

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

NORTH CAROLINA STATE)
CONFERENCE OF THE NAACP, *et al.*,)
)
Plaintiffs,)
)
v.) 1:13CV658
)
PATRICK LLOYD MCCRORY, in his)
official capacity as Governor of North)
Carolina, *et al.*,)
)
Defendants.)
-----)
LEAGUE OF WOMEN VOTERS OF)
NORTH CAROLINA, *et al.*,)
)
Plaintiffs,)
)
and)
)
LOUIS M. DUKE, *et al.*,) 1:13CV660
)
Plaintiffs-Intervenors,)
)
v.)
)
THE STATE OF NORTH CAROLINA, *et al.*,)
)
Defendants.)
-----)
UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
v.) 1:13CV861
)
THE STATE OF NORTH CAROLINA, *et al.*,)
)
Defendants.)
-----)

**DEFENDANTS' PROPOSED FINDINGS OF FACT
AND CONCLUSIONS OF LAW REGARDING PHOTO ID CLAIMS**

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**DEFENDANTS' PROPOSED FINDINGS OF FACT
AND CONCLUSIONS OF LAW REGARDING PHOTO ID CLAIMS**

Defendants, by and through undersigned counsel, submit the following proposed findings of fact and conclusions of law under Fed. R. Civ. P. 52(a) and the Court's oral instructions and Text Order of February 1, 2016.

This matter arises out of three consolidated actions with four sets of plaintiffs: (1) The United States of America, acting through the United States Department of Justice ("USDOJ") in *United States v. North Carolina*, No. 1:13-CV-861; (2) a group of organizational and individual plaintiffs in *League of Women Voters v. North Carolina*, No. 1:13-CV-660 ("LWV Plaintiffs"); (3) the North Carolina State Conference of the NAACP, several churches, and several individual plaintiffs in *N.C. State Conferences of the NAACP v. McCrory*, No. 1:13-CV-658 ("NAACP Plaintiffs"), and a group of college students and other individual plaintiffs who have intervened in the action by the LWV Plaintiffs ("Intervenors") (collectively referred to as "plaintiffs" unless otherwise noted).

Plaintiffs challenged various provisions of an election law enacted by the North Carolina General Assembly in 2013. The enacted law is 2013 N.C. Sess. Laws 381 ("SL 2013-381") and originated in the North Carolina House of Representatives as House Bill 589 ("HB 589"). These cases were consolidated for trial by order dated May 5, 2015. (D.E. 252)¹ A bench trial on the merits was held from July 13, 2015, to July 31, 2015.

¹ References to docket entries are all in Case No. 13-861 unless otherwise noted.

Following the trial, the parties submitted proposed Findings of Fact and Conclusions of Law.

Plaintiffs also challenged the parts of SL 2013-381 known as the Voter Information Verification Act (“VIVA”) which requires voters to show photo identification (“photo ID”) at the polls beginning in 2016. In June 2015, the North Carolina General Assembly modified VIVA to allow voters who are unable to obtain acceptable photo identification to vote upon execution of a declaration stating the reason for their inability to obtain the photo ID. 2015 N.C. Sess. Laws 103 (“SL 2015-103”). After the enactment of SL 2015-103, plaintiffs asked the court to defer consideration of their claims challenging VIVA to a later date and the Court agreed to consider those claims separately.² A bench trial on the merits of the photo ID claims was held from January 25, 2016, to February 1, 2016. Plaintiffs presented a total of 21 witnesses during the photo ID trial. This included 18 fact witnesses, seven of whom were live, ten by video presentation, and one by deposition designation. This also included three expert witnesses, with all presenting by live testimony. Defendants presented three expert witnesses live, two fact witnesses live, and counter-designations of plaintiffs’ witnesses who testified by video or deposition designation. Following the trial, the parties submitted additional proposed Findings of Fact and Conclusions of Law.

² At trial, the United States conceded that it was no longer pursuing a “results” claim under Section 2 of the Voting Rights Act (“VRA”) as it relates to photo ID. (Tr. Day 1 at 22:3-9)

Pursuant to Federal Rule of Civil Procedure 52(a), the Court enters the following findings of fact — based upon an evaluation of the evidence, including the credibility of witnesses, and the inferences that the Court has found reasonable to draw therefrom — and conclusions of law. To the extent any factual statement is contained in the conclusions of law, it is deemed a finding of fact as well.

I. Findings of Fact

A. History of Voter Identification Measures in North Carolina and Procedural History of SL 2013-381.

The contextual backdrop of previous attempts by legislators to enact voter identification measures in North Carolina was discussed at length in the proposed Findings of Fact and Conclusions of Law submitted by defendants after the July 2015 trial. (D.E. 347 at 10-11) That filing also described the procedural history of SL 2013-381. (*Id.* at 11-27) For purposes of the instant proposed Findings of Fact and Conclusions of Law, those findings are incorporated herein by reference.

B. Enactment of SL 2015-103

On June 22, 2015, SL 2015-103 was signed into law. SL 2015-103 amended the photo ID requirements in several key aspects. First, SL 2015-103 expanded the list of acceptable photo IDs for voting by adding the ability to use an expired license, learner's permit, provisional license, or a special non-operator's identification card for up to four years past the expiration date stated on the ID. SL 2015-103, § 8(a).

Second, SL 2015-103 creates a new option for voting by allowing voters who present themselves at the polls to vote and who have been unable to obtain an acceptable

photo ID to cast a ballot upon completion of a declaration that they had a “reasonable impediment” to obtaining an acceptable photo ID. SL 2015-103, § 8(d), codified as N.C. Gen. Stat. § 163-166.15. Specifically, the amendment provides a list of examples of “reasonable impediments,” including lack of transportation, disability or illness, lack of birth certificate or other documents needed to obtain photo identification, work schedule, family responsibilities, that photo identification was lost or stolen, or that photo identification was applied for but not received by the voter in time for the election. *Id.*³ In addition, the amended law provides that the voter may indicate “any other reasonable impediment” to obtaining an acceptable photo ID. *Id.*⁴ Upon completion of the declaration, the voter must provide identification in the form of either (1) a copy of the voter’s voter registration card or a document allowed under N.C. Gen. Stat. § 163-166.12, including a current utility bill, bank statement, government check, paycheck, or other government document; or (2) the last four digits of the voter’s social security number and the voter’s date of birth. SL 2015-103, § 8(d). A voter who is unable to provide either of these forms of identification when they complete the reasonable impediment declaration may comply with the requirement by returning to the county board of elections by 12:00

³ The new, amended, statute is nearly identical to a South Carolina law that received preclearance under Section 5 of the VRA in 2012, *South Carolina v. United States*, 898 F. Supp. 2d at 30 (D.D.C. 2012), and which was enforced during elections in 2013 and 2014 without any evidence of an adverse effect on African American turnout. The new statute differs from the South Carolina law in that the statute itself describes what can be considered a “reasonable impediment.” South Carolina’s law left that determination to those executing and enforcing the law. (DX 400, 401, 402)

⁴ The new law clearly indicates that “reasonable impediment” is to be interpreted broadly in favor of the voter. SL 2015-103, §§ 8(d) and 8(e).

noon the day prior to the election canvass and presenting the required identification. SL 2015-103, § 8(e)(c).

The reasonable impediment ballot must be counted unless (1) the impediment described in the declaration is factually false, (2) the impediment listed merely denigrates the photo ID requirement, (3) the impediment listed is an obviously nonsensical statement, (4) the voter fails to provide the additional identification required by SL 2015-103, (5) the voter's registration cannot be confirmed using the identification provided, or (6) the voter is otherwise disqualified under the law. N.C. Gen. Stat. § 163-182.1B.

Finally, SL 2015-103 provides that voters who present to vote during the one-stop absentee voting period (sometimes called "early voting") without an acceptable photo ID must be instructed about their ability to vote an absentee ballot which requires no photo ID. Any voter who chooses not to vote using the absentee method may declare a reasonable impediment if he or she was unable to obtain a photo ID.

A reasonable impediment declaration may only be challenged on very narrow grounds. A challenger must demonstrate that the impediment chosen by the voter is factually false by clear and convincing evidence. The challenger may not challenge the reasonableness of the chosen impediment and all evidence must be construed in the light most favorable to the voter. SL 2015-103, § 8(e).

At trial, the Executive Director of the North Carolina State Board of Elections ("SBE"), Kim Strach, confirmed that SBE would implement 2015-103 in accordance with the plain statutory language. (Tr. Day 4 at 106:23-24; 107:16-20)

Moreover, in a memorandum to county board officials dated February 10, 2016, Director Strach provided a detailed explanation of the process by which challenges to reasonable impediment declarations would be held, and emphasized the statute's mandate that the reasonableness of a voter's declared impediment may not be challenged. (DX 547) (Numbered Memo 2016-01)

C. Voter Outreach and Training

As part of SL 2013-381, the General Assembly of North Carolina directed the SBE to educate the public regarding photo ID requirements for voting and the means of obtaining acceptable photo ID, as well as to identify voters who might lack acceptable photo ID and assist them with obtaining such identification. SL 2013-381, §§ 5.2, 5.3. SL 2015-103 contained a similar directive to inform the public of the availability of the reasonable impediment declaration option. SL 2015-103, § 8(g). These directives have been accompanied by roughly \$2 million in appropriations to SBE for the purpose of conducting outreach. (DX 535, ¶ 2)

SBE is responsible for overseeing the training of the elections officials who will implement the photo ID requirements of SL 2013-381, and began development of the training curricula in mid-2014. (Tr. Day 5 at 139:9-16) The final production phase of that program began in June 2015, with the production of training videos and the development of tools to be used by elections workers in processing voters. (Tr. Day 5 at 140:4-141:7; DX 535, ¶ 3; *see also* DX 417-418, 429, 434, 436, 445, 465, 469, 475, 476, 480, 481, 482, 483, 531, 532, 547-555)

The training materials include professionally produced training videos, a comprehensive Election Official Handbook, and “station guides” containing procedures and checklists for use by elections officials at each stage of the voting process. (Tr. Day 5 at 140:4-142:19) The reasonable impediment declaration and absentee ballot request options are featured prominently. The training program will ensure that each and every elections official or poll worker encountering voters at the polls will be capable of fulfilling their responsibilities. (Tr. Day 5 at 141:20-25; DX 535, ¶ 4)

The training videos produced by SBE were developed with the assistance of the county boards of elections officials who train election workers. SBE personnel met with focus groups representing county boards of elections around the State, seeking input which allowed for the development of training materials that county election officials felt would be most effective in training polling place workers. (DX 535, ¶ 5)

The video training program was in development at the time SL 2015-103 was passed. SBE took immediate steps to incorporate the changes, including the reasonable impediment declaration option, into the training videos. The training videos were provided to the county boards of elections in early December 2015 for use in their training of elections workers for the Primary Election in March 2016. (Tr. Day 5 at 140:4-14; DX 535, ¶ 6)

The videos provide instruction to poll workers on all aspects of interaction with voters throughout the photo ID process utilizing a combination of narration, text, graphics, and professionally-acted scenes depicting the interaction of election officials

with voters in a polling place. (Tr. Day 5 at 140:4-14; DX 476) The video training element of the program employs 11 separate modules lasting a combined total of approximately one hour, and covers topics including processing voters who lack acceptable photo ID or whose photo ID does not meet expiration requirements, determining reasonable resemblance, and informing voters of all of their applicable voting options. (Tr. Day 5 at 140:4-10, 141:2-7; DX 535, ¶ 7)

A comprehensive “Election Official Handbook” (“Handbook”) (DX 475) was completed in December 2015. It has been provided to county boards of election for distribution to every precinct polling place and one-stop early voting location in the State. The Handbook is an operations manual for the administration of elections, and is formatted in such a way as to provide both an additional resource to be used by county election administrators in the training of elections workers and a reference tool for the elections workers themselves. It addresses every aspect of polling place operations, and provides procedures along with scripts, checklists, charts, and graphics. (Tr. Day 5 at 141:12-25, 142:4-9; DX 535, ¶ 8)

The sections of the Handbook pertaining to implementation of the photo ID requirements are comprehensive. Local elections officials have been trained to be familiar with its contents and to consult it if and when they have questions. (Tr. Day 5 at 142:6-9, 15-18, 145:10-16) In the event that the Handbook fails to address a particular eventuality, poll workers will be trained to contact their county board of elections staff and/or SBE personnel for assistance. (DX 535, ¶ 9)

The “station guide” consists of sections applicable to each individual polling place station manned by election officials, including election greeter, voter check-in, curbside voting, help station, and election judges. (Tr. Day 5 at 143:1-17; DX 469, 531) It provides detailed, step-by-step procedures for processing voters both with and without acceptable photo ID, and contains scripts to be followed by elections workers. The processes for assisting voters who present without acceptable photo ID, determining the acceptability of photo ID, determining whether the photo ID presented bears a reasonable resemblance to the voter presenting it, and for assisting voters with completing a reasonable impediment declaration or requesting an absentee ballot are addressed in detail. The station guide was distributed to county boards of elections electronically in early December 2015. (Tr. Day 5 at 145:10-16) Printed versions have been provided to county boards of elections for use in their regularly-scheduled training of elections officials and poll workers in advance of the 2016 Primary Election. (Tr. Day 5 at 145:10-17; DX 535, ¶ 10)

County board of elections officials received mandatory training regarding the photo ID requirement and reasonable impediment declaration exception in January and early February, 2016. (Tr. Day 5 at 146:14-17) These county officials in turn were to train precinct officials. (DX 480; DX 465; Tr. Day 5 at 145:22-149:15) Poll workers for the March 2016 primary election received mandatory training regarding the photo ID requirement and the reasonable impediment declaration exception in January and/or February 2016.

