UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

SOUTH CAROLINA'S CORRECTED TRIAL BRIEF

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Plaintiff, the State of South Carolina, respectfully requests that this Court preclear four provisions of the State's Act R54 pursuant to Section 5 of the Voting Rights Act ("VRA § 5"), 42 U.S.C. § 1973c.

BACKGROUND

A. South Carolina's Voter ID Law Was Enacted To Detect and Deter Voter Fraud and Safeguard Public Confidence in the Electoral System.

The South Carolina General Assembly passed Act R54 on May 11, 2011, and Gov. Nikki Haley signed it into law seven days later. The State seeks preclearance of Sections 4, 5, 7 and 8 of Act R54.

The purpose of Act R54 "is to confirm the person presenting himself to vote is the elector on the poll list." Act R54, § 5(E). Section 5 of the Act provides: "When a person presents himself to vote, he shall produce a valid and current" (1) South Carolina driver's license; (2) other form of photo ID issued by the S.C. Department of Motor Vehicles ("DMV"); (3) U.S. passport; (4) federal government-issued military photo ID; or (5) South Carolina voter registration card with a photograph of the voter, pursuant to Section 4 of Act R54. Act R54, § 5(A). Section 4 provides that the State Election Commission ("SEC") "shall implement a system in order to issue voter registration cards with a photograph of the elector." *Id*. § 4. Upon preclearance, these photo voter cards will be available to all eligible voters free of charge, at every county election office in the State, including on election day. The SEC will also operate a mobile unit that will make the free photo voter registration cards even more widely available by visiting public events and areas with higher concentrations of voters currently lacking an Act R54 ID.

The Act also includes provisional ballot procedures for voters who are unable to present an acceptable form of identification. If a voter possesses one of the five acceptable forms of

photo ID but arrives at the polls without it, he may cast a provisional ballot that will be counted so long as he brings the ID to the county board of registration and elections ("county board") before certification of the election. *Id*. § 5(C)(1). *See* Poll Manager's Handbook Supplement, JA-SC_0666; Reasonable Impediment/Religious Objection Procedures, JA-SC_0830. This procedure ensures that voters who have forgotten their IDs or have not yet obtained one but have the ability to do so within the allotted time (such as by visiting the county registration office on election day to obtain a free photo voter registration card) will still be able to vote.

Further, if a voter "suffers from a reasonable impediment that prevents the elector from obtaining" photo ID, he may complete an affidavit at the polling place and cast a provisional ballot. Act R54, § 5(D)(1)(b). The affidavit must "affirm that the elector: (i) is the same individual who personally appeared at the polling place; (ii) cast the provisional ballot on election day; and (iii) the elector suffers from a reasonable impediment that prevents him from obtaining photograph identification." *Id.* This affidavit will appear on the provisional ballot envelope. *See* JA-SC_0641-43. And the South Carolina Attorney General's Office has opined that the term "reasonable impediment" means "any valid reason, beyond the voter's control, which create[s] an obstacle to the voter's obtaining the necessary photographic identification in order to vote." S.C. Att'y Gen. Op. of Aug. 16, 2011 at 4; JA-SC_0670; *see also* Reasonable Impediment/Religious Objection Procedures, JA-SC_0829-32. A voter similarly may execute an affidavit and cast a provisional ballot if he has "a religious objection to being photographed." Act R54, § 5(D)(1)(a).

The county board "*shall* find that [a] provisional ballot is valid unless the board has grounds to believe the affidavit is false." *Id*. § 5(D)(2) (emphasis added). In other words, Act R54 mandates the counting of reasonable impediment and religious objection ballots, with the

burden on the county boards to find that the voter's affidavit is false. Thus, under Act R54, any registered voter who cannot obtain a photo ID, for reasons beyond her control, is guaranteed the right to execute an affidavit and effectively exercise the electoral franchise.

Section 7 requires the SEC to "establish an aggressive voter education program" to "educate the public" concerning Act R54. Required features of the program are set forth in Section 7, subsections (1)-(8). Among other things, the SEC must, *inter alia*, advertise in general-circulation newspapers and other local media outlets, *id*. § 7(6)-(7), and send a notice to each registered voter who lacks a DMV-issued ID, *id*. § 7(8). The SEC has already taken steps to implement these requirements. *See* Photo ID Voter Education Plan, JA-SC_0647-63; Poll Manager's Handbook Supplement, JA-SC_0666; Reasonable Impediment/Religious Objection Procedures, JA-SC_0829-32; Voter Education Postcard, JA-SC_0833-35.

Finally, Section 8 directs the SEC to create "a list containing all registered voters of South Carolina who are otherwise qualified to vote but do not have a South Carolina driver's license or other form of" DMV-issued photo ID. *Id*. § 8. This list must be publicly available, *id.*, and will be used to conduct the targeted mailings required in Section 7(8).

Under South Carolina's current law, which the Attorney General precleared, a voter must show either a driver's license, other DMV-issued photo ID, or a (non-photo) voter registration card. *See* S.C. Code § 7-13-710 (1976) (last amended by Act 459 of 1996); United States Answer to Request for Admission No. 11. Thus, Act R54 changes current law by (1) expanding the list of acceptable photo ID to include passports, military ID, and the photo voter cards made available pursuant to Section 4 of Act R54, (2) removing non-photo voter registration cards from the list, (3) creating a free photo voter registration card that can be obtained with the same documents needed to register, (4) adding provisional ballot procedures that ensure all eligible

voters can cast a ballot, and (5) mandating Section 7's "aggressive voter education program" and individualized voter notification mailing.

B. South Carolina's Voter ID Law Is Consistent With the Text, Purpose, and History of the Voting Rights Act.

The VRA's text, purpose, and legislative history demonstrate that Congress did not intend to prohibit voter ID requirements. On the contrary, in securing the right to vote for minorities, the 89th Congress was keenly aware that voting fraud nullifies votes cast by lawful voters. To safeguard minority voters from the vote-dilutive effect of in-person voter fraud, the VRA made it a crime to provide false identifying information when voting. It follows that the VRA should not be construed to prohibit preclearance of a State's generally applicable voter ID law because such a construction would be inconsistent with congressional intent.

In Section 11(c) of the VRA, Congress made it a federal crime to provide false personal identification when voting:

> Whoever knowingly or willfully gives false information as to his name, address or period of residence in the voting district for the purpose of establishing his eligibility to register or vote . . . shall be fined not more than $10,000 or imprisoned not more than five years, or both . . ..

42 U.S.C. § 1973i(c). Section 11(c) thus recognizes that voters must establish their eligibility to vote, including by providing personal identifying information. Section 11(c) was adopted because "members of the House Judiciary Committee deemed it imperative that the Act include methods for enforcing clean elections." *United States v. Cole*, 41 F.3d 303, 307 (7th Cir. 1994).

The House Report on the VRA explained that securing voting rights for minorities required measures to stop in-person voter fraud:

> As we destroy the traditional bastions of discrimination erected at registration and polling places, we must foresee the path of retreat and reentrenchment of those who may continue to preserve the effects of discrimination on account of race or color. Surely, it will be in the form of fraud, intimidation, and corruption. Therefore, we maintain that *any effective voting*

> *rights bill must include a comprehensive clean elections section. The public record is replete with endless instances of vote frauds, including stuffing the ballot box, tombstone voting, multiple casting of votes by one individual in several precincts or districts*, threats and coercion of voters, destruction or alteration of ballots, willful miscounting of votes, and buying votes. These conditions do not exist in just one part of the country, but can be found in many States across the length and breadth of this land.
>
> It is a cruel deception to give any man the elective franchise and then allow destruction of the effect of his vote through a multitude of corrupt vote, but we are obligated to protect the integrity of the vote cast by any citizen. Without such safeguards, the right to vote becomes but a snare and a delusion. Representation in government is reduced to a mirage.

H.R. Rep. No. 89-439 (1965), *reprinted in* 1965 U.S.C.C.A.N. 2437, 2471-72 (emphasis added).

The House Report also observed:

> *Every voter of every race or color shall be assured that* not only will he be guaranteed an equal opportunity to register and vote, but that upon qualification he will be afforded an opportunity to vote without personal fear, knowing that *his ballot will* be fairly counted and tabulated, and *not nullified by illegally cast ballots* or those cast by persons whose vote and freedom of choice have been purchased by another.
>
> The call for this legislation has long been sounded and the need for it is clear. It is particularly appropriate in the present context of national realization of the need for comprehensive voting rights legislation. For it can confidently be expected that *once systematized impediments to Negro registration and voting are removed, there will be an increase in practices of fraud* and corruption in attempts to nullify the impact on election results of the reinfranchised voters.

Id. at 2478-79 (emphases added). Like the Voting Rights Act itself, Act R54 was enacted so that "[e]very voter of every race or color" is able to vote in South Carolina without fear that her lawful vote will be diluted or off-set by an unlawful fraudulent vote. The Act achieves this goal without imposing a disproportionate or material burden on minority voters' effective exercise of the electoral franchise.

ARGUMENT

I. Voter ID Laws Are a Supreme Court-Approved, Common Sense Means of Preventing Voter Fraud, Enhancing Public Confidence, and Protecting the Right to Vote.

The Constitution vests the States with the power to prescribe "[t]he Times, Places and

Manner of holding Elections," U.S. Const. art. I, § 4, cl. 1, which includes the power to enact laws aimed at the "prevention of fraud and corrupt practices." *Smiley v. Holm*, 285 U.S. 355, 366 (1932). "A State indisputably has a compelling interest in preserving the integrity of its election process." *Eu v. San Francisco Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 231 (1989). States may therefore adopt "generally-applicable and evenhanded restrictions that protect the integrity and reliability of the electoral process itself." *Anderson v. Celebrezze*, 460 U.S. 780, 788 n.9 (1983).

To combat election fraud and ensure that fraudulent ballots do not dilute lawful votes, 18 States, including South Carolina, have enacted laws requiring voters to verify their identity and eligibility to vote by presenting photo ID when voting in person.[1] Another 15 States have passed laws requiring voters to show either a photo ID or other specified form of ID at the polls.[2] And the Attorney General has precleared the voter ID laws of four States covered by VRA § 5—Arizona, Georgia, Louisiana, and Michigan. *See* U.S. Answer to S.C. Request for Admission No. 12.

The overwhelming majority of American voters support photo ID requirements as a common sense means of ensuring that those who show up to vote are eligible to do so (and have not already voted). A public opinion survey of voting reforms conducted by the United States' own expert found that "the greatest support is for requiring all voters to show government issued photo identification when they go to vote, with 75.6% of respondents supporting this reform." Charles Stewart III *et al*., *Voter Opinions About Election Reform: Do They Support Making*

[1] The 18 States are Alabama, Florida, Georgia, Hawaii, Idaho, Indiana, Kansas, Louisiana, Michigan, Mississippi, New Hampshire, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, and Wisconsin. *See* National Conference of State Legislatures, *Voter ID: State Requirements*, http://www.ncsl.org/legislatures-elections/elections/voter-id.aspx.

[2] The 15 States are Alaska, Arizona, Arkansas, Colorado, Connecticut, Delaware, Kentucky, Missouri, Montana, North Dakota, Ohio, Oklahoma, Utah, Virginia, and Washington. *See id*.

Voting More Convenient, 10 Election L.J. 73, 78 (2011), JA-SC_1197. Voter ID was supported by 74% of blacks, 75% of whites, 63% of Obama voters, 88% of McCain voters, 64% of Democrats, 77% of Independents, 88% of Republicans, and 78% of South Carolinans. *Id*. at 79-81, JA-SC_1198-99.

