IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STATE OF SOUTH CAROLINA, Plaintiff, v. UNITED STATES OF AMERICA, *et al*., Defendants, JAMES DUBOSE, *et al.*, Defendant-Intervenors.	Case No. 1:12-cv-203 (CKK, BMK, JDB)

INTERVENORS' RESPONSE TO SOUTH CAROLINA'S AUGUST 31, 2012 FILING

This case has been litigated on the shifting sands of South Carolina's ever-changing interpretations of the voter identification requirements of R54. Now, at the conclusion of trial, South Carolina has pivoted once again, informing the Court, the United States, and Defendant-Intervenors, in its August 31, 2012 filing (Dkt. 263), that the voting changes at issue in this case should be understood as being defined, *inter alia*, by the entirety of Ms. Andino's trial testimony, the representations set forth in the August 31 filing, and any directions this Court might provide to the State as part of an opinion granting preclearance.[1]

This amorphous portrayal of the very subject matter of this litigation, encompassing assertions contrary to those previously made by South Carolina, cannot provide the foundation

[1] Aug. 31, 2012 filing, at 2 ("The State adopts and endorses all of Ms. Andino's interpretations and clarifications of Act R54 [in her testimony], as well as Ms. Andino's intended process to implement the law."); at 4 ("If granted preclearance, the State will implement Act R54 in accordance with Ms. Andino's testimony and any directions from this Court."); at 10 ("if granted preclearance, the State Election Commission's educational and training materials will fully reflect Ms. Andino's testimony, the State's representations in this filing, and any directions from the Court.").

on which this Court may construct its preclearance decision. In particular, South Carolina's description of the "reasonable impediment" provision remains, at this late date, a work in progress: the provision's meaning and method of implementation are still uncertain, with Ms. Andino offering contradictory interpretations in her sworn testimony. Under longstanding Supreme Court precedent, Section 5 requires jurisdictions seeking preclearance to identify *clearly* the voting changes they have "enact[ed] or seek to administer." 42 U.S.C. § 1973c(a). Yet, South Carolina has failed to do that in this case, despite the fact that R54 was enacted more than 17 months ago and the State is proposing to implement the statute in the fast-approaching November 2012 election.

Accordingly, Intervenors respectfully urge this Court to order South Carolina to submit a statement which expressly, within its four corners, provides (1) a precise and complete identification of the voting changes at issue, and (2) an explanation as to how those changes will be implemented. It is insufficient for South Carolina to simply aver that it is "adopt[ing]" the testimony of Ms. Andino, which – despite her good faith – is internally inconsistent on issues at the core of how R54 would operate. The State also should attach to and incorporate in its statement the final education materials that the State Election Commission intends to provide to county election commissions, poll managers, and voters. Once this statement is filed, Intervenors and the United States should be allowed an adequate opportunity to respond in their proposed findings of fact and conclusions of law.[2]

[2] Intervenors have styled this pleading as a "response" since the Court granted leave to Intervenors and the United States to file such a document. However, since Intervenors are requesting certain relief, the pleading also may be understood as being akin to a motion for a more definite statement, and, if the Court so desires, Intervenors will re-file as such. Intervenors also note that, absent clarification of the voting changes by the State, it is their position that the significant racial disparity in ID possession that currently exists would not be mitigated by a "reasonable impediment" provision whose interpretation is so confused that county election

I. The August 31 Filing is Ambiguous and Contradictory

On key issues, Ms. Andino gave contradictory or inconsistent answers in her lengthy testimony. Most significantly, on the central question of what constitutes a "reasonable impediment," she said both that it will be judged by a *subjective* standard and that it will be judged by an *objective* standard, and gave various answers as to who would be authorized to apply whatever standard may control:

Subjective, Applied by Voter	Objective, Applied by Poll Worker, County Board
8/28 Trial Tr. 210:17-23 Q. If there's a question about whether the impediment is reasonable, how would that question be resolved? A. I believe it's up to the voter to determine if they have a reasonable impediment. Q. So does that mean the reasonableness of the impediment is subjective as to the voter? A. Yes. 8/28 Trial Tr. 219:24-220:4 THE WITNESS: I think that it's up to the voter to decide if they have a reason. And we're going to err on the side of the voter and give them as much latitude as possible and, you know, not ask the poll managers to determine if it's valid or not. If the voter believes that they have a reasonable impediment, that should be good enough for the poll manager. 8/28 Trial Tr. 217:7-14 A. I think the reasonability test is on the voter. If they feel like they have a reasonable impediment, then the poll manager should allow them to vote the provisional ballot.	8/28 Trial Tr. 271:14-20 Q. So if I think it's reasonable that I didn't feel like getting one because it's a dumb law, then can I vote? A. I don't think so. Q. Why not? A. It has to be a reasonable impediment that prevented you from getting a photo ID. And if you didn't feel like it, that's a personal choice. 8/28 Trial Tr. 272:8-19 Q. So suppose . . . I walk into the polls, I don't have a photo ID, the manager gives me an affidavit, I put down "I didn't feel like it." Now, you say that vote doesn't get counted. After I write down, "I don't feel like it," what happens so that the vote doesn't get counted? A. I think if somebody said I didn't feel like it, that's not an impediment. Q. Who decides that? A. I don't believe the poll manager would hand them a provisional ballot if they said, no, I just didn't want to get a photograph. 8/28 Trial Tr. 277:5-9 Q. And are you saying that the county boards are not to make the determination as to whether the voter's complied with the law? A. Unless the county has a reason, has grounds to believe that something wasn't out of their control.

commissions, poll managers, and affected voters would not be able to apply it consistently and effectively.

For his part, Rep. Clemmons, the lead sponsor and proponent of the legislation, testified that the impediment will be judged by an objective standard, with the county commissions determining the sufficiency of the claimed impediment.[3]

There also is an irreconcilable contradiction between the State's representation in its August 31 filing and Ms. Andino's testimony concerning R54's "falsity" test, *i.e.*, whether this test applies to the truth or falsity of the "reasonable impediment" submitted by the voter, or only to whether the voter truthfully has identified herself or himself. The State asserts the latter position in its filing, declaring that "Ms. Andino correctly construes that law to mean that provisional ballots will be rejected *only* when a 'board has grounds to believe the [reasonable impediment] affidavit is false,' meaning the voter is not who they say they are." Aug. 31, 2012 filing, at 5 (emphasis in original). However, Ms. Andino said the opposite at trial.[4]

As to whether a "reasonable impediment" (or "religious objection") affidavit must be signed by a notary, the State indicates in its August 31 filing that the affidavit may, instead, be witnessed by a poll manager if a notary is not available. On the other hand, in response to a

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[3] Q. Ultimately it's going to be the responsibility of the 46 separate county boards of registration and election to determine whether any provisional ballot cast pursuant to that exemption would count, correct?
A. They will be called upon to ascertain the reasonableness of the requested exemption and whether or not that affidavit is false.

8/27 Trial Tr. 251:5-11.

[4] HON. COLLEEN KOLLAR-KOTELLY: So the falsity is not the falsity of the identification. It also includes the falsity of the reasonable impediment. Is that what you're saying?
THE WITNESS: I believe the way it's stated is that the ballot should be counted unless evidence is presented to say that the affidavit is incorrect or is false.
HON. COLLEEN KOLLAR-KOTELLY: But is the falsity, does it encompass the reason that was given as a reasonable impediment, or just the other information that I'm so-and-so and I live at this address and this is my signature.
THE WITNESS: No, I believe it includes the reason.

8/28 Trial Tr. 225:2-25.

request for admission propounded by the United States, South Carolina admits "that the affidavit to be completed as part of the reasonable impediment and religious objection provisions of Act R54 *requires* notarization by a notary public." South Carolina Response to United States' Request for Admission No. 19 (US Ex. 196 at JA-US 000435) (emphasis added).

Another important question concerns what evidence notaries would accept to prove an affiant voter's identity.[5] Here, again, the State provides contradictory answers even after the conclusion of trial. In its August 31 filing, the State appears to say that the State (not notaries) will be the one to decide, specifying three methods of identification, including use of the current non-photo voter registration card. Aug. 31, 2012 filing, at 11. But Ms. Andino testified that "[i]t may not" be unreasonable for notaries to refuse to accept a non-photo registration card, given that R54 rejects that form of identification for voting, thus indicating that notaries will make this decision. 8/29 Trial Tr. 21:3. Likewise, in his oral presentation to the Court on August 31, Attorney General Wilson stated that the identification must "satisfy the notary's belief that that person is who they say they are," 8/31/12 Trial Tr. 237: 17-18, again apparently indicating that notaries will decide for themselves what constitutes adequate identification.[6]

