

**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,

Defendants, and

KENNETH SULLIVAN, *et al.*,

Defendant-Intervenors.

No. 1:11-cv-1428-CKK-MG-ESH

UNITED STATES' AND DEFENDANT-INTERVENORS' JOINT REPLY
CONCERNING PROPOSED FINDINGS OF FACT AND
CONCLUSIONS OF LAW

Defendants United States of America and Attorney General Eric H. Holder, Jr. (“United States”) and Defendant-Intervenors (collectively “Defendants”) respectfully submit their joint reply to the State of Florida’s (“Florida”) response to Defendants’ Joint Submission Concerning Proposed Findings of Fact and Conclusions of Law (Dkt. No. 95).

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GLOSSARY

Terms and Abbreviations

3PVRO	Third-Party Voter Registration Organization
CL	Proposed Conclusion of Law
CPS	Current Population Survey (prepared by the U.S. Census Bureau)
CVAP	Citizen Voting Age Population
DOE	Florida Department of State, Division of Elections
DOJ	United States Department of Justice
DOS	Florida Department of State
DRCL	Defendants' Reply in Support of Proposed Conclusion of Law
DRFF	Defendants' Reply in Support of Proposed Finding of Fact
FF	Proposed Finding of Fact
FRCL	Florida's Response/Reply Proposed Conclusion of Law
FRFF	Florida's Response/Reply Proposed Finding of Fact
FSASE	Florida State Association of Supervisors of Elections
FVRS	Florida Voter Registration System
HB 1355	House Bill 1355 (2011)
LWVF	League of Women Voters of Florida (Defendant-Intervenor)
NCLR	National Council of La Raza (Defendant-Intervenor)
RPOF	Republican Party of Florida
SB 2086	Senate Bill 2086 (2011) (companion to HB 1355)
SOE	Florida Supervisor of Elections

SOS Florida Secretary of State

V Volume of the Appendix (in which the cited material is located)

Voting Changes The three sets of voting changes for which Florida seeks preclearance

VRA Voting Rights Act of 1965

Deponents and Declarants¹

Allen Ophelia Allen (Defendant-Intervenor)

Berman DOJ, Civil Rights Division, Voting Section, Deputy Chief Robert Berman

Browning Former SOS Kurt Browning

Cate DOS Communications Director Chris Cate

Coffee Ella Kate Coffee (Defendant-Intervenor)

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Cruz* Representative Janet Cruz (Defendant-Intervenor)

Edwards Collier County (“COL”) SOE Jennifer Edwards

Gronke* Professor Dr. Paul Gronke (Defendant-Intervenors’ designated expert)

Holland DOS Assistant General Counsel Gary Holland

Hood Professor Dr. M.V. (Trey) Hood III (Florida’s designated expert)

Joyner* Senator Arthenia Joyner (Defendant-Intervenor)

Lennard Hillsborough County (“HIL”) SOE Earl Lennard

Macnab LWVF President Deirdre Macnab

¹ Messrs. Berman, Collazo, and Weaver were inadvertently omitted from the list of declarants included in Defendants’ initial submission concerning FF and CL. (Dkt. No. 95.) Their declarations, however, were specifically identified in the Appendix and cited repeatedly in Defendants’ initial submission.

Matthews	DOS Assistant General Counsel Maria Matthews
McKenzie	Reverend Charles McKenzie, Jr. (Defendant-Intervenor)
Mitchell	RPOF Co-General Counsel Emmett “Bucky” Mitchell
Salas	DOE Director Gisela Salas
Sancho*	Leon County SOE Ion Sancho (Defendant-Intervenor)
Sawyer	Monroe County (“MON”) SOE Harry Sawyer (Defendant-Intervenor)
Schuessler	DOS Legislation Liaison Pierce Schuessler
Scott	Reverend Tom Scott (Defendant-Intervenor)
Slater*	Florida NAACP Second V.P. Cynthia Slater (Defendant-Intervenor)
Sola	Former Miami-Dade County SOE Lester Sola
Stafford	Escambia County SOE and FSASE Officer ² David Stafford
Stewart*	Professor Dr. Charles Stewart III (United States’ designated expert)
Strickland	Hendry County (“HEN”) SOE Lucretia Strickland
Townsley	Miami-Dade County SOE Penelope Townsley
Ussery	Hardee County (“HAR”) SOE Jeffery Ussery
Weaver	Social Science Analyst Russell Weaver (Defendant-Intervenors’ designated expert)

