IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STATE OF SOUTH CAROLINA, *Plaintiff,* v. UNITED STATES OF AMERICA, and ERIC HIMPTON HOLDER, JR., in his official capacity as Attorney General of the United States, *Defendants,* and JAMES DUBOSE, *et al.*, *Defendant-Intervenors.*	Civil Action No. 1:12-CV-203-CKK-BMK-JDB (Three Judge Court)

UNITED STATES' RESPONSES TO SOUTH CAROLINA'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

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Glossary of Abbreviations

Terms:

§ 4……...Section 4 of Act R54

§ 5……...Section 5 of Act R54

§ 7……...Section 7 of Act R54

§ 8……...Section 8 of Act R54

§ 11…….Section 11 of Act R54

CBRE……County Board of Registration and Elections; County Election Commission; County Board of Canvassers

CL……...Conclusion(s) of Law

DI……....Defendant Intervernors

DMV…….. South Carolina Department of Motor Vehicles

DMV ID…….South Carolina Department of Motor Vehicles-issued Identification

FF……...Finding(s) of Fact

FY…….. Fiscal Year

H3418…….House Bill 3418

H3003…….House Bill 3003

HAVA……Help America Vote Act of 2002

ID……... Identification or Identification Card

JA……...Joint Appendix

LBC……Legislative Black Caucus

NH……..New Hampshire

PVID…….. Photo Voter Identification

R54…….2011 SC Act 27, H3003, 2011 Leg., 119th Sess. (SC 2011)

Rep(s)…….Representative(s)

RI……....Reasonable Impediment

RO……..Religious Objection

S334……... Senate Bill 334

SC……...South Carolina

SCAG…….South Carolina Attorney General

SC GA……South Carolina General Assembly

SEC PVRC….Photo voter registration card issued by the South Carolina State Election Commission pursuant to Section 4 of Act R54

SEC…… South Carolina State Election Commission

Sen(s)……. Senator(s); Senate

SJ……Senate Journal

US……...United States

VA……..Virginia

VRA……....Voting Rights Act

Witnesses:

AC……..Representative Alan Clemmons

BH……..Senator Bradley Hutto

CC…….. Senator George "Chip" Campsen

CW…….Chris Whitmire
Director of Public Information and Training, South Carolina State Election Commission

CS……...Dr. Charles Stewart
United States' expert

GCH……... Representative Gilda Cobb-Hunter

GM……. Senator Gerald Malloy

HA……..Heather Anderson
Staff Attorney, South Carolina Senate Judiciary Committee

JCR……...John C. Ruoff
Consultant to Defendant-Intervenors

JS……....Senator John Scott

KS……...Kevin Shwedo
Executive Director, South Carolina Department of Motor Vehicles

LGM……...Lt. Gov. Glenn McConnell

LM……..Senator Larry Martin

MA……. Marci Andino
Executive Director, South Carolina State Election Commission

MB……. Marilyn Bowers
Commissioner, South Carolina State Election Commission

MVH……... M.V. Hood
South Carolina's expert witness

OB…….. Orville Vernon Burton
Defendant-Intervenors' expert witness

RH…….Speaker Robert "Bobby" Harrell

SB……...Scott Buchanan
South Carolina's expert witness

TA…….. Dr. Ted Arrington
United States' expert witness

TP……...Timothy Pearson
Chief of Staff to Governor Haley

RESPONSES TO SOUTH CAROLINA'S PROPOSED FINDINGS OF FACT

I. SOUTH CAROLINA'S CURRENT AND PROPOSED VOTER IDENTIFICATION REQUIREMENTS

1. Disputed. SC law did not permit use of photo ID as a form of voter identification in 1976. *See* S.C. Code Ann. § 7-13-710 (1976). The option for SC voters to present a driver's license or other ID issued by the DMV (then called the Department of Highways and Public Transportation) was first added in 1984. *See* Act 510 of 1984, available at http://www.scstatehouse.gov/sess105_1983-1984/bills/3083.htm (last viewed Sept. 14, 2012). The current version of SC's ID requirement, allowing voters to vote a regular ballot at the polls by showing a non-photo voter registration card, a SC driver's license, or a SC DMV ID, has been in place since 1988. ECF No. 1 (Compl. ¶ 5).

2. Disputed. **A.** "[T]o confirm the person presenting himself to vote is the elector on the poll list" is only the stated purpose of the specific ID requirement contained in § 5(A), which requires a voter to possess one of five PVIDs in order to cast a regular ballot. JA-US 002715-17 (R54 § 5(E)). It is not the stated purpose of the Act itself. *Id*. **B**. "[T]o help detect and deter voter fraud and to enhance public confidence in the electoral system" is only the purpose as stated by certain proponents of the bill. *See* US FF 91-96. None of the actual examples of voter fraud mentioned during the legislative process, including vote buying and mail-in absentee ballot fraud, are addressed by R54. 8/27/12 Tr. at 245:25-247:6 (AC); US FF 96-97; *see* US Ex. 25, JA 000275-77 (2/24/11 SJ). In fact, the SEC's current Executive Director, Marci Andino, testified that she was not aware of any type of fraud, impersonation fraud or otherwise, that would be prevented by a photo voter ID law like R54. 8/28/12 Tr. at 269:14-18 (MA). Further, photo ID proponents in the General Assembly never sought out any data on electoral confidence in the State and SC presented no data at trial regarding a low level of voter confidence in the electoral

system. 8/28/12 Tr. at 269:24-270:15 (MA); US FF 98-99. Indeed, evidence of high and undiminished levels of voter confidence, generated by the SEC, are uncontested. 8/28/12 Tr. at 270:3-15 (MA). **C**. A definitive statement of the intent of every individual member of the SC GA cannot be made solely by referencing the testimony of Act proponents and other staff members. *See Hale Cnty. v. United States*, 496 F. Supp. 1206, 1217 (D.D.C. 1980) (three judge court) (in a judicial preclearance case, discounting as a factual matter the testimony of certain legislators because "both [legislators] are 'interested witnesses' in that they were both proponents of the questioned change and continued to serve as County officials after its enactment," and because "a legislator's subsequent statements as to an enactment's purpose are not the sole source to be examined in an inquiry for discriminatory purpose."). Indeed, the applicable legal standard does not require proof that every legislator had a discriminatory motive. *Cf. United States v. Brown*, 561 F.3d 420, 433 (5th Cir. 2009) ("[R]acial discrimination need only be one purpose, and not even a primary purpose, of an official act" in order to violate the VRA). Regardless, the key House proponent of R54 endorsed racist comments concerning photo ID requirements made during the legislative process. US Ex. 212, JA-US 001992 (AC email); US FF 121. **D**. During the legislative process, African American legislators voiced concerns that a photo ID requirement would have a chilling effect on minority voting. 8/28/12 Tr. at 185:24-187:1 (LGM); *see* US FF 101-110. Bill opponents further asserted that, in contrast to the purported justifications, the historically high African American turnout in the 2008 general election, which outpaced white turnout for the first time in SC history, was the true motivating force behind the legislation. US Ex. 167, JA 005234-42 (1/26/11 House Tr.) (Statement of Rep. Hart); *id.* at JA 005258 (Statement of Rep. Mack); US FF 91. African American legislators from

both the House and the Senate testified at trial that R54 was intended to depress turnout among minority voters. 8/30/12 Tr. at 270:15-272:13 (JS); *id*. at 290:18-291:4 (GCH).

3. Not disputed.

4. Disputed. Section 11 of R54 makes clear that the implementation of § 4 "is contingent upon the SEC's receipt of funds necessary to implement these provisions." JA-US 002719 (R54 § 11); *see* US FF 89.

5-7. Not disputed.

8. Disputed. The SEC may charge a fee for the list of voters lacking a DMV-issued ID. JA-US 002718-19 (R54 § 8). The list must also only be current "as of December 1, 2011[.]" *Id.* at 002718.

II. ORIGINS OF INTEREST IN VOTER ID REQUIREMENTS

9. Disputed. **A**. SC Ex. 138 (Voter ID Timeline) is a demonstrative exhibit created by the plaintiff, and does not represent the entire history of ID laws or voter reform initiatives. **B.** Not disputed that part of the quoted passage appears in the report of the Democratic Caucus Special Committee on Election Reform, but disputed as incomplete and misleading to the extent that this report is proffered as support for R54. The cited report includes no affirmative support for photo ID requirements. Indeed, the report warns that "[v]oter identification requirements must not be abused," and states that "Federal, state and local prosecutorial agencies must ensure that election officials and poll workers apply voter identification requirements equally in conformance with the VRA. . . . The identification required must be readily available to all voters – driver's licenses and passports may not be the only two forms of photo identification that are accepted." JA-SC 0315 (Democratic Caucus Special Committee on Election Reform, *Revitalizing Our Nation's Election System* (2001)). The report contains no information regarding voter

impersonation fraud or voter confidence in SC elections. **C.** SC's citation in footnote 3, to statutes enacted by Michigan and Louisiana is misleading and irrelevant. The State fails to mention that the U.S. Attorney General interposed an objection to a predecessor Louisiana statute in 1994 and denied Louisiana's request for reconsideration in 1995.[1] The citation is also misleading to the extent that it is intended to suggest that either of those states' statutes is comparable to R54. *Compare* 1997 La. Sess. Law Serv. Act No. 779 (H.B. No. 635) (West) and 1996 Mich. Legis. Serv. P.A. No. 583 (H.B. No. 5420) (West) *with* JA-US 002713-19 (R54).

10. Disputed. The Help America Vote Act of 2002 ("HAVA"), 116 Stat. 1666, rejects photo ID as the sole method to establish a voter's identity. HAVA requires a subset of first-time voters, specifically those who register by mail and whose identities were not established from information submitted at that time, to provide identifying documentation. *See* 42 U.S.C. § 15483(b). But this documentation can consist either of a photo ID or a variety of non-photo documents, such as a utility bill, a bank statement, a government check, or a paycheck. *Id*. at § 15483(b)(2)(A). Thus, enactment of HAVA reflects a Congressional determination that photo ID-only requirements are not necessary to determine a voter's identity.

11. Disputed. Although Sen. Campsen cited to the Carter-Baker report in his testimony, 8/27/12 Tr. at 35:9-17 (CC), he "did not read the entire report of the Carter-Baker Commission," *id* at 35:12-13, "which view[s] the other concerns about IDs – that they could disenfranchise eligible voters, have an adverse effect on minorities, or be used to monitor behavior – as serious and legitimate." JA-SC 0214, ¶ 1 (Carter-Baker Report); *see* 8/27/12 Tr. at 159:2-161:4 (CC). Further, the Report confirmed that the introduction of new voter ID requirements raised concerns

[1] *See* US DOJ, Civil Rights Division, Voting Section, Section 5 Objections: Louisiana, *at* http://www.justice.gov/crt/about/vot/sec_5/la_obj2.php (last visited Sept. 12, 2012).

that they may present a barrier to voting, particularly by traditionally marginalized groups such as the poor and minorities. JA-SC 0214, ¶ 2 (Carter-Baker Report). Concerned "that the different approaches to identification cards might prove to be a serious impediment to voting[,]" *id.* at JA-SC 0213, ¶ 4, the Commission made several recommendations that were not incorporated into R54 by the SC legislature, including: (a) acceptance of a driver's license *or other government-issued photo ID* for voting purpose;[2] (b) a four-year (9/05-1/10) phase-in period, during which time a voter without an ID could cast a provisional ballot counted on signature verification,[3] that does not require a notary;[4] (c) the use of *mobile offices* for voter registration and issuance of photo IDs;[5] and (d) further measures to prevent absentee ballot fraud, "the largest source of potential voter fraud," and voter registration fraud.[6] The Report does not include evidence of voter fraud or address voter confidence in SC. *See id.* at JA-SC 0188-300.

