No. 26-1541

In the United States Court of Appeals for the Fourth Circuit

NORTH CAROLINA STATE CONFERENCE OF THE NAACP, ET AL.,
Plaintiffs-Appellants,

v.

FRANCIS X. DE LUCA, ET AL.
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

PLAINTIFFS-APPELLANTS' OPENING BRIEF

Caitlin Swain-McSurely
Kathleen E. Roblez
FORWARD JUSTICE
P.O. Box 1932
Durham, NC 27702
(919) 323-3889
cswain@forwardjustice.org
kroblez@forwardjustice.org

Penda D. Hair
FORWARD JUSTICE
P.O. Box 42521
Washington, DC 20015
(202) 256-1976
phair@forwardjustice.org

Irving Joyner
P.O. Box 374
Cary, NC 27512
(919) 319-8353
ijoyner@nccu.edu

John A. Freedman
Jeremy C. Karpatkin
David Kouba
Preston Smith
ARNOLD & PORTER KAYE SCHOLER LLP
601 Massachusetts Ave., NW
Washington, DC 20001
(202) 942-5000
john.freedman@arnoldporter.com

G. Thomas Rivera III
ARNOLD & PORTER KAYE SCHOLER LLP
Four Embarcadero Center, 14th Floor
San Francisco, CA 94111
(415) 471-3100

Counsel for Plaintiffs-Appellants

26.1 DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Fourth Circuit Rule 26.1, Plaintiffs-Appellants North Carolina State Conference of the NAACP, Chapel Hill-Carrboro NAACP, Greensboro NAACP, High Point NAACP, Moore County NAACP, Stokes County Branch NAACP, and Winston-Salem/Forsyth County NAACP state that each is a nonprofit, nonstock corporation. None has a parent corporation, and no publicly held corporation owns 10% or more of any Plaintiff-Appellant.

TABLE OF CONTENTS

Page

26.1 DISCLOSURE STATEMENT i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

INTRODUCTION 1

JURISDICTIONAL STATEMENT 3

STATEMENT OF THE ISSUES 3

STATEMENT OF THE CASE 4

A. Factual Background 4

1. Racial Discrimination and Inequality in North Carolina 4

2. H.B. 589 and the *McCrory* Litigation 5

3. S.B. 824's Unusual Passage 6

B. Procedural Background 10

1. 2019 Preliminary Injunction & Subsequent Proceedings 10

2. 2023–2024 Post-Injunction Proceedings & Pre-Trial Expert Evidence Dispute 16

3. May 2024 Evidentiary Rulings and Trial 18

4. March 2026 Findings & Ruling 20

SUMMARY OF ARGUMENT 21

STANDARD OF REVIEW 23

ARGUMENT 23

I. The District Court Made Intertwined Legal Errors that Fundamentally Misapplied *Arlington Heights*. 23

A. The Misapplication of the Good Faith Presumption 26

B. The District Court's Consideration of Evidence in Isolation Rather than the "Totality of the Relevant Facts."....30

C. The Misapplication of "Law of the Case" and Limiting the Evidence to the 2019 Preliminary Injunction Record....32

1. The District Court's Exclusion of Supplemental Expert Evidence after 2019....34

2. The District Court's Exclusion of Evidence that the Legislature Sought and Used Racial Data and Manipulated the Legislative Process....48

II. The District Court's Legal Errors Were Material....52

A. The District Court's Legal Errors Caused It to Misapply Two *Arlington Heights* Factors....52

B. The District Court's Errors Resulted in an Erroneous Judgment....62

CONCLUSION....64

STATEMENT IN SUPPORT OF ORAL ARGUMENT....65

CERTIFICATE OF COMPLIANCE....66

CERTIFICATE OF SERVICE....67

TABLE OF AUTHORITIES

Page(s)

Cases

Abbott v. Perez,
585 U.S. 579 (2018).....27

Belk v. Charlotte-Mecklenburg Bd. of Educ.,
269 F.3d 305 (4th Cir. 2001).....37, 42

Berger v. N.C. State Conf. of the NAACP,
142 S. Ct. 577 (2021).....15

Berger v. N.C. State Conf. of the NAACP,
597 U.S. 179 (2022).....15

Bresler v. Wilmington Tr. Co.,
855 F.3d 178 (4th Cir. 2017).....35, 36

Brnovich v. Democratic Nat'l Comm.,
594 U.S. 647 (2021).....28

Coastal Coal Co. v. Harrison,
No. 22-2122, 2024 WL 3042895 (4th Cir. June 18, 2024).....62, 63

In re Complaint of CF Bean,
841 F.3d 365 (5th Cir. 2016).....41

Cooper v. Harris,
581 U.S. 285 (2017).....26

Covington v. North Carolina,
316 F.R.D. 117 (M.D.N.C. 2016).....4

DeMarines v. KLM Royal Dutch Airlines,
580 F.2d 1193 (3d Cir. 1978).....41

Dep't of Homeland Sec. v. Regents of Univ. of Cal.,
591 U.S. 1 (2020).....28

EEOC v. Alton Packaging Corp.,
901 F.2d 920 (11th Cir. 1990).....63

EEOC v. Freeman,
778 F.3d 463 (4th Cir. 2015).....34

EEOC v. Watergate at Landmark Condominium,
24 F.3d 635 (4th Cir. 1994).....50

Gen. Elec. Co. v. Joiner,
522 U.S. 136 (1997).....34

Holmes v. Moore,
270 N.C. App. 7 (2020).....13

Holmes v. Moore,
881 S.E.2d 486 (N.C. 2022).....13

Holmes v. Moore,
886 S.E.2d 120 (N.C. 2023).....16

Hunter v. Underwood,
471 U.S. 222 (1985).....24, 46

Inwood Labs., Inc. v. Ives Labs., Inc.,
456 U.S. 844 (1982).....23

Lee v. Virginia State Board of Elections,
843 F.3d 592 (4th Cir. 2016).....28

Loving v. Virginia,
388 U.S. 1 (1967).....28

Martinez v. United States,
33 F.4th 20 (1st Cir. 2022).....41

McCrory. North Carolina v. N.C. State Conf. of NAACP,
581 U.S. 985 (2017).....6

Miller v. Johnson,
515 U.S. 900 (1995).....27

N.C. State Conf. of the NAACP v. Cooper,
430 F. Supp. 3d 15 (M.D.N.C. 2019) 29

N.C. State Conf. of the NAACP v. McCrory,
831 F.3d 204 (4th Cir. 2016)..... 1, 4-6, 19, 22, 24, 25, 28, 30-33, 52, 54-56, 59

N.C. State Conf. of the NAACP v. Raymond,
981 F.3d 295 (4th Cir. 2020).....2, 13, 29, 30

Nat'l Fed'n of the Blind v. Lamone,
813 F.3d 494 (4th Cir. 2016).....23

Newsom v. Albemarle Cnty. Sch. Bd.,
354 F.3d 249 (4th Cir. 2003).....33

North Carolina v. Covington,
581 U.S. 1015 (2017).....4

Obergefell v. Hodges,
576 U.S. 644 (2015).....28

OFS Fitel v. Epstein, Becker and Green, P.C.,
549 F.3d 1344 (11th Cir. 2008).....41

Pierce v. N.C. State Bd. of Elections,
97 F.4th 194 (4th Cir. 2024) 32

Reeves v. Sanderson Plumbing Prod.,
530 U.S. 133 (2000).....46

SAS Inst., Inc. v. World Programming Ltd.,
874 F.3d 370 (4th Cir. 2017).....34

Sea "B" Mining Co. v. Addison,
831 F.3d 244 (4th Cir. 2016).....62

Shelby County v. Holder,
570 U.S. 529 (2013).....5

Sherrod v. Lingle,
223 F.3d 605 (7th Cir. 2000).....41, 42

Shinseki v. Sanders,
556 U.S. 396 (2009).....62

Southern States Rack & Fixture, Inc. v. Sherwin-Williams Co.,
318 F.3d 592 (4th Cir. 2003).....37, 38

Strickland v. Moritz,
149 F.4th 378 (4th Cir. Aug. 15, 2025).....63

Sutton v. Roth,
361 F. App'x 543 (4th Cir. 2010).....50

United States v. Brothers Constr. Co. of Ohio,
219 F.3d 300 (4th Cir. 2000).....50

United States v. Windsor,
570 U.S. 744 (2013).....28

Village of Arlington Heights v. Metropolitan Housing Development Corp.,
429 U.S. 252 (1977)..... 1, 2, 21, 23, 24, 27, 28, 29, 30, 33, 43, 52, 57, 60

Washington v. Davis,
426 U.S. 229 (1976).....30

Weil v. Citizens Telecom Servs. Co.,
922 F.3d 993 (9th Cir. 2019)..... 50-51

White v. Honeywell, Inc.,
141 F.3d 1270 (8th Cir. 1998).....50

Zerega Ave. Realty Corp. v. Hornbeck Offshore Transp.,
571 F.3d 206 (2d Cir. 2009).....41

Statutes

28 U.S.C. § 1331 3

28 U.S.C. § 1343(a)(3) 3

28 U.S.C. § 1343(a)(4) 3

52 U.S.C. § 10308(f) 3

N.C. Gen. Stat. Ann. § 1-72.2(b) 48

Other Authorities

Fed. R. Civ. P. 26(a)(2) 34, 42

Fed. R. Civ. P. 26(a)(3) 36

Fed. R. Civ. P. 26(e) 14

Fed. R. Civ. P. 26(e)(2) 36

Fed. R. Civ. P. 61 62

Fed. R. Evid. 801(d)(2) 49

N.C. H.B. 589 ..... 1, 5, 6, 7, 19, 29, 44, 59

N.C. S.B. 824 ..... *passim*

INTRODUCTION

This appeal concerns whether North Carolina's 2018 voter-identification law, S.B. 824, was enacted with a racially discriminatory purpose. In 2016, this Court held that the General Assembly's 2013 voter identification law, H.B. 589, illegally burdened Black voters "with almost surgical precision." *N.C. State Conf. of the NAACP v. McCrory*, 831 F.3d 204, 214 (4th Cir. 2016). Immediately after *McCrory*, legislative leaders vowed to try again. Through legislative chicanery, those leaders secured a constitutional amendment requiring photo voter identification and enacted S.B. 824 as its implementing legislation. After a bench trial in 2024, the district court found "significant and compelling" evidence that both North Carolina's history of racial discrimination and S.B. 824's disparate impact supported Plaintiffs' claims. It nevertheless ruled for Defendants.

The judgment rests on a series of interrelated legal errors, each impacting the Equal Protection analysis. *First,* the district court transformed a rebuttable presumption of legislative good faith into an "almost impenetrable deference" that requires "direct evidence of discriminatory intent" displacing the "sensitive inquiry" required by *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977).

Second, the district court further misapplied *Arlington Heights*, analyzing each category and piece of evidence in isolation, without considering their cumulative force.

