**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

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

**REPLY TO PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Plaintiff, the State of Florida, submits the following Reply to its Proposed Findings of Fact and Conclusions of Law.[1]

[1] Pursuant to this Court's Scheduling Order, Florida has conducted *de bene esse* depositions of Senator Arthenia Joyner, Representative Janet Cruz, Dr. Paul Gronke, Dr. Charles Stewart III, Rafael Collazo, Cynthia Slater, and Ion Sancho.

# TABLE OF CONTENTS

**Page**

## TABLE OF AUTHORITIES

**Page(s)**

**FEDERAL CASES**

**STATE STATUTES**

# GLOSSARY

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|---|---|
| CL | Proposed Conclusions of Law |
| DCL | Defendants' Conclusions of Law |
| DFF | Defendants' Findings of Fact |
| DOJ | Department of Justice |
| DOS | Florida Department of State |
| FF | Proposed Findings of Fact |
| FSASE | Florida State Association of Supervisors of Elections |
| HB | House Bill |
| LWV | League of Women Voters |
| RCL | Reply Conclusions of Law |
| RFF | Reply Findings of Fact |
| SB | Senate Bill |
| SOE | Supervisor of Election |
| TPRO | Third-Party Voter Registration Organization |
| V | Volume of the Appendix |
| VRA | Voting Rights Act |

## INTRODUCTION

Notwithstanding the Supreme Court's warning that there is grave doubt as to Section 5's constitutionality, Defendants ask this Court to adopt the most expansive and burdensome construction of the statute conceivable. Under their interpretation, which is unsupported by any case law, preclearance should be denied under the "purpose" prong unless Florida can document "compelling" reasons for the voting changes and unless individual legislators offer testimony defending their votes; they argue that preclearance should be denied under the "effect" prong so long as the Three Voting Changes have even a trivial "disparate impact" on a minority group irrespective of whether the change denies anyone a reasonable and fair opportunity to register and cast a ballot or whether the change prevents any group from electing the candidate of their choice. Because Defendants' construction of Section 5 will cement its unconstitutionality, this Court should reject it. *See Zadvydas v. Davis*, 533 U.S. 678, 689 (2001).

Unlike Defendants, Florida proposes a reasonable construction of the statute that is consistent with established case law and avoids these serious constitutional issues. Florida is entitled to preclearance under the "purpose" prong because, among other reasons, it has met its *prima facie* burden of showing that these facially neutral laws were not motivated by racial animus, and Defendants have not rebutted this showing with sufficient evidence that racial animus was the "but for" cause of the changes. Florida is entitled to preclearance under the "effect" prong because, among other reasons, even if the Three Voting Changes have a negative "disparate impact" on certain voters—which they do not—any affected voter still has a reasonable and fair opportunity to register and

cast a ballot, and none of the changes will interfere with any group's ability to elect the candidate of its choice. Accordingly, Florida respectfully requests that the Court grant preclearance based on the voluminous record and pleadings before it.[2]

## PROPOSED FINDINGS OF FACT

1-8. Florida does not have a "long history of racial discrimination in voting" for purposes of Section 5 of the VRA because it is not a "covered" State. FF ¶ 1.

9-9J. Although legislators consulted with the FSASE and SOEs, FF ¶¶ 11-12, 16, 53, it is the legislators who make policy, V9 5195; V2 1151-52; V7 3602-03, not the SOEs, who perform "ministerial" functions, V7 3742, and frequently oppose change of any kind, V12 6669; V7 3500, 3510. It thus is not unusual for legislators to disagree with SOEs, V9 5206-07; V12 6893-95; V6 3216-17, or with the DOS, V9 4950; V12 6893-95, whose proposals are generally "housekeeping in nature," V12 6790. Nor is it unusual for legislators to receive policy advice from outside consultants. V9 4853, 5202-03; V12 6763-64; V13 6933. Florida offers the best evidence of legislative intent: legislators' *contemporaneous* statements, which occurred during committee hearings and on the floor

[2] As shown herein, any factual dispute between the parties is not material because even if all of Defendants' evidence is accepted as true, which it should not be, Florida is entitled to preclearance under the controlling legal standard. But even if any factual dispute is material, the preponderance of the evidence weights in Florida's favor. Finally, live testimony is unnecessary and would only impose additional costs on the people of Florida. The parties have created a sizable record and each side had the opportunity to cross-examine anyone offering testimony. Indeed, there have been 27 depositions, including seven *de bene esse* depositions of Defendants' declarants. While the parties criticize each other's experts, Defendants' experts have each submitted two reports and each has been deposed twice; Florida's expert was subjected to a full-day deposition and has not supplemented his testimony since then. Repeating this process in open court will not aid the Court's deliberative process.

through, *inter alia*, opening statements describing the purposes of the Changes, responses to legislators' questions, and legislative debate. FF ¶¶ 11-13, 16-20, 30-31, 36-37, 44-45.

10A-15A. The Three Voting Changes *were* amended to address concerns raised by legislators, state officials, and the public. *E.g.*, V3 1594 (military exemption); V4 1861-74 (expanding early voting). That so many amendments were proposed, debated, and rejected on their merits further demonstrates the fairness of the process. FF ¶¶ 18-20.