12. Disputed. **A**. VRA § 5 requires SC to prove that R54 "neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color" or membership in a language minority group. *See* 42 U.S.C. § 1973c(a); *see also Texas v. Holder*, No. 1:12-cv-128, 2012 WL 3743676, at *12 (D.D.C. Aug. 30, 2012) (three judge court) ("In *Crawford* itself, the Court noted that it was 'consider[ing] *only* the statute's broad application *to all Indiana voters*.' Here, not only do we face different questions – does [the Texas voter ID law] have discriminatory purpose or retrogressive effect – but we focus on the limited subset of

[2] *Id.* at JA-SC 0215, ¶ 2 (emphasis added).
[3] *Id.* at JA-SC 0214, ¶ 5.
[4] *See id* at JA-SC 0215, ¶ 1.
[5] *Id.* ¶ 2; *id.* at JA-SC 0228 ¶ 6; *compare id.* at JA-SC 0215, ¶ 2, *with* SC FF 61 (only one bus).
[6] JA-SC 0241-42, § 4.1 (Carter-Baker Report).

voters who are racial and language minorities.") (alteration and emphasis in original) (citation omitted). That Indiana's photo ID legislation withstood a facial challenge under the First and Fourteenth Amendments is not itself evidence that SC can meet its burdens in this case. **B**. In addition, R54 is not comparable to Indiana's photo ID law. R54 permits fewer types of photo ID for in-person voting than Indiana's law. *Compare* JA-US 002715 (R54 § 5), *with* Ind. Code Ann. § 3-5-2-40.5(a); US FF 113. Indiana permits the use of any federal or Indiana ID with an individual's name, photograph, and an expiration date after the most recent general election. Ind. Code Ann. § 3-5-2-40.5(a); US FF 113.

13. Disputed. **A**. R54 permits fewer forms of ID for in-person voting than Georgia's photo ID law. *Compare* JA-US 002715 (R54 § 5), *with* Ga. Code Ann. § 21-2-417(a); US FF 112, 114. Unlike R54, Georgia permits use of photo ID issued by *any* state or federal entity authorized to issue ID, employee photo IDs issued by any Georgia county, municipality, board, authority, or entity in the state, as well as tribal photo IDs. Also unlike R54, Georgia also does not bar the use of expired driver's licenses. Ga. Code Ann. § 21-2-417(a); US FF 112, 114. Unlike SC, Georgia offers early voting (during a 21-day early voting period). Also unlike SC, Georgia permits no-excuse absentee voting allowing those without ID to vote freely by mail. Ga. Code Ann. §§ 21-2-380(b), 21-2-385; 8/30/12 Tr. at 21:8-22:12 (MVH). **B**. Rep. Cobb-Hunter introduced legislation dealing with absentee ballot fraud, which would have required persons collecting and turning in absentee ballots (not the actual absentee voter) to provide a photo ID. 8/30/12 Tr. at 288:5-289:19 (GCH). When asked about this legislation, Rep. Cobb-Hunter confirmed that photo ID would have remedied an issue, "[o]nly as it relates to the absentee ballot, from the standpoint of the person who is picking up the absentee ballots, taking them in." *Id.* at 289:14-16.

14. Disputed. **A**. The precursor legislation to R54 was introduced in SC in 2009, after the historically high African American turnout in the 2008 election, which outpaced white turnout for the first time in SC history. *Supra* 2C; *see* US Ex. 49, JA 000488-89 (H3418 Bill History); US Ex. 102, JA 001026 (S334 Bill History). **B**. Sen. Campsen did not claim that he introduced S334 in response to specific expressions of "interest[]" in such legislation from "SC voters." Instead, he testified that his introduction of S334 was in response to court decisions. *See* 8/27/12 Tr. at 31:3-23 (CC).

15. Disputed. **A**. Seventy-eight percent of South Carolinians surveyed supported a requirement *to show government-issued photo ID* to vote, not specific "voter ID legislation." 8/30/12 Tr. at 174:1-20 (CS). Likewise, the national statistics also represented support for *showing a government-issued photo ID* to vote, not blanket support for "voter ID legislation." *See id.* at 173:12-25. **B**. The quotation reflects SC counsel's question to Charles Stewart, not the witness's trial testimony; the statement does, however, appear in substantially the same form in the cited document. SC Ex. 137, JA-SC 1200 (*Voter Opinions About Election Reform* article).

16. Disputed. **A**. When asked if anyone in SC has "*ever*" voted with someone else's voter registration card, Rep. Sellers responded, "yes." US Ex. 167, JA 005215 (1/26/11 House Tr.) (emphasis added). It is, however, ambiguous at best as to what Rep. Sellers response referred. Indeed, no specific instances of voter fraud were mentioned or requested. *See id.* During consideration of H3418 and H3003, no evidence was ever presented to the legislature regarding specific, credible instances of voter impersonation fraud in SC. 8/27/12 Tr. at 114:6-9, 115:10-116:14 (CC); 8/27/12 Tr. at 242:17-22 (AC) (referencing JA-US 001123 (AC Dep. 40:19-41:10)); JA-US 001447 (LM Dep. 40:9-40:17); JA-US 001563 (TP Dep. 78:22-79:12); US FF 92-94; *see also* US Ex. 121, JA 001693 (AC and political consultant discussing the need to find a

"boogey-man" for the photo ID law). **B**. SC's citation of testimony regarding absentee ballot fraud is irrelevant in that such fraud is not addressed by R54, nor is voter registration fraud. 8/27/12 Tr. at 245:25-247:6 (AC); US FF 96; *see* US FF 92-94; 8/28/12 Tr. at 269:14-23 (MA). **C**. SC's statement that Marilyn Bowers is aware of "confirmed" cases of vote buying and multiple voting is incorrect. Bowers testified that she referred an alleged incident of vote buying to a county solicitor, and that no charges were brought. 8/27/12 Tr. at 97:18-22 (MB). **D.** Dr. Buchanan's report is not a reliable source for the blanket assertions about the frequency of incidents of voter fraud. The sole source for Dr. Buchanan's opinions on this topic is reflected in Exhibit 12 of his report. 8/31/12 Tr. at 218:8-14 (SB). That exhibit was compiled by a researcher he never met, who was provided to him by another source, who relied solely on accounts listed on a website compiling news stories, which Dr. Buchanan made no attempt to verify. *Id*. at 217:25-218:23. **E.** None of the cases cited by SC in footnote 5 involved in-person voter fraud.

17. Disputed. *See supra* 9-16; US FF 90-131.

18. Disputed. US FF 111-14; *see supra* 13-14. The photo ID laws in effect in other states vary greatly in their structure, substance, and impact on minority voters. US FF 79-80, 101-09, 111-14; ECF No. 264 (NH preclearance); ECF No. 205 (VA preclearance).

III. LEGISLATIVE HISTORY OF ACT R54

A. H. 3418: African American Legislators Are Shut Out of the Process in the House and Senate Consideration Ends in a Filibuster

19 -20. Not disputed.

21. Disputed. **A**. Cloture severely limits debate and consideration of amendments on a bill. Cloture cuts off the ability to introduce further amendments, and limits debate on pending amendments to only six minutes. The time allotted to bill opponents once cloture is invoked

cannot exceed one hour. 8/28/12 Tr. at 68:1-5 (RH). **B**. As a result of their lopsided majority, photo ID proponents in the House "already dictate[d] what's going to happen, when it's going to happen," such that the cloture vote was viewed as an insult by members of the Legislative Black Caucus who were cut off from advocating for their constituents. 8/30/12 Tr. at 283:18-284:22 (GCH). This led to the walkout by the LBC. *Id*. **C**. Numerous ameliorative amendments to HB3418 proposed by members of the LBC were rejected without full consideration. The ameliorative amendments offered on the floor by LBC members (*see* US FF 116) – were repeatedly tabled. Tabling an amendment defeats it without having a full debate. 8/28/12 Tr. at 69:6-13 (RH). **D**. After invoking cloture on H3418, photo ID proponents went further and passed a clinching motion, after members of the LBC had walked out in protest, to ensure that they could not reopen debate on the bill once they returned to the chamber. *See* US FF 119.

22. Not disputed.

23. Disputed. **A**. Sen. Campsen did not claim that S334 as introduced in 2009 was simply a "bare-bones . . . version of voter ID." Despite the fact that S334 would have allowed only the use of SC driver's licenses and DMV IDs – and thus varied dramatically from the Georgia and Indiana photo ID laws – Sen. Campsen claimed that he sought to model his bill on photo ID legislation passed in Georgia and Indiana. 8/27/12 Tr. at 109:14-17 (CC). **B**. No one claims credit for drafting S334. Sen. Campsen claims that Senate staffer Heather Anderson drafted it, while Anderson testified that she does not know who drafted the bill and was unaware of photo ID legislation in SC prior to its introduction. 8/27/12 Tr. at 107:24-108:16 (CC); JA-US 003357-58 (HA Dep. 17:1-19:14).

24. Not disputed.

25. Disputed. Notwithstanding the addition of an early voting period, the Senate Judiciary Committee was divided over H3418 and a minority report was placed on the committee report by Sen. Ford, an African American. US Ex. 63, JA 000608 (5/14/09 SJ). A minority report indicates strong opposition. As a result of a minority report, contested bills are taken up under the Senate's special order procedures. 8/28/12 Tr. at 116:16-117:11, 188:1-12 (LGM).

26. Disputed. H3418 was placed on special order by majority vote only after failing to receive the two-thirds vote that is necessary for a "regular" special order motion. *See* US FF 123-24.

27. Disputed. Then-Senator McConnell did not convene the January 28, 2010, meeting to "prevent an impasse" along race and party lines. The impasse was already full-blown. Because bill opponents had been overridden on January 26, 2010, when H3418 was placed on special order by a bare majority vote, they began a filibuster the next day, January 27. US Ex. 149, JA 002777-80 (1/27/10 Sen. Tr.). The bill was filibustered even though it included twelve days of early voting. US Ex. 65, JA 000627-44 (Sen. Jud. Comm. Rep.). On the Senate floor, Sen. Anderson stated that ID proponents were "using [H3418] as one of your priorities to prevent African Americans from voting[.]" US Ex. 149, JA 002608 (1/27/10 Sen. Tr.). Sen. Nicholson questioned why photo ID was coming up for the first time, "after the 2008 election [when] we had the highest turnout of voters to ever occur in the state" *Id*. at JA 002624. When photo ID proponents expressed surprise over the number of amendments introduced to block consideration of H3418, Sen. Ford responded that the number was "only a drop in the bucket compared with the sacrifice that was made to win [African Americans] a right to vote." *Id*. at JA 002628, 002633-34. Facing this opposition as well as failed votes to cut off debate, *see* US Ex. 68, JA 000659 (1/27/2010 SJ), then-Sen. McConnell held the January 28 meeting.

28. Disputed. Senator Malloy worked with photo ID proponents on Amendment 8 with the understanding that opponents faced the "inevitable passage of a [photo ID] bill" and so attempted to lessen the burdens that would be imposed by the law. 8/30/12 Tr. at 249:1-9 (GM). Bill opponents accepted the resulting compromise "very reluctantly," *id*. at 249:22-24, but considered it necessary to prevent the more restrictive House preferences from controlling all contents of the eventual law. 8/31/12 Tr. at 25:5-26:22 (TA).

