NCICL Explains NC Supreme Court Case Invalidating Voter ID Law
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The North Carolina Supreme Court issued its opinion today in the voter ID legislation case *Holmes v. Moore*. In the final days of the Democrat-controlled court, a 4-3 majority struck down legislation designed to implement the voter approved constitutional amendment requiring photo ID when voting. The case was unnecessarily fast-tracked and comes before a final resolution in *NC NAACP v. Moore*, a separate lawsuit attacking the constitutional amendments requiring voters present photo ID and lowering the income tax cap. You can read more about the other lawsuit and the NC Supreme Court decision here.

Today's decision on the legislation required by that amendment is the result of the NC Supreme Court taking this case on an unusual and unjustifiable pace. This case was decided at the trial level and appealed to the Court of Appeals. But, the Court of Appeals did not get a chance to decide the case. The NC Supreme Court ordered the case bypass the lower appeals court—a decision criticized as overtly political at the time and criticized in today's dissenting opinion. Expeditated review in this case is especially disturbing because the remand proceedings in the other case, *NC NAACP v. Moore*, is still pending.

Written by Justice Anita Earls, the *Holmes* decision begin with the truism, "The right to vote is a fundamental right, preservative of all other rights." The majority opinion goes off the rails from there. The majority, 2 of whom will not be on the court at the end of this month, dedicates 59 pages to concluding that "discriminatory intent was a motivation in passing" the voter ID legislation and agreeing with the trial court's finding that "a less restrictive law could have been sufficient to deter voter fraud and promote voter confidence in elections had this goal been the law's only actual purpose."

The majority is wrong on both points. The voter ID legislation was passed because a constitutional amendment *required* the legislature to enact a statutory framework to implement the photo voter ID. The intent of the General Assembly wasn't discriminatory. The legislature was doing what the people told it to do. In 2018, the people overwhelming approved a constitutional amendment that requires photo ID for voter and requires the General Assembly to pass laws, often called "enabling legislation," to detail the constitutional amendment.

As for the majority's belief that a "less restrictive law *could* have been sufficient," a couple of things are important to consider. First, by passing an amendment requiring photo ID, the people decided that what would be sufficient to deter voter fraud and promote confidence in elections is a photo ID requirement. Of course, these same justices responsible for today's decision are the same

ones who disregarded the people's votes in August when the court held that the voter ID and tax cap amendments approved by voters in 2018 could be second-guessed by judges. Second, the photo ID law would not have prevented someone without an ID from voting. The dissent aptly points out, the photo ID legislation not only listed 8 different forms acceptable photo ID, but also included a provision to provide every voter with a free photo ID and "a host of exceptions which allows individuals to vote without an identification."

The dissenting opinion, written by Justice Phil Berger, describes the ease of getting a free voter ID: "voters need not submit any official documentation to receive these free IDS," rather voters "only need to provide their 'name,' 'date of birth,' and 'the last four digits of their social security number.'" The dissent also explains various exceptions to the law, including a reasonable impediment exception allowing voters to cast a provisional ballot without a photo ID so long as they complete an affidavit at the voting location. Yet, the majority opinion maintains there "could" be a less restrictive way to accomplish the goals of voter ID. Do the 4 liberal justices in the majority really think so, or do they just disagree with the voters who approved the voter ID amendment? Consider this footnote from the dissent:

> This Court granted expedited review even though the constitutional claim in *North Carolina State Conference of the NAACP v. Moore* [case challenging legislature's authority to put the voter ID amendment on the ballot for voter approval], had not been resolved and remand is still pending in the trial court. One might contend that this grant of expedited review was a concrete example of this Court, as Justice Earls stated in a recent interview, "wielding power based on our own political views." *'Ramifications are substantial.' How Republicans gained a lasting grip on the NC Supreme Court*, WRAL (Nov. 13, 2022), https://www.wral.com/ramifications-are-substantial-how-republicans-gained-a-lasting-grip-on-the-nc-supreme-court/20570554/. Indeed, many North Carolinians would agree with Justice Earls that this is "a whole different notion of justice" and that the outcome of this case was wholly "depend[ent] on what year [a party] brings [its] case" or when the majority decided to hear this matter.