Third, the district court misapplied "law of the case" by treating this Court's reversal of a preliminary injunction in *N.C. State Conf. of the NAACP v. Raymond*, 981 F.3d 295 (4th Cir. 2020) ("*Raymond*") as final and binding, despite additional evidence presented four years later at trial. Relatedly, the district court effectively froze the record in time, forcing Plaintiffs to try a case in 2024 with expert evidence from the 2019 preliminary injunction hearing and excluding critical evidence regarding the *Arlington Heights* factors it ultimately resolved against Plaintiffs: sequence of events and legislative history.

These legal errors rippled throughout the district court's ruling and require reversal. Under the proper legal framework, and on a complete record, the evidence establishes that race was a motivating factor behind S.B. 824. The judgment should therefore be reversed or, at minimum, vacated and remanded for reconsideration under the correct framework and with a full evidentiary record.

JURISDICTIONAL STATEMENT

The district court had subject-matter jurisdiction over Plaintiffs' constitutional and statutory claims pursuant to 28 U.S.C. §§ 1331, 1343(a)(3)-(4), and 52 U.S.C. § 10308(f). The district court entered final judgment on March 31, 2026, and Plaintiffs timely appealed. JA0161, JA5360. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether the district court erred by supercharging the rebuttable "presumption of legislative good faith" as requiring "almost impenetrable deference" to the North Carolina legislature and requiring "direct evidence of discriminatory intent."
2. Whether the district court misapplied *Arlington Heights* by considering the evidence of discriminatory intent in isolation without analyzing the totality of the circumstances case law requires.
3. Whether the district court misapplied the law of the case doctrine following *Raymond*.
4. Whether the district court committed legal error or otherwise abused its discretion by excluding critical expert and direct factual evidence that the North Carolina legislature acted with racially discriminatory intent.

STATEMENT OF THE CASE

A. Factual Background[1]

1. Racial Discrimination and Inequality in North Carolina

North Carolina's long history of race-based discrimination in voting is undisputed. JA0047, JA0100-0101; *see also N.C. State Conf. of NAACP v. McCrory*, 831 F.3d 204, 223-24 (4th Cir. 2016) ("*McCrory II*"). The State Defendants conceded that "[t]here is no denying North Carolina's long history of racial discrimination." Dkt. 178 at 20.

Part of that history includes racially gerrymandering state legislative districts. In 2016, North Carolina state legislators were found to have been elected under a racially gerrymandered district map. *Covington v. North Carolina*, 316 F.R.D. 117, 176 (M.D.N.C. 2016), *aff'd*, 581 U.S. 1015 (2017). From 2016 until the November 2018 election, the Republican Party maintained a veto-proof supermajority "due, in part" to unconstitutionally gerrymandered maps. JA0062.

[1] Unless otherwise noted, facts are from the district court's Trial Findings of Fact and Conclusions of Law. *See* JA0027-0160.

2. H.B. 589 and the *McCrory* Litigation

The Voting Rights Act (VRA) Section 5 preclearance process required certain jurisdictions to get federal approval before changing their voting laws. On June 25, 2013, the Supreme Court decided *Shelby County v. Holder*, 570 U.S. 529 (2013), ending preclearance for forty North Carolina jurisdictions. JA0060-0061. Before *Shelby County*, the North Carolina legislature was considering a voter identification bill (H.B. 589) that permitted a wide array of identifications, including community-college, public-assistance, and government-employee IDs. JA0060. Within weeks of *Shelby County*, the General Assembly revised H.B. 589 to include "stringent voter ID requirements that excluded many of the alternative photo IDs which had been used by African Americans." JA0061. H.B. 589 passed on a party-line vote and was signed into law on August 12, 2013. JA0061.

This Court ruled that the General Assembly enacted H.B. 589 with racially discriminatory intent in violation of the Equal Protection Clause and VRA Section 2. *McCrory II*, 831 F.3d at 214-15, 219. Noting the State's history of discrimination, this Court observed that the General Assembly's "requests for racial data" showing "that African Americans disproportionately . . . lacked DMV-issued ID"—and its resulting choices about which forms of identification

to accept and which to reject—showed that the law targeted Black voters "with almost surgical precision." *Id.* at 214; JA0061.

3. S.B. 824's Unusual Passage

In May 2017, the Supreme Court denied *certiorari* in *McCrory*. *North Carolina v. N.C. State Conf. of NAACP*, 581 U.S. 985 (2017). Within "hours," legislative leaders called for a new voter ID law that would "incorporate some of the same ideas" as H.B. 589. JA0061-0062. Starting in late 2017 and continuing through late 2018, North Carolina House Rules Committee Chair and Elections Committee Co-Chair David Lewis requested updates to the data regarding voters who lacked "valid" photo ID. JA2161. On December 18, 2017, Chairman Lewis's top aides Mark Coggins and Neal Inman emailed the State Board of Elections ("SBOE") referencing the "300,000 people . . . that are on the voter rolls who didn't have photo ID." JA2161. Specifically, Coggins requested data showing the number of North Carolinians "believed to be on the voter rolls without a photo ID," along with "any subsequent data on why the number is so high," any "potential data issues with an accurate assessment of the number," and the "steps [SBOE] ha[d] taken to bring that number down." JA2161.

SBOE General Counsel Joshua Lawson responded on January 8, 2018, providing "no-match" data previously generated in conjunction with H.B. 589, as well as updated "raw data" of the registered voters on no-match lists that included racial and ethnic data. JA2163-2164. SBOE's response did not identify any measures SBOE had taken to "bring that number down."

Armed with this updated data, Chairman Lewis and Speaker Moore sponsored House Bill 1092 ("H.B. 1092"), which proposed a constitutional amendment requiring that voters present photo-ID before voting in person. JA0063-0064. Introduced in June 2018, during the final two days of its "short session," Republican leadership placed H.B. 1092 and five other constitutional amendments on the November ballot. JA0062-0063. This was an "unprecedented" departure from the General Assembly's regular practice of using short sessions to only "tweak[] the budget." JA0063. Unlike the other proposed constitutional amendments, H.B. 1092 was offered with no implementing legislation attached and it was "abruptly withdrawn" from the Elections Committee and re-referred to Chairman Lewis's Rules Committee. JA0064. At the only hearing open to public testimony, speakers "presented evidence to show that adopting a photo ID requirement would disenfranchise voters on a racially discriminatory basis." JA0064. The General Assembly

passed H.B. 1092 along party lines on June 29, 2018—less than a month after its introduction, and far faster than typical deliberation for constitutional amendments. JA0064-0065. The General Assembly then adjourned the short session indefinitely, which was not "typical." JA0065.

In the November 6, 2018 election, Republicans lost their supermajority under remediated district maps, and voters approved H.B. 1092. JA0065. Contrary to normal practice for constitutional amendments, the General Assembly did not convene a study commission to recommend implementing language. JA0066-0067. Instead, the lame-duck General Assembly—run by members elected under racially gerrymandered maps—reconvened on November 27, 2018. JA0065-0066.

Before reconvening, the General Assembly adopted a resolution suspending the constitutional requirement that bills be read three times in each house and waiving its ordinary filing deadlines. JA0066. The first draft of S.B. 824 debuted on November 20, 2018, and passed the Senate Rules Committee on November 27—the same day the final version was released. JA0068. One African-American Senator, Joel Ford, co-sponsored the legislation. JA0112. The Senate rejected all Democratic proposed amendments that would have expanded the list of qualifying identifications

and mitigated the racial effect, S.B. 824 passed the second reading on November 28, 2018, passed the third reading the next day, and was sent to the House for consideration on December 4. JA0068-0069.

One member testified that S.B. 824 moved through the House faster than any other legislation she had witnessed. JA0069. Democratic and bipartisan amendments that would have mitigated the racial impact of the bill failed. JA0069. On December 5, 2018, without even acknowledging a Member's objection, the Speaker called for a third reading immediately after the second-reading vote, foreclosing consideration of additional amendments. JA0070. Representative Harrison testified that had never happened before. JA0070. S.B. 824 passed by a vote of 67 to 40. JA0070.

The General Assembly presented S.B. 824 to Governor Cooper on December 6, 2018, which he vetoed, noting in part that it would disenfranchise "minority" voters. JA0070-0071, JA5520-5521. The outgoing Republican supermajority overrode the veto within five days, making S.B. 824 law. JA0071.

As enacted, S.B. 824 requires voters to present one of ten forms of qualifying photo ID with limited exceptions. JA0036-0043.

Due to both federal and state court injunctions, the first elections conducted under S.B. 824 occurred between September 2023 (municipal elections) and March 5, 2024 (the statewide primary). JA0071.

B. Procedural Background

1. 2019 Preliminary Injunction & Subsequent Proceedings

Plaintiffs sued on December 20, 2018, asserting the photo ID requirements violated the Fourteenth and Fifteenth Amendments and VRA Section 2. JA0245-0281.[2] The Legislative Defendants—leaders of the General Assembly—unsuccessfully sought to intervene and appealed. Dkt. 7, Dkt. 104. Parallel litigation under the state constitution proceeded in state court in *Holmes v. Moore* ("*Holmes*").

Plaintiffs moved for a preliminary injunction on September 17, 2019 (Dkt. 72) and submitted six expert reports and eleven fact witness declarations in support of their motion. JA0317, JA0468, JA0553, JA0610, JA0666, JA1232. Shortly thereafter, the parties submitted their Rule 26(f) report and commenced discovery. JA0308. In Rule 26(a)(1) initial disclosures provided October 18, 2019, the Plaintiffs identified 27 fact witnesses and "all expert

[2] Plaintiffs also challenged two other S.B. 824 provisions. Following trial, the district court granted Defendants judgment. Dkt. 348 at 2 n.1. Plaintiffs do not appeal that decision.

witnesses designated by any party." JA1961. The State Defendants deposed two of Plaintiffs' experts (JA0017; *see also* Dkt. 283-1, 283-2) and served initial disclosures identifying seven fact and no expert witnesses. JA1972-1974. The then-*amici* Legislative Defendants submitted five opposition expert reports (Dkt. 96-7, 96-8, 96-9, 96-10, and 96-11) that were ultimately stricken (JA1312-1314).

The district court granted Plaintiffs' preliminary injunction motion, holding that Plaintiffs were likely to succeed on their discriminatory-intent claim. JA1351. State Defendants appealed. Dkt. 123.

While State Defendants' appeal was pending, the district court proceedings continued. The district court adopted the Parties' proposal that expert discovery close June 1, 2020, dispositive motions due July 1, 2020, with trial scheduled for January 2021. JA0305-0309, JA0313, JA1375; Oct. 1, 2019 Text Order. As reflected in the Rule 26(f) report, Plaintiffs agreed to the expedited schedule given the State Defendants' agreement to provide discovery from the *Holmes* case, noting that "Plaintiffs agreed to review that production before making any new discovery requests … to prevent unnecessary duplication of effort or expense." JA0306.

