IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

NORTH CAROLINA STATE CONFERENCE OF THE NAACP, et al., Plaintiffs, v. PATRICK LLOYD MCCRORY, in his official capacity as the Governor of North Carolina, et al., Defendants.	**NAACP PLAINTIFFS' PRE-TRIAL BRIEF** **Case No.: 1:13-CV-658**
LEAGUE OF WOMEN VOTERS OF NORTH CAROLINA, et al., Plaintiffs, v. THE STATE OF NORTH CAROLINA, et al., Defendants.	**Case No.: 1:13-CV-660**
UNITED STATES OF AMERICA, Plaintiff, v. THE STATE OF NORTH CAROLINA, et al., Defendants.	**Case No.: 1:13-CV-861**

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INTRODUCTION

As originally enacted, North Carolina SL 2013-381 imposed a strict photo identification requirement that threatened to disenfranchise substantial portions of the State's electorate. Last summer, after two years of litigation and on the eve of trial, the State recognized that its law suffered from two crippling legal infirmities: (1) there was no evidence of in-person voter fraud in North Carolina, thus undermining the purported justification for the law; and (2) the statute stood to impose enormous and disproportionate burdens on minorities once it went into effect in violation of Section 2 of the Voting Rights Act and the 14th and 15th Amendments of the Constitution). Faced with those realities, the North Carolina General Assembly amended SL 2013-381 weeks before trial to establish a procedure permitting individuals without photo ID to cast a provisional ballot so long as they execute a "reasonable impediment" declaration.

In many ways, the amendment raised more questions than it answered. The rationale for North Carolina's originally enacting a photo ID requirement was to deter in-person voter fraud. But allowing those without such ID to vote simply by signing a "reasonable impediment" affidavit would seem to undermine that justification, particularly against an evidentiary background of no in-person voter fraud in North Carolina and the increased tax dollars that North Carolina taxpayers will need to spend implementing this law. Against that background, one must question what North Carolina's real motivation is in continuing to insist on imposing a photo ID law at all.

In any event, the reasonable-impediment revisions to SL 2013-381 fall far short of curing the illegal and unconstitutional burdens the photo ID law would plainly have

imposed on North Carolina minority voters in the absence of such a provision. African-American and Latino voters in North Carolina still face disproportionate burdens to obtaining photo ID, including the ostensibly free photo ID that the law provides. That means that a disproportionate number of African-American and Latino registered voters will be funneled into the reasonable-impediment process, a process that does not allow them to cast a regular ballot at the polls. It also remains unclear how the State will implement many of the crucial details of the reasonable-impediment process, and that uncertainty poses a substantial risk that African Americans and Latinos will face more significant obstacles to using that process than will whites, and that some will be deterred from undertaking that process in the first place in light of statewide confusion regarding its implementation and requirements.

Moreover, the North Carolina legislature's knowledge of the photo ID requirement's disproportionate burdens on African Americans, its elimination of forms of ID originally included in the bill, and the absence of any credible (much less substantial) legislative rationale, all show that the legislature enacted the statute—at least in part—to make it harder to vote and to deter minority voters in violation of the Fourteenth and Fifteenth Amendments. The law's subsequent amendment does not ameliorate its prohibited intent. And even if this Court concludes that the legislature lacked discriminatory intent in enacting SL 2013-381, the requirement remains unlawful because it produces discriminatory results and burdens the right to vote in ways that, as has been established in the record, are not outweighed by any substantial State purpose.

BACKGROUND

On June 25, 2013, the Supreme Court decided *Shelby County v. Holder*, 133 S. Ct. 2612 (2013), which struck down the coverage formula for the pre-clearance requirement of the Voting Rights Act of 1965, rendering it inoperable. In the immediate aftermath, the North Carolina General Assembly passed sweeping voting restrictions in North Carolina House Bill 589 (2013) (which became SL 2013-381). SL 2013-381 mandates, among other things, that registered voters show one of a limited number of specific government-issued photo ID cards in order to cast a regular ballot in North Carolina elections.

The North Carolina State Conference of the NAACP, along with other plaintiff groups, filed these actions against the State and certain State officials in their official capacities (collectively, the "Defendants") pursuant to Section 2 of the Voting Rights Act, 52 U.S.C. § 10301, and the Fourteenth and Fifteenth Amendments to the United States Constitution, challenging the photo ID requirement and other provisions of SL 2013-381, both individually and cumulatively. Discovery demonstrated that the photo ID requirement imposes disproportionate burdens on African Americans and Latinos, who are statistically less likely to possess one of the forms of ID required to vote; that lawmakers knew and intended this result when they passed the law; and that the State's efforts to educate and assist voters in obtaining one of the mandated forms of ID was plagued with problems.

