IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

TRIAL BRIEF OF DEFENDANT-INTERVENORS

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES AND REGULATIONS

TABLE OF EXHIBITS

TABLE OF ABBREVIATIONS

A. Martin	Initial Report of Dr. Andrew D. Martin, expert witness for Defendant-Intervenors (June 19, 2012)
A. Martin Supp.	Supplemental Report of Dr. Andrew D. Martin (July 28, 2012)
Anderson Tr.	Deposition of Heather Anderson, Staff Attorney for Senate Judiciary Committee
Arrington	Initial Report of Dr. Theodore S. Arrington, expert witness for the United States (June 19, 2012)
Arrington Tr.	Deposition of Dr. Theodore S. Arrington
Bloodgood Tr.	Deposition of Nancy Bloodgood, election protection attorney
Bowers Tr.	Deposition of Marilyn Bowers, State Election Commissioner
Burton	Initial Report of Dr. Orville Vernon Burton, expert witness for Defendant-Intervenors (June 19, 2012)
Burton Supp.	Supplemental Report of Dr. Orville Vernon Burton (July 26, 2012)
Buchanan	Rebuttal Report of Dr. Scott Eugene Buchanan, expert witness for South Carolina (August 6, 2012)
Buchanan Tr.	Deposition of Dr. Scott Eugene Buchanan
B. Williams Tr.	Deposition of Dr. Brenda C. Williams, Intervenor
Calkins Tr.	Deposition of Dr. Patricia Calkins, former York County poll manager
Campsen Tr.	Deposition of Sen. George "Chip" Campsen III, Chair of Senate Judiciary Sub-Committee on Election Law during H.3418's legislative consideration
Clemmons Tr.	Deposition of Rep. Alan Clemmons, Chair of House Judiciary Sub-Committee on Election Law
County Elec. Hrs. RJN	Defendant-Intervenors' Request for Judicial Notice, as to the days and hours of operation for South Carolina's county boards of election and voter registration offices*
Debney Tr.	Deposition of Joseph Debney, Executive Director of Charleston County Board of Elections and Voter Registration
Debose Tr.	Deposition of Craig Debose, Intervenor
Dennis Tr.	Deposition of Patrick Dennis, Staff Attorney for House Judiciary Committee
DMV	South Carolina Department of Motor Vehicles

Donehue Tr.	Deposition of John Wesley Donehue, former Senate Republic Caucus Director and current Republican political consultant
Freelon Tr.	Deposition of Delores Freelon, Intervenor
Glover Tr.	Deposition of Junior Glover, Intervenor
H.3003	House Bill 3003, enacted as Act R54
H.3418	House Bill 3418, predecessor bill to H.3003
Harrell Tr.	Deposition of the Hon. Robert "Bobby" W. Harrell, Jr., Speaker of South Carolina House of Representatives
Harrison Tr.	Deposition of Rep. James H. Harrison, Chair of House Judiciary Committee
Hist. Discr. RJN	Defendant-Intervenors Request for Judicial Notice, as to judicial findings of recent and ongoing racial discrimination in voting in South Carolina*
Hood	Initial Report of Dr. M.V. Hood III, , expert witness for South Carolina (June 19, 2012)
Hood Supp.	Supplemental report of Dr. M.V. Hood III (July 28, 2012)
Hood Reb.	Rebuttal Report of Dr. M.V. Hood III (August 3, 2012)
Hood Tr.	Deposition of Dr. M.V. Hood III
ID	Identification
JA	Joint Appendix
JA-DI	Defendant-Intervenors' Supplement to the Joint Appendix
Knotts Tr.	Deposition of Sen. Jake Knotts, Chair of Senate Rules Committee
K. Rutherford Tr.	Deposition of Karen Rutherford, Benedict College
L. Martin Tr.	Deposition of Larry A. Martin, Chair of Senate Judiciary Sub-Committee on Election Law during H.3003's legislative consideration
McConnell Tr.	Deposition of Lt. Gov. Glenn McConnell, President Pro Tempore of the Senate during H.3418 and H.3003's legislative consideration
Quinn	Initial Report of Prof. Kevin J. Quinn, expert witness for Defendant-Intervenors (June 18, 2012)
Quinn Reb.	Rebuttal Report of Prof. Kevin J. Quinn (August 6, 2012)
SEC	State Election Commission
Shwedo Tr.	Deposition of Col. Kevin Shwedo, Executive Director of the South Carolina Department of Motor Vehicles

Stewart	Initial Report of Dr. Charles Stewart III, expert witness for the United States (June 9, 2012)
Stewart Reb.	Rebuttal Report of Dr. Charles Stewart III (August 6, 2012)
Stewart Tr.	Deposition of Dr. Charles Stewart III
Whitmire Tr.	Deposition of Chris Whitmire, SEC Public Information Officer

* Defendant-Intervenors have requested that South Carolina stipulate to these facts, but intend to file Requests for Judicial Notice in the absence of such a stipulation.

PRELIMINARY STATEMENT

For decades, South Carolina has successfully conducted elections relying on non-photographic voter registration cards to verify voters' identities and, in doing so, recorded tens of millions of votes without a single instance of voter impersonation fraud. However, three months following the unprecedented turnout in South Carolina by African-American voters during the 2008 election, and the election of this country's first African-American president, the South Carolina General Assembly filed legislation to change in-person voting requirements, legislation which became one of the strictest voter photo ID laws in the nation.

Act R54 ("R54" or "the Act") eliminates use of the non-photo voter registration cards, requiring instead that voters produce one of a narrow list of "current and valid" photo IDs to cast a ballot in person either on election day or through in-person absentee voting before election day. The evidence at trial will show that this change will have a discriminatory effect on African-American voters in South Carolina and that South Carolina enacted R54 with a discriminatory purpose.

First, the analyses conducted by experts for the United States *and* South Carolina agree that current registered African-American voters are far less likely than whites to possess one of the currently available photo IDs mandated by R54: a DMV-issued driver's license or state ID card, a passport, or a military ID.[1] While these analyses differ on the precise numbers of African-American and white registered voters without the required photo ID, the experts agree that, as the State's own expert has stated, the gap between the two groups is "significant." (JA-DI 382 (Hood Tr. 64:16-24).)

[1] The fifth form of ID, the registration card with photo, is not currently available because the SEC will not produce this card unless and until Act R54 is precleared.

Notwithstanding the State's claims that certain provisions of R54 will mitigate the disparate rates of photo ID ownership, the evidence at trial will demonstrate that these provisions not only fail to mitigate R54's discriminatory effect, but are more likely to exacerbate that effect. The Act's so-called mitigating provisions are of limited scope on their face and are likely to prove exceedingly problematic to implement. The new voter registration card with photo may be obtained only in person, and only at one election office in each county. While these provisions present challenges for all voters who currently lack the requisite photo ID, African-American voters in South Carolina will, on average, face greater difficulties in making use of the purported mitigating provisions because of, among other reasons, their substantially lower socioeconomic status, including less access to transportation, lower education attainment, and a per capita income that averages half that of white residents. The "reasonable impediment" exception is perplexing even to its drafters, and gives thousands of persons working at the polls discretion as to how and even whether to allow a voter to employ this purported mitigating factor to vote. As Intervenors will show, such broad discretion to such a large group of people often exacerbates, rather than mitigates, discrimination, and will not remedy the disparity in ID possession. Thus, the State cannot meet its burden of proving the absence of discriminatory effect.

Second, the State's General Assembly enacted R54 immediately following record African-American turnout in the 2008 election of President Obama, while fully aware of the disparate burden that the Act's requirements would impose on minority voters, and over the continuous objections of minority legislators and others who highlighted the discriminatory effect of the photo ID requirement. Confronted with this evidence, proponents refused efforts by the Legislative Black Caucus to ameliorate the law's discriminatory impact, systematically rejecting various amendments to R54 that would have lessened the Act's overall burden. Among

these rejected amendments were provisions expanding the list of acceptable forms of photo IDs to include expired and suspended driver's licenses, student IDs, and government-issued employee IDs. Legislators also abandoned provisions for early voting, which was widely associated with increased African-American turnout. In pushing the Act forward while rejecting efforts to ameliorate its harsh consequences, proponents resorted to unusual and irregular legislative procedures designed to limit debate and the record. All the while, proponents were *never* able to point to objective evidence of problems with the State's benchmark system of voter identification that R54 purportedly would address.

For these and other reasons, which are detailed below and will be demonstrated at trial, the State cannot and will not meet its burden of demonstrating that Act R54 will not have a racially discriminatory effect and was not motivated by a racially discriminatory purpose. Defendant-Intervenors (or "Intervenors") therefore respectfully request that this Court deny preclearance to R54.

LEGAL STANDARD

To prevail, South Carolina must satisfy its burden of proving that R54 "neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race of color." Voting Rights Act ("VRA"), 42 U.S.C. § 1973c(a) ("Section 5").

I. DISCRIMINATORY EFFECT

A voting change has a discriminatory "effect" when the change "would lead to a 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). A voting change is retrogressive when it "will make members of . . . a [minority] group worse off than they had been before the change." 28 C.F.R. § 51.54(b).