* Depositions *de benne esse* were conducted for the individuals with an asterisk following Defendants’ Joint Submission Concerning Proposed Findings of Fact and Conclusions of Law (Dkt. No. 95)

² SOE Stafford served as the Chair of the FSASE’s Legislative Committee during the 2011 Florida legislative session and is currently the FSASE President. V9 4991-92.

PRELIMINARY STATEMENT

Florida's Reply, Dkt. No. 97, disregards and mischaracterizes the factual record in this case, and misstates the well-established Section 5 standards for discriminatory purpose and retrogressive effect. Also, although Florida asserts that Section 5 is of doubtful constitutionality, Reply at 1, the D.C. Circuit has just upheld Section 5 as a congruent and proportional, and thus constitutional, remedy for racial discrimination in voting. *Shelby Cnty. v. Holder*, 2012 WL 1759997, at *31 (D.C. Cir. May 18, 2012).³

REPLY CONCERNING DEFENDANTS' PROPOSED FINDINGS OF FACT

1A-1G. The only disputed fact is Florida's history of discrimination, FF 1G, and Florida does not claim it is untrue but rather that it is irrelevant. *See* FRCL 105.

9A-9J. Florida does not dispute the lack of support for the Voting Changes among election officials or the public, and that Miami-Dade SOE Lester Sola's testimony refutes Sen. Diaz de la Portilla's legislative record statements that the Early Voting Changes originated with Mr. Sola. V13 7124, 7167, 7181. Florida offers no evidence that it is typical for legislators to adopt legislation that both SOEs or DOS oppose. V19 10307-08.

10A-17A. The Early Voting Changes were not amended, as Florida claims, to "expand[] early voting;" instead Sen. Diaz de la Portilla's original proposal (to eliminate the first full week of early voting) was amended to become the Early Voting Changes. V2 1082. Other than this and the military exemption, all proposed amendments were rejected. FF 14A. Florida does not dispute the facts in FF 10A, 15A, and 17A. The Senate Budget

³ Defendants also note the following decision recently issued: *LaRoque v. Holder*, 2012 WL 1760281 (D.C. Cir. May 18, 2012) (vacating district court decision as moot).

Committee Chairman had authority to hear testimony from the 36 speakers excluded at the April 26, 2011 hearing. V18 9831-32; V19 10628-29.

19A. Florida misstates Sen. Joyner's testimony. While she noted that she did not "know what Senator Bennett's intentions were," she testified that she is "guided by what he said, and his words to me had some – had an impact of race in it." V18 9839. She explained that she urged the Legislature not to "cut back on the people's right [to vote], [and] then the Number 2 person [Bennett] gets up and analogizes it to people in Africa, everybody knew then I was talking about black folks, and obviously, he was." V18 9839.⁴

25A-28E. Florida does not dispute its history of imposing 3PVRO restrictions and relaxing them only pursuant to federal legislation or court injunction, FF 25A-G, or that there was no evidence to support proponents' alleged concerns about late or fraudulent 3PVRO submissions, FF 27A-27E. Nor does Florida dispute the complete statement of the Third Party Changes, FF 28A-E, other than to incorrectly assert that the pre-2011 law required 3PVROs to register with the State. *LWVF v. Browning*, 575 F. Supp. 2d 1298, 1305 (S.D. Fla. 2008). With regard to tracking registration forms, groups such as the LWVF, the NAACP, and NCLR did identify forms they collected when turning those forms into the SOE. V10 5289; V17 9163-64; V20 11233-34.

30A-31B. Florida does not dispute that legislative sponsors of the Third Party Changes provided no factual support for their alleged belief that "fraud and untimely submissions were a problem," even though opponents of HB 1355 requested factual support for the

⁴ Sen. Joyner's quoted comments about Sen. Bennett, in March 2012, were for an end of term "goodbye speech to Senator Bennett" and unrelated to HB 1355. V18 9842-43.

changes. Florida's response is to cite to these legislators' un-sworn, self-serving, and conclusory statements in the legislative record. Defendants were precluded from testing the knowledge of the proponents as to the reliance of minority citizens on 3PVROs since the proponents refused to provide testimony in this case.

