No. COA 22-16 TENTH DISTRICT

NORTH CAROLINA COURT OF APPEALS
****

JABARI HOLMES, FRED CULP, DANIEL E. SMITH, BRENDON JADEN PEAY, 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 Elections for the 2018 Third Extra Session*; THE STATE OF NORTH CAROLINA; and THE NORTH CAROLINA STATE BOARD OF ELECTIONS,

Defendants.

From Wake County
No. 18 CVS 15292

****

BRIEF OF AMICUS CURIAE LAWYERS DEMOCRACY FUND[1]

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[1] No person or entity other than the amicus curiae and its counsel, directly or indirectly, either wrote this brief or contributed money for its preparation.

INDEX

TABLE OF CASES AND AUTHORITIES

Cases

Constitutional Provisions

Statutes

Other Authorities

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BRIEF OF AMICUS CURIAE LAWYERS DEMOCRACY FUND

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INTEREST OF AMICUS CURIAE

Lawyers Democracy Fund ("LDF") is a non-profit, tax exempt organization under section 501(c)(4) of the Internal Revenue Code, with a long history of advancing the role of ethics, integrity, and legal professionalism in the electoral process, including safeguarding rights of eligible voters to vote. LDF primarily conducts, funds, and publishes research and in-depth analysis regarding the effectiveness of current and proposed election methods, particularly those lacking adequate coverage in the national media. LDF also has an extensive history of supporting voter identification requirements, publishes broadly about the value of Photo ID, and submits briefs as amicus curiae in cases defending Photo ID laws, including *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008) and *N.C. NAACP v. McCrory*, 831 F.3d 204 (4th Cir. 2016).

ARGUMENT

This case concerns 2018 N.C. Sess. Law 144 ("SB824"), legislation implementing North Carolina's constitutional mandate for Photo ID. *See* N.C. Const. art. VI, § 2(4) ("Photo ID Clause"). Neither this legislation nor this litigation is unique, as approximately 35 states have implemented Photo ID laws for voting, many of which have been upheld by courts. *See Voter ID Laws,* Nat'l Conf. of State Legislatures (Jan. 1, 2022), https://www.ncsl.org/research/elections-and-campaigns/voter-id.aspx. Since the U.S. Supreme Court's

decision in *Crawford*, upholding Indiana's Photo ID law against a federal law challenge, Photo ID laws have been upheld consistently. North Carolina's Photo ID law should be upheld too; requiring Photo ID in connection with voting is lawful and a common-sense solution for identifying qualified voters, deterring voter fraud, and instilling public confidence in election outcomes. For these reasons, significant majorities of voters support Photo ID.

North Carolina's voters mandated the use of Photo ID for in-person voting by amending the state constitution in 2018. The Photo ID Clause passed by an emphatic margin of approximately 11% with the support of over 2 million voters. *See 11/06/2018 Official General Election Results*, N.C. State Bd. of Elections https://er.ncsbe.gov/?election_dt=11/06/2018&county_id=0&office=REF&contest=1425. Consistent with other litigation efforts to stop Photo ID, opponents in this lawsuit now seek to thwart the will of the People. *See, e.g.*, *N.C. NAACP v. McCrory*, 831 F.3d 204 (4th Cir. 2016) (challenge to N.C.'s prior Photo ID law before passage of the constitutional amendment); *N.C. NAACP v. Moore*, 273 N.C. App. 452, 849 S.E.2d 87 (2020) (challenge to the Photo ID Clause pending before the Supreme Court of North Carolina). As a result, North Carolina's Photo ID law still has yet to be used in a North Carolina election.

This present lawsuit challenges SB824 on the asserted basis that it violates North Carolina's Equal Protection Clause, Article I, § 19. Plaintiff-

Appellees allege the legislature passed SB824 with discriminatory intent but failed to introduce any direct evidence of such at trial. (R p 1031-34) Nevertheless, a majority ("Majority") of the three-judge trial court panel ("Panel") determined that discriminatory intent against minority voters could be inferred from the "totality of the circumstances" surrounding the enactment of SB824, and thus struck it down as unconstitutional. (R pp 975, 1000-01 at ¶¶ 206, 271, 273).

