NC NAACP v. Hirsch
The Lingering Lawsuit Attacking Voter ID

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A federal court recently scheduled a trial in a federal lawsuit attacking North Carolina's voter ID law. The trial is set for May 6, 2024. The public may wonder why attacks on voter ID are *still* working their way through the court system. To clear that up and to provide a brief explanation of some of the big issues in the case, check out the background information and simplified legal analysis below.

Background

The General Assembly passed an omnibus voting law that included a photo ID requirement in 2013. That law was the subject of litigation and ultimately, a federal appeals court found the law was enacted with racially discriminatory intent and block it, including the photo ID requirement. *N.C. State Conf. of NAACP v. McCrory*, 831 F.3d 204, 215 (4th Cir. 2016).

In 2018, the voters approved an amendment to the North Carolina Constitution to require voters to provide photo ID before voting. N.C. Const. art. VI §§ 2(4), 3(2). That amendment required the General Assembly to pass legislation to implement the amendment. As amended, the North Carolina State Constitution provides as follows: "Voters offering to vote in person shall present photographic identification before voting. The General Assembly shall enact general laws governing the requirements of such photographic identification, which may include exceptions." N.C. Const. art. VI, §§ 2(4), 3(2)

On December 5, 2018, the General Assembly passed SB 824, which the Governor vetoed. On December 19, 2018, the General Assembly overrode the veto.

The day after SB 824 became law, the North Carolina chapter of the NAACP sued the Governor[1] and the State Board of Elections and its members[2], challenging the provisions of SB 824 that implement the photo ID amendment the voters approved and also changes to election law concerning poll observers and ballot challenges. They allege that SB 824 was enacted with the same discriminatory intent as the 2013 law. Plaintiffs allege that "[t]hese provisions, separately and together, will have a disproportionately negative impact on minority voters," (Compl. ¶ 80), ultimately resulting in "the effective denial of the franchise and dilution of [African American and Latino] voting strength," (Compl. ¶ 7). Plaintiffs' Complaint further alleges that the challenged provisions "impose discriminatory and unlawful burdens on the

[1] The Governor was dismissed as an improper defendant.

[2] As members of the State Board have changed over time, new members have been substituted as defendants. See Fed R. Civ. Pro. 25(d). Such substitution is common in cases naming government officials "in their official capacities."

right to vote that are not justified by any legitimate or compelling state interest."

Initially, a federal court granted Plaintiffs a preliminary injunction to temporarily block the voter ID and ballot-challenge provisions of SB 824 while the case proceeded, but a three-judge appeals court lifted that preliminary injunction on December 2, 2020, stating "we cannot agree that the Challengers [Plaintiffs] would likely carry their burden of proving that the General Assembly acted with discriminatory intent in passing the 2018 Voter-ID Law."

Along the way, legislative leaders tried to intervene in the lawsuit. They had not been named as defendants but wanted to join the case to defend SB 824. That motion to intervene was initially denied and the case was stayed on December 30, 2021, while legislators sought review at the United States Supreme Court. In June 2022, the United States Supreme Court ruled in an 8-1 decision that legislative leaders could intervene to defend the constitutionality of the law.

About a year after the US Supreme Court decision allowing the legislative leaders to intervene, the court lifted the stay that had paused the case. Since that time, various motions have been filed including a motion by Plaintiffs to reopen discovery, which was denied. The case has now been scheduled for a bench trial on May 6, 2024, five and a half years since the case was first filed.

Legal Issues—Fourteenth and Fifteenth Amendments

The Plaintiffs claim racial discrimination. A look at SB 824 shows that is it "race-neutral" and does not include race-based factors, so it is what courts describe as "facially race-neutral." Because S.B. 824 is facially race-neutral, Plaintiffs must "establish that the State . . . acted with a discriminatory purpose" in order to prevail on their constitutional claims. *Reno v. Bossier Par. Sch. Bd.*, 520 U.S. 471, 481–82 (1997) (explaining that facially neutral actions only violate the Fourteenth and Fifteenth Amendments if motivated by discriminatory purpose).

The Fourth Circuit (the federal appeals court that includes North Carolina) explained, "[d]etermining whether a statute was enacted with discriminatory intent is a factual question involving a two-step process." *N.C. State Conf. of the NAACP v. Raymond*, 981 F.3d 295, 303 (4th Cir. 2020).