17A. The April 26 hearing was not unusual: committee hearings are "designated for a set period of time and they don't go over," and the other bills took up a "significant amount of time," V9 5112-15, 4902, 4959; V13 6933; V18 9834-37; V20 10971-79, despite the Chairman's attempts to keep the process moving, V3 1602. The public provided ample testimony. FF ¶¶ 11-12, 16; *see* V9 5113; V1 436-41; V2 974-79.

19A-23. The comments of Senator Bennett—a person Senator Joyner recently called "a good guy" and thanked "for all you've done for the people of Florida … and the love and comradery that you've shown to all of us here"—did not evince a racially discriminatory purpose, as Senator Joyner conceded in her deposition. V18 9842-45.

24-29. Defendants cannot dispute that before the Act "[f]ew TPROs registered with the State," FF ¶ 26, V20 11231, even though registering has always been required, FF ¶ 26, and that there was "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," FF ¶ 27; V18 9815, 10284; V20 11233-34. The evidence shows that detecting fraud and untimely submissions was "almost impossible," FF ¶ 27, and, regardless of the number of

prior incidents, the Changes undoubtedly "prevent and deter fraud" and "ensure that registrations are returned" on time. FF ¶ 29; V8 4428; V19 10597-98.

30-31B. Defendants cannot refute that the legislative record shows that legislators thought fraud and untimely submissions were a problem and that it would be solved by the Third Party Changes. FF ¶¶ 30-31; V13 6991-95, 6997-98. The evidence confirms this belief, as the Act has already allowed the State to discover fraudulent and untimely submissions. FF ¶ 29. Defendants provide no evidence that legislators knew whether minorities registered through TPROs more often than Whites, V12 6605-06, or that legislators had a hidden discriminatory purpose, RFF ¶¶ 47-50.

32-36D. Defendants cannot refute that under the prior law, SOEs "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." FF ¶ 34; V6 3202; V7 3534, 3809-10, 3823, 3981-83. Even if it were detected later, there was no "way to retrieve the regular ballot after it had been cast." V6 3030-31, 3258; V7 3552, 3982-83; V13 7097-98; V18 9788, 10229. Defendants cannot refute that legislators thought this was a problem that the Inter-County Changes would solve. FF ¶ 36.

37/37A. Defendants cannot refute that legislators thought that the Inter-County Changes protected the right to vote of those affected because provisional ballots cast by eligible voters "shall be counted." FF ¶ 37. The evidence confirms this belief. FF ¶¶ 69-70. Provisional ballots most often are not counted "simply because the person is not eligible to vote." V9 5048; V18 9789; V19 10556. Defendants provide no evidence that

legislators knew whether minorities moved inter-county more than Whites, V9 4794-95, or that legislators had a hidden discriminatory purpose, RFF ¶¶ 47-50.

38-45F. Defendants cannot refute that legislators thought that the prior law regarding early voting was inflexible, limited the availability of convenient, non-working hours, and was inefficient for some counties. FF ¶¶ 44-45. The evidence justifies these beliefs. FF ¶ 43; V6 3337; V7 3611-12, 3770, 3847; V12 6736. There is no evidence that legislators knew whether minorities used early voting more than Whites, V9 4785; V12 6736, or that legislators had a hidden discriminatory purpose, RFF ¶¶ 47-50. There is certainly no evidence that Senator Diaz de la Portilla, a Hispanic senator, had a discriminatory motive, V18 10299-300; nor was his "sole" motivation to decrease costs, *e.g.* V4 2255-61; *see* V19 10494.

46. Defendants concede that the Covered Counties have *never* had early voting on any Sunday and that many SOEs did not want the State to mandate early voting on the Sunday before Election Day. FF ¶ 46.

47-50. Both Senator Joyner and Representative Cruz admitted in their depositions that they had no evidence that *any* legislator acted with a discriminatory purpose. V18 10294, 10298-308; V18 9841-55. Nor is there any evidence to the contrary. Defendants' "multiple assertions of discrimination" are mostly complaints about the Act's effect on *all voters*, not minorities in particular and pale in comparison to those about students, military personnel, and the elderly. Legislative "decorum" should not have prevented legislators and Defendant-Intervenors from respectfully voicing their concerns about the *effect* of the Bill on minorities, especially if they believed that the Bill was being enacted

*because of* its effect on minorities. Yet such concerns were almost entirely non-existent. FF ¶¶ 47-51. Nor were legislators afraid to criticize the Bill in hyperbolic accusatory terms. *E.g.*, V3 1346, 1392; *see* RFF ¶¶ 38-45.

51. Defendants provide no evidence that *any* legislator from the Covered Counties was motivated by a discriminatory purpose. *See* FF ¶¶ 1-53; RFF ¶¶ 1-53.

52-53. Defendants do not dispute the numerous examples of the fairness of the legislative process. *See* FF ¶¶ 52-53. Senator Dockery was not present at the committee hearings she describes, V2 1001-02; V3 1640-42; she raised no concerns when she was present, V1 607-08; V4 1879; and, regardless, her post-hoc allegations a year later in an editorial are of little value. Representative Cruz's declaration should be almost entirely discounted, as her deposition demonstrated her complete unfamiliarity with the Voting Changes, V18 10236-37, 10256-57, 10262-63, the Act's legislative process, *id.* 10291-92, and Florida election law in general, *id*. 10227-32, 10282. Strike-all or late-filed amendments are not unusual or problematic, V9 4759, 4776, 4952-54; V12 6766-67, and, in fact, have been filed by Senator Joyner just this year, V18 9828-33.

