IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STATE OF FLORIDA, Plaintiff, v. UNITED STATES OF AMERICA and ERIC H. HOLDER, JR., in his official capacity as Attorney General of the United States, Defendants, v. KENNETH SULLIVAN, *et. al.*, Defendant-Intervenors	Civil No. 1:11-cv-01428-CKK-MG-ESH

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

Plaintiff, the State of Florida, submits the following proposed findings of fact and conclusions of law.

TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

RULES AND REGULATIONS

LEGISLATIVE MATERIALS

GLOSSARY

CL	Proposed Conclusions of Law
DOJ	Department of Justice
FF	Proposed Findings of Fact
HB	House Bill
SB	Senate Bill
TPRO	Third-Party Voter Registration Organization
V	Volume of the Appendix
VRA	Voting Rights Act

PROPOSED FINDINGS OF FACT

I. INTRODUCTION

1. The State is not a covered jurisdiction under Section 4(b) of the Voting Rights Act ("VRA"). V1 117. However, five of the State's 67 counties are covered jurisdictions. V1 117. These five counties are Collier, Hardee, Hendry, Hillsborough, and Monroe Counties (the "Covered Counties"). V1 117.

2. On May 19, 2011, Governor Rick Scott signed into law Committee Substitute for Committee Substitute for House Bill No. 1355 (the "Act"), an omnibus bill revising the Florida Election Code. V1 117-18. The Act amended 80 provisions of the Election Code and addressed a wide range of subjects. V1 118, 130; V16 8978-93.

3. The Department of Justice has administratively precleared 77 of the 80 provisions of the Florida Election Code that the Act amended. V1 118; V5 2592.

4. The State now seeks judicial preclearance for the Act's changes to three provisions (the "Three Voting Changes") regarding: (1) third-party voter registration organizations, Fla. Stat. § 97.0575, Fla. Admin. Code. R. 1S-2.042 ("Third Party Changes"); (2) inter-county address changes, *id*. § 101.045 ("Inter-County Changes"); and (3) early voting, *id*. § 101.657 ("Early Voting Changes"). *See* V1 21-23, 24-27.

II. OVERVIEW OF FLORIDA ELECTION LAW

5. The Florida Secretary of State is Florida's chief election officer and the head of the Department of State. Fla. Stat. §§ 20.10(1), 97.012. The Division of Elections is within the Department of State. *Id*. § 20.10(2). The Secretary of State is charged with, among other things, interpreting and implementing the requirements of the Election

Code, maintaining all voter registration files, and providing direction and opinions to the 67 supervisors of elections on the performance of their duties. *Id*. § 97.012.

6. The supervisors of elections are charged with, among other things, verifying, entering, and updating voter registration information, *id.* § 98.015, transmitting each voter's updated voting history to the Department of State after the general election, *id*. § 98.0981, training poll workers, *id*. § 102.014, and conducting elections within their respective counties, *id*. §§ 101.001-102.171; *see* V5 2597 ¶¶ 18-23, 2598 ¶¶ 28, 37.

7. The State regularly revises the Election Code to ensure that the State conducts fair, transparent, and accurate elections. For example, following the 2000 Presidential Election, the State adopted extensive changes to its Election Code to correct past and potential problems. Fla. Laws ch. 2001-40. Similarly, in 2005, the State adopted numerous changes to its process of verifying voter eligibility, registering voters, and updating voter registration records. Fla. Laws chs. 2005-278, 2005-277.

8. Since 2000, the State has revised the Election Code in all but two years. Fla. Laws chs. 2000-249, 2000-361, 2001-40, 2002-17, 2002-197, 2002-214, 2002-281, 2003-415, 2004-252, 2005-278, 2005-277, 2005-286, 2005-360, 2007-30, 2008-95, 2010-167, 2011-40, 2011-148; *see also* V12 6291; V13 7123.

III. THE 2011 ACT

9. The Act was the product of two similar bills revising the Election Code (HB 1355 and SB 2086) that moved through the Florida House and Senate over a period of more than two months. V1 119-22.

A. House Bill 1355

10. HB 1355 was introduced on March 7, 2011. V1 119.

11. On April 1, 2011, Representative Baxley explained a proposed committee substitute to HB 1355 at the House Government Operations Subcommittee. V1 383-88. The committee substitute introduced most of the relevant Third Party and Inter-County Changes, but did not address early voting. V1 484-91, 526-27. After discussing the committee substitute and debating the Bill, V1 389-417, 445-64, and receiving public testimony from a supervisor of elections and representatives of multiple third-party voter registration organizations ("TPROs"), V1 417-45, the proposed committee substitute was reported favorably by a 9-4 vote, V1 464-65.

12. On April 14, 2011, Representative Baxley offered a strike-all amendment to HB 1355 at the House State Affairs Committee. V1 120; V2 683-90. The amendment contained most of the relevant Third Party and Inter-County Changes, but did not address early voting. V2 807-12, 848-50. After discussing the committee substitute and debating the Bill, V2 692-740, 771-86, and receiving public testimony from a supervisor of elections and representatives of multiple TPROs, V2 740-71, the committee approved the amendment by a vote of 12 to 6. V2 786-88.

13. On April 20, 2011, the House debated HB 1355 and voted on proposed amendments, adopting eleven amendments and rejecting twenty-eight amendments. V1 120; V3 1149-1333. On April 21, 2011, the House again debated HB 1355 and approved the Bill by a vote of 79-37. V1 120; V3 1338-1419. This version of HB 1355 contained

most of the relevant Third Party and Inter-County Changes, but did not address early voting. V3 1445-50, 1485-89.

B. Senate Bill 2086

14. SB 2086 was introduced on March 29, 2011. V1 119.

15. On April 4, 2011, the Senate Rules Subcommittee on Ethics and Election debated the Bill, heard public testimony, and approved a committee substitute by a 7-5 vote. V1 605-29.

16. On April 15, 2011, Senator Thrasher offered a strike-all amendment to SB 2086 at the Senate Rules Committee. V2 942-50. The amendment contained most of the Third Party and Inter-County Changes. V2 1024-30, 1066-67. With regard to early voting, the amendment changed the Election Code to provide early voting hours for 6 days for 8 hours each day. V2 1081-83. After discussing and debating the amendment, V2 950-64, 999-1001, and receiving public testimony from two supervisors of elections and representatives of multiple TPROs, V2 964-99, the committee approved the committee substitute by a vote of 10-2, V2 1001-02.

17. On April 26, 2011, Senator Diaz de la Portilla explained a strike-all amendment at the Senate Budget Committee. V3 1586-92. The amendment contained the Third Party and Inter-County Changes. V4 1647-52, 1689-92. With regard to early voting, the amendment changed the prior law to provide early voting hours for 6 days for 8 hours each day. V4 1706-08. During this hearing, Senators Diaz de la Portilla and Gaetz notified the committee that they were developing and would soon offer an amendment that would shorten the early voting period while expanding the hours available on each

day. V3 1596-97, 1601, 1608-10, 1612-13, 1622-23, 1635-36. After discussing and debating the strike-all amendment, V3 1592-1638, and receiving public testimony, V3 1638-40, the committee reported the bill favorably by a vote of 13-7, V3 1640-42.

C. Final Passage

18. On May 4, 2011, the Senate adopted an amendment substituting HB 1355 for SB 2086. V1 121. The Senate debated the Bill and adopted an amendment by Senators Diaz de la Portilla and Gaetz that shortened the early voting period to 8 days while expanding the maximum hours available each day from 8 to 12. V4 1861-74.

19. On May 5, 2011, the Senate debated the Bill and approved HB 1355 by a vote of 25 to 13. V1 121; V4 2213. This version of HB 1355 contained the final versions of the Three Voting Changes. V5 2266-71, 2309-11, 2330-32. Of the eight Senators representing the Covered Counties, six voted for the Bill, one voted against the Bill, and one did not vote. V16 8947, 8951-52.

20. On May 5, 2011, the House received the Senate's version of HB 1355, debated the Bill, held votes on proposed amendments (rejecting sixteen amendments), and approved the Bill by a vote of 77 to 38. V1 121-22; V5 2422-550. Of the eighteen Representatives representing the Covered Counties, fifteen voted for the Bill and three voted against the Bill. V16 8949, 8954-57.

21. On May 19, 2011, HB 1355 was signed into law. V1 122.

IV. POST-ACT REGULATIONS

22. After the Act was signed into law, the Department of State adopted administrative rules implementing the Third Party Changes. V5 2596, 2841-54. The Department notified

the public of its proposed rules, received written comments, and modified its rules to address concerns that were raised. V5 2596.

23. The Secretary of State issued Directives to the supervisors of elections instructing them on the proper procedures for counting provisional ballots with respect to the Inter-County Changes. V5 2595-97; 2764.

V. THE THREE VOTING CHANGES WERE NOT MADE FOR ANY DISCRIMINATORY PURPOSE.

A. The Three Voting Changes Were Made For Legitimate Purposes.

1. Third Party Changes

a. *History Of The Prior Law*

24. Prior to 1995, only state officials and individuals deputized by the supervisors of elections as registrars were permitted to collect voter registration applications. Fla. Stat. § 98.271 (1993). To register people to vote, these volunteer deputy registrars were required to (1) complete a two-hour training session, (2) reside or be employed in the same county in which the appointment was sought, and (3) sign a sworn statement acknowledging penalties for false swearing. *Id*.; Fla. Admin. Code. R. 1S-2.014 (1993).

25. In 1994, the State amended the Election Code to allow TPROs to solicit voter registration forms and then submit them to the State. Fla. Laws ch. 1994-224, § 42. In 2005 and 2007, the State passed laws that attempted to ensure that TPROs timely submitted registrations they collected. Fla. Laws chs. 2005-277, § 7; 2007-30, § 2.

b. *Problems With The Prior Law*

26. Under the prior law, TPROs were required to register with the State and report when and where they held voter registration drives, Fla. Stat. § 97.0575(1) (2010), but

faced no penalties for failing to do so, *id.* § 97.0575(2). Few TPROs registered with the State, V15 8669; *e.g.*, V10 5290-95.

27. Under the prior law, TPROs were not required to track voter registration forms they collected or solicited. Fla. Stat. § 97.0575. There was thus no way to determine from the face of a voter registration application whether it had been submitted by a TPRO at all, let alone by a particular TPRO. V6 3244-45, 3470-71; V7 3673, 3991-92; V15 8147-48. Consequently, although the Division of Elections was charged with detecting and preventing fraud and untimely submissions from TPROs, Fla. Stat. § 97.0575(3)-(8), such enforcement, or even detection, was almost impossible. V4 2256; V5 2512; V6 3470-71; V7 3549-50; V8 4424, 4472-74; V15 8147-48, 8669. For example, the State had absolutely no ability to detect a TPRO withholding registrations of voters of particular political parties (or submitting them after the book-closing deadline), unless the TPRO self-reported its violation. V4 2256; V15 8669; V16 8860-61.

c. *The Third Party Changes*

28. The Third Party Changes addressed these problems by establishing a system that could effectively regulate TPROs. The Changes require, among other things, that: (1) TPROs ensure that their unique identifying number is on every voter registration form they submit and account for all registration forms the TPRO gives to or collects from its registration agents, Fla. Stat. § 97.0575(2),(5), Fla. Admin. Code. R. 1S-2.042(4)(c), (5)(a); (2) the Division of Elections maintain a database of all TPROs and the voter registration forms assigned to them, *id*. § 97.0575(2); and (3) TPROs submit completed voter registration applications they collect to a supervisor of elections or the Division of

Elections within 48 hours (or on the next business day, if the office is closed), *id*. § 97.0575(3)(a), Fla. Admin. Code. R. 1S-2.042(7).

29. The Third Party Changes thus prevent and deter fraud and make TPROs more accountable. V7 3986; V8 4425, 4471-72; V12 6871; V15 8461-64, 8690-93. They also ensure that registrations are returned before book closing deadlines so voters are eligible to vote in the upcoming election. V6 3252-53, 3375-76, 3386; V8 4427; V12 6871; Fla. Stat. §§ 97.053(2), 97.055(1)(a)-(b).

d. *Legislators Enacted The Third Party Changes To Address Problems With The Prior Law*.

30. Legislators sought to create a system for detecting and deterring TPRO fraud, V2 688, 947-48, 984-85; V3 1167-68, 1230; 1382-83, 1586-87; V4 2255-57, and for holding TPROs accountable for the voter registrations they collect, V1 386-87; V2 723-24; V3 1149-50, 1161, 1230, 1258, 1338, 1383, 1418-19; V4 1822-24, 2215, 2255-57.

31. Legislators believed that by requiring TPROs to return voter registration application within 48 hours, the Bill would deter fraud, V2 785-86; V3 1161; V4 2215, and would ensure that TPROs turned in voter registrations before the book-closing deadline, V4 1830, 2256-57.