In its review here, however, this Court should be aware that SB824 implements a more permissive Photo ID process than those implemented and upheld in many other states, rendering the Majority's decision an anomaly in the post-*Crawford* era.

I. States Have a Legitimate Interest in Enacting Photo ID Legislation to Protect the Franchise.

Numerous courts have affirmed states' legitimate interests in administering elections with integrity and preventing their voters from disenfranchisement. *See Brnovich v. Democratic Nat'l Comm.*, 141 S.Ct. 2321, 2340 (2021) ("One strong and entirely legitimate state interest is the prevention of fraud."). The U.S. Supreme Court recognized two, equally effective ways to disenfranchise voters:

> "[T]he right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise."

Purcell v. Gonzalez, 549 U.S. 1, 4 (2006) (quoting *Reynolds v. Sims*, 377 U.S. 533, 555 (1964)). The Majority's failure to recognize the truth of North Carolina's legitimate interest in this area undermines its conclusion that the enactment of SB824 violated the Equal Protection Clause.

Voting is among the most sacrosanct rights recognized in our constitutional order, "the basic right without which all others are meaningless." President Lyndon Johnson, Remarks in the Capitol Rotunda at the Signing of the Voting Rights Act (Aug. 6, 1965). States have legitimate interests in both punishing and preventing election fraud. *See Brnovich*, 141 S. Ct. at 2340. For example, impersonating another for voting is a felony in North Carolina. N.C.G.S. § 163-275(1) (2021). Yet, only punishing past voter fraud is insufficient where such an affront can be effectively prevented. *See Crawford*, 553 U.S. at 196 ("While the most effective method of preventing election fraud may well be debatable, the propriety of doing so is perfectly clear.").

The Majority erroneously reasoned that "[v]oter fraud is extremely rare[,]" and concluded "[t]here is no evidence that voter identification laws actually bolster overall confidence in elections or that they make people less concerned about voter fraud." (R pp 970-71 at ¶¶191, 196.) Notably, such a finding was not dispositive for the U.S. Supreme Court, which upheld Indiana's

Photo ID legislation in *Crawford* even though there was no record of voter impersonation fraud in Indiana. 553 U.S. at 194 ("The record contains no evidence of [voter impersonation] fraud actually occurring in Indiana.").

Even so, the Majority's conclusion ignores material evidence of voter fraud, both nationally and in North Carolina. *See, e.g.*, The Comm'n on Fed. Election Reform, Report, *Building Confidence in U.S. Elections* 18 (Sept. 2005) (Report chaired by President Carter and Secretary James Baker concluding "there is no doubt" that both vote fraud and multiple voting occur and "could affect the outcome of a close election."). The North Carolina State Board of Elections ("SBOE") identified more than 500 voting irregularities connected to the 2016 election, including double voters, felon voters, noncitizen voters, and voter impersonators. *See Post-Election Audit Report*, N.C. State Bd. Elections (April 21, 2017), https://s3.amazonaws.com/dl.ncsbe.gov/election-security/audits/2016-11-08-election-audit-report.pdf. Furthermore, the SBOE vacated the 2018 9th Congressional election following an investigation of voter fraud. Order, *In re:* Investigation of Election Irregularities Affecting Counties Within the 9th Congressional District, N.C. State Board of Elections (Mar. 13, 2019), https://dl.ncsbe.gov/State_Board_Meeting_Docs/Congressional_District_9_Portal/Order_03132019.pdf.

