

No. 20-1092

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NORTH CAROLINA STATE CONFERENCE OF THE NAACP; CHAPEL
HILL-CARRBORO NAACP; GREENSBORO NAACP; HIGH POINT NAACP;
MOORE COUNTY NAACP; STOKES COUNTY BRANCH OF THE NAACP;
WINSTON SALEM-FORSYTH COUNTY NAACP,

Plaintiffs - Appellees,

v.

KEN RAYMOND, in his official capacity as a member of the North Carolina
State Board of Elections; STELLA ANDERSON, in her official capacity as
Secretary of the North Carolina State Board of Elections; DAMON CIRCOSTA,
in his official capacity as Chair of the North Carolina State Board of Elections;
JEFFERSON CARMON, in his official capacity as a member of the North
Carolina State Board of Elections; DAVID C. BLACK, in his official capacity as
a member of the North Carolina State Board of Elections,

Defendants - Appellants.

PHILIP E. BERGER, in his official capacity as President Pro Tempore of the
North Carolina Senate; TIMOTHY K. MOORE, in his official capacity as
Speaker of the North Carolina House of Representatives
Intervenors

On Appeal from the United States District Court
for the Middle District of North Carolina at Winston-Salem

**AMICUS BRIEF OF DEMOCRACY NORTH CAROLINA IN SUPPORT
OF APPELLEES**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Local Rule 26.1, *amicus* Democracy North Carolina discloses the following:

Democracy North Carolina is a non-profit corporation organized under Section 501(c)(3) of the Internal Revenue Code. Furthermore,

1. It is not a publicly held corporation or other publicly held entity.
2. It has no parent corporations.
3. It does not issue stock, hence no publicly held company owns 10% or more of its stock.
4. No publicly held corporation or other publicly held entity has a direct financial interest in the outcome of the litigation.
5. It is not a trade association.
6. This case does not arise out of a bankruptcy proceeding.

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**IDENTITY OF THE *AMICUS*, ITS INTEREST IN THE CASE, AND THE
SOURCE OF ITS AUTHORITY TO FILE¹**

This *amicus curiae* brief in support of Appellants is filed on behalf of Democracy North Carolina (“Democracy NC”), a nonpartisan, nonprofit corporation incorporated in 2001 and organized under Section 501(c)(3) of the Internal Revenue Code.

Democracy NC conducts research, organizing, public education, and advocacy in order to increase voter participation—put simply, it aims to maximize the number of citizens at the polls and the number of eligible ballots counted. The organization has supporters throughout North Carolina who are registered voters and who vote in North Carolina elections. Democracy NC also works for pro-democracy reforms that improve government accountability and ethics and address the issue of money in politics. Through original research, policy advocacy, grassroots organizing, civic engagement, and leadership training, Democracy NC seeks to achieve a government that is truly of the people, for the people, and by the people.

When it comes to voting, Democracy NC conducts year-round voter registration drives and trainings across the state, distributes over 500,000 brochures, wallet cards, church bulletin inserts, and other flyers each year to educate the public

¹ No party or party’s counsel authored this brief in whole or in part or contributed money intended to fund the preparation or submission of this brief. Furthermore, no person other than the *amicus* or its counsel contributed money intended to fund the preparation or submission of this brief.

about the voting process, and speaks at over 100 events a year about voting rights. One of its core efforts is its Poll Monitoring Project (“PMP”). The PMP is Democracy NC’s program to educate individuals, during an election, on their rights to participate in elections. Through the PMP, the *amicus* works with volunteers and community partners to station poll monitors outside individual polling places and early voting locations; the monitors are trained to assist voters who approach them. The monitors fill out “incident reports” describing the voter’s problem and connect the voter via cell phone to a call center, where election experts provide further assistance. As part of the PMP, Democracy NC also analyzes voting data during and after elections to determine if registered voters experienced problems voting in an election.

Democracy NC conducted what was at the time the largest nonpartisan poll monitoring project in the history of North Carolina during the 2016 March primary election in North Carolina. Because the March 2016 primary occurred after North Carolina’s 2013 photo ID law went into effect, but before it was enjoined by this Court in July 2016, it was the only major election in North Carolina history conducted with a photo voter ID requirement. During the March 2016 primary, Democracy NC placed over 700 poll monitor volunteers in polling places and early voting locations in over 50 counties, including the ten most populous counties in

North Carolina. This experience gave Democracy NC a unique understanding of what implementation of a photo ID law actually looks like in North Carolina.

During and after the March 2016 primary, Democracy NC collected publicly-available data from the State Board of Elections and county boards of elections on a variety of voting procedures and results, including cases of registered voters who were disenfranchised due to the implementation of the photo ID law, passed in 2013 and amended in 2015. Democracy NC also logged and reviewed a number of “incident reports” about the photo ID requirement that were reported to its PMP volunteers.

