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' 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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INTRODUCTION

The NAACP Plaintiffs seek a preliminary injunction to enjoin implementation of North Carolina's Photo ID requirements during the state's March 2016 primary elections. Though North Carolina educated voters and poll workers on the provisions of HB 589 during the "soft rollout" of voter ID during the 2014 and 2015 elections, the General Assembly materially changed the requirements of the original Photo ID law this past June, and the State must now correct its prior efforts. To date, however, the State has failed to sufficiently prepare itself or educate voters to overcome what has become the substantial misinformation provided during the initial rollout. Accordingly, a preliminary injunction is necessary to protect the rights of North Carolina voters in the March 2016 primary in order to maximize the amount of time available to North Carolina officials to re-educate and clarify the actual requirements for voting in accordance with North Carolina law. Moreover, a permanent injunction entered even shortly following the current January 2016 trial risks providing insufficient time for North Carolina officials to implement the remedy, provides insufficient time for appellate review, and risks an appellate stay. The NAACP Plaintiffs ask the Court to set a schedule that will allow it to rule on the motion and allow sufficient time for appellate review and implementation of a preliminary injunction prior to the start of Early Voting for the March 2016 primary election.

Because of the short amount of time prior to the March 2016 primary election and the fact intensive nature of the Section 2 "results" claim, the NAACP Plaintiffs in this

motion rely only on their claims of intentional discrimination (already tried and pending before this Court) and the unconstitutional burden that implementing the Photo ID requirement in the March 2016 primary election will have on the right to vote pursuant to 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).[1]

The primary factual ground for this Motion is that, following two years of State efforts to inform voters that they ***would*** be required to show Photo ID to vote starting in 2016, the State has failed to re-educate voters and election officials regarding the General Assembly's eleventh-hour changes to the Photo ID law, made just weeks before trial this summer. Specifically, the State has not re-educated voters that they do ***not*** need to show a Photo ID if they have not been able to obtain one, it has ***not*** educated voters on the nature and details of the process to execute a "Reasonable Impediment Declaration" in lieu of showing Photo ID, it has ***not*** yet even determined the details of the Reasonable Impediment Declaration process following the June 2015 amendment, and it has ***not*** educated County election officials or poll workers regarding that process. Although the State theoretically had nine months to implement the modified Photo ID law following the June amendment, it only recently undertook any such effort, and the remaining time is simply insufficient to effectively avoid voter confusion, misinformation, deterrence, and intimidation.

[1] At trial, the NAACP Plaintiffs also intend to prove that the Photo ID law produces "discriminatory results" in violation of Section 2 of the Voting Rights Act, but the NAACP Plaintiffs do not base the present motion on that ground.

The facts concerning the State's lack of efforts are largely undisputed and any open factual questions can be established through limited and straightforward discovery, which can be expedited under the circumstances without significant burden on the State. Insofar as the NAACP Plaintiffs' Motion is based primarily on existing evidence already in the trial record from this summer's trial, the NAACP Plaintiffs are not requesting an evidentiary hearing, and instead ask that the Court rule on the basis of (i) the written evidence attached as exhibits to this Motion, (ii) evidence already in the trial record , and (iii) additional evidence to be provided in written form obtained through prompt, limited discovery focused on the issues addressed herein. The NAACP Plaintiffs also respectfully submit that oral argument may be useful to the Court.

BACKGROUND

The background of this case and the challenged provisions of North Carolina House Bill 589 ("HB 589"), designated as North Carolina Session Law 2013-381 ("SL 2013-381"), are set forth in detail in Plaintiffs' Proposed Findings of Fact and Conclusions of Law. [Case No. 13-CV-658, ECF No. 364, at 1-32, 67-99.] The NAACP Plaintiffs' instant preliminary injunction motion relates exclusively to the State's proposed imposition and implementation of the Photo ID Requirement set forth in HB 589, as amended, during the March 2016 primary elections. Specifically, beginning January 1, 2016, North Carolina voters who cast ballots in person are required to provide

an acceptable form of government-issued photo identification.[2] HB 589 exempts three types of voters from the Photo ID requirement: (i) curbside voters; (ii) voters with a religious objection to being photographed (provided they complete a form 25 days in advance of Election Day); and (iii) certain voters deemed victims of natural disasters as established by the State. The Photo ID requirement does not apply to voters who vote absentee by mail.

The NAACP Plaintiffs, along with their co-plaintiffs, were prepared to present extensive evidence regarding HB 589's Photo ID Requirement at the July 2015 trial, including that: (1) HB 589 (including but not limited to the Photo ID Requirement) was enacted with discriminatory intent, (2) the Photo ID Requirement will have discriminatory results for African American and Latino voters as compared to white voters, and (3) the Photo ID Requirement imposes an undue and unjustified burden on North Carolinians' right to vote. Approximately three weeks before trial, however, on June 18, 2015, the General Assembly passed North Carolina House Bill 836 (2015) ("HB 836"), which made various amendments to the Photo ID requirement. Governor Patrick McCrory signed HB 836 into law on June 22, 2015, constituted as North Carolina

[2] Acceptable forms of ID are: (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); (6) or a military or veterans' identification card. *See* N.C. Gen. Stat. § 163-166.13.

Session Law 2015-103 ("SL 2015-103").

