

N.C. State Conference, of the Naacp v. McCrory

North Carolina State Conference, of the NAACP, Emmanuel Baptist Church, Bethel A. Baptist Church, Covenant Presbyterian Church, Barbee's Chapel Missionary Baptist Church, Inc., Rosanell Eaton, Armenta Eaton, Carolyn Coleman, Jocelyn Ferguson-Kelly, Faith Jackson, Mary Perry, and Maria Teresa Unger Palmer, Plaintiffs, v. Patrick Lloyd McCrory, in his Official capacity as Governor of North Carolina, Kim Westbrook Strach, in her official capacity as Executive Director of the North Carolina State Board of Elections, Rhonda K. Amoroso, in her official capacity as Secretary of the North Carolina State Board of Elections, Joshua D. Malcolm, in his official Capacity as a member of the North Carolina State Board of Elections, Paul J. Foley, in his official Capacity as a member of the North Carolina State Board of Elections and Maja Kricker, in her official capacity as a member of the North Carolina State Board of Elections, Defendants. League of Women Voters of North Carolina; A. Philip Randolph Institute; Unifour Onestop Collaborative; Common Cause North Carolina; Goldie Wells; Kay Brandon; Octavia Rainey; Sara Stohler; and Hugh Stohler, Plaintiffs, and Louis M. Duke; Josue E. Berduo; Nancy J. Lund; Brian M. Miller; Becky Hurley Mock; Lynne M. Walter; and Ebony N. West, Plaintiff-Intervenors, v. The State of North Carolina, Joshua B. Howard, in his official capacity as a member of the State Board of Elections; Rhonda K. Amoroso, in her official capacity as a member of the State Board of Elections; Joshua D. Malcolm, in his official capacity as a member of the State Board of Elections; Paul J. Foley, in his official capacity as a member of the State Board of Elections; Maja Kricker, in her official capacity as a member of the State Board of Elections; and Patrick L. McCrory, in his official capacity as the Governor of the State of North Carolina, Defendants. United States of America, Plaintiff, v. The State of North Carolina, The North Carolina State Board of Elections; and Kim W. Strach, in her official capacity as Executive Director of the North Carolina State Board of Elections, Defendants.

156 F.Supp.3d 683

United States District Court, M.D. North Carolina.

Decided January 15 2016

Bridget K. O'Connor, Christopher J. Maner, Daniel T. Donovan, Jodi K. Wu, Kenneth Winn Allen, Kimberly D. Rancour, Michael A. Glick, Ronald K. Anguas, Jr., Susan Marie Davies, Thomas D. Yannucci, Uzoma N. Nkwonta, Kirkland &

Ellis, LLP, Caitlin Swain-McSurely, Denise D. Lieberman, Donita Judge, Jadine C. Johnson, Jasmyn G. Richardson, Penda Denise Hair, Advancement Project, Washington, DC, Irving Joyner, N.C. Central University School of Law, Cary, NC, Jennifer R. Basch, John J. Song, Madelyn A. Morris, Kirkland & Ellis, LLP, New York, NY, Adam Stein, Tin Fulton Walker & Owen, PLLC, Chapel Hill, NC, for Plaintiffs.

Karl S. Bowers, Jr., Bowers Law Office LLC, Columbia, SC, Alexander McClure Peters, Katherine A. Murphy, N.C. Department of Justice, Phillip John Strach, Thomas A. Farr, Michael Douglas McKnight, Ogletree Deakins Nash Smoak & Stewart, P.C., Raleigh, NC, Amy M. Pocklington, Ogletree, Deakins, Nash, Smoak & Stewart, P.C., Richmond, VA, Elizabeth R. Dangel, Ogletree, Deakins, Nash, Smoak & Stewart, P.C., Charlotte, NC, for Defendants.

* * *

MEMORANDUM OPINION AND ORDER

[156 F.Supp.3d 687] THOMAS D. SCHROEDER, District Judge. impediment” exception identical to that approved by a three-judge court in *South Carolina v. United States* , 898 F.Supp.2d 30 (D.D.C.2012). For the reasons set forth below, the motion will be denied.

I. BACKGROUND

A. Procedural History

On May 19, 2014, all Plaintiffs moved to preliminarily enjoin the challenged provisions, and the United States sought the appointment of federal observers. (Docs. 108, 110.) As to the photo-ID requirement, however, NAACP Plaintiffs (and those challenging the photo-ID requirement) moved to enjoin only its “soft rollout” in which voters would be advised that the photo-ID requirement would apply starting in 2016.

On August 8, 2014, after considering the testimony of multiple fact and expert witnesses and an extensive record of over 11,000 pages of exhibits and materials, this court issued a 125-page opinion denying the motions for preliminary injunction but refusing to dismiss any claims. 997 F.Supp.2d 322 (M.D.N.C. 2014). Certain Plaintiffs appealed, and on October 1, 2014, a divided panel of the Fourth Circuit issued an opinion affirming in part, reversing in part, and remanding with instructions. *League of Women Voters of N.C. v. North Carolina* , 769 F.3d 224 (4th Cir. 2014). The majority found that Plaintiffs had demonstrated a likelihood of success on the claim that the repeal of SDR and OOP voting violated § 2 of the VRA, but