Under the Arlington Heights framework, the Court must first determine whether a statute that is facially neutral regarding race or ethnicity was enacted with discriminatory intent. N.C. State Conf. of the *NAACP v. Raymond*, 981 F.3d 295, 303 (4th Cir. 2020). At step one, Plaintiffs bear the burden of showing that racial discrimination was a "'substantial' or 'motivating' factor behind enactment of the law." *Id.*

> Satisfying that burden requires looking at the four factors from the Supreme Court's *Arlington Heights* decision: (1) historical background; (2) the specific sequence of events leading to the law's enactment, including any departures from the normal legislative process; (3) the law's legislative history; and (4) whether the law 'bears more heavily on one race than another.'

Id. (quoting *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265–69).

"[T]he district court *must* afford the state legislature a 'presumption' of good faith." *Id*.

(citing *Abbott v. Perez*, 138 S. Ct. 2305, 2324 (2018)). At this first stage, a defendant is not required to prove that a new law "cleanse[d] the discriminatory taint" of a different, prior law that was invalidated. *Id.* at 304. A "new voter-ID law" is not presumed "'fatally infected' by the unconstitutional discrimination of a past voter-ID law that has been struck down." *Raymond,* 981 F.3d at 303.

If Plaintiffs meet their burden to show discriminatory intent, then the Court turns to step two, where "the burden shifts to the law's defenders to demonstrate that the law would have been enacted without" racial discrimination. *Id*. (internal quotation marks omitted) (quoting *Hunter*, 471 U.S. 222, 0228 (1985)) "It is only then that judicial deference to the legislature 'is no longer justified.'" *Id*. (quoting *Arlington Heights*, 429 U.S. at 265–66.) "Without deference and with the burden placed firmly on the legislature, a district court at the second step must 'scrutinize the legislature's *actual* nonracial motivations to determine whether they *alone* can justify the legislature's choices.'" *Id*.

North Carolina has a well-known and shameful history of racial discrimination, but as the Fourth Circuit explicitly acknowledged, its decision invalidating a previous voter ID law did not "freeze North Carolina election law in place." The same decision noted the North Carolina legislature has the authority under the federal constitution to modify its election laws based on legitimate, nonracial motivations. *N.C. State Conf. of NAACP v. McCrory*, 831 F.3d 204, 241 (4th Cir. 2016).

A compelling factor in the case includes the context of SB 824. It was enacted pursuant to the passage of a constitutional amendment—approved by 55% of voters—that required photo ID. Without overlooking the State's troubled history of racial discrimination, the "ultimate question remains whether a discriminatory intent has been proved in a given case." Abbott v. Perez, 138 S. Ct. 2305, 2324-25 (2018).

Whatever the link between the State's history of racial discrimination and the previously invalidated voter ID law passed in 2013, the voter-ID amendment passed by 55% of voters in 2018 is an independent intervening event, one that breaks any alleged link between the State's history of discrimination and the present photo ID law. In *Raymond*, the Fourth Circuit recognized the interceding constitutional amendment alters the analysis significantly. *Raymond*, 981 F.3d at 305 ("For after the constitutional amendment, the people of North Carolina had interjected their voice into the process, mandating that the General Assembly pass a voter-ID law.").

The legislative history of SB 824 is itself "unremarkable" as the Fourth Circuit described it. *Raymond*, 891 F.3d at 308. "Nothing here suggests that the General Assembly used racial voting data to disproportionately target minority voters 'with surgical precision.' And neither party nor the district court has brought to our attention any discriminatory remarks made by legislators during or about the legislation's passage." *Id.* at 308-09.

Not only are the categories of acceptable ID numerous, but exceptions also provide extra protections for voters who do not have an ID. Plaintiffs face the unavoidable fact that SB 824 allows any voter to cast a ballot, with or without a photo ID, so any burden to a voter without an ID would be minimal.

Legal Issues—Voting Rights Act (VRA) §2

Section 2 of the Voting Rights Act provides:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 10303(f)(2) of this title, as provided in subsection (b).
>
> (b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, that nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

52 U.S.C.A. § 10301.

"Unlike discrimination claims brought pursuant to the Fourteenth and Fifteenth Amendments, which require proof of both discriminatory intent and actual discriminatory effect, the language of Section 2(a) of the VRA requires only proof of discriminatory 'results,' not of discriminatory intent." *Greater Birmingham Ministries v. Sec'y of State for State of Ala.*, 992 F.3d 1299, 1328-29 (11th Cir. 2021). "[A] violation [of § 2 of the VRA] c[an] be proved by showing discriminatory effect alone," without having to show a discriminatory purpose. *Thornburg v. Gingles*, 478 U.S. 30, 35 (1986).