Democracy NC is interested in this case because the District Court’s judgment directly affects the number of citizens who will go the polls and whose ballots will be counted. It also affects the uniform and fair administration of election law and the integrity of the voting process.

Democracy NC has authority to file this brief pursuant to Rule 29(a)(2) of the Federal Rules of Appellate Procedure because all parties have consented to its filing.

Summary of the Argument

This Court should uphold the District Court’s preliminary injunction and its underlying finding that the Plaintiffs-Appellees “are likely to succeed in showing that S.B. 824 will ‘bear more heavily on one race than another.’” JA 2657 (*North Carolina State Conference of the NAACP et al, v. Cooper*, 430 F. Supp. 3d 15, 37 (M.D.N.C. 2019) (hereinafter “Opinion” or “Op.”). Defendants-Appellants and Intervenor suggest that this finding is error in part because of S.B. 824’s “reasonable impediment” exception. They rely heavily on this Court’s finding in *Lee v. Virginia State Board of Elections*, 843 F.3d 592 (2016), that exceptions to a photo ID law that gave “every registered voter . . . the full ability to vote when election day arrives,” could cure a law’s discriminatory effects. Brief for Appellants at 25–26, *North Carolina State Conference of the NAACP et al, v. Cooper*, 430 F. Supp. 3d 15 (M.D.N.C. 2019), *appeal docketed*, No. 20-1092 (4th Cir. March 9, 2020); Brief for Intervenor’s at 46, *North Carolina State Conference of the NAACP et al, v. Cooper*, 430 F. Supp. 3d 15 (M.D.N.C. 2019), *appeal docketed*, No. 20-1092 (4th Cir. March 9, 2020). As the District Court noted, however, unlike in *Lee*, S.B. 824’s “ameliorative provisions,” and specifically its reasonable impediment exception, were unlikely to provide such a “panacea” for the burden placed on voters of color. JA 2654, 2671 (Op. 34, 51).

The mere fact that a photo ID law includes a reasonable impediment provision does not cure an otherwise unconstitutional law. This *amicus* brief focuses on the practical realities that prove that the provision in S.B. 824 is no such panacea. Democracy NC's experiences monitoring elections in North Carolina demonstrate that an "intensely local appraisal" of how the reasonable impediment exception functions in the real world necessitates a different result than in *Lee*. See *Thornburg v. Gingles*, 478 U.S. 30, 78 (1986); *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 243 (4th Cir. 2014). In theory, this provision is designed to provide a safety net to permit otherwise eligible voters to vote if they do not have one of the limited number of statutorily-approved photo IDs. In practice, however, the exception has not been, and will not be, implemented in a way that provides that safety net.

The District Court recognized this risk and correctly based its finding not only on the statutory language of, and requirements in, S.B. 824, but also on the actual experience of Black and Latinx voters in the March 2016 elections, the lack of any meaningful changes to S.B. 824 after that experience, and the structural deficiencies of S.B. 824 that make it nearly impossible for the state to implement. Events after the District Court's opinion and preliminary injunction further support the decision. Moreover, the ongoing COVID-19 crisis will magnify the structural challenges with S.B. 824 and its negative impact on the upcoming elections. This Court should not

disturb the District Court's finding and once again put the rights of Black and Latinx voters in jeopardy.

I. THE FIRST ITERATION OF NORTH CAROLINA'S REASONABLE IMPEDIMENT PROCESS FAILED THE VERY PEOPLE IT WAS DESIGNED TO PROTECT DURING THE 2016 PRIMARY

In August 2013, a mere three months after the dramatic Supreme Court decision that exempted North Carolina from the long-standing preclearance requirements of the Voting Rights Act for the first time in decades, *see Shelby County, Ala. v. Holder*, 570 U.S. 529 (2013), North Carolina adopted its first photo ID law. Two years later, under pressure about the impact of its new law, North Carolina established exceptions to its photo ID requirements – among them, a reasonable impediment process. N.C. GEN. STAT. § 163-166.15 (2015) (repealed 2018).

Under the reasonable impediment process, otherwise eligible voters lacking one of the statutorily approved forms of photo ID – who are disproportionately Black and Latinx – are required to complete a reasonable impediment declaration (“RID”) affirming they could not obtain a qualifying form of photo ID before voting. *Id.*; 2018 N.C. Sess. Laws 144 § 1.2(a). In *North Carolina State Conference of NAACP v. McCrory*, this Court held that the RID process did not remedy the harm caused by the photo ID law because voters using the process, who were more likely to be Black,

were required to shoulder the burden of additional “affirmative steps” to vote. 831 F.3d 204, 241 (4th Cir. 2016).