Because of the COVID-19 pandemic and interlocutory appeals, in the spring of 2020 the parties jointly proposed a revised schedule. JA1376-1377. The Magistrate Judge denied the parties' proposal and a subsequent joint motion for reconsideration. JA1380-1396. Then, counsel for the State Defendants wrote to Plaintiffs' counsel at 4:30 p.m. on Friday, May 8, 2020, stating:

> Acknowledging that Judge Auld's order currently continues to be in place (including today's deadline for any defendant expert disclosures) and based on having received no expert reports and disclosures from Plaintiffs by April 15, 2020, we are writing to let you know that we do not intend to designate any expert witnesses at this time.
>
> We understand that an objection to Judge Auld's order may be pursued shortly. If the case management order is revised by the court, we reserve the right to revise our positions accordingly.

JA1811. Twenty-two minutes later, Plaintiffs' counsel responded, "We will be reaching out regarding an objection to MJ Auld's order and hope that can be a joint objection." JA1810.

On May 18, 2020, Plaintiffs' counsel filed a consent objection to the denial of the revised schedule noting, among other things, that the parties were briefing multiple interlocutory appeals and had prepared expert reports, and had engaged in expert depositions and exchange of discovery. Dkt. 143 at 6-7.

On May 27, 2020, the district court overruled the objection. JA1397-1401.

Meanwhile, the *Holmes* litigation proceeded in state court. In early 2020, the North Carolina Court of Appeals preliminarily enjoined S.B. 824. *Holmes v. Moore*, 270 N.C. App. 7, 35-36 (2020). After a 14-day trial, the court in *Holmes* found that "racial discrimination was a motivating factor in the enactment of Senate Bill 824." JA1483-1505. The North Carolina Supreme Court initially affirmed the decision. 881 S.E.2d 486 (N.C. 2022).

In the federal litigation, on November 3, 2020, the district court vacated the January 2021 trial date, and reset trial for January 2022. JA1402. Then on December 2, 2020, this Court reversed the preliminary injunction, holding that the district court failed to apply the presumption of legislative good faith and misallocated the burden of proof in evaluating Plaintiffs' discriminatory-intent claim. *Raymond*, 981 F.3d at 310-11.

Throughout 2021, the parties discussed seeking leave to reopen discovery. *See* JA1813-1826. In conjunction with those discussions, Plaintiffs committed to limit additional discovery to "supplementing Plaintiffs existing expert reports already disclosed to Defendants" and requested related data and discovery reports. JA1821-1822, JA1826. The State Defendants indicated that while they opposed formally reopening discovery, they would "be happy

to discuss what data we can provide to your expert." JA1821. The State Defendants continued to produce discovery from the *Holmes* matter, as well as voter file data that they sent directly to Plaintiffs' expert Dr. Herron. JA1813-1814, JA1828.

On October 2, 2021, well after the scheduling order's July 1, 2020 dispositive motion deadline, the State Defendants moved for summary judgment, which the Legislative Defendants subsequently joined. Dkt. 177-178, 182, 231. Plaintiffs' opposition expressly referenced their experts and supplemental analyses. Dkt. 187 at 8, 11 n.7, 15, 16 n.12, 17. Defendants' motion was denied in March 2024. Dkt. 234.

In anticipation of the January 2022 trial date, Plaintiffs supplemented four of their expert disclosures pursuant to Fed. R. Civ. P. 26(e) to address the data and discovery the State Defendants produced in 2021. *See* JA2330-2372, JA2576-2658, JA3159-3190. Plaintiffs also supplemented their Rule 26(a)(1) initial disclosures identifying ten fact witnesses "in addition to those individuals identified in Plaintiffs' Initial Disclosures [and] Plaintiffs' Motion for Preliminary Injunction." JA1835-1837.

In December 2021, the Plaintiffs and State Defendants exchanged Rule 26(a)(3) disclosures, including trial witness and exhibit lists. Plaintiffs

identified 25 fact witnesses and their six experts, and listed expert reports and supplemental reports as trial exhibits. JA1851-1853, JA1854, JA1857, JA1859, JA1874, JA1878-1879, JA1880, JA1883, JA1885, JA1893, JA1896, JA1898. The State Defendants identified four fact witnesses. JA2000. The State Defendants did not contemporaneously object to Plaintiffs' identification of any witness, including experts.

Trial was further delayed by the *certiorari* grant concerning the Legislative Defendants' intervention. *Berger v. N.C. State Conf. of the NAACP*, 142 S. Ct. 577 (2021) (mem.). At the State Defendants' request, on December 30, 2021, the district court entered a stay and vacated the January 2022 trial date. JA1615-1618.

On February 2, 2022, Plaintiffs emailed State Defendants regarding production of further *Holmes* discovery and inquired whether they intended to depose any of Plaintiffs' experts, noting extra time due to the delayed trial. JA2024-2025. Defense counsel responded that they would "get back to [Plaintiffs]," but never did. *See* JA2024.

On June 23, 2022, the Supreme Court held that the Legislative Defendants were entitled to intervene. *Berger v. N.C. State Conf. of the NAACP*, 597 U.S. 179, 200 (2022).

2. 2023–2024 Post-Injunction Proceedings & Pre-Trial Expert Evidence Dispute

Following a change in its composition, in April 2023, the North Carolina Supreme Court reconsidered its prior affirmance and vacated the *Holmes* injunction against S.B. 824. 886 S.E.2d 120 (N.C. 2023).

Plaintiffs moved to lift the federal litigation stay and for a status conference. Dkt. 202. On July 5, 2023, the Magistrate Judge lifted the stay, scheduled a status conference on July 26, 2023, and invited any party who wished to conduct discovery to "provide copies of any proposed discovery (including the names of any proposed deponents) to all opposing counsel by 5:00 p.m. on 07/19/2023." July 5, 2023 Text Order. Plaintiffs requested that discovery be reopened and submitted proposed discovery. JA1620-1629. The Defendants successfully opposed reopening discovery. *See* Dkt. 204; JA1634, JA2050, JA1645-1675, JA1754-1770. The State Defendants subsequently provided the remaining materials from the *Holmes* litigation and updated voter file data to Plaintiffs' expert Dr. Herron. JA2517, JA2524.

On February 12, 2024, the district court set trial for May 6, 2024, and ordered that final Rule 26(a)(3) pretrial disclosures be made "no later than April 5, 2024." JA1771.

On April 5, 2024, the parties exchanged Rule 26(a)(3) disclosures. Plaintiffs identified 39 fact witnesses and the six experts, while the State Defendants identified three fact witnesses. Dkt. 241; JA1792-1796. Plaintiffs also served supplemental expert reports from each of their experts, which addressed the newly-produced *Holmes* materials and included updated analyses of S.B. 824's impact and implementation in the March 2024 primary election and the updated no-match data State Defendants produced in February 2024. JA2181-2183, JA2193-2248, JA2281-2285, JA2373-2476, JA2527, JA2532-2536, JA2660-2815, JA2912-2915, JA2957-2985, JA3011-3014, JA3024-3057, JA3132-3136, JA3192-3226. Despite their lack of Rule 26(a)(1) disclosures and failure to produce any discovery, the Legislative Defendants reserved the right to call witnesses at trial and identified 108 trial exhibits, none of which had been previously produced. Dkt. 240, 240-1, 253.

The Plaintiffs and Legislative Defendants cross-moved to exclude untimely disclosed exhibits and witnesses (Dkt. 247, 253) and all parties filed motions to exclude expert witnesses. Dkt. 249, 251, 254. Despite the fact that Plaintiffs disclosed their experts and original reports in 2019 (JA0317, JA0468, JA0553, JA0610, JA0666, JA1232), supplemented them in 2021, and included the experts in Rule 26(a) disclosures (JA1961, JA1852), the Defendants

claimed Plaintiffs' experts had not been timely disclosed, and that in the five years the litigation had been pending, Defendants "did not have an opportunity to depose Plaintiffs' expert witnesses." Dkt. 251 at 2; Dkt. 249 at 2-3.

3. May 2024 Evidentiary Rulings and Trial

The case proceeded to trial on Monday, May 6, 2024. JA0031. On the Saturday before trial, the district court barred Plaintiffs' experts from testifying and confined Plaintiffs' evidence to the 2019 preliminary-injunction record with limited exceptions. JA0008-0009, JA0025. Plaintiffs moved to present the excluded expert evidence as an offer of proof pursuant to Federal Rule of Evidence 103(a)(2). Dkt. 303.

The district court also excluded Plaintiffs' evidence concerning the legislative process from the *Holmes* trial, including:

- PX1012, an email chain, JA2172-2179, which showed Senator Berger's top aides secured Senator Ford's sponsorship through deception, which rebutted any inference that his involvement reflected genuine bipartisan agreement. *See* JA5303-5307.

- PX196, in which Chairman Lewis's chief aides requested updates to the impact data regarding the 300,000 registered voters who lacked photo identification. JA2161.

The district court also limited the admissibility of PX197, in which the State Board provided Chairman Lewis's aide the updated "no match" data, *i.e.*, the same racial data that led this Court to declare H.B. 589 as racially discriminatory (*McCrory II*, 831 F.3d at 214-15), and a link to the "raw data" no-match lists that included current, updated racial and ethnic data. JA2163. The court similarly limited PX785, an email chain from early October 2018, shortly before S.B. 824 was introduced, in which Chairman Lewis's staff asked the Board how many free IDs had been issued under H.B. 589. JA2169-2170. The district court held that PX197 and PX785 showed Chairman Lewis's knowledge only, and refused to "impute" his knowledge "to the entire legislature." JA4608-4610. Dr. Lichtman's 2021 supplemental expert report discussing the significance of this evidence was also excluded. JA2623-2625, JA5308-5311.

Following five days of trial, Plaintiffs submitted written offers of proof and presented three days of expert testimony for the purpose of preserving the issue for appeal. JA0031, JA4748-5359.

4. March 2026 Findings & Ruling

The district court issued its Trial Findings of Fact and Conclusions of Law on March 26, 2026. JA0027-0160.

Applying *Arlington Heights*, the district court found that the historical background factor "weighs decidedly in favor of a finding of discriminatory intent," noting Defendants "do not dispute that North Carolina has a history of extensive official discrimination against African Americans, and that this history in the area of voting is well documented." JA0047, JA0102.

The district court likewise found "significant evidence of the disparate impact that S.B. 824 has inflicted and continues to inflict on minority voters." JA0137. The court cited Dr. Herron's analysis of the State's own 2019 "no-match" list, which showed an overall rate of 8.1% of registered voters lacking DMV-issued ID, but a 10.6% rate for Black voters and 11.1% for Hispanic voters, compared to 6.5% for White voters. JA0123. The court also cited Dr. Barreto's 2019 survey of eligible voters, which found that 11.4% of Black voters and 22.9% of Hispanic voters lacked qualifying DMV-issued ID, compared to 6.7% of White voters—a gap of nearly 5 points for Black voters and over 16 points for Hispanic voters. JA0123-0124.

Yet the district court then found that *Raymond*'s observations concerning the sequence of events and legislative history were to be treated as "final" and "law of the case." JA0036, JA0138. Characterizing the presumption of good faith as an "almost impenetrable deference," JA0138, the court assessed whether each individual event in the legislative proceedings was "truly peculiar" or "otherwise inexplicable" or "could be explained by an alternative race-neutral reason." JA0111, JA0113. The district court concluded Plaintiffs had not established the sequence of events or legislative history of S.B. 824 supported an inference of discrimination, and entered judgment for Defendants. JA0100, JA0138.