The retrogression standard compares the proposed change in law to the existing practice and measures the effect of the proposed change. 28 C.F.R. §§ 51.18 & 51.54(c); *Reno* v. *Bossier Parish Sch. Bd*., 520 U.S. 471, 478-79 (1997) (*Bossier I*) (existing law is "the benchmark against which the 'effect' of voting changes is measured"); *Texas* v. *United States*, 831 F. Supp. 2d 244, 250 (D.D.C. 2011).

Where, as here, a preclearance case involves issues of ballot access, a change that alters the procedures governing voting and registration will be retrogressive if: (1) "the individuals who will be affected by the change are disproportionately likely to be members of a protected minority group"; and (2) the change imposes "a burden material enough that it will likely cause some reasonable minority voters not to exercise their franchise." *Florida v. United States, et al.*, No. 11- 01428, slip Op. at *23-24 (D.D.C. Aug. 16, 2012) ("[T]o be retrogressive, a ballot access change must be sufficiently burdensome that it will likely cause some reasonable minority voters not to register to vote, not to go to the polls, or not to be able to cast an effective ballot once they get to the polls"). The *Florida* court rejected several "novel arguments" against this standard, including that a ballot access change must impose a "severe . . . or excessive[]" burden "before it can be considered retrogressive," or that "*de minimis*" disenfranchisement is permissible. *Id.* at *25, *36-37. In short, Section 5 of the VRA was enacted to address obstacles to voting, not just absolute bars. *Id.* at *35; *see South Carolina* v. *Katzenbach* 383 U.S. 301, 311 (1966).

To assess retrogression, a court conducts a "fact-intensive" inquiry and "carefully scrutinize[s] the context in which the proposed voting changes will occur." *Georgia v. Ashcroft*, 195 F. Supp. 2d 24, 76 (D.D.C. 2002), *vacated on other grounds*, 539 U.S. 461 (2003). This Court must also assess the efficacy of purportedly ameliorative adjustments. *Florida v. United States*, slip Op. at *24 (citing *City of Richmond* v. *United States*, 422 U.S. 358, 370-71 (1978)).

Accordingly, evidence of the barriers inherent in these provisions—including minorities' limited access to transportation, educational disadvantages, and lower income levels, and poll workers' wide discretion and lack of clarity in carrying out the "reasonable impediment" exception (*see* pp. 11-18 *infra*)—are all relevant to this Court's assessment of discriminatory effect. *See also Beer*, 425 U.S. at 31 (factors are relevant to court's determination if they bear on "the ability of minority groups to participate in the political process"); *Perkins* v. *Matthews*, 400 U.S. 379, 436–37 (1971) ("The accessibility, prominence, facilities, and prior notice of the polling place's location all have an effect on a person's ability to exercise his franchise."). "The political, social, and economic legacy of past discrimination" also is relevant in determining the ability of minorities "to participate effectively in the political process" in light of proposed voting changes. *League of United Lat.-Am. Citizens* v. *Perry*, 548 U.S. 399, 440 (2006).

II. DISCRIMINATORY PURPOSE

This Court must also deny preclearance of Act R54 *unless* the State can show that it passed the Act without "any discriminatory purpose" and that discrimination was not "a motivating factor." *Bossier I*, 520 U.S. at 488; *see also* VRA, 42 U.S.C. § 1973c(c); *Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977); *Mississippi* v. *United States*, No. 87-3464, 1988 WL 90056, at *4 (D.D.C. Aug. 9, 1988) ("[P]laintiff is required to demonstrate that its decision to use the voting changes at issue was not motivated even in part by a racially discriminatory purpose."); *see also United States* v. *Brown*, 561 F.3d 420, 433 (5th Cir. 2009) (racial discrimination "need only be one purpose, and not even a primary purpose" of law to constitute violation of VRA).

Whether the State can show "objectively verifiable," non-pretextual reasons for a voting change is relevant to the discriminatory purpose analysis. *City of Richmond*, 422 U.S. at 375. Once a state posits a legitimate, nondiscriminatory reason for adopting the voting change, the

burden shifts to the defendants to "provide some evidence to refute the covered jurisdiction's prima facie showing." *Florida* v. *United States*, slip Op. at *98-99 (citations omitted). The court must then assess the state's prima facie case and other evidence to determine whether the proposed voting change was motivated by a discriminatory purpose. *Id.* at *99.

In *Arlington Heights*, the Supreme Court provided a non-exhaustive list of the categories of circumstantial evidence relevant to whether a law was motivated by discriminatory purpose, including: (1) "whether '[the law] bears more heavily on one race than another'"; (2) the historical background of the law; (3) "[t]he specific sequence of events leading up to" the decision; (4) "[d]epartures from the normal procedural sequence" as well as substantive departures, "particularly if the factors usually considered important . . . strongly favor a decision contrary to the one reached"; and (5) legislative history. 429 U.S. at 266-68. *See also Bossier I*, 520 U.S. at 488.

A finding of racial animus is not required to conclude that a law intentionally discriminates against minorities. *See Garza* v. *Los Angeles Bd. of Supervs.*, 918 F.2d 763, 778 n.1 (9th Cir. 1990) (Kozinski, J., concurring and dissenting) ("Your personal feelings toward minorities don't matter; what matters is that you intentionally took actions calculated to [disadvantage them]."). Thus, regardless of ultimate motives, if the General Assembly knowingly and intentionally raised obstacles to the minority franchise, R54 violates the VRA. *See* 42 U.S.C. § 1973c(c).

BENCHMARK LAW AND ACT R54

Since 1896, the State has accepted a non-photo voter registration card to confirm voters' identity at the polls. (JA 1550 (Burton at 12).) There is *no* evidence of any confirmed case of voter impersonation fraud in the modern era. (*See* JA-DI 845 (Andino Tr. 62:23-63:1); JA-DI

738 (Whitmire Tr. 44:13-22); JA-DI 191 (Debney Tr. 46:1-4); JA-DI 46-47 (Calkins Tr. 42:19-48:5).) The registration card issued by the State Election Commission ("SEC") includes the voter's signature, name, address, date of birth, gender, race, and assigned polling precinct (out of the approximate 2,100 precincts in the State) (JA-DI 2190 (Intervenor Delores Freelon's voter registration card); JA-DI 855 (Andino Tr. 140:3-6)), and thus provides poll workers with sufficient information to deter and detect any attempt to engage in voter impersonation fraud.

Under benchmark practice, the registration card is provided by the State to every individual who registers to vote. Since most registrants do not register in person at the county election offices (JA 1767 (A. Martin 9, Table 8); JA-DI 1025 (Bowers Tr. 48:13-20)), voters are usually delivered their registration cards by mail. Consistent with the Help America Vote Act of 2002, 42 U.S.C. § 15483(b), when registering to vote for the first time in her county, an applicant must present or mail with her registration application any of several non-photo proofs of identity. In the alternative, a voter can present such proof at the polls.[2] (JA-DI 2995-98 (SEC election handbook).)

In 1984, the State expanded the list of IDs accepted at the polls to allow a South Carolina driver's license (whether current or not), a DMV-issued photo ID (whether current or not), or the non-photo registration card described above. (JA-DI 854 (Andino Tr. 136:16-18).) On election day, a poll worker examines the form of ID presented against the voter rolls for that precinct. (JA-DI 855 (Andino Tr. 137:5-8).) If any poll worker, poll watcher, or other voter challenges whether the voter is the person on the ID presented, that voter will be required to cast a provisional ballot if she wants to vote. (JA-DI 188, 192 (Debney Tr. 36:23-25, 51:8-16).)

[2] These proofs of identity include: (a) *any* valid and current photo ID with a name and picture (and, for in-person registrants, their address); *or* (b) any of various proofs listing a voter's name and address, without photo, such as a current utility bill, a bank statement, a paycheck, or any government document. (JA-DI 2995-98.)

Act R54 eliminates the use of non-photo voter registration cards and requires the voter to present a valid and current South Carolina driver's license, DMV-issued photo ID card, U.S. passport, U.S. military ID, or new photo registration card, which may be obtained only in-person at a registrar's office and will not be available unless and until R54 is precleared (together, "Required ID"). (R54; § 5(a).) Neither R54 nor current law requires that a photo ID be presented when an individual votes absentee by mail.[3] (*Id.*) S.C. Code Ann. § 7-15-385.

Section 5(c)(1) of the Act allows a voter without ID to cast a provisional ballot, but that ballot will not be counted unless the voter subsequently brings a valid and current photo ID to the county election office at the county seat *before* certification of the vote. Certification occurs within 72 hours after election day. (Ex. 1 (Andino Tr. 128:14-23).)[4] Section 5(d) allows voters who either have a religious objection to being photographed or who "suffer[] from a reasonable impediment that prevents the elector from obtaining photograph identification" to cast a provisional ballot after swearing by notarized "affidavit," under penalty of perjury, to such effect. The county election board must count such a provisional ballot "unless the board has grounds to believe the affidavit is false." (R54, § 5(d)(2).) Section 7 of R54 instructs the SEC to carry out an "aggressive voter education program" concerning R54's new mandates. (R54, § 7.)

---

[3] South Carolina does not offer "no-fault" absentee by mail voting, but instead provides for a limited number of circumstances under which voters may be eligible to vote absentee by mail. S.C. Code Ann. § 7-15-320.

[4] In practice, voters rarely appear at county commission hearings to defend their provisional ballots, and, therefore, such ballots are rarely counted. (JA-DI 189 (Debney 39:16-17); JA-DI 44 (Calkins 35:1-4).) Burdens such as securing transportation, babysitters, and time off from work to attend the certification hearings are a significant impediment for low-income and working class voters. (Ex. 2 (Bloodgood Tr. 79:18-80:7).)

