IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

DEFENDANT-INTERVENORS' MOTION *IN LIMINE* FOR AN ADVERSE INFERENCE DUE TO PLAINTIFF'S FAILURE TO PRESERVE EVIDENCE

Defendant-Intervenors hereby move for an adverse inference due to the State's failure to preserve documents and other evidence, including the emails of members of the General Assembly from the period during which Act R54 was debated and enacted. Although it was well-known that emails in General Assembly email accounts are automatically deleted after 180 days, the State failed to implement a litigation hold, or otherwise act to prevent the destruction of relevant emails or tapes of proceedings, until mid-April 2012—16 months after debate began over a bill widely expected to lead to litigation, more than nine months after formally requesting preclearance, more than seven months after hiring outside counsel to represent it, and more than two months after filing its complaint in this action. The State's delay has almost certainly caused the destruction of relevant evidence. As a result, Defendant-Intervenors seek an adverse inference from this Court that the destroyed materials would have

contained evidence adverse to the State in attempting to meet its burden to prove "the absence of discriminatory purpose and effect." *See Reno* v. *Bossier Parish School Board*, 520 U.S. 471, 480 (1997).

ARGUMENT

It is well-established that "[a] party has a duty to preserve potentially relevant evidence . . . once [it] anticipates litigation." *Zhi Chen* v. *District of Columbia*, 839 F. Supp. 2d 7, 12 (D.D.C. 2011) (quoting *D'Onofrio* v. *SFX Sports Group, Inc.,* 2010 WL 3324964, at *5 (D.D.C. Aug. 24, 2010)) (internal quotation marks omitted) (omission in original). "'[A] district court may impose issue-related sanctions,' such as an adverse inference instruction, 'whenever a preponderance of the evidence establishes that a party's misconduct has tainted the evidentiary resolution of the issue.'" *Id.* (quoting *Shepherd* v. *Am. Broadcasting Cos.*, 62 F.3d 1469, 1478 (D.C. Cir. 1995)) (alteration in original). To obtain an adverse inference due to the opposing party's failure to preserve evidence, the requesting party must show that:

> (1) the party having control over the evidence had an obligation to preserve it when it was destroyed or altered; (2) the destruction or loss was accompanied by a "culpable state of mind"; and (3) the evidence that was destroyed or altered was "relevant" to the claims or defenses of the party that sought the discovery of the spoliated evidence, to the extent that a reasonable factfinder could conclude that the lost evidence would have supported the claims or defense of the party that sought it.

Id. at 13 (quoting *Mazloum* v. *D.C. Metro. Police Dep't*, 530 F. Supp. 2d 282, 291 (D.D.C. 2008)). The "culpable state of mind" requirement is met by a showing of negligence. *Zhi Chen*, 839 F. Supp. 2d at 13; *see also Mazloum*, 530 F. Supp. 2d at 292-93.

The State conceded in South Carolina's Responses to Defendant-Intervenors' First Set of Interrogatories, dated May 16, 2012, that it did not issue litigation hold notices instructing State officials to preserve relevant documents until mid-April 2012. (South Carolina's Response to Interrogatories at 6 (Ex. A).) Specifically, the State did not issue a

litigation hold notice to the South Carolina General Assembly until April 11, 2012. (*Id.*)[1] The State also conceded that, under the General Assembly's document retention policy, emails in the "Inbox" and "Sent" folders of members of the General Assembly are deleted after 180 days unless they are manually archived. (*Id.* at 7.) The State has further conceded that tapes of House floor debates, as well as committee and subcommittee meetings, were destroyed. (Bartolomucci Aff. (Docket No. 116-1) at ¶¶ 6-11.)[2] By the time the State took its terribly belated steps to ensure the preservation of documents on April 11, 2012, the majority of legislators' emails from before mid-October 2011 had been irretrievably deleted and tapes of debates on photo ID in the House destroyed. Because Act R54 was signed into law on May 18, 2011, and consideration and debate concerning Act R54 occurred in the years and months before its enactment, the State's delay virtually guaranteed that probative evidence was destroyed.

I. The State Had an Obligation To Preserve General Assembly Emails and Tapes

The State had an obligation to preserve the emails of State officials and tapes of debates as soon as it reasonably anticipated litigation. *See Zhi Chen*, 839 F. Supp. 2d at 12; *see also Caudle* v. *District of Columbia*, 804 F. Supp. 2d 32, 53-54 (D.D.C. 2011) (holding that, in employment discrimination action, plaintiffs' written complaints to the Department of Justice

[1] Following this initial litigation hold notice, the State issued further belated litigation hold notices to the South Carolina State Election Commission, the South Carolina Governor's Office, and the South Carolina Attorney General's Office on April 18, 2012, to the South Carolina Department of Motor Vehicles on April 23, 2012, to the South Carolina Legislative Council Office on April 27, 2012, and to the South Carolina Division of State Information Technology on May 4, 2012.