34A-36D. Florida does not dispute the lack of evidence of double voting, that any instance of double voting would have been detected and prosecuted, or that bill sponsors provided no factual support for their alleged belief that double voting was a problem.

37A. Florida does not dispute that legislators knew that provisional ballots are counted at a significantly lower rate than regular ballots, with as many as 50% or more invalidated. Florida offers no evidence that legislators knew which types of provisional ballots are most frequently rejected. Defendants were precluded from testing the legislators' knowledge of the relative rates, by race, that persons change residence in Florida.

42A-45F. Florida does not dispute that there was no evidence that the length or flexibility of the early voting period was a problem, or that the legislative sponsors were unable to provide any factual support for their alleged belief that such problems existed. Legislators may be presumed to have known that Florida's African-American voters use early voting at a higher rate than Whites since that fact was widely reported after the 2008 election.

V17 9415-41. In addition, the proponents refused to provide testimony in this case as to their knowledge, or request data on this issue during the legislative session from the DOS Legislative Liason. FRFF 38-45F; V9 4785. Florida does not dispute that "[t]he reduction in early voting days reduces the opportunity to vote early." FF 43B.

48A-D. Florida again misstates Sen. Joyner's and Rep. Cruz's testimony regarding the

legislature's purpose in passing the Voting Changes. DRFF 19A. Sen. Joyner and Rep. Cruz both stated they could not testify as to what was in the mind of fellow legislators, but based on the totality of the circumstances, including statements made during legislative debate, they believed the legislation was passed with a discriminatory purpose. V18 9838-40; V18 10305, 10307-08. There were multiple references in the legislative debate about HB 1355's effect on minority voters. FF 48A. The legislators were fully aware of HB 1355's retrogressive effect, yet voted in favor of it nonetheless. *Id.*

57A-57H. Florida has provided no probative evidence regarding minority usage of 3PVROs.⁵ Defendants have provided Census data, and evidence of 3PVROs' significant role in registering minority voters in the Covered Counties and statewide. FF 57C-H.

58A-62A. Florida generally does not dispute that compliance with the Third Party Changes is significantly burdensome.⁶ Florida also does not dispute that those 3PVROs that still are attempting to conduct voter registration in the non-covered counties have been forced by the Changes to restrict their registration activities, and that this necessarily reduces the opportunity to register to vote. V17 9212-19, 9136-40, 9166-71; V20 11301-02; V21 11309-14, 11330. While the LWVF does not control what individual members do in their personal time, it is clearly established that the LWVF imposed and maintains a

⁵ Florida argues that a numerical majority of persons registered in registration drives are White, but this says nothing about the relative rates, by race, that registration drives are utilized by Florida voters.

⁶ Florida's only contention in this regard is that it is "speculation" whether the Sworn Statement is intimidating to those who may seek to conduct voter registration. Defendants, however, have presented the testimony of those active in Florida 3PVROs, FF 58J, V20 11303-04, and thus this proposed finding is not based on speculation.

statewide moratorium on all LWVF voter registration drive activities in Florida, including the option of activities deputized by election officials, V10 5237, 5239-42, 5369-77, and that the LWVF has not authorized its members or volunteers to violate this moratorium in any way or to participate in voter registration activities on the LWVF's behalf. *Id.*; V10 5340, 5348. This is consistent with SOE Sancho's testimony that the LWVF is not engaging in any independent voter registration drives. V19 10606.

68A-77B. Florida generally does not dispute the significant burdens and disincentives to voting that the Inter-County Changes place on voters by requiring use of provisional ballots, which create a greater likelihood that eligible votes will not be cast or counted.⁷ FRFF 65-68F. Nor does Florida dispute that "minority voters are more likely to avail themselves of the law that is still in effect in the five covered counties, which allows registered voters who have moved between counties to simultaneously change their address and vote a regular ballot in their new home county." FF 77A; FRFF 72-82; V16 8901, 8907-10. Florida does not dispute that Dr. Hood's analysis of the Inter-County Changes is incomplete. FF 73B; FRFF 72-82; FF 1D.