County boards of elections are responsible for providing in-person training to the local election workers and officials who will staff polling places. This training is historically conducted in the months immediately preceding an election. SBE provides oversight and resources to the counties' training efforts, including developing training materials and programs for use by county boards of elections such as those described above. (DX 535, ¶ 11)

As part of the rollout of the training program, SBE staff conducted regional training sessions in January 2016 for the county boards of election personnel who are in turn responsible for conducting the poll worker and election official training for the 2016 Primary. (Tr. Day 5 at 145:22-146:3) The sessions were conducted in a "train the trainer" type of format. County boards of election were also encouraged to invite poll workers and elections officials to attend these training sessions in addition to the mandatory scheduled training which they will receive from their county boards. (DX 535, ¶ 12)

At each of the statewide conferences for county boards of election members and staff since the passage of SL 2013-381, SBE personnel have conducted training sessions on the photo ID requirements and exceptions contained in SL 2013-381 and later amendments. At the conference in August 2015, SBE staff provided training on SL 2015-103 and the new reasonable impediment declaration process. Attendance by county board members and election directors at these training sessions is mandatory. The information provided included the laws' requirements, implementation plans, and outreach efforts. (DX 482; DX 483; Tr. Day 5 at 150:5-19) County boards of election staff are familiar

with the typical schedule for training elections workers and have received new training materials for the regularly-scheduled training in advance of the 2016 Primary. (DX 535, ¶ 13)

Training election officials immediately in advance of an election is not only adequate and consistent with past practice, it is preferable to conducting the training at any earlier time. This format allows the training to be fresh in the minds of election workers and to address any new procedures or policies. (DX 535, ¶ 14)

There is no precedent for county boards of elections to train elections workers on new elections procedures before the training they will receive for the 2016 elections. Polling place elections workers often are not professional elections administrators. They typically work only a few days each year. For this reason, they receive training only on the procedures which will be in effect during the election for which they are being trained. (DX 535, ¶ 15)

The strategy for conducting outreach to the public is focused on several major objectives, the most important of which are (1) identifying and contacting individual voters who may lack acceptable identification for voting; (2) raising general awareness of the photo identification requirements and the exceptions to those requirements; and, (3) targeting specific populations such as the elderly, disabled, and persons who may be economically disadvantaged with additional information and outreach. (DX 535, ¶ 16)

SL 2013-381 required that elections officials inform voters presenting in person at polling places in 2014 and 2015 that an acceptable form of photo ID would be required for in-person voting in 2016, and inquire of those voters whether they possessed a form of acceptable photo ID for voting. (DX 468; Tr. Day 5 at 156:15-24) Voters who indicated that they did not possess an acceptable form of photo ID were instructed to sign an "Acknowledgment of No Photo ID" and were provided with a flyer containing information on alternative voting options, assistance with obtaining acceptable identification, and toll-free contact information for the SBE Voter Outreach Team. (Tr. Day 5 at 154:25-155:4) The voters' information was then provided to SBE for further targeted, direct outreach. The primary purpose of this effort was to identify voters without acceptable identification and target them for subsequent individualized outreach. (Tr. Day 5 at 155:6-12; DX 535, ¶ 17)

In the 2014 elections, 10,743 voters signed the acknowledgment. After eliminating 59 voters who had been removed from the voter rolls through regular list maintenance and nine voters whose addresses could not be validated, this data was used by SBE to contact 10,675 of those voters via a mailing in February 2015. (Tr. Day 5 at 156:11-24, 158:10-21) The letter mailed to each voter provided additional information and requested that the voters return a response form to SBE in a postage-prepaid envelope indicating whether the voters had a form of acceptable photo ID and whether they required any assistance obtaining one. (Tr. Day 5 at 157:19-22; DX 477) A total of 2,353 marked response forms were received by SBE. (Tr. Day 5 at 159:12-14) Of those responses,

2,230 voters indicated that they had an acceptable form of photo ID for voting, representing roughly 95% of the feedback received by SBE. A total of 51 voters responded with a request for assistance. Outreach staff also received telephone calls from a large number of voters who received the mailing but did not return a response form, and those voters requiring assistance or information were assisted by phone. (DX 535, ¶ 18; DX 453; DX 477)

In 2015, 823 voters signed the acknowledgment during the municipal elections conducted in September, October, and November. In December 2015, these voters were sent a mailing similar to the mailing sent to those voters who signed the acknowledgment when voting in elections held in 2014. This mailing also explained the reasonable impediment declaration process. (Tr. Day 5 at 163:10-164:21; DX 535, ¶ 19; DX 484)

Since the passage of SL 2013-381, SBE has been engaged in ongoing efforts with the North Carolina Division of Motor Vehicles ("DMV") to identify registered voters who could not be matched to DMV's customer database. The latest of these efforts was conducted in early February 2015 based on November 4, 2014 snapshots of both SBE's and DMV's databases. This resulted in a list of 254,391 registrants who could not be matched to DMV's database (the "no-match list"). In April 2015, the SBE sent an informational mailing to 218,097 registrants on the no-match list, after removing (1) registrants who had a registration status of "Removed" at the time of the mailing and (2) registrants whose address could not be validated by the mail house vendor responsible for sending out the mailer. (Tr. Day 5 at 161:12-16; DX 535, ¶ 20)

This mailing provided information regarding the photo ID requirement, and included a postage pre-paid response card that recipients were asked to complete by confirming whether they had acceptable photo ID, and indicating whether, if they did not, they would like assistance in obtaining one. SBE received a total of 20,580 marked response cards from voters, and 42,588 cards were returned to SBE as undeliverable by the U.S. Postal Service. (Tr. Day 5 at 160:18-161:8) Of the 20,580 voters who returned the response card, 18,729 indicated that they already possessed an acceptable form of photo ID, and 633 indicated that they lacked acceptable identification and required assistance. (DX 535, ¶ 21)

SBE has been conducting follow-up with every voter who returned a response card indicating a need for assistance or who received the mailing and opted to contact SBE by phone. SBE staff identified 1,592 cases from this mailing for additional outreach. As of December 2015, all but eight of those cases have been closed. Of the cases identified for follow-up, 212 voters already possessed a form of acceptable photo ID, and 236 obtained or will obtain acceptable photo ID. A total of 620 cases were closed without the voter receiving additional assistance, either because the voters had moved, were deceased, or informed SBE staff that a voting method which does not require photo ID was their preferred method. (DX 535, ¶ 22)

During the course of this litigation, SBE received data concerning a matching analysis conducted by Dr. Charles Stewart, an expert employed by the plaintiffs. This analysis attempted to identify registered voters who could not be matched to either DMV

customer databases or federal databases of federally-issued identification such as military ID cards and passports. This report was based in part on analyses of data maintained by the federal government to which SBE has no access. In June 2015, SBE sent a mailing to 209,253 of the voters on Dr. Stewart's list. (Tr. Day 5 at 161:13-23) From Dr. Stewart's list, SBE eliminated voters who had been removed from the voter rolls through regular list maintenance. SBE also eliminated voters from Dr. Stewart's list who also appeared on SBE's no-match list and had therefore already been sent a mailing. This resulted in the total of 209,253 of the voters on Dr. Stewart's list being sent the mailing. (Tr. Day 5 at 161:9-162:6; DX 535, ¶ 23)

This mailing informed the recipients of the photo ID requirements and included a tear-off response portion to be completed by the recipient and returned to the SBE postage pre-paid. (Tr. Day 5 at 161:17-21) The U.S. Postal Service returned 42,382 cards as undeliverable. SBE received 8,440 marked responses from voters, out of which 6,427 voters indicated that they already possessed an acceptable form of photo ID. Another 522 cards indicated that the voters to whom they were addressed were deceased or had moved. A total of 1,151 voters indicated that they lacked acceptable photo ID, but only 782 indicated that they required assistance with complying with the photo identification requirements. (Tr. Day 5 at 162:10-12; DX 535, ¶ 24)

Those voters who responded that they required assistance, 340 other voters whose responses were unmarked or otherwise required follow-up, and voters who opted to contact SBE by phone instead of returning a response card have been the subject of

individual outreach. SBE staff identified 1,734 cases for action. SBE closed over 1,600 of those cases. Of the closed cases, it was determined that 70 voters already possessed acceptable ID and that 264 voters obtained an acceptable form of photo ID after receiving the mailing. It was further determined that 705 of these voters had moved, were deceased, or informed SBE staff of their preference to vote an absentee ballot by mail or vote curbside in future elections. A total of 130 cases remained open and were being actively worked by SBE outreach personnel as of December 2015. (DX 535, ¶ 25)

The original three mailings predated the enactment of SL 2015-103 and the availability of the reasonable impediment declaration option. SBE therefore developed another mailing to be sent to voters who received any of the previous mailings described above. This mailing educated voters regarding the reasonable impediment declaration option and other exceptions to the photo ID requirement, such as those for voters over the age of 70, voters with a sincerely-held religious objection to being photographed, and voters who are victims of natural disasters. It also informed them of other modifications to SL 2013-381, such as the acceptability of expired DMV-issued identification. In addition, it explained the process and requirements for obtaining a free photo ID from the DMV, obtaining a free copy of a birth certificate or marriage license, and requesting a mail-in absentee ballot. (DX 535, ¶ 26)

The SBE developed the list of voters who would be sent this mailing by beginning with all voters who were sent any of the three prior mailings regarding photo identification requirements and then removing voters who responded to a prior mailing

by reporting that they already possessed acceptable photo ID or for whom prior mailings were returned to SBE as undeliverable. The mailing explaining the reasonable impediment declaration was ultimately sent to 315,755 voters. (DX 535, ¶ 27)

A major component of the SBE's program of voter outreach is a statewide advertising and public awareness campaign. (DX 441, 442, 444, 466, 468, 472, 473, 477, 478, 484, 485, 486, 537, 556) The campaign was originally designed to raise awareness of the photo ID requirements of SL 2013-381 and communicate the availability of assistance with obtaining acceptable photo ID. The amendments to SL 2013-381 enacted by SL 2015-103 required the SBE to also address those modifications. (DX 535, ¶ 28)

After the 2015 elections concluded, the first television and radio messages began to air on television and radio stations throughout every major media market in the State. As of December 2015, radio ads were airing on at least 45 AM and FM stations of varying programming formats in the Raleigh-Durham, Fayetteville, Greenville-New Bern-Jacksonville, Greensboro-High Point-Winston Salem, Charlotte, and Wilmington media markets, providing coverage across North Carolina. Additional stations have since aired the messages. Television ads have been aired on the largest television stations in each market, including the Raleigh-Durham, Fayetteville, Greensboro-High Point-Winston Salem, Charlotte, and Wilmington markets; it was planned that they would eventually air on 30 major television stations across North Carolina. Additionally, the SBE developed plans to conduct targeted advertising on cable television, tailored to reach particular geographic areas and demographic groups. (DX 535, ¶ 29)