Trial was set for July 13, 2015. On June 18, 2015, the North Carolina General Assembly passed House Bill 836, and on June 22, 2015, the Governor signed it into law as North Carolina Session Law 2015-103 (“SL 2015-103”). The law relaxed the photo-ID requirement created by SL 2013-381 by providing an additional exception that permits individuals to vote without a

photo ID so long as they sign a reasonable impediment affidavit. The court immediately held a status conference to address how this change in law might affect the pending cases. Plaintiffs desired additional time to assess the new law but urged the court not to delay trial on the remaining claims; Defendants argued that the amendment rendered the challenge to the photo-ID requirement moot. The court proposed continuing the trial to September 2015 rather than bifurcating the photo-ID claim but, at Plaintiffs' urging, carved out the challenge to the photo-ID law (except as it related to Plaintiffs' intent claims) from the July 13 trial setting and agreed to proceed to trial on the balance of the consolidated claims. (Doc. 299.) Thereafter, Defendants moved to dismiss the photo-ID challenge as moot (Doc. 316); the court denied the motion, setting trial for January 25, 2016.

On November 24, 2015, five months after the photo-ID law was modified by the reasonable impediment exception and two months before trial, NAACP Plaintiffs filed the present motion to preliminarily enjoin the implementation of the photo-ID provision of SL 2013-381, as amended by the reasonable impediment provision, for the March 15, 2016 primary. (Doc. 390.) The United States has not joined this motion. Briefing was completed on December 21, 2015. (Doc. 395.)

[156 F.Supp.3d 689] NAACP Plaintiffs limit their present motion to their claims of intentional discrimination and the alleged unconstitutional burden the photo-ID requirement with the reasonable impediment exception will have on the right to vote under the Fourteenth Amendment pursuant to the *Anderson -Burdick* line of cases. See *Anderson v. Celebrezze* , 460 U.S. 780, 788–89, 103 S.Ct. 1564, 75 L.Ed.2d 547 (1983) ; *Burdick v. Takushi* , 504 U.S. 428, 433–34, 112 S.Ct. 2059, 119 L.Ed.2d 245 (1992). The motion is not based on their “results” claim under § 2 of the VRA. (Doc. 391 at 6-7.) NAACP Plaintiffs make three principal contentions in support of their motion. First, they argue that the State has not

sufficiently educated voters and election officials on the reasonable impediment exception. Second, they argue that the reasonable impediment provision has not been sufficiently defined by Defendants to prevent it from being applied in a discriminatory and burdensome manner. Third, they claim that SL 2013-381's version of photo ID was passed with discriminatory intent.

B. Original Photo-ID Requirement and Reasonable Impediment Exception

Session Law 2013-381 required the State to provide a special photo ID free of charge to any registered voter who executes a declaration “stating the registered voter is registered and does not have other photo identification [that is] acceptable.” Id. § 20-37.7(d)(5). The State must also provide a free photo ID to anyone appearing before the North Carolina Department of Motor Vehicles (“DMV”) for purposes of registering to vote who declares that she does not have an acceptable photo ID. Id. § 20-37.7(d)(6).

If an election official determines that a voter's photo ID “does not bear any reasonable resemblance to that voter,” SL 2013-381 requires the election official to “notify the judges of election of the determination.” Id. § 163-166.14(a). The judges of election present must review the photo ID and determine if it bears any reasonable resemblance to the voter. Id. § 163-166.14(b). The judges may take into account additional evidence proffered by the voter and must construe all evidence in the light most favorable to the voter. Id. Unless the judges present unanimously determine that the voter's photo ID bears no reasonable resemblance to him or her, the voter will be allowed to vote. Id. § 163-166.14(c). If the judges do so unanimously agree, the voter is permitted to cast a provisional ballot. Id. § 163-166.14(d).

[156 F.Supp.3d 690] Voters who do not comply with the photo-ID requirement are permitted to cast a provisional ballot, which will be counted so long as

the voter appears at his or her county board of elections (“CBOE”) before noon on the day prior to the convening of the election canvass and presents a form of photo ID bearing a reasonable resemblance to them. Id. § 163-182.1A(b)-(c).

Session Law 2013-381 provided three exceptions which permitted certain groups of individuals to vote without presenting photo ID: (1) voters who are permitted to vote curbside; (2) those who have a religious objection to being photographed; and (3) those who have been the victim of a natural disaster occurring within sixty days of Election Day. Id. § 163-166.13(a).

Further, rather than implement the photo-ID provision immediately, SL 2013-381 provided for a two-year “soft-rollout” so that the requirement would not take effect until January 1, 2016. This was consistent with the bipartisan recommendation of former President Jimmy Carter and former Secretary of State James A. Baker, III, see Commission on Federal Election Reform, Building Confidence in U.S. Elections 19 (Sept. 2005) (“Carter-Baker Report”), and is evidence that the legislature attempted to soften any burden imposed by the photo-ID requirement by giving voters two years to acquire a free photo ID.

Although a reasonable impediment voter casts a provisional ballot, the ballot must be counted unless one of the following is true: the impediment described in the declaration is “factually false, merely denigrate[s] the photo identification requirement, or [is an] obviously nonsensical statement[]”; the voter fails to provide one of the alternate forms of identification discussed above; the CBOE could not confirm the voter's registration using the alternate form of identification provided; or the “voter is disqualified for some other reason provided by law.” Id. § 163-182.1B(a).

