

# **EXHIBIT A**

# EXPERT REPORT

*North Carolina State Conference of the NAACP*

v.

*McCrary, et al.*

UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF NORTH CAROLINA  
Case No.: 1:13-cv-00658-TDS-JEP (M.D.N.C.)  
Judge Thomas D. Schroeder  
Magistrate Judge Joi Elizabeth Peake

**December 4, 2015**

A handwritten signature in black ink that reads "Barry Burden". The signature is written in a cursive, flowing style.

**Barry C. Burden, Ph.D.**

## **Background and Purpose**

In preparation for trial, I submitted an expert report in this case to the Court on February 12, 2015. In the days just before the trial began, the state legislature passed and Governor McCrory enacted SL 2015-103, an amendment passed as HB 836 that modified the photo ID provision of SL 2013-381. As a result of the last-moment change in law, the photo ID provision was not addressed during the summer trial proceedings and my report was not altered to reflect the amendment to the law. The purpose of this supplemental report is to explain how the modification of the photo ID law found in SL 2015-103 affects the conclusions I reached.

My earlier report analyzed SL 2013-381 through the lens of the “Senate factors” that underlie Section 2 of the Voting Rights Act. Relying on well-established social science theories and a variety of documents and data sources, I reached several conclusions about the photo ID portion of the law. I deemed the original photo ID requirement to be a tenuous policy because the law is poorly reasoned in terms of its lack of connection to evidence of a policy need for the provisions enacted, and unnecessarily strict in terms of its limited pool of acceptable forms of identification and other restrictions. I concluded that SL 2013-381 would impose a disproportionate burden on blacks and Latinos relative to whites because of how the law interacts with social and economic conditions in the state. Moreover, minority residents would face more difficulty than whites in overcoming those burdens.

On review of SL 2015-103,<sup>1</sup> I conclude that while the modification of the photo ID law has potential to ameliorate certain of the burdens imposed by the original law and the potentially to reduce the disparate effects that it imposed on blacks and Latinos in North Carolina, the requirement remains tenuous and disproportionately burdensome, particularly among those who are unaware of the newly added “reasonable impediment” option or who may be deterred by the process required to use the option. The evidence available as to the State’s efforts at public education around SL 2013-381 over the last two years shows that such education efforts generally did not include information about the reasonable impediment option. At the same time, however, there has been significant media coverage and public discussion of the new laws and their requirements, and thus there is likely some understanding within the electorate that a photo ID requirement now exists and perhaps that an “exception” to that requirement was created. However, what little information is available to the public is less accessible to black and Latino voters for many of the same reasons discussed at length at the trial last summer, *i.e.*, due to disproportional educational attainment and lower literacy rates, as well as language barriers. As a result, blacks and Latinos will continue to be disproportionately impacted by the photo ID requirement.

## **The Options Available in SL 2015-103**

SL 2015-103 provides that a resident who appears at a polling place to vote but lacks valid ID is permitted to pursue one of two alternatives. First, he or she may complete a written request for

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<sup>1</sup> As of the time of writing of this Report, I understand that the State of North Carolina has not provided responses to any of the discovery requests served upon it as to the details of the requirement or the State’s plans as to administering the photo ID requirement or the new provisions pursuant to SL 2015-103. I reserve the right to supplement these Opinions on the basis of such additional information if and when it becomes available.

an absentee ballot within the time frame previously allowed by law. Second, he or she may complete a reasonable impediment declaration and cast a provisional ballot at the polls.

The *absentee ballot option* provides only limited amelioration of the burden imposed by the photo ID requirement. Indeed, the option is not new because voters were permitted to request an absentee ballot under the same parameters before SL 2015-103 was enacted. The amendment requires that voters without acceptable ID be “notified” about the option. Absentee ballot request forms are due to the county Board of Elections by 5 p.m. on the Tuesday before the election. The form may be delivered to the Board by mail, by email, by fax, or in person. Thus, the absentee ballot option is not available to a voter who appears in the final week before Election Day or a voter who wishes to cast a ballot in person at the polls. Use of this option is further limited for those who are given the form within a day or two of the deadline, as submission of the form by mail will not be a viable means for meeting the application deadline. Other means of delivery require time and resources such as transportation, more expensive shipping options (*e.g.*, overnight), or access to a computer or fax machine. Many votes are cast in the final days of the campaign cycle. Professor Charles Stewart’s expert report shows that black voters are more likely than white voters to cast ballots in the final week of early voting.<sup>2</sup> Minority voters also have less in the way of resources such as literacy and transportation to navigate this process. As a result, the absentee ballot option for voters without ID has little ability to ameliorate the disparate burden of the law because of its limited applicability.

