No. 12-96

**IN THE SUPREME COURT OF THE UNITED STATES**

**SHELBY COUNTY, ALABAMA,** *Petitioner*,

v.

**ERIC H. HOLDER, JR., ET AL.,** *Respondents*.

*ON WRIT OF CERTIORARI*
*TO THE UNITED STATES COURT OF APPEALS*
*FOR THE DISTRICT OF COLUMBIA CIRCUIT*

# BRIEF OF SENATOR C. BRADLEY HUTTO, SENATOR GERALD MALLOY, SENATOR JOHN L. SCOTT, JR., REPRESENTATIVE GILDA COBB-HUNTER, and THE LEAGUE OF WOMEN VOTERS OF SOUTH CAROLINA as *AMICI CURIAE* IN SUPPORT OF RESPONDENTS


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## STATEMENT OF INTEREST OF AMICI CURIAE

Senator C. Bradley Hutto, Senator Gerald Malloy, Senator John L. Scott, Jr., Representative Gilda Cobb-Hunter, and the League of Women Voters of South Carolina ("*Amici*"), all South Carolina citizens, respectfully submit this brief to demonstrate how the Voting Rights Act of 1965 ("VRA") had a powerful and beneficial effect on South Carolina's recently enacted voter photo identification law.[1]

## SUMMARY OF ARGUMENT

In November 2012, after eight months of litigation and a week-long trial, a three-judge panel precleared Act R54, South Carolina's new voter photo identification law, for elections commencing in 2013. *Codified as* S.C. Code § 7-13-710. In the course of this litigation under Section 5 of the Voting

[1] This brief is submitted pursuant to Rule 37 of the Rules of the Supreme Court of the United States. Counsel for the Petitioner and Respondent have both consented to the *Amici*'s submission. No counsel for a party authored this brief in whole or in part, nor did any such counsel or anyone other than the *Amici* make any monetary contribution intended to fund the preparation or submission of this brief.

Rights Act, Pub. L. 89-110, § 5, 79 Stat. 439, the United States and intervening South Carolina citizens and civil rights organizations ("Intervenors") articulated—through discovery, experts and judicial notice—how the law as enacted would have disproportionately burdened minority voting. Indeed, undisputed record evidence established that approximately 130,000 *registered voters* lacked an ID acceptable under Act R54, and that there was "an undisputed racial disparity of at least several percentage points" in ID possession. *South Carolina* v. *United States*, --- F. Supp. 2d ----, 2012 WL 4814094, at *8, *20 (D.D.C. Oct. 10, 2012). That racial disparity—combined with the indirect fees, time burdens and transportation costs necessary to obtain a new photo ID card—meant that the law as enacted would have almost certainly disparately impacted minority voters in violation of Section 5. *See id.* But the voter ID law that was ultimately precleared by the Court was "not the R54 enacted in May 2011." 2012 WL 4814094, at *21 (Bates, J., concurring). Instead, and to its credit, South Carolina responded to the preclearance process by

substantially revising its initial interpretation of the Act and ultimately committing to apply the law in a manner designed not to disenfranchise minority voters.

Consequently, the litigation resulted in a law that accomodated both the mandates of the 15th Amendment and the State's interest in enhancing the integrity of the electoral process. This outcome would not have been possible if not for Section 5. The successful application of Section 5 to South Carolina's voter ID law demonstrates the statute's potency in protecting minority voters and the courts' flexibility and restraint in applying it to covered states, in deference to state sovereignty.

*Amici* are mindful that Section 5 may be applied in ways that impose "substantial federalism costs" and not-insubstantial burdens on covered jurisdictions. *Nw. Austin Mun. Util. Dist. No. 1* v. *Holder*, 557 U.S. 193, 224 (2009). We respectfully submit that identifying those burdens, and determining how covered jurisdictions fare under them, is critical to adjudicating Section 5's constitutionality. South Carolina's recent experience

shows that the effects of Section 5, in actual practice, are not so great or unmanageable as Petitioner claims, and are more than outweighed by the Constitution's demand that racial discrimination in voting be eradicated.

Following this Court's decision in *Crawford* v. *Marion County Election Board*, 553 U.S. 181 (2008), numerous states have enacted laws requiring voters to show one of specified forms of government-issued photographic identification at the polls (typically called "voter ID" laws). These laws range from the lenient to the restrictive, depending upon which forms of ID a particular law accepts; how the law treats voters who lack acceptable photo ID; and whether acceptable ID is available to racial minorities without substantial cost or other burdens. In Michigan, for instance, a voter without photo ID may cast a regular ballot by signing an affidavit swearing to the voter's identity.[2] At the other end of the spectrum, in Texas, voters in certain counties would have had to bear the costs of traveling as much as 200 miles round-trip to obtain the "free" ID

[2] Mich. Code § 168.523.

required by the Texas voter ID law to exercise their right to vote.[3]

In South Carolina, Section 5 contributed powerfully to a successful balancing of the State's interest in electoral integrity and minority voters' right to vote. First, Section 5 created a deterrent effect at the legislative stage, as South Carolina legislators expressed keen awareness that any change to voter eligibility requirements would require preclearance. As a direct result of Section 5, legislators and election officials closely scrutinized the realities of racial discrimination in South Carolina voting with respect to both current practices and the lingering socioeconomic effects of past state-sponsored discrimination. Legislators on both sides of the issue responded to Section 5's preclearance requirement by incorporating multiple ameliorative provisions into Act R54—most importantly, a provision allowing voters to cast a provisional ballot if they sign an affidavit stating that they suffer from a "reasonable impediment" that

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[3] *Texas* v. *Holder*, --- F. Supp. 2d ----, 2012 WL 3743676, at *28 (D.D.C. Aug. 30, 2012).

prevents them from obtaining an acceptable form of photo ID. S.C. Code § 7-13-710(D)(1)(b).