STATEMENT OF THE EVIDENCE AND ARGUMENT

I. THE STATE CANNOT AND WILL NOT MEET ITS BURDEN OF SHOWING THE ABSENCE OF A RETROGRESSIVE EFFECT.

R54 will have a retrogressive effect because African-Americans "are disproportionately [less] likely" to have a Required ID, and the barriers to obtaining a Required ID are "material enough that [they] will likely cause some reasonable minority voters not to exercise their franchise." *Florida* v. *United States,* slip. Op. at *23-24. The State's purported mitigating provisions—including its "free" photo IDs, the "reasonable impediment" exception, and the voter education program—will not, in fact, remedy the discrimination which all parties agree exists as a result of rates of ownership of Required IDs; indeed, the State's expert witness claims that the effect of these supposedly ameliorative provisions is "entirely speculative." (JA 1101 (Hood Reb. 3).) Moreover, due to the lower socioeconomic status of South Carolina's African-American population, African-Americans lacking photo ID are disproportionately less likely to obtain one in time to vote.

A. There Are Significant Racial Disparities in Rates of Required ID Possession.

Act R54 is retrogressive not merely because it requires photo ID at the polls, but because it restricts the list of accepted photo IDs to five forms, which African-Americans are less likely to possess than whites. Unlike the Georgia photo ID law after which R54 was allegedly patterned (*see* Ex. 3 (Campsen Tr. 41:18-42:2)), R54 does not allow voters to use their government employee IDs, student IDs, or expired driver's licenses to verify their identities at the polls. (*Compare* R54, § 5(a) *with* Ga. Code Ann. § 21-2-417; *see also* Ind. Code Ann. § 3-5-2-40.5.) The Act's restrictive nature is intentional, as the General Assembly stripped from R54 a broader list that included these other forms of ID.

Both the analysis of Dr. Stewart, the United States' expert, and even the flawed analysis of Dr. Hood, the State's expert, demonstrate that African-American registered voters (and other minority registrants) in South Carolina lack Required IDs at rates far exceeding those of white registered voters. (*See generally* JA 1309-1339 (Stewart Reb. ¶¶ 8-85 (discussing flaws in Hood's matching analysis and conclusions)).) Dr. Stewart concludes that "African-Americans are more than twice as likely as white voters not to possess an ID that is acceptable under Act R54." (JA 1339 (Stewart Reb. ¶ 84).) Dr. Stewart's matching analysis indicates there are 61,000 active registered African-Americans who, in the first instance, would be prevented from voting in person by regular ballot unless they obtain some form of Required ID. (JA 1338 (Stewart Reb., Table 11).)[5]

While Dr. Hood's flawed analysis shows a smaller number of affected voters, he nevertheless finds a "significant" racial disparity. (JA-DI 382 (Hood Tr. 64:16-24).) According to Dr. Hood: (1) African-American individuals are 1.45 times as likely as white individuals to not possess a Required ID (JA-DI 418 (Hood Tr. 205:22-206:16)); and (2) 53,609 registered African-American electors would be prevented from voting in person by regular ballot *unless* they overcome hurdles necessary to obtain a Required ID (JA 1090 (Hood Supp. 10, Table 6)).

Thus, while both experts present statistics in a variety of ways, both come to two inescapable conclusions: (1) African-American voters are significantly less likely to possess a form of Required ID; and so (2) R54 imposes additional burdens on tens of thousands of African-American voters.

---

[5] While R54 did not change absentee-by-mail voting procedures, only certain voters can avail themselves of these procedures. S.C. Code Ann. § 7-15-320. In the elections of 2004 and 2008, white voters were twice as likely as African-American voters to vote absentee by mail, and 1.5 times more likely to do so in the 2010 election (JA 1766-67 (A. Martin 8-9); JA 1793 (A. Martin Supp. 2).) This information was publicly available to legislators during the passage of R54. (JA 1755 (Burton Supp. 15).)

In the face of this clear disparate impact, the State can only satisfy its burden by relying on the purported mitigation provisions of R54. These provisions include: (1) the availability of Required IDs issued by the DMV and SEC without direct fees;[6] (2) the ability of a voter to swear that a "reasonable impediment" prevented him or her from obtaining a Required ID, and then vote by provisional ballot; and (3) a voter education program (collectively, the "Purported Mitigation Factors"). (R54, §§ 4, 5(d)(2), 7.) The evidence will demonstrate, however, that the Purported Mitigation Factors will not re-enfranchise those African-American voters who lack the Required IDs. In practice, these factors are likely to exacerbate R54's racially disparate effect, and are "material enough that [they] will likely cause some reasonable minority voters not to exercise their franchise." *Florida* v. *United States*, slip Op. at *24.

B. The "Free" DMV and SEC IDs Impose Significant Indirect Costs.

1. Indirect Monetary Costs Associated with DMV IDs

Two of the five Required IDs—the State driver's license and photo ID card—can be obtained only at DMV offices. Both require significant underlying documentation to prove residency, citizenship/identity, and one's social security number. (JA-DI 2897-2901.) In order to prove identity, most applicants must provide a birth certificate. A normal birth certificate search costs voters $12-17; an amended or delayed certificate requires a petition to family court. (JA-DI 819, 825.) For example, Intervenor Junior Glover has had to pay attorney fees for a delayed birth certificate; Amanda Wolf obtained birth, marriage and divorce records only after several months and attorney assistance; Delores Freelon, in the process of obtaining an amended birth certificate with her correct name, has paid $150 to a Californian court as well as fees to

[6] Not all the Required IDs are issued without direct fees. For example, a passport carries a $135 fee, $238 if expedited. (8/5/11 Cost Letter (ECF No. 7-2), at 8.)

State agencies for criminal record checks. (JA-DI 825-27; JA-DI 267 (Freelon Tr. 52:22-53:12).)[7]

The process to obtain vital records can involve other costs such as the use of a computer or credit card, which many low-income individuals do not have. (JA-DI 826, 828-29, 835; *see* Ex. 5 (B. Williams Tr. 43:5-48:23 (detailing burdensome process of obtaining Thelma Hodge's birth certificate from DHEC and Vitalchek)).) Similarly, the thousands of African-American drivers with suspended licenses will face $100 reinstatement fees in order to have a "valid and current" driver's license accepted at the polls. (JA-DI 2409 & n.20 (135,000 non-white drivers with suspended licenses in 2010); Ex. 6, at 2-3).)

All these indirect costs can be expected to dissuade some African-Americans who lack Required IDs from acquiring the "free" DMV-issued IDs, and at higher rates than for whites who lack Required IDs.[8] African-American household income in South Carolina is 25.6% lower than white household income (JA 1259 (Stewart ¶ 138)); African-Americans are twice as likely as whites to live below the poverty line, and twice as likely to be unemployed. (JA 1259-60 (A. Martin 4-5).) More specifically, Dr. Stewart's report shows that the African-American voters who lack the Required IDs live in areas with lower average incomes and average educational attainment than the white voters who lack Required IDs. (JA 1213 (Stewart ¶ 17).) This socioeconomic disparity indicates that the indirect fees inherent in the DMV IDs will be a

[7] The General Assembly was well aware that many current registered voters do not possess acceptable birth certificates. (Ex. 4 (Anderson Tr. 65:9-16).)

[8] Even though the SEC will not require the vital records that DMV requires for the registration card with photo, voters may still be under the impression that they will have to provide these, as none of the educational materials describe how to get the new voter registration card. (*See* ECF No. 65-3; JA-DI 269 (Freelon Tr. 84:2-24); JA-DI 651 (K. Rutherford Tr. 72:11-73:2); *see also* Ex. 7, at 7-8 (SC_00164948-49 (revised SEC postcard)).)

significantly greater obstacle for African-American voters without Required IDs than for their white counterparts.

2. Institutional Costs Associated with the "Free" Required IDs

Under DMV and SEC procedures, voters have to appear in person at a DMV office or at a county election office to obtain the "free" Required IDs. This means that voters who register by mail, at a social services office, or at any of the other government offices that serve as registration agencies pursuant to the National Voter Registration Act of 1993 ("NVRA"), 42 U.S.C. § 1973gg-5—and any already-registered voters without Required ID—will not be able to use the same convenient method to obtain a Required ID. As Congress recognized when it enacted the NVRA, restrictive methods of voter registration may be "discriminatory and unfair," including to "racial minorities." 42 U.S.C. § 1973gg(a)(3).

This functional re-registration requirement will, in and of itself, impose a disparate burden on African-American voters, who are 1.3 times more likely to register to vote by mail than whites, and 3.5 times more likely to register at a social services agency.[9] (JA 1766-67 (A. Martin 8-9, Table 8).) White voters, on the other hand, are 1.5 times more likely to register at the DMV. (*Id.*) *See Condon* v. *Reno*, 913 F. Supp. 946, 959 (D.S.C. 1995) (finding lacking South Carolina's provision of voter registration forms at the DMVs, as "poor and minority citizens are less likely to be served by the DMV").

