UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STATE OF SOUTH CAROLINA, *Plaintiff*, v. UNITED STATES OF AMERICA and ERIC H. HOLDER, JR., in his official capacity as Attorney General, *Defendants*, JAMES DUBOSE, *et al.*, *Defendant-Intervenors*.	Case No. 1:12-cv-203 (CKK-BMK-JDB)

SOUTH CAROLINA'S REPLY IN SUPPORT OF ITS PROPOSED FINDINGS FACT AND CONCLUSIONS OF LAW

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PRELIMINARY STATEMENT

R54 was enacted with the common sense, non-discriminatory purpose of preventing voter fraud and enhancing the integrity of the electoral process. Debate over voter ID in the South Carolina General Assembly was vigorous, with strongly held beliefs voiced on both sides of the issue. In the end, the enacted legislation includes key components developed in a bi-partisan compromise reached by African American and white legislators, including the core mitigation provisions that will ensure that all voters will be able to exercise effectively the electoral franchise on Election Day. This includes not only free photo IDs but also the reasonable impediment exception. If voters cannot obtain a free ID (or any ID) due to reasons beyond their control or a religious objection to being photographed, they will be able to vote a provisional ballot that must be counted unless it contains falsehoods. This combination of mitigating provisions is unique to South Carolina's voter ID law and makes R54 uniquely protective of the right to vote.

There is at present a small difference in current R54 ID possession rates between white and black voters. SC FOF ¶¶ 104-07. But that difference is present today, before implementation—*i.e.*, before the free photo VR cards are available, *id.* ¶¶ 57-63; before the SEC's education plan is put into effect, *id.* ¶¶ 85-94; and before the advocacy groups that are now spreading disinformation among voters stop doing so and start helping the small number of voters who do not currently possess R54 ID comply with the new law, SC Opp. DI ¶ 8. After implementation, free photo ID will be available without major inconvenience in every county in the State. And any remaining difference will be

effectively reduced to zero on Election Day, when reasonable impediment provisional ballots will be available to any voter who needs one. SC FOF ¶¶ 67-84.

Unable to counter the evidence, Defendants oppose the State's proposed findings of fact and conclusions of law with misdirection. They invoke the specter of Jim Crow and analogize R54 to a "poll tax," a "literacy test," and a "re-registration requirement." US Opp. ¶ 153; DI Opp. ¶¶ 157, 161. But R54 is nothing like those barriers to voting, as is perhaps most dramatically demonstrated by the fact that African American lawmakers in the General Assembly helped to write into the legislation the key mitigating provisions—free photo voter registration cards, the reasonable impediment exception, and the aggressive voter education program—and participated in the compromise brokered by now Lt. Governor McConnell. No legislator, much less any African American legislator, would have agreed to any compromise if the photo ID requirement in it were actually similar to features of Jim Crow laws such as a poll tax or literacy test. And the early voting period, additional form of acceptable ID, and different timing for implementation now emphasized by Defendants could not possibly convert Jim Crow into something acceptable to any legislator, much less African American legislators.

At bottom, R54 was enacted for legitimate, non-discriminatory purposes using normal legislative procedures. And it is a law that will not adversely impact *anyone* once implemented with Ms. Andino's guidance in a manner that will err on the side of the voter. Acceptable photo ID will be available at no cost—with the same documentation currently needed to register and vote under the benchmark law—and without major inconvenience in every county. *See Texas v. Holder*, No. 12-128, 2012 WL 374367, at

*13 (D.D.C. Aug. 30, 2012) (three-judge court). Because all voters will remain able to cast an effective ballot, the law does not disproportionately affect any racial group. *See Florida v. United States*, No. 11-1428, 2012 WL 3538298, at *9 (D.D.C. Aug. 12, 2012) (three-judge court). Nor does it pose a material burden that is likely to result in any reasonable voter not exercising the electoral franchise. *See id.* To hold otherwise would place South Carolina on unequal footing with non-covered States like Indiana and other covered States like Georgia, and thus would cast Section 5 of the Voting Rights Act into grave constitutional doubt. For these reasons, R54 should be precleared.

REPLY IN SUPPORT OF PROPOSED FINDINGS OF FACT

I. Defendants Fail to Counter the State's Evidence That R54 Was Not Enacted With Any Discriminatory Purpose.

A. Act R54's Purpose Was To Deter And Detect Voter Fraud And Enhance Public Confidence In The Electoral System.

2, 16–17. The purpose of Act R54's identification requirement is to "confirm the person presenting himself to vote is the elector on the poll list." SC FOF ¶ 2; PX-1 (JA-US_002717) (Act R54, § 5(E)). And the purpose of Act R54 as a whole is to "help detect and deter voter fraud" and to "enhance public confidence in the electoral system." SC FOF ¶ 2.

The State has never argued that R54 was created as a direct response to specific instances of voter fraud. *See, e.g.*, 8/28/12 Tr. 114:11-16 (McConnell). That several individuals were unable to cite specific examples of in-person voter impersonation fraud, US Opp. ¶ 2(B), is of no moment. Rather, it shows the need for further tools to *detect* voter fraud, one of R54's purposes. SC FOF ¶ 2. *See also* SC Opp. US FOF ¶ 96 (Sen.

Campsen explaining that he believed R54's voter ID requirements would also "deter registration fraud").

The evidence in this case shows that voter fraud has occurred in South Carolina. SC FOF ¶ 16. Rep. Sellers, a vocal opponent of R54, admitted that in-person impersonation fraud has occurred in South Carolina. SC FOF ¶ 16. Although Intervenors and the United States attempt to minimize Sellers' statement, they cannot walk away from the fact that Sellers stated on the House floor that he believed voter impersonation fraud has occurred in South Carolina, SC FOF ¶ 16, or that he stated in the South Carolina House Journal that the U.S. Attorney had three investigations into voter fraud. SC Opp. US FOF ¶ 94. There was nothing ambiguous about "to what Rep. Sellers [sic] response referred." US Opp. ¶ 16. He was asked: "do you believe anyone in the state has ever voted with someone else's voter registration card?" SC FOF ¶ 16 (JA_005215). He answered: "Yes." *Id.*

Moreover, the United States is wrong to suggest that "evidence of high and undiminished levels of voter confidence . . . are uncontested." US Opp. ¶ 2(b). Legislators are in the best position to address constituent concerns. SC Opp. DI ¶ 59. And South Carolina legislators had been hearing from constituents for several years about the need for voter ID legislation. SC FOF ¶ 14.

