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' REPLY MEMORANDUM IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION** **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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Defendants' response fails to refute either of the two bases of Plaintiffs' challenge to the implementation of North Carolina's Photo ID requirement during its upcoming March 2016 primary election: (1) that based on the evidence presented in the July 2015 trial, HB 589, including its Photo ID requirement, was enacted with discriminatory racial intent; and (2) that implementation of the Photo ID requirement, even as amended, in the March 2016 primary elections will unconstitutionally burden Plaintiffs' constitutional right to vote. On the first score, the State offers no new evidence or arguments rebutting discriminatory intent. And on the second score, the State concedes in its response (as it has in discovery) that many key aspects of their educational and training efforts are just getting started—less than three months prior to the March primary election period—and that those programs lack explicit information on how to exercise or interpret the new reasonable impediment provision of the amended North Carolina law.

Defendants attempt to minimize their failures by mischaracterizing Plaintiffs' challenge as mere "nitpicking" in an attempt to "micromanage" their educational programs. (Opp. at 16.) But Plaintiffs' insistence that the State educate potential voters and poll workers ***as to the correct statute*** in order to avoid impermissibly burdening voters is hardly nitpicking or an attempt at micromanagement. Education is a critical aspect to the implementation of any new voting regulation, and particularly here, given the significant changes that were put in place under HB 589, and then changed yet again with HB 836. Indeed, the Executive Director of the State Board of Elections last week, she conceded during a deposition last week that "people might not know what that

means, reasonable impediment, they might not understand what that means." (12/18/15 Strach Dep. 128:21-129:18.) Yet the State has now admitted that the substantial portion of its educational efforts regarding the amended law is only now just starting. As a result, Defendants have failed to rebut Plaintiffs' claims that the State cannot sufficiently implement the law for the March elections without creating voter confusion and misinformation and deterring voters. Such burden constitutes irreparable harm for which the State has offered no justification. Preliminary relief is warranted.

ARGUMENT

I. Plaintiffs Have Demonstrated a Likelihood of Success On The Merits.

Defendants' Response fails to rebut either of the two bases upon which Plaintiffs demonstrate likelihood of success on the merits: (1) that the photo ID requirement was passed with prohibited discriminatory intent; and (2) that the requirement unconstitutionally burdens the right to vote.

A. The Photo ID Requirement is Impermissibly Tainted by Intentional Discrimination.

Plaintiffs' discriminatory racial intent claim was tried in July 2015 and the decision on that claim is currently pending. Both Plaintiffs and Defendants rest on the record from the July trial on regarding this claim, which Plaintiffs submit amply supports their claim. (*See* Mot. 9-12; Plaintiffs' Joint Proposed Findings of Fact & Conclusions of Law ("Pltfs. FOF") [Case No. 13-CV-658, ECF No. 364, at 1-5, 32-67, 98-99, 126-134];

see also Opp. at 14.)[1] Because the Court has not yet ruled on the merits of Plaintiffs' intent claim, the Court must decide the likelihood of Plaintiffs' prevailing on that claim.

B. The Photo ID Requirement Imposes Impermissible and Unjustified Burdens on the Right to Vote.

Plaintiffs are also likely to succeed on their claim based on the impermissible and unjustified burdens created by the Photo ID requirement.

1. Defendants Fail To Identify Any Countervailing Justification For The Photo ID Requirement.

As an initial matter, Defendants fail in their Opposition to identify ***any*** countervailing justification or state interest for the Photo ID requirement, even as amended. Thus, Defendants have offered nothing to support the extent to which its "interests make it necessary to burden the plaintiff's rights" in the March 2016 primary elections under the *Anderson-Burdick* line of cases. *See Anderson v. Celebrezze*, 460 U.S. 780, 788–89 (1983); *Burdick v. Takushi*, 504 U.S. 428, 433–34 (1992). Instead, Defendants simply deny that Plaintiffs have demonstrated a burden on voters resulting from the Photo ID requirement (or argue that such burden is merely speculative), and thus aver that they need not offer any justification for the law. Defendants have thus left one side of the *Anderson-Burdick* balancing scale empty. Having done so, should the Court find the likelihood of ***any*** burden to voters in the upcoming March 2016

