STATE OF NORTH CAROLINA

COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
CASE NO. 18-CVS-009806-910

NORTH CAROLINA STATE CONFERENCE OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE,

Plaintiff,

v.

TIM MOORE, in his official capacity, PHILIP BERGER, in his official capacity,

Defendants.

MEMORANDUM OF LAW IN SUPPORT OF DISPOSITIVE MOTION

OVERVIEW

This matter is on remand to determine whether two amendments proposed by the 2018 North Carolina General Assembly and adopted overwhelmingly by the people of North Carolina should be erased from the Constitution. In order for the Court to take such an extraordinary step, Plaintiff must prove, according to *N. Carolina State Conf. of the NAACP v. Moore*, 382 N.C. 129, 165, 876 S.E.2d 513, 539 (2022), that the amendments have "a substantial risk" of (1) immunizing legislators from democratic accountability; (2) perpetuating the continued exclusion of a category of voters from the democratic process; or (3) constituting intentional racial discrimination. *Id.* "If any of these factors are present, then the balance of equities requires the court to invalidate the challenged amendment." *Id.* "If these factors are not present—or if the legislators elected due to an unconstitutional gerrymander

were not so numerous as to be potentially decisive in the vote to put a proposed amendment to the people—the challenged amendment must be left in place." *Id.*

Both amendments at issue here must be left in place because neither amendment meets these factors. This three-factor equitable test is not adjudicated in a vacuum. Rather, to prevail, Plaintiff must show "that there are no circumstances under which the[se] statute[s] might be constitutional." *Hart v. State*, 368 N.C. 122, 126, 774 S.E.2d 281, 284 (2015) (quotation omitted). Newer precedent from the North Carolina Supreme Court regarding photographic identification to vote bears on this Court's analysis, as does the traditional principles of constitutional review. It is for these legal reasons that Defendants submit that Plaintiff's claim to invalidate the tax cap amendment, N.C. Sess. Law 2018-119 (hereinafter, the "Tax Cap Amendment"), and the voter ID amendment, N.C. Sess. Law. 2018-128 (hereinafter, the "Voter ID Amendment") (collectively, the "Amendments"), presently fails as a matter of law.

RELEVANT BACKGROUND

The circumstances and legal theories underlying this matter are truly one of a kind and deserve a thorough review.

In 2018, the General Assembly passed six amendments on to the people of North Carolina for ratification. Disagreeing with the policies those amendments put forth to the people, Plaintiff challenged four[1] of them, alleging that the ballot language for all four proposed amendments violated various provisions of the North

[1] These included the Voter ID (N.C. Sess. Law. 2018-128), Tax Cap (N.C. Sess. Law 2018-119), Board Appointments (N.C. Sess. Law 2018-117), and Judicial Vacancies (N.C. Sess. Law 2018-118) Amendments.

Carolina Constitution and that the session laws putting the proposed amendments on the ballot were improperly enacted by a General Assembly that was unconstitutionally convened under *North Carolina v. Covington*, 138 S. Ct. 2548 (2018) (per curiam). The part of Plaintiff's challenge regarding the ballot language was resolved in pretrial litigation and new language for some amendments. All four challenged amendments and two others were presented to the Citizens on the November 6, 2018 general election ballot. After the people of North Carolina voted in favor of four of the six in November 2018 by wide margins, with two challenged amendments failing ratification, Plaintiff focused their attention on the Voter ID Amendment and Tax Cap Amendment—two of the four successful amendments—in a Second Amended Complaint. (*See* Appendix A[2]). The only remaining claim in the Second Amended Complaint was for a declaratory judgment that—because of the final judgment in *Covington*, which invalidated twenty-eight North Carolina House and Senate districts as the product of a racial gerrymander—the Legislature was a usurper body that lost the ability to propose amendments to the people.

On February 22, 2019, on Plaintiffs' Motion for Partial Summary Judgment, Judge Bryan Collins determined in a first of its kind ruling that the Amendments were invalid because they were passed by an unconstitutional body of legislators akin to usurpers. *N. Carolina State Conf. of the NAACP v. Moore*, No. 18CVS9806, 2019 WL 2331258 (Wake Cnty. Super. Ct. Feb. 22, 2019) (Appendix B[3]). That

[2] Attached as **Appendix A** is a true and correct copy of Plaintiff's Second Amended Complaint in this case.

[3] Attached as **Appendix B** is a true and correct copy of Judge Collins' February 22, 2019 Order in this case.

determination was stayed by the Court of Appeals, and then the Court of Appeals reversed the trial court in a 2-1 decision, with the majority holding that the General Assembly did in fact have authority to propose the Amendments. *N. Carolina State Conf. of the NAACP v. Moore*, 273 N.C. App. 452, 849 S.E.2d 87 (2020). Plaintiff appealed as a matter of right based on the dissenting opinion. In a 4-3 decision on August 19, 2022, the North Carolina Supreme Court reversed the Court of Appeals and created out of whole cloth a new, novel balancing test for the trial court to examine on remand. *N. Carolina State Conf. of the NAACP v. Moore*, 382 N.C. 129, 133, 876 S.E.2d 513, 519 (2022) (Appendix C[4]).