The National Voter Registration Act of 1993, 107 Stat. 77, and the Help America Vote Act of 2002, 116 Stat. 1666, do not require the States to enact voter ID laws, but they "indicate that Congress believes that photo identification is one effective method of establishing a voter's qualifications to vote." *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 193 (2008). "That conclusion is also supported by a report issued" by the bipartisan, blue-ribbon commission "chaired by former President Jimmy Carter and former Secretary of State James A. Baker III." *Id*. *See* Commission on Federal Election Reform, *Building Confidence in U.S. Elections* (Sept. 2005), JA-SC_0188. The Carter-Baker Commission explained that requiring photo ID can "detect, deter, or eliminate several potential avenues of fraud—such as multiple voting or voting by individuals using the identities of others or those who are deceased." *Id*. at 18-19, JA-SC_0213-14. It concluded:

> The electoral system cannot inspire public confidence if no safeguards exist to deter or detect fraud or to confirm the identity of voters. Photo IDs currently are needed to board a plane, enter federal buildings, and cash a check. Voting is equally important.

Id. at 18, JA_0213 (quoted with approval in *Crawford*, 553 U.S. at 194). The Commission also noted that, around the globe, "[v]oters in nearly 100 democracies use a photo identification card without fear of infringement on their rights." *Id*. at 5, JA-SC_0200.

Even before Carter-Baker, a special committee of Democratic Members of Congress chaired by Rep. Maxine Waters declared: "We support a jurisdiction's right to require voter identification at the polls," including "photo identification." Democratic Caucus Special

Committee on Election Reform, *Revitalizing Our Nation's Election System* 103, 104 (2001), JA-SC_0407-08 ("Waters report").[3] The Waters report shows that support for voter ID crosses political and racial lines.

The Supreme Court has upheld voter ID laws in two cases. In *Purcell v. Gonzalez*, 549 U.S. 1 (2006) (per curiam), the Court unanimously vacated a Ninth Circuit order preliminarily enjoining Arizona's voter ID law prior to the 2006 general elections. The Court observed: "Confidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy. Voter fraud drives honest citizens out of the democratic process and breeds distrust of our government. Voters who fear their legitimate votes will be outweighed by fraudulent ones will feel disenfranchised." *Id.* at 4. The Court also explained that preventing fraudulent voting protects the right to vote: "[T]he right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." *Id.* (quoting *Reynolds v. Sims*, 377 U.S. 533, 555 (1964)).

In *Crawford*, the Supreme Court upheld Indiana's voter ID law against claims that the law "substantially burdens the right to vote in violation of the Fourteenth Amendment; that it is neither a necessary nor appropriate method of avoiding election fraud; and that it will arbitrarily disenfranchise qualified voters who do not possess the required identification and will place an unjustified burden on those who cannot readily obtain such identification." 553 U.S. at 187. [4]

[3] The Waters report goes on to say that States should (1) not require a voter to show more than one ID; (2) advise voters in advance which forms of ID are acceptable; (3) permit voters to show something other than driver's licenses and passports; and (4) not require social security cards. Waters Report at 104, JA-SC_0408. Act R54 passes all four tests.

[4] Justice Stevens authored the lead opinion in *Crawford*, joined by Chief Justice Roberts and Justice Kennedy. Justice Scalia, joined by Justices Thomas and Alito, concurred in the judgment. All citations herein are to the lead opinion, unless noted otherwise.

The Court held that Indiana's law was justified by the state's interests in "deterring and detecting voter fraud" and in "safeguarding voter confidence." *Id*. at 191. As to the former, the Court ruled that "[t]here is no question about the legitimacy or importance of the State's interest in counting only the votes of eligible voters." *Id*. at 196. As to the latter, the Court found that "public confidence in the integrity of the electoral process has independent significance, because it encourages citizen participation in the democratic process." *Id*. at 197.

Although Indiana's law placed a slight burden on eligible voters who lacked photo ID when the law took effect, the Court held that "the inconvenience of making a trip to the [Bureau of Motor Vehicles], gathering the required documents, and posing for a photograph surely does not qualify as a substantial burden on the right to vote, or even represent a significant increase over the usual burdens of voting." *Id*. at 198; *accord id*. at 209 (concurrence). The Court recognized that the law imposed a "somewhat heavier burden" on a "limited number of persons" such as "elderly persons born out of state, who may have difficulty obtaining a birth certificate," and "homeless persons," but it concluded that "the severity of [this] burden is . . . mitigated by the fact that, if eligible, voters without photo identification may cast provisional ballots that will ultimately be counted." *Id*. at 199. The Court held that the special burden "on some voters" did not justify "invalidat[ing] the entire statute." *Id*. at 203.

Summing up, the lead opinion in *Crawford* found that Indiana's voter ID law was "a nondiscriminatory law" supported by "valid neutral justifications." *Id*. at 204. The concurrence likewise found that "[t]he Indiana photo-identification law is a generally-applicable, nondiscriminatory voting regulation." *Id*. at 205.

The United States filed a brief in the Supreme Court in *Crawford* in support of Indiana. *See* Br. for U.S. as *Amicus Curiae* at 9-10, *Crawford*, 553 U.S. 181 (Nos. 07-21, 07-25), 2007

WL 4351593 ("Any burden that is imposed by the Voter ID Law is more than justified by the State's interest in combating in-person voter fraud. Voter fraud itself constitutes an impairment of the right to vote.").

After *Crawford*, courts have rejected every fully-resolved challenge to a voter ID law. *See Gonzalez v. Arizona*, 677 F.3d 383, 404-410 (9th Cir. 2012) (en banc) (upholding, by a 10-1 vote, Arizona's voter ID law against VRA § 2, equal protection, and poll tax claims); *Common Cause/Ga. v. Billups*, 554 F.3d 1340, 1354 (11th Cir. 2009) (rejecting Fourteenth Amendment challenge to Georgia's photo ID law; holding that "[t]he insignificant burden imposed by the Georgia statute is outweighed by the interests in detecting and deterring voter fraud"); *ACLU of N.M. v. Santillanes*, 546 F.3d 1313, 1325 (10th Cir. 2008) (holding that Albuquerque's photo ID law "is a valid method of preventing voter fraud" and does not violate equal protection); *Democratic Party of Ga., Inc. v. Perdue*, 707 S.E.2d 67, 75 (Ga. 2011) (Georgia's photo ID law is "a minimal, reasonable, and nondiscriminatory restriction which is warranted by the important regulatory interests of preventing voter fraud."); *see also In re Request for Advisory Op. Re: Constitutionality of 2005 PA 71*, 740 N.W.2d 444, 448 (Mich. 2007) (Michigan's voter ID law "is a reasonable, nondiscriminatory restriction designed to preserve the purity of elections and to prevent abuses of the electoral franchise . . ., thereby preventing lawful voters from having their votes diluted by those cast by fraudulent voters."); *Applewhite v. Pennsylvania*, No. 330 M.D. 2012, 2012 WL 3332376 (Pa. Commw. Ct. Aug. 15, 2012) (denying request to enjoin Pennsylvania's voter ID law and rejecting equal protection challenge).[5]

As the United States noted in its *Crawford amicus* brief (at 9), "[p]hoto ID requirements are ubiquitous in American society today." Presenting photo ID is a common, if not daily,

[5] A state trial court has enjoined Wisconsin's voter ID law; the ruling is on appeal.

occurrence in this country. To board an airplane, cash a check, purchase all sorts of goods, or enter virtually any government building, one must show photo ID. This very Court has a "100% ID Check" policy. *See* Requirements for Entry, http://www.dcd.uscourts.gov/dcd/entry ("To enter the courthouse, all visitors must show a photo ID issued by a government agency, such as a driver's license"). Voter ID laws do not burden the right to vote (or any other right) any more than courthouse ID checks burden the right of access to the courts. *See Foti v. McHugh*, 247 F. App'x 899, 901 (9th Cir. 2007) (rejecting challenge to courthouse ID check policy). Like other photo ID requirements, South Carolina's Act R54 is perfectly lawful. As shown below, the law has no discriminatory purpose or effect.

II. Act R54 Was Enacted for Legitimate, Non-Discriminatory Purposes.

South Carolina adopted Act R54 to detect and deter voter fraud and to enhance public confidence in the integrity of the electoral process. The Supreme Court has held that these are legitimate, important, and nondiscriminatory purposes justifying a voter ID law. *Crawford*, 553 U.S. at 196-197, 204.

Act R54 does not have "the purpose . . . of denying or abridging the right to vote on account of race or color, or [membership in a language minority group]" or any "discriminatory purpose." 42 U.S.C. §§ 1973c(a), 1973c(c). A "discriminatory purpose" means "more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979) (citation omitted). *Accord City of Mobile, Ala. v. Bolden*, 446 U.S. 55, 71-72 n.17 (1980). "It is settled that discriminatory purpose" in the VRA § 5 context means the *Feeney* definition. *New York v. United States*, 874 F. Supp. 394, 399 (D.D.C. 1994) (three-judge

court). *See* S. Rep. No. 109-295, at 18 (2006) ("[I]t is th[e] constitutional definition which we incorporate."); H.R. Rep. No. 109-478, at 68 (2006).

"[U]nder section 5's 'purpose' analysis, the question is what *actually* motivated the legislators." *New York*, 874 F. Supp. at 399. "[T]he plaintiff must come forward with evidence of legitimate, nondiscriminatory motives" and "that the proposed changes were not motivated by a discriminatory purpose." *Id*. at 400; *accord Shelby Cnty., Ala. v. Holder*, 811 F. Supp. 2d 424, 431 (D.D.C. 2011), *aff'd*, 679 F.3d 848 (D.C. Cir. 2012). Then "the burden shifts to the Attorney General, as the party resisting preclearance, to provide some evidence of a discriminatory purpose." *Id*. Absent "such a showing, the section 5 plaintiff will be found to have carried its burden of establishing a lack of discriminatory purpose." *Id*. South Carolina meets its burden, and Defendants cannot meet theirs.

A. Act R54's Purposes Are Non-Discriminatory.

Section 5(E) of Act R54 expressly states: "The purpose of the identification required pursuant to subsection [5](A) is to confirm the person presenting himself to vote is the elector on the poll list." Four of the key General Assembly members involved in the drafting, consideration, and passage of Act R54—Speaker Bobby Harrell, Rep. Alan Clemmons, Sen. Chip Campsen, and Lt. Gov. Glenn McConnell—will testify at trial that Act R54 was enacted to combat voter fraud and enhance public confidence in elections and not enacted for any discriminatory purpose. Indeed, Act R54 was inspired by and modeled after the Indiana voter ID law that the Supreme Court upheld in *Crawford* and the Georgia voter ID law that the Attorney General precleared and the Eleventh Circuit upheld in *Billups*.

Act R54 was signed into law by Gov. Nikki Haley, who is herself a member of a racial minority group. Furthermore, during the 2009-2010 session, *every* Senator present (save two)—Republican and Democrat, white and black—voted for a predecessor election reform bill with a

photo ID requirement similar to Act R54 and other reforms, such as early voting. It is highly doubtful that the Senate would have voted, 36-2, to pass a bill with a photo ID requirement if that requirement were discriminatory.