[1] Defendants make a half-hearted argument against Plaintiffs' intent claim based on the increase in turnout during the post-HB 589 elections in 2014. Plaintiffs have previously set forth the numerous reasons why the increase in turnout during the 2014 election cycle is misleading and cannot rebut Plaintiffs' challenge. *See* Pltfs. FOF ¶¶ 268-277. Moreover, the results of elections in *2014* cannot rebut the legislature's original intent in passing HB 589 in *2013*.

primaries—and it should—the Plaintiffs will have demonstrated a likelihood of success on the merits.[2]

2. The Photo ID Requirement Will Impose Substantial, Non-Speculative Burdens On Voters In The March Election.

In addition to failing to offer any countervailing justifications for the law, Defendants fail to rebut the substantial burdens to be faced by voters in the March 2016 primary election.

a. <u>The Proper Inquiry Is On Voters Who Stand Actually Be Impacted by the Law In The Challenged March Election.</u>

As a threshold matter, Defendants mischaracterize the proper inquiry for the Court in assessing the relevant burden. *First*, Defendants impermissibly attempt to expand the body of individuals who are the subject of the *Anderson-Burdick* burden analysis as it relates to the Motion. Specifically, Defendants mischaracterize the application of the balancing test in *Crawford v. Marion Election Board*, 553 U.S. 181 (2008), in arguing that *Crawford* prohibits an assessment of the law's burdens that is limited only to the subset of voters impacted by the law. (Opp. at 15 n.4.) Not so. Rather, the flexible balancing test under the *Anderson* and *Burdick* cases requires courts to "weigh the

[2] Indeed, the state cannot offer an articulation of such a countervailing interest. Dr. Lorraine Minnite, who testified during the July 2015 trial, has opined that the Photo ID law, including its reasonable impediment amendments, "serves no rational public policy purpose." (Minnite Sup. Rpt. (attached as Ex. S) at 5 (Dec. 4, 2015). The legislature was not presented with any empirical evidence—either at the time the Photo ID requirement was originally passed in 2013 or when it was amended this past summer—to suggest that voter fraud was a problem in North Carolina or that voters lacked confidence in the electoral process. 7/23/15 Trial Tr. 68:12-69:24 (Minnite) (attached as Ex. T). Instead, the Photo ID requirement (even as amended) remains a solution in search of a problem and cannot be justified by any rational public purpose.

character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiffs seeks to vindicate against the precise interests put forward by the State as justifications for the burden imposed by its rule." *Burdick*, 504 U.S. at 434 (quoting *Anderson*, 460 U.S. at 789 (internal quotation omitted)).

Indeed, the case law makes clear that the court must consider the effects of the restriction on those voters who are *actually* affected by such restriction, compared against the State's interest in burdening *those voters'* right to vote. *See Crawford*, 553 U.S. at 198, 201 (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"); *Anderson*, 460 U.S. at 793-94. Although no single opinion in *Crawford* expressed the rationale of a majority of the Court, six Justices agreed that the *Anderson-Burdick* balancing test applied to the plaintiffs' claim in that case. *See Crawford*, 553 U.S. at 189-91 (opinion of Stevens, J.); *id.* at 204-08 (opinion of Scalia, J.). While Justices Stevens and Scalia differed in their precise application of the test, a majority of the court accepted the test, and both *Anderson* and *Burdick* affirm that courts are to look to the law's effect on the sub-group of voters who are actually impacted by the challenged law. *Burdick*, 504 U.S. at 434 (quoting *Anderson*, 460 U.S. at 789).