To succeed on a § 2 results-only claim, a plaintiff must "make a greater showing of disproportionate impact" than is required to evidence discriminatory intent under an *Arlington Heights* analysis. *N.C. State Conf. of NAACP v. McCrory*, 831 F.3d 204, 231 n.8 (4th Cir. 2016). "Otherwise, plaintiffs could prevail in any and every case in which they proved any impact." *Id.*

In *Thornburg v. Gingles*, 478 U.S. 30, 44-45 (1986), the Supreme Court listed factors to consider:

> "[(1)] the history of voting-related discrimination in the State or political subdivision; [(2)] the extent to which voting in the elections of the State or political subdivision is racially polarized; [(3)] the extent to which the State or political subdivision has used voting practices or procedures that tend to enhance the opportunity for discrimination against the minority group, such as unusually large election districts, majority vote requirements, and prohibitions against bullet voting; [(4)] the exclusion of members of the minority group from candidate slating processes; [(5)] the extent to which minority group members bear the effects of past discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process; [(6)] the use of overt or subtle racial appeals in political campaigns; and [(7)] the extent to which members of the minority group have been elected to public office in the jurisdiction."

Plaintiffs' VRA §2 claims do not meet the requirements set forth in the Supreme Court's recent decision in *Brnovich v. Democratic Nat'l Comm*., 141 S. Ct. 2321 (2021), which heightens the standard Plaintiffs must meet. *Brnovich* determined that when analyzing rules pertaining to time, place, and manner of voting like S.B. 824, a court must consider "several important circumstances" when determining "whether voting is 'equally open' and affords equal 'opportunity.'" *Id.* at 2338.

First, reviewing courts must consider the size of the burden imposed by the challenged voting rule. *Id.* In undertaking this consideration, the Supreme Court acknowledged that "every voting rule imposes a burden of some sort," including time and travel to the polls or a mailbox to mail a ballot. *Id.* The mere inconvenience of the usual burdens of voting is not enough to demonstrate a violation of §2. *Id*. It is telling that the Supreme Court cited *Crawford v. Marion Cty. Election Bd*., 553 U.S. 181 (2008), a case that examined and upheld a photo ID law from Indiana that was stricter than S.B. 824.

Second, "the degree to which a challenged rule has a long pedigree or is in widespread use in the United States is a circumstance that must be taken into account." *Brnovich*, 141 S. Ct. at 2338-9. As of 2019, 35 states have laws requesting or requiring voters to show some form of identification at the polls, 17 of which require photo ID. Eight states enacted voter ID laws since the 2020 election while another 17 require some other form of identification. The implementation of voter identification laws in 35 States patently constitutes "widespread use in the United States." *Brnovich*, 141 S. Ct. at 2339.

Third, "[t]he size of any disparities in a rule's impact on members of different racial or ethnic groups is also an important factor to consider." *Id*. at 2339. However, "the mere fact that there is some disparity in impact does not necessarily mean that a system is not equally open or that it does not give everyone an equal opportunity to vote." Id. Even if Plaintiffs can show that minority voters disproportionately lack qualifying IDs, the ameliorative provisions within S.B. 824 greatly reduce the impact to overcome this disparity.

Fourth, "courts must consider the opportunities provided by a State's entire system of voting when assessing the burden imposed by a challenged provision." *Brnovich*, 141 S. Ct. at 2339. The Supreme Court found Arizona's opportunities to vote by mail and early vote for nearly a month before the election to be especially persuasive in showing that the burdens imposed on Election Day voters by the laws in question were modest. *Id*. at 2344.

By comparison, North Carolina's entire voting system provides numerous opportunities and ample time for the public to vote. For example, the early voting period lasts two weeks, includes expansive weekday hours, and guarantees voting on the Saturday before Election Day. N.C.G.S. §§ 163-227.2(b), -227.6(c). A voter may vote at any early voting location in their county. *Id*. § 163-227.2. North Carolina also makes available no-excuse absentee vote by mail to all voters. N.C.G.S. § 163-226(a).

Conclusion

SB 824 should survive this attack. The law results from a constitutional amendment that disrupts the link between North Carolina's shameful history and the new voter ID law. The long list of acceptable IDs and provisions for voting without an ID mean that every voter

may vote. At trial these and other points should put to rest any suspicion that SB 824 violates the Fourteenth and Fifteenth Amendment or the Voting Rights Act.

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"A frequent recurrence to fundamental principles is absolutely necessary to preserve the blessings of liberty."

Constitution of 197, art. I, §35
Constitution of 1868, art. I, § 29
Constitution of 1176, Declaration of Rights, § 21