

**IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA  
NO. 1:15-cv-00399**

SANDRA LITTLE COVINGTON, *et al.*,

Plaintiffs,

v.

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

Defendants.

**PLAINTIFFS' MEMORANDUM IN  
SUPPORT OF MOTION TO  
ENFORCE SCHEDULING ORDER**

NOW COME Plaintiffs by and through their undersigned counsel, and pursuant to Rules 26 and 37 of the Federal Rules of Civil Procedure and Local Rules 7.2 and 16.2, submit this memorandum in support of their Motion to Enforce Scheduling Order.

**NATURE OF THE MATTER**

Defendants have ignored the requirements of the Federal Rules of Civil Procedure and the scheduling order entered by the Court in this case. Defendants served deposition subpoenas for two expert witnesses, Dr. Stephen Ansolabehere and Dr. Barry Burden: experts who were neither disclosed by Defendants under Rule 26 and experts who have not been retained by Defendants. Plaintiffs bring this motion to bar Defendants from taking two expert depositions by enforcing the existing scheduling order.

A “scheduling order is not a frivolous piece of paper, idly entered, which can be cavalierly disregarded by counsel without peril.” *Halpern v. Wake Forest Univ. Health Sciences*, 268 F.R.D. 264, 274, 2010 U.S. Dist. LEXIS 65386, \*35 (M.D.N.C. 2010) (quoting *Forstmann v. Culp*, 114 F.R.D. 83, 85 (M.D.N.C. 1987)). Defendants cannot

obtain expert testimony by experts who were not retained in this case nor timely disclosed to Plaintiffs, and this Court should bar their attempts to do so.

### **STATEMENT OF FACTS**

In this action, Plaintiffs have challenged as unconstitutional racial gerrymanders a number of State Senate and House districts enacted by the North Carolina General Assembly in 2011. Following the decision in *Alabama Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257 (Mar. 25, 2015), Plaintiffs filed suit on May 19, 2015. (D.E. # 1). This Court entered a scheduling order on October 9, 2015, which established discovery and motion deadlines and set a trial date for April 11, 2016. (D.E. # 25). On October 7, 2015, Plaintiffs moved for a preliminary injunction to enjoin elections under the challenged districts. That motion was denied on November 25, 2015. (D.E. # 39).

The scheduling order established November 30, 2015 as the deadline for Defendants to disclose all expert reports. (D.E. # 25). Discovery closes on February 11, 2016. (D.E. # 25).

On November 30, Defendants disclosed the following experts: Thomas Hofeller, Trey Hood, and Sean Trende. Dr. Stephen Ansolabehere and Dr. Barry Burden were not mentioned or listed. Plaintiffs never received expert reports from Dr. Ansolabehere or Dr. Burden. To Plaintiffs' knowledge, these experts have not been retained or compensated by Defendants in this case.

Two weeks after their disclosure deadline, Defendants' counsel notified Plaintiffs on December 16, 2015 that Defendants intended to introduce a portion of the expert

testimony of Dr. Ansolabehere from the *Harris v. McCrory* case, 1:13-cv-949 (M.D.N.C.). Plaintiffs' counsel responded that they would oppose such an effort. *See* Exhibit A.<sup>1</sup> In response, Defendants' counsel stated they would be noticing Dr. Ansolabehere and Dr. Barry Burden for depositions.<sup>2</sup> Plaintiffs' counsel told Defendants' counsel that any depositions would be opposed as neither expert had been designated in this case, to which Defendants' counsel responded, "[y]ou can hereby consider our designations as amended."

On January 6, 2016, Defendants' counsel served on Plaintiffs' counsel deposition notices and subpoenas to Dr. Stephen Ansolabehere and Dr. Barry Burden. *See* Exhibit B. The notices and subpoenas were not served on Dr. Burden until January 13, 2016, and, to the best knowledge of Plaintiffs' counsel, have not yet been served on Dr. Ansolabehere. The depositions are scheduled for February 11, 2016 for Dr. Burden in Milwaukee, Wisconsin and February 18, 2016 for Dr. Ansolabehere in Boston, Massachusetts.

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<sup>1</sup> Defendants attempted to introduce a portion of Dr. Burden's report in the *Harris* case, which the plaintiffs in that case opposed for similar reasons as this motion. That court took the dispute under advisement, and has not yet ruled.

<sup>2</sup> Dr. Burden served as an expert for one set of plaintiffs in a voting rights case in the Middle District, *North Carolina State Conference of the NAACP v. McCrory*, No. 1:13-cv-658 (M.D.N.C.).

## **ARGUMENT**

### **I. DEFENDANTS FAILED TO TIMELY DISCLOSE DR. ANSOLABEHERE AND DR. BURDEN AS EXPERTS AND ARE NOT ENTITLED TO RELY ON THEIR OPINIONS**

Rule 26(a)(2) requires a party to disclose to the other parties the identity of any witness it may use at trial to present evidence under Federal Rule of Evidence 702, 703, or 705. The disclosure must be accompanied by a written report if the “witness is one retained or specially employed to provide expert testimony in the case.” If the witness is not one required to provide a report, the party must still disclose the subject matter on which the witness is expected to present evidence and a summary of the facts and opinions to which the witness is expected to testify. Rule 26(a)(2)(D) requires a party to “make these disclosures at the time and in the sequence that the court orders.” This Court’s Scheduling Order established a deadline of November 30, 2015 for Defendants to disclose all expert reports. (D.E. # 25). Plaintiffs are prejudiced by Defendants’ failure to timely disclose experts. *See Saudi v. Northrop Grumman Corp.*, 427 F.3d 271, 278-79 (4th Cir. 2005) (“Rule 26 disclosures are often the centerpiece of discovery in litigation that uses expert witnesses. A party that fails to provide these disclosures unfairly inhibits its opponent’s ability to properly prepare, unnecessarily prolongs litigation, and undermines the district court’s management of the case.”).

Defendants did not timely identify Dr. Ansolabehere or Dr. Burden in their expert disclosures on November 30. Under Rule 37, Defendants are not entitled to rely upon the opinions of Dr. Ansolabehere and Dr. Burden. Rule 37(c) states that if “a party fails to

provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless.” The court may also order additional sanctions, such as the payment of reasonable expenses caused by the failure, informing the jury of the party’s failure, and any other appropriate sanctions, including those listed in Rule 37(b)(2)(A)(i)-(vi). Finally, though Rule 37(c)(1) authorizes other sanctions “in addition to or instead of” excluding undisclosed witnesses, the rule itself nevertheless is self-executing and requires the exclusion of Rule 26 information that is not timely disclosed, unless the failure to disclose is either substantially justified or is harmless. As the Fourth Circuit has noted, “[t]he federal rules impose an ‘automatic sanction’ of exclusion of a party’s expert witness for failure to adhere to the requirements set forth in Rule 26(a).” *Sss Enters. v. Nova Petroleum Realty, LLC*, 533 Fed. Appx. 321, 324 (4th Cir. 2013). The failure to disclose here is neither justified nor harmless.

Defendants’ failure to identify Drs. Burden and Ansolabehere by the deadline in the scheduling order is not substantially justified. The Fourth Circuit, in considering whether to permit the testimony of an expert following a party’s untimely disclosure, considers five factors: (1) the surprise to the party against whom the evidence would be offered; (2) the ability of that party to cure the surprise; (3) the extent to which allowing the evidence would disrupt the trial; (4) the importance of the evidence, and (5) the non-

disclosing party's explanation for its failure to disclose the evidence. *Southern States Rack and Fixture, Inc. v. Sherwin Williams Co.*, 318 F.3d 592, 597 (4th Cir. 2003).

The decision is within the discretion of the trial court. *See Wilkins v. Montgomery*, 751 F.3d 214, 220 (4th Cir. 2014) (“We review the district court's exclusion of a plaintiff's expert witness ... for abuse of discretion.”). Moreover, the party seeking to offer the late-disclosed testimony bears the burden of proving that their failure to abide by the scheduling order was justified and harmless. “Under Rule 37(c)(1), the plaintiffs had the burden of justifying their noncompliance by showing that it ‘was either substantially justified or harmless.’” *Sss Enters. v. Nova Petroleum Realty, LLC*, 533 Fed. Appx. 321, 324 (4th Cir. Va. 2013) (citing *Carr v. Deeds*, 453 F.3d 593, 602 (4th Cir. 2006)).

The opinion testimony that Defendants apparently seek to elicit was known to Defendants well in advance of the November 30 deadline, as subject matter sought from Dr. Burden, according to the deposition notice, relates to his work in *NC NAACP v. McCrory*, No. 1:13-cv-658 (M.D.N.C.), the trial which ended in July of 2015. Nor is the failure to disclose harmless, because the addition of two expert witnesses would require substantial time and expense from Plaintiffs, well after expert disclosure deadlines, to ensure that such new testimony was reviewed by and responded to by Plaintiffs' experts. Finally, under the Fourth Circuit's rubric for determining whether to exclude untimely expert testimony, this expert testimony is not important. First, it is redundant to expert testimony that Defendants did timely disclose on racially polarized voting and

compactness. Second, and equally important, whatever their testimony, that information was not available to the North Carolina General Assembly before they enacted the 2011 redistricting plan at issue in this case. Thus, the testimony is irrelevant to prove any disputed issue of fact regarding whether the challenged districts are narrowly tailored to a compelling government interest. *See Shaw v. Hunt*, 517 U.S. 899, 910 (1996) (where expert reports were not before the legislature when it enacted the redistricting plan, they cannot demonstrate that legislature had a compelling interest to take race into account).

Finally, the failure to disclose is not harmless. The Defendants are taking the Plaintiffs on a tour of expert opinions around the country, wasting their valuable discovery and pre-trial preparation time, for evidence that is not relevant to any disputed issue of fact in this case. Plaintiffs are prejudiced in their ability to prepare their case by having to attend, and pay the transcript costs for, needless depositions conducted in Milwaukee, Wisconsin and in Boston, Massachusetts. There is indeed harm to the Plaintiffs from this late disclosure of irrelevant expert testimony.

This Court should exclude the testimony of and prevent the depositions of Drs. Burden and Ansolabehere. Numerous courts in analogous situations have enforced the automatic exclusion provision of the Rules of Civil Procedure and excluded expert testimony not disclosed in accordance with the court's scheduling order. *See, e.g., Wilkins v. Montgomery*, 751 F.3d at 221 (no abuse of discretion for trial court to exclude expert testimony disclosed after the deadline in scheduling order); *Sss Enters. v. Nova Petroleum Realty, LLC*, 533 Fed. Appx. at 321 (trial court properly excluded testimony of

plaintiffs' expert witness who was not disclosed by deadline in scheduling order even where result was dismissal of the case). *See also Flatiron-Lane v. Case Atl. Co.*, No. 1:12-cv-1234, 2015 U.S. Dist. LEXIS 102539, at \*69-70 (M.D.N.C. Aug. 4, 2015) (excluding expert from testifying because the opposing party had no knowledge expert would express an expert opinion and there was no showing it could have cured the surprise); *Buckman v. Bombardier Corp.*, 893 F. Supp. 547 (E.D.N.C. 1995) (excluding experts from testifying at trial where they were not designated and had no personal knowledge of the matter); *Port Terminal & Warehousing Co. v. John S. James Co.*, 695 F.2d 1328 (11th Cir. 1983) (no abuse of discretion where district court excluded an expert on the basis that "firm deadlines for discovery are more than helpful to the Court in promoting the just and efficient administration of justice, they are essential").

Furthermore, Defendants may not rely on the testimony of Dr. Burden or Dr. Ansolabehere as lay witnesses. It is undisputed that neither was involved in the 2011 redistricting process in North Carolina. Neither has personal knowledge of the actions at the center of this litigation—the 2011 redistricting process—and thus may not give opinion testimony beyond their personal knowledge. It is clear from the subpoenas that Defendants are seeking to elicit opinion testimony and may not do so under F.R.E. 701. Accordingly, these witnesses should be excluded from testifying and relieved from appearing at depositions for a case they presumably know nothing about.



**II. THIS COURT MAY, UNDER ITS EQUITABLE POWERS, ENFORCE THE SCHEDULING ORDER AND QUASH THE SUBPOENAS, ESPECIALLY IN LIGHT OF THE UNRETAINED EXPERTS' LIKELIHOOD OF SUCCESS IN QUASHING THE SUBPOENA THEMSELVES**

Although Plaintiffs may not have standing under F.R.C.P. 45 to move to quash the subpoenas, equitable concerns relating to the burden such subpoenas create on these unretained experts further suggest the scheduling order should be enforced and these unretained experts should not be compelled to sit for deposition when their expert testimony was not timely disclosed. This Court has the authority to act, regardless of Plaintiffs' standing with respect to third-party discovery requests, to issue an order enforcing the scheduling order and preventing discovery that violates the scheduling order. *See Dedmon v. Cont'l Airlines, Inc.*, No. 13-cv-0005, 2015 U.S. Dist. LEXIS 48807 (D. Colo. April 14, 2015) (granting motion to enforce scheduling order and quashing untimely subpoena because of the court's inherent power regardless of the moving party's standing to challenge a third-party subpoena); *Assoc. Elec. & Gas Ins. Servs. v. Nat'l Union Fire Ins. Co.*, No. 2:11-cv-368, 2014 U.S. Dist. LEXIS 10574 (D. Utah Jan. 28, 2014) (granting motion to enforce scheduling order and for a protective order under Fed. R. Civ. P. 16(f)(1)(C)); *Bare v. Brand Energy & Infrastructure Servs.*, No. 2:09-cv-807-DB-BCW, 2012 U.S. Dist. LEXIS 153881, at \*3 (D. Utah Oct. 25, 2012) (unpublished) (reasoning that a court could "issue just orders if a party fail[ed] to obey a scheduling order," such as where a party issued a third-party subpoena after the fact discovery deadline); *Scherer v. GE Capital Corp.*, 185 F.R.D. 351, 352 (D. Kan.

1999) (ordering “that discovery by [] subpoenas served upon [] three non-parties not be had” where the plaintiff served such subpoenas after the discovery deadline).

The unretained experts in this case, upon information and belief, do not desire to be involved in this litigation. Defendants’ attempt to depose them, despite their failure to disclose them as expert witnesses or retain them, will require these professors to retain private counsel to resist the improper subpoenas, at an enormous financial and time burden to themselves. Indeed, should Dr. Burden and Dr. Ansolabehere assume the cost of retaining private counsel to resist the subpoenas, they are likely to succeed in having the subpoenas quashed. This further weighs in favor of the Court granting Plaintiffs’ motion.

Rule 45 of the Federal Rules of Civil Procedure provides that in order to protect a person subjected to a subpoena, a court may quash or modify a subpoena if it requires “disclosing an unretained expert’s opinion or information that does not describe specific occurrences in dispute and results from the expert’s study that was not requested by a party. F.R.C.P. 45(d)(3)(B)(ii). In notes to the 1991 Amendment, the advisory committee explained the need for the abovementioned provision, stating:

A growing problem has been the use of subpoenas to compel the giving of evidence and information by unretained experts...The rule establishes the right of such persons to withhold their expertise, at least unless the party seeking it makes the kind of showing required [under (d)(3)(C)].

F.R.C.P. 37, 1991 Amendment Advisory Committee Notes.

When considering the merits of a motion to quash or modify a subpoena of an unretained expert, a court may consider:

[T]he degree to which the expert is being called because of his knowledge of facts relevant to the case rather than in order to give opinion testimony; the difference between testifying to a previously formed or expressed opinion and forming a new one; the possibility that, for other reasons, the witness is a unique expert; the extent to which the calling party is able to show the unlikelihood that any comparable witness will willingly testify; the degree to which the witness is able to show that he has been oppressed by having continually to testify; and, undoubtedly, many others.

*Chavez ex rel. Chavez v. Bd. of Educ. Of Tularosa Mun. Sch.*, No. 05-380 2007 WL 1306734, at \*4 (D.N.M. 2007) (citing *Kaufman v. Edelstein*, 539 F.2d 811, 822 (2d Cir. 1976) (granting a motion to quash a deposition notice after noting that the noticing party had not shown that the putative expert witness was a unique witness or that no comparable witness would willingly testify)).

The information sought by Defendants—in Dr. Burden’s case, whether racially polarized voting was present as it relates to the Senate Factor inquiry in a vote denial case, *NC NAACP v. McCrory*, not whether it was legally sufficient to warrant the construction of majority black districts across the state of North Carolina—and in Dr. Ansolabehere’s case, the compactness of two particular challenged congressional districts in the *Harris* case—“does not describe specific occurrences in dispute” and is not the result of research undertaken at the request of a party to the litigation. See F.R.C.P. 45(d)(3)(B)(ii). Neither unretained expert’s testimony would relate to the 2011

redistricting of the North Carolina State House or State Senate. Neither unretained expert's testimony was the result of research undertaken at the request of a party to this litigation. As such, it is the burden of the party issuing the subpoena to establish (1) a substantial need; (2) the requested material's unavailability from other sources without undue hardship; and (3) that the expert would be reasonably compensated for responding to the subpoena. *See* F.R.C.P. 45(d)(3)(C)(i-ii).

All of the factors necessary to quash the subpoena are present here, and Defendants have not made the requisite showing for modification of the subpoena. Because of this, the Court should enforce the scheduling order and direct that Defendants may not conduct the noticed depositions.

Respectfully submitted, this the 27<sup>th</sup> day of January, 2016.

POYNER SPRUILL LLP

/s/ Edwin M. Speas, Jr.

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*Counsel for Plaintiffs*

**CERTIFICATE OF SERVICE**

I hereby certify that on this date I served a copy of the foregoing Plaintiffs' Brief in Support of Motion to Enforce Scheduling Order, with service to be made by electronic filing with the Clerk of the Court using the CM/ECF System, which will send a Notice of Electronic Filing to all parties with an e-mail address of record, who have appeared and consent to electronic service in this action.

This the 27<sup>th</sup> day of January, 2016.

/s/ Edwin M. Speas, Jr.  
Edwin M. Speas, Jr.

*Counsel for Plaintiffs*

**Mackie, Caroline P.**

---

**From:** Farr, Thomas A. <thomas.farr@ogletreedeakins.com>  
**Sent:** December 21, 2015 4:23 PM  
**To:** Speas, Edwin M.; Peters, Alec  
**Cc:** Anita Earls; Allison Riggs; astein@tinfulton.com; Mackie, Caroline P.; O'Hale, John W.  
**Subject:** RE: Covington: Steve Ansolabehere

*You can hereby consider our designations as amended.*

**Thomas A. Farr | Ogletree, Deakins, Nash, Smoak & Stewart, P.C.**

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**From:** Speas, Edwin M. [mailto:ESpeas@poynerspruill.com]  
**Sent:** Monday, December 21, 2015 4:21 PM  
**To:** Farr, Thomas A.; Peters, Alec  
**Cc:** Anita Earls; Allison Riggs; astein@tinfulton.com; Mackie, Caroline P.; O'Hale, John W.  
**Subject:** RE: Covington: Steve Ansolabehere

Tom, as you did not designate either Burden or Ansolabehere as experts in this case we will oppose any effort to take their depositions. Thanks. Eddie

---

**From:** Farr, Thomas A. [mailto:[thomas.farr@ogletreedeakins.com](mailto:thomas.farr@ogletreedeakins.com)]  
**Sent:** December 21, 2015 4:05 PM  
**To:** Speas, Edwin M.; Peters, Alec  
**Cc:** Anita Earls; Allison Riggs; [astein@tinfulton.com](mailto:astein@tinfulton.com); Mackie, Caroline P.; O'Hale, John W.  
**Subject:** RE: Covington: Steve Ansolabehere

Thanks Eddie. We will be noticing him and Burden for depositions and will let you know of the dates.

**Thomas A. Farr | Ogletree, Deakins, Nash, Smoak & Stewart, P.C.**

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**From:** Speas, Edwin M. [mailto:[ESpeas@poynerspruill.com](mailto:ESpeas@poynerspruill.com)]  
**Sent:** Monday, December 21, 2015 3:40 PM  
**To:** Farr, Thomas A.; Peters, Alec  
**Cc:** Anita Earls; Allison Riggs; [astein@tinfulton.com](mailto:astein@tinfulton.com); Mackie, Caroline P.; O'Hale, John W.  
**Subject:** Covington: Steve Ansolabehere

Tom,

Thanks for informing me on 12/16/15 that defendants in *Covington* plan to offer a part of the expert testimony of Dr. Steve Ansolabehere in *Harris* in *Covington*. For the same reasons plaintiffs in *Harris* opposed your effort to use the expert testimony of Dr. Burden in the Voter ID cases in *Harris*, plaintiffs in *Covington* will oppose your effort to offer the expert testimony of Dr. Ansolabehere in *Harris* in *Covington*.

Eddie

**Exhibit A**

Edwin Marion Speas, Jr. | Partner

**Poyner Spruill**<sup>LLP</sup>

ATTORNEYS AT LAW

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**Mackie, Caroline P.**

---

**From:** Lawler, Patrick <Patrick.Lawler@ogletreedeakins.com>  
**Sent:** January 06, 2016 4:11 PM  
**To:** Anita Earls; Allison Riggs; Speas, Edwin M.; O'Hale, John W.  
**Cc:** Peters, Alec; Strach, Phillip J.; McKnight, Michael D.; Farr, Thomas A.  
**Subject:** Covington v. N.C. - Deposition notices and subpoenas for Dr. Burden and Dr. Ansolabehere  
**Attachments:** Subpoena to Dr. Ansolabehere 1.6.2016.PDF; Subpoena to Dr. Burden 1.6.2016.PDF; Defendants' Joint Notice of Deposition of Dr. Barry Burden.pdf; Defendants' Joint Notice of Deposition of Dr. Stephen Ansolabehere.pdf

Counsel,

Please find attached deposition notices and subpoenas for Drs. Barry Burden and Stephen Ansolabehere.

Thank you,

Patrick Lawler

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**IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA  
NO. 1:15-CV-00399**

SANDRA LITTLE COVINGTON, <i>et al.</i> ,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	
	)	
THE STATE OF NORTH CAROLINA,	)	
<i>et al.</i> ,	)	
	)	
Defendants.	)	

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**DEFENDANTS' JOINT NOTICE OF DEPOSITION OF  
DR. BARRY BURDEN**

TO ALL COUNSEL OF RECORD:

PLEASE TAKE NOTICE that pursuant to Rule 30 of the Federal Rules of Civil Procedure, Defendants in the above-captioned actions will take the deposition upon oral examination of Dr. Barry Burden.

The deposition will begin at 10:00 a.m. on February 11, 2016, at Ogletree Deakins Law Firm, Pabst Boiler House, 1243 North 10<sup>th</sup> Street, Suite 210, Milwaukee, WI 53205. The deposition will be recorded by sound and/or stenographic means and may also be recorded by additional audiovisual means. The deposition shall take place before a notary public or other person authorized by law to administer oaths.

The purpose of this deposition will be to examine Dr. Burden on the identities of the parties and attorneys who engaged him to provide expert testimony in the case of *NC NAACP v. McCrory*, to confirm the testimony given by him in *NC NAACP* as reflected by Exhibit A and the official report by Dr. Burden designated as Plaintiffs' Exhibit 229, with particular emphasis on Dr. Burden's study of racially polarized voting found on pages 7 and 8 of Exhibit 229, and other

matters that are reasonably related to his testimony as reflected by Exhibit A and Exhibit 229, pages 7 and 8. Defendants are noticing this deposition strictly in response to plaintiffs' objection to the submission into evidence in this case of Dr. Burden's testimony as reported and reflected by Exhibit A and Exhibit 229, pages 7 and 8.

This the 6th day of January, 2016.

NORTH CAROLINA DEPARTMENT OF  
JUSTICE

By: /s/ Alexander McC. Peters  
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*Co-counsel for Defendants*

## **CERTIFICATE OF SERVICE**

I, Thomas A. Farr, hereby certify that I have this day served the foregoing **Defendants' Joint Notice of Deposition of Dr. Barry Burden** upon the following persons by placing a copy thereof in a depository under the exclusive care and custody of the United States Postal Service in a first-class, postage-prepaid envelope and addressed as follows:

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*Attorney for Plaintiffs*

This the 6th day of January, 2016.

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

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23363874.1

**IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA  
NO. 1:15-CV-00399**

SANDRA LITTLE COVINGTON, <i>et al.</i> ,	)
	)
Plaintiffs,	)
	)
v.	)
	)
THE STATE OF NORTH CAROLINA,	)
<i>et al.</i> ,	)
	)
Defendants.	)

---

**DEFENDANTS' JOINT NOTICE OF DEPOSITION OF  
DR. STEPHEN ANSOLABEHERE**

TO ALL COUNSEL OF RECORD:

PLEASE TAKE NOTICE that pursuant to Rule 30 of the Federal Rules of Civil Procedure, Defendants in the above-captioned actions will take the deposition upon oral examination of Dr. Stephen Ansolabehere.

The deposition will begin at 10:00 a.m. on February 18, 2016, at Ogletree Deakins Law Firm, One Boston Place, 201 Washington Street, Suite 3220, Boston, MA 02108. The deposition will be recorded by sound and/or stenographic means and may also be recorded by additional audiovisual means. The deposition shall take place before a notary public or other person authorized by law to administer oaths.

The purpose of this deposition will be to examine Dr. Ansolabehere on the identities of the parties and attorneys who engaged him to provide expert testimony in the case of *Harris v. McCrory*, to confirm the testimony given by him in *Harris* as reflected by Exhibit A, and other matters that are reasonably related to his testimony as reflected by Exhibit A. Defendants are noticing this deposition strictly in response to plaintiffs' objection to the submission into

evidence in this case of Dr. Ansolabehere's testimony as reflected by Exhibit A.