Second, the State wrongly argues that the Court cannot limit its assessment of the law's burdens to only the upcoming March election—the only election that is the subject of Plaintiffs' Motion. The appropriate scope of review for purposes of a preliminary

injunction is the burden of the law in the election as to which an injunction is sought. *See Common Cause/Georgia v. Billups*, 439 F. Supp. 2d 1294, 1351 (N.D. Ga. 2006). In *Billups*, for instance, the court granted a preliminary injunction where the evidence demonstrated that Georgia could not adequately educate voters for the ***particular upcoming election***, finding a likelihood of success on the merits based on the undue burden on voters in the challenged election:

> [T]he Court does not intend to imply that all Photo ID requirements would be invalid or overly burdensome on voters. Certainly, the Court can conceive of ways that the State could impose and implement a Photo ID requirement without running afoul of the requirements of the Constitution. Indeed, if the State allows sufficient time for its education efforts with respect to the 2006 Photo ID Act and if the State undertakes sufficient steps to inform voters of the 2006 Photo ID Act's requirements before future elections, the statute might well survive a challenge for such future.

Billups, 439 F. Supp. 2d at 1351. The court ultimately held that the Georgia act "fails the constitutional test with respect to the July 18, 2006, primary elections and the primary run-off elections," and for that reason found that "Plaintiffs have a substantial likelihood of succeeding on their claim that the 2006 Photo ID Act violates the Equal Protection Clause . . . ." *Id.* Similarly, here, Plaintiffs need not establish a likelihood that the Photo ID requirement will cause an undue burden in ***all*** future elections, only that Plaintiffs are likely to demonstrate that the law will create a burden in the upcoming March election.

b. The Photo ID Requirement's Burdens on Voters Are Not Speculative.

The Defendants' wrongly argue that Plaintiffs' claims regarding the burden on voters are speculative. (*See* Opp. at 16.) As documented in Plaintiffs' Motion, there is nothing speculative about the burdens facing Plaintiffs and other North Carolina voters in light of the hasty and haphazard implementation of the amended Photo ID Requirement. As in the case of the South Carolina law that Defendants attempt to rely upon, North Carolina has substantial work to do prior to the implementation of the Photo ID requirement, and the State's lack of preparation justifies the same delay ordered with regard to the South Carolina law. *See South Carolina v. United States*, 898 F. Supp. 2d 30, 49 (D.D.C. 2012).

Insufficient Training. While the State purports to point to a number of training materials and programs regarding the Photo ID law, these efforts fall short with respect to the State's specific readiness to implement the amended Photo ID requirement (with the reasonable impediment provision) in the March 2016 elections. For example, the State asserts that "[a]t the most recent conference in August 2015, SBOE staff provided training on S.L. 2015-103 and the new reasonable impediment declaration process. Attendance by county board members and election directors at these training sessions is mandatory." (Strach Decl. ¶ 13.) Yet during a recent Rule 30(b)(6) deposition, the Executive Director of the State Board of Elections Kim Strach admitted that she was not sure that the specific training course relating to the reasonable impediment provision was mandatory for all training participants and that she was "not sure if that [course] was one

of the ones that everyone received." (12/18/15 Strach Dep. 118:6-21 (excerpts attached as Ex. X).) Ms. Strach further admitted that not all counties were represented at the August 2015 training. (*Id.* 119:5-12.)

Moreover, the State's assertion that it has been training and educating people on reasonable impediment provisions since August is undermined by the declarations of poll workers and election officials, who say as recently as late November 2015 that they have not received the type of training the State claims it has provided. As documented in Plaintiffs' Motion and supporting exhibits, several county election board members and poll workers—arguably among the most engaged and knowledgeable individuals in the election process—have indicated that they have not received sufficient information regarding the amended law. (*See, e.g.*, Mot. Ex. M at ¶ 6 (Gates County Board of Elections Member stating "Thus far I have not received training on the processes that will be used in the March 2016 election for a 'Reasonable Impediment Declaration' and have not been trained or instructed by the State Board of Elections on its use."); Ex. O at ¶ 8 (Precinct Official in Hertford County stating "I have no knowledge of a reasonable impediment declaration form and have not been trained or instructed by the Hertford County Board of Elections in its use.").)