2. Inter-County Changes

a. *History Of The Prior Law*

32. Before 2006, only voters who moved within the county in which they were registered were permitted to vote at their new precinct. Fla. Stat. § 101.045(2)(a) (2005). Voters who moved to another county after the book-closing deadline could only vote

absentee in their former county and, even then, could only vote in a few national and statewide elections. *Id*. § 101.663 (2005); *see also* Fla. Laws ch. 1969-280, § 11; Fla. Laws ch. 1969-136, § 1.

33. In 2005, the State amended the Election Code to allow voters to make an inter-county address change at the polls and cast a regular ballot in any election. Fla. Laws ch. 2005-278, §§ 31, 40. To do so, such voters would complete a change of address affidavit or a voter registration application at the polling place and, after their eligibility to vote was verified, they could cast a regular ballot. Fla. Stat. § 101.045(2)(a),(c)-(d) (2006).

b. *Problems With The Prior Law*

34. Under the prior law, supervisors of elections could not determine whether someone who sought to vote in their county had already voted in another county until after the election and, thus, after both ballots were counted. V6 3258, 3454-56; V7 3809, 3822-23, 3981-83; V9 5148, 5190; V15 8672-73. This gap in the system allowed for negligent or fraudulent double voting. *Id*.

c. *The Inter-County Changes*

35. The Inter-County Changes addressed this problem by requiring that a person who moves from one county to another and has not notified the State of the address change before arriving at the polling place cast a provisional ballot. Fla. Stat. § 101.045(2)(b); V12 6889-90. The provisional ballot "shall be counted unless the canvassing board determines by a preponderance of the evidence that the person was not entitled to vote." *Id*. § 101.048(2)(a); *see* FF ¶¶ 67-70.

d. *Legislators Enacted The Inter-County Changes To Address Problems With The Prior Law*.

36. Legislators sought to prevent people from fraudulently or negligently voting in more than one county, V1 463; V3 1155-56, 1351-52, 1386, 1389, 1403-06, 1414-15, 1417-18, and to preserve the integrity of the system by ensuring that the State could finalize its books before Election Day, V2 713-16, 722, 738-39, 948; V3 1196-97, 1204; V5 2548.

37. Legislators believed that the Bill protected the right to vote of those moving inter-county because provisional ballots cast by eligible voters "shall be counted." V2 715-16, 783; V3 1156, 1350, 1353-54, 1385-87, 1401-04, 1417-18; V5 2530, 2548.

3. Early Voting Changes

a. *History Of The Prior Law*

38. Before 2002, if a voter wanted to vote on any day other than Election Day, he or she needed to provide the State with an excuse (e.g., religion or being a poll-worker assigned to a different precinct). Fla. Stat. § 101.64(1)(1)-(7) (2001).

39. In 2001, the State amended the Election Code to allow voters to vote absentee without an excuse (either through "in-person absentee voting" or absentee voting by mail). Fla. Laws ch. 2001-40, §§ 55, 53.

40. In 2004, the State amended the Election Code to allow in-person early voting. Fla. Laws ch. 2004-252, § 13. Early voting was required for "at least" 8 hours each weekday and for an aggregate of 8 hours each weekend. Fla. Stat. § 101.657(1)(b) (2005). It lasted

15 days (beginning on the 15th day before an election and ending on the day before that election). *Id*.

41. In 2005, the State shortened the early voting period to 14 days (beginning on the 15th day before an election and ending on the 2nd day before that election) and limited the available hours to exactly 8 hours a day on the weekdays and 8 hours in the aggregate over each weekend. Fla. Laws ch. 2005-277, § 45. This change was precleared by the Attorney General on September 6, 2005. V16 9002-03.

b. *Problems With The Prior Law*

42. The prior law imposed an inflexible early voting schedule on Florida counties. On the one hand, it limited convenient, non-working hours available for early voting. Fla. Stat. § 101.657(1)(d) (2010); V6 3447-48; V7 3605; V12 6890-92; V13 7215-17. On the other hand, it mandated 8 hours of early voting each day for as long as 2 weeks before an election. Fla. Stat. § 101.657(1)(d). For many small and rural counties, and for low-turnout primary elections, this was an inefficient use of resources, V6 3197-98, 3445-46; V9 5144-45; V12 6890-92; V13 7215-17, as the second week of early voting is more popular with voters. V6 3345-46, 3406; V7 3526, 3623, 3917-18; V9 5061; V13 7166.

c. *The Early Voting Changes*

43. The Early Voting Changes addressed these problems by giving supervisors of elections greater flexibility to offer convenient, non-working hours of early voting. Under the Early Voting Changes, each county must offer between 6 and 12 hours of early voting each day over a period of 8 days. *See* Fla. Stat. § 101.657(1)(d). This allows counties to offer the same maximum number of early voting hours (96 hours), but with more hours

on each day and during a period closer to the election. It also allows counties to offer fewer total hours of early voting (although never fewer than six hours on each day) if the supervisor of elections for a county determines that 12 hours a day of early voting is not necessary to accommodate the anticipated early voting turnout in his or her community for any particular election. *Id*.; V6 3412-13, 3448; V7 3851-52; V12 6383-84.

d. *Legislators Enacted The Early Voting Changes To Address Problems With The Prior Law*.

44. Legislators sought to increase early voting by allowing counties to offer more convenient morning, night, and weekend hours of early voting, V3 1608-10, 1612-14, 1635-36; V4 1866-67, 2258, and, at the same time, to give the supervisors of elections flexibility in tailoring early voting for each county's needs, V2 729, 959-60; V3 1297; V4 1863-66, 2214, 2257-59; V5 2472, 2517-18.

45. Legislators believed it would be a better use of resources to provide the same total number of hours, but for longer hours on days closer to the election, as that is when most of the early voting occurs. V1 454-55; V2 956-57, 962-64; V3 1595-97, 1601-02, 1608-10, 1612-13; V4 2257-59.

46. While mandating additional weekend hours (from 16 hours of weekend early voting under the prior law to 18-36 hours of weekend early voting under the Early Voting Changes), legislators also wanted to ensure that early voting would not be required on the last Sunday before Election Day, because the supervisors of elections need this day to prepare for Election Day on Tuesday. V4 1870; V6 3194-95, 3294-95, 3415-16; V9 5062-63; V15 8690; V16 9060 n.17; *cf.* V16 9018.

B. No Concerted Claims Of Discrimination On The Basis Of Race Or Ethnicity Were Raised During The Legislative Process.

47. The legislative record contains testimony and comments from many of the Intervenors in this case: (1) Representative Cruz, V3 1194-95; (2) Senator Joyner, V3 1600, 1604-06, 1617, 1620-21, 1636-38; V4 1842-43, 1846-49, 1859-61, 1865, 1879-81, 2234-41; (3) Supervisor Sancho, V1 436-41; V2 974-79; (4) League of Women Voters, V1 442-45; V2 765-69, 993-95; and (5) the Florida AFL-CIO, V1 417; V2 745-50.

48. During the legislative process, *none* of these Intervenors offered a single statement claiming that the Act (or any of the Three Voting Changes) was motivated by or would have the effect of discriminating on the basis of race or ethnicity. *See* FF ¶ 47. Instead, the record contains only a few offhand, generalized claims about the Act's effect on racial minorities. V2 761; V3 1374-75, 1407.

49. To the extent legislators (or those offering testimony or providing comment) were concerned with the effect of the Bill on groups of voters, they worried about: (1) young people and college students, V2 712, 741, 772; V3 1155, 1194-95, 1206, 1281-82, 1340, 1345, 1350, 1409; V4 1824, 1846-49, 1859-61, 2222, 2227, 2246, 2254; V5 2432-43, 2447-49, 2463-65, 2524-25, 2529, 2533-34; (2) military personnel, V2 711-12, 721, 772; V3 1281-82, 1594; V4 1846-48, 1864, 2227; V5 2438-39, 2449, 2507, 2529; (3) and the elderly, V4 1824, 2230; V5 2483, 2485-87.

50. Those involved in the legislative process were not confronted with any concerted allegation that the Three Voting Changes were motivated by a discriminatory purpose. V9 4785, 4955-56, 5185; V12 6895-96.

51. There is no evidence that any Representative or Senator who represented the Covered Counties was motivated by a discriminatory purpose. FF ¶¶ 19, 20, 48.

C. The Legislative Process Was Fair And Provided Ample Opportunity For All To Express Their Views And Amend The Bill.

52. The sponsors of the Bill frequently expressed their willingness to work with all parties to improve the Bill, V1 388, 404, 407, 458-59; V2 683-84, 999-1001; *see also* V2 784-85, and, in fact, reached legislative compromises on key provisions, V9 4689-91.

53. Legislators had ample opportunities during the committee hearings and on the floor to debate the Bill and submit amendments. FF ¶¶ 11-13, 16-20; V2 979, 986; V4 2235. And the Bill's sponsors were repeatedly thanked by legislators and witnesses for providing an open and fair legislative process and for listening to and addressing their concerns. V1 417-18; V2 751, 773-74, 780-81; V3 1365-66, 1368-72, 1384; *see also* V2 687; V3 1149-50, 1153, 1182-83, 1342; V4 1862-64; V5 2506-07; V13 6932-34.

VI. THE THREE VOTING CHANGES WILL HAVE NO DISCRIMINATORY EFFECTS ON FLORIDA VOTERS

A. The Third Party Changes Will Have No Discriminatory Effects

1. The Third Party Changes Will Not Prevent Any Person From Registering To Vote Or Casting A Ballot

54. Floridians may register to vote at: (1) the office of any supervisor of elections; (2) the Division of Elections; (3) Florida driver license offices or tax collector's offices; (4) any office of the Department of Highway Safety and Motor Vehicles; (5) any public library; (6) any office that provides public assistance; (7) any office that serves persons with disabilities; (8) any center for independent living; and (9) any armed forces recruitment office. Fla. Stat. §§ 97.021(41), 97.053(1), 97.057(1).

55. If a person wishes to register to vote from home, he or she may obtain a voter registration application online or, upon request, by mail from the Division of Elections or any supervisor of elections. Fla. Stat. § 97.052(1). He or she can then mail or hand-deliver the application to any of the nine places listed above. *Id*. § 97.053(1). If an individual receives and completes a voter registration application from a TPRO, that TPRO can return the registration to any supervisor of elections or the Division of Elections. *Id*. § 97.053(3)(a).

56. Additionally, there are a variety of state programs designed to encourage people to register to vote: (1) voter registration applications are available at each location where hunting, fishing, or trapping licenses or permits are sold, Fla. Stat. § 379.352(8); (2) many educational institutions must give their students the opportunity to register to vote or to update their voter registration record on campus at least once a year, and they are encouraged to provide voter registration services at other times and places, *id*. §§ 97.021(32), 97.0583; and (3) each supervisor of elections must conduct voter registration programs in public high schools and on each college campus in the county, Fla. Admin. Code. R. 1S-2.033(3).

57. Accordingly, the Third Party Changes could only affect those individuals who, in the absence of TPROs, will choose not to register to vote through any of the numerous options provided by the State. Very few people fall into this category. V6 3376; V7 3990-91; V9 5130, 5152. In each of the Covered Counties, there is little or no TPRO activity. V6 3215-16, 3378; V7 3515-17, 3521, 3657, 3939, 3990-91.

2. The Third Party Changes Will Not Prevent Third Party Registration Organizations From Registering People To Vote.

58. At base, the Third Party Changes institute: (1) a new system of registration and accounting requirements for TPROs; and (2) a requirement that TPROs return completed voter registration applications to a supervisor of elections or the Division of Elections within 48 hours after they are collected. FF ¶ 28; *see* V1 9-13. There is no evidence that TPROs will be unable to comply with either of these minimal regulations.

59. First, TPROs will be able to comply with the new registration and accounting requirements; dozens of TPROs across the State have already complied. V15 8457-58, 8504-532, 8689, 8695-706.

60. Second, TPROs are already complying with the 48 hour rule across the State, V6 3371, and past experience demonstrates that TPROs are fully capable of complying. V1 432; V6 3232-33; V7 3943; V12 6892-93; V13 6994-95.

61. If a TPRO violates any of the Third Party Changes, it can receive minor fines, which cannot exceed more than $1,000 in the aggregate per year for the TPRO and its affiliate organizations. Fla. Stat. § 97.0575(3). The TPRO is subject to a potential civil enforcement action only in limited situations, such as where the TPRO has caused significant voter harm or repeatedly violated the law. *Id*. § 97.0575(4); V15 8153-55.

62. TPROs admit, as they must, that they could pay this minor fine and continue to engage in voter registration activities. V16 8871-73; *see* V16 8798-801; *see also* V6 3472; V7 3548-49; V13 7038-42.

3. The Third Party Changes Will Have No Discriminatory Effect On Account Of Race, Color, Or Membership In A Language Minority.

63. The Third Party Changes will not decrease voter registration or turnout because TPROs can and will still register people to vote and, even if they could not, there are numerous and easy additional ways to register to vote. FF ¶¶ 54-57. Because the Third Party Changes will not decrease registration or turnout, the changes necessarily will have no discriminatory effects. *See* V7 3993; V12 6354-56.