This the 6th day of January, 2015.

NORTH CAROLINA DEPARTMENT OF  
JUSTICE

By: /s/ Alexander McC. Peters  
Alexander McC. Peters  
Senior Deputy Attorney General  
N.C. State Bar No. 13654  
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*Counsel for Defendants*

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

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Telephone: (919) 787-9700  
Facsimile: (919) 783-9412  
*Co-counsel for Defendants*

## **CERTIFICATE OF SERVICE**

I, Thomas A. Farr, hereby certify that I have this day served the foregoing **Defendants' Joint Notice of Deposition of Dr. Stephen Ansolabehere** upon the following persons by placing a copy thereof in a depository under the exclusive care and custody of the United States Postal Service in a first-class, postage-prepaid envelope and addressed as follows:

Edwin M. Speas, Jr.  
John W. O'Hale  
Carolina P. Mackie  
Poyner Spruill LLP  
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*Attorneys for Plaintiffs*

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*Attorneys for Plaintiffs*

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Tin Fulton Walker & Owen, PLLC  
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Chapel Hill, NC 27516  
astein@tinfulton.com  
*Attorney for Plaintiffs*

This the 6th day of January, 2015.

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

/s/ Thomas A. Farr  
Thomas A. Farr  
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thomas.farr@odnss.com

23361376.1

# UNITED STATES DISTRICT COURT

for the

Middle District of North Carolina

Sandra Little Covington, et al.

*Plaintiff*

v.

The State of North Carolina, et al.

*Defendant*

Civil Action No. 1:15-CV-00399

## SUBPOENA TO TESTIFY AT A DEPOSITION IN A CIVIL ACTION

To:

Dr. Barry Burden

*(Name of person to whom this subpoena is directed)*

☒ **Testimony:** **YOU ARE COMMANDED** to appear at the time, date, and place set forth below to testify at a deposition to be taken in this civil action. If you are an organization, you must designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on your behalf about the following matters, or those set forth in an attachment:

See Attachment A.

Place: Ogletree, Deakins, Nash, Smoak and Stewart, P.C.  
Pabst Boiler House, 1243 North 10th Street, Suite 210,  
Milwaukee, WI 53205

Date and Time:

02/11/2016 10:00 am

The deposition will be recorded by this method: sound and/or stenographic means

☐ **Production:** You, or your representatives, must also bring with you to the deposition the following documents, electronically stored information, or objects, and must permit inspection, copying, testing, or sampling of the material:

The following provisions of Fed. R. Civ. P. 45 are attached – Rule 45(c), relating to the place of compliance; Rule 45(d), relating to your protection as a person subject to a subpoena; and Rule 45(e) and (g), relating to your duty to respond to this subpoena and the potential consequences of not doing so.

Date: 01/06/2016

CLERK OF COURT

OR

/s/ Thomas A. Farr

*Signature of Clerk or Deputy Clerk*

*Attorney's signature*

The name, address, e-mail address, and telephone number of the attorney representing *(name of party)* Defendants

, who issues or requests this subpoena, are:  
Thomas Farr, 4208 Six Forks Road, Suite 1100, Raleigh NC 27609, thomas.farr@ogletreedeakins.com, (919) 787-9700

### Notice to the person who issues or requests this subpoena

If this subpoena commands the production of documents, electronically stored information, or tangible things before trial, a notice and a copy of the subpoena must be served on each party in this case before it is served on the person to whom it is directed. Fed. R. Civ. P. 45(a)(4).



Civil Action No. 1:15-CV-00399

**PROOF OF SERVICE**

*(This section should not be filed with the court unless required by Fed. R. Civ. P. 45.)*

I received this subpoena for *(name of individual and title, if any)* \_\_\_\_\_  
on *(date)* \_\_\_\_\_.

☐ I served the subpoena by delivering a copy to the named individual as follows: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_ on *(date)* \_\_\_\_\_; or

☐ I returned the subpoena unexecuted because: \_\_\_\_\_  
\_\_\_\_\_.

Unless the subpoena was issued on behalf of the United States, or one of its officers or agents, I have also  
tendered to the witness the fees for one day's attendance, and the mileage allowed by law, in the amount of  
\$ \_\_\_\_\_.

My fees are \$ \_\_\_\_\_ for travel and \$ \_\_\_\_\_ for services, for a total of \$ 0.00.

I declare under penalty of perjury that this information is true.

Date: \_\_\_\_\_

\_\_\_\_\_  
*Server's signature*

\_\_\_\_\_  
*Printed name and title*

\_\_\_\_\_  
*Server's address*

Additional information regarding attempted service, etc.:

**Federal Rule of Civil Procedure 45 (c), (d), (e), and (g) (Effective 12/1/13)**

**(c) Place of Compliance.**

(1) *For a Trial, Hearing, or Deposition.* A subpoena may command a person to attend a trial, hearing, or deposition only as follows:

(A) within 100 miles of where the person resides, is employed, or regularly transacts business in person; or

(B) within the state where the person resides, is employed, or regularly transacts business in person, if the person

(i) is a party or a party's officer; or

(ii) is commanded to attend a trial and would not incur substantial expense.

(2) *For Other Discovery.* A subpoena may command:

(A) production of documents, electronically stored information, or tangible things at a place within 100 miles of where the person resides, is employed, or regularly transacts business in person; and

(B) inspection of premises at the premises to be inspected.

**(d) Protecting a Person Subject to a Subpoena; Enforcement.**

(1) *Avoiding Undue Burden or Expense; Sanctions.* A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The court for the district where compliance is required must enforce this duty and impose an appropriate sanction—which may include lost earnings and reasonable attorney's fees—on a party or attorney who fails to comply.

(2) *Command to Produce Materials or Permit Inspection.*

(A) *Appearance Not Required.* A person commanded to produce documents, electronically stored information, or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial.

(B) *Objections.* A person commanded to produce documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing, or sampling any or all of the materials or to inspecting the premises—or to producing electronically stored information in the form or forms requested. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:

(i) At any time, on notice to the commanded person, the serving party may move the court for the district where compliance is required for an order compelling production or inspection.

(ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

**(3) Quashing or Modifying a Subpoena.**

(A) *When Required.* On timely motion, the court for the district where compliance is required must quash or modify a subpoena that:

(i) fails to allow a reasonable time to comply;

(ii) requires a person to comply beyond the geographical limits specified in Rule 45(c);

(iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or

(iv) subjects a person to undue burden.

(B) *When Permitted.* To protect a person subject to or affected by a subpoena, the court for the district where compliance is required may, on motion, quash or modify the subpoena if it requires:

(i) disclosing a trade secret or other confidential research, development, or commercial information; or

(ii) disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party.

(C) *Specifying Conditions as an Alternative.* In the circumstances described in Rule 45(d)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:

(i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and

(ii) ensures that the subpoenaed person will be reasonably compensated.

**(e) Duties in Responding to a Subpoena.**

(1) *Producing Documents or Electronically Stored Information.* These procedures apply to producing documents or electronically stored information:

(A) *Documents.* A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand.

(B) *Form for Producing Electronically Stored Information Not Specified.* If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

(C) *Electronically Stored Information Produced in Only One Form.* The person responding need not produce the same electronically stored information in more than one form.

(D) *Inaccessible Electronically Stored Information.* The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

**(2) Claiming Privilege or Protection.**

(A) *Information Withheld.* A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:

(i) expressly make the claim; and

(ii) describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

(B) *Information Produced.* If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information under seal to the court for the district where compliance is required for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

**(g) Contempt.**

The court for the district where compliance is required—and also, after a motion is transferred, the issuing court—may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena or an order related to it.

For access to subpoena materials, see Fed. R. Civ. P. 45(a) Committee Note (2013).

# **Attachment**

**A**

**IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA  
NO. 1:15-CV-00399**

SANDRA LITTLE COVINGTON, *et al.*, )  
 )  
Plaintiffs, )  
 )  
v. )  
 )  
THE STATE OF NORTH CAROLINA, )  
*et al.*, )  
 )  
Defendants. )  
\_\_\_\_\_

**DEFENDANTS' JOINT NOTICE OF DEPOSITION OF  
DR. BARRY BURDEN**

TO ALL COUNSEL OF RECORD:

PLEASE TAKE NOTICE that pursuant to Rule 30 of the Federal Rules of Civil Procedure, Defendants in the above-captioned actions will take the deposition upon oral examination of Dr. Barry Burden.

The deposition will begin at 10:00 a.m. on February 11, 2016, at Ogletree Deakins Law Firm, Pabst Boiler House, 1243 North 10<sup>th</sup> Street, Suite 210, Milwaukee, WI 53205. The deposition will be recorded by sound and/or stenographic means and may also be recorded by additional audiovisual means. The deposition shall take place before a notary public or other person authorized by law to administer oaths.

The purpose of this deposition will be to examine Dr. Burden on the identities of the parties and attorneys who engaged him to provide expert testimony in the case of *NC NAACP v. McCrory*, to confirm the testimony given by him in *NC NAACP* as reflected by Exhibit A and the official report by Dr. Burden designated as Plaintiffs' Exhibit 229, with particular emphasis on Dr. Burden's study of racially polarized voting found on pages 7 and 8 of Exhibit 229, and other

matters that are reasonably related to his testimony as reflected by Exhibit A and Exhibit 229, pages 7 and 8. Defendants are noticing this deposition strictly in response to plaintiffs' objection to the submission into evidence in this case of Dr. Burden's testimony as reported and reflected by Exhibit A and Exhibit 229, pages 7 and 8.

This the 6th day of January, 2016.

NORTH CAROLINA DEPARTMENT OF  
JUSTICE

By: /s/ Alexander McC. Peters  
Alexander McC. Peters  
Senior Deputy Attorney General  
N.C. State Bar No. 13654  
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N.C. Department of Justice  
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Telephone: (919) 716-6900  
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*Counsel for Defendants*

OGLETREE, DEAKINS, NASH  
SMOAK & 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  
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phil.strach@ogletreedeakins.com  
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Telephone: (919) 787-9700  
Facsimile: (919) 783-9412  
*Co-counsel for Defendants*

## CERTIFICATE OF SERVICE

I, Thomas A. Farr, hereby certify that I have this day served the foregoing **Defendants' Joint Notice of Deposition of Dr. Barry Burden** upon the following persons by placing a copy thereof in a depository under the exclusive care and custody of the United States Postal Service in a first-class, postage-prepaid envelope and addressed as follows:

Edwin M. Speas, Jr.  
John W. O'Hale  
Carolina P. Mackie  
Poyner Spruill LLP  
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cmackie@poymerspruill.com  
*Attorneys for Plaintiffs*

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allisonriggs@southerncoalition.org  
*Attorneys for Plaintiffs*

Adam Stein  
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Chapel Hill, NC 27516  
astein@tinfulton.com  
*Attorney for Plaintiffs*

This the 6th day of January, 2016.

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

/s/ Thomas A. Farr  
Thomas A. Farr  
N.C. State Bar No. 10871  
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thomas.farr@odnss.com

23363874.1

# **Exhibit**

## **A**

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

3 NORTH CAROLINA STATE CONFERENCE ) CASE NO. 1:13CV658  
4 OF THE NAACP, et al., )

5                   Plaintiffs, )  
6                   V. )

7 PATRICK LLOYD MCCRORY, in his )  
8 Official capacity as Governor )  
9 Of North Carolina, et al., )

10                   Defendants. )

11 LEAGUE OF WOMEN VOTERS OF NORTH ) CASE NO. 1:13CV660  
12 CAROLINA, et al., )

13                   Plaintiffs, )  
14                   V. )

15 STATE OF NORTH CAROLINA, et al., )

16                   Defendants. )

17 UNITED STATES OF AMERICA, ) CASE NO. 1:13CV861  
18                   Plaintiff, )

19                   V. )

20 STATE OF NORTH CAROLINA, et al., ) Winston-Salem, North Carolina  
21                   Defendants. ) July 15, 2015

22                   ) 9:04 a.m.

23                   TRANSCRIPT OF THE TRIAL/DAY THREE  
24                   BEFORE THE HONORABLE THOMAS D. SCHROEDER  
25                   UNITED STATES DISTRICT JUDGE

Proceedings recorded by mechanical stenotype reporter.  
Transcript produced by computer-aided transcription.

NAACP, et al. v. NC, et al. - Trial Day 3 - 7/15/15



1 APPEARANCES:

2 For the Plaintiff:  
 3 (NAACP)

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 DONITA JUDGE, ESQ.  
 DENISE D. LIEBERMAN, ESQ.  
 ADVANCEMENT PROJECT  
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 BRIDGET K. O'CONNOR, ESQ.  
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14 (LWV)

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 ANITA S. EARLS, ESQ.  
 GEORGE E. EPPSTEINER, ESQ.  
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JULIE A. EBENSTEIN, ESQ.  
 DALE E. HO, ESQ.  
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CHRISTOPHER A. BROOK, ESQ.  
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1 APPEARANCES (Continued):

2 (USA) CATHERINE MEZA, ESQ.  
 3 JOHN A. RUSS, IV, ESQ.  
 4 DAVID G. COOPER, ESQ.  
 5 AVNER M. SHAPIRO, ESQ.  
 6 SPENCER R. FISHER, ESQ.  
 7 ELIZABETH M. RYAN, ESQ.  
 8 JENIGH J. GARRETT, ESQ.  
 9 U. S. DEPARTMENT OF JUSTICE  
 10 Civil Rights Division  
 11 950 Pennsylvania Avenue, NW  
 12 Washington, DC 20530  
 13  
 14 GILL P. BECK, ESQ.  
 15 U. S. ATTORNEY'S OFFICE  
 16 100 Otis Street  
 17 Asheville, North Carolina 28801

11 (Intervenor  
 12 Plaintiff): JOSHUA L. KAUL, ESQ.  
 13 PERKINS COIE, LLP  
 14 1 E. Main Street, Suite 201  
 15 Madison, Wisconsin 53703  
 16  
 17 BRUCE V. SPIVA, ESQ.  
 18 AMANDA R. CALLAIS, ESQ.  
 19 PERKINS COIE, LLP.  
 20 700 13th Street, NW, Suite 600  
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 22  
 23 JOHN W. O'HALE, ESQ.  
 24 POYNER SPRUILL, LLP  
 25 P. O Box 1801  
 Raleigh, North Carolina 27602-1801

21 For the Defendants:

22 (State of NC) ALEXANDER M. PETERS, ESQ.  
 23 KATHERINE A. MURPHY, ESQ.  
 24 N.C. DEPARTMENT OF JUSTICE  
 25 P.O. Box 629  
 Raleigh, North Carolina 27602

1 APPEARANCES (Continued):

2 (State of NC) THOMAS A. FARR, ESQ.  
3 PHILLIP J. STRACH, ESQ.  
4 MICHAEL D. MCKNIGHT, ESQ.  
5 OGLETREE DEAKINS NASH SMOAK & STEWART  
6 P. O. Box 31608  
7 Raleigh, North Carolina 27622

8  
9  
10 (Governor) BUTCH BOWERS, ESQ.  
11 BOWERS LAW OFFICE, LLC  
12 1419 Pendleton Street  
13 Columbia, South Carolina 29201

14  
15  
16  
17  
18  
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22  
23  
24  
25  
Court Reporter: BRIANA NESBIT, RPR  
Official Court Reporter  
P.O. Box 20991  
Winston-Salem, North Carolina 27120

1 THE COURT: Any objection?

2 MR. STRACH: No, Your Honor.

3 THE COURT: Admitted.

4 All right. You may call your next witness.

5 MS. O'CONNOR: Good morning, Bridget O'Connor on  
6 behalf of the NAACP Plaintiffs, and we would call Dr. Barry  
7 Burden.

8 BARRY BURDEN PH.D., PLAINTIFFS' WITNESS, at 11:13 a.m., being  
9 first duly sworn, testified as follows:

10 DIRECT EXAMINATION

11 BY MS. O'CONNOR

12 Q Good morning, Mr. Burden.

13 A Good morning.

14 Q Dr. Burden, would you please introduce yourself to the  
15 Court.

16 A My name is Barry Burden.

17 Q And what do you do for a living?

18 A I'm a professor of political science at the University of  
19 Wisconsin-Madison.

20 Q Do you have any particular area of focus in your work?

21 A My general area of focus is American politics, but I have  
22 a particular interest and expertise in American elections,  
23 electoral politics, campaigns and voting behavior.

24 Q What were you asked to do in this matter?

25 A I was asked to examine the burdens imposed by H.B. 589 on

NAACP, et al. v. NC, et al. - Trial Day 3 - 7/15/15

1 black, Latino, and white voters in North Carolina.

2 Q And more recently, since your work last summer in this  
3 case, have you done any additional work?

4 A Yes. I submitted a report and some rebuttal reports this  
5 year.

6 Q And was there any additional analysis in that report  
7 beyond the work that you had presented last summer?

8 A Yes. Compared to the report I submitted last summer, this  
9 year's report was expanded to cover the voter ID provision and  
10 to examine the 2014 general election.

11 Q Have you reached any opinions based on your work?

12 A Yes.

13 Q And at a high level, Dr. Burden --

14 MS. O'CONNOR: And I would ask if we could put  
15 slide 1 up, please.

16 BY MS. O'CONNOR

17 Q Dr. Burden, could you describe at a high level what are  
18 the opinions that you reached in this case?

19 A I concluded that H.B. 589 imposes new costs on voters in  
20 North Carolina and that those costs are more heavily felt by  
21 black and Latino voters than by whites. Black and Latino  
22 voters are also less able to pay the costs imposed by H.B. 589  
23 and, as a result, would be more likely to be deterred from  
24 participation than were whites.

25 I also examined the 2014 election as possible evidence on

NAACP, et al. v. NC, et al. - Trial Day 3 - 7/15/15

1 the costs of H.B. 589 and concluded that the turnout levels  
2 observed in this election were not a measure of the burden  
3 imposed by the law.

4 Q Have you submitted an expert report based on your work in  
5 this matter?

6 A Yes, I have.

7 Q And we talked about it briefly, but you submitted some  
8 reports last summer in conjunction with the preliminary  
9 injunction hearing as well as this spring in connection with  
10 the trial?

11 A Yes.

12 Q Dr. Burden, I will refer to your report, your most recent,  
13 as your 2015 expert report today. Before we get to your  
14 opinions, let's talk a little bit about your background.

15 Would you please tell the Court a little bit about  
16 yourself, starting with where are you currently employed?

17 A I'm currently employed at the University of  
18 Wisconsin-Madison as a professor in the Department of Political  
19 Science. I also have an affiliation with the La Follette  
20 School of Public Affairs.

21 MS. O'CONNOR: And if we could see slide 2, please.

22 BY MS. O'CONNOR

23 Q Where, sir, did you attend school?

24 A I was an undergraduate at Wittenberg University, was a  
25 political major there, and then earned my Ph.D. in political

1 science at Ohio State University.

2 Q And since earning your Ph.D., what kind of work have you  
3 done in the political science field?

4 A I have been a faculty member ever since earning my Ph.D.  
5 I was first a professor at Louisiana State University, then a  
6 professor at Harvard University, and for the last nine years at  
7 the University of Wisconsin-Madison. During that time, I  
8 devoted most of my research and teaching to American elections  
9 and electoral politics in various forms.

10 Q How many years of experience do you have in researching  
11 and analyzing election laws and their effects on voter turnout?

12 A I began my interest in the study of elections and  
13 electoral laws as a graduate student. That was about 20 years  
14 ago.

15 Q Have you taught courses on these subjects?

16 A I have continuously taught courses on elections and  
17 voting, on election reform and election administration, on  
18 public opinion, on representation, and on statistical  
19 methodology.

20 Q And have you published any peer-reviewed articles or books  
21 on these issues?

22 A I have. I have published both books published with the  
23 University Press that have gone through peer review and a  
24 number journal articles in peer-reviewed scholarly journals,  
25 again on topics dealing with election reform, election

1 administration, various electoral procedures and voting  
2 behavior.

3 Q Are you a member of any professional organizations  
4 relating to your field of study?

5 A Yes. I'm a member of the American Political Science  
6 Association and the Midwest Political Association and have been  
7 active in those associations.

8 Q Have you testified before?

9 A I have. I testified to the Presidential Commission on  
10 Election Administration just a year or two ago. That was a  
11 bipartisan commission appointed by President Obama to examine  
12 management issues in recent elections. I also testified in  
13 several federal cases dealing with voting rights. Two of those  
14 were cases dealing with voter identification laws under  
15 Section 2. One was in Wisconsin, one was in Texas. And then I  
16 testified in this Court in the preliminary injunction hearing  
17 last summer.

18 Q And what was your -- the subject of the testimony in the  
19 cases that you've testified in previously?

20 A In the two voter ID cases in Wisconsin and Texas, those  
21 were Section 2 claims under the Voting Rights Act. So I  
22 examined the Senate Factors and how they related to voter  
23 identification laws in those states.

24 Q Have your opinions ever been excluded from any Court?

25 A No.



1 Q Dr. Burden, in reaching the opinions that you described  
2 earlier, did you review any information in this case?

3 A Yes.

4 Q Can you describe those types of information?

5 A I reviewed a variety of materials. Those materials  
6 included official government and state documents related to  
7 elections, data produced by state and federal sources, academic  
8 research including articles of my own, and media coverage of  
9 the most recent election.

10 Q Now, could you please describe the frameworks that you  
11 used to assess the effect of H.B. 589?

12 A To assess the effects of H.B. 589, I relied on two  
13 frameworks. One of those is an academic theory known as the  
14 calculus of voting. It is a well-established idea tested over  
15 the years in political science examining the costs and benefits  
16 of participation.

17 The second framework I relied on was the Senate Factors.  
18 That's the list of factors that comes from the Senate Judiciary  
19 Committee report around the time the Voting Rights Act was  
20 amended in the early 1980s.

21 MS. O'CONNOR: And, Your Honor, at this time, I would  
22 like to offer Barry Burden as an expert in the analysis of  
23 election laws and administration and their effect on voter  
24 behavior.

25 MR. FARR: No objection, Your Honor.

1           **THE COURT:** He may give his opinions.

2           **MS. O'CONNOR:** I would also move at this time to  
3 admit Dr. Burden's 2014 expert report, surrebuttal report and  
4 declaration. Those are Plaintiffs' Exhibit 44 and 169, both of  
5 which are in the binders that I handed up, as well as his 2015  
6 expert report and surrebuttal report, which are Plaintiffs'  
7 Exhibits 229 and 224 (sic), also in the binders.

8           **THE COURT:** Any objection?

9           **MR. FARR:** No, sir.

10          **THE COURT:** They are admitted.

11 **BY MS. O'CONNOR**

12 Q       Dr. Burden, you referred a moment ago to the calculus of  
13 voting. Can you explain what that means?

14 A       The calculus of voting is a theory of voter behavior. It  
15 is a mathematical equation that explains why some voters  
16 participate and other voters do not. It relies on a simple  
17 idea of cost and benefits, that a voter participates when the  
18 benefits of participating exceed the costs.

19       The benefits to a voter are essentially the value that the  
20 voter sees in electing a candidate of their preference compared  
21 to other the candidate or candidates in the race.

22       The costs involve the efforts and other costs that a voter  
23 would have to pay in order to participate. Those costs can be  
24 tangible and financial: The cost of transportation, the cost  
25 of postage, the cost of a long distance phone call. They could

# **Plaintiffs' Exhibit**

**229**

# EXPERT REPORT

*North Carolina State Conference of the NAACP*  
v.  
*McCrory, et al.*

UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF NORTH CAROLINA  
Case No.: 1:13-cv-00658-TDS-JEP (M.D.N.C.)  
Judge Thomas D. Schroeder  
Magistrate Judge Joi Elizabeth Peake

February 12, 2015

A handwritten signature in black ink, reading "Barry Burden". The signature is written in a cursive, flowing style.

**Barry C. Burden, Ph.D.**

**PX0229**

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## I. SUMMARY OF OPINIONS

I closely monitored the development and implementation of North Carolina House Bill 589, the Voter Information Verification Act, which became Session Law (SL) 2013-381 in August 2013. The law made multiple significant changes to state election law. Among other changes, SL 2013-381 imposed a new requirement that residents show specific photo identification (ID) to vote in person, reduced the early in-person voting period from 17 days to at most 10 days (including the elimination of the final Sunday before Election Day), eliminated same day voter registration, ended pre-registration of 16 and 17-year olds, expanded the number of people who can challenge ballots, and ended the practice of “out-of-precinct” voting, or the counting of provisional ballots from individuals who appear to vote in the wrong precinct.

The federal Voting Rights Act (VRA) bears directly on SL 2013-381. Passed in 1965, the VRA’s Section 2 prohibits voting practices that discriminate on the basis of race, color, or language group. Unlike some other portions of the VRA, Section 2 is permanent.

The VRA was modified in 1982 with overwhelming votes in both chambers of Congress and was signed into law by President Ronald Reagan. The amendments made clear that discriminatory intent was not necessary for the law to be violated; only discriminatory results are necessary.

The U.S. Senate Committee on the Judiciary issued a report at the time, declaring that the law would be violated if the “totality of the circumstances of the local electoral process” had the effect of denying equal opportunities to participate in the political process. The committee report identified an illustrative list of seven “Senate factors” and two unenumerated factors for courts to consider when evaluating the “totality of the circumstances.” I have spent considerable time examining the Senate factors, drawing upon my expertise and training as a scholar of electoral politics.