94B-94E. Contrary to Florida's attempted parsing, the extent to which early in-person voting, in isolation, increases overall turnout is not the foundation for Dr. Gronke's opinions, or the relevant scholarship in the field. V18 9978, 9985-86, 9998, 10032-35,

⁷ Florida cites to only one statement regarding voters' confidence in and ability to use provisional ballots, V7 3972, but does not address numerous contrary statements in the record. FF 68D. Florida does not disagree that increased use of provisional ballots will result in longer lines at polling places. Defendants cite testimony that provisional ballots take longer to complete than regular ballots. FF 68A; *see also* Defs.' Resp. to CL 38-39.

10081, 10090-92. And Florida does not dispute that none of the research in the field considers the fundamental question presented here: whether a reduction of early in-person voting days will have a negative impact on minority voters. Research indicates that convenience voting methods, including early in-person voting, have a modest positive turnout effect. V11 6059-61, 6081-83, V 15, 7920, 7929-26. As both Dr. Gronke and Dr. Stewart testified, pre-2008 research is now informed by newer scholarship examining early voting methods and patterns in greater detail. V10 5496-97; V18 9984-86. Research after 2008 shows African Americans in several southern states using early voting methods, including in-person, at higher rates than Whites. V18 9985-86, 10008. Florida does not dispute that Dr. Hood failed to consider these developments or provide any analysis to support his assertion that, despite their higher early voting rates, minority voters will successfully adjust to the reduction of early in-person voting in Florida.⁸

97A-98P. Florida does not specifically dispute FF 97A-98P, that African-American voters use early voting at a higher *rate* than white voters. The cited 2009 paper by Dr. Gronke is fully consistent with his opinions, based on an analysis of the 2008 *and* 2010 elections, that the 2008 election marked a historic shift and that African Americans will continue to use early in-person voting at a higher rate than Whites. V18 10069, 10079; *see also* V18 9914-18; FF 98I-M. Florida offers no evidence that adding more *hours* of

⁸ Nor does any academic “prior work” by Dr. Gronke support the view that all or almost all voters will adapt to a reduction in the early voting period. FF 99D; V18 10025-29.

weekend early voting will overcome the “differential, negative impact on African-American voters” of fewer early voting *days*.” FF 98P.

99A-99E. Dr. Gronke provided an extensive analysis demonstrating that Dr. Hood’s early voting analysis is “flawed” and “misleading” for several reasons. V17 9088-96.⁹

104A-106A. Florida’s reliance on the raw numbers of voters of each race that would be affected by the Early Voting Changes has no relationship to the proportional impact on each group. V17 9089; V18 9888; V19 10294.

113A-116C. Florida also does not dispute that longer lines may deter voters from voting and make voting more difficult. Florida’s statements regarding the elimination of Covered County SOE’s flexibility to conduct early voting on the Sunday before Election Day ignores that the Hillsborough County SOE has said he is ready to consider offering Sunday early voting as long as it is not forbidden by HB 1355. V17 9109, 9193-94.

117-122. Florida does not dispute that partisan politics provide no explanation for the enactment of the Voting Changes. Florida also does not dispute that, in order to ensure uniform application of Florida election law, its past practice has been to not implement unprecleared voting changes in the non-covered counties unless and until the changes were precleared under Section 5 for use in the Covered Counties, and Florida provides no explanation for its sudden change in practice.

REPLY CONCERNING DEFENDANTS’ PROPOSED CONCLUSIONS OF LAW

⁹ Florida’s claim that Dr. Hood’s analysis is confirmed by other evidence is misleading because it improperly attributes certain methods of *analyzing* the underlying data to Dr. Stewart, *see* FF 99A-E; FF 102 n.6, 105 n.8, 109 n.9, 110 n.10, 112 n.11, when he did not conduct or approve such analysis.

Florida has not met its burden under Section 5 of proving that the proposed 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 group.