64. Even if voter registrations did decrease because of the Third Party Changes, it would only be because certain voters were choosing not to register through the myriad additional avenues for registering to vote. FF ¶¶ 54-57. There is no evidence that minorities are more likely to make this choice than Whites.

B. The Inter-County Changes Will Have No Discriminatory Effects.

1. The Inter-County Changes Will Not Prevent Anyone From Registering To Vote Or Casting A Ballot.

65. Under prior and current Florida law, a person may vote only in the precinct in which the person has his or her legal residence and is registered to vote. Fla. Stat. § 101.045(1). When a registered voter changes his or her residence address, Florida law requires that individual to notify the supervisor of elections of his or her new address. *Id*. § 97.1031(1). The voter may do so by (1) contacting the supervisor of elections via telephone or electronic means or (2) submitting the change on a voter registration application or other signed written notice. *Id*. § 97.1031(1)(b); V9 5074. A person who has changed his or her legal residence using any of these methods before arriving at the polling place may cast a regular ballot. *Id*. § 101.045(1)(b).

66. The Inter-County Changes thus can only affect those few individuals who move to another county, fail to notify the supervisor of elections of the address change, and then seek to cast a ballot at the polls. FF ¶ 35; V1 16-19. Only these individuals must cast a provisional ballot. Fla. Stat. § 101.045(2)(b).

2. Because Provisional Ballots "Shall Be Counted," The Inter-County Changes Will Not Prevent Anyone From Casting A Ballot And Having It Counted

67. Under the prior law, a person who moved to another county, had not notified the supervisor of elections of the address change, and sought to cast a ballot would vote through a three step process. First, the voter would submit a change of address affidavit or a new voter registration, which required the voter, under penalty of false swearing, to: (1) identify the former address of residence, including county and precinct, in which he or she was registered to vote; (2) affirm that he or she had not already voted in the election; (3) provide his or her current address of residence; and (4) affirm that he or she was eligible to vote. Fla. Stat. § 101.045(2)(a),(c) (2010). Second, the voter would fill out a ballot. *Id*. § 101.045(2)(a). Third, the voter would feed the ballot into a tabulating machine, and the vote would be counted.

68. Under the Inter-County Changes, a person who moves to another county, has not notified the supervisor of elections of the address change, and seeks to cast a ballot (and does not fall into the military exemption) will vote through a similar three step process. First, the voter submits a provisional ballot voter's certificate and affirmation, which requires the voter, under penalty of false swearing, to: (1) identify the former address of residence, including county and precinct, in which he or she was registered to vote; (2)

affirm that he or she has not already voted in the election; (3) provide his or her current address of residence; and (4) affirm that he or she is eligible to vote. *Id*. §§ 101.045(2)(b), 101.048(1) (2011). Second, the voter fills out a ballot. *Id*. § 101.045(2)(b). Third, the voter places that ballot in a provisional ballot envelope, which is deposited in a ballot box and remains sealed until the county canvassing board reviews the ballot. *Id*. § 101.048(1)-(2).

69. A voter's provisional ballot "shall be counted unless the canvassing board determines by a preponderance of the evidence that the person was not entitled to vote." Fla. Stat. § 101.048(2)(a) (2011). A provisional ballot will not be counted only in three limited circumstances: "[1] if the voter was not registered; [2] the voter voted in a precinct other than the one that corresponds to his or her new address . . . ; or [3] if evidence was available before the board that either the voter had already voted or that the voter was committing fraud." V5 2765.

70. There is no impediment to the accurate and complete counting of provisional ballots. V9 5042-45; V15 8673. If there are more provisional ballots than usual, the canvassing board will simply work longer hours to canvass the additional ballots. V9 5044-45. And in the unlikely event that the canvassing board is unable to examine all the provisional ballots, the canvassing board *shall count* the provisional ballots, as the State has the burden of proof to disprove the voter's affirmation that he or she is eligible to vote. V6 3207-08, 3270-71; V8 4467-68; V9 5045-46; V11 5793-94; V13 7099-101; V15 8673.

71. The Inter-County Changes impose no new burdens on voters. Completing a provisional ballot takes approximately the same amount of time and requires the same information as was required for completing a change of address affidavit under the prior law. V6 3260-62, 3419, 3452-53; V7 3830, 3938, 3972, 3982; V15 8673, 8687.

3. The Inter-County Changes Will Affect Very Few People.

72. Very few people in the Covered Counties are moving to another county, failing to notify their supervisor of elections, and then seeking to cast a ballot at the polls. V6 3356; V7 3510, 3785, 3927-28, 3937-38; *see also* FF ¶¶ 75-76, 80-82. This number is even smaller when members of the military and their families are excluded. Fla. Stat. 101.045(2)(b).

73. During discovery, the parties attempted to obtain the change-of-address affidavits submitted by voters under the prior law in the Covered Counties. These affidavits would show exactly which voters moved from one county to another, failed to notify the State, and then cast a ballot at the polls. The parties, however, received these affidavits only from Collier County and were informed by Hardee and Hendry counties that they had no affidavits in two elections in 2008 and 2010. *See* V16 9069-70.

74. At the close of discovery, the parties received the results of a database query which tabulated those individuals: (1) whose address was changed in the statewide voter registration database during the early voting period or shortly after Election Day; and (2) who voted early in-person or on Election Day during that time period (hereinafter "Inter-County Voters"). V16 8895. Because this database query captures individuals who may not have changed their address at the polling place (e.g., they changed their address

through the mail, in-person at the supervisor of elections office, or after Election Day), its results are necessarily higher than the actual number of those affected by the Inter-County Changes. *See* V16 8895, 9035.

75. After discovery closed, Professor Stewart submitted a supplemental report analyzing this data. V16 8884. Table 1 plots the total number of Inter-County Voters in the Covered Counties; total in-person turnout in the Covered Counties; and the percentage of total in-person votes that were Inter-County Voters. V16 8908.[1]

Table 1
Inter-County Voters in Covered Counties

Election	Inter-County Voters	Total Turnout	Percent of Total Turnout
2008 Pres Primary*	94	90,217	0.10%
2008 Primary	96	82,681	0.12%
2008 General	2240	532,649	0.42%
2010 Primary	137	135,588	0.10%
2010 General	613	356,011	0.17%
Elections Combined	3180	1,197,146	0.27%

*This election does not contain data from Hillsborough County. V16 8896, 8908-09.

76. In 4 of the 5 elections, fewer than 2 in 1000 individuals were Inter-County Voters in the Covered Counties; in all 5 elections, fewer than 5 in 1000 individuals were Inter-County Voters in the Covered Counties; and on average fewer than 3 in 1000 individuals were Inter-County Voters in the Covered Counties. FF ¶ 75.

4. The Inter-County Changes Will Have No Discriminatory Effect On Account Of Race, Color, Or Membership In A Language Minority.

[1] "Inter-County Voters" is the total number of inter-county movers on election day and during early voting combined. V16 8908. "Total Turnout" is the total number of voters who voted on election day (the sum of "voters in this mode" with "inter-county movers in this mode"). V16 8898 ¶ 35 n.18, 8908.

77. Because provisional ballots cast by eligible voters "shall be counted," the Inter-County Changes will have no effect on voter turnout and, thus, no discriminatory effects. Even if the Inter-County Changes inexplicably caused a decline in turnout, this decline would only occur because certain voters were choosing not to notify the supervisor of elections of their address change before attempting to vote at the polling place and choosing not to cast a provisional ballot. *See* FF ¶¶ 65, 68. There is no evidence that minorities are more likely to make this choice than Whites.

78. Additionally, even if the changes lowered turnout, they would affect more Whites than minorities. Table 2 shows the number and percentage of Inter-County Voters based on race/ethnicity.[2]

Table 2
Inter-County Voters by Race/Ethnicity in the Covered Counties

Election	White	African-American	Hispanic	Total
2008 Pres Primary*	71 (75.5%)	5 (5.3%)	14 (14.9%)	94
2008 Primary	62 (64.6%)	21 (21.9%)	9 (9.4%)	96
2008 General	1317 (58.8%)	432 (19.3%)	325 (14.5%)	2,240
2010 Primary	108 (78.8%)	13 (9.5%)	12 (8.8%)	137
2010 General	379 (61.8%)	117 (19.1%)	98 (16.0%)	613

*This election does not contain data from Hillsborough County. V16 8896, 8908-09.

79. In all five elections, more than 58% of Inter-County Voters were White. FF ¶ 78.

[2] The number of Inter-County voters by race/ethnicity was calculated by multiplying the percentage of Inter-County voters by race/ethnicity by the total number of Inter-County voters (e.g., 64.6% x 96 = 62 White Inter-County voters). V16 8908.

80. Finally, any adverse effects would be *de minimis*. Table 3 shows the number of Inter-County Voters by race/ethnicity and as a percentage of total in-person turnout.[3]

Table 3
Inter-County Voters by Race/Ethnicity and as a Percentage of Total Turnout

Election	White	African-American	Hispanic	Total
2008 Pres. Primary*	71 (.0787%)	5 (.0055%)	14 (.0155%)	90,217
2008 Primary	62 (.0750%)	21 (.0254%)	9 (.0109%)	82,681
2008 General	1317 (.2473%)	432 (.0811%)	325 (.0610%)	532,649
2010 Primary	108 (.0797%)	13 (.0096%)	12 (.0089%)	135,588
2010 General	379 (.1065%)	117 (.0329%)	98 (.0275%)	356,011

*This election does not contain data from Hillsborough County. V16 8896, 8908-09.

81. In two of the five elections, fewer than 1 in 10,000 votes in the Covered Counties were African-American Inter-County Voters. In four of the five elections, fewer than 4 in 10,000 votes in the Covered Counties were African-American Inter-County Voters. And in all five elections, fewer than 9 in 10,000 votes in the Covered Counties were African-American Inter-County Voters. FF ¶ 80.

82. Similarly, in four of the five elections, fewer than 3 in 10,000 votes in the Covered Counties were Hispanic Inter-County Voters. And in all five elections, fewer than 7 in 10,000 votes in the Covered Counties were Hispanic Inter-County Voters.

C. <u>The Early Voting Changes Will Have No Discriminatory Effects.</u>

[3] "Total In-Person Turnout" is the total number of voters who voted on election day (the sum of "voters in this mode" with "inter-county movers in this mode"). V16 8898 n.18, 8908; *see also* FF ¶ 78 n.2.

1. The Early Voting Changes Will Not Prevent Anyone From Registering To Vote Or Casting A Ballot.

83. A registered voter has multiple options for casting a ballot. He or she may: (1) request and return an absentee ballot; (2) vote in-person at an early voting site; or (3) vote at his or her precinct on the day of an election. Fla. Stat. §§ 101.62, 101.64, 101.65, 101.67; 101.657; 101.69.

84. To vote absentee, a person can request an absentee ballot (in person, in writing, or by telephone) without excuse and then mail or hand-deliver the absentee ballot to the supervisor of elections. Fla. Stat. §§ 101.62(1), 101.65.

85. To vote early in-person, a person can vote at a number of designated early voting sites. Fla. Stat. § 101.657(1)(a). Under the prior law, early voting began "on the 15th day before an election and end[ed] on the 2nd day before an election" and was "provided for 8 hours per weekday and 8 hours in the aggregate each weekend." Fla. Stat. § 101.657(1)(d) (2010). After the Early Voting Changes, early voting begins "on the 10th day before an election . . . and end[s] on the 3rd day before the election, and shall be provided for no less than 6 hours and no more than 12 hours per day at each site during the applicable period." Fla. Stat. § 101.657(1)(d) (2011).

86. To vote on Election Day, a person can vote between the hours of 7 a.m. and 7 p.m, and any person who is in line at the time of the official closing of the polls may cast a vote in the election. Fla. Stat. § 100.011.

87. Because of the numerous opportunities to vote, the Early Voting Changes can only affect those few individuals who would have voted early during those days eliminated by

the Early Voting Changes, but will now (in the absence of these specific days) choose not to vote at all. V2 782-83; V5 2542-43. The vast majority will still vote, either during the more convenient hours authorized by the Early Voting Changes, by absentee ballot, or on Election Day. V6 3408-09; V7 3504, 3531, 3617, 3764-65, 3859; V9 5089.

2. The Early Voting Changes Will Expand Access To Early Voting In The Covered Counties.

88. Under the prior law, the Covered Counties never offered early voting on Sundays. V15 8680; V16 8848, 9047 n.10, 9048-52; *see* V6 3194, 3415-16; V7 3495, 3841, 3912.

89. If the Early Voting Changes receive preclearance from this Court, each Covered County will still need to separately preclear the particular early voting hours it wishes to offer within the framework that has already been precleared. V16 8849, 8879.