This Court scheduled trial to commence on July 13, 2015, during which Plaintiffs were prepared to present evidence regarding the photo ID requirement and other provisions of SL 2013-381. However, approximately three weeks before trial, the

General Assembly passed North Carolina House Bill 836 (2015) ("HB 836"), which made various amendments to the photo ID requirement contained in SL 2013-381.

The parties agreed to defer trial on Plaintiffs' challenges to the photo ID requirement. Trial proceeded on the remaining challenged provisions of SL 2013-381 and concluded on July 31, 2015. On October 23, 2015, this Court denied the State's motion to dismiss the photo ID claim and later adopted a schedule setting trial on Plaintiffs' challenges to the photo ID law.

The challenged photo ID requirement in SL 2013-381 requires that beginning January 1, 2016, North Carolina voters who cast ballots in person must provide one of the following forms of government-issued photo ID: (1) a North Carolina driver's license, learner's permit, or provisional license; (2) a special non-operators identification card; (3) a United States passport; (4) a tribal enrollment card issued by a federally recognized tribe or tribe recognized in North Carolina; (5) an identification card issued by another state subject to certain limitations (only if the voter's voter registration was within 90 days of the election); or (6) a military or veterans' identification card. *See* N.C. Gen. Stat. § 163-166.13. SL 2013-381 requires the DMV to issue a special identification card free of charge to any registered voter who lacks SL 2013-381 ID. *See* N.C. Gen. Stat. § 20-37.7(d)(5).[1] SL 2013-381 establishes three statutory exceptions; the following voters are not subject to the photo ID requirements: (i) curbside voters; (ii) those with a religious

[1] North Carolina law requires applicants for such free identification cards to furnish the same underlying identifying information as applicants for any other DMV identification, including at least two forms of identification approved by the Commissioner of Motor Vehicles. *See* N.C. Gen. Stat. §§ 20-37.7(b); 20-7(b1).

objection to being photographed who complete a form 25 days in advance of Election Day; and (iii) voters deemed victims of natural disasters as established by the state.

HB 836 does not eliminate the photo ID requirement but rather amends SL 2013-381 to provide a process for voters who cannot obtain a form of mandated ID to complete a "reasonable impediment declaration," provide a form of identification, and vote a provisional ballot, which shall be counted in accordance with N.C. Gen. Stat. § 163-182.1B (the "Reasonable Impediment Declaration Provision"), *see* N.C. Gen. Stat. § 163-166.13(c). The law, however, allows a voter in the county to challenge the veracity of a reasonable impediment declaration and allows a county board of elections to reject the provisional ballot if it determines the declaration is factually false, denigrates the photo ID requirement, or is obviously nonsensical; or if the voter has failed to provide underlying supporting identification. *Id.*

ARGUMENT

I. THE EVIDENCE WILL SHOW THAT THE PHOTO ID REQUIREMENT VIOLATES SECTION 2 OF THE VOTING RIGHTS ACT

A. Fourth Circuit Standard for Vote Abridgement Claims

Section 2 of the Voting Rights Act ("VRA") prohibits a state from "impos[ing] or appl[ying]" any electoral practice "which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color." 52 U.S.C. § 10301(a). Under Section 2(b) of the VRA, a voting practice "results in a denial or abridgment of the right . . . to vote on account of race or color," *id.*, if, after examining "the totality of the circumstances," racial minorities have "less opportunity than other

members of the electorate to participate in the political process and to elect representatives of their choice," *id.* § 10301(b). The total numbers of such voters is not the appropriate metric; the disparity between whites and racial minorities is.

The U.S. Court of Appeals for the Fourth Circuit, applying Section 2 in this case, reinforced the fact that a Section 2 vote abridgement claim consists of two elements:

> (i) The challenged standard, practice, or procedure must impose a discriminatory burden on members of a protected class, meaning that members of the protected class have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.
>
> (ii) That burden must in part be caused by or linked to social and historical conditions that have or currently produce discrimination against members of the protected class.

League of Women Voters v. North Carolina, 769 F.3d 224, 240 (4th Cir. 2014).