Session Law 2015-103 expressly clarifies what can constitute a reasonable impediment. At a minimum, all

reasonable impediment declarations are required to include separate boxes listing the following reasonable impediments to acquiring a photo ID: (1) “Lack of transportation; (2) “Disability or illness”; (3) “Lack of birth certificate or other documents needed to obtain photo identification”; (4) “Work Schedule”; (5) “Family responsibilities”; (6) “Lost or stolen

Under the law, a voter's stated reasonable impediment cannot be rejected on the ground that it is not reasonable. See *id.* § 163-182.1B(b)(6). Instead, the law provides that, if a voter's reasonable impediment declaration is challenged, the CBOE is required to “construe all evidence presented in the light most favorable to the voter submitting the reasonable impediment declaration” and can only reject a declaration for the reason provided by the declarant if the statement “merely denigrate[s] the photo identification requirement,” is “obviously nonsensical,” or is “factually false.” *Id.* § 163-182.1B(a)(5),(7).

- the reasonable impediment declaration provision should be interpreted very broadly (*Doc.* 395-6 at 12);
- the provision should be construed with all inferences in favor of the voter (*id.*);
- election officials should err on the side of viewing declarations in the light most favorable to the voter (*id.*);
- the provision should be construed with all inferences in favor of protecting the fundamental right to vote (*id.* at 13);
- if CBOE officials have doubts, such doubts should be resolved in favor of the vote being counted (*id.* at 15);
- it is up to the voter to determine if he or she has a reasonable impediment and a voter's belief that he or she has a reasonable impediment should not be second-guessed (*id.*);
- poll workers and CBOEs do not have discretion to determine if a voter's explanation is not reasonable (*id.*);
- poll workers and CBOE officials should not investigate or question voters regarding the reasonableness of the impediments that they identify (*id.*);
- voters may get assistance from a person of their choosing when executing a reasonable impediment declaration, without first determining they are illiterate or suffer from a disability (*id.* at 62-63).

[156 F.Supp.3d 692] NAACP Plaintiffs concede Director “Strach's Rule 30(b)(6) deposition testimony establishes both the State Board's interpretation of the reasonable impediment exception, including the

position that a broad reading of the exception in favor of the voter is clearly required by the statute, and its plans for implementation of the exception.” (*Id.* at 5.) Nevertheless, even though the SBOE is responsible for administering elections in North Carolina, NAACP Plaintiffs believe that the clear language of the statute and Director Strach's Rule 30(b)(6) deposition do not provide adequate assurances because Defendants have declined to stipulate to or more formally memorialize the position articulated by Director Strach. (*Id.*) In fact, in a telephonic hearing on January 7, 2016, NAACP Plaintiffs suggested to the court that their motion for preliminary injunction, at least as to their Anderson -Burdick claims, might be unnecessary if the statements made by Director Strach were memorialized.

C. Voter and Poll Worker Education

1. Education Efforts from SL 2013-381's Enactment until SL 2015-103's Enactment

[156 F.Supp.3d 693] Defendants engaged in substantial efforts to educate voters about the State's photo-ID requirement prior to when SL 2015-103 enacted the reasonable impediment exception. There were three elections during this time period (municipal elections in November 2013, midterm primary elections in May 2014, and midterm general elections in November 2014). election, poll workers gave them the two-sided color push card noted above with instructions on how to get a free ID. (*Id.* at 20-21.) The State kept track of those who claimed they did not have access to an acceptable photo ID and sent a mailing to each. (*Id.* at 20-22.) That mailing asked voters whether they needed assistance in acquiring an acceptable photo ID. (*Id.* at 22.)

In addition to efforts to educate voters at polling sites, the SBOE created a special website dedicated to the photo-ID requirement and sent a mailing to more than 218,000 registered voters who could not be matched to having an acceptable DMV-issued photo ID. (*Doc.*

390-4 at 5.) The mailing stated that photo ID would be needed to vote in 2016, listed resources for obtaining free photo ID, and provided a postage pre-paid response card where recipients could indicate they needed assistance in acquiring a photo ID. (Doc. 394-1 at 9 & Ex. 5.)

In sum, over the course of the last two years, North Carolina has been continually notifying voters that, unless certain exceptions apply, they will need photo ID to vote in 2016.

2. Education Efforts Since SL 2015-103's Enactment of the Reasonable Impediment Exception

On June 22, 2015, SL 2015-103 added the reasonable impediment exception, thus rendering the prior information provided to voters incomplete. Session Law 2015-103 requires the SBOE to educate voters on the availability of the reasonable impediment declaration, 2015 N.C. Sess. Laws 103, § 8.(g), and the SBOE has engaged in substantial efforts to do so.

Creation and Distribution of Updated Materials

Director Strach testified that “[i]mmediately after the enactment of S.L. 2015-103 in June 2015, SBOE staff developed new materials which would inform the public of modifications to the photo identification requirements and the availability of the reasonable impediment declaration option.” (Doc. 394-1 at 16.)

These 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”; “have been distributed to groups and associations by the SBOE Outreach Team”; “have been made available to candidates filing for the 2016 election contests”; and can be “download[ed] from the SBOE's dedicated ‘Voter Id’ website.” (Id. at 16-17.) As of December 11, 2015, the

“SBOE ha[d] distributed 105,000 copies of these materials, including Spanish-language materials.” (Id. at 17.) The SBOE also represents that within two weeks of December 11, 2015, it will have implemented statewide distribution of an additional “300,000 flyers and 13,000 full-size posters” to CBOEs 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.