The typical South Carolina county has one DMV and one election office, which operate Monday to Friday, opening between 8-9 a.m. and closing at 5 p.m. (JA-DI 712; County Elec. Office Hrs. RJN, Ex. 2.) SEC and DMV are underfunded and understaffed (JA-DI 689 (Shwedo

[9] *See also* JA 1414-16 (Arrington ¶¶ 67-69 (discussing reregistration requirements, and limits on hours and locations for registration, that Southern states have used to suppress minority registration)).

Tr. 108:8-109:12); JA-DI 912), while county election offices have neither the capacity nor the experience necessary to process large numbers of in-person customers. (JA-DI 1025 (Bowers Tr. 48:13-20); JA-DI 185 (Debney Tr. 21:7-13).) In fact, SEC currently plans to stock nearly all county offices with just one camera and printer station to produce the new registration cards with photo. (JA-DI 850 (Andino Tr. 82:2-6).) These agencies' limited hours and capacity will exacerbate the burdens voters will face in taking time off from work, arranging child care and transportation, and waiting in line.[10]

These institutional costs too will fall more heavily on African-American voters without the Required IDs, because of their lower socioeconomic status on average. (*See* JA 1259 (Stewart ¶ 137).) These voters—who have lower levels of functional literacy, education, and wealth as compared to white voters—will have a harder time navigating the detailed requirements for obtaining DMV- or SEC-issued IDs and interacting with the agencies' underpaid and overworked bureaucrats. (*See* JA 1257-58 (Stewart ¶ 133); Ex. 8 (Stewart Tr. 141:13-142:1).)

3. Transportation Costs Associated with the "Free" Required IDs.

As Intervenors will establish at trial, there is little public transportation to DMV or county election offices where residents may obtain a Required ID. Intervenors will demonstrate that public transportation is minimal statewide and unavailable entirely, in several counties, to African-American citizens. For example, in the 700-square-mile Clarendon County, African-American citizens comprise 50% of the population, but the County has *no* public transit.[11] In

[10] The State already has gained the dubious distinction of having the longest wait time in the entire country in order to cast a ballot. (JA 1416 (Arrington ¶ 70).)

[11] Of the seven counties in South Carolina with African-American voting-age populations of 60% or more, public transit is available in only one, Orangeburg County, and there only in or in the immediate vicinity of the country seat, the City of Orangeburg. (Ex. 9.)

general, voting-age African-Americans in the State are *4.3 times* more likely than voting-age whites to live in a household with no access to a vehicle. (JA 1760 (A. Martin 2).) Several of the individual Intervenors lack access to their own form of transportation and rely almost exclusively on family or friends to reach even the most common places, such as a grocery store or bank. (JA-DI 272 (Glover Tr. 9:15-10:13); JA-DI 265-66 (Freelon Tr. 27:7-8, 28:9-30:16); Ex. 10 (Debose Tr. 14:10-16:17).) Given their limited or complete lack of access to transportation, these Intervenors' attempts to acquire Required IDs have been very difficult.

C. R54's "Reasonable Impediment" Exception Is Fatally Flawed.

The "reasonable impediment" provision of R54 provides that a voter who does not have a Required ID can execute a notarized affidavit—under penalty of perjury—attesting to a "reasonable impediment that prevents him from obtaining photographic identification," and, thereafter, cast a provisional ballot. The evidence at trial will demonstrate that this "reasonable impediment" program will not mitigate the Act's retrogressive effect, for a variety of significant reasons.

First, there is rampant disagreement among State officials as to what "reasonable impediment" means, with officials explicitly disagreeing with each other about what the phrase covers. (*Compare* JA-DI 859 (Andino 160:12-23 ("didn't feel like it" could be a reasonable impediment)) *with* JA-DI 330 (Harrison Tr. 55:14-17 (disagreeing with Andino)); *compare* JA-DI 295 (Harrell 75:4-8 ("just about anything" could be reasonable impediment)) *with* JA-DI 524 (L. Martin 111:24-112:20 (lack of transportation not a reasonable impediment)).) This confusion persists even after the State Attorney General issued an opinion on what constitutes a "reasonable impediment." Indeed, as an example, the Executive Director of the election office for Charleston County (the second largest in the State), testified that he does not have "an understanding" of what "reasonable impediment" means. (JA-DI 196 (Debney 82:6-83:1).) If a

voter asked the Executive Director for guidance on what constitutes a reasonable impediment, he would send the voter to a lawyer or the legislators who wrote the bill. (*Id.*).

This confusion among the highest State officials all but guarantees that the 20,000 county officials, notaries, and poll workers who will implement the "reasonable impediment" provision will not apply the exception uniformly across the State's 46 counties and 2,100 precincts. (JA-DI 868 (Andino Tr. 206:17-20).) After initially stating that poll workers would receive no training on the provision, the SEC released new procedures on August 13, 2012 attempting to address the confusion over the "reasonable impediment" exception. (JA-DI 853 (Andino Tr. 116:9-15); Ex. 7, at 2-5 (SC_00164943-46).) But as Intervenors' expert, Dr. Kevin Quinn, will testify, these late guidelines fail to address the systemic factors that prevent uniform application of the provision, such as the lack of a centralized election administration system,[12] the near-unlimited discretion of poll workers and county election board members, the lack of uniformity in voter education materials, the lack of poll worker training,[13] and the apparent resistance of local election officials to the "reasonable impediment" exception. (*See* JA 1815-22 (Quinn 15-22).) Further discovery on these issues will be incorporated in Dr. Quinn's testimony at trial.

A non-uniform application of the provision means that the exception will have extremely limited, if any, ameliorative effect, and may in fact open the law to abusive, discriminatory enforcement. (JA 1580 (Burton 42); JA 1419 (Arrington ¶ 75).) Empirical studies have shown that even straightforward voter ID laws are enforced in a racially discriminatory manner, even by

---

[12] The SEC has no ability to compel any particular interpretation of law by the county election boards (JA-DI 854 (Andino Tr. 135:4-18).) Once a county board decides whether to allow or reject a vote, there is no appeal to the SEC; the voter's only recourse is to the courts. (Ex. 1 (Andino Tr. 129:19-25).)

[13] Significantly, as of 2010, 64 county election officials have failed to be trained, in violation of State law. (JA-DI 774 (Whitmire 186:12-17).)

trained poll workers.[14] (JA 1807-11 (Quinn 7-11); *see also* (JA-DI 650-51 (K. Rutherford Tr. 67:24-70:17), Ex. 2 (Bloodgood Tr. 59:2-60:11) (detailing arbitrary and discriminatory enforcement of current voting laws by poll workers and watchers).)

Local officials also have wide discretion in applying provisional balloting laws, resulting in substantial variance in the rates at which provisional ballots are actually counted. (JA 1812-13 (Quinn 12-13).) Studies have shown that partisan preferences may determine whether provisional ballots are accepted, and provisional ballots are accepted at lower rates in jurisdictions covered by the VRA. (JA 1813-15 (Quinn 13-15).)

Second, even assuming the term "reasonable impediment" is adequately defined and uniformly interpreted, the State law requirement that the affidavit be notarized presents additional implementation problems. The SEC's recent push to station notaries at all 2,100 polling places on election day met with immediate disbelief and confusion among election officials and poll workers.[15] There is no certainty as to who will pay each notary's fee, as the SEC stated it would not reimburse these fees. (Ex. 7, at 14-15 (SC_00164958-59).) In addition, the notary requirement creates a "Catch-22" for voters, because notaries must have proof of an affiant's identity before notarization. (Ex. 12, at 11 (Resp. to U.S. Request for Admission 20)); *see* Ex. 7, at 11 (SC_00164955 (Comment by election official: "How do you notarize an affidavit stating that they do not have an id? The purpose of the notary is to verify the

[14] Indeed, the State's expert admits in his writings (but not in his opinion to the Court) that his "opinion" about whether photo ID laws typically burden minorities at higher rates than whites "stands in contrast to other researchers who have concluded that voter identification laws disproportionately affect racial or ethnic minorities." (Ex. 11 at 22; JA-DI 429 (Hood Tr. 250:11-251:2).)

[15] *See, e.g.*, Ex. 7, at 11 (SC_00164955 ("Marci, you get kudos for trying to make this one palatable for us because I assume you also understand how ridiculous it is to require a notary at every polling location."); *id.* at 14 (SC_00164958 ("So, if a precinct doesn't have notary, a person without a valid photo ID will not be allowed to cast a vote?")).

identification of the person signing the document.")).) The first listed forms of ID that a notary may accept in the State manual for notaries are precisely those IDs—a driver's license and passport—that the affiant *ipso facto* does not have. Moreover, whether the notaries' discretion to accept or reject an affiant's proffered identification and/or to charge their fee will be affected by race (or partisan politics) is a question the State has failed to address.

When told of the State's current plans to implement the "reasonable impediment" provision, the Senate attorney who drafted the provision stated that these plans gave her concern that the provision will not achieve the intended ameliorative result. (Ex. 4 (Anderson Tr. 88:23-91:19).) As Intervenors will show fully at trial, Ms. Anderson is entirely justified in her concern.

