IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

STATE OF FLORIDA, Plaintiff v. UNITED STATES OF AMERICA et al., Defendant.	CASE NO. 4:12-mc3-RH/WCS

UNITED STATES' BRIEF IN SUPPORT OF DEFENDANT-INTERVENORS' MOTION TO COMPEL COMPLIANCE WITH NON-PARTY DEPOSITION SUBPOENAS

On January 13, 2012, the Defendant-Intervenors in *State of Florida v. United States*, a judicial preclearance case under Section 5 of the Voting Rights Act that is currently pending before a three-judge court in the United States District Court for the District of Columbia, requested that this Court compel six legislators and staff members of the Florida Legislature to comply with deposition and document subpoenas issued by this Court and rule that no privilege precludes the requested depositions and document productions. N.D. Fla Dkt. 1-1 at 1. The United States submits this brief in support of Defendant-Intervenors' motion.

In the underlying Section 5 preclearance action, the D.C. District Court must determine whether four sets of voting changes contained in Florida House Bill 1355 (2011) ("HB 1355") have "the purpose [or] will have the effect of denying or abridging the right to vote on account" of race or color or membership in a language minority group. *See* Section 5 of Voting Rights Act, 42 U.S.C. § 1973c ("Section 5"); Case No. 1:11-cv-01428-CKK-MG-ESH (D.D.C.). The Defendant-Intervenors in the D.C. District Court preclearance action have requested that this

Court compel deposition testimony and the production of withheld documents[1] from a small number of Florida legislators and staff members who are particularly likely to have first-hand knowledge of the process leading up to the passage of HB 1355, the facts and issues considered in enacting the bill, as well as the impact that the bill is likely to have on voters and the voting process. The United States files this brief to set out the framework governing Section 5 judicial preclearance cases and to explain why, in light of the searching nature of the inquiry into legislative purpose under Section 5, no privilege bars the discovery sought here.

PROCEDURAL HISTORY AND STATUTORY FRAMEWORK

A. Initiation of the Underlying Preclearance Suit

On May 19, 2011, the Florida State Legislature enacted HB 1355, codified at Chapter 2011-40, Laws of Florida. This omnibus election law contained numerous statutory changes to the Florida Election Code, as well as other Florida statutes. On June 8, 2011, the State submitted the law to the Department of Justice for administrative review under Section 5 of the Voting Rights Act. On July 29, 2011, before the Department made a determination under Section 5, the State withdrew four of the seventy-six voting changes from review.[2] On August 1, 2011, Florida filed a declaratory judgment action in the D.C. District Court seeking judicial preclearance under Section 5 for the four sets of voting changes contained in HB 1355 that it withdrew from

[1] As characterized in the House Memorandum, the seven documents being withheld are handwritten notes taken by Representatives Baxley and McKeel "related to the presentation of the bill and debate in committee and on the floor." N.D. Fla. Dkt. 21 at 2.

[2] The Attorney General has a 60 day period to review and make a determination on an administrative Section 5 submission. Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, 28 C.F.R. § 51.9 (2011). On August 8, 2011, the Department precleared the other voting changes contained in Chapter 2011-40 that were not withdrawn by the State.

administrative review.[3] On October 19, 2011, the D.C. District Court granted the intervention requests of several groups of Defendants-Intervenors. Shortly after October 25, 2011, when Florida filed its now-operative Second Amended Complaint, the D.C. District Court issued an expedited discovery schedule – at Florida's specific request – to ensure that the preclearance decision would be made as early as possible during the 2012 election cycle. Under the D.C. District Court's scheduling order, discovery commenced on November 2, 2011, and is due to close on February 29, 2012. In a minute order regarding discovery deadlines issued on January 17, 2012, the D.C. District Court reiterated to all parties that discovery will close on February 29, 2012.

B. Subpoenas Issued by the U.S. District Court for the Northern District of Florida

Defendant-Intervenors have issued subpoenas to obtain deposition testimony from a small group of state legislators and legislative staff members as well as notes taken by two members of the Florida House. These legislators and staff members (referred to collectively as the "Legislative Deponents") include the sponsors of the Senate and House bills, as well as other legislators and staff members likely to have first-hand knowledge of the process through which HB 1355 was adopted as well as the bill's likely impact.

Opposing the motion to compel, Florida and counsel for the Legislative Deponents contend that the testimony sought is not relevant to the underlying litigation and may not be

[3] The four sets of voting changes at issue are: (1) procedures for third-party voter registration organizations (Section 4) (97.0575, Fla. Stat.); (2) the time frame that signatures are valid for citizen initiatives to amend the state constitution (Section 23) (100.371, Fla. Stat.); (3) election-day polling place procedures for voters who have moved from the voting precinct in which they are registered to a precinct in a different county (Section 26) (101.045, Fla. Stat.); and (4) early voting procedures, including changes in the duration of the early voting period for county, state, and federal elections (Section 39) (101.657, Fla. Stat.).

obtained because the deponents enjoy legislative immunity. The Legislative Deponents request that this Court quash the subpoenas for testimony and documents, or in the alternative limit the time and scope of the depositions. As discussed below, the arguments raised by Florida and the Legislative Deponents regarding relevance and immunity are unavailing. Because the doctrine of absolute legislative immunity has no bearing on this dispute, and the fact discovery sought here bears directly on an issue of central relevance to the D.C. Court's determination of legislative purpose under Section 5 of the Voting Rights Act, any qualified testimonial privilege must yield.

C. Section 5 Standard

Section 5 of the Voting Rights Act provides "[w]henever" a covered jurisdiction "enact[s] or seek[s] to administer any . . . standard, practice, or procedure with respect to voting different from that in force or effect" on its coverage date, it must first obtain administrative preclearance from the Attorney General or judicial preclearance from a three-judge panel of the United States District Court for the District of Columbia. 42 U.S.C. § 1973c. In either case, preclearance may be granted only if the jurisdiction demonstrates that the proposed change "neither has the purpose nor will have the effect of denying or abridging the right to vote on account" of race or color or membership in a language minority group. *Id.*; *see Georgia v. United States*, 411 U.S. 526 (1973); Procedures for the Administration of Section 5, 28 C.F.R. Pt. 51.

Five Florida counties are covered jurisdictions under the Voting Rights Act: Collier, Hardee, Hendry, Hillsborough, and Monroe Counties. 28 C.F.R. Pt. 51 App. Covered jurisdictions may not implement a voting change unless and until preclearance is obtained. *Clark v. Roemer*, 500 U.S. 646, 652 (1991). Voting changes enacted by Florida that impact these

five covered counties must be precleared before they can be implemented in those counties. *See Lopez* v. *Monterey Co.*, 525 U.S. 266, 278 (1999).

D. Section 5 Inquiry into Legislative Purpose

Section 5 of the Voting Rights Act prohibits covered jurisdictions from implementing voting changes that have either a prohibited retrogressive effect or were motivated by a discriminatory purpose. *Beer v. United States*, 425 U.S. 130 (1976). In a judicial preclearance case, the D.C. District Court must accordingly make findings under both Section 5's effects prong and its purpose prong. *See generally Shelby Cnty. v. Holder*, No. 10-cv-0651, 2011 U.S. Dist. LEXIS 107305 (D.D.C. Sept. 21, 2011) (discussing the current preclearance standards under both prongs in light of amendments to the Voting Rights Act made by Congress in 2006).

The discovery at issue here relates most directly to the purpose inquiry. Under this prong, Florida bears the burden of showing that the four voting changes at issue are "free of a discriminatory purpose." *Texas v. United States*, 866 F. Supp. 20, 27 (D.D.C. 1994) (citing *City of Richmond v. United States,* 422 U.S. 358 (1975)) (hereinafter "*Edwards Aquifer*"). Evidence of a prohibited purpose may be direct or circumstantial, and a discriminatory purpose need only be a motivating factor, not a primary motivation of the legislation, in order for preclearance to be denied. *See Reno v. Bossier Parish School Board*, 520 U.S. 471, 488 (1997) (hereinafter "*Bossier Parish I*"). The Supreme Court has held that "in cases brought under § 5 of the Voting Rights Act of 1965, the *Arlington Heights* framework should guide a court's inquiry into whether a jurisdiction had a discriminatory purpose in enacting a voting change." *Hunt v. Cromartie*, 526 U.S. 541, 546 n.2 (1999) (citing *Bossier Parish I*, 520 U.S. at 488)). Congress endorsed this approach to Section 5's purpose inquiry in reauthorizing the Voting Rights Act in 2006. *See* H.R. REP. NO. 109-478, at 42 (2006).

In *Arlington Heights*, the Supreme Court identified a number of factors that courts must address in assessing whether a discriminatory purpose exists. As the Court explained, "[d]etermining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Arlington Heights*, 429 U.S. at 266. Factors relevant to ascertaining discriminatory intent include: (1) whether the impact of the decision bears more heavily on one racial group than another; (2) the historical background of the decision; (3) the sequence of events leading up to the decision; (4) whether the decision departs, either procedurally or substantively, from the normal practice; and (5) contemporaneous statements made by the decisionmakers. *Id.* at 266-268.

In contested Section 5 judicial preclearance cases, courts considering the *Arlington Heights* factors and evidence as to legislative purpose rarely reach conclusions based on the official legislative record alone. *See, e.g.*, *Texas v. United States*, No. 11-cv-1303, 2011 U.S. Dist. LEXIS 147586, at *80 (D.D.C. December 22, 2011) (Section 5's "intensely fact-driven" legislative purpose inquiry is "typically difficult to resolve at the summary judgment stage");[4] *Edwards Aquifer*, 866 F. Supp. at 27 (denying summary judgment because "there is evidence that several Texas legislators believed that the [change at issue] had a discriminatory purpose at the time of its passage"). Instead, extensive formal or informal discovery – including taking

[4] In this pending preclearance case, the D.C. District Court denied Texas's motion for summary judgment as to the State's legislative and congressional redistricting plans on Section 5's purpose and effects prongs. *Texas v. United States*, 2011 U.S. Dist. LEXIS 147586, at *82. During a trial which lasted 8 days and concluded only last week, Texas, the United States, and several groups of defendant-intervenors noticed the testimony of five legislative and executive branch staff members, eighteen members of the Texas legislature, and three members of the U.S. House of Representatives. *See* Exhibit 1.

testimony from elected decisionmakers – is generally required. *See, e.g.*, *New York v. United States*, 874 F. Supp. 394, 402 (D.D.C. 1994); *Georgia v. Ashcroft*, 195 F. Supp. 2d 25, 32 (D.D.C. 2002), *vacated on other grounds*, 539 U.S. 461 (2003); *Busbee v. Smith*, 549 F. Supp. 494 (D.D.C. 1982), *aff'd* 459 U.S. 1166 (1983).

Indeed, in *Arizona v. Reno*, the three-judge panel of the D.C. District Court denied the State of Arizona's motion to limit discovery and its motion for summary judgment on the purpose prong of Section 5 because the United States had not yet been afforded "reasonable discovery in order to determine if evidence of a discriminatory purpose exists." *Arizona v. Reno*, 887 F. Supp. 318, 323 (D.D.C. 1995). Noting that under *Arlington Heights*, "the specific sequence of events leading up to the [enactment of the voting change] and the legislative and administrative history of those decisions are relevant to determining whether [the voting change] was motivated by a discriminatory purpose," the Court stated that summary judgment was unwarranted where the United States had "not yet been able to identify and depose many of the officials – state court judges, legislators, and executive officials – who participated in the decision" to make the voting change at issue. *Id.* The D.C. District Court noted that while Arizona had submitted affidavits from some legislators in support of its motion for summary judgment, the United States was "entitled" to depose "the other officials who participated in the process" regarding the purpose issue under Section 5. *Id.*

Once developed, testimony of legislators and staff typically provides crucial evidence in Section 5 declaratory judgment cases bearing on the central findings the court must make as to the purpose and effect of the voting changes at issue. For example in *Georgia v. Aschroft*, the testimony of elected officials was "significant" to the Supreme Court's consideration of the impact of the voting change at issue. *See* 539 U.S. 461, 471-75 & 483 (2003). In *Busbee v.*

Smith, deposition testimony was crucial to obtaining the contemporaneous statements made by key decisionmakers concerning the racial intent and results of the voting change. 549 F. Supp. at 500. The D.C. District Court relied on this deposition testimony from legislators about "overt racial statements" in finding discriminatory purpose and denying preclearance. *Id.* at 517.[5] And in *Port Arthur v. United States*, the D.C. District Court considered the testimony of elected officials in deciding whether the officially stated reasons for the changes at issue were pretextual. 517 F. Supp. 987, 1021-23 (D.D.C. 1981).

In every Section 5 case, including this one, the testimony of particular legislators and legislative staff members (or the equivalent local decision-makers) is likely to bear directly on the *Arlington Heights* factors. This is because the Section 5 inquiry puts the decision-making process itself at issue, and because the bulk of the relevant information is within the decision-makers' control. *See Arizona*, 887 F. Supp. at 323 (describing the necessity for deposition testimony of decision-makers in a Section 5 declaratory judgment action); *see also Jones* v. *City of College Park,* 237 F.R.D. 517, 521 (N.D. Ga. 2006) (deposition testimony of officeholders appropriate where "government intent is at the heart of the issue in this case" involving race discrimination); *United States v. Irvin*, 127 F.R.D. 169, 173 (C.D. Cal. 1989) (noting that the decision-process itself was called into question by allegations of intentional discrimination under Section 2 of the Voting Rights Act); *cf. United States v. Board of Education*, 610 F. Supp. 695,

[5] In *Busbee v. Smith*, the testimony of several state legislators, elected executive officials, and individuals assisting legislators in the redistricting process, was obtained after the court granted a motion to compel. *See* Exhibit 2 at Dkt. 52 & Dkt. 82 (Docket, *Busbee v. Smith*, 549 F. Supp. 494 (D.D.C. 1982)); Exhibit 3 (Order, *Busbee v. Smith*, 549 F. Supp. 494 (D.D.C. 1982) (No. 82)), granting defendant-intervenors' motion to compel such that plaintiffs were ordered to comply with the notice of depositions listed at Dkt. 52).

700 (N.D. Ill. 1985) ("Here the decisionmaking process is not 'swept up into' the case, it *is* the case") (emphasis in original).

ARGUMENT

A. The Testimony Sought is Relevant and Discoverable

The Federal Rules of Civil Procedure define the scope of discovery as "any non-privileged matter that is relevant to any party's claim or defense. . . ." Fed. R. Civ. P. 26(b)(1). This language "is to be construed broadly." *National Service Industries, Inc. v. Valfa Corp.*, 694 F.2d 246, 250 (11th Cir. 1982). Given the broad scope of relevance under the Federal Rules, the showing required to prevail on a motion to quash is strict. "A subpoena may be quashed if it calls for 'clearly irrelevant' matter, but the court need not determine the admissibility of documents prior to trial or quash a subpoena demanding their production if there is any ground on which they might be relevant." *Bailey Indus. v. CLJP, Inc.*, 270 F.R.D. 662, 667 (N.D. Fla. 2010) (quoting *Herron v. Blackford*, 264 F.2d 723, 725 (5th Cir. 1959)); *see also* Wright & Miller, Federal Practice & Procedure: Civil 3d § 2459 (2008).