[156 F.Supp.3d 694] “includ [ing] educational institutions, food banks and pantries, retail and business establishments, churches, and other locations open to the public.” (Id. at 17-18.) Pursuant to “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.” (Id. at 18.)

Further, on or about November 2, 2015, the State mailed a letter to those organizations who received a prior version of educational materials not including the reasonable impediment provision stating “that recipients should provide updated current information to any individuals to whom they disseminated the original materials or information.” (Id. at 17.) The letter also offered the assistance of SBOE staff and included a form to order new materials. (Id.)

Statewide Media Campaign

(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.

[156 F.Supp.3d 695] The State also intends to implement “an expansive outdoor advertising campaign to promote general awareness of the photo-ID requirements and exceptions.” (Doc. 394-1 at 14.) As of Director Strach's December 11, 2015 declaration, the SBOE projected that this “message will be displayed throughout North Carolina in rural, suburban, and urban areas on 40 vinyl billboards through November 2016, and 100 printed billboards through roughly August 2016.” (Id.) Forty digital electronic billboards across the State will also bear the message from January through March 2016. (Id.) The State estimates that 16.5 million passersby viewed its billboard messages on 52 billboards over a 5-week period leading up to the 2014 general election. (Id.)

Information Provided on SBOE and CBOE Websites

The State has also used the SBOE's website, CBOE websites, and the stand-alone website dedicated to the photo-ID requirement to educate voters about the reasonable impediment exception. (Id. at 13.) The first result of a Google search for “North Carolina voting ID” is the dedicated photo-ID website. At the top of that site is the statement, “Beginning in 2016, Most Voters Will Need to Show Acceptable Photo ID at the Polls.” See N.C. State Bd. of Elections, www.voterid.nc.gov (last visited January 15, 2016). Below that statement is an image of acceptable forms of photo ID. Id. Below that statement in bold, pink letters is the statement, “Reasonable Impediment: Can't Get a Photo ID? Click Here.” Id. Clicking on the accompanying link produces the following prominently-displayed statement:

Declaration of Reasonable Impediment Voters who are unable to obtain an acceptable photo ID due to a reasonable impediment may still vote a provisional ballot at the polls. (Examples of a reasonable impediment include but are not limited to the lack of proper documents, family obligations, transportation problems, work schedule, illness or disability, among other reasonable

impediments faced by the voter.) Voters must also: 1. Sign a declaration describing their impediment; and 2. Provide their date of birth and last four digits of their Social Security number, or present their current voter registration card or a copy of an acceptable document bearing their name and address. (Acceptable documents include a current utility bill, bank statement, government check, paycheck, or other government-issued document.) The provisional ballot will be counted when the information on the declaration is verified and all other eligibility requirements are met.

Id. A video on the home page also concludes with the statement “if you don't have an ID or if you are unable to obtain one, voting options are available. For more information on exceptions, or for help getting a free ID, visit voterid.nc.gov or call 866-522-4723.” Id.

Judicial Voter Guide

[156 F.Supp.3d 696] The SBOE also intends to educate voters about the reasonable impediment declaration through the State's “Judicial Voter Guide,” which is required by statute to be mailed 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.” (Doc. 394-1 at 14.) The SBOE represents that “[i]nformation regarding the reasonable impediment declaration option and other exceptions will be a primary focus” of the guide and that its front cover “will bear a prominent statement that important information regarding photo-ID requirements and exceptions for 2016 elections is contained inside.” (Id. at 14-15.)

Targeted Mailing of Those Previously Contacted

Most importantly, the SBOE has taken specific steps to re-educate those individuals that it previously contacted regarding the photo-ID requirement. As noted above, individuals who signed the “Acknowledgment of no Photo ID” form while voting and individuals appearing on “no-match” lists were mailed information about the need for photo ID in

2016 and how to acquire it. (Id. at 7-10.) These mailings predated SL 2015-103. (Id. at 11.) However, and of critical importance here, after the fall elections in November 2015, the SBOE sent every individual who received a prior mailing (315,755 voters)—except those who had reported they already possess acceptable photo ID and those for whom prior mailings were returned to the SBOE as undeliverable—an additional mailing describing the reasonable impediment exception and other exceptions to the photo-ID requirement. (Id.)

Election Official Training

In addition to in-person training, the SBOE provided CBOEs with a training video on the photo identification requirement, including the reasonable impediment exception, “in early December 2015 for use in their training of elections workers for the Primary Election in March 2016.” (Id. at 3.) The training video includes “11 separate modules lasting a combined total of approximately one hour.” (Id. at 4.) The SBOE also represents that an “Election Official Handbook,” which is “an operations manual for the administration of elections,” “will be provided to county boards of elections for distribution to every precinct polling place and one-stop early voting location in the State.” (Id.) Each polling place will also be provided a 123-page “station guide” containing “step-by-step procedures for processing voters both with and without acceptable photo ID,” several pages of which address the reasonable impediment situation. (Id. at 4-5.)