D. The State's Voter Education Plan Is Wholly Inadequate.

The voter outreach program in Section 7 of Act R54 is central to the State's preclearance argument. (JA 1066 (Hood 19).) But the "final" voter outreach materials submitted to the Court (ECF No. 65-3) are incomplete and complex enough that educationally disadvantaged voters may have difficulty understanding their options and be dissuaded from voting.[16] Moreover, there is *no* component of the outreach plan that addresses the costs to voters in obtaining approved ID, including the cost of required vital records, arranging time off from work, or transportation to county offices. (*See* ECF No. 65-3, pp. 2-3, 8, 14, 17-18.) As Dr. Stewart testified, the voter education plan is "pretty general and generic . . . [these] are the sorts of things we naturally expect government to do, but "not the sort of things that one would focus on if one were particularly concerned about . . . helping folks who had low income, low literacy skills, lacked

[16] For example, certain key materials fail to mention the "reasonable impediment" and religious objection exemptions, and absentee voting as an alternative for those without approved ID. (*See* ECF No. 65-3, at 4 (SEC press release), 11 (poster).) And none of the SEC's education materials state how to obtain the new registration card with photo. (ECF No. 65-3; *see also* Ex. 7, at 7-8 (revised SEC postcard).)

transportation." (Ex. 8 (Stewart Tr. 146:6-16).)[17] And the SEC's drastic budget reductions, which have threatened the quality of core election functions, may likewise hamper its voter outreach plan. (JA-DI 912-13.)

If the Court preclears R54 before the November 2012 election, there will be insufficient time to implement even this inadequate outreach plan. SEC witnesses have stated that a number of key components of the outreach plan are not in place (JA-DI 762 (Whitmire Tr. 138:17-140:5)), and Director Andino has not once retreated from her April 10, 2012 affidavit that "the Act must go into effect by at least August 1, 2012" for the SEC to "completely fulfill its duties under Section 7 of the Act [the voter outreach program]"—a date that has long passed. (ECF No. 47, ¶ 28; (JA-DI 866 (Andino Tr. 192:18-25); Ex. 1 (Andino Tr. 278:3-16).). The State's Attorney General, although disagreeing with the SEC over this August 1 date, nevertheless believes that "any preclearance after September 15 would be too late for full implementation to occur" by the November 6, 2012 election. (ECF No. 117-2, at 4.)

E. The State's Expert Opinion Fails to Show that the Purported Mitigation Factors Will Be Effective.

The State cannot meet its burden of proof by relying on the opinion of its expert, Dr. Hood, with regard to the Purported Mitigation Factors. Dr. Hood's assertion as to the impact of these factors is quite tepid: Dr. Hood offers simply that he has "no reason to suspect that the implementation of Act R54 in South Carolina will produce a racially disparate impact on

[17] A similar failure to address key obstacles to voters without ID led to poor results from the DMV's "Voter ID Day," a program to give free rides to voters lacking photo ID to DMV offices. (*See* JA-DI 691 (Shwedo Tr. 116:19-22).) The DMV held "Voter ID Day" on a Wednesday, during normal business hours, and gave voters only 28 days to obtain the necessary documentation; ultimately, out of over 170,000 voters without DMV-issued ID, only *21* received IDs. (JA-DI 693-94 (Shwedo Tr. 120:19-121:10, 126:6-13); JA-DI 2219-22; *see also* JA-DI 693 (Shwedo Tr. 124:18-22 (no significant increase in demand for ID cards over the month before "ID Day," and DMV Director "wouldn't have expected one")).) The State's past experience with this outreach program does not suggest future success for the SEC.

minority turnout." (JA 1066 (Hood 19).) He then states that "[a]ny conclusion concerning the future effect of the law is . . . *speculative in nature*." (JA 1101 (Hood Reb. 3 (emphasis added)).) This concession, alone, is fatal to the State's case. At his deposition, Dr. Hood retreated even further, agreeing that he "d[id]n't know that the gap in ownership of IDs between white[s] and minorities in South Carolina *won't* translate into a disparate impact at the polls." (JA-DI 438 (Hood Tr. 286:3-7 (emphasis added)).) Dr. Hood offers no empirical evidence in evaluating the Purported Mitigation Factors,[18] and in fact did nothing more than read the statutory language of R54, the SEC's implementation plans, and the Attorney General's "reasonable impediment" opinion. (JA 415, 421 (Hood Tr. 194:22-195:15; 220:7-25).)

The sole basis on which Dr. Hood offers his tentative view is a not-yet-published article he co-authored regarding the impact on voter turnout in Georgia of that state's photo ID requirement; that study purported to show that the photo ID requirement had only a minor racially disparate impact on turnout in the 2008 general election. (*See* JA 1063-64 (Hood 16-17); JA-DI 372 (Hood Tr. 24:9-20).) But, there are at least two major problems with the State's reliance on this unpublished article.

First, as will be demonstrated at trial through the cross-examination of Dr. Hood and the testimony of Dr. Quinn, there are significant flaws in the study's methodology and in Dr. Hood's interpretation of his results. (JA 1837-38 (Quinn Reb. 1-2).)

---

[18] Dr. Hood claimed absentee voting by mail could be a mitigating factor for those age 65 and older (JA 1095 (Hood Supp. 15).) However, even the analysis by Dr. Hood shows that the relative disparity between African-American registered voters without Required ID and whites *increases* when he assumes that voters 65 and older vote absentee by mail. (*Compare* JA 1094 (Hood Supp. 14, Table 10 (rate of African-Americans without Required ID is 1.65 times higher than white rate, for registrants under 65)) *with* JA 1090 (Hood Supp. 10, Table 6 (rate of African-Americans without Required ID is 1.45 times higher than white rate, for all registrants)). Empirical evidence further demonstrates that white registered voters make use of absentee-by-mail voting at a higher rate than African-Americans. (JA 1766-67 (A. Martin 8-9); JA 1793 (A. Martin Supp. 2).)

Second, even if the study had been properly performed, Dr. Hood would not be able to extrapolate the results he claims to have seen in Georgia to South Carolina.[19] (JA 1838-39 (Quinn Reb. 2-3); JA 1357-64 (Stewart Reb. ¶ 129-146).) This is because, among other reasons, the photo IDs accepted in South Carolina are in no way comparable to the much broader list of IDs accepted to vote in Georgia. (JA-DI 393 (Hood Tr. 105:19-106:8); *see generally* JA-DI 388-91 (Hood Tr. 88:10-99:20).) Furthermore, the Georgia study did not distinguish between those who voted in person and those who voted absentee by mail in 2008—meaning that Dr. Hood has no way of knowing whether those who were most impacted by the law cast mail-in absentee ballots instead. (JA-DI 404 (Hood Tr. 149:24-150:11).) Because Georgia provided for "no excuse" absentee voting in 2008, whereas South Carolina does not, this option—by which those without ID may have voted in Georgia—is not generally available to South Carolinians. (JA 1359 (Stewart Reb. ¶ 133).)

Significantly, another three-judge panel of this Court rejected Dr. Hood's opinions only last week. *Florida* v. *United States*, No. 11-01428, at *49 (In finding retrogressive effect, "we reject the contrary opinions of Florida's expert witness, Professor Hood. We do so because the analysis underlying his conclusions suffers from a number of methodological flaws."). This marks the second time this year that a court has found Dr. Hood's expert opinion to be unreliable. *NAACP* v. *Walker*, No. 11-5492, at 10 (Wis. Cir. Ct. Jul. 17, 2012). Indeed, in 2007,

---

[19] Nor is it apparent that the State would wish him to. Georgia's voter ID law, like Act R54, provided for a voter education campaign and a free voter registration card with photo in order to ameliorate the photo ID requirement's impact. *Common Cause/Georgia* v. *Billups*, 504 F. Supp. 2d 1333, 1344-48, 1363-64 (N.D. Ga. 2007). Yet, according to Dr. Hood's Georgia article, the gap in turnout between voters with driver's licenses and those without driver's licenses *widened* by 5 percentage points after Georgia's voter ID law came into force. (JA 1346-47 (Stewart Reb. ¶ 103).) Thus, "for those who would point to Georgia for evidence that a certain set of programs can overcome gaps . . . it doesn't look like promising reasoning." (Ex. 8 (Stewart Tr. 212:15-21).)

a Georgia federal court excluded Dr. Hood's analyses of absentee voting in Georgia and the effects of Georgia's voter ID law as methodologically unreliable. *Common Cause/Georgia* v. *Billups*, No. 05-0201, 2007 WL 7600409, at *14 (N.D. Ga. Sept. 6, 2007).

The State concedes that the racial disparity in ownership of Required IDs between whites and African-Americans is "significant," and that tens of thousands of registered African-American voters do not possess any Required ID. The State will be unable to show that the Purported Mitigating Factors will mitigate this discriminatory effect. Thus, Act R54 is retrogressive.

II. THE STATE CANNOT AND WILL NOT MEET ITS BURDEN OF SHOWING THE ABSENCE OF A DISCRIMINATORY PURPOSE.

Pursuant to the multi-pronged test the Supreme Court has laid out in *Arlington Heights* and as detailed in the expert reports of Drs. Burton and Arrington, there is significant evidence that R54 was enacted with a discriminatory purpose, and the State cannot and will not meet its burden to prove otherwise.

A. Discriminatory Impact

"The important starting point" for assessing discriminatory purpose is "the impact of the official action [and] whether it bears more heavily on one race than another." *Arlington Heights*, 429 U.S. at 266. For the reasons set forth above (pp. 9-19), R54 clearly bears more heavily on African-American voters.