But before examining the North Carolina Supreme Court's opinion in this case, it is important to note what else was going on while these Amendments were being litigated. Following enactment of the Voter ID Amendment in November 2018, the same General Assembly that passed the Amendments returned in December 2018 and during a special session passed legislation to implement the Voter ID Amendment. That legislation, S.B. 824, was enacted and codified in Chapter 163 of our General Statutes. *See* N.C. Sess. Law 2019-72. The current Supreme Court described the Voter ID Amendment's implementing legislation as such:

> In sum, S.B. 824 permits registered voters to present a multitude of acceptable identifications, including expired identifications, and requires the State to provide free voter identification cards to any registered voter. If a registered voter leaves their identification at home or otherwise fails to present it on voting day, he or she can cast a provisional ballot which will be counted if the identification is later presented to the county board of elections. Even if a

[4] Attached as **Appendix C** is a true and correct copy of the Supreme Court's opinion in this case.

> registered voter still somehow fails to obtain or otherwise possess an acceptable form of identification, the law permits him or her to cast a provisional ballot that will be counted so long as they do not provide false information in the reasonable impediment affidavit. Essentially, North Carolina's photo identification statute does not require that an individual present a photo identification to vote.

Holmes v. Moore, 384 N.C. 426, 431, 886 S.E.2d 120, 126 (2023). Following a similar path as the Voter ID Amendment, S.B. 824 was immediately challenged as facially unconstitutional in separate actions in both state court and federal court. *See id.*

The federal litigation, brought by Plaintiff in this case and several of its local branches, challenged S.B. 824 under federal statutory and constitutional law. *N. Carolina State Conf. of the NAACP v. Raymond*, 981 F.3d 295, 298 (4th Cir. 2020). Although the federal case is still pending, S.B. 824 remains in effect following the Fourth Circuit's reversal of a preliminary injunction issued by the federal district court. *Id.* at 311. In *Raymond*, the Fourth Circuit noted that the challengers to the Voter ID Amendment's implementing legislation argued that the General Assembly was motivated by discriminatory intent in passing the statute because discriminatory intent was found to have existed in 2013 when a prior Voter ID statute was enacted.

> [The 2018 Voter-ID Law] was passed after this Court found that North Carolina acted with racially discriminatory intent in enacting a 2013 omnibus voting law ("2013 Omnibus Law"), which included a voter-ID requirement. *See N.C. State Conf. of the NAACP v. McCrory*, 831 F.3d 204, 215 (4th Cir. 2016). The Challengers allege that the 2018 Voter-ID Law was enacted with the same discriminatory intent as the 2013 Omnibus Law.

Id. at 298. The challenge was a facial constitutional challenge under the Equal Protection Clause and "[t]o prevail on the merits of their constitutional challenges,

these Challengers had to prove that the 2018 Voter-ID Law was passed with discriminatory intent and has an actual discriminatory impact." *Id.* at 302. While the district court found that to be the case, the Fourth Circuit determined that the district court failed to give the law the presumption of constitutionality it was entitled to and reversed the burden on the Legislature to prove that the legislation was not passed with discriminatory intent. *See id.* at 298.

> To the district court, the North Carolina General Assembly's recent discriminatory past was effectively dispositive of the Challengers' claims here. But the Supreme Court directs differently. See Abbott v. Perez, — – U.S. ——, 138 S. Ct. 2305, 2324, 201 L.Ed.2d 714 (2018). A legislature's past acts do not condemn the acts of a later legislature, which we must presume acts in good faith. Id. So because we find that the district court improperly disregarded this principle by reversing the burden of proof and failing to apply the presumption of legislative good faith, we reverse.

Id. When the correct standards were applied, the Fourth Circuit found the implementing legislation to be "more protective of the right to vote than other states' voter-ID laws that courts have approved." *Id.* at 310. Thus, it reversed the district court, noting that it was unlikely Plaintiff could meet its burden of proving discriminatory intent and discriminatory impact. *Id.* at 298.

Alongside this federal case, the North Carolina Supreme Court has also conclusively passed judgment on the constitutionality of the Voter ID Amendment's implementing legislation—albeit after the Supreme Court's decision to remand this case.

In *Holmes v. Moore*, the North Carolina Supreme Court reviewed a facial challenge to the implementing legislation under the state Constitution's Equal Protection Clause and determined—when applying the presumption of constitutionality—that the legislation did not create a discriminatory impact and was not passed with discriminatory intent. 384 N.C. 426, 460, 886 S.E.2d 120, 144 (2023) ("Plaintiffs here have failed to prove beyond a reasonable doubt that S.B. 824 was enacted with discriminatory intent or that the law actually produces a meaningful disparate impact along racial lines.").

Calling on the traditional standards of constitutional review of an act of the General Assembly, the Court noted that arguing discriminatory intent is a heavy burden:

> Constitutional deference and the presumption of legislative good faith caution against casting aside legislative policy objectives on the basis of evidence that could be fairly interpreted to demonstrate that a law was enacted in spite of, rather than because of, any alleged racially disproportionate impact. To that end, a challenge to a presumptively valid and facially neutral act of the legislature under Article I, Section 19 of the North Carolina Constitution cannot succeed if it is supported by speculation and innuendo alone.

Id. at 439, 886 S.E.2d at 131. Accordingly, the Court noted that to succeed in their facial challenge to the implementing legislation, "the challenger must prove beyond a reasonable doubt that: (1) the law was enacted with discriminatory intent on the part of the legislature, and (2) the law actually produces a meaningful disparate impact along racial lines." *Id.* at 440, 886 S.E.2d at 132.