90. Because of this preclearance obligation, the Covered Counties may seek to provide the maximum early voting hours available under the Act (96 hours), as such a framework will have already received preclearance from this Court.

91. Even without this obligation, however, the Covered Counties will offer the maximum number of hours of early voting needed to accommodate voters. V6 3338, 3447-48; V7 3611-12, 3846, 3875, 3999; V9 5174-78; V15 8469, 8677, 8689.

92. The Act will allow the Covered Counties to offer new, more-convenient morning, night, and weekend hours of early voting. V6 3193-94, 3337-38, 3348, 3446-48, 3450; V7 3611-12, 3765-66, 3770, 3846-47; V9 5177-78; V12 6890-92; V15 8676-77.

93. By expanding the maximum time available for early voting on each weekday (from 8 hours a day to 12 hours a day) and expanding weekend early voting hours (from

16 hours to 18-36 hours), Fla. Stat. § 101.657(d); V16 8879, the Early Voting Changes should *increase* the use of early voting in the Covered Counties. V6 3446-48, 3450; V7 3611-12, 3765-66, 3770, 3846-47; V10 5573-74; V11 6161; V15 8676-77.

3. The Early Voting Changes Will Have No Effect On Overall Turnout.

94. There is wide agreement among political science scholars that the availability of early in-person voting has little or no effect on overall turnout. FF ¶¶ 95-97.

95. Paul Gronke, the Intervenors' expert witness, has written extensively to document how early in-person voting has had little or no effect on overall turnout. For example, in 2008, Mr. Gronke concluded that "[e]nough research has accumulated . . . to state a scholarly consensus: *early voting does not increase turnout* by bringing new voters into the system." V14 7999, 8009 ¶ 3 (emphasis in original); *see also* V14 7972, 7973 ¶ 3, 7988 ¶¶ 2-3, 7964, 7969 ¶¶ 1-2, 7920, 7926 ¶ 2.[4]

96. This scholarly consensus has been confirmed by: (1) Professor Hood, V16 9058-59; (2) Professor Stewart, V10 5496; (3) the Florida legislature, V16 8999-9000; *see* V3 1595, 1612; and (4) supervisors of elections, including Ion Sancho, an intervenor in this case, V1 440; V6 3443-44; V13 7161-62.

97. Instead, early in-person voting is merely a *convenience* to voters—it gives those who would vote anyway an opportunity to vote at their most convenient time, rather than on Election Day. FF ¶¶ 95-96; V10 5571; V14 7972, 7987 ¶¶ 2-4.

[4] Despite these long-documented views that early voting does not increase turnout, Mr. Gronke now states that "the consensus of experts is that early voting reforms have increased turnout *modestly*, when examined from the 1990s through 2008." V14 7882 ¶ 9 (emphasis added).

4. The Early Voting Changes Will Have No Discriminatory Effect On Account Of Race, Color, Or Membership In A Language Minority.

98. Because the Early Voting Changes will not decrease turnout, they necessarily will have no discriminatory effects. But even if the changes did decrease overall turnout, they would only affect those voters who would choose not to vote through the myriad additional opportunities in the absence of the eliminated hours of early voting. There is no evidence that minorities are more likely than Whites to make this choice. V7 3978-79.

99. Additionally, past voter turnout demonstrates that the Early Voting Changes will have no discriminatory effect. Professors Hood and Stewart each independently analyzed the State's voter registration and history files. V14 7763-64; V16 9038-39. Because the voter history files contain millions of disaggregated voter history files and the professors used different means for analyzing the data, minor differences in the numbers were inevitable. *See* V11 5727, 5729, 5740; V14 7765 ¶ 15, 7769-70 ¶ 27, 7774-75 ¶¶ 41-43.

100. However, there are no material differences in the professors' calculations. *See* FF ¶¶ 102, 105, 109-10, 112; *see* V14 7774 ¶ 39, 7782 ¶ 65. Therefore, the State's findings and conclusions do not change, no matter which professor's numbers are used. *See* FF ¶¶ 103, 104, 106-08, 111, 113-16.

101. In order to easily compare the professors' findings, Professor Stewart's early voting numbers are presented in Table 4.[5]

[5] Early Voting ("EV") by race/ethnicity is the sum of the "Repealed" and "Remaining" days. V16 8905-06. Turnout ("TO") by race/ethnicity is the sum of voting by absentee, early voting, and on Election Day. V16 8905-06. "Total EV" is the sum of White, African-American, and Hispanic early voting. V16 8905-06. "Total TO" is the sum of White, African-American, and Hispanic total turnout. V16 8905-06

Table 4 Professor Stewart's Figures for Early Voting (EV) and Total Turnout (TO) in the Covered Counties								
	White EV	White TO	African-American EV	African-American TO	Hispanic EV	Hispanic TO	Total EV	Total TO
2006 Primary	27,443	148,170	2,662	14,939	1,117	7,093	31,222	170,202
2006 General	68,489	340,499	5,382	33,006	2,968	22,865	76,839	396,370
2008 PPP	62,685	283,103	4,206	25,524	2,810	18,441	69,701	327,068
2008 Primary	17,440	102,652	2,051	12,033	927	6,132	20,418	120,817
2008 General	145,836	525,324	45,162	86,314	18,463	66,391	209,461	678,029
2010 Primary	31,300	169,072	3,334	14,430	1,362	8,346	35,996	191,848
2010 General	91,176	369,296	12,985	45,337	5,874	31,118	110,035	445,751

a. *Whites Constitute The Significant Majority Of Early Voters.*

102. Table 5 shows the percentage of total early voting turnout in the Covered Counties by race/ethnicity across seven elections. V16 8905-06, 9040.[6]

Table 5 Early Voting by Race/Ethnicity as a Percentage of Total Early Voting Turnout						
	Professor Hood's Findings			Professor Stewart's Findings		
	White	African-American	Hispanic	White	African-American	Hispanic
2006 Primary	88%	9%	4%	88%	9%	4%
2006 General	89%	7%	4%	89%	7%	4%
2008 Pres Primary	90%	6%	4%	90%	6%	4%
2008 Primary	85%	10%	5%	85%	10%	5%
2008 General	70%	22%	9%	70%	22%	9%
2010 Primary	87%	9%	4%	87%	9%	4%
2010 General	83%	12%	5%	83%	12%	5%

[6] Stewart's figures are calculated by dividing the early voting turnout for each race/ethnicity by the total early voting turnout. (e.g., White EV/Total EV). FF ¶ 101. Because Hood's figures are rounded to the nearest whole percentage, V16 9040, Stewart's figures are displayed similarly for ease of comparison.

103. In every election, Whites comprised approximately 70% or more of early in-person voting. In 6 of the 7 elections, Whites comprised more than 80% of early in-person voting. In one election, Whites comprised approximately 90% of early in-person voting. FF ¶ 102; V10 5598-99.

104. This pattern of early voting is consistent with overall turnout by race/ethnicity, as demonstrated in Table 6.[7]

Table 6 Voter Turnout by Race/Ethnicity in the Covered Counties			
Year	White	African-American	Hispanic
2006 Primary	87.1%	8.8%	4.2%
2006 General	85.9%	8.3%	5.9%
2008 Pres Primary	86.6%	7.8%	5.6%
2008 Primary	85.0%	10.0%	5.1%
2008 General	77.5%	12.7%	9.8%
2010 Primary	88.1%	7.5%	4.4%
2010 General	82.8%	10.2%	7.0%

b. *Early Voting, As A Percentage Of Total Turnout, Does Not Generally Vary By Race Or Ethnicity*.

105. Table 7 plots the percentage of Whites, African-Americans, and Hispanics who voted early in-person in the Covered Counties across seven elections. V16 8905-06, 9041.[8]

Table 7 Early Voting by Race/Ethnicity as a Percentage of Total Turnout by Race/Ethnicity						
	Professor Hood's Findings			Professor Stewart's Findings		
	White	African-American	Hispanic	White	African-American	Hispanic

[7] These figures are calculated by dividing the total turnout for each race/ethnicity by the total turnout. (e.g., White TO/Total TO). FF ¶ 101.

[8] Stewart's percentages are calculated by dividing the early voting turnout for each race/ethnicity by the total early voting turnout (e.g., White EV/White TO). FF ¶ 101.

2006 Primary	20.4%	18.0%	16.8%	18.5%	17.8%	15.7%
2006 General	21.8%	16.5%	13.6%	20.1%	16.3%	13.0%
2008 Pres Primary	22.2%	16.5%	15.2%	22.1%	16.5%	15.2%
2008 Primary	17.0%	17.3%	15.2%	17.0%	17.0%	15.1%
2008 General	27.7%	52.3%	27.8%	27.8%	52.3%	27.8%
2010 Primary	18.5%	23.2%	16.4%	18.5%	23.1%	16.3%
2010 General	24.7%	28.6%	18.9%	24.7%	28.6%	18.9%

106. In almost all elections, Whites, African-Americans, and Hispanics are voting in similar numbers. For 6 of the 7 elections, White early in-person voting turnout exceeded the percentage of Hispanic early in-person voting, and in one election these figures were about the same. In 3 of the 7 elections, White early in-person voting turnout exceeded the percentage of African-American early in-person voting, and in one election these figures were about the same. FF ¶ 105. As Professor Stewart concluded, "Black, White, and Hispanic voters all utilized early voting at roughly the same rates both before and after the 2008 general election." V14 7785 ¶ 71.

107. The obvious outlier is the 2008 general election. While Whites and Hispanics voted early in-person at about the same level (about 27.8%), African-American early in-person turnout was 52.3%. This is likely explained by the historic candidacy of President Obama, the first African-American presidential candidate representing one of the two major political parties. Political science studies have shown that strong partisans and early deciders are more likely to vote early if that option is available. V16 9042. And it is probable that this intensity of interest in President Obama's candidacy caused this spike in early voting among African-Americans. V10 5531, 5534-36; V11 6111, V16 9042.

108. The 2008 General Election does not represent a fundamental shift in the means by which African-Americans will cast a ballot. V16 9042; *see* V11 6195-98.

109. Without the 2008 general election, there is almost no difference in White and African-American early voting turnout. Table 8 shows the percentage of Whites, African-Americans, and Hispanics who voted early in-person in the Covered Counties in six of seven elections from 2006 through 2010 (not including the 2008 general election). V16 8905-06, 9043.[9]

Table 8 Early Voting as a Percentage of Total Turnout by Race/Ethnicity for All Elections Combined (Without the 2008 General)					
Professor Hood's Findings			Professor Stewart's Findings		
White	African-American	Hispanic	White	African-American	Hispanic
21.8%	21.2%	16.3%	21.1%	21.1%	16.0%

110. In addition, Table 9 plots the percentage of Whites and minorities (African-Americans and Hispanics together) who voted early in-person in the Covered Counties across seven elections. V16 8905-06, 9043-44.[10]

Table 9 Early Voting by Whites/Minorities as a Percentage of Total Turnout by Whites/Minorities				
	Professor Hood's Findings		Professor Stewart's Findings	
	White	Minorities	White	Minorities
2006 Primary	20.4%	17.8%	18.5%	17.2%

[9] Stewart's figures were calculated by dividing the early voting turnout for each race/ethnicity (minus the 2008 general) by the total voting turnout (minus the 2008 general) (e.g., the sum of White EV for all elections but the 2008 General/the sum of White TO for all elections but the 2008 General). FF ¶ 101.

[10] Stewart's figures were calculated by dividing the early voting turnout for each race/ethnicity by the total voting turnout (e.g., White EV/White TO). FF ¶ 101. In calculating Minorities, African-Americans and Hispanics were analyzed together.

2006 General	21.8%	15.7%	20.1%	14.9%
2008 Pres Primary	22.2%	16.7%	22.1%	16.0%
2008 Primary	17.0%	16.3%	17.0%	16.4%
2008 General	27.7%	39.5%	27.8%	41.7%
2010 Primary	18.5%	20.0%	18.5%	20.6%
2010 General	24.7%	24.3%	24.7%	24.7%

111. Table 9 demonstrates that White early in-person voting exceeded minority early in-person voting in four of the seven elections. In two of the remaining three elections, the difference between White early in-person voting and minority early in-person voting was less than 2.1%. The exception, again, is the 2008 general election.

c. *Shortening The Early Voting Period Will Have No Discriminatory Effect On Account Of Race Or Ethnicity*.