[2] Although the tapes were made by SCETV, South Carolina's public broadcasting network, rather than the General Assembly, the State could have preserved *all* of the tapes. For example, the tapes of House floor debates were transferred from SCETV to the Clerk of the House after the legislative session; the Clerk ultimately destroyed these tapes. (Bartolomucci Aff. (Docket No. 116-1) at ¶ 6.) According to the State, the Clerk of the House disposed of the tapes from the 2010 legislative session by January 2011 and disposed of the tapes from the 2011 session by January 2012. (*Id.* ¶ 7.) The State similarly could have prevented the destruction of the SCETV tapes of House committee and subcommittee meetings by requesting a copy before their foreseeable deletion. (*See id.* ¶ 11.)

"put defendant on notice of potential litigation," triggering "an obligation to preserve evidence that it should have known might be relevant"); *Mazloum*, 530 F. Supp. 2d at 291 (Bates, J.) (holding that "the operative inquiry is whether the . . . defendants should have reasonably foreseen the possibility of litigation when they caused the [surveillance] tape to be over-written," and finding "no difficulty concluding" that defendant was obligated to preserve the surveillance tapes after plaintiff filed a police complaint); *Rice* v. *United States*, 917 F. Supp. 17, 17 (D.D.C. 1996) (holding that, despite lack of pending administrative claim or litigation, defendant had notice of a "potential claim," and was therefore obligated to preserve donated blood sample, where both the sample and the recipient of the blood had tested positive for HIV and recipient's counsel had requested medical records).

It was clear from the outset that litigation over the voter ID bill was likely. During Senate floor debate over the voter ID bill on June 16, 2010, Senator Bradley Hutto (Democrat) stated that the voter ID bill would be challenged under the Voting Rights Act. (SC_00162521 (Ex. B); *see also* SC_00161172 (Ex. C) (Senator Ralph Anderson); SC_00161190 (Ex. D), SC_00161198-99 (Ex. E) (Senator Robert Ford).) Representative Alan Clemmons (Republican), a co-sponsor of H. 3003 (which later became Act R54), testified during his deposition: "[A]ny time that there is an issue involving voting in South Carolina, that there is – which requires precertification by the Justice Department, there always exists the potential of a lawsuit." (Clemmons Dep. Tr. 20:16-23 (Ex. F).) For that reason, Senator Larry Martin (Republican), former Chairman of the Senate Rules Committee and current Chairman of the Senate Judiciary Committee, testified that he anticipated litigation over Act R54 during the subcommittee meetings and throughout the legislative process that began in December of 2010.

(Martin Dep. Tr. 171:8-12 (Ex. G); *see also* Harrison Dep. Tr. 127:10-128:19 (Ex. H) (Representative Harrison (Republican) testified that he expected the bill to end up in litigation).)

At the very least, the State should have reasonably anticipated litigation when Act R54 became law in May 2011 and when the State sought preclearance in June 2011. Governor Haley signed Act R54 into law on May 18, 2011, and the State hired outside counsel and began gathering materials for its request for preclearance soon thereafter. (*See* SC_00112482-83 (Ex. I).) The State filed its request for preclearance on June 28, 2011. (SC_00017813-81 (Ex. J).) On August 30, 2011, the State notified the Department of Justice that it had hired outside counsel to represent it. (SC_00024447 (Ex. K).) Yet, inexcusably, the State waited nine and a half months after formally requesting preclearance and seven and a half months after hiring outside litigation counsel before issuing its litigation hold notices in mid-April 2012—long after the majority of the materials had been destroyed, as discussed above. If a litigation hold notice had properly been issued (at the very least by May 2011 if not months earlier during debate and consideration of the voter ID bill), e-mails going back at least to the beginning of the H. 3003 legislative process in December of 2010 that have been destroyed would have been preserved. While the State has not made clear when tapes actually were destroyed,[3] those also likely would have been preserved had the State issued a timely hold notice.

II. The State Allowed the Destruction of the Emails and Tapes with a Culpable State of Mind

"To justify the issuance of an adverse inference instruction, the spoliation of evidence need not be 'purposeful,' . . . ; negligent spoliation may suffice." *Zhi Chen*, 839 F.

[3] The tapes of House floor debates appear to have been destroyed sometime between July and December 2011. (Bartolomucci Aff. (Docket No. 116-1) at ¶ 7.) The tapes of House committee and subcommittee meetings appear to have been destroyed on a weekly basis, unless staff of the General Assembly requested a copy of the tapes. (*Id.* ¶ 11.)