That Act R54 has no racially discriminatory purpose is confirmed by the fact that it applies to far more white voters than minority voters. Act R54 applies to *all* South Carolina voters regardless of race. Because there are 1,935,787 white registrants in the State compared to 839,934 minority registrants (786,788 of which are black),[6] the law applies to 1.1 million more white registrants than minority registrants. Put differently, the law applies to more than twice as many whites as minorities. Moreover, of the 3.57% of registrants under 65 years old who currently lack an acceptable form of photo ID, more of them are white (57,363) than minority (41,395). Hood Supp. Decl. at Table 8, JA_001092; Table 10, JA_001094.[7]

In *Feeney*, a state veterans' preference statute was challenged on the ground that it discriminated against women, since the "preference operate[d] overwhelmingly to the advantage of males." 442 U.S. at 259. The Supreme Court held that the statute was not a "pretext for gender discrimination." *Id*. at 275. It reasoned:

> Although few women benefit from the preference the nonveteran class is not substantially all female. To the contrary, significant numbers of nonveterans are men, and all nonveterans—male as well as female—are placed at a disadvantage. Too many men are affected . . . to permit the inference that the statute is but a pretext for preferring men over women.

[6] *See* Supp. Decl. of M.V. Hood III, at Table 6 ("Hood Supp. Decl."), JA_001090. 69.37% of registrants are white. *Id*. All figures cited include registrants classified as "active" by the State Election Commission and two categories of "inactive" voters who are more likely to vote in future elecitons.

[7] All registrants age 65 or older are automatically qualified to vote absentee in South Carolina and thus need not show any form of identification in order to vote. *See* S.C. Code § 7-15-320(B)(8).

Id This is a far easier case than *Feeney*. Act R54 not only applies to "significant numbers" of white voters, it applies to *more* whites than minorities. Further, this is a case in which "the legitimate noninvidious purposes of a law cannot be missed." *Id*. *See also Jackson v. Thornburgh*, 907 F.2d 194, 197 (D.C. Cir. 1990) (applying *Feeney*).

The same General Assembly that passed Act R54 also passed state and congressional redistricting plans, Acts 72 & 75 of 2011. The Attorney General precleared those plans, and a three-judge district court upheld them against VRA § 2 and equal protection challenges, finding no "evidence tending to prove" any "racial discrimination by the legislature." *Backus v. South Carolina*, No. 11-03120, 2012 WL 786333, at *9 (D.S.C. Mar. 9, 2012). The court "decline[d] to credit [the] opinion" and testimony of Rep. Bakari Sellars, an opponent of the plans—and Act R54—alleging that the plans were racially motivated. *Id.*

B. Act R54's Purposes Are Legitimate.

Defendants claim that voter fraud is not a real problem and thus the State's purpose must be deemed illegitimate or pretextual. The argument fails on many levels.

First, *Crawford* holds that detecting and deterring in-person voter fraud is a state interest of unquestionable "legitimacy [and] importance." *Crawford*, 553 U.S. at 196. The Court upheld Indiana's voter ID law even though there was "no evidence of any [in-person voter] fraud actually occurring in Indiana at any time in its history." *Id*. at 194;[8] *see also Florida v. United States*, No. 11-cv-1428 (MBG)(CKK)(ESH), slip op. at 115-16 (D.D.C. Aug, 16, 2012) (per

[8] The Seventh Circuit's opinion in *Crawford* explained that "the absence of prosecutions [of voter fraud in Indiana] is explained by the endemic underenforcement of minor criminal laws . . . and by the extreme difficulty of apprehending a voter impersonator. He enters the polling place, gives a name that is not his own, votes, and leaves. If later it is discovered that the name he gave is that of a dead person, no one at the polling place will remember the face of the person who gave that name, and if someone did remember it, what would he do with the information?" 472 F.3d 949, 953 (7th Cir. 2007), *aff'd*, 553 U.S. 181.

curiam) ("[T]he 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.") (citing *Crawford*).

Second, *Crawford* found that "the risk of voter fraud [is] real" and "it could affect the outcome of a close election." *Id*. at 196. The Court noted that "flagrant examples of such [in-person] fraud in other parts of the country have been documented throughout this Nation's history by respected historians and journalists, [and] that occasional examples have surfaced in recent years." *Id*. at 195.

The Carter-Baker report, which the Court cited with approval in *Crawford*, found that while "[t]here is no evidence of extensive fraud in U.S. elections or of multiple voting," "there is no doubt that it occurs." Report 18, JA-SC_0213. It noted that in the November 2004 elections in Milwaukee, there were "more than 100 people who voted twice, used fake names or false addresses, or voted in the name of a dead person" and that "there were more than 4,500 more votes cast than voters listed." *Id*. at 4, JA-SC_0199. "The problem," the Commission stated, "is not the magnitude of the fraud. In close or disputed elections, and there are many, a small amount of fraud could make the margin of difference." *Id*. at 18, JA-SC_0213.

The Fourth Circuit, which has jurisdiction over South Carolina, considers voter impersonation "a very real danger." In *Hoffman v. Maryland*, 928 F.2d 646 (4th Cir. 1991), the court upheld Maryland's voter purge statute, which removes from registration rolls persons who have not voted for five years. It held that the statute "is designed to curb vote fraud" and that "[w]ithout removing the names, there exists the very real danger that impostors will claim to be

someone on the list and vote in their places." *Id*. at 649. South Carolina is entitled to rely on the precedent of its own Circuit.[9]

Third, there have been numerous cases of confirmed and suspected voter fraud in South Carolina:

- The South Carolina Democratic Party voided its June 8, 2004 primary election for State Senate District No. 30 because the election was "tainted by widespread voter fraud"—"including voting by convicted felons, double voting by persons casting absentee ballots and voting in person, and absentee ballots collected in violation of law by paid campaign staff that were contrary to the will of the voter." *Glover v. S.C. Democratic Party*, No. 4:04-CV-2171, 2004 WL 3262756, at *2, *11 (D.S.C. Sept. 30, 2004). The Governor ordered a new election. *Reaves v. S.C. Democratic Party*, No. 4:04-CV-2047, 2007 WL 895440, at *3 (D.S.C. Mar. 21, 2007).

- Shortly before the November 2004 elections, an investigation by the *Charlotte Observer* found that some 60,000 voters were registered to vote in both North and South Carolina. *See* Scott Dodd & Ted Mellnik, *Voters Found on Both N.C., S.C. Rolls: Miscount, Fraud Possible as Elections Officials Not Cross-Checking Lists*, Charlotte Observer, Oct. 24, 2004, at 1A, JA_1184-88. And "up to 180 [people] were listed as having voted in two places in either the 2000 or 2002 general elections." *Id*., JA-SC_1185.

- In 2008, the Mayor of Eastover, S.C., Chris Campbell, was convicted of voter fraud. *See* Dawn Hinshaw, *Eastover mayor guilty; chief cleared: Campbell sentenced to 18 months for forgery, misconduct*, Columbia State, Mar. 1, 2008, Section b, JA-SC_1181. "[Prosecutor Susan Porter] said Campbell cast 16 ballots illegally in his town's April 2006 election, seeking out voters who were addled or infirm with absentee ballots he filled out for his handpicked candidates." *Id*., JA-SC_1181.

- In 2004, Terrence Hines presented more than 1,500 fraudulent voter registration forms to the Florence County Voter Registration Office. On June 22, 2006, he pleaded guilty to the crime of fraudulent registration or voting. *South Carolina v. Terrence Hines*, Case No. H705166 (Twelfth Judicial Circuit Court), JA-SC_1189-90.

- In 2000, Georgetta M. Wiggleton, the Clerk of the McCormick County Board of Voter Registration, was convicted of absentee vote fraud in connection with the November

[9] Other circuits also recognize that in-person voter fraud occurs. *See United States v. McCranie*, 169 F.3d 723, 724 (11th Cir. 1999) ("This case involves . . . vote buying, vote selling, multiple voting, and votes casts by felons and deceased voters."); *Kasper v. Bd. of Election Comm'rs of City of Chi.*, 814 F.2d 332, 334 (7th Cir. 1987) ("Once Chicago was known as Hog Butcher to the World. No more. One Chicago industry is hardier: election fraud. The dead awaken just in time to vote on election day.").

1994 general election, in violation of 42 U.S.C. § 1973i(c). *See* Judgment, *United States v. Wiggleton*, No. 8:99-cr-00882 (D.S.C. Aug. 1, 2000).

- Five individuals—Mark Dougals Odom, Joyce Geraldine Beach, Benny Carol Dyson, Donna Wike, and one Lackey—were convicted of absentee vote fraud in connection with the November 1982 general election in Alexander County, S.C. *United States v. Odom*, 736 F.2d 104 (4th Cir. 1984).

- State Sen. Albert Eugene Carmichael, Sheriff Roy Lee, and five other persons—Joe Grady Flowers, Mazel J. Arnette, Alan Schafer, Luther Nance, and Booker T. Mason—were convicted of vote buying in connection with the 1980 Democratic primary election in Dillon County, S.C. *United States v. Carmichael*, 685 F.2d 903 (4th Cir. 1982); *United States v. Mason*, 673 F.2d 737 (4th Cir. 1982).

- The State Law Enforcement Division ("SLED") has an ongoing investigation into whether hundreds of votes were cast in recent elections in the name of deceased voters. South Carolina's Response to Intervenors' Interrogatory Nos. 8 and 17; Jan. 19, 2012 Letter from A. Wilson to W. Nettles, JA-SC_0878; Press Release, *State Election Commission Calls for Investigation into Allegations of Voter Fraud* (Jan. 11, 2012), JA-SC_0708.

And the expert rebuttal report of Dr. Scott Buchanan compiles confirmed and reported cases of voter fraud nationwide. *See* Declaration of Scott Eugene Buchanan, Ph.D. at 22-29, JA_001126-33; *see also id.* Ex. 12, JA_001189-1206.

South Carolina is not immune from voter fraud. As Congress found in enacting the VRA: "The public record is replete with endless instances of vote frauds," including "tombstone voting, [and] multiple casting of votes by one individual," and "[t]hese conditions do not exist in just one part of the country, but can be found in many States across the length and breadth of this land." H.R. Rep. No. 89-439, 1965 U.S.C.C.A.N. at 2471. The *Crawford* Court reasoned that if one kind of voter fraud occurs in a jurisdiction (such as absentee ballot fraud), it is reasonable to believe that other kinds of fraud (such as in-person voter impersonation) also occur. *See Crawford*, 553 U.S. at 195 ("Indiana's own experience with fraudulent voting in the 2003 Democratic primary for East Chicago Mayor—although perpetrated using absentee ballots and not in-person fraud—demonstrate that not only is the risk of voter fraud real but that it could

affect the outcome of a close election."). The State need not wait for in-person voter fraud to tip an election before it takes action. *See Munro v. Socialist Workers Party*, 479 U.S. 189, 195-196 (1986) (Legislatures are "permitted to respond to potential deficiencies in the electoral process with foresight rather than reactively . . ..").

Fourth, in addition to combatting voter fraud, Act R54 promotes "public confidence in the integrity and legitimacy of representative government," which encourages "citizen participation in the democratic process." *Crawford*, 553 U.S. at 197 (quotation marks omitted). *See Purcell*, 549 U.S. at 4 ("Voter fraud drives honest citizens out of the democratic process . . .."). While this public-confidence purpose is "closely related to the State's interest in preventing voter fraud," it has "*independent significance*." *Crawford*, 553 U.S. at 197 (emphasis added). Enhancing public confidence in elections, which increases voter participation, is a free-standing justification for a voter ID law, regardless of the magnitude of the voter fraud problem. *Fla. St. Conf. of NAACP v. Browning*, 569 F. Supp. 2d 1237 (2008) ("This interest . . . is nearly as weighty as the state's interest in the prevention of fraud.").