SUMMARY OF ARGUMENT

"Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Arlington Heights*, 429 U.S. at 266. The Supreme Court established a flexible framework precisely because discriminatory purpose is rarely susceptible to direct proof.

The district court misapplied *Arlington Heights* in critical ways.

First, the district court treated the presumption of legislative good faith as an "almost impenetrable" barrier and required "direct evidence of

discriminatory intent," JA0113, JA0120, JA0138, with no basis in Supreme Court or this Court's precedent.

Second, rather than considering the "totality of the circumstances" and considering the evidence cumulatively, the district court considered each piece of evidence "in a vacuum." *Contra McCrory*, 831 F.3d at 233.

Third, the district court erroneously treated *Raymond*'s observations as binding "law of the case," summarily dismissing probative trial evidence. JA0036, JA0105-0113, JA0116-0120, JA0138. This error was exacerbated by erroneous evidentiary decisions, including (i) precluding Plaintiffs' experts from testifying, (ii) excluding supplemental expert analyses without properly analyzing prejudice or justification or considering alternative sanctions, and (iii) excluding evidence of the conduct of Defendants' agents.

The cumulative effect of these errors distorted the district court's assessment of the sequence of events and legislative history factors, where the district court gave "almost impenetrable deference to the presumption of legislative good faith," and determined that *Raymond* required Plaintiffs to provide "direct evidence of discriminatory intent," and "compelled" the conclusion that Plaintiffs' extensive evidence of discriminatory intent had "fallen short." JA0113, JA0116, JA0120, JA0127, JA0137-0138.

None of the legal errors were harmless. Collectively, they resulted in a fundamental misapplication of *Arlington Heights* and Supreme Court Equal Protection jurisprudence.

The decision below should be reversed, or at minimum, remanded for consideration under the correct legal framework.

STANDARD OF REVIEW

The Fourth Circuit reviews "judgments resulting from a bench trial under a mixed standard of review: factual findings may be reversed only if clearly erroneous, while conclusions of law are examined de novo." *Nat'l Fed'n of the Blind v. Lamone*, 813 F.3d 494, 502 (4th Cir. 2016). If, however, a trial court "bases its findings upon a mistaken impression of applicable legal principles, the reviewing court is not bound by the clearly erroneous standard." *Inwood Labs., Inc. v. Ives Labs., Inc.*, 456 U.S. 844, 855 n.15 (1982).

ARGUMENT

I. The District Court Made Intertwined Legal Errors that Fundamentally Misapplied *Arlington Heights*.

In *Arlington Heights*, the Supreme Court recognized that "[d]etermining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." 429 U.S. at 266. The Supreme Court established

a flexible evidentiary framework precisely because discriminatory legislative purpose is rarely susceptible to direct proof. The Supreme Court therefore identified several categories of relevant evidence—historical background, the sequence of events, procedural and substantive departures, legislative history, and disparate impact—not because any single category is dispositive, but because discriminatory purpose often becomes apparent from their cumulative force. *Id.* at 266–68.

Courts have consistently reaffirmed *Arlington Heights*'s holistic approach to analyzing evidence of intent. *Hunter v. Underwood*, 471 U.S. 222 (1985), held that the totality of the evidence established discriminatory purpose even though the challenged constitutional provision had facially neutral language and also served asserted race-neutral purposes. 471 U.S. at 228–33. This Court in *McCrory* emphasized that discriminatory intent is established by considering the "totality of the circumstances" surrounding enactment of the challenged legislation, not by compartmentalizing each evidentiary category into isolated inquiries. 831 F.3d at 219–33. Indeed, *McCrory* overturned the district court because of "the court's consideration of each piece of evidence in a vacuum, rather than engaging in the totality of the circumstances analysis required by *Arlington Heights*." *Id.* at 233.

The district court departed from this standard in three critical respects.

First, the district court interpreted and misapplied the presumption of legislative good faith as an "almost impenetrable" barrier and requiring "direct evidence of discriminatory intent," supercharging it beyond what *Raymond* held and what the Supreme Court has established. JA0113, JA0120, JA0138. The district court effectively ruled that, short of a full-throated confession of discriminatory intent by the legislature, the presumption of good faith carries the day.

Second, rather than considering the "totality of the circumstances" and the cumulative weight of the evidence, the district court considered each *Arlington Heights* factor and the corresponding evidence "in a vacuum," contrary to *McCrory*. *Compare McCrory*, 831 F.3d at 220, 233 *with* JA0106-0113.

Third, the district court incorrectly treated *Raymond*'s preliminary injunction findings as binding "law of the case," summarily dismissing probative trial evidence that had not been presented when *Raymond* was decided. JA0036, JA0105-0113, JA0116-0120, JA0138. The district court compounded its misapplication of the law of the case with a series of erroneous evidentiary decisions limiting Plaintiffs' evidence to the 2019 record,

notwithstanding extensive new factual and expert evidence that was not previously available and consequently not before this Court in *Raymond*.

Each error alone requires reversal. In tandem, they resulted in a fundamental misapplication of *Arlington Heights* and Supreme Court Equal Protection jurisprudence as applied to the facts in the record, particularly in the district court's flawed analysis of the sequence of events and legislative history factors.

A. The Misapplication of the Good Faith Presumption

The district court's application of the good faith presumption to the evidence presented bears no resemblance to the rebuttable inference described in *Raymond* and Supreme Court precedent.

First, the district court mischaracterized the presumption of good faith as requiring "almost impenetrable deference." JA0138. That runs contrary to Supreme Court precedent that has taken care to ensure the presumption does not become an insurmountable barrier. *See, e.g.*, *Cooper v. Harris*, 581 U.S. 285, 301 (2017) (noting the presumption is *not* a "super-charged, pro-State presumption").

Relatedly, the district court noted that the "strength of the presumption" required Plaintiffs to provide "direct evidence" of intent.

JA0113, JA0120. That contradicts *Arlington Heights* itself, which calls for a "sensitive inquiry into such circumstantial and direct evidence of intent as may be available." 429 U.S. at 266.

The district court measured Plaintiffs' evidence against this "impenetrable deference" and "direct evidence" standard, considering for example, whether each irregularity in the legislative process was so extreme as to be "truly peculiar" or "otherwise inexplicable." JA0111. Indeed, the district court misread *Abbott v. Perez*, 585 U.S. 579 (2018), as requiring "that the presumption of good faith only be disturbed by findings of truly peculiar, and otherwise inexplicable, legislative circumstances," JA0111 (citing 585 U.S. at 610–11). No such language appears in *Abbott*. The district court had no basis to treat a rebuttable presumption as "almost impenetrable."

The Supreme Court developed the presumption of legislative good faith to address racial-gerrymandering claims.[3] None of the Supreme Court's cases

[3] The Supreme Court has emphasized that the good faith presumption is warranted by special considerations in redistricting disputes that are not present in this vote denial case. In *Miller v. Johnson*, 515 U.S. 900, 915–16 (1995), the Supreme Court explained the presumption was warranted because "[e]lectoral districting is a most difficult subject for legislatures," "represents a serious intrusion on the most vital of local functions," and is consistent with "the sensitive nature of redistricting," which "requires courts to exercise extraordinary caution" before finding that a State has drawn district lines on the basis of race.

applying *Arlington Heights* have applied the presumption of good faith outside the redistricting context, let alone held the presumption to be "almost impenetrable." *See, e.g.*, *Brnovich v. Democratic Nat'l Comm.*, 594 U.S. 647, 687–90 (2021); *Dep't of Homeland Sec. v. Regents of Univ. of Cal.*, 591 U.S. 1, 33–35 (2020).[4] The Supreme Court has never applied the presumption or held it should apply to other types of Equal Protection claims or to a vote denial case. Similarly, this Court's prior decisions applying *Arlington Heights* to facially neutral, non-redistricting election legislation did not invoke any "presumption of legislative good faith." *See* JA0113. For example, *McCrory* found discriminatory intent based on the ordinary *Arlington Heights* factors, 831 F.3d at 223–33, and *Lee v. Virginia State Board of Elections*, 843 F.3d 592, 601–04 (4th Cir. 2016), upheld Virginia's voter-ID law based on that same established framework.

[4] The Supreme Court has invalidated a myriad of federal and state statutes as unconstitutional without ever suggesting that legislation was entitled to any presumption of good faith. *See, e.g., United States v. Windsor*, 570 U.S. 744 (2013) (invalidating Defense of Marriage Act); *Obergefell v. Hodges*, 576 U.S. 644 (2015) (invalidating laws of four states requiring marriage to be between a man and a woman); *Loving v. Virginia*, 388 U.S. 1 (1967) (invalidating state anti-miscegenation laws).

This Court's ruling in *Raymond* was the first time this Circuit imported the redistricting presumption into the analysis of a facially neutral vote-denial statute. *Raymond* reasoned by analogy to *Abbott*'s treatment of Texas's congressional map because here, as in *Abbott*, "the very same people who passed the old, unconstitutional law passed the new." 981 F.3d at 303–05 (citing *N.C. State Conf. of NAACP v. Cooper*, 430 F. Supp. 3d 15, 32 (M.D.N.C. 2019)). In that context, *Raymond* held that the district court could not assume that illegal racial intent from H.B. 589 carried over to the General Assembly that passed S.B. 824, and it must instead consider the legislators' intent anew. *Id.* But while *Raymond* may have injected the good faith presumption into a vote denial analysis, it did not raise the bar from rebuttable to "almost impenetrable." To the contrary, *Raymond*'s application of the presumption was limited to its holding that the district court erred in misapplying the burden of proof. *See id.* at 304. Yet the district court repeatedly stated that it could not consider or give due weight to Plaintiffs' evidence because of its supercharged presumption. *See, e.g.*, JA0045, JA0098-0102, JA0106-0113, JA0116-0120, JA0137-0138.

The district court's unprecedented application of the presumption cannot be squared with *Arlington Heights*. The *Arlington Heights* framework

exists precisely because unconstitutional legislative purpose must ordinarily be inferred from circumstantial evidence. *Arlington Heights*, 429 U.S. at 266. In applying an "almost impenetrable deference" and insistence on "direct evidence," the district court displaced the "sensitive inquiry" that *Arlington Heights* requires and that the *Raymond* decision recognizes still applies. *Id.*; *Raymond*, 981 F.3d at 305.

In sum, the district court's "almost impenetrable deference" to the Legislature and insistence on "direct evidence" have no basis in Supreme Court or Fourth Circuit precedent, including the *Raymond* decision. It was reversible error for the district court to apply such extreme deference, which rippled throughout its ruling.