Furthermore, whatever efforts the State has made to train *county board of elections officials* in August 2015 says nothing of the *poll workers and managers* who will actually be on the front lines at polling places this March, interacting with and handling questions from voters. Indeed, Ms. Strach admitted that the State's poll workers

have not received any training whatsoever regarding the amended law and requirements. (12/18/15 Strach Dep. 72:2-73:4.)[3] Ms. Strach attempted to explain this away by asserting that it is unnecessary to train poll workers on the meaning of "reasonable impediment" because it is not the role of poll workers to answer questions or provide this type of information to voters. (*Id.* at 74:15-78:13.) Thus, according to Ms. Strach, while precincts will have help desk workers to provide the Reasonable Impediment Declaration forms to voters and to show voters where to write in their answers, these front-line election workers will not be trained to assist voters with questions, nor will they be trained to tell a voter, for example, whether declaring a particular impediment will be deemed "reasonable" or even "truthful" by the county board who will evaluate the declaration and any potential challenge. Such process creates the potential for chaos, confusion, and voter intimidation, not to mention a substantial risk that the law will not be uniformly applied across the State, or even from precinct to precinct within the same county. And the failure to train such officials alone constitutes a significant deficiency. As the court in South Carolina explained, proper implementation of the reasonable impediment provision requires "that *several thousand poll workers and poll managers* be educated and trained about the intricacies and nuances of the law, including about our decision here today." *South Carolina*, 898 F. Supp. 2d at 40 (emphasis added).

[3] This is confirmed by certain of the declarations submitted in support of Plaintiff's Motion, which demonstrate that at least some poll workers who intend to serve in 2016 elections have received no notice of planned poll worker trainings for the March 2016 primary elections. (*See, e.g.*, *id.* at ¶ 4; Ex. P at ¶ 4.)

Finally, even the materials prepared and distributed by the State to date fail to adequately explain the reasonable impediment process. For example, a training video prepared by the State contains a 5-minute segment on the reasonable impediment provision process (out of a 48-minute video)—but that segment says nothing of the State's broad interpretation of the reasonable impediment provision (discussed in more detail below), including failing to offer any guidance on the list of acceptable impediments, the scope of impediments that constitute an acceptable "other" reasonable impediment, or the assistance that a voter is entitled to when filling out his or her declaration form. (*See* NC Election Official Training - Voter ID (https://vimeo.com/147460425) (last checked Dec. 21, 2015); *see* 12/18/15 Strach Dep. 171:5-172:7 (confirming for first time in deposition that voters may get assistance from person of choosing when executing reasonable impediment form).

Inadequate Outreach and Education. The Defendants expend the majority of their response on describing their outreach programs. Such outreach is critical insofar as education is a key element—if not ***the*** key element—that dictates the burdens to voters. (Burden Supp. Rpt. (attached as Ex. U) at 5) ("Public awareness of photo ID requirements is essential so that aspiring voters can successfully navigate the law and cast ballots that will be counted.").) Because changing election laws disrupt voting habits—and thereby make it less likely that individuals will vote, 7/15/15 Trial Tr. at 71:24-72:13 (Burden) (excerpts attached as Ex. V)—the reasonable impediment exception to the Photo ID requirement at issue here can only be successful if the public is sufficiently

educated on the substance of that exception. (Burden Supp. Rpt. at 6; *see also* 7/27/15 Trial Tr. 146:1-147:18 (Hood) (defense expert acknowledging that the "costs of voting" model is among the most well established principles in political science) (excerpts attached as Ex. W).)[4]

The Defendants' Opposition cites to a series of education measures, which it asserts nullify any claim of burden based on lack of education. (*See* Opp. at 16.) But such education can only be effective if two conditions are met: (i) the educational efforts actually reach the voters that stand to be most impacted by the change to the voting law, and (ii) the so-called education provides voters with the information needed to navigate the costs of the process—including the tools needed to do so. (*See* Burden Supp. Rpt. at 4-5 ("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.").) The State's efforts fall short on at least the second prong.