29. Disputed. **A**. A number of ameliorative provisions included in Amendment 8 were not included in R54 as passed. These included a transition period to allow voters to acquire PVID before the ID requirement went into effect; an early voting period, which would have allowed voters a greater opportunity to address a lack of PVID and vote a regular ballot; and the allowance of state, local, and federal employee IDs. *See* US FF 127-29. **B**. Legislators did not decide that receipt of the SEC PVRC would not require a birth certificate. This was a decision made post-enactment by SEC officials. *See* US Ex. 299, JA-US 000094-96 ("Procedure for Issuing Photo Voter Registration Cards"). Furthermore, the exhibit that SC cites for the proposition that voters would not need a birth certificate to obtain an SEC PVRC says nothing about birth certificates. See SC Ex. 2, JA 000665 (US Ex. 69). **C**. Senator Campsen understood that the reasonable impediment affidavit would require notarization and that notaries can charge for their services. 8/27/12 Tr. at 150:16-151:17 (CC). He did not give much thought to how the RI exception would work in practice. *Id.* at 156:1-3.

30. Disputed. *See supra* 29A-C.

31. Not disputed.

32. Disputed. While some photo ID opponents in the Senate voted to send a less burdensome version of H3418 back to the House, Senate ID opponents ultimately killed the bill through a

successful filibuster – specifically continuing to object to the burdens that would be imposed by the ID requirement even with the reasonable impediment provision. US Ex. 116, JA 001500 (TA Sup. Decl. ¶¶ 26-27); *see e.g.*, US Ex. 160, JA 004360 (6/15/10 Sen. Tr.) (bill opponents explaining on the floor of the Senate that even with the reasonable impediment provision, such provisional ballots "would be contested on Thursday [after the election] and may or may not count").

33. Not disputed.

34. Disputed. *See supra* 32.

35. Disputed. In addition to stripping out employee IDs, the May 2010 House amendments to H3418 eliminated the Senate's transition period and had the ID requirement take effect immediately. But the SEC was not allowed to start the process of providing PVRCs for over a year (not until July 2011), and only then if funding was in place. US Ex. 94, JA 000929 (5/5/10 version of H3418). The House amendments restricted early voting to only three days, at only one location per county (no matter the number of voters per county). *Id*. at JA 000921. The House version further eliminated the ability of a member of the voter's immediate family to request an absentee ballot, and eliminated voters' ability to request absentee ballots by phone. Under the House amendments absentee voters – including elderly and disabled voters – would have to request a ballot in writing by mail or in-person at their CBRE office. *Id*. at JA 000924.

36. Not disputed.

37. Disputed. Republican House members serving on the H3418 conference committee abruptly ended negotiations and circulated a conference report. The two African American legislators on the committee, Sen. Malloy and Rep. Mitchell, refused to sign the report. 8/30/12 Tr. at 250:18-22 (GM); US Ex. 146, JA 001746 (OB Sup. Decl. at 6). Senator Malloy was

excluded from the meeting at which the report was signed. US Ex. 116, JA 001499 (TA Sup. Decl. ¶ 24).

38. Disputed. After the H3418 conference committee report was filibustered, the Senate unanimously included a new H3418 conference report with the *sine die* resolution ending the session to give ID proponents "a little [political] cover." 8/30/12 Tr. at 251:3-15 (GM).

B. H. 3003: Mitigating Provisions Favored by African American Legislators Are Omitted From the Final Bill

39. Disputed. As prefiled by Rep. Clemmons, H3003 did not include early voting, a transition period, or government employee IDs. It also included restrictions on absentee ballot requests (*e.g.*, no requests to be made by telephone, and no requests to be made by the voter's immediate family) that were not in the conference reports on H3418. US Ex. 2, JA 000004-16 (12/7/10 version of H3003). Last, the prefiled bill would have repealed in-person absentee balloting on machines at CBRE offices. *Id*. at JA 000015 (attempting to repeal S.C. Code § 7-15-470).

40. Disputed. **A**. Whether as a stand-alone bill or included with photo ID, early voting was opposed by many House photo ID proponents. House photo ID proponents associated early voting with increased African American turnout. *See* US FF 128. **B**. Lt. Gov. McConnell did not agree that the House bill was in fact a "clean" voter ID bill, and regarded the description of it as such as "propaganda" meant to pressure the Senate into concurring. 8/28/12 Tr. at 173:11-176:2 (LGM).

41. Disputed. H3003 was not debated "at length" in the House, but passed and sent to the Senate only sixteen days after introduction. 8/30/12 Tr. at 269:17-20 (JS).

42. Disputed. H3003 was first passed by the House in 2011, not 2010. The absentee voting restrictions included in by the House in H3003 are described *supra* at 39. Also included was a

poll watcher provision that Sen. Campsen believed could be interpreted as a voter intimidation measure. *See* US Ex. 11, JA 000109 (1/26/11 version of H3003, ¶ 16); 8/27/12 Tr. at 149:2-5 (CC).

43. Not disputed.

44. Disputed. H3003 was taken up on the floor of the Senate after twice failing to receive a two-thirds vote on failed motions for special order. *See* US FF 123-34.

45. Not disputed.

46. Disputed. The absentee voting restrictions orginally in the House version of H3003 drew opposition across party lines in the Senate. 8/27/12 Tr. at 121:3-12 (LGM).

47. Not disputed.

48. Disputed. Pressure placed on Senate Republicans did not come from a broad spectrum of grassroots constituents generally, but from the SC Republican Party organization and other Tea Party and Republican Party factions. 8/27/12 Tr. at 239:2-16 (AC); 8/28/12 Tr. at 175:7-15 (LGM); US Ex. 116, JA 001510 (TA Sup. Decl. ¶ 49).

49-50. Not disputed.

51. Disputed. The sole African American member of the H3003 conference committee, Sen. Scott, testified that other members from each delegation negotiated the contents of the report in meetings without him. ECF No. 221 (JS written direct, ¶¶ 21-22). Senator Scott had never before seen this kind of exclusion in his twenty years of service as a state legislator. *Id*.

52. Disputed. The more restrictive House position prevailed during the H3003 conference committee on the contested ameliorative provisions of the bill – *e.g*., an elderly exemption, the Senate's broader ID list, and early voting. *See* US Ex. 44, JA 000451-60 (H3003 conf. report).

53. Disputed. Key ameliorative provisions that were part of earlier Senate compromises but not included in the H3003 conference report and R54 as enacted include a transition period, early voting, and the use of government employee IDs. *See* US FF 127-29.

54. Disputed. The purposes that SC has asserted for the ID requirement are pretextual. *See* US FF 91-100. Lt. Gov. McConnell's testimony is not dispositive on the question of legislative purpose. *See supra* 2C.

55. Disputed. Senator Campsen stated on the floor of the Senate that he believed that photo ID and early voting were connected and had to be considered together. US Ex. 149, JA 002619, 002624 (1/27/10 Sen. Tr.).

56. Disputed. All African American legislators voted against adoption of the H3003 conference report. US FF 131.

IV. THE STATE'S PLANNED IMPLEMENTATION OF ACT R54 WILL NOT ENSURE THAT ALL QUALIFIED SOUTH CAROLINA VOTERS CAN CAST A BALLOT ON ELECTION DAY

A. Photo Voter Registration Cards

57. Disputed. The State has made no showing that the SEC PVRC will actually ameliorate any retrogressive effect of R54. US FF 71-86. Nor does R54 require the SEC PVRC to be free. *See* R54 § 4. Additionally, the SEC did not issue the referenced implementation procedures, nor are those procedures final. Rather, the procedures were developed by SEC Executive Director Marci Andino and her staff, without being reviewed or adopted by the SEC itself, and are subject to change. US FF 9.

58. Disputed. **A.** There is currently no lawful appropriation of funds in place to implement § 4 of R54, and there is no requirement in R54 that funding be made available to implement § 4 of R54 in the future. US FF 6, 89; JA-US 001294-96 (JH Dep. 65:11-66:1, 67:21-69:21, 70:13-71:23). The State Budget and Control Board has conceded that its approval of the SEC's request

to carry forward the voter ID implementation funding from FY 2012 (7/1/11-6/30/12) into FY 2013 (7/1/12-6/30/13) was unauthorized by law. US FF 87-89. That carry-forward authorization is therefore subject to be invalidated by a SC court upon the petition of any concerned SC citizen and taxpayer. *See Grimball v. Beattie*, 177 S.E. 668, 672 (S.C. 1934) (SC constitution prohibits money being paid out of treasury except by lawful appropriation of funds); *Sloan v. Sch. Dist. of Greenville Cnty.*, 537 S.E.2d 299, 301 (S.C. Ct. App. 2000) ("A taxpayer's standing to challenge unauthorized or illegal governmental acts has been repeatedly recognized in South Carolina.").

B. In addition, the SEC staff's implementation procedures are not final and binding, do not have the force and effect of law, and therefore cannot be relied upon or considered by this Court. US FF 9-11; S.C. Code § 1-23-10(4) ("Policy or guidance issued by an agency other than in a regulation does not have the force or effect of law."); *Doe v. South Carolina Dep't of Health & Human Servs.*, 727 S.E.2d 605, 608 n.7 (S.C. 2011) (eligibility requirement listed in agency's informal policy guidelines was entitled to no deference because it was not formally adopted as a regulation and did not have the force and effect of law); 28 C.F.R. § 51.22(a) (non-final changes are generally not appropriate for review under VRA § 5).

59. Disputed. The referenced implementation procedures are not final and binding, do not have force and effect of law, and therefore cannot be relied upon or considered by this Court. *Supra* 58B.

60. Disputed. There is currently no lawful appropriation of funds in place to implement § 4 of R54, and there is no requirement in R54 that funding be made available to implement § 4 of R54 in the future. *Supra* 58A. In addition, the implementation procedures are not final and binding, do not have force and effect of law, and therefore cannot be relied upon or considered by this Court. *Supra* 58B.

61. Disputed. There is currently no lawful appropriation of funds in place to implement § 4 of R54, and there is no requirement in R54 that ongoing funding be made available to implement § 4 of R54. *Supra* 58A. In addition, the SEC staff's implementation procedures are not final and binding, do not have force and effect of law, and therefore cannot be relied upon or considered by this Court. *Supra* 58B. **A**. There is insufficient evidence that SEC PVRCs will be available at the CBRE during "any extended hours offered around Election Day." Any change in the established office hours of a CBRE—including the provision of extended office hours—would constitute a change in voting that would need to be submitted to the U.S. Attorney General or this Court for preclearance under Section 5 of the VRA. *See* 28 C.F.R. § 51.12. The State has not introduced any evidence of a preclearance submission or a preclearance determination regarding extended office hours for CBREs around Election Day. **B**. SEC staff has developed no concrete plans for exactly where its single bus would go, and on what schedule, in advance of the 2012 general election. 8/28/12 Tr. at 262:22-265:3 (MA); JA-US 001673, 1686 (CW Dep. 82:1-86:25, 140:3-5). In addition, SC has not introduced any evidence of how one bus could plausibly reach the scores of thousands of people who lack R54 ID in any reasonable period of time. Accordingly, SC cannot show that the SEC bus will effectively ameliorate the retrogressive effect of R54.

62. Disputed. There is currently no lawful appropriation of funds in place to implement § 4 of R54, and there is no requirement in R54 that ongoing funding be made available to implement § 4 of R54. *Supra* 58A. In addition, the SEC staff's implementation procedures are not final and binding, do not have force and effect of law, and therefore cannot be relied upon or considered by this Court. *Supra* 58B. Additionally, SC FF 62 is a non-sequitur. That some black voters who cast their absentee ballots in-person at the CBRE office in advance of Election Day may

find it easy to obtain the SEC PVRC is of little to no moment. Such voters have already established their ability to get to the CBRE. Moreover, SC proffers no evidence that the black voters who vote by absentee ballot are the same black voters who lack allowable R54 ID. SC cannot show that its provision of "free" PVRCs at CBREs would in any way mitigate the retrogressive effects of R54 upon the disproportionate percentage of minority voters who *are not* able to reach the CBRE to obtain the PVRC because of lack of transportation, lack of funds, and other factors. US FF 75-78, 81-85.

