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

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Terms:

§ 4……...Section 4 of Act R54

§ 5……...Section 5 of Act R54

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§ 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

HJ……House Journal

ID……....Identification or Identification Card

JA……...Joint Appendix

LBC……Legislative Black Caucus

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

SJC……..Senate Judiciary Committee

US……...United States

US Resp……. United States' Responses to South Carolina's Proposed Findings of Fact and Conclusions of Law, ECF No. 281

VRA……....Voting Rights Act

Witnesses:

AC……..Representative Alan Clemmons

BH……..Senator Bradley Hutto

CC……..Senator George "Chip" Campsen

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

LGM……...Lt. Gov. Glenn McConnell

LM……..Senator Larry Martin

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

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

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

I. Introduction and Background

1-8. SC does not directly dispute US FF 1-8; the texts of the respective benchmark and proposed laws speak for themselves.[1]

9-11. SC does not directly dispute US FF 9-11. Andino's testimony that her procedures need not be approved by the SEC is misleading and irrelevant, inasmuch as SC concedes that Andino's procedures provide only informal and non-binding guidance to CBREs, do not have the force or effect of law, and thus cannot be relied upon by this or any other court. *See also* US CL 13 n.3; US Resp. 58B. Only the five commissioners who comprise the SEC are legally empowered to promulgate formal procedures that CBREs would be compelled to follow—and those commissioners have admittedly not done so with respect to R54.

12. SC does not dispute US FF 12.

13-17. The cited provisions demonstrate the internal inconsistencies, proposed violations of SC law, and contradiction of the State's prior admissions, as described in US FF 13-17.[2] Regardless of how one characterizes Andino's testimony, it is undisputed that her

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[1] Contrary to SC Resp. to US FF 2, no current and valid ID must be shown to obtain the current non-photo voter registration card, which is mailed to the voter. *See* S.C. Code § 7-5-125 (2010); 8/28/12 Tr. at 261:18-21 (MA). The referenced portion of HAVA requires registrants to list their driver's license or the last 4 digits of their SSN on an application for voter registration. 42 U.S.C. § 15483(a)(5)(A).

[2] SC argues that the portion of Andino's trial testimony and the SCAG's 8/31/12 filing that contemplate non-notary poll managers witnessing RI/RO affidavits where notaries are unwilling or unavailable to do so constitutes "substantial compliance" with R54's affidavit requirement and does not contradict the State's prior admissions in this case. The record supports neither argument. Allowing non-notary poll managers to

(Cont'd…)

interpretations of R54 and other state law—whether in her oral testimony or her written procedures—are legally unenforceable, not binding upon the CBREs or anyone else, and beyond her authority as executive director of the SEC, and therefore should not be relied upon by this Court. US FF 9-11; US Resp. 58B, 76A-B. Similarly, the SCAG's litigation strategy adopting "all" of Ms. Andino's interpretations of Act R54, ECF No. 263 at 2, is not legally binding under state law and thus entitled to no deference. US CL 13 n.3; US Resp. 70A-B.[3]

II. Retrogressive Effect of the Photo Voter Identification Requirement of R54

18. SC concedes that minority voters in SC are disproportionately less likely than white voters to possess any of the currently available, acceptable forms of PVID under R54. No evidence establishes that any of the licenses identified as having been returned to the State actually remain in the custody of the customer. *See* US Resp. 112-114. Removing these records from Dr. Stewart's datasets addressed the problem of "deadwood" and increased the validity and reliability of his analyses. *See* US Resp. 112-116; US FF 20.

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witness RI/RO affidavits *supplants,* rather than substantially complies with, the affidavit requirement contained in R54 § 5. 8/28/12 Tr. at 286:2-5 (MA) (conceding that unless SC law is violated and non-notarized affidavits accepted, voters will be disenfranchised.) A document that is not signed and certified by a notary public is not an affidavit. *Doty v. Boyd*, 24 S.E. 59, 60 (S.C. 1896).

[3] SC's citation of *Beard-Laney, Inc. v. Darby*, 49 S.E. 2d 564, 567 (1948), for the concept that agencies may have inferred or implied powers to assist them in carrying out their express powers, is misplaced. No agency—and certainly no agency staff member, such as Andino—has the implied power to violate or disregard express statutory commands, such as election certification deadlines, RI/RO provisional ballot counting rules, and RI/RO affidavit procedures.

19. The evidence shows that R54 will have a disparate burden on minority voters. *See* US Resp. 106, 117, 147-160; *infra* 22-28. There is no need for a RI/RO provision in the current law because the non-photo voter registration card is acceptable for voting and issued to every registered voter whether they choose to register by mail or at a CBRE location. *See* US Resp. 68.

20. Dr. Stewart's data preparation methods met all accepted analytical standards and ensured the validity and reliability of his analyses. *See supra* 18. Indeed, SC's expert expressed no concerns whatsoever with any methodology employed by Dr. Stewart. 8/30/12 Tr. at 7:14 to 8:1 (MVH); US FF 31; US Resp. 109.