In fact, the RID process was flawed by design. Despite a three-year roll-out period for the photo ID requirement and a nine-month roll-out for the RID process, the system proved to be a disaster when implemented during a major election in March 2016.

a. Experience Matters: The March 2016 primary was marred by the failures of the reasonable impediment process

Despite the long roll-out period and an extensive public education campaign, the RID process failed to protect eligible voters during the March 2016 primary. The RID process disenfranchised thousands of eligible voters in a number of ways, including:

- 1,419 reasonable impediment provisional ballots cast were not counted for a number of reasons detailed below, JA 410;
- An unknown but significant number of voters showed up without an acceptable photo ID, but were mistakenly given regular provisional ballots, JA 412; and
- An unknown but significant number of voters left the polling place rather than completing the cumbersome reasonable impediment provisional ballot process. JA 2393.

The statistics do not accurately, adequately, or fully reflect the human toll of these implementation challenges. In a prior *amicus curiae* brief filed with this Court, Democracy NC detailed the experience of voters who were disenfranchised by the RID process, many of whom had voted for *decades* without incident before the photo

ID law was passed. Brief of *Amicus Curiae* Democracy NC in Support of Appellants at 14–26, *North Carolina State Conference of NAACP v. McCrory*, 831 F.3d 204 (4th Cir. 2016) (No. 16-1468, Doc. 106-1) (hereinafter “Democracy NC 2016 Amicus Brief”).

These included Creola Clark, an 89-year-old Black voter in Forsyth County who has voted for decades and was disenfranchised in the March 2016 primary. Ms. Clark, who has only one leg, voted curbside, where voters were not required to present photo ID to vote but had to present some form of non-photo ID, such as a utility bill. Despite presenting a utility bill with her name and address on it at the polls, Ms. Clark was offered a provisional ballot, not a regular ballot, and her provisional ballot did not count. She was never even offered a reasonable impediment ballot. In fact, poll workers first informed Ms. Clark’s niece, Elaine Bevels, who assisted her aunt with the voting process that Ms. Clark would not be permitted to cast any ballot, including a provisional one. Even if poll workers (mistakenly) thought Ms. Clark was subject to the photo ID law, which she was not because she voted curbside, she should have been offered a reasonable impediment ballot and a mail-in absentee ballot request form, but she was not. Democracy NC 2016 Amicus Brief, at 16–17.

In addition, Charles Roger Young Sr., a 73-year-old registered voter in Catawba County and an attorney for 45 years, was turned away at the polls because

he did not have acceptable photo ID to vote. Mr. Young voted successfully in North Carolina 64 times between 1977 and 2015 before being turned away at the polls in the March 2016 primary. He went to his polling place in Catawba County twice on Election Day. He was initially turned away because he did not have acceptable photo identification and was encouraged to go home and find his passport. He returned to the polls with his passport, which was expired, and he was not offered a provisional ballot or reasonable impediment ballot, despite not being able to find any other acceptable photo identification for voting. “Lost/stolen ID” appeared on the pre-printed list of reasonable impediments on the reasonable impediment paperwork at the polls, and yet Mr. Young was simply turned away the second time he presented to vote. Poll workers at his polling place knew Mr. Young personally, as a staple of the Catawba County community for 65 years, and still he was unable to vote. Democracy NC 2016 Amicus Brief, at 17–18.

The record below, and the District Court’s Opinion, provides insight as to why the reasonable impediment process failed so many.

First, poll workers mistakenly gave numerous voters the wrong type of ballots, and thereby undermined the purpose of the reasonable impediment ballot. See JA 176; JA 2655. In contrast to reasonable impediment provisional ballots, regular provisional ballots still require voters to present valid photo identification to their county board of elections before the end of the canvass period

in order to be counted. *See* JA 176. Voters who mistakenly received regular provisional ballots had to clear bureaucratic hurdles only to discover their provisional ballot was still invalid without an acceptable photo ID.

Second, the 2016 law failed to provide clear, consistent statewide guidance, which resulted in counties rendering arbitrary and inconsistent decisions on whether to accept or reject reasonable impediment provisional ballots. *See* JA 178; JA 2660 (Op. 41). The 2016 RID, like the 2020 version, allowed voters to check “other” as a category of impediment and further describe the impediment in a comment box. JA 178. Counties varied in accepting the same wordings of the “other” impediment—e.g., a voter not having photo identification due to being a non-driver. *Id.* This lack of guidance or standards led to eligible voters’ ballots being rejected arbitrarily based solely on where they lived.