63. Disputed. There is currently no lawful appropriation of funds in place to implement § 4 of R54, and there is no requirement in R54 that ongoing funding be made available to implement § 4 of R54 in subsequent years. *Supra* 58A.

B. DMV-Issued Identification Cards

64. Not disputed.

65. Disputed. SC has not shown that the availability of "free" DMV IDs at county DMV offices would "be accessible to South Carolinians who need them" or that such IDs would ameliorate the retrogressive effect of R54. US FF 75-82, 85-86. In the context of the overwhelming socio-economic disparities affecting African Americans in SC, the economic and institutional costs of the burdens imposed by R54 are not disputed. US FF 81-82, 85-86.

C. Provisional Ballots for Voters Who Possess ID But Do Not Bring it to the Polls

66. Disputed. The US agrees that some voters without ID in their possession can cast a provisional ballot without signing an affidavit. However, under those circumstances, such voters still have to "bring[] a valid and current photograph identification to the county board of registration and elections before certification of the election by the county board of canvassers," *see* R54 § 5(C)(1)(A), which means they must do so by the end of the second day following the

election (for a primary election) or the third (for a general election). 8/29/12 Tr. at 25:11-12, 43:6-8 (MA); S.C. Code §§ 7-17-10, 7-17-510.

D. Reasonable Impediment and Religious Objection Exemptions

67. Disputed. The RI provision is vague, inadequately defined, and subject to varying interpretations. US FF 39-50. The implementation of the RI provision is left to partisan CBREs who have a history of discriminating against minorities and who will know the identity and race of the voter when making determinations regarding the provisional ballot. US FF 54-58; 8/31/12 Tr. at 37:19-39:6 (TA). And the notary requirement largely nullifies any potential ameliorative effect of the RI provision. US FF 59-65. Furthermore, the RI provision imposes material burdens on voters and poses a risk of disenfranchisement. US FF 66-70. Thus, SC has not shown that the RI provision "provides a way for any voter to cast a ballot even if she does not currently possess" R54 ID.

68. Disputed. While the benchmark voter ID procedure in SC does not contain a RI/RO exception, there is no need for a RI/RO provision because the non-photo voter registration card is acceptable ID for voting and is mailed directly to each voter. In addition, the assertion regarding the "shall find" language is irrelevant in that it applies to the RI/RO provision that did not previously exist. Moreover, the "shall find" language does not apply to all provisional ballots, just those provisional ballots cast pursuant to the RI/RO provision. Finally, SC's assertion as to the "shall find" language of 5(D)(2) is incomplete because that purported directive is qualified by the phrase "unless the board has grounds to believe the affidavit is false."

1. Ms. Andino Lacks Legal Authority to Require a Consistent Application of the Vague and Ambiguous Reasonable Impediment Exception

69. Disputed. As Executive Director and chief administrative officer of the SEC, Andino does not have "primary responsibility for implementing R54's requirements." R54 assigns those responsibilities to the SEC or CBREs, not Andino. *See* R54 §§ 4, 5, 7, 8. And while Andino may be called upon to interpret and apply R54 on a day-to-day basis, her interpretations are not authoritative or binding on CBREs or anyone else. *Supra* 58B. That Andino claims to have a good working relationship with county election officials does not change the nature of her advice; it is informal and non-binding, as the State concedes. *Supra* 58.B. Additionally, Andino's claims of having good working relationships with CBREs and providing effective informal guidance to them are contradicted by the testimony of other State witnesses, who claim that the SEC has had trouble ensuring consistency in the implementation election laws from county to county, in part because of the SEC's failure to issue clear guidance to the CBREs. US FF 51. The US agrees that the SEC has authority to promulgate formal regulations; indeed, those are the only type of regulations that would have the force and effect of law and that CBREs would be compelled to follow. Tellingly, the SEC has not done so with respect to R54. US FF 9-10.

70. Disputed. **A**. Although the SCAG has the authority and duty under SC law to interpret state law and advise the governor and state agencies, among others, with respect thereto, SCAG opinions are not binding upon SC courts. *See Eargle v. Horry Cnty.*, 545 S.E.2d 276, 280 (S.C. 2001). **B**. The SCAG's August 31, 2012, filing (ECF No. 263) contradicts that office's prior advice to the SEC by endorsing Andino's newly-minted subjective "up to the voter" test for determining the reasonableness of a voter's claimed impediment. US FF 13, 16. Most

significantly, the SCAG's August 31, 2012, filing contravenes SC law by, among other things, endorsing Andino's stated plans to violate R54's RI/RO provisions, as well as statutory election certification timeframes and notary procedures. US FF 14. The SCAG's August 31, 2012, filing sets forth a litigation position that is neither persuasive nor entitled to deference, and it should therefore be rejected by this Court. *Cf. Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 213 (1988) ("Deference to what appears to be nothing more than an agency's convenient litigating position would be entirely inappropriate.).

71. Not disputed.

72. Disputed. Andino's testimony interpreting the RI provision to include a purely subjective standard (*i.e.*, "up to the voter") for determining reasonableness of the impediment is not consistent with the SCAG's August 2011 opinion, which described objective standards of reasonableness. In any event, neither Andino's interpretations nor those adopted by the SCAG in this litigation are authoritative or binding on SC courts, which, if R54 is precleared, will likely be called upon to resolve differences between the statute's plain language and the State's newly-evolved interpretations. *Supra* 58B, 70A-B.

73. Disputed. Andino's guidance, as set forth in her informal RI/RO procedures, is neither final nor binding, does not have force and effect of law, is contrary to the plain text of § 5 of R54, and therefore cannot be relied upon or considered by this Court. *Supra* 58B. No poll manager or CBRE will be required to follow such informal, non-binding guidance. *Supra* 58B. Indeed, several CBREs have expressed concern and confusion over how to apply the RI/RO provisions of R54, and Andino agrees with those concerns. US FF 45-47. Andino's RI/RO procedures, in addition to being legally unenforceable, do not provide clear guidance regarding the degree of discretion poll managers or CBREs will have to determine whether a stated RI is

reasonable, or whether to count a provisional ballot cast in connection with a RI/RO affidavit. US FF 50. Andino's courtroom testimony on that point, as outlined in SC FF 73, was internally inconsistent and, in any event, is just as unenforceable and non-binding as her written RI/RO procedures. US FF 40.

74. Disputed. Andino's trial testimony and written procedures interpreting the RI/RO provisions of § 5of R54 are not "authoritative" in any respect, but rather are informal and without the force or effect of law, and therefore cannot be relied upon by the Court. *Supra* 58B. Further, her testimony regarding the RI exception was internally inconsistent, contrary to R54's plain text, and would lead to absurd results by allowing falsely cast ballots to be counted in an election even though the voter would be subject to criminal prosecution – not only for perjury but also for potential election crimes. US FF 13-16; 8/29/12 Tr. at 37:6-38:3 (MA); S.C. Code §§ 7-25-20 (unlawful to "offer or attempt to vote in violation of this title or under any false pretense as to circumstances affecting his qualifications to vote"), 7-25-190 (illegal conduct at elections generally). Indeed, Andino's proposed RI procedures, and their wholesale adoption by the SCAG, may have the anomalous result of actually *generating* voting crimes and *reducing* public confidence. *See* S.C. Code §§ 7-25-20, 7-25-190.

2. The Notary Requirement Largely Defeats Any Ameliorative Effect

75. Disputed. While Andino has taken steps to identify and recruit volunteer notaries to work at SC's approximately 2,100 polling places, she has not found a single notary willing to volunteer his or her services on Election Day. US FF 62.

76. Disputed. **A**. SC has admitted that RI/RO affidavits require notarization by a notary public, and that R54 "does not purport to alter any SC law, regulation, or procedure with respect to notaries public, including the laws and procedures set forth in the South Carolina Secretary of

State's Notary Public Reference Manual." US FF 17. Those admissions are conclusively established for purposes of this matter and may not be contradicted by Andino's trial testimony or her written RI/RO procedures. Fed. R. Civ. P. 36(b); *Airco Indus. Gases, Inc. v. Teamsters Health & Welfare Pension Fund*, 850 F.2d 1028, 1037 (3d Cir. 1988) (admission of fact is "not merely another layer of evidence, upon which the district court can superimpose its own assessment of weight and validity. It is, to the contrary, an unassailable statement of fact that narrows the triable issues in the case."). **B**. Andino has no legal authority to instruct CBREs to have non-notary poll managers witness RI/RO affidavits. US FF 11. Moreover, such *ultra vires* instructions would be ignored. *See* 8/29/12 Tr. at 107:24-108:8 (MB) (testifying that that no CBRE would ever intentionally violate state law, no matter who asked them to do so). Moreover, because non-notarized affidavits are not legally recognized under SC law, any RI/RO affidavit witnessed by a non-notary poll manager would be subject to challenge and disqualification at the canvass. US FF 63-64; *Doty v. Boyd*, 24 S.E. 59, 60 (S.C. 1896) (affidavit not bearing signature and certificate of notary is invalid).

77. Disputed. Andino's efforts to rewrite R54's RI/RO affidavit requirements to make them consistent with existing provisional ballot and absentee ballot procedures, which do not require notarized affidavits, are legally unenforceable, contrary to law, contrary to the State's prior admissions in this case, and beyond her authority as the SEC's Executive Director. *Supra* 58B, 76A-B. Andino's promise to scrap R54's affidavit requirements, and the SCAG's endorsement of that position, are not appropriate bases upon which to seek or obtain judicial preclearance under § 5 of the VRA. *Supra* 58B, 70A-B, 76A-B. Moreover, Andino's misunderstanding of the legal requirements relating to affidavits under SC law, as reflected in an alleged discussion

with Heather Anderson, is inadmissible hearsay, was not previously designated by the State, and is irrelevant to the actual legal requirements for notarization of affidavits by a notary public.

78. Disputed. Andino's notary procedures are legally unenforceable and contrary to the State's prior admissions in this case. *Supra* 58B, 76A-B. Andino has not identified any volunteer notaries and, in any event, has no power to compel such notaries to forego payment they are legally authorized to collect for their services. US FF 62, 65.

79. Disputed. Andino's notary procedures are legally unenforceable and contrary to the State's prior admissions in this case. *Supra* 58B, 76A-B.

3. Ms. Andino's Planned Implementation is Legally Unenforceable

80. Disputed. Andino's interpretations, trial testimony, and written implementation procedures, and the SCAG's endorsement thereof, are legally unenforceable, contrary to law in some instances, and contrary to the State's prior admissions in some instances—and therefore cannot be relied upon by the Court. *Supra* 58B, 70 A-B, 76A-B. Furthermore, Heather Anderson's hearsay testimony regarding statements of senators during a meeting in the Senate President *Pro Tempore*'s office cannot be used to alter the plain language of the RI/RO provisions contained in § 5 of R54.

81. Disputed. The evidence shows that there was no consensus among legislators as to the meaning of the RI/RO provisions that they enacted. US FF 42-44. Rep. Harrison even predicted that the vague terms will eventually have to be clarified by the courts in post-election challenges. JA-US 001293 (JH Dep. 60:23-61:5).

82 - 84. Not disputed, but irrelevant inasmuch as the *post hoc* trial testimony of legislators does not alter the legislative record and, as SC concedes at SC FF 84, cannot be used to alter the plain language of the RI/RO provisions contained in § 5 of R54. The US agrees that legislators are not

responsible for post-enactment implementation of R54. Local CBREs and, in some cases, the SEC are responsible for implementing the statute. US FF 4-8.