21. While it incorrectly disputes Dr. Stewart's methodology, *supra* 18 and 20, SC cannot validly dispute that Dr. Stewart's analyses show that rates of PVID possession are racially disproportionate at a statistically significant level. In SC, absentee voting by mail is not an equivalent substitute for in-person voting. *See* US Resp. 105, 107.

22-28. SC ignores the substance of Dr. Stewart's and Dr. Arrington's analyses of the disparate socio-economic disadvantages borne by black voters in South Carolina without PVID. SC cannot contest that the disproportionate burdens imposed by R54 on minority voters are compounded by the fact that minority voters in SC who lack PVID are significantly less likely than white voters lacking PVID to have the resources necessary to acquire an allowable ID. Instead, SC simply relies on already-rebutted criticisms of Stewart's matching methodology, criticisms their own expert did not see fit to make. *See supra* 18, 20-21; *infra* 81-83; US Resp. 112-16, 152; 8/30/12 Tr. at 8:14-9:1 (MVH).

29-30. SC ignores Dr. Hood's testimony that the gap in ID possession rates he found represented a "significant racially disparate impact." *See* 8/29/12 Tr. at 167:9-168:24, 218:11-219:12 (MVH); *see also* US Resp. 106. Notably, Dr. Hood conceded that the ameliorative factors "might not" affect the gap at all and, moreover, noted he had no evidence to suggest that they would in fact close that gap. 8/29/12 Tr. at 167:9-168:24 (MVH); *see also* US Resp. 106.

31-32. SC has tried to rehabilitate Dr. Hood's analysis by presenting after-the-fact explanations for his inclusion of deceased registrants and individuals whose licenses were returned from other states. But Dr. Hood himself testified that when he conducted his analysis he had no idea the data included deceased persons. 8/29/12 Tr. at 203:12-17 (MVH). He also testified he assumed that persons whose licenses had been returned from other states had been excluded from his analysis and that, were he to do this analysis again tomorrow, he would be certain to exclude those data *and* deceased persons. *Id. at* 207:1-9; 211:15-213:7. These are the same errors that led a Wisconsin court to reject Dr. Hood's analysis as flawed and unreliable. Dr. Stewart's analysis shows that those with returned licenses are essentially equivalent to inactive voters, and thus properly removed as deadwood. *See* US Resp. 108-09.

33-37. SC does not directly dispute US FF 33-37, although it contends that Dr. Hood's Georgia studies are reliable. But Dr. Hood's first study is admittedly limited to holders of DL and DMV ID only – not all allowable forms of ID – and was excluded as unreliable by another federal court for that reason (among others). 8/29/12 Tr. at 226:15-21 (MVH). And Dr. Hood's second study failed to report actual turnout by race; applied

statistical controls that diminished turnout differences between white and black voters while purporting to estimate racial disparities; systematically overestimated actual turnout by race (especially for those without ID); and failed to account for differences in the national political dynamic between 2004 and 2008 – including the influence of the 2008 candidacy of Barack Obama on African American turnout. US Ex. 106, JA 001348, JA001353-57 (CS Reb. Decl. ¶ 107, 110-128); 8/29/12 Tr. at 236:2-7 (MVH). Dr. Hood further conceded that Georgia's list of acceptable ID is much more expansive than SC's. US Resp. 13; US FF 39-70; US Resp. 67-84. No reliable inferences can be drawn from Dr. Hood's Georgia study that apply to SC. *See* US Ex. 106, JA001343-59 (CS Reb. Decl. ¶¶ 95-132); US FF 33-37; *see also* US Resp. 118.

III. Inefficacy of the Purported Ameliorative Provisions of R54

38. SC distorts Dr. Stewart's testimony, which dealt specifically with the burdens imposed by R54. He did not testify that "any photo identification requirement necessarily" burdens voters. Dr. Hood, on the other hand, did. 8/29/12 Tr. at 262:19-263:5, 264:16-20 (MVH) (conceding that photo ID laws impose institutional costs on voters, and that those with lower SES are less able to bear such costs). Dr. Hood, however, offered no opinion on the burdens that R54 imposes and so his testimony cannot help SC.

39. SC does not directly dispute US FF 39.

40. Andino's testimony regarding interpretation and implementation of the RI provision was inconsistent at trial and over the course of this litigation. *See* 8/28/12 at 210:17-211:8, 219:14-220:12, 225:2-25, 271:3-273:20, 274:3-22, 278:5-281:4.

41-53. SC does not directly dispute US FF 41-53. Its claims are rebutted at US Resp. 58B, 70A-B, 76A-B.

54. SC does not directly dispute that the selection of CBREs, whether by the governor or the county's legislative delegation, is done on a partisan basis.

55. In *United States v. Charleston County*, the Court found that the County's at-large system of elections denied African Americans equal access to the political process. 316 F. Supp. 2d 268, 307 (D.S.C. 2003). And although the evidence of poll manager harassment and intimidation was not dispositive, SC has not disputed the court's extensive factual findings that "by a preponderance of the evidence…there is significant evidence of intimidation and harassment" of black voters at the polls. *Id*. at 286 n.23. Those findings support the US's contention that by disproportionately increasing the number of black voters who are forced to rely on provisional ballots rather than regular ballots, and by increasing the amount of discretion that poll managers may exercise in whether and how those provisional ballots are counted, R54 disproportionately exposes black voters to precisely the kind of discriminatory polling place practices that have been documented by federal courts and social scientists alike. Additionally, US FF 55 accurately states Andino's testimony that the SEC has received complaints about poll managers acting in partisan ways.