Third, poll workers failed to provide voters even the most basic assistance. Many reasonable impediment provisional ballots in 2016 were rejected due to minor scrivener’s errors that could have been corrected with the “most elementary guidance from a poll worker.” JA 178–79; *see also* JA 2655 (Op. 35). Even the extended roll-out period of the RID process before the March 2016 primary was insufficient to fully train poll workers in how to help voters fill out reasonable impediment ballots. JA 178-179; JA 2655–56 (Op. 35-36)

Fourth, some county boards “systematically rejected” valid reasonable impediment provisional ballots in violation of state law. *See* JA 178. Prior to the 2016 primary, the State Board issued a memo to county boards of elections instructing them to consider “something related to ‘school schedule’” as a valid “other” impediment when counting reasonable impediment provisional ballots. *Id.* Even with this kind of guidance, some counties failed to implement the rule properly. Mecklenburg County election officials rejected the reasonable impediment provisional ballots of students proffering college attendance as an “other” impediment. *Id.* Student voters in Mecklenburg County were left without a remedy when their votes were improperly rejected. The reasonable impediment provision failed to protect them.

b. These failures in the March 2016 reasonable impediment process disparately impacted voters of color

The reasonable impediment provision was supposed to alleviate the photo ID law’s burden on voters of color. It did the opposite. The reasonable impediment provision’s training, oversight, and implementation failures disproportionately impacted Black and other minority voters who were most likely to lack proper photo IDs in the first place. JA 173. For example, Black voters cast 34% of reasonable impediment provisional ballots that were not counted in the March 2016 primary even though at the time they comprised only 23% of North Carolina’s registered voters. *See* Democracy NC 2016 Amicus Brief, at 9.

This impact was not lost on this Court. In 2016, this Court recognized the reality that Democracy NC chronicled and found that the reasonable impediment provision failed to cure the constitutional invalidity of the photo ID provision. This Court stated, “Here, nothing in this record shows that the reasonable impediment exception ensures that the photo ID law no longer imposes any lingering burden on African American voters.” *McCrory*, 831 F.3d at 240. In short, the attempted safety net did not “eradicate its impact or otherwise eliminate the taint from a law that was originally enacted with discriminatory intent.” *Id.* at 241 (citing *Johnson v. Governor of Fla.*, 405 F.3d 1214, 1223 (11th Cir. 2005) (en banc)).

II. NORTH CAROLINA HAS NOT ADDRESSED THE FLAWS THAT LED TO THE REJECTION OF VALID VOTES IN 2016

Evidence from subsequent elections shows that the problems that plagued the reasonable impediment process in the March 2016 primary are only repeating themselves. According to Democracy NC’s research, approximately 200,000 otherwise eligible North Carolina voters lacked an approved photo ID. *The High Cost of Voter ID in Wake County*, DEMOCRACY NC, https://democracync.org/wp-content/uploads/2018/09/wake_countyids.pdf (last visited July 20, 2020). Moreover, a demographically changing electorate is likely to further overwhelm the system with larger numbers of Black and Latinx voters in this election than previous ones, who are statistically less likely to have an approved photo ID, showing up at the polls. *See, infra*, at 18– 19.

a. Democracy NC's experiences with election monitoring since the March 2016 Primary indicate that problems with training, oversight, and process implementation have persisted

Democracy NC's election monitoring experience demonstrates that poll worker training has not improved since the March 2016 election. Eyewitness reports and complaints from multiple counties note many instances of poll workers misunderstanding or misapplying aspects of North Carolina election law during early voting and on Election Day during the 2016 General Election. *See* JA 2405–06, 2419–20. Reports indicate that poll workers failed to provide correctly registered voters who arrived at the wrong precinct with out-of-precinct (“OOP”) provisional ballots. *See* JA 2405–06. Moreover, some poll workers misinformed such voters that their OOP ballot would not count, contrary to state law. *Id.*

Training failures manifested themselves in other ways as well. Poll workers misapplied election rules by rejecting valid identification for same-day registrants, turning away properly registered voters, and prohibiting people from providing voter assistance to disabled voters or those requiring language assistance. *See* JA 2419–20. Democracy NC also observed instances of poll workers displaying rudeness or racial bias toward voters during the 2016 General Election, which further reflects poor poll worker guidance. One poll worker ignored a voter's request for a Spanish interpreter, while another poll worker belittled the intelligence of voters having trouble navigating voting lines. *See* JA 2418–19.

Training, guidance, and implementation failures continued in the recent March 2020 primary election. Poll workers did not demonstrate improved training, even with the re-established State Board of Elections in place to provide guidance. Democracy NC received many complaints concerning poll worker conduct during the March 2020 primary. The same errors observed during the 2016 General Election repeated themselves: Poll workers gave voters inaccurate information about their provisional ballots—e.g. telling voters the ballots would not count—or otherwise failed to provide assistance with filling them out. *2020 Primary Election Report*, DEMOCRACY NC (June 25 2020), https://democracync.org/wp-content/uploads/2020/06/2020PrimaryReport_06.25.20.pdf (last visited July 20, 2020) [hereinafter “Democracy NC 2020 Report”]. Furthermore, poll workers often failed to offer provisional ballots to eligible voters under circumstances that would dictate their use. *Id.* at 29. This level of poll worker confusion over provisional ballots would surely be compounded with the addition of reasonable impediment provisional ballots. Beyond misinformation regarding voter eligibility, some voters reported poll workers making inappropriate comments, which may not have occurred with better guidance, *see id.* at 28, 38, and a “larger group of voters reported a general lack of helpfulness when needing assistance[.]” *Id.* at 28.