Second, Section 5 created an incentive for State officials to interpret Act R54 in a manner that would avoid disenfranchising minority voters after passage of the bill, during the process of administrative review and litigation. During the course of administrative review and litigation, faced with evidence that Act R54 would still likely disenfranchise tens of thousands of African-American voters, South Carolina election officials drafted policies interpreting and implementing the "reasonable impediment" and other ameliorative provisions in an expansive manner. Similarly, during and after trial, the South Carolina Attorney General made multiple representations to the District Court concerning the State's interpretation of the Act and how it would be implemented, committing to the expansive application of these ameliorative provisions. Ultimately, such actions carried South Carolina's burden to show that R54 had neither a retrogressive effect nor a discriminatory purpose.

Throughout the litigation, the District Court took every precaution to minimize the federalism costs that the VRA may theoretically impose. Deferring to the State's obviously strong interest in resolving the litigation before the November 6, 2012 general election, the District Court set an extraordinarily expedited pretrial schedule, condensing what could have easily been a two-year litigation into five and one-half intensive months.

The District Court also construed the State's evidentiary burden in a manner that rendered the preclearance standard not only meaningful, but practicable and fair to the State. For example, the District Court accepted South Carolina's contention that Act R54's ameliorative provisions, once implemented in the manner described at the end of trial, would greatly mitigate the retrogressive effect of proven racial disparities in photo ID possession—in other words, South Carolina did not have to predict the future with unreasonable certainty.

As two panel members noted, Section 5 played a "vital function" in ensuring that South Carolina's voter ID requirement did not disenfranchise voters.

2012 WL 4814094, at *21-22 (Bates, J., concurring, with Kollar-Kotelly, J., joining). Judge Bates wrote that "[w]ithout the review process under the Voting Rights Act, South Carolina's voter photo ID law certainly would have been more restrictive," and explained that "the history of Act R54 demonstrates the continuing utility of Section 5 . . . in deterring problematic, and hence encouraging non-discriminatory, changes in state and local voting laws." *Id.* Judge Kavanaugh, writing for the unanimous South Carolina panel, concluded, "[t]he Voting Rights Act of 1965 is among the most significant and effective pieces of legislation in American history." 2012 WL 4814094, at *2.

## ARGUMENT

Under Section 5, jurisdictions with a substantial history of racial discrimination in voting must seek approval from the federal government before changing their election laws. Section 5 thus encourages covered jurisdictions to carefully consider the likely effects on minority voters of any new law concerning voting or elections. As described below, Section 5 caused South Carolina officials to consider

and respond to the new ID law's impact on African-American voters during the legislative process and the ensuing litigation. Ultimately, this evolutionary process resulted in a voter ID law that serves the State's interest in preventing election fraud without unduly burdening anyone's right to vote.

## I. SOUTH CAROLINA'S LEGACY OF STATE-SPONSORED DISCRIMINATION CONTINUES TODAY.

As in other covered jurisdictions, South Carolina's painful experience of state-sponsored racial discrimination continues to affect the political participation of African-Americans to this day. In addition to the ongoing effects of past discrimination, discussed below, the Court recognized that, even in 2012, "[r]acial insensitivity, racial bias, and indeed outright racism are still problems." *South Carolina*, 2012 WL 4814094, at *14; *cf. Bartlett* v. *Strickland*, 556 U.S. 1, 25 (2009) ("[R]acial discrimination . . . [is] not ancient history. Much remains to be done to ensure that citizens of all races have equal opportunity to share and participate in our democratic processes."). As record evidence before the Court confirmed, the State's recent history

reveals numerous "second generation" voting changes that have diluted or suppressed the African-American vote, including the reenactment of voting changes previously rejected by the Department of Justice as retrogressive.[4] *See, e.g.*, H. Rep. No. 109-478, at 23, 39, 73 (2006) (detailing changes to at-large and partisan voting systems in South Carolina counties and school districts to dilute African-American electoral influence); *United States* v. *Charleston Cnty.*, 316 F. Supp. 2d 268, 286 n.23 (D.S.C. 2003) (racial intimidation and harassment at polls); (JA-DI 650-51 (ECF No. 190-1) (Rutherford Dep. Tr.); JA 2799-2800 (Senate debate on

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[4] As a telling example, South Carolina openly resisted and sought to enjoin provisions of the National Voter Registration Act, 42 U.S.C. § 1973gg-5 ("NVRA"), which requires states to offer voter registration in state social services and public assistance agencies where clients are in greater proportion "poor and minority citizens" who are "less likely to be served by the DMV." *Condon* v. *Reno*, 913 F. Supp. 946, 959 (D.S.C. 1995). The District Court permanently enjoined South Carolina's non-compliance, which "ignore[d] Congress' statutory scheme and open[ed] the door to discrimination that Congress so carefully shut." *Id.* at 959, 967. Indeed, Congress explicitly cited racial discrimination in voter registration laws as a key finding justifying the NVRA. 42 U.S.C. § 1973gg(a)(3).