1-95. Defendants incorporate by reference herein their responses to CL 1-95 in Dkt No. 95 and in their responses below to Dkt No. 97's FRCL 96-104.

96-107E. Florida has not rebutted the Defendants' legal authorities regarding "purpose" and "effect." The State asks this Court to disregard binding precedent and create new legal standards under Section 5, all in the name of "constitutional avoidance." The D.C. Circuit rejected a facial challenge to Section 5, *Shelby Cnty. v. Holder, supra*, and this court need not depart from established precedent. Evidence of a prohibited purpose may be direct or circumstantial, and a discriminatory purpose need only be a motivating factor, not a primary motive of legislation. *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 256-66 (1977); *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 488 (1997) ("*Bossier I*"). There is no authority for Florida's assertion that it has "a relatively low threshold" to meet its Section 5 burden, such that it only needs to offer "some evidence" of non-discriminatory purpose. Florida bears the burden of persuasion to prove that the changes are "free of a discriminatory purpose."¹⁰ *E.g., Texas v. U.S.*, 866 F. Supp. 20, 26-27 (D.D.C. 1994). Florida cites no authority that only the views of legislators from Covered Counties are relevant to intent. *See Resp. to CL 6-7*.

¹⁰ In FRCL 18-22, Florida cites to *City of Richmond*, an annexation case, as the controlling legal standard, but fails to note that a voting change "taken for the purpose of discriminating" against minority voters "has no legitimacy at all under our Constitution or under [Section 5]." *City of Richmond v. U.S.*, 422 U.S. 358, 378 (1975).

Contrary to FRCL 23-31, facially neutral laws can be motivated by discriminatory purpose, and such laws receive no special deference under Section 5. *Shelby*, 2012 WL 1759997, at *13 (citing “second-generation” dilutive tactics). The fact that some voting changes in a statute are precleared does not address whether other changes in the same law have a discriminatory purpose or effect. Each change is analyzed separately under the factors identified at 28 C.F.R. 51.57. In FRCL 28, Florida misquotes *Arlington Heights* to argue that effect is relevant to analyzing purpose only if “unexplainable on grounds other than race.” Actually, the Court held that fact patterns where the racial impact is so severe that the change can only be explained by race are rare; thus, courts “must look to other evidence” to determine discriminatory purpose, with “an important starting point” being whether the change “bears more heavily on one race than another.” 429 U.S. at 266-68. Florida erroneously claims purpose must be proven by “smoking gun” evidence. *Arlington Heights* found that legislators may have multiple reasons for adopting a statute, but courts can find discriminatory purpose if it is a “motivating factor.” 429 U.S. at 265-66. Indeed, legislators can intend to discriminate on the basis of race without harboring racist attitudes.¹¹ Defendants rely on both legislators’ contemporaneous statements as well other evidence to show purpose.¹² Courts

¹¹ See, e.g., *Garza v. County of Los Angeles*, 918 F.2d 763, 778 n.1 (9th Cir. 1990) (Kozinski, J., concurring in part and dissenting in part).

¹² Contrary to FRCL 42-44, Senator Joyner made no concession regarding Senate leader Bennett’s Africa comment. DRFF 19A; V18 A9840 (“[H]e had race on his mind.”).

considering the *Arlington Heights* factors rarely reach conclusions based on the official legislative record alone. *E.g. Texas v. U.S.*, 2011 WL 6440006, at *21-22 (D.D.C. Dec. 22, 2011) (denying state's motion for summary judgment as to purpose). The history of voting discrimination in Florida is directly relevant to drawing an inference of purposeful discrimination. *Rogers v. Lodge*, 458 U.S. 613, 625 (1982). That history is well documented, despite Florida's claim that it expanded voting rights. FF 1G. That Florida is only partially covered by Section 5 does not erase that history.