B. The District Court's Consideration of Evidence in Isolation Rather than the "Totality of the Relevant Facts."

Arlington Heights requires courts to weigh "the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another." *McCrory*, 831 F.3d at 220 (quoting *Washington v. Davis*, 426 U.S. 229, 242 (1976)). But rather than engaging in holistic analysis, the district court considered each *Arlington Heights* factor separately; and within each factor, the district court considered each fact in isolation. The district court wrote that "[t]he presumption of legislative good faith requires this

Court to seriously consider how each alleged legislative irregularity could be explained by an alternative race-neutral reason." JA0113. It then assessed each one in isolation and found each to be not unreasonable. *See, e.g.*, JA0111, JA0116. The court further stated that to find discriminatory intent, the Supreme Court "requires" findings of "truly peculiar, and otherwise inexplicable, legislative circumstances." JA0111.

This atomized approach is one that *McCrory* held constitutes reversible error. *See* 831 F.3d at 228–29, 232–33. The totality-of-the-circumstances inquiry requires courts to assess not whether any single fact, viewed alone, compels an inference of discriminatory intent; but whether the cumulative impact of those irregularities, viewed together, do. *Id.* at 232–33. Indeed, *McCrory* identified individual facts that the district court excused or explained away, and emphasized how those same facts "besp[oke] a certain purpose" when viewed collectively. *Id.* at 229. In particular, *McCrory* reversed the district court for its failure to consider specific components of the "sequence of events" and impact evidence holistically, noting that when viewed collectively, the evidence supplied "a compelling piece of the puzzle of the General Assembly's motivation," even if "not dispositive on its own." *Id.* Similarly, *McCrory* held that the district court "clearly erred in finding that

the cumulative impact of the challenged provisions . . . d[id] not bear more heavily on African Americans" merely because each restriction, considered on its own, might seem defensible. *Id.* at 231. "Thus, cumulatively, the panoply of restrictions results in greater disenfranchisement than any of the law's provisions individually." *Id.*

The district court here engaged in the same piecemeal approach to the evidence that *McCrory* rejected. The court's failure to "acknowledg[e] the whole picture" is legal error. *Id.* at 228.

C. The Misapplication of "Law of the Case" and Limiting the Evidence to the 2019 Preliminary Injunction Record

It is well established that following the interlocutory appeal of a preliminary injunction, evidence developed at trial should not be assessed through the lens of the appellate court's commentary about the preliminary injunction record. *See, e.g.*, *Pierce v. N.C. State Bd. of Elections*, 97 F.4th 194, 221 (4th Cir. 2024) (scope of circuit court's review of preliminary injunction is at "preliminary stage" and "will return to the district court for final fact finding on a more fulsome record after discovery and trial"). Yet the district court repeatedly imported *Raymond*'s characterizations wholesale, without considering whether the *Raymond* decision, based on a limited record, retained the same force after an expanded trial record. JA0117.

The district court relied on *Raymond* to erroneously minimize the *Arlington Heights* factors that weighed in favor of Plaintiffs—the historical background and disparate impact. *Compare* JA0100, JA0121 (giving these factors "limited weight") *with McCrory*, 831 F.3d at 223, 231 ("district court erred in ignoring or minimizing these facts"). As discussed *infra* Section II.A, the district court relied on *Raymond* in its erroneous assessment of the sequence of events and legislative history. The district court acknowledged, but did not follow the rule that "any ruling on a preliminary injunction[] does not preclude a different resolution of . . . claims on a more fully developed record," JA0036; *Newsom v. Albemarle Cnty. Sch. Bd.*, 354 F.3d 249, 261 (4th Cir. 2003). Instead, the district court improperly treated *Raymond* as establishing "final judgments of law." JA0036.

A series of interrelated evidentiary rulings magnified the effect of the misapplication of "law of the case." The district court improperly narrowed the evidentiary record to the 2019 preliminary injunction record and then relied on the resulting evidentiary gaps to conclude that Plaintiffs had failed to prove discriminatory intent. Those rulings, in aggregate, shaped the court's factual findings, infected its weighing of the *Arlington Heights* factors, and ultimately predetermined the result.

This Court reviews evidentiary rulings, including on motions *in limine*, for abuse of discretion. *SAS Inst., Inc. v. World Programming Ltd.*, 874 F.3d 370, 384 (4th Cir. 2017); *see also Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 141 (1997) (collecting cases). A district court abuses its discretion when it "relies on an error of law or a clearly erroneous factual finding." *SAS Inst., Inc.*, 874 F.3d at 384 (quoting *EEOC v. Freeman*, 778 F.3d 463, 466 (4th Cir. 2015)). Here, these errors—particularly those tied to precluding evidence not presented during the preliminary injunction phase of the case—exacerbated the district court's erroneous application of "law of the case." As discussed in Section II, these errors were not harmless.

1. The District Court's Exclusion of Supplemental Expert Evidence after 2019

The district court erred in its decision to confine the expert evidence at trial to five-year-old expert reports. JA0022, JA0031. The exclusion of the updated expert evidence and all expert testimony was improper.

1. Each expert was disclosed in 2019 in the preliminary injunction proceeding, well in advance of the district court's April 10, 2020 expert disclosure deadline. In fall 2019, Plaintiffs tendered full reports compliant with the disclosure requirements of Fed. R. Civ. P. 26(a)(2). *See* JA0318-0444 (123 pages), JA0469-0540 (72 pages), JA0554-0590 (36 pages), JA0611-0647 (35

pages), JA0667-0709 (43 pages), JA1233-1291 (58 pages). These disclosures were more than sufficient to satisfy the "purpose of Rule 26(a)(2) [which] is to provide notice to opposing counsel – before the deposition – as to what the expert witness will testify." *Bresler v. Wilmington Tr. Co.*, 855 F.3d 178, 210 (4th Cir. 2017) (citation modified) (Wynn, J., concurring and dissenting in part).[5] Plaintiffs' October 18, 2019 initial disclosures specifically referenced "all expert witnesses designated by any party," JA1961, and the reference to these experts was subsequently repeated in Plaintiffs' supplemental disclosures on September 10, 2021, and trial witness disclosures on December 24, 2021, and April 5, 2024. JA1835, JA1852, JA1941-1942. The district court's conclusion that Plaintiffs failed to timely disclose their expert witnesses is clearly wrong. JA0016.

2. The district court failed to both consider whether the 2021 and 2024 supplemental expert reports were appropriate Rule 26(e) supplementation and assess timeliness under Rule 26(e)(2). *Compare* JA0014-0016 (not addressing whether reports were proper supplementation) *with* JA2008-2009, JA2012-2014 & JA2033, JA2036-2039 (arguing that the disclosures were

[5] State Defendants deposed two of the experts. Dkt. 283-1, 283-2.

proper and timely under Rule 26(e)(2)). Rule 26(e)(2) sets the deadline to supplement to "the time the party's pretrial disclosures under Rule 26(a)(3) are due." Here, the district court set the final Rule 26(a)(3) disclosure deadline for April 5, 2024. JA1771. Plaintiffs disclosed the supplemental reports on or before that deadline. JA1941-1942.

The supplemental disclosures analyzed facts and evidence that could not have been addressed in the 2019 reports, including documents produced in the *Holmes* litigation, JA1814, JA2516, additional NCSBE data that was not produced until fall 2021 and winter 2024, JA1814, JA1832-1833, and analyses of subsequent legislative actions and the State Board's implementation of S.B. 824 in elections that took place after the state court injunction was lifted in 2023. JA2180-2248, JA2280-2296, JA2373-2476, JA2531-2547, JA2659-2985, JA3010-3057, JA3131-3146, JA3191-3226. These are appropriate subjects for supplementation under Fed. R. Civ. P. 26(e)(2). *Cf. Bresler*, 855 F.3d at 212 (Rule 26(e) permits supplemental reports for the purpose of "adding information that was not available at the time of the initial report."). The district court did not address appropriateness of disclosures under Rule 26(e); it simply ruled, clearly erroneously, that the experts were untimely disclosed under Rule 26(a)(2). JA0014-0016.

3. The district court's exclusionary sanction ruling was based on a fundamental misapplication of Rule 37 precedent. Rule 37(c) provides that a party's failure to disclose may be excused when the failure was "harmless," or when a non-disclosure is "substantially justified." In *Belk v. Charlotte-Mecklenburg Bd. of Educ.*, 269 F.3d 305, 348 (4th Cir. 2001) (*en banc*), this Court established a:

> four-part test for a district court to use when determining what sanctions to impose under Federal Rule of Civil Procedure 37. Specifically, "the court must determine (1) whether the non-complying party acted in bad faith, (2) the amount of prejudice that noncompliance caused the adversary, (3) the need for deterrence of the particular sort of non-compliance, and (4) whether less drastic sanctions would have been effective."

Under *Southern States Rack & Fixture, Inc. v. Sherwin-Williams Co.*, 318 F.3d 592, 597 (4th Cir. 2003), the analysis of whether nondisclosure was "harmless" turns on: "(1) the surprise to the party against whom the evidence would be offered; (2) the ability of that party to cure the surprise; (3) the extent to which allowing the evidence would disrupt the trial; [and] (4) the importance of the evidence." *Id.* Whether a failure to disclose is "substantially justified" turns on "the non-disclosing party's explanation for its failure to disclose the evidence." *Id.* Harmonizing this standard with the *en banc* decision in *Belk*, the *Southern States* court stated for a Rule 37(c) sanction,

while "bad faith" is not a "prerequisite for exclusion . . . [it] might be relevant to the . . . nondisclosing party's explanation for its failure to disclose evidence." *Id.* at 598. Here, the district court clearly erred in concluding that nondisclosure was neither harmless nor substantially justified and in failing to evaluate the appropriateness of the sanction.

a. The district court clearly erred in finding the nondisclosure was not harmless. Indeed, the district court found that surprise as to the 2019 and 2021 expert disclosures was "minimal." JA0021. This is supported by Plaintiffs':

- disclosure of hundreds of pages of reports in 2019,
- inclusion of "disclosed experts" in their 2019 initial disclosures,
- inclusion of each expert in 2021 Rule 26(a)(3) trial witness disclosures,
- service of the supplemental reports in 2019 and 2021.

Regarding prejudice, the district court properly found the Legislative Defendants were not prejudiced because they made a "decision not to seek leave from the Court to reopen discovery." JA0020.[6]

[6] The district court focused on the Legislative Defendants' strategic opposition to reopening discovery, JA0019-0020, JA2049, but the conclusion is supported by Legislative Defendants' submission of five opposition expert reports (Dkt. 96-7, 96-8, 96-9, 96-10, and 96-11), cross-examination of Plaintiffs' expert in the

The district court clearly erred, however, in failing to make a parallel finding as to the State Defendants. In particular, the district court's analysis did not consider the State Defendants:

- deposed two expert witnesses in 2019 (Dkt. 283-1, 283-2) and made no showing why they could not have deposed others;
- waited until 4:30 p.m. on the day their expert disclosures were due to advise Plaintiffs that they "[did] not intend to designate any expert witnesses at this time," apparently overlooking that Plaintiffs' 2019 reports met the standards for Rule 26(a)(2) disclosure (JA1811);
- knew in summer 2021 that Plaintiffs intended to use and supplement the fall 2019 expert reports, and did not contemporaneously object, while declining the opportunity to reopen discovery or take "additional depositions" (JA1821-1823, JA1825-1826);
- prepared and entered a protective order to facilitate providing election data to Plaintiffs' expert, Dr. Herron (Dkt. 171, 172);
- provided data to Dr. Herron so that he could update his analysis in fall 2021 and February 2024 (JA1833, JA2524);

Holmes trial, and declination of the opportunity to depose Plaintiffs' experts. JA2050.