As such, Photo ID is a reasonable and common-sense measure to deter and prevent voter fraud. Modern society requires Photo ID for a wide range of

daily activities, from flying to healthcare to starting a job or obtaining a marriage license. *See, e.g.*, *Milwaukee Branch of NAACP v. Walker*, 357 Wis.2d 469, 493, 851 N.W.2d 262, 274 (2014) ("[P]hoto identification . . . is a fact of life to which we all have to adjust."). Therefore, Photo ID requirements, especially with reasonable accommodations for hardships, are an easy means of verifying identity. They are also the strongest, prophylactic defense against illegal impersonation fraud, voting under fictitious registrations, double-voting by people registered in multiple states, and voting by non-citizens, as people who consider engaging in such crimes know that they would not be able to cast illegal ballots because they would be asked to verify their identity at the polls. Clearly, North Carolina had a legitimate interest in enacting SB824.

II. SB824 is More Flexible than Analogous Photo ID Laws Upheld in Numerous Other States.

SB824 fulfills these legitimate policy goals in a manner more permissive (or as permissive) than analogous laws in other states. Since *Crawford*, numerous state-level Photo ID laws have been upheld despite having tighter regulations than SB824. As a result, the Majority's order is a pronounced outlier within Photo ID jurisprudence.

A. SB824 is Permissive, Flexible, and Accommodating.

Legal challenges to Photo ID laws generally focus on three aspects of governing statutes: (1) the types of identification deemed sufficient (e.g., the

types and sources of accepted IDs and the rationales for excluded ones); (2) how the statutory scheme ameliorates barriers to obtaining ID (invoking questions of cost, access to prerequisite documents, and distance between voters and entities authorized to issue IDs); and (3) voting alternatives for eligible voters who lack adequate ID at the time of voting. SB824 is permissive on all three metrics.

First, SB824 recognizes *ten* forms of Photo ID. N.C. Sess. Law 2018-144 § 1.2(a). Although most forms of ID must be unexpired, several do not, such as federally-issued military and veterans IDs and those of voters over 65 whose ID was unexpired on their 65th birthday. *Id.* SB824 also recognizes certain IDs issued by other locales for voters who registered to vote in North Carolina within the 90 days preceding an election. *Id.*

Second, SB824 contains numerous accommodations to foster access to ID. The state funds county boards of elections issuing free Photo IDs upon request of a voter who provides basic information. *Id.* § 1.1(a). This accommodation provides cost-free IDs in locations convenient to voters and sidesteps logistical hurdles in obtaining supporting documentation. SB824's accommodation for expired but otherwise valid IDs for voters over 65 helps elderly citizens for whom renewing their IDs may be difficult. *See id.* § 1.2(a).

Finally, SB824 affords voters ways of voting even if they lack a valid ID on election day. *Id.* Voters who possess a valid ID but fail to present it may

vote provisionally and present Photo ID to their county board of elections during the ten days between election day and county canvass. *Id.* For voters lacking a valid ID due to a religious objection, having a "reasonable impediment" to obtaining a valid ID (defined expansively), or suffering the loss of their ID due to a natural disaster, SB824 allows the voter to cast a provisional ballot with an accompanying affidavit describing their exemption. *Id.* Such provisional ballots are presumed valid and are to be counted "unless the county board has grounds to believe the affidavit false." *Id.* Similarly, an allegation that a voter is not the person depicted in their ID bars the voter from voting only if the election judges present "unanimously agree." *Id.*

Accordingly, SB824 is a flexible and permissive Photo ID statute.

B. SB824 is More Permissive than Photo ID Laws in Other States.

SB824's permissiveness is reinforced when compared against similar statutes in other states and judicial decisions on their constitutionality.

Georgia's Photo ID law is more restrictive than SB824. Unlike SB824, Georgia does not recognize IDs issued to postsecondary students. *See* Ga. Code Ann. § 21-2-417.1(a) (2021). Further, although Georgia allows voters without a valid ID to cast a provisional ballot upon an oath affirming identity, such ballots are presumptively invalid unless officials verify the voter's identity and eligibility within three days of the election, *id.* § 21-2-417.1(b), stricter than SB824's presumption of validity.