54-57. Defendants do not dispute that Florida provides numerous avenues for registering to vote and that only those voters who choose not to use one of these alternative options can be affected. FF ¶¶ 54-57. Defendants provide no evidence that any citizen will not have a reasonable and fair opportunity to register to vote under the Changes.

57A. There is no evidence that TPROs register more minorities than Whites. The Census measurement of "Registration Drive" includes more than TPRO activity—it includes *State* registrations (at the post office or the library), V20 10971-72, 11106-07, as well as

*State* "registration drives," which SOEs frequently conduct and which often focus on minority communities, V6 3378; V7 3515-16, 3659-60; V19 10603-04. In any event, the numbers show that the majority registered through a "Registration Drive" are White.[3]

57B-60. Defendants do not dispute that TPROs are successfully complying with both the registration and accounting rules, FF ¶ 59, as well as the 48-hour rules, FF ¶ 60, V20 11226, and they cannot dispute that TPRO activity in the Covered Counties is minimal, FF ¶ 57; V19 10343-44. That a few TPROs involved in this litigation temporarily "suspended" their voting registration activities is irrelevant because these TPROs concede that they are conducting or will conduct voter registration activities in 2012. V16 8863-67; V17 9166. In particular, LWV *is* registering voters in Florida, despite contrary claims, V19 10606, as are many TPROs not in this litigation, FF ¶¶ 59-60; V19 10618.

58B-64. Late submissions do not lead to "automatic fines"—not a single TPRO has been fined for a 48-hour violation. V18 9821; V19 10376-77, 10445; V20 11248, 11272-73. Florida's guidance regarding the 48-hour rule is not ambiguous. *See* V15 8148-50. Florida law does not require "quality control" measures. V1 256-58. TPROs *can* return registrations in time. FF ¶ 60. That volunteers will be "scared" by the Sworn Statement is pure speculation, V19 10440; V20 11261-62; indeed, a notice of penalties for false registration is contained on every voter registration application, *id*. 11261-62, 11308. The possibility of minor penalties will not deter TPROs. FF ¶¶ 61-62. Defendants can provide no evidence of *how many* minority voters in the Covered Counties will not register because of the Third Party Changes. FF ¶ 57; V9 5130-31.

[3] V14 7688-90 (multiplying the "Sample Universe" by the "Registration Drive").

65-68E. Defendants do not dispute that provisional ballots take no longer to complete *than the prior process* for changing an address at the polls. *See* FF ¶ 71. A line does not "prevent" anyone from voting, Fla. Stat. § 100.011, and, regardless, longer lines would affect *all voters* equally (not just inter-county movers or minorities). Defendants grossly exaggerate the "extremely embarrassing" and "difficult" process of filling out a provisional ballot. V7 3972. The potential for poll worker error is not unique to provisional ballots. V9 5192. Statewide projections of provisional ballots are irrelevant.

68E-71. Defendants cannot dispute that SOEs "*shall count*" provisional ballots, as the law requires, unless the State has proved that the voter was ineligible. FF ¶ 69. Nor will SOEs have trouble counting the provisional ballots. FF ¶ 70; V9 5044-46. In any event, Defendants do not dispute that the law requires that even if the canvassing board cannot examine all the provisional ballots, it "*shall count* the provisional ballots, as the State has the burden of proof to disprove the voter's affirmation that he or she is entitled to vote." FF ¶ 70. The SOEs understand these requirements. *Id*.; V19 10559-63.

72-82. Defendants do not dispute the accuracy of the inter-county figures (for which there is proper foundation, FF ¶ 75 n.1) that show a miniscule number and rate of inter-county movers, FF ¶¶ 75-82; V19 10662; *see* FF ¶ 74; V19 10648-53. Defendants cannot dispute the accuracy of Dr. Hood's tabulations, which corroborate Dr. Stewart's, FF ¶ 73, or that turnout can be affected only if a voter chooses not to vote through a provisional ballot, FF ¶ 77; *see* V19 10666-67. Defendants do not dispute the accuracy of the inter-county figures, FF ¶¶ 80-82, for which there is proper foundation, FF ¶ 80 n.3. Voters can easily update their address before arriving at the polls, V9 5074, or at the polls, FF ¶ 54.

83-87. Defendants do not dispute that the State provides numerous options for casting a ballot and that the Early Voting Changes will affect *only* those 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." FF ¶ 87.

88-93. Defendants cannot dispute that the Covered Counties intend to "offer the maximum number of hours of early voting needed to accommodate voters," FF ¶ 91, or that voters will use the new expanded hours, FF ¶ 92; V19 10525.

94-96. Intervenor Sancho (an SOE) testified that early voting does *not* increase turnout, but is instead a "redistributive process" that simply "shifts turnout to different times." V19 10492, 10507-08. Other SOEs confirmed this conclusion. V6 2929, 3443-44; V13 7161-62. Likewise, DOJ's own expert, Dr. Stewart, says that early voting "make[s] voting more convenient . . . but does not generally increase turnout overall," V10 5496, and the Florida Senate in October 2011 determined that "early voting has not had any impact on voter turnout in Florida," V16 8999-9000.