112. Table 10 shows the percentage of Whites, African-Americans, and Hispanics who voted during the repealed days (15th, 14th, 13th, 12th, 11th, and 2nd days before the election) and the remaining days (10th, 9th, 8th, 7th, 6th, 5th, 4th, and 3rd days before the election) in the Covered Counties across 7 elections. V16 8905-06, 9053.[11]

Table 10
Early Voting Turnout by Repealed and Remaining Days Across all Elections

	White		African-American		Hispanic	
	Repealed	Remaining	Repealed	Remaining	Repealed	Remaining
Hood	34.5%	65.5%	31.6%	68.4%	28.0%	72.0%
Stewart	34.5%	65.5%	31.6%	68.4%	28.0%	72.0%

113. First, the significant majority of early in-person voting is occurring in the days that were retained under the Act. Early voting is slow during the first week and then steadily

[11] Hood's data measures the first five days and the last nine days of the prior early voting period. Because there was no early voting on the 2nd day before the election (a Sunday), the results are the same. V16 9053. Stewart's figures were calculated by dividing the sum of each period by the sum of the early voting turnouts (e.g., sum of White Repealed/sum of White EV). V16 8905-06; FF ¶ 101.

grows closer to Election Day. V6 3345-46; V7 3559, 3917-18; V10 5599; V13 7166; V16 9047-57. More than 65% of all groups are voting in the remaining early voting days. FF ¶ 112.

114. Those voters who voted in the first five days will likely vote through other means (i.e., in the remaining early voting days, by absentee ballot, or on Election Day). It is unlikely that these voters—who took the time to vote (1) early in-person (2) during the middle of a weekday and (3) more than a week before the election—will simply abandon voting altogether. V6 3445; V7 3504, 3558, 3617, 3919, 3962.

115. Nor will there be any problem accommodating those who wish to vote under the Early Voting Changes. V7 3558, 3859. The length of Florida's early voting period is not unusual; it reflects the standard practice from those states with early voting (between ten and fourteen days before the election, generally ending on the Friday or Saturday before the election). V16 9060 n.16.

116. Second, repealing the first five days of early voting will not adversely affect racial or ethnic minorities. Indeed, Whites constitute a higher percentage of early in-person turnout in the repealed days (34.5%) than both African-Americans (31.6%) and Hispanics (28.0%). FF ¶ 112; *see also* V6 3347, 3434-35; V7 3918, 3978-79; V10 5526.

PROPOSED CONCLUSIONS OF LAW

I. SECTION 5 OF THE VOTING RIGHTS ACT

A. Section 5's History

1. As originally enacted in 1965, Section 5 provided that a voting change was entitled to "preclearance" if it "does not have the purpose and will not have the effect of

denying or abridging the right to vote on account of race or color." Voting Rights Act of 1965, Pub. L. No. 89-110, § 5, 79 Stat. 437, 439. Section 5 was previously reauthorized in 1970, 1975, and 1982. *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 129 S. Ct. 2504, 2510 (2009) ("*Nw. Austin*"). The 1975 reauthorization amended Section 5 to require certain covered jurisdictions to demonstrate that a voting change did not have the purpose or effect of denying or abridging the right to vote because of membership in a language minority group. Voting Rights Act Amendment of 1975, Pub. L. 94-73, 89 Stat. 400, codified at 42 U.S.C. 1973b(f)(2).

2. In 2006, Congress reauthorized Section 5 for another 25 years. Congress retained the original preclearance provision in subsection (a), but amended the statute to add subsections (b)-(d). Under subsection (b), any voting change that "has the purpose of or will have the effect of diminishing the ability of any citizens of the United States on account of race or color, or [membership in a language minority], to elect their preferred candidates of choice denies or abridges the right to vote within the meaning of subsection (a) of this section." 42 U.S.C. § 1973c(b). The "purpose of subsection (b) of this section is to protect the ability of such citizens to elect their preferred candidates of choice." *Id.* § 1973c(d). Subsection (c) provides that the "term 'purpose' in subsections (a) and (b) of this section shall include any discriminatory purpose." *Id.* § 1973c(c).

3. To obtain judicial preclearance, then, Florida bears the burden of demonstrating that the Three Voting Changes neither: (1) have the purpose "of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title"; nor (2) "will have the effect of denying or abridging the

right to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title[.]" 42 U.S.C. § 1973c(a).

4. The Supreme Court has repeatedly emphasized that Section 5 raises "'serious constitutional questions'" in light of its "intrusion on state sovereignty." *Perry v. Perez*, 132 S. Ct. 934, 942 (2012) (quoting *Nw. Austin*, 129 S. Ct. at 2504); *see also Miller v. Johnson*, 515 U.S. 900, 926-27 (1995); *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 480 (1997) ("*Bossier Parish I*"); *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 336 (2000) ("*Bossier Parish II*"); *Georgia v. Ashcroft*, 539 U.S. 461, 491-92 (2003) (Kennedy, J., concurring). On several occasions, therefore, it has interpreted Section 5 to avoid these constitutional issues. *See, e.g.*, *Perry*, 132 S. Ct. at 942; *Nw. Austin*, 129 S. Ct. at 2513; *Bossier Parish II*, 528 U.S. at 336. It is the Supreme Court's "settled policy to avoid an interpretation of a federal statute that engenders constitutional issues if a reasonable alternative interpretation poses no constitutional question." *Gomez v. United States*, 490 U.S. 858, 864 (1989).

B. Preclearance Obligations Of Non-Covered States.

5. Florida is not one of the jurisdictions Congress singled out for coverage under Section 4(b) of the VRA. FF ¶ 1. As a non-covered state, Florida has no duty under Section 5 to obtain preclearance of its laws. The fact that five of Florida's counties are covered, however, means that Florida must, as a practical matter, obtain preclearance for any state-wide laws of general applicability that will affect its Covered Counties before the voting change may be implemented by or in those counties. FF ¶ 1; *Lopez v. Monterey Cnty*, 525 U.S. 266, 278 (1999).

6. Florida's preclearance burden when acting on behalf of its Covered Counties cannot be expanded beyond the burden that would apply if those Covered Counties were themselves applying for preclearance of their own laws. Thus, when a non-covered State submits a general, state-wide voting change for preclearance on behalf of a covered county, the State has the burden of showing only that *the covered county* acted with no impermissible purpose and that the voting change will not have the prohibited effect *in the covered county*. *Lopez*, 525 U.S. at 284 ("Section 5, as we interpret it today, burdens state law only to the extent that that law affects voting in jurisdictions properly designated for coverage."). The motives of the State of Florida, or of legislators representing areas of the state outside the Covered Counties, are irrelevant, as are "effects" that exist only outside the Covered Counties.

7. Any greater burden—*e.g.*, requiring a showing that *the State* itself did not have the prohibited purpose or that the voting change will not have the prohibited effect in a non-covered part of the State—would extend Section 5 well beyond its intended sweep. *Nw. Austin*, 129 S. Ct. at 2512. It would be neither congruent nor proportional to any valid Fifteenth Amendment objective to subject state-wide legislation of general applicability enacted by Florida—a non-covered State—to Section 5 scrutiny in the same manner as if Florida were itself covered. *City of Boerne v. Flores*, 521 U.S. 507 (1997). Section 5's burden of proof must be limited to avoid this constitutional problem.

II. NONE OF THE VOTING CHANGES HAS THE PURPOSE OF DENYING OR ABRIDGING THE RIGHT TO VOTE ON ACCOUNT OF RACE, COLOR, OR MEMBERSHIP IN A LANGUAGE MINORITY.

A. Legal Standard For "Purpose" Prong

8. Before 2000, DOJ interpreted the "purpose" prong of Section 5 as precluding preclearance whenever a covered jurisdiction had *not* provided evidence sufficient to demonstrate that it had *not* enacted the voting change with a discriminatory purpose. The Supreme Court had never formally interpreted the meaning of "purpose" in Section 5.

9. In *Bossier Parish II*, the Supreme Court held that, to ensure that "denying or abridging the right to vote" had the same meaning for both the purpose and effect prongs, the "purpose" prong was limited to voting changes with a *retrogressive*, rather than discriminatory, purpose. 528 U.S. at 328. Thus, a "voting change with a discriminatory but nonretrogressive purpose . . . [did] not violate Section 5." *Ashcroft*, 539 U.S. at 477. This construction was bolstered by a concern that giving the "purpose" prong any broader sweep "would also exacerbate the 'substantial' federalism costs that the preclearance procedure already exacts, . . . perhaps to the extent of raising concerns about Section 5's constitutionality." *Bossier Parish II*, 528 U.S. at 336.

10. Undeterred by these concerns, Congress added subsection (c) to the statute in 2006. 42 U.S.C. § 1973c(c) (The "term 'purpose' . . . shall include any discriminatory purpose."). The amendment was intended to overturn *Bossier Parish II* and thus "clarify[] that any voting change motivated by any discriminatory purpose is prohibited under Section 5." H.R. Rep. No. 109-478, at 68 (2006); *see also id.* at 66-68.

11. Because Section 5 bars preclearance only where the voting change has the *purpose* of discriminating *on account of* race, color, or language minority status, the standard for finding a discriminatory purpose under Section 5 is identical to the constitutional standard for intentional racial discrimination under the Constitution. S. Rep. No. 109-295,

at 18 (2006) ("The Constitution and the courts already define racial discrimination and it is that constitutional definition which we incorporate."); *see also* H.R. Rep. No. 109-478 at 68; *City of Mobile v. Bolden*, 446 U.S. 55, 68-70 (1980).

12. *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256 (1979), sets forth the constitutional standard: "[E]ven if a neutral law has a disproportionately adverse effect upon a racial minority, it is unconstitutional under the Equal Protection Clause only if that impact can be traced to a discriminatory purpose . . . . [T]he Fourteenth Amendment guarantees equal laws, not equal results." *Id.* at 271-73. Under *Feeney*, the plaintiff must show that "the decisionmaker . . . selected or reaffirmed a particular course of action at least in part '*because of*,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Id.* at 279 (emphasis added).

13. The Supreme Court has repeatedly affirmed that *Feeney* is the standard for judging discriminatory purpose under the Constitution. *See, e.g.*, *Tennessee v. Lane*, 541 U.S. 509, 519-20 (2004); *Hernandez v. New York*, 500 U.S. 352, 362 (1991); *McCleskey v. Kemp*, 481 U.S. 279, 298 (1987). This Court has applied *Feeney* in the preclearance context. *See New York v. United States*, 874 F. Supp. 394, 399 (D.D.C. 1994).

14. To prevail under this standard, the plaintiff in an ordinary case must show that the law is facially discriminatory or is "ostensibly neutral but is an *obvious* pretext for racial discrimination." *Feeney*, 442 U.S. at 272 (citations omitted) (emphasis added). In other words, facially neutral laws of general applicability are presumptively constitutional, and the presumption may be rebutted with evidence of pretext. *See id*.; *see also Washington v. Davis*, 426 U.S. 229, 241-42 (1976).

15. To overcome this presumption, *i.e.*, to show that the facially neutral law actually "reflects invidious race-based discrimination," the plaintiff in an ordinary case may rely on the factors outlined in *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252 (1977). *Arlington Heights* provides a "checklist" for examining whether a facially neutral law has discriminatory pretext, but does not itself set forth the constitutional standard. *Bossier Parish II*, 528 U.S. at 343; *see, e.g., Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 540 (1993).

16. The *Arlington Heights* factors include: (1) whether the law has a disproportionate impact on a particular group; (2) the historical background of the decision, including the jurisdiction's history of official actions taken for invidious purposes; (3) the sequence of events leading up to the challenged decision, including whether the decision was the result of a departure from the normal procedural sequence or substantive considerations; and (4) the legislative history of the decision, including statements by legislators pertaining to the purpose of the decision. 429 U.S. at 266-68.

17. In contrast to a normal action alleging racial discrimination, Section 5 places the burden on the covered jurisdiction to show the absence of discriminatory purpose. *Bossier Parish I*, 520 U.S. at 480. But because, "as a practical matter it is never easy to prove a negative," *Elkins v. United States*, 364 U.S. 208, 218 (1960), courts have never required a covered jurisdiction, in order to obtain preclearance, to bring forth evidence *disproving* the existence of each of the *Arlington Heights* factors.

18. In *City of Richmond v. United States*, 422 U.S. 358 (1975), which addressed whether an annexation was enacted with a discriminatory purpose, the Supreme Court

stated that "if verifiable reasons are now demonstrable in support of the annexation, and the ward plan proposed is fairly designed, the city need do no more to satisfy the requirements of [Section] 5." *Id.* at 374; *see also id.* at 375.

19. In implementing the *City of Richmond* standard, this Court has required no more of the covered jurisdiction. In *City of Port Arthur v. United States*, 517 F. Supp. 987 (D.D.C. 1981), this Court found some evidence of discriminatory purpose, but determined that it was overcome by the fact that there were legitimate nondiscriminatory economic reasons for the annexations that would have fully justified the annexations even in the absence of discriminatory purpose, *see id*. at 1019-21.

20. In *State of New York,* this Court further explained that "the plaintiff must come forward with evidence of legitimate, nondiscriminatory motives for the proposed changes to the voting laws" as well as "some affirmative evidence that the proposed changes were not motivated by a discriminatory purpose." 874 F. Supp. at 400. After making that minimal showing, the burden of production "shifts to the Attorney General, as the party resisting preclearance, to provide some evidence of a discriminatory purpose on the part of the legislators who seek to make the change." *Id.* To meet its burden, New York merely presented evidence that the intent behind the addition of new judgeships was to keep pace with a rapidly burgeoning docket. *See id.* at 400-01.