Supp. 2d at 13; *see also Mazloum*, 530 F. Supp. 2d at 292-93 (holding that "the adverse inference doctrine embraces negligent (in addition to deliberate) destruction of evidence" and explaining that "each party should bear the risk of its own negligence"); *More* v. *Snow,* 480 F. Supp. 2d 257, 275 (D.D.C. 2007) (explaining that an adverse inference may be applied even if deliberate or reckless conduct is not present).

In *Zhi Chen*, the requirement of a culpable state of mind was satisfied where a hotel, much like the circumstances here, allowed the foreseeable overwriting of security footage that would have captured the disputed events on video. 839 F. Supp. 2d at 13-14. The court applied the doctrine of *res ipsa loquitur* because the destruction of the evidence could not have occurred absent the fault of the party in control of the evidence. *Id.* The court explained that the hotel could have either halted the automatic overwriting of the disc or made a copy. *Id.* at 14. Although only ordinary negligence is required for an adverse inference, the court found that the hotel was at least grossly negligent. *Id.*

Here, the deletion of the emails of the General Assembly and debate tapes similarly could not have occurred other than through the culpable failure of the State to preserve the documents. It was widely known that General Assembly emails are automatically purged after 180 days. Senator Martin testified that this policy was "widely publicized." (Martin Dep. Tr. 15:20-21 (Ex. G); *see also* Brannon Dep. Tr. 72:18-23 (Ex. L).) Similarly, the House surely knew of the practice of SCETV to write over tapes of debates. Nonetheless, several legislators testified during their depositions that they did not receive *any* instruction not to delete or destroy documents until well *after* this action had begun. (*See*, *e.g.*, Clemmons Dep. Tr. 32:12-33:5 (Ex. F); Harrison Dep. Tr. 24:6-18 (Ex. H); Lowe Dep. Tr. 7:7-8:2 (Ex. M); Brannon Dep. Tr. 71:5-13 (Ex. L).) Representative Harry "Chip" Limehouse III (Republican) even testified on

June 14, 2012, that he did not recall being asked at *any* time to preserve emails. (Limehouse Dep. Tr. 6:23-7:1 (Ex. N).) And the State has conceded that the Clerk of the House did not inform House members and staff about the obligation to preserve potentially responsive documents until April 12, 2012. (Bartolomucci Aff. (Docket No. 116-1) at ¶ 8.)

The State's consistent pattern of failing to search for and turn over probative evidence further supports a finding of culpability. On June 22, 2012, Defendants and Defendant-Intervenors contacted this Court because their investigation had uncovered recordings of committee and subcommittee meetings for the voter ID legislation that had not been produced by the State despite being responsive to Defendants' and Defendant-Intervenors' document requests. (Order of June 25, 2012 (Docket No. 113) at 1.) A diligent search by the State would have uncovered these same recordings. In fact, Senator Larry Martin testified in his deposition that he "would be surprised" if the tapes had not been produced because all of the hearings are recorded. (Martin Dep. Tr. 168:23-169:5 (Ex. G).) As a result of the revelation of the new evidence, this Court held a telephone conference on June 25, 2012, and indicated that it would extend both fact and expert discovery. (Order of June 25, 2012 (Docket No. 113) at 1.) Within hours after the conclusion of the conference, the State informed the Court that it had discovered 27 *additional* disks of Senate recordings regarding H. 3418, the predecessor to H. 3003, which later became Act R54. (*Id.* at 1-2.) In response, the Court ordered counsel for the State to submit an affidavit "outlining, in exhaustive detail, Plaintiff's search for responsive recordings" (*id.* at 2-3), which the State did through an affidavit of Chistopher Bartolomucci on June 27, 2012 (Bartolomucci Aff. (Docket No. 116-1)).[4] The State's consistent failure to exercise reasonable diligence to search for and produce relevant evidence through the course of this

[4] Since this direction by this Court, the State has continued to make piecemeal productions, including as recently as August 14, 2012.

action has repeatedly prejudiced Defendants and Defendant-Intervenors and supports the conclusion that the State acted with a culpable state of mind in failing to prevent the foreseeable deletion of General Assembly emails and destruction of General Assembly debate tapes.

III. The Deleted Emails and Tapes Were Highly Relevant to the Claims in This Action

The deleted General Assembly emails and debate tapes were highly likely to have been relevant to the claims in this action. That is evident, in part, because other produced e-mails and tapes of other debates demonstrate that both categories of materials contain evidence highly probative of issues related to the State's burden to prove the absence of discriminatory purpose and effect. As a result of the State's inaction in issuing litigation holds and otherwise ensuring the preservation of documents, a majority of the emails sent or received by members of the General Assembly and their staffs prior to mid-October 2011 were deleted and debate tapes were destroyed. (Bartolomucci Aff. (Docket No. 116-1) at ¶¶ 7-11; South Carolina's Response to Interrogatories at 6-7 (Ex. A).)