It is my considered opinion that elements of SL 2013-381 in North Carolina, both individually and jointly, implicate the Senate Report factors in ways that demonstrate how the state’s black and Latino voters are more likely to be deterred or prevented from voting by the new law. The dramatic disruption of voting practices induced by SL 2103-381 is likely to negatively affect minority voters more than white voters.<sup>1</sup>

This is precisely what happened in Florida – another politically competitive battleground state with a sizeable minority population – when early voting was restricted there.<sup>2</sup> SL 2013-381, which is far more sweeping than the changes in Florida, or any other state in recent memory, will disproportionately harm black and Latino voters because, among other grounds, of the concrete costs it imposes on them in terms of the alternative and additional measures they will now need to undertake in order to attempt to vote and because of the chilling effect of the message it sends to minority voters in North Carolina.

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<sup>1</sup> I use the terms Hispanic and Latino interchangeably in this report. Wherever possible the terms white and black refer to non-Hispanic whites and blacks.

<sup>2</sup> Michael C. Herron and Daniel A. Smith. 2014. “Race, Party, and the Consequences of Restricting Early Voting in Florida in the 2012 General Election.” *Political Research Quarterly* 67:646-65.

The following sections outline how SL 2013-381 interacts with social and economic conditions affecting racial minorities in North Carolina in a way that disproportionately deprives them of the ability to participate in the political process and to influence the outcome of elections.

## **II. BACKGROUND AND QUALIFICATIONS**

I am a Professor of Political Science at the University of Wisconsin-Madison. I earned my Ph.D. at The Ohio State University in 1998. From 1999 to 2006 I was a faculty member in the Department of Government at Harvard University. I have been on the faculty as a full-time professor at the University of Wisconsin-Madison since 2006. A copy of my curriculum vitae is attached. I am being compensated \$250 per hour for my effort.

My expertise lies generally in American politics with a focus on elections and voting, public opinion, representation, partisanship, and research methodology. I teach courses on these topics at both the undergraduate and graduate levels. I am author of the book *Personal Roots of Representation* (2007 Princeton University Press), co-author of *Why Americans Split Their Tickets* (2002 University of Michigan Press), and co-editor of *The Measure of American Elections* (2014 Cambridge University Press). I have also published articles in respected scholarly peer-reviewed journals such as the *American Political Science Review*, *American Journal of Political Science*, *Electoral Studies*, *Public Opinion Quarterly*, *Legislative Studies Quarterly*, *Public Administration Review*, *Election Law Journal*, and *Political Analysis*. I serve on the editorial boards of *Electoral Studies* and *Election Law Journal*, and have served as a manuscript reviewer for many academic journals. I am a member of the American Political Science Association and have been active in the profession, giving presentations at many conferences and universities. My research has been supported by grants won from sources including the Pew Charitable Trusts, National Science Foundation, and Dirksen Congressional Center.

I have particular expertise in elections and election administration. I am the co-founder of the Election Administration Project at the University of Wisconsin-Madison. This collaboration has produced research on election administration around the country. I have testified before state officials and the bipartisan Presidential Commission on Election Administration. I conducted the first independent evaluation of the Electronic Registration Information Center (ERIC), an initiative launched by seven states to modernize voter registration systems. I am frequently contacted by journalists and civic organizations to speak about election administration. In recent years I have been quoted in several national media outlets such as *USA Today*, *The Wall Street Journal*, and *The New York Times*.

## **III. MATERIALS REVIEWED**

To establish an expert opinion in this case, I reviewed a variety of materials from academic, governmental, legal, and media sources. Building on my existing knowledge, expertise, and experience, I consulted scholarly research on the general causes and effects of changes in state election laws. My review also included data sources and statutes made available by agencies in the North Carolina government and the federal government. I also reviewed news

coverage of HB 589 and SL 2013-381. The sources on which I relied are cited in footnotes and listed together in the appendix to this document.

#### IV. DISCUSSION

##### A. The Calculus of Voting

The likely effects of SL 2013-381 may be understood using the “calculus of voting.” The “calculus of voting” is the dominant theoretical framework used by scholars to study voter turnout. Dating back at least to Anthony Downs’s seminal 1957 book, *An Economic Theory of Democracy*, researchers typically view the likelihood of voting as a formula. A person votes if the probability of one’s vote determining the outcome multiplied by the net psychological benefit of seeing one’s preferred candidate win is greater than the “costs” of voting. These costs include the effort needed to become informed about the candidates and issues. But they also include the time, resources, and activity needed to overcome the administrative requirements and other barriers to registering to vote and successfully casting a ballot.<sup>3</sup> These are costs controlled by the state administering the vote.

This “calculus of voting” framework suggests that for many individuals the decision to vote is made “on the margins.” Small changes in benefits or costs may alter the likelihood of voting dramatically. The decision to vote is sensitive enough to costs that even Election Day weather has been shown to depress turnout.<sup>4</sup> Costs are especially consequential for individuals with less education and non-habitual voters for whom the complications of registering, finding the correct polling place, and making the time to vote are frequently quite costly. In general, disruptions to voting habits raise costs and deter participation. It is little surprise, then, that a modest change to election procedures is enough to deter voting.<sup>5</sup> A more significant change or a series of changes would have even greater potential to raise the costs for voting.

SL 2013-381 increases an array of voting costs. The changes I consider in this report include:

- requiring approved government identification to vote for those voting in person who are no older than 70,
- shortening of the early voting period by seven days,
- eliminating pre-registration of 16 and 17 year olds,
- preventing counting of ballots cast out of precinct, and

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<sup>3</sup> Some formulations add a “duty” term to indicate the positive effect of norms supporting the democratic system. Aldrich shows that this is not necessary because the cost term can be viewed as the net costs that encompass one’s sense of duty. See John H. Aldrich (1993), “Rational Choice and Turnout,” *American Journal of Political Science* 37:246-78.

<sup>4</sup> Thomas G. Hansford and Brad T. Gomez (2010), “Estimating the Electoral Effects of Voter Turnout,” *American Political Science Review* 104:268-88.

<sup>5</sup> Henry E. Brady and John E. McNulty (2011), “Turnout Out to Vote: The Costs of Finding and Getting to the Polling Place,” *American Political Science Review* 105:1-20. John E. McNulty, Conor M. Dowling, and Margaret H. Ariotti (2009), “Driving Saints to Sin: How Increasing the Difficulty of Voting Dissuades Even the Most Motivated Voters,” *Political Analysis* 17:435-55. Moshe Haspel and H. Gibbs Knotts (2005), “Location, Location, Location: Precinct Placement and the Costs of Voting,” *Journal of Politics* 67:560-73.



- eliminating same day registration,

each of which imposes disproportionate costs on racial and ethnic minorities. The law is likely to exacerbate differences in political participation of whites on the one hand and, black and Latino residents on the other because blacks and Latinos have fewer of the socioeconomic resources necessary to navigate restrictions imposed on the voting process.

Scholarly research has demonstrated how increasing the costs of voting depresses voter turnout. These negative effects are usually greater for racial and ethnic minorities who frequently benefit from fewer socioeconomic resources and have shorter histories of electoral participation upon which to support their continued voting habit. For example, a study of the 2000 election showed that increasing the costs of voting by shortening polling hours and not mailing sample ballots decreased turnout by 4 percentage points among whites, 4.8 points among blacks, and 6.8 points among Latinos.<sup>6</sup> This is an example of how SL 2013-381 can be understood using the “calculus of voting” and how underlying differences across racial and ethnic groups create a disparate effect on minority residents in North Carolina. What may appear to be “equal” costs imposed by a restriction on voting practices are in fact more acute for black and Latino voters. These minority groups are doubly burdened because they possess fewer of the resources needed to overcome those costs as a result of ongoing effects of historical discrimination in the state.

## **B. The Effect of Habit**

Political science research demonstrates that voting participation is largely a product of habit. As long as the habit is not disrupted, voting in an election makes voting in the next election more likely. Once a person becomes a voter, he or she tends to remain a regular voter, at least in major federal elections.<sup>7</sup> The power of habit comes in part from the fact that once having voted, the costs of participating again are much lower. A successful voter has already figured out where, how, and when to register and where, how, and when to cast a ballot. If one of these parameters is altered, it is a disruption that adds new and unexpected costs to the voting calculus. Following this logic, it is unsurprising that people who relocated recently are significantly less likely to vote, in part because it entails updating or initiating a new registration.<sup>8</sup> Changing polling places has been shown to decrease turnout by several percentage points.<sup>9</sup> Mandating (rather than simply offering) vote-by-mail has been shown to reduce

<sup>6</sup> Raymond E. Wolfinger, Benjamin Highton, and Megan Mullin (2005), “How Postregistration Laws Affect the Turnout of Citizens Registered to Vote,” *State Politics & Policy Quarterly* 5:1-23.

<sup>7</sup> Alan S. Gerber, Donald P. Green, and Ron Shachar (2003), “Voting May Be Habit-Forming: Evidence from a Randomized Field Experiment,” *American Journal of Political Science* 47:540-50. Eric Plutzer (2002), “Becoming a Habitual Voter: Inertia, Resources, and Growth in Young Adulthood,” *American Political Science Review* 96:41-56.

<sup>8</sup> Peverill Squire, Raymond E. Wolfinger, and David P. Glass (1987), “Residential Mobility and Voter Turnout,” *American Political Science Review* 81:45-65. Richard J. Timpone (1998), “Structure, Behavior, and Voter Turnout in the United States,” *American Political Science Review* 92:145-58.

<sup>9</sup> Brady and McNulty (2011). McNulty, Dowling, and Ariotti (2009). Hapsel and Knott (2005).

turnout.<sup>10</sup> Implementing new registration requirements deters turnout.<sup>11</sup> Drawing new legislative district lines also depresses voter participation.<sup>12</sup>

This pattern highlights an asymmetry in the effects of election laws. Research by myself and others has shown that introducing additional convenience for registering or voting has mixed effects on turnout.<sup>13</sup> This is largely because voting behavior is habitual and slow to respond to new opportunities. In contrast, the studies cited in the previous paragraph demonstrate that removing options consistently reduces participation, especially among those with fewer resources to navigate the disruption.

As Green and Shachar's study of the voting habit explains, the foreignness of the voting experience can itself deter participation. They explain that, "[t]he registered non-voter may regard going to the polls with a certain amount of apprehension. Will I know how to work the voting machine? Will the poll workers treat me respectfully? Will I know where to go and which line to stand in?"<sup>14</sup> There would be a similar set of concerns for a potential voter interested in registering to vote. Apprehension is lowered if the voting process is predictable, allowing the "costs" paid in the past to facilitate participation in the future. Changes in voting processes naturally inhibit the reliance on habit and sunk costs.

The wide range of election law changes in SL 2013-381 is targeted at practices that are used more by blacks and Latinos than by whites. A recent statistical analysis by political scientists Michael Herron and Daniel Smith provides a careful and comprehensive understanding of how the law will affect black and white political participation in North Carolina. Their report concludes the following:

Our study indicates that [SL 2013-381] will have disparate effects on black voters in North Carolina. Specifically, we find that in presidential elections the state's black early voters have traditionally cast their ballots disproportionately often in the first week of early voting, a week eliminated by [SL 2013-381]; that blacks disproportionately have registered to vote during North

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<sup>10</sup> Elizabeth Bergman and Philip A. Yates (2011), "Changing Election Methods: How Does Mandated Vote-By-Mail Affect Individual Registrants?," *Election Law Journal* 10:115-27.

<sup>11</sup> Barry C. Burden and Jacob R. Neiheisel (2013), "Election Administration and the Pure Effect of Voter Registration on Turnout," *Political Research Quarterly* 66:77-90.

<sup>12</sup> Danny Hayes and Seth C. McKee (2009), "The Participatory Effects of Redistricting," *American Journal of Political Science* 53:1006-23.

<sup>13</sup> Adam J. Berinsky (2005), "The Perverse Consequences of Electoral Reform in the United States," *American Politics Research* 33:471-91. Barry C. Burden, David T. Canon, Kenneth R. Mayer, and Donald P. Moynihan (2014), "Election Laws, Mobilization, and Turnout: The Unanticipated Consequences of Election Reform," *American Journal of Political Science* 58:95-109. Melanie J. Springer (2012), "State Electoral Institutions and Voter Turnout in Presidential Elections, 1920-2000," *State Politics & Policy Quarterly* 12:252-83. I note that the Burden et al. (2014) study does not focus on North Carolina specifically or analyze differences across racial and ethnic groups.

<sup>14</sup> Donald P. Green and Ron Shachar (2000), "Habit Formation and Political Behaviour: Evidence of Consuetude in Voter Turnout," *British Journal of Political Science* 30:561-73, p. 570.

Carolina's early voting period and in the run-up to Election Day, something now prohibited by [SL 2013-381]; that VTVA's photo identification provision falls disproportionately on registered blacks in North Carolina; that the special identification dispensation for North Carolina voters who are at least 70 years old disproportionately benefits white voters; and, that prior to the implementation of [SL 2013-381] young blacks were disproportionately more likely than whites to avail themselves of the opportunity to preregister to vote.<sup>15</sup>

A new set of more restrictive election rules would not necessarily implicate the Senate factors. For example, new election laws could impose additional costs of voting in a way that meets state interests and that also fall somewhat equally across racial and ethnic groups. A package of reforms might have been enacted in North Carolina that created additional burdens for white voters in one aspect but for minority voters in some other aspect. As I elaborate below, SL 2013-381 is not of this sort. Herron and Smith's summary of their analysis makes clear that all or nearly all of the changes in election law instigated by SL 2013-381 generated more significant costs for blacks and Latinos than for whites. These lopsided costs cumulate across the various provisions to create hurdles that are more significant for blacks and Latinos.<sup>16</sup>

### C. The Senate Factors

Considering the "calculus of voting" and related research on how election practices affect turnout among blacks and Latinos in particular, several of the "Senate factors" indicate how SL 2013-381 will predictably and disproportionately depress black and Latino voting. What follows is a discussion of several Senate factors and the two additional, unenumerated factors that inform my analysis of the effect of SL 2013-381 on black and Latino voters.

As background, it is important to understand that black and Latino voter turnout in North Carolina has long lagged behind that of whites. While Latino registration and turnout rates continue to be far below that of other groups, black turnout has only recently approached parity with whites as black voters have made use of same day registration and early voting opportunities in North Carolina. SL 2013-381 puts new restrictions on these practices that have over time facilitated greater minority participation.

Turnout rates for each racial and ethnic group can be computed by dividing the number of votes cast by size of the population eligible to vote. For the eligible population, I use the Citizen Voting Age Population (CVAP) as estimated by data from the U.S. Census Bureau.<sup>17</sup> Other reliable measures show similar patterns. The data are reported in Table 1.

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<sup>15</sup> Michael C. Herron and Daniel A. Smith (2014), "Race, *Shelby County*, and the Voter Information Verification Act in North Carolina," manuscript, version 2 dated February 12, 2014, p. 44.

<sup>16</sup> See also Expert Report of Allan Lichtman, *North Carolina State Conference of the NAACP, et al. v. Patrick McCrory, et al.*, Civ. No. 1:13-cv-658, 12 February 2015.

<sup>17</sup> For the 2000, 2002, and 2004 elections, CVAP is drawn from the 2000 Census Special Tabulation STP-76. For the 2006, 2008, 2010, and 2012 elections, CVAP is drawn from the American Community Survey 1 Year table B050003. Because 2014 CVAP is not yet available, turnout in the 2014 election is based on the 2013 ACS. For

**Table 1. Voter Turnout by Racial and Ethnic Groups in  
Recent Federal Elections in North Carolina**

	Presidential Elections				
	2000	2004	2008	2012	Average
White	54.9%	63.5%	65.6%	64.4%	62.1%
Black	43.1%	55.0%	69.3%	67.8%	58.8%
Latino	3.3%	15.0%	31.2%	28.8%	19.6%
	Midterm Elections				
	2002	2006	2010	2014	Average
White	43.9%	35.6%	42.0%	43.1%	41.2%
Black	33.7%	23.8%	36.8%	40.0%	33.6%
Latino	3.3%	5.8%	8.3%	11.3%	5.1%

The table indicates that white turnout exceeds black turnout in every election but the last two presidential elections. White turnout surpasses black turnout by an average of 3.3 percentage points in presidential elections and 7.6% in midterm elections. White turnout far exceeds Latino turnout in every federal election, with an average disparities of 42 percentage points in presidential elections and 35 points in midterm elections. Blacks and especially Latinos have yet to establish voting habits that are as robust as those of whites.

Of the eight elections examined in the table, black turnout surpassed white turnout only in 2008 and 2012. This is a combination of two factors. One is surely the candidacy of Barack Obama, the first black candidate to be nominated for President by a major political party. The other factor is that black turnout has been steadily approaching levels of white turnout in North Carolina. This has been possible in part because black residents have made increasing and disproportionate use of early voting and same day registration. I characterize the recent parity in black and white turnout in presidential elections as fragile, dependent on the particular candidates and issues as well as increasing adoption of voting practices offered by the state that are under threat of disruption under SL 2013-381.

#### 1. History of Official Voting-Related Discrimination

Senate Factor One considers whether there is history in the jurisdiction of “official voting-related discrimination.”<sup>18</sup> Because this issue overlaps considerably with the criteria in Factor Three, it will be discussed there.

#### 2. Racial Polarization

Senate Factor Two addresses whether voting is “racially polarized.”<sup>19</sup> Following the standard established by the U.S. Supreme Court in *Thornburg v. Gingles* (1986), racial

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years in which turnout is reported by race, the North Carolina State Board of Elections reports somewhat higher turnout rates, but gaps between blacks and whites are similar to those apparent in my calculations.

<sup>18</sup> Senate Committee on the Judiciary, S. Rep. 417, 97th Cong., 2nd Sess. (1982).

<sup>19</sup> Senate Committee on the Judiciary, S. Rep. 417, 97th Cong., 2nd Sess. (1982).

polarization may be defined as a “consistent relationship between [the] race of the voter and the way in which the voter votes.”

Racial polarization in voting patterns is easily observed in North Carolina. Media exit polls from the 2012 presidential election indicated that 96% of black voters in North Carolina voted for the Democratic presidential ticket while only 31% of whites did so, a gap of 65 percentage points.<sup>20</sup> Similar patterns exist in other recent presidential elections in North Carolina. The gap between blacks and whites was 60 points in 2008, 58 points in 2004, and 59 points in 2000. It is also apparent in midterm federal elections: the racial gap was 63 points in 2014.<sup>21</sup> These large disparities far exceed other demographic comparisons including income, education, and sex. Moreover, because the voting patterns were apparent back in 2000 and 2004, polarization is not simply an artifact of the 2008 and 2012 elections in which one of the major party candidates was black.

It is important to note that racially polarized voting is more than a simple reflection of partisanship. Evidence from Democratic primary elections demonstrates this. In the 2008 Democratic presidential primary in North Carolina, exit polls showed that 91% of blacks voted for Barack Obama while 37% of whites did so.<sup>22</sup> This 54-point gap between blacks and whites dwarfs other demographic differences and mimics the polarization observed in general elections where partisanship is a major factor.<sup>23</sup>

### 3. Enhanced Opportunity for Discrimination

Senate Factor Three concerns whether voting practices have “enhanced the opportunity for discrimination” against minority groups. As more fully discussed in the expert report of James Leloudis, North Carolina has a long and pronounced history of election practices that facilitate discrimination.<sup>24</sup> These patterns of discrimination are addressed in detail in the reports of other experts, and are so widely known and documented that they require only brief reference here as reminder of their widespread use.

Following the Civil War and emancipation of most black slaves, passage of the 15th Amendment to the U.S. Constitution in 1870 promised voting rights regardless of race. During the Reconstruction period that ensued, the federal government installed officials in North Carolina and other former Confederacy states in part to facilitate electoral participation of black men. Like other southern states, North Carolina was required to give blacks the right to vote as one of the terms for readmission to the Union. As a result, under Republican control by the late

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<sup>20</sup> Exit polls are conducted by the National Election Poll (NEP), a consortium of major television networks and the Associated Press. Latinos were judged to be too small of a group for exit pollsters to produce reliable estimates of voting patterns.

<sup>21</sup> Exit polls were not conducted in North Carolina in 2010.

<sup>22</sup> The survey contained too few Latinos to provide reliable statistics for that group.

<sup>23</sup> See Expert Report of Allan Lichtman, *North Carolina State Conference of the NAACP, et al. v. Patrick McCrory, et al.*, Civ. No. 1:13-cv-658, 12 February 2015, at Section VI, for a discussion of polarized voting in North Carolina.

<sup>24</sup> See Expert Report of James Leloudis, *North Carolina State Conference of the NAACP, et al. v. Patrick McCrory, et al.*, Civ. No. 1:13-cv-658, 12 February 2015.



1800s, North Carolina saw ample voting by black men and had “probably the fairest and most democratic election law in the post-Reconstruction South.”<sup>25</sup>

Around the turn of the century, backlash to this success led white Democrats to impose new restrictions to deter black voters. These included changing the date of Election Day to August, allowing registrars to exclude voters, and introducing other complications such as multiple ballot boxes to confuse black voters.<sup>26</sup> These restrictions were part of a larger, explicit “white supremacy” campaign by the party as it settled in to long-term control of state government.<sup>27</sup> The *Raleigh News and Observer* argued at the time that the state legislature should “make it impossible for any element of white voters to appeal to the Negro voters upon any question.”<sup>28</sup> Indeed, in 1899 the state’s voters approved a “suffrage amendment” to the Constitution that added a literacy test for registration and poll tax for voting. The literacy test, which required that “[e]ach person presenting himself for registration shall be able to read and write any section of the Constitution in the English language,” was ratified by the state legislature the following year.<sup>29</sup> The provision was used selectively by vote registrars to discriminate against blacks.<sup>30</sup> In response to these changes and the violence used to enforce them, black turnout fell from 87% in 1896<sup>31</sup> to “the complete elimination of black turnout over an eight-year period, between the Presidential elections of 1900 and 1904.”<sup>32</sup> It would take decades to recover. Governor Charles Aycock bragged in a 1903 speech that, “I am proud of my State...because there we have solved the negro problem... We have taken him out of politics and have thereby secured good government under any party.”<sup>33</sup>

The poll tax lasted until 1920 but the literacy test remains on the books to this day. The literacy test persisted even after the VRA was passed in 1965 and literacy tests were explicitly banned nationwide by congressional amendment five years later. To implement the amended VRA in 1970, a statewide referendum was put on the ballot asking voters to remove the literacy test from the state constitution. That referendum failed, and the provision remains in the North

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<sup>25</sup> J. Morgan Kousser (1974), *The Shaping of Southern Politics: Suffrage Restriction and the Establishment of the One-Party South, 1880-1910*. New Haven, CT: Yale University Press, p. 187.

<sup>26</sup> Kousser (1974).

<sup>27</sup> The white supremacy movement in late 19th Century North Carolina has been widely documented. For a representative portrayal, see Eric Anderson (1981), *Race and Politics in North Carolina, 1872-1901*, Baton Rouge, LA: Louisiana State University Press or James Beeby (2008), *Revolt of the Tar Heels: The North Carolina Populist Movement*, Jackson, MS: University Press of Mississippi.

<sup>28</sup> Kousser (1974), p. 190.

<sup>29</sup> N.C. Const. art VI, § 2.

<sup>30</sup> William R. Keech and Michael P. Siström (1994), “North Carolina,” in *Quiet Revolution in the South: The Impact of the Voting Rights Act 1965-1990*, ed. Chandler Davidson and Bernard Grofman, Princeton, NJ: Princeton University Press.

<sup>31</sup> Jeffrey J. Crow and Robert Franklin Durden (1977), *Maverick Republican in the Old North State*, Baton Rouge, LA: Louisiana State University.

<sup>32</sup> Richard H. Pildes (2000), “Democracy, Anti-Democracy, and the Canon,” *Constitutional Commentary* 17:295-319, 302.

<sup>33</sup> Learn NC, Governor Aycock on “the Negro Problem,” available at <http://www.learnnc.org/lp/editions/nchist-newsouth/4408> (last visited March 24, 2014).

Carolina Constitution. A bill (HB 311) to repeal the provision was introduced in the state legislature in 2013. Despite incorporating a long list of other election-related changes in HB 589, the State Senate did not even bring this measure up for a vote.

Since the passage of the VRA in 1965, there continue to be incidents in which black and Latino residents are intimidated or potentially deterred from voting by administrative actions.<sup>34</sup> Between 1971 and 2012, the U.S. Department of Justice (DOJ) issued 64 “objection letters” to officials in the 40 North Carolina counties that had been required to get preclearance under Section 5 of the VRA.<sup>35</sup> Because of the U.S. Supreme Court ruling in *Shelby County v. Holder*,<sup>36</sup> actions that would have been stopped in advance by the DOJ because of their discriminatory effect may now proceed.

The North Carolina legislature moved hastily to pass new voting restrictions after the *Shelby County* decision. The decision was issued on June 25, 2013; less than a month later, the legislature quickly moved a radically different form of HB 589. As a local television station reported, “House Bill 589 sat idle for three months since the House approved it before undergoing an extreme makeover in recent days” after which “[t]he Senate Rules Committee passed the bill on a hasty voice vote before members rushed off to a floor session.”<sup>37</sup> HB 589 was ratified by the state legislature on July 26, 2013 and signed into law on August 12, 2013. The resulting law may be the most dramatic example of a state rushing to implement new policies once inhibited by the preclearance requirement. In a review of recent election laws adopted across the country, the *Washington Post* editorial board described SL 2013-381 as an “especially draconian bill” that differs from restrictions in other states because of “how much further it goes.”<sup>38</sup>

#### 4. Effects of Discrimination on Minority Group Members and Participation in Electoral Process<sup>39</sup>

Senate Factor Five assesses the extent to which “minority group members bear effects of discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process.”<sup>40</sup> Stemming in large part from historic legacies of unequal treatment, segregation, and discrimination, blacks, Latinos, and whites experience markedly different outcomes in these areas. The state’s history of racial discrimination and

<sup>34</sup> See “Voting Rights in North Carolina 1982-2006,” a report of RenewtheVRA.org prepared by staff at the University of North Carolina Center for Civil Rights, available at <http://www.protectcivilrights.org/pdf/voting/NorthCarolinaVRA.pdf> (last visited March 24, 2014).