Ample live testimony and other evidence will show that these legitimate, non-discriminatory justifications motivated legislators to create and enact Act R54.

C. Defendants Cannot Refute Act R54's Legitimate, Non-Discriminatory Purposes.

Given this strong *prima facie* evidence that Act R54 was enacted for legitimate, non-discriminatory purposes, the burden shifts to Defendants "to refute the [State's] prima facie showing." *Reno v. Bossier Parrish Sch. Bd.*, 528 U.S. 320, 332 (2000) (*Bossier II*). The Supreme Court has instructed that "courts should look to [the] decision in *Arlington Heights* for guidance." *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 488 (1997) (*Bossier I*); *see Village of*

Arlington Heights v. Metro. Housing Dev. Corp., 429 U.S. 252 (1977). Application of the *Arlington Heights* factors confirms that Act R54 was not enacted for a discriminatory purpose.

The "starting point" in the *Arlington Heights* framework is "the impact of the official action [and] whether it bears more heavily on one race than another." 429 U.S. at 266. "Other considerations relevant to the purpose inquiry include, among other things, 'the historical background of the [jurisdiction's] decision'; '[t]he specific sequence of events leading up to the challenged decision'; '[d]epartures from the normal procedural sequence'; and '[t]he legislative or administrative history, especially . . . [any] contemporary statements by members of the decisionmaking body." *Bossier I*, 520 U.S. at 489 (quoting *Arlington Heights*, 429 U.S. at 267-68) (brackets in *Bossier I*). This "inquiry may also include an examination of such other 'circumstantial and direct evidence of intent as may be available,' *Arlington Heights*, 429 U.S. at 266, including whether there are legitimate, race-neutral justifications for the change, *see, e.g.*, *City of Richmond v. United States*, 422 U.S. 358, 374 (1975)." *Florida*, slip op. at 99-100.

As demonstrated above, Act R54 was enacted for legitimate, race-neutral reasons. Application of the *Arlington Heights* factors confirms these legitimate purposes. And even if Defendants could rebut the State's *prima facie* showing, Act R54 is still entitled to preclearance because "the same decision would have resulted even had [any] impermissible purpose not been considered." *Arlington Heights*, 429 U.S. at 207 n.21 (citing *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 285-87 (1977)).

The requirements in Act R54 will not "bear[] more heavily" on any race. As explained above, Act R54 applies to all voters in South Carolina and thus will apply to many more white voters than minority voters. As explained more fully below, only 6.76% of minority registered voters currently lack one of the currently available forms of Act R54 IDs. This is only 2.05%

more than the percentage of white active registered voters who currently lack a form of currently available Act R54 IDs. This *de minimis* difference, moreover, is not determinative because it does not account for Act R54's key ameliorative provisions. Act R54's education programs will ensure that all voters are aware of South Carolina's new voter ID requirements. The free photo voter registration card will provide an additional form of acceptable identification that can be obtained with nothing more than the documentation needed to register. And the Act's provisional ballot procedures will ensure that *all voters*, regardless of race, will be able to cast a ballot, even if they have a religious objection to being photographed, forget to bring acceptable ID to the polls, or face an obstacle to obtaining one of the five acceptable forms of ID. Thus, upon preclearance, Act R54 will not bear heavily on *any* voters' ability to exercise the electoral franchise.

Even if Act R54 were to affect minority voters slightly more than white voters, that minor difference would not support a finding of discriminatory purpose. "[W]here the character of a law is readily explainable on grounds apart from race . . . disproportionate impact alone cannot be decisive, and courts must look to other evidence to support a finding of discriminatory purpose." *Bolden*, 446 U.S. at 70 (citing *Arlington Heights*, 429 U.S. at 226). The record evidence, which will be corroborated by testimony at trial, demonstrates that the "character" of Act R54 is "readily explainable" as a common sense measure enacted to detect and deter voter fraud and safeguard public confidence in the electoral process.

Further, even if the General Assembly anticipated that Act R54's requirements might impact minority voters at a slightly higher rate than white voters, as Defendants allege, this too is not dispositive. The Supreme Court has explained that "'[d]iscriminatory purpose' implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker

selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Bolden*, 446 U.S. at 72 n.17 (quoting *Feeney*, 442 U.S. at 279) (internal quotation and alteration marks omitted). There is no evidence that the Legislature adopted or that Governor Haley signed Act R54 because of any racial disparity in current possession of currently available forms of Act R54 identification. To the contrary, the Act includes a number of ameliorative provisions designed to ensure that any burden imposed by Act R54 proves minimal for all eligible voters.

The historical background of Act R54 confirms its legitimate, non-discriminatory purposes. Voter ID legislation received national attention following the close presidential race in 2000, when policymakers and scholars began focusing upon the fact that a small number of votes can swing an election. During this period, states including Indiana and Georgia passed voter ID laws that were upheld by the courts and, in Georgia's case, precleared by the Attorney General. *Crawford*, 553 U.S. 181; *Billups*, 554 F.3d 1340. Other states, including South Carolina, took notice and adopted similar measures to secure their electoral processes as part of the "nationwide effort to improve and modernize election procedures" the Supreme Court endorsed in *Crawford*. 553 U.S. at 191.

Act R54's chief sponsors and the leaders in the South Carolina House and Senate will testify that Act R54 was conceived in the wake of *Crawford* and *Billups*, and modeled on the voter ID laws upheld in those cases. Specifically, Act R54 includes the voter education and free photo voter registration features the *Billups* court emphasized when upholding Georgia's law. *See* 554 F.3d at 1347-48 (voter education); *id.* at 1346 (photo voter registration card). Like Indiana's law, Act R54 eliminates fees for DMV identification cards and provides provisional ballot procedures, which the Supreme Court highlighted in *Crawford*. 553 U.S. at 185, 198 (free

ID card); *id.* at 186, 199 (provisional ballot procedures). And Act R54's provisional ballot provisions are more inclusive than Indiana's. South Carolina's law allows a provisional ballot based on any "reasonable impediment" faced by the voter, while Indiana's exemption is limited to "indigence," and Act R54 enables voters claiming a reasonable impediment or a religious objection to execute the required affidavit at the polling place, while Indiana's law requires voters to execute an affidavit "before the circuit court clerk within 10 days following the election." *Id.* at 186.

In addition, the electorate in South Carolina supported voter ID legislation. Consistent with the national support recounted above, constituents in South Carolina encouraged their representatives to adopt voter ID legislation. Thus, beyond the anti-fraud benefits of Act R54, the bill was enacted for the simple democratic reason that the public wanted it.

Looking more broadly at South Carolina's recent history, it is clear that the State has come a long way from the 1960s. The Supreme Court has cautioned that "[p]ast discrimination cannot, in the manner of original sin, condemn government action that is not itself unlawful." *Bolden*, 446 U.S. at 74. For that reason, "unless historical evidence is reasonably contemporaneous with the challenged decision, it has little probative value." *McClesky v. Kemp*, 481 U.S. 279, 298 n.20 (1987). Dr. Buchanan has chronicled the significant strides South Carolina has taken to achieve a more inclusive political process. *See* Buchanan Decl. at 4-16, JA_001108-20 (detailing racial progress in South Carolina, as evidenced by increased minority voter registration and turnout, the election of minority officials, socio-economic changes, and diversification of the State's population). In fact, while the General Assembly was considering voter ID legislation, the State elected Gov. Haley as the first minority Governor in the State's history. *See id.* at 15, JA_001119. Even more telling, the majority-white First Congressional

District elected Tim Scott, an African-American, by a 36 point margin. *See id.* at 11-12, JA_001115-16. "In light of the[se] changes in [South Carolina] society since [the 1960's], changes in no small way effected by . . . the impact of the Voting Rights Act . . . it would be anomalous to attempt to tar the present [Legislature] with the racist brush of" that regrettable period over half a century ago. *United States v. Johnson*, 40 F.3d 436, 440 (D.C. Cir. 1994).

Meanwhile, the methodologically bankrupt opinions submitted by Dr. Arrington and Dr. Burton are not proper expert reports and warrant no evidentiary weight. *See* Memorandum of Points and Authorities in Support of South Carolina's Motion to Exclude the Testimony of Theodore Arrington and Orville Burton (Doc. 165-1). The reports intentionally ignore countervailing evidence and make no effort to link their suggestion of racial animus with the enactment of Act R54. *See id.* at 10. Thus, even if the experts' conclusions could be accepted, they say nothing specific to this case; rather, under their specious logic, any legislation ever supported by the targeted legislators would necessarily carry a discriminatory purpose. To state this proposition is to refute it. And even if Defendants' expert reports could impugn the purpose of a select group of Act R54's supporters, "[t]he purpose of a single legislator is normally too slim a reed upon which to rest a determination regarding the legislature as a whole." *Florida*, slip op. at 113 (citing *Castaneda-Gonzalez v. Immigration & Naturalization Serv.*, 564 F.2d 417, 424 (D.C. Cir. 1977)); *see also United States v. O'Brien*, 391 U.S. 367, 384 (1968) (declining to void a statute "on the basis of what fewer than a handful of Congressmen said about it").

Act R54 was enacted through the normal legislative procedures. Like all significant legislation, Act R54 was introduced, considered in committees, debated, read for a third time, ratified by majority votes in both houses of the General Assembly, and signed by the Governor.

See S.C. Const. art. III, § 18; *id.* art. IV, § 21.[10] Because the two chambers favored different versions of the legislation, the enacted legislation was hammered out as a compromise bill through a conference committee. The need for a conference committee is a common occurrence in South Carolina—as well as the United States Congress—and thus hardly indicates the presence of a discriminatory purpose.

The legitimate, non-discriminatory purposes motivating Act R54, moreover, are amply confirmed by the legislative record, including contemporaneous statements by key legislators. The Senate Journal contains statements from Senator Campsen, the Act's chief proponent in the Senate, that the purpose of the law "is to preserve the integrity of the election process." Senate Journal for Feb. 24, 2011, JA_000277. Senator Campsen also explained that he "introduced [voter ID legislation] because federal courts had recently given clear guidance on the constitutionality of Voter ID legislation in other states," not as a response to high turnout rates in the 2008 election, as some opponents suggested. Senate Journal for May 11, 2011, JA_000432 (discussing and quoting *Crawford* and *Billups*). Moreover, a colloquy between Senator Campsen and then-Senator McConnell detailed how the Act's ameliorative provisions would ensure that all eligible voters will still be able to vote. *See* Senate Journal for Feb. 24, 2011, JA_000284. Similarly, Representative Clemmons, the chief sponsor of Act R54 in the House explained the

[10] The Senate rules generally require that non-contested bills receive consideration before contested bills, but they reserve three slots for bills set for "special order" to be considered despite opposition from at least one Senator. S.C. Senate R. 33, JA-SC_1191. Because Democrats in the Senate opposed Act R54, it was set for special order. As the past and current Chairs of the Senate Rules Committee testified during depositions, special order is a commonly used procedure. L. Martin Dep. Tr. 85:10-87:12; J. Knotts Dep. Tr. 41:12-43:23. In fact, it is necessary to ensure that contested legislation receives consideration—otherwise, a single Senator (or the party out of power) could block significant legislation. *See id.* Thus, the use of special order to ensure consideration of voter fraud protections in no way indicates a discriminatory purpose. *See United States v. Johnson*, 40 F.3d 436, 440 (D.C. Cir. 1994) ("Congress' undeniable haste in passing the 1986 Act is more naturally attributed to a very real public concern over the generic elements of the crack phenomenon.").

law as a "bill to protect . . . [t]he integrity of our election system in South Carolina." Jan. 26, 2011 House Legislative Transcript, JA_005205.