94C-94D. Dr. Gronke's reversal from his long-held position is simply not credible. Although he now claims older academic work was based on "limited elections and sparse data," he previously stated that "enough research had accumulated" to "state a scholarly consensus" that "*early voting does not increase turnout*." FF ¶ 95. And at his deposition, after reviewing every article he cited for his new theory (none of which he authored), V18 9965-9991, 10119-10186, Dr. Gronke conceded that he "mischaracteriz[ed]" the literature, *id*. 9981, "inappropriately included" studies in his rebuttal report, *id*. 9983, and

could not point to any "particular statement in any of these papers that indicates that early in-person voting specifically has a relationship to overall turnout," *id*. 9986.

94E. Dr. Gronke's new position that voters will not vote if they "face a loss of previously available voting days" is again directly contradicted by his prior work. In July 2011, after Ohio passed a law shortening its early voting period, Dr. Gronke wrote that he is "convinced that *most early voters will adapt*, and those voters who cast ballots four weeks out *will happily cast ballots two weeks out*." V18 10020-21, 10025-26, 10189-90.

97A-97C. Defendants' contention that early voters will not adjust is refuted by their other contention that early voting will lead to "longer lines at the polls" when these voters use the new early-voting time period. DFF ¶ 113A-B; *see* FF ¶¶ 113A-115.

98-99O. Dr. Gronke's prior scholarship contradicts Defendants' assertion that 2008 was not an outlier. In 2009, Dr. Gronke concluded that the 2008 election was "anomalous … at least insofar as early voting is concerned," because the "demographic and political profile of the 2008 early voter deviates from the trajectory of early voting in the past few election cycles. Most notably, the number of African Americans who voted early increased enormously, particularly in the Southeast[.]" V18 10045-71, 10192-10215. Dr. Gronke argued that "the *primary reason* 2008 departed from previous election cycles was Barack Obama's presence at the top of the ticket," *id*. 10053, 10194, and he was thus "wary of drawing too many conclusions from the 2008 contest" because a finding that African American early voting would continue at 2008 levels would "run contrary to nearly two decades of data on early and absentee voting," *id*. 10068-72, 10211; FF ¶¶ 107-08.

98O-98P. Whites cast more early votes in the eliminated days in the aggregate and proportionally. FF ¶ 116; V14 7898. Dr. Gronke has praised laws that mandate weekend early voting. V18 10013-20, 10187; *id*. 9801, 10254-55, 10266-67; V19 10488, 10517.

99-99E. Dr. Hood is clearly qualified to testify about early voting. *See* V16 9037, 9078-87. Dr. Gronke confirmed that Dr. Hood is respected in the field of early voting, and that he only critiques Dr. Hood's findings, not his qualifications. V18 9880-83. In any event, almost every finding of Dr. Hood's is confirmed by other evidence. *E.g.*, FF ¶¶ 96, 100.

100-108. Defendants do not dispute the accuracy of *any* of Dr. Hood's and Dr. Stewart's early voting figures. Far from "misappropriating" Dr. Stewart's data, the State has simply used what Dr. Stewart intended to be "a common data set on which all the parties, including the State, would rely," V19 10681, to demonstrate that the early voting figures are not in dispute. Defendants do not dispute that in every election Whites comprised the overwhelming number of early voters and that their *own expert* states that "Black, White, and Hispanic voters all utilized early voting at roughly the same rates both before and after the 2008 general election." FF ¶ 106; V19 10679-80.[4] The State provides proper foundation. FF ¶¶ 101-104 nn. 5-7. Notably, although Dr. Stewart drew a conclusion on the impact of the Inter-County Changes, he drew *no* conclusion from the early voting data that he compiled. V19 10682-84. Dr. Gronke concedes that the 2004 election did not predict the 2008 election, nor the 2006 election the 2010 election, V18 9934-38, and that he cannot predict what will occur after the 2012 election, *id*. 9920-25; FF ¶¶ 107-08.

[4] Complaints that the State "improperly pooled" data and did not do the "correct comparisons" is merely Dr. Gronke's view that "disparate impact" is the relevant way to examine the effect of the changes. V18 9884-85, 9888, 9890-92, 9912-13.

109-113. Defendants do not dispute the accuracy of the early voting figures or that "[w]ithout the 2008 general election, there is almost no difference in White and African-American early voting turnout," and that White "early voting exceeded minority early voting in four of the seven elections." FF ¶¶ 109-11; V19 10499. Defendants do not dispute that "more than 65% of all groups are voting in the remaining early voting days." FF ¶ 113. *Compare with* V18 10013-20, 10187 ("applaud[ing]" Georgia's shortened early voting period because 80% of the early voting occurs in the remaining period).

113A-115. Longer lines cannot prevent anyone from voting, FF ¶ 86, V7 3962, nor would they deter *early voters*, as they are typically the most dedicated voters, V7 3617, 3994; RFF ¶¶ 97A-97C. Regardless, longer lines would affect *all voters* equally (not just early voters or minorities). Defendants' contention that the Early Voting Changes will "result in additional costs, primarily overtime associated with longer early voting days" contradicts their other contention that the Covered Counties will not offer "the maximum early voting hours needed to accommodate voters." DFF ¶¶ 90-91; FF ¶¶ 90-91.

116-116C. Defendants do not dispute that over all elections "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 ¶ 116. Since there has never been Sunday early voting in the Covered Counties, FF ¶ 88, and the Early Voting Changes now require it, FF ¶ 93, any positive effect from a "souls-to-the-polls" campaign would *increase* African American early voting in the Covered Counties, V18 9814, 10012-13. GOTV efforts will not be affected. V20 11282-84, 11287. Finally, Dr. Gronke's predictions are of little use because he did not "examine the potential impact of the

addition of the Sunday [or] the additional hours" or "weigh the expansion of hours against the reduction in the number of days." V18 10040-42.