This is a "totality of the circumstances" test—one that looks at the presence of one or more of the factors identified in the Senate Report accompanying the 1982 amendments to the Voting Right Act (the "Senate Factors"). *Id.* at 240 (citing *Thornburg v. Gingles*, 478 U.S. 30, 44-45 (1986)). The Fourth Circuit emphasized the settled law that there is no requirement that any particular number of Senate factors be proved, or even that a majority of them point one way. Rather, courts must undertake a searching practical evaluation of the reality, with a functional view of the political process. The Fourth Circuit stressed that this is an intensely local appraisal of the design and impact of electoral rules in the light of past and present reality. *Id.*; *Gingles,* 478 U.S. at 44-45. Thus, a practice that may be permissible in one place could result a prohibited inequality

in voting opportunities based on race in another, depending on the past situation and the particular impacts present.

Plaintiffs bringing a Section 2 claim need not show that a challenged practice makes voting impossible for minorities—only that it makes voting disproportionately more burdensome. As the Fourth Circuit has explained: "[N]othing in Section 2 requires a showing that voters cannot register or vote under any circumstance." *League of Women Voters*, 769 F.3d at 243; *see also Ohio State Conference of N.A.A.C.P. v. Husted*, 768 F.3d 524, 552 (6th Cir. 2014) ("Section 2 applies to any 'standard, practice, or procedure' that makes it harder for an eligible voter to cast a ballot, not just those that actually prevent individuals from voting."); *Holder v. Hall*, 512 U.S. 874, 922 (1994) (Thomas, J. concurring in the judgment). Section 2 thus prohibits not only the outright "denial," but also the "abridgement" of the right to vote. 52 U.S.C. § 10301.

B. African Americans Disproportionately Lack ID Mandated To Vote By SL 2013-381

Even after the enactment of the reasonable-impediment provision, African Americans in North Carolina continue to disproportionately lack the forms of identification required by SL 2013-381. The analysis of plaintiffs' expert Dr. Charles Stewart indisputably shows that African Americans disproportionately lack one of the forms of ID required to vote under SL 2013-381.[2] Indeed, Dr. Stewart's analysis shows

[2] Dr. Stewart's analysis found that although African Americans constitute just 22.4% of North Carolina's registered voters, they make up about 40% of voters on the list of voters who were unmatched to the most prevalent forms of acceptable Photo ID—the so-called "no-match list." By contrast, white voters comprise about 70.9% of North Carolina registered voters but only 51% of the no-match list. Stewart 4/2/2015 Addendum. The racial disparities are even greater if inactive licenses are not allowed for voting; a full 25% of North Carolina's African Americans

that African Americans lack the required photo ID at well over twice the rate of white voters. Stewart 4/2/2015 Addendum, Revised Table 11.

The evidence will show that the State's own matching analysis confirms the racial disparities:

- A January 2013 analysis by the North Carolina State Board of Elections ("SBOE") found that 31.2% of those registered voters without photo ID were African American and 56.8% were white—even though African Americans made up just over 20% of registered voters and whites constitute about 70% of North Carolina voters. JA 1671, 1673.

- The SBOE's March 2013 matching report concluded that 33.0% of those on the no-match list were African American (compared to 21.9% of registered voters) and 55.3% were white (compared to 71.9% of registered voters). JA 1784.

- Another comparison using additional matching criteria in April 2013 reported that 33.8% of those without a matched ID were African American and 54.2% were white (even though just 22.0% of registered voters were African American; 71.4% of registered voters were white). JA 1825-1827, 1830.

- And a 2015 analysis (using data from 2014) found that 36.0% of voters who could not be matched to the DMV database were African American and 48.8% were white. *See* Pls.' Dep. Ex. 411 at 607, 10-11 (Nov. 2014 Matching Report).

Indeed, with each successive revision to the SBOE's list of unmatched voters, the racial disparity between African American and white voters expanded. *See* Lichtman 2015 Response Rpt. (Mar. 24, 2015) at 11-13 & tbls. R-2, R-2A.

Defendants argue that the numbers of voters indicated as no-matches to an ID on these lists are inflated, based in part on responses from a series of mailings the State sent

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were without an active ID, compared to just 8.7% of white voters. *Id.* Tbl. 11, col. 6. The racial disparities are even more pronounced among those most likely to vote—active voters and people who voted in 2012 and 2014. Stewart Trial Decl. ¶¶ 107-109.

to voters on Dr. Stewart's and the State's no-match list. As an initial matter, the Defendants' expert did not perform a racial breakdown of those voters who did and did not respond to those mailings. In any event, the evidence will show that the response rate was under 10% for the State's mailings, and that a higher rate of respondents indicated they had ID than the matching process would suggest. Plaintiffs' experts will demonstrate that it is not valid to draw inferences from the response rates to those mailings, pointing to the return as too low from which to draw inferences. Even Defendants' experts concede that the low response rate is likely not one from which they would draw inferences. Plaintiffs' experts will also point to social science suggesting individuals may respond in such surveys that they have ID when they do not; that people of lower education, lower literacy, and lower socio-economic status are less likely to respond to this type of mailing than voters with higher education and literacy rates; and thus that the response sample received from the SBOE mailings is unlikely to be representative of the rates of ID possession among the mailing group.

