by their mistaken belief that they would not be permitted to vote. *See* Benson Aff. ¶ 5.

In light of the deterrent effect that voter confusion surrounding election requirements can have, the full extent of disenfranchisement that resulted in 2016 from the inadequate voter education and outreach effort is unknowable. The inconsistent application of nearly identical provisional-ballot alternatives in 2016, despite a comparable training period on reasonable impediment exceptions and a longer overall rollout of the ID requirement, demonstrates that, even with these provisional ballot options, Plaintiffs and other voters may be irreparably harmed. Simply labeling something a "failsafe" mechanism is inadequate to prevent disenfranchisement here, where insufficient time and resources have been allocated to alert voters and election administrators alike not only to the change in status quo that an ID requirement presents, but also the available exceptions to this new requirement.

Furthermore, preliminary relief is especially appropriate where, as here, delay in enjoining SB 824 would harm plaintiffs' ability to vindicate their rights fully. *See* Wright & Miller, 11A Fed. Prac. & Proc. Civ. § 2948.1 (3d ed.) ("threatened harm" justifying preliminary relief exists when waiting "would impair the court's ability to grant an effective remedy"); *see also Macnab* v. *Gahderi*, 209 WL 10671026, at *5 (C.D. Cal. July 28, 2009) ("A plaintiff will suffer irreparable harm without a preliminary injunction . . . if the threatened harm would impair the court's ability to grant an effective remedy after a trial on the merits"). The timing of an injunction has particular significance in cases regarding impermissible election regulations, as the efficient administration of election requires state

agencies to abide by strict timelines and to complete many crucial tasks well in advance of Election Day. For example, in *U.S. Student Ass'n Found.* v. *Land,* 585 F. Supp. 2d 925, 944 (E.D. Mich. 2008), a court preliminarily enjoined a state election regulation because "delaying the issuance of an injunction until close to the election date would risk organizational chaos" on the part of state election administrators. Similarly, in *NAACP* v. *Guilford Cnty. Bd. of Elections,* 858 F. Supp. 2d 516, 526 (M.D.N.C. 2012), the court granted a preliminary injunction where waiting "would likely result in . . . voter confusion," "needlessly spent tax dollars," and "possible low voter turnout."

To be clear, even if this Court were to conduct a trial on the merits of this case and enjoin enforcement of SB 824 before a single voter was asked to present an ID at the polls in 2020, failing to halt the implementation process now, which requires the State and county boards of elections to expend valuable resources on widespread voter outreach and education as well as the training of election officials, will incite significant voter and pollworker confusion. That confusion will ultimately result in some amount of voter disenfranchisement.

From 2013 to 2016, when the State intended to enact HB 589, the previous voter ID law invalidated by the Fourth Circuit, it placed billboards across the State, mailed approximately 12.7 million guides to residential addresses, produced and distributed approximately 400,000 posters, and conducted more than 200 presentations and events. Johnson Aff. Ex. B at 7–12. If the State is allowed to conduct similar voter education efforts this year, many voters will have received the

message that photo identification is required to vote—information that will become more difficult to counteract the closer to Election Day that an injunction issues. *See* Guttierez Aff. ¶¶ 18–20. During the 2016 General Election, the first election following HB 589's invalidation, pollworker confusion over voting requirements led to the dissemination of inaccurate information to voters. *Id.* ¶¶ 13–14. Despite the State Board of Elections' effort to inform pollworkers that HB 589's voter ID requirement was no longer in effect, pollworkers improperly demanded ID from duly-registered voters in at least 9 different counties: Chatham, Davidson, Durham, Gaston, Harnett, Johnston, Mecklenburg, Wayne, and Wake. *Id.* ¶¶ 15–17. At least one voter had to independently pursue guidance from their county board of elections in order to correct the pollworker misunderstanding before being permitted to cast a ballot. *Id.* at ¶¶ 15. In light of this experience, it is necessary that the implementation aspects of SB 824 be enjoined during the pendency of this litigation to prevent the disenfranchisement that results from pollworker misunderstanding and misinformation. Gutierrez Aff. ¶¶ 18-20.

There is "no value" in allowing the dissemination of information that may prove to be inaccurate if SB 824 is struck down. *See* Johnson Aff., Ex. N, *Applewhite,* No. 330 M.D. 2012 at 3. The best way to guard against irreparable voter confusion is to issue a preliminary injunction now, before any significant or sustained voter miseducation has occurred.