The first installment of the media campaign was designed to raise awareness of the photo ID requirements and the exceptions to those requirements, and to direct members of the public to the appropriate resource for obtaining more detailed information. The ad informs the public that (1) photo ID will be required for most voters beginning in 2016; (2) exceptions to the requirements exist; (3) assistance obtaining free acceptable identification is available; and, (4) voters who could not obtain acceptable identification will still be able to vote and should present at the polls for assistance casting a ballot or vote by mail. (DX 535, ¶ 30) More recent television and radio ads provided additional information regarding exceptions and alternative voting options. These ads encourage voters to come to the polls even if they do not have an acceptable photo ID and provide contact information for resources that the voters can utilize regarding the reasonable impediment process. (Tr. Day 5 at 170:15-23, 171:3-13; DX 556)

Following the passage of SL 2013-381, the SBE added information regarding the election law changes to its existing website. In February 2015, the SBE also launched a stand-alone website dedicated to the photo ID requirements of SL 2013-381. (Tr. Day 5 at 164:14-20; DX 485) Following the passage of SL 2015-103, the information contained on both websites was updated to reflect the changes contained within that legislation. SBE's main website was updated within days, and both websites have been continuously updated since that time. In particular, information pertaining to the availability of the reasonable impediment declaration option is featured on both sites. (DX 535, ¶ 31)

SL 2013-381 also directed each county board of elections that maintains a website to include on it information regarding photo ID requirements for voting and the exceptions to those requirements. Director Strach promulgated Numbered Memo 2015-08, which informs each county board of elections of the need to audit the information on any website it maintains to ensure that it is current and complete. The Numbered Memo also informs county boards of elections of the option to provide a link to one of the SBE's websites, where voters can find current and accurate information regarding voting laws. (DX 535, ¶ 32)

In the months leading up to the 2014 General Election, the SBE contracted with a vendor to develop and display election-related messages on digital billboards throughout North Carolina through a partnership with the North Carolina Outdoor Advertising Association. Over a period of five weeks, 52 billboards displaying four different messages ran continuously, informing voters of, among other things, the date of the start of early voting, the times polls would be opening on Election Day, and the date by which absentee ballots should be returned. Based on established traffic density for the locations of the billboards, it is estimated that the messages were viewed by 16.5 million passersby. (DX 535, ¶ 33)

In December 2015, SBE began a more expansive outdoor advertising campaign to promote general awareness of the photo ID requirements and exceptions. It was projected that the SBE message will be displayed throughout North Carolina in rural, suburban, and urban areas on 40 large vinyl billboards through November 2016, and 100 printed

billboards through roughly August 2016. The message will also to be displayed on 40 digital electronic billboards across the State from January through March 2016, and on 50 digital electronic billboards from August 2016 until the November 2016 General Election. (Tr. Day 5 at 175:4-13; DX 535, ¶ 34)

SBE is required by N.C. Gen. Stat. § 163-278.69 to send a publication called the "Judicial Voter Guide" to every household in North Carolina not more than twenty-five days prior to the start of early voting in each election in which there is a statewide judicial contest. Historically, this publication has been used to communicate changes in election law to the citizens of North Carolina. It is sent to every residential household address. In advance of the 2014 Primary and General Elections, the SBE included information on the photo ID requirement and other election law changes. SBE again utilized a portion of the Judicial Voter Guide for photo ID education prior to the 2016 Primary Election, devoting multiple full-size pages to the effort. Information regarding the reasonable impediment declaration option and other exceptions is also a primary focus. The front cover of the publication bears a prominent statement that important information regarding photo ID requirements and exceptions for 2016 elections is contained inside. (Tr. Day 5 at 173:2-174:23; DX 535, ¶ 35)

SBE has sought to inform each newly-registered voter of the photo ID requirements and the exceptions to those requirements, including the reasonable impediment declaration option. In October 2013, SBE modified the content of its voter registration application forms to provide applicants with information regarding those

requirements and contact information for the SBE should voters require additional information or assistance with obtaining acceptable identification. (DX 535, ¶ 36)

In November 2013, SBE also modified the language on the voter registration cards sent to all new registrants and existing voters who update their information or address. The mailing containing the voter registration card provides information regarding the voter's assigned precinct and voting place, as well as instructions for updating or correcting registration information and steps voters should take if their address changes. Following the November 2013 changes, the cards also included information pertaining to photo ID requirements and contact information for SBE. (DX 535, ¶ 37)

In July 2015, following the enactment of SL 2015-103, SBE staff began the process of updating the information contained on voter registration applications and voter registration cards to address the changes to SL 2013-381. The downloadable web-based version of the registration form was updated in July 2015. The modified version of the voter registration form is currently being printed. In December 2015, the SBE delivered modified language for voter registration cards to the county boards. As a result, all voters who receive a new voter registration card, including new registrants as well as voters who update their information or address, will receive information regarding the reasonable impediment declaration option and other methods of voting without photo ID. (DX 535, ¶ 38)

Another significant component of the educational campaign has been the production and dissemination of printed voter education materials such as flyers and

posters, as well as materials such as magnets and pens designed to raise awareness generally and provide contact information. (Tr. Day 5 at 164:24-165:13) As of December 2015, over 168,000 copies of flyers and posters had been distributed throughout the State. SBE developed and distributed over 67,000 copies of flyers and posters as part of its outreach and awareness campaign between April 2014 and August 2015. These materials were designed to raise awareness of the photo ID requirements, provide instructions for obtaining no-fee photo ID cards from the DMV, and advertise the availability of assistance in doing so. (DX 535, ¶ 39)

Immediately after the enactment of SL 2015-103 in June 2015, SBE staff developed new materials which would inform the public of modifications to the photo ID requirements and the availability of the reasonable impediment declaration option. These new materials were modified to reflect the changes enacted in SL 2015-103. (DX 535, ¶ 40)

New materials were delivered to every county board of elections for posting and distribution at early voting and Election Day polling locations during the 2015 municipal elections. Since the beginning of September 2015, these materials have been distributed to groups and associations by the SBE Outreach Team. They have been made available to candidates filing for 2016 election contests. A form for requesting additional materials was included in the informational “filing packets” provided to all candidates. Materials are also available in print form upon request and for download from the SBE's dedicated “Voter ID” website. To date, SBE has distributed over 105,000 copies of these materials,

including Spanish-language materials. (DX 535, ¶ 41) SBE's photo ID website also includes Spanish-language resources; a button labeled "Español" appears prominently on the site. (Tr. Day 5 at 165:5-25)

In addition to distributing the new materials, SBE has also taken steps to provide the new information they contain to those groups and individuals who were previously supplied with the prior version of SBE's educational materials. SBE mailed a letter on or about November 2, 2015, to every organization or individual who was provided the original version of the materials. The letter states that recipients should provide updated current information to any individuals to whom they disseminated the original materials or information, and offers the assistance of SBE staff. The letter also includes a form to order new materials. (DX 535, ¶ 42)

An additional 300,000 flyers and 13,000 full-size posters were delivered to the SBE in December, which SBE distributed statewide, with distribution to each county board of elections for posting in public buildings throughout the State, such as county courthouses and offices, municipal government offices, town or city halls, health departments, public assistance agencies, vocational rehabilitation and mental health centers, hospitals, schools, police stations, libraries, chambers of commerce, public transit and bus stations, senior centers, community centers, shelters and temporary/emergency housing, and other facilities open to the public. (DX 535, ¶ 43)

Another component of the distribution plan includes the distribution of printed education materials to outside partners for posting in additional targeted locations. These

include educational institutions, food banks and pantries, retail and business establishments, churches, and other locations open to the public. As part of agreements reached with the University of North Carolina system, the North Carolina Community College system, and the North Carolina Independent Colleges and Universities, print materials will also be disseminated to the campuses of every institution of higher learning in the State. (DX 535, ¶ 44) Distribution of these materials will be repeated in the months leading up to the November 2016 General Election. (DX 535, ¶ 45)

The distribution of educational print materials is an ongoing process. The Voter Outreach Team provides materials to groups and organizations when giving presentations to or meeting with them. Members of the public and groups such as churches, advocacy organizations, and government agencies have also requested materials from SBE. (DX 535, ¶ 46)

A major component of the outreach efforts of the SBE has been to engage third-party organizations in both the public and private sectors. These efforts have consisted of making educational presentations to organizations in order to equip them to educate their own members and communities. (DX 535, ¶ 47)

Since its creation, the Voter Outreach Team has exhibited and distributed informational materials directly to the public at major public events such as the North Carolina State Fair. They have also made presentations to many organizations, advocacy groups, government agencies, veterans' organizations, and faith community groups. Following the enactment of SL 2015-103, the Voter Outreach Team modified the content

of its presentation and exhibition materials to reflect the changes to SL 2013-381, including the reasonable impediment option. Since the enactment of SL 2013-381, the Outreach Team has given over 200 presentations to agencies, associations, and groups. (DX 535, ¶ 48)

A central mission of SBE and its Voter Outreach Team continues to be developing partnerships with public and private organizations serving communities and individuals. Enlisting the assistance of groups able to disseminate information to their members and clients, assist with display or distribution of print materials, and make further and more penetrating inroads into communities is a significant part of the outreach plan. Since the enactment of SL 2015-103, SBE has modified its engagement with organizations to highlight the exceptions to the photo ID requirements and other available voting options for individuals lacking acceptable photo ID, in addition to the prior emphasis on the availability of free DMV-issued ID and the assistance available to those seeking to obtain one. Existing partners are being advised of the changes made by SL 2015-103 so that they can more effectively educate their various constituencies, clients, and customers. (DX 535, ¶ 49)

An example of the partnerships developed by SBE includes SL 2013-381-related messaging on the “2-1-1” telephone information and “help-line” system operated by the United Way. The system is staffed by agent counselors who provide callers assistance with issues such as gaining access to affordable child care, counseling and support groups, health care and medical services, employment and housing assistance, legal

services, and help locating local food pantries and homeless shelters, and last year documented assisting 125,000 callers with such needs. As a result of the partnership with SBE, a recorded message containing information on photo ID requirements for voting will be played while callers are holding for a live agent, and agent counselors will also inform callers of SL 2013-381's photo ID requirements and inquire whether they possess acceptable ID for voting. Agent counselors were to receive training necessary to equip them to provide answers to basic questions, and will direct callers to SBE staff for assistance and additional information on exceptions and other available options for voting. Those callers who request additional information but who do not desire a referral to the SBE will be mailed informational materials. (DX 535, ¶ 50)

The partnership with United Way includes statewide distribution of informational materials to United Way Partner Organizations. Depending on the size of the county United Way organization, the number of community partners can be from 20-60 different agencies, community programs, and charities that directly serve specific demographic groups. They include the American Red Cross, medical equipment loan programs, Boys and Girls Clubs, Catholic Charities (mental health support, family support services), Meals on Wheels, Senior Volunteer Program, Senior Information Line, Interfaith Food Pantry, mental health programs, medical assistance programs, Family Life Centers, Urban League, literacy programs, YMCA/YWCA, crisis shelters and counseling, homeless shelters, Goodwill Industries, housing assistance programs, and Habitat for Humanity. (DX 535, ¶ 51)

The SBE Voter Outreach Team has also developed partnerships in the African American faith community. It is developing similar connections within religious and secular organizations associated with the State's Hispanic communities. Voter Outreach Team member Dr. Lee Cooley, herself a pastor in a predominantly African American church, works directly with the leadership of North Carolina's religious denominations such as the General Baptist State Convention, Baptist State Convention, the African Methodist Episcopal Church, the African Methodist Episcopal Zion Church, the Church of Christ/Disciples of Christ, the North Carolina Conference of the United Methodist Church, the Episcopal Diocese of North Carolina, and others. (DX 535, ¶ 52)