Despite these tighter restrictions, Georgia's law withstood challenges in both state and federal courts. In *Common Cause/Georgia v. Billups*, the Eleventh Circuit upheld the statute against challenges brought under the Voting Rights Act ("VRA"), the Civil Rights Act, the 14th and 24th Amendments, and the Georgia Constitution, holding that the state's "legitimate interest . . . in preventing voter fraud justified the insignificant burden of requiring voters to present photo identification before they vote in person." 554 F.3d 1340, 1355 (11th Cir. 2009) (citing *Crawford*). Two years later, Georgia's Supreme Court also upheld the statute against challenges brought under Article II, § 1 (voting qualifications) and Article I, § 1 (equal protection) of the state constitution. *See Democratic Party of Georgia, Inc. v. Perdue*, 288 Ga. 720, 720, 708 S.E.2d 67, 69 (2011). As to the Article II challenge, the Court held the statute to be a reasonable regulation on the election process, not a new voting qualification. *Id.* at 725–26, 708 S.E.2d at 72. As to the Article I challenge, the Court held: "As did virtually every other court that considered this issue, we find the photo ID requirement as implemented in the 2006 Act to be a minimal, reasonable, and nondiscriminatory restriction which is warranted by the important regulatory interests of preventing voter fraud." *Id.* at 730, 708 S.E.2d at 75 (citing *Common Cause/Georgia* and *Crawford*).

Unlike SB824, Tennessee's Photo ID law does not recognize tribal IDs or student IDs. *See* Tenn. Code Ann. § 2-7-112(c) (2021). Although Tennessee's statute allows a voter without a valid ID to vote provisionally with an affidavit explaining lack of ID, the provisional ballot is not counted unless the voter returns evidence of a valid ID to election officials within two business days of the election. *Id.* § 2-7-112(e). Like Georgia's, Tennessee's provision is stricter than SB824, which presumes validity of the provisional ballot valid unless proven otherwise. Finally, whereas SB824 provides exceptions for religious grounds, natural disasters, and a broadly-defined "reasonable impediment," Tennessee's § 2-7-112 exempts only voters who swear to indigency or religious objection for lacking a valid ID. *Id.* § 22 2-7-112(f).

Tennessee's statute also withstood multiple challenges. In *City of Memphis v. Hargett*, the Supreme Court of Tennessee rejected challenges under Articles I, § 5 (free elections) and IV, § 1 (voter qualifications) of the state Constitution, recognizing the state's compelling interest in its "duty and . . . authority to 'secure the purity of the ballot box,'" 414 S.W.3d 88, 104 (2013), and concluding that any additional burden is permissible given the availability of free IDs and tailored exceptions for classes of people with certain impairments. *Id.* at 105–06. The statute survived challenges in federal courts as well. *See Nashville Student Org. Comm. v. Hargett*, 155 F.Supp.3d 749 (M.D. Tenn. Dec. 21, 2015) (citing *Crawford* against challenges brought by

students under the 14th and 26th amendments for lack of a suspect class or a substantial burden on voting); *Green Party of Tennessee v. Hargett*, 194 F.Supp.3d 691 (M.D. Tenn. Jul. 13, 2016) (statute did not create undue burden on voting (*Nashville Student Organizing Committee*) nor an unconstitutional additional requirement or qualification for voting (*City of Memphis*)).

In addition to being upheld in *Crawford*, Indiana's Photo ID law also survived challenge under Article II, § 2 (voting qualifications) and Article I, § 23 (equal protection) of Indiana's state Constitution. *See League of Woman Voters of Indiana, Inc. v. Rokita*, 929 N.E.2d 758 (Ind. 2010) ("*LWV*"). Although subsequently amended, the law at issue in *Crawford* and *LWV* permitted only IDs issued by the governments of the United States or Indiana. *See* Pub. L. No. 109-2005, § 1, 2005 Ind. Acts 2005, 2005. Absentee voters and nursing home residents were not required to present Photo ID at the time of voting, but those failing to present Photo ID for reasons of cost, religious objection, or simple failure to bring ID are required to vote provisionally and appear before the election board and undergo a cure process for the ballot to be counted. *Id.* §§ 3, 8, 13.