21. In sum, Florida can meet its burden under Section 5 by showing that each voting change is a neutral law of general applicability and thus presumptively constitutional. At most, cases such as *City of Richmond, City of Port Arthur,* and *State of New York* suggest that Florida must also bring forth "some" evidence that the change was made for a

legitimate purpose. Once Florida meets its burden, DOJ must "refute the covered jurisdiction's prima facie showing that a proposed voting change does not have a [discriminatory] purpose in order for preclearance to be denied." *Bossier Parish II*, 528 U.S. at 332. To do so, DOJ may rely on the *Arlington Heights* factors. If DOJ meets its burden under *Arlington Heights*, Florida may rebut this showing with contrary evidence. *See State of New York*, 874 F. Supp. at 400-401.

22. Imposing any burden beyond that set forth in *City of Richmond*, *City of Port Arthur*, and *State of New York* would "increase further the serious federalism costs already implicated by § 5" and thus trigger serious constitutional concerns. *Bossier Parish I*, 520 U.S. at 480. And given the serious nature of a charge of intentional discrimination levied against a sovereign State, the burden of showing that the change was not enacted for a discriminatory purpose must not outpace the *Feeney* standard.

B. Legislators *From The Covered Counties* Did Not Enact The Three Voting Changes For The Purpose Of Discriminating On The Basis Of Race, Color, Or Membership In A Language Minority.

23. There is no evidence that legislators *from the Covered Counties* were motivated by any discriminatory purpose. *See* FF ¶¶ 19, 20, 48, 51. But even if these legislators had a discriminatory purpose—which they clearly did not—it would be irrelevant as the Act was passed by such wide margins that the votes of the legislators from the Covered Counties had no effect on the Act becoming law. FF ¶¶ 19-20. As such, it is impossible for the Act to have been motivated by a discriminatory purpose from the Covered Counties. For this reason alone, the State has met its burden.

C. The Florida Legislature Did Not Enact The Three Voting Changes For The Purpose Of Discriminating On The Basis Of Race, Color, Or Membership In A Language Minority.

24. Even if the State must prove that the legislature as a whole lacked a discriminatory purpose, it has done so. The Three Voting Changes are facially neutral laws of general applicability. FF ¶¶ 28-29, 35, 43. As a result, the Voting Changes are presumptively constitutional under *Feeney*. And even if more is required of the State, the record evidence amply demonstrates that those who drafted, provided input on, supported, and voted in favor of the Act, and these changes in particular, did so for legitimate, nondiscriminatory reasons. FF ¶¶ 26-27, 30-31 (Third Party Changes); 34, 36-37 (Inter-County Changes); 42, 44-46 (Early Voting Changes).

25. Therefore, the Three Voting Changes do not have the purpose of discriminating on account of race, color, or language minority status unless DOJ can rebut the State's prima facie case by showing (via the *Arlington Heights* factors) that the Voting Changes, while ostensibly neutral, were obviously the product of an impermissible purpose. *Feeney*, 442 U.S. at 271-73; *State of New York*, 874 F. Supp. at 400-401.

26. DOJ cannot satisfy that test. The Three Voting Changes were included in the final Act that contained 77 other voting changes that have been precleared by DOJ. FF ¶¶ 3-4. Because the vast majority of these changes were administratively precleared, the Attorney General necessarily found the absence of discriminatory purpose with regard to the passage of the Act generally. *See* 28 C.F.R. § 51.52. Thus, any facts or evidence that pertain to the Act generally cannot serve as evidence of a discriminatory purpose, and any allegedly discriminatory purpose must be specific to the Three Voting Changes.

27. There is no evidence that the Florida legislature passed the Act in general or any of the Three Voting Changes in particular for any discriminatory reason or because the Act in general or the Three Voting Changes in particular would have a discriminatory effect on any protected racial, ethnic, or language minority group. FF ¶¶ 47-51.

1. Third Party Changes

28. The Third Party Changes were enacted for legitimate reasons, including: (1) providing a mechanism to determine which TPRO delivered a particular voter registration application in the event that a problem should arise with the registration, FF ¶¶ 26-27; (2) preventing TPROs from gaming the system and engaging in fraud by withholding registration documents for voters of disfavored political parties while filing registration documents of favored political parties, FF ¶ 29; and (3) preventing TPROs from failing to file voter registration applications before the book-closing deadline to register for an election, FF ¶ 31. These are all legitimate State goals. *Crawford v. Marion Cnty Election Bd.*, 553 U.S. 181, 196 (2008) (plurality opinion).

29. The historical background of the State's decision to make these voting changes does not indicate purposeful discrimination. In *League of Women Voters of Florida v. Browning*, 575 F. Supp. 2d 1298 (S.D. Fla. 2008), the district court upheld the prior law, noting that the State's interests in "1) ensuring that all voter registrations applications are properly and timely submitted; 2) holding third-party voter registration organizations accountable for the applications they collect; and 3) preventing instances of fraud" were "'indisputably important and within the purview of the Florida legislature' because "'[t]he right to vote is fundamental, forming the bedrock of our democracy.'" *Id*. at 1323

(citations omitted). The Third Party Changes support the same legitimate goals. The history behind the Third Party Changes also includes Florida's experience with creating and then liberalizing the ability of TPROs to register voters, as well as the more recent fears that the procedures were made so liberal that they invited abuse. FF ¶¶ 24-27, 61.

30. The sequence of events leading up to these voting changes was not unusual. The process leading up to the passage of the Third Party Changes was the usual one followed in Florida lawmaking. FF ¶¶ 9-21. The two versions of bills that became the Act worked their way through the two chambers of the legislature, were given full readings, were subjected to votes on amendments, were considered by the appropriate committees, and were voted on during regular sessions. *Id.* All evidence shows that the legislative process was open and fair, and that all who desired to offer input on the bills were given the opportunity to do so. FF ¶¶ 52-53.

31. The legislative history does not reveal purposeful discrimination. There is no evidence that the Third Party Changes resulted from a desire on the part of the representatives from the Covered Counties or from anywhere else to discriminate against protected minority groups. FF ¶¶ 47-51. As noted above, the changes were promoted for legitimate reasons and no legislators made statements evidencing, or even alleging, an intent to make these changes for a discriminatory reason. FF ¶¶ 24-31.

32. The Third Party Changes will not have a disproportionate impact on any minority group. First, the evidence shows that TPROs have remained (and will remain) in the State notwithstanding these voting changes. FF ¶¶ 58-62. Second, even if they do not, voters of all races have many other avenues available to register to vote. FF ¶¶ 54-57. Third, even

if some voters will not be able to register because of the changes, there is no evidence that a greater number or proportion of minorities than Whites will not be able to register to vote either through TPROs or through some other means in the Covered Counties. CL ¶ 82.

33. The balance of the evidence on the *Arlington Heights* factors demonstrates that the Third Party Changes resulted from legitimate, rather than discriminatory, purposes, and fails to overcome the presumption that these facially neutral provisions were not adopted "because of" their impact on protected groups.

2. Inter-County Changes

34. The legislative history shows that the Inter-County Changes were enacted for legitimate reasons, including preventing fraud by creating a way to determine whether voters who moved to a new jurisdiction without informing the supervisor of elections had cast ballots in another jurisdiction in the same election. FF ¶¶ 32-34. This purpose is legitimate. *Crawford*, 553 U.S. at 196. The State intended to accomplish this goal while ensuring that every lawful vote is counted, FF ¶ 37, and without disenfranchising any eligible voter or requiring the voter to disprove fraud. FF ¶ 35; *see* FF ¶¶ 68-69.

35. The historical background of the State's decision to make these voting changes does not indicate purposeful discrimination. The history of the Inter-County Changes is that a voter would be able to cast a ballot in two jurisdictions in the same election and the counties involved would have no way of preventing that fraud. FF ¶¶ 32-33, 67.

36. The sequence of events leading up to this voting change was not unusual. As with the Third Party Changes and the Act generally, the normal legislative process was

followed and there were no contemporaneous complaints about the legislative process that led to the passage of the Inter-County Changes. *See* CL ¶ 31.

37. The legislative history does not reveal purposeful discrimination. Those who spoke in favor of the Inter-County Changes in the legislative process believed that the changes would help ensure that the same voter did not vote in the same election twice by falsely claiming a change of address, while disenfranchising no eligible voter. FF ¶¶ 36-37. No legislator made any statement that could be construed as evidencing an intent to make the changes for a discriminatory reason. FF ¶¶ 47-51.

38. The Inter-County Changes do not have a disproportionate impact on any minority group's ability to cast ballots and have them counted. All ballots cast under the new procedure will be counted unless the preponderance of the evidence before the canvassing board demonstrates that the voter was ineligible to vote. FF ¶¶ 68-71.

39. Even assuming that all inter-county movers who utilized the former procedure for casting a ballot would somehow be precluded from casting a ballot altogether or having their votes counted, the evidence shows that the vast majority of all persons affected are Whites and not members of protected minority groups. FF ¶¶ 72-82. To the extent that anyone is adversely affected, too many White voters would be adversely affected to raise an inference of purposeful discrimination. *See Feeney*, 442 U.S. at 275; *see also* CL ¶ 85.

40. The balance of the evidence on the *Arlington Heights* factors demonstrates that the Inter-County Changes resulted from legitimate, rather than discriminatory, purposes, and fails to overcome the presumption that these facially neutral provisions were not adopted "because of" their impact on protected groups.

3. Early Voting Changes

41. The legislative history shows that the Early Voting Changes were enacted for legitimate reasons, including allowing the counties to have the same maximum number of early voting hours as under the prior law, while also: (1) providing the counties greater flexibility; and (2) expanding the availability of early voting during non-business hours to make early voting more convenient for all voters. FF ¶¶ 43-46.

42. The historical background of the State's decision to make these voting changes does not indicate purposeful discrimination. The historical background of the decision is one of continual expansion of alternative voting opportunities, including early voting. In the years leading up to the enactment of the Early Voting Changes, Florida enacted its first early voting law and began permitting no-excuse absentee voting. FF ¶¶ 38-41. Under prior law, the Covered Counties offered 96 hours of early voting over 12 days (consecutive Monday through Saturdays), with no Sunday early voting. FF ¶¶ 41, 88, 93. All early voting, except on Saturday, took place during regular business hours, which was not convenient for voters working normal hours. FF ¶¶ 41-43.

43. The sequence of events leading up to this voting change was not unusual. As with the other changes, and the Act generally, the normal legislative process was followed and there were no contemporaneous complaints about the legislative process that led to the passage of the Early Voting Changes. *See* CL ¶ 31. While certain portions of the Early Voting Changes were added to the Act through amendment, this was done in the course of the normal legislative process, debate was held, a compromise was reached, and no complaints were raised about the process. FF ¶¶ 18-21.

44. The legislative history does not reveal purposeful discrimination. It demonstrates that the legislators who supported the Early Voting Changes and voted in favor of the Act had legitimate, nondiscriminatory reasons for doing so, including the expansion of opportunities to vote early during non-business hours, increased flexibility for the counties, and saving counties money by concentrating early voting hours on fewer days. FF ¶¶ 44-46, 85-86, 89-91. There is no evidence that any legislator voted for the Act because the Early Voting Changes would have a discriminatory effect. FF ¶¶ 47-51.

45. The Early Voting Changes do not have a clear disproportionate impact on any particular group in the Covered Counties. First, the number of minority voters casting ballots will not decrease as a result of the Early Voting Changes because: (1) early voting does not increase turnout, but rather operates as a convenience for those who are already likely to vote; (2) minority voters in the Covered Counties use early voting roughly proportionate to their share of the electorate; (3) White voters represent the vast majority of all early voters; and (4) White voters represent the vast majority of those who voted on the early voting days eliminated by the Early Voting Changes. FF ¶¶ 94-116. Second, the evidence shows that any additional burdens on voters generally or minority voters specifically will be offset by additional conveniences brought about by the Early Voting Changes through increased weekend and evening early voting. FF ¶¶ 88-93. In particular, none of the Covered Counties previously offered early voting on Sundays, but all will now offer 6 to 12 hours of Sunday early voting under the Early Voting Changes. *Id.*

46. To the extent that there is any adverse effect, too many White voters would be adversely affected by the Early Voting Changes to raise an inference of a discriminatory purpose. *See Feeney*, 442 U.S. at 275.

47. The balance of the evidence on the *Arlington Heights* factors demonstrates that the Early Voting Changes resulted from legitimate, rather than discriminatory, purposes, and fails to overcome the presumption that these facially neutral provisions were not adopted "because of" their impact on protected groups. *See Feeney*, 442 U.S. at 279.

III. NONE OF THE VOTING CHANGES HAS THE EFFECT OF DENYING OR ABRIDGING THE RIGHT TO VOTE ON ACCOUNT OF RACE OR COLOR OR MEMBERSHIP IN A LANGUAGE MINORITY.