**DEFENDANTS' ADDITIONAL PROPOSED FINDINGS OF FACT**

117-122. Immediate implementation of an election law is *not* unusual: at least eight election bills since 2000 contained provisions with immediate effective dates, Florida Laws Chs. 2010-167 § 32; 2008-95 §§ 28, 30-31, 34; 2007-30 §§ 9-10, 18-19, 21, 23; 2005-278 § 45; 2003-415 §§ 5, 10(5); 2002-281 §§ 1, 3, 13; 2002-17 § 30; 2001-40 §§ 6, 63; V19-20 10699-10970; V7 3869; V9 4918; V12 6632-33, 6742; *see* V9 5201-02. Florida law *requires* immediate implementation in the non-covered counties, V8 4119-20; V13 6981-82, regardless of prior non-binding memoranda, V13 6985. DOS' notifications, were entirely appropriate. *See Sullivan v. Scott*, 2011 WL 4954261, at *2 (S.D. Fla. 2011); V8 4119-20; V13 6988-90.

**PROPOSED CONCLUSIONS OF LAW**

4-7. Defendants ignore the central role the canon of constitutional avoidance must play in resolving this case. CL ¶ 4. By focusing on the entire Legislature's supposed motivation for enacting the changes, Defendants obliterate any distinction between the application of the "purpose" prong to covered states and to covered counties in non-covered states. This renders Section 5 constitutionally suspect. CL ¶¶ 5-7.[5]

[5] Defendants incorrectly suggest that the Court should defer to DOJ's implementation of the VRA. *See* DFF ¶¶ 6-7, DCL ¶¶ 55-57. DOJ's enforcement practices are not a binding "interpretation" of Section 5. *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 483 (1997) ("*Bossier Parish I*"). Moreover, constitutional avoidance trumps any deference to which an agency interpretation might be entitled. *Nat'l Mining Ass'n v. Kempthrone*, 512 F.3d 702, 711 (D.C. Cir. 2008).

8-11. Defendants appear to resist the notion that a "discriminatory purpose" under Section 5 is one that violates the Fourteenth or Fifteenth Amendment. But regardless of the underlying right at issue, the phrase "discriminatory purpose" refers to unconstitutional intentional discrimination, *Ashcroft v. Iqbal*, 556 U.S. 662, 676-77 (2009), and Congress intended for that standard to control under Section 5, CL ¶ 11.

12-14. Defendants wrongly attack the State's citation to *Feeney* as the governing standard. *Arlington Heights* discussed the kinds of circumstantial evidence that could be amassed to prove that a facially neutral law is in fact intentionally discriminatory. *Bossier Parish I*, 520 U.S. at 488; *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 343 (2000) ("*Bossier Parish II*") (Souter, J., concurring in part and dissenting in part); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 540 (1993). But the evidence amassed under those "factors" must be measured against some standard; that unitary standard is *Feeney*'s directive that the law be enacted "because of" and not merely "in spite of" its negative disparate effects. *Personnel Admin. v. Feeney*, 442 U.S. 256, 271-73, 279 (1979); *see, e.g.*, *McCleskey v. Kemp*, 481 U.S. 279, 298 (1987).

15-17. Defendants confuse the issue of *which* party bears the burden under Section 5 with *what* that burden is. Florida bears the burden of proving absence of discriminatory purpose by a preponderance of the evidence, but the case law sets a relatively low threshold for meeting it. Florida meets its burden if the law is facially neutral and there is some evidence that it was enacted for a non-discriminatory purpose. The burden then shifts to require Defendants to show that the law was in fact changed "because of" racial animus. CL ¶ 20; *New York v. United States*, 874 F. Supp. 394, 400-01 (D.D.C. 1994).

18-22. Defendants cannot distinguish *Richmond, Port Arthur*, and *New York*. *Richmond v. United States* included an important elaboration of the controlling legal standard. 422 U.S. 358, 370-71 (1975). *New York* and *Port Arthur* applied this legal standard.

23-25. Defendants do not refute the absence of "evidence that legislators *from the Covered Counties* were motivated by any discriminatory purpose," and do not dispute that each of the changes is facially neutral with regard to race or ethnicity. These conclusions should be deemed established. CL ¶¶ 11-23; RCL ¶¶ 11-22.

26-27. The Attorney General approved of 77 of the 80 changes made by the Act. Defendants' counterargument is a non-sequitur. While DOJ must separately preclear each change, those 77 changes would not have been precleared if some general characteristic of the Act revealed a discriminatory intent. Defendants' evidence of discriminatory purpose must therefore come from *something peculiar to these three changes*. One vote was cast on all 80 changes, making it extremely unlikely that a discriminatory motive behind one of the Three Voting Changes was a but-for cause of any particular legislator's "yea" vote on the entire bill. *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977). As explained below, RCL ¶¶ 28-47, there is nothing particular to the Three Voting Changes—or the entire Act—evidencing discriminatory intent under *Feeney*, which tends to require a smoking gun to find discriminatory purpose. *Compare United States v. Johnson*, 40 F.3d 436, 440 (D.C. Cir. 1994), *with Hialeah*, 508 U.S. at 540-42.