Notably, the Department of Justice has objected to proposed changes in voting practices or procedures in South Carolina 122 times since 1972, and eleven times since 2000. (JA 1546 (ECF No. 157-5).)

discriminatory poll challenges).) Furthermore, the trial record contained myriad examples of discriminatory behavior by local election officials, including: poll managers providing what one legislator euphemistically described as "unsolicited assistance . . . in the voter booth" (8/27/12 Tr. at 205 (ECF No. 301) (Rep. Clemmons)); poll managers denying African-American voters in-person absentee ballots and refusing to assist such voters with provisional voting (JA-DI 30-32 (ECF No. 190) (Bursey Dep. Tr.)); and election officials purposefully appointing "white poll workers with aggressive personalities" in majority African-American precincts to disrupt voting (8/30/12 Tr. at 194 (ECF No. 307) (Bloodgood).) Finally, evidence confirmed that a legislative sponsor of Act R54 responded sympathetically to a blatantly racist comment about the law's disparate effect. (08/28/12 Tr. at 19-22 (ECF No. 302) (Rep. Clemmons).)[5]

[5] Specifically, on January 17, 2012, a supporter of the legislation wrote to Rep. Alan Clemmons that he did not "buy that garbage" about "a poor black person" being unable to obtain a photo ID. The supporter remarked that if the South Carolina legislature gave "a hundred dollar bill away if you came down with a voter ID card," poor African-Americans

Moreover, South Carolina's historical government-sponsored discrimination against African-American voters has significant impact even today. *See Charleston Cnty.*, 316 F. Supp. 2d at 286 & n.23; *Colleton Cnty. Council* v. *McConnell*, 201 F. Supp. 2d 618, 641-42 (D.S.C. 2002); *Cnty. Council of Sumter* v. *United States*, 596 F. Supp. 35, 37 (D.D.C. 1984). The now-dismantled formal institutions of racial discrimination, such as segregation in schooling and government services, continue to impede the ability of African-Americans to participate in South Carolina's democratic process, through lingering and pronounced socioeconomic disparities. *Colleton Cnty.*, 201 F. Supp. 2d at 642; *Jackson* v. *Edgefield Cnty. Sch. Dist.*, 650 F. Supp. 1176, 1180 (D.S.C. 1986); Fannie Lou Hamer, Rosa Parks, and Corretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. 109-246, 120 Stat. 577 (2006), § 2(b)(3); H. Rep.

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would rush to get their IDs "like a swarm of bees going after a watermelon." Although admitting at trial that this email was "offensive" and contained "a shade of racism," Rep. Clemmons originally wrote in response: "AMEN, Ed!!! Thank you for your support of voter ID." (08/28/12 Tr. at 19-22 (ECF No. 302) (Rep. Clemmons).)

No. 109-478, at 33. As of 2010, almost one-fourth (24.4%) of African-Americans in South Carolina live below the federal poverty line, more than double the 10.9% rate of whites in the state. (JA 1762-63 (ECF No. 182).) Likewise, African-Americans in South Carolina are dramatically more likely to have low levels of educational attainment—in 2010, 22.9% of African-Americans lacked a high school diploma, versus 11.8% of whites—and are four times less likely to have access to a vehicle. (JA 1263-64 (ECF No. 166-3); JA 1764 (ECF No. 182).) As expert witnesses demonstrated in the *South Carolina* litigation, such disparities in social resources increase the obstacles that a voter must overcome to vote and translate to tangible differences in voter turnout rates. For example, in the last decade white voter turnout in South Carolina's wealthiest county was 13.8% higher than African-American turnout in the five poorest counties. (JA 1114 (ECF 152-7).)

As a result, facially neutral laws may nevertheless disproportionately burden minority voting. Indeed, record evidence showed ways that Act R54—as originally enacted—would have

disparately impacted African-Americans' ability to vote. To start, registered African-American voters were more than twice as likely as white voters to lack a photo ID that was acceptable under the Act. *South Carolina*, 2012 WL 4814094, at *8 ("[T]he evidence reveals an undisputed racial disparity of at least several percentage points," where the percentage of registered voters without accepted photo ID was 96% for whites but 92-94% for African-Americans.). Moreover, obtaining a new photo ID would be substantially more burdensome for African-American voters than white voters. For instance, the South Carolina Department of Motor Vehicles requires that applicants for a driver's license or non-driver photo ID provide a copy of their birth certificate. Due to historical state-sponsored segregation of hospital care, however, a large number of African-American seniors were delivered by midwives and lack birth certificates.

While obtaining a copy of a birth certificate costs $12, obtaining a "delayed" birth certificate—for those born without one—requires a petition to family court, and can cost hundreds or even thousands of

dollars in court filing fees and legal representation. As a result of the income disparity noted above, African-American South Carolinians are also those less likely to be able to bear this cost.