HB 836 does not eliminate HB 589's Photo ID Requirement. To the contrary, a spokesperson for the State Board of Elections made clear shortly after HB 836's passage that the amendment "is not an opportunity to evade the law" and "does not swallow the rule. Photo ID is still required to vote a regular ballot in-person beginning in 2016." *See* Nicole Caporaso, *Law Creates Alternatives to Photo ID for Voting*, The Daily Tar Heel, July 2, 2015, *available at* http://www.dailytarheel.com/article/2015/07/law-creates-alternatives-to-photo-id-for-voting (attached as Ex. A).[3] Indeed, during oral argument on the State's motion to dismiss last month, counsel for the State confirmed that North Carolina "still" had a Photo ID requirement "or at least it will as of January 1, 2016." 10/23/15 Hearing Tr. 42:11-14; *see also id.* at 39:18-19 ("I admit readily, the photo ID requirement is still in place").

Rather than eliminating the Photo ID requirement, HB 836 provides a process for voters who appear at the polls without one of the required Photo IDs and who cannot satisfy the Photo ID Requirement to either: (a) complete a written request for an absentee ballot at the Early Voting site or in accordance with N.C. Gen. Stat. 163-227.2(b1) until the deadline for submission of requests for absentee ballots provided in N.C. Gen. Stat. 163-230.1 (the "Absentee Ballot Option"), or (b) complete a "reasonable impediment declaration," provide a form of identification, and vote a provisional ballot (the

[3] Unless otherwise noted, all websites referenced herein were last visited on November 23, 2015.

"Reasonable Impediment Declaration" and "Reasonable Impediment Declaration Provision"), *see* N.C. Gen. Stat. § 166-166.13(c). Although the law does not specify all of the acceptable bases for a Reasonable Impediment Declaration will be (*i.e.*, "what is going to be considered reasonable?"), the law allows any registered voter in a given county to challenge the veracity of another voter's declaration, and also permits county boards of elections to reject a voter's declaration 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 required supporting documentation or information. *Id.*

The amended Photo ID Requirement is scheduled to take effect on January 1, 2016, and will first be implemented during the March 2016 Primary Elections. The March 2016 Primary Elections will include presidential, statewide, and certain local elections.[4] Early voting for that primary election is scheduled to begin on March 3, 2015, and could begin even earlier should the Plaintiffs succeed on their pending claims related to the State's reduction of the early voting period.

Despite the fact that the Photo ID Requirement, as amended, will first be employed in North Carolina in just a matter of weeks, the State has yet to undertake any material steps to educate (or, as called for here, re-educate) the public about the

[4] On September 30, 2015, Governor McCrory signed into law North Carolina House Bill 373 ("HB 373"), moving state primary elections to the same date as the presidential preference primary, March 15, 2016. Those primary elections will include the following races: U.S. President, one U.S. Senate seat, 13 U.S. House of Representatives seats, Governor, Secretary of State, Attorney General and other statewide offices, all members of the NC General Assembly, and a variety of local offices.

Reasonable Impediment Declaration process. The NAACP understands that the State has also not yet started training county boards of elections officials or poll workers with regard to the process to be used to implement the new and amended requirement. Neither the State's Attorney General, nor the SBOE, nor any public official has offered an official interpretation of HB 836 or the Reasonable Impediment Declaration Provision, nor has the State publicized a plan for implementing this provision or notifying and educating voters and poll workers of its availability in advance of the March 2016 primary elections.

The lack of information regarding the State's educational efforts stands in contrast to the State's wide-ranging efforts *before* the amendment to the Photo ID Requirement to inform voters of the near-absolute need to have photo identification in order to vote, with only the very limited exceptions for curbside voting, religious objection, or natural disasters. In particular, following the passage of HB 589 in 2013 and before the amendments in HB 836 this past June, the State engaged in wide-ranging education efforts as part of a "soft rollout" undertaken over the objection of the NAACP Plaintiffs. These efforts included:

- Hiring election specialists to educate the public regarding the HB 589 Photo ID requirement;
- Creating and operating a dedicated Voter ID website—http://voterid.nc.gov (current homepage attached as Ex. B)—informing citizens they would need Photo ID to participate in elections beginning in 2016—with no mention of the forthcoming exceptions under HB 836 for execution of a Reasonable Impediment Declaration;
- Developing color posters used at every voting precinct during the 2014

elections that depicted photo IDs that would be accepted in 2016 and stated: "In 2016, you will need a photo ID to vote"—again with no mention of the HB 836 Reasonable Impediment Declaration;

- Requiring poll workers to read statements to voters participating in the 2014 elections informing them that: "In 2016, you will need a photo ID to vote in North Carolina. Do you have one of these?" Poll workers were further directed to point to the poster directly in front of the voter and receive a response from the voter acknowledging their lack of Photo ID;

- Requiring voters who represented during the 2014 election that they did not have a Photo ID to fill out an affidavit acknowledging that they would need such ID in 2016—again, without any mention the Reasonable Impediment Declaration; and

- Preparing a mailing—a mailing which made no reference to the Reasonable Impediment Declaration—to more than 218,000 registered voters who appeared on the State's "no match" list as those who did not have qualifying Photo ID, informing them that they would be required to present such ID to participate in the 2016 elections.