II. ANALYSIS

To prevail on their motion for preliminary injunction, NAACP Plaintiffs must establish that (1) they are likely to succeed on the merits; (2) they are likely to suffer irreparable harm without an injunction; (3) the balance of the equities favors an injunction; and (4) an injunction is in the public interest. *Winter v. Nat'l Res. Def. Council, Inc.* , 555 U.S. 7, 20, 129 S.Ct. 365, 172

L.Ed.2d 249 (2008). Granting a preliminary injunction is “an extraordinary and drastic remedy” that cannot be provided absent a plaintiff establishing each element by a clear showing. *Mazurek v. Armstrong* , 520 U.S. 968, 972, 117 S.Ct. 1865, 138 L.Ed.2d 162 (1997) ; *Real Truth About Obama, Inc. v. Fed. Election Comm'n* , 575 F.3d 342, 346 (4th Cir.2009) (finding that “[a]ll four requirements must be satisfied” in order for relief to be granted), vacated on other grounds , 559 U.S. 1089, 130 S.Ct. 2371, 176 L. Ed.2d 764 (2010). It is also not enough that Plaintiffs show a grave or serious question for litigation; they must make a “clear” demonstration they will “likely” succeed on the merits. *Real Truth About Obama, Inc.* , 575 F.3d at 346–47.

On the present record, NAACP Plaintiffs have failed to clearly demonstrate that they are likely to succeed on the merits or that the balance of the equities or public interest favors an injunction.

A. Likelihood of Success on the Merits

NAACP Plaintiffs, relying on the testimony of Lorraine Minnite, Ph.D., Associate Professor of Public Policy and Director of the Urban Studies Program in the Department of Public Policy and Administration at Rutgers University, assert that North Carolina's photo-ID law “serves no rational public policy purpose” because no actual voter fraud has been shown to exist in North Carolina. (Doc. 395-1 at 6-7.) This position fails in light of *Crawford* , where the Supreme Court thoroughly laid out the benefits of a photo-ID requirement. 553 U.S. at 192–200, 128 S.Ct. 1610 (election modernization, avoidance of potential voter fraud, and safeguarding voter confidence). The legislative history of SL 2013-381 and the law itself indicate that the North Carolina General Assembly sought to achieve the same end. (Pl. Ex. 549 at 2-4 (“North Carolina is one of the last in the Southeast to introduce [photo ID] for honesty and integrity in the electoral process and we believe it will go a long way to building confidence back in our voters and our

citizens.”)); 2013 N.C. Sess. Laws 381 (stating that its purpose was to “to protect the right of each registered voter to cast a secure vote with reasonable security measures that confirm voter identity as accurately as possible without restriction”); 2015 N.C. Sess. Laws 103 (stating that its purpose was to “authorize voters who suffer from a reasonable impediment preventing the voter from obtaining photo identification to complete reasonable impediment declarations when voting”).

[156 F.Supp.3d 699] Dr. Minnite simply disagrees with the Supreme Court and did not even reference Crawford in her report, instead citing a Missouri Supreme Court case predating Crawford . (Doc. 355 at 47-48; Pl. Ex. 232 at 22.) Indeed, at trial in this case, she testified that the United States Supreme Court's discussion of fraud “doesn't constitute an informed opinion or an informed knowledge about voter fraud” because “it doesn't sort of meet my standards of having a correct understanding about the evidence.” (Doc. 355 at 48.) Even Dr. Minnite conceded at trial, however, that the risk of voter fraud is “real in the sense that it could happen” and while “[t]here is no evidence of extensive fraud in U.S. elections or of multiple voting, ... both occur and it could affect the outcome of a close election.” (Id. at 50-51.) She nevertheless discounts it, however, “in the sense that it likely happens.” (Id. at 49.)

[156 F.Supp.3d 700] North Carolina has sought to accommodate those expressing genuine difficulties in acquiring photo ID, but it still has a photo-ID requirement. When the State did not have a reasonable impediment exception, NAACP Plaintiffs claimed the burden imposed on the socioeconomically disadvantaged was too severe. Now that the State has sought to accommodate these voters with the reasonable impediment exception, Plaintiffs claim that the exception swallows the rule and that the State need not have a photo-ID requirement. This court finds any alleged diminution in achieving the State's purported interest to be more than offset by the reduction of

burden achieved by the reasonable impediment exception. the court found that filling out the form would not constitute a material burden, at least under the VRA. Id.

Upon close examination, North Carolina's reasonable impediment provision is effectively a codification of the three-judge panel's holding in South Carolina . As noted above, a voter's reasonable impediment declaration can only be rejected if it is false, denigrating to the photo-ID requirement, or obviously nonsensical. The law does not permit a voter's declaration to be denied on the ground that it is not reasonable. N.C. Gen. Stat. § 163–182.1B(b)(6). Only the voter's subjective belief is relevant to the issue of reasonableness. See *id.* Further, the law clearly provides that in considering a challenge to a reasonable impediment declaration, “the county board shall construe all evidence presented in the light most favorable to the voter submitting the reasonable impediment declaration.” Id. § 163–182.1B(b)(5). Finally, the law requires all reasonable impediment forms to, “at a minimum,” contain practically the exact same categories required by the panel in South Carolina . The only omission is that the law does not require a box for “religious objection,” id. § 163–166.15(e), but this is because a separate provision of the law grants an exception for those with religious objections to having their photo taken, id. § 163–166.13(a)(2). In fact, the law goes a step beyond what was required in South Carolina by requiring that a box be listed for “[I]ost or stolen photo identification.” Id. § 163–166.15(e)(1) f. As in South Carolina , a voter need only provide a written explanation if one of the provided boxes does not apply. Id. § 163–166.15(e)(1) h.