56. Dr. Arrington's conclusions regarding discretion, race, partisanship and provisional ballots are based the court's findings in *Charleston County*, 316 F. Supp. 2d at 286-289, n. 23, the evidence in that case, and scholarship on the behavior of election officials. US Ex. 108, JA 001423 (TA Decl. ¶¶ 84-85).

57. While the race and party affiliation of a voter does not appear on the provisional ballot envelope, Andino testified that, in some instances, it is possible for CBRE officials to determine the race of a voter who casts a provisional ballot. *See* 8/29/12 Tr. at 52: 5-20 (MA).

58. R54 does not change the procedures for voting employed by CBREs during a meeting of the board of canvassers. 8/29/12 Tr. at 48:22-49:20 (MA).

59-60. SC previously admitted that RI/RO affidavits require notarization by a notary public; that the laws and procedures set forth in the SC SOS's Notary Public Reference Manual govern that process and are not contradicted by R54; and that those procedures require presentation of a valid, government-issued photo ID signed by the affiant, unless the notary already knows the affiant or another credible witness can attest to the affiant's identity. US Ex. 196, JA-US 000435-36 (SC Resp. to US Req. for Adm. Nos. 18, 19, 21). Those admissions are conclusively established. Fed. R. Civ. P. 36(b); *Airco Indus. Gases, Inc. v. Teamsters Health & Welfare Pension Fund*, 850 F.2d 1028, 1037 (3d Cir. 1988). Moreover, Andino specifically acknowledged that it would be reasonable for a notary to refuse to accept a non-photo ID, including a non-photo voter registration card, as proof of an affiant's identity. 8/29/12 Tr. 19:25-21:21 (MA).

61-62. SC does not directly dispute US FF 61-62. The SC GA has appropriated no funds to staff notaries at each of SC's approximately 2,100 polling places, and no evidence shows that any SC notary has agreed to work on Election Day for free. If notaries are not available at SC polling places, SC says it will disregard R54's affidavit requirement and state notary laws by directing non-notary poll managers to witness

RI/RO affidavits. SC FF 76. However, that contingency plan is unlawful, as even Andino recognized. US Resp. 76A-B; *supra* 59-60; 8/28/12 Tr. at 286:2-5 (MA).

63-64. SC offers no legal support for its claim that affidavits witnessed by non-notary poll managers are valid under SC law, or that such a procedure substantially complies with the affidavit requirement of § 5 of R54 for RI/RO provisional ballots.[4] Indeed, the established law in SC is that non-notarized documents are not affidavits at all, and that CBREs would disregard any *ultra vires* instruction by Andino to accept non-notarized RI/RO affidavits and to count such provisional ballots. US Resp. 76A-B; *supra* 59-60.

65. SC concedes that notaries can charge for their services and that Andino has no power to stop them from doing so. *See also* US Resp. 76A-B; *supra* 59-60.

66. SC does not directly dispute US FF 66, except to say that SEC PVRCs will also be available from the SEC bus. *But see* US Resp. 61B.

67-68. SC does not directly dispute US FF 67-68. The State's argument that only four of the eight steps "require the voter to do something" is both incorrect and beside the point. Each step in the process requires the voter to interact with a poll manager or notary. Each step also increases the time it takes to vote. SC already has some of the longest polling place lines in the nation. JA 001416, 1420 (TA Decl. ¶¶ 70, 78). Indeed, SCARE opposed R54 precisely because the law would likely increase the already-too-long lines at polling places in SC—thus discouraging or depressing turnout. US FF 100.

[4] It is unclear for what purpose SC cites *Lovelle v. Thornton*, 106 S.E. 2d 531, 534 (S.C. 1959), which deals with whether certain candidate filings substantially complied with statutory provisions. Nothing in that case suggests that Andino has the right to disregard statutory affidavit requirements in R54.

Similarly, the State's argument that the RI/RO provisional ballots are secret ballots is contradicted by Andino's testimony that voters would have to hand their completed ballots back to a poll manager to be placed into the provisional ballot envelope, thereby exposing the ballot to the poll manager and poll watchers and compromising the ballot's secrecy. 8/29/12 Tr. at 47:18-48:14 (MA).

69. SC distorts Ms. Andino's testimony with respect to provisional ballots being challenged. Andino stated that "there's not a way in place that [the voter] would know" if the stated RI was going to be challenged. 8/29/12 Tr. at 27:4-16 (MA). She agreed that under "the current process" for provisional ballots, "if you want to make sure that [the ballot] gets counted" a voter should attend the canvass. *Id.*

70-72. SC does not directly dispute US FF 70-72.

73-76. SC does not directly dispute US FF 73-76, except to add that the SEC bus will also be available to issue SEC PVRCs. *But see* US Resp. 61A; *see also* U.S. Resp. 61B.