28. In a Section 5 case, whether a change "bears more heavily on one race or another" means "retrogressive," which is already accounted for in the "effect" analysis. *Bossier Parish I*, 520 U.S. at 489. Moreover, to be probative of purposeful discrimination, the

effect must be so severe that the legislation is "unexplainable on grounds other than race," *id*., and, as a result, "such cases are rare," *Arlington Heights*, 429 U.S. at 265. Defendants concede that *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 196 (2008), supports Florida's assertion that election integrity is a valid state interest.

29. Defendants offer no support for their assumption that Florida must prove that the voting changes were "necessary" or that the legislature must consider "less burdensome" alternatives. Florida need not satisfy strict scrutiny. At most, Florida need only bring forth "some affirmative evidence" of non-discriminatory purpose, *New York*, 874 F. Supp. at 400, which Florida has done. RCL ¶¶ 31, 34-35, 42-44. Defendants' proposed standard contradicts the "presumption of good faith" afforded to state legislation, *Miller*, 515 U.S. at 916, particularly as Florida is *not a covered jurisdiction*.

30. The preponderance of the evidence shows that the legislative process was not unusual. FF ¶ 9; RFF ¶¶ 9-53; CL ¶ 26. Post-enactment implementation is irrelevant to legislative intent and provides no evidence of discriminatory purpose. RFF ¶¶ 117-122.

31. Defendants proffer after-the-fact declarations, instead of the contemporaneous record, to determine legislative intent. But the best evidence of the motivations for a bill are the "contemporary statements by members of the decisionmaking body." *Arlington Heights*, 429 U.S. at 268. Only in an "extraordinary" case is after-the-fact testimony proper, *id.*, and there is no exception to this rule for Section 5 litigation, *see* Order at 2, *State of Texas v. Holder*, No. 1:12-cv-128 (D.D.C. Apr. 20, 2012) (Doc. 84). That legislators have volunteered testimony in other cases does not mean that such testimony is *required*. RCL ¶ 107(f). Requiring legislators to defend their votes in Court, on pain of

denial of preclearance, would exacerbate Section 5's federalism costs. CL ¶ 4. Defendants' witnesses present their view of the necessity of the legislation and speculate why others voted for it (retreating significantly from those claims in their depositions). RFF ¶¶ 19-23, 42-44, 47-50. As Judge Hinkle found, a legislator's testimony explaining "why she thinks others voted for it" is of little or no probative value. V17 9397.

32-33. Availability of other means of registration *is* relevant because, so long as citizens retain a reasonable and fair opportunity to register, they are not negatively affected. Here, any statistical racial disparity in current use of TPROs to register comes nowhere close to the level needed to infer invidious intent. RCL ¶ 81; *see, e.g.*, *Feeney*, 442 U.S. at 278-79. Even if all of Defendants' evidence is accepted as true, they have not brought forth sufficient evidence to rebut Florida's *prima facie* showing on discriminatory purpose, RCL ¶ 29, or the evidence that legislators held a genuine *belief* that the Third Party Voting Changes were warranted for legitimate reasons, RFF ¶¶ 30-31B.

34-37. The purpose and background behind the Inter-County Changes are legitimate as the preponderance of the evidence shows that the legislators *believed* that the prior law allowed a voter to cast two ballots in the same election, RFF ¶¶ 32-36D. The preponderance of the evidence shows that the legislative process was neither unusual nor provides contemporaneous evidence of discriminatory purpose. RCL ¶ 30.

38-40. The Inter-County Voting Changes do not have a discriminatory effect. RCL ¶ 82-84. Moreover, any such effect is not so severe as to lead to an inference of discriminatory purpose. Defendants' evidence, even if true, is insufficient to rebut Florida's *prima facie* showing that the facially neutral Inter-County Voting Changes were not motivated by a

discriminatory purpose, RCL ¶¶ 82-84, or the showing that legislators held a genuine belief that the Inter-County Voting Changes were warranted, RFF ¶¶ 32-36D.

41. Defendants cannot dispute that, because the Covered Counties must separately preclear the hours they choose, the only changes at issue here are: (1) the elimination of the first five days of the early voting period; (2) the addition of night and weekend hours, some of which are mandatory; and (3) the elimination of the option to allow voting on the final Sunday before the election—a day the Covered Counties *never* held early voting and thus was not an aspect of the benchmark practice. The Court thus must assume that the maximum number of hours of early voting will be used. In any event, county officials have testified that they will offer the maximum available hours. FF ¶¶ 89-91.

42-44. The preponderance of the evidence shows that the legislative process was neither unusual nor does it provide contemporaneous evidence of discriminatory purpose. RCL ¶ 30. Senator Joyner conceded in her *de bene esse* deposition that Senator Bennett's comment was not evidence of intentional discrimination. RFF ¶¶ 17A-23. The statement also does not overcome all the other evidence of legitimate motivations. FF ¶¶ 41-46, 88, 93. Defendants' disagreement with the wisdom of these changes does not mean they were intentionally discriminatory. *See* RCL ¶¶ 28-29; CL ¶¶ 28-31, 42; RFF ¶¶ 28-31, 42.