See Deposition of Ted Fitzgerald, Mar. 3, 2015 ("Fitzgerald Dep.") at 16:1-17:19, 28:2-30:16, 30:24-31:21, 39:11-22, 69:2-75:2 (excerpts attached as Ex. C); Trial Testimony of Brian Neesby, July 29, 2015, at 211:2-9, 212:20-23 (excerpts attached as Ex. D). To date, the State has not undertaken (nor has it identified a plan to provide) commensurate corrective voter education regarding the amended Photo ID Requirement, including the new exceptions to the requirement.[5]

[5] Pursuant to Fed. R. Civ. P. 26(e), the Defendants have an ongoing obligation to "supplement or correct [their] disclosure or response" to the NAACP Plaintiffs' existing discovery requests "in a timely manner" to the extent it relates to the still-pending Photo ID claims. *See* Fed. R. Civ. P. 26(e)(1)(A). Although a number of the NAACP Plaintiffs prior discovery requests referenced the State's plans to implement the Photo ID law (including education and other efforts), to date, Defendants have failed to produce any evidence of "re-education" efforts, as described above.

ARGUMENT

The purpose of a preliminary injunction is to "protect the status quo and to prevent irreparable harm during the pendency of a lawsuit ultimately to preserve the court's ability to render a meaningful judgment on the merits." *United States v. South Carolina*, 720 F.3d 518, 524 (4th Cir. 2013) (quotations omitted) ("*South Carolina I*"). A Court may enter a preliminary injunction if a plaintiff shows "[1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). All four factors of the *Winter* test favor issuing a preliminary injunction.

I. THE NAACP PLAINTIFFS' CLAIMS ARE LIKELY TO SUCCEED ON THE MERITS

A. The NAACP Plaintiffs Are Likely To Succeed on the Merits of Their Intentional Discrimination Claim

While Photo ID was not directly litigated in the July 2015 trial, the plaintiffs in that proceeding proved that HB 589 was enacted with an intent to discriminate. The abundant evidence of intentional discrimination is summarized in Plaintiffs' Proposed Findings of Fact & Conclusions of Law [Case No. 13-CV-658, ECF No. 364, at 1-5, 32-67, 98-99, 126-134] and is incorporated by reference herein. The Photo ID provision was part and parcel of HB 589 as a whole. *See* Trial Tr. 7/17/15 at 107:7-11 ("So in assessing evidence on intent, you've got to look at the whole bill. It's like looking at a hand. You just can't take out one finger of the hand. You've got to look at all the fingers, and photo

ID was one of the fingers of the post-*Shelby* H.B. 589.") (Lichtman) (excerpt attached as Ex. K). Thus, a finding by this court that HB 589 was enacted with discriminatory intent necessarily encompasses a finding that the Photo ID provisions of HB 589 are tainted with illicit racial motive.

The fact that lawmakers amended portions of SL 2013-381 concerning the Photo ID requirement does not ameliorate the original prohibited intent. Once racial intent is found, the burden shifts to the State to demonstrate that its subsequent amendments address, rectify and remedy the original intent. Additionally, "[o]nce 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 state cannot satisfy this burden. Nothing in the legislative record supports an affirmative finding that the legislators (who have asserted legislative privilege) passed HB 836 for the purpose of undoing the racial intent in HB 589. To the contrary, the timing of the passage of HB 836—three weeks before trial, and nearly two years after passage of the initial bill—and the surprise and rushed manner in which the measure was adopted—with minimal debate following a conference committee on an unrelated bill—appear on their face to be designed to circumvent this Court's July 2015 trial on the plaintiffs' photo ID claim. *See* Anne Blythe & Colin Campbell, *NC Legislature Votes to Soften Voter ID Requirement*, The News & Observer, June 18, 2015, *available at*

http://www.newsobserver.com/news/politics-government/article24877873.html (quoting Senator Gladys Robinson: "Not having sufficient time to review this document that affects the voters of this state … means that we are not doing our job") (attached as Ex. E); Mark Binker & Matthew Burns, *Lawmakers Agree to Allow Affidavit at Polls in Lieu of Photo ID*, WRAL, June 18, 2015, *available at* http://www.wral.com/lawmakers-agree-to-allow-affidavit-at-polls-in-lieu-of-photo-id/14724244 ("This is a joke of a process," said Sen. Josh Stein, D-Wake. "We had no notice this provision was going to be voted on today.") (attached as Ex. F). The circumstances surrounding enactment of HB 836 show that far from purging the Photo ID requirement of its racial intent, the same legislators who supported the passage of HB 589 enacted HB 836 on the eve of this summer's trial to avoid a judicial loss rather than attempting to ameliorate any prior discriminatory intent. *See* Editorial, *We Don't Buy Affi-David Lewis Explanation on the Photo ID*, Beaufort Observer, June 22, 2015, *available at* http://www.beaufortobserver.net/Articles-NEWS-and-COMMENTARY-c-2015-06-22-278524.112112-We-dont-buy-AffiDavid-Lewis-explanation-on-the-photo-ID.html ("Rep. [Michael] Speciale [Beaufort, Republican] told us that the Department of Motor Vehicles had botched the ID-making process for a number of voters and rather than have that imbroglio be used against the law in the current court case he was willing to accept the exception the whiners had asked for until DMV could clean up its act. He said: 'You may rest assured that I fully support requiring a photo ID and once this DMV mess is straightened out I will, if no one else does, introduce a bill to scrap the "impediment" exception.'") (attached as Ex. G). The

evidence submitted at trial this summer demonstrates that HB 589, including but not limited to its Photo ID requirement, was passed with discriminatory intent, and nothing in the General Assembly's passage of HB 836 rectifies that intent.