C. An Injunction Is In the Public Interest

In considering whether Plaintiffs have met the second prong of the preliminary injunction standard, it is necessary for this court to weigh the equities. *See Redlee/SCS, Inc. v. Pieper,* 153 N.C. App. 421, 427, 571 S.E.2d 8, 13 (2002). The equities here plainly fall in Plaintiffs' favor. While the Defendants have an interest in election security and integrity—an interest that they claim SB 824 serves—there is simply no harm done to the integrity of North Carolina elections, given the near absence of demonstrated in-person voter fraud in the state. *See McCrory,* 831 F.3d at 235 (noting that the state had "failed to identify even a single individual who has ever been charged with committing in-person voter fraud in North Carolina" of the type that photo ID would prevent). But even if there were any such harm, and there is no evidence to suggest there is, it would be greatly outweighed by the benefits of enjoining a law with a demonstrated likelihood to result in voter disenfranchisement. "By definition, '[t]he public interest . . . favors permitting as many qualified voters to vote as possible.' And 'upholding constitutional rights serves the public interest.'" *League of Women Voters* v. *North Carolina*, 769 F.3d 224, 248 (4th Cir. 2014) (quoting *Obama for Am.* v. *Husted,* 697 F.3d 423, 437 (6th Cir. 2012)); *Newsome* v. *Albemarle Cnty. Sch. Bd.*, 354 F.3d 249, 261 (4th Cir. 2003)).

There is also no harm to delaying implementation of SB 824 until after the 2020 election. The Legislative Defendants themselves have twice delayed enforcement of the voter ID requirement, as detailed *supra* 19–20, first by wholly

exempting the CD 9 race from SB 824 before SB 824 even became law, *see* 2018 Sess. Laws. 146 Part II, and again when it became apparent that a new election would also need to be held in CD 3 due to a vacancy, delaying enforcement of the requirement until 2020. *See* 2019 N.C. Sess. Laws 4. These delays demonstrate that the Legislature does not believe it necessary for the Constitution's new voter ID requirement to be immediately enforced. And the public interest is served by extending the educational and rollout timeframe in light of the constitutional injury that enforcement of SB 824 is likely to inflict, and the confusion and uncertainty that voters are already facing. Only with this extra time offered by preserving the *status quo* can the public interest be adequately served: it is the only way to ensure that the new constitutional ID requirement is implemented in a manner that not only allows for the efficient administration of elections, but also protects all constitutional rights.

The granting of a preliminary injunction would not only serve Plaintiffs and the public at large, it would also *alleviate,* not worsen, the hardships faced by Defendants here. There is no election administration hardship associated with maintaining the status *quo ante* in this instance, where officials would simply be required to conduct polling place check-in procedures as they have done for years (with only brief exception in the 2016 primary elections). *See Mich. State A. Philip Randolph Inst.* v. *Johnson*, 833 F.3d 656, 669 (6th Cir. 2016) (noting that it was "[o]f particular significance" that the district court's injunction "maintained the status quo in Michigan that was in place for 125 years" and the record did not show that

there were any problems with the old procedure). Failing to enjoin the implementation aspect of SB 824 will result in countless wasted resources on the part of both the State and county boards of elections. SB 824 requires the State Board of Elections to engage in further rulemaking beyond the temporary measures already taken, as well as engage in an aggressive voter education campaign, requiring print and digital materials, billboards, mailers, and training, (among other things) on a tight deadline, all while supervising implementation at the county level. 2018 N.C. Sess. Laws 144 §§ 1.1.(a), 1.5.(a). County boards of elections have serious concerns regarding their ability to implement SB 824 in light of the limited resources that they have been allocated to do so. To comply with SB 824's requirement that county boards issue voter photo IDs, a task that has never been a core function of election services, *see* J. Quinn Aff. ¶ 7, county boards will be required to either seek additional resources from their County Commission, or where this is not possible, reallocate their resources away from other pressing election administration concerns. *See* Read Aff. ¶¶ 6, 9, 12. If this Court issues a preliminary injunction, the State and county boards of election can refocus their efforts on ensuring the orderly and secure administration of the 2020 elections, without having to spend significant time, financial, and personnel resources engaging in rulemaking, producing training and educational materials, participating in outreach efforts, and troubleshooting a brand new voting procedure – all while facing the very real possibility that SB 824 will be enjoined and their efforts will have been for naught. The weighing of the equities therefore

demonstrates that enjoining the implementation of SB 824 provides the greatest opportunity to alleviate hardship on all parties involved.

CONCLUSION

For the foregoing reasons, the Court should grant Plaintiffs' motion and enjoin implementation or enforcement of SB 824 pending a trial on the merits.

Respectfully submitted this the 15th day of May, 2019.

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CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing Memorandum of Law in Support of Plaintiffs' Motion for Preliminary Injunction was served upon all parties by electronic mail and to the following:

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