Similarly, African-Americans in South Carolina are much less likely to have access to a private vehicle, further complicating the process of traveling to a place where IDs are available. (JA 1263-64 (ECF No. 182).) South Carolina is composed mostly of large, geographically diffuse agricultural counties with minimal or no public transit systems. In those counties, voters could be forced to travel 30 to 40 miles to the nearest county office. (*See, e.g.*, 08/27/12 Tr. at 179-180 (ECF No. 301) (Sen. Campsen) (agreeing that there is "virtually no public transportation" in counties with highest percentage of African-Americans); 8/30/12 Tr. at 105-106 (ECF No. 306) (Debose) (describing his 25-30 mile journey to all government offices); JA-DI 3866 (ECF No. 237-2) (map of South Carolina, with public transportation routes).)[6]

[6] For instance, one Intervenor, Mr. Craig Debose, has no car and lives in a very rural area with no public transportation.

As discussed in detail below, Section 5 provided a powerful incentive for election officials and legislators to engage with and address these burdens on minority voting. Were it not for Section 5, 130,000 registered voters, who were disproportionately African-American, would have faced significant—and in many cases, prohibitive—obstacles in exercising their constitutionally guaranteed right to vote.

## II. SECTION 5 INCENTIVIZED SOUTH CAROLINA TO CONFRONT AND ULTIMATELY MITIGATE LIKELY NEGATIVE EFFECTS ON MINORITY VOTING.

### A. *Section 5 Influenced the Legislative Process.*

As Judge Bates emphasized, Section 5 had an important "deterrent effect" during the legislative process, influencing lawmakers to provide greater

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(8/30/12 Tr. at 103, 110 (ECF No. 306).) In order to attempt to obtain an ID, Mr. Debose would have had to travel 25 to 30 miles to the nearest town with an elections office and a Department of Motor Vehicles branch. (8/30/12 Tr. at 105-106 (ECF No. 306).) In order to reach that town, Mr. Debose would have needed to take a taxicab, pay a neighbor to drive him, or rely on the kindness and availability of friends or family. (8/30/12 Tr. at 108, 110-112 (ECF No. 306).)

protections to minority voters. *South Carolina*, 2012 WL 4814094, at *22 (Bates, J., concurring). Facts of racial socioeconomic disparities and incidents of ongoing discrimination were raised during the South Carolina General Assembly debate on Act R54. Legislators, citing the VRA and Section 5, responded by amending the bill to attempt to ameliorate the negative impact of the proposed legislation.

From the beginning of Act R54's legislative history, legislators voiced concerns that voter ID legislation would negatively impact minority voting. (8/28/12 Tr. at 186-87 (ECF No. 303) (Lt. Gov. McConnell); 8/30/12 Tr. at 279 (ECF No. 307) (Rep. Cobb-Hunter).) These concerns were exacerbated when the South Carolina State Election Commission ("SEC") distributed data to lawmakers showing that minority voters were in fact disproportionately less likely to own a photo ID acceptable under R54 (as then-drafted). (JA-DI 1998-2002 (ECF No. 190).) Concerned, several influential legislators sought to formulate a bill that could obtain preclearance under Section 5. For example, Speaker of the House Robert Harrell testified at trial: "[I] ask[ed] the staff who

drafted the bill for me to please make sure that we are passing a bill that will withstand constitutional muster and get through DOJ or through this court." (8/28/12 Tr. at 105 (ECF No. 302); *see also* 8/28/12 Tr. 104 (ECF No. 302) ("I was very aware at the time that we were doing this that whatever we would have to do would have to be subject to the Voting Rights Act because that would be the basis for the Department of Justice preclearing the bill for us.")); 8/27/12 Tr. 108 (ECF No. 300) (Sen. Campsen) (stating that he was "interested in what voter ID legislation had been precleared" in drafting R54); 8/28/12 Tr. at 182 (ECF No. 303) (on Senate floor "[t]here was discussion about" how "to craft a bill that would comply" with VRA)); *South Carolina*, 2012 WL 4814094, at *21 (Bates, J., concurring). In the Senate in particular, then-Senator McConnell sought out the opinions and support of African-American senators, reasoning that a bill that was supported by minority lawmakers was more likely to achieve preclearance. (8/28/12 Tr. at 176, 185 (ECF No. 303) (Lt. Gov. McConnell) ("[T]hose things have to go up to Justice and I know there are witnesses,

and if everybody is generally pleased, who's going to testify against it? . . . . [W]e had bipartisan support and we had biracial, philosophical, I mean, who was to complain?").)

As a result of legislators' desire to ensure that Act R54 satisfied Section 5, the South Carolina bill was amended in an effort to reduce its discriminatory effect. Lawmakers added provisions to, among other things, require the SEC to "establish an aggressive voter education program" and to "educate the public" concerning Act R54—provisions later cited by the Court in granting preclearance. *South Carolina*, 2012 WL 4814094, at *3, *8.

The beneficial impact of Section 5 is perhaps best illustrated by the process that led to the addition of two other ameliorative provisions that ultimately proved crucial to preclearance: (i) the "reasonable impediment" exception, which allows voters to vote by provisional ballot if they are prevented from obtaining ID by a "reasonable impediment," S.C. Code § 7-13-710(D)(1)(b); and (ii) a provision making available photo voter registration cards free of charge, S.C. Code § 56-1-3350(C)(2). *See*

*South Carolina*, 2012 WL 4814094, at *7, *9-10, *15-17 (discussing "reasonable impediment" exception); *id.* at *8, *15-17 (discussing free photo voter registration cards). When concerns about the voter ID bill were expressed during the legislative process, then-Senator McConnell convened Republican and Democratic leaders to address those issues.[7] That bipartisan meeting resulted in Amendment 8 to Act R54—a compromise package with provisions to mitigate the discriminatory effects of the photo ID law on minorities, including the reasonable impediment exception and the free ID cards. (8/28/12 Tr. at 120-122, 123-124 (ECF No. 302) (Lt. Gov. McConnell); 8/30/12 Tr. at 257, 263-264 (ECF No. 307) (Sen. Malloy); JA 664-79 (ECF No. 182).) The Senate adopted Amendment 8 unanimously. (JA 678-679 (ECF No. 182).)