Ultimately, the Court determined that the *Holmes* challengers failed. The Court analyzed how the challenge would fail under the federal constitution, relying on *Raymond* and United States Supreme Court precedent stressing both the presumption of constitutionality in the face of prior findings of discrimination in other acts, and the determination that the typical burdens associated with photographic identification to vote are not sufficient enough to otherwise thwart a statute's plainly legitimate sweep. *Id.* at 447-52, 886 S.E.2d at 136-39. The Court also analyzed the legislation against North Carolina precedent and our state Constitution. The Court examined the evidence the challengers showed and determined it was insufficient to show discriminatory impact. *Id.* at 453–54, 886 S.E.2d at 140. It found that the evidence "simply ignores the reality that compliance with any government licensing or registration requirement requires effort on the part of citizens." *Id.* at 454, 886 S.E.2d at 141.

> "[M]inor inconvenience[s] ... do[ ] not impose a substantial burden." *Lee v. Va. State Bd. of Elections*, 843 F.3d 592, 600 (4th Cir. 2016). Plaintiffs cannot prove such a crucial aspect of their claim by relying on speculation; they must provide sufficient evidence demonstrating that S.B. 824 actually produces disparate impact in reality, not hypothetical circumstances.

Id. The Court found that the Voter ID Amendment's implementing legislation would not have a racially discriminatory impact on voters. Rather, the Court determined that the legislation would ultimately deny no one the right to vote.

> S.B. 824 allows all would-be voters in North Carolina to vote either with or without an approved form of identification. Plaintiffs failed to produce sufficient evidence that either they, or any other citizen of this state,

> would be precluded from voting due to the terms and conditions of S.B. 824. Every prospective voter can vote without an identification if they submit a reasonable impediment affidavit, which can only be rejected if the county board of elections unanimously determines that the declaration is false.

Id. at 455, 886 S.E.2d at 141. While *Raymond* came before the Supreme Court's decision in this case and *Holmes* after, each bear on the analysis on remand.

An examination of the Court's opinion in this case shows that the Court was concerned with identifying amendments, proposed to the people of North Carolina from a Legislature based on gerrymandering, that would substantially threaten popular sovereignty or democratic self-rule. *N. Carolina State Conf. of the NAACP v. Moore*, 382 N.C. 129, 162, 876 S.E.2d 513, 537 (2022). For instance, the Court referenced hypothetical amendments from a *de facto* General Assembly that might change amendments to the constitutions to be ratified by super majorities of voters, or amendments that would extend the legislators' terms of office. *Id*. But the Court did not hold the Voter ID or Tax Cap Amendments are in this same category of those hypothetical amendments.

Rather, the Supreme Court undercut Plaintiff's argument that the General Assembly was a usurper body, instead determining that the 2018 legislators who were from unconstitutionally drawn districts were *de facto* legislators with full authority to propose and pass legislation while in office. *Id*. at 161, 876 S.E.2d at 536. Furthermore, because the legislators had authority to propose and pass legislation, principles of equity warranted a closer review of constitutional amendment proposals over that of ordinary legislation. Only in certain extreme

circumstances could a constitutional amendment ratified by the people be retroactively invalidated under the newly-penned balance of the equities test. *N. Carolina State Conf. of the NAACP v. Moore*, 382 N.C. 129, 162, 876 S.E.2d 513, 537 (2023).

Thus, the Court noted that trial courts should "determine if a challenged constitutional amendment so gravely threatens principles of popular sovereignty and democratic self-rule as to require retroactive invalidation." *Id.* at 163, 876 S.E.2d at 538. First, the Court said the trial court "should have examined as a threshold matter whether the legislature was composed of a sufficient number of legislators elected from unconstitutionally gerrymandered districts—or from districts that were made possible by the unconstitutional gerrymander—such that the votes of those legislators could have been decisive in passing the challenged enactments." *Id.* at 162-63, 876 S.E.2d at 537. If the answer to this threshold question is "no," then "no further inquiry is necessary, and the challenged amendments must be left undisturbed." *Id.*

If, however, the answer is yes, then the Court next determined that trial courts must balance the equities and determine whether retroactively invalidating proposed constitutional amendments is necessary. *Id.* at 133, 876 S.E.2d at 519. The Court invented a three-factor test to inform the trial court of this new standard. "Courts must consider whether there is a substantial risk that a challenged constitutional amendment will immunize legislators from democratic accountability going forward or perpetuate the ongoing exclusion of a category of voters from the political process." *Id.* at 163–64, 876 S.E.2d at 538. "When either of these situations occur, a legislature

that did not fully represent the people of North Carolina has sought to entrench itself by redefining who 'the people' are and how they govern themselves–the legislature has attempted to legitimate and perpetuate an otherwise legally deficient claim to exercise the people's political power and, in the process, sought to preempt the people's capacity to reassert their will consistent with the terms of their fundamental law." *Id.* If, however, these two factors are not present, then the proposed amendment should not be retroactively invalidated.

> In general, if a constitutional amendment does not immunize legislators from democratic accountability or perpetuate the ongoing exclusion of a category of voters, the risk of chaos and confusion arising from retroactively examining the validity of an act proposing a constitutional amendment outweighs the threat to constitutional principles that arises from allowing the amendments to remain in place.

Id. at 164, 876 S.E.2d at 538.