No serious argument can be made that the discovery at issue here is not relevant. Again, before the D.C. District Court, Florida bears the burden of establishing that the four sets of voting changes at issue in HB 1355 have neither a discriminatory effect nor a discriminatory purpose. In the event that Florida makes out its prima facie case as to legislative purpose, the burden shifts to the United States and Defendant-Intervenors. *See Bossier Parish Sch. Bd. v. Reno*, 907 F. Supp. 434, 446 (D.D.C. 1995) (describing Section 5's burden shifting framework), *vacated on other grounds*, 520 U.S. 471 (1997). As in *Arizona v. Reno*, the United States and Defendant-Intervenors are entitled to take reasonable discovery – including the depositions of decision-makers – in order to have the opportunity to proffer their own evidence rebutting

Florida's prima facie showing. *See Arizona*, 887 F. Supp. at 323. Accordingly, questions regarding legislative purpose are thus not only relevant but central to any Section 5 declaratory judgment action.

As noted, in making preclearance determinations under Section 5 of the Voting Rights Act, the D.C. District Court and the Supreme Court have long relied on testimony from members of the decision-making body responsible for the voting change. *See Georgia v. Ashcroft*, 539 U.S. at 471-75 & 483; *Busbee v. Smith*, 549 F. Supp. at 500. Courts considering intentional discrimination claims brought under Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, have also relied on the testimony of elected decision-makers in considering allegations of discriminatory purpose. *See, e.g.*, *Brooks v. Miller*, 158 F.3d 1230, 1236 (11th Cir. 1998), *cert. denied,* 526 U.S. 1131 (1999); *Garza v. County of Los Angeles*, 756 F. Supp. 1298, 1314-18 (C.D. Cal. 1990), *aff'd* 918 F.2d 763, 768 (9th Cir. 1990). Notably, and as discussed further below, relevant evidence in the *Garza* case was obtained as a result of a motion to compel the deposition testimony of members of the County's governing body and employees. *See United States v. Irvin,* 127 F.R.D. 169, 174 (C.D. Cal. 1989).

Contrary to the characterizations of Florida and the Legislative Deponents, relevant testimony on intent is not limited to legislators' subjective characterizations of legislative purpose – either as to their own motivation or the actions of the body as a whole. Rather, legislators and staff are often the witnesses best-positioned to provide the evidence of circumstantial factors relevant to discriminatory purpose that the Supreme Court identified in *Arlington Heights*.

Testimony from legislators and staff involved with the enactment of voting changes will accordingly be useful in determining what impact – if any – legislators anticipated that the

proposed changes would have on minority voters. To the extent the evidence in this case shows that one or more of the changes at issue has a prohibited retrogressive impact on minority voters, establishing whether that impact was foreseeable or anticipated by legislators is often important to establishing the presence of a discriminatory purpose. *Cf. McMillan v. Escambia County*, 748 F.2d 1037, 1047 (11th Cir. 1984) (recognizing that "if a Section 2 plaintiff chooses to prove discriminatory intent, direct or indirect circumstantial evidence, including the normal inferences to be drawn from the foreseeability of defendant's actions would be relevant evidence of intent") (internal citation and quotation marks omitted); *cf. also Ammons v. Dade City*, 783 F.2d 982, 988 (11th Cir. 1986) ("when [discriminatory impact] is foreseeable . . . then a discriminatory purpose as found by the district court is properly shown").

The testimony of legislators and staff would likewise include relevant information on: the sequence of events leading up to enactment of a voting change; the identities of persons involved in the drafting and decision-making processes; the decision-making procedures employed and whether those differed from usual legislative processes; and knowledge of what materials, documents, and facts were in legislators' possession at the time the voting change was made. Under the *Arlington Heights* framework, all such facts are probative of and relevant to consideration of discriminatory purpose under Section 5 of the Voting Rights Act. *See Bossier Parish I,* 520 U.S. at 489; *Texas v. United States*, 2011 U.S. Dist. LEXIS 147586, at *18-*22 (discussing the *Arlington Heights* framework and relevant factors for discriminatory purpose analysis).

Given that legislators and legislative staff may be the only source for evidence related to certain *Arlington Heights* factors, Florida misses the mark in characterizing the purpose of such depositions as simply seeking legislators' "personal reasons for promoting or opposing" HB

1355. N.D. Fla. Dkt. 22 at 5. Much of the potentially relevant evidence relating to the *Arlington Heights* factors – such as the content of contemporaneous conversations, what particular background information legislators read and relied on, and the identities of those giving input – is not contained in the official legislative record. But such information is not – as Florida and the Legislative Deponents would have it – "post hoc." *See* N.D. Fla. Dkt. 20 at 5; N.D. Fla. Dkt. 22 at 5. Rather, deposition testimony can be the only way in which to obtain a complete statement of the contemporaneous facts. *See Arizona*, 887 F. Supp. at 323. That such information is not contained in the contemporaneous official record hardly renders it irrelevant – especially given that the focus of Section 5 is discovering and blocking potential racial discrimination. *Cf. Smith v. Clarkton*, 682 F.2d 1055, 1064 (4th Cir. 1982) ("Municipal officials acting in their official capacities seldom, if ever, announce on the record that they are pursuing a particular course of action because of their desire to discriminate against a racial minority. Even individuals acting from invidious motivations realize the unattractiveness of their prejudices when faced with their perpetuation in the public record.").[6]

B. No Privilege Allows the Legislative Deponents to Refuse to Provide Testimony or Documents

In addition to the clear relevance of their testimony, no privilege allows the Legislative Deponents to refuse to give any deposition testimony in this case. As the underlying preclearance litigation is "premised upon a federal question . . . privilege is a matter of federal

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[6] As the *Arlington Heights* factors themselves make clear, evidence relevant to intent is not limited to evidence directly exhibiting racial animus. In addition, the intentional discrimination that is prohibited by the Voting Rights Act encompasses actions that employ racial discrimination to achieve an otherwise permissible aim. *See 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) (describing purposeful housing discrimination that is motivated by an otherwise permissible desire to maintain property values).

law." *Florida Ass'n of Rehab. Facilities, Inc. v. State of Florida Dep't of Health and Rehab. Servs.*, 164 F.R.D. 257, 261 (N.D. Fla. 1995). Federal common law is thus the source of any applicable privilege. *See generally* Fed. R. Evid. 501.

Testimonial exclusionary rules and privileges are disfavored. *See Adkins v. Christie*, 488 F.3d 1324, 1328 (11th Cir. 2007). Such privileges "contravene the fundamental principle that the public . . . has a right to every man's evidence." *Univ. of Pa. v. EEOC,* 493 U.S. 182, 189 (1990) (alteration in original) (internal quotation marks omitted). Accordingly, the Eleventh Circuit applies "a presumption against privileges which may only be overcome when it would achieve a 'public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth.'" *Adkins*, 488 F.3d at 1328 (quoting *Trammel v. United States*, 445 U.S. 40, 50 (1980)). This is a "high standard" under which "'only the most compelling candidates will overcome the law's weighty dependence on the availability of relevant evidence.'" *Id.* (quoting *Pearson v. Miller,* 211 F.3d 57, 67 (3d Cir. 2000)).

Florida and the Legislative Deponents cannot overcome this high standard. As discussed below, the doctrine of absolute legislative immunity that Florida and the Legislative Deponents primarily rely on does not apply in this case – where the Legislative Deponents are neither being sued nor face potential liability themselves. Florida and the Legislative Deponents are also unable to show that a qualified testimonial privilege for state legislators – which neither the D.C. Circuit nor the Eleventh Circuit has ever recognized – should bar the testimony requested here given its central relevance to this Section 5 declaratory judgment action.

1. Legislative Immunity Does Not Apply in This Case

Much of the argument in Florida's and the Legislative Deponents' briefs is based on an erroneous conflation of legislators' absolute immunity from suit and a testimonial privilege that,

where it exists, is qualified at best. For federal legislators, the Speech and Debate Clause of the U.S. Constitution shields them from any award of damages or prospective relief, and also provides an accompanying testimonial privilege. *See Rodriguez v. Pataki*, 280 F. Supp. 2d 89, 94 (S.D.N.Y. 2003). Although "the Speech or Debate Clause does not apply at all to state and local legislators," *Florida Ass'n of Rehab. Facilities*, 164 F.R.D. at 266, federal common law provides state legislators with immunity from civil liability for their legislative acts. *See, e.g.*, *Tenney v. Brandhove*, 341 U.S. 367 (1951) (holding that a state legislator acting within the traditional sphere of legislative activity is immune from suit under the Civil Rights Act of 1871).

For example, in *City of Safety Harbor v. Birchfield*, 529 F.2d 1251 (5th Cir. 1976), a case relied on in the Senate memorandum, N.D. Fla. Dkt. 20 at 11, the Fifth Circuit merely held that notwithstanding the lack of an immunity clause in the Florida constitution, the common law immunity recognized in *Tenney* afforded the defendant-legislators immunity from suit under 42 U.S.C. Sections 1983, 1985, and 1986. *Id.* at 1257. But there is no question here about state legislators' immunity from suit. They are not being sued. Notwithstanding this fact, Florida and the Legislative Deponents repeatedly cite legislative immunity cases that deal only with legislators being sued for their official activities and not with any testimonial issue or privilege. *See, e.g., Bryant v. Jones*, 575 F.3d 1281 (11th Cir. 2009); *Yeldell v. Cooper Green Hosp., Inc.*, 956 F.2d 1056 (11th Cir. 1992); *De Sisto College v. Line*, 888 F.2d 755 (11th Cir. 1989). As the House Legislative Deponents concede, the Eleventh Circuit has never recognized such a non-party testimonial legislative privilege, *see* N.D. Fla. Dkt. 21 at 5, nor has the D.C. Circuit. *See Texas v. United States*, No. 11-cv-1303, 2012 U.S. Dist. LEXIS 5, at *13 (D.D.C. Jan. 5, 2012). Given that all judicial preclearance cases are heard before three-judge district courts in the District of Columbia, it is appropriate to give deference to the evidentiary rules of that forum. *Id.*

("There is no state legislative privilege identified in the Federal Rules of Evidence and the D.C. Circuit has never recognized one.").

Moreover, this Court has already rejected the absolute legislative immunity framework that Florida and the Legislative Deponents urge. In *Florida Association of Rehabilitation Facilities v. State of Florida Department of Health and Rehabilitative Services*, this Court held that the absolute legislative immunity framework does not govern the issue of testimonial privilege, where as here "Plaintiffs d[id] not sue legislators." 164 F.R.D. at 267. In rejecting the argument that an absolute testimonial privilege necessarily flows from immunity from suit, Magistrate Judge Sherrill relied on the Supreme Court's decision in *United States v. Gillock*, 445 U.S. 360 (1980).[7] In *Gillock*, the Supreme Court held that state legislators have no evidentiary privilege against the introduction of evidence of their legislative acts in the context of a criminal prosecution for bribery. 445 U.S. at 373. *Gillock* recognized that, where "important federal interests are at stake," there is no basis to impose "a judicially created limitation that handicaps proof of the relevant facts." *Id.* at 373-74. Thus, in *Gillock,* the Supreme Court "rejected the notion that the common law immunity of state legislators gives rise to a general evidentiary privilege." *Manzi v. Dicarlo*, 982 F. Supp. 125, 129 (E.D.N.Y. 1997); *In re Grand Jury (Granite Purchases)*, 821 F.2d 946, 957 (3d Cir. 1987); *Rodriguez*, 280 F. Supp. 2d at 100; *Kay*

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[7] Notably, in rejecting the contention that legislative immunity necessarily includes an absolute privilege against testimonial disclosures, Judge Sherrill found that many of the cases cited by Legislative Deponents for this same proposition were "not persuasive." 164 F.R.D. at 266 (concluding that *Marylanders for Fair Representation, Inc. v Schaefer*, 144 F.R.D. 292 (D. Md. 1992), *Schlitz v. Commonwealth of Va.*, 854 F.2d 43 (4th Cir. 1988), and *Corporacion Insular de Seguros v. Garcia*, 709 F. Supp. 288 (D.P.R. 1989), were not persuasive, in light of the reasoning in *Gillock*, for the proposition that the immunity from suit conferred by *Tenney* necessarily includes an absolute privilege against testimonial disclosures).

v. City of Rancho Palos Verdes, No. 02-cv-03922, 2003 U.S. Dist. LEXIS 27311, at *43 (C.D. Cal. Oct. 10, 2003).

Moreover, *Arlington Heights* itself recognizes that there are instances in which legislative testimony may be needed and appropriate. 429 U.S. at 268. Section 5 cases are exactly those unusual cases in which the need for relevant evidence at the very heart of the claims means that any otherwise applicable testimonial privilege must give way. *Cf. Arizona*, 887 F. Supp. at 323.

2. Any Qualified Legislative Privilege Must Yield in Voting Rights Act Cases Alleging Discriminatory Intent

Unlike legislative immunity, legislative privilege – in those courts that have recognized it[8] – is a qualified privilege that can be overcome by a showing of need. *See Rodriguez v. Pataki*, 280 F. Supp. 2d at 95 (distinguishing absolute immunity from the qualified testimonial privilege). Several courts adjudicating Voting Rights Act cases have held that a qualified testimonial privilege must yield when legislative purpose is directly at issue.

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8 Again, the D.C. District Court, where the underlying action here is pending, very recently stated in another judicial preclearance case under Section 5, that "there is no state legislative privilege identified in the Federal Rules of Evidence and the D.C. Circuit has never recognized one." *Texas v. United States*, 2012 U.S. Dist. LEXIS 5, at *13. In the same opinion, the D.C. District Court noted that the State of Texas could not invoke, under the federal common law, a privilege for its legislators that Texas state courts would not recognize. *Id.* at *29 ("Texas cannot claim a privilege here that its own courts do not recognize."). Florida and the Legislative Deponents face the same difficulty here because "no Florida legislative testimonial privilege has been recognized in the [Florida] Evidence Code, [Florida] statutes, or Florida constitution" and "[t]here is no counterpart to [the federal Speech and Debate Clause in the U.S. Constitution] in Florida's constitution or laws." *City of Pompano Beach, Florida v. Swerdlow Lightspeed Mgmt. Co., LLC*, 942 So.2d 455, 457 (Fla. 4th DCA 2006). The absence of any testimonial privilege in Florida law weighs heavily against allowing the invocation of such a privilege as a matter of federal common law. *But see Florida Ass'n of Rehab. Facilities*, 164 F.R.D. at 267 (stating without deciding that there "probably is a qualified state legislative evidentiary privilege which may be applicable" to legislators in those cases where the privilege is not overridden by a showing of need).