- knew that the Plaintiffs listed the experts as trial witnesses in December 2021 (JA1849-1852) and failed to contemporaneously object;
- failed to conduct depositions or in any way suggest that Plaintiffs' experts had not been properly disclosed in February 2022 when Plaintiffs offered another opportunity to conduct depositions of the experts (JA2024-2025), and
- opposed Plaintiffs' request and the Magistrate's invitation in summer 2023 to reopen discovery, which easily would have accommodated any requested depositions or allowed designation of opposing expert reports. JA1642.

The district court's analysis (JA0012, JA0021) focused exclusively on the May 15, 2020 exchange (JA1810) without addressing the State Defendants' five subsequent opportunities to "cure" the claimed prejudice: in July 2021 (JA1821), fall 2021 (JA1827, JA1835, JA2330, JA2575, JA2927, JA3158), December 2021 (JA1849), February 2022 (JA2023-2025), and July 2023 (July 5, 2023 Auld text order). At any of these junctures, the State Defendants could have advised that they objected to the sufficiency of Plaintiffs' expert disclosures, accepted Plaintiffs' offer to depose experts, or sought leave to counter-designate experts. The district court did not address any of these

opportunities for State Defendants to "cure," and disregarded its own finding that any "surprise" as to the 2019 and 2021 reports was "minimal." The trial court's application of this Court's Rule 37 precedent on harmlessness was wrong as a matter of law, and against this record, constitutes an abuse of discretion. *Cf. Sherrod v. Lingle*, 223 F.3d 605, 613 (7th Cir. 2000) (finding district court abused discretion in excluding experts when party "disclosed names of both retained experts and their initial reports well before the deadline"). *See also Martinez v. United States*, 33 F.4th 20, 35–36 (1st Cir. 2022) (finding abuse of discretion); *Zerega Ave. Realty Corp. v. Hornbeck Offshore Transp.*, 571 F.3d 206, 213 (2d Cir. 2009) (same); *DeMarines v. KLM Royal Dutch Airlines*, 580 F.2d 1193, 1202 (3d Cir. 1978) (same); *In re Complaint of CF Bean*, 841 F.3d 365, 372–74 (5th Cir. 2016) (same); *OFS Fitel v. Epstein, Becker and Green, P.C.*, 549 F.3d 1344, 1360–65 (11th Cir. 2008) (same).

b. The district court clearly erred in finding the disclosure was not "justified." The district court focused exclusively on whether disclosure was made prior to the June 1, 2020 expert discovery cutoff (JA0021), and clearly erred in concluding that the combination of Plaintiffs' extensive expert disclosures (served eight months before the scheduling order deadline) and

identification in their October 18, 2019, Rule 26(a)(1) disclosures of "all expert witnesses designated by any party" was insufficient to satisfy the Rule 26(a)(2) disclosure requirement. *See, e.g., Sherrod*, 223 F.3d at 613 (the disclosure of "initial reports well before the deadline . . . prevent[ed] the chance that unfair surprise would hamper the defendants' preparation of the case").

The district court also failed to address Plaintiffs' arguments whether the supplemental expert disclosures, which analyzed evidence not available in 2019, could have been made earlier. *Compare* JA2008-2009, JA2012-2014, JA2033, JA2036-2039 (explaining why 2021 and 2024 reports concerned evidence produced or arising after 2019 and could not have been made earlier) *with* JA0001-0026 (no discussion).

c. Having concluded that a sanction was appropriate, the district court failed to analyze what sanction to impose. It did not assess whether nondisclosure was in "bad faith," if there was "need for deterrence," or if "less drastic sanctions would have been effective." *Belk*, 269 F.3d at 348. This Court's *en banc* decision in *Belk* is instructive. In *Belk*, defendants did not disclose *any* trial witnesses until five days before trial. *Id.* at 348. As a sanction, the trial court delayed the trial to allow for depositions of the witnesses and held defendant responsible for the fees and expenses. *Id.* Here, the district

court could have extended the discovery period (as the parties jointly requested in spring 2020 (JA1376-1377)), reopened discovery (as Plaintiffs requested in summer 2023 (Dkt. 202)), delayed the trial to permit depositions (as the *Belk* court did and the State Defendants suggested as alternative relief, Dkt. 252 at 20), or admitted the testimony limited to the Legislative Defendants, as to whom the district court had found no prejudice. JA0020. The failure to conduct any aspect of the assessment was clear error under this Circuit's Rule 37 precedent.

4. The district court acknowledged the excluded expert evidence was "important" and Plaintiffs' case "would certainly be weakened without" it. JA0020-0021. As relevant to the *Arlington Heights* analysis, the excluded evidence was critical.

First, the excluded Lichtman testimony discussed sequence of events and legislative history—the two *Arlington Heights* factors where the district court found Plaintiffs "fell short." In particular, Dr. Lichtman presented analysis that the General Assembly's "rushed and irregular" process to pass the legislation (JA5152-5181, JA5308-5313, JA2831-2839, JA2856-2863, JA2885-2892) included:

- North Carolina legislative leaders' efforts to obtain data (including racial data) about the impact of the law. JA5308-5313, JA2890. As Dr. Lichtman testified, the data acquisition was "quite important" because the "raw data includes racial data" and "the State Board of Elections provides this raw data to a staffer for a key player in photo voter ID, David Lewis, and generally an advisor to Republicans in the General Assembly." JA5310;
- Efforts of Republican sponsors of S.B. 824 to keep their possession of that data "secret" by not sharing "the racial data" with Democrats, were "a very important indicia of discriminatory intent. You got the racial data. You can look at the racial implications of what you're doing, but you're not sharing any of that." JA5311-5313, JA2891;
- Consistent with the updated racial data, Republican sponsors of S.B. 824 designed it to include the same features of H.B. 589 that had a racially disparate impact. JA5222-5240, JA2849-2853;
- Efforts of North Carolina legislative leaders (including David Lewis, Tim Moore, and Phil Berger) to deceive the federal court overseeing the *Covington* redistricting litigation to delay new elections by falsely asserting that compliant maps did not exist. JA5171-5182, JA2838-

2839. According to Dr. Lichtman, the legislative leadership engaged in "outright deception" and "clear bad faith" to retain its unconstitutional legislative supermajority. JA5181-5182. This intentional deception preserved the Republican supermajority, ultimately allowing the override of the veto of S.B. 824. JA5181-5182;

- Efforts of Senator Berger's top aides to mislead the sole Democratic sponsor, Senator Ford, as to the provisions of the bill and its impact on Black voters, undermining arguments that S.B. 824 was "bipartisan." JA5292, JA5300-5302, JA2863, JA2888-2889. As Dr. Lichtman testified, Senator Berger's aides obtained Senator Ford's support for the bill by deceiving him into believing it made free identifications available on election day, a provision that Senator Ford asserted was essential to his support for the bill, when the bill contained no such provision. JA5301-5302.

Also relevant to the legislative history, Drs. Lichtman and Minnite supplemented their analysis that the stated rationale for S.B. 824 (voter fraud) was "almost nonexistent" and claims to the contrary during legislative debate were disingenuously pretextual. JA4829-4879, JA5260-5268, JA5313-5316, JA5321-5331, JA2866, JA2896-2899, JA3000-3009. Evidence that

contemporaneous justifications were pretextual supports a finding of discrimination. *See, e.g.*, *Hunter*, 471 U.S. at 232-33; *Reeves v. Sanderson Plumbing Prod.*, 530 U.S. 133, 143 (2000) (evidence that the "proffered explanation is unworthy of credence" supports an inference of discrimination).

Second, the court excluded evidence from Drs. Leloudis, Burden, and Lichtman on post-S.B. 824 efforts to enact further voting laws that disproportionately burdened minorities. JA4757, JA4808, JA4815-4817, JA4946-4954, JA5340-5351, JA2905-2907, JA3253, JA3257-3258, JA3110-3113. While the district court found the history "weighs decidedly in favor of a finding of discriminatory intent," it tempered this finding, noting that *Raymond* warned "not to place an outsized weight on historical background." JA0102-0104. The excluded analysis showed that recent discriminatory enactments continued after S.B. 824.

Third, excluded evidence from Drs. Herron and Barreto demonstrated the ongoing, strong discriminatory impact of S.B. 824. Using data provided by the State Defendants, JA2508, JA2527, Dr. Herron twice updated his analysis and found that Black voters continued to lack photo ID at 2.6 times and Latino voters at 1.7 times the rate of White voters. JA5059, JA5065-5067, JA2484-2506. Dr. Barreto readministered his 2019 survey following the March 2024

primary and found Blacks were 2.3 times and Latinos were 2.5 times more likely to lack a qualifying identification than White voters. JA4977, JA5015-5038, JA2265-2279. The district court also excluded analysis from Dr. Burden on irregularities in the implementation of photo voter ID in North Carolina in 2023 and 2024 and the lack of efficacy of mitigating effects. JA4802-4828, JA3249-3260. Although the district court found the "burden to obtain ID . . . fall[s] disproportionately on Black and Hispanic voters," it tempered this finding, noting Legislative Defendants' objection that the analysis was conducted in 2019, and *Raymond*'s conclusion that studies have "limited weight when assessing disparate impact." JA0121-0125. The excluded evidence showing persistent racial disparities, consistent over time, would have buttressed the district court's findings.

Fourth, while the court allowed Defendants to introduce extensive evidence concerning their implementation of S.B. 824 in 2023 municipal and 2024 primary elections (*see* JA6459-6666), the court excluded Drs. Burden and Barreto's analysis of the implementation, which showed S.B. 824 had a pronounced discriminatory impact. JA2201-2209, JA3198-3208.

2. The District Court's Exclusion of Evidence that the Legislature Sought and Used Racial Data and Manipulated the Legislative Process

The district court improperly excluded or limited key evidence that the State Defendants provided racial data concerning the impact of S.B. 824 to senior staff of the North Carolina legislature (PX 196, PX 197 & PX 785) and the efforts of Legislative Defendants to deceive the sole Democratic sponsor of S.B. 824 (PX 1012). JA2160-2161, JA2162-2167, JA2168-2170, JA2171-2179. Both topics were discussed at length in Dr. Lichtman's excluded 2021 report (PX 1005) and in his offer of proof testimony. JA5300-5317.

During trial, Plaintiffs offered each of these exhibits into evidence, noting that they were statements of agents of the Defendants—senior General Assembly staff acting within the scope of their authority, and senior leadership of the State Defendants. JA4579-4596. Defendants objected to the introduction of each of these exhibits as hearsay. Dkt. 309, Dkt. 310. As Plaintiffs argued (i) because the basis for Legislative Defendants' intervention and standing was on behalf of the General Assembly as a whole, N.C. Gen. Stat. Ann. § 1-72.2(b), and (ii) these communications all involved statements by senior General Assembly legislative aides and State Board's senior staff, (iii) the communications were statements of a party opponent and

not hearsay under Fed. R. Evid. 801(d)(2), and (iv) the agent statements are attributable to the Defendants. JA2149-2156.