These facts stand in stark contrast to *Busbee v. Smith*, 549 F. Supp. 494 (D.D.C. 1982), the paradigm of purposeful discrimination under Section 5. In *Busbee*, the key legislator in control of Georgia's redistricting process was "a racist" who regularly used the n-word "to refer to black persons." *Id.* at 500. This legislator generally "oppose[d] legislation of benefit to blacks" and aggressively sought to halt the creation of effective majority-minority districts. *Id.* Another key legislator involved in the redistricting process had publicly joked that he would "love to have a district" with only two black residents. *Id.* at 510. And a number of senators stated that they voted for the redistricting plan at issue because they "(didn't) want to have to go home and explain why I (the Senator) was the leader in getting a black elected to the United States Congress." *Id.* at 514. Here, there is no direct or circumstantial evidence remotely close to the facts in *Busbee*. There is thus no basis for this Court to reach the same result as *Busbee*.

It is also significant that key legislators have waived legislative privilege, willingly sat for multiple depositions, opened their files and email accounts to discovery, and will testify under oath at trial. These transparent actions are remarkable in their own right, but they also contrast with other States' approach in similar cases. *See, e.g.*, Order on Motion to Compel Deposition of Lieutenant Governor, *Texas v. Holder*, 12-cv-128 (June 14, 2012). Though the assertion of legislative privilege by no means should raise an inference of discriminatory intent, Act R54's proponents have nothing to hide and they have acted accordingly. Their motive was to secure their State's elections against voter fraud, not to discriminate on the basis of race.

III. Act R54 Has No Discriminatory Effect.

Act R54 does not "deny[ ] or abridg[e] the right to vote on account of race or color, or [membership in a language minority group]." 42 U.S.C. § 1973c(a).

A. Act R54 Does Not Deny or Abridge the Right to Vote.

Voter ID laws such as Act R54 do not deny or abridge the right to vote *at all*. These laws do not prevent anyone from exercising the right to vote lawfully; they only prevent unlawful, fraudulent votes. As *Crawford* holds, requiring voters to show photo ID "does not qualify as a substantial burden on the right to vote or even represent a significant increase over the usual burdens of voting." 553 U.S. at 198; *id*. at 209 (concurrence); *see also supra* pp. 8-9. And as *Crawford* also holds, provisional ballot procedures like those found in Act R54 "provide[] an adequate remedy" for any such minor burdens. *Id*. at 198.

If precleared, Act R54 will require South Carolinians who vote in person to present one of five forms of photo ID. 96.43% of registrants under age 65 already possess one of the currently available forms of ID. Hood Supp. Decl. at 12, JA_001092. The other 3.57% may obtain *free* photo ID at the DMV or (after preclearance of Section 4) at their county election office. *See* 553 U.S. at 202 n.20 (concluding that estimate of number of voters lacking photo ID when voter ID law was passed "tells us nothing about the number of free photo identification cards issued since then"). There are 67 DMV locations and 46 county offices throughout the State. Notably, defendants have not identified a single person in the State of South Carolina who would be unable to obtain a free photo voter card after Section 4 is precleared.

Act R54 also permits voters to cast a ballot without showing any photo ID in three circumstances: First, voters age 65 and above qualify to vote absentee; Act R54 thus does not preclude such persons from voting. S.C. Code § 7-15-320(B)(8). Second, a voter who lacks photo ID on election day may cast a provisional ballot which will be counted if she brings an R54 ID to the county board before the certification of the election. Act R54, § 5(C)(1). Third, a voter who lacks photo ID due to a religious objection or a "reasonable impediment" may execute

a simple affidavit and cast a provisional ballot. *Id*. § 5(D)(1)(a), (b). Because Act R54 ensures that all eligible voters can effectively exercise the franchise, it is entitled to preclearance.

B. Act R54's Effect, If Any, Is Not "on Account of Race or Color."

Whatever effect Act R54 may have is not "on account of race or color." 42 U.S.C. § 1973c(a). Like Indiana's voter ID law, Act R54 is a "nondiscriminatory law [] supported by valid neutral justifications." *Crawford*, 553 U.S. at 204. It applies evenhandedly to all voters without regard to race for the purposes of combatting fraud and enhancing public confidence.[11]

To the extent that registrants who currently lack photo ID cannot vote in person after preclearance of Act R54, the legal cause of their inability to vote is not Act R5 but their own decision not to obtain a free photo ID. *See Ortiz v. City of Phila. Office of City Comm'rs Voter Registration Dir.*, 28 F.3d 306 (3d Cir. 1994). In *Ortiz*, the Third Circuit held that Philadelphia's voter purge statute did not violate VRA § 2, even though black and Latino voters were purged at higher rates than white voters. The court held that the cause of the statistical disparity was not the purge statute itself, but the fact that "for a variety of historical reasons, minority citizens have turned out to vote at a statistically lower rate than white voters." *Id*. at 313. *See id*. at 314 ("[T]he purge statute did not cause the statistical disparities which form the basis of Ortiz's complaint."). "More importantly," the court added, "registered voters are purged . . . without regard to race [or] color." *Id*. The court "emphasize[d] that the sole purpose of that act is to prevent the very electoral fraud which can diminish the voting power of all citizens who have registered [to vote] and voted, including registered and voting members of minority groups." *Id*. at 317.

[11] Defendants admit that "Act R54 is on its face applicable to all South Carolina voters regardless of a voter's race, color, or membership in a language minority group," United States' response to request for admission No. 4, and that "Act R54 is written such that it generally applies, on its face, to all voters," Intervenors' response to same request.

So too here. Act R54 is not the cause of any disparity in the rates of possession of photo ID by registered voters. Act R54 is a legitimate means of preventing voter fraud, it applies without regard to race or color, and any registered voter may obtain free photo ID. *See also Hoffman*, 928 F.2d 646 (upholding Maryland's voter purge statute). And any slight burden occasioned by the Act is momentary—once a voter obtains an ID or executes an affidavit, she can vote.

Gonzalez v. Arizona, 677 F.3d 383 (9th Cir. 2012) (en banc), also supports preclearance. *Gonzalez* rejected a VRA § 2 claim and affirmed the district court's ruling that there was "no proof of a causal relationship between [Arizona's voter ID law] and any alleged discriminatory impact on Latinos." *Id*. at 406. The Ninth Circuit cited the absence of "evidence that Latinos' ability or inability to obtain or possess identification for voting purposes (whether or not interacting with the history of discrimination and racially polarized voting) resulted in Latinos having less opportunity to participate in the political process and to elect representatives of their choice." *Id*. at 407.

Similarly, "statistical evidence" of "racial disparities" does not prove that a felon disenfranchisement law violates the VRA. *Farrakhan v. Gregoire*, 623 F.3d 990, 992 (9th Cir. 2010) (en banc). Such laws violate the VRA if "enacted for the purpose of denying minorities the right to vote," *id*. (citing *Hunter v. Underwood*, 471 U.S. 222 (1985)), but the mere *effect* of such laws does not deny the right to vote "on account of race." *Id*. at 992 (quoting 42 U.S.C. § 1973(a)). For this reason, too, Act R54 is entitled to preclearance.

C. Act R54 Will Not Result in Retrogression.

Act R54 will not "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). The Act will neither disproportionately affect nor impose a material burden on minority

voters.

The three-judge panel in *Florida v. United States* recently articulated a retrogression framework for "ballot access" preclearance suits like the case at hand. Under this test, "a change that alters the procedures or circumstances governing voting and voter registration will result in retrogression 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 the franchise." *Florida*, slip op. at 23-24.

Importantly, "the retrogression test in ballot access cases is not solely one of 'disparate impact.'" *Id.* at 24. Thus, "a change is not retrogressive simply because it deals with a method of voting or registration that minorities use more frequently, or even because it renders that method marginally more difficult or burdensome. Rather, to 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." *Id.* And courts "do not focus solely on the burdens imposed by a voting change, but rather must also take account of any off-setting, or 'ameliorative,' adjustments." *Id.* (citing *City of Richmond v. United States*, 422 U.S. 358, 370-71 (1975); *City of Petersburg v. United States*, 354 F. Supp. 1021, 1031 (D.D.C. 1973) (three-judge court)).

In all cases, retrogression is "measured against the existing voting practice," referred to as the "benchmark" practice. *Holder v. Hall*, 512 U.S. 874, 883 (1994) (plurality opinion); *Riley v. Kennedy*, 553 U.S. 406, 421 (2008) (defining the "baseline as the most recent practice that was both precleared and 'in force or effect'").

Under South Carolina's benchmark voter ID law, voters are required to provide one of

three forms of identification to vote in-person: (1) a driver's license, (2) a DMV special ID card, or (3) a signed voter registration card. *See* S.C. Code § 7-13-710 (1976) (last amended by Act 459 of 1996); United States Answer to Request for Admission No. 11. If a voter fails to present one of those forms of identification, he cannot vote in-person.

Under Act R54, voters are required to provide one of five forms of identification to vote in-person: (1) a driver's license, (2) a DMV special ID card, (3) a passport, (4) a military ID, or (5) a photo voter registration card. Act R54 § 5(A). And Act R54 includes a number of ameliorative provisions to ensure all eligible voters will be able to cast an effective vote.

Most important, the Act creates two new forms of free photo identification. It eliminates the fee for DMV special ID cards for all persons "aged seventeen years or older," *id.* § 6(B)(2), and it mandates the creation of free photo voter registration cards that can be obtained with the same information needed to register, *id.* § 4. Upon preclearance, a voter will be able to obtain the photo voter registration card in one of three ways: (1) by presenting her current (non-photo) voter registration card; (2) by presenting any non-photo identification materials accepted for registration pursuant to the Help America Vote Act of 2002 (HAVA), Pub. L. No. 107-252, 116 Stat. 1666, such as a current utility bill, bank statement, paycheck, or government document showing the voter's name and address; or (3) by providing the last four digits of her social security number and date of birth. *See* South Carolina State Election Commission, Procedures for Issuing Photo Voter Registration Cards (Doc. 65-2); JA-SC_0644-46. These photo voter registration cards will be available on Election Day, and the Election Commission plans to have a mobile unit to issue photo voter registration cards at public events and in areas with greater numbers of persons currently lacking an acceptable form of Act R54 ID. *Id.*; Whitmire Dep. Tr. 79:15-21.

The Act also mandates "an aggressive voter education program" to ensure the public is aware of the Act's changes. Act R54 § 7. The SEC must place posters at its office, county election offices, and on the their respective websites, *id.* § 7(1); train poll workers on the changes, *id.* § 7(2) ; disseminate information at every election following preclearance, *id.* § 7(3) ; conduct at least two seminars with each county board of elections, *id.* § 7(4) ; provide additional public seminars in conjunction with civic organizations, *id.*§ 7(5) ; and publicize the changes through newspaper advertisements, *id.* § 7(6) , and other local media outlets, *id.* § 7(7) . Pursuant to these requirements, the SEC has developed a voter education plan and materials that are included in the record. *See* JA-SC_0647-63; JA-SC_0666; JA-SC_0829-32; JA-SC_0833-35. Along with this general education program, Act R54 directs the SEC to create a publicly-available list of eligible voters who currently lack a DMV-issued form of ID, *id.* § 8, and to notify those individuals of Act R54's requirements through direct mailings, *id.* § 7(8) ; JA-SC_0833-35 (notification postcard).