The problems did not end with individual poll workers. Democracy NC received several reports of inaccurate or missing information on County Board of

Elections websites in the lead-up to the March 2020 primary. For example, a Democracy NC advocate noticed that the link on the Northampton County Board of Elections website to the county's one-stop early voting hours and locations page was completely broken. Email from May Ross, Regional Managing Organizer – Northeast, Democracy NC, to Spinosa Clements, Director, Northampton County Board of Elections (Feb. 10, 2020, 3:35 ET) (on file with amici).

III. S.B. 824 DOES NOT SOLVE THESE PROBLEMS – IT MAKES THEM WORSE

S.B. 824 is a wholly insufficient solution for the problems that have plagued North Carolina's recent elections. Even before the preliminary injunction was entered, implementation of the RID procedure was a failure. With just months to go before the general election, the failures of 2016 are sure to be compounded in 2020.

a. S.B. 824 adds more burden on the State Board without a necessary corresponding increase in time or funding

In an ostensible attempt to address some of the gaps in its statutory language, S.B. 824 requires North Carolina election officials to take several implementation steps—but it provided too little time and no funding to do so, all-but-guaranteeing that S.B. 824 would see the same kinds of widespread disparate impacts the State experienced under H.B. 589. S.B. 824 requires the State Board to undertake specific actions (1) to provide meaningful interpretations of critical provisions of the photo ID law; (2) to aggressively educate the public about the photo ID law and its

requirements; and (3) to inform eligible voters on voting without identification, including through the RID process. 2018 N.C. Sess. Laws 144 § 1.5(a)-(b). County boards are also independently obligated to engage in certain voter education efforts. *Id.* at § 1.5(c). The evidence makes clear that even if these requirements could possibly cure the problems caused by the photo ID law—and they cannot—state and local authorities were and are under-resourced and ill-prepared to administer them.

North Carolina had years to prepare to implement the photo ID requirement and reasonable impediment process for the 2016 primary elections, where failures were persistent and well-documented. Now, however, North Carolina has mere months to do the same for the 2020 General Election. *See* JA 2397. The 2013 photo ID law also provided funding for a public education campaign. *Id.* S.B. 824 provides no such funding, further exacerbating the problem of compressed time for adequate voter education. The evidence demonstrates that the lack of state funding has impacted voter education at the county level. In March 2020, the chair of the Lenoir County Board of Elections reported that, “[d]ue to an absence of funds to do so, the County Commission has not allocated any funds...to educate community residents regarding Voter ID requirements.” JA 621.

S.B. 824 imposed unrealistic burdens on the State Board of Elections, and before the preliminary injunction, they were already falling behind:

- S.B. 824 states that a reasonable impediment provisional ballot may be rejected only if a county board of elections finds a voter’s RID to be “false,”

2018 N.C. Sess. Laws 144 § 1.2(e), yet the law provides no guidance to evaluate falsity, JA 409, the State Board did not issue guidance, and the District Court questioned the State's proffered interpretation of the term, JA 2661(Op. 41 n.20);

- Section 1.5(a) of S.B. 824 requires the State Board to “establish an aggressive voter education program” aimed at educating the public about the legislation’s requirements and the options for voting without identification. 2018 N.C. Sess. Laws 144 § 1.5. Although there is evidence in the record that the State Board took a few of the actions required by Section 1.5.(a), the record, or the absence of information in the record, also demonstrates that nearly half of the voter education obligations under Section 1.5(a) have not yet been met;² and
- In addition, the record is devoid of evidence that the State Board satisfied its obligations under Sections 1.5(b) and 1.5(c) to create a list of all registered voters with no DMV-issued identification and provide information to registered voters with no DMV-issued identification prior to the 2019 municipal elections. 2018 N.C. Sess. Laws 144 § 1.5(b).

Given this background, the compressed time frame makes it even more certain that the State will not meet even the statutory requirements for reasonable implementation.

b. The burdens of S.B. 824’s “reasonable impediment” exception fall particularly harshly on North Carolina’s Latinx population

Latinx voter registration numbers increased from just 10,000 registrations in 2004, to 164,000 in 2016. *See* JA 345; JA 2436. Since the March 2016 primary, Latinx voter registration increased by approximately by 57%. *See* Democracy NC

² For example, the District Court found that the State Board failed to satisfy Section 1.5(a)(6), which requires that the State Board “coordinate with local media outlets... to disseminate information in a way that would reasonably inform the public concerning the changes in legislation.” JA 2676-2678 (Op. 56-57).