9–15, 18. Since 2000, photo voter ID laws have been enacted by state legislatures, approved by courts, and discussed and endorsed by national commissions such as the

Carter-Baker Commission.[1] *See, e.g.*, SC FOF ¶¶ 9-13. Intervenors suggest that this history does not matter because "restrictive" photo voter ID laws (however that is defined—Intervenors do not say) were enacted only after 2008. DI Opp. ¶ 12. But the evidence shows that South Carolina legislators were keenly aware of the national trend and closely followed the judicial treatment of voter ID laws in Indiana and Georgia. *See, e.g.*, SC FOF ¶ 14; SC Opp. DI ¶ 36. There is nothing surprising about the State, a covered jurisdiction, waiting for judicial approval of voter ID laws before attempting to pass such its own version. And the State's voter ID legislation was introduced at the beginning of the first legislative session following *Crawford v. Marion County Election Board*, 553 U.S. 181, 193 (2008). SC FOF ¶ 14. To be sure, neither R54 nor predecessor legislation mirrors exactly the Indiana or Georgia laws, US Opp. ¶¶ 9, 18; DI Opp. ¶¶ 9, 18, but that fact does not mean those laws did not serve as the model and starting point for the State's voter ID law. They did. *See* SC FOF ¶ 18. And R54 certainly does not mirror the Georgia or Indiana laws in that R54 includes the reasonable impediment exception, a provision that is far more protective of voters than anything in the other laws. SC FOF ¶ 6.

Relying principally upon the testimony of R54 opponents, the United States and Intervenors insist that voter ID legislation in South Carolina was actually a reaction to the

[1] The United States attempts to distinguish the photo ID recommendation in the Carter-Barker Report from R54. US Opp. ¶ 11. But it is indisputable that the Commission is one of the many governmental and non-governmental entities that studied and recommended some type of photo ID requirement long before the 2008 time period during which Defendants now argue the concept of photo ID suddenly sprang to the fore in reaction to the election of President Obama. The evidence shows that simply is not true.

2008 election. US Opp. ¶ 2(D); DI Opp. ¶ 17A. Intervenors go even further, stating that these purposes are pretext for a racially discriminatory purpose. DI Opp. ¶ 2. But that argument ignores the timeline just discussed. SC FOF ¶ 13. And it ignores efforts in South Carolina by Democrats to enact photo ID requirements well before 2008. Rep. Cobb-Hunter introduced legislation on multiple occasions before 2008 requiring *all* voters who use a "short form ballot" to show photo ID before voting.[2] SC FOF ¶ 13; *see also* 8/30/12 Tr. 289:23-290:15 (Cobb-Hunter). They also ignores the evidence that South Carolina legislators had been hearing from constituents for many years about the need for a photo voter ID law. SC FOF ¶ 14. Specifically, Speaker Harrell testified that he had heard from constituents about voter ID "frequently," and that he did not "remember a time when I have been in office when I haven't heard a concern from constituents about [voter ID]." SC FOF ¶ 14; 8/28/12 Tr. 56:12-16 (Harrell). And Speaker Harrell stated, *as an example*, that he had heard about voter ID from constituents at the grocery store. *Id.* at 57:20-24. Intervenors badly mischaracterize the testimony when they suggest that these were the "only constituents [Harrell] remembered speaking with about voter ID." DI Opp. ¶ 14.

Finally, the United States and Intervenors attempt to downplay the survey taken by the United States' own expert showing overwhelming support nationally and in South Carolina for a government-issued photo ID requirement in 2008 by pointing out that the

[2] The United States and Intervenors incorrectly state that Rep. Cobb-Hunter introduced a photo ID requirement only for absentee ballots. US Opp. ¶ 13; DI Opp. ¶ 13. That is wrong. She introduced legislation requiring photo IDs for in-person "short form" voting as well.

survey asked only about a "generic" government-issued photo ID requirement and not specifically R54. US Opp. ¶ 15; DI Opp. ¶ 15(A). But generic or not, Defendants cannot and do not deny the fact that there was broad support for at least a "generic" photo ID reform. And that support coincided with the start of the debate over voter ID in South Carolina. SC FOF ¶ 15.

In the absence of any direct evidence that R54 was enacted with a discriminatory purpose, *see* SC Opp. DI ¶ 35, or has any connection to the 2008 election, *supra*, the United States and Intervenors emphasize a single e-mail exchange with Rep. Clemmons. US FOF ¶ 121; DI FOF ¶ 45. *See also* SC Opp. DI ¶ 38; SC Opp. US FOF ¶ 23. But that e-mail is no "smoking gun" of discriminatory purpose. DI FOF ¶ 45; US FOF ¶ 121; US Opp. ¶ 2(C). Nor could it be: The e-mail was sent and received on January 17, 2012, a full eight months after R54 was signed into law by the Governor, and nearly three years after Rep. Clemmons first introduced voter ID legislation. *See* US Ex. 212 (JA-US_001992). The United States therefore is wrong even to suggest that Clemmons "endorsed" any of the comments in this e-mail exchange "during the legislative process." *See* US Opp. ¶ 2(C). And Intervenors are wrong to assert that the exchange occurred "[w]hile [African American] legislators argued that minorities were more likely to lack photo ID." DI FOF ¶ 45. No inference can possibly be drawn about the intent even of Rep. Clemmons, much less the entire General Assembly, from a single e-mail created so long after R54 had been enacted.

B. Proponents of R54 Took Into Account The Views Of And Adopted Provisions Favored By Minority Legislators.

21. When the House considered H.3418, there was no effort to stifle or silence opposing views. *See* US Opp. ¶¶ 2(D), 21; DI Opp. ¶ 21. Rather, the House employed its normal procedure of invoking cloture on contentious legislation, which allowed for every introduced amendment to receive a full debate where proponents and opponents were given an opportunity to speak on each amendment. SC FOF ¶ 21; SC Opp. DI ¶¶ 46-47. Tabling amendments is not, as Defendants assert, at all unusual. *See* SC Opp. DI ¶ 46. To the contrary, tabling is a customary House practice, where those voting in favor of "tabling" are merely voting "no." SC Opp. DI ¶ 46 (citing Speaker Harrell).

25–34. Not only were the views of Democrats and African Americans considered during the legislative process, they shaped some of the most important parts of R54. SC FOF ¶¶ 27-33. When African American Senators expressed concerns about how H.3418 would impact voters who lack birth certificates, the bi-partisan group of Senators created the reasonable impediment affidavit. SC FOF ¶ 29. When concerns were expressed about the list of acceptable IDs, the same bi-partisan group created the photo voter registration card. *Id*. Likewise, to address concerns about voter notification, the group agreed upon a compromise requirement that the SEC engage in an "aggressive" voter education program. SC FOF ¶ 29.

Defendants emphasize the testimony of Sen. Malloy—who has previously promised to "kill[]" voter ID legislation at the "federal level," SC Opp. US FOF ¶ 131—that he only "very reluctantly" accepted the compromise amendment that included these

mitigating provisions. US Opp. ¶ 28. *See also* DI Opp. ¶ 32. But that testimony is inconsistent with the fact that Sen. Malloy described the meeting that resulted in the comprise as the "Senate . . . at its finest." SC FOF ¶ 28. And it ignores the fact that African American Senators did not merely participate in the meeting: After the meeting they became *co-sponsors* of the compromise amendment. *Id.*

The evidence thus shows that African American legislators and Democrats were integral to creating R54, with nearly every African American Senator supporting Amendment No. 8 and Democrat Senator Hutto's amendment being adopted by the full Senate. SC FOF ¶¶ 32-34. And, notwithstanding Intervenors' assertion to the contrary, on H.3418's third reading, just seven votes against the bill were recorded, and Sens. Malloy, Scott, and Hutto's were not among them. SC FOF ¶ 34. *See* DI Opp. ¶ 34; *see also* JA_000726.