As a final backstop, Act R54 also provides provisional ballot procedures for persons who arrive at the polls without acceptable identification. Any person who is unaware of the Act's requirements or forgets his photo ID will be permitted to cast a provisional ballot that will be counted if he presents an acceptable form of identification to his county election office "before certification of the election." *Id.* § 5(C)(1). Any person with a religious objection may execute an affidavit to that effect and cast a provisional ballot. *Id.* § 5(D)(1)(a). Any person who "suffers from a reasonable impediment that prevents the elector from obtaining photograph identification" can likewise execute an affidavit and cast a provisional ballot. *Id.* § 5(D)(1)(b). And under the law, county boards "*shall* find that the provisional ballot is valid unless the board has grounds to believe the affidavit is false." *Id.* § 5(D)(2) (emphasis added).

1. Act R54 Will Not Disproportionately Affect Minority Voters.

In the aggregate, Act R54's changes will not disproportionately affect "members of a protected minority group." *Florida*, slip op. at 24. Because important ameliorative provisions have not been precleared, current statistics reflecting current possession of currently available forms of Act R54 identification cannot alone dictate whether the law will have a cognizable disproportionate effect. And once the entire law is in place, it *will not* disproportionately affect minority voters. At present, even without Act R54's ameliorative provisions, there is only a *de minimis* difference (1.8%) between the low percentages of white and minority voters under 65 years old who currently lack a currently available form of Act R54 photo identification. There is no reason to believe that minority and white voters who do not currently possess a currently available ID will not obtain acceptable identification following implementation voter education initiatives and the free photo voter registration cards. If anything, comparative evidence from Georgia suggests that any negligible remaining disparity will favor minorities.

Because the Attorney General has refused to preclear a number of the "ameliorative" provisions in Act R54, current conditions are not indicative of Act R54's future effect. In particular, voters cannot yet obtain the most accessible form of photo ID that will be available under the law—the photo voter registration card—because the Attorney General has twice declined to preclear Section 4 of Act R54, on the false premise that the State's implementing procedures are not yet final. *See* Dec. 23, 2011 Letter from T. Perez to C.H. Jones, Jr., JA-SC_1031-35; June 29, 2012 Letter from T. Perez Letter to H.C. Bartolomucci, Exhibit 1, Notice of Attorney General's Administrative Determination Under Section 5 of the Voting Rights Act (Doc. 118-1). Similarly, the educational programs mandated in Sections 7 and 8 of the Act will surely decrease the number of voters without acceptable photo ID. In fact, there is good reason to believe nearly all registered voters are capable of obtaining at least one acceptable form of

photo ID, considering photo voter registration cards can be obtained by presenting an existing voter registration card (which anyone lacking a DMV ID would have to show to vote in-person under the benchmark), any document sufficient to register, or one's last four social security digits and date of birth. Any remaining group of voters without ID will be small and by definition eligible to cast a provisional ballot that *shall* be counted by virtue of whatever religious objection or reasonable impediment that has kept them from obtaining ID.

Most important, the State's considerable burden under VRA § 5 cannot be compounded by an effects test dependent on the current state of affairs without all provisions of the law. Though covered jurisdictions generally bear the burden of proof in preclearance suits, *see, e.g.*, *City of Rome v. United States*, 446 U.S. 156, 184 n.18 (1980); *Beer*, 425 U.S. at 140-41, that statutory obligation already "imposes substantial 'federalism costs.'" *Nw. Austin Mun. Utility Dist. No. One v. Holder*, 557 U.S. 193, 202 (2009) (quoting *Lopez v. Monterey Cnty.*, 525 U.S. 266, 282 (1999) (quoting *Miller v. Johnson*, 515 U.S. 900, 926 (1995))). The prediction of future effects, therefore, must permit some reasonable extrapolation beyond the current statistics based on a law's key "'ameliorative' adjustments." *Florida*, slip op. at 24. And room for permissible inference is especially warranted here, where the lack of more accurate information rests in part on the Attorney General's refusal to preclear the patently non-retrogressive provision of *free* photo voter registration cards. *Cf. Beer*, 425 U.S. at 141 ("It is thus apparent that a legislative reapportionment that enhances the position of racial minorities with respect to their effective exercise of the electoral franchise can hardly have the 'effect' of diluting or abridging the right to vote on account of race within the meaning of s 5.").

Dr. Hood's expert analysis demonstrates that Act R54 will not disproportionately affect minority voters. Even now, pre-implementation, Dr. Hood has shown that Act R54 can only

possibly affect a very small number of registered voters. Less than 5.5% of South Carolina registered voters—149,021 of over 2.7 million registered voters—currently lack a currently available form of Act R54 photo identification.[12] *See* Supplemental Declaration of M.V. Hood III, Table 3, JA_001085 ("Hood Supp. Decl."). Among these, 4.71% (91,119) of white registered voters and 6.76% (56,770) of minority registered voters currently lack a currently available form of Act R54 ID—a 2.05% disparity.[13] *Id.* at Table 6, JA_001090. Broken down further, Asian Americans are the least likely (2.86%) racial group to currently lack a currently available form of ID, followed by white voters (4.71%), then black voters (6.81%), Hispanic voters (7.60%), and American Indian voters (7.75%). *Id.* Thus, white voters are 1.85% more likely than Asian voters to currently lack a currently available form of ID, while black voters are 2.10% more likely than white voters, Hispanic voters are 2.89% more likely than white voters, and American Indians are 3.04% more likely than white voters to currently lack a currently available form of identification. *Id.*

These numbers get even smaller when Dr. Hood removes voters 65 years old or older, who are automatically eligible to cast a mail absentee ballot without having to show photo identification. *See* S.C. Code § 7-15-320(B)(8).[14] Only 3.57% (99,745) of registered voters in South Carolina are under 65 years old and currently do not possess a DMV-issued ID, passport,

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[12] These figures include the two categories of "inactive" voters who are most likely to vote in future elections. *See* Hood Supp. Decl. at 12, JA_001092. Because "inactive" voters are less likely to vote in future elections, Defendants' expert "generally focus[ed] on active voters." Declaration of Charles Stewart III, PhD ¶ 62 ("Stewart Decl."). Dr. Hood reports his analysis with and without these two categories of inactive registrants, and typically the statistics are not significantly different. To avoid eliminating too many eligible voters from the analysis, the State will typically use Dr. Hood's "active and inactive" numbers.

[13] The vast majority of minority registrants are black voters (786,788 out of 839,934). Hood Decl. at Table 6, JA_001090.

[14] Act R54 does not change mail absentee ballot procedures, but it requires in-person absentee voters to show an acceptable form of photo identification. *See* Act R54 § 5.

or military ID. *See* Hood Supp. Decl. at Table 8, JA_001092. Among these, 2.96% (57,363) of white registered voters and 4.93% (41,395) of minority registered voters under 65 years old currently lack a currently available form of Act R54 ID—a 1.97% disparity. *Id.* at Table 10, JA_001094. Broken down further, Asian Americans are the least likely (2.47%) racial group to currently lack a currently available form of ID, followed by white voters (2.96%), then black voters (4.93%), American Indian voters (6.81%), and Hispanic voters (7.10%). *Id.* Thus, white voters are 0.49% more likely than Asian voters to currently lack a currently available form of ID, while black voters are 1.93% more likely than white voters, American Indian voters are 3.85% more likely than white voters, and Hispanic voters are 4.14% more likely than white voters to currently lack a currently available form of identification. *Id.*

Dr. Hood's analysis is a good-faith estimate of likely voters who currently lack a currently available form of Act R54. His straight forward analysis takes the State's voter registration and driver's license databases at face value, incorporates passport and military ID data from federal agencies, and calculates a conservative approximation of registered voters who do not match against one of the state or federal photo ID databases. *See* Hood Supp. Decl. at 2, JA_001082; Declaration of M.V. Hood III at 6-9, JA_001053-56 ("Hood Decl."). Dr. Stewart, meanwhile, manipulates the databases to exclude categories of voters more likely to be white and exclude IDs (but not voters) more likely to be possessed by minorities, to artificially increase the disparity between white and minority voters. *See* Memorandum of Points and Authorities in Support of South Carolina's Motion to Exclude the Testimony of Charles Stewart III at 2-5 (Doc. 166-1). And Dr. Stewart acknowledges that he excludes a number of registrants who are still likely to vote and a number of IDs that are still possessed by voters. *See id.* at 4-5. Thus, while Dr. Stewart takes a tortured path to a known false conclusion, Dr. Hood's analysis places "a

premium on parsimony and simplicity." Stewart Dep. Tr. 74:6-7. It uses the state databases as the agencies themselves would use them; consequently, it represents the best account of the current state of affairs.

More important, Dr. Hood attempts to move beyond his data-matching analysis to venture a conclusion based on the entirety of Act R54, including its ameliorative provisions. *See Florida*, slip op. at 24. Dr. Hood rightly acknowledged that he "was only able to analyze ID possession as it related to four of the five types of identification which would be allowed under Act R54," and thus was able to calculate only a partial estimate of Act R54's likely effect. Hood Supp. Decl. at 15, JA_001095.

Outside the scope of this litigation, however, Dr. Hood has conducted a study of Georgia's fully implemented voter ID law, in which he was able to make an actual *ex ante* and *post hoc* comparison of voter turnout within a controlled group of Georgia residents who lacked a DMV ID prior to implementation of Georgia's law. Hood Decl. at 16-17, JA_001063-64. What Dr. Hood's study in Georgia showed was that "[r]acial and ethnic minorities . . . were not disproportionately impacted by" Georgia's law, which included a free photo voter registration card and educational program, but no reasonable impediment or other provisional ballot procedures. *Id.* at 17, JA_001064; *see also id.* at 4-5, JA_001051-52 (comparing and contrasting Act R54 with Georgia's voter ID law). Based on South Carolina's comparable photo voter registration card and educational provisions, Dr. Hood concluded that "[i]f Act R54 is allowed to be implemented, . . . the education and free ID programs to be launched by the State should allow the 3.57% of the electorate who will be directly affected by the law to reach full compliance." *Id.* at 15, JA_001095. And in Dr. Hood's view, the law's other "mitigating

factors," such as the reasonable impediment exemption, will "ensure that no qualified elector, of whatever race/ethnicity, is denied access to the ballot." *Id.*

In contrast, Dr. Stewart purposefully avoided a full analysis of Act R54. *See* Stewart Decl. at ¶ 23 (acknowledging that "analysis concerning the fifth form of identification is not included" in his analysis); *id.* at ¶ 24 ("I have not analyzed in this report whether or how the measures proposed to implement Sections 5, 7, and 8 would affect the new burdens imposed on voters by Act R54."). In fact, Dr. Stewart admitted during his deposition that he did not even read any of the State's implementation materials until after he submitted his rebuttal report. *See* Stewart Dep. Tr. 138:6-20 (attached to the State's Motion to Exclude as Exhibit 3). On top of this admittedly incomplete analysis, Dr. Stewart adopts the assumption that voters who currently lack a currently available form of ID will choose not to obtain an acceptable ID (including the not-yet-available photo voter registration card). Thus, in his view, based on their current "preference" to vote while not possessing a photo ID, these voters are likely not to vote if Act R54 is precleared. *See* Stewart Decl. at ¶ 12. This assumption not only blinks reality, as demonstrated by Dr. Hood's analysis of voters' behavior in Georgia, it also impermissibly converts the retrogression inquiry into one concerning personal convenience, rather than the effective exercise of the electoral franchise. *See Florida*, slip op. at 89 ("[T]he retrogression standard is not in place to prevent people from being irritated.").