To date, the State's educational efforts have focused (and continue to focus) on the baseline requirement that voters must present Photo ID at the polls, and fail to explain to

[4] Dr. Burden's supplemental expert report discusses national survey data demonstrating that aspiring voters often abstain from voting because they believe that they are unable to comply with voter ID laws. (Burden Supp. Rpt. at 5 (noting that in 2014, 8% of whites and 14% of African Americans and Latinos cited believing they did not have the necessary ID as a factor as to why they did not vote).) Although it is unclear whether these individuals had an accurate perception of what constituted a lack of ID, that is precisely the point: a nontrivial share of the electorate does not participate in federal elections because they do not believe they can comply with the Photo ID requirement. (*Id*. at 6.)

voters *how* they may vote if they cannot meet this mandate. In other words, the very voters burdened by the Photo ID requirement as originally passed continue to be bombarded with messages that Photo ID is necessary. While the State's messaging references generic "options" and, in only certain cases, mentions "reasonable impediment" in passing, the State's messages fail to specifically walk through the Reasonable Impediment process—which the SBOE's Rule 30(b)(6) representative admitted is an "important" exception to the baseline requirement. (12/18/15 Strach Dep. 130:10-15.)

In its response, the State describes a series of mailings to voters regarding the Photo ID requirement. (*See* Strach Decl. ¶¶ 17-19 & Exs. 3, 5, & 7.) The fact of these mailings is misleading, however, and in fact support *Plaintiffs'* position regarding the need to re-educate voters regarding the *amended* requirement. Specifically, three of the four mailings referenced in Ms. Strach's declaration—including a mailing to over 218,000 voters referenced during trial this summer (*see* 7/29/15 Neesby Testimony (Mot. Ex. D)—pre-date the passage of HB 836 in June 2015. These mailings obviously could not have referenced the reasonable impediment process, instead underscoring the State's then-strict Photo ID requirement, which featured only the barest of exceptions. And although the State sent an additional mailing in November 2015 (*see* Strach decl. ¶ 26 & Ex 9), that mailing fails to reference the fact that the law has changed since the last mailing. (12/18/15 Strach Dep. 124:15-125:12.) Furthermore, although the mailing includes bare language regarding the reasonable impediment declaration, it fails to

describe the breadth of that provision, explain how voters may exercise that option, or encourage voters lacking ID to come to the polls. Such information is critical given the SBOE Executive Director's admission that "***people might not know what that means, reasonable impediment, they might not understand what that means.***" (*Id.* at 128:21-129:18; *see id.* at 131:12-20.)

The State's television and advertising campaigns carry similar risks. Both advertising that is currently available and advertisements that are planned focus first and foremost on the requirement that voters must present ID before referencing unnamed and unspecified exceptions to that requirement, including that voters may "have options" if they do not have ID. (*Id.* at 128:13-23, 135:17-136:21.) But, the ads do not tell people what those options are or how they can exercise them, requiring voters to seek additional information elsewhere, thereby reinforcing prior misinformation regarding the law.

Other materials promised by the State—including the Judicial Election Guide and other fliers and materials will not surface until January 2016. Given the initiation of the primary election period on March 3 (at the latest), the Plaintiffs continue to have substantial concerns regarding the length of time that the State's education process will have to sink in. Indeed, this is part of the reason for Dr. Burden's conclusion "that the State has not sufficiently informed the public about the amendments to the photo ID requirement." (Burden Supp. Rpt at 4.) This lack of time is precisely the reason that the *Billups* court enjoined Georgia's Photo ID law. *Billups*, 439 F. Supp. 2d at 1351-52 (concluding that the state lacked sufficient time to educate its citizens about the new

requirements before the elections). While Georgia's window to educate voters before the election was more condensed than it is in North Carolina, here the State has the additional burden of needing to overcome the dissemination of prior information that is no longer accurate, adding to the necessary educational timeframe. In particular, the State here has advertised for nearly two years that a Photo ID requirement was being implemented without any mention of a reasonable impediment provision for voters who are not able to procure an ID. Re-educating voters and poll workers on the new provisions will take more than the few remaining months prior to the March election, and the burden of failing to do so falls squarely on Plaintiffs and other North Carolina voters.