B. The NAACP Plaintiffs are Likely to Succeed on Their *Anderson/Burdick* Fourteenth Amendment Claim

The NAACP Plaintiffs also have established a likelihood of success on the merits of their claim that implementation of the State's Photo ID law in the March 2016 primary election will violate the 14th Amendment.

As an initial matter, to meet the likelihood of success criterion for the purposes of this preliminary injunction motion, it is not necessary for plaintiffs to establish a likelihood that implementation of North Carolina's Photo ID law will cause an undue burden in *all* future elections—only that they have a likelihood of success of proving that the law will cause an undue burden in *the upcoming March 2016 election* (for which the injunction is sought). *See Common Cause/Ga. v. Billups*, 439 F. Supp. 2d 1294, 1351 (N.D. Ga. 2006) (granting preliminary injunction of Georgia photo ID law in upcoming primary election where the Act "fails the constitutional test with respect to the July 18, 2006, primary elections and the corresponding primary run-off elections"). That is, it is irrelevant for the purposes of this Motion whether the State might be able to effectively administer the Photo ID law at some point *in the future*; what matters is whether the State's interest, if any, in implementing the Photo ID law *in March 2016* outweighs the substantial harm that would result from such implementation.

1. Imposing the Photo ID requirement during the March 2016 primary would constitute an undue burden on voters.

As in Georgia, North Carolina's planned implementation of its Photo ID law "fails the constitutional test with respect to" the upcoming March election 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. The limited timeframe before the beginning of the March 2016 primary election cycle leaves minimal opportunity for re-education, training, public input, and planning regarding the recent amendments, particularly in light of the State's prior efforts to educate the public regarding the since-modified Photo ID Requirement. The result will be increased voter confusion, intimidation, and barriers to participation in the electoral process, which will place an undue burden on North Carolinians' right to vote.

a. Inadequate Voter Re-Education

Following the passage of HB 589—and as required by that statute—the State undertook efforts to educate the public regarding the need for Photo ID to participate in North Carolina elections beginning in 2016. These efforts included hiring specialists to educate the public, developing posters and a dedicated website, requiring poll workers to inform voters that they must show ID to vote beginning in 2016, sending a mailing to voters on the state's no-match list of voters believed to not have ID, and other measures

discussed above. These efforts came at a time—before HB 836—when the Photo ID Requirement permitted just a small number of limited exceptions (for curbside voters, voters with religious objections to being photographed, and victims of natural disasters), and the message to North Carolina voters was clear: "***In 2016, you will need a photo ID to vote***." *See* Fitzgerald Dep. 28:2-30:16, 39:11-22 (Ex. C).

In the aftermath of HB 836, and in stark contrast to the State's education efforts following the enactment of the strict Photo ID Requirement, the State has been virtually silent in ***re***-educating the public with respect to the amendments to the Photo ID Requirement. This is critical: prospective voters who were only subjected to the State's prior education campaign—which conveyed an absolute need to possess qualifying Photo ID—but who did not possess such ID (or the means to obtain one) will likely be deterred from showing up at the polls at all given the prior understanding that such voters would not be eligible to vote.

The State's subsequent re-education efforts do not rectify the situation. First and foremost, the State has admitted that notwithstanding the passage of HB 836 in June 2015, it would not *commence* re-education efforts with respect to the modified Photo ID law until after the November 2015 municipal elections. *See* 10/23/15 Hr'g Tr. at 45:24-46:13 (excerpts attached as Ex. H). Thus, in contrast to the nearly ***two years*** of education following passage of HB 589, the State will engage in, at most, ***four months*** of re-education following the enactment of HB 836.

Even where the State has purported to provide information to voters regarding the

modified Photo ID Requirement, those efforts have been (at best) ambiguous and incomplete. For example, a September 2015 memorandum from Kim Strach, Executive Director of the State Board of Elections to County Boards of Elections, instructed county boards to require poll workers during the recent November 2015 municipal elections to read a statement to voters who indicated that they lacked a form of Photo ID that would be required starting in 2016. *See* Memorandum from K. Strach for County Board of Elections, Sept. 4, 2015, *available at* ftp://alt.ncsbe.gov/sboe/numbermemo/2015/2015-04_PhotoID_Education.pdf (attached as Ex. I). That statement, however, did not set out the details of the Reasonable Impediment Declaration process, but instead made only vague reference to "alternative voting options," while leaving it up to voters to read a separate document for "further details." *Id.*

Similarly, the purported educational materials published by the State to date do not remedy the confusion. For instance, the fliers that the State has published to date feature a "Vote with ID in North Carolina" logo at the top of the page and announce—in bold, all-caps print—that "BEGINNING IN 2016, MOST VOTERS WILL NEED TO SHOW ACCEPTABLE PHOTO ID AT THE POLLS." That bold, all-caps print is followed by colorful graphics depicting the various types of Photo ID required to cast a regular ballot in elections in 2016 and beyond:

Only below those logos—buried in smaller print in the bottom third of the flier—does the State advertise the possibility of voting a provisional ballot if a voter lacks a qualifying Photo ID but can identify a reasonable impediment to obtaining one. Nowhere does the flier inform voters that their declaration may be subject to challenge by other voters in the

county or prosecution for erroneous information. *See* NC Voter ID poster (attached as Ex. J).