48. The Three Voting Changes are entitled to preclearance under Section 5's "effect" prong for three reasons. First, under the 2006 Amendments the "effect" prong is limited to practices that have the effect of diminishing minority voters' ability to elect the candidates of their choice, which cannot be applied to ballot access measures like the Three Voting Changes; and even if it does apply here, minority voters' ability to elect is not diminished by these changes. Second, Section 5 requires that the prohibited effect be "on account of" race, color, or language minority status, and any effects here are not "on account of" those prohibited factors. Third, and finally, even under a pure impact analysis, minority voters in the Covered Counties are not made any worse off as a result of the changes than they were under the former practice.

A. The "Effect" Standard

49. The Supreme Court's first prominent application of the "effect" prong was in *City of Richmond*, in which it considered a proposed annexation of territory by Richmond,

Virginia. In deciding the case, the Court agreed with this Court's earlier decision in *City of Petersburg v. United States*, 354 F. Supp. 1021 (D.D.C. 1972), which had found that Section 5 was never intended to preclude cities from annexing territory for legitimate reasons, even if the result would be to reduce minority groups' voting strength. *See id.* at 1030 (quoted with approval in *City of Richmond*, 422 U.S. at 369). Thus, the Court held that an annexation that has a legitimate, nondiscriminatory basis should be approved under the "effect" prong of Section 5 as long as minority voting power post-annexation "fairly reflects the strength of the [minority] community." *Id.* at 371.

50. The Supreme Court's first explicit interpretation of the "effect" prong was in *Beer v. United States*, 425 U.S. 130 (1976). In reaffirming *City of Richmond*, *see id.* at 140 n.11, the Court held that the "effect" prong precluded changes that "would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Id*. at 141.

51. The Court did not further explicate the "effective exercise of the electoral franchise" language until *Georgia v. Ashcroft*, which held that several circumstances were relevant to determining whether a redistricting plan will violate the *Beer* standard. First, "[a]ny assessment of the retrogression of a minority group's effective exercise of the electoral franchise depends on an examination of all the relevant circumstances, such as the ability of minority voters to elect their candidate of choice, the extent of the minority group's opportunity to participate in the political process, and the feasibility of creating a nonretrogressive plan." 539 U.S. at 479. The Court also found that courts should consider whether minority legislators supported the plan. *Id.* at 484. Finally, the

Court cautioned that a "court should not focus solely on the comparative ability of a minority group to elect a candidate of its choice. While this factor is an important one in the § 5 retrogression inquiry, it cannot be dispositive or exclusive." *Id*. at 480.

52. In 2006, Congress amended Section 5 in 2006 to overrule *Ashcroft*. H.R. Rep. No. 109-478, at 69-71; S. Rep. No. 109-295, at 20-21, and, in particular, to make "the ability of [minority] citizens to elect their preferred candidates of choice," 42 U.S.C. § 1973c(d), the sole criterion for preclearance under the "effects" prong of the statute.

B. The "Effect" Prong Envisioned By The 2006 Amendment Cannot Be Applied To Ballot-Access Measures.

1. The 2006 Amendment Has Limited The Reach Of Section 5's "Effect" Prong To Measures That Would Undermine The Ability Of Minorities To Elect Their Preferred Candidate Of Choice.

53. The Three Voting Changes regulate the ways in which persons register to vote and the time and manner in which they cast ballots, but do not concern the weight of the vote once cast. FF ¶¶ 28-29, 35, 43. The "effect" prong, in light of the 2006 Amendments adding subsections (b) and (d), cannot be applied to ballot access measures in any administrable way.

54. The legislative history of subsections (b) and (d) explains that "[t]he preclearance provisions in Section 5 were and are intended to put the burden of proof on covered jurisdictions to demonstrate they are not enacting voting changes that diminish the ability of minorities to elect their preferred candidates of choice." H.R. Rep. No. 109-478, at 69. The House Report repeatedly noted that the purpose of Section 5 in general, and the

amendments in particular, was to prevent minorities' *gains in electoral power* from being undone. *Id.* at 69-70.

55. The House Report continued: "Thus, in amending Section 5 to add a new subsection (b), the Committee makes clear that in making preclearance determinations under Section 5, the comparative 'ability [of the minority community] to elect preferred candidates of choice' is the relevant factor to be evaluated when determining whether a voting change has a retrogressive effect." *Id.* at 70-71; S. Rep. No. 109-295, at 20-21.

56. It would be anomalous to apply the "ability to elect" standard to ballot-access measures. Measures pertaining to voter registration and the circumstances under which ballots are cast do not impact any community's "ability . . . to elect their preferred candidates of choice" unless the ability to actually cast a countable ballot is denied to a minority group in such a widespread way that it will deny that group voting power that it previously possessed. Such a situation would be exceedingly rare and there is no indication that Congress intended for the test to apply in this setting.

57. Indeed, by explaining that the "effect" prong is concerned *only* with "ability to elect," Congress clarified that the "effect" prong does not apply to voting changes that impact only the ability to register and cast ballots. Accordingly, the State is entitled to preclearance under this prong of the statute.

2. <u>Even If The "Ability To Elect" Standard Applies To Ballot Access Cases, The Evidence Clearly Shows That The Three Voting Changes Will Not Have The Effect Of Diminishing Minority Citizens' Ability To Elect The Candidates Of Their Choice.</u>

58. In *LaRoque v. Holder*, No. 10-561, 2011 WL 6413850 (D.D.C. Dec. 22, 2011), Judge Bates determined that the 2006 amendments to the preclearance standard "affirmed that minorities' 'ability to elect,' not the 'totality of the circumstances,' is the critical issue in the preclearance of any proposed voting change. . . . *[A]ny factor that is not related to minorities' 'ability to elect' is off the table.*" *Id.* at *38 (emphasis added). He specifically found that, following the enactment of subsections (b) and (d), "Congress clarified that Section 5 is focused on minorities' ability 'to elect their preferred candidates of choice.'" *Id*. at *32; *see id*. at *12.

59. Judge Bates was correct insofar as he found that the 2006 Amendments leave no room for a discriminatory "effect" other than a diminishment of a group's ability to elect the candidate of its choice. Under this standard, none of the Three Voting Changes will affect the ability of minority voters in the Covered Counties to elect their preferred candidates of choice because: (1) eligible voters retain myriad other ways to register to vote and cast ballots, and thus retain the full ability to cast ballots for whomever they would have supported prior to the enactment of the changes; (2) any *de minimis* effect on the ability to register to vote, to cast a ballot, and on overall turnout is too small to make any difference in minority groups' actual electoral power; and (3) even if any effects on minority voting power occur, the Three Voting Changes will affect in the aggregate significantly more Whites than minorities, making the effects on minority groups' actual relative voting strength negligible. *See* CL ¶¶ 78-93.

C. Florida Did Not Adopt The Voting Changes "On Account Of" Their Discriminatory Effect In The Covered Counties.

60. In the event that the Court disagrees with Florida's position that the "effect" prong either does not apply at all in this case or is limited to the changes' effect on electoral outcomes, then the Court should apply the "effect" prong according to its proper construction in a ballot-access case.

61. No decision from this Court or the Supreme Court has applied the "effect" prong to voting changes that impact ballot access, rather than the relative power of a vote once cast. Each decision applying the "effects" test has concerned redistricting (*e.g.*, *Ashcroft* and *Beer*), annexation (*e.g.*, *City of Richmond*), or preservation or enactment of at-large election systems (*e.g.*, *City of Lockhart v. United States*, 460 U.S. 125 (1983)), all of which concern the weight of votes once cast. There is no body of established precedent that dictates the proper application of the "effect" prong to a ballot-access measure.

62. With no prior judicial constructions to rely upon in this case, the plain language of the statute must govern, *see Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000), unless constitutional avoidance requires otherwise, *see* CL ¶ 4. The statute reads, in pertinent part:

> [S]uch State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure neither has the purpose nor will have the *effect of denying or abridging the right to vote on account of race or color*, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title[.]

42 U.S.C. § 1973c(a) (emphasis added).

63. The language minority provision, which provides the basis for the Covered Counties' coverage under Section 4(b), provides that: "No voting qualification or

prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote *because* he is a member of a language minority group." 42 U.S.C. § 1973b(f)(2) (emphasis added).

64. The words "because" in Section 4(f)(2) and "on account of" in Section 5 mean the same thing under Supreme Court precedent and require a "but for" causal connection. *See, e.g.*, *Rousey v. Jacoway*, 544 U.S. 320, 326 (2005); *Bank of Am. Nat. Trust & Sav. Ass'n. v. 203 N. LaSalle St. P'ship*, 526 U.S. 434, 450–51 (1999); *Gross v. FBL Fin. Servs., Inc.*, 129 S. Ct. 2343, 2350 (2009).

65. The words "effect of denying or abridging the right to vote" in Section 5 mean "retrogression." *See Beer*, 425 U.S. at 141-42.

66. A proper reading of the "effect" prong of Section 5 is thus: "nor will have [a retrogressive effect because of] race or color [or because of membership in a language minority group]." *See Allen v. State Bd. of Elections*, 393 U.S. 544, 565 (1969) ("The Voting Rights Act was aimed at the subtle, as well as the obvious, state regulations which have the effect of denying citizens their right to vote because of their race."). Ignoring the causal limitation on Section 5 would further exacerbate the serious constitutional concerns raised by Section 5. *See* CL ¶ 4. It is therefore clear that the race, color, or language minority status of the affected persons must play a decisive role in producing the prohibited effect. There are two possible constructions of this causation requirement, neither of which are present in this case.

67. Under the first reading, a voting change violates the "effect" prong of the statute only if it both has a racially retrogressive effect *and* the covered jurisdiction made the voting change *because* it would have that racially retrogressive effect. A voting change that happens to be retrogressive, but that was not made "because of" the effect it would have on minority voters is entitled to preclearance under this construction. Here, there is no evidence that legislators were aware that the Three Voting Changes would have any retrogressive effects on minority voters, let alone that they supported or adopted the changes *because of* those retrogressive effects. *See* FF ¶¶ 30-31, 36-37, 44-46, 47-51.

68. Under the second reading, a change will violate the "effect" prong if it has a retrogressive effect on minority voters *and* the voters' race, color, or language minority status is *the reason for the retrogression*. Thus, if the retrogression is "because of" some other factor (*e.g.*, socioeconomic status, gender, or factors within the voter's control), it is not "because of" race, color, or language minority status and preclearance cannot be denied under the "effect" prong. A voting change could not fail the "effect" prong merely based on an incidental correlation.

69. Here, the evidence shows that any incidental effects that might exist are because of some factor other than voters' race, color, or language minority status. Race, color, or language minority status will not be the cause of a voter's failure to register to vote following implementation of the Third Party Changes; rather, the cause will be the voter's decision not to register through different means, the voter's socioeconomic status, or some other factor. Race, color, or language minority status will not be the cause of an inter-county mover's failure to cast a countable ballot following implementation of the

Inter-County Changes; rather, the cause will be the voter's decision not to complete a provisional ballot or to notify the supervisor of elections of his or her address change before arriving at the polling place. Finally, race, color, or language minority status will not be the cause of any minority voter's failure to cast a ballot following implementation of the Early Voting Changes; rather, the cause will be the voter's decision not to vote through other means (by absentee ballot, through the remaining early voting period, or on Election Day). Because the causation requirement inherent in Section 5 is not satisfied here, Florida has met its burden under the "effect" prong.

D. The Three Voting Changes Will Not Have The Effect Of Making Minority Voters "Worse Off" Than They Were Previously.

70. DOJ's position appears to be that the "effect" prong turns on nothing but disparate impact: regardless of whether the voting change imposes any true impediment to registration and voting, if the change proportionately affects more minority citizens than White citizens, it is not permitted. *See, e.g.*, V15 8757; *see* V15 8807. But that position reads the words "on account of" out of the statute, which betrays the text of the statute, *see* CL ¶¶ 61-69, and raises constitutional concerns, *see* CL ¶ 4. It also would impermissibly conflate the Section 5 analysis with the analysis under Section 2 of the VRA. *See, e.g.*, *Bossier Parish II*, 528 U.S. at 336. The net effect of such a construction of the "effect" prong would be to require states and political subdivisions to take account of race in every decision they make in order to ensure that any change would have an

ameliorative impact on minority groups.[12] This too would raise serious constitutional concerns. *Cf. Ricci v. DeStefano*, 557 U.S. 557, 129 S. Ct. 2658, 2677 (2009).

71. Moreover, any retrogression analysis must take account of the relative burdens imposed by a ballot access measure. Given that, under *Beer*, the question is whether the voting change "would lead to a retrogression in the position of racial minorities *with respect to their effective exercise of the electoral franchise*," 425 U.S. at 141 (emphasis added), only barriers that prevent minority voters from "effectively exercising" the right to vote should be denied preclearance. Nevertheless, the State has met its burden even if the "effects" prong focus solely on whether the changes have a disproportionate impact on minority voters.