In an effort to undercut the clear ameliorative nature of the reasonable impediment exception that resulted from the work of this bi-partisan group of African American and white legislators, Intervenors assert that "[l]egislators understood the RI ballots' vulnerability to discriminatory challenges." DI Opp. ¶ 29B. But there is no credible evidence of that. Intervenors point to just one statement during debate by an opponent of the bill about such challenges—and that is a statement from the same Senator who accused the "entire Republican Caucus" of acting with discriminatory purpose, including even Sen. McConnell and others who supported and fought for the Senate positions. 8/30/12 Tr. 271:20-25.

35–38. The House, and ultimately the H.3418 conference committee, incorporated all of the key ameliorative provisions from the Senate compromise Amendment No. 8—*i.e.*, the Reasonable Impediment and Religious Objection exceptions ("RI/RO"), the free photo voter registration cards, the aggressive voter education requirement, and the requirement to identify and notify persons without R54 ID of the change by direct postcard outreach. SC FOF ¶¶ 35, 37-38. The United States and Intervenors point to other provisions in the compromise bill, DI Opp. ¶ 29D; US Opp. ¶ 29, but their exclusion from the final bill does not evidence discriminatory intent.

One additional category of IDs favored by the Senate (federal and state employee IDs) was not included, but there is no evidence that including such IDs would have any ameliorative effect. Although Intervenors suggest that certain state employee IDs may be disproportionately held by African Americans, DI Opp. ¶ 37A, they offer *no* evidence that any individuals who have state employee IDs are likely to lack other R54 ID. Nor is the staggered implementation period necessary given the availability of the reasonable impediment exception for voters unable to secure a photo ID due to the short time frame between preclearance and Election Day and the aggressive voter education requirement. SC Opp. US COL ¶ 33. And finally, for the reasons discussed *infra*, early voting is separate from voter ID except for purposes of political compromise—early voting is not a "mitigation" provision.

Importantly, one of the key mitigation provisions that the House accepted from the Senate's compromise was the photo voter registration card. SC FOF ¶ 35. The United States and Intervenors point out that Amendment No. 8, and ultimately R54, did not state

that photo VR cards would be available without a birth certificate. *See* US Opp. ¶ 29B; DI Opp. ¶ 29C. But that is irrelevant, and there is no reason why it should have so stated. R54 requires the implementation of a system to issue voter registration cards with a photograph. PX-1 (JA-US_002717) (Act R54, § 4). Nothing in R54 purports to alter the State's current voter registration requirements, which do not require a birth certificate. S.C. Code §§ 7-5-120; 7-5-155; and 7-5-170. And nothing in evidence suggests that any legislator thought a birth certificate would be required to obtain a photo VR card. To the contrary, Intervenors have to selectively quote then-Sen. McConnell to make it appear that he "vehemently opposed" issuing any IDs that did not require birth certificates. DI Opp. ¶ 29C. In fact, as the preceding sentences in the quoted material make clear, McConnell was talking only about DMV-issued IDs. JA_004887.

41, 46. The House ultimately abandoned absentee voting reform, which was opposed by the Senate and African American members of both the House and Senate. SC FOF ¶¶ 41, 46. The fact that the opposition was bi-partisan in the Senate, US Opp. ¶ 46; DI Opp. ¶ 46, does not diminish the fact that the opposition to absentee voting changes was taken into account in the House, where bi-partisan opposition was absent. SC FOF ¶ 41.

47–53. When H.3003 went to conference, then-Sen. McConnell sought to point out the problems with the House's "inartfully drawn" bill in an effort to gain leverage and to strengthen the bill. SC FOF ¶ 50. In the end, both the House and Senate conferees each "gave some" and a compromise was reached. SC FOF ¶ 51.

The final, as-passed bill included mitigating provisions that were created and supported by Democrats. SC FOF ¶¶ 52-53. These included the reasonable impediment and religious objection exceptions, the free photo voter registration card, the list of persons lacking Act R54 IDs, and the aggressive voter education program. SC FOF ¶¶ 3-8, 37-38.

54–55. The final conference report did not include early voting. SC FOF ¶ 53. There has been no evidence that early voting bears any connection to photo ID. SC FOF ¶¶ 54-55; SC Opp. DI ¶ 40. The United States and Intervenors posit that an early voting period "would provide voters more advance notice to obtain ID[.]" DI FOF ¶ 40(a). But, the United States and Intervenors have not focused their criticisms of R54 on a lack of notice. Rather, they have argued that R54 will disadvantage persons lacking certain documentation or resources. *See, e.g.*, US FOF ¶¶ 18, 19, 23; DI FOF ¶¶ 1, 3, 6, 7. If that is the case, early voting will offer no assistance to a person lacking resources or documentation. And R54's aggressive education program, individual notice requirement, and reasonable impediment exception will address any concerns about a lack of notification.

C. The General Assembly Did Not Depart From Normal Procedures During The Debate And Passage Of R54.

39. H.3003 was part of a multi-year process. *See* SC FOF ¶ 39. Each House proponent who testified stated that, when the House took up H.3003, it picked up where it left off the year before and there was no need for extensive work in the House. *Id.* The United States and Intervenors present no reason to disbelieve the clear testimony of the

H.3003's House proponents. US Opp. ¶¶ 39, 41; DI Opp. ¶ 39. Further, Intervenors fail to recognize, DI Opp. ¶ 39, that the key ameliorative provisions from the prior year were all included in H.3003. SC FOF ¶¶ 39-42.

26, 44. The Senate used normal, routinely-employed Senate rules when it considered H.3003 and H.3418. SC FOF ¶ 44; SC Opp. DI ¶ 49. There is no evidence to the contrary, aside from Intervenors' *ipse dixit*. *See, e.g.*, DI Opp. ¶ 26. The Senate Rule 33B Rules Committee special order provision was only added to the rules in 2005. SC Opp. DI ¶ 49. It is thus axiomatic that it would not have a long history of use. And since its 2005 creation, it has been used by some Rules Committee Chairmen "a lot." *Id.* (citing Rules Committee Chairman Jake Knotts). It was even used in the final week of the most recent legislative session. *Id.*

37-38, 51. The H.3418 and H.3003 conference committees were conducted properly. Although Sens. Malloy and Scott now state that they did not sign the respective conference reports because of procedural irregularities, US Opp. ¶ 37; DI Opp. ¶ 51A, neither Sen. Malloy nor Sen. Scott made *any* statements at the times of the conference committees indicating that committees were conducted improperly. SC Opp. DI ¶ 51.