The district court properly found that each of these exhibits "are statements by a party opponent." JA4609. But the district court then cited hearsay rationales for excluding PX 196 and PX 1012 and misapplied hearsay principles in admitting PX 197 and PX 785 only for the purpose of showing a single legislator had access to racial demographic data. JA4609-4611. Each of these rulings involved legal errors and was clearly erroneous.

- Ex. 196 (JA2160-2161): an email from two senior House legislative aides to senior SBOE officials seeking data concerning the impact of S.B. 824. The district court excluded Ex. 196 because the "Legislative Defendants ... would not have an opportunity to cross-examine anything therein." JA4609. The inability to cross-examine is true of all hearsay. Moreover, this is a communication between agents of the two Defendants; if they wanted to provide context, they could have called the authors as witnesses.

- Ex. 1012 (JA2171-2179): an internal email among senior aides to Legislative Defendant Phil Berger about their efforts to manipulate Senator Joel Ford. The district court excluded it because Senator Ford did not testify. JA4611. But Senator Ford was the subject of the email, not one of the correspondents. If the Legislative Defendants wanted to provide context, they could have called the authors as witnesses. They also could have called Senator Ford, whom their counsel represented in this and the *Holmes* proceeding. Dkt. 97-5 at 15-19.

With regard to the district court's decision that PX 197 and PX 785 would be admitted only to show that "Representative Lewis only" received the

information, JA4609-4610, those rulings involved a legal error in applying Rule 801(d)(2). The district court failed to consider that these statements were made by senior officials of the State Defendants, who provided the requested racial data in response to a request from the General Assembly's agents. Moreover, this Court and other appellate courts have held repeatedly that out-of-court statements of an agent of an entity party-opponent are admissible as to the entity as a whole. *See, e.g.*, *United States v. Brothers Constr. Co. of Ohio*, 219 F.3d 300, 310-11 (4th Cir. 2000) ("Because a corporation can act only through its employees, a statement by a corporate official . . . can certainly be considered an admission by a corporate defendant") *superseded by statute on other grounds*, 803 F.3d 167, 182; *EEOC v. Watergate at Landmark Condominium*, 24 F.3d 635, 638 (4th Cir. 1994) (attributing statements of defendant's agents to defendant); *see also Sutton v. Roth*, 361 F. App'x 543, 547-48 (4th Cir. 2010) (unpub.) (reversing a district court for abusing its discretion in excluding an employee's statements as hearsay contrary to Federal Rule of Evidence 801(d)(2)(D)); *White v. Honeywell, Inc.*, 141 F.3d 1270, 1274–76 (8th Cir. 1998) (reversing a district court's abuse of discretion in excluding an agent admission as hearsay when the evidence was "highly probative" of plaintiff's claims against the employer); *Weil v. Citizens Telecom*

Servs. Co., 922 F.3d 993, 1000–01 (9th Cir. 2019) (finding abuse of discretion in excluding an employee's statements as hearsay). Here, the Legislative Defendants' statutory basis for intervening in this case is to represent the Legislature as a whole (Dkt. 7, Dkt. 8 at 8), so the General Assembly is a party opponent. There was also trial testimony about the leadership role Chairman Lewis played in the General Assembly and his central importance to the passage of S.B. 824. JA4168, JA4179, JA4211-4212, JA4268-4269, JA4547-4548, JA4552-4553, JA5158-5162, JA5166, JA5174-5176.

The exclusion and limitation were critical: based on the exclusion, the district court improperly concluded that "there is no evidence before [it] that conclusively demonstrates that the General Assembly requested racial data before or during their consideration of S.B. 824," JA0119, and that the legislation had "bipartisan support." JA0112. This led the court to conclude that the legislative history of S.B. 824 does not support a finding of discriminatory intent. The exclusion of both racial-data and the Senator Ford evidence goes directly to the findings the district court itself identified as dispositive.

II. The District Court's Legal Errors Were Material.

A. The District Court's Legal Errors Caused It to Misapply Two *Arlington Heights* Factors.

Despite its legal errors, the district court found that Plaintiffs introduced "significant and compelling evidence" of discriminatory intent under the *Arlington Heights* historical background disparate racial impact factors. JA0137.

But the effect of the district court's legal errors is clear in its assessment of legislative history and the General Assembly's procedural shenanigans that it held "compelled" the conclusion that Plaintiffs' extensive evidence of discriminatory intent had "fallen short." JA0113, JA0116, JA0120, JA0127, JA0137-0138.

When viewed cumulatively as *Arlington Heights* requires (429 U.S. at 265–66), the sequence of events to and legislative history of S.B. 824 "bespeaks a certain purpose" in the same way this Court found dispositive in *McCrory*. 831 F.3d at 229. Importantly, the district court made the following findings:

- "[O]nly hours after … the Supreme Court's [denial of *certiorari* in *McCrory*] that legislative leaders began calling for a new law." JA0061-0062. *Cf. McCrory*, 831 F.3d at 227 (noting legislature acted "immediately after *Shelby County*");
- The same supermajority of legislators who were elected based on maps found to be illegal racially gerrymandered districts passed the operative legislation. JA0062;

- "[T]he procedural irregularities of S.B. 824 began with H.B. 1092, the proposed constitutional amendment that spurred it." JA0108. The legislature enacted H.B. 1092 under "unique circumstances" and "distinct from how the General Assembly has previously passed proposed amendments to the State constitution." JA0107;

- H.B. 1092 was passed as one of six proposed constitutional amendments considered simultaneously in the short session, which was "abnormal" and "not the General Assembly's usual practice." JA0062-0063;

- During the single public hearing on H.B. 1092, speakers "presented evidence to show that adopting a photo ID requirement would disenfranchise voters." JA0064;

- It took twenty-two days to passage, when "the process from proposal to passage of a proposed constitutional amendment" "normally . . . takes months." JA0064;

- "The unusual pace of H.B. 1092 is amplified by [its] peculiar committee route." JA0107. H.B. 1092 was "abruptly withdrawn" from the Elections and Ethics Law Committee and "immediately re-referred to the Committee on Rules, Calendar and Operations of the House," JA0064, "a committee not normally entrusted" with constitutional amendment review. JA0108;

- H.B. 1092 was enacted without implementing legislation—"which violated the General Assembly's decades-long norm for constitutional amendments" JA0064. "Not only was the process rushed . . . the lack of draft implementing legislation for voters' consideration was unprecedented." JA0108;

- H.B. 1092 "was passed along party lines, with Republican legislators voting in favor and Democratic legislators voting against." JA0065;

- The day that H.B. 1092 was passed, "[t]he General Assembly was adjourned indefinitely" when "typically a short session of General Assembly is adjourned to some concrete date in the future." JA0065, JA0108-0109;

- Following election day in which the Republicans lost their supermajority, the General Assembly commenced a "lame duck session" to consider implementing legislation. The legislative procedures for S.B. 824 were "immediately unusual." JA0108. The session was "suddenly announced" and convened on November 27, 2018, the Tuesday following Thanksgiving. JA0065, JA0108-0109;

- The process was "rushed," "went more quickly than any other legislation" and was "better suited for the next legislative session." There were "no upcoming elections that necessitated the constitutional amendment's implementing legislation that could not have been addressed . . . [by] the new General Assembly." JA0065-0066, JA0069. *Cf. McCrory*, 831 F.3d at 228 ("the legislature rushed it through the legislative process");

- "S.B. 824's proposed text was released" on November 20, 2018, "the Tuesday before Thanksgiving Day." After convening on November 27, S.B. 824 passed the Senate by November 29. JA0065, JA0108-0109;

- S.B. 824 was "brought [up] with limited external and internal study." JA0109. The legislature did not follow "the usual practice of the General Assembly to convene a commission to study a constitutional amendment's issue and have that commission recommend proposed implementing language." JA0066-0067. "No such commission was convened, or study performed for S.B. 824." JA0109;

- The "urgency to enact implementing legislation for S.B. 824 was not present for the other three constitutional amendments the voters ratified that November," which were not considered in the lame-duck session. JA0067, JA0109;

- "The five days of readings of S.B. 824 . . . were abnormally fast." JA0110. *Cf. McCrory*, 831 F.3d at 228 ("legislators expressed dismay at the rushed process").

- "Regular legislative procedure was also changed for the lame-duck session." The Assembly eliminated the three-reading requirement to allow S.B. 824 to "quickly pass through the legislative session"; JA0066, JA0110;

- "There were irregularities in the limited debate and public comment permitted for S.B. 824." JA0109. The Senate only received public comment on "the Monday after Thanksgiving" and "was limited to less than an hour" and "before S.B. 824 was even filed in the Senate," and speakers were "allocated" "two minutes" each. JA0067, JA0109-0110. *Cf. McCrory*, 831 F.3d at 228 (noting only "one day for a public hearing").

- "The time allotted for public comment in the House was even shorter," only "five members of the public" were "permitted to speak" and were "limited to one minute each." JA0069, JA0109-0110;

- All Democratic amendments proposed in the Senate and House that would have mitigated the racial impact of the law were rejected. JA0068, JA0069. The district court noted rejection of these amendments "appears suspect." JA0118. *Cf. McCrory*, 831 F.3d at 227 (noting exclusion of public assistance identifications "was suspect").

- "Legislators of both parties expressed fear [during debate] that S.B. 824 would be considered by the public to be voter suppression." JA0116;

- From the debate and public comment, "legislators were on notice about the difficulties that voters in minority groups would have in trying to comply with S.B. 824's photo identification requirements." JA0117;

- Following second reading in the House, the bill proceeded "immediately" to third reading, "overrul[ing] objections" when "normally [the third reading] would have gone over to another day" to permit additional amendments. JA0070, JA0110;

- The pace "left no opportunity for the minority caucus—or really, any other representative[]—to make substantial amendments to the text before the successive reading. . . . amendments to S.B. 824 were defeated as a result of veto, lack of time, and denial of debate." JA0110-0111. *Cf. McCrory*, 831 F.3d at 228 ("hurried pace . . . strongly suggests an attempt to avoid in-depth scrutiny").

  It bears emphasis that these are the district court's own factual findings.

Hearing much of the same evidence, the *Holmes* court found that "the

significant departures by the North Carolina General Assembly from its normal legislative processes leading up to the passage of S.B. 824 provide strong circumstantial evidence of discriminatory intent" and "the legislative history of S.B. 824 here indicates that the General Assembly intended to target African American voters in order to entrench the Republican majority." JA1486-1495; *see also* JA1430-1431.