Lack of Rulemaking or Pronouncements Regarding Interpretation. Defendants' brief says nary a word regarding the lack of rulemaking or other criticisms regarding the vagueness of the law, which are set forth in the Motion. (Mot. at 23-26.) For one, the State does not dispute that it has not held public hearings or issued proposed rules regarding the breadth or interpretation of the amended law. (12/18/15 Strach Dep. 88:20-89:2, 97:19-98:2.) In its briefing and prior arguments before the Court, the State has insisted that it need not issue rules or provide an official interpretation of the new law—as was done in South Carolina by the State's Attorney General and election officials—because "the statute itself describes what can be considered a 'reasonable impediment.'" (Opp. at 3 n.2.) But that is only half true. While the North Carolina law (unlike the South Carolina statute) provides some examples of specific impediments that would be accepted in North Carolina—including lack of transportation, disability or

illness, lack of birth certificate or documentation needed to obtain photo ID, work schedule, or family responsibilities—the North Carolina law also contains an "other" category that is open to substantial interpretation on its face. N.C. Gen. Stat. Ann. § 163-166.15(e)(1)(h); 12/18/15 Strach Dep. 15:13-15. Moreover, while North Carolina's statute provides some language regarding how a voter's declaration should be viewed in the face of a prospective challenge, the official interpretation provided by South Carolina election officials (by way of an official written interpretation of the Attorney General followed by trial testimony by the Election Director of South Carolina State Election Commission) was much broader. For instance, South Carolina officials confirmed that:

- conflicting legal requirements should be resolved in favor of the voter;
- "the reasonable impediment provision must be interpreted in light of fundamental nature of the right to vote"; and
- the State's Election Director "furnished specific assurances about how the reasonable impediment provision would be implemented."

South Carolina, 898 F. Supp. at 35-36. Each of these facets was cited by and central to the three-judge panel's pre-clearance of the South Carolina law, which stated: "We thus accept and adopt, ***as a condition of pre-clearance***, the expansive interpretation offered by the South Carolina Attorney General and the South Carolina State Election Commission. . . . [T]hat understanding is central to our resolution of the case." *Id.* at 37 (emphasis added).

Here, North Carolina officials have remained silent, deferring to the statute itself—even though the statute fails to expressly confirm such a broad interpretation.

And Ms. Strach's 21-page declaration filed in support of the Defendants' opposition brief notably makes no mention of the interpretation—broad or otherwise—to be afforded the amended law. Although Ms. Strach confirmed at her deposition last week that North Carolina's reasonable impediment provision should be interpreted broadly, 12/18/15 Strach Dep. 20:15-21:9, 31:6-32:5, 34:1-36:1, that interpretation has not been offered in any official letter, memorandum, opinion, or educational or training materials conveyed to voters or county election officials, nor has it been a part of any official rulemaking offered by the State. The State instead appears to be content to allow county board of elections, poll workers, and voters to interpret the statute for themselves, thus risking substantial voter confusion and a lack of uniformity throughout the State. Nothing in the Defendants' Opposition addresses this void.

Lack of Guidance Regarding the Factual Falsity Provision. Finally, the Defendants have failed to put forth any guidance—let alone adequate guidance—to voters, county election officials, or poll workers regarding the factual falsity provision of HB 836, which allows county boards of elections to reject reasonable impediment declarations under certain circumstances.

At first glance, the reasonable impediment provision of HB 836 offers the promise of a broad exception to the Photo ID requirement. Specifically, under the amended law, a county board of elections must find a voter's provisional ballot to be valid and direct that the ballot be counted (assuming the other steps of the provisional balloting process are complete) unless the board has grounds to believe the declaration "is factually false,

merely denigrated the photo identification requirement, or made obviously nonsensical statements." N.C. Gen. Stat. Ann. § 163-182.1B(a)(1). Furthermore, as confirmed by Ms. Strach at her recent deposition, a voter's assertion of a reasonable impediment is not to be second-guessed and all doubts should favor the voter. *See, e.g.*, 12/18/15 Strach Dep. 20:15-21:9, 31:6-32:5, 34:1-36:1.