In *Baldus v. Members of the Wisconsin Government Accountability Board*, Case No. 11-cv-562, 2011 U.S. Dist. LEXIS 142338 (E.D. Wis. Dec. 8, 2011), the three-judge court was faced with a dispute similar to the one here. Private plaintiffs raising intentional discrimination claims under both the Voting Rights Act and the Equal Protection Clause sought document discovery and deposition testimony from a legislative staff member regarding the adoption of Wisconsin's redistricting plan. *Id.* at *5-*6. The Wisconsin Assembly and Senate, non-parties in the case, moved to quash. *Id.* The three-judge court noted that "proof of a legislative body's discriminatory intent is relevant and extremely important" for both the Voting Rights Act and constitutional claims raised. *Id.* at *6. Relying on *Arlington Heights*, the Court concluded that "any documents or testimony relating to how the Legislature reached its decision on the 2011 redistricting maps are relevant to the plaintiffs' claims as proof of discriminatory intent." *Id.* The Court concluded that "legislative privilege does not apply in this case" given the nature of the case and plaintiffs' showing of need. *Id.* at *8. Balancing the interests at stake, the Court held that the plaintiffs' requests might have "some minimal future 'chilling effect' on the Legislature, but that fact is outweighed by the highly relevant and potentially unique nature of the evidence." *Id.* The Court likewise found disclosure was warranted "given the serious nature of the issues in this case and the government's role in crafting the challenged redistricting plans." *Id.*

Similarly, in *United States v. Irvin*, 127 F.R.D. 169 (C.D. Cal. 1989), the Court faced a motion to compel deposition testimony regarding the contemporaneous communications between County Supervisors and their staff about the adoption of Los Angeles County's redistricting plan in a case where discriminatory intent was alleged. As in *Baldus*, the Court applied a balancing test to determine that the depositions ought to go forward. *Id.* at 173-74. Citing *Arlington*

Heights, the court found that the "withheld information is directly relevant to the validity of the redistricting plan" and held that "the federal interest in enforcement of the Voting Rights Act weighs heavily in favor of disclosure." *Id.* The court accordingly ordered that the qualified privilege at issue (which it termed the deliberative process privilege), "must yield . . . to the need for disclosure." *Id.* at 174.[9]

In another recent Voting Rights Act case involving allegations of discriminatory intent, a three-judge district court held that the seriousness of the issues involved outweighed a qualified legislative privilege with respect to documents containing "objective facts upon which lawmakers relied in drawing" a redistricting plan. *Comm. for a Fair and Balanced Map v. Illinois State Bd. of Elections*, No. 11-cv-5065, 2011 U.S. Dist. LEXIS 117656, at *34 (N.D. Ill. Oct. 12, 2011).

3. Any Privilege Must Yield In This Case

Applying the factors generally considered in cases similar to this one, it is clear that any qualified testimonial privilege must yield. In *Rodriguez v. Pataki*, 280 F. Supp. 2d 89 (S.D.N.Y. 2003), another case raising claims of intentional discrimination under the Voting Rights Act, the court identified five factors to be weighed to determine whether and to what extent a claim of legislative privilege must yield. The factors include: (1) the relevance of the evidence sought to be protected; (2) the availability of other evidence; (3) the seriousness of the litigation and the issues involved; (4) the role of the government in the litigation; and (5) the possibility of future

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[9] Contrary to the suggestion in the Senate memorandum, N.D. Fla. Dkt. 20 at 21, *Irvin* was not superceded by the split decision of the three-judge court *Cano v. Davis*, 193 F. Supp. 2d 1177 (E.D. Cal. 2002), which held only that the voluntary testimony of one member of the legislature does not waive the testimonial privilege held by other members. *Cano* did not decide the circumstances under which legislative privilege must yield to need.

timidity by government employees who will be forced to recognize that their secrets are violable. *Id.* at 100-01.

Each factor weighs strongly in favor of granting the motion to compel here. As to the first and second factors regarding relevance and the availability of other evidence, written discovery has already made clear that certain relevant evidence can only be ascertained by deposition. In its Interrogatories, the United States asked Florida to identify all facts related to a list of statements made by specific legislators, two of whom are the subject of the subpoenas at issue here, as well as all persons with knowledge of those facts. Rather than attempt to obtain such information, Florida heightened the need for deposition testimony by responding that it "has no personal knowledge of the particular incidents, events, statements, and statistics identified in the interrogatory by legislators speaking in support of or opposition to HB 1355 and SB 2086." *See* Exhibit 4 at 4-6; Exhibit 5 at 3. Florida's complete denial of any knowledge of the relevant information sought makes clear that such facts can likely only be obtained through deposition of legislators and staff.

On the third and fourth factors, both the seriousness of issues surrounding this Voting Rights Act case, as well as the fact that the intent of the Florida Legislature is directly at issue in this case, weigh strongly in favor of disclosure. *See Irvin,* 127 F.R.D. at 174 ("The federal interest in the present case is compelling. The Voting Rights Act forbids local practices that abridge the fundamental right to vote. This Act requires vigorous and searching federal enforcement."); *Baldus*, 2011 U.S. Dist. LEXIS 142338, at *6-*8. Finally, on the fifth factor, the possibility for "future timidity" on the part of Florida legislators as a result of the requested discovery is speculative at best. Given the recognition, even before the legislature passed HB 1355, that Section 5 requires Florida to establish that changes affecting voting were not adopted,

even in part, with a discriminatory intent, legislators and staff have no reason to expect to be excused from providing testimony (by deposition and/or in court), and document discovery concerning the adoption of the law.

CONCLUSION

The testimony and documents sought from the Legislative Deponents are relevant, probative, and not barred by any privilege. Because the Legislative Deponents have no valid basis for resisting the subpoenas, the United States respectfully requests this Court's assistance in expeditiously obtaining the requested discovery.

Date: January 30, 2012

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing (filed through EM/ECF system) will be sent electronically to the registered participant and an e-mail copy of the same will be transmitted to the non-registered participants, on this the 30th day of January, 2012:

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/s/ Elise Sandra Shore

ELISE SANDRA SHORE

EXHIBIT 1

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STATE OF TEXAS, Plaintiff, v. UNITED STATES OF AMERICA, and ERIC H. HOLDER, JR. in his official capacity as Attorney General of the United States, Defendants, WENDY DAVIS, *et al.*, Defendant-Intervenors.	)	Case No. 1:11-CV-01303 (RMC-TBG-BAH) [Three-Judge Panel]

JOINT NOTICE OF TRIAL WITNESSES

The parties designate the following individuals as witnesses who may testify at trial.

Witnesses who may testify before three judges on direct examination:

Texas
Doug Davis
Ryan Downton
David Hanna
Representative Todd Hunter
Gerardo Interiano
Representative Jose Aliseda**
Representative John Garza**

United States/Intervenors
Roy Brooks**
Representative Garnet Coleman
Senator Wendy Davis
Representative Dawnna Dukes
Senator Rodney Ellis
Representative Joe Farias**
Alex Jiminez
United States Representative Eddie Bernice Johnson

George Korbel**
** These persons will testify live in front of two judges if there is not time for three judges.

United States/Intervenors
United States Representative Shiela Jackson Lee
Jaime Longoria
Senator Jose Rodriguez
Judge David Saucedo
Mike Siefert
Representative Marc Veasey
Senator Judith Zaffirini

Witnesses who may testify through pre-filed direct testimony:

Texas
Dr. John Alford
Representative Charlie Geren
Todd Giberson
Representative Joe Pickett
Senator Kel Seliger
Senator Florence Shapiro
Representative Burt Solomons
Dr. Richard Engstrom[1]

United States/Intervenors
Dr. Stephen Ansolabehere
Dr. Theodore Arrington
Rogene Calvert
Sergio DeLeon
Dr. Richard Engstrom
David Escamilla
Dr. Henry Flores
United States Representative Al Green
Dr. Lisa Handley
Abel Herrero
Representative Scott Hochberg
Dr. Morgan Kousser
Dr. Alan Lichtman

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[1] Texas reserves the right to call other witnesses of the United States and Intervenors via deposition testimony in accordance with the Federal Rules of Civil Procedure, but also intends at this time to provide written direct testimony of Dr. Engstrom in its case in chief.

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Boyd Ritchie
Dean Rogelio Saenz
Representative Sylvester Turner

Dated: December 28, 2011.

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DIST.	OFF.	DOCKET YR.	DOCKET NUMBER	FILING DATE MO. DAY YR.	J	N/S	O	D PTF	D DEF	R 23	$ DEMAND	JUDGE/ MAG. NO.	COUNTY	JURY DEM.	DOCKET YR.	DOCKET NUMBER
0090	1	82	0665	03/08/82	2	441	1				Nearest $1,000	J 9045 M	88888	N	82	0665

TITLE: BUSBEE, ET AL V SMITH, ET AL

CAUSE: SEC.5, VOTING RIGHTS ACT OF 1965.

ROBINSON, J.
JUNE L. GREEN, J.
EDWARDS, J.(USCA)

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RAYMOND BROWN

27 INTV.DFT
J.J. JONES

28 INTV.DFT
DUANE MCMAHON

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DC 111A
(Rev. 1/75)

ROBINSON, J.

CIVIL DOCKET CONTINUATION SHEET

FPI-MAR—7-14-80-70M-4388

PLAINTIFF	DEFENDANT	DOCKET NO. 82-0665
GEORGE D. BUSBEE, et al.	WILLIAM FRENCH SMITH, et al.	PAGE 1 OF ___ PAGES

DATE	NR.	PROCEEDINGS
1982 Mar 8	1	COMPLAINT; exhibits A and B; appearance.
Mar 8		SUMMONS (5) issued.
Mar 8	2	APPLICATION of pltfs. for a three-judge court.
Mar 8	3	MOTION of pltfs. to expedite proceedings; statement of P&A's; exhibits A and B.
Mar 8	4	INTERROGATORIES (first) of pltfs. to defts.
Mar 8	5	REQUEST (first) of pltfs. for production of documents.
Mar 8	6	REQUEST of pltfs. for appointment of special process server and ORDER by Clerk appointing Elaine Rihtarchik to serve summons and complaint upon defts.
Mar 9	7	AFFIDAVIT of Elaine S. Rihtarchik of service of summons and complaint upon deft.#1 on March 8, 1982
Mar 9	8	AFFIDAVIT of Elaine S. Rihtarchik of service of summons and complaint upon deft.#2 on March 8, 1982
Mar 9	9	AFFIDAVIT of Elaine S. Rihtarchik of service of summons and complaint upon deft.#3 to U.S. Attorney's Office and by certified mail to the Attorney General.
Mar 9		MOTION of pltf. to expedite proceeding, heard and granted. (Rep; Robert Weber) ROBINSON, J.
Mar 10	9a	DESIGNATION of the Honorable June L. Green, United States District Judge and the Honorable Harry T. Edwards, United States Circuit Judge, to serve with the Honorable Aubrey E. Robinson, Jr., United States District Judge, as members of a three judge court to hear and determine this case. ROBINSON, C.J. (USCA)
Mar 12	10	ORDER filed 3-9-82, that defts. answer complaint within 10 days after service; parties to file their responses to written discovery within 15 days after eceipt thereof; discovery to be completed by 5-1-82; trial to commence on 5-13-82. (N) EDWARDS, J. (USCA), ROBINSON, J., GREEN, J.
Mar 12	11	PETITION of William C. Randall, Jr. et al; memo in support; exhibit; (answers); $5.00 USDC fee paid and credited to U.S. Treasury' (Appearance: Frank Parker, 733-15th Street, N.W. #520; 20005; (202) 628-6700).
Mar 15	12	INTERROGATORIES (second) of plffs to defts.
		SEE NEXT PAGE

DC 111A
(Rev. 1/75)

CIVIL DOCKET CONTINUATION SHEET

FPI-MAR—7-14-80-704-4396

PLAINTIFF	DEFENDANT	DOCKET NO. 82-0665
BUSBEE, et al.	SMITH, et al.	PAGE 2 OF ___ PAGES

DATE	NR.	PROCEEDINGS
1982 Mar 17	13	ANSWER of defts. to complaint.
Mar 17	1	CALENDARED. CD/N
Mar 17	14	MOTION by defts. to dismiss William F. Smith and William Bradford Fr Reynolds, in their individual capacities, as defts; memo;.
Mar 17	15	RESPONSE of defts. to ptlfs' first interrogatories; declaration of Ellen M. Weber.
Mar 17	16	RESPONSE of defts. to pltfs' first request for production of documents.
Mar 17	17	STATEMENT of Points and authorities by pltfs. in opposition to the punitive deft/internevors' petition for leave to intervene; table of contents; exhibits A&B.
Mar 18	18	ORDER filed 3-16-82, that responses to Motion to intervene to be filed by 3.19-82. (N) ROBINSON, J.
Mar 18	19	MEMORANDUM of the U.S. in response to motion for leave to intervene.
Mar 18	20	SUPPLEMENTAL STATEMENT of points and authorities by plffs' in opposition to the puntative deft/intervenors' petition for leave to intervene.
Mar 19	21	INTERROGATORIES of defts to pltfs (setnone).
Mar 19	22	REQUEST (first) of defts for production of documents.
Mar 22	23	REPLY BRIEF of William C. (Billy) Randall, Jr. et al in support of their petition to intervene.
Mar 23	24	ORDER filed 3-19-82 granting defts' motion to dismiss William French Smith and William Bradford Reynolds in their individual capacities as defts. (N) ROBINSON, J .
MaR 23	25	ORDER filed 3-22-82 granting petition of William C. (Billy) Randall Jr. et al to intervene as defts. (N) ROBINSON, J.
Mar 23	26	ANSWER of deft intervenors to the complaint.
Mar 25	27	RESPONSE of defts to pltfs' second interrogatories.
Mar 29	28	INTERROGATORIES (third) of pltfs to each deft-intervenor.
Mar 29	29	REQUEST (second) of pltfs for production of documents to deft-inter.

SEE NEXT PAGE

DC 111A
(Rev. 1/75)

CIVIL DOCKET CONTINUATION SHEET

PLAINTIFF	DEFENDANT	
BUSBEE, et al	SMITH, et al	DOCKET NO. 82-665 PAGE 3 OF ___ PAGES

DATE 1982	NR.	PROCEEDINGS
Apr 1	30	NOTICE of pltfs to take the depositions of William Bradford Reynolds and Gerald W. Jones.
Apr 2	31	MOTION of pltfs for partial summary judgment; statement of material facts; statement of PA's; affidavit of Linda D. Meggers w/ exhibits A thru D.
Apr 5	32	RESPONSE of deft-intervenors to pltfs' first request for production of documents.
Apr 5	33	RESPONSE of deft-intervenors to pltfs' first interrogatories.
Apr 5	34	RESPONSE of deft-intervenors to pltfs' second interrogatories.
Apr 5	35	REQUEST (first) of deft-intervenors for production of documents addressed to each pltf.
Apr 5	36	INTERROGATORIES (first) of deft-intervenors addressed to each ptlf.
Apr 5	37	INTERROGATORIES (second set) of deft-intervenors addressed to each pltf.
Apr 5	38	INTERROGATORIES (third set) of deft-intervenors to pltfs.
Apr 6	39	MOTION of Atlanta Branch NAACP; et al for leave to intervene; memo in support; exhibits A and B; exhibit (answer); (Appearance: Lezli Baskerville, 1025 Vermont Avenue, NW, 820; 20005 (202) 638-2269). $5.00 fee paid and credited to U.S. Treasury.
Apr 7	40	RESPONSE of pltfs to defts' first request for production.
Apr 7	41	RESPONSE of pltfs to defts' interrogatories (set 1).
Apr 7	42	MOTION of defts for a protective order that certain depositions not be taken and for an order quashing subpoenas; memo in support.
Apr 7	43	ORDER that responses to petition of Atlanta Branch NAACP et al to intervene as defts to be filed by 4-14-82. (N) ROBINSON, J.
Apr 7	44	ORDER that commencing with response to defts' motion for protective order, all responses to motions to be filed on or before 5 days following filing of motions. (N) ROBINSON, J.