Intervenors and the United States also suggest that the informal meetings during the H.3003 conference committee that then-Sen. McConnell had with other conferees were unlawful. *See, e.g.*, DI Opp. ¶ 51A. However, when Sen. Scott spoke on the record at the conference committee meeting following this supposedly once-in-a-career "exclusion," he said nothing about it. SC Opp. DI ¶ 51. This is not surprising, because State law does not prohibit informal meetings among conference committee

members. Intervenors simply misunderstand South Carolina law. The State's FOIA law requires that certain meetings of "public bodies," where a quorum is present, be transacted in public and on the record. S.C. Code § 30-4-30. In order for there to be a quorum, a majority of the committee membership must be gathered. S.C. Code § 30-4-20(e). Although Intervenors attempt to infer the opposite, the House conferees are not their own "public body," just as the Senate conferees are not their own "public body." DI Opp. ¶ 51A. Rather, a "public body" must have the ability to act. S.C. Code § 30-4-20. As one chamber's conferees cannot conduct business of the conference committee on their own, the "public body" in this context is the entire conference committee. And thus an informal meeting of less than a quorum of the six-member conference committee does not trigger the State's FOIA requirements. In short, as the State has consistently explained in this litigation, then-Sen. McConnell's informal meetings during the conference committee were neither abnormal nor in violation of any State law. SC FOF ¶ 51.

II. Defendants Fail To Counter the State's Evidence That R54 Does Not And Will Not Have Any Discriminatory Effect.

A. Implementation Of The Burden-Mitigating Provisions Will Ensure That All Qualified Voters Can Cast A Ballot On Election Day.

1. Free Photo Voter Registration ("VR") Cards Are Available To Voters.

57- 60. R54 makes free, photo VR cards available from any County Board of Registration and Elections ("CBRE") to any current or new registered voter. All that is required to obtain one is the documentation already required to register in the first place

(for first-time registrants) or the voter's current, photo-less VR card, documents used to register in the first place, or even date of birth and last four digits of social security number (for already registered voters). PX-87 (JA-SC_0644-46) (4/26/12 Section 4 Procedures). It is no response that there is "widespread confusion" about what documents are required to obtain a photo VR card. DI Opp. ¶ 59. The statute provides that the SEC "shall implement a system in order to issue" photo VR cards. SC FOF ¶ 4. There is nothing confusing about that, and because Section 4 is not yet precleared the SEC's procedures have not yet been described to the public. Any supposed "confusion," therefore, has been manufactured by Intervenors themselves. SC Opp. DI ¶ 8.

61-62. The United States' opposition to the State's photo VR card findings is misplaced. *First,* the evidence does not support the assertion that Ms. Andino lacks the funding to implement Section 4. US Opp. FOF ¶¶ 61-62. Both she and the Budget & Control Board have testified to just the opposite—*i.e.*, the SEC has the funding and will use it. SC FOF ¶ 63; SC Opp. US FOF ¶¶ 87, 89. *Second,* the United States is wrong to argue that the State's law establishing flexible CBRE office hours requires preclearance. The law providing that flexibility has been in effect since 1982, when DOJ in fact precleared it. *See* S.C. Code § 7-5-140 (providing in part that CBREs "shall remain open as provided by law and, in addition thereto, shall remain open and available for registration on any additional days, during such hours and at such various places throughout the county as the boards may determine"). The State has "introduced no evidence" about preclearance of that law because R54, not a law that DOJ precleared three decades ago, is at issue in this case.

62. Defendants also argue that the fact that photo VR cards are available at the place where African American voters are more likely to vote in-person absentee is "of no moment" because there is no evidence that voters who cast in-person absentee ballots are "are the same black voters who lack allowable R54 ID." US Opp. ¶ 62; DI Opp. ¶ 62. But the same is true of all of the "evidence" offered by Defendants about obstacles to obtaining photo ID that might be experience by the small number of African American voters who currently do not possess R54 ID. Defendants do not and cannot proffer evidence that the minority residents whom they describe as having, for example, low socio-economic standing or difficulty finding transportation to CBREs or DMVs "are the same black voters who lack allowable R54 ID." In all events, obtaining the photo VR card is just one way voters who currently lack R54 ID can cast an effective ballot on Election Day. If they cannot obtain a free photo VR card or DMV ID, then the RI/RO exception is available. SC FOF ¶¶ 67-79; SC Opp. US FOF ¶ 13.

63. The SEC has the funding to implement Section 4. *Supra* ¶¶ 61-62. The United States offers nothing more than *ipse dixit* to support its assertion that the funding is "unlawful." US Opp. ¶¶ 58A, 60-63.

2. Free DMV-Issued IDs Are Also Available to Voters.

64-65. Defendants cannot and do not dispute that at least some voters who currently lack R54 ID, including some minority voters, will be able to obtain one for free from the DMV. US Opp. ¶¶ 64-65; DI Opp. ¶¶ 64-65.

3. Voters Who Forget Their ID May Cast A Provisional Ballot.

66. Defendants cannot dispute that R54 includes an effective provisional ballot mechanism for voters who have but forget their R54 ID. Intervenors' attempt to muddy the waters by suggesting South Carolina's *current* provisional ballot procedures are illegal is misplaced. DI Opp. ¶ 66. To cast a regular ballot, voters must present valid ID acceptable under current law, as Ms. Andino testified, and the benchmark provisional ballot practice in South Carolina does not violate HAVA. *See* S.C. Code § 7-13-830; 42 U.S.C. § 15482(a); 8/29/12 Tr. 74:10-75:7 (Andino).

4. Voters With A Reasonable Impediment Or Religious Objection To Being Photographed Also May Cast A Provisional Ballot.

67-68. The number of voters who, on Election Day, would be prevented from casting an effective ballot will be reduced effectively to zero by the RI/RO affidavit. Upon preclearance, Ms. Andino will issue guidance to poll managers and CBREs concerning RI/RO affidavits. Her guidance will be that any voter unable to obtain an R54 ID because of the short time frame between preclearance and the election would qualify for the exception. And going forward, voters will qualify for the exception if there is any valid reason, beyond his control, which created an obstacle to his obtaining the necessary ID. SC Opp. US FOF ¶ 13; SC FOF ¶¶ 70-72. Those reasons include a voter's lack of the documentation necessary to obtain an ID or transportation to get to a CBRE or DMV. SC Opp. US FOF ¶¶ 44, 49; SC FOF ¶ 80.