In this sense, the plain language of North Carolina's reasonable impediment exception establishes that it is to be broadly applied in favor of the voter. Nevertheless, as noted above, Director Strach has provided assurances under oath that every advantage will be given to the voter in implementing the

exception. Specifically, in a Rule 30(b) deposition on behalf of the SBOE, Director Strach provided that the reasonable impediment provision should be interpreted very broadly (Doc. 357-6 at 12); the provision should be construed with all inferences in favor of the voter (id.); election officials should err on the side of viewing declarations in the light most favorable to the voter (id.); the provision should be construed with all inferences in favor of protecting the fundamental right to vote (id. at 13); if CBOE officials have doubts, such doubts should be resolved in favor of the vote being counted (id. at 15); it is up to the voter to determine if he or she has a reasonable impediment, and a voter's belief that he or she has a reasonable impediment should not be second-guessed (id.); poll workers and CBOEs do not have discretion to determine if a voter's explanation is not reasonable (id.); poll workers and CBOE officials should not investigate or question voters regarding the reasonableness of the impediments that they identify (id.); and voters may get assistance from a person of their choosing when executing a reasonable impediment declaration, without first determining they are illiterate or suffer from a disability (id. at 62-63).

NAACP Plaintiffs express some concern over the fact that reasonable impediment declarants will be provided provisional ballots. Here, too, this issue was addressed by the panel in *South Carolina*, which did not view it as problematic:

[156 F.Supp.3d 701] [T]he word 'provisional' is a bit of a misnomer in this instance. [Provisional ballots cast due to a reasonable impediment] must be counted and will be counted, at least so long as the voter does not lie when he or she fills out and signs the reasonable impediment affidavit. Counting the reasonable impediment ballots will not differ in substance from the counting of absentee ballots. When the provisional ballot process operates this way, casting a provisional ballot instead of a regular ballot does not burden the right to vote.

898 F.Supp.2d at 41. Here, the text of the statute and the SBOE's representations require provisional ballots to be counted so long as (1) an acceptable alternate form of identification can be verified (last four digits

of social security number and date of birth, etc.) and (2) the stated reason is not factually false, merely denigrating the requirement, or obviously nonsensical. As NAACP Plaintiffs indicate, although the Help America Vote Act of 2002, 52 U.S.C. §§ 20901–21145 (formerly 42 U.S.C. §§ 15301–15545), requires provisional ballots to be given to voters in certain circumstances, it only requires those ballots be counted “in accordance with State law.” 52 U.S.C. § 21082(a)(4). The problem with NAACP Plaintiffs' argument is two-fold. First, it is in conflict with Plaintiffs' position at trial in July 2015, where they advocated for OOP provisional ballots on the grounds that they ameliorate burdens. Accord *South Carolina*, 898 F.Supp.2d at 42 (“[T]he Supreme Court characterized provisional ballots as curing problems and alleviating burdens, not as creating problems and imposing burdens.”). Second, with regard to reasonable impediment declarants, North Carolina law provides for counting these ballots. Thus, Plaintiffs have failed to show that giving reasonable impediment declarants a provisional ballot is likely to impose a material burden on the right to vote.

Finally on this issue, NAACP Plaintiffs have failed to show that there has been insufficient time to implement the reasonable impediment provision in the March 2016 primary election. Plaintiffs rely on *South Carolina* for this proposition, but that case is clearly distinguishable in this respect. First, when *South Carolina* was decided, § 5's preclearance requirement had prevented *South Carolina* from initiating any steps to implement it. Once the law was precleared, preparations had to begin with the 2012 presidential general election fewer than four weeks away. *Id.* at 49. Although *South Carolina* had had a voter-ID requirement for several decades, it had never had a photo-ID requirement. *Id.* at 32. Accordingly, the court expressed concern that the reasonable impediment provision would be greatly relied upon, as there was very little time for those without photo ID to acquire it. *Id.* at 50. Second, election officials in that case represented to the court that it was too late for the law

to be properly implemented for the upcoming election. Id. at 49. Third, the law itself called for nearly a year of education and training. Id.

[156 F.Supp.3d 703] Next, the SBOE has been creating educational materials about the reasonable impediment provision since at least July 2015 (eight months before the election), educating CBOEs about the provision since August 2015 (seven months before the election), and educating voters about the provision since at least November 2015 (four months before the election). Although many poll workers will need to be educated, the reasonable impediment provision is an exception to the photo-ID requirement that poll workers have been instructed to describe to voters for the last four elections. Consequently, this is not a wholly new voter-ID law that needs to be implemented, as in South Carolina . Training on the photo-ID provision has been ongoing, and the SBOE has held public hearings in nine cities across North Carolina during the two-year roll-out. (Doc. 395-6 at 36-37; Doc. 390-17 at 3-4.) Based on the record, the training on the reasonable impediment exception involves an issue likely to involve a small fraction (between 0% and 6%) of voters. In light of these facts, Plaintiffs have failed to demonstrate why the court should discount Director Strach's representation that training election workers in the months preceding the March 2016 primary will be sufficient, especially given her representation that such training has “historically [been] conducted in the months immediately preceding an election,” and that 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.” (Doc. 394-1 at 5-6.)