2020 Report. S.B. 824 poses additional challenges for this population that raise constitutional concerns.

S.B. 284 has no requirement for Spanish language translations of either the declaration form or the educational materials, despite the fact that Latinx voters make up disproportionate numbers of voters who lack the required ID. JA 2394. Without a standard Spanish language translation available, counties may not provide one at all or may provide Spanish-language materials that vary between counties. *Id.*

The failed implementation of the photo ID law is creating more disenfranchisement and distrust, and Latinx populations are disproportionately harmed at every stage. For example, only 21.3% of Latinx individuals said they were aware of the RID option when surveyed in August and September 2019. JA 2240. Compared with their white counterparts, Latinx eligible voters were statistically less likely to report an accurate understanding of what qualifies as a reasonable impediment. *Id.* These numbers indicate that North Carolina systematically failed to educate and/or provide for the very populations most likely to rely on the RID provision.

Moreover, the RID itself, which may be hard for some Latinx populations to understand given a lack of Spanish-language translation, informs voters that they are subject to prosecution if the reasons given in their RID are ultimately deemed

inaccurate. JA 411. The threat of prosecution is a very real threat that serves to discourage Latinx populations from validly exercising their right to vote using the RID provision. *Id.*

c. The State’s implementation failures are already having an impact on the very individuals the reasonable impediment process was designed to help

Contemporaneous evidence from likely voters confirms the District Court’s finding that many North Carolina residents “remain confused by or uninformed about S.B. 824’s exceptions.” JA 258 (Op. 38); *See* JA 2239. Voting rights advocates have already received numerous questions about the law including “questions about the RID process and form and whether provisional ballots will be accepted, questions about the absentee process and new applications, and questions about which student and employee IDs will be acceptable and when the requirements will be known.” JA 628.

Even assuming private voter outreach and education efforts could somehow remedy North Carolina’s failure to implement its own prerequisites to the implementation of the RID provision, Democracy NC and other civic engagement organizations will find it extremely difficult to increase nonpartisan voter education and engagement efforts before November 2020 to bridge the gap. *See* JA 483–484. Moreover, volunteers from these organizations are also confused about the requirements of S.B. 824 and the RID process. JA 628. Volunteers are reportedly

fearful of providing incorrect information to adequately answer voters' questions. *Id.* Hence, volunteers must spend more time with each voter, limiting the number of voters each volunteer can reach. *Id.*

d. The North Carolina Court of Appeals has also found S.B. 824 unconstitutional

The District Court is not alone in its criticism of S.B. 824. Recently, the North Carolina Court of Appeals also granted a preliminary injunction of S.B. 824 and found that the RID process disproportionately impacts minority voters. *Holmes v. Moore*, 840 S.E.2d 244, 263 (N.C. Ct. App. 2020). In *Holmes*, the court found that “African American voters will...have to rely on the reasonable-impediment provision more frequently than white voters,” and that the reasonable impediment process represents “one more obstacle to voting...that African Americans will have to overcome at a rate higher than white voters, given their disproportionately lower rates of possessing qualifying IDs.” *Id.* Accordingly, the “reasonable impediment provision...suffices as a showing of disproportionate impact, establishing another circumstance evidencing discriminatory intent.” *Id.* at 263–264 (internal quotations and citation omitted).

IV. THE NOVEMBER 2020 ELECTIONS WILL COMPOUND THE FAILINGS OF S.B. 824

The November 2020 elections will pose new challenges that will exacerbate the problems that have already surfaced. First, changes to North Carolina's

demographics will intensify the law's discriminatory effects. Second, COVID-19 will transform elections and impose new obstacles for voters and elections officials alike. Implementing a complex new system such as the RID provision under these conditions could be a recipe for disaster and disenfranchisement.

a. The population of eligible voters relying on the reasonable impediment process will be much greater in coming elections

Due to demographic changes and the ongoing pandemic, the failures of the RID process will be magnified in upcoming elections.

The District Court found that, based on the State Board's own analysis, Black and Latinx voters were twice as likely as white voters to lack DMV-issued ID's requiring them to rely more heavily on the RID process. JA 2657–58 (Op. 37-38). Data from recent elections not only confirms this trend, but demonstrates that the Black and Latinx populations that are disproportionately burdened by the photo ID law are growing and now make up a more significant percentage of the electorate.