69. Ms. Andino will implement R54, SC FOF ¶ 69, and Defendants' suggestion is misplaced that Ms. Andino somehow lacks the authority to do so. The views of one

legislative staffer (recounting the purported views of Rep. Clemmons) does not change the nature of Ms. Andino's role at the SEC, *see* SC Opp. US FOF ¶ 51, or the fact that CBREs actively seek and follow Ms. Andino's guidance, *id.* ¶¶ 47, 51; *see also* SC FOF ¶¶ 69, 95-97. Intervenors further miss the mark when they cherry-pick a single sentence from a single letter sent by an advocacy group to a single Senator about a bill (S.1) that never left committee and suggest that it is evidence of both a "request to authorize the SEC to promulgate regulations" to define "reasonable impediment" and the rejection of that request by "R54's proponents." DI Opp. ¶ 69A (JA-DI_01988); SC FOF ¶ 44 (H.3003 became vehicle for Voter ID). Even if the "request" had been considered and rejected by the General Assembly, Ms. Andino's guidance defines "reasonable impediment." SC FOF ¶¶ 67-79; SC Opp. US FOF ¶ 13. Finally, Intervenors are wrong to suggest that Ms. Andino cannot "interpret" R54. As Executive Director, Ms. Andino is authorized by statute to "perform such other duties relating to elections as may be assigned" by the SEC, S.C. Code § 7-3-20(c)(9), and implementing State election law is one of those duties, SC FOF ¶ 69. She cannot implement the law without interpreting it. *See Whitman v. Am. Trucking Assn's*, 531 U.S. 457, 475 (2001) ("[A] certain degree of discretion, and thus of lawmaking, inheres in most executive or judicial action." (quoting *Mistretta v. United States*, 488 U.S. 361, 417 (1989) (Scalia, J., dissenting))). If a State court later were to disagree, any change ordered to the interpretation of R54 would itself require preclearance. *See Branch v. Smith*, 538 U.S. 254, 262 (2003) (VRA § 5 "requires preclearance of *all* voting changes, and there is no dispute that this includes voting changes mandated by order of a state court." (citations omitted)).

70-74. Consistent with the S.C. Attorney General's opinions, Ms. Andino has developed R54 guidance and plans for implementing RI/RO exception. SC Opp. US FOF¶¶ 13, 49-50; SC FOF ¶¶ 71-71, 74. Unable to oppose the State's implementation with facts, the United States cites *Bowen* and attempts to dismiss the S.C. Attorney General's opinions as mere litigating positions. US Opp. ¶ 70B. But that attempt fails because *Bowen* is about retroactive rulemaking through litigation. *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208-09 (1988). It is inapposite in the context of this preclearance action, the very purpose of which is to consider R54 *before* it goes into effect. This case *is* the opportunity for the SEC and S.C. Attorney General to clarify its interpretation of R54 before any voter, poll manager, or CBRE relies upon it. *See* 42 U.S.C. § 1973c. And Intervenors fare no better when they join the United States in insisting that only a State court may "interpret" R54. DI Opp. ¶¶ 70-74A. Executive officials like Ms. Andino must interpret the laws they execute, otherwise no law could ever be executed without first having its meaning declared by a court. *Supra* ¶ 69.

75-79. The notary requirement does not undermine the RI/RO exception or materially burden voters. There is no dispute that Ms. Andino has already undertaken efforts to identify notaries—nearly 2,000 notaries who have previously served as poll managers at the State's 2,100 polling places. And even if there were a precinct without a notary, poll managers would be permitted to witness the RI/RO affidavits, a procedure that will substantially comply with R54 and State law. This does not resolve a conflict "with the VRA." DI Opp. ¶ 76. It resolves a conflict between R54 and State law requiring that affidavits be notarized in light of the fundamental nature of the right to vote

under the State constitution. SC FOF ¶ 76; *see also Lovelle v. Thornton*, 234 S.C. 21, 25, 106 S.E.2d 531, 534 (S.C. 1959) ("We should not, because of a merely technical failure to comply with a directory provision of the statute, deny to the successful candidate the fruits of his victory, or to the voters the officer of their choice."). And Ms. Andino's resolution "errs on the side of the voter," consistent with the State constitution. Finally, Intervenors attempt to undermine the RI/RO exception by arguing that the Notary Handbook provides an "exhaustive" and limited list of acceptable forms of ID. DI Opp. ¶ 79. But that is not what the handbook says. The handbook provides only that acceptable forms of identification "include" the ones listed. And a handbook identifying what forms of ID are *included* on the list is no basis for Intervenors' argument that all other forms of ID are *excluded*.

5. The SEC Will Effectively Educate Voters, Poll Managers, And County Boards.

85-94. Pursuant to Section 7 of R54, the SEC, through Ms. Andino and her staff, developed a voter education plan, just as Ms. Andino has done in the past when the State has made other changes to its voting procedures. SC FOF ¶¶ 61, 85-94. The plan includes varied education initiatives and outreach, including specific outreach to locations and entities where people with low SES reside or visit. SC Opp. US FOF ¶ 85. The United States attempts to distract from the content of the plan by arguing that no one but the SEC Commissioners themselves can implement R54, as though the statute requires the Commissioners to hold hearings on poster design. US Opp. ¶ 85. But that is a requirement of neither R54 nor other State law, which permits the SEC to authorize Ms.

Andino to implement laws such as R54. SC FOF ¶ 69. Defendants also complain that the language used in the materials could be improved upon, US Opp. ¶¶ 87, 91-92, and also that Ms. Andino should not be permitted to improve her materials following questioning from the Court and counsel during trial, *id.* ¶¶ 89, 93. But the law does not put the State in that box. It is appropriate to base preclearance upon representations that the change will be implemented in a manner consistent with representations to the Court during preclearance. *See Florida*, 2012 WL 3538298, at *37 (preclearing change to Florida's provisional ballot procedures based in part on the condition that Florida implement those procedures in the manner represented to the court during proceedings); *see also Allen v. State Bd. of Elections*, 393 U.S. 544, 555-57 (1969) (private party may sue to enjoin implementation of unapproved new enactments).

101-103. The phrase "valid and current"—which was supported at one time by a unanimous Senate, SC FOF ¶¶ 30, 32—does not introduce unfettered discretion into the voting process. That is the point of the State's proposed findings in these paragraphs. Ms. Andino testified that "valid" means an ID issued by the entity on the R54 list. SC FOF ¶ 101. And Defendants do not and cannot dispute that CBRE officials and poll managers already apply laws that require voters to show "valid" or "valid and current" identification. There is no evidence in the record that those current requirements have resulted in confusion among election officials or discrimination against voters.

B. The Small Difference In Current Possession of R54 ID Is Reduced To Zero By The Ameliorative Provisions.

1. South Carolina's Matching Analysis Is Reliable, And The United States' Is Not.

105. Dr. Hood has calculated the current difference in ID possession rates taking into account the availability of no-excuse absentee voting by mail to any voter over age 65 and presented the results of his analysis to the Court. Stewart did not. This calculation does not, as the United States argues, "compound" the retrogressive effect of the law because the RI/RO exception is available to the remaining (smaller) number of voters affected by the photo ID requirement.