Outreach efforts will not end with the conclusion of the 2016 Primary election in March 2016. SBE will analyze the reasonable impediment declaration option data collected in the 2016 Primary. Each declaration will be provided to SBE for analysis of patterns and trends in the impediments declared by voters. (DX 535, ¶ 53)

Every voter casting a ballot—including voters declaring a reasonable impediment—must attest that they are eligible to vote. For all provisional voters this attestation is included on the Provisional Voting Application, which may be either pre-printed or generated on-demand by SBE's statewide election voter database called SEIMS. (DX 546, ¶ 5)

Voters casting a provisional ballot because a reasonable impediment prevents them from obtaining acceptable photo identification will attest to their eligibility on the Provisional Voting Application. Separately, those voters must complete a Reasonable

Impediment Declaration Form, which may be either pre-printed or generated on-demand by SEIMS. (DX 546, ¶ 6)

The reasonable impediment declaration required by G.S. § 163-166.15 was not added to the Provisional Voting Application because SBE staff determined that the language needed for the reasonable impediment declaration, including the list of options of reasonable impediments, would not fit on the Provisional Voting Application. (DX 546, ¶ 7)

On SEIMS-generated forms, the “Voter Registration/Update Form” section is pre-populated with data from the voter record. Additionally, the SEIMS-generated Provisional Voting Application is pre-populated to indicate the provisional voting reason is “No Acceptable ID” and will require the voter only to sign the application. (DX 546, ¶ 8)

Election officials at the Help Station may assist the voter in completing a Provisional Voting Application and a Reasonable Impediment Declaration Form. (DX 546, ¶ 9)

SBE staff will also attempt to contact every voter who completes a reasonable impediment declaration to help the voter obtain acceptable photo ID, continuing this form of personal, direct assistance to voters in which the Voter Outreach Team has engaged for the past two years. The SBE Voter Outreach Team has arranged transportation for voters, sometimes even providing it themselves, and has assisted voters with obtaining necessary identity documents, acted as a liaison between voters and DMV personnel, and guided

many North Carolinians through the process of obtaining acceptable photo ID. (DX 535, ¶ 54)

Voters may get assistance from a person of their choosing (other than their employer or someone that is prohibited from assisting at the polls) when executing a reasonable impediment declaration, without first demonstrating they are illiterate or suffer from a disability. Voters will not be required to execute their reasonable impediment declarations in the presence of a notary. (Tr. Day 5 at 138:20-139:6; PX 1034, p. 7)

On February 10, 2016, Director Strach issued SBE Numbered Memo 2016–1, which sets forth the procedure for a county board’s consideration of a challenge to a reasonable impediment declaration. (DX 547)

II. Conclusions of Law

A. Plaintiffs’ intentional discrimination claims are meritless.

The overwhelming evidence disproving any intentional discrimination is summarized in defendants’ previously filed Proposed Findings of Fact and Conclusions of Law (D.E. 347) and is incorporated by reference herein.

Defendants understood that plaintiffs’ intentional discrimination claims were fully tried during the trial proceedings before this Court in July 2015. Nevertheless, the Court allowed plaintiffs to present additional evidence of alleged intentional discrimination. The evidence presented by the plaintiffs not only fails to prove such a claim, it also demonstrates that plaintiffs’ claims of alleged intentional discrimination are baseless.

The primary witness offered by the plaintiffs to support their claims of intentional discrimination was Dr. Charles Stewart. Dr. Stewart testified that he was instructed to review and advise the United States Department of Justice on the information that was before the General Assembly on the issue of intentional discrimination. (Tr. Day 2 at 111:23-112:7) Dr. Stewart's own testimony more than shows that his review was woefully inadequate and that he never searched for evidence that would show the lack of discriminatory intent. (*Id.* at 112:8-11; 121:20-124:10)

Dr. Stewart focuses almost exclusively on the various matching reports made by the SBE before the General Assembly enacted HB 589. (*Id.* at 112:14-131:1; PX 891, pp. 2-7) The only other "evidence" cited by Dr. Stewart are papers prepared by academics and expert witnesses for the Justice Department or other plaintiffs in other cases. (PX 891, pp. 9-10) None of these academic papers or expert reports was actually submitted to the General Assembly at the time HB 589 was enacted. Each of these papers advances the theory that minorities in other states possess IDs at a lower rate than non-minorities.⁵ These theories are all based upon some form of matching analysis comparing voter rolls against data bases containing information on photo ID possession. (Tr. Day 2 at 123:24-126:28) As the testimony in this case demonstrates, matching reports are subject to manipulation based upon the criteria used. They cannot accurately

⁵ However, several reports that were before the General Assembly at the time of the enactment of SL 2013-381 were statements by Hans Van Spokavsky and Francis DeLuca, which described reasons why photo ID was warranted and that no-match lists were not reliable. (DX 506, 507)

predict possession rates with a reasonable degree of certainty absent extensive manual review of the no-match list. (Tr. Day 6 at 29:5-30:11) None of the reports from other states cited by Dr. Stewart have been examined in this Court nor have the academics and paid experts who made these reports been subject to cross examination. In any case, it is incredulous to conclude that the North Carolina General Assembly intentionally discriminated against minority voters because of dubious matching reports that were never submitted to the General Assembly. *Veasey v. Abbott*, 796 F.3d 487, 488-89 (5th Cir. 2015) (knowledge of a potential impact much less no knowledge at all is not sufficient intent evidence); *Dowe v. Total Action Against Poverty in Roanoke Valley*, 145 F.3d 653, 657 (4th Cir. 1998).

Turning to the matching reports by the SBE, in concluding that the matching disparities reported by SBE “prove” intentional discrimination, Dr. Stewart ignores the many qualifications made by SBE itself concerning the accuracy of its reports and their significance. First, Dr. Stewart ignores that SBE reported that its last report prepared in April 2013 was the most accurate of its matching reports. (Tr. Day 2 at 113:7-13, PX 534, p. 1) The inaccuracy of SBE’s prior reports is demonstrated by Dr. Stewart’s own matching analysis which actually over-estimated the number of no-matches. Even under Dr. Stewart’s reports, over 94% of registered black voters could be matched to an acceptable photo ID. This percentage is very similar to the possession rate of all registered voters (approximately 95%) as determined by the April 2013 SBE report. (PX 534, p. 6; 318,643 unmatched registered voters divided by 6,425,820 registered voters)

Dr. Stewart and the United States also ignore that the SBE report details why its no-match list was significantly inflated. The SBE report notes that many voters could not be matched because SBE did not begin to give voters an opportunity to provide either their driver license number or the last four numbers of their social security number (“SSN4”) until 2004. (Tr. Day 2 at 1-5; PX 534, p. 7) As explained by Dr. Thornton, the results of Dr. Stewart’s own report confirms the deficiencies of a matching analysis involving persons who have not provided either a driver license number or SSN4. Over 50% of the persons on Dr. Stewart’s December 2015 no-match list registered with SBE prior to 2004. (Tr. Day 6 at 40:5-17) Moreover, 76.9% of all voters on Dr. Stewart’s no-match list do not have a SSN4 or driver license number listed in the SBE database. (Tr. Day 6 at 38:18-39:2)⁶ Obviously, voters’ failure to provide the SBE with their SSN4 or a driver license number does not prove that they lack either, but instead only shows that they are more difficult to match against the DMV database. Despite the obvious problems involved in matching individuals without a SSN4 or driver license number, Dr. Stewart failed to report how many voters on his no-match list registered before 2004 or how many voters on his no-match list did not record their SSN4 or a driver license at the time they registered with SBE. (Tr. Day 2 at 116:14-16)

In assessing alleged discriminatory intent, until the time of trial, the United States and Dr. Stewart ignored SBE’s explanation that the no-match list was inflated because of

⁶ In contrast, out of the SBE’s general population of all active and inactive voters, only 17.7% lack either a SSN4 or a driver license. (Tr. Day 6 at 39:3-39)

typographical errors or other data entry errors. (Tr. Day 2 at 116:17-20; PX 534, p. 7) Dr. Stewart claims that he accounted for this possibility by the number of electronic sweeps he adopted. (*Id.*) However, Dr. Stewart's own reports demonstrated how electronic sweeps miss typographical errors and how criteria can be manipulated to increase the number of no-matches.

In her report of March 2015, Dr. Thornton conducted a limited manual review of Dr. Stewart's initial no-match report and determined that Dr. Stewart's electronic sweeps had incorrectly listed a registered voter named Ethellaine Torian as not matching with the DMV data base. (DX 309, pp. 35-48 and Example 18) In a sur-rebuttal prepared by Dr. Stewart before the July trial, Dr. Stewart admitted that his electronic sweeps had missed Ms. Torian and that she should have been counted for a match. (Tr. Day 2 at 102:8-17) Dr. Stewart also admitted in his December 2015 report that in his original report he had failed to use two tables in the DMV database that list a person's name and address changes which could account for someone like Ms. Torian being incorrectly counted as a no-match. (Tr. Day 2 at 92:1-2) Dr. Stewart represented that he used these tables when preparing his December 2015 report. (PX 891, pp. 16-17 n. 30, 31)

Dr. Stewart then applied his "refined" criteria to develop his December 2015 no-match report. He contended that he applied the DMV name and address change table. To account for married women who may have changed their names, he decided to create a new electronic sweep that flipped a person's middle and last names. In his December report, Dr. Stewart assured that this new electronic sweep strategy would account for the

criticisms leveled at him by Dr. Thornton and Brian Neesby (an employee of SBE who does matching analysis in the course of his regular job activities) and that women like Ms. Torian would thus be matched by his refined electronic sweeps. (PX 891, p 30:16-18)

However, Ms. Torian remained unmatched in Dr. Stewart's December 2015 report. (Tr. Day 2 at 18-23) While Dr. Stewart again admitted this error, he did not disclose that he had truncated his use of the DMV address change table by only matching persons who had changed their address since 2006. As explained by Dr. Thornton, Ms. Torian originally registered in 1968. By limiting address changes in the DMV address change table to only those occurring after 2006, Dr. Stewart could not electronically match addresses listed in that table prior to 2006. (Tr. Day 6 at 42:24-43:12)

Nor, as admitted by Dr. Stewart, could his refined matching criteria account for women or others who had changed their name who had not listed a middle name in their SBE registration form or women or persons who only listed a middle initial. (Tr. Day 2 at 96:8-97:15) Indeed, the evidence shows that Ms. Torian listed neither a middle name nor middle initial. (Tr. Day 6 at 41:15-43:12; DX 511, p. 13, Table 2) When asked at trial to explain why Ms. Torian remained unmatched in his December 2015 report, Dr. Dr. Stewart blamed a typographical error in the way her name was entered in the SBE database. (Tr. Day 2 at 102:18-23) Thus, despite spending over two years to create and execute several different matching reports, Dr. Stewart's own errors regarding Ms.

Torian confirm SBE's assessment, explained to the General Assembly in April of 2013, that typographical and data entry errors can inflate any no-match analysis.