From there, the positive impact of Section 5 continued. When the voter ID bill passed both the

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[7] Notably, throughout the legislative process, then-Senator McConnell repeatedly emphasized that the ID law must comply with the VRA. (8/28/12 Tr. at 140-141 (ECF No. 302) (Lt. Gov. McConnell)); JA-DI 559-560, 569 (ECF No. 190) (Lt. Gov. McConnell Dep. Tr.); JA 4923 (ECF No. 182) (Conf. Comm. Tr.).)

Senate and House, with only conference committee negotiations remaining, legislators were under "tremendous pressure" from special interest groups to accept a more restrictive version of the voter ID bill, which would have negatively impacted minority voting. (8/30/12 Tr. at 250-251 (ECF No. 307) (Sen. Malloy); *see also* 8/28/12 Tr. at 77 (ECF No. 302) (Rep. Harrell); 8/28/12 Tr. at 133 (ECF No. 302) (Lt. Gov. McConnell).) Nonetheless, on April 13, 2011, several senators published statements in the Senate Journal explaining that they would not accept a more restrictive voter ID bill because "the responsible thing to do was to fix [the bill] so that it would not fail in the courts or get tripped up by the Voting Rights Act." (JA 396-97 (ECF No. 182); *see also* 8/28/12 Tr. at 140–141 (ECF No. 302) (Lt. Gov. McConnell) (explaining that Senate version of bill "had a better chance" of obtaining preclearance).)

In sum, "key ameliorative provisions were added during [the] legislative process and were shaped by the need for pre-clearance." *South Carolina*, 2012 WL 4814094, at *21 (Bates, J., concurring). Section 5 played a "vital function"

during the legislative process in South Carolina; it guided and encouraged legislators to enact a fairer and less discriminatory law. *Id*.

### B. *Section 5 Influenced the Administrative Preclearance and Litigation Processes.*

Section 5 continued to beneficially shape the effect of South Carolina's voter ID law throughout the preclearance process—first, when the State was seeking administrative preclearance and then during litigation. As evidence mounted that various aspects of the law were likely to disenfranchise minority voters disproportionately, South Carolina clarified or reinterpreted the offending provisions. In particular, State officials ultimately embraced expansive interpretations of provisions concerning: (1) procedures for obtaining a free photo voter registration card; (2) voter education programs; and (3) the reasonable impediment exception.

#### 1. Procedures for Obtaining a Photo Voter Registration Card

During administrative review, questions from the Department of Justice prompted the SEC to

reevaluate and refine its draft procedures for issuing photo voter registration cards, which ultimately enabled voters to obtain such IDs more easily. For example, the original procedures demanded very specific information in order to receive photo registration cards. After the Department of Justice noted apparent discrepancies in the draft procedures, the SEC "recognize[d] there are other acceptable methods" to confirm one's identity for purposes of receiving a photo registration ID, such as presenting a current non-photo voter registration card or any form of ID accepted under the Help America Vote Act of 2002. The SEC then revised its draft procedures to include these additional options. (S.C. SEC Response to Dep't of Justice Information Request (ECF No. 63-1).) Similarly, the SEC revised its draft procedures to allow county voter registration offices to issue permanent photo registration cards, rather than temporary cards that would expire after thirty days. (*See id.* at 8; JA-DI 747 (ECF No. 190-1) (Whitmire I Dep. Tr.).)

2. Voter Education

During the preclearance process, it became evident that the SEC's planned voter education materials neglected to inform voters about alternatives and exceptions to Act R54's ID requirement. Those shortcomings likely would have discouraged eligible individuals from voting—for example, senior citizens, the disabled, or those without access to transportation who were entitled to utilize the reasonable impediment exception. Failures "to educate voters on the opportunity to vote absentee without photo identification" or to notify voters of the reasonable impediment exception and its requirements were the subject of several comment letters during both the administrative preclearance process and litigation. (*See, e.g.*, Dec. 7, 2011 Cmt. Ltr. (ECF No. 7-3).) Indeed, throughout the pretrial proceedings—and right up to the eve of trial—the SEC continued to revise these educational materials to encourage voters who lacked ID to vote under the alternatives provided by the law. (8/28/12 Tr. at 238 (ECF No. 303) (Andino); S.C. SEC Voter Education Plan (ECF No. 65-3).) As the SEC Executive

Director testified, these revisions came in direct response to questions raised by Intervenors, the United States, and the District Court: "[B]ecause of some questions that were asked during depositions, we went back and took another look . . . and realized we needed to make a few changes." (8/28/12 Tr. at 238-239 (ECF No. 303) (Andino).)