In *LWV*, the Indiana Supreme Court acknowledged additional "procedural burdens" levied by the Photo ID requirement, but found them to be limited, to serve "numerous substantial interests relating to the use of technology to modernize and to protect the integrity and reliability of the

electoral process," and to constitute reasonable regulations rather than a new voter qualification. 929 N.E.2d at 767, 768–69. The Court also affirmed dismissal of the equal protection challenges, holding the law's disparate treatment of in-person absentee voters and seniors residing in nursing homes against those residing elsewhere to be "reasonably related to inherent distinctions" in each scenario, and holding that the law's substantial enhancement to election integrity and its attempt to tailor its operation warranted judicial deference to legislative discretion about "possible absence of precise congruity in application to all voters." *Id.* at 771, 772.

The Supreme Court of Oklahoma upheld that state's Photo ID statute against a challenge brought under Articles II, § 4 (interference with voting rights) and III, § 5 (free and equal elections) of its state constitution. *Gentges v. State Election Bd.*, 419 P.3d 224 (Okla. 2018). Although Oklahoma's Photo ID statute contains a more limited list of acceptable Photo IDs and does not provide for free, government-issued Photo IDs, the statute does allow any person unwilling or unable to produce a Photo ID to vote by a provisional ballot accompanied by a sworn statement under oath. *See* Okla. Stat. tit. 26, § 7-114 (2021). In *Gentges*, the court cited liberally from *Crawford* in denying the challenge, affirming the state's interest in "protect[ing] the integrity and reliability of the electoral process and prevent[ing] voter fraud," and concluding that free Photo ID cards and the provisional ballot option

sufficiently obviate burdens. *Id.* at 2018 OK 39, ¶ 24, 419 P.3d at 231. The Court upheld the law "as a procedural regulation to ensure voters meet an existing qualification of voting" without direct cost. *Id.*

The Eleventh Circuit Court of Appeals recently upheld Alabama's Photo ID statute against challenges under the VRA and the 14th and 15th Amendments. *See Greater Birmingham Ministries v. Alabama*, 992 F.3d 1299 (11th Cir. 2021). Alabama's statute generally allows the same forms of ID allowed by SB824 and provides free Photo IDs to individuals through mobile Photo ID vehicles and registrars' offices throughout the state. Ala. Code § 17-9-30 (2021); *Greater Birmingham Ministries*, 992 F.3d at 1320. The statute places heavier Photo ID restrictions on absentee ballots than SB824, however, requiring a photocopy of an approved ID to be submitted with an absentee ballot request form. *Id.* § 17-9-30(b)–(c).

The Court found both the burdens and state interests implicated by Alabama's law to be analogous to *Crawford*, and thus similarly dispatched challenges under the VRA and the 14th and 15th Amendments. *Greater Birmingham Ministries*, 992 F.3d at 1319. Addressing claims of racial discrimination that were not present in *Crawford*, the Court held Alabama's law to be a "neutral, nondiscriminatory regulation of voting procedure" under *Arlington Heights*, thus dismissing challenges under the 14th and 15th amendments as well. *Id.* at 1328 (citing *Vill. of Arlington Heights v. Metro.*

Hous. Dev. Corp., 429 U.S. 252 (1977)). As for the VRA, the Court found that the statute had no "causal connection between racial bias and disparate effect" and did not result in a lesser opportunity for minority voters to participate in the political process. *Id.* at 1334 (*citing* 52 U.S.C. § 10301(b) and *Gingles v. Thornberg*, 478 U.S. 30, 35 (1986)).

Even when courts have struck down Photo ID statutes, it has been for features *not present in SB824*. *See, e.g.*, *Priorities USA v. State*, 591 S.W.3d 448, 454 (Mo. 2020) (Photo ID law struck due to ambiguous affidavit requirement for provisional ballot for voters without adequate ID); *Applewhite v. Commonwealth*, 2014 WL 184988 (Pa. Commw. Ct. Jan. 17, 2014) (striking down a Photo ID law due to "unreasonable restrictions" on the types of Photo ID permitted and problems with the implementation of mechanisms for providing Photo ID to voters).