Dr. Stewart's testimony that the April 2013 SBE report is evidence of intentional discrimination also ignores Dr. Stewart's prior work in South Carolina and SBE's warning that many voters on the SBE's April 2013 no-match list may no longer live in North Carolina or at the same address, or may no longer be interested in voting. In its April 2013 report, SBE explained the difference between active and inactive voters. Active voters have had some contact with their county boards between the time encompassed by two federal elections cycles while inactive voters have not had any contact. The SBE report also noted the lack of voting history for many of the registered voters on the no-match list, again suggesting that these persons may no longer live at the addresses listed in the SBE registration rolls. SBE also reported that in a very high turnout election of 2012, possibly a more accurate representation of the actual voter pool in North Carolina than all registered voters, only 2% of all registered voters who voted in 2012 were listed on the SBE's April 2013 no-match list. (Tr. Day 2 at 112:14-118:11; PX 534, pp. 3, 4, 7, 8)

Dr. Stewart also failed to disclose or explain a similar analysis he prepared for the United States Department of Justice in its photo ID litigation against South Carolina. In that case, Dr. Stewart agreed that no-match lists are inflated by persons who are no longer eligible or interested in voting. In the South Carolina case, Dr. Stewart decided to remove inactive voters from his no-match analysis because of his opinion that inactive

voters are unlikely to vote in the future and are more likely to be removed from the voter rolls and placed in a status known as “archived” under South Carolina law. (Tr. Day 2 at 65:10-68:4)⁷ While Dr. Stewart had identified inactive North Carolina voters in prior reports, in his December 2015 report he elected to include inactive voters on his no-match list. (Tr. Day 2 at 67:4-68:25) In South Carolina, Dr. Stewart and the Justice Department agreed that no-match lists should be reduced to account for that portion of the registered voter pool which was unlikely to vote. In contrast, in the North Carolina litigation, Dr. Stewart and the Justice Department made no similar adjustment to his December 2015 no-match list. (*Id.*)

Plaintiffs have argued that North Carolina’s policy reasons for photo ID were “tenuous” because of the alleged lack of evidence of in-person voter fraud. In making this argument, the United States and other plaintiffs pretend that the Supreme Court had not addressed this issue in *Crawford v. Marion Cnty. Elections Bd.*, 553 U.S. 181 (2008) (“*Crawford*”). In that decision, the Court found that photo ID could be adopted as a prophylactic measure based upon the reports of voter fraud that have occurred elsewhere in the United States and to restore public confidence in the election process. Plaintiffs have ignored this precedent which was available to the General Assembly at the time HB 589 was enacted. Also ignored by the United States and Dr. Stewart was evidence

⁷ During his trial testimony, Dr. Stewart testified that voters with the status of “archived” under South Carolina law could still vote and that North Carolina voters with the status of removed could not. (Tr. Day 2 at 66:9-24) This is incorrect. Voters listed as “Removed” can still vote if they present themselves at the polls and verify that they have not moved outside the county since being moved to “Removed” status. (Tr. Day 5 at 131:12-24)

before the General Assembly presented by a prominent election expert that no-match reports made in other states (prior to their adoption of a photo ID requirement) had greatly inflated the number of persons who allegedly lacked ID and that turnout in those states had gone up after photo ID was adopted. (Tr. Day 2 at 121:20-123:13, DX 506 and 507)

Concerning in-person fraud, Dr. Stewart admitted that persons on his no-match list may no longer reside in the state of North Carolina and that requiring a North Carolina driver license to vote might dissuade such persons from continuing to vote illegally in North Carolina. (Tr. Day 2 at 119:10-121:19) Another of plaintiffs' experts, Dr. Barry Burden, testified that mail-in absentee voting is more likely to be fraudulent than in-person voting. (Tr. Day 1 at 73:13-20) However, Dr. Burden admitted that he has no experience investigating voter fraud and has no way to compare the type of information available to elections officials to investigate mail-in fraud versus in-person fraud. (Tr. Day 1 at 72:23-73:7; 105:20-106:9)⁸ Dr. Burden evasively refused to answer several questions designed to elicit the obvious – a precinct official who does not know a person who presents to vote in person has no way of ensuring whether the person is who

⁸ Contrary to Dr. Burden's speculation, (Tr. Day 1 at 68:22-69:9), precinct officials do not have access to a person's signed registration card and cannot compare the signature on that card versus a person's signature on the attestation form that is signed when a person presents to vote, even assuming precinct officials were trained in the science of handwriting comparisons or had time to make such comparisons while other voters are waiting in line. (Tr. Day 5 at 123:16-124:3)

they claim to be or instead someone intent on committing voter fraud. (Tr. Day 1 at 68:22-71:13)

Dr. Burden's testimony on voter fraud relies upon studies or papers recording convictions and arrests as well as newspaper accounts. (Tr. Day 1 at 68:15-21) Dr. Burden referenced a recent study on photo ID done by the GAO which purports to show that photo ID suppressed minority turnout in Kansas and Tennessee. (PX 983)⁹ Having relied upon the GAO report, Dr. Burden could not explain away or discount the report's qualification that in-person voter fraud is nearly impossible to detect because it involves persons engaged in intentional deception. (Tr. Day 1 at 72:10-73:7) Nor could Dr. Burden explain away or discount the GAO's conclusion that "[a] variety of factors affect efforts to estimate the incidences of in person voter fraud making it difficult to complete estimates." (*Id.* at 72:10-22) Throughout this case, plaintiffs' experts and plaintiffs have refused to admit this self-evident fact: in modern elections involving large precincts and early voting locations where anyone in a county can vote, election officials cannot possibly distinguish legitimate voters from those engaged in intentional deception without some form of photo ID. Neither the United States nor its expert disclosed the obvious shortcomings of their North Carolina report or how it compared to their South Carolina report. The decision by the United States and other plaintiffs to pursue an

⁹ Both Kansas and Tennessee challenged the GAO report and disputed the way GAO estimated the race of voters in each state. (Tr. Day 1 at 78:14-80:6) Dr. Burden admitted that it is extremely difficult to prove the effect of election laws on turnout. (*Id.* at 80:21-81:21)

intentional discrimination claim based upon North Carolina’s photo ID statute was and is without any foundation in either fact or law.

B. Plaintiffs’ Anderson-Burdick claims are without merit.

Plaintiffs’ Anderson-Burdick claims rest upon a fundamental misunderstanding of the Equal Protection claim they assert. In *Crawford*, in rejecting a Fourteenth Amendment challenge to Indiana’s voter identification requirement, the Court held that “even-handed restrictions that protect the integrity and reliability of the electoral process itself are not invidious” regulations subject to strict scrutiny.¹⁰ *Id.* at 189-90. Instead, in reviewing non-invidious election laws, a court is required to “weigh the asserted injury to the right to vote against the ‘precise interests put forward by the state as justification for the burden imposed by its rule.’” *Id.* at 190 (quoting *Burdick v. Takushi*, 504 U.S. 428, 434 (1992)).

Under *Crawford*, plaintiffs must show that the photo ID requirement, as amended by SL 2015-103, is an unconstitutional burden on its face, not as applied to any particular group of voters or as to a particular election. Plaintiffs made no attempt to demonstrate that the amended photo ID requirement is unconstitutionally burdensome on

¹⁰ The actual holding of *Crawford* is the following: “When we consider only the statute’s broad application to all Indiana voters we conclude that it ‘imposes only a limited burden on voters’ rights.’ The ‘precise interests’ advanced by the State are therefore sufficient to defeat petitioners’ facial challenge to SEA 483.” *Crawford*, 553 U.S. at 202-03 (internal citations and quotations omitted). The foregoing statement received the support of six Justices. To the extent that the opinion of Justice Stevens addressed the impact of election laws on classes or subgroups of voters, that language was plainly dicta and not controlling.

its face. They produced no evidence of the number of voters that will allegedly be “dissuaded” from voting because of the law. They performed no study or survey of voters who will supposedly be “confused” or fail to understand the reasonable impediment process. They did not attempt to prove how many voters will purportedly not be able to vote even with the existence of the reasonable impediment option.

To the contrary, plaintiffs could not muster evidence of even a single person who would not be able to vote under the photo ID law as amended. (Tr. Day 2 at 195:3-6-7) The NAACP plaintiffs admitted in interrogatory answers that they could not identify any voters who could not vote using the reasonable impediment declaration. (DX 540, Response to Interrogatory 30) Instead, plaintiffs offered only unreliable opinion testimony by lay witnesses who speculated that various individuals they had encountered might not have the literacy or English language skills required to complete the reasonable impediment declaration. None of plaintiffs’ witnesses, however, had actually attempted to have any of these individuals complete a reasonable impediment declaration nor had they performed a single study regarding the ability of any voter who they described as being “low literacy” abilities or having limited English proficiency to use the reasonable impediment process.

As the testimony of multiple witnesses presented by plaintiffs shows, voters with lower literacy levels and limited English proficiency are able to function and participate in society, including in the electoral process. For instance, the Rev. Maria Teresa Unger Palmer assists individuals in taking the United States citizenship exam. Although Rev.

Palmer acknowledged that the exam must be completed in English, is a “big job,” and takes about a year to prepare for (Tr. Day 4 at 26:5-14), thousands of individuals nonetheless pass the exam each year and become U.S. citizens. Despite the fact that ballots typically contain elections for multiple offices and sometimes referenda or other initiatives, Rev. Palmer acknowledged that voters who have limited English proficiency are able fill out their ballot and have developed methods of identifying the candidate for whom they want to vote on the ballot and testified that filling out a ballot is “not that complicated.” (*Id.* at 27:22)

Significantly, voters identified by plaintiffs as likely to encounter difficulties obtaining a photo ID had successfully navigated more complex government processes. For instance, plaintiffs’ fact witness Sarah Foster testified that she had successfully navigated the complex process of applying for and retaining Medicaid Supplemental Security Income (“SSI”) benefits even though the SSI application process took several years to complete. (PX 1052) (Foster Dep. 36:18 – 38:9; 43:3 – 43:22) Similarly, plaintiffs’ fact witness Alonzo Phillips testified that he had successfully applied for food stamps. (PX 1048) (Phillips Dep. 34:13-34:22)

Instead, plaintiffs’ trial evidence was reduced to speculation that voters will not vote because of the State’s allegedly inadequate efforts to educate voters about both the photo ID requirement and its exceptions.¹¹ They engaged in this speculation solely by

¹¹ To the extent plaintiffs claim voters will be dissuaded from voting because the reasonable impediment declaration requires the voting of a provisional ballot, they are

nitpicking at SBE's pushcards and advertisements. Essentially, plaintiffs are inviting the Court to either micromanage the administration of the State's outreach effort or deny enforcement to a validly enacted law because plaintiffs would use different words or font sizes on pamphlets and websites the State has designed to educate all voters about all aspects of the photo ID law.¹²

For example, plaintiffs complain that the State's advertisements did not specifically mention "reasonable impediment." The various educational materials created and distributed by SBE, however, made it clear that other voting options are

clearly wrong. First, to vote a provisional ballot, the voter will have already shown up to the polling site, so it is unclear why such a voter, having arrived at the polls, would simply walk away, and plaintiffs' evidence at trial shed no light on this issue. Second, out of precinct voting, which plaintiffs are litigating to keep, also requires the voting of a provisional ballot, and plaintiffs do not explain why provisional balloting is bad in the reasonable impediment context but good in the out of precinct voting context. Third, plaintiffs own expert witness, Dr. Minnite, agreed that there is no reason to think that provisional ballots voted for reasonable impediment purposes will be not counted at the same rate as other provisional ballots (which usually reflect registration problems). (Tr. Day 3 at 41:21-25, 43:12-17) In addition, to the extent plaintiffs claim that voters will be dissuaded from voting because they will have to go to a Help Desk to receive assistance with the reasonable impediment declaration, they fail to note that same-day registration, which plaintiffs are litigating to keep, also requires voters to visit the Help Desk for assistance with that process. Rev. Barber confirmed that minorities were able to navigate that process. (Tr. Day 2 at 211:14-24) Finally, to the extent plaintiffs claim that voters will be dissuaded from voting because of the warning on the reasonable impediment form that lying on the form is a felony, plaintiffs ignore that all similar SBE forms come with the same warning, yet plaintiffs do not argue that, for instance, plaintiffs are dissuaded from registering to vote, or voting provisional out of precinct ballots. (Tr. Day 5 at 133:2-134:7; DX 407, 546)

¹² In a sense, plaintiffs' claims are nothing more than a collateral attack on the State's outreach and education effort to inform voters about the State's election laws. This is not a valid basis for a Section 2 claim. If it were, any State's election law could be challenged at any time because the State can always do a "better" job of outreach or spend more money than it is already spending to educate voters about an election law.

available to voters who have been unable to obtain acceptable ID. Moreover, educational materials on photo ID produced by the NC NAACP also do not mention “reasonable impediment.”¹³ (Tr. Day 2 at 207:1-3)

Plaintiffs’ speculation is all the more disingenuous when considered in the context of the actual education campaign the State is embarked on to fully inform all voters about the photo ID law and its exceptions. The State is using numerous methods available to it such as broadcast media, billboards, websites, and outreach to interested groups. The State has even sent a mailing specifically describing the new reasonable impediment provision to thousands of voters who have been previously identified as not matching to the State’s DMV database.