<sup>35</sup> Lawyers’ Committee for Civil Rights under Laws, “Voting Rights Act: Objections and Observers,” available at [http://www.lawyerscommittee.org/projects/section\\_5/](http://www.lawyerscommittee.org/projects/section_5/) (last visited March 25, 2014).

<sup>36</sup> *Shelby County v. Holder*, 570 U.S. \_\_\_\_ (2013).

<sup>37</sup> WRAL, “Elections Changes Advance in Senate,” available at <http://www.wral.com/elections-changes-advance-in-senate/12693772/>.

<sup>38</sup> “A Tar Heal Travesty,” *Washington Post*, August 16, 2013, p. A16.

<sup>39</sup> Analysis regarding Senate Factor 4 (the exclusion of minority groups from the candidate slating process) is not included in this Report, as this strategy is no longer used in North Carolina.

<sup>40</sup> Senate Committee on the Judiciary, S. Rep. 417, 97th Cong., 2nd Sess. (1982).

disparities bears directly on the impact that voting practices have on the ability of minority voters to participate in the political process and influence the outcomes of elections. As the U.S. Supreme Court explained in *Thornburg*, Section 2 of the VRA is violated when a voting practice “interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives.”<sup>41</sup> That is exactly how SL 2013-381 affects minority voting in North Carolina. Following the logic of the “calculus of voting,” the greater voting costs imposed on blacks and Latinos by their socioeconomic disadvantages continue to inhibit their political participation. These disadvantages are pervasive and enduring. Only a sampling is offered here to indicate their prevalence.

Employment data from the U.S. Census Bureau indicates that racial and ethnic disparities in unemployment are sizable in North Carolina. Estimated unemployment rates for the third quarter of 2014 were 5.3% for whites, 10.3% for blacks, and 8.1% for Latinos.<sup>42</sup>

Experiences with poverty are sharply differentiated between whites and minorities in North Carolina. A report based on U.S. Census Bureau data shows that poverty rates, defined as those living below the federal poverty level in 2013, were 12% for whites, 27% for blacks, and 43% for Latinos.<sup>43</sup>

Educational attainment varies significantly by race and ethnicity in North Carolina. Standardized test scores compiled for fourth and eighth graders shows that blacks and Latinos in North Carolina have lower scores in both reading and mathematics.<sup>44</sup> These tests show, for example, that for fourth grade reading scores, 81% of white students were deemed to meet “basic” standards in 2013 while only 55% of blacks and 56% of Latinos met those standards.<sup>45</sup> Compared to whites, high school dropout rates during the 2012 to 2013 academic year were 41% higher for blacks and 65% higher for Latinos.<sup>46</sup> Data reported by the state’s Department of Public Instruction show that long-term suspensions for Latino students were 1.9 times those of whites and the rate of long-term suspensions for black students was 4.2 times that of whites.<sup>47</sup>

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<sup>41</sup> *Thornburg v. Gingles*, 478 U.S. 30, 47 (1986).

<sup>42</sup> Valerie Wilson, Economic Policy Institute, “Virginia Boasts Smallest Gaps in Unemployment Rates by Race in Third Quarter, but No State Leads in Race to Recovery for All Groups,” October 27, 2014.

<sup>43</sup> The Henry J. Kaiser Family Foundation, “State Health Facts,” available at <http://kff.org/other/state-indicator/poverty-rate-by-raceethnicity/> (last visited December 31, 2014).

<sup>44</sup> *Achievement Gaps: How Black and White Students in Public Schools Perform in Mathematics and Reading on the National Assessment of Educational Progress*, 2014, U.S. Department of Education. *Achievement Gaps: How Hispanic and White Students in Public Schools Perform in Mathematics and Reading on the National Assessment of Educational Progress*, 2014, U.S. Department of Education.

<sup>45</sup> *Achievement Gaps* reports, cited in previous footnote.

<sup>46</sup> State Board of Education, Department of Public Instruction, Consolidated Data Report, 2012-2013, April 15, 2014. Figure D6. The dropout rates were 2.07 for whites, 2.92 for blacks, and 3.42 for Latinos.

<sup>47</sup> State Board of Education, Department of Public Instruction, Consolidated Data Report, 2012-2013, April 15, 2014. Figure S11. The long-term suspension rates per 100,000 pupils were 47 for whites, 199 for blacks, and 89 for Latinos.



The National Center for Education Statistics reports that for the 2011-2012 cohort high school graduation rates in North Carolina were 85% for whites, 75% for blacks, and 73% for Latinos.<sup>48</sup> Another report shows that although 71% of white male students graduated from high school in North Carolina in 2009-2010, the rates were 58% for black males and 50% for Latino males.<sup>49</sup> Unsurprisingly, an analysis of Census Bureau's 2009-2011 American Community Survey reports that 43% of whites held two- or four-year college degrees, while only 27% of blacks and 16% of Latinos held such degrees.<sup>50</sup> The November 2012 Current Population Survey indicates that bachelor's degrees (or their equivalent) were attained by 28% of North Carolina whites but only 17% by blacks and 10% by Latinos.

Numerous studies have shown that educational attainment is often the single best predictor of whether an individual votes.<sup>51</sup> This is largely because education lowers the "costs" of voting by providing language skills, direct information about the electoral process, and a sense of confidence of efficacy that facilitate participation even when the rules are changed.<sup>52</sup> Income also affects voter participation. Individuals with lower household incomes are significantly less likely to vote because it is comparably more burdensome for them to make time to do so.<sup>53</sup> A majority of states, for instance, require employers to give employees time off from work to vote. Most of those states also mandate that the employee must be paid for time taken to vote.<sup>54</sup> North Carolina does neither. Education and income are, therefore, predictive in large part because they lower the "costs" of voting when the voting habit is interrupted.

There are also widespread disparities between whites and blacks and Latinos in terms of health outcomes. On an array of official state health indicators that include such diverse measures as infant deaths, heart disease, and homicides, blacks and Latinos routinely fare worse than whites. More general measures such as the rate at which groups are rated as having "fair" or "poor" overall health show the same patterns. The "fair" and "poor" categories apply to only 16% of whites in North Carolina, as compared to 24% of blacks and 29% of Latinos.<sup>55</sup> Finally,

<sup>48</sup> <http://www.governing.com/gov-data/education-data/state-high-school-graduation-rates-by-race-ethnicity.html>, (last visited December 31, 2014).

<sup>49</sup> Schott Foundation for Public Education, *The Urgency of Now*, Cambridge, MA, 2012 report using data from the U.S. Department of Education's National Center for Education Statistics.

<sup>50</sup> Lumina Foundation, "A Stronger North Carolina through Higher Education," June 2013.

<sup>51</sup> Steven J. Rosenstone and John Mark Hansen (1993), *Mobilization, Participation and Democracy in America*, Macmillan. Sidney Verba, Kay Lehman Schlozman, and Henry E. Brady (1995), *Voice and Equality: Civic Volunteerism in American Politics*, Harvard University Press. Rachel Milstein Sondheimer and Donald P. Green (2010), "Using Experiments to Estimate the Effects of Education on Voter Turnout," *American Journal of Political Science* 54:174-89.

<sup>52</sup> For example, see Sidney Verba, Kay Lehman Schlozman, and Henry E. Brady (1995), *Voice and Equality: Civic Volunteerism in American Politics*, Cambridge, MA: Harvard University Press.

<sup>53</sup> See references in previous footnotes.

<sup>54</sup> See the League of Women Voters Education Fund web site, [vote411.org](http://www.vote411.org), available at [http://www.vote411.org/search-by-topic?topics\\_tid%5B%5D=60#U0QVPq1dVhl](http://www.vote411.org/search-by-topic?topics_tid%5B%5D=60#U0QVPq1dVhl) (last visited April 9, 2014).

<sup>55</sup> For example, see North Carolina Department of Health and Human Services, "Racial and Ethnic Health Disparities in North Carolina: 2010 Report Card," June 2010; "North Carolina Vital Health Facts: Population and Health Data by Race and Ethnicity," available at <http://www.schs.state.nc.us/schs/pdf/NCPopHealthDataByRaceEthDec2012.pdf> (last visited March 28, 2014).

recent research shows that health influences voter participation. For example, a disability makes the average person approximately 20 points less likely to vote, mostly because it increases the burdens and costs associated with voting.<sup>56</sup>

Blacks and Latinos also suffer from unequal treatment by the criminal justice system. An analysis by Brennan and Spohn finds that of those convicted for drug offenses in North Carolina in 2000, white offenders received less severe punishments than blacks and especially Hispanics.<sup>57</sup> Similarly, analysis of data on all traffic stops in the state between 2000 and 2011 also shows substantial racial disparities. Blacks and Latinos were far more likely to be searched and arrested.<sup>58</sup> Compared to white motorists who were stopped, blacks were 77% more likely to be searched and Latinos were 96% more likely to be searched.

Data from the National Prison Statistics, collected under the auspices of the U.S. Department of Justice, show glaring disparities in incarceration among these same racial and ethnic groups. In 2011, the last year for which annual data are publicly available, whites accounted for only 35% of those under custody in North Carolina while blacks were 56% and Latinos were 6%. U.S. Census Bureau data show that blacks and Latinos make up 22% and 9% of the North Carolina population in 2012. A Prison Policy Institute analysis shows that North Carolina Latinos are incarcerated at a rate of 1.4 times that of whites; blacks are incarcerated at a rate of 4.7 times that of whites.<sup>59</sup>

Criminal justice is an area where discrimination has the most immediate effects on political participation. Felon disenfranchisement laws in North Carolina, which prohibit voting by inmates, parolees, and probationers, disproportionately remove voting rights for blacks relative to whites. One recent report indicates that such laws disenfranchise over 46,000 black residents, or 2.84% of the black voting age population. The disenfranchisement rate was only .68% for the rest of the population of the state (*i.e.*, all non-blacks).<sup>60</sup> Research shows that ex-felons are further discouraged from voting even after they are “off paper” due to the social stigma of a criminal record, financial consequences of incarceration, and lack of support from the state in reactivating their voting rights.<sup>61</sup>

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<sup>56</sup> Lisa Schur, Todd Shields, Douglas Kruse, and Kay Schirner (2002), “Enabling Democracy: Disability and Voter Turnout,” *Political Research Quarterly* 55:167-90.

<sup>57</sup> Pauline K. Brennan and Cassia Spohn (2008), “Race/Ethnicity and Sentencing Outcomes among Drug Offenders in North Carolina,” *Journal of Contemporary Criminal Justice* 24:371-98.

<sup>58</sup> Frank R. Baumgartner and Derek Epp, “North Carolina Traffic Stop Statistics Analysis,” Final Report to the North Carolina Advocates for Justice Task Force on Racial and Ethnic Bias, February 1, 2012.

<sup>59</sup> Prison Policy Initiative, “North Carolina,” available at <http://www.prisonpolicy.org/profiles/NC.html> (last visited December 31, 2014).

<sup>60</sup> Christopher Uggen, Sarah Shannon, and Jeff Manza, (2012), “State-Level Estimates of Felon Disenfranchisement in the United States, 2010,” report for The Sentencing Project, Washington, DC. The non-black disenfranchisement rate was computed by taking the differences between Table 3 and Table 4. Data on Latinos were not provided in the report.

<sup>61</sup> Jeff Manza and Christopher Uggen (2006), *Locked Out: Felon Disenfranchisement and American Democracy*, New York, NY: Oxford University Press. Erika Wood and Rachel Bloom (2008), *De Facto Disenfranchisement*, American Civil Liberties Union and Brennan Center for Justice.

These glaring disparities in outcomes have a direct bearing on the impact of state election laws on minority voting rates. Decades of political science research show that voter participation is significantly affected by the very demographic characteristics that so strongly separate whites from minorities in North Carolina. As a result, although the limits on voting practices imposed by SL 2013-381 appear to be uniform, they are in fact more consequential for black and Latino residents because the restrictions interact with disparities in education, employment, and health.

In summary with regard to Senate Factor Five, North Carolina displays substantial and enduring racial disparities in areas such as education, income, employment, criminal justice, and health. These are highly relevant to Section 2 of the VRA. Demographic markers such as these are strongly associated with the likelihood of an individual being deterred from voting by a burdensome voting practice, much less multiple new practices that all fall more heavily on those same groups. Because they bear the effects of discrimination in the very domains that contribute to voting participation, blacks and Latinos in North Carolina are more likely than whites to be deterred from voting by the restrictions imposed by SL 2013-381.

#### 5. Extent of Minority Election to Public Office in Jurisdiction<sup>62</sup>

Senate Factor Seven evaluates the extent to which members of the minority group have been elected to public office in the jurisdiction.”<sup>63</sup> Blacks and Latinos have long been underrepresented in North Carolina. Blacks have only recently approached parity with their prevalence in the electorate. Latinos continued to be significantly underrepresented.

Blacks have not been well represented in North Carolina public life. As of late 2014, the North Carolina Legislative Black Caucus had 10 members in the State Senate and 23 in the House of Representatives.<sup>64</sup> This corresponds to 20% of the Senate and 19% of the House. Between 1900 and 1968, there were no black members of the General Assembly. As recently as 1989, blacks comprised only 8% of the Senate and 11% of the House.<sup>65</sup> The state’s congressional delegation has two black members out of 13 (15%). During the twentieth century, no blacks had been elected to Congress or statewide office until 1992. Election of black representatives that year was a direct consequence of the VRA.<sup>66</sup> Among its nine statewide constitutional officers and two U.S. senators, only one has been black in the 225-year history of the state (State Auditor Ralph Campbell, 1993-2005). This level of representation is particularly

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<sup>62</sup> Senate Factor 6 (the use of overt or subtle racial appeals in political campaigns) is not analyzed in this Report, but continues today. See Expert Report of James Leloudis, *North Carolina State Conference of the NAACP, et al. v. Patrick McCrory, et al.*, Civ. No. 1:13-cv-658, 12 February 2015.

<sup>63</sup> Senate Committee on the Judiciary, S. Rep. 417, 97th Cong., 2nd Sess. (1982).

<sup>64</sup> North Carolina Legislative Black Caucus, <http://nclbc.com/about-us/members/> (last visited December 31, 2014).

<sup>65</sup> Milton C. Jordan (1989), “Black Legislators: From Political Novelty to Political Force,” *North Carolina Insight* December: 40-58.

<sup>66</sup> Daniel P. Tokaji (2008), “Representation and Raceblindness: The Story of *Shaw v. Reno*,” in *Race Law Stories*, ed. Rachel F. Moran and Devon W. Carbado. New York, NY: Foundation Press.

notable considering North Carolina's status as one of the states with the largest share of black residents.<sup>67</sup>

Latinos have also been unrepresented. The National Hispanic Caucus of State Legislators reports just one member in the General Assembly.<sup>68</sup> Latinos thus make up just 2% of the state Senate and 0% in the House. No Latinos have been elected to statewide office in North Carolina. No Latinos have been elected to Congress from North Carolina.

It is not surprising that in recent years black voter turnout and black representation in the state legislature have risen in tandem. Academic research has shown that blacks are more likely to vote when their state legislatures have larger percentages of black representatives, and that Latinos are more likely to vote when their state legislatures have more Latino representatives. The two trends (increased voter turnout and increased representation in the legislature) reinforce each other.<sup>69</sup> To the degree that SL 2013-381 deters minority voter participation, black and Latino representation among elected officials will be inhibited as well. The state's history of underrepresentation of these groups has contributed to their lower levels of electoral participation and contributes to the likelihood that adding burdens to the voting process will more likely deter blacks and Latinos from voting because the perceived benefits of voting are not as high as they would be if minority-preferred candidates enjoyed greater electoral success.

#### **D. Lack of Responsiveness on the Part of Elected Officials**

The first additional, unenumerated factor the Senate report is whether "there is a lack of responsiveness on the part of elected officials to the particularized needs of minority group members."<sup>70</sup> Evidence for a lack of responsiveness is provided in the discussion of Senate Factor Five and elsewhere in this document. Blacks and Latinos suffer severe and enduring disparities in education, health, employment, income, and criminal justice in part due to state policies. The legislative debate over HB 589 made clear that blacks and Latinos would be disproportionately affected and that the legislation could have been altered to respond to their particularized use of existing election practices.

There is also social science evidence that local election officials in North Carolina are less responsive to minority constituents seeking information about how to participate in state elections. A study by Ariel White, Noah Nathan, and Julie Faller of Harvard University provides

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<sup>67</sup> Historic data from the U.S. Census Bureau indicate that over the past century the black share of the population has ranged between about 22% and 30%.

<sup>68</sup> The member listed as Hispanic is State Senator Tom Apodaca, but his status as a Latino is ambiguous. After winning election to the State Senate in 2002, he explained that "I am probably the only half-Mexican in the state who speaks very, very little Spanish" and "I've never considered myself Hispanic. But I've never considered myself not Hispanic" (as quoted in David Rice, "Hispanic Legislators May Be Pacesetters," *Winston-Salem (NC) Journal*, December 13, 2002).

<sup>69</sup> Christopher J. Clark (2014), "Collective Descriptive Representation and Black Voter Mobilization in 2008," *Political Behavior* 36:315-33. Rene R. Rocha, Caroline J. Tolbert, Daniel C. Bowen, and Christopher J. Clark (2010), "Race and Turnout: Does Descriptive Representation in State Legislatures Increase Minority Voting?," *Political Research Quarterly* 63:890-907; Kenny J. Whitby (2007), "The Effect of Black Descriptive Representation on Black Electoral Turnout in the 2004 Elections," *Social Science Quarterly* 88:1010-23.

<sup>70</sup> Senate Committee on the Judiciary, S. Rep. 417, 97th Cong., 2nd Sess. (1982).

an empirical demonstration of this using a randomized field experiment.<sup>71</sup> The researchers sent an email to each of North Carolina's county election boards in September 2012 to assess the responsiveness of election administrators to the public. The email messages all contained the following text: "Hello, I've been hearing a lot about voter ID laws on the news. What do I need to vote? Thank you."<sup>72</sup> Following this text, the messages were randomly signed by someone with a name that was putatively white and non-Latino (i.e., "Greg Walsh" or "Jake Mueller") or a name that was putatively Latino (i.e., "José Martinez" or "Luis Rodriguez"). Because this was a randomized field experiment, each county election board received only one or the other message, and boards were not informed that they were participating in an experiment.

The authors' analysis found that equivalent messages sent to county boards were 5.6 percentage points less likely to get a response if they were signed by Latino names.<sup>73</sup> This suggests that even a law that applies uniformly to the population is likely to be more costly for minority voters because they are less likely to receive official assistance in navigating election processes.

The VRA appears to mitigate unequal treatment of constituents. In an analysis of the same experiment conducted nationwide, the authors found that jurisdictions covered by Section 5 or Section 203 of the VRA showed no bias in response rates between white and non-Latino names. In contrast, officials in jurisdictions not subject to these VRA sections were about five percentage points less likely to respond to messages signed by Latino names. The U.S. Supreme Court's decision in *Shelby County v. Holder*, less than one year after the authors' experiment, removes this protection from 40 counties in North Carolina that had been subject to pre-clearance under Sections 4 and 5 of the VRA.

#### **E. Tenuousness of the Policy**

The second additional, unenumerated factor identified in the Senate report is whether the policy is "tenuous." Footnote 117 of the Senate Report explains further:

If the procedure markedly departs from past practices or from practices elsewhere in the jurisdiction, that bears on the fairness of its impact. But even a consistently applied practice premised on a racially neutral policy would not negate a plaintiff's showing through other factors that the challenged practice denies minorities fair access to the process.<sup>74</sup>

SL 2013-381 is an abrupt departure from voting practices in North Carolina. The massive scope of the law indicates its tenuousness. As election law expert and University of

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<sup>71</sup> Ariel R. White, Noah L. Nathan, and Julie K. Faller (forthcoming), "What Do I Need To Vote? Bureaucratic Discretion and Discrimination by Local Election Officials," *American Political Science Review*.

<sup>72</sup> A random half of county boards received this message. The other half received a "control" question about voting in a primary that serves as a baseline for the voter ID question.

<sup>73</sup> This estimate is statistically significantly different from zero. See panel B of Figure SI.5 in the Supplemental Information file accompanying the article.

<sup>74</sup> Senate Committee on the Judiciary, S. Rep. 417, 97th Cong., 2nd Sess. (1982).



California-Irvine Chancellor's Professor of Law and Political Science Richard Hasen explained, SL 2013-381 is "the most sweeping anti-voter law in at least decades." As he explains in measured terms, "I'm not big on using the term 'voter suppression,' which I think is overused and often inaccurate, but it is hard to see this law as justified on anti-fraud, public confidence, or efficiency grounds. The intent here is to make it harder for people – especially non-white people and those likely to vote Democratic – to register or cast a vote that will be counted."<sup>75</sup>

All evidence indicates that SL 2013-381 was enacted primarily for strategic gain and not because of a compelling state interest such as enhancing security of the election system, reducing costs, or alleviating the administrative burden on election officials<sup>76</sup>. An extensive statistical analysis by Bentele and O'Brien shows that recent state-level restrictions on voting such as those in SL 2013-381 are primarily a response by office holders to rising or high minority voter turnout rather than to genuine concern for improving the electoral system.<sup>77</sup> By disrupting the very aspects of the state's electoral system that are most used by black and Latino voters, it is as if the new restrictions imposed by SL 2013-381 were selected precisely to disproportionately disrupt the voting habits of minority voters.

For instance, SL 2013-381 eliminates same day registration (SDR) as part of the early voting process, and effectively removes 7 days of early voting (also known as one-stop absentee voting). Both SDR and early voting were disproportionately used by racial and ethnic minorities in North Carolina. The law does require the same number of hours for early voting as in prior general elections but concentrates those hours in a smaller number of days. In addition, a county may reduce the number of early voting hours if the county board votes unanimously to do so and is granted a waiver by the State Board of Elections. Even setting aside these waivers, this redistribution of early voting time still leads to the elimination of early voting on the Sunday before Election Day, which has been more heavily used by minority voters.<sup>78</sup>

In this section I argue that SL 2013-381 is highly tenuous. Specifically, I find that elements of the law: (1) are unnecessarily strict, (2) arbitrarily create two classes of voters, and (3) lack a factual rationale.

#### 1. SL 2013-381 is Unnecessarily Strict

SL 2013-381 implements a photo ID requirement for in-person voters. The law generally requires that a voter show one of the following forms of government-issued ID to receive a ballot: North Carolina driver's license, state ID card, U.S. passport, military ID card, veterans ID card, tribal ID card, or driver's license from another state if the person registered to vote within 90 days of the election.<sup>79</sup> The ID must include a photograph that reasonably resembles the voter,

<sup>75</sup> Election Law Blog entry, July 25, 2013. < <http://electionlawblog.org/?p=53461> >

<sup>76</sup> See Expert Report of Allan Lichtman, *North Carolina State Conference of the NAACP, et al. v. Patrick McCrory, et al.*, Civ. No. 1:13-cv-658. 12 February 2015, at Section IX.

<sup>77</sup> Keith G. Bentele and Erin E. O'Brien (2013), "Jim Crow 2.0? Why States Consider and Adopt Restrictive Voter Access Policies," *Perspectives on Politics* 11:1088-116.

<sup>78</sup> See Figure 2 and 3 in Herron and Smith (2014).

<sup>79</sup> Limited exceptions to the law are for curbside voters with disabilities, voters with religious objections, and voters who suffer from declared natural disasters within 60 days of election day.

include a printed date of expiration that has not yet passed, and be issued no more than eight years before the date of voting.<sup>80</sup>

A voter who does not present an acceptable form of ID is permitted to cast a provisional ballot. That ballot generally will only be counted if the voter travels to the county board of elections to present valid ID by noon on the day before the county election canvass, which creates an effective deadline of six or seven days after Election Day.<sup>81</sup>

Two studies by the State Board of Elections (SBOE) indicate that blacks are less likely than whites to possess the required ID, even though the analysis was limited to those who are already registered. Where blacks comprise about 22% of registered voters, the two SBOE analyses found that they comprise 31% to 34% of those who could not be matched with Department of Motor Vehicle records, and are thus more apt to lack ID.<sup>82</sup> When compared to their shares of registered voters, this implies that registered blacks are twice as likely as whites to lack proper ID. As Professor Allan Lichtman's expert report demonstrates, this disparity holds despite the fact that the SBOE analysis included expired IDs in its matching algorithm, even though such IDs are not permissible under SB 2013-381. When expired IDs are excluded, the disparity between blacks and whites is larger than the SBOE analysis indicated.<sup>83</sup> In addition, Lichtman's report shows that replicating the SBOE analysis with more recent data from 2014 produces nearly identical results as the earlier analysis.