B. The State's Historical Background of Racial Discrimination in Voting

Under *Arlington Heights*, R54's enactment must be viewed in the context of South Carolina's long history of discrimination against minority voters—a history that has continued in recent years, as documented by judicial decisions and other authorities. (Hist. Discr. RJN, ¶¶ I.1-20; JA 1615-16, 1619 (Burton, App'x B, at 7-8, 11).) The State's recent history reveals a pattern

of resorting to intricate "second-generation" voting changes to dilute or suppress the African-American vote, while, at the same time, intimidation and harassment of African-American voters at the polls has continued throughout the 1990s and 2000s, up to the 2008 election. (JA 1544 (Burton 6); Hist. Discr. RJN, ¶¶ I.4, II.3.c.; JA-DI 650-51 (K. Rutherford Tr. 67:24-70:17).) Moreover, the legacy of past systemic state-sponsored discrimination remains very much a part of everyday life in South Carolina. (*See* Hist. Discr. RJN ¶ I.3.) Indeed, the expert report of Dr. Buchanan, one of the State's experts, paints a stark picture of this reality:

- White per capita income in the State is $24,822, 83% higher than the $13,531 per capita income of minorities (*see* JA 1180-82 (Buchanan, Exs. 7, 8));
- The State's five poorest counties are "overwhelmingly" African-American and show the lowest education attainment rates in the State (JA 1112-13 (Buchanan 8-9 & n.6));
- White voter turnout in the State's wealthiest county was 13.8% higher in the last decade—despite historic levels of African-American turnout in 2008—than African-American turnout in the five poorest counties (JA 1114 (Buchanan 10));
- South Carolinians have never elected an African-American to state-wide office, and the State has only once had more than one African-American member of the House of Representatives (JA 1120, 1186 (Buchanan 16, Ex. 10));

In addition, voting in the State remains drastically racially polarized (JA 1120, 1123 (Buchanan 16, 19); *see also* JA 1760-61 (A. Martin 2-3); JA 1548-50 (Burton 10-12); Ex. 13 (Buchanan Tr. 122:15-124:11)). "Voting along racial lines allows those elected to ignore black interests without fear of political consequences, and without bloc voting the minority candidates would not lose elections solely because of their race." *Rogers* v. *Lodge*, 458 U.S. 613, 623 (1982). This background information provides key context for fully understanding the sequence of events leading up to R54's enactment.

C. Events Leading Up to Act R54's Introduction

H.3418—the predecessor to H.3003, which was enacted as R54—was introduced on February 3, 2009, three months after the 2008 general election. (JA 488.)

That election was notable in South Carolina for several reasons. First, minority turnout surged: compared to the 2004 presidential election, minority voter turnout rose by 10.4 percentage points. (JA 1765-66 (A. Martin 7-8).) Moreover, 2008 marked the first election in which African-Americans voted at a higher rate than white voters. (JA 1765 (A. Martin 7)). At the same time, there was an increase in in-person absentee voting that created extensive delays in some jurisdictions, and prompted election officials, voters and—initially—State senators in both parties to call for expanded, "no-excuse" early voting. (JA-DI 866 (Andino Tr. 189:9-12); JA-DI 198 (Debney Tr. 110:9-111:25); JA-DI 53, 58 (Campsen Tr. 67:19-21, 187:6-12).) As then-Senator McConnell (a proponent of both voter ID and early voting) said on the Senate floor, "[O]ne of the things that chills the right to vote is the long lines at the polls. And this bill [H.3418] offers an opportunity to look at revising South Carolina's laws on early voting." (JA 2487.)[20] African-Americans were particularly likely to cast their votes early through in-person absentee voting, as seen in a highly visible movement by African-American churches to bus community members for this purpose. (JA 1747-50 (Burton Supp. 7-10); JA-DI 256 (Donehue Tr. 115:23-116:3).)

In light of South Carolina's racially polarized voting, R54's proponents were acutely aware that the vast majority of African-Americans vote for Democratic candidates. (JA-DI 578 (McConnell Tr. 283:25-284:3).) State Republicans thus understood that, if it continued, increased African-American turnout would threaten their future electoral success.[21] This widely-

[20] The SEC supported early voting but took no position on the photo ID requirement (JA-DI 848, 866 (Andino Tr. 74:10-13, 189:7-14).) Early voting was a top priority of the association that represents county election officials, but the organization was "not interested" in the photo ID requirement because of the burden it would place on county election offices. (JA 6021.)

[21] In one candid moment, for instance, Rep. Lowe testified that a redistricting plan that reduced the ratio of African-American voters in his district by two percentage points could be the "deciding factor" in his re-election campaign. (JA-DI 487-89 (Lowe Tr. 90:11-98:20).)

held belief explains, for instance, why House Republicans ultimately removed early voting from both of the voter ID bills—party leaders and "activists" (a description used by Republican legislators themselves) thought that African-Americans would disproportionately utilize early voting and give an electoral edge to Democratic candidates. (JA-DI 256 (Donehue Tr. 115:13-116:5); JA 1749-50 (Burton Supp. 9-10); *see also* JA 1691 (remark by Charleston County GOP committeeman that "a good ID bill blunts the gain for 'them' that they think they get in early voting…")).) As the testimony will show, Republicans supporters of R54 were well aware of the racially disparate impact of a strict photo ID requirement—and knew that this disparate impact would be politically advantageous for them.

D. Legislators' Awareness of the Law's Discriminatory Effects

Throughout the consideration of both H. 3418 and H.3003, substantial evidence was presented to lawmakers about the ways these bills would disparately impact African-Americans and other racial minorities. In sub-committee hearings, witnesses warned that a photo ID law would discriminate against minorities (JA 1560-61 (Burton 22-23); JA 2025-2031), and in floor debates, bill opponents presented the case that photo ID would deprive African-Americans of the gains they had made toward achieving equality at the polls (JA 2687 (Sen. Ford: "We already did that in our history. We don't have to go back there."); *see also* JA 2743-44; JA 2853-54).

Despite these warnings, R54's proponents did nothing to investigate the impact of a photo ID requirement on minority voters. Instead, SEC Director Marci Andino ran a comparison in January 2010 of DMV ID and voter registration lists and found that of 178,175 registered voters without DMV-issued IDs, 63,756 (36%) were non-white—well above African-Americans' 28% share of State registered voters. (JA-DI 847 (Andino Tr. 69:13-23); JA 1998-2002; *see* JA 2998 (floor remarks of Sen. Matthews explaining the disparate impact).) Senator Ford, an African-American Democrat, ensured that all senators received a copy of the SEC study

(JA 3128-29); House sub-committee members also received the report (JA-DI 847 (Andino Tr. 69:6-10).) On the floor, Sen. Matthews, also an African-American Democrat, discussed a study showing that photo ID laws were discriminatorily enforced in 2008, and reminded the senators of an incident in the 2008 election in which a white poll worker challenged all African-American students' IDs. (JA 2799-2801.) This evidence was ignored: proponents never studied the claims of discrimination, nor did they pursue Ms. Andino's study further. (*See, e.g.*, JA-DI 219 (Dennis Tr. 78:23-81:16); JA-DI 846 (Andino Tr. 68:4-8).)

Further evidence of R54's discriminatory impact appeared in October 2011, when a reporter compared the SEC's study to precincts' African-American voting-age population, and wrote that voter ID legislation "appears to be hitting black precincts in the state the hardest." (JA 1579 (Burton 41).) In response, Senate Republican Caucus Director Wesley Donehue circulated this article on the social media website Twitter, commenting: "Nice! [This] proves EXACTLY why we need Voter ID in SC."[22] (JA 1580 (Burton 42).)

E. R54's Contentious Legislative History and Departures from Normal Practice

The legislative process by which the General Assembly enacted R54 was marked by procedural irregularities as well as a repeated refusal to consider both the viewpoint of African-American lawmakers and the ameliorating amendments they offered—despite the known racially disparate impact of a strict photo ID requirement.

1. H.3418 (2009-2010)

Photo ID legislation proved the most contentious and emotionally heated issue in memory. (JA 3160 (floor remarks of Sen. Campsen).) In the House, African-American

[22] His subsequent 'Tweets' "clarified" that he meant that half of the students at the historically black college described in the article could be voting improperly. (JA-DI 259 (Donehue Tr. 127:16-128:7).)

legislators grew frustrated over their Republican colleagues' unwillingness to consider their ameliorative amendments, culminating in a walk-out from chambers by all members of the Legislative Black Caucus, something R54's proponents had never seen before. (JA-DI 174 (Clemmons Tr. 182:19-183:7).) In the face of this unprecedented show of protest, the House voted to advance the bill to a final vote soon after, using procedural tactics to prevent further debate or amendments. (JA-DI 173 (Clemmons Tr. 179:9-10); JA 1756 (Burton Supp. 16).) The bill passed, with lawmakers voting almost entirely along party and racial lines.[23] (JA 1561 (Burton 23).)

In the Senate, persistent opposition stalled the bill, and proponents twice failed to garner the two-thirds majority vote necessary to bring contested bills to a floor vote under a "Special Order" motion. (JA 1566 (Burton 28).) Finally, the Senate resorted to an extremely unusual procedure—the Rules Committee Special Order "slot"—to designate H.3418 as Special Order by a simple majority vote. (JA 1744 (Burton Supp. 4).) Senator Land, the Democratic minority leader, remarked on the irregularity of this tactic:

> Sen. Land: You got voted down. So what you do, you got your little trick move there . . . I know our president pro tempore [Sen. McConnell] even said this is a little used approach, we don't normally do this . . .
>
> Sen. Martin: Senator, normally isn't it true we normally get the requisite vote in the motion period, and there's no need to use it. For some reason or another we couldn't quite get the vote, so we decided that we'll go -- that the rule permitted.