The State's Photo ID website similarly makes it difficult to find information about the Reasonable Impediment option. For instance, the home page reiterates "BEGINNING IN 2016, MOST VOTERS WILL NEED TO SHOW ACCEPTABLE PHOTO ID AT THE POLLS." Only by clicking on a link on the page can an individual learn about the reasonable impediment declaration. And even then, the website fails to explain how the reasonable impediment process works or that a person's stated impediment could be subject to challenge by another voter in the county.[6]

What is more, a one-minute video commissioned by the SBOE that has recently appeared on the Voter ID website touts the need to bring an ID in order to vote in 2016:

> In 2016, when you go to the polls, bring your passion, bring your individuality, bring your wisdom, and be sure to bring a Photo ID.

The video continues with images of a variety of Photo IDs accompanied by a voiceover:

[6] Information on the Photo ID requirement on County Board of Elections websites (which vary across the state) do not cure the problems with the SBOE website. Many websites include only links to the SBOE website (*e.g.*, Warren, Montgomery, Jones, McDowell,) or require navigation from the main page to locate the links (*e.g.*, Lincoln, Wade, Halifax). Other CBOE websites are out of date. For example, as of November 17, 2015 the Anson County Board of Elections website provides no link to information about Voter ID or the reasonable impediment declaration and includes only a broken link to the main SBOE website.

> You see, this election, you'll be asked to show an acceptable Photo ID at the polls. The process is easy. When you go to the polls, simply bring your North Carolina Driver's License or Identification Card, passport, military ID, veteran's affairs card, or certain tribal IDs.

The video makes ***no mention whatsoever*** of the possibility of filling out a reasonable impediment declaration, instead stating in vague terms: "If you don't have an ID or if you're unable to obtain one, there are still options for voting."[7] *Id.* The video fails to set forth what those options are, however, requiring voters to go elsewhere for information and leaving the unmistakable impression that Photo ID will be required to vote absent some unnamed exceptions.[8] This video and similar audio recently began running on television and radio in North Carolina, but the State has not yet indicated to plaintiffs or the public where and how long the commissioned video will run.[9]

Notably, neither the State's fliers, nor its website, nor the new video state that the Photo ID Requirement changed following what voters were told as part of the "soft rollout" during the 2014 election cycle. Accordingly, none of those messages sufficiently rectify and update the information voters received when they voted in 2014: that with only the most limited of exceptions, they must provide photo ID to vote in 2016.

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[7] Similarly, an on-screen banner at the end of the video reads: "If you're unable to obtain an ID, voting options are available." The banner does not explain what those options are.

[8] HB 836 by its terms requires the SBOE to "educate the public *regarding the reasonable impediment declaration*." SL 2013-381 Section 5.3(10) (emphasis added). The Board's mass communications at best inform the public that some other voting option exists, rather than providing any, much less in-depth, education regarding "the reasonable impediment declaration."

[9] The full video is available at https://vimeo.com/144657827.

Federal courts have delayed implementation of Photo ID laws in at least two states to ensure proper voter education could be completed. First, a federal district court enjoined implementation of Georgia's Photo ID requirement for the 2006 elections, concluding that the state lacked sufficient time to educate its citizens about the new requirements before the elections. *Billups*, 439 F. Supp. 2d at 1351-52. Only after Georgia dedicated substantial time and expense to implementing a major public education campaign did the court allow the law to go into effect. In particular, that court noted that the state had made "exceptional efforts to contact voters who potentially lacked a valid form of photo ID." *Common Cause/Ga. v. Billups* (*Common Cause III)*, 504 F. Supp. 2d 1333, 1378-80 (N.D. Ga. 2007), *vacated on other grounds*, 554 F.3d 1340, 1346 (11th Cir. 2009).

Similarly, in preclearing South Carolina's reasonable impediment system, a three-judge panel of the United States District Court for the District of Columbia relied on the statutory requirement that the South Carolina State Election Commission "establish an aggressive voter education program." The court specifically noted that "[a]mong other things, the Commission must post information at county elections offices, train poll managers and poll workers, coordinate with local and service organizations, advertise the changes in South Carolina newspapers, and disseminate information through local media outlets." *South Carolina v. United States*, 898 F. Supp. 2d 30, 34 (D.D.C. 2012) ("*South Carolina II*"). Even then, the court delayed implementation of that state's Reasonable Impediment Declaration process for one election cycle, noting that among the "large

number of difficult steps [that] would have to be completed in order for the reasonable impediment provision to be properly implemented" was "that more than 100,000 South Carolina voters be informed of and educated about the law's new requirements." *Id.*

Although the injunction decisions regarding the Georgia and South Carolina laws were closer in time to the elections than the present case, neither Georgia nor South Carolina presented the unique circumstances present here where the State affirmatively advertised ***for more than a year and a half*** that citizens would need Photo ID to vote in State elections (with virtually no exception), thus requiring the State to properly re-educate citizens regarding an amended law. The fact that there are a few more weeks before the next North Carolina election as compared to Georgia and South Carolina cannot make up for the effects of the State's nearly two-year miseducation campaign.

b. Inadequate Training

In addition to failing to properly inform voters, the State has also failed to inform and train the county officials and poll observers who will be administering the Photo ID requirement during the March primary election.