These studies showing differential possession of ID for voting are consistent with other facts. Blacks and Latinos are less likely to possess the IDs need to vote as a result of other activities in their lives such as driving, flying, or banking. These activities have been mentioned to argue that requiring ID to vote does not impose much additional burden. When it comes to driving, a recent study by AAA shows that while 79% of whites aged 18 to 20 have driver's licenses, only 55% of blacks and 57% of Latinos do.<sup>84</sup> There is little reason to believe that these disparities would differ significantly in North Carolina. In terms of flying, one national academic survey indicates that 46% of whites had flown by plane in the past 12 months, but only 30% of blacks had done so.<sup>85</sup> Finally, a report by the Federal Deposit Insurance Corporation (FDIC) found that 8.4% of North Carolina households are "unbanked," that is, they lack both savings and checking accounts.<sup>86</sup> However, the rate is a mere 4.4% for whites but is 17.8% for

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<sup>80</sup> Voters who are at least 70 years old maybe present expired IDs as long as those IDs were not expired at the time the voter turned 70. Military, veterans, and tribal ID cards need not include printed expiration dates.

<sup>81</sup> See §163-182.5 for details. Two of those days fall on a weekend when the board of elections is expected to be closed.

<sup>82</sup> See summary in Table 6 in Herron and Smith (2014). The SBOE reports did not provide data for Latinos.

<sup>83</sup> See Expert Report of Allan Lichtman, *North Carolina State Conference of the NAACP, et al. v. Patrick McCrory, et al.*, Civ. No. 1:13-cv-658, 12 February 2015, at Section VIII.A.1.

<sup>84</sup> AAA Foundation for Traffic Safety, "Timing of Driver's License Acquisition and Reasons for Delay among Young People in the United States, 2012," July 2013.

<sup>85</sup> Analysis of the American National Election Study 2008-2009 Panel Study.

<sup>86</sup> Federal Deposit Insurance Corporation, 2013 FDIC National Survey of Unbanked and Underbanked Households, Washington, DC, October 2014. Appendix Table G-1.

blacks and 18.4% for Latinos.<sup>87</sup> In sum, blacks and Latinos bear a heavier burden than whites to meet the voter ID requirements of SL 2013-381 both because they are less likely to possess acceptable government IDs in the first place and because they face more costs and less ability to pay them in order to procure IDs.

The Department of Transportation (DOT) issues special non-operator voter ID cards for voting purposes. The DOT will not charge a fee for the card if the applicant is registered to vote and signs a declaration stating that they lack ID. To obtain the card, a person must appear at a DOT office with appropriate underlying documentation and information. The applicant must first verify his or her identity. The documents must display a full name and date of birth. DOT outlines 12 acceptable document types. These include a certified birth certificate, original Social Security card, tax forms, school transcript, and immigration documents. They also include forms of ID that are accepted directly for voting – such as a U.S. passport and military ID – that would almost certainly not be used to obtain a separate state ID.<sup>88</sup> The applicant must also provide a Social Security Number (or documentation if the DOT is unable to verify it). The applicant must also provide proof of citizenship and residency. There are 10 acceptable forms of documentation. Finally, the person must also sign a declaration stating that he lacks an ID acceptable for voting. If all of these requirements are met, the person is given a receipt and mailed an ID card, which may take up to 10 days to arrive. The receipt may not be used for identification or voting.<sup>89</sup> Acquiring a DOT ID may entail significant costs in terms of the time to gather documents, the legal or state fees required to obtain them (e.g., birth certificates), and the travel necessary to appear at a DMV office.

A study by Harvard University researcher Richard Sobel finds that the cost of obtaining ID to vote in a state with a strict voter ID requirement can be substantial.<sup>90</sup> Based on real examples from Pennsylvania, South Carolina, and Texas, he estimates the expense of obtaining an ID based on costs due to travel, purchase of underlying documents, and lost wages due to the time required for travel and interacting with government agencies. Setting aside potential legal fees, he finds that the cost for nine different individuals falls between \$75.00 and \$175.00. Even accounting for inflation, these costs are far above the poll taxes ended by Constitutional amendment and U.S. Supreme Court rulings.

There is little reason to believe that the costs would be substantially lower to obtain ID for voting in North Carolina. For example, a standard birth certificate request requires a

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<sup>87</sup> Federal Deposit Insurance Corporation, *Unbanked and Underbanked for North Carolina, 2013 by Selected Household Characteristics*.

<sup>88</sup> DL-231 (revised November 18, 2014), *available at* [http://www.ncdot.gov/download/dmv/DMV\\_voter\\_id\\_list.pdf](http://www.ncdot.gov/download/dmv/DMV_voter_id_list.pdf). The DOT indicates that other types of documents might be acceptable and will be reviewed.

<sup>89</sup> Non-operator ID cards, Voter ID, and No-Fee ID Card, *available at* <http://www.ncdot.gov/dmv/driver/id/> (last visited January 2, 2015).

<sup>90</sup> Richard Sobel (2014), "The High Cost of 'Free' Photo Voter Identification Cards," Charles Hamilton Houston Institute for Race and Justice, Harvard University Law School.



payment of \$24.00 to the Department of Health and Human Services.<sup>91</sup> Travel to a DMV office may be challenging for many voters. Most counties have just one DMV location—and some counties have no DMV offices. The average county has a land area of 486 square miles and could thus require lengthy, inconvenient, costly, or difficult travel to acquire an ID even if the underlying documents were readily available at no cost. Mobile DMV units may be helpful in mitigating these costs, but the limited availability of this ameliorative provision renders it an inadequate remedy. Travel by public transportation comes with a financial cost and may be time-consuming. Blacks and Latinos are less likely than whites to live in households where a vehicle is readily available.<sup>92</sup> Traveling to multiple agencies to acquire underlying documents required by the DMV naturally compounds the burden placed on individuals. Blacks and Latinos have fewer of the financial and other resources needed to overcome these burdens.

The unnecessary strictness of SL 2013-381 is apparent when comparing it with other states that have somewhat similar voter ID laws. The National Conference of State Legislatures (NCSL) lists seven other states as having “strict photo ID” laws and three other states as having “strict non-photo ID laws.”<sup>93</sup> The NCSL listing also suggests that Alabama could be labeled as a “strict photo ID” state. To this list I add South Carolina because its law also enumerates a limited set of acceptable photo IDs for voting and New Hampshire because its strict voter ID law goes into effect in 2015.<sup>94</sup> This results in a set of 13 state voter ID laws that might be seen as comparable to SL 2013-381.

Reviewing the details of the laws in these 13 states reveals that most of them have adopted provisions to mitigate the harsh impact that a strict ID law might otherwise have on voters. These states demonstrate that it is possible to have a strict voter ID regime that meets purported state interests while also being much more accommodating of the costs of voting. North Carolina legislators must have been aware of these ameliorative options but chose to exclude nearly all of them. Professor Allan Lichtman’s expert report provides a summary of specific provisions that were retained in the final version of SB 2013-381, each of which imposes greater costs on black voters than white voters.<sup>95</sup>

SL 2013-381 enumerates specific forms of ID that may be used for voting. Some states with strict voter ID laws instead prescribe requirements for acceptable IDs, rather than limiting voters to a small, enumerated set. For example, Arizona, Indiana, Mississippi, Ohio, and

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<sup>91</sup> DHHS states that the request may take up to five weeks to be fulfilled. This requires individuals without a birth certificate on hand to act well in advance of the election to procure ID in time to vote. Faster service is available for an additional \$15.00 fee.

<sup>92</sup> For example, the 2005 American Community Survey reports that the share of North Carolina households lacking a motor vehicle was 3.8% for whites, 6.6% for Latinos, and 15.5% for blacks. See Expert Report of Allan Lichtman, *North Carolina State Conference of the NAACP, et al. v. Patrick McCrory, et al.*, Civ. No. 1:13-cv-658, 12 February 2015, at Section IV, for statistics.

<sup>93</sup> National Conference of State Legislatures, “Voter Identification Requirements,” available at <http://www.ncsl.org/research/elections-and-campaigns/voter-id.aspx> (last visited January 5, 2015).

<sup>94</sup> See later discussion of how the “reasonable impediment” provision in South Carolina makes its voter ID requirement much less strict.

<sup>95</sup> See Table 33 in the Expert Report of Allan Lichtman, *North Carolina State Conference of the NAACP, et al. v. Patrick McCrory, et al.*, Civ. No. 1:13-cv-658, 12 February 2015.

Virginia require only that the photo ID be issued by the federal government or the state government. Tennessee allows any photo ID card issued by the state or the federal government or an employee ID with a photograph issued by the federal government, the State, or any county, municipality, board, authority or other entity of the state. Alabama, Kansas, and Georgia go further and allow voters to present IDs issued by other states. Arizona allows for use of two non-photo IDs with the name and address of the voter instead of a photo ID. SL 2013-381 allows none of these options.

SL 2013-381 does not permit student IDs for purposes of voting, even those issued by public colleges and universities in the state. This prohibits use of IDs certain to be held by a large group of residents enrolled in postsecondary institutions. In contrast, several other strict ID states allow student IDs. Strict voter ID states such as Georgia and Indiana allow IDs from state colleges and universities. Alabama, Arkansas, Kansas, Mississippi, and Virginia allow student IDs from both public and private universities.<sup>96</sup> SL 2013-381 does not allow any of these forms of IDs.

SL 2013-381 generally requires that IDs have not expired. Other strict ID states tend to be more forgiving. Alabama only requires that IDs have not expired more than four years before the election. Mississippi allows IDs to be expired up to 10 years. Georgia and Tennessee allow IDs to be indefinitely expired. SL 2013-381 does not allow for any of these alternatives.

The law lacks a clear and consistent rationale for requiring that the ID not be expired. In fact, SL 2013-381 allows two forms of ID that do not include expiration dates. Other states with strict voter ID laws allow for IDs that are either expired or lack expiration dates. For example, Alabama only requires that IDs have not expired more than four years before the election. Mississippi allows IDs to be expired up to 10 years. Georgia and Tennessee allow IDs to be indefinitely expired. Kansas does not require that IDs include expiration dates at all. Other states have recognized that, if the purpose of the voter ID law is to establish a voter's identity, then the name and photo on the ID should be adequate.

Several strict ID states permit an even wider range of IDs for voting. Virginia allows use of employee ID cards from private employers. In Kansas a voter may present a public school district employee ID, public high school student ID, city library card, emergency management card, or municipal pool pass.<sup>97</sup> Missouri and Ohio permit a voter to show a utility bill, bank statement, or government paycheck. SL 2013-381 does not allow any of these alternative means to establish identity.

South Carolina allows a voter who faced a "reasonable impediment" to obtaining an acceptable photo ID to vote after signing an affidavit.<sup>98</sup> This provision allows a voter to cast a ballot without ID due to any "reasonable" reason including illness, lack of transportation, work

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<sup>96</sup> Note that the law in Arkansas was struck down by the state's Supreme Court in October 2014.

<sup>97</sup> "Photographic Identification Frequently Asked Questions," available at [http://www.gotvoterid.com/pdf/FAQs\\_for\\_PhotoID.pdf](http://www.gotvoterid.com/pdf/FAQs_for_PhotoID.pdf) (last visited June 10, 2014).

<sup>98</sup> The voter technically casts a provisional ballot. The ballot will be counted along with regular ballots as long as the voter presents a registration card and the county election commission does not deem the affidavit as false.

conflicts, and lack of underlying documents such as a birth certificate. It essentially removes the ID requirement for voters who face difficulty obtaining the resources to obtain ID. It was only after this ameliorative provision was added that South Carolina's law was deemed not to be racially retrogressive. Indiana and Tennessee also have exemptions for voters who cannot obtain ID because they are indigent.<sup>99</sup> SL 2013-381 does not allow for these options.

Exclusion of many reasonable ameliorative provisions that exist in other state's voter ID laws increases the costs that SL 2013-381 imposes on voters, especially blacks and Latinos, but does so without a firm factual rationale.

Most North Carolinians are unlikely to view the new requirements and restrictions in SL 2013-381 as unreasonably burdensome. But that is not the standard that the VRA Senate Factors establishes, which instead focuses on unequal abridgement of the right to participate. As an example of this distinction, consider the study conducted by professors Alvarez, Hall, and Llewellyn.<sup>100</sup> The researchers asked the public directly in a nationally representative survey how difficult it was to register to vote. Respondents answered on a continuum ranging from 1 ("very hard") to 7 ("very easy"). The majority indicated that registering was relatively easy, with 65% choosing point 7 and a total of 86% choosing values above the midpoint of 4. Only 10.0% choose answers of 4 or below. But that average disguised important differences across demographic groups. Only 9.6% of whites reported that registering to vote was difficult, but that percentage was 16.1% among blacks and 18.8% among "other" races (which presumably includes most Latinos). Alvarez, Hall, and Llewellyn concluded that while "most voters find it relatively easy to register to vote," the perception of difficulty among minorities "suggests that the legacy of disenfranchising minority voters...continue[s] to exist," and "just because the barriers seem low to policy makers, the barriers may be a relative problem, with certain voters still finding the barriers to be quite high, oppressive, and disheartening."<sup>101</sup> The restrictions on voter registration and other new requirements each fall more heavily on blacks and Latinos, but also cumulate into an overall message that is especially discouraging to minority voters.

The design of SB 2013-381 is likely to dissuade participation among blacks and Latinos more than whites. However, detecting the effects of the law on voter turnout is more challenging than it might initially seem. In particular, simply comparing the levels of turnout among racial and ethnic groups between elections before and after the law took effect will not be conclusive. As I explain later in the report, a multitude of factors influence voter turnout, so isolating the effect of the law from other elements on the electoral environment is challenging. Without an appropriate research design, it is inappropriate to reason backward from levels of turnout to reach conclusions about the relative burden placed on voters by an election law.

Most academic studies of the effect of voter ID on turnout are uninformative. This is because they were conducted at a time when only a small number of states had strict ID laws and

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<sup>99</sup> In both states, the voter casts a provisional ballot, but the ballot will be counted if the voter returns to the election board and executes an affidavit to this effect.

<sup>100</sup> R. Michael Alvarez, Thad E. Hall, and Morgan Llewellyn (2007), "How Hard Can It Be: Do Citizens Think It Is Difficult to Register to Vote?," *Stanford Law and Policy Review* 18:382-409.

<sup>101</sup> Alvarez, Hall, and Llewellyn (2007), p. 406.

all such laws were treated as equivalent despite important differences among them. This limited the ability of researchers to draw firm inferences from the data available.<sup>102</sup> The most recent study of voter ID's effects on voter turnout that minimizes these liabilities was conducted by the U.S. Government Accountability Office.<sup>103</sup> The study drew careful quasi-experimental comparisons between otherwise similar states with and without strict voter ID laws. This allowed the researchers to avoid the problem of lumping together different types of laws and to sidestep the complications of other state-specific factors that influence turnout. The study found that strict ID laws in Kansas and Tennessee decreased overall voter turnout among registrants by two to three percentage points. Moreover, the depressive effects were 1.5 to 3.7 percentage points larger among blacks than among whites. Although the GAO report is not the final word on the subject, the sophistication and recency of the study strongly suggest that strict voter ID laws and new restrictions on voting such as those in SB 2013-381 can be seen to reduce turnout disproportionately among black voters once other factors are held constant.

## 2. SL 2013-381 Arbitrarily Creates Two Classes of Voters

SL 2013-381 only requires photo ID of in-person voters. People who wish to vote absentee by mail generally need to provide only a driver's license number or the last four digits of a Social Security number.<sup>104</sup> This creates an inequality in how absentee voters and in-person voters are treated. This inequality runs counter to the state's purported interest in reducing election fraud and imposes a heavier burden on minority voters.

Because the rate of voting by mail is greater among whites, the seemingly race-neutral imposition of ID requirements for in-person voters falls more heavily on blacks and Latinos. The Current Population Survey (CPS) shows that whites were generally more likely than blacks or Latinos to vote by mail in federal elections from 2000 to 2012, particularly in presidential election years.<sup>105</sup> Official data from the State Board of Elections confirms these differences. Table 2 presents mail voting rates for whites, blacks, and Latinos in the past four federal elections in North Carolina. The rate of voting by mail is higher for whites than for minorities in all four elections. On average whites voted by mail at a rate that was roughly twice that of blacks and 70% more than Latinos. A larger proportion of black and Latino voters are thus compelled to comply with the strict ID requirements in SL 2013-381.

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<sup>102</sup> Robert S. Erikson and Lorraine C. Minnite (2009), "Modeling Programs in the Voter Identification-Voter Turnout Debate," *Election Law Journal* 8:85-101.

<sup>103</sup> United States Government Accountability Office (September 2014), "Issues Related to State Voter Identification Laws," Report to Congressional Requesters, GAO-14-634, Washington, D.C.

<sup>104</sup> Section 303(b) of the federal Help America Vote Act (HAVA) requires that a first-time voter who did not provide a driver's license number or last four digits of a Social Security number when registering to vote must provide a copy of an ID when voting. Acceptable forms of ID are current photo ID, utility bill, bank statement, government check, paycheck, or other government document showing the name and address of the voter.

<sup>105</sup> The CPS is a large-scale national survey administered by the U.S. Census Bureau. In November of even numbered years it includes a supplement focused on voting and registration. The 2014 CPS data were not yet publicly available at the time this report was submitted. Because these are survey estimates, each is accompanied by a different statistical margin of error. As a result, not all group differences will be statistically significant by conventional standards. See also Exhibits 6 and 7, which show similar patterns despite employing a different weighting scheme than the standard CPS weights offered in the Expert Report of Paul Gronke, *League of Women Voters of North Carolina, et al. v. The State of North Carolina, et al.*, Civ. No. 1:13-cv-660, 11 April 2014.



**Table 2. Mail Voting Rates by Racial and Ethnic Groups in  
Recent Federal Elections in North Carolina**

	2008	2010	2012	2014	Average
White	6.4%	2.4%	5.8%	3.0%	4.4%
Black	1.7%	1.8%	3.0%	2.3%	2.2%
Latino	3.1%	1.8%	3.0%	2.3%	2.6%

The unequal treatment of in-person and mail voters under SL 2013-381 compounds underlying differences in the degree to which minority voters hold the IDs needed to vote in person. Both because they are more likely to vote in person and because they are less likely to have an appropriate ID in advance, larger shares of black and Latino voters will need to take actions to secure ID under SL 2013-381, despite the fact that they have less in the way of resources to do so. As a result, the arbitrary design of the voter ID law has a compound effect on minority voters.

The exemption for voters who are aged 70 and above further exaggerates the differential burden placed on minority voters. This is because the white population in North Carolina is older than the minority population in North Carolina. Data indicate that the share of registered voters that is white is 9 to 11 percentage points higher among those who are aged 70 and above. Black registrants on average are about 5 years younger than white registrants.<sup>106</sup> The median age for each group in North Carolina is 42.3 for whites, 34.4 for blacks, and 24.4 for Latinos.<sup>107</sup> This provision of the law thus places a heavier burden on black voters who are more likely to be required to acquire ID for voting because of their younger ages.

SB 2013-381 also removes pre-registration opportunities for 16 and 17 year olds. Because of the differing age distributions of white and minorities in North Carolina, the pre-registration provision had disproportionately benefitted blacks and Latinos. The share of each group who are citizens under age 18 is 19.5% for whites, 25.9% for blacks, and 57.9% for Latinos.

### 3. SL 2013-381 is Not Well Reasoned and Will Have Little Effect on Election Fraud

SL 2013-381 is not well designed if its aim is to address the state's purported interest in reducing voter fraud or to boost public confidence in elections. Advocates of the law have not explained how elimination of same day registration or reducing the early voting period will reduce fraud. As explained above, by limiting the law's voter ID requirement to in-person votes, it counter-intuitively imposes new burdens on the form of voting that is least susceptible to fraud.

<sup>106</sup> Herron and Smith (2014). The report did not include comparable data for Latinos, but all evidence indicates that Latinos are also less likely than whites to be aged 70 or older. The median age for Latinos is the youngest of the three groups. Although standard reports from the 2013 American Community Survey 3-year averages do not specifically isolate those 70 years or older, the reports are informative based on isolating those 65 or older and 75 or older. The data indicate that among Latinos in North Carolina only 2.4% are 65 or older and only .9% are 75 or older. Among whites the percentages are 17.1% are 65 or older and 7.5% are 75 or older.

<sup>107</sup> Data are 3-year averages from the 2013 American Community Survey.

The voter ID requirement focuses on an extremely rare form of election crime while ignoring where vote fraud more frequently occurs: through mail ballots. Studies of voting system security routine express greater concerns about mail ballots than in-person ballots.<sup>108</sup> Political scientist John Fortier, now at the Bipartisan Policy Center, summarizes the prevailing view among political scientists and policy analysts. His summary of this issue is worth quoting at length:

While there will always be disagreement over the seriousness of election fraud in general, both sides to this argument agree on one important matter: The most likely avenue for voter fraud is absentee balloting, which offers more opportunities for it than the traditional polling place. . . . At a polling place today, the ballot is secure. Voters must present themselves and at least declare who they are in person. In many states, they may have to show a form of identification. The ballot is not to be handled by poll workers, other voters, party officials, spouses, relatives, or companions of the voter. The voter casts or deposits the ballot without assistance, in a privacy booth or curtained stall that allows him or her to do so in complete secrecy. No one can influence the voter while voting, not see the completed ballot. . . . Absentee ballots have none of these protections.<sup>109</sup>

The unequal treatment of mail and in-person ballots under SL 2013-381 runs counter to professional understandings of where vote fraud is mostly likely to occur and thus imposes heavier burdens on black and Latinos voters without a compelling rationale.

SL 2013-381 restricts the counting of provisional ballots cast in the incorrect precinct. Before the law, ballots cast in the wrong precinct were still counted for non-precinct-specific elections. Under SL 2013-381 this is no longer permitted. As Professors Allan Lichtman and Charles Stewart have documented in their expert reports, in the 2008, 2010, and 2012 general elections, blacks were twice as likely as whites to cast provisional ballots in the wrong precinct.<sup>110</sup> This is compounded by the fact that blacks have been found on average to change residences more frequently than whites.<sup>111</sup>

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<sup>108</sup> See R. Michael Alvarez, Dustin Beckett, and Charles Stewart III (2012), "Voting Technology, Vote-by-Mail, and Residual Votes in California, 1990-2010," *Political Research Quarterly* 66:658-70. Martha Kropf (2013), "North Carolina Election Reform Ten Years After the Help America Vote Act," *Election Law Journal* 12:179-89. Charles Stewart III (2010), "Losing Votes by Mail," *NYU Journal of Legislation and Public Policy* 13:573-602.

<sup>109</sup> John C. Fortier (2006), *Absentee and Early Voting: Trends, Promises, and Perils*, Washington, DC: The AEI Press.

<sup>110</sup> See Tables 38, 39 and 40 in the Expert Report of Allan Lichtman, *North Carolina State Conference of the NAACP, et al. v. Patrick McCrory, et al.*, Civ. No. 1:13-cv-658. 12 February 2015. See Table 14 of the Expert Report of Charles Stewart III, *United States of America, et al. v. The State of North Carolina, et al.*, Civ. No. 1:13-cv-861. 2 May 2014.

<sup>111</sup> See, e.g., U.S. Census Bureau, *Geographic Mobility: 2012 to 2013*, available at <http://www.census.gov/hhes/migration/data/cps/cps2013.html>.

Compounding these additional bureaucratic hurdles is that minority voters are warier of interacting with the election system. It is unsurprising that a minority population disenfranchised from voting by violence until at least the 1960s and still feeling defensive about modern practices around redistricting and voting procedures would be more easily deterred from a novel and burdensome voter ID requirement. A set of election reforms that imposed additional costs on voters would not necessarily send a discouraging message to blacks and Latinos in North Carolina if some of those costs happen to fall more heavily on minorities while others fall more heavily on whites. Instead, SL 2013-381 contains an array of new restrictions that almost uniformly levy the new costs of voting disproportionately on blacks and Latinos.

In short, SL 2013-381 imposes restrictions on precisely those key elements of the state's electoral system that black and Latino voters have disproportionately adopted in recent years. The law's major provisions end the right to vote without a list of approved government photo IDs, to use same day registration, to have ballot counted that is cast out of precinct, and to pre-register as a 16 or 17 year old. The abrupt withdrawal or curtailing of the options represents a more acute disruption in the habits of black and Latino voters and will thus deter their participation to a larger degree. On their own, each imposes more costs on minority voters than white voters. This leads to a more significant cumulative burden that disproportionately falls on the minority population in North Carolina.

A sharp break with existing election law might be acceptable if the state had compelling reasons for imposing new, dramatic restrictions. The benefit to the state of such a dramatic change in law appears to be minimal. Indeed, it is not even clear that key elected officials were aware of the full contents of the bill that became law. After he "praised the bill" in a July 26, 2013 press conference, Governor McCrory was asked about specific provisions. His answers indicated that he was unaware of much of the content of the bill he was about to sign into law. When questioned about new restrictions on pre-registration of 16 and 17-year olds, he responded, "I don't know enough. I'm sorry, I haven't seen that part of the bill."<sup>112</sup> He also stated that limits on same day registration were not problematic because "[t]here is plenty of opportunity for voter registration – online, offline, through many methods" despite the fact that North Carolina still does not permit online registration.<sup>113</sup> In multiple interviews touting the law, McCrory repeatedly stated that under SL 2013-381: "[w]e have every political precinct open the week before election" and "[w]e have two weeks of early voting and we changed some of the rules where every precinct has to be open." Ten days is not the same as "two weeks," and under §25.3 of SL 2013-381 a county may in fact reduce the number of hours if the county board votes unanimously to do so and obtains a waiver from the State Board of Elections. In addition, only early voting locations – not the more numerous local precinct polling places – are open during early voting.<sup>114</sup>

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<sup>112</sup> Governor Patrick McCrory on CNN's "Crossfire," as quoted in Gary D. Robertson, "N.C. Counties Reduce Early Voting Hours for Primary," *The (Elizabeth City) Daily Advance*, February 27, 2014.