In contrast to amendments that immunize legislators or exclude voters, enshrinement of policy choices are generally not those that the *Moore* Court's new test found so threatening to warrant removal from the Constitution. "Amendments that constitutionalize a particular policy choice, but do not alter the way the people's sovereign power is allocated, channeled, and exercised by the people's representatives, do not typically threaten principles of popular sovereignty and democratic self-rule." *Id.* The exception to this general principle is an amendment that "intentionally discriminate[s] against a particular category of citizens who were also discriminated against in the drawing of the districts from which the legislators who initiated the amendment process were elected." *Id.*

> Thus, when the votes of legislators elected due to an unconstitutional gerrymander could have been decisive in enacting a bill proposing a constitutional amendment, courts must assess whether there is a substantial risk that the challenged amendment will (1) immunize legislators from democratic accountability; (2) perpetuate the ongoing exclusion of a category of voters from the political process; or (3) intentionally discriminate against a particular category of citizens who were also discriminated against in the political process leading to the legislators' election. If any of these factors are present, then the balance of equities requires the court to invalidate the challenged amendment. If these factors are not present—or if the legislators elected due to an unconstitutional gerrymander were not so numerous as to be potentially decisive in the vote to put a proposed amendment to the people—the challenged amendment must be left in place.

Id. at 165, 876 S.E.2d at 539.

When creating this test, the Court acknowledged the extreme (and before this case, unprecedented) nature of the remedy Plaintiff seeks: retroactive invalidation of constitutional amendments ratified by the people of North Carolina. *Id.* at 164, 876 S.E.2d at 539. Thus, the Court instructed that the following principles must also be considered:

> The likelihood that invalidating a challenged constitutional amendment will engender significant confusion varies depending on the circumstance. For example, the magnitude of the potential confusion will vary depending on whether the constitutional amendment has been implemented through enabling legislation that has already taken effect, whether the public has relied upon changes in the law introduced by the amendment, and whether there was a significant lapse in time between passage of the constitutional amendment and the successful challenge to the legislators' authority.

Id.

Judge Graham Shirley, on remand, determined that Plaintiff's claim to invalidate the Amendments through application of the three-part test was a facial challenge to the acts' constitutionality on August 2, 2023. (*See* Appendix D[5]). Plaintiffs did not seek appellate review of the transfer motion. Instead, they moved to remand to a single judge on January 12, 2024. This Court essentially agreed with Judge Shirley, determining not to remand the matter to a single superior court judge for an as-applied challenge.

ARGUMENT

As both the Fourth Circuit and the North Carolina Supreme Court have stressed specifically about North Carolina's voter identification legislation: there is a presumption of constitutionality to the acts of the General Assembly. That presumption does not stop in this case merely because the North Carolina Supreme Court created a new novel balancing test on remand. Quite the contrary, the Supreme Court has left the analytical role to this Court in the first instance. Thus, applying this unique test must still be done with cautionary deference befitting the separation of powers.

> "[A] statute enacted by the General Assembly is presumed to be constitutional," *Wayne Cty. Citizens Ass'n v. Wayne Cty. Bd. of Commr's*, 328 N.C. 24, 29, 399 S.E.2d 311, 314-15 (1991) (citation omitted), and "will not be declared unconstitutional unless this conclusion is so clear that no reasonable doubt can arise, or the statute cannot be upheld on any reasonable ground," *id.* at 29, 399 S.E.2d at 315 (citing, inter alia, *Poor Richard's, Inc. v. Stone,* 322 N.C. 61, 63, 366 S.E.2d 697, 698 (1988)). Put another way, since "[e]very presumption favors the validity of a statute," that

[5] For ease of review, attached as **Appendix D** is a true and correct copy of Judge Shirley's August 2, 2023 Order.

> statute "will not be declared invalid unless its unconstitutionality be determined beyond reasonable doubt." *Baker v. Martin,* 330 N.C. 331, 334, 410 S.E.2d 887, 889 (1991) (quoting *Gardner*10 *v. City of Reidsville,* 269 N.C. 581, 595, 153 S.E.2d 139, 150 (1967)).

N. Carolina State Bd. of Educ. v. State, 371 N.C. 170, 180, 814 S.E.2d 67, 74 (2018). "[A] facial challenge to the constitutionality of an act ... is the 'most difficult challenge to mount successfully,'" *Hart v. State,* 368 N.C. 122, 131, 774 S.E.2d 281, 288 (2015) (quoting *Beaufort Cty. Bd. of Educ. v. Beaufort Cty. Bd. of Comm'rs*, 363 N.C. 500, 502, 681 S.E.2d 278, 280 (2009)), with the challenger being required to show "that there are no circumstances under which the statute might be constitutional," *Beaufort Cty. Bd. of Educ.,* 363 N.C. at 502, 681 S.E.2d at 280 (citations omitted). "Where a statute is susceptible of two interpretations, one of which is constitutional and the other not, the courts will adopt the former and reject the latter." *Wayne Cty. Citizens Ass'n*, 328 N.C. at 29, 399 S.E.2d at 315 (citing *Rhodes v. City of Asheville,* 230 N.C. 759, 53 S.E.2d 313 (1949)).

Here, this standard means Plaintiff must be able to demonstrate that there is no circumstance in which either the Tax Cap Amendment, (N.C. Sess. Law 2018-119), or the Voter ID Amendment, (N.C. Sess. Law. 2018-128), would pass this three-factor test. As a matter of law, however, Plaintiff cannot meet that burden and these two Amendments do pass these factors. That legal determination is not based on questions of fact, but instead on settled legal precedent decided by other courts about Voter ID in this state and the equities of this case.