(JA 2778-79.) Indeed, in the previous decade, the Senate had used the procedure only *twice* before, the last time being 5 years earlier. (JA 1757 (Burton Supp. 17); JA 2498.)

A compromise version of H.3418 passed the Senate with a provision that allowed "no-excuse" early voting, though reducing the early voting period from 30 to 15 days. (JA-772.) In

[23] The final vote was entirely along party lines, but Tim Scott, the sole African-American Republican, voted in favor of H. 3418.

the conference committee that followed, however, House proponents of H.3418 circulated the conference report before the Senate could present and defend its less restrictive version. (JA 4147-50, 4162-64.) The conference report was finalized with two signatories from the Senate and two from the House, all of whom are white Republicans. (JA 1746 (Burton Supp. 6).) The two African-Americans Democrats did not sign—likewise an unusual gesture of protest. (*Id.*; JA 4107.) When the conference committee's version went back to the Senate for consideration, opponents were able to filibuster until the legislative session ended. (JA 1562 (Burton 24); JA-DI 554-55 (McConnell Tr. 98:21-101:17).)

2. H.3003 (2011)

When the General Assembly resumed in January 2011, photo ID proponents were determined to pass H. 3003, much to the surprise of the SEC (JA-DI 904 (Andino Tr. 284:1-10).) In particular, state Republican Party "activists" put extraordinary "political heat" on legislators to prioritize and pass voter ID. (JA-DI 563 (McConnell Tr. 161:17-162:8); JA-DI 239-40 (Donehue Tr. 29:10-16, 34:14-35:1).) Although there was no evidence of voter impersonation fraud before the General Assembly, Mr. Donehue testified, "this issue was pushed greater than any other issue that we have worked on," in his roughly ten years consulting for the State's Republican Party. "[T]here is no plan B," wrote Lanneau Siegling, a Charleston County GOP committeeman, to Rep. Clemmons in 2010, "no compromise position . . . We must sign into law, this year . . . a Voter ID Bill!" (JA 1691.) "[I]f we don't get this [voter ID law] taken care of," Mr. Siegling wrote again in the new session, "2012 belongs to Obama." (JA-DI 2843.)[24]

After H. 3003 was introduced on January 11 in the House, Rep. Clemmons raced to approve his version of H.3003 so that the House version would gain procedural advantage over

[24] Rep. Clemmons agreed with both statements: "I'm with you, Lanneau!" (JA 1691; JA-DI 2843.)

the Senate's version, which again provided for early voting and permitted a far broader list of accepted IDs. (JA 1565 (Burton 27).) On January 13, his sub-committee held a single, 70-minute hearing. (JA 1570 (Burton 32).) On January 26—*fifteen days* after its introduction—the bill passed on strict party and racial lines, over strong opposition from every African-American lawmaker in the House. (JA 1566 (Burton 28).) Lt. Governor McConnell, at the time President Pro Tempore of the Senate, testified that he could not recall another House bill being introduced, passed and sent to the Senate so quickly. (JA-DI 576-77 (McConnell Tr. 239:8-13).)

In the Senate, proponents hurried their version of the bill, S.1, as well, holding only one sub-committee hearing and one committee debate. (*See* JA 4942-5052 (1/6/11 hearing); JA 5053-5201 (1/18/11 committee debate).) But H.3003 crossed over to the Senate first, on January 27. Senate proponents again failed to garner the supermajority vote for Special Order in order to advance the bill to the floor, and resorted again to the Rules Committee "slot." (JA 1566 (Burton 28).) Republican senators voted for cloture against their Democratic colleagues—even those who never do so out of principle—something that Republican senators agreed was rare. (JA 1746-47 (Burton Supp. 6-7 (citing testimony of Sen. Cleary and Lt. Gov. McConnell)).)

H.3003 ultimately passed the Senate with amendments establishing early voting, expanding the list of acceptable IDs and loosening ID restrictions for persons over 65. (JA 270-298.) In retaliation for failing to pass a so-called "clean" ID bill, Senate Republicans were castigated by their party and threatened with primary challenges. (JA 6468.) The advocacy campaign was so strong that President Pro Tempore McConnell took to the floor of the Senate to provide an extraordinary explanation of the unusual process: "I wanted to make sure the story was told because we were subjected, in my opinion, to a propaganda campaign . . . . It's just an

unhealthy environment where you['re] trying to battle the House, to have somebody come in and undermine your position." (JA 6527.)

Like H. 3418, H. 3003 was sent to conference committee where, as testimony will show, bill proponents excluded the lone African-American Senator during certain closed-door discussions. Ultimately, the committee passed the House's restrictive version of H. 3003 with no early voting. To gain approval from the Senate conferees, Rep. Clemmons promised Senator McConnell that the House would provide for early voting in a separate bill—but the House never pursued such legislation when offered. Despite decades in the General Assembly, Senator McConnell could not recall anything else like this series of events. (JA-DI 576-77 (McConnell Tr. 262:10-263:7).)

3. Rejected Amendments Offered by African-American Legislators

As mentioned above, bill proponents consistently rejected amendments offered by African-American legislators designed to ameliorate the disparate burden of the photo ID requirement, a pattern highly probative of discriminatory intent. Proponents rejected, among others, amendments that would:

- Exempt seniors from the photo ID requirement, reducing the impact of the law on large numbers of persons lacking birth certificates;
- Make the photo ID requirement prospective, allowing more time for those who lacked transportation or underlying documents to obtain approved ID;
- Accept employee IDs issued by federal or state government;
- Accept college and university student IDs; and
- Accept "valid when issued" IDs.

(*See, e.g.*, Ex. 14.) With respect to the provision allowing use of government employee IDs at the polls—which House proponents stripped out in both conference committees—legislators knew that minorities are overrepresented in state and federal government jobs and thus would disproportionately *have* the IDs permitted under the Georgia law. (JA-DI 569 (McConnell Tr.

201:10-22).) Opponents and even some Senate Republicans pointed out that refusing to allow someone to vote with a State law enforcement ID was "flat dumb." (JA 6471.) Public data also showed that minorities were more likely to have suspended licenses than white drivers: in 2010, non-white drivers made up 56% of license suspensions. (JA-DI 2409 & n.20.) A "valid when issued" provision would have allowed voters to use suspended or expired licenses to vote, something disallowed under R54's "valid and current" language. (*Id.*)

With respect to college IDs, bill proponents opposed including them in R54's approved list out of professed concerns over transient voters, and because such IDs do not contain addresses that would aid poll workers in confirming voters' residency. (*See, e.g.*, JA-DI 569 (McConnell Tr. 182:19-184:7).) However, as Mr. Bowers, a proponent of voter ID, testified in sub-committee hearings, the same concerns would apply to military IDs, which were included in both bills.[25] (JA 1990.) Accepting student IDs would have helped to mitigate the H.3003's burden on the substantial African-American student bodies at South Carolina's eight historically African-American colleges and universities. Importantly, in the 2008 election, students at Benedict and Morris Colleges, two such institutions, reported a white poll watcher who abusively challenged African-American voters. (JA-DI 650-51 (K. Rutherford Tr. 67:24-70:17); JA 2799-2800 (Sen. Matthews discusses incident on Senate floor).)

Notably, these three amendments—to accept government employee IDs, student IDs, and "valid when issued" IDs—would have brought R54 closer in substance to the Georgia voter ID law that proponents misleadingly claimed was "virtually the same." (JA 2822 (remarks of Sen. Campsen); *see* JA 1358 (Stewart Reb. 53, Table 13).)

[25] Legislators voted military IDs into the Act despite having almost no information on the numerous forms of "military ID," what documentation must be shown to obtain any one of these IDs, or even what information it shows. (JA-DI 214, 230 (Dennis Tr. 59:10-15, 136:2-24).) Notably, minorities are *under*represented in the U.S. military. (JA 1393 (Arrington ¶ 27).)

In addition to rejecting mitigating amendments, the House adopted Republican amendments that would have increased the voter ID bill's burden. Rep. Clemmons proposed, and the Judiciary Committee adopted, an amendment to allow the SEC to charge $5.00 for a voter registration card with photo. (JA 1564 (Burton 26).) Rep. Lowe proposed, and the House adopted, an amendment allowing poll watchers to sit behind poll workers—the better to challenge ballots based on photo IDs. The Senate rejected the latter amendment in conference committee, but only because it was poorly drafted. (JA-DI 557 (McConnell Tr. 129:17-25).)

F. Lack of Legitimate, Race-Neutral Justifications

The State has offered two justifications for R54—preventing voter impersonation fraud and increasing public confidence in the system. (Compl. ¶ 8.) Both are blatant pretext. (*See, e.g.*, JA-1693 (Rep. Clemmons and political consultant discussing the need to find a "boogey-man" for the photo ID law).) There is no evidence of even a single instance of voter impersonation fraud in South Carolina, nor is there any evidence that lawmakers believed that impersonation fraud was an actual concern. (JA-DI 166 (Clemmons Tr. 41:9-10 ("No instances of impersonation fraud [were] brought into the record during the debate of [R54].")); *see also* JA 2675 (Sen. Campsen concedes same).) The absence here of "objectively verifiable" reasons, *City of Richmond*, 422 U.S. at 375, for the enactment of a strict photo ID requirement provides further evidence of South Carolina's discriminatory purpose. *See* 28 C.F.R. § 51.57(a).

