



**BRENNAN CENTER
FOR JUSTICE**

at New York University School of Law



July 15, 2011

Chris Herren
Chief, Voting Section
Civil Rights Division
Room 7254 – NWB
U.S. Department of Justice
1800 G St., N.W.
Washington, DC 20006

RE: Comment Under Section 5, Submission No. 2011-2187

Dear Mr. Herren:

I. Introduction and Summary

The League of Women Voters of Florida, Democracia USA, the Brennan Center for Justice, and the Lawyers' Committee for Civil Rights Under Law hereby submit this letter opposing preclearance of three sets of provisions of a new Florida law, H.B. 1355 (2011), which dramatically impact the State's voter registration and voting processes. All four organizations are non-partisan, non-profit entities that work to expand and protect voting rights in Florida and across the United States.

The voting changes which we address in this letter are the following: 1) a panoply of burdensome and wholly unnecessary restrictions on the opportunity and ability of individual citizens and grassroots organizations to conduct voter registration drives; 2) a reduction in the number of days during which early voting will be conducted, and a possible concomitant reduction in the number of early voting hours; and 3) a limitation on registered voters' existing opportunity to vote when they move between Florida counties and do not re-register to vote in their new county.

The available data indicate that these changes will disproportionately and negatively impact the voting rights of minority citizens in the covered counties. Despite this, and despite the fact that H.B. 1355 was strongly opposed by minority leaders during its consideration by the Florida Legislature, the State has failed to include any data or other evidence in its preclearance

submission to demonstrate that the changes will not have an impermissible retrogressive effect and were not impermissibly motivated by a discriminatory purpose.

Accordingly, the Department of Justice, should not grant Section 5 preclearance to these voting changes. In particular, the evidence with regard to the third-party voter registration changes, discussed herein, is so overwhelming in demonstrating their retrogressive effect that the Justice Department should interpose an objection to these changes now, without sending the State a written request for additional information pursuant to 28 C.F.R. § 51.37. With regard to the other changes addressed in this comment letter, while the State has not met its burden under Section 5, it would be appropriate to send a “more information” request, which would be in accord with the Department’s frequent practice when controversial changes are submitted for preclearance and the submitting authority fails to provide adequate information regarding the purpose and effect of the changes.¹

II. Overview of the Covered Counties

Five of Florida’s 67 counties are covered by Section 5: Collier, Hardee, Hendry, Hillsborough, and Monroe. Hillsborough is by far the largest of the counties in population, constituting 73 percent of the citizen voting age population (“CVAP”) of the combined counties according to the 2010 Census.²

The CVAP of the five counties combined (2010 Census) is 12.0 percent black (non-Hispanic, “black alone”) and 15.2 percent Hispanic. The CVAP data for the individual counties are as follows:

County	Total CVAP	White Alone	Black Alone	Hispanic
All Covered Counties, Combined	1,091,365	69.9%	12.0%	15.2%
Collier	205,090	85.1%	3.1%	10.4%
Hardee	16,765	64.8%	10.3%	22.6%
Hendry	19,570	58.0%	16.6%	23.1%
Hillsborough	794,060	65.6%	14.8%	16.2%
Monroe	55,880	81.3%	3.8%	13.2%

¹ We also note that Florida has not requested expedited consideration of its preclearance request.

² The CVAP data used herein are from the special 2010 Census tabulation prepared by the Census Bureau on behalf of the Justice Department.

III. Florida Seeks to Severely Restrict the Ability of Individual Citizens and Citizen Groups to Conduct Voter Registration Outreach and Voter Registration Drives

Section 4 of H.B. 1355 enacts highly intrusive, burdensome, and unnecessary restrictions on the ability of individual citizens and citizen groups to conduct voter registration outreach and voter registration drives in Florida, including in the five covered counties. The new requirements are unique, both in terms of how Florida law addresses other similar grassroots election activities and how other covered and partially covered states address citizen voter registration efforts. Florida only recently adopted less restrictive provisions which provide more than adequate assurance that citizen registration efforts are properly conducted, and yet the State now is seeking to impose new and more extreme burdens on citizen voter registration efforts without any evidence to suggest that the existing provisions are inadequate in any way. Minority voters disproportionately rely on third-party registration drives, and the new restrictions will significantly reduce this activity. Finally, the State has not provided any data to support preclearance, has not provided any specific justifications for the new requirements, and has adopted emergency regulations and forms to further define and implement the new statutory provisions but has not submitted these related changes for preclearance.