106-109. The defects in Stewart's methodology and data are clear from the evidence: Under the guise of addressing the "dead wood" problem, Stewart actually excluded tens of thousands of South Carolina registered voters who had in fact voted in the past two elections. He did not have to do this. Stewart analyzed which voters had voted recently for his much expanded discussion of his method in his rebuttal declaration. Having done that, he could have at the very least included voters whose licenses had been returned from out of state but who he identified as having voted. But he did not even do that, much less account for all still registered voters as Hood did. Even worse, Stewart excluded from his analysis *licenses* that the DMV database still identifies as being in the possession of the voter. These licenses belonged overwhelmingly to black voters. SC FOF ¶ 112. The United States attempts to distract from these flaws in Stewart's method and data by accusing Dr. Hood of failing to address the "dead wood" problem. US Opp. ¶ 108B. Dr. Hood, however, made the considered judgment that to assess the difference

in possession rates fairly, he could not simply exclude an entire category of registered voters and certainly could not exclude licenses that the DMV itself still has recorded as active. SC FOF ¶ 111. Dr. Hood's matching analysis is sound—and it is the only fair analysis presented to the Court.[3]

112-113. Contrary to the United States assertion that "no record evidence" shows that Stewart used the wrong data table in his analysis, US Opp. ¶ 113, the very materials cited by the United States and purportedly relied upon by Stewart, US Opp. ¶ 112, demonstrate Stewart's fundamental error. Those materials show that the "License" table is the "[e]xisting Phoenix Database table *used to identify active licenses*"; that the "Key Fields" for are "License_Status" and "Expiration_Date"; and that the value of License_Status can be "active" or "surrendered." US Ex. 290 (JA-US_000602) (emphasis added). It is data from this "License" table that Dr. Hood used and that he confirmed in an interview with DMV indicates which licenses are active. SC FOF ¶¶ 108-09. His analysis reflects that understanding and investigation. *Id.* Stewart on the other hand ignored this table, failed to interview anyone at DMV (or to request that the United States depose someone about the data), and chose instead on his own to look at a different table ("License_Receive") that is described as being used only to "track when a license is surrendered." US Ex. 290 (JA-US_000602). The very categories of "reasons" why a license appears on the table indicate that the table does not include licenses that in fact

[3] To be clear, Dr. Hood did not say that he should have purged the voter roll of active voters whose licenses were returned from out of state. He testified that he should have excluded and did exclude those *licenses*, leaving the voters in the analysis. SC Opp. US FOF ¶ 31.

remain surrendered (*e.g.*, "reinstatement met").[4] Other than by citing a single letter from the DMV's director that does not provide any detail about how the DMV database works, US Opp. ¶ 109, the United States nowhere provides any factually supported basis for Stewart's counter-factual assumption that licenses identified as "active" (*i.e.*, not surrendered) on the table that tracks license status are instead actually surrendered.

115. The United States selectively quotes Ms. Andino's response to DMV Director Shwedo and ignores her subsequent, more complete discussion of the issue in the letter cited by the State. Ms. Andino explained that she would not exclude from her matching analysis voters whose licenses had been returned from out of state (and could not purge them from the voter roll) because the DMV itself said that "these voters could have simply forgotten to renew their driver's license or had their driver's license suspended, neither of which disqualify them from voting"; it is "possible that some of these voters may have an improper license in another state or be in the process of moving to or from S.C., which again does not disqualify them from voting"; and R54 does not exempt voters who "*may* have moved to another state" from the notification requirement. PX-96 (JA-SC_0722); SC FOF ¶ 115. Thus, the SEC did indeed reject the DMV director's position and his suggestion to exclude wholesale any voter whose license was

[4] The United States suggests that the Court should assume that Stewart's unverified assumptions are correct because there is "[n]o record evidence" that any licenses on the table remain in the possession of the customer. US Opp. ¶ 112B. That has it exactly backwards. It is the United States that is asking the Court to rely upon Stewart's analysis, which is based upon his manipulation of data on a data table that the United States to this day cannot explain and concedes there is "no evidence" with which to explain it. As discussed, the License table relied upon by Hood does in fact indicate which licenses are "active" and therefore in the possession of the customer. Unlike Stewart, Hood confirmed this himself.

returned from out of state. The different letter cited by the United States in opposition does not suggest otherwise.

2. R54's Mitigating Provisions Will Reduce The Small Difference to Zero.

117. The availability of free photo VR cards and free DMV-issued IDs, together with the RI/RO exception, ensure that any voter currently without R54 ID will either be able to obtain one or cast an effective ballot without one. There is nothing "misleading" about that conclusion, which is fully supported by the evidence of the State's planned implementation of R54. *See* SC FOF ¶¶ 57-103; SC Opp. US FOF ¶ 13 (RI exception).

118. The Court should also consider Dr. Hood's Georgia study. Dr. Hood has never asked this Court simply to extrapolate from that study to this case. But the conclusions of that study—which was peer-reviewed and uses methods generally accepted in political science, SC Opp. US FOF ¶¶ 34-35—indicate that the Court should approach Defendants' socio-economic arguments and data cautiously. Socio-economic factors do not necessarily translate into turnout gaps, SC FOF ¶ 118, and the evidence of mitigating provisions in this case demonstrate that they will not. *See also* SC Opp. DI ¶ 30.

3. Individual Intervenors Will Be Able To Cast An Effective Ballot.

119-120. Nothing Intervenors say changes the fact that they will be able to vote effectively. R54 includes two ways for voters to obtain free photo ID and the RI/RO exception, which was intended to address the very "indirect financial costs," "institutional costs," and "transportation costs" that Defendants assert will burden voters

like the Individual Intervenors. SC FOF ¶¶ 57-84. Thus, the State does not "ignore" these potential burdens, DI Opp. ¶ 120, but instead addresses them directly in R54. That makes R54 nothing like the law in *Texas* to which Intervenors analogize. DI Opp. ¶ 119.

REPLY IN SUPPORT OF CONCLUSIONS OF LAW

124-25. Though VRA § 5 "authorizes federal intrusion into sensitive areas of state and local policymaking," *Lopez v. Monterey Cnty.*, 525 U.S. 266, 282 (1999), it does not eviscerate South Carolina's constitutional authority to prescribe "[t]he Times, Places and Manner of holding Elections," U.S. Const. art. I, § 4, cl. 1, including the "prevention of fraud and corrupt practices." *Smiley v. Holm*, 285 U.S. 355, 366 (1932). Nor does VRA § 5 change the "indisputabl[e]" fact that South Carolina "has a compelling interest in preserving the integrity of its election process." *Eu v. San Francisco Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 231 (1989); *accord Texas*, 2012 WL 3743676, at *12; *Florida*, 2012 WL 3538298, at *45; *Smiley*, 285 at 366. South Carolina does not merely assert these interests in the abstract. Rather, the State has proven that R54's purpose is to detect and deter voter fraud and enhance public confidence in the electoral process, and that the law will protect *all* voters' "effective exercise of the electoral franchise." *Beer v. United States*, 425 U.S. 130, 141 (1976). R54 is therefore entitled to preclearance.

I. R54 Was Enacted For Legitimate, Non-Discriminatory Purposes.

126-127. Defendants do not dispute that the discriminatory purpose standard under VRA § 5 requires preclearance unless the General Assembly enacted R54 "at least in part 'because of,' not merely 'in spite of,'" any alleged adverse effects. *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979); *accord New York v. United States*, 874 F.

