

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' STATUS
REPORT REGARDING VOTER
PHOTO ID CLAIMS**

Civil Action No. 1:13-cv-658

LEAGUE OF WOMEN VOTERS OF
NORTH CAROLINA, *et al.*,

Plaintiffs,

v.

THE STATE OF NORTH CAROLINA, *et
al.*,

Defendants.

Civil Action No. 1:13-cv-660

UNITED STATES OF AMERICA,

Plaintiff,

v.

THE STATE OF NORTH CAROLINA, *et
al.*,

Defendants.

Civil Action No. 1:13-cv-861

Pursuant to this Court's December 3, 2015 Order, the NAACP Plaintiffs file this status report regarding their claims based on the voter photo identification requirement in North Carolina Session Law 2013-381 (2013), as amended by North Carolina Session Law 2015-103 (2015) (the "Photo ID Requirement"), including the status of the NAACP Plaintiffs' Motion for Preliminary Injunction relating to implementation of the Photo ID requirement in the March 2016 primary elections (the "Motion") [ECF No. 390].¹

Following the December 2, 2015, telephonic hearing with the Court, the parties continued to engage in briefing and discovery related to the Photo ID Requirement and the Motion. The Defendants filed their opposition to the Motion on December 11, 2015 [ECF No. 394] and the NAACP Plaintiffs filed a reply in support of the Motion on December 21, 2015 [ECF No. 395]. Additionally, the parties have engaged in discovery, including a three-hour Rule 30(b)(6) deposition on December 18 of the Executive Director of the State Board of Elections ("SBOE"), Kim Strach.

As set forth in the NAACP Plaintiffs' reply brief the NAACP Plaintiffs continue to have serious and substantial concerns regarding the implementation of the Photo ID requirement in the upcoming March 2016 primary elections. Specifically, the NAACP

¹ In accordance with the Court's December 3, 2015 Order, the NAACP Plaintiffs conferred with the Defendants regarding the issues addressed in the NAACP Plaintiffs' Preliminary Injunction Motion (and the claims based on the Photo ID Requirement generally) and outlined affirmative steps to address the relief they seek through the preliminary injunction. The Defendants responded that the SBOE's testimony should be sufficient and that it would not agree to affirmative relief regarding education and training related to the March 2016 primary. The NAACP Plaintiffs thereafter presented to Defendants a proposed joint status report for Defendants' review and any position statements by the Defendants. The Defendants declined to provide any edits or additional language but noted that they objected to the joint status report. (*See* Dec. 29, 2015 E-mail attached as Exhibit A.)

Plaintiffs maintain that the implementation of the Photo ID requirement, even as amended, in the upcoming elections will cause an undue burden on the NAACP Plaintiffs and other North Carolinians in light of the Defendants' insufficient training of election officials and poll workers, inadequate education of voters, and failure to promulgate rules or otherwise publicize information regarding how the Reasonable Impediment Declaration provision (including the "factual falsity" exception to that provision) should be interpreted by county election officials. The NAACP Plaintiffs (along with the other plaintiffs and intervenors) additionally contend that the law was enacted with discriminatory intent, as established by the trial record in this case. Both the NAACP Plaintiffs and Defendants rest on the record from the July trial on regarding this claim with regard to the pending Motion.

The NAACP Plaintiffs understand that the Defendants continue to believe that the NAACP Plaintiffs' claims and the arguments in their Motion lack merit.

The NAACP Plaintiffs have discussed with the Defendants steps that the State and the SBOE could take to address the NAACP Plaintiffs' concerns and the relief sought in the Motion. Specifically, the NAACP Plaintiffs seek certain commitments in writing regarding the interpretation and implementation of the Reasonable Impediment Declaration exception to the Photo ID requirement (including with regard to voter education and the training of election officials and workers).

During the conferral process, the Defendants agreed that certain of the relief the NAACP Plaintiffs seek has been admitted in the Rule 30(b)(6) deposition of the SBOE's

Executive Director, Ms. Strach. For instance, during her recent deposition, Ms. Strach conceded that:

- the Reasonable Impediment Declaration provision should be interpreted very broadly (Dep. 31:6-13);
- the provision should be construed with all inferences in favor of the voter (*id.* 31:14-17);
- election officials should err on the side of viewing declarations in the light most favorable to the voter (*id.* 31:18-25);
- the provision should be construed with all inferences in favor of protecting the fundamental right to vote (*id.* 32:1-5);
- if county board of elections officials have doubts, such doubts should be resolved in favor of the voter's vote being counted (*id.* 34:1-5);
- it is up to the voter to determine if he or she has a reasonable impediment and a voter's belief that he or she has a reasonable impediment should not be second-guessed (*id.* 34:6-13);
- poll workers and county boards do not have discretion to determine if a voter's explanation is not reasonable (*id.* 34:14-19); and
- poll workers and county board officials should not investigate or question voters regarding the reasonableness of the impediments that they identify (*id.* 34:21-25).

In addition, Ms. Strach made other representations regarding the Election Day implementation of the Reasonable Impediment Declaration provision, including:

- that voters will not be required to execute their reasonable impediment declarations in the presence of a notary (*id.* 145:5-11);
- that voters wishing to execute a Reasonable Impediment Declaration will have their identifying information (including name, address, and phone number) populated electronically on their declaration form (*id.* 146:24-147:10, 148:6-8, 148:17-20); and

- that voters may get assistance from a person of their choosing when executing a Reasonable Impediment Declaration, without first demonstrating they are illiterate or suffer from a disability (*id.* 171:5-172:7).

Although Defendants have acknowledged that Ms. Strach's Rule 30(b)(6) deposition testimony establishes both the State Board's interpretation of the reasonable impediment exception, including the position that a broad reading of the exception in favor of the voter is clearly required by the statute, and its plans for implementation of that exception (including education), they are unwilling to include those points in a written agreement, or to commit to publicizing Ms. Strach's interpretation of the Reasonable Impediment Declaration provision in an official memorandum to county boards of elections or poll workers (*see id.* 87:15-88:17).

As the NAACP Plaintiffs have made clear in their briefing, a number of the points to which Ms. Strach has testified above are not otherwise provided for in the text of the amended statute, regulations promulgated by the SBOE, or authoritative interpretations by the North Carolina Attorney General.

In addition to the areas referenced above where the NAACP Plaintiffs believe the parties can reach agreement on their *Anderson-Burdick* claim, the NAACP Plaintiffs submit that there remain a limited number of areas where the parties continue to disagree.

These include:

1. The form and content of voter education advertisements prior to the March 2016 election.
2. The range of authority granted to county boards of elections to evaluate Reasonable Impediment Declarations under the "factual falsity" exception.

3. The need to hold public hearings and promulgate formal rules regarding the exception.

Accordingly, although the NAACP Plaintiffs will continue to confer with the Defendants to narrow the issues through agreement, if possible, it remains necessary for the NAACP Plaintiffs to continue to seek preliminary injunctive relief through their Motion.²

² The NAACP Plaintiffs have consulted with the United States and the Duke Intervenors, which are not parties to the NAACP Plaintiffs' preliminary injunction motion. The United States and Duke Intervenors continue to retain their claims that HB 589's voter photo identification requirement was enacted with a discriminatory purpose. As previously indicated, the United States intends to present evidence in support of this claim at the January 25, 2016 trial.

Dated: December 29, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 29, 2015, I electronically filed the foregoing **NAACP PLAINTIFFS' STATUS REPORT REGARDING VOTER PHOTO ID CLAIMS**, 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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