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PLAINTIFF	DEFENDANT	
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DATE 1982	NR.	PROCEEDINGS
Apr 9	45	STATEMENT OF P&A'S of pltfs in opposition the petition for leave to intervene of the Atlanta Branch, NAACP, et al.
Apr 9	46	MEMO of pltfs in opposition to defts' motion for protective order.
Apr 12	47	MOTION of defts for order compelling discovery; exhibits A, B, C; memo of P&A's.
Apr 12	48	RESPONSE of defts to pltfs' motion for partial summary judgment; statement of material facts.
Apr 13	49	REPLY MEMORANDUM of defts in support of their motion for a protective order that certain depositions not be taken and for an order quashing subpoenas.
Apr 13	50	RESPONSE pf deft-intervenor to the petition for leave to intervene of the Atlanta Branch, NAACP, et al
Apr 13	51	NOTICE (first) of deft-intervenor to produce to pltfs.
Apr 13	52	NOTICE (first) of deft-intervenor to take the deposition of Linda Meggers; Rep. Joe Mack Wilson; Sen Perry Hudson; Sen Terrell Starr; Rep. Benson Hamm; Rep. Godbee; Rep. Thomas Murphy; Lt Gov Zell Miller; Gov George Busbee; Martha Jean Brown and Louise Sommers.
Apr 13	53	ORDER granting defts' motion for protective order except with respect to deposition of Hallue Wright; granting defts' motion to quash except with respect to subpoena duces tecum served upon Hallue Wright. (N) ROBINSON, J.
Apr 15	54	NOTICE of pltfs to take the deposition of Susan Nalls.
Apr 15	55	NOTICE of pltfs to take the deposition of Julian Bond.
Apr 15	56	NOTICE of pltfs to take the deposition of Paul D. Coverdell.
Apr 15	57	NOTICE of pltfs to take the deposition of William C. (Billy) Randall
Apr 15	58	NOTICE of defts to take the depositions of Linda Meggers, Penelope Williams and each member of the reapportionment staff; attachments A, B, and C.
Apr 15	59	MOTION of pltfs for protective order as to certain depositions; statement of P&A's; exhibit A.
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PLAINTIFF	DEFENDANT	DOCKET NO. 82-665
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DATE 1982	NR.	PROCEEDINGS
Apr 16	60	RESPONSE of deft-intervenors to pltfs' motion for partial summary judgment; statement of genuine issues for trial; affidavit of David Walbert.
Apr 16	61	RESPONSE of deft-intervenors to pltfs' second request for production of documents.
Apr 16	62	RESPONSE of deft-intervenors to pltfs' third interrogatories.
Apr 16	63	REPLY BRIEF of pltfs in support of pltfs' motion for partial summary judgment.
Apr 16	64	SUPPLEMENTAL AFFIDAVIT of Linda D. Meggers.
Apr 16	65	MEMORANDUM of pltfs in opposition to Federal Defts' motion for order compelling discovery; exhibit A.
Apr 16	66	MOTION of pltfs for pretrial case management order; statement of [illegible]
Apr 16	67	MEMORANDU[illegible] he United States in opposition to pltfs' motion for a protective order.
Apr 19	68	REPLY BRIEF of pltfs in support of pltfs' motion for protective order.
Apr 20	69	MOTION of pltfs for protective order as to deft-intervenors second notice of depositions; exhibit A; statement of P&A's.
Apr 20	70	RESPONSES ofpltfs to deft-intervenors' first request for productio of documents, addressed to each pltf.
Apr 20	71	RESPONSES of pltfs to deft-intervenors' first interrogatories.
Apr 20	72	RESPONSES of pltfs to deft-intervenors' second set of interrogatories.
Apr 20	73	RESPONSES of pltfs to deft-intervenors' third set of interrogatories.
Apr 20	74	MEMORANDUM of the U.S. in response to pltfs' motion for a pretrial case management order.
Apr 21	75	BRIEF of deft-intervenors Randall et al in response to pltfs' motion for protective order as to certain depositions and pltf's motion or pretrial case management order.
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PLAINTIFF	DEFENDANT	
BUSBEE, et al	SMITH, et al	DOCKET NO. 82-665 PAGE 6 OF ___ PAGES

DATE 1982	NR.	PROCEEDINGS
Apr 21	76	ORDER filed 4-19-82 denying Petition of Atlanta Branch NAACP, et al to in· ·vene as defts; petitioners for intervention may parti· ·pate as amicus curiae. (N) ROBINSON, J.
Apr 21	77	NOTICE (second) of deft-intervenors Randall, et al to take the depositions of Susan Nalls; Paul D. Coverdell; Julian Bond; William C. (Billy) Randall, Jr.
Apr 21	78	MOTION of deft-intervenors Randall, et al to compel discovery; memo in support.
Apr 21	79	MOTION of deft-intervenors Randall, et al to shorten time to respond to deft-intervenors motion to compel discovery; memo in support.
Apr 22	80	MEMORANDUM of pltfs in opposition to deft-intervenors' motion to compel discovery.
Apr 21		MOTION of pltfs for partial summary judgment; motion of deft intervenor, Randall, et al to compel discovery; motion of pltfs for pretrial case management order; motion of pltfs for protective order as to certain depositions; and motion of defts for [illegible] compelling discovery, heard and taken under advisement (Rep: Robert Weber) ROBINSON, J.
Apr 23	81	MOTION of pltfs for expedited determination of pending motion for partial summary judgment and for stay of the Court's discovery order of 4-22-82; statement of P&A's.
Apr 23	82	ORDER filed 4-22-82 denying pltf's motion for protective order; denying pltfs' motion for pretrial case management order; holding in abeyance defts' motion to compel; granting to certain extent deft-intervenors' motion to compel. (N) ROBINSON, J.
Apr 26		TRANSCRIPT OF PROCEEDING from 4-21-82; pages 1-104; (Rep: Robert M. Weber); court copy.
Apr 24	83	ORDER continuing trial to 6-28-82; extending period for discovery to 6-11-82; parties may taken de benee esse depositions between 6-11-82 and 6-21-82; trial brief to be submitted by 6-24-82; counsel to file list of exhibits by 6-24-82; stipulations of evidence to be filed by 6-25-82; counsel to file list of witnesses by 6-24-82 and counsel to file list of depositions to be introduced into evidence by 6-24-82. (N) ROBINSON, J.
Apr 30	84	MEMORANDUM of defts in opposition to pltf's motion for expedited determination of pending motion for partial summary judgment and for stay of the discovery order of 4-22-82.
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PLAINTIFF	DEFENDANT	DOCKET NO. 82-665
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DATE 1982	NR.	PROCEEDINGS
May 3	85	MEMORANDUM of deft-intervenors in opposition to pltfs' motion for expedited determination of pending motion for partial summary judgment.
May 7	86	APPLICATION of U.S. Deft for order to show cause; memo in support; attachment A.
May 14	87	MEMORANDUM of pltfs in opposition to defts' application for order to show cause; exhibits A, B, and C.
May 14	88	MOTION of Deft-intervenors for injunction and interim reapportionment plan; exhibits A, B, and C; memo in support.
May 14	89	MOTION of deft-intervenors for denial of declaratory judgment relief because of pltfs' misconduct and unclean hands; memo in support
May 17	90	RESPONSE of deft-intervenors to defts' application for order to show cause.
May 18	91	ORDER filed 5-14-82, that pltfs. appear on 5-21-82 at 2PM and show cause why they should not be enjoined from proceeding with implementation of certain act. (N) ROBINSON, J.
May 18	92	MEMORANDUM of pltfs in opposition to deft-intervenors' motion for injunction and interim reapportionment plan; third affidavit of Linda D. Meggers; exhibits A thru H.
May 18	93	MEMORANDUM of pltfs in opposition to deft-intervenors' motion for denial of declaratory judgment relief "Because of pltfs' Misconduct and Unclean Hands"; exhibit A.
May 20	94	SECOND MOTION of deft U.S. for order compelling discovery and to renew first motion for order compelling discovery; memo in support; attachment.
May 21		MOTION of deft to show cause and motion of deft for order to compel discovery, heard and taken under advisement. (Rep: Robert Webber) ROBINSON, J.
May 21	95	AFFIDAVIT of Susan Nalls; exhibit A submitted by deft intervenors.
May 21	96	DECLARATION of Carl W. Gabel; attachment, submitted by defts.
May 24	97	MEMORANDUM OPINION AND ORDER enjoining pltfs from certain action; denying intervenor-defts motion for interim relief; granting 2nd and renewed 1st motion for an order compelling discovery. (N) ROBINSON, J.
May 24	98	APPLICATION of pltfs for stay.

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PLAINTIFF	DEFENDANT	
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DATE 1982	NR.	PROCEEDINGS
May 24	99	NOTICE of appeal of pltfs to the supreme Court of the United States.
May 25	100	ORDER denying application of pltf for a stay. (N) ROBINSON, J.
May 25		TRANSCRIPT OF PROCEEDINGS from 5-21-82; pages 1-102; (Rep: Robert M. Weber); court copy.
May 25		DEPOSITION of Hallue Elizabeth Wright taken 4-30-82 on behalf of pltfs.
Jun 2	101	SUPPLEMENTAL RESPONSES of pltfs to certain of defts interrogatories.
Jun 7	102	SUPPLEMENTAL RESPONSES of deft-intervenor Julian Bond to pltfs' third interrogatories.
Jun 14		DEPOSITION of Representative Al Scott taken 6-3-82 on behalf of pltfs; correction sheet.
Jun 14		DEPOSITION of Susan Nalls taken 5-28-82 on behalf of pltfs; correction sheet; exhibit 1.
Jun 14		DEPOSITION of William (Billy) Randall taken 6-7-82 on behalf of pltfs; unexecuted.
Jun 17	103	MOTION of pltf in limine; statement of P&A's; exhibits A, B, and C.
Jun 18	104	APPLICATION of pltfs for order to issue subpoena.
Jun 21	105	JOINT MOTION for authorization toserve subpoenas in Georgia.
Jun 21	106	ORDER allowing subpoenas for trial wtinesses to be served in the state of Georgia. (N) ROBINSON, J.
Jun 23		TRANSCRIPT of Video Taped Newscasts from 8-31-81 to 9-17-81 before E. DUane Smith, Certified Court Reporter at WSB-TV, Atlanta, Georgia taken on 6-17-82.
Jun 23		DEPOSITION of Jack Sells taken 6-17-82 pursuant to Court Order; exhibits 1 and 2.
Jun 24	107	TRIAL BRIEF of deft-intervenors.
Jun 24	108	DESIGNATION of deft-intervenors of depositions.
Jun 24	109	RESPONSE of deft-intervenors to pltfs' motion in limine.

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PLAINTIFF	DEFENDANT	DOCKET NO. 82-665
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DATE 1982	NR.	PROCEEDINGS
Jun 24	110	MASTER LIST of deft-intervenors of exhibits.
Jun 24	111	LIST OF WITNESSES of deft-intervenors.
Jun 24	112	SUBMISSION of the U.S. setting forth trial witnesses, depositions to be introduced into evidence, and the master list of exhibits; exhibits 1 thru 18.
Jun 24	113	TRIAL BRIEF of the U.S.A.; table of contents; table of authorities.
Jun 24	114	LIST of pltfs of depositions to be introduced into evidence.
Jun 24	115	LIST of pltfs of exhibits; attachment.
Jun 24	116	WITNESS LIST of pltfs.
Jun 24	117	PRETRIAL BRIEF of pltfs.
Jun 25	118	DEPOSITION of Terrell Starr taken 5-27-82 on behalf of defts; errata sheet; exhibit 1.
Jun 25	119	STIPULATION of facts.
Jun 25	120	THIRD SUPPLEMENTAL RESPONSE of deft-intervenors to pltfs' third interrogatories.
Jun 25	121	FOURTH SUPPLEMENTAL RESPONSE of deft-intervenors to pltfs' third interrogatories.
Jun 25	121	REQUEST (first) of deft-intervenors for judicial notice; exhibits A1 thru A72; excluding A66 and A67.
Jun 25	122	REQUEST of the U.S. for judicial notice ot adjudicative facts.
Jun 25	123	AMENDED SUBMISSION of the U.S. setting forth trial witnesses.
Jun 28		DEPOSITION of Dr. Alex Willingham taken 6-18-82 on behalf of pltfs.
Jun 28		DEPOSITION of Representative Roger Williams taken 6-7-82 on behalf of federal defts; errata sheet.
Jun 28		DEPOSITION of Dan Ebersole taken 6-1-82 on behalf of defts; errata sheet.
Jun 28		DEPOSITION of Senator Perry Hudson taken 5-24-82 on behalf of government; errata sheet.

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PLAINTIFF	DEFENDANT	
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DATE 1982	NR.	PROCEEDINGS
Jun 28		DEPOSITION of Vinson Wall taken 5-31-82 on behalf of deft-intervenor; correction sheet. (Volume I)
Jun 28		DEPOSITION of Vinson Wall taken 5-31-82 on behalf of deft-intervenor; (Volume II).
Jun 28		DEPOSITION of Joe Mack Wilson taken 5-31-82 on behalf of Government; correction sheet. (Volume I).
Jun 28		DEPOSITION of Joe Mack Wilson taken 5-14-82 on behalf of Government; correction sheet. (Volume II).
Jun 28		DEPOSITION of Joe Mack Wilson taken 5-19-82 on behalf of Government; correction sheet. (Volume III)
Jun 29		DEPOSITION of Linda Meggers taken 5-28-82 on behalf of defts; correction sheet. (Volume VII)
Jun 29		DEPOSITION of LInda Meggers taken 6-9-82 on behalf of defts; correction sheet. (Volume VIII)
Jun 29		DEPOSITION of Governor George D. Busbee taken 6-21-82 on behalf of deft-intervenors; errata sheet; exhibits 1 thru 15.
Jun 29		DEPOSITION of Thomas B. Murphy taken 5-11-82 on behalf of defts; unexecuted.
Jun 28		TRIAL BY COURT begun and respited to 6-29-82 at 9:00 .am. (Rep: Joe Rogers) EDWARDS, J USCA ROBINSON, J . GREEN, JUNE, J.
Jun 30		TRIAL resumed and respited to 7-1-82 at 9:00 a.m. (Rep: Craig Knowles) EDWARDS, J. USCA ROBINSON, J. GREEN, JUNE, J.
Jul 1		DEPOSITION of Representative John GOdbee taken 5-26-82 on behalf of defts; errata sheet.
Jul 1		DEPOSITION of Louis Summers taken 6-1-82 on behalf of deft-intervenor errata sheet.
Jul 1		DEPOSITION of Representative Bettye Lowe taken 5-25-82 on behalf of defts-intervenor and defts; exhibit 1; errata sheet.
Jul 1		DEPOSITION of Senator Floyd W. Hudgins taken 6-8-82 on behalf of defts-intervenors; unexecuted.
Jul		DEPOSITION of Patricia Nally taken 6-8-82 on behalf of federal defts; unexecuted.