1. The Three Voting Changes Will Not Have The "Effect" Of Making Minority Voters "Worse Off" *Vis-a-Vis* The 1972 Benchmark.

72. Florida's five Covered Counties must obtain preclearance prior to "enact[ing] or seek[ing] to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on" November 1, 1972, the effective date of their coverage. V1 117, 127-28.

73. While the Supreme Court has previously accepted Alabama's implicit concession that the immediately prior standard in force or effect is the proper benchmark for purposes of determining retrogression, *see Riley v. Kennedy*, 553 U.S. 406, 421 (2008),

[12] For example, imagine a scenario in which 30% of Whites vote absentee but only 10% of African Americans vote absentee. Under the DOJ's interpretation, a voting change that increased turnout by making it easier to vote absentee could not receive preclearance because the voting change would diminish African American voting power vis-à-vis Whites. Section 5 cannot require such a result.

the plain language of Section 5 dictates that preclearance should not be denied if the change at issue does not leave minority voters worse off than the practice in place on the Act's effective date, *see* Oral Argument Transcript at 22-23, *Riley v. Kennedy*, No. 07-77 (Mar. 24, 2008) (question of Chief Justice Roberts) ("Now, the Respondents in their brief accused you of making the argument that since this isn't different from what was in effect in 1964 you don't have to preclear it. And you said, no, that's not what we're saying; we take no position on that. Why in the world did you say that? It says quite clearly the standard has to be different from that in force or effect on November 1st, '64.").

74. This should especially be true where, as here, the relevant history since becoming covered under the Voting Rights Act is one of progressively expanding voting rights for minorities (and indeed all eligible citizens). Before November 1, 1972, in the Covered Counties: (1) TPROs could not register people to vote; (2) a person could not change his or her address at the polls and vote in his or her new precinct; and (3) early voting did not exist. FF ¶¶ 24-25, 32-33, 38-41. In two instances (Third Party Registration and Early Voting Changes), the historical background of the change includes significant liberalization of voting/registration procedures over a number of years, followed by slight restrictions from the peak because of problems experienced under the more liberal procedures. FF ¶¶ 24-25, 38-41. The Inter-County Changes, similarly, are slight restrictions from the significant liberalization in 2005. FF ¶¶ 32-33.

75. Ignoring the fact that the State has been progressive in amending its voting procedures over the last forty years and denying preclearance any time a voting change is more restrictive than the immediate prior practice—no matter how problematic the prior

practice might be—is not consistent with the intent behind the VRA. *See City of Petersburg*, 354 F. Supp. at 1030 (stating that the "Court cannot agree that . . . the intent of Congress when it enacted" Section 5 would be to lock jurisdictions into problematic prior practices "if the racial balance were to shift even in the smallest degree as a result of the" change) (quoted with approval in *City of Richmond*, 422 U.S. at 369). Construing Section 5 as one-way ratchet exacerbates the serious federalism costs that make the statute constitutionally problematic. *See* CL ¶ 4. Because each of the Three Voting Changes is more permissive than the procedures in place on November 1, 1972, they are *a fortiori* entitled to preclearance.

2. The Three Voting Changes Will Not Have The Effect Of Making Minority Voters "Worse Off" *Vis-à-Vis* The Immediately Prior Law.

a. The Voting Changes Will Not Lead To Retrogression In The Position Of Racial Or Language Minorities With Respect To Their Effective Exercise Of The Electoral Franchise.

76. In the Fourteenth Amendment context, the Supreme Court has found that laws pertaining to the administration of elections (including voter registration, voter identification, and the like) are subject to strict scrutiny only where it can be shown that the standard, practice, or procedure imposes "excessively burdensome requirements" or is a "severe burden" on a particular group's right to vote. *See Crawford*, 553 U.S. at 202, 205 (plurality opinion); *Burdick v. Takushi*, 504 U.S. 428, 433-34 (1992); *Storer v. Brown*, 415 U.S. 724, 728-29 (1974) (characterizing law invalidated in *Williams v. Rhodes*, 393 U.S. 23 (1968), as "severe" because it was "virtually impossible" to comply with the standard). No such burden is present in this case.

77. There is no evidence that any person will be unable to register to vote as a result of the Third Party Changes. FF ¶¶ 54-57. TPROs will continue to register voters, and there are numerous other ways in which persons who wish to register to vote can do so. FF ¶¶ 58-62. Any eligible person who desires to vote will continue to have many different means of registration available. *Id.*

78. The Inter-County Changes will not prevent any voter from casting a ballot or having his or her vote counted. In fact, everyone who shows up at the polls and casts a ballot will have that ballot count unless the preponderance of evidence before the canvassing board shows that the person has already voted in that election or was otherwise ineligible to vote. FF ¶¶ 65-70. The right to cast a ballot and have it counted is not abridged at all, and no additional burdens are placed on the voter that would prevent an eligible voter from casting a ballot. FF ¶ 71.

79. There is no evidence that the Early Voting Changes will prevent any person from voting or having that vote counted. The evidence shows that the maximum number of hours available for early voting are the same and cannot be reduced by a Covered County without separate preclearance by DOJ or this Court. FF ¶¶ 89-90. And it is likely that the Early Voting Changes will *increase* early voting because counties may offer additional morning, night, and weekend hours of early voting. FF ¶¶ 88-93.

80. In sum, racial and language minorities will be able to exercise their right to register, cast ballots, and have their votes count just as effectively under the Three Voting Changes as they could prior to the changes' implementation, if not more so.

b. The Voting Changes Will Not Have A Disparate Impact On Minority Voters; Any Impact That Does Exist Is *De Minimis* And Cannot Preclude Preclearance.

(1) Third Party Changes

81. The registration requirements in the Third Party Changes will not prevent TPROs from registering voters. FF ¶¶ 58-59, 62. With regard to the 48-hour requirement of the Third Party Changes, the record establishes that there are numerous ways for people to register to vote, FF ¶¶ 54-57, and that TPROs will continue to register voters even when the Third Party Changes take effect in the Covered Counties, FF ¶¶ 58-62, as they already have in the remainder of the State, FF ¶ 60. TPROs must register voters regardless of their race, gender, party, or language minority status. FF ¶ 28.

(2) Inter-County Changes

82. The evidence shows that all votes will be counted unless the preponderance of evidence before the canvassing board demonstrates that the person was not entitled to vote, FF ¶¶ 67-70, and that filling out a provisional ballot under the Inter-County Changes procedure is no more burdensome than filling out the address change form under the prior procedure, FF ¶ 71. Thus, the Inter-County Changes should not adversely affect anyone.

83. Even if the Court considers the effect of the Inter-County Changes to be adverse, very few voters are affected. Between 2 and 5 of every 1,000 votes were cast by a person who had moved counties and changed addresses in the two weeks up to, including, and "shortly after" Election Day. FF ¶¶ 72-76. Fewer than 9 out of every 10,000 votes cast were cast by African-Americans who changed addresses in the two weeks up to,

including, and "shortly after" Election Day, and fewer than 7 out of every 10,000 votes cast were cast by Hispanic voters who changed addresses in the two weeks up to, including, and "shortly after" Election Day. FF ¶¶ 77-82. Such figures show that no minority "group" in the Covered Counties is adversely affected, even if one assumes that every one of these individual voters has been.

84. Even assuming that every voter who changed his or her address in the two weeks leading up to the election would be adversely affected by the Inter-County Changes, which is not correct, FF ¶ 74, White voters would be impacted the most. Between 58% and 70% of those who moved counties and changed their addresses in the two weeks leading up to the election were White voters. FF ¶¶ 77-80.

(3) Early Voting Changes

85. Again, the bulk of the evidence demonstrates that the Early Voting Changes will not prevent anyone from casting a ballot or having it counted. Because there is no evidence that early voting increases overall turnout, FF ¶¶ 94-97, the evidence shows that voters generally will not be precluded from casting ballots even if early voting were eliminated altogether. And if simply measuring convenience to voters who are already likely to vote, the Early Voting Changes will allow the Covered Counties to make early voting *more* convenient. FF ¶¶ 88-93.

86. Because there is substantial overlap in the early voting periods before and after enactment of the Early Voting Changes, and setting aside any anticipated gains from expanded early voting outside normal business hours and on Sunday, the most the evidence shows is that the Early Voting Changes *might* force a small group of people

who otherwise would have voted on one of the repealed early voting days to vote on a different early voting day, Election Day, or via absentee ballot. Such a minor inconvenience cannot possibly rise to the level of a cognizable "burden" on the right to vote. *See Burdick*, 504 U.S. at 433-34.

87. Because those who would have voted *only* on one of the repealed early voting days are the only group that could possibly be affected in a negative way by the Early Voting Changes, that group is the proper group to analyze when determining whether the Early Voting Changes uniquely burdens a particular minority group in the Covered Counties. FF ¶¶ 87, 98.

88. Given that fewer than 35% of all early voters voted on one of the days that were repealed by the Early Voting Changes, the potential group is quite small to begin with. FF ¶¶ 112-116. And these voters are very likely to continue to vote, but simply on a different day or via absentee voting. FF ¶ 114.

89. But even if some group exists that would not vote at all due to the repeal of five early voting days, the fact that the vast majority of people who voted on the repealed early voting days were Whites indicates that that group would be impacted the most. FF ¶¶ 112, 116. Indeed, because the evidence shows that Whites are the most likely users of the earliest of early voting days, the *addition*, rather than the *subtraction*, of early voting days might be retrogressive—contrary to Defendants' theory.

90. Even using total early voting figures (as opposed to data from the repealed days only) from past elections as a guide to determine which groups will be most affected by the Early Voting Changes, the evidence shows that Whites are impacted the most as they

use early voting the most. Indeed, in six out of seven elections between 2006 and 2010, between 83% and 90% of all early voters were Whites (Whites were 70% of all early voters in the 2008 general election). FF ¶¶ 101-104.

91. Even if the data is broken down by percentage of each racial group, the evidence shows that members of all relevant racial groups tend to use early voting to the same degree. Putting aside an anomalous 2008 general election, FF ¶¶ 107-108, between 17% and 24.7% of Whites who voted between 2006 and 2010 did so using early voting; between 16.5% and 28.6% of all African-Americans who voted between 2006 and 2010 did so using early voting; and between 13.6% and 18.9% of all Hispanics who voted between 2006 and 2010 did so using early voting. FF ¶¶ 105-106. To the extent that there is any difference at all, White voters are slightly more likely to use early voting than their minority counterparts. FF ¶¶ 110-111. To the extent that early voting is burdened by the Early Voting Changes, then, all groups are burdened to an approximately equal degree. FF ¶ 111.

92. Finally, to find that a particular minority group is uniquely burdened by the Early Voting Changes, the evidence would need to show that the purported burdens are not offset by any increased convenience stemming from the new weekday, Saturday, and Sunday hours made available for the first time by the Early Voting Changes. FF ¶¶ 85-87. But the evidence shows exactly the opposite. FF ¶ 93.

(4) *De Minimis* Disparate Impacts Cannot Preclude Preclearance

93. The Supreme Court has found that *de minimis* disparate impacts of otherwise neutral voting changes do not constitute an impermissible "effect" for purposes of the Section 5 inquiry. In an annexation case, for example, a covered jurisdiction may annex and change the racial composition of the municipality in a *de minimis* way without violating Section 5. *City of Port Arthur*, 517 F. Supp. at 1011-12; *City of Petersburg*, 354 F. Supp. at 1030; *City of Richmond*, 422 U.S. at 369.

94. And even if the Court agrees with DOJ's construction of Section 5 generally, it should reject any construction under which any disparate impact, no matter how minor, is considered to have the prohibited "effect." The Supreme Court has itself engaged in such exercises in Section 5 cases, noting in *Bossier Parish II* that, in *City of Richmond*, "we found it necessary to make an exception to normal retrogressive-effect principles . . . in order to permit routine annexation." 528 U.S. at 331. To the extent that *any* relative adverse impact would ordinarily be considered to be a prohibited "effect," preclearance should be granted here under the reasoning of *City of Richmond*.

IV. CONCLUSION

95. For the foregoing reasons, this Court should enter a declaratory judgment that the Three Voting Changes neither have the purpose nor will have the effect of denying or abridging the right to vote on account of race, color, or membership in a language minority.

Respectfully submitted,

/s/ William S. Consovoy

Daniel E. Nordby
Ashley E. Davis
FLORIDA DEPARTMENT OF STATE
R.A. Gray Building
500 S. Bronough Street
Tallahassee, FL 32399-0250
Tel: 850-245-6536

William S. Consovoy* (D.C. Bar 493423)
Brendan J. Morrissey (D.C. Bar 873809)
J. Michael Connolly (D.C. Bar 995815)
WILEY REIN LLP
1776 K Street, NW
Washington, DC 20006
Tel.: (202) 719-7000
Fax: (202) 719-7049

* *Counsel of Record*

Dated: April 16, 2012