<sup>113</sup> Michael Biesecker, "McCrory Not Familiar with All of Bill He's to Sign," *The (Raleigh) News & Observer*, July 27, 2013. Several bills that would have introduced online registration in North Carolina were defeated in 2013. See <http://www.ncsl.org/research/elections-and-campaigns/electronic-or-online-voter-registration.aspx>

<sup>114</sup> Mark Binder, "Precincts Versus Early Voting Locations," August 13, 2013, WRAL, available at <http://www.wral.com/precincts-versus-early-voting-locations/12772554/>.

McCrory appeared to hold the same erroneous beliefs even months after the law was adopted. In February 2014, McCrory elaborated more recently that “[w]e didn’t shorten early voting. We compacted the calendar, but we’re going to have the same hours in which polls are open in early voting and we’re going to have more polls available.” Over 30 of the state’s 100 counties had already received approval from the SBOE to reduce hours when these statements were made. This continuing misinformation suggests that the law was not thoughtfully crafted to meet compelling state interests, but rather was rushed through the legislative process. This points to the tenuous nature of the law.

State legislators seemed uninformed about whether SL 2013-381 actually resembled voter ID laws in other states. Governor McCrory and multiple state legislators in favor of the bill stated that 30 to 35 states had voter ID laws in mid 2013.<sup>115</sup> It is not clear where this number originates and it surely includes states with voter ID laws that would not be regarded as strict, requiring a photo ID, or even requiring an ID at all.<sup>116</sup> As explained above, there are arguably 13 states that could be viewed as having comparable strict voter ID laws, and many of those have accommodating provisions that were purposely excluded from SL 2013-381.

The state’s rationale for the restrictions in SL 2013-381 as a means to combat election fraud is also tenuous at best.<sup>117</sup> A thorough analysis of voter fraud allegations by the News21, an investigative reporting project based at Arizona State University, shows little evidence of criminal activity by potential voters. They found 22 allegations of fraud of various kinds in North Carolina between 2000 and 2012. Of these, only 15 implicated voters rather than campaign or election officials; just two cases were settled by plea and none led to conviction.<sup>118</sup> This compares to the millions of votes cast without criminal charges during that time.

Following the logic of the “calculus of voting,” the “costs” of these crimes are high because they come with legal penalties. The “benefit” of casting a ballot and “probability” of being decisive in most elections are comparatively low.

Another rationale offered by legislative proponents of the bill was that a voter ID law would help to improve public confidence in the state’s election system. However, political science research shows that there is no relationship between the strictness of state voter ID laws and voter confidence. Based on a systematic nationwide analysis, Professor Stephen Ansolabehere concluded that an individual’s “Belief in the frequency of election fraud is uncorrelated with the propensity to vote.”<sup>119</sup> He explains further:

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<sup>115</sup> See Matthew Burns, “Senate Backs Sweeping Elections Bill, WRAL, July 24, 2013. Statement by State Senator Jerry Tillman, Senate Debate on House Bill 589, July 24, 2013 (p. 77, line 7). “N.C. Gov. Pat McCrory Defends New Voter ID Law,” WUNC, August 13, 2013.

<sup>116</sup> See <http://www.ncsl.org/research/elections-and-campaigns/voter-id.aspx>.

<sup>117</sup> Lorraine C. Minnite (2010), *The Myth of Voter Fraud*, Cornell University Press. See also Ray Christensen and Thomas J. Schultz (2014), “Identifying Election Fraud Using Orphan and Low Propensity Voters,” *American Politics Research* 42:311-337.

<sup>118</sup> See [votingrights.news21.com](http://votingrights.news21.com).

<sup>119</sup> Stephen Ansolabehere (2009), “Effects of Identification Requirements on Voting: Evidence from the Experiences of Voters on Election Day,” *PS: Political Science & Politics* 42:127-130, p. 129.



ID laws will have little or no effect on the confidence in the electoral system or the belief in the incidence of fraud. Those beliefs, wherever they come from, are no different when a stricter ID law is in place and enforced than when less invasive voter-authentication methods are used.<sup>120</sup>

Related research conducted with law Professor Nathaniel Persily similarly finds that:

[T]here is little or no relationship between beliefs about the frequency of fraud and electoral participation. . . . Nor does it appear to be the case that universal voter identification requirements will raise levels of trust in the electoral process.<sup>121</sup>

Voter confidence is affected by factors other than ID laws. The most relevant of these is whether a person votes by mail or in person. Research by Professor Paul Gronke shows that rather than being influenced by voter ID laws, voter confidence is improved when a voter's preferred candidate won the election, when polling places appear to be well-run, and—importantly for SB 2013-381—when a voter votes in person rather than by mail.<sup>122</sup> Research by Professors Michael Alvarez, Thad Hall, and Morgan Llewellyn also finds that mail voters are less confident than polling place voters that their ballots are counted properly.<sup>123</sup> This again indicates that a law designed to increase voter confidence in the security of election systems should focus on mail ballots rather than in-person voting.

Moreover, the voter ID provision only hinders one of the least common crimes that might be committed at a polling place: voter impersonation. An analysis by the SBOE of the most meritorious voter fraud allegations shows that voter impersonation accounted for only two cases out of hundreds investigated between 2000 and 2012.<sup>124</sup> Much more common concerns such as voting by felons or absentee fraud are not addressed by SB 2013-381.

The legislative history of HB 589 makes clear that the black and Latino communities opposed the law on the grounds that it would impose a disproportionate burden on minority electors. Black and Latino legislators spoke out directly against the legislation. For example, members of the Legislative Black Caucus expressed alarm that what was originally a voter ID

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<sup>120</sup> Ansolabehere (2009), p. 130.

<sup>121</sup> Stephen Ansolabehere and Nathaniel Persily (2008), "Vote Fraud in the Eye of the Beholder: The Role of Public Opinion in the Challenge to Voter Identification Requirements," *Harvard Law Review* 121:1737-1774, p. 1759.

<sup>122</sup> Paul Gronke (2014), "Voter Confidence as a Metric of Election Performance," in Barry C. Burden and Charles Stewart III, eds., *The Measure of American Elections*, New York, NY: Cambridge University Press.

<sup>123</sup> R. Michael Alvarez, Thad E. Hall, and Morgan H. Llewellyn (2008), "Are Americans Confident Their Ballots Are Counted?," *Journal of Politics* 70:754-66.

<sup>124</sup> North Carolina State Board of Elections. "Documented Cases of Voter Fraud in North Carolina." March 13, 2013. This table lists investigated cases that were referred to district attorneys, so the actual number in which formal charges were filed or convictions happened is smaller.

law had become a “voter suppression” tool.<sup>125</sup> Legislators would have been well aware of these concerns in minority communities when the bill was passed.

#### **F. The 2014 Election**

The 2014 general election was the first federal election in which SL 2013-381 (aside from the voter ID requirement) was in effect. It is tempting to examine the voter turnout rates of whites, blacks, and Latinos in that election with the previous midterm election in 2010 to assess the effects of the law. Such an approach can be misleading. As explained above in the context of voter ID laws, simply comparing the 2010 and 2014 elections in North Carolina will reveal little about the effects of SB 2013-381 on voter turnout because other changing factors overdetermine the conclusions. Turnout is known to be affected by a multitude of factors including important factors such the number, kind, and intensity of races being contested. As a result, turnout itself is not a measure of the legal burden placed on voters.

Section 2 of the VRA prohibits use of a law that would “deny or abridge” the right to vote “on account of race or color.” The Senate Report makes clear that a law, in combination with the totality of the circumstances, should not prevent “equal opportunities to participate.” The degree to which members of a racial or ethnic group actually vote in a specific election will naturally reflect many factors beyond the law, including such things as activities of candidates, political parties, and other interested groups. These actors might help groups of voters pay the costs of voting, but voting rates themselves do not indicate whether the law is valid or not. To make an analogy to an earlier time in North Carolina elections, poll taxes were deemed to be unconstitutional even though some black residents managed to pay them and vote. That some blacks overcame the burden did not make the poll tax valid.

It is not surprising that black turnout in the 2014 election was robust, despite the presence of SL 2013-381 (again, minus the voter ID law). The U.S. Senate race between Kay Hagan and Thom Tillis was one of the most intense in the country. The election was decided by just 1.5 percentage points. This contrasts with the 2010 Senate election in North Carolina, which was far less competitive and was decided by almost 12 percentage points. The 2014 Senate election in North Carolina saw over \$111 million spent, it was by most accounts the costliest Senate campaign in U.S. history.<sup>126</sup> The amount of spending dwarfed the approximately \$15 million spent in the 2010 Senate election in North Carolina.<sup>127</sup> Campaign spending in 2014 funded the airing 69,349 television ads between September 1 and election day. This compares to just 8,916 ads in the less intense 2010 Senate race.<sup>128</sup> That is, the volume of campaign spending and

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<sup>125</sup> Annalise Frank, “Voter ID Turns into ‘Voter Suppression,’ Says Legislative Black Caucus,” *The News & Observer*, Under the Dome blog, July 24, 2013 (last visited March 28, 2014).

<sup>126</sup> Grace Wallack and John Hudak, “How Much Did Your Vote Cost? Spending Per Voter in the 2014 Senate Races,” Brookings Institution FixGov blog, available at <http://www.brookings.edu/blogs/fixgov/posts/2014/11/07-spending-per-voter-2014-midterm-senate-wallack-hudak> (last visited January 6, 2015).

<sup>127</sup> <http://www.opensecrets.org/races/summary.php?id=NCS2&cycle=2010> (last visited January 6, 2014).

<sup>128</sup> Wesleyan Media Project.

advertising was roughly seven times as great in 2014 as it was in 2010. Political science demonstrates that campaign effort of this type increases voter turnout.<sup>129</sup>

Journalists covering the campaign pointed to the significant efforts aimed at turning out the black vote, with the NAACP dispatching organizers across the state,<sup>130</sup> groups running racially charged ads on black-dominated media,<sup>131</sup> and members of the Congressional Black Caucus visiting the state as well.<sup>132</sup> Efforts to turn out black voters relied in part on a negative backlash against voting restrictions imposed by SL 2013-381.<sup>133</sup> Those mobilization efforts appear to have buoyed turnout in Democratic areas of the state, which are disproportionately black.<sup>134</sup> Given the unprecedented campaign activity in North Carolina, much of it aimed at black voters, it is unsurprising that black voter turnout increased between 2010 and 2014 despite the imposition of most of the elements of SL 2013-381.<sup>135</sup>

## V. CONCLUSION

I conclude that SL 2013-381 has a disproportionate negative impact on voting participation by blacks and Latinos in North Carolina. The law increases the costs of voting more sharply for minority voters, for whom voting is already significantly more costly with fewer perceived benefits. Individual elements of the law impose greater burdens on minority voters and cumulatively they interact for greater effect. For all of the reasons outlined above, it is my opinion that SL 2013-381 will result in minority voters being denied an equal opportunity to participate in, and influence the outcome of, elections in North Carolina.

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<sup>129</sup> For example, see Paul Freedman, Michael Franz, and Kenneth Goldstein (2004), "Campaign Advertising and Democratic Citizenship," *American Journal of Political Science* 48:723-41.

<sup>130</sup> Wesley Lowery, "Black Voters Could Be Key to North Carolina Race," *Washington Post*, November 2, 2014.

<sup>131</sup> Jeremy W. Peters, "In Democratic Election Ads in South, a Focus on Racial Scars" *The New York Times*, October 29, 2014. Renee Schoof, "Democrats Say Black Turnout Key to North Carolina Senate Contest," *The News & Observer*, September 19, 2014.

<sup>132</sup> S.A. Miller, "Democrats Microtarget Blacks in South in Effort to Keep Senate," *Washington Times*, July 6, 2014.

<sup>133</sup> William Selway, Mark Niquette, and Greg Stohr, "Republicans Set to Gain From Laws Requiring Voter IDs," Bloomberg News, October 21, 2014, available at <http://www.bloomberg.com/politics/articles/2014-10-22/republicans-set-to-gain-from-laws-requiring-voter-ids> (last visited February 11, 2015).

<sup>134</sup> Nate Cohn, "For Democrats, Turnout Efforts Look Successful (Though Not Elections)," *The New York Times*, November 14, 2014.

<sup>135</sup> Calculations produced by Professor Michael McDonald indicate that overall turnout rose from 39.8% in 2010 to 41.2% in 2014. See <http://www.electproject.org/home/voter-turnout/voter-turnout-data> (last visited January 6, 2015).

**APPENDIX A**  
**Curriculum Vitae**

**Barry C. Burden**

**1. Contact**

University of Wisconsin-Madison  
Department of Political Science  
1050 Bascom Mall  
301 North Hall  
Madison, WI 53706-1316

bcburden@wisc.edu  
<http://faculty.polisci.wisc.edu/bcburden>  
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**2. Academic Positions**

Professor of Political Science, University of Wisconsin-Madison (2006-present)

Founding Director, Elections Research Center (2015-present)

Associate Chair/Director of Graduate Studies (2007-2012)

Associate Professor of Government, Harvard University (2003-2006)

Assistant Professor of Government, Harvard University (1999-2003)

Assistant Professor of Political Science, Louisiana State University (1998-1999)

**3. Education**

Ph.D. The Ohio State University (1998)

B.A. Wittenberg University (1993)

**Authored or Co-Authored Books**

Burden, Barry C. 2007. *Personal Roots of Representation*. Princeton, NJ: Princeton University Press. [Reviewed in *Choice*, *Democratization*, *Journal of Politics*, *Legislative Studies Section Newsletter*, *Political Studies Review*, & *Polity*]

Burden, Barry C., and David C. Kimball. 2002. *Why Americans Split Their Tickets: Campaigns, Competition, and Divided Government*. Ann Arbor, MI: The University of Michigan Press. [Reviewed in *Campaigns & Elections Magazine*, *Choice*, *Journal of Politics*, *Legislative Studies Section Newsletter*, *National Journal*, *Party Politics*, *Perspectives on Politics*, *Political Science Quarterly*, *Public Choice*, & *VOX POP.*]

## Edited Books

- Burden, Barry C., and Charles Stewart III, eds. 2014. *The Measure of American Elections*. New York, NY: Cambridge University Press.
- Hershey, Marjorie R. (editor), Barry C. Burden (associate editor), and Christina Wolbrecht (associate editor). 2014. *Guide to Political Parties*. Thousand Oaks, CA: Sage Publications.
- Burden, Barry C., editor. 2003. *Uncertainty in American Politics*. New York, NY: Cambridge University Press. [Reviewed in *Choice*, *Perspectives on Political Science*, *Political Studies Review*, & *Public Choice*.]

## Refereed Journal Articles

- Burden, Barry C. Forthcoming. "Economic Accountability and Strategic Calibration in Japan's Liberal Democratic Party." *Party Politics*.
- Burden, Barry C., and Jeffrey Milyo. Forthcoming. "The Quantities and Qualities of Poll Workers." *Election Law Journal*.
- Burden, Barry C., and Brian J. Gaines. Forthcoming. "Absentee and Early Voting: Weighing the Costs of Convenience." *Election Law Journal*.
- Burden, Barry C., and Amber Wichowsky. 2014. "Economic Discontent as a Mobilizer: Unemployment and Voter Turnout." *Journal of Politics* 76:887-98.
- Burden, Barry C., Bradley M. Jones, and Michael S. Kang. 2014. "Sore Loser Laws and Congressional Polarization." *Legislative Studies Quarterly* 39:299-325. [Featured in *The New York Times* column by Mickey Edwards, *Mischiefs of Faction* blog, and *Washington Monthly* Ten Miles Square blog]
- Burden, Barry C. David T. Canon, Kenneth R. Mayer, and Donald P. Moynihan. 2014. "Election Laws, Mobilization, and Turnout: The Unanticipated Consequences of Election Reform." *American Journal of Political Science* 58:95-109. [Featured in a variety of outlets including *The Atlantic Wire*, *The New York Times*, Pew Research Center FactTank, *The Huffington Post*, *The Deseret News*, *National Review Online*, *The Baltimore Sun*, and *Orlando Sentinel*]
- Burden, Barry C., David T. Canon, Stéphane Lavertu, Kenneth R. Mayer, and Donald P. Moynihan. 2013. "Selection Methods, Partisanship, and the Administration of Elections." *American Politics Research* 41:903-36.
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- Burden, Barry C. David T. Canon, Kenneth R. Mayer, Donald P. Moynihan. 2011. "Early Voting

- and Election Day Registration in the Trenches: Local Officials' Perceptions of Election Reform." *Election Law Journal* 10:89-102.
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- Burden, Barry C., and Gretchen Helmke. 2009. "The Comparative Study of Split-Ticket Voting." *Electoral Studies* 28:1-7. [Introduction to a Special Issue co-edited with Gretchen Helmke.]
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- Burden, Barry C. 2007. "Ballot Regulations and Multiparty Politics in the States." *PS: Political Science & Politics* 40:669-73.
- Burden, Barry C. 2006. "A Tale of Two Campaigns: Ralph Nader's Strategy in the 2004 Presidential Election." *PS: Political Science and Politics* 39:871-4.
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4. Burden, Barry C. 2004. "Candidate Positioning in U.S. Congressional Elections." *British Journal of Political Science* 34:211-27.
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- Burden, Barry C., and Marni Ezra. 1999. "Calculating Voter Turnout in U.S. House Primary Elections." *Electoral Studies* 18:89-99.
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## Book Chapters

- Burden, Barry C., and Logan Vidal. Forthcoming. "How Resources, Engagement, and Recruitment are Shaped by Election Rules." In *Resources, Engagement, and Recruitment: New Advances in the Study of Civic Volunteerism*, ed. by Casey A. Klofstad. Philadelphia, PA: Temple University Press.
- Vidal, Logan, and Barry C. Burden. Forthcoming. "Voter Registration." In *American Governance*, ed. Stephen L. Schechter. Farmington Hills, MI: Cengage Learning.
- Burden, Barry C., and Charles Stewart III. 2014. "Introduction to the Measure of American Elections." In *The Measure of American Elections*, eds. Barry C. Burden and Charles Stewart III. New York, NY: Cambridge University Press.
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- Burden, Barry C. 2005. "Family Feud in Massachusetts: How Intraparty Dynamics Influence Redistricting." In *Redistricting in the New Millennium*, ed. Peter F. Galderisi. Lanham, MD: Lexington Books.
- Burden, Barry C. 2005. "The Nominations: Technology, Money, and Transferable Momentum." In *The Elections of 2004*, ed. Michael Nelson. Washington, DC: CQ Press.
- Burden, Barry C. 2003. "Minor Parties in the 2000 Presidential Election." In *Models of Voting in Presidential Elections: The 2000 U.S. Election*, ed. Herbert F. Weisberg and Clyde Wilcox. Stanford, CA: Stanford University Press.
- Burden, Barry C. 2003. "Everything but Death and Taxes: Uncertainty and American Politics." In *Uncertainty in American Politics*, ed. Barry C. Burden. New York, NY: Cambridge University Press.



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- Burden, Barry C., and Aage R. Clausen. 1998. "The Unfolding Drama: Party and Ideology in the 104th House." In *Great Theatre: The American Congress in the 1990s*, ed. Herbert F. Weisberg and Samuel C. Patterson. New York, NY: Cambridge University Press.
- Mughan, Anthony, and Barry C. Burden. 1995. "The Candidates' Wives." In *Democracy's Feast: Elections in America*, ed. Herbert F. Weisberg. Chatham, NJ: Chatham House.

## Book Reviews

- Burden, Barry C. 2014. Review of *Getting Primaried: The Changing Politics of Congressional Primary Challenges* by Robert G. Boatright. Ann Arbor, MI: University of Michigan Press. *Congress & the Presidency* 41:132-4.
- Burden, Barry C. 2009. Review of *Minority Report: Evaluating Political Equality in America* by John D. Griffin and Brian Newman. Chicago, IL: University of Chicago Press. *Public Opinion Quarterly* 73:590-2.
- Burden, Barry C. 2009. Review of *The American Voter Revisited*, ed. Michael S. Lewis-Beck, William G. Jacoby, Helmut Norpoth, and Herbert F. Weisberg. Ann Arbor, MI: University of Michigan Press. *Political Science Quarterly* 124:344-6.
- Burden, Barry C. 2003. Review of *Learning by Voting: Sequential Choices in Presidential Primaries and Other Elections* by Rebecca B. Morton and Kenneth C. Williams. *Public Choice* 114:248-51.
- Burden, Barry C. 2002. Review of *Elements of Reason: Cognition, Choice, and the Bounds of Rationality*, ed. Arthur Lupia, Mathew D. McCubbins, and Samuel L. Popkin. *Journal of Economic Literature* 40:928-9.

## Reports

- Bland, Gary, and Barry C. Burden. 2013. "Electronic Registration Information Center: Stage 1 Evaluation." Report to the Pew Charitable Trusts. December 10.
- Burden, Barry C., and Brian J. Gaines. 2013. "Administration of Absentee Ballot Programs." Testimony and report to the Presidential Commission on Election Administration. Hearing in Denver, CO. August 8.
- Burden, Barry C., and Jeffrey Milyo. 2013. "The Recruitment and Training of Poll Workers." Testimony and report to the Presidential Commission on Election Administration. Hearing in Cincinnati, OH. September 20.
- Burden, Barry C. 2010. *Polling Place Incidents in the November 2008 General Election*. Report to the Wisconsin Government Accountability Board.

- Burden, Barry C., David T. Canon, Stéphane Lavertu, Kenneth R. Mayer, and Donald P. Moynihan. 2009. *2008 Wisconsin Election Data Collection Grant Program Evaluation Report*. Report to the Wisconsin Government Accountability Board.
- Burden, Barry C., and Janet M. Box-Steffensmeier. 1998. "Vote Likelihood and Institutional Trait Questions in the 1997 NES Pilot Study." Report to American National Election Study Board of Overseers.

## Other Publications

- Burden, Barry C., David T. Canon, Kenneth R. Mayer, and Donald P. Moynihan. 2014. "Keep Hands off the GAB." *Milwaukee Journal Sentinel*. October 15.
- Burden, Barry C. 2014. "How Political Scientists Informed the President about Election Reform." The Monkey Cage blog. January 23.
- Burden, Barry C., and Kevin J. Kennedy. 2013. "State Ranks High on Election Performance." *Milwaukee Journal Sentinel*. February 7.
- Burden, Barry C., David T. Canon, Kenneth R. Mayer, and Donald P. Moynihan. 2012. "Election-Day Registration Works Here." *Milwaukee Journal Sentinel*. December 26.
- Burden, Barry C. 2012. "A Portrait of the Wisconsin Municipal Clerk." *The Municipality*. Volume 106, Number 5.
- Burden, Barry C. 2011. "Polarization, Obstruction, and Governing in the Senate." *The Forum*. Volume 9, Issue 4.
- Burden, Barry C., and Kenneth R. Mayer. 2010. "Voting Early, but Not So Often." *The New York Times*, October 25.
- Burden, Barry C. 2009. "Representation as a Field of Study." In *The Future of Political Science: 100 Perspectives*, ed. Gary King, Kay Lehman Schlozman, and Norman Nie. New York, NY: Routledge.
- Burden, Barry C. 2004. "An Alternative Account of the 2004 Presidential Election." *The Forum*. Volume 2, Issue 4.
- Burden, Barry C. 2003. "Chronology of the 2000 Presidential Campaign." In *Models of Voting in Presidential Elections: The 2000 U.S. Election*, ed. Herbert F. Weisberg and Clyde Wilcox. Stanford, CA: Stanford University Press.
- Burden, Barry C. 1998. "Chronology of the 1996 Presidential Campaign." In *Reelection 1996: How Americans Voted*, ed. Herbert F. Weisberg and Janet M. Box-Steffensmeier. Chatham, NJ: Chatham House Publishers.
5. Burden, Barry C. 1995. "Chronology of the 1992 Presidential Campaign." In *Democracy's Feast: Elections in America*, ed. Herbert F. Weisberg. Chatham, NJ: Chatham House Publishers.

## Honors and Awards

- Vilas Associates award (2014-2016)

Robert H. Durr Award – *given by the Midwest Political Science Association for the best paper applying quantitative methods to a substantive problem in political science* – “Election Laws and Partisan Gains: The Effects of Early Voting and Same Day Registration on the Parties’ Vote Shares,” with David Canon, Kenneth Mayer, and Donald Moynihan (2014)

H. I. Romnes Faculty Fellow, UW Graduate School (2010-2015)

Licking Valley Schools “Wall of Pride” Award (2009) – *given annually to alumni who distinguished themselves professionally or made notable contributions to society*

Hamel Family Faculty Fellow, UW College of Letters and Science (2008-2013)

University Residence Hall Favorite Instructor Award (2007)

Nominated for Harvard University Everett Mendelsohn Excellence in Graduate Mentoring Award (2006)

Emerging Scholar Award (2005) – *given by the Political Organizations and Parties section of APSA for significant research by a scholar receiving her or his doctorate within the past seven years*

Wittenberg University Outstanding Young Alumnus Award (2002) – *given to a graduate of the last decade to recognize professional achievement*

Council of Graduate Schools/University Microfilms International Distinguished Dissertation Award (2000) – *given to recognize best dissertation completed nationwide in the social sciences between 1998 and 2000*

Nominated for Harvard University Joseph R. Levenson Memorial Teaching Prize (2000)

ΑΑΑ Award for superior instruction of freshman students (1999)

OSU Presidential Fellow (1998)

Francis R. Aumann Award for best OSU graduate student conference paper (1996 & 1997)

Malcolm Jewell Award (1996) – *best graduate student paper presented at the 1995 Southern Political Science Association meeting*

Ohio Board of Regents Fellow (1993-1995)

ΦΒΚ (1993)

Wittenberg University Student Leader of the Year (1992-1993)

Jeffrey Y. Mao Alumni Award in Political Science (1992)

## Grants

6.