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PLAINTIFF	DEFENDANT	DOCKET NO. 82-665
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DATE 1982	NR.	PROCEEDINGS
Jul 1		DEPOSITION of Hosea Williams taken 6-14-82; unexecuted.
Jul 1		DEPOSITION of Robert Ford taken 6-16-82 on behalf of pltfs; exhibits 1,2, and 3; unexecuted.
Jul 1		DEPOSITION of Grace T. Hamilton taken 6-3-82 on behalf of federal defts; exhibits 1,2, and 3; errata sheet.
Jul 1		DEPOSITION of Representative Hank ELliott taken 6-4-82 on behalf of defts and deft intervenors; unexecuted.
Jul 1		DEPOSITION of Representative Hank Elliott taken 6-11-82 on behalf of defts and deft intervenors; unexecuted. (Volume II).
Jul 1		DEPOSITION of Senator Culver Kidd taken 6-1-82 on behalf of federal defts; exhibit 1; unexecuted.
Jul 1		DEPOSITION of Senator Thomas F. Allgood taken 6-8-82 on behalf of federal defts; unexecuted.
Jul 1		DEPOSITION of Representative Robert A. Holmes taken 6-4-82 on behalf of defts and deft intervenors.
Jul 1		DEPOSITION of James Brewer taken 6-17-82; unexecuted.
Jul 1		DEPOSITION of Julian Bond taken 6-4-82 on behalf of pltfs.
Jul 1		DEPOSITION of Glen Vey taken 6-8-82 on behalf of federal government; errata sheet; exhibit 1.
Jul 1		DEPOSITION (continued) of Representative John Godbee taken 6-4-82.
Jul 1		DEPOSITION of Linda D. Meggers taken 5-3-82 on behalf of defts exhibits 10 thru 19; errata sheet; unexecuted.
Jul 1		DEPOSITION (Continued) of Linda D. Meggers taken 5-4-82 on behalf of defts; errata sheet; unexecuted. (Volume II)
Jul 1		DEPOSITION (continued) of Linda D. Meggers taken 5-5-82 on behalf of defts; errata sheet; unexecuted.
Jul 1		DEPOSITION (continued) of LInda D. Meggers taken 5-6-82 on behalf of defts; errata sheet; unexecuted. (Volume IV)
Jul 1		DEPOSITION (continued) of LInda D. Meggers taken 5-7-82 on behalf of defts; errata sheet; unexecuted. (Volume V)
Jul 1		DEPOSITION (continued) of Linda D. Meggers taken 5-10-82 on behalf of defts; errata sheet. (Volume VI)

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PLAINTIFF	DEFENDANT	
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DATE 1982	NR.	PROCEEDINGS
Jul 1		DEPOSITION of Lieutenant Governor Zell Miller taken 5-18-82 on behalf of Government; errata sheet.
Jul 1		DEPOSITION (continued) of Grace T. Hamilton taken 6-10-82.
Jul 1		TRIAL resumed and concluded; parties to submit memoranda with respect to designation by 7-2-82; proposed findings to be submitted by 7-12-82. (Rep: Joyce Northwood) EDWARDS, J. USCA ROBINSON, J. GREEN, J.
Jul 2	123	AMENDED DESIGNATION of deft intervenors of depositions to be relied upon at trial.
Jul 2	124	SUPPLEMENTAL DESIGNATION of pltfs of depositions.
Jul 8		TRANSCRIPT OF PROCEEDINGS from 6-28-82; pages 1-161; (Rep: JOseph D. ROgers, court copy. (1st day)
Jul 8		TRANSCRIPT OF PROCEEDINGS from [illegible]-92-82; pages 162-398; (REp: Cathy Jardim); court copy. (2nd day)
Jul 8		TRANSCRIPT OF PROCEEDINGS from 6-30-82; pages 399-651; (Rep: Craig L. Knowles); court copy. (3rd day)
Jul 8		TRANSCRIPT OF PROCEEDINGS from 7-1-82; pages 652-727; (Rep: JOyce Northwood); court copy. (4th day)
Jul 12	125	EXHIBITS 66,67 and 74 of deft intervenor to first request for judicial notice filed 6-25-82.
Jul 12	126	PROPOSED FINDINGS of pltfs of fact and conclusions of law; table of contents.
Jul 12	127	PROPOSED FINDINGS of U.S. of fact and conclusions of law.
Jul 12	128	MOTION of deft U.S. to designate and introduce certain additional portions of depositions into evidence; attachment.
Jul 12	129	PROPOSED FINDINGS of intervenors of fact and conclusions of law. (filed per chambers).
Jul 14		DEPOSITION of Representative Ken Workman taken 6-16-82 on behalf of Federal government; errata sheet.
July 23	130	FINDINGS OF FACT AND CONCLUSIONS OF LAW. (N) EDWARDS, J. GREEN, J. ROBINSON, J.

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PLAINTIFF	DEFENDANT	
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DATE	NR.	PROCEEDINGS
1982 July 23	131	ORDER filed 7-22-82, declaring that Act No. 5 of the 1981 Extra-ordinatry Session of the Georgia General Assembly was enacted with the purpose of denying or abridging the right to vote on request for a declaratory judgment; enjoining pltfs. from implementing Act. No. 5; and directing pltfs. to submit by 8-11-82 a reapportionment of the Fourth and Fifth Congressional Districts. (N) EDWARDS, J., GREEN, J., & ROBINSON, J.
Jul 26	132	APPLICATION of pltfs for stay.
Jul 26	133	NOTICE OF APPEAL of pltfs to the Supreme Court of the U.S.; $5.00 fee paid and credited to U.S. Treasury.
Jul 27		DEPOSITION of Senator Paul Coverdell taken 6-2-82 on behalf of defts errata sheet.
Jul 26	134	ORDER denying pltfs' application for stay of this court's order of 7-22-82. (N) GREEN, J.
Jul 29	135	MOTION of U.S. for clarification of the Court's order of 7-22-82; memo in support.
Jul 30	136	STATEMENT OF P&A'S of pltfs in oppositon to defts' motion for clarification of the court's order of 7-22-82.
Aug 2	137	ORDER filed 7-30-82 that on or before Monday, 8-2-82 at 4:00 p.m. pltfs and intervenor-defts shall file a response to the motion of the U.S. for clarification of the Court's order of 7-22-82. (N) ROBINSON, J.
Aug 2	138	RESPONSE of intervenors to motion of the US for clarification.
Aug 3	139	ORDER filed 8-2-82 denying federal defts motion for clarification of order of 7-22-82. (N) ROBINSON, J. for the Court.
Aug 9	140	SUPPLEMENTAL REAPPORTIONMENT PLAN of pltfs; exhibits A thru D.
Aug 11	141	CORRECTION of pltfs in statistical data for supplemental reapportionment plan filed 8-9-82; exhibits 1 and 2.
Aug 13	142	ORDER directing deft and deft-intervenor to file a response to supplemental reapportionment plan by 8-16-82 at 2:00 p.m. (N) EDWARDS, J. (USCA)
Aug 13	143	RESPONSE of the U.S. to pltfs' supplemental reapportion ment plan; exhibit A.
Aug 13	144	MOTION of pltfs for an expedited order to proceed with an expedited election schedule for Congressional Districts 1-3 and 6-10.

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DATE 1982	NR.	PROCEEDINGS
Aug 16	145	RESPONSE of intervenors to supplemental reapportionment plan.
Aug 16	146	MOTION of pltfs for an order approving special primary and general election schedules for Georgia's Fourth and Fifth Congressional Districts; exhibit 1.
Aug 16	147	ORDER filed 8-13-82 granting pltfs' motion for an expedited order to proceed with an expedited election schedule for Congressional Districts 1-3 and 6-10. (N) ROBINSON, J.
Aug 19	148	MOTION of deft-intervenors for an order approving special primary and general election schedules for Georgia's fourth and fifth Congressional Districts; P&A's in support of their motion and in opposition to pltfs' motion for an order approving special primary and general election schedules; exhibits I-1 and I-2.
Aug 19	149	SUPPLEMENTAL MEMORANDUM of pltfs regarding proposed election schedules; exhibits 1 thru 5.
Aug 19	150	RESPONSE of the U.S. to pltfs' motion for an order approving special primary and general election schedules for Georgia's fourth and fifth congressional districts.
Aug 24	151	REPLY MEMORANDUM of intervenors regarding proposed election schedule.
Aug 24		MOTION of pltf and deft-intervenors for an order approving special primary and general election schedules for Georgia's fourth and fifth congressional districts heard and court to set forth schedule. (REp: R. Weber) (USCA) EDWARDS, J. ROBINSON, J. GREEN, J.
Aug 24	152	ORDER directing that the Special primary, Runoff, and General Elections for Georgia's Fourth and Fifth Congressional Districts shall proceed according to the attached schedule; that the dates and events numbered 4, 6, 7, 9, 10, 11, 12, 13, 17, 18, 19, 20, 21 and 22 may be altered by pltfs and the dates and events numbered 1,2,3,5,8,14,15,16 and 23 may not be altered except on order of this Court; attachment. (N) (USCA) EDWARDS, J. ROBINSON, J. GREEN, J.
Aug 24	153	ORDER that pltfs are entitled to and granted a declaratory judgment that Act No. 5 as supplemented by House Bill 1 Ex does not have the purpose and will have the effect of denying or abridging the right to vote on account of race, color, or membership in a language minority group. (N) (USCA) EDWARDS, J. ROBINSON, J. GREEN, J.
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DATE 1982	NR.	PROCEEDINGS
Aug 26		TRANSCRIPT OF PROCEEDINGS from 8-24-82; pages 1-49; (Rep: Robert Weber); court copy.
Sep 23	154	MEMORANDUM OPINION filed 9-21-82 regarding congressional elections in certain districts. (N) EDWARDS.J. (USCA) ROBINSON, J. GREEN, J.
Dec 6	155	CHANGE OF ADDRESS of Thomas I. Atkins, General Counsel; N.A.A.C.P. Special Contribution Fund; 186 Remsen Street; Brooklyn Heights, New York 11201 (212) 858-0800.
Feb 17	156	NOTICE by Intervenor-defts. to take depositions of Mr. Michael Bowers, Ms. Carol Cosgrove, and Mr. Mark Cohen.
Feb 17	157	REQUEST by Intervenor-defts. to pltfs. for production of documents.
Feb 28	158	CERTIFIED COPY OF JUDGMENT from the Clerk Supreme Court of the U.S. affirming judgment USDC.
Mar 8	159	BILL OF COSTS as verified by counsel for the United States; Brief in support; exhibits A thru G.
Mar 21	160	OBJECTIONS by pltfs. to United States Bill of Costs; exhibit A.
Apr 11	161	CONSENT ORDER concerning attorneys' fees costs and expenses of intervenors. (N) ROBINSON, CJ.
Jun 15	---	BILL OF COSTS as taxed by the Clerk in the amount of $20,458.15; attachment. (N)
June 22	162	MOTION of the United States defts to review taxation of costs; attachment A; memorandum of law in support; Attachments A thru G.
July 5	163	MEMORANDUM OF LAW of pltfs in opposition to United States' motion to review taxation of costs.
Sept 29	164	MEMORANDUM filed 9/28/83. (N) ROBINSON, CJ. (sb)
Sept 29	165	ORDER filed 9/28/83 granting motion of the United States of America to review taxation of costs; directing that pltf State of Georgia shall be taxed $40,929.48 for the costs deft United States of America incurred in defending this action. (N) ROBINSON, CJ. (sb)

EXHIBIT 3

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

GEORGE D. BUSBEE, *et al.*,	)	
Plaintiffs,	)	
v.	)	CIVIL ACTION NO. 82-0665
WILLIAM FRENCH SMITH, *et al.*,	)	
Defendants.	)	

FILED

APR 22 1982

JAMES F. DAVEY, Clerk

ORDER

Upon consideration of Plaintiffs' Motion for a Protective Order as to Certain Depositions, Defendants' Motion to Compel, Defendant-Intervenors' Motion to Compel, Plaintiffs' Motion for a Pretrial Case Management Order, the responses thereto, the hearing held April 21, 1982, and the entire record herein, it appearing to the Court that: (1) inquiry into considered but rejected alternative Congressional plans is a proper subject for discovery in this case since it may lead to circumstantial evidence on the purpose of the Georgia legislature in adopting the plans at issue, Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 266 (1977); Washington v. Davis, 425 U.S. 229, 242-43 (1976); (2) inquiry into the reasons why certain state legislative districts were chosen may similarly lead to circumstantial evidence; and (3) the scope of discovery should be broadly construed where "there is the possibility that the information sought may be relevant to the subject matter of the action", 8 Wright & Miller, Federal Practice and Procedure § 2008, it is by the Court this 23rd day of April, 1982,

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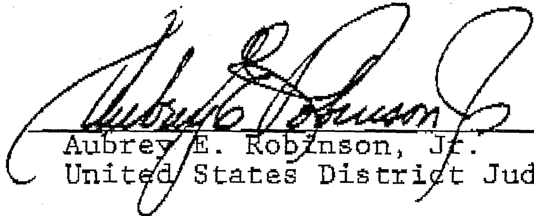
ORDERED, that Plaintiffs' Motion for a Protective Order be and hereby is DENIED; and it is

FURTHER ORDERED, that Plaintiffs' Motion for a Pretrial Case Management Order be and hereby is DENIED; and it is

FURTHER ORDERED, that Defendants' Motion to Compel be and hereby is HELD IN ABEYANCE pending Plaintiffs' submission of more complete information; and it is

FURTHER ORDERED, that if Defendants are dissatisfied with Plaintiffs' submission, they shall renew their Motion to Compel; and it is

FURTHER ORDERED, that Defendant-Intervenors' Motion to Compel be and hereby is GRANTED only to the extent that Plaintiffs shall comply with the "First Notice of Depositions" and the "First Notice to Produce".



Aubrey E. Robinson, Jr.
United States District Judge

FOR THE COURT

EXHIBIT 4

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STATE OF FLORIDA, Plaintiff v. THE UNITED STATES OF AMERICA and ERIC H. HOLDER, Jr., in his official capacity as Attorney General of the United States, Defendants, FLORIDA STATE CONFERENCE OF THE NAACP, *et al.*, Defendant-Intervenors, KENNETH SULLIVAN, *et al.*, Defendant-Intervenors, and NATIONAL COUNCIL OF LA RAZA, and LEAGUE OF WOMEN VOTERS OF FLORIDA, Defendants-Intervenors.	NO. 1:11-CV-01428 (CKK-MG-ESH) THREE JUDGE COURT

DEFENDANT UNITED STATES' FIRST SET OF INTERROGATORIES TO THE STATE OF FLORIDA

Defendant United States of America requests that the State of Florida respond to the following interrogatories in accordance with Federal Rules of Civil Procedure 33, Local Rules 5.2 and 26.2, and the Court's Order dated November 3, 2011 (Docket No. 61). This request is continuing in nature as provided in Federal Rule of Civil Procedure 26(e).

DEFINITIONS

As used herein, the following terms have the following meanings:

1. To "identify" in reference to a person means to state a person's full name, present or last known business address and business telephone number, present or last known employer and job title, and (if no business address or telephone number is available), present or last known home address and home telephone number.

2. To "identify" in reference to governmental agencies, firms partnerships, corporations, proprietorships, associations or other entities, means to state their names, and each of their present or last known addresses.

3. To "identify" in reference to documents means to state the form, name, or title of any document and the date it was prepared; parties to the document and the substance thereof; and to identify the person or persons who prepared it, its present location and its custodian.

4. To "identify" in reference to oral statements and communications means to state when and where they were made; identify each of the makers and recipients thereof, in addition to all others present; indicate the medium of communication; and state their substance.

5. A "document" means any "writing," "recording," or "photograph" within the meaning of Federal Rule of Evidence 1001, including but not limited to any information stored, produced, or generated by a computer system, whether by word processing, electronic mail, or any other form; any information stored, produced, or generated by telephone, including voice mail messages or any other form; and includes each copy of a document that

contains any attachment, notes, or markings which are in the possession or control of the answering party.

6. The term "you" or "your" means the State of Florida, the Secretary of State, the Office of the Secretary of State, and the Division of Elections, as well as all officers, employees, agents and attorneys for the State of Florida, the Secretary of State, the Office of the Secretary of State, and the Division of Elections.

7. The phrase "four sets of voting changes for which Florida seeks judicial preclearance" refers to the four sets of voting changes at issue in this lawsuit. The four sets of voting changes are part of House Bill 1355 enacted by the Florida Legislature and codified at Chapter 2011-40, Laws of Florida. The changes include the following: (1) the procedures for third-party voter registration organizations (Section 4) (97.0575, Fla. Stat.); (2) the time frame that signatures are valid for citizen initiatives to amend the state constitution (Section 23) (100.371, Fla. Stat.); (3) election-day polling place procedures for voters who have moved from the voting precinct in which they are registered to vote to a voting precinct in a different county (Section 26) (101.045, Fla. Stat.); and (4) early voting procedures, including changes in the number of early voting days and hours for county, state, and federal elections (Section 39) (101.657, Fla. Stat.).