45-47. The Early Voting Changes do not have a discriminatory effect on minority voters, RCL ¶ 85-92, and any such effect is not so severe to permit an inference of intentional discrimination. Even if Defendants' evidence is accepted as true, they have not brought forth sufficient evidence to rebut Florida's *prima facie* showing that the facially neutral Early Voting Changes were not motivated by a discriminatory purpose, RCL ¶ 29, or that

legislators held a genuine belief that the Early Voting Changes were warranted for legitimate reasons, RFF ¶¶ 38-45F.

48-59. Defendants concede that the "ability to elect" concept can only be applied to redistricting and other "potentially dilutive changes," and that ballot-access measures do not implicate those concerns. If the Court agrees, preclearance should be granted for that reason alone. CL ¶¶ 53-59.

60-69. Defendants contend that *Beer v. United States*, which allows preclearance under the "effect" prong unless the change "would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise," remains the controlling standard. 425 U.S. 130, 141 (1976). But the Supreme Court had never explained what it meant by "effective exercise of the electoral franchise" until *Georgia v. Ashcroft*, 539 U.S. 461, 479 (2003), and Congress' abrogation of *Ashcroft* left a void in ballot-access cases if "ability to elect" does not apply here. Claiming "decades of Supreme Court precedent" support their view (and citing only a single Section 2 case in support), Defendants ask this Court to fill that void by converting "retrogression" into "disparate impact." That test is inappropriate. First, it reads the phrase "on account of race" out of Section 5, even though a change might not be a cause of the disparate impact. CL ¶¶ 60-69; *Gonzalez v. Arizona*, --- F.3d ---, 2012 WL 1293149, at *13-15 (9th Cir. Apr. 17, 2012) (en banc). Second, "retrogression" examines whether a voting change interferes with a citizen's or racial group's opportunity to participate in the electoral process; in contrast, "disparate impact" evaluates how changes in certain registration and voting procedures effect use of *that procedure* without considering whether that change

prevents anyone from registering and voting through other means. CL ¶ 70-71. Third, using "disparate impact" as a proxy for retrogression would be unconstitutional. CL ¶ 4. 70-80. The "effect" prong in a ballot-access case must bear some relationship to the constitutional standard that Section 5 was meant to address—*i.e.*, whether the measure denies individuals or groups a reasonable and fair opportunity to register and cast a vote. *Rice v. Cayetano*, 528 U.S. 495, 512-14 (2000). Under *Beer*, then, the elimination of one particular way of registering or casting a vote cannot be retrogressive if it does not unduly interfere with the individual's or group's exercise of the franchise. *Cf. Burdick v. Takushi*, 504 U.S. 428, 433-34 (1992).[6] Defendants seem to agree, as they argued that adding voting methods favored by Whites would not be barred under the "effect" prong because it would not make it "*more* difficult" for minorities to register and vote. DFF ¶ 70 n.17. If disparate impact were the relevant inquiry, the only thing that would matter would be that minority voters experienced a differential negative effect. But having made that concession, Defendants must then rebut Florida's central claim: that the Three Voting Changes will not unduly interfere with minorities' ability to register and vote given the myriad of options offered by the State. FF ¶¶ 54-57, 65-66, 83-87; CL ¶¶ 32, 34, 45. Defendants have failed to do so as a matter of law.

[6] Literacy tests would not be entitled to preclearance under this standard because the failure to pass the literacy test *prevented* the individual from voting. There was no alternative means of registering or voting (let alone a reasonable and fair one), unlike here. Literacy tests also were purposely discriminatory and were administered in a discriminatory fashion. *Nw. Austin v. Holder*, 557 U.S. 193, 220 (2009) (Thomas, J. concurring in part and dissenting in part).

81. Even if the Court adopts Defendants' standard, the Third-Party Changes will not have a disparate impact on minority voters. FF ¶¶ 58-64; RFF ¶¶ 58-64. At most, the 48-hour rule might make it marginally more difficult for TPROs to register voters. RFF ¶¶ 57-62. But there is no interference with minorities' ability to register to vote. RFF ¶¶ 61-64. If the Court disagrees, that change is severable, and the registration/reporting requirements, which are clearly legitimate, *Crawford*, 553 U.S. at 194-196, 204 (plurality opinion); *LWV v. Browning*, 575 F. Supp. 2d 1298, 1323 (S.D. Fla. 2008), should be precleared.

82. The Inter-County Changes will not have a disparate impact on minority voters. FF ¶¶ 65-82; RFF ¶¶ 65-82. The preponderance of the evidence shows that filling out a provisional ballot is not more burdensome than the change of address form under the prior law, that provisional ballots will be canvassed, and that if for some reason they are not, the law requires those votes to be counted. *Id.* Defendants' claim that voters will not cast a provisional ballot out of "fear" that it will not be counted is not supported by competent evidence. *Id.* In any event, a misperception about the law is not a basis for denying its legitimacy. *Crawford*, 553 U.S. at 196.

83-84. Defendants have not refuted that few voters of any racial group will be affected by the Inter-County Changes, and that conclusion should be deemed admitted. Defendants' assertion that Florida has not explained how it arrived at these figures is simply incorrect. FF ¶¶ 75-82 nn. 1-3.

Defendants also have not refuted that Dr. Stewart's figures overstate the number of people actually affected by the change, and Dr. Stewart admitted in his *de bene esse*

deposition that his figures might overstate the number of inter-county movers. RFF ¶¶ 72-76. That conclusion also should be deemed admitted.