E. Voter Education and Post Card Notification Plan

85. Disputed. The SEC has not developed a voter education plan in accordance with § 7 of R54. Rather, a draft plan was developed by Andino and her staff, without being reviewed or adopted by the SEC itself, and is subject to change. US FF 9. As of trial, the voter education materials had not been finalized. *Compare* 8/28/12 Tr. at 237:21-238:2 *with* 241:7-242:7 (MA). The voter education plan does not have the force or effect of law and is not binding upon anyone. *Supra* 58B. In addition, the education and outreach provisions may in fact intensify R54's retrogressive effect and not mitigate it, given that such programs may not in fact reach those most in need of them. *See* US FF 84-85; 8/31/12 Tr. at 38:2-39:6 (TA).

1. Statewide Voter Education

86. Disputed. *See supra* 85.

87. Disputed. *See supra* 85. These materials do not define "reasonable impediment" or explain how the RI/RO affidavit will be interpreted in the polling place. *See* US Ex. 354, JA-US 003427-29 (post card); US FF 39-50; *see, e.g.*, 8/28/12 Tr. at 241:7-242:7 (MA).

88. Disputed. *See supra* 85.

89. Disputed. *See supra* 85. The Court's discussion with Andino regarding possible improvements to the voter education materials, and Andino's willingness (without the knowledge of, or approval and action by, the SEC) to accept such suggestions reveals the fluid and non-final nature of the materials and the plan.

90. Disputed. *See supra* 61B, 85. Also disputed as to State's characterization of the single bus's visibility.

2. Direct Voter Outreach

91-92. Disputed. *See supra* 85. The post card does not define "reasonable impediment," does not provide information about the notary requirement, including acceptable IDs and fees, and omits the requirement that R54 IDs must be "valid and current." US Ex. 354, JA-US 003427-29 (post card); *see* US FF 59-65.; 8/28/12 Tr. at 242:25-243:11 (MA).

93. Not disputed. However, the Court's discussion with Andino regarding possible improvements to the voter education materials, and Andino's willingness (without the knowledge of, or approval and action by, the SEC) to accept such suggestions reveals the fluid and non-final nature of the materials and the plan.

94. Disputed. *See supra* 8.

F. Poll Manager and County Elections and Registration Officials Education and Training

95. Disputed. As separate and independent legal entities, CBREs have wide discretion to interpret and implement election laws, and the SEC cannot guarantee that information it disseminates will be consistently followed. 8/28/12 Tr. at 205:8-11, 253:20-254:19, 255:22-256:1 (MA); US FF 51-53. Indeed, any guidance intended to have CBREs violate state law to avoid voter disenfranchisement will likely be ignored. *See* 8/29/12 Tr. 107:24-108:8 (MB) (testifying that that no CBRE would ever intentionally violate state law, no matter who asked them to do so).

96. Disputed. CBREs—not the SEC—facilitate direct training of poll managers and many CBREs do not require poll managers to complete the SEC online training. *See* US FF 52. Also, while CBRE officials are legally required to attend and complete the SEC's CBRE training program, 82 of 500 CBRE officials failed to do so in 2011. 8/29/12 Tr. at 12:19-13:10 (MA); US Ex. 291, JA-US 002651 (2011 SEC Accountability Report); US FF 53; *see supra* 95.

97-98. Disputed. *See supra* 95-96.

99. Disputed. *See supra* 95-96. Andino's announced willingness to revise its poll manager training materials to comport with her trial testimony "in response to this Court's and others' questions" reveals the fluid and non-final nature of the materials and the plan. *See supra* 85.

100. Disputed. *See supra* 95-96.

101. Disputed. Andino's view of what constitutes a "valid and current" PVID is not legally binding and cannot be relied upon by the Court. *See supra* 58B.

102. Disputed. Andino admits that the SEC does not give guidance to ask for a valid and/or current ID, but also does not provide guidance *not* to do so. 8/28/12 Tr. at 245:3-14 (MA). Additionally, the referenced HAVA ID requirements apply only to *first-time* voters who registered by mail *and* whose identities were not established from information submitted at that time. 42 U.S.C. § 15483(b).

103. Disputed. SC FF 103 is argument as to the amount of discretion exercised by poll managers on Election Day unsupported by record facts.

V. CURRENT PHOTO IDENTIFICATION POSSESSION AND THE DISCRIMINATORY POST-IMPLEMENTATION EFFECTS UNDER ACT R54

A. Current Act R54 ID Possession Rates Reveal an Undisputed Racial Disparity

104. Disputed. Under VRA § 5, the analysis under the effects prong considers whether minority voters are disproportionately less likely to possess the acceptable PVID required for voting under R54, not simply, as suggested by SC, the total PVID possession rates among SC registered voters. *See* US CL 2-3. Minority voters in SC are disproportionately and significantly less likely than white voters to possess any of the currently available, acceptable forms of PVID, and thus, will be disproportionately affected by R54. *See* US FF 18, 21.

105. Disputed. R54 applies to in-person absentee voting. Absentee voting by mail is not an equivalent substitute for voting in-person. *See* US Ex. 106, JA001359-62 (CS Reb. Decl. ¶¶ 133-39). Notably, SC has a strict "for cause" absentee voting law that requires voters to fall into one of 15 categories to qualify to vote by absentee ballot. SC Code § 7-15-320. Moreover, because black voters are, on average, younger than white voters, the option of voting absentee because one is age 65 or older is more likely to be available to white voters; thus, to the degree voters age 65 and older avail themselves of this option, the retrogressive effect of the law will only be compounded. *See* US Ex. 106, JA001362-63 (CS Reb. Decl. ¶¶ 140-144).

B. The Difference Between Non-Hispanic White and Black Voters Currently Without Act R54 ID is Legally Material and Statistically Significant

106. Disputed. Whether one group of voters bears a disproportionate burden over another group of voters as a result of implementation of R54, specifically minority voters over white voters, is not based on the absolute number of individuals in each group who are affected but on a comparison of the different proportions of individuals in each group who are affected. US Ex. 106, JA001333-35, 001364 (CS Reb. Decl. ¶¶ 69-71, 148). SC's expert concluded that black voters are at least 1.45 times (6.81/4.71), or 145 percent, more likely not to possess one of the currently available, acceptable PVID under R54 than non-Hispanic white voters, *see* US FF 29-30; 8/29/2012 Tr. at 214:10-219:12 (MVH); Dr. Hood agreed that this was a "fair and meaningful" way to describe those data. 8/29/2012 Tr. at 223:14-16 (MVH). **A**. Despite SC's attempt to minimize the difference between the rates at which white and black voters currently lack PVID, Dr. Hood conceded that the difference he found demonstrated a "significant racial disparate impact." *Id*. at 218:12-219:1; *see* US Ex. 106, JA 001307-08, 001339-43 (CS Reb. Decl. ¶¶ 4, 86-94). **B**. The more complete and reliable analysis by the US expert, Dr. Charles Stewart, found that black voters are more than twice as likely as white voters not to possess any

of the currently available, acceptable PVID. US Ex. 106, JA001339 (CS Reb. Decl. ¶¶ 84-85), 001377 (Attach. H). **C**. Moreover, in *Florida v. United States*, a panel of this Court concluded that "[i]f even a small number of voters are sufficiently burdened by a voting change that they do not exercise the franchise when they otherwise would have done so, then that change can (under some circumstances) be considered retrogressive . . . . [N]o amount of voter disenfranchisement can be regarded as '*de minimis*.'" *Florida v. United States*, No. 1:11-cv-01428, 2012 WL 3538298, at *14 (D.D.C. Aug. 16, 2012) (three judge court) (citations omitted).

107. Disputed. *See supra* 105. SC's expert concluded that black voters age 65 and older are at least 1.65 times (4.89/2.96), or 165 percent, more likely not to possess one of the currently available, acceptable PVID under R54. 8/29/2012 Tr. at 221:3-223:6 (MVH). That, too, was a "fair and meaningful" way to describe those data. *Id.* at 223:14-16.

C. South Carolina's Matching Analysis is Unreliable

108. Disputed. Dr. Hood's database matching methodology was flawed and unreliable. *See* US FF 31-32, 37; US Ex. 106, JA 001309, 001364 (CS Reb. Decl. ¶¶ 8, 147). **A**. The SEC database contained 6,423,574 total records. US Ex. 105, JA 001226 (CS Decl. ¶ 58), 001285 (Attach. E). Dr. Hood analyzed 2,790,754 records, which included active registrants plus two of a dozen categories of inactive registrants. Tr. 8/29/12 at 114:12-117:8 (MVH); JA 001059 (MVH Decl. at 12). **B**. Dr. Hood's database matching is unreliable primarily because he failed to address the "dead wood" problem. 8/31/12 Tr. at 101:3-103:21 (CS). "Dead wood" is a term of art in election administration that refers to people who appear on the voter registration rolls but who are not, in fact, eligible or active voters. *Id*. at 87:13-88:12 (CS). "[D]ead wood is a problem from a political science standpoint or a social science standpoint because it inflates the number of people who appear to be voters, and it can therefore muddy the results and add some

uncertainty into the outcome." *Id*. at 88:20-89:7 (CS). **C**. Dr. Hood failed to address the presence of deceased persons on the voter rolls. 8/29/12 Tr. at 117:15-19, 118:6-12, 210:1-211:25 (MVH); 8/31/12 Tr. at 101:3-19 (CS); US Ex. 106, JA 001313 (CS Reb. Decl. ¶ 21). **D.** Dr. Hood also failed to address the presence of registrants who had likely moved out of state because he mistakenly assumed such voters had already been removed from the data. 8/29/12 Tr. at 205:5-212:7 (MVH); 8/31/12 Tr. at 101:3-21 (CS); US Ex. 106, JA 001316-27 (CS Reb. Decl. ¶¶ 30-50). This is significant because the vast majority of the close to 157,000 persons who surrendered their driver's licenses to other states were in fact white. *Id*. at JA001372 (Attach. C). Thus, as Dr. Hood conceded, the failure to exclude such voters from the data matching analysis affects its basic accuracy and reliability because it minimizes the racial differences found. 8/29/12 Tr. at 207:25-208:14 (MVH). **E**. Finally, Dr. Hood dealt inappropriately with inactive voters by including in his analysis two categories of inactive voters based on erroneous advice from someone at the SEC. 8/31/12 Tr. at 101:3-103:10 (CS). One such category contained approximately 60,000 inactive registrants, almost none of whom voted in either the 2008 or 2010 elections. *Id.*; US Ex. 105, JA 001285 (CS Decl. Attach. E). **F**. The result of Dr. Hood's flawed methodological choices is that his estimates of non-possession rates are inaccurate and thus unreliable. US Ex. 106, JA 001307, 001364 (CS Reb. Decl. ¶¶ 3-4, 147). Indeed, his estimates show the racial disparities in non-possession rates to be much narrower than they in fact are. *Id*. at JA 001326-27 (¶¶ 49-50); 8/31/12 Tr. at 103:11-18 (CS).

109. Disputed. Dr. Hood's methodology was flawed given (a) his unawareness (as of the date of his deposition) that his analysis failed to account for deceased voters and those who surrendered their driver's licenses in other states, and (b) his concession that in the future he would be sure to remove from his analysis deceased voters and those who had surrendered their

driver's licenses in other states. *See* US FF 31; 8/29/12 Tr. at 203:4-17; 204:10-208:14; 205:25-207:9; 208:10-14 (MVH). Moreover, Dr. Hood's methodological approach here mirrored the approach rejected as flawed and unreliable in the Wisconsin voter ID case. *See* US FF 32, 37. Finally, SC FF 109 is contradicted by the SC DMV's Executive Director, who made clear that any analysis that included deceased persons and persons who had surrendered their driver's license to another state was "flawed." US Ex. 107, JA 001378-79 (Letter from KS to SCAG).