Of course, "the propriety of [preventing election fraud] is perfectly clear." *Florida* v. *United States*, slip Op. at *116 (quoting *Crawford* v. *Marion Cnty. Elec. Bd.*, 553 U.S. 181, 196 (2008) (plurality opinion)). In *Florida*, this Court applied this to mean 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." *Id.* (emphasis in original). However, "in some

circumstances it is reasonable to infer discriminatory intent based on evidence of pretext," particularly where "the State not only acted without evidence of fraud, but also acted in a way that materially increased the burden of minority voters." *Id.* at *115. This Court explained that it was not persuaded by the pretext argument in *Florida* v. *United States* because, first, the challenged law did not produce a retrogressive effect and second, "significantly . . . [the state] made ameliorative adjustments that will make it easier for [the affected individuals] to vote." *Id.* at *116-17. Here, the circumstances are the reverse: R54 ultimately rejected "ameliorative adjustments" by excluding from the list of Required IDs government employee IDs, student IDs, and "valid when issued" IDs, forms of ID that African-Americans possess in substantial numbers. (*Supra* pp. 30-31.) More fundamentally, there is simply no "loophole" for South Carolina to close, given its current, rigorous voter identification rules.

There is no voter impersonation fraud in South Carolina for good reason: such fraud is hard to perpetrate successfully under current South Carolina law, the gains (one vote) are small, and the penalties are severe, including three years of imprisonment and a $12,000 fine. S.C. Code Ann. §§ 7-25-120, 7-25-130. (*See also* JA 1425 (Arrington ¶ 88); JA-DI 452 (Knotts Tr. 54:14-25).) To successfully impersonate another at the polls in South Carolina, the impersonator would: (1) have to obtain a voter registration card of the same sex, race and approximate age; (2) go to the precinct listed on the card and trust poll managers (frequently, neighbors of the owner of the registration card) not to recognize either the impersonator or the name on the card; (3) sign the rolls to match the signature on the card and (4) count on the owner of the registration card not having already voted by other means or showing up to vote later. (JA-DI 856-57 (Andino Tr. 144:9-146:9); JA-DI 191-92 (Debney Tr. 36:3-8, 48:1-52:13); JA-DI 45-47 (Calkins

Tr. 40:20-41:4, 43:6-47:4); JA-DI 561 (McConnell Tr. 148:12-20).) To say the least, the procedure in place raises a serious challenge for any attempted voter impersonation.

Although the State's expert on purpose, Dr. Buchanan, claims that voter fraud "occur(s) at an alarming rate across the nation and in South Carolina," he is able to allege just five instances of what he claims to be impersonation fraud—and none in South Carolina. (JA 1190-91 (Buchanan, Exs. 12, at 12-13).) This, after reviewing elections since 1985, during which hundreds of millions of votes surely were cast. (*Id.*) Even these five do not actually involve impersonation fraud prevented by a photo ID. (*See id.*)

As for voter confidence in the system, the General Assembly never asked any questions about the issue. (JA-DI 863 (Andino Tr. 177:11-15); Ex. 3 (Campsen Tr. 181:1-9); *see also* JA-DI 261 (Donehue Tr. 136:5-9 (proponents never requested public opinion polling on voter confidence)).) Had the issue been of interest, the SEC would have told legislators that surveys demonstrate that South Carolina voters have a high level of confidence in the system (JA-DI 863 (Andino Tr. 177:6-10)), and Ms. Andino expects that is true to this very day (JA-DI 863 (Andino Tr. 178:20-23); *see also* JA-DI 48 (Calkins Tr. 49:7-14); JA 1431 (Arrington ¶ 100).)

CONCLUSION AND REQUEST FOR RELIEF

The State of South Carolina has two separate and distinct burdens that it must meet to prevail under Section 5 of the VRA—that Act R54 neither was enacted with a discriminatory purpose nor will operate to have a retrogressive effect on minority voters in South Carolina. South Carolina cannot and will not satisfy this burden. Indeed, the evidence will demonstrate that R54 has both the purpose and the effect of denying the right to vote based on race. To preserve the rights of minority persons to vote in South Carolina and carry out Congress' intent

in passing and re-enacting the VRA, Intervenors respectfully request that this Court deny preclearance to R54.

Dated: August 20, 2012

Respectfully submitted,

/s/ Garrard R. Beeney

Arthur B. Spitzer (DC Bar No. 235960)
AMERICAN CIVIL LIBERTIES UNION OF THE NATION'S CAPITAL
4301 Connecticut Avenue, NW, Suite 434
Washington, DC 20008
(202) 457-0800
(202) 457-0805 (fax)
artspitzer@gmail.com

Laughlin McDonald
Nancy Abudu
Katie O'Connor
AMERICAN CIVIL LIBERTIES UNION FOUNDATION, INC.
230 Peachtree Street, N.W., Suite 1440
Atlanta, GA 30303-1227
(404) 523-2721
(404) 653-0331 (fax)
koconnor@aclu.org

Susan Dunn
AMERICAN CIVIL LIBERTIES UNION OF SOUTH CAROLINA
P.O. Box 20998
Charleston, SC 29413
sdunn@aclusouthcarolina.org

J. Gerald Hebert (D.C. Bar No. 447676)
CAMPAIGN LEGAL CENTER
215 E Street, NE
Washington, DC 20002
(202) 736-2200
ghebert@campaignlegalcenter.org

Attorneys for Defendant-Intervenors James Dubose, et al.

Jon M. Greenbaum (D.C. Bar No. 489887)
Mark A. Posner (D.C. Bar No. 457833)
Robert A. Kengle
LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW
1401 New York Ave. NW
Ste. 400
Washington, DC 20005
Tel: (202) 662-8389
Fax: (202) 628-2858
mposner@lawyerscommittee.org

Michael A. Cooper *(pro hac vice)*
Garrard R. Beeney *(pro hac vice)*
Peter A. Steciuk *(pro hac vice)*
Taly Dvorkis *(pro hac vice)*
Theodore A.B. McCombs *(pro hac vice)*
Sean A. Camoni *(pro hac vice)*
SULLIVAN & CROMWELL LLP
125 Broad Street
New York, NY 10004-2498
Tel: (212) 558-4000
Fax: (212) 291-9007
beeneyg@sullcrom.com

Wendy R. Weiser (*pro hac vice)*
Keesha M. Gaskins (*pro hac vice*)
Mimi Marziani (*pro hac vice*)
Elisabeth Genn (*pro hac vice*)
THE BRENNAN CENTER FOR JUSTICE AT NYU SCHOOL OF LAW
161 Avenue of the Americas, Floor 12
New York, NY 10013-1205
Tel: (646) 292-8310
Fax: (212) 463-7308
keesha.gaskins@nyu.edu

Debo P. Adegbile (D.C. Bar No. NY0143)
Elise C. Boddie
Ryan P. Haygood (D.C. Bar No. NY0141)
Dale E. Ho (D.C. Bar No. NY0142)
Natasha M. Korgaonkar
Leah C. Aden
NAACP LEGAL DEFENSE &
EDUCATIONAL FUND, INC.
99 Hudson Street, Suite 1600
New York, NY 10013
(212) 965-2200
rhaygood@naacpldf.org
laden@naacpldf.org

Douglas H. Flaum
Michael B. de Leeuw
Adam M. Harris
FRIED, FRANK, HARRIS,
SHRIVER & JACOBSON LLP
One New York Plaza
New York, NY 10004-1980
(212) 859-8000

Victor L. Goode
NATIONAL ASSOCIATION FOR THE
ADVANCEMENT OF
COLORED PEOPLE
4805 Mt. Hope Dr.
Baltimore, MD 21215

Counsel for Defendant-Intervenors South Carolina State Conference of the NAACP, et al.

Armand Derfner (D.C. Bar No. 177204)
DERFNER, ALTMAN & WILBORN
575 King Street, Suite B
P.O. Box 600
Charleston, SC 29402
Tel: (843) 723-9804
Fax: (843) 723-7446
aderfner@dawlegal.com

Counsel for Defendant-Intervenors the League of Women Voters of South Carolina, et al.

CERTIFICATE OF SERVICE

I certify that on August 20, 2012, I filed the foregoing Trial Brief along with Exhibits in redacted form, pursuant to the Protective Order Governing Confidential Documents and Information (ECF No. 51), through the Court's electronic filing system, which will provide notice to all counsel of record; and that on the same day, I served courtesy copies of the unredacted Exhibits by e-mail upon the following counsel:

Bradley E. Heard
Catherine Meza
Anna M. Baldwin
Jared Michael Slade
Richard Alan Dellheim
Erin Marie Velandy
Attorneys, Voting Section
Civil Rights Division
U.S. DEPARTMENT OF JUSTICE
950 Pennsylvania Avenue, N.W.
Washington, DC 20530

H. Christopher Bartolomucci
Christopher Coates
Brian J. Field
Michael H. McGinley
Stephen V. Potenza
BANCROFT PLLC
1919 M Street NW
Washington, DC 20036

/s/ Theodore A.B. McCombs
Theodore A.B. McCombs