C. Voters Of Color Are Disproportionately Burdened In Obtaining ID Mandated To Vote By SL 2013-381

The record at trial will also establish that racial minorities still face disproportionate barriers to obtaining required ID due to demographics, poverty, and a host of other social and economic factors that interact with the law to erect greater barriers and costs for African Americans and Latinos. For example, Dr. Stewart's matching analysis found that counties with larger African American populations, lower median household incomes, lower literacy levels, and less access to private automobiles

had more voters on the no-match list. Stewart Trial Decl. ¶¶ 135, 141-143, Figures 6 and 7 (analyzing 397,997-person no-match list). Indeed, in every county in North Carolina, except for two, African American voters are more likely to be on the no-match list than white voters. *Id.* ¶ 138, Figure 5.

The evidence will demonstrate that obtaining ID for voting under SL 2013-381 can be burdensome due to a variety of factors, including underlying documentation requirements, fees, travel to DMV offices due to in-person application requirements, limited business hours or availability of DMV offices, and a lack of voter education. As Plaintiffs' experts and witnesses will opine, these burdens are disproportionately borne by minority voters, who also lack the resources to overcome them. This evidence includes testimony from African American voters who will testify that obtaining ID is burdensome for them.

Moreover, the evidence will show that the process for obtaining North Carolina driver's licenses, non-operator identification cards, and no-fee voter ID cards can be daunting, time-consuming, costly, and difficult. Applicants must apply in person at a Department of Motor Vehicles ("DMV") office, provide underlying documents that are not free to obtain, pay a fee (sometimes multiple fees), and overcome a variety of procedural and substantive barriers. First-time applicants must complete an application form, and present (i) at least two forms of documentary proof of identity, (ii) proof of social security number, and (iii) proof of North Carolina residency. The North Carolina DMV charges fees to issue a driver's license and non-operator ID cards, both originals and renewals—fees that just increased as of January 1, 2016 ($40 for those age 18-65;

$13 for non-operator ID cards). N.C. Gen. Stat. §§ 20-7, 20-37.13, 20-37.15, 20-37.16. No-fee ID cards are available but only to individuals (1) who can prove that they are homeless, (2) who are legally blind, (3) who are age 70 or over; (4) whose driver's license have been medically canceled; or (5) who are registered voters and otherwise lack photo ID that can be used for voting under SL 2013-381. N.C. Gen. Stat. § 20-37.7(d).

Plaintiffs will present evidence that African American and Latino voters are less likely to have access to a DMV office from which to procure ID required to vote under SL 2013-381. Evidence from the North Carolina State Department of Transportation ("DOT") confirms that brick-and-mortar offices are not available in every county, Defs.' Resps. to Reqs. for Adm. ¶¶ 72, 74, and that hours vary, with limited evening and weekend hours, Defs.' Resp. to Supp. Reqs. for Adm. ¶¶ 78, 79, 82, 83. DOT evidence will likewise demonstrate that the DMV's mobile units fail to ameliorate the limited availability of the brick and mortar offices. *Id.* ¶¶ 68, 69, 79, 81. Some counties do not have access to a DMV office.

The evidence will demonstrate that it can be difficult for some voters to obtain the underlying identification necessary to procure ID, that the underlying documents required to do so may cost money, and that the process may be error-ridden (errors which can be burdensome to rectify). In particular, Latinos may be particularly prone to errors in underlying identifying documents due to disparities in Latino naming conventions. The evidence will also show that African Americans are more likely to possess canceled, suspended, or revoked driver's license, which cannot be used for purposes of voting

under the law. Defs.' Resps. to Reqs. for Adm. 36, 38, 40; Stewart Trial Decl. ¶ 127 & tbl.11; Stewart 4/2/2015 Addendum.

D. The No-Fee Voter ID Program Does Not Ameliorate the Burden on Voters of Color Who Lack Qualifying Photo ID.

The evidence will demonstrate that the availability of a no-fee voter ID is insufficient to ameliorate the burdens on voters of color in North Carolina. North Carolina allows certain voters to obtain ID without cost, including those who are registered voters and otherwise lack photo identification that can be used for voting under SL 2013-381. N.C. Gen. Stat. § 20-37.7(d). Because African Americans disproportionately lack one of the required forms of ID, African Americans have been disproportionately funneled into the no-fee voter ID process.