Defendants recognize that the procedural posture of this case presents unique circumstances and does not squarely fall within routinely timed dispositive motions in the Rules of Civil Procedure. But Defendant's Amended Dispositive Motion and representations to the Court show that no matter the exact form of the dispositive motion, Defendants are relying on arguments of law, not fact, and that no discovery is necessary to answer the Court's inquires at this point. The Amended Dispositive Motion challenges the sufficiency of the claims in light of the North Carolina Supreme Court's new test and does not raise any new or disputed facts. A judgment on the pleadings is proper here in light of the case law and the text of the challenged Amendments, and prior factual findings about the pleadings in this case. *See Ragsdale v. Kennedy*, 286 N.C. 130, 137, 209 S.E.2d 494, 499 (1974). Only questions of law remain. Accordingly, this Court should dismiss Plaintiff's challenge because Defendants had *de facto* authority to propose the Tax Cap and Voter ID Amendments.[6]

I. LOWERING THE INCOME TAX CAP IS A POLICY CHOICE THAT DOES NOT IMPACT DEMOCRATIC SELF RULE.

A top end "cap" on the rate of income tax in North Carolina dates back to 1920. On November 2, 1920, the people ratified an amendment proposed in 1919 N.C. Sess. Law § 129 that replaced a sentence to then Article V, Section 3 creating a cap on

[6] Defendants specifically preserve for appellate review, but do not intend to raise to this Court, the issue that the North Carolina Supreme Court's determination of justiciability in *Moore* was wrongly decided, as generally articulated by the dissenting opinion and Court of Appeals majority. That said, for the purposes of this Motion, Defendants will show that even if the test in *Moore* was correctly decided, Plaintiffs cannot prevail as a matter of law. Nothing in Legislative Defendants' Motion or this briefing should be construed as an express or implied waiver of whether *Moore* was wrongly decided.

income tax of six percent. (Appendix E[7]) The General Assembly proposed amending the provision again in 1935 to increase the tax rate cap from six percent to ten percent, *see* 1935 N.C. Sess. Law § 248, and the people ratified that amendment on November 3, 1936. The drafters of the 1971 Constitution did not amend the amount of the income tax cap, but consistent with other editorial changes, moved it to where it is now in Article V, Section 2(6). It remained ten percent until it was lowered to seven percent by the people of North Carolina in 2018, who ratified the Tax Cap Amendment proposed to them by N.C. Sess. Law 2018-119. (Appendix F[8]).

Thus, in 2018, over the nearly 100-year history of the income tax cap, the rate had fluctuated by affirmation of the people, but a cap was always present. It is hard to see how adjusting the rate of an income tax cap "alter[s] the way the people's sovereign power is allocated, channeled, and exercised by the people's representatives." *N. Carolina State Conf. of the NAACP v. Moore*, 382 N.C. 129, 164, 876 S.E.2d 513, 538 (2022). Instead, it constitutionalizes a particular policy choice. *Id.* Setting the tax rate of various taxes is quintessentially an exercise of the General Assembly in establishing public policy. *See In re Morgan*, 186 N.C. App. 567, 572, 652 S.E.2d 655, 658 (2007) (Geer, J. dissenting) ("The Commission and the majority opinion have improperly imposed their view of appropriate public policy—fairness to individual taxpayers—to override other public policies promoted by the statute's

[7] Attached as **Appendix E** are true and correct copies of the prior versions of the Tax Cap Amendment, publicly available on the North Carolina Legislative Library's website at https://sites.ncleg.gov/library/wp-content/uploads/sites/5/2023/01/NC-Constitution-Amendments-1873-1967.pdf, pp. 904-905 (1920 Amendment); pp. 920-21 (1936 Amendment).
[8] Attached as **Appendix F** is a true and correct copy of N.C. Sess. Law 2018-119, as challenged in this case.

plain language such as equality of taxation and reduction of tax rates."), *rev'd per curiam for the reasons stated in the dissent*, 362 N.C. 339, 661 S.E.2d 733 (2008); *see also Helvering v. Bliss*, 293 U.S. 144, 150–51, 55 S. Ct. 17, 20–21, 79 L. Ed. 246 (1934) ("The exemption of income devoted to charity and the reduction of the rate of tax on capital gains were liberalizations of the law in the taxpayer's favor, were begotten from motives of public policy, and are not to be narrowly construed."); *Power Co. v. Membership Corp*., 256 N.C. 62, 64, 122 S.E.2d 782, 784 (1961) ("Courts have no right to usurp legislative powers and by judicial decrees formulate public policy not declared by the Legislature"). While a cap on the income tax rate is established by the Constitution, the allocable rate is a matter of statute. For instance, in 2013 N.C. Session Law § 316, North Carolina went from a tiered income tax rate structure based on amount of income to a flat single rate for all taxpayers. The current tax rate is 4.5% set by 2023 N.C. Sess. Law 134 § 42.1(a), which amended section 105-153.7. If the General Assembly wants to raise or lower the tax rate, or return to a tiered structure, it could do so without a constitutional amendment so long as the highest rate did not exceed seven percent. Establishing the rate of the cap does not relate to legislative terms in office or district lines, and the cap applies equally to everyone in North Carolina.