Moreover, contrary to plaintiffs’ allegations, this education effort began immediately after SL 2015-103 became law. The SBE websites were updated immediately. In August – less than two months after enactment – SBE trained elections officials on the reasonable impediment option at a statewide elections conference. SBE also immediately updated its written education materials on photo ID and distributed them to individuals and groups around the State. Then, as soon as the 2015 municipal elections ended, the State launched a media campaign which specifically informs voters that if they are unable to obtain a photo ID they can still vote if they show up to the

¹³ In fact, the NC NAACP’s advertisements are misleading and may lead voters to falsely believe they can vote without ID, even if they possess acceptable photo ID. Those advertisements also fail to disclose the full range of documentation allowed by SL 2015-103 to vote using a reasonable impediment declaration. (Tr. Day 2 at 206:16-210:16, 213:6-215:2)

polls. There is simply no factual basis for plaintiffs' claim that voters will be unconstitutionally burdened because of the photo ID requirement or the reasonable impediment failsafe.

Nor is there a legal basis for this claim. Plaintiffs have previously relied on two cases: *Common Cause/Ga. v. Billups*, 439 F. Supp. 2d 1294 (N.D. Ga. 2006) and *South Carolina v. United States*, 898 F. Supp. 2d 30 (D.D.C. 2012). These cases are inapplicable for several reasons. For instance, *Billups* was decided prior to *Crawford*. Moreover, the *Billups* court had concerns about the photo ID requirement there because the photo ID requirement itself had not been advertised in time for the election just six days away. In North Carolina, the photo ID requirement has been advertised for over eighteen months. And the State has been advertising the reasonable impediment requirement since June 2015. In contrast, the *Billups* court specifically noted that there was only "one piece of equipment" to issue free IDs that the state had promised, and that broadcast advertisements regarding the ID requirement had begun "to run only shortly prior the July 18, 2006" elections. 439 F. Supp. 2d at 1347. Indeed, "the State did not seriously begin to educate its voters concerning the requirements of the 2006 Photo ID Act and the availability of a free Voter ID card until approximately two weeks before the July 18, 2006, primary elections." *Id.* at 1351. Thus, it was not surprising that the court concluded the photo ID requirement would be potentially unduly burdensome.

Similarly, in *South Carolina*, involving a reasonable impediment provision that is narrower than what was enacted in SL 2015-103, the court did not preclear the Act until

four weeks before the 2012 elections. 898 F. Supp. 2d at 48-49. Prior to preclearance, the State had hardly advertised the new reasonable impediment option at all. More significantly, the Act that created the reasonable impediment provision in South Carolina itself laid out a timeline for its advertisement that spanned at least eleven months. *Id.* at 49. Thus, the State would not be able to comply with its own law if it had been implemented for the 2012 elections. Indeed, the officials responsible for implementing the reasonable impediment provision had previously informed the court that it could not be implemented if preclearance was not received at least two months prior to the election. *Id.* No such timeline was present in SL 2015-103.

Moreover, unlike any of plaintiffs' experts, Dr. Trey Hood provided expert testimony regarding the North Carolina photo ID requirements and the impact of the reasonable impediment provision. (DX 500) Dr. Hood's testimony included an analysis of the post-implementation effects of photo ID laws in Georgia, Texas, and Mississippi. His unrebutted testimony showed no disproportionate effect on turnout among minority voters as compared to white voters in those states. (Tr. Day 4 at 220:13-21 [GA]; Tr. Day 4 at 227:2-14 [TX]; Tr. Day 4 at 228:2-229:5 [MS]) More importantly, his analysis of the effect of the South Carolina photo ID statute with its similar reasonable impediment provision concluded that virtually no voters in South Carolina's 2014 general election were affected by the State's photo ID law.¹⁴ (Tr. Day 4 at 235:9-17) Dr.

¹⁴ Only 131 reasonable impediment affidavits were executed in the 2014 general election in South Carolina, which equates to 0.011% of the votes cast in the 45 (out of 46)

Hood also concluded that the reasonable impediment declaration in North Carolina is functionally equivalent to the reasonable impediment affidavit in South Carolina, so the South Carolina experience can be used as a proxy for North Carolina. (Tr. Day 4 at 231:2–12) This is particularly the case since North Carolina has engaged in an aggressive education and outreach campaign to inform voters about the photo ID provisions, and the SBE has been actively assisting registered voters to become compliant with the new law. (Tr. Day 4 at 237:11–238:24)¹⁵

Dr. Hood’s conclusions are bolstered by South Carolina’s actual experience with the reasonable impediment option. Marci Andino, Executive Director of the South Carolina State Election Commission testified that she was not aware of a single instance when a reasonable impediment affidavit has been challenged for being false and that very few people showed up without a photo ID. (PX 1064 at 37:18-24, 92:17-21) Indeed, “photo ID turned out to be really a nonevent in South Carolina.” (PX 1064 at 92:22-23) Only “a little over a hundred” people showed up to vote without a photo ID during the statewide general election in 2014 (PX 1064 at 92:24–93:7) and she is not aware of any complaints from voters who wanted to cast a reasonable impediment ballot but they were unable to do so because of poll worker error. (PX 1064 at 148:25–149:5)

counties for which such data was available.

¹⁵ To the extent plaintiffs claim that voters will be burdened because their reasonable impediment votes will be challenged, such a claim lacks merit. Any voter or group of voters whose reasonable impediment provisional ballot is challenged and not counted improperly can file as-applied claims seeking to have their votes counted and any improper challenge procedure changed. The hypothetical possibility of an improper challenge is no basis for a facial attack on the photo ID requirement.

Moreover, Ms. Andino is not aware of any challenges in South Carolina to either the legitimacy of a person's identity or the truthfulness of the reasonable impediment affidavit. (PX 1064 at 55:9-18)

Finally, she testified that it is "highly unlikely" that counties in South Carolina tracked a reasonable impediment ballot as a provisional ballot for some other purpose in 2014 (PX 1064 at 145:5-11), and the budget for implementation of photo ID in South Carolina was \$635,000.00, which included money to purchase camera equipment and printers to produce voter registration photo ID cards. (PX 1064 at 114:11-23)¹⁶

Plainly, plaintiffs' primary disagreement with North Carolina's photo ID law is not that it is an illegal burden, but that it is a policy with which they strongly disagree. This was evident from the testimony of plaintiffs' own witnesses. For example, Rev. William Barber, President of plaintiff NC NAACP, insists that so-called "signature attestation" is sufficient for the State to prevent voter fraud and improve voter confidence. (Tr. Day 2 at 191:12-23) Rev. Barber argued that photo ID is still an unreasonable burden even if a voter actually possesses photo ID and brings it with him to the polling site. (Tr. Day 2 at 190:15-193:13)¹⁷ Indeed, his position is simply that the

¹⁶ Significantly, while South Carolina has issued thousands of free photo IDs during the implementation of its photo ID requirement, it is undisputed that South Carolina began issuing free photo IDs in November 2012 (over a year before North Carolina began issuing them), and that there is no evidence regarding how many South Carolinians who were issued free IDs already possessed a photo ID acceptable for voting in that State.

¹⁷ Nonetheless, even Rev. Barber and Dr. Minnite agreed that the reasonable impediment option would allow some voters to vote who might not otherwise be able to vote. (Tr. Day 2 at 194:19-20; Tr. Day 3 at 37:23-38:3)

full photo ID law should be “completely eliminated.” (Tr. Day 2 at 217:20-22) The same is true for plaintiffs’ expert Dr. Minnite. (Tr. Day 3 at 33:3-4)

C. North Carolina’s photo ID statute and its reasonable impediment option do not create discriminatory effects or burdens under Section 2.

In *Crawford*, the Supreme Court ruled that Indiana’s photo ID statute, similar in scope to HB 589, did not create an unconstitutional burden under the Fourteenth Amendment. In *South Carolina*, the three-judge court precleared South Carolina’s photo ID statute which included a reasonable impediment option nearly identical to the opportunity created by SL 2015-103. Given these two cases, it is hard to fathom how a photo ID provision which does not violate the Fourteenth Amendment, and which includes an option to vote a reasonable impediment ballot that has been precleared under Section 5, can possibly constitute a violation of Section 2. This conclusion follows regardless of whether the statute is analyzed for discriminatory effects or alleged discriminatory burdens.

Plaintiffs’ theories are based upon the arguments that minority groups are disproportionately less educated and less affluent than non-minorities and that because of this disparity they will be less able to bear the costs imposed by a photo ID requirement or the option to vote by way of a reasonable impediment ballot. (Tr. Day 1 at 84:22-85:19) Plaintiffs’ theories are based upon a book written by an economist named Anthony Downs and a chapter he prepared on the “calculus of voting.” (*Id.* at 85:20-86:1; Tr. Day 5 at 71:14-73:3) As explained by defendants’ expert Stephan

Thernstrom, Downs' original work does not merely discuss "burdens" or costs, it also focuses on the rewards of voting. Downs emphasizes the rewards to explain why persons decide to vote. (*Id.* at 72:21-73:25) Plaintiffs' expert, Dr. Barry Burden, fails to account for the rewards side of the Downs equation focusing only on the alleged "burdens" of photo ID and reasonable impediment. (*Id.* at 73:9-74:10)

Dr. Burden's version of the calculus of voting relies upon the demeaning assumption that persons of lower economic status and educational attainment lack the ability to adapt to changes in the law. (Tr. Day 5 at 75:6-76:7) Dr. Burden uses the rhetorical word "burden" instead of the term used by Downs ("costs") to make normal activities of life sound more "burdensome" and difficult than they actually are. (*Id.* at 72:21-73:8) For example, during the July trial, defendants' expert, Dr. Janet Thornton, explained how the costs of applying for social welfare benefits were similar if not more "burdensome" than the costs associated with obtaining a photo ID. (DX 309, pp. 49-58)¹⁸ Despite the "barriers" related to applying for social welfare benefits, unrefuted testimony by Dr. Thornton shows that African Americans are participating in social welfare programs at a higher rate than the percentage of African Americans who live below the poverty line. This evidence proves that minorities can master application procedures and the costs associated with obtaining benefits because of the rewards that are available. (Tr. Day 6 at 64:16-65:22) Further, all experts in this case have admitted

¹⁸ While not fully explained in her July testimony, Dr. Thornton has extensive experience analyzing racial disparities in similar application procedures as they relate to credit and insurance applications. (Tr. Day 6 at 25:1-26:7)

that African Americans have less access to motor vehicles and therefore have less incentive to obtain a driver license.¹⁹ (Tr. Day 1 at 89:12-90:3) Despite the “disproportionate” “burden” resulting from lack of access to a car, even Dr. Stewart was able to match over 94% of North Carolina’s registered black voters to an acceptable form of photo ID. Therefore, it cannot be disputed that an overwhelming majority -- in fact over 90% -- of registered African Americans had the resources, knowledge and ability to obtain photo ID. (Tr. Day 1 at 87:15-25)

Neither Dr. Stewart nor Dr. Burden have explained why well over 90% of African American registered voters were able to navigate the ID application process but the remaining 6% of African American registered voters will not be able to do so. Persons in the latter category might lack photo ID, as of July 2014, because they did not own a car and therefore did not need an ID or simply because they did not want an ID. (Tr. Day 1 at 89:12-90:3; Tr. Day 2 at 110:23-111:10) Tellingly, no expert has compared the education level of “matched” African American versus those who are not matched nor has any expert given testimony that unmatched minorities lack an ID because of disproportionately lower education and affluence. (Tr. Day 1 at 88:6-89:2; Tr. Day 2 at

¹⁹ Testimony offered by plaintiffs’ fact witnesses shows that even individuals who do not drive may need an official DMV-issued photo ID for activities other than voting. For instance, one witness testified that he was asked for a photo ID when he applied for food stamps ten years earlier while another testified that friends had urged her to obtain a photo ID “years ago” before North Carolina enacted SL 2013-381. (PX 1048) (Phillips Dep. 34:13-22); (PX 1052) (Foster Dep. 39:13-25)