3. Reasonable Impediment Exception

The reasonable impediment exception is perhaps the most important ameliorative provision in Act R54 because it provides a safety net to ensure that all eligible voters are able to cast a ballot, even those unable to obtain photo ID. Accordingly, this provision was critical to the District Court's decision to preclear the Act. *South Carolina*, 2012 WL4814094, at *19 ("[K]eep in mind that Act R54 may *not* have been pre-cleared for any elections without the expansive reasonable impediment provision."). Notably, the reasonable impediment exception was initially largely undefined, and preclearance became justified only after the interpretation of the exception evolved before,

during, and after trial to become more expansive. *Id.* at *4 ("[T]he initial rhetoric surrounding this case arose in part because of a key unanswered question at the time of Act R54's enactment: namely, how would the reasonable impediment provision be interpreted and enforced?").

As enacted, the Act contained no definition of a "reasonable impediment," no standard for determining what constituted one, and no information about who would make the "reasonableness" determination. (*See, e.g.*, Aug. 5, 2011 Cmt. Ltr. (ECF No. 7-2).) It was not until the administrative preclearance process began—and, more specifically, when the Department of Justice sought clarity—that South Carolina officials made their first effort to interpret this crucial provision. On August 16, 2011, in response to the Department of Justice's request for a more concrete definition, the South Carolina Attorney General provided an opinion that endeavored to construe this key provision—but was, in fact, only the first step in a longer interpretive process. (*See* S.C. Att'y Gen. Op. (ECF No. 63-2).)

Although helpful in some respects, the Attorney General opinion failed to resolve the ambiguities regarding the scope of the reasonable impediment exception and who would make a final determination of reasonableness, leaving those issues for exploration in discovery. Deposition testimony from key legislators and election officials demonstrated persistent disagreement over, for example, whether a voter who lacked transportation to a county office where free IDs were available could claim a "reasonable impediment" when seeking to vote without an acceptable photo ID. (*Compare* JA-DI 853 (ECF No. 190-1) (Andino I Dep. Tr. (lack of transportation a reasonable impediment)) *with* JA-DI 524 (ECF No. 190) (Sen. Martin Dep. Tr.) (lack of transportation *not* a reasonable impediment)) *and* JA-US 1128 (ECF No. 233) (Rep. Clemmons Dep. Tr.) (unsure about lack of transportation).) In mid-August 2012, two weeks before trial, election officials further revised poll manager guidelines and educational materials defining the reasonable impediment exception (*see* JA-DI 3470-73), due to "[s]ome of the issues that [the parties] raised in the

deposition[s]." (JA-DI 3948-49 (ECF No. 249-2) (Andino IV Dep. Tr.).) The definition continued to evolve during the course of the trial, as the "responsible South Carolina officials determined, often in real time, how they would apply the broadly worded reasonable impediment provision." *South Carolina*, 2012 WL 4814094, at *4. In response to a specific inquiry from the Court at the end of the five-day trial, the State Attorney General stated that the exception encompassed any reason a voter subjectively but genuinely believed created an obstacle to obtaining photo ID. (S.C. Responses to the Court's Questions (ECF No. 263).) The Court not only adopted this view in preclearing Act R54, but expressly mandated it as a condition of preclearance. 2012 WL4814094, at *6.

A similar evolutionary process occurred during the Section 5 litigation with respect to other aspects of the reasonable impediment exception, including the grounds on which South Carolina county election boards could reject a reasonable impediment affidavit and the initial requirement that reasonable impediment affidavits be notarized. As originally

interpreted by State officials, both had the potential to discourage minority turnout, result in the rejection of valid votes, and introduce illegal burdens on voters. But subsequent reinterpretations by the State mitigated these effects.

For example, the State initially left unresolved the problem that Act R54 appears to require notarization of reasonable impediment affidavits, despite the fact that polling places were not required to make notaries available.[8] Ultimately, the District Court accepted the State's representation that if election officials could not recruit notaries to work without fee at the polling places, "poll managers may witness reasonable-impediment affidavits, and county election boards will be directed to count the accompanying provisional ballots." 2012 WL4814094, at *7. Toward the end of the litigation, the SEC further issued policies prohibiting notaries from charging a fee to witness reasonable impediment affidavits. (JA-DI 3471.) Similarly, the

[8] Act R54 requires that a voter utilizing the reasonable impediment exception complete an "affidavit," S.C. Code § 7-13-710(D)(1)(b), and South Carolina law requires that "affidavits" be notarized. *See South Carolina*, 2012 WL4814094, at *7.

State initially left unresolved the question of whether county election boards could assess the reasonableness of a stated reasonable impediment or only its factual truth, but later interpreted Act R54 to allow county boards to assess only its factual truth.[9]

Again, "one cannot doubt the vital function that Section 5 of the Voting Rights Act has played here." 2012 WL4814094, at *21 (Bates, J., concurring). Today's Act R54 is significantly more protective of minority voters, as it features mitigating provisions that are substantially clearer and more capable of uniform, non-discriminatory implementation. Without Section 5, many minority

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[9] Act R54 provides that reasonable impediment ballots must be counted unless the county board of elections "has grounds to believe the affidavit is false." S.C. Code § 7-13-710(D)(2). Prior to the litigation, the State provided little insight on whether county boards' discretion encompassed an assessment of reasonableness—*i.e.*, whether this provision enabled county election boards to reject ballots if they viewed the stated impediment as not being "reasonable." As a result of the VRA litigation, South Carolina confirmed that county boards could reject reasonable impediment ballots only if they determined that the affidavit was false, not if they merely deemed the impediment to be unreasonable. (S.C. Responses to the Court's Questions (ECF No. 263)); *see also* 2012 WL 4814094, at *5-6.

voters almost certainly would have been disenfranchised as a result of Act R54.