Finally, NAACP Plaintiffs seek to enjoin the photo-ID provision of SL 2013-381 on the grounds it was adopted with discriminatory intent. The question of discriminatory intent in these cases—including as it related to the photo-ID requirement—was fully tried by this court in July 2015. As noted above, the record

in that case is extensive (over 20,000 pages), and the court is working diligently to decide all claims related to all of the other challenged provisions of SL 2013-381. Thus, the court is not prepared to definitively resolve that claim here, especially since evidence as to the reasonable impediment exception has yet to be heard at trial. But the court has considered all evidence of intent (including that related to other the challenged provisions) and can say that, based on its current review, NAACP Plaintiffs have not demonstrated that they are likely to succeed on the merits of the photo-ID intent claim.

Discriminatory purpose “implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker, in this case a state legislature, selected or reaffirmed a particular course of action at least in part ‘because of,’ not merely ‘in spite of,’ its adverse effects upon an identifiable group.” *Pers. Adm'r of Mass. v. Feeney* , 442 U.S. 256, 279, 99 S.Ct. 2282, 60 L.Ed.2d 870 (1979) (citation and footnote omitted); *Veasey v. Abbott* , 796 F.3d 487, 498–99 (5th Cir.2015) (“The appropriate inquiry is not whether legislators were aware of [a law's] racially discriminatory effect, but whether the law was passed because of that disparate impact. Importantly, although discriminatory effect is a relevant consideration, knowledge of a potential impact is not the same as intending such an impact.” (internal citations omitted)). According to the Supreme Court, “Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available.” *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.* , 429 U.S. 252, 266, 97 S. Ct. 555, 50 L.Ed.2d 450 (1977). In making such an inquiry, courts look to a non-exhaustive list of factors from *Arlington Heights* : whether the law bears more heavily on one race, *id.* at 266, 97 S.Ct. 555 ; whether there is evidence

Central to NAACP Plaintiffs' intent claim is the argument that any form of photo-ID requirement is not

defensible on the merits and thus must be pretext for racial motivation. As is evident by the discussion above, however, the Supreme Court has already rejected that claim in Crawford and permitted Indiana's form of photo-ID requirement. Moreover, proponents of North Carolina's photo-ID requirement campaigned on the issue, citing popular constituent support. At the time legislators were considering North Carolina's bill, some twenty other States had enacted a photo-ID requirement. (Pl. Ex. 231 at 135 (tbl. 47).) A photo-ID requirement was not only countenanced, but actually recommended by the 2005 bipartisan Carter-Baker Report, and SL 2013-381 provided for a two-year roll-out and for a free photo ID to alleviate any burden on those who did not have a qualifying photo ID, as recommended by the report.

[156 F.Supp.3d 705] Plaintiffs point to the fact that sponsors of the photo-ID bill requested a cross-matching of registered voters who “have neither a NC Driver's License nor a NC Identification Card,” broken down by all possible demographics that SBOE captures, including “party affiliation, ethnicity, age, gender, etc.” (Pl. Ex. 72 at 3-4.) But this is not as nefarious as Plaintiffs suggest. First, at the time of Representative Harry Warren's request on March 5, 2013, legislators would have been preparing for the first public hearing on photo ID on March 12, 2013. (See Pl. Ex. 127.) Opponents frequently challenge voter photo-ID bills on the basis of racial disparities in photo-ID possession. Any responsible legislator would need to know the disparities in order to properly assess the bill and account for such challenges. In fact, during the preliminary injunction stage of this case, the United States could not tell this court whether it would have been better or worse for the State not to have requested demographic data. (Doc. 179 at 219-20.) Second, given that North Carolina was at the time subject to preclearance under § 5, legislators would have needed to know the racial impact of the voting changes in order to evaluate whether they were even feasible. In other words, evaluating racial impact is always an issue but was especially so as it was a

prerequisite to evaluating the likelihood that any voting change would not be retrogressive and thus could be precleared by the Attorney General. Accordingly, while Plaintiffs seek the inference that legislators requested demographic information because they sought to discriminate against African Americans, alternative explanations are considerably more persuasive. In April 2013 and passed all three readings under House Rule 41(a). (Pl. Ex. 548 at 178.) Those included public hearings during which over seventy-five citizens from across the political spectrum had the opportunity to speak (Pl. Ex. 130), a second hearing during which the bill was discussed and additional public comments were received (Pl. Ex. 545), and further debate where amendments were adopted (Pl. Ex. 546). The bill advanced, as amended, from the various House committees and was debated on the House floor on April 24, 2013. (Id. ; Pl. Exs. 547–48.) Three amendments were adopted, six others were rejected, and the bill passed “second reading” on a roll-call vote of 80-36. (Pl. Ex. 121; Pl. Ex. 548 at 177.) The bill subsequently passed “third reading,” on a vote of 81-36, and was passed by the House. (Pl. Ex. 548 at 178.) Five House Democrats joined all present Republicans in voting for the photo-ID bill (Pl. Ex. 122 (noting roll call vote on April 24 third reading)); Pl. Ex. 138 at 67–68, 77, 88), but none of the African American members of the House supported it (Pl. Ex. 154). Representative Rick Glazier, who strongly opposed the bill, nevertheless acknowledged that “[f]or a large bill,” HB 589 received up to this point “the best process possible” in the House, one he characterized as “excellent.” (Doc. 178 at 56-57; see also Pl. Ex. 25 at 8.)