110. Disputed. Pursuant to the Court's instructions, subpoenas served by SC, a stipulation and order for the protection of Privacy Act protected information (ECF No. 111), and a supplemental stipulation (ECF No. 124), all parties, including Dr. Hood, were provided data from the U.S. Department of State and U.S. Department of Defense that matched the results of Dr. Hood's matching analysis and Dr. Stewart's matching analysis against databases of U.S. passports and military identification from the respective federal agencies.

111. Disputed. Dr. Hood's analysis of racial disparities in the possession of acceptable PVID is inaccurate and incomplete because his preparation of the data did not appropriately address records of registered voters who have had their driver's licenses returned by an out of state jurisdiction, the records of deceased individuals in DMV and voter registration databases, and records of voters who had to surrender their licenses due to suspensions. *See* US FF 31-32, 37; US Ex. 106, JA 001307, 001309 (CS Reb. Decl. ¶¶ 3, 8).

112. Disputed. Dr. Stewart relied not on "unverified assumptions" but on data and explanatory information provided by the DMV indicating that a license had been surrendered and received by the State. 8/31/12 Tr. at 184:4-187:5 (CS); US Ex. 290, JA-US 000611 (DMV Proposed Production Tables); US Ex. 289, JA-US 000519-601 (DMV Database, Tables and Columns). **A**. No record evidence establishes that a license identified in the database as

received by the State but which is also coded as "reinstatement met" or "another license issued" or "must be returned due to the suspension" actually remains in the possession of the customer, as SC contends. **B**. No record evidence establishes that there are *any* licenses identified in the database as received by the State but which are also identified in the database as "active." Nor does any record evidence establish that Dr. Stewart excluded any such licenses from his analysis. **C**. No record evidence establishes the existence of any data conflicts with respect to any licenses included or excluded from Dr. Stewart's analysis.

113. Disputed. Dr. Stewart did not testify that his – and only his – analyses are affected by the inclusion or exclusion of licenses identified in the database as returned to the State. Rather, his analysis established that, for any researcher, the analysis of racial disparities in the possession of driver's licenses and photo IDs "will be significantly affected by how one deals with returned licenses." US Ex. 106, JA 001324-27 (CS Reb. Decl. ¶¶ 43-50); *see* 8/29/12 Tr. at 207:14-208:9 (MVH) (noting that the failure to account for returned licenses would affect accuracy and reliability of data matching analysis). No record evidence establishes that any licenses identified in the database as returned to the State actually remain in the possession of the customer; Dr. Stewart removed such licenses from his dataset to increase the validity and reliability of his analyses. 8/31/12 Tr. at 85:10-87:9 (CS).

114. Disputed. Dr. Stewart's analysis confirmed that the vast majority of registrants whose license had been returned from out of state did not vote and where thus likely "dead wood" on the rolls. US Ex. 106, JA 001316-23 (CS Reb. Decl. ¶¶ 30-42); 8/31/12 Tr. at 161:15-162:17 (CS). Including such registrants in the matching analysis would have resulted in a net *decrease* in the reliability of the results. 8/31/12 Tr. at 88:20-89:7, 92:6-95:14, 157:15-24, 162:7-17 (CS).

115. Disputed. The last sentence of SC FF 115 is misleading and unsupported by the record. The DMV's position was that the no-match list produced by the SEC was artificially inflated by the inclusion of, among other things, surrendered licenses. US Ex. 107, JA 001378-79 (Letter from KS to SCAG). The SEC did not reject that position but agreed with it: "We agree with your conclusion that there may be fewer voters who actually do not have a valid and current photo ID that are represented in the list." US Ex. 275, JA-US 002588 (Letter from MA to KS). The SEC merely concluded that it should use the inflated list to provide notice under the law. *Id.*

116. Disputed. Dr. Stewart's database-matching analysis is reliable: **A**. Database matching is a reliable technique. 8/31/12 Tr. at 78:20-79:15 (CS). **B**. Dr. Stewart was able to get all of the data he needed, and it was "of particularly high quality" because it encompassed all forms of accepted ID, had full social security numbers and had complete race information. *Id*. at 81:1-83:7. **C**. Dr. Stewart dealt reasonably with the "dead wood" problem and other data issues to create a dataset that was as high-quality as possible. *Id*. at 84:20-95:14. Dr. Stewart's data preparation was in keeping with the highest standards of his profession. *Id*. at 95:7-14. And while Dr. Stewart agreed that the number of deceased individuals at issue was not likely to change the conclusion, it was nonetheless incorrect and methodologically flawed for Dr. Hood to have included them. *Id.* at 101:3-103:21 (CS). **D**. Dr. Stewart performed the database matching reliably. *Id*. at 95:15-97:15. **E**. Significantly, Dr. Hood testified that, having read both of Dr. Stewart's reports, he did not criticize, take issue with, or challenge any methodology employed by Dr. Stewart. 8/30/12 Tr. at 8:14-9:1 (MVH).

D. R54's Ameliorative Provisions Are Insufficient

117. Disputed. SC cannot show by a preponderance of the evidence that the purported ameliorative measures of R54 will cure its known retrogressive effect. *See* US FF 38-86; *supra*

67-103; *infra* 147, 151, 153-160; 8/30/12 Tr. at 10:1-7; 167:9-168:24 (MVH) (conceding that he cannot say that the gap in ID possession rates between black and non-Hispanic white voters will not result in a racially discriminatory impact at the polls). In some cases these measures may even exacerbate the disparity. *See* US FF 85. SC FF 117 is also misleading to the extent that it ignores the uncontested evidence of the disproportionate burdens R54 imposes on SC's minority voters, which are exacerbated by minorities' disproportionately lower socio-economic status, higher rates of poverty, lower rates of educational attainment, lower rates of literacy, and lower rates of access to a vehicle. *See infra* 152A-B; 8/31/12 Tr. at 39:7-43:1 (TA).

118. Disputed. Dr. Hood's study of Georgia voter ID is inapposite. *See* US FF 33-37. The conclusions drawn about Georgia by Dr. Hood are misleading and any inferences made concerning SC's implementation of R54 based on his study are inappropriate and irrelevant. US Ex. 106, JA 001308, 001343-59 (CS Reb. Decl. ¶¶ 7, 95-132).

E. Individual Intervenors and Those Similarly Situated Will Substantially Burdened by the Requirements Imposed by R54

119-123. Disputed in part. Each individual Intervenor will face substantial burdens in voting if R54 is precleared. See *infra* 139, 149, 153-56; SC FF 119-23.

RESPONSES TO SOUTH CAROLINA'S PROPOSED CONCLUSIONS OF LAW

124. Disputed. The State misapprehends the nature of the inquiry under § 5 of the VRA. States clearly have legitimate interests in preserving the integrity and reliability of the election process. But under VRA § 5, SC cannot carry its burden merely by asserting those interests in the abstract. And while this Court's VRA §5 inquiry "cannot hinge" on the single factor of whether SC can cite documented instances of in-person voter fraud, additional relevant evidence can suggest that SC's invocation of "voter fraud" was a mere pretext for discrimination. *See Texas v. Holder*, 2012 WL 3743676, at *12.

125. Disputed. The State's repeated assertion that R54 was enacted to detect and deter voter fraud and enhance public confidence does not make it so, nor is it a substitute for the searching inquiry that must assess whether a jurisdiction's professed justifications are merely pretextual. *See Pleasant Grove v. United States*, 479 U.S. 462, 470 (1987). The United States further rebuts *infra* at 139-60 SC's claim that R54 has no discriminatory effect.

I. ACT R54 WAS NOT ENACTED FOR SOLELY FOR LEGITIMATE, NON-DISCRIMINATORY PURPOSES

126. Disputed. **A**. There is an impermissible purpose under Section 5 when race was a "motivating factor" in a decision. *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 488 (1997) ("*Bossier I*") (quoting *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977)). "Of course, the fact that a given action will have a disparate impact on minorities (and that the decisionmaker knew that) can provide powerful circumstantial evidence of discriminatory intent." *Florida*, 2012 WL 3538298, at *40. In this case, exactly this kind of "powerful circumstantial evidence of discriminatory intent" is present given the data that the General Assembly received from the SEC showing that non-white voters disproportionately lack DMV IDs. *See Bossier I*, 520 U.S. at 487 ("[T]he impact of an official action is often probative of why the action was taken in the first place since people usually intend the natural consequences of their actions."). SC fails to address that evidence in arguing that the State has met its burden as to discriminatory purpose. **B**. SC simply ignores the remainder of the *Arlington Heights* factors in making its conclusory and unsupported assertions in SC CL 126-38 that passage of R54 lacks any discriminatory purpose. *See Texas v. United States*, 2012 WL 3671924, at *21, n.32 (D.D.C. 2012) (three judge court) ("Texas did not adequately engage with the evidence raised by the other parties on [discriminatory purpose], and under *Arlington Heights* we find sufficient evidence to conclude that the Congressional [redistricting] plan was motivated,

at least in part, by discriminatory intent."); *see also id.* at *26 ("Texas has made no real attempt to engage with the *Arlington Heights* factors, even though it concedes that the Senate [redistricting] Plan has a disparate impact on minority voters," which "compels us to conclude that the Senate Plan was enacted with discriminatory purpose . . . .").

127. Disputed. The United States has provided ample "evidence of a discriminatory purpose on the part of the legislators who seek to make the change." *New York v. United States*, 874 F. Supp. 394, 400 (D.D.C. 1994) (three judge court). This evidence includes the known disparate impact of the decision, legislative responsiveness to racialized views of constituents, the fact that less discriminatory alternatives were rejected, and the use of unusual procedures to deny effective input by minority legislators, particularly in the House. *See* US FF 91-131. In the face of such evidence, SC cannot meet its ultimate burden of persuasion through repeated iteration of abstract governmental interests combined with citation to proponents' self-serving statements about R54's purposes, which are directly contested by other legislators.

A. Act R54's Asserted Purposes Are Pretextual

128. Disputed as unsupported, inaccurate, or both. *See* US FF 91-100.

129. Disputed. *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008), dealt solely with whether Indiana's photo voter identification law was facially constitutional. *Id.* at 189. The Court in *Crawford* did not consider whether Indiana's law had the effect or intent of discriminating on the basis of race. *See id.* at 202-03. Furthermore, the State misses the import of the language it quotes from *Florida v. United States*. It is of course true that "the fact that a state has acted proactively to close a loophole in its election laws . . . does not *by itself* raise an inference of discriminatory intent." *Florida*, 2012 WL 3538298, at *45 (emphasis in original). But as the next sentence in the *Florida* opinion explains, "[i]t might well be different, of course,

had the State not only acted without evidence of fraud, but also acted in a way that materially increased the burden on minority voters." *Id.* Here, SC addressed a problem of no documented significance fully aware of the disparate impact that would be borne by minority voters, and did so in a manner that shut out many black legislators (but not constituents making racial statements) from the process, while employing irregular procedures, and scrapping ameliorative provisions that would not have undercut the asserted justifications. *See* US FF 91-131. The facts in this case are not indicative of loophole-closing "by itself."

130. Disputed for the reasons stated *supra* at 124-29.[7]

131. Disputed. It is a significant mischaracterization to contend that the *Texas* court "adopted" *Crawford*'s holdings. The *Texas* opinion specifically concluded that *Crawford* "informs our analysis" but "does not control this case." *Texas v. Holder*, 2012 WL 3743676, at *12. And the *Texas* court also held that, notwithstanding the legitimacy of the interests recognized in *Crawford*, other circumstantial evidence as discussed in *Arlington Heights* can suggest that a State has "invoked the specter of voter fraud as pretext for racial discrimination." *Id.*

132. Disputed. The SC General Assembly had no credible evidence that voter impersonation is a problem in the State. *See* US FF 91-95.