85-92. The Early Voting Changes will not have a disparate impact on minority voters. FF ¶¶ 98-116; RFF ¶¶ 83-87. First, the preponderance of the evidence shows that in-person early voting has no effect on overall turnout and thus the changes cannot be retrogressive. FF ¶¶ 94-97; RFF ¶¶ 94-96. Dr. Gronke admitted in his *de bene esse* deposition that the "recent literature" he cited did not in fact support his claims. RFF ¶¶ 94C-D. Second, the preponderance of the evidence shows that voters of all races tend to use in-person early voting in roughly equal proportions. FF ¶¶ 101-111; RFF ¶¶ 98O-99P. Even Dr. Gronke has concluded that President Obama's historic candidacy makes the 2008 results anomalous and, accordingly, they must be given less weight. RFF ¶¶ 98-99O. In any event, the issue here is *not* the effect these changes will have in 2012; Dr. Gronke testified that he has minimal ability to make predictions beyond 2012. RFF ¶¶ 100-08. Third, the increase in evening and weekend hours (particularly on a Sunday for the first time in the Covered Counties) are clearly ameliorative and must be accounted for. FF ¶¶ 88-93; RFF ¶¶ 88-94E, 97A-C. Dr. Gronke assumed that voters will not adjust, but did not examine the issue despite its conceded relevance. RFF ¶ 116-116C.

93-95. Defendants' assertion that *any* disparate impact—no matter how minor—should result in the denial of preclearance demonstrates the untenable nature of their proposed test. It would serve to force jurisdictions to maintain certain convenience measures no matter the consequences to the state, while completely ignoring whether minority voters retain a full and fair opportunity to register and cast ballots.

**DEFENDANTS' ADDITIONAL PROPOSED CONCLUSIONS OF LAW**

96-104. Florida denies Defendants' interpretation of the "retrogression" standard for the above reasons. RCL ¶¶ 4-22. Florida denies Defendants' interpretation of the "purpose" standard for the above reasons. RCL ¶¶ 48-80.

105. Because Florida is not a "covered state," CL ¶ 1, it does not have a "history" of discrimination for purposes of the Section 5 inquiry. In any event, Florida's recent history is one of *expansion* of voting rights. CL ¶ 42. The *Covered Counties'* history of discrimination might arguably be relevant to the "purpose" prong, but Defendants have provided no evidence of such a history.

106-107(e). Florida denies that any of the Three Voting Changes have a retrogressive effect for the above reasons. RCL ¶¶ 81-95. Florida denies that any of the Three Voting Changes have a discriminatory purpose for the above reasons. RCL ¶¶ 23-47.

107(f). A negative inference does not apply where a court has specifically found that evidence need not be turned over, as is the case here. *UAW v. NLRB*, 459 F.2d 1329, 1339 n.45 (D.C. Cir. 1972). Florida need not waive privilege to obtain preclearance.

108. Dr. Hood's testimony should be received and considered. He is qualified to testify as an expert; his methodology is sufficiently reliable; and his opinion will assist the Court. RFF ¶¶ 99-99E. Any dispute goes to the *weight* of his opinions, not his credibility or methodology, which is not grounds to exclude an expert, *Ambrosini v. Labarraque*, 101 F.3d 129, 141 (D.C. Cir. 1996), especially in a bench trial, *United States v. H&R Block*, 2011 WL 6367753, at *2 (D.D.C. 2011). In any event, the issue is immaterial as Florida can prevail using Dr. Stewart's data. RFF ¶¶ 99-99E. Dr. Gronke's first expert

report is entitled to little weight because it is severely undermined by (1) his extensive prior scholarship and testimony, FF ¶ 95; RFF ¶¶ 94C-113; (2) DOJ's expert and Defendants' declarants, FF ¶ 96; RFF ¶¶ 94-96; and (3) his failure to disclose all publications as required by rule, V18 9877, 10046-50. Dr. Gronke's rebuttal expert report also was three months late. V17 9096; V19 10697. The Court should strike the following documents: V5 2562, 2569-70; V13 7226-27, 7279-80, 7315, 7381, 7283, 7457, 7472, 7508, 7517, 7536-40; V14 7554, 7560, 7569-72; V15 8299-8300, 8337-49, 8360, 8364, 8371; V17 9114, 9242, 9247-49, 9252-95. *See* DFF ¶¶ 1G, 9D, 9F, 9G, 19A, 27B, 27D, 29, 30C, 30G, 34B, 36B, 36D, 37A, 42A, 42B, 42C, 45F, 48C, 58-60, 58B, 58D, 68A, 68C, 73B, 74, 113A, 113C, 119-121. Defendants fail "to point to any deposition testimony which properly authenticates" this evidence, *Williams v. CSC*, 2010 WL 3395293, at *4 (M.D.N.C. 2010), and the exhibits "offered for the truth of the matters asserted therein are inadmissible hearsay," *Kodrea v. City of Kokomo, Ind.*, 458 F. Supp. 2d 857, 862 (S.D. Ind. 2006). The Court should strike the following newspaper articles and editorials as barred as hearsay: V17 9244-46, 9410-54; DFF ¶¶ 9I, 15A, 30G, 48D, 52-53, 80-82 n.9, *Convertino v. DOJ*, 769 F. Supp. 2d 139, 151 (D.D.C. 2011).

109-110. Florida is entitled to a declaratory judgment that the Three Voting Changes will have neither 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.

Respectfully submitted,

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