110:11-18)²⁰ Nor have Dr. Stewart nor Dr. Burden or any other expert accounted for the undisputed fact – as advanced by plaintiffs’ expert in this case as it related to out of precinct voting – that African Americans are more likely to move than non-minorities and that they may be on a no-match list in greater numbers because they are more likely to reside at a different address than the one they gave to either SBE when they registered or DMV when they obtained a license. (Tr. Day 2 at 81:6-14; 111:11-22)

By his own admission, Dr. Burden repeatedly ignored the rewards that accrue to those who vote. (Tr. Day 1 at 44:10-16, 45:21-25; Tr. Day 5 at 72:3-77:25) Despite the fact that the registration process, like all election laws, could be described as being more difficult for the less affluent and less well educated (Tr. Day 1 at 85:20-86:1), as admitted in July by Dr. Stewart and all of plaintiffs’ experts, African Americans are registered at a higher rate of their voting age population than whites. (Tr. Day 5 at 73:4-25) Moreover, the results of the 2014 General Election show Dr. Burden’s and Dr. Stewart’s models for predicting voting behavior are demonstratively wrong. Despite the elimination of same-day registration and out of precinct voting, and despite the reduction of the days available for early voting, African American turnout during early voting and in the election in general increased in 2014 as compared to 2010, the most recent off-year election. Further, following the 2014 General Election, the African American

²⁰ Dr. Stewart gave a skewed analysis of educational attainment by African Americans versus non-minorities by only looking at persons who have obtained college degrees. Dr. Stewart did not compare high school graduation rates or explain why a college degree is needed to obtain a photo ID. (Tr. Day 2 at 157:17)

advantage in registration rate as compared to whites increased despite the “burdens” purportedly caused by the elimination of same-day registration. (Tr. Day 5 at 73:4-75:5)

Plaintiffs rely upon Dr. Stewart’s flawed matching report to support their claims of discriminatory effects or burdens. In addition to the fatal deficiencies already discussed, there are other problems with Dr. Stewart’s report, all of which cast doubt upon Dr. Stewart’s qualifications to give an expert opinion. Dr. Stewart has never done a matching analysis for a private sector client. In contrast, Dr. Thornton has made her living preparing matching reports for private sector companies. (Tr. Day 2 at 60:17-19; Tr. Day 6 at 26:8-27:3) The only time Dr. Stewart has ever attempted to match elections and DMV databases are in the two cases in which he has testified as an expert witness for the United States. In both cases, the United States was seeking to block photo ID statutes. (*Id.* at 60:22-61:11)²¹

In the private sector, in order to create an accurate list of who should be considered matched versus unmatched, hundreds if not thousands of hours of manual review of electronic no-match lists is required. (Tr. Day 6 at 27:4-30:11) In contrast,

²¹ Dr. Stewart’s evidence reduces solely to his unsupported assertion that minorities disproportionately lack photo ID in North Carolina and nationally. Thus, under plaintiffs’ Section 2 theories, no State may enact a photo ID law because it will disproportionately impact minority voters. Presumably the only way North Carolina or other states could enact photo ID would be to eliminate the disparity in photo ID possession by, for instance, making ID possession mandatory and providing every individual a photo ID. Of course, if that were the law, then states could not impose other reasonable rules on the right to vote, such as requiring voters to travel to precincts, without providing free transportation for every individual wanting to vote. Nor could the state impose voter registration unless such registration was mandatory and automatic upon turning voting age.

Dr. Stewart spent only a few hours of manual review of his no-match list. But even in this limited review he found that 15% of his alleged “no-matches” actually should have been matched. For his original report, Dr. Stewart only reviewed 50 to 100 of the individuals on his no-match list to determine whether he had missed any false negatives. (Tr. Day 2 at 103:19-106:1)²² In contrast, Dr. Stewart manually reviewed 100 voters who were matched on each of his 36 electronic sweeps (or a total of 3600) in his attempts to find false positives – or persons he matched who should not have been matched. (*Id.* at 151:16-154:3) Dr. Stewart’s greater focus on discovering false positives undermines his research and casts great doubt on his credibility.

Moreover, Dr. Stewart’s failure to remove inactive voters from the December 2015 report and his failure to compare how the percentage of inactive voters on his no-match list compares to the general voting population reveals further flaws in his analysis. North Carolina’s inactive voters represent only 11% of the combined total of active and inactive voters. (Tr. Day 6 at 50:5-24) In South Carolina, Dr. Stewart elected to remove inactive voters because they were unlikely to vote and likely to be removed from the voter rolls. Dr. Stewart did not make this same adjustment in his December 2015 matching report. Had this adjustment been disclosed, based upon voter status as of December 2015, 44% of Dr. Stewart’s December 2015 no-match list (99,172) had been moved to inactive status. (*Id.*) During his cross examination, Dr. Stewart admitted that

²² Dr. Stewart did not do any additional manual review for false negatives in his December 2015 report. (*Id.* at 105:6-18)

he did not disclose the number of inactive voters in his December 2015 report. (Tr. Day 2 at 75:16-24)

After his cross examination, and during a break for lunch, Dr. Stewart prepared a summary of persons on his no-match list who were inactive based upon their status in July 2014. As confirmed by Dr. Thornton, the number of inactive voters on Dr. Stewart's no-match list – even in July 2014 – represents over 33% of the persons on Dr. Stewart's no-match list. (Tr. Day 6 at 50:5-24) Thus, persons on Dr. Stewart's no-match list, even if calculated by their status under the July databases, were three times more likely to be inactive than the percentage of inactive voters in the general voter population. (*Id.* at 51:4-9)

As acknowledged by Dr. Stewart and the United States in South Carolina, inactive voters in an elections board database inevitably inflate the number of actual voters who cannot be matched with a DMV database. The United States and Dr. Stewart were right to remove these voters from their South Carolina analysis in order to give that court a closer estimate of possession rates by real voters. It is telling, then, that the United States and Dr. Stewart did not make this same reduction in the final report they presented to this Court.²³

²³ In South Carolina, Dr. Stewart concluded that African Americans were twice as likely not to possess an acceptable ID. He reached the same conclusion in this case. (Tr. Day 2 at 75: 11-15; 93:6-17) In both cases, a super majority of registered black voters (well in excess of 90%) were matched by Dr. Stewart. However, as compared to South Carolina, Dr. Stewart inflated the number of no-matched in North Carolina by including inactive voters.

Nor did Dr. Stewart disclose the number of voters on his December 2015 no-match list who had been removed from the voter rolls or how the percentage of voters removed from his no-match list by December 2015 compared to the percentage of registered voters removed from the SBE rolls in any given year. (Tr. Day 2 at 75:16-21) Dr. Thornton demonstrated that 25% (55,847) of Dr. Stewart's no-match list had been removed from North Carolina's voter rolls by December 2015. (Tr. Day 6 at 48:9-49:19) This compares to only 3.5% of active and inactive voters who were removed by SBE in 2013 because of list maintenance and other reasons.²⁴

Still other flaws can be found in Dr. Stewart's report. In Dr. Stewart's South Carolina analysis, Dr. Stewart removed from his no-match list persons in the DMV database who had returned their South Carolina driver license after they obtained a driver license in another state. While this same information was available in the DMV database, Dr. Stewart elected not to remove from his North Carolina no-match report persons who have returned their North Carolina license to the DMV. (Tr. Day 2 at 90:11-91:15) Thus, knowing that removal of surrendered driver's license was necessary in South Carolina to present a more accurate no-match report, Dr. Stewart elected in

²⁴ In 2013, the SBE removed 230,877 individuals from the voter rolls which includes active and inactive voters. (DX 309, p. 34; PX 534, p. 2) In 2013, SBE reported a total of 6,425,820 registered voters in active or inactive status. (PX 534, p. 6) Removed voters in 2013 (230,877) represented only 3.5% of the total number of active and inactive voters.

North Carolina to include persons with surrendered licenses on the North Carolina no-match list.

Dr. Stewart also admitted that he did not account for persons on his no-match list with military base addresses. (Tr. Day 2 at 99:14-22) He admitted that students are more likely to have a different registration address at college than the address they have provided DMV if they obtained their license in their home county and therefore more likely to cause false negatives. (Tr. Day 2 at 100:8-22) He did not account for this. (DX 309, pp. 25-32; Tr. Day 6 at 44:6-45:15) He did not address criticisms by Dr. Thornton that Dr. Stewart had failed to use mailing addresses or phone numbers to match voters with the DMV database even though both are available in the SBE and DMV databases. (Tr. Day 2 at 106:3-23) Nor did Dr. Stewart use change of name and change of address information found in the SBE database to search for matches in the DMV database. (Tr. Day 6 at 34:5-7) Dr. Stewart also failed to account for his flawed logarithm to search for address matches. Dr. Stewart only used the number for the address and zip code. He did not use the street name. Thus, persons residing at “100 Apple Street, 100 Mulberry Street and 100 Maple Street” located in the same zip code were treated by Dr. Stewart as duplicates. This caused persons who actually matched on Mulberry or Maple to be treated as no-matches. (Tr. Day 6 at 35:8-36:4)

Nor did Dr. Stewart disclose the extremely poor turnout history of persons on his no-match list as compared to the general voting population. In fact, 55% of the persons

on Dr. Stewart's no-match list had never voted and 69% did not vote in 2012 or 2014. (Tr. Day 6 at 54:20-55:25)

As summarized by Dr. Thornton, Dr. Stewart did not sufficiently modify his programming logic in his December report to address the many criticisms made by Dr. Thornton and Mr. Neesby before the July trial and failed to conduct even a minimal manual review of his no-match list. The fact that Dr. Stewart's no-match list is greatly inflated is confirmed by the number of unmatched voters who failed to provide SBE with either their SSN4 or driver license number, by the number of inactive voters on Dr. Stewart's list, the number of voters on Dr. Stewart's list who have become inactive or removed as of December 2015, and the absence of voting history for a very high percentage of the voters on Dr. Stewart's no-match list. (Tr. Day 6 at 30:22-31:11; 35:8-36:11; 54:20-55:25; 63:17-64:15)

In an attempt to show discriminatory effects or burdens, Dr. Stewart offered testimony concerning the percentage of unmatched voters from his no-match list by county. He then attempted to correlate these percentages with measurements of education attainment and economic status. This testimony fails to show any discriminatory effects or burdens for a variety of reasons.

First, Dr. Stewart gave no opinion in this case concerning North Carolina's reasonable impediment option. (Tr. Day 2 at 59:8-11) Presumably, voters without photo ID located anywhere in North Carolina, including counties with more limited access to

DMV facilities, may cast a reasonable impediment ballot if they cannot obtain an acceptable ID.

Next, in his December 2015 report, Dr. Stewart did not disclose the actual numbers of persons per county who lack photo IDs based upon Dr. Stewart's no-match report. (Tr. Day 2 at 107:15-108:10)²⁵ Dr. Stewart also ignored other evidence showing minority access to DMV facilities. In her March 16, 2015 report, Dr. Thornton explained that DMV offices in five of North Carolina's most populous counties (Mecklenburg, Wake, Durham, Guilford, and Forsyth) are located in census tracts with high percentages of minority population. (DX 309, pp. 52-54) Dr. Stewart's testimony also ignored evidence concerning important initiatives by the North Carolina DMV to provide customers with better access to services.