The factual falsity exception, however, has the potential to undermine the efficacy of the reasonable impediment provision by subjecting votes to challenge, as Ms. Strach conceded during her recent deposition. By way of example, one of the reasons provided in HB 836 for a voter who wishes to declare a reasonable impediment to obtaining ID is that the voter has a "lack of transportation." Under the interpretation of the reasonable impediment provision offered by Ms. Strach, a county board could not reject or second-guess the "reasonableness" of this reason should the voter check the box corresponding to "lack of transportation." However, under the factual falsity exception, the County Board *could* assess the truthfulness of this reason and determine whether the voter did in fact have access to transportation during the period leading up to the election. (*Id.* at 53:3-21.) Thus, for a voter who had access to a car for, say, one day per week during the period before the election, that voter's declaration may be subject to challenge as "factually fals[e]," even if the voter reasonably believed that he or she could not obtain requisite Photo ID due to difficulties with transportation (*i.e.*, the one day was not sufficient in the eyes of that voter). Indeed, Ms. Strach could not answer whether this assertion would be treated as true or false if the voter had such access to a car, but rather

conceded (as the State's chief elections official) that: ***"I don't know what facts you would have to have to prove that."*** (*Id.* at 56:24-57:20.)[5]

Ms. Strach thus demonstrated that what the amended law gives with one hand, it risks taking away with another. Such response illustrates the problem with rushing to implement a new law without public input and careful legal guidance, and risks North Carolina's reasonable impediment process "becom[ing] a trap for the unwary, or a tool for intimidation or disenfranchisement of qualified voters." *South Carolina*, 898 F. Supp. 2d at 40.

II. Plaintiffs Have Satisfied The Requirements For a Preliminary Injunction.

Defendants also fail to adequately rebut the other prongs of the test for preliminary relief. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008):

Irreparable Harm. Plaintiffs have amply demonstrated irreparable harm absent a preliminary injunction based on the denial or abridgement of the right to vote. *See, e.g.*, *Williams v. Salerno*, 792 F.2d 323, 326 (2d Cir. 1986) (denial of right to vote is "irreparable harm").

[5] Because the SBOE has given no guidance about whether access to a car one day per week constitutes "lack of access to transportation" (and whether the answer to that question might be different if the person in question were a college student in an urban setting compared with a senior citizen in a rural area), one county board presumably could rule that access to a car one day a week makes the "lack of transportation" claim false, while another could find the claim false only if the voter has access to a car five days out of the week. And in either case, the county board would have authority to investigate, challenge the voter's declaration, and haul the voter in to explain his or her impediment. At the very least, such system threatens to deter prospective voters from executing such declarations (and therefore casting a ballot) in the first place.

Balance of the Equities. The balance of the equities favors injunctive relief because a preliminary injunction would maintain the status quo—the "soft rollout" of the Photo ID law the State has used without injury in the 2014 and 2015 election cycles. The State suffers no burden from continuing to administer elections under this regime and continuing to educate voters on the amended requirement during the March primary election. Even if the State could identify a burden, any harm is far outweighed by the injury to voters by a poorly implemented Photo ID requirement. *See Taylor v. Louisiana*, 419 U.S. 522, 535 (1975); *Johnson v. Halifax Cnty.*, 594 F. Supp. 161, 171 (E.D.N.C. 1984); *Pashby v. Delia*, 709 F.3d 307, 329 (4th Cir. 2013).

Public Interest. Finally, a preliminary injunction is in the public interest. "The public interest in holding free and fair elections is beyond question." *Perdue Farms, Inc. v. NLRB*, 927 F. Supp. 897, 906 (E.D.N.C. 1996). The citizens of North Carolina will undoubtedly benefit from elections that are free of voter confusion and are conducted by well-trained poll workers and managers. The public interest therefore weighs strongly in favor of an injunction.

CONCLUSION

The NAACP Plaintiffs respectfully request that the Court preliminarily enjoin implementation of the Photo ID requirement during the March 2016 North Carolina Primary Elections.

Dated: December 21, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 21, 2015, I electronically filed the foregoing **NAACP PLAINTIFFS' REPLY MEMORANDUM IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION**, 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.

/s/ Daniel T. Donovan
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