133. Disputed for the reasons stated *supra* at 124-33 as well as in US CL 26-32. In addition, SC quotes selectively from *Purcell v. Gonzalez*, 549 U.S. 1 (2006). In the same paragraph as the

[7] The suggestion that the "risk[s] of voter fraud" which allegedly motivated R54 in any way parallel the conditions that gave rise to passage of the VRA is a sweeping distortion of the "historical experience which [the VRA] reflects." *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966). There is no comparison to be made between the non-existent record of impersonation fraud before the SC General Assembly and the record of the 1965 Act meticulously documenting the "insidious and pervasive evil which had been perpetuated in certain parts of our country through unremitting and ingenious defiance of the Constitution" for more than a century. *Id*. at 308-09.

sentence SC cites, the Court goes on to say: "Countering the State's compelling interest in preventing voter fraud is the plaintiffs' strong interest in exercising the 'fundamental political right' to vote. Although the likely effects of [the Arizona law] are much debated, the possibility that qualified voters might be turned away from the polls would caution any district judge to give careful consideration to the plaintiffs' challenges." *Id.* at 4 (citation omitted). In addition, *Purcell* did not adjudicate the merits of any claim; the state and four Arizona counties sought relief from an injunction pending appeal, and in lifting the injunction, the Supreme Court "underscore[d] that we express no opinion here . . . on the ultimate resolution of these cases." *Id.* at 5.

B. Act R54 Was Enacted With Discriminatory Purpose

134. Disputed. Proponents' statements that they "intentionally modeled Act R54" on Indiana and Georgia law cannot be squared with the significant differences between the laws, especially given the rejection of ameliorative amendments that would have more closely conformed R54 with those other statutes. *See* US FF 111-14, 116.

135. Disputed. It is of no moment that R54 is facially neutral and of general applicability. "[A] central goal of the Voting Rights Act was to prevent covered jurisdictions from enacting laws that 'may have been facially neutral' but that could be 'easily manipulated to keep [minorities] from voting.'" *Florida*, 2012 WL 3538298, at *40 (quoting *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 198 (2009)). Nor is the inclusion of some potentially mitigating provisions – particularly when others were excluded – dispositive. *See* US FF 127-29; *cf. Personnel Adm'r of Massachusetts v. Feeney*, 442 U.S. 256, 277 (1979) ("Invidious discrimination does not become less so because the discrimination accomplished is of a lesser magnitude."). This is especially so when the core ameliorative measure – the RI provision – is

so vague, so disputed, and so complicated as to require the State's election director to vow to violate R54 and other requirements of SC law to prevent voter disenfranchisement. *See supra* 69-84; US FF 39-60. Moreover, there is evidence that the House viewed the RI provision not as a voluntary ameliorative measure, but as constitutionally required. *See* US FF 130. Finally, bill sponsors testified that they did not consider compliance with the VRA or impact on racial minorities in drafting photo ID legislation. *See* US FF 104.

136. Disputed as unsupported by the record.

137. Disputed. A three judge panel of this Court rejected the identical argument last month, and held that the impact of a voting change must be assessed in "*relative* terms, with reference to the proportions of each group affected by the change." *Florida*, 2012 WL 3538298, at *14 ("Focusing on the effects of voting changes in absolute terms would mean that almost no ballot access change would be considered retrogressive; after all, the fact that fewer members of a particular group are present in the overall electorate is part of what it means to be a *minority* group.") (emphasis in original). R54 functions as a vehicle for racial discrimination given the known disproportionate impact of the law on minority voters and the fact of high levels of racially polarized voting in the State. Knowledge of the racial impact suggests actions were taken in part to suppress the turnout of certain voters and gain electoral advantage. US FF 91, 101-10; *supra* 104, 106.

C. The United States Has Amply Refuted South Carolina's Asserted Purposes

138. Disputed. The United States has amply refuted SC's *prima facie* assertions. *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 332 (2000) (*Bossier II*) ("[T]he Government need only refute the covered jurisdiction's *prima facie* showing that a proposed voting change does not have a [prohibited] purpose in order for preclearance to be denied."). Moreover, to the extent the

evidence conflicts as to the purposes of R54, a view with which the US would disagree, preclearance must be denied because Section 5 prohibits "any" discriminatory purpose (even if there are other purposes). *See* 42 U.S.C. § 1973c(c); *Bossier I*, 520 U.S. at 488.

II. ACT R54 WILL HAVE A DISCRIMINATORY EFFECT

139. Disputed. SC has failed to meet its burden of demonstrating that R54 will not have the effect of denying or abridging the right to vote on account of race, color, or membership in a language minority group. 42 U.S.C. § 1973c(a). It is uncontested that minority voters constitute a disproportionate number of the registered and eligible SC voters who lack the photo ID required to cast a regular ballot on Election Day under R54. *See* US FF 18-21; US CL 4-7; *supra* 104-07. Further, SC has not shown that the availability of the purported mitigating provisions will alleviate the new and substantial burden imparted by the requirement to acquire PVID that will likely cause some reasonable minority voters not to exercise the franchise. *See* US FF 79-82; US CL 8-17. While SC claims that "unlike the Texas voter ID, R54 will not require voters to pay a fee or travel an inordinate distance," neither is true. There are costs associated with obtaining both a DMV-issued ID and SEC PVRC. *See supra* 65; *infra* 153-155. Notaries are permitted to charge a fee in SC and Andino has admitted that charging to complete a RI/RO affidavit would constitute a poll tax. *See* US FF 65. Some minority voters in areas with no public transportation would be required to undertake roundtrip travel of approximately fifty to seventy miles to obtain SEC PVRCs from their CBRE. ECF No. 220-1 (JCR written direct, ¶ 1); *see also* 8/30/12 Tr. at 243:24-244:10 (GM) ("I think it is burdensome because of the transportation. . . . [I]n the four counties that I represent, they only have one DMV office, one county registration office, and the travel distance in these areas, in this rural area is very, very difficult."); 8/30/12 Tr. at 274:21-276:5 (GCH) ("[I]n my district in particular, and in a lot of

districts like mine, transportation doesn't exist, and when you add the fact that people are poor and have to pay to come to the county seat, it's pretty difficult and can be a big barrier to getting around in that district."). **A**. Indeed, the State failed to show how the mitigating factors would affect white and minority voters differently and thus, eliminate the gap in ID possession rates. Significantly, its expert, Dr. Hood, conceded that the mitigating facts "might not" affect the gap at all and, moreover, noted he had no evidence to suggest otherwise. 8/30/12 Tr. at 167:9-168:24 (MVH). **B**. Acquiring acceptable PVID under R54 will require the costs and burden of traveling to DMV or CBRE offices that are largely inaccessible by public transportation, and subject minority voters who are more likely to lack access to vehicles or live in counties that lack public transportation to even greater burdens. US FF 71-86; *infra* 153-56.

A. Act R54 Will Result in Retrogression

140. Not disputed that as a statement of the legal standard, to be entitled to preclearance under the effect prong of Section 5, SC must establish that R54 will not "lead to retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Beer v. United States*, 425 U.S. 130, 141 (1976). Disputed that SC has met its burden of proving the absence of retrogression. SC has failed to show that R54 will not worsen the position of minority voters in comparison to the preexisting voting standard. *See* US FF 18-30; US CL 4-7, 17. Therefore, preclearance must be denied. *See Beer*, 425 U.S. at 141; *Florida*, 2012 WL 3538298, at *8.

141. Not disputed as an accurate statement of the standard set forth in *Florida v. United States*. *See* US CL 3.

142. Disputed. The court in *Florida v. United States* further stated that the plaintiff jurisdiction bears the burden of proving that the voting changes at issue are non-retrogressive. *Florida*, 2012 WL 3538298, at *9.

143. Disputed. *See supra* 140-142.

144. Not disputed that the retrogression standards articulated in *Texas* and *Florida* are consistent with one another. Disputed as otherwise incomplete and misleading. The *Texas* Court found that *Crawford* cannot be read as holding that the burdens imposed by a voter ID law—like making a trip to the DMV—can never "qualify as a substantial burden on the right to vote." *See Texas v. Holder*, 2012 WL 3743676, at *13 (quoting *Crawford*, 553 U.S. at 198). Moreover, as with their citation to other sources (including the *Purcell* opinion and the Report of the Carter-Baker Commission), SC's citation to *Crawford* omits crucial language. While SC cites *Crawford* as holding that "the inconvenience of making a trip to the BMV . . . does not qualify as a substantial burden," they omit important qualifying language immediately preceding that passage: "*For most voters who need them* . . . ." 553 U.S. at 198 (emphasis added). And as the *Texas* Court specifically stated, "Obviously, 'most' is different from 'all.'" *Texas v. Holder*, 2012 WL 3743676, at *13.

145. Not disputed to the extent it quotes *Texas v. Holder*.

146. Disputed. *See* US CL 4-9; *supra* 139-40. SC has failed to carry its burden under the *Florida* or *Texas v. Holder* frameworks.

1. Act R54 Will Disproportionately Affect Minority Voters

147. Disputed. Analyses by Dr. Stewart and Dr. Hood demonstrate conclusively that R54 will have a significant disproportionate effect on minority voters. *See* US FF 18-21. Specifically, black registered voters are more than twice as likely as white registered voters to lack the

requisite PVID, and Hispanic registered voters are nearly 72% more likely than white voters to lack requisite PVID. US Ex. 106, JA 001339, 0001377 (CS Reb. Decl. ¶¶ 84-85, Attach. H); *see also supra* 106A-B. These statistically significant disparities are conclusive evidence that R54 will have a disproportionate effect on minority voters. *See Florida*, 2012 WL 3538298, at *17-18, *31-32; US CL 4-7. SC cannot show by a preponderance of the evidence that the purported ameliorative measures of R54 will cure the known retrogressive effect. *See* US FF 38-86; *supra* 57-103. SC's conclusion that the purported ameliorative measures "will surely decrease the number of voters without acceptable photo ID" is thus unsupported by evidence and, moreover, beside the point. The State has no evidence to suggest that such measures will affect in any way the significant racially disparate impact of R54. *See* 8/29/12 Tr. at 167:9-168:24 (MVH). Indeed, reliable evidence demonstrates that in some cases R54's ameliorative provisions may even exacerbate R54's retrogressive effect. *See* US FF 85. That evidence is undisputed.

148. Disputed. Section 4 of R54, setting forth the requirement that the SEC issue PVRCs, is a related change that cannot be considered independently of Section 5 of R54. *See* US CL 37.

149. Disputed. **A.** SC has not offered any evidence demonstrating that "virtually all registered voters are capable of obtaining at least one acceptable form of photo ID." SC simply ignores the uncontested evidence in this case of the significant material and institutional costs associated with acquiring acceptable PVID for substantial numbers of South Carolinians. *See infra* 153-56. Several Intevenors are registered voters who lack PVID; they need not demonstrate the metaphysical impossibility of acquiring ID for the voting change to have a prohibited effect under Section 5. *See* DI FF 3. **B.** Moreover, SC misstates the legal standard. No case holds that it has to be *impossible* to vote for a change to be retrogressive. Rather, "retrogression in the position of racial minorities with respect to their effective exercise of the

electoral franchise," *Beer*, 425 U.S. at 141, means that the voting change at issue will, if implemented, "worsen the position of minority voters" in comparison to the preexisting voting standard, practice, or procedure. *Bossier II*, 528 U.S. at 324; *see also Florida*, 2012 WL 3538298, at *14 (rejecting Florida's argument "that the only ballot access changes that violate the effect test are those that make it *impossible* for minority citizens to vote" and stating if that "were the case, a state could close polling places in minority precincts and yet survive the effect test so long as voters still had the option to travel across town to more distant polls. No court has endorsed such a restrictive construction of the section 5 effect prong.") (emphasis in original).