Since Act R54 became law on May 18, 2011, legislator emails from the time period encompassing the subcommittee and committee proceedings, floor debates, and conference committee negotiations for H. 3003, which became Act R54, are now irretrievable unless they had been manually archived. Senator Martin, for example, testified that it was "very likely" that correspondence related to the voter ID legislation had been destroyed. (Martin Dep. Tr. 16:16-20 (Ex. G).) Senator George "Chip" Campsen III (Republican) likewise testified that he may have purged emails related to the voter ID legislation from his personal email account before being instructed to preserve documents. (Campsen Dep. Tr. 14:17-20 (Ex. O).) The destruction of legislator emails is particularly troublesome in a case, such as this one, where one of the ultimate issues is legislative purpose. Email communications among members of the

General Assembly would be one of the most likely sources to contain probative evidence of legislative purpose.

In any event, "[r]elevance . . . may be inferred if the spoliator is shown to have a sufficiently culpable state of mind." *Zhi Chen*, 839 F. Supp. 2d at 15 (internal quotation marks omitted) (omission in original). In *Zhi Chen*, for example, the court ruled that "[the defendant's] actions in allowing the original security footage to be destroyed without preserving a viable copy were at best grossly negligent," and, "[b]ased on that conclusion, a reasonable jury could also find that the destroyed evidence was adverse [to the defendant]." *Id.* Similarly here, the State's actions in not preventing the foreseeable automatic deletion of General Assembly emails and tapes was grossly negligent, warranting an inference of relevance.

IV. This Court Should Impose an Adverse Inference Against the State

"[I]t is settled beyond all question that at common law the destruction, alteration, or failure to preserve evidence in pending or reasonably foreseeable litigation warrants the finder of fact inferring that the destroyed evidence would have been favorable to the opposing party." *Jones* v. *Hawley*, 255 F.R.D. 51, 52-53 (D.D.C. 2009) (quoting *Ashford* v. *E. Coast Express Eviction*, 2008 WL 4517177, at *2 (D.D.C. Oct. 8, 2008)) (internal quotation marks omitted); *see also Gerlich* v. *U.S. Dep't of Justice*, 828 F. Supp. 2d 284, 297 (D.D.C. 2011) (recognizing an "evidentiary presumption that the destroyed documents contained favorable evidence for the party prejudiced by their destruction" (quoting *Talavera* v. *Shah*, 638 F.3d 303, 311 (D.C. Cir. 2011)) (internal quotation marks omitted)); *Zhi Chen*, 839 F. Supp. 2d at 16 (permitting jury to "infer that the evidence would have been unfavorable to the defendant" where defendant allowed security footage to be foreseeably overwritten); *Rice* v. *United States*, 917 F. Supp. 17, 17

(D.D.C. 1996) (granting adverse inference where defendant consumed entire sample of tainted blood during testing rather than preserving some of the sample for likely litigation).

The State's failure to preserve General Assembly emails and tapes was egregious and warrants an adverse inference. As discussed above, the State anticipated legal proceedings regarding the voter ID legislation throughout the legislative process and formally sought preclearance in June 2011, even going so far as to hire the former Solicitor General of the United States in August 2011. Had the State complied with its obligation to preserve evidence in the summer of 2011, the General Assembly emails from the time period covering the passage of Act R54, as well as tapes of House debates, would have been available in this litigation to provide evidence of the motivations of General Assembly members. Instead, the State did *nothing* while a "well-publicized" document retention policy resulted in the destruction of highly relevant emails and House debate tapes were foreseeably destroyed. The State's failure to comply with its discovery obligations has severely prejudiced Defendant-Intervenors (and Defendants), and the State should bear the cost of its own negligence or gross negligence. Accordingly, Defendant-Intervenors request that this Court order an adverse inference that the destroyed General Assembly emails and tapes would contain evidence adverse to the State's burden of proof, and would support a finding that the State has failed to meet its burden to show the absence of discriminatory purpose and effect.

CONCLUSION

For the foregoing reasons, this Court should grant an adverse inference with respect to the destroyed evidence.

Dated: August 15, 2012

Respectfully submitted,

/s/Garrard R. Beeney_________________

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CERTIFICATE OF SERVICE

I certify that on August 15, 2012, I filed the foregoing Defendant-Intervenors' Motion *in Limine* for an Adverse Inference Due to Plaintiff's Failure To Preserve Evidence with the Court's electronic filing system, which will provide notice to all counsel of record.

Dated: August 15, 2012

/s/___Theodore McCombs___________________
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