In a memo to County election officials about the Photo ID requirement, SBOE Director Kim Strach acknowledged, "We have very few windows for training prior to March 15[, 2016]." *See* Memorandum from Kim Strach for County Board of Elections, Oct. 1, 2015, at 5, *available at* ftp://alt.ncsbe.gov/sboe/numbermemo/2015/2015-05_2016%20Primary.pdf (attached as Ex. L). Indeed, the NAACP Plaintiffs understand that the SBOE does not plan to initiate statewide training for county officials until early

February. *See* Sears Decl., at ¶¶ 8-10, attached as Ex. M (noting that the SBOE has scheduled its statewide training of county elections officials for February 1-2, 2016).[10] After receiving that training, county officials must develop local plans and subsequently train county poll workers prior to the March primary elections.

However, early voting for the March primary elections will begin no later than March 3. Thus, even if such training begins in early February, county officials will have barely a month to develop their local plans for implementing the Reasonable Impediment Declaration procedure and provide detailed training to thousands of poll workers around the State who are required to administer and assist voters in navigating this new, complex, and potentially intimidating Reasonable Impediment Declaration procedure. This presents a substantial challenge to the administration of the upcoming primary elections and threatens a sever burden on voters who have to access this new process. *See id.* at ¶ 11. ("Given the late date of the February training and the lack of information available to date, and considering my own experience as a Board of Elections member, I am concerned about how County Boards are going to adequately train poll-workers to allow them to be fully comfortable with the process and to ensure that voters are not deterred from voting due to confusion, difficulties that result from administering the new rules under such a compressed timetable, or intimidation because of misinformation or

[10] *See* North Carolina State Board of Elections County Staff and Board Member Training, *available at* https://www.ncsu.edu/mckimmon/cpe/opd/NCSBE/index.html (attached as Ex. N).

misunderstandings about the changing Photo-ID requirements."). To be effective, this information will have to be accurately and clearly passed from county officials to trainers to poll workers all within a matter of days. *See id.* at ¶ 13 ("In my experience as an elections official, I am concerned that too many people do not understand the Photo-ID requirements, including the new declaration process, for voting at this time and that voters may be steered away because of the situation created by lack of understanding and fears about this new requirement.").

The State might have mitigated its training deficit had poll workers who served during the Fall 2015 Municipal Elections—many of whom will also serve during the March 2016 primary election—been trained on the Reasonable Impediment Declaration process. At that time, however, the SBOE had not (and, to the NAACP Plaintiffs' knowledge, still has not) developed policies and procedures for implementing the Reasonable Impediment Declaration. Indeed, some poll workers who worked in the 2015 November municipal elections did not even know that the Reasonable Impediment Declaration option exists. *See* Barnes Decl., at ¶ 8, attached as Ex. O ("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."). And at least some poll workers who intend to serve in the 2016 elections have yet to receive notice of planned poll worker trainings for the March 2016 primary elections. *See, e.g.*, *id.* at ¶ 4; Coleman Decl., ¶ 4, attached as Ex. P.

Once again, North Carolina's inability to provide ample time for training poll

workers and elections officials is indistinguishable from the situation that caused the three-judge district court panel to delay the implementation of the South Carolina Photo ID requirement for one election cycle. In particular, the panel noted "the potential for chaos" because "a large number of difficult steps would have to be completed in order for the reasonable impediment provision to be properly implemented," including the fact that "several thousand poll workers and poll managers [would need to] be educated and trained about the intricacies and nuances of the law." *South Carolina II*, 898 F. Supp. 2d at 49. The court concluded that the state could not "ensure proper implementation of the multi-step training and educational process required by its new law, and in particular the critical reasonable impediment provision, in the few short weeks that remain." *Id*.

North Carolina's Photo ID requirement, even as amended, presents no fewer "intricacies and nuances" to be mastered by state and county officials, poll workers, and voters alike. It will be virtually impossible for thousands of North Carolina poll workers to be adequately trained to understand the "intricacies and nuances" of the NC Reasonable Impediment Declaration process when county officials will not be given this information until weeks prior to the start of the election.

c. Inadequate Rulemaking and Public Input

To date, the State has neither provided an official interpretation of HB 836 or the Reasonable Impediment Declaration provision, nor has it announced a plan for implementing this provision or notifying the voters of its availability in advance of the

March 2016 primary elections.[11] The rules for administering the Reasonable Impediment provision remain unclear, including, *inter alia*, (1) the ability of voters to challenge the legitimacy of the Reasonable Impediment Declaration made by another voter, (2) the discretion afforded to County Boards of Election to reject a provisional ballot cast pursuant to the Reasonable Impediment Provision, (3) the definition of a "factually false" or "nonsensical" declaration, (4) the discretion and penalties for erroneous statements, and (5) the potential interaction of this new requirement with additional election law changes contained in HB 589 during the March 2016 elections. As just one example, if a voter without ID indicates on a Reasonable Impediment Declaration that he or she did not have transportation to obtain a DMV ID, will the poll worker interrogate the voter on the availability and schedule of bus service to the DMV? What about the possibility of getting a ride from friends or neighbors? If the voter might have been able, with some amount of effort, to find transportation to the DMV, will the declaration be rejected as "factually false"? Would the voter be prosecuted for submitting a false declaration?