Vilas Associates award, "The Genetic, Personality, and Health Origins of Political Participation" (2015-2017)

UW Graduate School Research Committee, "Political Participation among Older Americans" (2014-2015, co-PI with Moynihan)

Center for Demography of Health and Aging, "Political Participation of Older Americans: The Role of Social and Genetic Factors" (co-PI with Jason M. Fletcher and Donald P. Moynihan, 2013-2014)

Pew Charitable Trusts, \$46,400 for "Measuring Elections Performance Project," (with head PI Charles Stewart III, 2012-2013)

Wisconsin Government Accountability Board, \$43,234 for "Analysis of Polling Place Incident Logs" (head PI with Canon, Mayer, and Moynihan, 2011-2012)

UW Graduate School Research Committee, "The Consequences of Electing Election Officials" (2009-2010)

Pew Center on the States, Making Voting Work: \$49,400 for "Early Voting and Same Day Registration in Wisconsin and Beyond" (head PI with Canon, Mayer, and Moynihan, 2008-2009)

U.S. Election Assistance Commission, Election Data Collection Grant Program: responsible for \$212,442 of \$2,000,000 grant to the Wisconsin Government Accountability Board (head PI with Canon, Mayer, and Moynihan, 2008-2010)

UW Graduate School Research Committee: "The Puzzling Geography of Federal Spending," (2007-2008)

UW Graduate School Research Committee: "The Political Economy of the Japanese Gender Gap" (2006-2007)

CAPS faculty research conference: \$36,500 for "Democracy, Divided Government, and Split-Ticket Voting" (2006)

Joseph H. Clark fund award: "The Limits of Representation" (2004-2006)

Reischauer Institute of Japanese Studies: "Accountability, Economics, and Party Politics in Japan" (2004-2006)

Time-sharing Experiments in the Social Sciences: "Affect and Cognition in Party Identification" (with Casey A. Klobstad, 2004)

Harvard Faculty of Arts & Sciences Course Innovation Funds: "The Practice of Political Science" (2003)

Dirksen Congressional Center Congressional Research Award: "The Discharge Rule and Majoritarian Politics in the House of Representatives" (2002-2003)

Reischauer Institute of Japanese Studies Curriculum Enrichment Grant: "Electoral Politics in America and Japan" (2002)

CBRSS research program grant: "Affect and Cognition in Party Identification" (2001)

Joseph H. Clark fund award: "Affect and Cognition in Party Identification" (2001-2002)  
Joseph H. Clark fund award: "Ideology in Congressional Elections" (2000-2001)  
National Science Foundation Doctoral Dissertation Improvement Grant: "Candidates' Positions in Congressional Elections" (1997)

## Teaching and Advising

### Undergraduate courses:

Introduction to American Politics  
Elections and Voting Behavior  
Political Behavior  
American Public Opinion  
Election Reform in America  
The Politics of Congress/The Legislative Process/U.S. Congress  
Techniques of Political Analysis  
Electoral Politics in America and Japan  
The Practice of Political Science Research

### Graduate courses:

American Politics Field Seminar  
Mass Political Behavior/American Electoral Politics  
Congressional Politics  
Readings on Advanced Statistical Methods  
Quantitative Research Design/Empirical Methods of Political Inquiry  
American Political Institutions  
Readings on Interest Group Politics  
American Politics Workshop  
Political Science as a Discipline and Profession

### Advising of doctoral students (year and placement):

Danna Basson (2007 Mathematica Policy Research)  
Amy Bree Becker, Journalism & Mass Communication (2010 Towson University & Loyola University Maryland)  
Deven Carlson (2012 University of Oklahoma)  
Amnon Cavari (2011 Interdisciplinary Center-IDC Israel)  
*George C. Edwards III Dissertation Award for best dissertation in presidency research*  
Meghan Condon (2012 Loyola University Chicago)  
*APSA section on Experimental Research best dissertation award*  
Benjamin Deufel (2006 Greenberg Quinlan Rosner Research)  
Jack Edelson (ABD)  
William Egar (ABD)  
Erika Franklin Fowler (2006 RWJ Scholar in Health Policy & Wesleyan University)  
Tammy M. Frisby (2006 Stanford University-Lane Center)  
Hannah Goble (2009 Texas Christian University)  
Matthew Holleque, *chair* (2012 Obama for America)  
Bradley Jones, *chair* (ABD)

Michael Kang (2009 Emory University-School of Law)  
 Andrew Karch (2003 University of Texas & University of Minnesota)  
 Dimitri Kelly, *chair* (2013 Linfield College)  
 Yujin Kim, *chair* (2014)  
 Casey A. Klofstad (2005 University of Miami)  
 Paul Lachelier, Sociology (2007 Stetson University)  
 Ruoxi Li (ABD)  
 Jeremy Menchik (2011 Stanford Shorenstein Center post-doc & Boston University)  
 Daniel Metcalf  
 Jacob Neiheisel, *chair* (2013 Denison University & University of Buffalo)  
 Joel Rivlin (ABD MSHC Partners & Pivot)  
 Rajen Subramanian (2008 Abt Associates)  
 Benjamin Toff (ABD)  
 Robert Van Houweling (2003 University of Michigan & UC-Berkeley)  
*Carl Albert Dissertation Award for best dissertation in legislative studies*  
 Logan Vidal  
 Amber Wichowsky, *chair* (2010 Yale CSAP Fellowship & Marquette University)  
*Carl Albert Dissertation Award for best dissertation in legislative studies*

## Reviewing Activities

### Journal manuscript reviews:

*Acta Politica, American Journal of Political Science, American Political Science Review, American Politics Quarterly, American Politics Research, American Review of Politics, British Journal of Political Science, Comparative Political Studies, Congress & the Presidency, Election Law Journal, Electoral Studies, European Journal of Political Research, International Journal of Forecasting, International Organization, Journal of Law, Economics, and Organization, Journal of Politics, Journal of Theoretical Politics, Journal of Women, Politics, & Policy, Legislative Studies Quarterly, Party Politics, Perspectives on Politics, Political Analysis, Political Behavior, Political Communication, Political Psychology, Political Research Quarterly, Political Science Quarterly, Politics & Gender, Politics and Policy, Presidential Studies Quarterly, PS: Political Science & Politics, Public Administration Review, Public Choice, Public Opinion Quarterly, Rationality and Society, Research and Politics, Quarterly Journal of Political Science, Social Science Quarterly, Sociological Forum, Sociological Methods and Research, State Politics & Policy Quarterly, Statistical Science, and World Politics*

### Book manuscript reviews:

Addison Wesley Longman, Atomic Dog Publishing, Brookings Institution Press, Cambridge University Press, CQ Press, Oxford University Press, Palgrave, and University of Chicago Press



Tenure and promotion reviews:

Dartmouth College, Florida State University, Fordham University, Louisiana State University, Princeton University, Rutgers University, Temple University, Texas Tech University, Tulane University, University of British Columbia, University of California-Berkeley, University of California-Riverside (twice), University of Chicago (public policy), University of Colorado, University of Houston, University of Massachusetts-Dartmouth, University of Maryland (twice), University of Missouri-Columbia, University of Missouri-St. Louis, University of North Carolina at Charlotte, University of Notre Dame, University of Pennsylvania, University of Texas-Dallas, Washington State University, and Washington University in St. Louis

External review committee, Union College Department of Political Science (*chair*, 2010)

Other reviews:

Canada Research Chair College of Reviewers, Radcliffe Institute Fellows, National Science Foundation, Robert Wood Johnson Scholars in Health Policy, Time-sharing Experiments in the Social Sciences (TESS)

**Professional and University Service**

Journal editorial boards:

*Election Law Journal* (2013-present)  
*Electoral Studies* (2011-present)  
*Political Research Quarterly* (2014-present)  
*Legislative Studies Quarterly* (2011-2013)

Other boards and councils:

Election Performance Index Advisory Board, Pew Center on the States (2010-2014)  
Elections, Public Opinion, and Voting Behavior organized section Communications Director (2012-2015)  
Legislative Studies organized section council (2009-2011)  
Political Organizations and Parties organized section council (2005-2007)  
APSA Ad Hoc Committee on Member Communications (2013)  
Project Vote Smart Advisory Board (2007-present)

Conference program organizer:

Political Organizations and Parties, APSA annual meeting (2006)  
Political Methodology, SPSA annual meeting (2001)

Award committees:

Elections, Public Opinion, and Voting Behavior organized section graduate student travel award committee (2013-2015)  
Political Organizations and Parties organized section */Party Politics* award committee for the best paper presented at the 2006 APSA annual meeting (*chair*, 2007)  
Political Organizations and Parties organized section Emerging Scholar Award committee (*chair*, 2013)

Campus presentations:

Dartmouth College, Northwestern University, Stanford University, SUNY-Stony Brook, University of Houston, University of Minnesota, University of Missouri-Columbia, University of Notre Dame, University of Rochester, University of Texas at Austin, Utah State University (twice), Wittenberg University, & Yale University (twice)

Public and community presentations:

Boston Museum of Science, Brookings Institution, Civitas, National Legislative Program Evaluation Society, Newton Center for Lifetime Learning, Reach Out Wisconsin, Senior Summer School, UW-Extension College Days, Vantage Point, Wisconsin Academy of Sciences, Arts, & Letters, Wisconsin Department of Revenue, and university events in Wisconsin and New York City

Affiliations:

Elections Research Center (*founding director*, 2015-present)  
Election Administration Project (*co-founder*, 2008-present)  
Wisconsin Advertising Project team (2008-2010)  
La Follette School of Public Affairs, Faculty Associate (2007-present)  
Center for Demography of Health and Aging (2013-present)  
Political Behavior Research Group (2006-present)  
Institute for Quantitative Social Science, Faculty Associate (1999-2006)  
Political Psychology and Behavior Workshop (*co-founder*, 2000-2006)  
Center for American Political Studies, Executive Committee (2001-2006) & Steering Committee (2003-2004)  
Program on US-Japan Relations, Faculty Affiliate (2004-2006)  
Weatherhead Center for International Affairs, Faculty Associate (2005-2006)  
Harvard Kennedy School, Mid-Career MPA Summer Program (2001-2005 & 2007-2012)  
Summer Institute in Political Psychology (1995 & 1997)

Wisconsin Department of Political Science service:

Associate Chair/Director of Graduate Studies (2007-2012)  
Graduate Admissions and Fellowships, *chair*  
Graduate Program Committee, *chair*  
Teaching Assistant Evaluation Committee, *chair*  
Faculty Recruitment Committee (2013-2014)  
American Politics Search Committee, *chair*  
Preliminary Examination Appeals Committee (2013-2014)  
Graduate Program Committee (2014-2015)  
Budget and Development Committee (2014-2015)

Other Wisconsin service:

Faculty Senate (2006-2007)  
L&S Teaching Fellow Anniversary Symposium Planning Committee (2009-2010)  
L&S C-GRS Faculty Executive Committee (2009-2010)  
Graduate School Social Studies Fellowships Committee (2010-2013)



Social Studies Divisional Executive Committee (2013-2017)  
Hilldale Award subcommittee (2014-2015)

Harvard service:

American Politics Faculty Search (1998-1999, 2001-2002, 2002-2003, & 2005-2006)  
Graduate Admissions (1999-2000)  
Government Concentration/Board of Senior Examiners (2000-2001 & 2004)  
Teaching Fellow Coordinator (2003-2004)  
American Politics Field Coordinator (2005-2006)  
Center for Government and International Studies, Subcommittee on Teaching and  
Conference Spaces (2003)  
Truman Scholarship Nomination (2000-2001)  
Eben Fiske Studentship Nomination (2004-2005)  
Political Communication Faculty Search, Kennedy School of Government (2004-2005)

Occasional source for media coverage of politics including abcnews.com, *Atlanta Journal-Constitution*, Associated Press, *The Baltimore Sun*, *The Baton Rouge Advocate*, Bloomberg News, *The Boston Herald*, cbsnews.com, *Campaigns & Elections Magazine*, *Chicago Tribune*, *Christian Science Monitor*, *Cleveland Plain Dealer*, *Congressional Quarterly Weekly Report*, *The Daily Caller*, *Dallas Morning News*, *Des Moines Register*, forbes.com, Fox News, *Glamour*, *The Globe and Mail* (Canada), *The Guardian* (UK), *The Harvard Crimson*, *Harvard Political Review*, *The Hill*, *International Herald Tribune*, *Kansas City Star*, *Los Angeles Times*, *The London Times*, *Le Monde*, *The New Orleans Times-Picayune*, *National Journal*, *The New Republic*, *New Scientist*, *New York Post*, *The New York Times*, *Newsday*, *Newsweek*, *el Nuevo Herald*, *Omaha World Herald*, PBS *NewsHour*, *Pittsburgh Post-Gazette*, Politico.com, Reuters, Salon.com, States News Service, *USA Today*, *Veja* (Brazil), *The Wall Street Journal*, *The Washington Post*, *The Washington Times*, *Wisconsin Law Journal*, *Yomiuri Shimbun*, *Greater Boston* on WGBH, NECN, *Nitebeat with Barry Nolan*, *Odyssey* on Chicago Public Radio, and many local television, radio, and newspaper outlets

Featured in *An Unreasonable Man*, an independent documentary film about the life and career of Ralph Nader (2006)

**Expert Consulting**

Research consultant, via Research Triangle International Institute and the Pew Charitable Trusts, for evaluation of the Electronic Registration Information Center (2012-2014)

Expert witness (testifying), *League of United Latin American Citizens of Wisconsin et al. v. Judge David G. Deininger et al.*, case 12-cv-00185, U.S. District Court, Eastern District of Wisconsin (2013)

Expert witness (testifying), *North Carolina State Conference of the NAACP et al. v. Patrick Lloyd McCrory et al.*, case 13-CV-658, U.S. District Court, Middle District of North Carolina (2014)

Expert witness (non-testifying), *Ohio State Conference of the NAACP et al. v. Jon Husted et al.*,

case 13-cv-00404, U.S. District Court, Southern District of Ohio (2014)

Expert witness (testifying), *United States of America v. State of Texas*, case 13-cv-00263, Southern District of Texas (2014)

Academic researcher, Presidential Commission on Election Administration, established by presidential Executive Order 13639 (2013)

## APPENDIX B Reliance Materials

### Books and Articles

- Michael C. Herron and Daniel A. Smith (forthcoming) "Race, Party, and the Consequences of Restricting Early Voting in Florida in the 2012 General Election." *Political Research Quarterly*.
- John H. Aldrich (1993), "Rational Choice and Turnout," *American Journal of Political Science* 37:246-78.
- Thomas G. Hansford and Brad T. Gomez (2010), "Estimating the Electoral Effects of Voter Turnout," *American Political Science Review* 104:268-88.
- Henry E. Brady and John E. McNulty (2011), "Turnout Out to Vote: The Costs of Finding and Getting to the Polling Place," *American Political Science Review* 105:1-20.
- John E. McNulty, Conor M. Dowling, and Margaret H. Ariotti (2009), "Driving Saints to Sin: How Increasing the Difficulty of Voting Dissuades Even the Most Motivated Voters," *Political Analysis* 17:435-55.
- Moshe Haspel and H. Gibbs Knotts (2005), "Location, Location, Location: Precinct Placement and the Costs of Voting," *Journal of Politics* 67:560-73.
- Raymond E. Wolfinger, Benjamin Highton, and Megan Mullin (2005), "How Postregistration Laws Affect the Turnout of Citizens Registered to Vote," *State Politics & Policy Quarterly* 5:1-23.
- Alan S. Gerber, Donald P. Green, and Ron Shachar (2003), "Voting May Be Habit-Forming: Evidence from a Randomized Field Experiment," *American Journal of Political Science* 47:540-50.
- Eric Plutzer (2002), "Becoming a Habitual Voter: Inertia, Resources, and Growth in Young Adulthood," *American Political Science Review* 96:41-56.
- Peverill Squire, Raymond E. Wolfinger, and David P. Glass (1987), "Residential Mobility and Voter Turnout," *American Political Science Review* 81:45-65.
- Richard J. Timpone (1998), "Structure, Behavior, and Voter Turnout in the United States," *American Political Science Review* 92:145-58.
- Elizabeth Bergman and Philip A. Yates (2011), "Changing Election Methods: How Does Mandated Vote-By-Mail Affect Individual Registrants?," *Election Law Journal* 10:115-27.
- Barry C. Burden and Jacob R. Neihsel (2013), "Election Administration and the Pure Effect of Voter Registration on Turnout," *Political Research Quarterly* 66:77-90.
- Danny Hayes and Seth C. McKee (2009), "The Participatory Effects of Redistricting," *American Journal of Political Science* 53:1006-23.
- Adam J. Berinsky (2005), "The Perverse Consequences of Electoral Reform in the United States," *American Politics Research* 33:471-91.

- Barry C. Burden, David T. Canon, Kenneth R. Mayer, and Donald P. Moynihan (2014), "Election Laws, Mobilization, and Turnout: The Unanticipated Consequences of Election Reform," *American Journal of Political Science* 58:95-109.
- Melanie J. Springer (2012), "State Electoral Institutions and Voter Turnout in Presidential Elections, 1920-2000," *State Politics & Policy Quarterly* 12:252-83.
- Donald P. Green and Ron Shachar (2000), "Habit Formation and Political Behaviour: Evidence of Consuetude in Voter Turnout," *British Journal of Political Science* 30:561-73, p. 570.
- Michael C. Herron and Daniel A. Smith (2014), "Race, *Shelby County*, and the Voter Information Verification Act in North Carolina," manuscript, version 2 dated February 12, 2014, p. 44.
- J. Morgan Kousser (1974), *The Shaping of Southern Politics: Suffrage Restriction and the Establishment of the One-Party South, 1880-1910*. New Haven, CT: Yale University Press, p. 187.
- Eric Anderson (1981), *Race and Politics in North Carolina, 1872-1901*, Baton Rouge, LA: Louisiana State University Press.
- James Beeby (2008), *Revolt of the Tar Heels: The North Carolina Populist Movement*, Jackson, MS: University Press of Mississippi.
- William R. Keech and Michael P. Siström (1994), "North Carolina," in *Quiet Revolution in the South: The Impact of the Voting Rights Act 1965-1990*, ed. Chandler Davidson and Bernard Grofman, Princeton, NJ: Princeton University Press.
- Jeffrey J. Crow and Robert Franklin Durden (1977), *Maverick Republican in the Old North State*, Baton Rouge, LA: Louisiana State University.
- Richard H. Pildes (2000), "Democracy, Anti-Democracy, and the Canon," *Constitutional Commentary* 17:295-319, 302.
- Learn NC, Governor Aycock on "the Negro Problem," available at <http://www.learnnc.org/lp/editions/nchist-newsouth/4408> (last visited March 24, 2014).
- "A Tar Heal Travesty," *Washington Post*, August 16, 2013, p. A16.
- Economic Policy Institute (2013), "Ongoing Joblessness in North Carolina," Issue Brief No. 359, May 16.
- Education Week and the Editorial Projects in Education Research Center, *Diplomas Count – Second Chances: Turnout Dropouts into Graduates*, June 6, 2013.
- Lumina Foundation, "A Stronger North Carolina through Higher Education," June 2013.
- Steven J. Rosenstone and John Mark Hansen (1993), *Mobilization, Participation and Democracy in America*, Macmillan.
- Sidney Verba, Kay Lehman Schlozman, and Henry E. Brady (1995). *Voice and Equality: Civic Volunteerism in American Politics*, Harvard University Press.
- Rachel Milstein Sondheimer and Donald P. Green (2010).
- "Using Experiments to Estimate the Effects of Education on Voter Turnout," *American Journal of Political Science* 54:174-89.

Sidney Verba, Kay Lehman Schlozman, and Henry E. Brady (1995), *Voice and Equality: Civic Volunteerism in American Politics*, Cambridge, MA: Harvard University Press.

The League of Women Voters Education Fund web site, [vote411.org](http://www.vote411.org), available at [http://www.vote411.org/search-by-topic?topics\\_tid%5B%5D=60#.U0QVPq1dVhl](http://www.vote411.org/search-by-topic?topics_tid%5B%5D=60#.U0QVPq1dVhl) (last visited April 9, 2014).

Schott Foundation for Public Education, *The Urgency of Now*, Cambridge, MA, 2012 report using data from the U.S. Department of Education's National Center for Education Statistics.

Lisa Schur, Todd Shields, Douglas Kruse, and Kay Schriner (2002), "Enabling Democracy: Disability and Voter Turnout," *Political Research Quarterly* 55:167-90.

Pauline K. Brennan and Cassia Spohn (2008), "Race/Ethnicity and Sentencing Outcomes among Drug Offenders in North Carolina," *Journal of Contemporary Criminal Justice* 24:371-98.

Frank R. Baumgartner and Derek Epp, "North Carolina Traffic Stop Statistics Analysis," Final Report to the North Carolina Advocates for Justice Task Force on Racial and Ethnic Bias, February 1, 2012.

Prison Policy Initiative, "North Carolina," available at <http://www.prisonpolicy.org/articles/northcarolina.html> (last visited March 25, 2014).

Christopher Uggen, Sarah Shannon, and Jeff Manza, (2012), "State-Level Estimates of Felon Disenfranchisement in the United States, 2010," report for The Sentencing Project, Washington, DC.

Jeff Manza and Christopher Uggen (2006), *Locked Out: Felon Disenfranchisement and American Democracy*, New York, NY: Oxford University Press.

Erika Wood and Rachel Bloom (2008), *De Facto Disenfranchisement*, American Civil Liberties Union and Brennan Center for Justice.

The Henry J. Kaiser Family Foundation, "State Health Facts," available at <http://kff.org/other/state-indicator/poverty-rate-by-raceethnicity/> (last visited March 25, 2014).

Milton C. Jordan (1989), "Black Legislators: From Political Novelty to Political Force," *North Carolina Insight* December: 40-58.

Daniel P. Tokaji (2008), "Representation and Raceblindness: The Story of *Shaw v. Reno*," in *Race Law Stories*, ed. Rachel F. Moran and Devon W. Carbado. New York, NY: Foundation Press.

David Rice, "Hispanic Legislators May Be Pacesetters," *Winston-Salem (NC) Journal*, December 13, 2002.

Rene R. Rocha, Caroline J. Tolbert, Daniel C. Bowen, and Christopher J. Clark (2010), "Race and Turnout: Does Descriptive Representation in State Legislatures Increase Minority Voting?," *Political Research Quarterly* 63:890-907;

Kenny J. Whitby (2007) "The Effect of Black Descriptive Representation on Black Electoral Turnout in the 2004 Elections," *Social Science Quarterly* 88:1010-23.

Keith G. Bentele and Erin E. O'Brien (2013), "Jim Crow 2.0? Why States Consider and Adopt Restrictive Voter Access Policies," *Perspectives on Politics* 11:1088-116.

- R. Michael Alvarez, Dustin Beckett, and Charles Stewart III (2012), "Voting Technology, Vote-by-Mail, and Residual Votes in California, 1990-2010," *Political Research Quarterly* 66:658-70.
- Martha Kropf (2013), "North Carolina Election Reform Ten Years After the Help America Vote Act," *Election Law Journal* 12:179-89.
- Charles Stewart III (2010), "Losing Votes by Mail," *NYU Journal of Legislation and Public Policy* 13:573-602.
- Gary D. Robertson, "N.C. Counties Reduce Early Voting Hours for Primary," *The (Elizabeth City) Daily Advance*, February 27, 2014.
- Michael Biesecker, "McCrory Not Familiar with All of Bill He's to Sign," *The (Raleigh) News & Observer*, July 27, 2013.
- Mark Binder, "Precincts Versus Early Voting Locations," August 13, 2013, WRAL <<http://www.wral.com/precincts-versus-early-voting-locations/12772554/>>
- Lorraine C. Minnite (2010), *The Myth of Voter Fraud*, Cornell University Press.
- Ray Christensen and Thomas J. Schultz (forthcoming), "Identifying Election Fraud Using Orphan and Low Propensity Voters," *American Politics Research*.
- Annalise Frank, "Voter ID Turns into 'Voter Suppression,' Says Legislative Black Caucus," *The News & Observer*, Under the Dome blog, July 24, 2013 (last visited March 28, 2014).
- WRAL, "Elections Changes Advance in Senate." <http://www.wral.com/elections-changes-advance-in-senate/12693772/>

### **Cases**

- Shelby County v. Holder*, 570 U.S. \_\_\_\_ (2013).
- Thornburg v. Gingles*, 478 U.S. 30, 47 (1986).

### **Government Documents**

- N.C. Const. art VI, § 2.
- Senate Committee on the Judiciary, S. Rep. 417, 97th Cong., 2nd Sess. (1982).
- Achievement Gaps: How Black and White Students in Public Schools Perform in Mathematics and Reading on the National Assessment of Educational Progress*, 2014, U.S. Department of Education. *Achievement Gaps: How Hispanic and White Students in Public Schools Perform in Mathematics and Reading on the National Assessment of Educational Progress*, 2014, U.S. Department of Education.
- State Board of Education, Department of Public Instruction, Data Report, 2011-2012, March 15, 2013. Figure D5.

State Board of Education, Department of Public Instruction, Consolidated Data Report, 2011-2012, March 15, 2013. Figure S11.

North Carolina Department of Health and Human Services, "Racial and Ethnic Health Disparities in North Carolina: 2010 Report Card," June 2010.

"North Carolina Vital Health Facts: Population and Health Data by Race and Ethnicity," *available at* <http://www.schs.state.nc.us/schs/pdf/NCPopHealthDataByRaceEthDec2012.pdf> (last visited March 28, 2014).