INSTRUCTIONS

In answering each interrogatory:

(a) identify each person who prepared or assisted in the preparation of the interrogatory;

(b) state whether the answer is within the personal knowledge of the

person answering the interrogatory and, if not, the identity of each person known to have personal knowledge of the answer;

(c) identify each person who provided information or input, or who was interviewed or consulted in order to complete the interrogatory;

(d) identify each document not prepared in anticipation of this litigation that was used in any way to formulate the answer to the interrogatory;

(e) identify each person who possessed documents not prepared in anticipation of this litigation which were used in any way to formulate the answer to the interrogatory; and

(f) to the extent these interrogatories seek identification or production of communications and/or documents, all non-privileged communications and/or documents are to be disclosed/divulged that are in the possession of the State of Florida, its attorneys, investigators, agents, employees or other representatives of the State and its attorneys. To the extent the State of Florida claims any relevant communications and/or documents to be privileged, the United States requests a list identifying each communication and/or document and the specific privilege asserted. *See* Fed. R. Civ. P. 26(b)(5) and the Court's Order at 6 (Nov. 3, 2011).

INTERROGATORY NO. 1

Identify all facts, and every individual with personal knowledge of any of the following incidents, events, statements or statistics which either (1) prompted the sponsor(s) and/or legislators named below of HB1355 and its companion bill SB2086 to introduce, amend or otherwise support each of the four sets of voting changes for which Florida seeks judicial preclearance, or (2) prompted legislators named below to oppose one or more of the four sets of voting changes for which the State seeks judicial preclearance:

(a) the reference to previous third-party voter registration "mishaps" that "leaked through" (Representative Baxley, April 14, 2011 House Committee on State Affairs at 1:08:16);

(b) the statement that early voting in Miami-Dade has not been efficient based on costs per votes and low voter turnout for early voting (Senator Díaz de La Portilla, April 15, 2011 Senate Rules Committee Hearing at 52:60)

(c) the statement that the "evidence is clear" that most of early voting takes place in the last seven days of the early voting period (Senator Díaz de la Portilla, April 26 Senate Budget Committee Hearing at 1:16:32);

(d) the statement that early voting has not increased overall turnout but has increased costs (Senator Díaz de la Portilla, April 26 Senate Budget Committee Hearing at 1:22:44);

(e) the statement that people who vote early overwhelmingly vote by absentee ballot; and "more and more" voters prefer to cast absentee ballots, which is the "fastest [growing] area" of voting (Senator Díaz de la Portilla, April 15, 2011 Senate Rules Committee Hearing at 59:04; April 26, Senate Budget Committee Hearing at 1:24:10);

(f) the statement that there have been "allegations of falsifying hundreds of voter registration applications" (Representative Eisnaugle, April 20, 2011 House Floor Session at 47:08)

(g) the reference to the 2009 mayoral election, and voters who changed address on Election Day (Representative Van Zant, April 20 House Floor Debate at 55:09)

(h) the statement that 12,000 voters changed address on Election Day in 2010 (Senator Rich, April 26 Senate Budget Committee Hearing at 1:56:34)

(i) the statement that "people in Africa . . . in the desert . . . walk 200-300 miles so they" can vote and therefore voting need not be made any more convenient for voters (Senator Bennett, May 5 Senate Floor Debate at 35:40);

(j) the statement that approximately 150,000 Florida voters updated addresses at the polls on Election Day in 2008 and cast a regular ballot (Representative Pafford, May 5 House Floor Debate 36:33)

(k) the rationale and justifications for eliminating early voting on the Sunday immediately before a Tuesday Election Day for county, state, or federal elections.

Identify all documents supporting your response to Interrogatory No. 1, including but not limited to DS-DE 34 forms (entitled "Elections Fraud Complaint") (dating from January 2007 to June 1, 2011) submitted to the Division of Elections.

INTERROGATORY NO. 2

Identify all facts, and every individual with personal knowledge of the following:

(a) the "loophole" of voters casting multiple ballots on Election Day identified by the Secretary of State in his August 18, 2011 editorial published in the *Orlando Sun Sentinel* and page 11 of your July 25, 2011 Supplemental Memorandum to the United States (identified in Plaintiff's Rule 26(a)(1)(A) Initial Disclosures at 3, ¶ 2);

(b) the "burden on poll workers" related to early voting as referenced in the Secretary of State's May 20, 2011 editorial published in *the St. Petersburg Times*; and

(c) the basis for the statement that "Florida's early voting remains at 96 hours" and that early voting will be "more accessible now than ever before," as referenced in the Secretary of State's May 20, 2011 editorial in *the St. Petersburg Times*.

INTERROGATORY NO. 3

With respect to the history, development, and implementation of each of the four sets of voting changes for which the State seeks judicial preclearance, identify every document, memorandum, report or other written communication of any type involving your office and members of the legislature (including all committees and subcommittees); county election officials (including but not limited to Supervisors of Elections), their staff, agents and counsel; other state agencies; and/or any election-related organizations or associations, including but not limited to the Florida State Association of Supervisors of Elections.

INTERROGATORY NO. 4

Identify the nature of and the schedule for training relating to any of the four sets of voting changes for which the State seeks judicial preclearance, including but not limited to training for Supervisors of Elections, their staff, agents and counsel; other state agencies; and/or

any election-related organizations or associations, including but not limited to the Florida State Association of Supervisors of Elections. Identify all documents supporting your response to this Interrogatory.

INTERROGATORY NO. 5

Identify all individuals, interested parties, and organizations, including but not limited to all third-party voter registration organizations, which received notice from your office of the requirements contained in Section 4 of Chapter 2011-40 (amending 97.0575 Fla. Stat.) and the Emergency Rules implementing this provision of law.

INTERROGATORY NO. 6

Identify each criterion the Secretary will use to determine: (1) when the Secretary may refer a matter to the Attorney General for enforcement under 97.0575, Fla. Stat., and (2) when the Secretary may waive the fines imposed for failure to timely deliver the voter registration application in the case of force majeure or impossibility of performance pursuant to the same provision of law.

INTERROGATORY NO. 7

Identify all third-party voter registration organizations that were registered as of May 19, 2011 under the predecessor to 97.0575 Fla. Stat., and have:

(a) withdrawn as registered third-party voter registration organizations;
(b) re-registered pursuant to the requirements of 97.0575, Fla. Stat.;
(c) failed to comply with the 90-day re-registration requirement; and/or
(d) failed to comply with the 90-day re-registration requirement and have had their registration cancelled.

Identify and describe all documents supporting your response to this Interrogatory, including but not limited to Forms DS-DE 119, 120, 121, 123, and 124.

INTERROGATORY NO. 8

Identify all third-party voter registration organizations and agents not previously registered with the Secretary of State as of May 19, 2011, that have registered pursuant to the requirements set forth in 97.0575, Fla. Stat., and Rule 1S-2.042, along with all documents each identified organization and agent has submitted to the Division of Elections, including but not limited to forms DS-DE 119, 120, and 123.

INTERROGATORY NO. 9

For every voter in the State registered by all third-party voter registration organizations since May 19, 2011, pursuant to the provisions of 97.0575, Fla. Stat., identify the race and/or ethnicity of the individual registered and the County where registered, along with documents or databases supporting your response to this Interrogatory, including but not limited to DS-DE 124 forms.

INTERROGATORY NO. 10

For each year since January 1, 2007, identify the total number of voters in Collier, Hardee, Hendry, Hillsborough, and Monroe Counties, categorized by race and/or ethnicity, registered through third-party voter registration organizations, and the total number of voters, categorized by race and/or ethnicity, registered through any other method of voter registration. If such information is unavailable, identify the total number of voters registered in Collier, Hardee, Hendry, Hillsborough, and Monroe Counties for each year since 2007, categorized by race and/or ethnicity.

INTERROGATORY NO. 11

For each year since January 1, 2007, identify the total number of voter registration applications received by an election official in Collier, Hardee, Hendry, Hillsborough, and

Monroe Counties from a third-party voter organization within 48 hours of the completion of the application, and the total number received from a third-party voter registration organization more than 48 hours after the application was completed. If this information is not currently available, for each year since January 1, 2007, identify the total number of voter registration applications (regardless of the source of the voter registration application) received by an election official in Collier, Hardee, Hendry, Hillsborough, and Monroe Counties within 48 hours of their completion. Identify and describe all documents supporting your response to this Interrogatory.

INTERROGATORY NO. 12

Identify all individuals, third-party organizations, registered agents and any other entities whom the State is currently investigating or has investigated for alleged violations of 97.0575, Fla. Stat. For each such investigation, identify: (1) the incident(s) forming the basis of the investigation, including the time, date and all other relevant facts; (2) the number of voter registration applications submitted by the organization, agent, or entity, and the race and/or ethnicity of each the voter registration applicants whose form was submitted, and (3) whether the investigation has been or will be referred to the Attorney General. This interrogatory covers the time period from May 19, 2011. Identify and describe all documents supporting your response to this Interrogatory.

INTERROGATORY NO. 13

Identify voter statistics (and all sources or databases for such statistics) for all counties in the State of Florida in each county, state, or federal election since January 1, 2005. For each such election, please indicate the total number, categorized by race and/or ethnicity, for each of the following: (a) voters who have changed their address on Election Day, (b) voters who changed their address on Election Day to a different county from the county in which they were

registered to vote, and (c) voters who changed their address on Election Day but remained in the same county in which they were registered to vote. If any of these statistics are not available, identify all facts, persons, documents or analyses to support the basis for a statement that such data is not available, and identify what data is available.

INTERROGATORY NO. 14

Identify all communications sent from the Office of the Secretary of State to Supervisors of Elections since May 19, 2011 concerning the procedures to be used for verifying whether a voter who has moved from one county to another is eligible to vote in the particular precinct in which he or she casts a provisional ballot on Election Day pursuant to 101.045, Fla. Stat.

INTERROGATORY NO. 15

Identify voter turnout statistics (and all sources or databases for such statistics) for each county, state, and/or federal election held in Collier, Hardee, Hendry, Hillsborough, and Monroe Counties since January 1, 2006. For each such election, please indicate the total number, categorized by race and/or ethnicity, for each of the following: (a) the number of registered voters at the time of the election, (b) the number of persons who voted in the election (by absentee ballot, by early voting, and on Election Day), and(c) the number of persons who voted in person <u>on each day</u> of the early voting period, and (d) the early voting days and hours utilized for the five counties referenced in this Interrogatory.

INTERROGATORY NO. 16

Please (a) identify the days and hours of early voting in all counties in the State of Florida in county, state, and/or federal election since January 1, 2006 and prior to the adoption of 101.657, Fl. Stat., (b) identify the names of counties anywhere in the State of Florida that will continue to have 96 hours of early voting before each county, state, or federal election in 2012,

and (c) identify the names of counties anywhere in the State of Florida that will have less than 96 hours of early voting before each county, state, or federal election in 2012, as well as the number of early voting hours planned for each county.

INTERROGATORY NO. 17

For each year since 2000, identify all citizen petitions initiated, including a description of the subject matter of the petition, the petition's sponsors (including name and race/ethnicity), and the number of days that passed between the collection of the first signature and the date upon which the Secretary of State determined that valid and verified petition forms had been signed by the constitutionally required number and distribution of electors. For each such petition identified, please indicate if and when (by date) the petition was placed on the ballot and whether the sponsor(s) of each identified petition utilized a professional petition signature-collecting entity in order to collect the constitutionally required number and distribution of electors. Identify all documents and databases supporting your response to this Interrogatory.

INTERROGATORY NO. 18

Identify all persons within your employ who have knowledge of the enactment, history, development and implementation of the four sets of voting changes for which the State seeks judicial preclearance.

Pursuant to the Court's Order at 5 (Nov. 3, 2011), the United States has a maximum of twenty-five (25) interrogatories. The United States reserves its right to propound the remaining seven (7) Interrogatories at a future date consistent with the Federal Rules of Civil Procedure and the Court's February 29, 2012, deadline for discovery as set forth in the aforementioned Order.

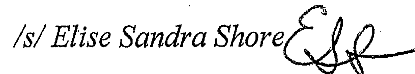
Date: November 15, 2011

Respectfully submitted,

RONALD C. MACHEN, JR.
United States Attorney
District of Columbia

THOMAS E. PEREZ
Assistant Attorney General
Civil Rights Division

/s/ Elise Sandra Shore



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Certificate of Service

I certify that on November 15, 2011, I served the foregoing Defendant United States' First Set of Interrogatories to the State of Florida by electronic mail upon the following counsel of record:

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EXHIBIT 5

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, FLORIDA STATE CONFERENCE OF THE NAACP, *et al.*, Defendant-Intervenors, KENNETH SULLIVAN, *et al.*, Defendant-Intervenors, NATIONAL COUNCIL OF LA RAZA, and LEAGUE OF WOMEN VOTERS OF FLORIDA, Defendant-Intervenors.	No. 1:11-cv-1428-CKK-MG-ESH

FLORIDA'S RESPONSES TO FIRST SET
<u>OF INTERROGATORIES OF DEFENDANT UNITED STATES</u>

Plaintiff, the State of Florida by and through Secretary of State Kurt Browning ("Florida"), hereby submits the following responses to the First Set of Interrogatories of Defendant United States dated November 15, 2011.

GENERAL OBJECTIONS

The following General Objections apply to every paragraph of the First Set of Interrogatories of the United States:

1. Florida objects to every interrogatory that calls for privileged information, including, without limitation, (1) information protected by the attorney-client privilege; (2) information prepared in anticipation of litigation or trial; or (3) information containing or reflecting the mental impressions, conclusions, opinions, or legal theories of any attorney for Plaintiff and subject to the attorney work-product doctrine.

2. Florida objects to every interrogatory that is overly broad, unduly burdensome, harassing, duplicative or which requests documents which are already in the possession of Defendants.

3. Florida objects to every interrogatory that calls for information which is neither relevant to the subject matter of the pending action nor reasonably calculated to lead to the discovery of admissible evidence in connection with the pending Complaint.

4. Florida objects to every interrogatory, and to every introductory "definition" or "instruction," that seeks to impose obligations beyond those required by the Federal Rules of Civil Procedure, as reasonably interpreted and supplemented by the Local Rules of the District Court for the District of Columbia and any orders entered by this Court.

5. Florida objects to every interrogatory that seeks the production of documents on the basis that such discovery is beyond the scope of Rule 33.

6. Florida reserves all objections as to the competence, relevance, materiality, admissibility, or privileged status of any information provided in response to these interrogatories, unless specifically stated otherwise.

7. Florida has responded to these interrogatories to the best of its present ability. Florida reserves the right to supplement, revise, correct, or clarify any of these responses, if necessary or appropriate.

In addition to these objections, Florida further objects to Defendants' interrogatories as indicated below.

RESPONSES TO INTERROGATORIES

INTERROGATORY NO. 1

Identify all facts, and every individual with personal knowledge of any of the following incidents, events, statements or statistics which either (1) prompted the sponsor(s) and/or legislators named below of HB1355 and its companion bill SB2086 to introduce, amend or otherwise support each of the four sets of voting changes for which Florida seeks judicial preclearance, or (2) prompted legislators named below to oppose one or more of the four sets of voting changes for which the State seeks judicial preclearance.