Unlike South Carolina, North Carolina requires applicants for no-fee voter ID cards to furnish the same underlying identifying information as applicants for any other DMV identification, including at least two forms of identification approved by the Commissioner of Motor Vehicles. *See* N.C. Gen. Stat. §§ 20-37.7(b), 20-7(b1). Moreover, African Americans still face the following hurdles: the need to apply in person at locations that may be remote and/or only open on limited days of for limited hours; documentation requirements and knowledge of such requirements; the DMV's failure to publicize the program; and unbridled examiner discretion. The evidence will demonstrate that African Americans and Latinos have fewer resources to overcome those hurdles. The unsurprising result of these barriers is that North Carolina has issued a small number of no-fee voter IDs since the program's inception in January 2014.

E. The Reasonable Impediment Provision Does Not Ameliorate the Disproportionate Burden on Voters of Color Who Lack Qualifying Photo ID

The "reasonable impediment" provision added by HB 836 does not alleviate the unlawful burdens imposed by the photo-identification requirement of SL 2013-381. That is true for several reasons. *First*, as explained above, African Americans and Latinos are less likely to have ID mandated by SL 2013-381 and face greater burdens to obtaining that ID than their white counterparts. They are therefore disproportionately more likely to have to avail themselves of HB 836's reasonable impediment procedures if they appear to vote in person, and therefore disproportionately more likely than their white counterparts to face the burdens discussed below.

Second, the evidence will establish that completing a reasonable impediment declaration is a transaction that could be complex and intimidating depending on the voter's situation. Witnesses will testify that voters are segregated to a separate line, required to declare the nature of their "impediment" in a public setting, under penalty of perjury, before a poll worker who may be a neighbor. These additional costs and burdens of voting will be disproportionately borne by African Americans and Latinos who have fewer resources to overcome them and could swing the balance against participation for many would-be voters.

Third, implementation of the reasonable impediment declaration provision remains unclear in ways that will discourage minority voter participation. For example, it is unclear what ability voters have to challenge the legitimacy of the reasonable impediment declaration made by another voter, the discretion afforded to County Boards

of Election to reject a provisional ballot cast pursuant to the reasonable impediment provision, and the discretion and penalties for erroneous statements.

Finally, although other courts have sustained voter-ID laws even without a reasonable impediment exception, that does not inevitably sustain the lawfulness of the photo identification requirements at issue here. This Court must reject the notion that the existence of a reasonable impediment provision *per se* ameliorates any burden imposed by a photo ID requirement. As with all Section 2 inquiries, its impact is gleaned through an intensely local appraisal that examines the impact of the challenged provision in the light of past and present reality—for voters in North Carolina. *League of Women Voters*, 769 F.3d at 240; *Gingles*, 478 U.S. at 44-45.

F. The Reasonable Impediment Provision Is Different In Important Ways From the Reasonable Impediment Provision In South Carolina

The Defendants have thus far defended the photo ID requirement in part on grounds that North Carolina's reasonable impediment exception is similar to South Carolina's photo ID law. The evidence will establish that the situations in the two states are distinct.

First, the South Carolina proceedings occurred under Section 5 of the VRA, a different standard than applicable to this Section 2 claim. There, the court had to determine whether the voting change was racially retrogressive: "The effects prong of Section 5 of the Voting Rights Act measures a State's proposed new voting law against the benchmark of the State's pre-existing law." *South Carolina v United States*,

898 F. Supp. 2d 30, 32 (D.D.C. 2012). In contrast, the Section 2 inquiry here must look to the present disparity of the current law between minorities and whites.

Second, the scope of change from prior law is relevant to this Court's analysis of the impact of the photo ID requirement as it goes to the relative burden the law imposes on voters to acclimate to the new requirement. Indeed, Section 2's effects test behooves the court to examine the challenged provision in the light of past and present reality**.** *League of Women Voters*, 769 F.3d at 240-41; *Gingles*, 478 U.S. at 44-45. On this metric, there is considerable difference between North Carolina and South Carolina. As the three-judge panel in *South Carolina* noted, South Carolina already had a voter ID law in effect for "several decades" prior to passage of Act 54. *South Carolina*, 898 F. Supp. 2d at 32. Before enactment of Act R54, South Carolina's prior law required all voters to show ID, including "a South Carolina driver's license, DMV photo ID card, or non-photo voter registration card in order to vote." *Id.* Although South Carolina was now introducing a *photo* ID requirement, such modification was much less pronounced than in North Carolina, which, prior to HB 589, did not require voters to show *any* ID, much less DMV-issued ID. Rather, for decades, North Carolina voters verified their identity through a signature attestation process. As Plaintiffs' experts will establish, the larger the change in law, the greater the costs that voters will need to pay in order to acclimate—and the less likely that voters will be to participate in the political process.