DMV operates 114 brick and mortar locations and 24 mobile sites. (Tr. Day 4 at 164:7-16) DMV will expand its mobile site locations from 24 to 70 by the summer of 2016 with 45 mobile sites available by the end of April 2016. (*Id.* at 170:7-175:23) Currently 98% of DMV's market population is within a thirty minute drive of a DMV brick and mortar or mobile location. DMV plans to reduce the distance for 98% of the market population to less than 20 minutes after it opens all of its 70 new mobile locations. (*Id.* at 174:24-176:16)

²⁵ Dr. Stewart testified that the number of unmatched voters could be calculated from Table M included in his original no-match report. (*Id.*; PX 242)

Plaintiffs also ignore other DMV initiatives to give better service and access to its customers. DMV's new Commissioner, Kelly Thomas, was appointed in October of 2013. (*Id.* at 154:18-20) He inherited 1970s-era computer systems, all of which will be replaced by December 2017. (*Id.* at 159:24-161:25) In 2015, for the first time, DMV implemented on-line services for persons wishing to renew their driver license by way of the internet. Since June of 2015, over 219,000 North Carolina drivers have renewed on-line eliminating over 60,000 hours of wait time those drivers and others would have otherwise experienced at a DMV office. (*Id.* at 164:20-166:12) DMV has commenced annual in-person and on-line training for all DMV examiners on customer service and quality control, something that was not done by prior DMV commissioners. (*Id.* at 162:2-164:5) Prior to Commissioner Thomas' appointment, each DMV office was equipped with only one camera and could only accept cash payments. Today, each DMV examiner in every office has his own camera, vision and sign testing equipment and can now accept payment by credit and debit cards. (*Id.* at 167:16-168:6)

DMV has also staffed each office with a person whose only assignment is to greet each customer to determine each customer's needs. (*Id.* at 166:16-167:5) DMV has also recently implemented a system that routes all calls to local offices to a central location. This allows DMV personnel in each office to focus exclusively on assisting customers arriving at their office. (*Id.*) DMV has fully implemented a computerized "Q Flow" system that allows managers to electronically track services sought by each customer and wait times in each office. This information is used by DMV managers to allocate

resources in order to maintain reasonable wait times. (*Id.* at 169:2-25) DMV also now offers extended business hours at 19 offices that serve 86% of its market population. (*Id.* at 168:7-169:1) As a result of these initiatives, DMV has reduced its average statewide wait time to receive services to 19 minutes and 42 seconds. (*Id.* at 170:1-6)

To the extent plaintiffs rely on alleged errors or omissions by DMV, their evidence is largely inadmissible but otherwise fails to prove discriminatory effects or burdens. Most of the evidence presented by plaintiffs about DMV errors consisted of individuals explaining their perceptions of visits to a DMV office and hearsay testimony of alleged statements by DMV officials.²⁶ Even assuming this evidence proved a mistake by DMV officials, poor customer service, or errors in legal interpretation, this evidence only shows sporadic and isolated incidents and falls well short of the type of evidence needed to prove a pattern or practice in violation of Section 2 or the Fourteenth Amendment. *United States v. Jones*, 57 F.3d 1020, 1023-24 (11th Cir. 1995) (“We have

²⁶ Ironically, the problems experienced by one plaintiff, Rosanell Eaton, whose testimony plaintiffs’ counsel highlighted throughout trial, were caused in substantial part by the federal Social Security Administration. In her testimony, Ms. Eaton identified four trips that she made to a DMV office and three to Social Security Offices to get the name on her driver license to match the name on her Social Security card and voter registration card. (PX 1045) (Eaton Dep. 24:16-25:9; 53:21-54:21) Although such a match is not required in order to vote with a photo ID in 2016, the longest wait times Ms. Eaton experienced (1 hour, 48 minutes and 45 minutes) while attempting to address this issue were at the Social Security office. (*Id.* at 56:13-24) On one trip, Ms. Eaton testified that she could not even get into the Social Security office due to lack of parking. (*Id.* at 54:22 – 55:5) Surely, plaintiffs do not suggest that these inconveniences and inefficiencies experienced by Ms. Eaton at an agency run by the United States create a legal claim. Moreover, Ms. Eaton clearly testified that she went to all of this trouble in order to continue driving. Under VIVA, she could have used her expired driver license for voting purposes.

found no case holding that an inadvertent error can constitute a standard, practice, or procedure under Section 2. As the district court correctly noted, the text of the act contains no reference to inadvertent error.”); *Gamza v. Aguirre*, 619 F.2d 449, 454 (5th Cir. 1981) (“In the absence of evidence that the alleged maladministration of the local election procedures was attended by the intention to discriminate against the affected voters or motivated by a desire to subvert the right of the voters to choose their school board representative, we cannot conclude that the error constituted a denial of equal protection of the laws.”); *Harris Co. Dept. of Educ. v. Harris Co.*, No. H-12-2190, 2012 WL 3886427, at *6 (S.D. Tex. Sept. 6, 2012) (“But no facts have been alleged or identified that would tend to support an inference that Harris County's actions were anything more than an inadvertent mistake. . . . The [plaintiff] alleges a single instance of a failure to use the correct map lines in a primary election, possibly affecting the outcome of one race. The correct map was otherwise used. Such an allegation of isolated, inadvertent error is insufficient to state a Fourteenth Amendment one-person, one-vote claim.”); *Vallejo v. City of Tucson*, No. CV 08-500 TUC DCB, 2009 WL 1835115, at *3 (D. Ariz. June 26, 2009) (dismissing plaintiff’s Section 2 claim because the plaintiff “offers no facts to show that the Defendants committed anything more than an inadvertent error. The City's ‘standard, practice, or procedure’ was to follow state law. This includes allowing persons such as [plaintiff] with insufficient identification to vote using a provisional ballot. The Court finds the failure to issue [plaintiff] a provisional ballot was an isolated incident and in no way affected the standard, practice,

or procedure of the election.”); *Coleman v. Bd. of Educ.*, 990 F. Supp. 221, 227 (S.D.N.Y. 1997) (“[A] ‘standard, practice, or procedure’ must be more than a ‘run-of-the-mill mistake’ that one would expect in the normal course of an election”) (quoting *Jones*, 57 F.3d at 1023).

Nor do the issuances of no-fee IDs by the DMV show discriminatory effects or illegal burdens. Any person who travels to DMV to obtain a no-fee ID will receive a DMV customer number if they provide the DMV examiner with their name, date of birth and social security number all of which must match with the Social Security Administration’s database. (Tr. Day 4 at 178:15-179:5)²⁷ Since January 1, 2014, DMV has recorded a total of 2,139 no-fee ID transactions. (*Id.* at 176:25-177:12) As of the time of trial, less than 30 persons who had provided DMV with enough information to obtain a DMV customer ID had not completed the process for obtaining a no-fee ID. (*Id.* at 177:17-178:14) Finally, since April of 2015 through the date of trial, only three persons presented at a DMV office to obtain a no-fee ID but were unable to provide enough information to obtain a DMV customer ID. (*Id.* at 179:6-180:2) The evidence shows that very few persons have been unable to obtain a no-fee ID and there is no evidence of a pattern of failures by minority applicants as compared to whites. Almost everyone who has attempted to obtain a no-fee ID has in fact successfully navigated the

²⁷ Federal law requires that a driver license cannot be issued unless the applicant provides a name, social security number and birthdate that match exactly with the information in the Social Security Administration’s database. (Tr. Day 2 at 182:6-183:6)

process and provided DMV with information sufficient for NC DMV to confirm identity and residence.²⁸

²⁸ DMV's flexibility in considering identity and residence documentation is demonstrated by its instructions to examiners to use other documents to confirm identity and residence for no-fee applicants as well as persons who apply for a driver's license. While DMV's publication of its representative alternative documents was inadvertently delayed, all public notices advised potential no-fee applicants that DMV would consider any documents in their possession that might prove identity and residence. Further, the list of representative alternative documents is now available on the DMV website and at DMV offices. (*Id.* at 180:12-188:3; DX 533)

Respectfully submitted, this the 24th day of February, 2016.

NORTH CAROLINA DEPARTMENT
OF JUSTICE

/s/ Alexander McC. Peters
Alexander McC. Peters
Senior Deputy Attorney General
N.C. State Bar No. 13654
apeters@ncdoj.gov

N.C. Department of Justice
P.O. Box 629
Raleigh, NC 27602
Telephone: (919) 716-6900
Facsimile: (919) 716-6763
*Counsel for Defendants North Carolina and
State Board of Elections Defendants.*

OGLETREE, DEAKINS, NASH
SMOAK & DR. STEWART, P.C.

/s/ Thomas A. Farr
Thomas A. Farr
N.C. State Bar No. 10871
Phillip J. Strach
N.C. State Bar No. 29456
thomas.farr@ogletreedeakins.com
phil.strach@ogletreedeakins.com

4208 Six Forks Road, Suite 1100
Raleigh, North Carolina 27609
Telephone: (919) 787-9700
Facsimile: (919) 783-9412
*Co-counsel for Defendants North Carolina
and State Board of Elections Defendants.*

BOWERS LAW OFFICE LLC

By: /s/ Karl S. Bowers, Jr.

Karl S. Bowers, Jr.*

Federal Bar #7716

P.O. Box 50549

Columbia, SC 29250

Telephone: (803) 260-4124

E-mail: butch@butchbowers.com

*appearing pursuant to Local Rule 83.1(d)

Counsel for Governor Patrick L. McCrory

By: /s/ Robert C. Stephens

Robert C. Stephens (State Bar #4150)

General Counsel

Office of the Governor of North Carolina

20301 Mail Service Center

Raleigh, North Carolina 27699

Telephone: (919) 814-2027

Facsimile: (919) 733-2120

E-mail: bob.stephens@nc.gov

Counsel for Governor Patrick L. McCrory

CERTIFICATE OF SERVICE

I, Thomas A. Farr, hereby certify that I have this day electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will provide electronic notification of the same to the following:

Counsel for United States of America:

T. Christian Herren, Jr.
John A. Russ IV
Catherine Meza
David G. Cooper
Spencer R. Fisher
Elizabeth M. Ryan
Jenigh Garrett
Attorneys, Voting Section
Civil Rights Division
U.S. Department of Justice
Room 7254-NWB
950 Pennsylvania Avenue, N.W.
Washington, DC 20530

Gill P. Beck
Special Assistant United States Attorney
Office of the United States Attorney
United States Courthouse
100 Otis Street
Asheville, NC 28801

Counsel for NCAAP Plaintiffs:

Penda D. Hair
Edward A. Hailes, Jr.
Denise D. Liberman
Donita Judge
Caitlin Swain
ADVANCEMENT PROJECT
Suite 850
1220 L Street, N.W.
Washington, DC 20005
phair@advancementproject.com

Adam Stein
TIN FULTON WALKER & OWEN
312 West Franklin Street
Chapel Hill, NC 27516
astein@tinfulton.com

Irving Joyner
P.O. Box 374
Cary, NC 27512
ijoyner@ncsu.edu

Thomas D. Yannucci
Daniel T. Donovan
Susan M. Davies
K. Winn Allen
Uzoma Nkwonta
Kim Knudson
Anne Dechter
Bridget O'Connor
Jodi Wu
Kim Rancour
KIRKLAND & ELLIS LLP
655 Fifteenth St., N.W.
Washington, DC 20005

tyannucci@kirkland.com

***Counsel for League of Women Voter
Plaintiffs:***

Anita S. Earls
Allison J. Riggs
Clare R. Barnett
Southern Coalition for Social Justice
1415 Hwy. 54, Suite 101
Durham, NC 27707
anita@southerncoalition.org

Laughlin McDonald
ACLU Voting Rights Project
2700 International Tower
229 Peachtree Street, NE
Atlanta, GA 30303
lmcDonald@aclu.org

Dale Ho
Julie A. Ebenstein
ACLU Voting Rights Project
125 Broad Street
New York, NY 10004
dale.ho@aclu.org

Christopher Brook
ACLU of North Carolina Legal Foundation
PO Box 28004
Raleigh, NC 27611-8004
cbrook@acluofnc.org

Counsel for the Intervening Plaintiffs:

John M. Davaney
jdevaney@perkinscoie.com
Marc E. Elias
melias@perkinscoie.com
Kevin J. Hamilton
khamilton@perkinscoie.com
Elisabeth Frost
efrost@perkinscoie.com
PERKINS COIE, LLP
700 Thirteenth Street, N.W., Suite 600
Washington, D.C. 20005-3960

Edwin M. Speas, Jr.
espeas@poynerspruill.com
John W. O'Hale
johale@poynerspruill.com
Caroline P. Mackie
cmackie@poynerspruill.com
POYNER SPRUILL, LLP
301 Fayetteville St., Suite 1900
Raleigh, NC 27601

This the 24th day of February, 2016.

OGLETREE, DEAKINS, NASH
SMOAK & STEWART, P.C.

/s/ Thomas A. Farr

Thomas A. Farr

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