Supp. 394, 399 (D.D.C. 1994) (three-judge court); *see also* S. Rep. No. 109-295, at 18 (2006); H.R. Rep. No. 109-478, at 68 (2006). Nor do Defendants dispute the burden-shifting scheme set forth in *New York*, 874 F. Supp. at 400. South Carolina has presented ample evidence to meet its *prima facie* burden, SC FOF ¶¶ 9-56; SC COL ¶¶ 126-37, refute Defendants' contrary allegations, SC Opp. US FOF ¶¶ 90-131; SC Opp. DI FOF ¶¶ 35-59, and ultimately prove that R54 was "*actually* motivated," *New York*, 874 F. Supp. at 399, by legitimate, nondiscriminatory purposes, *supra* ¶¶ 9-56; *infra* ¶¶ 126-37.

128-34. R54 was enacted for a legitimate purpose, and Defendants cannot prove otherwise. Defendants do not dispute that *Crawford*, *Texas*, and *Florida* confirm that South Carolina has a legitimate interest in "counting only the votes of eligible voters" and that a discriminatory purpose cannot be inferred from South Carolina's decision to pursue that interest. *See Crawford*, 553 U.S. at 194-96; *Florida*, 2012 WL 3538298, at *45; *Texas*, 2012 WL 3743676, at *12. R54 was enacted to prevent voter fraud, which dilutes legitimate votes and erodes public confidence. *See, e.g., Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006).[5] The law does not "materially increase[] the burden on minority voters," *Florida*, 2012 WL 3538298, at *45, or create "the possibility that qualified voters might be turned away from the polls," *Purcell*, 549 U.S. at 4. *See* SC FOF ¶¶ 57-103, 117-23; SC COL ¶¶ 152-60; SC Opp. US FOF ¶¶ 19, 38-89; SC Opp. US COL ¶¶ 8-17; SC Opp.

[5] R54, like the VRA, is aimed at preventing the dilution of *all* legitimate votes. *See* H.R. Rep. No. 89-439 (1965), *reprinted in* 1965 U.S.C.C.A.N. 2437, 2478-79 (emphasis added) ("*Every voter of every race or color shall be assured that* not only will he be guaranteed an equal opportunity . . . to vote without personal fear, knowing that *his ballot will* be fairly counted and tabulated, and *not nullified by illegally cast ballots* or those cast by persons whose vote and freedom of choice have been purchased by another.").

DI FOF ¶¶ 1-34; SC Opp. DI COL ¶¶ 60-66. Any confusion regarding R54 is the result of Intervenors' own disinformation campaign, which the SEC's education initiatives will remedy. *See* SC Opp. DI FOF ¶ 8. And it is nonsense to suggest that placing a photograph on voter registration cards *increases* the opportunity for fraud.

135-37. R54 was enacted for a non-discriminatory purpose, and Defendants cannot prove otherwise. Statements from legislators and staff regarding their purpose when drafting and enacting a law are highly probative, especially when they willfully have opened themselves to intrusive discovery and hours of depositions, redepositions, and cross-examination. *See, e.g., Vill. of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 268 (1977). Those statements and the legislative record clearly demonstrate that R54 was enacted to prevent fraud and enhance public confidence. In any event, such direct statements cannot be refuted by the baseless speculation of legislative opponents.

R54 applies to *all* South Carolina voters alike. Under Defendants' own theory (which the state disputes), the law will affect many more white than minority voters, which precludes any "inference that the statute is but a pretext for preferring [white voters] over [minority voters]." *Feeney*, 442 U.S. at 275.[6] R54's mitigating provisions are intended to (and will) ensure *all* voters will be able to effectively exercise the electoral franchise, *see, e.g.*, SC FOF ¶¶ 27-29, 57-74, and the State's policy decision to

[6] Defendants quote from *Florida*'s "effects" analysis and its discussion of a different "purpose" argument. The *Florida* court did not "reject" *Feeney*'s common sense holding that a law allegedly affecting more individuals in the purportedly *favored* class is an unlikely vehicle of purposeful discrimination. *See* 442 U.S. at 275.

adopt these provisions over other proposals is no ground for inferring discriminatory purpose. Among these mitigating provisions, R54 incorporates and expands on key elements of Indiana's law (free DMV ID; indigent exception; religious objection) and Georgia's (photo voter registration card; aggressive education). *See* SC COL ¶¶ 152-60. The reasonable impediment exception is intentionally open-ended, undisputed, and will be administered in a straight-forward manner that will err on the side of the voter. SC FOF ¶¶ 67-84.

138. Defendants have failed to rebut the State's *prima facie* evidence that R54 was *not* enacted for a discriminatory purpose. Defendants' theory that legislators "knew" R54 would have a discriminatory impact based on data on DMV ID possession rates would make sense only if R54 strictly limited the list of accepted IDs to DMV IDs, which it does not. Nor is there any evidence that R54 was intended to lower the "effective voting percentage" of any race.

II. R54 Will Have No Discriminatory Effect.

139-146. The State has proven, and Defendants cannot refute, that R54 will not "have the effect of denying or abridging the right to vote on account of race or color, or [membership in a language minority group]." 42 U.S.C. § 1973c(a). Defendants incorrectly treat data from April 2012, before implementation of R54's key mitigating provisions, as conclusive proof of the law's future effect. *But see Florida*, 2012 WL 3538298, at *9 (holding that courts "must also take account of any off-setting, or 'ameliorative,' adjustments"). Even that data shows that over 95% of South Carolina voters possess a currently available ID, and there is only a slight difference between

minority and white ID possession rates. A study of similar conditions in Georgia showed that a pre-implementation ID gap did not translate into a post-implementation turnout gap. Indeed, R54 ensures that no voter will be prevented from effectively exercising the electoral franchise because it makes acceptable ID available "without cost or major inconvenience," *Texas*, 2012 WL 3743676, at *13, and any voter who cannot obtain ID may cast a presumptively valid RI/RO provisional ballot, *cf. Florida*, 2012 WL 3538298, at *35. Thus, the law fits squarely within the permissible bounds recently set forth by other three-judge courts, and the law's catch-all reasonable impediment provision goes far beyond the permissible Georgia and Indiana voter ID laws.

147-151. R54 will not disproportionately affect minority voters. All eligible voters who could cast a ballot under the benchmark law can cast a ballot under R54. *See* SC FOF ¶¶ 57-123; SC Opp. US FOF ¶¶ 7-89; SC Opp. US COL ¶¶ 4-7; SC Opp. DI FOF ¶¶ 1-34; SC Opp. DI COL ¶¶ 60-66. Pre-implementation possession rates, which do not account for the most easily obtained form of ID or the SEC's education and outreach efforts, cannot constitute the proper metric for determining disparate effect under VRA § 5. *See Florida*, 2012 WL 3538298, at *9. Evaluating a law based on only some of its parts would pervert the preclearance process and "raise substantial constitutional concerns." *Shelby Cnty., Ala. v. Holder*, 679 F.3d 848, 884 (D.C. Cir. 2012); *see also Nw. Austin Mun. Util. Dist. No. 1 v. Holder*, 557 U.S. 193, 201 (2009). Dr. Hood's analysis shows there is currently only a slight ID possession gap between white and minority voters, and a similar pre-implementation ID gap in Georgia did not translate into a disparate racial impact. SC FOF ¶¶ 104-18.