## III. SECTION 5 WAS APPLIED IN *SOUTH CAROLINA* WITH APPROPRIATE DEFERENCE TO LEGITIMATE STATE INTERESTS.

"The historic accomplishments of the Voting Rights Act are undeniable," including the vital role that Section 5 has played in battling racial discrimination and advancing minority voting rights. *Nw. Austin*, 557 U.S. at 202. But Section 5 has the potential to "impose[] substantial 'federalism costs.'" *Id.* Cognizant of this risk, the *South Carolina* Court minimized any burden on state sovereignty throughout the litigation. South Carolina was not forced to "jump through unnecessary hoops." 2012 WL 4814094, at *22 (Bates, J., concurring). Rather, the State was given flexibility in shaping the litigation schedule and the scope of discovery as well as deference from the District Court during the evaluation of evidence. Further, as described below, the Court did everything in its power to issue a final preclearance decision before the 2012 general election. Indeed, had South Carolina not delayed

(and then acknowledged that, as a result, a decision for 2012 was likely impossible), the Court would have precleared Act R54 in time for the presidential election.

### A. *The Procedural Background of South Carolina v. United States.*

Flexibility, deference and speed of adjudication were recurring motifs throughout the course of the *South Carolina* litigation. The three-judge panel: (1) accommodated the State's procedural preferences, including the imposition of a drastically compressed pretrial schedule; (2) set realistic and manageable evidentiary standards; and (3) credited without question South Carolina's position, articulated by counsel, witnesses and the State's Attorney General, that the voter ID requirement was adopted in order to prevent fraud and safeguard public confidence in elections. The litigation process, detailed below, establishes that Section 5 need not impose undue burdens upon covered jurisdictions, and that the Act plays a crucial role in preventing disenfranchisement.

South Carolina passed its voter ID law in May 2011 and sought administrative preclearance in June. Because the State's initial submission was incomplete, the Department of Justice was unable to issue a decision until December—then, preclearance was denied. South Carolina waited several weeks before initiating preclearance litigation in February 2012; even then South Carolina did not request expedited treatment until a status conference in April, two months later. Thereafter, the State's repeated failures in discovery caused additional delays. *See, e.g.*, Scheduling and Procedures Order in *South Carolina* v. *United States*, 1:12-cv-00203, ECF No. 64, at 10-14 (Apr. 26, 2012) (Bates, J., concurring) ("Apr. 26 Scheduling Order") (noting that "South Carolina's own inexplicably dilatory conduct has largely created the difficult situation the Court and the parties now face").

Nevertheless, the District Court granted the State's request to proceed on an expedited basis, acknowledging South Carolina's strong interest in implementing a duly enacted election law in the November 2012 general election. *See id*. at 12. The

District Court ordered filings by Intervenors to be consolidated, and prescribed an "extremely aggressive" discovery and trial schedule geared to achieve an expedited decision. *South Carolina*, 2012 WL 4814094, at *20. For example, the schedule required the parties to serve requests for written discovery on May 4th, to serve objections on May 9th, and to complete responsive document productions by May 16th. (ECF No. 64, at 6.) The parties completed 21 fact witness depositions within a single month, and seven expert witness depositions in nine days.

In reaching its decision to preclear the South Carolina law for all elections after 2012, the District Court imposed realistic and manageable evidentiary standards upon the State consistent with congressional language and intent. The Court explained that a new ballot access law would violate Section 5 only if it "disproportionately and materially burden[ed] minority voters when measured against the pre-existing state law." *Id*. at *8 (citing *Florida* v. *United States*, --- F. Supp. 2d ----, 2012 WL 3538298, at *9 (D.D.C. Aug. 16 2012)). The Court

further explained that ordinary burdens faced by voters when exercising their franchise, such as long lines, confusing paperwork, and provisional ballots—while sufficient to dissuade some voters from voting—do not alone constitute the type of injury that runs afoul of the VRA. *Id.* at *10. Similarly, the *South Carolina* panel declined to require the State to predict with undue specificity the effects of Act R54 after implementation. Instead, the District Court largely accepted South Carolina's promise that the pre-implementation racial gap in ID ownership would be diminished by voter education, free photo voter registration cards, and the reasonable impediment exception, none of which were fully functioning at the time of trial. The District Court also deferred to the State's assurance that local election officials would be adequately trained and would adhere strictly to the procedures announced by South Carolina at the end of the litigation—despite the lack of centralized State control over local election administration and evidence of past implementation problems. *See, e.g.*, *id.* at *20 (Bates, J., concurring).

Finally, the *South Carolina* panel accepted the State's evidence regarding the General Assembly's motivations in introducing and passing the law. Citing *Crawford* v. *Marion County Election Board*, 553 U.S. 181 (2008), the District Court concluded that "South Carolina's goals of preventing voter fraud and increasing electoral confidence are legitimate; those interests cannot be deemed pretextual merely because of an absence of recorded incidents of in-person voter fraud in South Carolina." *Id*. at *13. Though "troubled" by evidence of racially charged comments involving the lead bill author, *see id*. at *14 and *supra* at 11 n.5, the District Court declined to find that the statements of one lawmaker, even a central one, tainted the entire legislative process.