The status of the State Election Commission's August 14 "Reasonable Impediment/ Religious Objection Procedures" (JA-SC_0830) also is unclear in light of the State's August 31 filing. On the one hand, the State cites to that document with approval in its filing. Aug. 31,

[5] As the State notes in its filing, "[n]otaries must obtain 'satisfactory evidence' that the affiant is who they claim to be. S.C. Code § 26-3-40; *see also* South Carolina Notary Public Reference Manual at 3, JA-SC_0793." Aug. 31, 2012 filing, at 11.

[6] The Attorney General also provided a list of forms of identification that could be used with notaries, including two ("a Blockbuster Video card" and "a credit card," 8/31/12 trial tr. 237: 18, 20) that were not included in the State's August 31 filing. Accordingly, it is unclear what the State's position is in this regard. What identification notaries may accept also is complicated by the fact that the Notary Manual states that the affiant should be asked for a "photo ID." DI Ex. 2 at JA-DI 01306, 01308-01314.

2012 filing, at 11. On the other hand, there are procedures included in this document which the State now seems to disavow (for example, that affidavits must be notarized), and the State also indicates that the procedures are to be updated yet again. Aug. 31, 2012 filing, at 9 ("The State will ensure that its representations to this Court, through Ms. Andino and the Attorney General, are included in training and education materials."). Thus, it is unclear whether the August 14 "Procedures" or some subset thereof are included in the State's preclearance request.[7]

Finally, it is impossible to say with any degree of assurance what the county election commissions and poll workers will do, given that not only is the State's position rife with contradictions, but the State Election Commission lacks the authority to compel local officials to comply with any state guidance.[8]

II. South Carolina Has Failed to Meet its Obligation to Identify Clearly the Voting Changes for Which It Seeks Preclearance

A. Jurisdictions Must Define with Specificity the Voting Changes for Which Preclearance is Sought

The threshold requirement in every Section 5 review is that the jurisdiction must define the voting changes for which preclearance is requested in an "unambiguous and recordable

[7] For example, it is unclear whether the State is sticking by the specific question that the Procedures direct poll managers to ask when voters present themselves to vote without R54 identification: "The poll manager must ask: . . . '*Is there a reason beyond your control that created an obstacle to you obtaining one of the necessary IDs, or do you have a religious objection to being photographed?*'" Procedures, at 1 (emphasis in original).

[8] In its supplemental response to Defendant Intervenor interrogatory No. 16 (D.I. Ex. 361 at JA-DI 01937), the State "confirm[ed] that all members of every board of registration and elections have authority to interpret and apply the 'reasonable impediment' provision of Section 5 of Act R54," and at trial, Ms. Andino testified that county boards have the authority to interpret the SEC's "reasonable impediment" guidelines, *See* 8/29/12 Trial Tr. at 51:5-11 (Q. What is reckless regard for the truth? A. It's language that was used in the Attorney General opinion, and we're trying not to interpret that, so we did not offer a definition of what reckless regard for the truth is. Q. So you're leaving that up to each individual county board? A. Yes.) Additionally, this conflicts with the State's response to the Court's question regarding who has authority to interpret and apply the law, which entirely omits any mention of the county commissions. ECF No. 263 at 7.

manner." *Allen v. State Board of Elections*, 393 U.S. 544, 571 (1969). *Accord*, *Clark v. Roemer*, 500 U.S. 656, 658 (1991) (covered jurisdictions "must identify [changes] with specificity"); *McCain v. Lybrand*, 465 U.S. 236, 249 (1984) (specificity requirement is dictated by "the structure, purpose, history, and operation of § 5"); 28 C.F.R. §§ 51.27(c) (jurisdiction must "identif[y changes] with specificity").[9]