Third, the *South Carolina* court noted that, compared to prior law, "R54 *expands* the kinds of photo IDs that may be used to vote—adding passports, military IDs, and new photo voter registration cards to the driver's licenses and DMV photo ID cards already

permitted by pre-existing law." 898 F. Supp. 2d at 32 (emphasis added). In contrast, North Carolina's law restricts the forms of ID allowed to vote compared to prior law.

Fourth, in granting preclearance in *South Carolina*, the court found it relevant that South Carolina law expanded opportunities for voters to obtain compliant ID. *Id.* ("Act R54 minimizes the burden of obtaining a qualifying photo ID as compared to pre-existing law."). Unlike South Carolina, where voters can obtain compliant ID to vote at either a DMV office or *any* county elections office, in North Carolina, voters may only obtain voter ID at a DMV office. In addition, the court noted in *South Carolina*, that every county had a county elections office, *id.* at 33 ("There is at least one elections office in each of South Carolina's 46 counties"), and that every county has a DMV office, *id.* at 34 ("There is at least one DMV office in all 46 counties, and more than one DMV office in some of the more populated counties."). In contrast, the evidence here will establish that that not all North Carolina counties have DMV offices; that the DMV offices that do exist are open for varying days and hours; and that voters cannot obtain ID at any North Carolina county elections office.

Additionally, the evidence will show North Carolina voters must present identification in order for their provisional ballot to be counted. In North Carolina, a voter's reasonable impediment declaration is subject to challenge by any other voter in the county. Beyond that, provisional ballots may be discarded for a host of other reasons, including errors or omissions on the provisional ballot envelope. As Plaintiffs' experts will testify, provisional ballots in North Carolina are rejected at a rate much higher than the national average.

II. SL 2013-381 WAS ENACTED WITH DISCRIMINATORY INTENT IN VIOLATION OF THE VRA AND 14TH AND 15TH AMENDMENTS

The trial record already includes substantial evidence demonstrating that the challenged provisions of SL 2013-381, including the photo ID requirement, were adopted at least in part for a discriminatory purpose. The evidence confirms, for instance: legislators' knowledge of the disparate impact of the changes to voting laws on African Americans and Hispanic voters; motivation to limit the methods of registering and voting used by minority groups; the tenuousness of the alternative rationales offered for the statute; and the irregular and unusual legislative process used to pass SL 2013-381. Plaintiffs will supplement that substantial evidence at the upcoming trial.

Section 2 of the Voting Rights Act prohibits voting practices adopted with a racially discriminatory purpose. *See*, *e.g.*, *Garza v. Cnty. of L.A.*, 918 F.2d 763, 766 (9th Cir. 1990); Senate Report at 27. To prevail on this type of Section 2 claim, a plaintiff must demonstrate that the legislation at issue was motivated by an unlawful discriminatory purpose, but it is not necessary "that the challenged action rested ***solely*** on racially discriminatory purposes" or that the racially discriminatory purpose "was the 'dominant' or 'primary' one." *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977) (emphasis added). "Rather, Plaintiffs need only establish that racial animus was one of several factors that, taken together, moved [the decision-maker] to act as he did." *Orgain v. City of Salisbury*, 305 F. App'x 90, 98 (4th Cir. 2008).

Discriminatory purpose may be proven by direct or circumstantial evidence, and a plaintiff need not demonstrate any invidious racial animus in order to establish liability.

See Rogers v. Lodge, 458 U.S. 613, 618 (1982). All that is required is a showing of intent to disadvantage or burden racial minorities. *Garza*, 918 F.2d at 778 & n.1 (Kozinski, J., concurring in part and dissenting in part); *see also LULAC v. Perry*, 548 U.S. 399, 440 (2006). Courts can also rely on the Senate Factors to find a racially discriminatory purpose. *See Rogers*, 458 U.S. at 620-21. "Once racial discrimination is shown to have been a 'substantial' or 'motivating' factor behind enactment of the [challenged] law, the burden shifts to the law's defenders to demonstrate that the law would have been enacted without this factor." *Hunter v. Underwood*, 471 U.S. 222, 228 (1985).