During the March 2020 primary, multi-racial voters were overrepresented in provisional ballots: whereas Black voters made up 21% of the voters in the 2020 primary, 25-26% of voters who cast provisional ballots were Black. Democracy NC 2020 Report. The same was true for Latinx voters: they made up around 2% of statewide ballots, but 4%-5% of provisional ballots that included ethnicity data. *Id.* The statistics are even more pronounced for Black voters who cast ballots using curbside voting, which often results in voters being offered a reasonable impediment

ballot due to poll-worker confusion regarding photo ID requirements. In the March 2020 primary, Black voters over the age of 66 represented a third of all voters who cast ballots using curbside voting. *Id.*

Moreover, these groups now make up a larger portion of eligible voters. North Carolina's Latinx population is growing rapidly, and as noted, Latinx North Carolina residents are registering to vote at higher rates. JA 2393. The numbers of Black voters casting ballots is increasing as well. The March 2020 primary saw 16,900 more Black voters cast ballots than in the March 2016 primary. Democracy NC 2020 Report.

This increase is due not just to growth in Black and Latinx populations, but to increased turnout. Black and Latinx voters turned up in much higher numbers in 2018 and are poised to do so again this election.

- The number of Black voters who voted in 2018 (753,229), increased by 20% compared to 2014 (629,059), despite only 4% growth in the total number of Black voter registrations at that time. The turnout rate for all Black voters in the 2018 election (ballots cast divided by registered voters) was up six percentage points (48% in 2018, up from 42% in 2014), while the turnout rate for Black women was slightly higher—up seven percentage points from 46% in 2014, to 53% in 2018.
- Almost double the number of multiracial voters cast ballots in 2018 (18,759) compared to 2014 (9,711). The turnout rate for multiracial voters in the 2018 election (ballots cast divided by registered voters) was 39% in 2018, up 14 percentage points from 25% in 2014.
- Hispanic or Latino voters cast 68,949 ballots in 2018, two and a half times the 26,036 ballots cast by Hispanic or Latino voters in 2014. Turnout for Hispanic or Latino voters increased by 15 points: 35% of registered Hispanic or Latino

voters cast ballots in 2018 compared to 20% in 2014. *Report: Democracy NC Analyzes 2018 Turnout, Demonstrates Youth Enthusiasm, Demographic Shifts*, DEMOCRACY NC, <https://democracync.org/research/report-democracync-analyzes-2018-turnout-demonstrates-youth-enthusiasm-demographic-shifts/> (last visited July 20, 2020).

If the photo ID requirement and reasonable impediment provision are allowed to be implemented in upcoming elections, North Carolina's changing demographics mean the demonstrated racially disparate impact of these policies will only grow.

In addition, unlike the 2013 photo ID law, S.B. 824 applies to absentee ballots. Due to the COVID-19 pandemic, North Carolina is likely to experience greater demand for absentee ballots than ever before. In North Carolina's only major election during the pandemic, the Republican Primary run-off for North Carolina's 11th Congressional District, the State Board of Elections observed a significant increase in the use of mail-in ballots—about as many voters used mail-in ballots as voted early in-person, in line with the State Board's projections for November. Minutes from February 14, 2020 Meeting, N.C. STATE BOARD OF ELECTIONS, at 2 (June 16, 2020), https://dl.ncsbe.gov/index.html?prefix=State_Board_Meeting_Docs/State_Board_Meeting_Minutes/2020%20SBOE%20Minutes/ (last visited July 20, 2020). Whereas mail-in absentee ballots traditionally account for 4% to 5% of all votes, the North Carolina State Board of Elections projects mail-in absentee ballots could make up 30% to 40% of votes this fall. *Id.* Democracy NC 2020 Primary Election Report. The reasonable impediment provision will apply to a large

number of voters who will be voting by mail for the first time. This is especially true because more voters than usual will need to rely on the RID. Due to the pandemic, 45 of North Carolina's 115 Driver's License Offices closed entirely, and the other 70 are open by appointment only. Decl. of Torre Jessup, *Democracy NC v. North Carolina State Board of Elections*, No. 1:20-cv-457, 4 (M.D.N.C. filed May 22, 2020). These scenarios could have a major impact on eligible voters, especially given the fact that Democracy NC and other voting rights organizations are projecting significant increases in overall voter turnout this fall.

b. The COVID-19 pandemic will magnify the failings of S.B. 824

Democracy NC has had volunteers observing county boards of elections meetings across the state during the COVID-19 pandemic as part of its early voting advocacy. Through this observation, Democracy NC volunteers have noticed several consistent themes about election administration in North Carolina during the COVID-19 pandemic: election officials are worried about poll worker recruitment, budget cuts, and long lines. Each of these themes spells trouble for S.B. 824 and its flawed RID procedure.

c. COVID-19 is straining poll worker recruitment efforts and limiting opportunities for effective poll worker training