The 1968 Commission, charged with drafting our adopted Constitution in 1971, even used the income tax rate as an example of constitutional interpretation:

> It is essential to keep this point in mind in interpreting state constitutions, for what may appear in form to be grant of authority to the General Assembly to act on a particular matter normally, is in legal effect a limitation,

> not a grant. For Example, Article V, § 3, of the State Constitution states that "The General Assembly may also tax trades, professions, franchises, and incomes, Provided the rate of tax on income shall not in any case exceed ten percent (10%) . . . ." This is not the source of the General Assembly's power to tax income; it levied an income tax under its genera legislative authority long before the constitution mentioned the matter. The provision above quoted is a limitation on the rate of tax on incomes to a maximum of ten per cent. To repeal that provision would not take away the power of the General Assembly to levy an income tax; it would instead take away the top limit on the rate.

Report of the North Carolina State Constitution Study Commission 1968, p.2 (1968).

With the income tax rate being adjustable by statute, subject to change in the ordinary course of legislation, and the cap on income tax being first instituted in 1920 (not 2018), Plaintiff cannot, as a matter of law, forecast a material fact that creates a substantial risk that proposing an adjustment to the income tax cap rate in 2018 was anything more than a policy choice. The cap has been instituted and changed by the people of North Carolina twice through legislatively proposed amendments ranging nearly 100 years. Neither the existence of the cap nor its change has appeared to insulate any legislative body from accountability. The tax cap does not threaten principles of popular sovereignty and democratic self-rule. Moreover, the tax cap applies equally to all state citizens regardless of race. This Court should dismiss Plaintiff's challenge to the Tax Cap Amendment because Defendants had *de facto* authority to propose it.

II. THE VOTER ID AMENDMENT PASSES THE COURT'S THREE-PART TEST AS A MATTER OF LAW.

The Voter ID Amendment constitutes new language to the Constitution in 2018 and by its very name, it implicates voting. But "[t]he Supreme Court of the United States has recognized that "every voting rule imposes a burden of some sort." *Holmes v. Moore*, 384 N.C. 426, 434, 886 S.E.2d 120, 128 (2023).

> Photo identification is a condition of our times where more and more personal interactions are being modernized to require proof of identity with a specified type of photo identification. With respect to these familiar burdens, which accompany many of our everyday tasks, a photo identification requirement does not constitute an undue burden on the right to vote.

Id. at 434–35, 886 S.E.2d at 128–29 (quotation omitted).

N.C. Session Law 2018-128[9] proposed the following text be added to Article VI, Section 2(4) of the Constitution:

> Photo identification for voting in person. 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.

The people overwhelmingly ratified that Amendment on November 6, 2018—a total of 2,049,121 voters—55.49% of North Carolina voters in that election—voted in favor of the Voter ID Amendment. 11/06/2018 Official General Election Results, NCSBE, https://er.ncsbe.gov/contest_details.html?election_dt=11/06/2018&county_id=0&contest_id=1425 (last accessed August 23, 2024). The text of the Amendment is what the North Carolina Supreme Court has asked this Court to examine. The text, to which the three questions established by the Court must be analyzed, is straightforward:

[9] Attached as **Appendix G** is true and accurate copy of N.C. Sess. Law 2018-128, the challenged Voter ID Amendment.

voters shall present photographic identification when voting. The Voter ID Amendment is a broad, generic endorsement of photo identification. It is up to the General Assembly, as requested by the people of this state, to craft the *statutory* ins and outs, the specific, permitted identifications and the exceptions for presenting a photo ID. The language of the Amendment does not get into those specifics—the enabling legislation does.

A. The Voter ID Amendment does not create rogue legislators or unduly insulate them from democratic accountability.

Therefore, this Court is tasked with determining whether the principle of presenting photographic identification in order to vote is a *substantial* "threat to popular sovereignty and democratic self-rule," *N. Carolina State Conf. of the NAACP v. Moore*, 382 N.C. 129, 162, 876 S.E.2d 513, 537 (2022), "or so gravely threatens principles of popular sovereignty and democratic self-rule as to require retroactive invalidation." *Id.* at 163, 876 S.E.2d at 538. If voter ID posed such a threat, then it would stand to reason that no state could adopt laws requiring photographic identification because to do so would violate the Fourteenth Amendment of the United States Constitution and the Equal Protection Clause.

But the United States Supreme Court has noted that photographic identification to vote, with exceptions, is constitutional and does not violate the Fourteenth Amendment. *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 198, 128 S. Ct. 1610, 1621, 170 L. Ed. 2d 574 (2008) ("For most voters who need them, the inconvenience of making a trip to the BMV, gathering the required documents, and posing for a photograph surely does not qualify as a substantial burden on the right

to vote, or even represent a significant increase over the usual burdens of voting."). Other courts examining photo identification requirements for voting have upheld them against federal equal protection challenges, *see, e.g., Greater Birmingham Ministries v. Sec'y of State for State of Alabama*, 992 F.3d 1299 (11th Cir. 2021), and state constitutional equal protection clauses and free election provisions, *see, e.g., Thurston v. League of Women Voters of Arkansas*, 2024 Ark. 90, 687 S.W.3d 805 (2024). Voter ID laws exist in a number of states; therefore, it is hard to fathom that as a concept the requirement to produce a photo identification upon voting threatens popular sovereignty and democratic self-rule. In fact, given the number of voter identification laws on the books across the country, it is more plausible that they work to better ensure those principles.