150. Disputed. Dr. Hood's study of Georgia voter ID and turnout rates is inapposite. *See* US FF 33-37. The conclusions drawn about Georgia by Dr. Hood are misleading and any inferences made concerning SC's implementation of R54 based on his study are inappropriate. US Ex. 106, JA 001343-1359 (CS Reb. Decl. ¶¶ 95-132). Moreover, insofar as R54 is significantly more restrictive than Georgia's voter ID law, any comparisons made between R54 and the Georgia ID law are irrelevant. *See Texas v. Holder*, 2012 WL 3743676, at *15 (rejecting comparison between Texas photo ID law and those in Georgia and Indiana "because the circumstances in Georgia and Indiana are significantly different from those in Texas.").

151. Disputed. Due to a vague standard open to differing interpretations, the wide discretion that will be given to poll managers and CBREs to interpret and implement the reasonable impediment provision, the lack of SEC authority over CBREs, and the additional material burdens imposed on the voting process by the reasonable impediment affidavit, the RI affidavit will not sufficiently ameliorate the retrogressive effect and may exacerbate it. *See* US FF 39-70; US CL 8-17; DI FF 16-31; *supra* 67-79.

2. Act R54 Will Impose a Material Burden on Minority Voters

152. Disputed. **A.** SC's assertion that "acceptable ID can be obtained without cost or major inconvenience" is incorrect. The undisputed record evidence demonstrates that minority voters in SC, and particularly black voters, are (1) disproportionately more likely than white voters to lack the requisite PVID; and are (2) disproportionately more likely than white voters to be of lower socio-economic status, possess lower levels of literacy skills, lower levels of educational attainment and generally possess fewer of the social resources that established political science and sociological research has shown correlate with political participation and facilitate compliance with the formal requirements of participation, such as registering to vote. *See* US FF 22-28. The poverty rate among blacks in SC is 30% and among Hispanics is 33.8%, compared to only 11.9% among whites. The median household income for blacks in SC is $27,651 and for Hispanics is $33,592, compared to a median household income of $49,163 for whites. Further, minorities in SC are less likely to have completed high school where 23.2% of blacks and 41.6 % of Hispanics lack a high school diploma, compared to 11.7% of whites lacking a high school diploma. Additionally, 16.1% of blacks and 6.4% of Hispanics in SC do not have access to a vehicle, compared to 4.1% of whites without access. ECF No. 262 (Req. for Jud. Not.). Because R54 will bear more heavily on voters lacking educational, economic, and social resources, it will have a retrogressive effect on minority voters. *See Hale County*, 496 F. Supp. at 1213-14 (noting socioeconomic disparities and concluding that these factors affect black voters in several ways that materially affect political participation); *see also* US FF 22-28; 8/31/12 Tr. at 110:13-111:12 (CS); 8/31/12 Tr. at 18:9-19:2, 39:7-43:1, 66:3-67:8 (TA); 8/29/12 Tr. at 246:16-21 (MVH). **B.** In addition, SC's assertion that "casting a provisional ballot does not constitute a material burden" is incorrect. The court's conclusion in *Florida* that changes in the procedures for

updating a voter's address on Election Day were not materially burdensome turned on a number of factual findings not present here, including that the process for casting a provisional ballot when one was making an inter-county address change did not differ significantly nor take any more time than the process to make an Election Day address change at the polls under Florida's benchmark law. *Florida*, 2012 WL 3538298, at *32-37. In fact, the court found that, in some respects, Florida's new law made it considerably easier for those making an inter-county address change to vote. *Id.* at *34, *37. In contrast, R54 has made the process of voting considerably more burdensome. US FF 67-70.

153. Disputed. While the SEC does not plan to charge a fee to obtain an SEC PVRC, there are significant burdens imposed on voters that are not present under the benchmark practice. *See* US FF 71-86. Voters are not only subject to the burden of having to travel to the CBRE location in their county of residence, but they are also subject to the equivalent of a mandatory in-person re-registration requirement. *See* US FF 79.

154. Disputed. In addition to the direct, tangible burdens and costs of acquiring a SEC PVRC, *see supra* 153, requiring voters to go through this process will impose disproportionate burdens on minority voters who by reason of lower socio-economic status and comparable lack of access to transportation, will be least able to bear the additional financial and institutional costs imposed by having to acquire a SEC PVRC. These additional costs are substantial and likely to have a measureable and retrogressive effect on minority voter registration and turnout rates. *See* US FF 71-86; 8/31/12 Tr. at 37:19-39:6 (TA).

155. Disputed. Acquiring a free non-driver's DMV-issued ID cards requires that a voter travel to a DMV office and present the same documentation necessary to apply for a driver's license, including proof of identification/citizenship, proof of social security, and proof of SC residence.

See US FF 75. To qualify for a DMV ID, voters may have to incur the costs associated with acquiring copies of birth certificates, marriage and divorce records, or legal fees associated with amending such records. *See* DI FF 6-8. Further, voters seeking to acquire "free" DMV ID are subject to additional institutional and transportation costs. *See* DI FF 9-15.

156. Disputed. *See supra* 153-55.

157. Disputed. The court in *Texas v. Holder* recognized that there may be a burden associated with having to travel to an administrative agency—the DMV or CBRE office in the case of SC—to obtain a form of free photo ID. 2012 WL 3743676, at *16.

158. Disputed. SC CL 158 is misleading and mischaracterizes the *Florida v. United States* opinion. *See supra* 152B (the provisional ballot process at issue in *Florida* and the provisional ballot measures in § 5 of R54 are not factually comparable, nor is the nature of the change between the benchmark and proposed practices between Florida and SC). The option to cast a provisional ballot when a voter does not have acceptable PVID on Election Day does not eliminate any burden, but imposes the costs and burden associated with traveling to the CBRE office to acquire and/or present PVID not present under the benchmark law. *See supra* 152B, 153-154.

159. Disputed. While not included in the Texas or Georgia laws, the reasonable impediment provision will not sufficiently ameliorate the racially disproportionate and retrogressive effect of R54. *See supra* 67-84, 151; US FF 39-70; US CL 8-17; DI FF 16-31.

160. Disputed. SC has not presented evidence to meet its burden of showing that all minority voters who, under SC's current law, cast a full, effective regular ballot will be able to continue to do so under the voting changes imposed by R54, nor has SC demonstrated that its purported ameliorative measures will mitigate the demonstrated retrogressive effect on minority voters.

See US FF 38-89; *supra* 147, 151. Moreover, it is clear that R54 is not comparable to the voter identification laws of Georgia or Indiana, which both include a significantly more expansive series of acceptable photo ID. *See* Ind. Code Ann. § 3-5-2-40.5(a)(3); Ga. Code Ann. § 21-2-417; *see also* US FF 36, 111-14; *supra* 12-13.

B. SC's Contention that Act R54's Effect Is Not "On Account of Race or Color" is Legally Incorrect

161. Disputed. The *Texas* court recently rejected the argument that the effect of Texas's voter ID law was "on account of" something other than race and therefore outside the scope of Section 5's non-retrogression requirement, holding that to read the VRA otherwise would be to "collapse[] its effect element into its purpose element." *See Texas*, 2012 WL 3743676, at *30-32 ("Never has a court excused 'retrogression in the position of racial minorities' because that retrogression was proximately caused by something other than race."). In addition, that a law is "neutral" on its face or "applies to all voters" says nothing about whether it has a discriminatory effect or purpose. *See id.* at *8 (describing ballot access measures enacted by states including SC that, although neutral on their face, were deliberately calculated to reduce the number of African Americans able to vote) (citing *Katzenbach*, 383 U.S. at 311).

162. Disputed. Judicial preclearance courts have repeatedly rejected the argument that minorities affected by a voting change are disenfranchised only by their own decision or choice; as articulated by the court in *Texas v. Holder* when the State of Texas attempted to make the same argument in defense of its voter ID law, this argument "completely misses the point of section 5." *See* 2012 WL 3743676, at *10-11 ("Just as educational and economic conditions might affect whether minorities 'choose' to vote, those conditions could also affect whether minorities 'choose' to obtain photo ID."); *see also Texas v. United States*, 831 F. Supp. 2d 244, 262-66 (D.D.C. 2011) (three judge court); US FF 22-28.

163. Disputed. *See supra* 162. The cited holdings in both *Gonzalez v. Arizona*, 677 F.3d 383 (9th Cir. 2012) (en banc), and *Farrakhan v. Gregoire*, 623 F.3d 990 (9th Cir. 2010) (en banc), were based on VRA § 2, not VRA §5. *Gonzalez*, 677 F.3d at 405-07; *Farrakhan*, 623 F.3d at 992-93. And both decisions interpreted *not* the "on account of race" language in Section 2(a), but rather the statutory "totality of the circumstances" test in Section 2(b), 42 U.S.C. § 1973(b) – which appears nowhere in the text of Section 5. *Gonzalez*, 677 F.3d at 405; *Farrakhan*, 623 F.3d at 993.

164. Disputed. The operative statutory language is not the same in VRA § 2 as in VRA § 5. *See supra* 163; *compare* 42 U.S.C. § 1973(b) ("A violation of subsection (a) of this section is established if, based on the totality of the circumstances, it is shown that the political processes leading to nomination or election . . . are not equally open to participation by members of a class of citizens protected by subsection (a)"), *with* 42 U.S.C. § 1973c(a) (requiring proof that a covered change "neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color" or membership in a language minority). In addition, the Supreme Court has rejected the argument that the Section 2 standard should be imported into the Section 5 retrogression analysis. *Bossier I*, 520 U.S. at 477-85 ("[W]e have consistently understood [Section 2 and Section 5] to combat different evils and, accordingly, to impose very different duties upon the States . . . .").

III. THE CONSTITUTIONAL AVOIDANCE CANON HAS NO APPLICATION HERE

165-69. Disputed. The State asks this Court to disregard binding precedent and create new legal standards under Section 5 to avoid "grave constitutional concerns." But as the D.C. Circuit recently reaffirmed, Section 5 is constitutional. *Shelby Cnty. v. Holder*, 679 F.3d 848, 884 (D.C. Cir. 2012) (facial challenge). As such, this Court has no reason to depart from applying well-

established Section 5 standards. *See Texas v. Holder*, 2012 WL 3743676, at *32 (noting that "we are sensitive to the concerns raised in *Northwest Austin*," but constitutional avoidance does not "require us to ignore section 5's purpose and structure, as well as decades of Supreme Court decisions interpreting its language"); *Texas v. United States*, 2012 WL 3671924, at *8 ("The constitutional avoidance canon is no aid to Texas because we are not faced with two competing yet permissible interpretations of section 5."); *Florida*, 2012 WL 3538298, at *41 ("[T]he doctrine of constitutional avoidance does not permit us to interpret section 5 in a way that would render its purpose prong meaningless…or that would require reversing the burden of proof specified by the statutory text."). SC is not entitled to preclearance because it has not carried its burden under those standards. *See* ECF No. 273 (US FF/CL). That R54 has not been precleared while other states' laws have is due solely to the facts surrounding R54's enactment, the singular aspects of R54 itself, SC's ancillary voting laws, and the overwhelming and uncontested evidence of its disparate racial impact and the substantial, disparate burdens it will place on SC's minority voters.

CONCLUSION

South Carolina's request for judicial preclearance of Act R54 should be denied.

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