The district court concluded that this litany of irregularities was insufficient—a conclusion predicated on misapplied, piecemeal *Arlington Heights* analysis that constitutes reversible error. *McCrory*, 831 F.3d at 228–29. Indeed, the district court repeatedly found that the process was "abnormal" (JA0063, JA0064, JA0070, JA0107, JA0108, JA0109, JA0110), "unusual" (JA0063, JA0066, JA0107, JA0108, JA0109), "atypical" (JA0065), "unique" (JA0072, JA0107, JA0147), "rushed" (JA0065, JA0066, JA0108, JA0109), "suspect," (JA0118), and "unprecedented" (JA0063, JA0108). Yet the district court found that this evidence could not "evoke a finding" of discriminatory intent unless each irregularity independently qualified as "truly peculiar," directly contrary to *McCrory*. JA0111; *see also supra*, Section I.B.

The district court's misapplication of law of the case doctrine and the *Arlington Heights* standard skewed its analysis. *See* JA0036, JA0138. It emphasized that "without more direct evidence" the "Fourth Circuit [has] made clear that the preliminary injunction record of the procedural irregularities before this Court cannot justify a finding of discriminatory intent." JA0113. Recognizing that *Raymond* found the preliminary injunction record insufficient on sequence of events and legislative history, Plaintiffs buttressed these points with supplemental analyses from Dr. Lichtman and six trial witnesses, including four legislators (Van Duyn, Reives, Morey, and McKissick) and two participants in the legislative process (Lopez and Barber). Notwithstanding this supplemental evidence, the trial court's deference to *Raymond* and misapplication of *Arlington Heights* led it to make a series of five clearly erroneous rulings.

1. Despite hearing from numerous trial witnesses who participated in the legislative process and finding that the five days of legislative deliberations (i) "were abnormally fast," (ii) only possible because of the House rule change and overruling objections, (iii) "left no opportunity for the minority caucus" to amend the bill and (iv) were rife with "irregularities in the limited debate," JA0109-0112, the district court concluded that it was bound by "the Fourth

Circuit [observation] that the short amount of time it took to pass S.B. 824 does not weigh in favor of finding discriminatory intent." JA0111.

2. The district court concluded that it was bound by *Raymond*'s observation that "S.B. 824 enjoyed bipartisan support." JA0112. The district court treated Senator Ford's sponsorship as sufficient to establish that "the degree of participation of both the minority and majority caucus in S.B. 824 . . . cuts against a finding of discriminatory intent"—without reevaluating whether that single fact retained the same significance against the whole trial record. JA0112. The district court ignored Plaintiffs' supplemental testimony that Senator Ford had lost his primary, had left the Democratic caucus at the time S.B. 824 was enacted, and that the legislation was not bipartisan. JA3776-3777, JA4128-4132, JA4140-4143, JA4262-4265, JA4307-4309. The district court's improper exclusion of Dr. Lichtman's analysis (both as to lack of bipartisanship, JA2863, and the deception of Senator Ford) and evidence of the efforts of Legislative Defendant Berger's aides to deceive Senator Ford discussed above compounded this error. *Cf.* JA1451-1454 (noting Senator Ford's misunderstanding on the availability of Election Day and concluding S.B. 824 "was not the result of a normal, bipartisan legislative process").

3. The district court concluded that it was bound by *Raymond*'s observations that "a previous legislature's request and use of racial data is not indicative of discriminatory intent," and "as instructed by the Fourth Circuit, this Court cannot conclude that the General Assembly had racial data, even though the makeup of the legislature's makeup was substantially similar to those who passed H.B. 589." JA0114-0115, JA0119. The district court's finding is anachronistic. Requests for data (in PX196, 197 & 785) were sent in December 2017 and July 2018, well after *certiorari* was denied in *McCrory*, and included not only the H.B. 589 data, but updated racial data confirming that Black and Hispanic voters lacked qualifying identification at much higher rates. As in *McCrory*, the data provided to the General Assembly's agents in early 2018 "showed that African Americans disproportionately lacked the most common kind of photo ID, those issued by the Department of Motor Vehicles." *McCrory*, 831 F.3d at 216. *Compare* JA5065-5067 (Black voters lack photo identification at over 2.5 times the rate of non-Hispanic White voters). In concluding "there is no evidence . . . that conclusively demonstrates that the General Assembly requested racial data" in conjunction with S.B. 824, the district court ignored PX196, 197, and 785. JA0119. In so doing, the district court made clear that it was imposing a heightened burden of proof of seeking

"direct evidence" that "conclusively demonstrates" discriminatory intent rather than simply requiring "preponderance of the evidence" or considering "circumstantial evidence." *Compare* JA0119-0120 *with Arlington Heights*, 429 U.S. at 266.

4. The district court discounted evidence that "legislators were on notice about the difficulties that voters in minority groups would have in trying to comply with S.B. 824's photo identification requirements," concluding it was bound by *Raymond* and "must avoid relying too heavily on comments made by the bill's opponents." JA0116-0117. But *Raymond*'s observation was made without the evidence that Legislative Defendants had obtained racial data on the impact of the bill, or trial testimony or the legislative transcripts including data on how S.B. 824 would discriminate against Black and Latino voters. *See, e.g.,* JA5697 (Senator Van Duyn noted that 381,000 registered voters lacked driver's licenses and referenced analysis that 9.6% of African American registered voters lacked acceptable ID, as compared with 4.5% of white registered voters); JA5740 (Representative Harrison noting that as many as 200,000 voters lacked identification); JA5829 (witness testified "218,000 North Carolinians [that] do not have a voter ID"). The district court also did not consider that in vetoing the bill, Governor Cooper specifically cited the

disenfranchisement of minority voters, JA5520, something the General Assembly knew when it overrode the veto.

5. The district court concluded that although the rejection of ameliorative amendments that would have, *e.g.*, permitted public assistance IDs was "suspect," it was bound by *Raymond*'s observation that these amendments' disposition "does not suggest . . . [they] passed or failed due to discriminatory intent." JA0117-0118. But this is belied by Dr. Lichtman's testimony, which concluded that the rejection of these amendments was "direct evidence for discriminatory intent." JA5239, JA2854. Although the district court noted that the rejection of three other ameliorative amendments (House Amendment 3 (allowing high school identifications), Senate Amendment 9 (allowing federal or state employment identifications), Senate Amendment 8 (allowing "one stop" issuance of identification and early voting) and the passage of House Amendment 7 (eliminating two-witness verification)) all had a "tendency to limit eligible voters" and "appear suspect," the district court held that under *Raymond* it was required to give these "limited weight." JA0118, JA0121.

* * *

The district court did not simply weigh conflicting evidence and find Plaintiffs' case lacking; it expressly found Plaintiffs' factual assertions to be *true*, noted that the "events in legislative history appear suspect," and acknowledged that comparable evidence supported a finding of discriminatory intent in *McCrory*. The district court attributed the contrary result here to "the strength of the presumption of legislative good faith," the "lens" that this presumption required it to apply, and reached its conclusion by misapplying the *Arlington Heights* standard and law of the case doctrine discussed above. JA0113, JA0116, JA0118.

B. The District Court's Errors Resulted in an Erroneous Judgment

None of the errors were harmless. A legal error that infects a court's analysis of the ultimate question in the case—and an evidentiary ruling that excludes evidence bearing on that same question—requires reversal or remand unless the reviewing court can say with confidence that the error did not affect the outcome. *See* Fed. R. Civ. P. 61; *see also Sea "B" Mining Co. v. Addison*, 831 F.3d 244, 253–54 (4th Cir. 2016) (quoting *Shinseki v. Sanders*, 556 U.S. 396, 411 (2009)); *Coastal Coal Co. v. Harrison*, No. 22-2122, 2024 WL 3042895, at *1 (4th Cir. June 18, 2024) (unpub.) (per curiam). That standard applies to errors committed at a bench trial: even where a court "erred in its

choice of legal principles, the error [is] harmless" only if the prevailing party "would have prevailed under the applicable legal principles" regardless. *See Strickland v. Moritz*, 149 F.4th 378, 392 (4th Cir. Aug. 15, 2025) (quoting *EEOC v. Alton Packaging Corp.*, 901 F.2d 920, 925 (11th Cir. 1990)). This record does not permit that confidence; to the contrary, the district court's opinion shows that the errors identified fundamentally determined its analysis.

Further, this is not a case in which the district court's judgment survives on other grounds, nor one in which the remaining, unchallenged record evidence would allow this Court to conclude with confidence that no reasonable factfinder could have reached a different result. *Coastal Coal*, 2024 WL 3042895, at *1. Rather, the legal errors were central to the district court's reasoning.

The district court's analysis reflects its misapplication of the good faith presumption and heightened evidentiary standards, its over-reading of *Raymond*'s conclusions, and the misapplication of totality of the circumstances review. Each of these errors requires reversal. Applying *Arlington Heights* correctly, under the appropriate totality of the evidence standard, and without erroneous law-of-the-case and evidentiary exclusions, as required by this

court's precedents, the evidence presented was more than sufficient to find discriminatory intent. Accordingly, the judgment on Plaintiffs' Fourteenth and Fifteenth Amendment claims should be reversed, or, at a minimum, vacated and remanded for reconsideration under the correct legal standard and on the complete evidentiary record.

CONCLUSION

The Court should reverse the district court's judgment.

Dated: September 30, 2026

Respectfully submitted,

/s/ John A. Freedman

John A. Freedman
Jeremy C. Karpatkin
David Kouba
Preston Smith
ARNOLD & PORTER KAYE SCHOLER LLP
601 Massachusetts Ave., NW
Washington, DC 20001
(202) 942-5000
john.freedman@arnoldporter.com

G. Thomas Rivera III
ARNOLD & PORTER KAYE SCHOLER LLP
Four Embarcadero Center, 14th Floor
San Francisco, CA 94111
(415) 471-3100

Caitlin Swain-McSurely
Kathleen E. Roblez
FORWARD JUSTICE
P.O. Box 1932
Durham, NC 27702
(919) 323-3889
cswain@forwardjustice.org
kroblez@forwardjustice.org

Penda D. Hair
FORWARD JUSTICE
P.O. Box 42521
Washington, DC 20015
(202) 256-1976
phair@forwardjustice.org

Irving Joyner
P.O. Box 374
Cary, NC 27512
(919) 319-8353
ijoyner@nccu.edu

Counsel for Plaintiffs-Appellants

STATEMENT IN SUPPORT OF ORAL ARGUMENT

Plaintiffs-Appellants request oral argument and believe oral argument would assist the Court in its decisional process given the complexity and importance of the constitutional issues presented. *See* 4th Cir. R. 34(a).

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 32(a) and 32(g), the undersigned counsel for Plaintiffs-Appellants certifies as follows:

1. This brief complies with the type-volume limitations because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this brief contains 12,555 words.

2. This brief complies with the typeface and type-style requirements of Fed. R. App. P. 32(a)(5) and (6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word for Office 365 and is set in 14-point Century Expanded BT font.

/s/ *John A. Freedman*
John A. Freedman

Counsel for Plaintiffs-Appellants

CERTIFICATE OF SERVICE

I hereby certify that on September 30, 2026, I electronically filed the foregoing brief with the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ *John A. Freedman*
John A. Freedman

Counsel for Plaintiffs-Appellants