77-78. SC does not directly dispute US FF 77-78. SC notes that the RI/RO provisional ballot may be available to those who qualify for it. *But see supra* 59-70.

79-80. SC does not dispute US FF 79-80.

81-82. SC does not directly contest US FF 81-82.

83. SC's assertion that "the current gap in R54 ID possession rates need not be reduced to zero" because of the existence of the RI exception is incorrect because the RI provision itself will disparately and materially burden minority voters. US FF 66-70; US CL 12-17.

84-86. SC does not directly dispute US FF 84-86. SC notes that Dr. Stewart did not consider Andino's implementation procedures and education plan until after forming his

opinion, but provides no basis for its apparent conclusion that his alleged failure to "timely consider" those plans would have changed his conclusions. *See also supra* 9-11; US Resp. 58B, 85. There is no basis for SC's apparent inference that higher in-person absentee voting rates for black voters will ameliorate R54's retrogressive impact. *See* US Resp. 62.

87-88. SC does not directly dispute US FF 87-88.

89. SC's opposition to US FF 89 is unpersuasive. Although the State Budget and Control Board approved the SEC's request to carry forward the voter ID funds from FY 2012 to FY 2013, the deposition testimony of the director of the Board makes clear that its approval of the SEC's carry-forward request was not authorized under Proviso 79.6 in the FY 2013 budget, because the FY 2012 voter ID funds were neither candidate filing fees nor general fund appropriations for the conduct of statewide primary, special, or general elections, and therefore would not fall within the ambit of Proviso 79.6. US FF 89; US Resp. 58A.

IV. Evidence of Discriminatory Purpose

91. SC concedes that introduction of voter ID legislation followed the historic levels of African American turnout in the State in 2008. Sen. Campsen's testimony about the origins of S334, 8/27/12 Tr. at 32:8-16, 107:20-108:25 (CC), is disputed. US Resp. 23B.

92-93. SC concedes that Sen. Campsen was unaware of credible incidents of impersonation fraud in SC at any time when photo ID legislation was pending, and that he tried and failed to find examples of such fraud after already introducing ID legislation. Rep. Cobb-Hunter's absentee ballot bill is not comparable to R54. *See* US Resp. 13B.

94. SC concedes that Rep. Clemmons previously testified that no evidence of voter impersonation fraud was brought into the House record. Rep. Sellers's Journal Statement – listing the numerous criminal laws already addressing voter fraud and that no law enforcement investigations in SC have uncovered impersonation fraud – is consistent with this. SC Ex. 3, JA 0063 (1/26/11 HJ).

95. SC concedes that current practices already provide a number of tools preventing impersonation fraud. That R54 would be the "most effective tool" is unsupported. *See* US Resp. 2A (Andino is unaware of any type of fraud that R54 would prevent).

96. Rep. Clemmons conceded that R54 does not detect or deter any kind of fraud other than in-person impersonation fraud. 8/27/12 Tr. at 245:25-247:6 (AC).

97-98. SC does not oppose US FF 97-98.

99-100. SC concedes that R54 proponents never sought actual data on electoral confidence, that SCARE opposed R54, including based on a concern that it would increase lines, and that such lines would discourage voting. *See, e.g.*, US Ex. 108, JA 001416, 1420 (TA Decl. ¶¶ 70, 78).

101. SC concedes that African American legislators' concerns about ID requirements chilling minority voting were well-known. There is no evidence that House adoption of an RI provision was based on concerns about minority voting. The cited testimony from Rep. Clemmons is about elderly voters.

102. SC concedes that voting in the State is racially polarized, that SC legislators understand this, and the changes to the African American percentage of the electorate have electoral consequences.

103-04. SC concedes that legislators knew of racial disparities in SES in the state, including access to transportation. SC also admits that the sponsors of ID legislation made no attempt to determine racial impact of ID legislation in advance. The claim that sponsors believed that a facially neutral law would have a no racially disparate impact is contradicted by the record. US FF 101-09; US CL 22.

105. SC misconstrues the significance of Dr. Ruoff's 2009 SJC testimony. Dr. Ruoff explained that social science confirmed that an ID requirement would place "very real burdens on folks" that are not "evenly applied across the population" by race and socio-economic status. US Ex. 143, JA 002032-33 (4/16/09 Hr'g).

107. The January 2010 SEC report did not show that the comparison between white and non-white registered voters generally and white and non-white registered voters without ID was "close." While non-white voters make up approximately 30% of registered voters, 8/27/12 Tr. at 146:5-21 (CC), they were 36% of registered voters without ID.

108. Campsen's testimony about relying on the RI provision to address R54's disproportionate impact on nonwhite voters is undercut by his admission that RI affidavits would be notarized and that he had not given significant thought to how the RI provision would work in practice. *See* US FF 130.

109. SC concedes that the only data before the SC GA on the impact of photo ID legislation was the January 2010 SEC data.

110. SC distorts Sen. Martin's clear testimony that racial disparities in ID possession were irrelevant to him. JA-US 001454-55 (LM Dep. at 68:9-12, 70:12-71:12). He did not condition that opinion on the existence of mitigating provisions.