Thus, only Dr. Hood has even attempted to analyze Act R54 in its entirety. By offering no complete analysis of their own, Defendants leave Dr. Hood's analysis unrefuted. And in all events, it hardly takes an expert to conclude that Act R54 will not have a disproportionate effect, given that the law ensures that all eligible voters will be able to cast an effective vote. As the next section will demonstrate, Act R54's relevant effects are no more than the minor

inconveniences of obtaining an acceptable form of identification or casting a provisional ballot. Those effects are borne by all eligible voters in the State—white, black, Hispanic, Asian, and American Indian alike. It makes no difference whether one has already obtained a necessary form of ID or will do so upon preclearance. *See Browning*, 569 F. Supp. 2d at n.13 ("In determining the extent to which a law burdens the right to vote, it is wrong to disregard applicants whose right to vote was not burdened because their right to vote was not burdened."). And there is no evidence to suggest that, following implementation of the free photo voter registration card, minority voters will face a greater need to rely on the reasonable impediment exemption, or any burden while utilizing that exemption.

2. Act R54 Will Not Impose a Material Burden on the Effective Exercise of the Electoral Franchise.

Act R54 will not "impose a burden material enough that it will likely cause some reasonable minority voters not to exercise the franchise." *Florida*, slip op. at 83; *see also id.* at 24. Act R54 potentially poses only two minimal burdens: (1) the need to obtain an acceptable form of photo identification, or (2) the need to cast a provisional ballot. Neither of these is likely to cause reasonable voters not to vote.

The Supreme Court has expressly held that "the inconvenience of making a trip to the [DMV], gathering the required documents, and posing for a photograph surely does not qualify as a substantial burden on the right to vote, or even represent a significant increase over the usual burdens of voting." *Crawford*, 553 U.S. at 198. To nearly all voters—over 95% in South Carolina—this and other slight inconveniences imposed by a photo voter ID requirement arise "from life's vagaries" and thus are immaterial. *Id.* at 197. This is especially true because Act R54 enables anyone who has lost, forgotten, or not yet obtained an ID to cast a provisional ballot that will be counted if the person returns with ID before the election is certified. Given that

photo voter registration cards will be available on election day, this burden is no more than a minor inconvenience. And to most it does not even rise to the level of an annoyance, since most already carry an Act R54 ID with them on a daily basis.

Crawford acknowledges that a "burden may be placed on a limited number of persons." *Id.* at 199. Among these are "elderly person[s] born out of state, who may have difficulty obtaining a birth certificate; persons who because of economic or other personal limitations may find it difficult either to secure a copy of their birth certificate or to assemble the other required documentation to obtain a state-issued identification; homeless persons; and persons with a religious objection to being photographed." *Id.*

Act R54 eliminates any burden felt by any of these groups. Voters will be able to obtain a free photo voter registration card without a birth certificate; the documentation needed for that cost-free form of ID is no more than what is required to register in the first place (and one's current registration card or date of birth and last four social security digits will suffice as well); any homeless person who can register to vote under the benchmark law can obtain a photo voter registration card under Act R54; and any person who still cannot obtain a free photo voter registration card or who has a religious objection may cast a provisional ballot. And, unlike in Indiana, voters casting a provisional ballot in South Carolina will be able to do so at their polling place. *See id.* ("The severity of that burden is, of course, mitigated by the fact that, if eligible, voters without photo identification may cast provisional ballots that will ultimately be counted," though "[t]o do so, . . . they must travel to the circuit court clerk's office within 10 days to execute the required affidavit."). Thus, obtaining a South Carolina photo voter registration card is as easy as casting a provisional ballot in Indiana, and casting a provisional ballot in South Carolina is much more convenient than in Indiana.

Indeed, the provisional ballot procedures under Act R54 are indistinguishable from the "inter-county mover" provisional ballots precleared in the *Florida* case last week. "At most, the total paperwork may take a few additional minutes because the voter may have to include some . . . information on the provisional ballot envelope." *Florida*, slip op. at 87. Like some of the covered counties in Florida, South Carolina has "sought to minimize even these burdens by . . . printing the [affidavit] directly onto the provisional envelope itself." *Id.*; *see* JA-SC_0641-43 (provisional ballot under Act R54). It is hard to "see how these minor burdens could deter a reasonable [voter] from voting." *Id.* Nor is it likely that "a voter who has already committed to waiting in line to cast a ballot, and then learns that he or she" does not possess the requisite identification, "will leave the precinct rather than vote a provisional ballot." *Id.* at 88-89. And at least one election official has testified his current and former county election commissions have set procedures for handling provisional ballot situations to prevent voters from "get[ting] embarrassed or . . . feel[ing] like they're holding up the line." Debney Dep. Tr. 37:13-18 ("[W]e want to do as much as we can to be as congenial to other people.").

Also, as in *Florida*, provisional ballots cast under Act R54 "shall" be counted so long as the voter is eligible and the county election board has no "grounds to believe the affidavit is false." Act R54, § 5(D)(2); *Florida*, slip op. at 89-90. The SEC has developed procedures for implementing and administering Act R54's provisional ballot procedures. *See* JA-SC_0829-32. Under current provisional ballot procedures, poll workers already hand provisional ballot voters "a ballot hearing slip of paper that tells them the time and date that they can come to the certification hearing." Debney Dep. Tr. 38:7-10. And Ms. Andino will testify regarding the specific training and guidance poll workers will receive upon preclearance.

There is no reason to believe that poll workers will fail to offer or county boards will fail to count these provisional ballots "due to human error (or malevolence)." *Florida,* slip op. at 92. The SEC's written procedures provide step-by-step instructions for poll workers and county boards, and even articulate detailed instructions for "determining whether an affidavit is false," the sole reason for which a reasonable impediment or religious exemption ballot may be rejected. JA-SC_0831. Most important, the instructions specify that "the burden is on the board, not the elector." *Id.* Courts typically presume, of course, that government officials will act in accordance with the law. *See, e.g.*, *Latif v. Obama*, 666 F.3d 746, 748 (D.C. Cir. 2011) ("The presumption of regularity supports the official acts of public officers and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties.") (quoting *Sussman v. U.S. Marshals Serv.*, 494 F.3d 1106, 1117 (D.C. Cir. 2007) (internal quotations omitted); *Starr v. Fed. Aviation Admin.*, 589 F.2d 307, 315 (7th Cir. 1978) (government official "is entitled to the normal presumption of good faith that, in courts of law, government officials still enjoy, that must be refuted by well-nigh irrefragable proof"). And this Court "cannot deny preclearance based on a speculative risk." *Florida,* slip op. at 93.[15]

Moreover, given the vanishing amount of people who will remain without photo ID following implementation of the photo voter registration card procedures, "it is highly unlikely that any individual precinct would be affected to any material degree," *Florida*, slip op. at 91, "[n]or is there any record evidence that, even if there were increased lines . . ., this would disproportionately affect minority voters," *id.* at n.56. There is no reason to believe the roughly 5% of voters who currently lack a currently available form of ID will not obtain free photo voter

[15] As in all VRA § 5 cases, a preclearance decision "does not bar subsequent actions for violations of federal or state law." *Florida*, slip op. at 95. Thus, if Defendants' speculation of disparate treatment ultimately proves true, they can file suit based on actual evidence.

registration cards following preclearance. Even if only half could take advantage of that option, that would still leave less than 75,000 voters needing to cast a reasonable impediment ballot in over 2,000 precincts statewide—less than thirty-eight voters per precinct.

Finally, it is important to note that in some material respects Act R54 "makes it considerably easier" to cast a ballot at the polls. There are now five forms of acceptable identification, rather than three. And voters without an acceptable form have three potential avenues for casting an effective provisional ballot. These benefits, of course, were not the purpose of the Act. But they highlight the great lengths to which the General Assembly went to *both* secure South Carolina's electoral process *and* ensure that no eligible voter suffers a material burden on his effective exercise of the electoral franchise.

D. Defendants Cannot Identify a Single Person Who Will be Materially Burdened by Act R54.

Defendants have failed to identify a single person in the State of South Carolina who would be unable to obtain an Act R54 ID. At the outset of this case, Intervenors purported to identify individuals who, under Act R54, would "be unable to vote on in-person [sic] election day[.]" Memorandum in Support of Motion for Leave to Intervene as Defendants at 7 (Feb. 24, 2012) (Doc. 7-1). Notwithstanding their best efforts, discovery has proven that statement false.

Seeking to locate South Carolinians who would be unable to obtain an Act R54 ID, Intervenors called upon the resources of several large advocacy groups–NAACP, ACLU, and the League of Women Voters. In addition to these large advocacy organizations, Intervenors employed the resources of grass-roots South Carolina advocacy organizations, the Family Unit, Inc. and the South Carolina Progressive Network. Yet, even with the combined efforts of these diverse groups, they have yet to be identify a *single* South Carolina voter who would be unable to obtain an Act R54 ID.

On the eve of trial, after thousands of documents have been produced, several interrogatories and requests for admission have been answered, and many hours of depositions have been taken, one thing is abundantly clear: Defendants and Intervenors fundamentally misunderstand Act R54. Nearly every individual who Intervenors identified as burdened by Act R54 was under the false impression that a birth certificate is required for an Act R54 ID. *See, e.g.*, Gordon Dep. Tr. 13:11-15 ("Q: Do you know what kind of ID you need to be able to vote? A: I [*sic*] photo ID, South Carolina state issued ID. Q: Where does the ID need to be issued from? A: The motor vehicle."). Further, it has become clear that there is widespread confusion amongst the individual Intervenors about their participation in the litigation. *See, e.g.*, Glover Dep. Tr. 25:8-10 (Q: Do you understand that you're a defendant in this lawsuit? A: No.); Dubose Dep. Tr. 22:19-24 (Q: Why did you decide to join this lawsuit? A: Want help. Q: What is it that you want to help? A: Try and get my ID, my birth certificate.); and Riley Dep. Tr. 19:24-20:1 (Q: Are you aware that you are a defendant in this lawsuit? A: No, sir. I sure ain't.).

This confusion should not come as a surprise, given the misinformation campaign that Intervenors have employed. For example, one of the flyers that the South Carolina Progressive Network issued was entitled "ATTENTION SC VOTERS!" and stated: "Help us find voters with no photo ID or birth certificate so we can document their difficulties and expenses in getting a photo ID." JA-SC_0467. Likewise, another poster from the South Carolina Progressive Network stated: "Because a birth certificate is required to get a photo ID, thousands of registered SC voters are at risk of being disenfranchised. Especially vulnerable are seniors and the poor." JA-SC_0469; Bursey Dep. Tr. 71:1-73:15 (admitting that the flyer does not mention the free photo voter registration card and that free photo voter registration cards can be obtained without a birth certificate).

When asked about Act R54's free photo voter registration cards—which require the same documentation needed to register to vote in the first place, not a birth certificate—no individual Intervenor could provide a reason why they would be unable to obtain this form of ID. *See, e.g.*, Glover Dep. Tr. 25:2-25:5 (Q: "[W]ould you be able to travel to your local county board of election to obtain that photo identification"; A: "I guess so."); Gordon Dep. Tr. 14:9-21 (Q: "If I were to tell you that . . . you'd be able to obtain a free photo identification card from the election office in your county . . . would you travel to that office to obtain that card?" A: "Yes."); Bailey Dep. Tr. 22:8-11 (Q: Same. A: "Maybe, if I have a way or the willingness to walk").