Section 5's language and legislative history, and the Attorney General's application of Section 5, contradict Florida's contention that "ability to elect" is the correct retrogression standard in this case. The 2006 amendments did not change the retrogression standard as applied to voting changes that restrict ballot access. Resp. to CL 51-59. Courts repeatedly have recognized that the Attorney General's interpretation of Section 5 is due "substantial deference." *Lopez v. Monterey Co.*, 525 U.S. 266, 281 (1999). FRCL 70-80 incorrectly characterizes the Defendants' position on retrogression as "disparate impact." Although disparate impact is relevant for the purpose inquiry under *Arlington Heights*, 429 U.S. at 266, the standard for the effect prong is retrogression, *i.e.* whether minority voters will be worse off as compared to the benchmark. *Beer v. U.S.*, 425 U.S. 130, 141 (1976); 28 C.F.R. 51.54(b).

Florida assumes, incorrectly, that only efforts that completely bar minority citizens from registering or casting a ballot violate Section 5.¹³ *Shelby*, 2012 WL 1759997, at

¹³ Likewise, even though Covered Counties would need to submit their specific early voting hours for Section 5 review if the Early Voting Changes are precleared, eliminating

*13. Florida erroneously argues that any change to registration is permissible if voters retain a “reasonable and fair opportunity” to register. Instead, “[r]etrogression, by definition, requires a comparison” between the benchmark practice and the proposed voting change. *Bossier I*, 520 U.S. at 478; *see also Georgia v. Ashcroft*, 539 U.S. 461, 478-79 (2003) (Section 2 not relevant). Florida’s changes will leave minority voters worse off than they were before, as compared to the benchmark practices. CL 106A-C and 107A-H.

Florida cites no authority in FRCL 83-84 that the Court should disregard retrogression for the Inter-County Movers change if it is allegedly *de minimis*. The harm to minority voters from this change cannot accurately be described as minimal. CL 68C, 77A; Resp. to CL 72, 80-82. Florida offers no support in FRCL 85-92 as to why the Court should disregard the impact of the early voting changes on November 2012. As all the experts’ data and testimony show, the early voting rates during the November 2008 election are the best predictor of the likely effect of the changes in the November 2012 election. FF 98E-P. The impact of the change on November 2012 is highly relevant to the court’s retrogression analysis.¹⁴

early voting days harms minority voters. CL 106A-C. The D.C. Circuit in *Shelby* cited a reduction in early voting that was harmful to African-American voters as an example of racial discrimination in voting. 2012 WL 1759997, at *14.

¹⁴ In Reply CL 83-84, Florida mischaracterizes Dr. Stewart’s *de bene esse* deposition as “overstating” his numbers. Dr. Stewart made no such statement. V18 A10653 (explaining that he could have provided a more precise definition of the voters designated as those who “moved into the county on or shortly after election day,” but not questioning the underlying numbers).

107F. Florida cites footnote 45 in *UAW v. NLRB*, 459 F.2d 1329, 1339 (D.C. Cir. 1972), to argue that the court should not draw an adverse inference from the legislators' decision not to testify. However, the Court noted that the adverse inference rule is inapplicable where a party has a constitutional right to not provide the evidence in question (*e.g.*, the right against self-incrimination)—circumstances not present here where the legislators asserted a qualified privilege. Florida repeatedly cites to the alleged “genuine belief” of legislators, FRCL 32-33, 38-40, 45-47, yet the rationales offered in the legislative record are not supported by the evidence, CL 107D-F, and the record provides no further evidence as to what the legislators' “genuine belief” actually was.

108. Dr. Gronke's Expert Report contains the required “list of all publications authored in the previous 10 years,” Fed R Civ P. 26(a)(2)(B)(iv). His disclosed CV inadvertently omitted an *unpublished* working paper. V18 10047-50. Dr. Gronke's Rebuttal declaration was not late as it was submitted pursuant to the Court's March 27, 2012, Order, Dkt. No. 87, and he was deposed on that declaration. Florida frivolously objects to a number of documents that were introduced as deposition exhibits, even though Florida's counsel, during the 30(b)(6) deposition of Florida, conceded that the State had no basis to question (1) the authenticity of any deposition exhibits; and (2) the admissibility of any deposition exhibit as an exception to hearsay under Fed. R. Evid. 803(6). V13 6905-07. Florida's objections to the remaining documents are without merit. V21 11336.

109-110. For the reasons set forth above, Defendants respectfully request that this Court deny the State's request for a Section 5 declaratory judgment.

Respectfully submitted on May 24, 2012,

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