111. During the legislative process, proponents did not qualify their cited statements about R54 closely mirroring or modeling Indiana and Georgia law.

112. ID proponents have admitted that a broader list of acceptable IDs would have been ameliorative. 8/28/12 Tr. at 179:23-180:9 (LGM); US FF 129; *see also* 8/29/12 Tr. at 262:6-8 (MVH) (limiting the types of acceptable ID imposes institutional costs).

113. SC concedes there are significant differences between R54 and Indiana law.

114. Absentee voting by mail is not an equivalent substitute for in-person voting. US Resp. 105; *see also Texas v. Holder*, No. 12-cv-128, 2012 WL 3743676, at *30 (D.D.C. Aug. 30, 2012) (three-judge court) (rejecting Texas's argument that the availability of absentee ballots for voters over 65 would reduce the burdens of that state's voter ID law, because "[s]ome voters over age 65 will undoubtedly prefer to cast their ballots at the polls – perhaps out of habit, a sense of civic pride, or simply because they wish to follow the news all the way up to Election Day before selecting a candidate").

115. Speaker Harrell admitted that cloture is "invoked rarely." 8/28/12 Tr. at 66:21 (RH). Cloture severely limits debate. US Resp. 21A-D.

116. The rejected House amendments would have broadened allowable ID to include other forms of photo ID as well as certain forms non-photo ID allowable to prove identity under HAVA. US Resp. 10.

117. Chronologically, the LBC walkout occurred after tabling of these amendments.

118. The highly unusual nature of the LBC walkout is undisputed.

119. Given the extraordinary nature of the walkout, purposefully voting on a clinching motion while LBC members are absent from the chamber is in no sense "normal."

120. SC concedes that no amendments proposed by black House members were adopted with respect to H3003.

121. That the key House sponsor and lead organizer of the pressure campaign to pass R54, 8/27/12 Tr. at 239:2-16 (AC), responded favorably to an admittedly racist email about photo ID is undisputed. 8/28/12 Tr. at 20:18-23 (AC). Rep. Sellers's statement that Rep. Clemmons is "an awesome man" was simply a collegial prelude to Sellers's criticism of Clemmons's failure to engage with H3003 opponents and the "callous and disheartening . . . injustice" of the bill itself. SC Ex. 29, JA 005219-20.

122. Sen. Malloy stated on the Senate floor that he was excluded from the meeting where the H3418 Conference report was signed by House members. US Ex. 116 (TA Supp. Decl at 24) (citing JA 004145-48) (6/15/10).

123. There is only one "regular" method of passing a special order motion according to Lt. Governor McConnell. 8/28/12 Tr. at 130:13-16 (LGM).

124. SC concedes that the majority vote by special order has only been used 5 other times outside of the photo ID context.

125. The cloture vote on H3003 in the Senate was concededly rare, and was the result of some Senators departing from their usual principles under pressure. ECF No. 218 (BH Direct Test. ¶¶ 13-14).

126. SC ignores the evidence that R54's proponents knew the House version of H3003 raised VRA issues. US Ex. 39, JA 000396 (4/13/11 SJ); 8/27/12 Tr. at 148:16-149:9 (CC).

127. SC provides no explanation for omitting a transition period when prior bills included both the RI provision and a transition period. *See* SC Ex. 2, JA 000980, 990 (H3418 conf. report). As a result of Senate Amendment 8, many versions of H3418 would have provided a transition period of up to two years before the polling place ID requirement went into effect. US Ex. 69, JA 000678 (1/28/10 SJ). While SC claims that voters without ID may have a RI for the November 2012 election, the State has never claimed that the "shortness of time" between the effective date of R54 and an election will apply to *any* election after November 2012, much less to all elections for up to two years. Moreover, a transition period would have allowed thousands of voters to continue using regular ballots rather than immediately pushing a large number of disproportionately minority voters into casting provisional ballots under the materially more burdensome RI process.

128. Although 12 days of early voting would have provided a longer window than election day itself to address a lack of ID and still vote a regular ballot, no party or witness has claimed that early voting would fully ameliorate the retrogressive effects of R54. Moreover, because SC has some of the longest polling place lines in the country, early voting would have helped to alleviate those lines, while R54 as passed will exacerbate them because it will dramatically increase the numbers of provisional ballots cast. US Ex. 108, JA 001416, 1420 (TA Decl. ¶ 70, 78) (noting that SC had the longest average wait time of any state in the 2008 election). It is uncontested that lines discourage voting and that SC election officials believed that early voting was needed as a result. US FF 100; 8/28/12 Tr. at 288:9-289:4 (MA).

129. Lt. Gov. McConnell saw no reason why state employee IDs should not be acceptable and also knew that the state workforce is disproportionately African American. *Supra* 112; 8/28/12 Tr. at 176:18-177:10 (LGM). Moreover, government employee IDs are not "one additional form of ID." Because Amendment 8 allowed for employee IDs issued by the federal government, the state, or any "political subdivision" of SC, dozens and dozens of additional IDs were ultimately excluded from R54.

130. SC concedes that the RI provision was not adopted in the House to ameliorate a retrogressive impact, and that staff and proponents anticipated that notaries would be required, as would possibly having to appear before CBREs to have an RI ballot counted.