There are strong policy reasons underlying this requirement. Most fundamentally, "the purposes of the Act would plainly be subverted if the Attorney General [or this Court] could ever be deemed to have approved a voting change when the proposal was neither properly submitted nor in fact evaluated . . . ." *McCain*, 465 U.S. at 249 (internal quotation marks omitted). Section 5 was enacted "after nearly a century of systematic resistance to the Fifteenth Amendment . . . to shift the advantage of time and inertia from the perpetrators of the evil to its victims." *South Carolina v. Katzenbach*, 383 U.S. 301, 328 (1966). This goal would be ill-served by preclearance decisions based on a lack of information, or based on mis-information, as to the voting changes presented for review.[10] In addition, the orderly operation of Section 5 necessitates that each submission clearly define the voting changes at issue since each precleared change becomes the benchmark for judging whether a future enactment is a change requiring preclearance, *Riley v. Kennedy*, 553 U.S. 406, 421 (2008); 28 C.F.R. § 51.2, and, if preclearance is sought, whether the subsequent change is non-retrogressive, *State of Florida v. United States*, no. 11-1428, op. at 33-35 (D.D.C. Aug. 16, 2012); 28 C.F.R. § 51.54(c).

[9] *See also NAACP v. Hampton County*, 470 U.S. 166, 182 (1985); *United States v. Sheffield County Board of Comm'ners*, 435 U.S. 110, 136 (1978).

[10] *See also Georgia v. United States*, 411 U.S. 526, 540 (1973) ("The judgment that the Attorney General must make is a difficult and complex one, and no one would argue that it should be made without adequate information.").

This specificity requirement applies with particular force in judicial actions. This Court is obligated to ensure that preclearance lawsuits, like other federal court litigation, involve "actual, ongoing [Article III] cases or controversies." *Virginia v. Reno*, 117 F. Supp. 2d 46, 51 (2000) (dismissing Section 5 suit as unripe; internal quotation marks omitted), *aff'd mem.*, 531 U.S. 1062 (2001). *See also Texas v. United States*, 523 U.S. 296 (1998) (Section 5 suit dismissed as unripe). If the jurisdiction does not clearly define the voting changes for which preclearance is sought, this Court is reduced to guesswork in divining whether or what "case or controversy" is presented. This imprecision also would severely handicap the Attorney General and intervenors in putting forward their views, which in turn would deprive this Court of the adversarial engagement it relies upon to illuminate the preclearance issues – to the ultimate detriment of minority and all other voters. At bottom, it is the responsibility of the jurisdiction seeking preclearance – as the plaintiff in a Section 5 action – to define for this Court and the defendants the subject matter of the litigation – *i.e.*, the voting changes at issue – most typically through a properly pled Complaint or amended Complaint.[11]

B. South Carolina's August 31 Filing Does Not Satisfy the Specificity Requirement

South Carolina's most recent effort to identify the voting changes at issue – in particular, its effort to define the "reasonable impediment" provision, explain how it will be implemented, and set forth the training and voter education materials to be used in this regard – falls far short of the "unambiguous and recordable" statement required by Section 5.

[11] In the pending *Florida v. United States* litigation, for example, the State of Florida has amended its Complaint three times (Dkt Nos. 39, 52, 54, 143, 147, and has submitted a fourth amended Complaint which is pending (Dkt No. 151), so as to properly reflect the progression in that case as to the voting changes for which preclearance is being requested.

At the outset, even if the trial testimony were not thoroughly inconsistent, asking this Court and defendants to review 169 pages of Ms. Andino's trial testimony plainly does not constitute "identify[ing] with specificity each change that [South Carolina] wishes the [Court] to consider." *Clark v. Roemer*, 500 U.S. at 658. The considerable amount of investigation and guesswork this would entail is precisely what the Supreme Court rejected in *Allen*, *McCain*, and *Clark*. *See also Young v. Fordice*, 520 U.S. 273, 290 (1997) ("Tying preclearance to a particular set of written documents themselves helps to avoid . . . arguments about [the] meaning and intent [of submitted voting changes].")

Furthermore, as explained above, if one does undertake a review of Ms. Andino's testimony and the State's representations in the August 31 filing, it is impossible to discern what the "reasonable impediment" provision means, how it will be explained to and implemented by 46 county election commissions and thousands of poll workers, and how the tens of thousands of affected voters will gain an understanding of what it means and therefore have the opportunity to effectively use it.

Under the Supreme Court's longstanding construction of Section 5 in *Allen*, *McCain*, *Clark*, and other cases, South Carolina must return to this Court with what is truly a final, unambiguous, and specific statement of the voting changes for which South Carolina seeks preclearance.