The lack of clarity and opportunity for public input regarding the Reasonable Impediment Declaration provision stands in stark contrast to the public input sought by the SBOE before HB 836 regarding other aspects of the Photo ID requirement, such as

[11] In the South Carolina case, the Attorney General and the State Board of Elections provided an official opinion regarding their broad interpretation of the law's Reasonable Impediment provision, on which the 3-judge federal court based its decision to preclear the law. *South Carolina II*, 898 F. Supp. 2d at 32 (citing "authoritative[] … interpretation on which we base our decision today), and 37 ("extremely broad" official interpretation "central" to court's determination).

the "reasonable resemblance" provision of HB 589. For that provision, the State earlier this year promulgated substantial rules and held a series of public hearings throughout the state to garner public input on the implementation of that provision. *See* Carly Swanson, *First of Voter ID Public Hearings Held in Raleigh*, TWC News, June 3, 2015, *available at* http://www.twcnews.com/nc/north-carolina/news/2015/06/3/first-of-voter-id-public-hearings-to-be-held-in-raleigh.html (attached as Ex. Q). To date, the State has not held any public hearings regarding the Reasonable Impediment Declaration, nor have they promulgated rules for interpreting or administering it. Indeed, the State has not publicized plans or announcements to suggest that public hearings will ever be held on the Reasonable Impediment Declaration.

The State's limited rule-making regarding the Reasonable Impediment Declaration process also stands in sharp contrast to its efforts to promulgate regulations and signage regarding the Absentee Ballot option enacted in HB 836. An October 2015 SBOE memo offers proposed Rule 08 NCAC 17 .0106, which requires signage at Early Voting polling sites informing voters of HB 836's mail-in absentee ballot option at Early Voting sites if they do not present mandated ID. *See* Memorandum from K. Strach for Interested Parties, Oct. 15, 2015, *available at* ftp://alt.ncsbe.gov/Rulemaking/public_comment_08_NCAC_17_0106.pdf (attached as Ex. R). It further afforded the public two months to offer comments on the rules and announced a public hearing on the rules. The allowance of rule-making and public debate for implementation of the Absentee Voting option—but not the Reasonable

Impediment option in HB 836—creates greater uncertainty and confusion related to the Reasonable Impediment Declaration portion of the law. This confusion will disproportionately burden African Americans and Latino voters in North Carolina, who, as the trial record establishes, are far less likely to vote by absentee ballot than are white voters, and thus, will be less likely to avail themselves of HB 836's Absentee Voting option, as compared to the Reasonable Impediment Declaration option. *See* PX 242 at App. S, Tables 2 and 3 (Stewart Rpt.); *see also* PX 231 at 144-148 (Lichtman Rpt.), PX 229 at 23 (Burden Rpt.).

d. Inadequate Preparation to Assist Voters

Finally, the State has failed to demonstrate that it has any plan to assist voters with the new Reasonable Impediment Declaration process in order to mitigate fear, embarrassment, confusion, and voter intimidation. Nothing in the materials published by the State to date addresses concerns about voters who may be intimidated by the Reasonable Impediment Declaration process, who may feel singled out by being directed to a separate line, who may be embarrassed by having to reveal the nature of their impediment, or who may have difficulty comprehending, reading, writing, or understanding the declaration.

The District Court panel considering the South Carolina law recognized the potential risk of intimidation from a reasonable impediment process in that state stating: "in order to achieve South Carolina's stated purposes and ensure that the reasonable impediment process does not disproportionately and materially burden minority voters in

violation of the Voting Rights Act, South Carolina agrees that the process of filling out the form must not become a trap for the unwary, or a tool for intimidation or disenfranchisement of qualified voters." *South Carolina II*, 898 F. Supp. 2d at 40. North Carolina has yet to provide details on how it intends to provide assistance to voters or reduce the deterrent effect of the Reasonable Impediment Declaration process. It is far too late for the State to promulgate such policies and communicate this information effectively to voters before the March 2016 primary election.[12]

2. **The State has not identified countervailing justifications for the Photo ID law.**

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." *Burdick*, 504 U.S. at 434 (quotations omitted). 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 burdening those voters' right to vote. *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 198, 201 (2008) (controlling opinion) (in assessing severity

[12] The court in the South Carolina case also found significant that the state's Photo ID law provided options for voters to obtain an acceptable free photo ID. First, free Photo Voter Registration cards are available at each county elections office upon presentation of the voter's non-photo voter registration card or another non-photo ID. *South Carolina II*, 898 F. Supp. 2d at 33-34. North Carolina does not provide the option of obtaining a free ID from the SBOE or county election boards and mandates onerous documents for its free DMV ID. And, unlike North Carolina, South Carolina has at least one DMV office in every county where a voter can obtain a free DMV Photo ID. *Id.* at 34.

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.

Here, the impact of requiring Photo ID in the March 2016 primary election on the subset of 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 in the upcoming election. 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 relentless 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. 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 as discussed in the "Balance of the Equities" section below—the State has no legitimate interest in implementing the Photo ID requirement at the last minute and little interest in implementing it at all.