131. McConnell and Campsen testified that H3003 presented preclearance concerns. 8/27/12 Tr. at 148:10-149:9 (CC); 8/28/12 Tr. at 141:7-12 (LGM).

PROPOSED CONCLUSIONS OF LAW

I. South Carolina Has Failed to Show by a Preponderance of the Evidence That R54 Will Not Have a Discriminatory Effect

1-3. The parties agree that both *Florida v. United States*, No. 1:11-cv-01428, 2012 WL 3538298 (D.D.C. Aug. 16, 2012), and *Texas v. Holder*, 2012 WL 3743676, inform the Court's analysis in this case.

4. The uncontested evidence establishes that R54 will have a retrogressive effect on minority voters. *See* US FF 18-22; US CL 4-17; US Resp.104-107; *supra* 18. SC's attempt to dismiss that effect as "small" should be rejected. *See Florida*, 2012 WL 3538298, at *14.

5. The US has established that R54 will have a retrogressive effect on minority voters, and SC has not met its burden of demonstrating that any provision of R54 will effectively ameliorate that retrogressive effect. *See supra* 4; US FF 38-86; US CL 9-17; US Resp. 57, 65-103, 117, 139-40, 147-160. In December 2011, the Attorney General informed SC that no objection would be interposed to § 6 of R54, which directs the DMV to issue free non-driver's ID cards to applicants age 17 years and older. JA-US 002634-38 (Determination Letter, Dec. 23, 2011). While SC had the opportunity to assess § 6's effect, it has presented no evidence that availability of free DMV IDs has had any mitigating effect on the number of voters without R54 ID or the racial disparity in possession rates.

6. Dr. Hood's database matching methodology is flawed and unreliable. *See* US FF 20, 31-37; US CL 6; US Resp. 108-109, 111, 116.

7. All parties' experts agree that R54's purported mitigating factors may not lessen the retrogressive effect of R54's PVID requirements. *See* US FF 29-30, 39-86; US CL 8-17; 8/29/12 Tr. at 167:9-168:24, 218:11-219:12 (MVH); 8/31/12 Tr. at 115:6-116:10 (CS); 8/31/12 Tr. at 33:3-39:6 (TA); US Resp. 57-103, 106, 117, 139, 147, 151, 153-60.

8. SC's objection that obtaining "free" ID imposes only insignificant burdens is contradicted by its own expert witness. Dr. Hood agreed that the more institutional costs a voting system imposes, the less likely a voter is to vote, *see* 8/29/12 Tr. 261:13-18 (MVH), and that requiring voters to travel to get a "free" ID for voting purposes is an institutional cost, *see id.* at 262:19-263:17 ("I agree, making the trip to get the ID is an institutional cost. I agree with that."); *see also* US Resp. 139, 149, 152-156. Nor can it

be concluded that the RI exception imposes no material burden; the RI affidavit would make voting considerably more burdensome than casting a regular ballot, and therefore cannot be analogized to the Florida inter county movers change. *See* US Resp. 152.

9. Under R54, SC registered voters who do not have an allowable ID would have to incur the monetary and other costs associated with obtaining one. In order to obtain a SEC PVRC voters must travel to the CBRE office and are effectively required to register to vote again, in order to receive the SEC PVRC. The US has proffered uncontroverted evidence that minority voters in SC—and specifically minority voters without R54 ID—have, on average, lower socioeconomic status, lower rates of literacy, lower rates of educational attainment, lower rates of access to vehicles, and higher rates of poverty than white voters. Dr. Stewart conducted his county-level and ZIP-code analyses of socio-economic and demographic factors using specific data on the number of SC registered voters without a driver's license or DMV ID to draw his conclusions. *See* US FF 23, 24; US Resp. 152. Dr. Arrington's conclusions regarding the further compounding effect of socioeconomic and demographic factors are based on Dr. Stewart's valid and reliable data analysis. *See supra* 18; *see also* US FF 27, 28.

10. SC's opposition to US CL 10 contends that the law could not disproportionately burden minorities because it "applies to all voters, regardless of race." But the VRA was enacted precisely because facially-neutral laws may, in some cases, have the effect or intent – or both – of burdening the right to vote of minority voters. *Florida*, 2012 WL 3538298, at *40 (citations omitted). R54 is such a law. *See supra* 4; US FF 38-86; US CL 9-17; US Resp. 57, 65-103, 117, 139, 140, 147-160.

11. The record demonstrates that minority voters are disproportionately less likely to possess the acceptable PVID, less likely to have access to a vehicle, and more likely to live in areas with no or limited public transportation, thus it follows, that minority voters—not all voters without acceptable PVID—will be disproportionately affected by the requirement to obtain SEC PVID in order to voter a fully effective, regular ballot on Election Day. This is a burden that is not present under the current law. *See* US Resp. 139, 154.