Even for a voter who is able to use the absentee ballot option, the administrative burdens are significant. Once an absentee ballot is received, the voter must return it for counting. Ensuring the completion and return of the absentee ballot requires additional actions on the part of the voter. As I noted in my prior report, absentee ballots are less likely to be counted than those cast in person.<sup>3</sup> Voters also rightly have less confidence that absentee ballots will be counted as they intended and might be dissuaded from using this option.<sup>4</sup> Moreover, minority voters in North Carolina are more likely to vote in person and are less likely than white voters to cast absentee ballots.<sup>5</sup> As a result of these limitations, this absentee ballot provision does not substantially ameliorate the disparate impact of the photo ID requirement.

Relative to an absentee ballot, the *reasonable impediment option* has more potential to ameliorate the impact of the photo ID requirement, but the relief provided is still limited, and disproportionately so for black and Latino voters. A brief description of the option is required to explain this conclusion.

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<sup>2</sup> See Figure 16 of the Stewart report.

<sup>3</sup> See also Charles Stewart (2011), “Adding Up the Costs and Benefits of Voting by Mail,” *Election Law Journal* 10:297-301.

<sup>4</sup> Barry C. Burden and Brian J. Gaines (2015), “Absentee and Early Voting: Weighing the Costs of Convenience,” *Election Law Journal* 14:32-7. Paul Gronke (2015), “Voter Confidence as a Metric of Election Performance,” in *The Measure of American Elections*, ed. Barry C. Burden and Charles Stewart III, New York, NY: Cambridge University Press.

<sup>5</sup> See PX242 at App. S, Tables 2 and 3 (Stewart Rpt.); see also PX231 at 144-148 (Lichtman Rpt.), PX229 at 23 (Burden Rpt.).

A voter wishing to avail her or himself of the reasonable impediment process must first present a voter registration card, another approved identification document showing name and address, or the last four digits of a Social Security Number and date of birth. The reasonable impediment declaration form then requires the voter to mark one of seven impediments (such as “lack of transportation” or “family responsibilities”) or to list an “other reasonable impediment.” Notwithstanding the voter’s indication, a voter’s county Board of Elections may apparently still reject a provisional ballot if it has grounds to believe that the declaration is “factually false,” was completed to “denigrate” the photo ID requirement, or is “obviously nonsensical.” No guidance is provided in the statute, nor am I aware of any guidance that has been issued by the State, regarding any limits on the discretion of such county Board of Elections officials in deciding to reject a ballot on these grounds. Any registered voter in the county may also challenge another voter for these reasons, prompting additional scrutiny by the county Board of Elections before the voter’s ballot may be counted. Although this requirement is not in the statute, the reasonable impediment declaration form developed by the state requires the voter to sign it to indicate understanding that “fraudulently or falsely completing this form is a Class I felony under Chapter 163 of the NC general statutes.” A voter might be reluctant to sign the form out of concern that making a mistake would subject him or her to prosecution.

Other important details of the reasonable impediment process remain unclear. First, it is unclear if another reason such as “not being aware of the photo ID requirement” would be accepted as a reasonable impediment. If lack of knowledge of the photo ID requirement is not accepted as reasonable impediment and an additional provisional ballot affidavit is required, SL 2015-103 continues to impose a significant burden on aspiring voters. Second, because a voter using a reasonable impediment form must also cast a provisional ballot, it is possible that the voter will additionally be required to complete a provisional ballot affidavit. Although to my knowledge the State has not declared exactly what processes will be used, it is clear that a voter using the reasonable impediment option faces the burdens of providing documents or information at the polls and completing additional paperwork.