Response

Florida objects to this interrogatory to the extent it seeks speculation regarding the facts, incidents, events, or statistics that may have prompted the individual legislators identified in the interrogatory to support or oppose one or more of the four sets of voting changes on the grounds that this request exceeds the bounds of permissible discovery. Expressly reserving and without waiving the general objections and this specific objection, Florida agrees to respond to the extent any individual employed by or acting on behalf of the Florida Department of State has personal knowledge of the incidents, events, statements, or statistics referenced by the identified legislators, and states as follows:

Florida has no personal knowledge of the particular incidents, events, statements and statistics identified in the interrogatory by legislators speaking in support of or opposition to HB 1355 and SB 2086.

INTERROGATORY NO. 2

Identify all facts, and every individual with personal knowledge of the following:

(a) the "loophole" of voters casting multiple ballots on Election Day identified by the Secretary of State in his August 18, 2011 editorial published in the *Orlando Sun Sentinel* and page 11 of your July 25, 2011 Supplemental Memorandum to the United States (identified in Plaintiff's Rule 26(a)(1)(A) Initial Disclosures at 3, ¶ 2);

(b) the "burden on poll workers" related to early voting as referenced in the Secretary of State's May 20, 2011 editorial published in the *St. Petersburg Times*; and

(c) the basis for the statement that "Florida's early voting remains at 96 hours" and that early voting will be "more accessible now than ever before," as referenced in the Secretary of State's May 20, 2011 editorial in the *St. Petersburg Times*.

Response

(a) The "loophole" referred to in the Secretary of State's August 18 editorial refers to a provision in the benchmark statute that would allow a single elector to cast regular ballots in more than one county for the same election. The change sought to be precleared closes this loophole by allowing these electors to cast provisional ballots in their new county of residence, which must be counted unless the canvassing board determines that the elector was ineligible to vote.

Under the benchmark practice, any elector who arrived to vote at a precinct in which he or she was not registered, and who provided a change-of-address affirmation, was permitted to vote a regular ballot upon verification of his or her registration alone. No means existed to verify, at the polling location, that a *registered* elector had not *already voted* in his or her former county.

Although many polling sites have electronic access to the Florida Voter Registration System database, this database does not provide contemporaneous voter history information that would allow a poll worker to verify that an out-of-county elector had not already cast a ballot.

Nor would verification be feasible on Election Day itself. A poll worker at the new precinct would need to verify with the supervisor of elections from that elector's former county that the elector had not returned an absentee ballot or cast a ballot during the early voting period. The former county's supervisor of elections would also need to contact a poll worker at the elector's former precinct to confirm that the elector had not already cast a ballot at that location in the former county. All of this information would then need to be conveyed to the poll worker at the new precinct before the elector would be able to cast a ballot. This process – even if it were feasible – would introduce a significant delay in the voting process and would impede the orderly operation of polling sites and supervisors' offices on Election Day.

In contrast, the change sought to be precleared would allow the elector's eligibility to be verified by the supervisor of elections at any time before provisional ballots are canvassed. The standards for canvassing a provisional ballot were not changed by HB 1355. A provisional ballot "shall be counted unless the canvassing board determines by a preponderance of evidence that the person was not entitled to vote." § 101.048(2)(a), Fla. Stat. In determining whether a person casting a provisional ballot was entitled to vote, the county canvassing board must review the information provided in the Voter's Certificate and Affirmation, any written evidence provided by the person casting the ballot, any other evidence presented by the supervisor of elections, and, in the case of a challenge, any evidence presented by the challenger. § 101.048(2)(a), Fla. Stat.

In the case of a provisional ballot cast by an out-of-county elector under the change sought to be precleared, Florida does not anticipate any need for the elector to provide additional

information regarding eligibility to the canvassing board (although the elector has the right to provide additional information). Instead, the supervisor of elections in the county where the provisional ballot is cast would be responsible for verifying with the former county that the elector had not already cast a ballot and presenting this evidence to the canvassing board.

(b) The "burden on poll workers" referred to in the Secretary of State's May 20 editorial refers to the provision in the benchmark statute requiring every early voting site in every county to be open for the same number of hours on each weekday (and the same number of aggregate hours on each weekend) during the early voting period. The change sought to be precleared reduces this burden by granting additional flexibility to county supervisors of elections to adjust early voting hours to the needs of the voters in their counties.

The manner in which each supervisor of elections chooses to exercise this discretion will be determined by the circumstances in his or her county. Florida anticipates that the large- and medium-sized counties that have historically had the largest early voting turnout will continue to provide 96 total hours of early voting over the early voting period during the August primary and November general elections.

In smaller counties that have not experienced a large early voting turnout, some supervisors of elections may choose to reduce the number of early voting hours from the eight hours per day required by the benchmark statute. In no circumstance, however, may fewer than six hours of early voting be offered per day during the early voting period. This change will allow local supervisors of elections to reduce the burden on poll workers where additional hours of early voting have been determined to be unnecessary.

For the Florida counties that are covered jurisdictions under Section 4 of the Voting Rights Act, the particular choice of early voting hours within the range authorized by statute

would be subject to a separate preclearance requirement under Section 5 of the Voting Rights Act.

(c) The statements in the Secretary of State's May 20 editorial regarding the increased accessibility of early voting and the number of hours available refer to the differences between the benchmark statute and the change sought to be precleared. Both the benchmark statute and the new law provide for up to 96 hours of early voting.

The change sought to be precleared increases accessibility to the convenience of early voting in several ways. First, the change sought to be precleared requires counties to offer additional hours of weekend early voting. Under the benchmark statute, weekend early voting was limited to a total of 16 hours. The change sought to be precleared requires counties to offer a minimum of 18 hours of weekend early voting and allows counties to offer as many as 36 hours of weekend early voting. As noted in the response to paragraph (b) above, Florida anticipates that the counties that have historically experienced the largest early voting turnout will offer the full 36 hours of weekend early voting.

Second, the change sought to be precleared will increase the accessibility of early voting by requiring all counties to offer Sunday early voting. Under the benchmark statute, counties were required to offer an aggregate of 8 hours of early voting on each of two weekends. Many counties – including each of Florida's five covered jurisdictions – chose to offer weekend early voting only on Saturdays. The change sought to be precleared would require every county in Florida to offer three full days of weekend early voting, from 6-12 hours per day, including a requirement to hold early voting on a Sunday.

Finally, the change sought to be precleared will increase the accessibility of early voting by allowing supervisors of elections to hold up to 12 hours of early voting on each weekday, up

from a maximum of 8 hours per day under the benchmark statute. Counties that choose to offer 12 hours of weekday early voting will make voting more accessible to those electors whose schedules will not permit them to early vote during the ordinary workday. Expanded weekday early voting hours will allow these electors to early vote before or after work, thereby increasing the accessibility of early voting.

INTERROGATORY NO. 3

With respect to the history, development, and implementation of each of the four sets of voting changes for which the State seeks judicial preclearance, identify every document, memorandum, report or other written communication of any type involving your office and members of the legislature (including all committees and subcommittees); county election officials (including but not limited to Supervisors of Elections), their staff agents and counsel; other state agencies; and/or any election-related organizations or associations, including but not limited to the Florida State Association of Supervisors of Elections.

Response

Expressly reserving and without waiving the general objections, Florida states as follows:

In accordance with Federal Rule of Civil Procedure 33(d), the response to this interrogatory may be determined by examining, auditing, compiling, abstracting, or summarizing the Florida Department of State's business records. Copies of the applicable documents will therefore be provided for Defendants to review and examine.

INTERROGATORY NO. 4

Identify the nature of and the schedule for training relating to any of the four sets of voting changes for which the State seeks judicial preclearance, including but not limited to

training for Supervisors of Elections, their staff, agents and counsel; other state agencies; and/or any election-related organizations or associations, including but not limited to the Florida State Association of Supervisors of Elections. Identify all documents supporting your response to this Interrogatory.

Response

Expressly reserving and without waiving the general objections, Florida states as follows:

The Department of State presented training and information regarding implementation of the four sets of voting changes at the FSASE Annual Summer Conference (June 19-23, 2011) and at the FSASE Canvassing Board Workshop / Winter Business Meeting (December 9-10, 2011). The Department of State also hosted Supervisor of Elections conference calls on November 1 and December 14, 2011, at which one or more of the four voting changes were discussed.

Documents supporting this response include the PowerPoint presentations created for the FSASE Conferences and the agenda/meeting materials for the Supervisor of Elections conference calls.

INTERROGATORY NO. 5

Identify all individuals, interested parties, and organizations, including but not limited to all third-party voter registration organizations, which received notice from your office of the requirements contained in Section 4 of Chapter 2011-40 (amending 97.0575 Fla. Stat.) and the Emergency Rules implementing this provision of law.

Response

Florida objects to this interrogatory to the extent it seeks the identification of "all individuals, interested parties, and organizations" that received notice from the Department of

State regarding a statutory change on the basis that the request is overly broad, vague, and unduly burdensome. Expressly reserving and without waiving the general objections or these specific objections, Florida states as follows:

Notice of the requirements of Section 4 of Chapter 2011-40 was provided by mail to the address of record for all third-party voter registration organizations registered as of May 19, 2011. Exhibit A.

Notice of these requirements was also posted on the Department of State's public website and was provided by email to each Supervisor of Elections. The Emergency Rules implementing this statute were published in the Florida Administrative Weekly, were emailed to each Supervisor of Elections, and were posted on the Department of State's public website.

INTERROGATORY NO. 6

Identify each criterion the Secretary will use to determine: (1) when the Secretary may refer a matter to the Attorney General for enforcement under 97.0575, Fla. Stat., and (2) when the Secretary may waive the fines imposed for failure to timely deliver the voter registration application in the case of force majeure or impossibility of performance pursuant to the same provision of law.

Response

Expressly reserving and without waiving the general objections, Florida states as follows:

If the Secretary of State reasonably believes that a person has committed a violation of Section 97.0575, Florida Statutes, the law provides that he may refer the matter to the Attorney General for enforcement. In exercising this authority, the Secretary's principal concern will be for the protection of applicants who have entrusted their voter registration applications to a third-party voter registration organization. The third-party voter registration organization serves as a

fiduciary to these applicants, who have a right to expect that their applications will be promptly delivered to an elections official irrespective of party affiliation, race, ethnicity, or gender.

The Secretary of State will carefully consider the facts and circumstances of each incident before determining whether a matter will be referred to the Attorney General for enforcement. Some of the criteria that would lead the Secretary to refer a violation of Section 97.0575 to the Attorney General include:

- Voter harm: Any evidence reasonably suggesting that an applicant or registered voter has been directly harmed by the violation, *e.g.*, evidence that a voter registration application was collected by a third-party before a book-closing deadline but was not delivered to a supervisor of elections until after the applicable deadline, thereby depriving the applicant of the right to cast a ballot at that election.
- History: Any evidence reasonably suggesting that the person or entity at issue has violated the third-party voter registration statute on more than one separate occasion, particularly if the person or entity at issue has been notified of the prior violations by the Department of State or a Supervisor of Elections.
- Other Violations of the Election Code: Any evidence reasonably suggesting that the person or entity at issue has violated additional provisions of the Election Code regarding voter registration, *e.g.*, altering the voter registration application of another person without the other person's knowledge and consent.

In contrast, some of the criteria that would lead the Secretary *not* to refer a violation of Section 97.0575 to the Attorney General, or to waive the statutory fines, include:

- Force majeure or impossibility of performance: Any evidence reasonably suggesting that the failure to timely deliver collected voter registration applications was a result of an

unexpected or uncontrollable incident outside the control of the person or entity at issue or the result of an incident that could not have reasonably been anticipated or controlled.

- Lack of knowledge: Any evidence reasonably suggesting that the first-time failure of a person or entity to timely deliver collected voter registration applications resulted from a genuine and sincere lack of knowledge regarding the applicable legal requirements.

INTERROGATORY NO. 7

Identify all third-party voter registration organizations that were registered as of May 19, 2011 under the predecessor to 97.0575 Fla. Stat., and have:

(a) withdrawn as registered third-party voter registration organizations;

(b) re-registered pursuant to the requirements of 97.0575, Fla. Stat.;

(c) failed to comply with the 90-day re-registration requirement; and/or

(d) failed to comply with the 90-day re-registration requirement and have had their registration cancelled.

Identify and describe all documents supporting your response to this Interrogatory, including but not limited to Forms DS-DE 119, 120, 121, 123, and 124.

Response

Expressly reserving and without waiving the general objections, Florida states as follows:

The response to this interrogatory is attached as Exhibit B. The documents supporting this response include, where applicable, Forms DS-DE 119, 120, 121, 123, and 124 for each organization.

INTERROGATORY NO. 8

Identify all third-party voter registration organizations and agents not previously registered with the Secretary of State as of May 19, 2011, that have registered pursuant to

the requirements set forth in 97.0575, Fla. Stat., and Rule 1S-2.042, along with all documents each identified organization and agent has submitted to the Division of Elections, including but not limited to forms DS-DE 119, 120, and 123.

Response

Expressly reserving and without waiving the general objections, Florida states as follows:

The response to this interrogatory is attached as Exhibit C. The documents supporting this response include, where applicable, Forms DS-DE 119, 120, and 123 for each organization.

INTERROGATORY NO. 9

For every voter in the State registered by all third-party voter registration organizations since May 19, 2011, pursuant to the provisions of 97.0575, Fla. Stat., identify the race and/or ethnicity of the individual registered and the County where registered, along with documents or databases supporting your response to this Interrogatory, including but not limited to DS-DE 124 forms.

Response

Expressly reserving and without waiving the general objections, Florida states as follows:

After a good faith search, Plaintiff lacks sufficient information or knowledge to respond to this interrogatory. Florida does not collect voter-level data regarding the registration activities of third-party voter registration organizations. The voter registration "source" data included in the Florida Voter Registration System database does not differentiate between applications delivered to a Supervisor of Elections office by a third-party voter registration organization, applications delivered directly by the applicants, and applications collected during registration drives conducted by the Supervisor's office itself.

The monthly reports filed by third-party voter registration organizations on Form DS-DE 123 include only the aggregate number of applications provided to and received by the organization's registration agents. The daily reports filed by each Supervisor of Elections on Form DS-DE 124 likewise include only the aggregate number of applications provided to and received from each third-party voter registration organization.

INTERROGATORY NO. 10

For each year since January 1, 2007, identify the total number of voters in Collier, Hardee, Hendry, Hillsborough, and Monroe Counties, categorized by race and/or ethnicity, registered through third-party voter registration organizations, and the total number of votes, categorized by race and/or ethnicity, registered through any other method of voter registration. If such information is unavailable, identify the total number of voters registered in Collier, Hardee, Hendry, Hillsborough, and Monroe Counties for each year since 2007, categorized by race and/or ethnicity.

Response

Expressly reserving and without waiving the general objections, Florida states as follows:

After a good faith search, Plaintiff lacks sufficient information or knowledge to fully respond to this interrogatory. Florida does not collect voter-level data regarding the registration activities of third-party voter registration organizations and therefore cannot identify the number of voters in any county registered with the assistance of a third-party voter registration organization.

In accordance with Federal Rule of Civil Procedure 33(d), the total number of voters registered in Collier, Hardee, Hendry, Hillsborough, and Monroe Counties for each year since 2007, categorized by race and/or ethnicity, may be determined by examining, auditing,

compiling, abstracting, or summarizing the database files previously provided by the Florida Department of State.