12. SC has not established that the RI provision will ensure that R54 will not result in a retrogressive effect on minority voters. Instead, the evidence shows that the RI provision is vague, inadequately defined, and subject to varying interpretations; the notary requirement largely nullifies any potential ameliorative effect; the RI provision is subject to arbitrary and inconsistent application by poll managers and county officials with unfettered discretion; and that full implementation of the RI provision will effectively require the violation of state law. *See* US FF 11-14, 16, 17, 39-53, 59, 62, 65; US Resp. 67-84. Notably, SC's contention that "the RI standard is clear and has been for over a year," is refuted by SC's own actions, including the facts that Andino was compelled to issue additional RO/RI procedures in August 2012 and that legislators, SEC staff, and county officials either gave conflicting testimony about the RI standard or stated they did not know what it meant, and that Andino's view of the standard further evolved at trial. *See* US FF 39-50. The absence of a clear RI standard is also evinced by the Court's many questions regarding the meaning and interpretation of the standard and its request that the SCAG further explicate that standard during the trial. *See* ECF No. 263.

13. That SC has failed to meet its burden under §5 of the VRA is based on the standard contained in the VRA, *see* 42 U.S.C. § 1973c(a), the Supreme Court's interpretation of that standard, and this Court's application of it. *See* US CL 1-3, 19, 20. SC's position that meeting this burden of proof is an "impossibility" is not the result of the US interpretation of the §5 burden, but rather, a consequence of the components of R54 itself. *See Texas*, 2012 WL 3743676, at *33 ("[I]f counsel faced an 'impossible burden,' it was because of the law Texas enacted – nothing more, nothing less.").

14. Only voters who do not possess one of the acceptable R54 ID would be eligible to cast an RI ballot, thus, the rates of possession of R54 ID are indeed determinative of which voters would be subject to the burdens of casting an RI provisional ballot. Further, SC mischaracterizes the holding in both *Texas* and *Florida*. The *Texas* Court recognized that there may be a burden associated with having to travel to an administrative agency to obtain a "free" form of photo ID. *See Texas*, 2012 WL 3743676, at *16. The *Florida* Court specifically noted 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. *See Florida*, 2012 WL 3538298, at *32-37. The opposite is true here where, in addition to imposing burdens when casting a regular ballot, the purported ameliorative provision—the option of casting an RI ballot—imposes a series of additional burdens.

15. While all voters are subject to challenge by a poll manager or a poll watcher, once a voter casts a regular ballot their ballot is counted and there is no review by the CBRE;

whereas, voters casting a provisional ballot under R54 using the RI affidavit will always be subject to review and possible rejection by the CBRE.

16. SC has presented no evidence definitively establishing whether provisional ballots cast pursuant to R54 will or will not be counted. *See* US FF 38-65; US Resp. 66-68.

17. SC has not established that any of the purported ameliorative provisions of R54, including the RI provision, will effectively ameliorate R54's retrogressive effect. *See supra* 4; US FF 38-86; US CL 9-17; US Resp. 57, 65-103, 117, 140, 147-160. Further, SC had offered no evidence that all would-be voters can easily obtain R54 qualifying-ID without cost or major inconvenience. *See* US Resp. 149.

II. South Carolina Has Failed to Show by a Preponderance of the Evidence That R54 Was Not Enacted, At Least in Part, For a Discriminatory Purpose

21. SC's claim that R54's mitigating provisions will ensure that all voters will continue to be able to exercise the franchise effectively is unsupported. First, SC has not shown that any mitigating provisions in R54 will close the uncontested gap in ID possession between white and minority voters. Second, given that gap, minority voters will be disproportionately either prohibited from voting, or required to vote a provisional ballot under the RI exception, which is both unlikely to be applied uniformly and is more burdensome than casting a regular ballot. In addition, the mere fact that a qualified voter casts a provisional ballot is no guarantee that ballot will be counted. US Ex. 108, JA 001423-24 (TA Decl. ¶¶ 84-86).[5]

[5] In the 2010 general election in South Carolina, approximately 37.2 percent of provisional ballots were uncounted; and of those ballots, 41.4 percent were rejected for (Cont'd…)

22. Lt. Gov. McConnell essentially admitted on the floor of the Senate that he did not expect R54 to be precleared. US FF 13. Moreover, SC's claim that there is no evidence that R54 was adopted because of the racial disparity in ID possession is incorrect. In addition to the repeated claims of racially discriminatory purpose made during the legislative process, Sen. Scott and Rep. Cobb-Hunter testified at trial that diminishing minority turnout – in response to the historically-high African American turnout in 2008 – was a purpose of R54. US Resp. 2D; *see Cnty. Council of Sumter Cnty. v. United States*, 596 F. Supp. 35, 38 (D.D.C. 1984) (three judge court) (denying preclearance as to discriminatory purpose because, among other reasons, the change would dilute "the then-increasing voting strength of the black minority"); *Wilkes Cnty. v. United States*, 450 F. Supp. 1171, 1175-76 (D.D.C. 1978) (three judge court) ("[T]he selection of the at-large plan, which would diminish black voting strength in some areas of the county . . . , was made shortly after black residents of Wilkes County began registering to vote in substantial numbers."); *cf. LULAC v. Perry*, 548 U.S. 399, 438-40 (2006) ("In essence the State took away the Latinos' [electoral] opportunity because Latinos were about to exercise it. This bears the mark of intentional discrimination that could give rise to an equal protection violation.").