In general the requirements of the photo ID law demand more time, skills, and other resources of voters lacking photo ID than are required of traditional voters. Perversely, the group of voters most likely to lack photo ID are also the group that would be most likely to lack precisely these additional resources, typically for the same reasons that they lack the identification in the first place, *i.e.*, disproportionately lower levels of literacy and education – and these are disproportionately black and Latino voters. The reasonable impediment option will be helpful to some voters who are aware of and are able to pay these costs, but the costs will continue to be disproportionately felt by blacks and Latinos compared to whites, even though minority voters have fewer resources to overcome them. Concern about the administrative hassle and time and money required to navigate the new photo ID requirement as well as its reasonable impediment exception declaration process is likely to deter blacks and Latinos more than whites. I conclude that while the reasonable impediment option moderates the impact of the photo ID requirement modestly, it does not eliminate the disproportionate burdens imposed by SL 2013-381. Depending upon the details as to how the new provisions are going to be administered, these burdens have the potential to remain significant.

## Public Awareness

Even if the absentee ballot and reasonable impediment options could successfully ameliorate the disparate burden imposed by SL 2013-381, they would do so only to the degree that aspiring voters are aware that these options exist and are prepared to take advantage of them. My review indicates that the State has not sufficiently informed the public about the amendments to the photo ID requirement.

The photo ID requirement under SL 2013-381 is in effect beginning on January 1, 2016. The law mandated a “soft rollout” in the 2014 and 2015 elections in which participating voters were informed about the law. Generally speaking, providing this sort of information at the polls, in concert with other means of public education, could have been helpful in ameliorating the burden imposed by the law. In this instance, however, this approach falls short in two ways. First, it misses many voters who will vote in the November 2016 presidential election. Even in the highest turnout election during the soft rollout period – the November 2014 election – approximately 3 million votes were cast. In the 2012 presidential election, which is a better guide to participation levels in the 2016 presidential election, turnout was 4.5 million — or 50% more voters. Thus, even delivery of accurate information at the polls about the photo ID requirement would fail to reach at least 1.5 million North Carolina residents expected to vote in November 2016.<sup>6</sup> Even voters who were informed about the photo ID requirement at the polls were not informed about the reasonable impediment option because it did not yet exist.

Additionally, in early 2015 the state Board of Elections implemented a targeted mailing to approximately 218,000 residents who were identified through Department of Transportation data as lacking photo ID for voting. These individuals were sent a mailing informing them about the ID requirement, but that mailing did not include information about the reasonable impediment option because it did not yet exist. Presumably recipients of the mailings remain largely unaware of the provisions created in SL 2015-103.

In early November 2015, following enactment of the reasonable impediment option, the state Board of Elections released a public service announcement that would be posted online and aired on television and radio stations around the state in the lead up to the 2016 elections.<sup>7</sup> The one-minute spot features individuals urging viewers to bring an ID to the polls to vote. The speakers list the IDs that are acceptable, although the ad makes no mention of whether various forms of ID must be unexpired to be valid for voting. Partway through the ad, a voiceover asserts that “the process is easy.” This assertion is true for many or even most voters, but not for all. Specifically, it is less true for black and Latino voters than for whites. Another voice in the ad states that, “If you don’t have an ID, or if you’re unable to obtain one, there are still options for voting,” with no further details or information on those options. This message is reiterated at the end of the ad, where the web site and phone number for the Board of Elections are provided. At no point does

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<sup>6</sup> The discrepancy between those informed at the polls in November 2014 and those who vote (or wish to vote) in November 2016 is actually greater than 1.5 million. Some voters who participated in 2014 will not vote in 2016, so the number of new voters exceeds 1.5 million. In addition, the voting eligible population has change between the two elections due to immigration to and from the state, deaths, and individuals who reached majority age in the two years between the elections.

<sup>7</sup> <https://vimeo.com/144657827> (last visited November 25, 2015).

the announcement mention the “reasonable impediment” affidavit option. In fact, the ad reflects no specific changes that resulted from the amendment to the photo ID law and could have been aired before SL 2015-103 was enacted.