B. Balance of the Equities

[156 F.Supp.3d 707] NAACP Plaintiffs argue that the State will not suffer any burden in continuing to administer elections under the “existing regime” without a photo-ID requirement, while Plaintiffs will suffer the burden of denial or abridgement of their right to vote “due to confusion and intimidation.”

(Doc. 391 at 35.) NAACP Plaintiffs claim that voters will be deterred because they believe a photo ID is required. These arguments are unpersuasive.

As noted above, the State has engaged in substantial voter education on the photo-ID requirement for over two years. There has been great publicity of the requirement, both in the public eye and indeed through this litigation. The State has also engaged in substantial efforts to implement the law. Significantly, the State has contacted every voter that it previously contacted—who did not indicate they had a photo ID and for whom the SBOE had a deliverable address—and advised them of the reasonable impediment exception. This mailing prominently listed the reasonable impediment exception as the first exception to the photo-ID requirement. (Doc. 394-1 at 80-81.) In addition, since July 2015, the State has also publicized, and is in continuing to publicize, the reasonable impediment provision. This latter education is accelerating as the primary election approaches. So, to the extent NAACP Plaintiffs seek to halt the effort now, two weeks before trial and seven weeks before early voting is set to begin on March 3, it would impose substantial hardship on the Defendants. And while NAACP Plaintiffs seek to characterize their request as preserving the status quo, the calculus has changed over the passage of time. The State's active engagement in implementing the photo-ID requirement has led voters to come to expect some form of it. At this late stage, it is the NAACP Plaintiffs who are seeking to change the rules close to the election.

NAACP Plaintiffs are at least partially to blame for their own emergency. They declined this court's urging to try the photo-ID issues in a September 2015 trial and chose not to move to enjoin implementation of the photo-ID requirement, including the reasonable impediment provision, earlier. Rather, they waited until now, on the eve of the January 25, 2016 trial, to do so. They have been less than diligent in pursuing their rights in this regard. Indeed, even now, and

considering the significant efforts underway to conduct the March 2016 primary election, NAACP Plaintiffs present substantial questions about whether this court could even act. See *Purcell v. Gonzalez*, 549 U.S. 1, 4–5, 127 S.Ct. 5, 166 L.Ed.2d 1 (2006); *Veasey v. Perry*, 769 F.3d 890, 894–95 (5th Cir. 2014).

Finally, there is a fundamental flaw in Plaintiffs' request. NAACP Plaintiffs seek to enjoin the photo-ID requirement on the grounds that voters without a qualifying photo ID will be deterred by past education efforts and publicity from voting. But an injunction will not fix this alleged problem. Merely eliminating the photo-ID requirement will not encourage those voters to appear at the polls. Put another way, an injunction against the photo-ID provision will have no benefit to a voter who wrongly believes he needs a photo ID. The only way to prevent the stay-at-home voter under these circumstances would be for the court to also order Defendants to educate voters that photo ID will not be required for the March 2016 primary. But NAACP Plaintiffs have not requested this relief, nor have they explained how educating these voters in that fashion will encourage them to appear at the polls any more than advising them that they need not present a photo-ID because they can sign a reasonable impediment affidavit. Moreover, insofar as Plaintiffs' argument is that there is insufficient time to adequately educate voters of the reasonable impediment exception, their position is even weaker in support of the education necessary to effectuate an injunction.

[156 F.Supp.3d 708] Given the substantial efforts underway for two years—including those on the reasonable impediment exception since at least November 2015—and those to be conducted before the primary, the court cannot say that the balance of the equities clearly tips in favor of Plaintiffs.

C. Public Interest

Finally, NAACP Plaintiffs argue that the public

interest is served by the prevention of the denial or abridgement of the right to vote. (Doc. 391 at 36.)

The public interest is served by “permitting as many qualified voters to vote as possible” and “upholding constitutional rights.” *League of Women Voters of N. C.* , 769 F.3d at 247–48 (citations and internal quotation marks omitted). But the public interest is also served by permitting legitimate and duly enacted legislation to be enacted and by reducing voter confusion. See, e.g. , *Serv. Emps. Int'l Union Local 1 v. Husted* , 698 F.3d 341, 346 (6th Cir.2012). As noted above, NAACP Plaintiffs' claim on voter deterrence is speculative and, in any case, cannot be cured by an injunction. In addition, NAACP Plaintiffs have failed to clearly demonstrate that the State's substantial educational efforts, including those relating to the reasonable impediment exception, have failed to prepare North Carolina voters for the photo-ID law. Quite the opposite. Changing course in midstream will likely serve to confuse voters as to the state of the law.

* * *

In sum, granting an injunction at this time would (1) negate substantial and adequate educational efforts by the State, (2) increase rather than ameliorate voter confusion, (3) offer only a speculative benefit, and (4) excuse Plaintiffs' delay. As such, in addition to finding above that the NAACP Plaintiffs are not likely to succeed on the merits, the balance of the equities and public interest do not favor an injunction.

III. CONCLUSION

For the reasons set forth above, NAACP Plaintiffs' motion to preliminarily enjoin SL 2013-381's photo-ID requirement, as amended by SL 2015-103 and its reasonable impediment exception, (Doc. 390) will be DENIED.