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reasons unrelated to the voter's qualifications (including incomplete or illegible ballots, or missing signatures). This means that more than 15% of provisional ballots in SC in 2010 (41.4% of 37.2%) were rejected for reasons unrelated to the voter's qualifications. *See* U.S. Election Assistance Commission, 2010 Election Administration and Voting Survey at 52, 56, 58, & tbls. 34, 35a, & 35b, available at www.eac.gov/assets/1/Documents/990-281_EAC_EAVS_508_revised.pdf (last viewed Sept. 19, 2012).

23-24. *Arlington Heights* does not support SC's effort to downplay Rep. Clemmons's embrace of a constituent's racist statements about photo ID. In *Arlington Heights*, the Supreme Court noted only that the lower court's observation that the fact that some public hearing participants "might have been motivated by opposition to minority groups" did not alone warrant the conclusion that such discriminatory opposition motivated the defendants. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp*., 429 U.S. 252, 269 (1977). Here, however, Rep. Clemmons embraced the racist comments made to him. SC's further effort to dilute the significance of this exchange based on the waiver of legislative privilege is hardly probative in light of the widespread spoliation of contemporaneous emails as well as the destruction of recordings from the House. *See* ECF No. 169; ECF No. 116-1 at ¶¶ 6-7.

25. Rep. Clemmons's email exchange is not a solitary example of racially charged rhetoric, but is accompanied by his repeated objections over email and at trial to "busing" voters and the fact of "homogenous groups" using in-person absentee voting. *See* ECF No. 272, DI FF 38, 41(a). While the *Florida* Court discounted a lone racially charged statement of a legislator, it did so noting that it was "important" that the Senator in question "was neither a sponsor nor a primary proponent of the [bill], and did not play an important role in passage of the bill." *Florida*, 2012 WL 3538298, at * 44. The same cannot be said of Rep. Clemmons, the lead sponsor and strategist of the House bill, and of the pressure campaign that forced the Senate to accept H3003. *Supra* 121; *see* 8/27/12 Tr. at 11:16-18 (Bartolomucci) (Rep. Clemmons was "instrumental" in R54's passage); *see also* US Ex. 43, JA 001449 (floor statement of then-Sen. McConnell that "this is the

second time that two major pieces of legislation in this Senate have almost gotten stampeded by either emails or blogs or whatever") (5/11/11 SJ). Rep. Clemmons's position is more like the redistricting committee chair in *Busbee v. Smith*, who "utilized the full power of his position and personality to insure passage of his desired Congressional plan." 549 F. Supp. 494, 502 (D.D.C. 1982).

26-32. The *Texas* Court specifically held that notwithstanding the legitimate interests recognized in *Crawford*, other circumstantial evidence can suggest that a State has "invoked the specter of voter fraud as pretext for racial discrimination." *Texas*, 2012 WL 3743676 at *12. As such, *Crawford* does not insulate SC's stated justifications from scrutiny. US Resp. 131. That R54 "actually was" passed to detect and deter voter fraud and shore up electoral confidence is unsupported beyond proponents' self-serving statements. US FF 91-100; *cf. St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 511 (1993).

33-34. Overwhelming evidence establishes that R54 will have a discriminatory effect and that less discriminatory alternatives were rejected. A transition period, allowing voters a greater opportunity to obtain acceptable ID could reasonably have been anticipated to have an ameliorative affect. Moreover, proponents have admitted that allowing a wider range of IDs from the outset – rather than effectively mandating in-person re-registration to obtain ID – would be ameliorative. US FF 129. Inclusion of the RI provision alone does not justify rejection of other ameliorative provisions because there is no evidence that the provision will be uniformly applied and, even if it is, it will still add disproportionate, material burdens to minority voters.

35-36. SC's view that the irregularities tainting consideration of photo ID—the LBC walkout, voting to foreclose further debate in the House when the LBC was absent from the chamber, the repeated cloture votes in both the House and Senate, the use of rarely used procedural tactics in the Senate, the exclusion of black Senators from certain conference committee negotiations—are merely incidental steps to passing a "popular law" is unsupported. Instead, photo ID legislation was racially divisive from the start and its proponents—pressured by specific factions rather than the public generally—used whatever procedural devices were necessary to pass the legislation and exclude black legislators at critical junctures. US Resp. 21, 25-27, 37, 40, 48, and 51. SC's response—that some black legislators participated in drafting the Senate's Amendment 8 and voted for it but not the ultimate bill—does not satisfy SC's burden of proving that R54 lacks discriminatory purpose and effect. The additional burdens that R54 will impose disproportionately on minority voters are well-established. And that some ameliorative provisions—but certainly not all that were contemplated—were included in R54 speaks only to the complexity of the legislative process. US Resp. 28. It does not outweigh the other evidence demonstrating discriminatory purpose.

37. Because SC has failed to show that Section 5 of R54 is without a discriminatory purpose or effect, this Court cannot make a determination with regard to Sections 4, 7, and 8 of R54 because they are related to the changes that are not enforceable.

III. Conclusion

This Court should deny preclearance of Act R54.

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