The news article cited by the dissent is worth reading. A reporter interviewed several people about Republicans sweeping the judicial elections last month. Justice Earls, the Democrat who wrote today's majority opinion, was asked about the new Republican majority on the NC Supreme Court. Today's dissent quoted a phrase from Earls's response, but the first part of her answer to that interview question deserves attention. WRAL quotes Justice Earls as saying, "Are we going to truly be constitutional conservatives or are we just going to be at the whim of how elections turn out?" Ahem, how elections turn out is--or should be--up to the voters. Election results are not a "whim."

In the August case about the voter ID and tax amendment, Justice Earls wrote for the Democrat justices: "Simply put the fact that a majority of voters ratified a constitutional amendment is insufficient to ensure adherence to the principles that animate our constitutional system of government as defined by the people of North Carolina." An overwhelming majority of North Carolinians voted for photo ID, among other amendments,

and that was "insufficient" to protect the amendment from attack.

In today's opinion, the majority claims the photo ID legislation stems from a discriminatory intent. Opponents of voter ID have a history of successfully claiming discriminatory intent. An old version of a photo ID law was passed in 2013, many years before voters approved the constitutional amendment requiring photo ID. Federal courts invalidated the old law but took a different view of the new voter ID legislation specifically because of the exception discussed above and because of the significance of the constitutional amendment passed in 2018. The General Assembly passed voter ID legislation because the voter ID constitutional amendment required the legislature to do so. The four Democrat justices in the *Holmes* majority brushed that aside, writing:

> State defendants also argue that because S.B. 824 [the voter ID legislation] was passed in response to a constitutional amendment requiring the General Assembly to enact a voter ID law, this circumstance should break the link to North Carolina's history of discriminatory laws, namely, between H.B. 589 [a previous voter ID law] and S.B. 824. In making this argument, State defendants cite to *North Carolina State Conference of the NAACP v. Raymond*, which determined that the constitutional amendment at issue "served as an independent intervening event between the General Assembly's passage of [the 2013 voter ID law] and its enactment of [new voter ID law]." There the Fourth Circuit stated that because the people of North Carolina had passed the constitutional amendment, thus "interjecting their voice into the process and mandating that the General Assembly pass a voter-ID law," the link between the General Assembly's passage of the 2013 voter ID law and this voter ID law had been broken. While it is true that the people of North Carolina voted for an amendment, imposing a voter ID requirement, there is no evidence the voters intended for the law to be passed in its current form.

(Cleaned up and internal citations omitted).

The last sentence should stand out. "There is no evidence the voters intended for the law to be passed in its current form." Well, of course not. Voters don't see the enabling legislation for a constitutional amendment, that's nothing unusual. Legislation, whether to implement a constitutional amendment or as part of common lawmaking, is left to the General Assembly. Voters elect legislators. Legislators enact legislation. That is how representative government works. That's what the voter ID amendment specified. The majority seems to disregard the very concept of representative government. Curiously, the majority deems it significant that there was no evidence that voters intended for the voter ID legislation as passed by the General Assembly, but those same justices didn't think voters' approval of the amendment itself was enough to stop the lawsuit claiming voters shouldn't have been allowed to vote on the amendment in the first place.

As noted at the outset, this case is separate from a case attacking the submission of the voter ID and tax cap amendments to voters. In August, the NC Supreme Court in a 4-3 decision remanded the case for a trial court to decide whether an amendment "will immunize legislators from democratic accountability," "perpetuate the ongoing exclusion of a category of voters from the political process," or "intentionally discriminate against a

particular category of citizens who were also discriminated against in the political process leading to the legislators action." "If any of these factors is present," the majority said a court must "invalidate the challenged amendment." North Carolina will have to see whether the remand in that case continues to insult voters who approved the amendments. Regardless of the result at the lower court, the case will likely return to the NC Supreme Court. But, as a result of the November election, it will return to a very different court, hopefully one which respects the will of the people. Justice Berger, joined by Chief Justice Paul Newby and Justice Tamara Barringer, began the dissenting opinions background today with this powerful truth from our Constitution: "All political power is vested in and derived from the people; all government of right originates from the people, is founded upon their will only, and is instituted solely for the good of the whole." N.C. Const. art. I, § 2.

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Questions?

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Constitution of 1971, art. I, §35
Constitution of 1868, art. I, § 29
Constitution of 1176, Declaration of Rights, § 21