Essentially every county board of elections in North Carolina is having difficulty recruiting poll workers for the November General Election. Many voters are understandably nervous about signing up to work at a polling place and

interacting with voters face-to-face during a pandemic. This poll worker shortage is compounded by the fact that poll workers on average tend to be older, and older people are at the greatest risk of developing complications from COVID-19. Rusty Jacobs, *NC Elections Officials Aim To Avoid Poll Worker Shortage This Fall*, WUNC (July 14, 2020), <https://www.wunc.org/post/nc-elections-officials-aim-avoid-poll-worker-shortage-fall> (last visited July 20, 2020). County boards of elections are also having to shift poll worker training sessions online, which may affect the overall quality of poll worker training and make it more difficult for election officials to train poll workers on a new process such as the reasonable impediment provision. *See* Democracy NC 2020 Report. The poll worker-related problems that Democracy NC observed in the March 2016 primary, the November 2016 general election, and the March 2020 primary will only get worse when poll workers are overworked and forced to process more votes than ever before.

d. COVID-19 is forcing county governments to consider budget cuts for county boards of elections

Democracy NC has observed several county boards of elections discuss the possibility that their county commissions will cut their budgets due to revenue shortfalls arising from the COVID-19 pandemic. Democracy NC 2020 Report. Absent a significant infusion of state or federal resources, this could force some county boards of elections to cut back on the provision of services to voters and voter education, including services and education relating to the reasonable impediment

provision. These cuts will make administration of what was already an unworkable process even more difficult.

e. The reasonable impediment process will exacerbate existing problems with long lines at polling places, creating a greater public health risk on Election Day

Because of the poll worker and resource constraints discussed above, some county boards of elections may wind up cutting polling places and early voting locations. In other states such as Wisconsin and Georgia, this has led to extremely long lines. Administration of a complex and unworkable system such as the reasonable impediment provision could make them even longer. Long lines in and outside of polling places already pose a public health risk during a pandemic. Wendy Weiser & Max Feldman, *How to Protect the 2020 Vote from the Coronavirus*, BRENNAN CENTER FOR JUSTICE 3 (March 16, 2020), <https://www.brennancenter.org/our-work/policy-solutions/how-protect-2020-vote-coronavirus> (last visited July 20, 2020). Making them longer only exacerbates that risk. Long lines on Election Day tend to disproportionately impact communities of color who are already disenfranchised at higher rates by the photo ID law and the failures of the reasonable impediment provision. Hannah Klain et al., *Waiting to Vote: Racial Disparities in Election Day Experiences*, BRENNAN CENTER FOR JUSTICE 4-5 (Jun. 3, 2020), https://www.brennancenter.org/sites/default/files/2020-06/6_02_WaitingtoVote_FINAL.pdf (last visited July 20, 2020).

f. The Pandemic will Rob Voters of Necessary Guidance on the Reasonable Impediment Process

Not only was the State Board not given adequate resources or time to address the RID process, but COVID-19 is likely to increase the usage of absentee ballots significantly. *See supra* at IV(a). There is no evidence in the record that there has been education regarding the use of the RID for absentee ballots. The larger number of anticipated COVID-19 absentee ballots suggests that more voters will lose the benefit of proper guidance from a poll worker. As discussed *supra*, reasonable impediment voters in the 2016 elections were disenfranchised by minor scrivener's errors. Though poll worker guidance has itself proven unreliable, without the possibility of any guidance from someone who has been educated in properly filling out the declarations, errors will likely greatly increase.

Conclusion

The District Court held that S.B. 824 was intentionally discriminatory and disproportionately burdened the rights of Black and Latinx voters as a result of “deeply rooted historical and social conditions.” JA 2672 (Op. 52). The District Court also found that unlike “ameliorative provisions” in other state voter ID laws, *see* JA 2671 (Op. 51), S.B. 824's RID process would not alleviate these burdens. Democracy NC's experiences monitoring North Carolina elections confirm this finding. Indeed, the failures of S.B. 824 will be magnified in 2020 and beyond because North Carolina has proven ill-equipped to implement a truly ameliorative

reasonable impediment process. For these reasons, in addition to all of those set forth by Appellees in their brief, this Court should affirm the District Court's preliminary injunction.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g), I certify that:

This motion complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) because it contains 6,415 words, excluding the parts of the motion exempted by Fed. R. App. P. 32(f).

This motion complies with the typeface and type-style requirements of Fed. R. App. P. 32(a)(5),(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

/s/ Nathaniel B. Edmonds

Nathaniel B. Edmonds

CERTIFICATE OF SERVICE

I hereby certify that on this July 20, 2020 I electronically filed the foregoing with the Court's CM/ECF system. All participants in this case are registered CM/ECF users and will be served via the CM/ECF system.

July 20, 2020

/s/ Nathaniel B. Edmonds

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