Act R54 provides two forms of free ID. A voter with the documentation required for a DMV ID, can now obtain a non-driver's license ID card free of charge. SC FOF ¶¶ 64-65. And upon preclearance, a voter will be able to obtain a photo voter registration card by (1) presenting her non-photo voter registration card, (2) providing a permissible HAVA ID, or (3) reciting her date of birth and the last four digits of her social security number. SC FOF ¶ 59. Like the Georgia law granted preclearance, and unlike the Texas law denied preclearance, the documentation needed for this photo ID costs nothing. *See Texas*, 2012 WL 3743676, at *16. And under the benchmark law, if a voter lacks a DMV ID, she *must* have a voter registration card to vote. SC FOF ¶ 1. Thus, by definition, anyone who can vote under the benchmark law can obtain a photo ID at no cost under R54.

Act R54 ID can be obtained without major inconvenience. Every county in South Carolina has at least one DMV location and at least one voter registration office. SC FOF ¶¶ 58, 65. Thus, like Georgia and Indiana, and unlike Texas, free ID is conveniently available in every South Carolina every county. *See Texas*, 2012 WL 3743676, at *16. Further, the SEC's voter education and outreach efforts—including a photo ID mobile unit—will ensure voters are aware of R54's requirements and can obtain acceptable ID without inconvenience. And the IDs are even available to voters who need them even on Election Day. SC FOF ¶ 61. For these reasons, Defendants have failed to identify a single voter will not be able to obtain acceptable ID once R54 is precleared. SC FOF ¶¶ 119-23.

Any voter who remains incapable of obtaining acceptable ID can still effectively exercise the electoral franchise under R54. If a voter has a religious objection or faces any obstacle to obtaining ID, she can execute an affidavit to that effect and cast a provisional ballot that *must* be counted by the county board unless it has grounds to believe the affidavit is false. SC FOF ¶¶ 66-74. Ms. Andino will ensure counties will apply this exception consistently and broadly, to "err on the side of the voter." *Id.* Thus, R54 accounts for all South Carolina voters and leaves no one without the ability to cast an effective ballot.

152-160. R54 will not impose a material burden that is likely to lead reasonable minority voters not to exercise the electoral franchise. Because obtaining acceptable ID is both free and convenient, *see supra* ¶¶ 147-51, and nearly all South Carolina voters already possess acceptable ID, SC FOF ¶ 104, R54's ID requirement imposes no material burden on South Carolina voters. *See Texas*, 2012 WL 3743676, at *32 (holding that preclearance is warranted when a voter ID law "ensure[s] (1) that all prospective voters can easily obtain free photo ID, and (2) that any underlying documents required to obtain that ID are truly free of charge"). Generalized, statewide socio-economic data that are not individualized to voters identified as currently lacking acceptable ID are unhelpful in determining whether minority voters would find it less convenient to obtain free ID.

In any event, South Carolina's law goes further than the *Texas* holding, and further than Georgia and Indiana's voter ID laws. Even if obtaining free ID from the DMV or voter registration office would constitute a burden for an individual voter, that voter necessarily is eligible to cast a reasonable impediment ballot that must be counted. The

reasonable impediment exception will be available to all voters for the November 2012 election. SC FOF ¶¶ 71-72. Notaries will not be allowed to charge a fee for reasonable impediment affidavits. SC FOF ¶ 78. If a notary is not available, and conflicting legal requirements must be reconciled, poll managers will witness reasonable impediment affidavits to ensure all voters can cast an effective ballot. SC FOF ¶ 76. Such affidavits would constitute substantial compliance with R54. SC FOF ¶ 77. And a voter who arrives at the polls without ID will not reasonably choose to forego voting merely because he has to cast a provisional ballot. *See Florida*, 2012 WL 3538298, at *34 (providing information on a provisional ballot, waiting in a different line, waiting for review and signature, and the irritation of having to vote provisionally will not "deter a reasonable [voter] from voting.").

161-164. Because R54 provides free and convenient forms of photo ID in every county and a catch-all reasonable impediment exception, any person who does not vote in-person following R54's implementation does so on account of a personal choice not to obtain ID or vote a provisional ballot—not on account of race. *See Ortiz v. City of Phila. Office of City Comm'rs Voter Registration Div.*, 28 F.3d 306 (3d Cir. 1994). What sets this case apart from *Texas* is that R54 provides free and convenient avenues for obtaining ID, as well as a provisional ballot safety net. A voter's choice not to utilize these avenues for complying with the law has nothing to do with race.[7]

[7] The Ninth Circuit decisions in *Gonzalez v. Arizona*, 677 F.3d 383 (9th Cir. 2012) (en banc) and *Farrakhan v. Gregoire*, 623 F.3d 990, 992 (9th Cir. 2010) (en banc) support this conclusion. And the United States is wrong to suggest that those cases were not interpreting VRA § 2's "on account of race" language. *See Gonzalez*, 677 F.3d at 405

III. Defendants' Arguments Fail To Address The Grave Constitutional Concerns Presented By Denial Of Preclearance.

165-69. The "serious constitutional questions" raised by VRA § 5 "are particularly acute in the voter ID context" because "states not covered by section 5 have successfully implemented voter ID laws." *Texas*, 2012 WL 3743676, at *5. At bottom, the United States and Intervenors seek to prevent South Carolina from implementing a duly enacted law with the same purposes and key mitigating provisions—plus *more*—as Indiana and Georgia's constitutionally approved and (in the case of Georgia) precleared voter ID laws. Worse yet, this federal and private interest group intrusion into core State prerogatives is premised on the view that a majority of South Carolina's legislators are racist, that the Executive Director of the State Election Commission is powerless, that the State Budget and Control Board violated state law by approving a routine funding request, and that thousands of local election officials are so bent on discrimination that they cannot be trusted to implement a law aimed at preventing voter fraud while preserving every eligible voter's electoral franchise. These assertions are wholly unsupported. R54 clearly satisfies the "difficult burden" of VRA § 5, *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 480 (1997), as articulated in the *Florida* and *Texas* cases. Any contrary application of the law would violate the "fundamental principle" that "all the States enjoy 'equal sovereignty.'" *Nw. Austin*, 557 U.S. at 203 (quoting *United States*

(holding that racial disparities in a State's criminal justice system do not prove that a felon disenfranchisement law "results in a denial or abridgement of the right . . . to vote *on account of race*" (emphasis added) (quoting 42 U.S.C. § 1973(a))).

v. Louisiana, 363 U.S. 1, 16 (1960)), and call VRA § 5's constitutionality into grave doubt. R54 should therefore be precleared.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the State proposed findings of facts and conclusions of law, the Court should preclear R54 under VRA § 5, as amended, 42 U.S.C. § 1973c.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 19, 2012, I filed the foregoing brief with the Court's electronic filing system, which will provide notice to all counsel of record.

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