INTERROGATORY NO. 11

For each year since January 1, 2007, identify the total number of voter registration applications received by an election official in Collier, Hardee, Hendry, Hillsborough, and Monroe Counties from a third-party voter organization within 48 hours of the completion of the application, and the total number received from a third-party voter registration organization more than 48 hours after the application was completed. If this information is not currently available, for each year since January 1, 2007, identify the total number of voter registration applications (regardless of the source of the voter registration application) received by an election official in Collier, Hardee, Hendry, Hillsborough, and Monroe Counties within 48 hours of their completion. Identify and describe all documents supporting your response to this Interrogatory.

Response

Expressly reserving and without waiving the general objections, Florida states as follows:

After a good faith search, Plaintiff lacks sufficient information or knowledge to respond to this interrogatory. Florida does not collect (1) voter-level data regarding the registration activities of third-party voter registration organizations; or (2) data regarding the date on which voter registration applications are completed by the applicant. The registration date recorded in the Florida Voter Registration System for each voter is generally the date the application was received by the applicable election official. Florida therefore cannot identify the number of applications received in any county within 48 hours of their completion, whether those applications were delivered by a third-party voter registration organization or otherwise.

The documents supporting this response include the Florida Voter Registration System database files previously provided by the Florida Department of State.

INTERROGATORY NO. 12

Identify all individuals, third-party organizations, registered agents and any other entities whom the State is currently investigating or has investigated for alleged violations of 97.0575, Fla. Stat. For each such investigation, identify: (1) the incident(s) forming the basis of the investigation, including the time, date and all other relevant facts; (2) the number of voter registration applications submitted by the organization, agent, or entity, and the race and/or ethnicity of each the voter registration applicants whose form was submitted, and (3) whether the investigation has been or will be referred to the Attorney General. This interrogatory covers the time period from May 19, 2011. Identify and describe all documents supporting your response to this Interrogatory.

Response

Florida objects to this interrogatory to the extent it seeks information regarding pending investigations. Florida also objects to this interrogatory to the extent that it requires speculation regarding whether a matter "will be" referred to the Attorney General in the future. Expressly reserving and without waiving the general objections or these specific objections, Florida states as follows:

The Department of State has completed its investigation of six alleged violations of Section 97.0575. These investigations are summarized below:

Individual/Entity	Description of Incident	Number of untimely applications	Disposition
Dawn Quarles	Individual in Santa Rosa County failed to timely submit voter registration	76	Referred to AG for enforcement (10/27/2011)

	applications in September/October 2011. Ms. Quarles had previously been registered as a 3PVRO, but had her registration cancelled in August 2011 for failure to re-register under the new law. The Supervisor of Elections for Santa Rosa County states that Ms. Quarles has a history of noncompliance with the third-party voter registration law. SOE provided a letter to Ms. Quarles from 2009 regarding applications filed five months late. SOE also disclosed that a separate application delivered by Ms. Quarles after 2008 book-closing deadline resulted in an applicant being ineligible to vote in the November 2008 General Election.		
Jill Cicciarelli/ New Smyrna Beach High School Student Government	Individual/entity in Volusia County failed to timely submit voter registration applications in August/September 2011. Ms. Cicciarelli has never been registered or associated with a 3PVRO. The Supervisor of Elections for Volusia County has contacted Ms. Cicciarelli to explain the third-party voter registration law and how to register. No applicable book closing deadlines were missed.	50	No referral to AG. Warning/explanation letter sent. (10/28/2011)
G & R Strategies, LLC	Third-party voter registration organization in	101	Referred to AG for enforcement

	Miami-Dade County, registered in August 2011, failed to timely submit voter registration applications in September 2011. Representative of organization stated to Miami-Dade SOE that the applications were not submitted timely because they were collected before the 3PVRO received its identifying number Many of the applications appear on their face to contain alterations to the signature date recorded by the applicants. Even with the alterations, the applications would be untimely. The Election Code prohibits the alteration of another person's voter registration application without that person's knowledge or consent.		(11/2/2011)
Ramiro Orta	Individual in Miami-Dade County failed to timely submit voter registration applications in September 2011. Mr. Orta was a candidate for local office and stated to the Miami-Dade SOE staff that he was not a registered 3PVRO. Miami-Dade SOE staff advised him of the procedures and provided pertinent information. No applicable book closing deadlines appear to have been missed.	21	No referral to AG. Warning/explanation letter sent. (11/2/2011)
Arenza Thigpen, Jr.	Third-party voter registration organization in	27	No referral to AG. Warning/explanation

	Lee County failed to timely submit voter registration applications in September 2011. Mr. Thigpen states that applications collected had not been timely submitted due to a death in his family that resulted in his travel out-of-state. No applicable book closing deadlines appear to have been missed.		letter sent. (11/28/2011)
Sandra McCreary / Delta Sigma Theta Sorority	Individual/entity in Escambia County failed to timely submit voter registration applications in September 2011. Ms. McCreary stated to SOE that she was unaware of the new procedures. Escambia SOE explained the new third-party voter registration law procedures and provided a fact sheet and contact information to Ms. McCreary. No applicable book closing deadlines appear to have been missed.	10	No referral to AG. Warning/explanation letter sent. (11/29/2011)

In accordance with Federal Rule of Civil Procedure 33(d), a complete description of the incidents forming the basis of the investigations listed above and the race/ethnicity of each of the voter registration applicants whose form was submitted may be determined by examining, auditing, compiling, abstracting, or summarizing the Florida Department of State's business records. Copies of the applicable documents will therefore be provided for Defendants to review and examine.

Florida is currently investigating two additional alleged violations of Section 97.0575 and will agree to supplement this response at the conclusion of these investigations.

INTERROGATORY NO. 13

Identify voter statistics (and all sources or databases for such statistics) for all counties in the State of Florida in each county, state, or federal election since January 1, 2005. For each such election, please indicate the total number, categorized by race and/or ethnicity, for each of the following: (a) voters who have changed their address on Election Day, (b) voters who changed their address on Election Day to a different county from the county in which they were registered to vote, and (c) voters who changed their address on Election Day but remained in the same county in which they were registered to vote. If any of the statistics are not available, identify all facts, persons, documents, or analyses to support the basis for a statement that such data is not available, and identify what data is available.

Response

Florida objects to this interrogatory on the grounds that the phrase "voter statistics" is unduly vague and overbroad, leaving Florida to guess at the meaning of the request. Expressly reserving and without waiving the general objections or these specific objections, Florida states as follows:

After a good faith search, Plaintiff lacks sufficient information or knowledge to fully respond to this interrogatory. The Florida Voter Registration System database does not consistently capture the date on which a voter has requested a change of registration address. Instead, the change-of-address date in the database reflects the date that the change of address request was *processed* by a Supervisor of Elections. Accordingly, a change of address

affirmation submitted by an elector on Election Day may appear in the database on that day, or some days or weeks after it is actually submitted.

Subject to the inherent limitations of the database described above, the database files previously provided by the Florida Department of State represent the relevant data regarding voter address changes. In accordance with Rule 33(d), the information sought in this Interrogatory may be determined by examining, auditing, compiling, abstracting, or summarizing the information in these database files.

INTERROGATORY NO. 14

Identify all communications sent from the Office of the Secretary of State to Supervisors of Elections since May 19, 2011 concerning the procedures to be used for verifying whether a voter who has moved from one county to another is eligible to vote in the particular precinct in which he or she casts a provisional ballot on Election Day pursuant to 101.045, Fla. Stat.

Response

Florida objects to this interrogatory on the basis that the request to identify all "communications" between the Office of the Secretary of State and any Supervisor of Elections regarding provisional ballot verification is vague, overbroad, and unduly burdensome to the extent it seeks information regarding telephone calls, casual conversations, or isolated email communications. Expressly reserving and without waiving the general objections or these specific objections, Florida states as follows:

The documents identified below concern the procedures for verifying whether a voter who has moved from one county to another is eligible to vote in the particular precinct in which he or she casts a provisional ballot on Election Day.

Date	Document	Substance
May 19, 2011	Directive 2011-01 from Secretary of State to Supervisors of Elections	Directive issued regarding specific changes in Chapter 2011-40 to ensure that "elections are conducted in a fair and impartial manner so that no voter is disenfranchised." Regarding verification of eligibility for those casting provisional ballots, directive notes that "the provisional ballot shall count unless the canvassing board determines more likely than not that the person was not entitled to vote. That would occur only if the voter was not registered or the voter voted in a precinct other than the one that corresponds to his or her new address [as written on the provisional ballot certificate] or if evidence was available before the board that either the voter had already voted or that the voter was committing fraud."
December 16, 2011	Memorandum from Dr. Gisela Salas to Supervisors of Elections re: Provisional Ballot Voters and Procedures	Memorandum summarizes the responsibilities of the supervisor of elections and canvassing board in verifying the eligibility of electors who have cast provisional ballots: 1. Every voter who casts a provisional ballot has the right, regardless of the reason for voting provisionally, to present written evidence supporting his or her eligibility to vote. 2. The Supervisor of Elections must verify that the person is registered and is eligible to vote at the precinct where he or she cast a ballot. 3. The canvassing board MUST review all information before the board to determine whether the voter was eligible to vote. 4. Every provisional ballot shall be counted UNLESS the canvassing board determines by a preponderance of the evidence (more likely than not) that the voter was not eligible to vote.

In accordance with Federal Rule of Civil Procedure 33(d), additional communications that may respond to this Interrogatory may be determined by examining, auditing, compiling,

abstracting, or summarizing the Florida Department of State's business records. Copies of the applicable documents will therefore be provided for Defendants to review and examine.

INTERROGATORY NO. 15

Identify voter turnout statistics (and all sources or databases for such statistics) for each county, state, and/or federal election held in Collier, Hardee, Hendry, Hillsborough, and Monroe Counties since January 1, 2006. For each such election, please indicate the total number, categorized by race and/or ethnicity, for each of the following: (a) the number of registered voters at the time of the election, (b) the number of persons who voted in the election (by absentee ballot, by early voting, and on Election Day), (c) the number of persons who voted in person on each day of the early voting period, and (d) the early voting days and hours utilized for the five counties referenced in this Interrogatory.

Response

Expressly reserving and without waiving the general objections, Florida states as follows:

In accordance with Federal Rule of Civil Procedure 33(d), information regarding the total number of voters registered in Collier, Hardee, Hendry, Hillsborough, and Monroe Counties at the time of each election, the number of persons who voted in the election (by each voting method), and the number of persons who voted in person on each day of the early voting period may be determined by examining, auditing, compiling, abstracting, or summarizing the database files previously provided to Defendants by the Florida Department of State.

Exhibit D contains the early voting days and hours used by Collier, Hardee, Hendry, Hillsborough, and Monroe Counties for the referenced elections.

INTERROGATORY NO. 16

Please (a) identify the days and hours of early voting in all counties in the State of Florida in county, state, and/or federal election since January 1, 2006 and prior to the adoption of 101.657, Fla. Stat., (b) identify the names of counties anywhere in the State of Florida that will continue to have 96 hours of early voting before each county, state, or federal election in 2012, and (c) identify the names of counties anywhere in the State of Florida that will have less than 96 hours of early voting before each county, state, or federal election in 2012, as well as the number of early voting hours planned for each county.

Response

Expressly reserving and without waiving the general objections, Florida states as follows:

Exhibit D contains the early voting days and hours used by each county for the referenced elections.

Under the change sought to be precleared, each county's supervisor of elections will determine the number of hours that his or her county will hold early voting for each election held in 2012. This information must be provided to the Department of State at least 30 days before each election. However, Florida continues to anticipate that the large- and medium-sized counties that have historically had the largest early voting turnout will continue to provide 96 total hours of early voting over the early voting period during the August primary and November general elections.

In smaller counties that have not experienced a large early voting turnout, some supervisors of elections may choose to reduce the number of early voting hours from the eight hours per day required by the benchmark statute. In no circumstance, however, may fewer than six hours of early voting be offered per day during the early voting period for these elections.

INTERROGATORY NO. 17

For each year since 2000, identify all citizen petitions initiated, including a description of the subject matter of the petition, the petition's sponsors (including name and race/ethnicity), and the number of days that passed between the collection of the first signature and the date upon which the Secretary of State determined that valid and verified petition forms had been signed by the constitutionally required number and distribution of electors. For each such petition identified, please indicate if and when (by date) the petition was placed on the ballot and whether the sponsor(s) of each identified petition utilized a professional petition signature-collecting entity in order to collect the constitutionally required number and distribution of electors. Identify all documents and databases supporting your response to this Interrogatory.

Response

Expressly reserving and without waiving the general objections, Florida states as follows:

After a good faith search, Plaintiff lacks sufficient information or knowledge to fully respond to this interrogatory. The Department of State does not collect or maintain data regarding whether an initiative petition sponsor has used a professional signature-collecting entity.

The response to the remainder of this interrogatory is attached as Exhibit E. The database files previously provided to Defendants by the Florida Department of State represent the relevant data regarding constitutional initiative petitions. In accordance with Rule 33(d), any additional information sought in this Interrogatory may be determined by examining, auditing, compiling, abstracting, or summarizing the information in these database files.

INTERROGATORY NO. 18

Identify all persons within your employ who have knowledge of the enactment, history, development and implementation of the four sets of voting changes for which the State seeks judicial preclearance.

Response

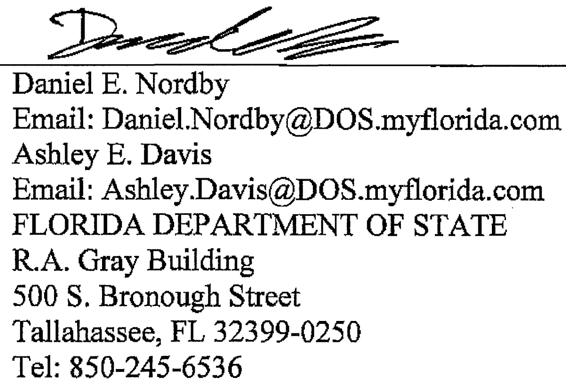
Florida objects to this request to the extent it requests the identification of "all persons" who have any degree of "knowledge" regarding the enactment, history, development, or implementation of any of the four changes sought to be precleared on the basis that the request is unduly burdensome and seeks information that is neither relevant nor likely to lead to the discovery of admissible evidence. Florida will not identify any person who simply has "knowledge" of the changes but whose role in the enactment or implementation of the changes has been minimal. Contact with any of these individuals should be made only through counsel. Expressly reserving and without waiving the general objections or these specific objections, Florida states as follows:

Title	Name
Executive Assistant I	Mark Ard
Chief Information Officer	Larry Aultman
Executive Assistant	Shelby Bishop
Deputy Secretary, Corporations and Elections	John Boynton
Chief, Bureau of Election Records	Kristi Bronson
Senior Management Analyst III	Toshia Brown
Secretary of State	Kurt Browning
Executive Assistant	Christie Burrus
Communications Director	Chris Cate
Assistant General Counsel	Ashley Davis
Assistant General Counsel	Gary Holland
Assistant Secretary/Chief of Staff	Jennifer Kennedy
Assistant General Counsel	Maria Matthews
Executive Assistant	Betty Money
Senior Management Analyst II	Joe Morgan

General Counsel	Daniel Nordby
Executive Assistant	Eddie Phillips
Director, Division of Elections	Dr. Gisela Salas
Director, Legislative Affairs	Pierce Schuessler
Regulatory Specialist III	Suzie Still
Chief, Bureau of Voter Registration Services (former)	Peggy Taff

Respectfully submitted this 16th day of December, 2011,

As to Objections:



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