Citizens must register to vote, vote on certain days within certain times, follow the law for absentee ballots, vote in the correct precinct, request the correct ballot, fill the ballot out appropriately, and turn it in timely. Changes to these laws occur regularly and it is substantially *unlikely* that implementing a photo identification verification step in the process will create rogue legislators. The members of the 2018 General Assembly were no more or less insulated from their constituents than in other years. Every person elected still served on behalf of those in their district who voted for them, those who voted for the other person, or indeed those who did not vote at all. In fact, the 2018 general election gave proof to democratic accountability[10] and saw the people approve the Voter ID Amendment at the same time.

[10] At the time the Voter ID Amendment was proposed, the House had 75 Republican seats and 45 Democratic seats; the Senate had 35 Republican seats and 15 Democratic seats. After the 2018 election, the

The Voter ID Amendment did not extend legislative terms, it did not alter House and Senate district lines, it did not alter the qualifications for office, and it did not change election dates or reduce the number of votes needed to win legislative office. The Voter ID Amendment changed neither the way amendments are proposed nor altered the manner that bills are made into law. It is not legally probable that Voter ID could do that when the language of the Amendment is neutral, applicable to everyone, and leaves room for exceptions. Voter ID does not immunize legislators from democratic accountability.

B. There is not a substantial risk that the Voter ID Amendment is racially discriminatory.

The North Carolina Supreme Court's second and third factors share a common theme: racial discrimination. Apart from not immunizing legislators from democratic accountability, the Court noted that an amendment should not perpetuate the ongoing exclusion of a category of voters from the political process. This is an apparent reference to the determination in *Covington* that racial discrimination occurred in the 2011 redistricting process and a request that the Court evaluate whether the Voter ID Amendment has a substantial risk of excluding racial minorities from the voting process.

Again, this is legally improbable when squared against the standard of review on a facial challenge—that under *all* circumstances the amendment must present a substantial risk of excluding minorities—and the general nature of the amendment

House was 65R, 55D; and Senate was 29R, 21D. See Districts by Incumbent Party Affiliation, NCGA, publicly available at https://www.ncleg.gov/Redistricting/AffiliationMaps.

itself. The text of the Voter ID Amendment itself is race neutral. And states requiring photographic identification to vote has been upheld through numerous equal protection challenges in states all around, as noted above, and we conclusively know, pursuant to *Holmes*, that there is at least one instance where North Carolina's Amendment has been implemented *without racial discrimination*. Even a single constitutional implementation of the Amendment is legally sufficient to defeat a facial challenge because the challenger must prove the statute unconstitutional in *all* sets of circumstances.

The *Holmes* Court essentially analyzed the Voter ID Amendment *as enacted* pursuant to an equal protection, facial constitutional challenge under the North Carolina Constitution.

> That reasonable minds may differ as to whether the legislature endeavored to pass the least restrictive voter identification law possible does not equate to a showing that the legislature endeavored to pass a voter identification law designed to disparately impact black North Carolinians. Plaintiffs' burden is not to demonstrate beyond a reasonable doubt that a hypothetical alternative law may have been less restrictive; it is to demonstrate beyond a reasonable doubt that *this* law was designed to discriminate on the basis of race.

Holmes v. Moore, 384 N.C. 426, 451, 886 S.E.2d 120, 139 (2023). When the implementing legislation of the Amendment is determined not to be discriminatory, then it conclusively demonstrates that there is at least one circumstance where the Amendment—which only establishes a voter identification requirement with exceptions—will not, as a matter of law, exclude the same voters impacted in *Covington*. Even though it is conceivable that the General Assembly could implement

voter identification in a less impactful way or a way that may be determined to be unconstitutional, that is not the standard here. Moreover, the enabling statute is a matter of "ordinary legislation" that the *Moore* Court noted was squarely a *de facto* act not presenting a risk of fundamental change. A substantial risk of excluding voters—any voters—cannot be shown in *all* circumstances of photographic identification to vote when the North Carolina Supreme Court has upheld the constitutionality of one manner of voter identification—the present manner.

Holmes is as equally binding on this Court as is the Supreme Court's mandate to evaluate the three-part test, which this Court is presently undertaking. And the analysis of *Holmes* yields the legal conclusion here that a requirement to present photographic identification to vote does not exclude minority voters from the voting process in North Carolina—in particular when there are exceptions and ways to cast a vote even without photographic identification.

C. There is not a substantial likelihood that the Voter ID Amendment was proposed with discriminatory intent.

The Court in *Holmes* also held that Plaintiffs failed to demonstrate an intent to discriminate in the Amendment's implementing legislation, which was passed by the exact same legislature that passed the proposed Amendments. *Holmes v. Moore*, 384 N.C. 426, 457, 886 S.E.2d 120, 143 (2023) ("[P]laintiffs' failure to provide sufficient evidence of disparate impact ends the matter. Nevertheless, we note that plaintiffs also fail to provide sufficient evidence of discriminatory intent."). That is critical to the Supreme Court's last query here: whether the amendment "intentionally discriminate[s] against a particular category of citizens who were also

discriminated against in the political process leading to the legislators' election." *N. Carolina State Conf. of the NAACP v. Moore*, 382 N.C. 129, 165, 876 S.E.2d 513, 539 (2022).