The evidence in this case supports a finding of discriminatory purpose. The record demonstrates that in enacting SL 2013-381, the North Carolina General Assembly was responding to increased political power among African American and Latino voters by making changes in the State's election law to limit that power and prevent minority voters from threatening the prospects of the political party then in control of the General Assembly. As set forth in the July 2015 trial, the political power of African Americans rose between 2004 and 2013. 7/17/15 Trial Tr. 98:3-99:6 (Lichtman). When combined with the State's racially polarized voting patterns, *see id.* 99:10-101:8, this posed a substantial threat to the political power of whites—thus motivating them to enact SL 2013-381. Sponsors and supporters of SL 2013-381 were well aware of the disproportionate impact that the photo ID requirement and other provisions of the law would have on minority voters. Indeed, they specifically requested and received this data while considering the law. *See* Plaintiffs' Joint Proposed Findings of Fact and Conclusions of Law ("FF"), [ECF No. 364], ¶¶ 166-174, 177-180. Legislators had ample

evidence regarding the disproportionate impact of the photo ID requirement in particular when they passed the law. But despite these warning signs, and despite rampant opposition from civil rights groups who presented evidence of the law's disparate impact, sponsors and supporters never substantively addressed concerns that SL 2013-381 would harm African American and Latino voters.

Consequently, this Court can draw the "normal inferences to be drawn from the foreseeability of defendant's actions," *i.e.*, that the sponsors and supports of HB 589 intended that the law would have the effect that they knew it would. *See McMillan v. Escambia Cnty.*, 748 F.2d 1037, 1047 (5th Cir. 1984) (quoting S. Rep. No. 97-417, at 27 n.108 (1982)); *see also Washington v. Davis*, 426 U.S. 229, 253 (1976) (Stevens, J., concurring) ("[N]ormally the actor is presumed to have intended the natural consequences of his deeds."). Indeed, the situation here bears resemblance to the situation in *LULAC*, where the Supreme Court affirmed a finding of a Section 2 violation when, on the eve of Latino voters gaining potential control over a particular Congressional District, the Texas Legislature made changes to the State's voting laws to prevent Latino voters from threatening the re-election prospects of a State Representative who was a member of the majority party. *See* 548 U.S. at 410-11. The same is true here.

The trial record further established that North Carolina has a long and repeated history of clamping down on African American voting strength after surges in minority political power. FF ¶¶ 3-13. SL 2013-381's photo ID requirement is only the most recent example. The path to that photo ID requirement began in 2011, when after a decade of expanded opportunities to vote in North Carolina, the legislature in 2011 passed a photo

ID requirement that was vetoed by the Governor. Following the election of Governor Patrick McCrory, lawmakers renewed their efforts to reverse course with another photo ID proposal in 2013, an effort that then expanded following the Supreme Court's decision in *Shelby County v. Holder*, 133 S. Ct. 2612 (2013), to limit the pre-clearance process.

"[A]n invidious discriminatory purpose may often be inferred from the totality of the relevant facts," *Davis*, 426 U.S. at 242, and "discriminatory intent need not be proved by direct evidence," *Rogers*, 458 U.S. at 618. Here, the disparate burdens that SL 2013-381 inflicts on African Americans and Latinos, the legislature's knowledge of those burdens at the time the statute was enacted, the lack of any credible, non-discriminatory basis for the law, and the highly unusual manner in which the law was enacted all lead to the conclusion that at least one motivating purpose behind SL 2013-381 was to make voting more burdensome for African Americans and Latinos. That analysis is only confirmed by the Senate Factors, many of which provide circumstantial evidence of discriminatory intent. *See, e.g.*, *Rogers*, 458 U.S. at 623 (explaining that racially polarized voting patterns (Senate Factor 2) "bear heavily on the issue of purposeful discrimination"); *id*. at 613, 619-20 & n.8, 623-24 (recognizing that "unresponsiveness of elected officials to minority interests [Factor 8], a tenuous state policy underlying the [challenged practice] [Factor 9], and the existence of past discrimination [Factor 1]," to be "relevant to the issue of intentional discrimination").

III. SL 2013-381 CONTRAVENES THE DIRECTIVES SET FORTH BY THE SUPREME COURT IN *ANDERSON* AND *BURDICK*

The flexible balancing test under the *Anderson* and *Burdick* cases requires courts to "weigh the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate against the precise interests put forward by the State as justifications for the burden imposed by its rule." *See Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (quotations omitted); *see also Anderson v. Celebrezze*, 460 U.S. 780, 793-94 (1983). In particular, the Court must consider the effects of the restriction on those voters who are actually affected by it, compared with the State's interest in burdening those voters' right to vote. *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 198, 201 (2008) (in assessing severity of burdens imposed by voter ID law, holding that relevant burdens "are those imposed on persons who are eligible to vote but do not possess a current photo identification" and "indigent voters").