C. South Carolina's Suggestion That This Court Figure Out How R54 Should Be Implemented Asks This Court To Act Beyond the Provisions of Applicable Law

South Carolina, curiously, has told this Court that, as part of a decision preclearing R54, the Court should feel free to include its own views as to how the statute should be implemented, and South Carolina would then do as the Court suggests. Aug. 31, 2012 filing, at 4 ("If the Court believes any interpretation or implementation procedures would be necessary for preclearance, the

State welcomes such guidance and will implement Act R54 accordingly."). This proposal, however, clearly would have the Court act beyond the authority granted by Section 5, and further underscores the perplexing inability of the State itself to "identify with specificity" the voting changes it enacted in R54 and which it now seeks to administer.

Under Section 5, the review process is initiated only after the jurisdiction itself has decided upon the voting changes it wishes to "enact or seek to administer." 42 U.S.C. § 1973c(a); *see also* 28 C.F.R. § 51.22(a)(1) (generally barring consideration of non-final changes). Accordingly, if this Court concludes (in a particular Section 5 review) that a submitted change does not pass muster, and also concludes that a modified voting provision would or could be precleared, the well-established procedure is for this Court to deny preclearance while, at the same time, outlining how the jurisdiction might modify its change going forward so as to obtain preclearance in the future. *See, e.g.*, *City of Port Arthur v. United States*, 459 U.S. 159, 162, 165 (1982); *City of Richmond v. United States*, 422 U.S. 358, 371 (1975); *cf. Commodity Futures Trading Comm'n* v. *Schor*, 478 U.S. 833, 841 ("[A]lthough this Court will often strain to construe legislation so as to save it against constitutional attack, it must not and will not carry this to the point of perverting the purpose of a statute or judicially rewriting it." (internal citations and quotation marks omitted)).

Indeed, that is precisely what this Court has done in two recent Section 5 decisions. *See Texas v. United States*, no. 12-cv-128, op. at *56 (D.D.C. Aug. 30, 2012) (denying preclearance to Texas' photo ID law, and identifying potential alternative ID provisions that would be more likely to obtain preclearance); *Florida v. United States*, *supra* at *4 (denying preclearance to Florida's early voting changes, and identifying additional changes that likely would render the early voting changes non-retrogressive). South Carolina's citation (Aug. 31, 2012 filing, at 4) to a different section of the *Florida* opinion is inapposite: there, the *Florida* Court granted

preclearance to a change affecting registered voters who move between Florida counties based, in part, on Florida's own unambiguous representation that it would follow the law *as written*. I*d.* at 78-79, 83, 93-95. Here, by contrast, South Carolina is asking that the Court grant preclearance based on a promise that South Carolina will *violate* the as written law. *See* Aug 28 Trial Tr. 283:16-21; 286:2-5.

III. Conclusion

For the foregoing reasons, the State of South Carolina has failed to satisfy the Section 5 threshold requirement that the voting changes be clearly and specifically defined. Accordingly, Intervenors respectfully request that this Court promptly issue an order to remedy this defect, as proposed herein.

Dated: September 5, 2012

Respectfully submitted,

/s/ Garrard R. Beeney

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

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

Susan Dunn
AMERICAN CIVIL LIBERTIES UNION OF

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

Michael A. Cooper *(pro hac vice)*
Garrard R. Beeney *(pro hac vice)*
Peter A. Steciuk *(pro hac vice)*
Taly Dvorkis *(pro hac vice)*
Theodore A.B. McCombs *(pro hac vice)*
Sean A. Camoni *(pro hac vice)*
SULLIVAN & CROMWELL LLP
125 Broad Street
New York, NY 10004-2498

SOUTH CAROLINA
P.O. Box 20998
Charleston, SC 29413
sdunn@aclusouthcarolina.org

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

Attorneys for Defendant-Intervenors James Dubose, et al.

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

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

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

Counsel for Defendant-Intervenors South

Tel: (212) 558-4000
Fax: (212) 291-9007
beeneyg@sullcrom.com

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

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

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

Carolina State Conference of the NAACP, et al.

CERTIFICATE OF SERVICE

I certify that on September 5, 2012, I filed the foregoing Response through the Court's electronic filing system, which will provide notice to all counsel of record.

/s/ Sean August Camoni
Sean August Camoni