The Voter ID Amendment does not selectively apply to some people voting in person and not to others. It applies equally across the board, with the acknowledgment that the General Assembly could create exceptions.

> "Whenever a challenger claims that a state law was enacted with discriminatory intent, the burden of proof lies with the challenger, not the State." *Abbott*, 138 S. Ct. at 2324 (citing Reno v. Bossier Parish Sch. Bd., 520 U.S. 471, 481, 117 S. Ct. 1491, 1499, 137 L.Ed.2d 730 (1997)). Where a law is facially neutral, as here, the challenger faces an especially heavy burden of proving enactment of the law was motivated by discriminatory intent.

Holmes v. Moore, 384 N.C. 426, 438, 886 S.E.2d 120, 131 (2023). Here, there are no allegations that the legislators of the 2018 General Assembly were motivated by discriminatory intent. Plaintiff argues instead that the Voter ID Amendment was hastily proposed in the waning days of the regular session (Appendix B at ¶ 66). Plaintiff also argues that the Legislature was motivated to undo its loss in *N. Carolina State Conf. of the NAACP v. McCrory*, 831 F.3d 204 (4th Cir. 2016), where the Fourth Circuit found that a voter identification statute based on the use of racial data was designed to intentionally discriminate. (Appendix B at ¶ 12).

But these two allegations were conclusively rebuffed by the North Carolina Supreme Court in *Holmes*, because those two theories were argued to support the discriminatory intent of S.B. 824. "[T]he evidence that S.B. 824 was passed in a special legislative session, did not receive overwhelming support from Democratic

legislators, and was enacted without the consideration of racial data, is wholly insufficient to demonstrate discriminatory intent beyond a reasonable doubt." *Holmes*, 384 N.C. at 458, 886 S.E.2d at 143.

> The trial court "found" that "[t]here is no reason why the General Assembly could not have followed normal procedures, passed implementing legislation to accompany the proposed constitutional amendment, and submitted that proposed legislation to the People of North Carolina for their approval." The trial court's findings on this issue, however, are contrary to both federal precedent, North Carolina precedent, and the historical role of the judiciary in not second-guessing the contours of the legislative process.
>
> The Supreme Court of the United States has stated "we do not see how the brevity of the legislative process can give rise to an inference of bad faith—and certainly not an inference that is strong enough to overcome the presumption of legislative good faith." *Abbott*, 128 S. Ct. at 2328–29.

Id. at 449, 886 S.E.2d at 137. And the *Holmes* Court, relying on *Abbott* and *Raymond*, established that reliance on a past finding of discriminatory intent is insufficient to suggest discriminatory intent in a later legislative act:

> The allocation of the burden of proof and the presumption of legislative good faith are not changed by a finding of past discrimination. Past discrimination cannot, in the manner of original sin, condemn governmental action that is not itself unlawful. The ultimate question remains whether a discriminatory intent has been proved in a given case. The historical background of a legislative enactment is one evidentiary source relevant to the question of intent. But we have never suggested that past discrimination flips the evidentiary burden on its head.

Holmes v. Moore, 384 N.C. 426, 451–52, 886 S.E.2d 120, 139 (2023) (quoting *Abbott*, 138 S. Ct. at 2324–25 (cleaned up)). Given the North Carolina Supreme Court's

determination that the Voter ID Amendment's implementing legislation, where the actual nuts and bolts of how the principled concept of photographic identification would be implemented resides, was *not* to be motivated by discriminatory intent it is legally improbable that the Amendment could bear such discriminatory intent when its language is even more generic and neutral.

Further, the North Carolina Supreme Court notes that invalidating a constitutional amendment can lead to its own chaos and confusion. The Court notes that confusion may be at its apex in situations like the one here where the Amendment's enabling legislation has already taken effect and, specific to photographic identification upon voting, been used in previous election cycles and about to be used in another. The "public has relied upon changes in the law introduced by the amendment," *N. Carolina State Conf. of the NAACP v. Moore*, 382 N.C. 129, 164, 876 S.E.2d 513, 539 (2022), by participating in an election cycle, seeking public identification cards, and preparing for continued compliance with S.B. 824 in an upcoming election. And Plaintiff has taken opportunities to lead the way in several court actions in state and federal court to stop it. This is not a spur of the moment decision; these Amendments were overwhelmingly ratified by the people of North Carolina in November 2018, even as two others were voted down. These Amendments were challenged before they were even ratified and that legal inquiry has continued now for approaching six years. In the meantime, the General Assembly's enabling legislation for voter identification has been implemented and is a reality for voters. The concerns of threatening popular sovereignty or democratic

self-rule the Supreme Court wanted this Court to evaluate are simply not present with these Amendments.

CONCLUSION

This Court on remand need not look any further than the text of the proposed Amendments, the pleadings in this case, and the law surrounding the issues to see that the Tax Cap and Voter ID Amendments do not pose substantial risks to popular sovereignty. Plaintiff cannot meet the new test espoused by the North Carolina Supreme Court in this case and Defendants are entitled to judgment as a matter of law. This Court should grant Legislative Defendant's Amended Dispositive Motion and dismiss all claims asserted in Plaintiff's Second Amended Complaint.

Respectfully submitted this the 23rd day of August, 2024.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on August 23, 2024, a copy of the foregoing was served upon the parties listed below by email at the addresses indicated below:

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