Ultimately, South Carolina met its burden by addressing in good faith the objections of the Department of Justice and Intervenors, and by detailing its plans for implementation of the law, including the State's educational efforts, free ID scheme, and election official training program (all of

which were the subject of ongoing revisions in response to new evidence and objections at trial).

### B. *South Carolina Exemplifies the Procedural Approach Taken in Recent, Similar Cases.*

In all three of the ballot access cases tried under Section 5 in 2012, flexibility, deference and speed of adjudication were recurring motifs. Despite originating from three different states (Texas, Florida and South Carolina), involving unique facts, and resulting in varying outcomes, each case illustrates that Section 5 litigation need not pose any undue burden on covered jurisdictions.

For instance, in *Texas* and *Florida*, as in *South Carolina*, the courts set schedules to accommodate the states' goal of obtaining an expedited decision. In *Texas*, the Court strove "to ensure that Texas had every possible opportunity to show that its own voter ID law could be implemented in time for the November elections." 2012 WL 3743676, at *5. In *Florida,* which involved a direct challenge to the constitutionality of Section 5, the Court bifurcated the case and ordered prompt

discovery on the preclearance issues. *See* 2012 WL 3538298, at *2 n.2, *5. The parties further accelerated the process by agreeing to forgo trial and proceed with the submission of findings of fact and conclusions of law. In all three cases, all intervening defendants were required to file consolidated submissions; in *Florida*, the Court further ordered the intervening defendants and the United States to file consolidated submissions. In each case, these procedural accommodations materially reduced the cost of litigation to the State, and at the expense of the defendants.

Similarly, as in *South Carolina*, the *Texas* and *Florida* courts set reasonable evidentiary standards. The *Texas* panel held that ordinary burdens—such as, for most voters, a one-time trip to a government agency to obtain an ID—do not undermine the "effective exercise of the electoral franchise" guaranteed by the VRA. 2012 WL 3743676, at *13; *see also id.* at *28. The Court in *Florida* refined the standard further to ask whether "the change [in voter access] imposes a burden material enough that it will likely cause some *reasonable* minority voters

not to exercise the franchise." 2012 WL 3538298, at *9. Moreover, the *South Carolina*, *Texas* and *Florida* courts all agreed that covered jurisdictions necessarily have the same anti-fraud interests as all other states. Accordingly, under the Supreme Court's decision in *Crawford*, none of these covered jurisdictions had to show any evidence of past fraud in order to take proactive steps to prevent future electoral misconduct. *See Texas*, 2012 WL 3743676 at *12; *Florida*, 2012 WL 3538298 at *45. Thus, by setting reasonable standards for the state to meet, and by accepting explanations of state motives, the courts eased the evidentiary burden shouldered by states.

It is true that while South Carolina's new voter ID law was approved for future elections, neither Florida's new early voting law nor Texas' ID law were precleared. But this difference is easily explained: unlike Texas and Florida, South Carolina met its burden of proof.

As explained above, South Carolina produced detailed information about how the new law would be implemented. In contrast, the *Texas* Court found

that "everything Texas has submitted as affirmative evidence is unpersuasive, invalid, or both." 2012 WL 3743676, at *32. Moreover, Texas failed to refute evidence that substantial numbers of minority voters lacked acceptable ID, and would be forced to expend money, travel vast distances, and sacrifice wage-earning hours to obtain the required ID. *See id*. at *25-33. Similarly, Florida submitted no credible record evidence about when local officials would open and close the polls for early voting. The *Florida* Court was thus forced to presume that those counties would offer just the minimum number of hours provided by law. 2012 WL 3538298, at *22. Notably, when plans to offer the maximum number of hours in Florida's covered counties were subsequently submitted to the Department of Justice, the Florida law was promptly administratively precleared. Had those plans been presented during the course of the litigation, the *Florida* Court would have approved them. *See id*. at *26-30.

In sum, "[e]ven in a case involving supremely important considerations, litigants who seek prompt equitable relief must show good cause for the request

and conduct themselves accordingly. A state is not exempt from such basic requirements." Apr. 26 Scheduling Order, at 13 (Bates, J., concurring). South Carolina cooperated with the defendants and with the Court, offered credible evidence, and achieved preclearance. Texas and Florida did not.

## CONCLUSION

For the reasons stated above, *Amici* request that the Court affirm the judgment of the Court of Appeals so that the administrative and judicial processes of Section 5 may continue to guide the efforts of South Carolina and other jurisdictions to guard against electoral fraud while protecting minority voters from discriminatory disenfranchisement.

Dated: February 1, 2013

Respectfully submitted,

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**SHELBY COUNTY, ALABAMA,** *Petitioner,*

v.

**ERIC H. HOLDER, JR., ET AL,** *Respondents.*

## CERTIFICATE OF COMPLIANCE

As required by Supreme Court Rule 33.1(h), I certify that the *Brief of Senator C. Bradley Hutto, Senator Gerald Malloy, Senator John L. Scott, Representative Gilda Cobb-Hunter, and The League of Women Voters of South Carolina as Amici Curiae in Support of Respondents* contains 7,063 words, excluding the parts of the documents that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on January 31, 2013.

Mimi M.D. Marziani

Subscribed and sworn to before me this 31st day of January, 2013.
Duly I am authorized under the laws of the State of _____ to administer oaths.

(Notary)

ELI AARON MELTZ
Notary Public, State of New York
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