The Photo ID laws in these states and their associated court challenges demonstrate that SB824 is consistent with, and generally more permissive than other states' whose Photo ID legislation were ruled constitutional. In fact, the Majority's decision below is wholly contrary to *Crawford* and its progeny.

III. Invalidating SB824 Places the North Carolina Constitution at Odds With Itself and Violates Well-Established Norms of Constitutional Construction.

Moreover, the trial court's order places the constitution at odds with itself, effectively depriving the legislature of any way to implement the Photo

ID Clause on the basis of a separate constitutional mandate for equal protection. (R p 1003). This defies foundational and well-settled rules of constitutional interpretation.

This unnecessary constitutional conflict violates the "harmonious-reading canon," which guides that "[t]he provisions of a text should be interpreted in a way that renders them compatible, not contradictory." *See* Antonin Scalia & Bryan Garner, *Reading the Law: The Interpretation of Legal Texts* 180 (2012); *see In re Martin*, 295 N.C. 291, 299, 245 S.E.2d 766, 771 (1978) (citations omitted) ("[A]mendments are to be construed harmoniously with antecedent provisions insofar as possible."). Thus, if there is a way to harmonize the Photo ID Clause and the Equal Protection Clause, it must be done. The Majority's approach, if upheld, portends great difficulty in crafting any implementing statute that would not run afoul of Article I, § 19. (R p 1003)

Relatedly, the Majority's order violates the spirit of the "surplusage canon," which provides that "every word and every provision is to be given effect. . . . None should needlessly be given an interpretation that cause it to duplicate another provision or to have no consequence." Scalia & Bryan at 174; *see also Marbury v. Madison*, 5 U.S. 137, 174 (1803); *Rhyne v. K-Mart Corp.*, 358 N.C. 160, 174, 594 S.E.2d 1, 11 (2004) (rejecting argument that would have rendered constitutional language "surplusage"). The Majority's decision here renders the Photo ID Clause—just approved by the People—mere surplusage

by making any Photo ID requirement tantamount to an Equal Protection Clause violation.

The Majority's most stark violation, however, is its inconsistency with the "latter-enacted canon" discussed in *Barnes v. Barnes*, 53 N.C. (8 Jones) 366 (1861):

> It is a well illustrated principle of constitutional law, that upon the adoption of a new constitution, or an amendment of the constitution, any and all laws previously existing, are *ipso facto* annulled, and become void so far as they are opposed to and conflict with the new or amended constitution . . . .

Id. at 371; *see also Lassiter v. Northampton Cnty. Bd. of Elections*, 248 N.C. 102, 111, 102 S.E.2d 853, 860 (1958) (citations omitted) (constitutional amendments reflect "the latest expression of the will of the people."). This principle requires that a constitutional amendment prevail over an inconsistent provision or interpretation predating the amendment. *Id.* ("[A]n amendment to the constitution becomes a part of the fundamental law, and its operation and effect cannot be limited or controlled by previous constitutions or laws that may be in conflict with it."). While applying that principle here does not require nullifying Article I, § 19, it certainly mandates an application of equal protection principles that does not gut the Photo ID Clause, and recognizes that the sovereign people of the state do not see a Photo ID requirement to be inconsistent with well-settled norms of equal protection.

CONCLUSION

SB824 is more permissive than Photo ID statutes across the country which have survived challenges, and the Majority violates foundational principles of constitutional interpretation to strike it down. This Court should reverse the Majority's order and uphold SB824.

Respectfully submitted, this the 7th day of February, 2022.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 28(j) of the Rules of Appellate Procedure, counsel for the Amicus Curiae certifies that the foregoing brief, which is prepared using a 13-point proportionally spaced font with serifs, is fewer than 3,750 words (excluding covers, captions, indexes, tables of authorities, counsel's signature block, certificates of service, this certificate of compliance, and appendixes) as reported by the word-processing software.

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CERTIFICATE OF SERVICE

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