Public awareness of photo ID requirements is essential so that aspiring voters can successfully navigate the law and cast ballots that will be counted. A lack of public information has been a concern in other states where photo ID laws have been implemented.

For instance, the Supreme Court of Pennsylvania cited in its opinion permanently blocking a photo ID law adopted in that state in 2012 an expert witness who provided evidence about public knowledge of the law. A statewide survey showed that 38% of eligible voters did not know that that the state had an ID requirement.<sup>8</sup> In addition, while 98% respondents believed that they had valid ID for voting, subsequent questions about specific forms of identification revealed that only 86% in fact did have valid IDs under the law. The Court’s opinion also cited another expert who opined that the state’s informational campaign about the photo ID law was inconsistent in messaging and incomplete in the detail it provided. As a result, the state fell short of correcting prior information and that “contributed to confusion and rendered the marketing campaign ineffective at accurately educating the electorate.”<sup>9</sup>

Beyond the Pennsylvania example, surveys in other states indicate that public knowledge is often far from accurate. In Wisconsin a statewide survey was conducted following a highly publicized federal appeals court ruling enforcing the state’s photo ID.<sup>10</sup> The survey showed that 20% of registered voters erroneously believed that a photo ID would not be required to vote in the upcoming election.<sup>11</sup> Another 7% reported “don’t know,” for a total of 27% who were unaware of the law. Most importantly, whereas only 19% of whites mistakenly believed that ID would not be required, 28% of blacks and 25% of Latinos were misinformed. Adding those who “don’t know” raises the share of each group that was uninformed to 28% for whites, 35% for blacks, and 40% for Latinos.<sup>12</sup>

Although public awareness in North Carolina about the general voter ID requirement might be better than in Wisconsin, knowledge of the reasonable impediment provision added in July 2015 is likely to be low.

National survey data suggest how commonly aspiring voters abstain from voting because they believe that they are unable to comply with voter ID laws. Consider data from the Survey on the Performance of American Elections, an academic study that surveys thousands of registered

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<sup>8</sup> Expert report of Matt A. Baretto, *Applewhite, et al. v. Commonwealth of Pennsylvania et al.* (No. 330 MD 2012). Rates were similar for registered voters (34.3%) and people who voted in the 2008 election (34.2%).

<sup>9</sup> Memorandum opinion by Judge McGinley, *Applewhite, et al. v. Commonwealth of Pennsylvania et al.* (No. 330 MD 2012) filed January 17, 2014, page 11.

<sup>10</sup> The decision was issued on September 12, 2014. The Marquette Law Poll was in the field September 25-28. A subsequent order from the U.S. Supreme Court reinstated the injunction on October 9, 2014.

<sup>11</sup> The rate was a similar 18% for “likely” voters.

<sup>12</sup> These figures are provided in the crosstab analysis posted at <https://law.marquette.edu/poll/results-data/> (last visited November 20, 2015).

voters after each federal election. Respondents who reported that they did not vote in a recent election were asked, “How much did the following reasons play in your not voting in the November General Election?” This question was followed by a list of 14 reasons. For each reason, a respondent could indicate that it was “not a factor,” “a minor factor,” “a major factor,” or “I don’t know.” In 2012 the share of non-voters selecting “I did not have the right kind of identification” as their reason for not voting was 11% among whites and 19% among blacks and Latinos. In 2014, those citing ID as a factor comprised 8% of whites and 14% of blacks and Latinos. It is unclear whether all of these individuals had accurate perceptions of what constituted a lack of ID, but that is part of the point. A nontrivial share of the electorate does not participate in federal elections because they believe that they do not have the necessary ID. For the reasons described above in other contexts, these perceptions are more common among black and Latino voters than among whites.

While the “reasonable impediment” option could help ameliorate the disproportionate burden of SL 2013-381, it would only do so if the public is sufficiently informed about the provision so that they are not dissuaded from voting by the belief that ID is strictly required of individuals who wish to vote in person, and if they are not deterred by the process of executing the paperwork necessary to exercise that option. Lower levels of education among blacks and Latinos relative to whites will require that initiatives to inform the public be particularly targeted at minority residents to counteract the misinformation that most likely exists on these issues at present.