Here, the impact of requiring photo ID from the subset of North Carolina voters who do not have one of the acceptable forms of photo ID must be balanced against the State's interest in implementing the photo ID requirement. The evidence will show that North Carolina's planned implementation of its photo ID law fails the *Anderson*/*Burdick* balancing test because of (i) the State's inability to adequately inform and re-educate voters with regard to the amended photo ID Requirement, (ii) the State's failure to properly train county board of election officials and poll workers regarding the amended law, (iii) the State's inadequate rulemaking and failure to seek public input on the

amended law, and (iv) the State's lack of preparation to assist voters to execute reasonable impediment declarations.

On the one hand, the interests of voters who do not have a qualifying photo ID are extremely strong: many voters without ID will simply be deterred from trying to vote because of the substantial efforts made by the State to inform voters that they "must" have photo ID to vote in 2016 and the failure to re-educate them regarding the new exceptions to the photo ID law. Others will be deterred or intimidated because of the lack of information regarding the details of the process and lack of public input and rulemaking. And those voters who make it to the polls are likely to encounter poll workers who are unprepared to administer the new law. In contrast to these serious harms to voters, and the State has no legitimate interest in implementing the photo ID requirement.

Applying the *Anderson-Burdick* framework, the lead opinion in *Crawford* explained that the proper balancing inquiry takes place within the specific context of the State at issue. 553 U.S. at 198-99. Although the *Crawford* Court upheld Indiana's voter ID requirement, notwithstanding its lack of a reasonable impediment exception, that determination does not require a finding that North Carolina's law passes muster. The application of this test is a highly localized inquiry. Plaintiffs already presented evidence at the July 2015 trial establishing North Carolina's long history of purposeful discrimination against African Americans and other minorities in the area of voting. *See* FF ¶¶ 3-13. Plaintiffs also demonstrated that this history of discrimination has created socioeconomic disparities that make African Americans and other minorities less able to

bear the costs of participating in the electoral process. *See* FF ¶¶ 4, 14-44. These State-specific factors impact the balancing analysis that the Court must conduct under the *Anderson-Burdick* framework and allow for a different outcome in this case relative to *Crawford* and *South Carolina*, notwithstanding any potential similarities among the three laws at issue.

With respect to North Carolina's *purported* justification for the law—the focus of the second half of the *Anderson-Burdick* balancing test—this is also a localized inquiry, and must be given particular weight in light of the facts in that case. Accordingly, a state's rationale is not "one size fits all," and a purported state rationale cannot be viewed as *per se* justifiable under this balancing test. Put simply, what one state may believe is a benefit or justification may not suffice in another state with a different history with respect to voting and elections. Not only have the underlying rationales for photo ID requirements listed by the court been discredited by some of the Indiana law's previous supporters (*See e.g.*, *Frank v Walker*, 773 F.3d 783, 794-95 (7th Cir. 2014) (Posner, J., dissenting)), but the inquiry must be specific to the validity of the rationales offered by lawmakers in light of the evidence in North Carolina.

Here, Plaintiffs presented substantial evidence that the State's claims of preventing fraud were pretextual given the absence of *any* history of in-person voter fraud in the State. *See* FF ¶¶ 169-184. Indeed, one North Carolina lawmaker admitted that: "There is some voter fraud, but that's not the primary reason for doing this." FF ¶ 169. No empirical evidence was presented to the North Carolina legislature to suggest that voter fraud was a problem in the State or that voters lacked confidence in the electoral process.

FF ¶ 170. Plaintiffs experts will testify at trial that no new information rebuts that conclusion. By contrast, in *South Carolina*, State lawmakers "***consistently asserted*** that [the law] will . . . deter voter fraud and enhance public confidence in the electoral system." *South Carolina*, 898 F. Supp. 2d at 43 (emphasis added). Plaintiffs respectfully submit that the evidence to be presented at trial will demonstrate that North Carolina's present photo ID law fails to satisfy the *Anderson-Burdick* balancing test because the State's history of discrimination interacts with the law to place an undue burden on voters with no valid justification.

CONCLUSION

For the foregoing reasons, the NAACP Plaintiffs respectfully submit that they have satisfied their burden of establish violations of the United States Constitution and the Voting Rights Act and are entitled to judgment in their favor.

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Respectfully submitted,

By: /s/ *Daniel T. Donovan*

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CERTIFICATE OF SERVICE

I hereby certify that on January 19, 2016, I electronically filed the foregoing **NAACP PLAINTIFFS' PRE-TRIAL BRIEF**, using the CM/ECF system in case numbers 1:13-cv-658, 1:13-cv-660, and 1:13-cv-861, which will send notification of such filing to all counsel of record.

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