U.S. Census Bureau, *Geographic Mobility: 2012 to 2013*, *available at* <http://www.census.gov/hhes/migration/data/cps/cps2013.html>

### **Other**

Election Law Blog entry, July 25, 2013. < <http://electionlawblog.org/?p=53461>>

Lawyers' Committee for Civil Rights under Laws, "Voting Rights Act: Objections and Observers," *available at* [http://www.lawyerscommittee.org/projects/section\\_5/](http://www.lawyerscommittee.org/projects/section_5/) (last visited March 25, 2014).

[votingrights.news21.com](http://votingrights.news21.com).

"Voting Rights in North Carolina 1982-2006," a report of RenewtheVRA.org prepared by staff at the University of North Carolina Center for Civil Rights, *available at* <http://www.protectcivilrights.org/pdf/voting/NorthCarolinaVRA.pdf> (last visited March 24, 2014).



# UNITED STATES DISTRICT COURT

for the

Middle District of North Carolina

Sandra Little Covington, et al.

*Plaintiff*

v.

The State of North Carolina, et al.

*Defendant*

Civil Action No. 1:15-CV-00399

## SUBPOENA TO TESTIFY AT A DEPOSITION IN A CIVIL ACTION

To:

Dr. Stephen Ansolabehere

*(Name of person to whom this subpoena is directed)*

☒ **Testimony:** **YOU ARE COMMANDED** to appear at the time, date, and place set forth below to testify at a deposition to be taken in this civil action. If you are an organization, you must designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on your behalf about the following matters, or those set forth in an attachment:  
See Attachment A.

Place: Ogletree, Deakins, Nash, Smoak and Stewart, P.C.  
One Boston Place, 201 Washington Street, Suite 3220,  
Boston, MA 02108

Date and Time:

02/18/2016 10:00 am

The deposition will be recorded by this method: sound and/or stenographic means

☐ **Production:** You, or your representatives, must also bring with you to the deposition the following documents, electronically stored information, or objects, and must permit inspection, copying, testing, or sampling of the material:

The following provisions of Fed. R. Civ. P. 45 are attached – Rule 45(c), relating to the place of compliance; Rule 45(d), relating to your protection as a person subject to a subpoena; and Rule 45(e) and (g), relating to your duty to respond to this subpoena and the potential consequences of not doing so.

Date: 01/06/2016

CLERK OF COURT

OR

/s/ Thomas A. Farr

*Signature of Clerk or Deputy Clerk*

*Attorney's signature*

The name, address, e-mail address, and telephone number of the attorney representing *(name of party)* Defendants

, who issues or requests this subpoena, are:  
Thomas Farr, 4208 Six Forks Road, Suite 1100, Raleigh NC 27609, thomas.farr@ogletreedeakins.com, (919) 787-9700

### Notice to the person who issues or requests this subpoena

If this subpoena commands the production of documents, electronically stored information, or tangible things before trial, a notice and a copy of the subpoena must be served on each party in this case before it is served on the person to whom it is directed. Fed. R. Civ. P. 45(a)(4).

Civil Action No. 1:15-CV-00399

**PROOF OF SERVICE**

*(This section should not be filed with the court unless required by Fed. R. Civ. P. 45.)*

I received this subpoena for *(name of individual and title, if any)* \_\_\_\_\_  
on *(date)* \_\_\_\_\_.

☐ I served the subpoena by delivering a copy to the named individual as follows: \_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_ on *(date)* \_\_\_\_\_; or

☐ I returned the subpoena unexecuted because: \_\_\_\_\_

Unless the subpoena was issued on behalf of the United States, or one of its officers or agents, I have also  
tendered to the witness the fees for one day's attendance, and the mileage allowed by law, in the amount of  
\$ \_\_\_\_\_.

My fees are \$ \_\_\_\_\_ for travel and \$ \_\_\_\_\_ for services, for a total of \$ 0.00.

I declare under penalty of perjury that this information is true.

Date: \_\_\_\_\_

\_\_\_\_\_  
*Server's signature*

\_\_\_\_\_  
*Printed name and title*

\_\_\_\_\_  
*Server's address*

Additional information regarding attempted service, etc.:

# **Federal Rule of Civil Procedure 45 (c), (d), (e), and (g) (Effective 12/1/13)**

## **(c) Place of Compliance.**

**(1) For a Trial, Hearing, or Deposition.** A subpoena may command a person to attend a trial, hearing, or deposition only as follows:

- (A) within 100 miles of where the person resides, is employed, or regularly transacts business in person; or
- (B) within the state where the person resides, is employed, or regularly transacts business in person, if the person
  - (i) is a party or a party's officer; or
  - (ii) is commanded to attend a trial and would not incur substantial expense.

**(2) For Other Discovery.** A subpoena may command:

- (A) production of documents, electronically stored information, or tangible things at a place within 100 miles of where the person resides, is employed, or regularly transacts business in person; and
- (B) inspection of premises at the premises to be inspected.

## **(d) Protecting a Person Subject to a Subpoena; Enforcement.**

**(1) Avoiding Undue Burden or Expense; Sanctions.** A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The court for the district where compliance is required must enforce this duty and impose an appropriate sanction—which may include lost earnings and reasonable attorney's fees—on a party or attorney who fails to comply.

**(2) Command to Produce Materials or Permit Inspection.**

(A) *Appearance Not Required.* A person commanded to produce documents, electronically stored information, or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial.

(B) *Objections.* A person commanded to produce documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing, or sampling any or all of the materials or to inspecting the premises—or to producing electronically stored information in the form or forms requested. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:

- (i) At any time, on notice to the commanded person, the serving party may move the court for the district where compliance is required for an order compelling production or inspection.
- (ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

**(3) Quashing or Modifying a Subpoena.**

(A) *When Required.* On timely motion, the court for the district where compliance is required must quash or modify a subpoena that:

- (i) fails to allow a reasonable time to comply;
  - (ii) requires a person to comply beyond the geographical limits specified in Rule 45(c);
  - (iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or
  - (iv) subjects a person to undue burden.
- (B) *When Permitted.* To protect a person subject to or affected by a subpoena, the court for the district where compliance is required may, on motion, quash or modify the subpoena if it requires:

(i) disclosing a trade secret or other confidential research, development, or commercial information; or

(ii) disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party.

(C) *Specifying Conditions as an Alternative.* In the circumstances described in Rule 45(d)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:

- (i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and
- (ii) ensures that the subpoenaed person will be reasonably compensated.

## **(e) Duties in Responding to a Subpoena.**

**(1) Producing Documents or Electronically Stored Information.** These procedures apply to producing documents or electronically stored information:

(A) *Documents.* A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand.

(B) *Form for Producing Electronically Stored Information Not Specified.* If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

(C) *Electronically Stored Information Produced in Only One Form.* The person responding need not produce the same electronically stored information in more than one form.

(D) *Inaccessible Electronically Stored Information.* The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

**(2) Claiming Privilege or Protection.**

(A) *Information Withheld.* A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:

- (i) expressly make the claim; and
- (ii) describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

(B) *Information Produced.* If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information under seal to the court for the district where compliance is required for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

**(g) Contempt.**

The court for the district where compliance is required—and also, after a motion is transferred, the issuing court—may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena or an order related to it.

For access to subpoena materials, see Fed. R. Civ. P. 45(a) Committee Note (2013).

# **Attachment**

**A**

**IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA  
NO. 1:15-CV-00399**

SANDRA LITTLE COVINGTON, <i>et al.</i> ,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	
	)	
THE STATE OF NORTH CAROLINA,	)	
<i>et al.</i> ,	)	
	)	
Defendants.	)	

---

**DEFENDANTS' JOINT NOTICE OF DEPOSITION OF  
DR. STEPHEN ANSOLABEHERE**

TO ALL COUNSEL OF RECORD:

PLEASE TAKE NOTICE that pursuant to Rule 30 of the Federal Rules of Civil Procedure, Defendants in the above-captioned actions will take the deposition upon oral examination of Dr. Stephen Ansolabehere.

The deposition will begin at 10:00 a.m. on February 18, 2016, at Ogletree Deakins Law Firm, One Boston Place, 201 Washington Street, Suite 3220, Boston, MA 02108. The deposition will be recorded by sound and/or stenographic means and may also be recorded by additional audiovisual means. The deposition shall take place before a notary public or other person authorized by law to administer oaths.

The purpose of this deposition will be to examine Dr. Ansolabehere on the identities of the parties and attorneys who engaged him to provide expert testimony in the case of *Harris v. McCrory*, to confirm the testimony given by him in *Harris* as reflected by Exhibit A, and other matters that are reasonably related to his testimony as reflected by Exhibit A. Defendants are noticing this deposition strictly in response to plaintiffs' objection to the submission into

evidence in this case of Dr. Ansolabehere's testimony as reflected by Exhibit A.

This the 6th day of January, 2015.

NORTH CAROLINA DEPARTMENT OF  
JUSTICE

By: /s/ Alexander McC. Peters  
Alexander McC. Peters  
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## CERTIFICATE OF SERVICE

I, Thomas A. Farr, hereby certify that I have this day served the foregoing **Defendants' Joint Notice of Deposition of Dr. Stephen Ansolabehere** upon the following persons by placing a copy thereof in a depository under the exclusive care and custody of the United States Postal Service in a first-class, postage-prepaid envelope and addressed as follows:

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*Attorney for Plaintiffs*

This the 6th day of January, 2015.

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

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23361376.1



# **Exhibit**

## **A**

IN THE UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF NORTH CAROLINA

DAVID HARRIS, CHRISTINE	)	
BOWSER, and SAMUEL LOVE,	)	Greensboro, North Carolina
	)	October 14, 2015
Plaintiff,	)	9:06 a.m.
	)	
vs.	)	
	)	
PATRICK MCCRORY, in his	)	
capacity as Governor of North	)	Case No. 1:13CV949
Carolina, NORTH CAROLINA STATE	)	
BOARD OF ELECTIONS, and JOSHUA	)	
HOWARD, in his capacity as	)	
Chairman of the North Carolina	)	
State Board of Elections,	)	
	)	
Defendants.	)	

TRANSCRIPT OF BENCH TRIAL VOLUME II OF III HELD BEFORE  
THE HON. WILLIAM L. OSTEEN, JR., UNITED STATES DISTRICT JUDGE  
THE HON. MAX O. COGBURN, JR., UNITED STATES DISTRICT JUDGE  
THE HON. ROGER L. GREGORY, UNITED STATES DISTRICT JUDGE

APPEARANCES:

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1 APPEARANCES, CONTINUED:

2 For the Defendant: **ALEXANDER MCCLURE PETERS**  
N.C. Department of Justice  
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22 Court Reporter: Joseph B. Armstrong, RMR, FCRR  
324 W. Market, Room 101  
23 Greensboro, NC 27401

24 Proceedings reported by stenotype reporter.  
25 Transcript produced by Computer-Aided Transcription.

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STEPHEN DANIEL ANSOLABEHERE,  
PLAINTIFF'S WITNESS SWORN AT 9:07 a.m.  
DIRECT EXAMINATION

BY MR. HAMILTON:

Q Good morning. Can you please state your name for the record, sir.

A My name is Stephen Daniel Ansolabehere, Stephen with P-H, and Ansolabehere is spelled A-N-S-O-L-A-B-E-H-E-R-E.

Q Thank you. Dr. Ansolabehere, you're an expert for the plaintiffs in this litigation?

A I am.

Q Let's start with Plaintiff's Exhibit 17 and 18. They're in the notebooks in front of you. Can you please take a moment to look at those exhibits and tell the Court what those are.

A Exhibit 17 is my expert report in this case, and Exhibit 18 is a reply report.

Q And do these reports contain your CV or resume?

A They do. Exhibit 17 contains my CV.

Q And can you point the Court to where that document begins.

A It begins after page 41.

Q Is that a complete and accurate summary of your educational background and professional experience, sir?

A It is.

Q Can you summarize briefly for the Court your background and training.

1 A I received my Bachelor of Arts and my Bachelor of Science  
2 from University of Minnesota. I received my Ph.D at Harvard  
3 University in Government and political science. My first job  
4 was at UCLA as an assistant professor, and then I moved to MIT.  
5 I taught at MIT for about 14 years where I held the Elting E.  
6 Morison chair, and then I moved to Harvard University, and I've  
7 taught there since 2008..

8 Q And what degrees do you currently hold?

9 A Bachelor degrees, Ph.D, and in passing I received a  
10 master's degree.

11 Q And what is the field your Ph.D was granted?

12 A Political science.

13 Q And have you attended law school?

14 A No.

15 Q Not a lawyer?

16 A No.

17 Q Where are you currently employed?

18 A I currently work at Harvard University.

19 Q And where else have you taught?

20 A UCLA, MIT, and Harvard.

21 Q And at Harvard, what are your principal areas of research  
22 and study?

23 A My principal areas of research and study are voting  
24 behavior, elections, representation, American Government  
25 generally. I teach the graduate and undergraduate Ph.D level

1 and undergraduate courses in American Government. I teach  
2 statistical methods in social sciences as well.

3 Q And have you published any peer-reviewed articles or  
4 studies in the area of redistricting?

5 A I have, as well as a book.

6 Q As well as a book; is that what you said?

7 A Yes.

8 Q Okay. Can you describe those -- that book -- well, let's  
9 start with the book. What was the book?

10 A The book is called *The End of Inequality: One Person, One*  
11 *Vote and the Transformation of American Politics*.

12 JUDGE OSTEN: Doctor, that microphone, the more you  
13 can kind of keep it directly in front of your face --

14 THE WITNESS: Got it.

15 JUDGE OSTEN: There you go.

16 MR. HAMILTON: All right. Thank you.

17 BY MR. HAMILTON:

18 Q And what's the book about generally?

19 A The book is about the one person, one vote cases from the  
20 1960s and how they changed American politics and the subsequent  
21 cases and the adjustment of the political parties, racial  
22 representation, and so forth.

23 Q All right. And you mentioned you published some other  
24 peer-reviewed articles or studies in the area of redistricting.  
25 Can you identify for the Court what those are.



1 A Um --

2 Q Are they listed in your resume?

3 A They are listed. The articles and journals begin on  
4 page 2. I have a piece forthcoming in NYU Law Review called  
5 Testing *Shaw v. Reno*.

6 Next piece would be from Harvard Law review in 2013,  
7 Regional Differences in Racially Polarized Voting.

8 Following that 2013 as well, The Effects of  
9 Redistricting on Incumbents in the Election Law Journal.

10 Following that, Partisanship and Public Opinion on  
11 Redistricting in 2010, also in the Election Law Journal.

12 Following that in 2010 as well, Race, Region --  
13 whoops, a typo -- Race, Region, and Voice Choice in the 2008  
14 Election, also in the Harvard Law Review.

15 Q All right. We can stop there. They're all listed, safe  
16 to say, in your CV?

17 A Yeah.

18 Q Who else teaches and writes in this field of study?

19 A Other political scientists include Bernie Grofman at UC  
20 Irvine, Bruce Cain at Stanford, my colleague Nate Persily also  
21 at Stanford, Charles Stewart at MIT, a long list. It's a very  
22 substantial part of our discipline.

23 Q And you know these gentlemen?

24 A Yes.

25 Q And you work with them?

1 A Yes.

2 Q Do you have expertise outside of academia with  
3 redistricting?

4 A Yes, I do.

5 Q And could you describe to the Court what that is.

6 A I've worked as an expert witness in about a dozen cases.

7 Q And in what context?

8 A In redistricting cases and other voting rights cases since  
9 2011.

10 Q So let's start with what states have you appeared in as an  
11 expert witness in connection with redistricting?

12 A In connection with redistricting specifically, in Nevada,  
13 the case of *Guy v. Miller*.

14 In Florida, a series of cases. The first was a  
15 proceeding in the Florida Supreme Court. It was essentially  
16 kind of a facial review of the House and Senate plans and then  
17 the subsequent lawsuit in the Congressional Plan called *Romo v.*  
18 *Detzner*.

19 In Virginia, the *Harris* -- the plan involving the  
20 House -- I'm sorry -- the dispute involving the House of  
21 Representatives districts that's currently before the Court.  
22 The trial is already finished, but the decision is yet to come.

23 In the state of Texas, a series of cases. The  
24 Section 2 and Section 5 and Section 3 cases involving the Texas  
25 redistricting dispute. All those trials are finished.

1 Section 2 and Section 5 -- the Section 5 dispute was settled  
2 and vacated by -- that was vacated by the Supreme Court when  
3 Section 4 was overturned, but -- and the Section 3 dispute, the  
4 trial was held last summer, and we're waiting for a decision.

5 Q You testified as an expert in each of those matters?

6 A Correct.

7 Q In each of those matters, were you accepted as an expert  
8 witness by the courts hearing those cases?

9 A I was.

10 Q Has any court in any jurisdiction in any matter in which  
11 you've appeared ever rejected you as an expert in your field of  
12 study?

13 A No.

14 Q Let me just ask you about one item on your resume. I  
15 believe it's on page 13. It says CBS Election Decision Desk  
16 2006 to the present. What is that?

17 A Since 2006, I've worked on the CBS Election Decision Desk.  
18 That is the group of people brought in by CBS Nightly News to  
19 call the election on election night. We use past election  
20 data, registration data, census data to make models to forecast  
21 what the election will likely be. Then over the course of the  
22 night, we receive realtime data on votes in the individual  
23 precincts and the exit polls to make projections about which  
24 congressional districts, which states, and -- for senate,  
25 governor, and president, have been won by each of the

1 candidates and make projections about who has won the  
2 presidency, the House, the Senate, and the governorships.

3 Q And you've done that for about nine years now?

4 A Yep, every general election and also the primary elections  
5 for the president.

6 Q How's the track record of the team for the Decision Desk  
7 in projecting the results of elections so far?

8 A The team has not had to walk back any decisions we've  
9 made, and we haven't missed anything.

10 Q All right. Thank you.

11 MR. HAMILTON: Your Honors, at this point, pursuant  
12 to Evidence Rule 702, I would proffer Dr. Ansolabehere as an  
13 expert in the field of electoral politics, voting behavior, and  
14 statistical methods.

15 JUDGE OSTEEEN: Any voir dire?

16 MR. FARR: I'll save it for the cross, Your Honor,  
17 and I will say we don't -- we're not arguing that  
18 Dr. Ansolabehere is not a distinguished political scientist.  
19 Our argument is that the methodology he used in this case is  
20 inappropriate because of a ruling by the US Supreme Court.

21 JUDGE OSTEEEN: All right. I'll then admit  
22 Dr. Ansolabehere as an expert witness in the field of -- could  
23 you repeat that again?

24 MR. HAMILTON: Sure, electoral politics, voting  
25 behavior, and statistical behavior.

1 JUDGE OSTEEEN: In the field of electoral politics,  
2 voting behavior, and statistical methods. You may proceed.

3 MR. HAMILTON: Thank you, Your Honor.

4 BY MR. HAMILTON:

5 Q Let's turn to your work specifically with respect to this  
6 case, Doctor, and I believe you identified Exhibits 17 and 18  
7 as your reports in this matter, is that correct?

8 A Correct.

9 Q What was the purpose of preparing these reports?

10 A The purpose for preparing these reports was to analyze the  
11 Districts CD 12 and CD 1 in North Carolina and assess the  
12 racial composition and racial representation.

13 Q And are they complete and accurate descriptions of your  
14 analysis and methodology?

15 A They are.

16 Q Do they contain a summary and explanation of your analysis  
17 of -- in this case?

18 A They do.

19 Q All right. What were you asked to do specifically? Is  
20 that contained in your report somewhere?

21 A It is. On page 3, paragraph 4, I was asked to assess  
22 whether race was a predominant factor in the configuration of  
23 CD 1 and CD 12 in North Carolina.

24 Q And what materials did you review in order to form an  
25 opinion and prepare the reports before the Court?

1 in compactedness in CD 12, but CD 12 is also highly non-compact  
2 so it wasn't too much further to go, but it went even further  
3 along that standard.

4 Q So how does a social scientist measure compactness?

5 A There are a lot of different measures of compactness, but  
6 I think there are two big concepts. One concept is how spread  
7 out is a district in terms of its area, and the other is how  
8 unusual or jagged is its boundary compared to a district with  
9 similar area.

10 Q And what is the commonly used measure of compactness in a  
11 redistricting analysis in most of these court cases?

12 A The Reock measure is probably the most commonly used, and  
13 it's a measure that was developed in the 1960s by a man named  
14 Reock.

15 Q And how do you spell that?

16 A R-E-O-C-K.

17 Q And can you describe how that test works?

18 A That test is to imagine the most compact possible area.  
19 The most compact possible area is a circle. So compare the  
20 area of a hypothetical district, which would be eye circle --  
21 and every once in a while we do see a district that is about  
22 the shape of a circle in some states -- and then compare the  
23 area of that circle to the area of a given width to the area of  
24 the district that is of the same length, okay. So the district  
25 may be 120 miles long. So how big would an area of a circle be

1 that had a diameter of 120 miles, and now what's the area of  
2 that circle compared to the area of the actual district?

3 Q And what are the range of scores for Reock?

4 A So the area of the districts in the top and the area of  
5 the circles in the bottom, and that ratio ranges from zero to  
6 one where one would be most compact district, a circular-shaped  
7 district. A district that's a perfect square based on simple  
8 geometry would have a Reock of .64 always.

9 Q What was the Reock score of the original gerrymander?

10 A So there were two original gerrymanders back in 1812 drawn  
11 by Elbridge Gerry in Massachusetts. One was a state senate  
12 seat and one was a congressional seat. The state senate seat  
13 had a Reock of .19, and the state -- the congressional seat, I  
14 believe, had a Reock of .28.

15 Q And how did that compare to CD 1 and CD 12 in the  
16 Rucho-Lewis map?

17 A Under the Rucho-Lewis map, the Reock of CD 1 is, I think,  
18 .29, which is about the same as the original gerrymander, and  
19 then the Reock of CD 12 is .07. That is the area covered by  
20 CD 12 is 7 percent of the ideal district area.

21 Q Fair to say that's lower than either of the two original  
22 gerrymanders?

23 A Correct.

24 Q Are you familiar with the interocular measure?

25 A Yeah, my colleague Bernie Grofman likes to call the visual



1 A I know of no legal case. I'm just testifying as an  
2 expert. I don't know the law on this.

3 Q Okay. And have you stated in this case, in *Bethune-Hill*,  
4 that if the Reock score is above .2, then that would not be  
5 considered a non-compact district?

6 A Yeah, .2 -- .19 remember is the Reock of the original  
7 gerrymander in the State Senate side and .29 -- or 28 is the  
8 original gerrymander in the congressional district. So .2 is  
9 one of the thresholds that we commonly use. .25 again is  
10 Pildes as well as .15 Pildes and Niemi. So different  
11 thresholds in that neighborhood are used, so we really look for  
12 that neighborhood. There's no firm statistical test for what's  
13 non-compact or compact. .2 is one of the rules of thumb.

14 Q So wait a second. I'm confused. What are the two  
15 districts you're talking about where you get this .19 and .28?

16 A The original gerrymander as it was drawn, the thing that  
17 we call the gerrymander, it's named after Elbridge Gerry --  
18 Gerry, had a Reock score of .19.

19 Q What kind of district is that?

20 A One of them is a State Senate district, and one of them is  
21 US congressional district. The State Senate district had a .19  
22 and the congressional had a .28.

23 Q And how do you know that?

24 A I calculated it.

25 Q Okay.

1 Q Okay. Was it -- I've got both reports here, Doctor. Do  
2 you know was it your first report --

3 A I don't recall which one.

4 Q Well, I'll bring both of them up to you. We'll see if we  
5 can find that.

6 MR. FARR: I made a mistake, Your Honor. I  
7 apologize. If I could just have it all back. Your Honor,  
8 would this be a good time to take a break so I can get this  
9 sorted out over lunchtime?

10 JUDGE OSTEEEN: Do you genuinely think pulling your  
11 exhibits together and being ready to move will speed things  
12 along?

13 MR. FARR: Sure.

14 JUDGE OSTEEEN: All right. Let's take -- we'll stand  
15 in lunch recess for an hour and resume at 1:15.

16 (At 12:11 p.m., break taken.)

17 (At 1:27 p.m., break concluded.)

18 JUDGE OSTEEEN: All right. Mr. Farr, you may continue  
19 your cross-examination.

20 MR. FARR: Thank you very much, Your Honor.

21 BY MR. FARR:

22 Q Doctor, I wanted to ask you just a couple of questions  
23 about compactness to wrap that subject up.

24 A Okay.

25 Q Do you believe this compactness -- would a compactness

1 score above -- on Reock above .2, would you agree that that's  
2 not considered a low score if it's above a .2?

3 A Correct.

4 Q That was easy.

5 Okay. Now, I want to talk to you about the part of  
6 your report which begins on page 7, I think, or maybe page 6  
7 about how many cities and counties CD 1 and CD 12 split.

8 A Which report are we looking at?

9 Q It's your first report, which is actually Exhibit 17?

10 A Yes.

11 Q And I wanted to ask you in preparing this report, are you  
12 aware of the concept of satellite annexation? Do you know what  
13 that means?

14 A I don't know what that is.

15 Q So since you don't know what it means, you didn't take  
16 into account the satellite annexation in evaluating how many  
17 cities had been divided into different congressional districts?

18 A No.

19 Q Okay. And for Congressional District 1, did you -- did  
20 you study the amount of population that was in some of the  
21 cities that were divided?

22 A In reference to -- which part of the report are you  
23 looking at?

24 Q Well, you talked -- in CD 1, you said that there were --  
25 in the 2011 version of Congressional District 1, you stated