Similarly, in each of their depositions, the leaders of the organizational Intervenors failed to identify even *one* person who could not obtain an Act R54 ID. *Cf. Crawford*, 553 U.S. at 201. In her deposition, Barbara Zia, President of the League of Women Voters of South Carolina, expressly stated that she did not know of a *single* person who would be unable to obtain an Act R54 ID. Zia Dep. Tr. 72:20-73:2 (Q: "And Ms. Zia, if you'll recall just a moment ago you were asked whether you can name any specific individual who would be rendered unable to vote by Act R54, do you recall that?" A: "I do." Q: "And you answered that you cannot name a specific individual, is that correct?" A: "That's correct.").

Likewise, Brett Bursey, a co-founder of the South Carolina Progressive Network, was asked whether he knew of a single person who would be unable to obtain an Act R54 ID. Notwithstanding his best efforts, Mr. Bursey also came up short, only being able to describe a man named "Mr. Hunter" who is a "very illiterate alcoholic who doesn't have his life together at all but wants to vote." Bursey Dep. Tr. 84:1-3. But Mr. Hunter is not a registered voter. Bursey Dep. Tr. 84:19. And when pressed further, Mr. Bursey admitted that he had *no* personal knowledge of anyone who lacked the necessary documentation for a free photo voter registration

card. Bursey Dep. Tr. 84:25-85:6. (Q: "Is there anybody else that you're aware of that either doesn't have a current non-photo voter registration card, doesn't have a HAVA document, or doesn't know their date of birth or Social Security Number?" A: "Anecdotally and by inference, not with personal knowledge."). Similarly, when Dwight James, Executive Director of the South Carolina NAACP, was asked whether he was "personally aware of any individual who would not be able to obtain photo identification if this law becomes precleared," he was only able to reference a single, anonymous call, from a woman he believed to have been in her 80s who did not have a birth certificate. James Dep. Tr. 102:12-103:2. And Dr. Brenda Williams, co-founder of the Family Unit, Inc., identified only one person when asked whether she knew of anyone who could not obtain any acceptable form of identification under Act R54. She later admitted that this individual possessed a voter registration card and therefore could obtain a free photo voter registration card. B. Williams Dep. Tr. 59:16-25.

One of the individual Intervenors, Kenyda Bailey, is a student at Benedict College, which is across the street from the Richland County voter registration office. *See* Bailey Dep. Tr. 21:6-22:2. Moreover, Ms. Bailey is a resident of the State of Georgia. She has a Georgia driver's license, Bailey Dep. Tr. 9:9-10, lists her Georgia address on her tax forms, *id.* at 13:7-9, receives her mail at her Georgia address, *id.* at 13:14-21, and lists her Georgia address on her banking documents, *id.* at 14:11-12. However, she testified at her deposition that she is registered to vote in South Carolina, and not in any other state. *Id.* at 9:23-25. She also testified that she has only ever voted in South Carolina. *Id.* at 15:10-15. It was later discovered that both of those statement were false. At the time of her deposition, Ms. Bailey was in fact also registered to vote in Georgia. *See* Defendant-Intervenors' Supplemental Responses to South Carolina's First Set of Interrogatories (July 19, 2012), JA-SC_0996-98. And she voted in the July 2008 primary in

Georgia and the 2008 general election in South Carolina. *See id.* at JA-SC_0998 (Ms. Bailey's Georgia voter registration screen shot showing "Last Voted: 07/15/2008"); Bailey Dep. Tr. 16:8-11 (Q: "Did you vote in the 2008 presidential election?" A: "Yes." Q: "And that was in South Carolina?" A: "Yes."). In any event, Act R54 surely cannot be denied preclearance based on an out-of-state college student's refusal to cross the street.

The importance of Intervenors' failure to identify a single person who will be unable to obtain an Act R54 ID must not be overlooked. Both Intervenors and DOJ have routinely asserted that Act R54 will have a direct effect on people with low socioeconomic status ("SES"). For example, one of Intervenors' experts was tasked with "present[ing] data about patterns in socioeconomic status and various types of political behavior in the state of South Carolina." A. Martin Dep. Tr. 15:15-18. Likewise, DOJ's expert, Charles Stewart, testified that "it's reasonable to assume that the African-Americans who do not have the current forms of ID are disadvantaged by virtue of SES compared to the white voters." Stewart Dep. Tr. 126:19-22. But, this assumption does not stand up to the facts. Intervenors identified numerous individuals with low SES. Yet, as discussed *supra*, each identified individual would be able to obtain Act R54 ID. There is thus no evidence that Act R54 "imposes a burden material enough that it will likely cause some reasonable minority voters not to exercise the franchise."

IV. Preclearance of Act R54 Will Avoid Grave Constitutional Concerns.

This Court should construe VRA § 5 to permit the preclearance of Act R54, because a contrary construction would raise a serious question as to whether Congress exceeded constitutional limits when in 2006 it extended VRA § 5 for another 25 years. The Supreme Court and D.C. Circuit have recognized that "the extraordinary federalism costs imposed by [VRA § 5] raise substantial constitutional concerns." *Shelby Cnty., Ala. v. Holder*, 679 F.3d 848, 884 (D.C. Cir. 2012). *See Nw. Austin Mun. Util. Dist. No. 1 v. Holder*, 557 U.S. 193, 201

(2009). Because construing VRA § 5 to bar South Carolina from implementing Act R54 would raise serious constitutional problems, such a construction should be eschewed in favor of one that allows preclearance in this case.

"[W]hen a particular interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result." *INS v. St. Cyr*, 533 U.S. 289, 299 (2001) (citing *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988)). Thus, "if an otherwise acceptable construction of a statute would raise serious constitutional problems, and where an alternative interpretation of the statute is 'fairly possible,' we are obliged to construe the statute to avoid such problems." *St. Cyr*, 533 U.S. at 299-300 (quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932); citing *Ashwander v. TVA*, 297 U.S. 288, 348 (1936) (Brandeis, J., concurring); and *United States ex rel. Att'y Gen. v. Delaware & Hudson Co.*, 213 U.S. 366, 408 (1909)). "A statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score." *United States v. Jin Fuey Moy*, 241 U.S. 394, 401 (1916).

If this Court were to construe VRA § 5 to prohibit the preclearance of Act R54, that construction would raise grave doubts about the constitutionality of VRA § 5 in this case, because it would mean that a ballot access change has a retrogressive effect even where (1) the change affects minority voters and white voters in nearly equal measure (while affecting more white voters than minority voters in absolute numbers), and even where (2) the change imposes *no* burden or an *insubstantial* burden on the overwhelming percentage of voters, and imposes merely a *mitigated* burden on a limited number of voters as a subset within a very small percentage of voters.

First, as to the *Florida* court's disproportionality prong: Act R54 affects whites and minorities in almost equal measure. The relevant difference in current possession of currently available ID among white and minority registered voters is 1.97%. Hood Supp. Decl. at Table 10, JA_001094. And these pre-preclearance figures do not account for the fact that such registrants can, and many surely will, obtain free photo ID if and when Act R54 goes into effect. If this thin statistical difference between small portions of the relevant populations, based on unavoidably incomplete information, means that Act R54 has a likely disproportionate effect on minorities, then the disproportionality prong is so easily failed by a legitimate, race-neutral ballot access change that it would render VRA § 5 unconstitutional, as applied in this case.

Second, as to *Florida*'s sufficient/material burden prong: Act R54 clearly imposes *no burden whatsoever* on the roughly 95% of active registrants who already possess an acceptable form of photo ID. *See Crawford*, 553 U.S. at 197. Of those registrants who currently lack acceptable ID, *Crawford* held that the burden of obtaining such ID "surely does not qualify as a substantial burden on the right to vote, or even represent a significant increase over the usual burden of voting." *Id*. at 198; *accord id*. at 209 (concurrence). That group will include "a limited number of persons" who may face a "somewhat heavier burden," such as "persons with a religious objection to being photographed" and some "elderly persons." *Id*. at 199. But that burden is fully "mitigated by the fact that, if eligible, voters without a photo identification may cast provisional ballots that will ultimately be counted." *Id*. Under Act R54, a voter may cast a provisional ballot by executing an affidavit indicating that she has "a religious objection to being photographed" or "suffers from a reasonable impediment that prevents [her] from obtaining photograph identification." Act R54, § 5(D)(1)(a), (b). Those provisional ballots "shall" be counted, as long as they are truthful. *Id.* § 5(D)(2); *cf. Florida*, slip op. at 89-90. And persons

age 65 and above may vote absentee without a photo ID. *See* S.C. Code § 7-15-320(B)(8). If the sufficient/material burden prong is failed by Act R54—which at most imposes a minor irritation or, at most, a fully mitigated burden on less than 3.57% of registrants—then VRA § 5 could very well be unconstitutional as applied here. *Cf. Florida*, slip op. at 89 ("[T]he retrogression standard is not in place to prevent people from being irritated."). This Court should construe VRA § 5—and preclear Act R54—to avoid that issue.

Denying preclearance to Act R54 would also violate the "fundamental principle" that "all the States enjoy 'equal sovereignty.'" *Nw. Austin*, 557 U.S. at 203 (quoting *United States v. Louisiana*, 363 U.S. 1, 16 (1960)). Thirty-three States have enacted voter ID laws. *See supra* nn. 1 & 2. In States that are not covered by VRA § 5, such as Indiana, voter ID laws may go into effect immediately upon adoption. In covered States, however, a voter ID law must be precleared by the Attorney General or a district court before it can take effect. The voter ID laws of four covered States—Arizona, Georgia, Louisiana, and Michigan—were precleared by the Attorney General and are in effect today. Yet the Attorney General refused to preclear South Carolina's voter ID law. He also objected to Texas' voter ID law. Recently enacted voter ID laws in Alabama, Mississippi, and Virginia—covered jurisdictions all—are on hold due to the VRA § 5 preclearance requirement.

If this Court refuses to preclear Act R54, it would mean that non-covered States such as Indiana, and even some covered States such as Michigan and Georgia, may adopt and implement voter ID laws, but South Carolina may not implement such a law. The resulting inequality among equal sovereigns would exacerbate the constitutional problems entailed by construing VRA § 5 to deny preclearance to Act R54, especially given that South Carolina ranks higher than

Indiana in minority "registration and voting rates, as well as in black elected officials." *Shelby County*, 679 F.3d at 902 (Williams, J., dissenting).

Finally, the need to avoid a problematic construction of VRA § 5 in this case is particularly acute in light of Congress' 2006 amendments to statute, which heightened the problems with the preclearance requirement. In 2006, "Congress extended [VRA] § 5 for yet another 25 years." *Nw. Austin*, 557 U.S. at 200. In so doing, Congress retained the 1972 geographic coverage formula, even though the "coverage formula is based on data that is now more than [38] years old, and there is considerable evidence that it fails to account for current political conditions." *Id*. at 203. The 2006 reauthorization also overrode two Supreme Court decisions—*Georgia v. Ashcroft*, 539 U.S. 461 (2003); *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 336 (2000)—that had adopted constructions of VRA § 5 that reduced the constitutional concerns arising from the statute. *See* 42 U.S.C. § 1973c(b)-(d); *see also* Pub. L. No. 109-246, § 2(b)(6), 120 Stat. 577, 42 U.S.C. § 1973 note. Thus, after Congress' 2006 amendments, VRA § 5 is more constitutionally suspect than ever before. This Court should not add to the weight of those problems by denying preclearance in this case.

CONCLUSION

For the reasons stated above, the Court should preclear Sections 4, 5, 7, and 8 of Act R54 under Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 21, 2012, I filed the foregoing brief with the Court's electronic filing system, which will provide notice to all counsel of record.

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