II. VOTERS WILL SUFFER IRREPARABLE HARM DURING THE MARCH 2016 ELECTIONS ABSENT A PRELIMINARY INJUNCTION

The NAACP Plaintiffs and other North Carolina citizens will suffer irreparable harm during the March 2016 primary elections absent a preliminary injunction preventing the State from implementing the Photo ID Requirement during the primary. The deprivation of a constitutional right, even for a brief period of time, amounts to

irreparable injury. *See Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."). Courts thus recognize that the denial or abridgement of the right to vote constitutes irreparable harm. *See, e.g.*, *Williams v. Salerno*, 792 F.2d 323, 326 (2d Cir. 1986) (denial of right to vote is "irreparable harm"). North Carolina courts have found irreparable harm and enjoined redistricting schemes found likely to violate Section 2 of the VRA and state laws requiring unduly burdensome election methods. *See, e.g.*, *NAACP-Greensboro Branch v. Guilford Cty. Bd. of Elections*, 858 F. Supp. 2d 516, 529 (M.D.N.C. 2012) (granting preliminary injunction because, *inter alia*, plaintiffs would be irreparably harmed if redistricting law were allowed to go into effect); *Republican Party of N.C. v. Hunt*, 841 F. Supp. 722, 728 (E.D.N.C. 1994) (granting preliminary injunction because, *inter alia*, plaintiffs would be irreparably harmed if existing method for electing superior court judges were followed).

As discussed above, the State is simply unprepared with regard to voter education, rule-making, and training to implement the Photo ID requirement in March. The deterrence of voters who have been mis-educated into believing they need Photo ID to vote in 2016, the confusion and intimidation of voters because of the lack of preparation to implement the Reasonable Impediment Declaration process, and the loss of the right to vote by those who either do not appear to vote or whose vote is lost because of mistakes in implementing the Photo ID and Reasonable Impediment Declaration process, all constitute irreparable harm.

III. THE BALANCE OF EQUITIES FAVORS INJUNCTIVE RELIEF

The balance of equities strongly favors a preliminary injunction because injunctive relief would simply maintain the status quo. Indeed, the purpose of a preliminary injunction is to maintain the status quo. *South Carolina I*, 720 F.3d at 524. Here, the State suffers no burden from continuing to administer elections under its existing regime. Indeed, the State recently conducted municipal elections under those rules (*i.e.*, without a Photo ID requirement) and has failed to identify any problems or issues from that election (or any other election) that would be rectified by imposing the modified Photo ID Requirement during the March 2016 primary election.

And even if the State could identify some harm related to its inability to impose the Photo ID requirement (even as modified), this burden would be far outweighed by the injury that the NAACP Plaintiffs and others in North Carolina will suffer—the abridgement or denial of their right to vote due to confusion and intimidation—absent an injunction. *See Taylor v. Louisiana*, 419 U.S. 522, 535 (1975) ("administrative convenience" cannot justify practice that impinges upon fundamental right); *Johnson v. Halifax Cty.*, 594 F. Supp. 161, 171 (E.D.N.C. 1984) ("administrative and financial burdens on the defendant are not … undue in view of the otherwise irreparable harm to be incurred by plaintiffs"); *Pashby v. Delia*, 709 F.3d 307, 329 (4th Cir. 2013). The balance of equities therefore favors a preliminary injunction.

IV. A PRELIMINARY INJUNCTION IS IN THE PUBLIC INTEREST

Finally, the issuance of a preliminary injunction is in the public interest. The public has a significant interest in preventing the right to vote from being denied or abridged. *See NAACP-Greensboro Branch*, 858 F. Supp. 2d at 529 ("[T]he public interest in an election . . . that complies with the constitutional requirements of the Equal Protection Clause is served by granting a preliminary injunction."); *see generally McCutcheon v. Fed. Election Comm'n*, 134 S. Ct. 1434, 1440-41 (2014); *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964). This public interest is well-served by reducing voter confusion and intimidation, and promoting adequate voter education. The State's hasty implementation of its eleventh-hour modification to the Photo ID Requirement risks substantial voter confusion and intimidation, particularly for African American and Latino low-literacy and functionally illiterate voters who are least capable of navigating and overcoming the modified regime.

In contrast, the public gains little benefit from implementing the Photo ID requirement—a requirement that is not yet in effect—for the March 2016 primaries. As set forth in detail in the trial record in this case (and summarized over more than ten pages of the plaintiffs' proposed post-trial findings of fact), the purported benefits from implementation of the challenged provisions of HB 589—the prevention of in-person voter fraud and increased electoral confidence—are nonexistent. [*See* ECF No. 364, ¶¶ 164-191.] The public interest therefore weighs strongly in favor of an injunction. *See U.S. Student Ass'n Found. v. Land*, 546 F.3d 373, 388 (6th Cir. 2008) ("Because the risk

of actual voter fraud is miniscule when compared with the concrete risk that [the State's] policies will disenfranchise eligible voters, we must conclude that the public interest weighs in favor of [preliminary injunctive relief].").

CONCLUSION

WHEREFORE, for the foregoing reasons, the NAACP Plaintiffs respectfully request that the Court preliminarily enjoin implementation of the Photo ID requirement outlined in Part 2 of Session Law 2013-138 and its amendments as specified in Session-Law 2015-103 during the March 2016 North Carolina Primary Elections.

Dated: November 24, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 24, 2015, I electronically filed the foregoing **NAACP PLAINTIFFS' 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.

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