For all these reasons, Florida has not met its burden of showing the absence of retrogressive effect and discriminatory purpose. The evidence relating to the submitted changes is so compelling that the Justice Department should immediately interpose a Section 5 objection. Alternatively, the Department may request additional information, or consider whether it would be appropriate to issue a “no determination” letter based on the lack of submission of the changes encompassed in the emergency regulations and forms (28 C.F.R. § 51.22(a)(2)).³

A. Proposed Changes

The changes enacted by Section 4 are numerous and onerous. Given the breadth of the enacted changes, it is important to begin by identifying their full scope. Also, as discussed below, the State’s submission misidentifies several of the voter registration changes in its section-by-section analysis of the submitted legislation contained in Exhibit E to the submission.

The enacted changes are as follows:

1. The new law mandates that every “third-party voter registration organization” register with the state before “engaging in any voter registration activities.”⁴ This mandate applies

³ It is important to note, in this regard, that Florida is in the process of issuing permanent regulations and forms which will supersede the emergency regulations and forms. The State released a proposed final rule (which includes the proposed permanent forms) for comment on July 5, 2011. As discussed below, the proposed permanent regulations and forms are nearly identical to the emergency versions. If the Justice Department decides to send a written request for additional information, it seems likely that the permanent regulations and forms will have been finalized shortly thereafter. Thus, if the Department does not interpose an objection now, it may be appropriate to combine a “more information” letter with a “please submit” request for the regulations and forms in effect at the time of the State’s response (rather than sending a “no determination/please submit” letter now).

⁴ The pre-registration must include the names of the organization’s officers, and the name and address of a registered agent in the State.

broadly to a wide variety of efforts by individuals to ask or help another individual register to vote, whether the voter registration effort is being undertaken by a single citizen acting alone to help one other person, an *ad hoc* volunteer citizens group (*e.g.*, a student group that sets up a registration table on campus), a more established citizens group, or a political party. This is because, under current law, a “third-party voter registration organization” includes “*any person, entity, or organization*” and applies to any person or organization that is “*soliciting or collecting* voter registration applications.” Fla. Stat. § 97.021(37) (emphasis added).⁵

Contrary to what the State advises in Exhibit E to its submission, no such state pre-registration mandate currently exists. As Exhibit E notes, the current statute does include a pre-registration provision. However, Exhibit E fails to note that the current statute also *expressly* specifies that there are no penalties for noncompliance; instead, the statute merely encourages pre-registration by reducing the fines that can be assessed against those who pre-register.⁶ The bottom line, therefore, is that compliance currently is optional. The new statute deletes this “no penalty” provision, and creates, for the first time, an onerous and mandatory pre-registration process for all individuals and organizations engaged in voter registration activity.⁷

2. The new law mandates that, before conducting any voter registration activities, each “third-party voter registration organization” must inform the State of the name of each and every individual who will conduct voter registration on its behalf or in association with it (referred to as “registration agents”), and must provide the temporary and permanent addresses for each such individual. No such requirement exists currently.

⁵ The definition of a “third-party voter registration organization includes a limited “family members” exception which excludes the situation where “[a] person . . . seeks only to register to vote or collect voter registration applications from that person's spouse, child, or parent.” Florida law also provides that the term does apply to state or county employees or agents. The proposed final regulations, if adopted, also may limit, to some extent, the application of the law to mere solicitations to register, since they would specify that a “third-party voter registration organization” is “engaging in . . . voter registration activities” as to solicitations to register only when it is “soliciting [voter registration applications] for collection.” On the other hand, the proposed final regulation does not alter the definition of a “third-party voter registration organization” which, as noted, seems to provide that any solicitation concerning voter registration triggers the restrictions set forth in state law, subject only to the “family members” exception.

⁶ Specifically, current Fla. Stat. § 97.0575 states that: “The failure to submit the information required by subsection (1) [– which includes the pre-registration provision –] does not subject the third-party voter registration organization to any civil or criminal penalties for such failure, and the failure to submit such information is not a basis for denying such third-party voter registration organization with copies of voter registration application forms.” In recognition of the fact that pre-registration is not mandatory, the current statute seeks to encourage pre-registration by providing that certain fines which may be assessed for violating the existing third-party registration requirements will be reduced if the organization has complied with the pre-registration provision. The new statute deletes this inducement since registration now is to be mandatory.

⁷ Should the Justice Department decide to make a written request for additional information, we suggest that the Department request a list of all “third-party registration organizations” that registered under current law, and a list of those that have subsequently withdrawn as registered third-party voter registration organizations.

3. The new law mandates that, before conducting voter registration, each “third-party voter registration organization” must submit a sworn statement from each “registration agent” in which the individual declares that he or she “will obey all state laws and rules regarding the registration of voters.” This statement must be made on a form provided by the State that also lists the “penalties for false registration.” No such requirement exists currently.

4. The new law provides that “registration agents” include both persons who are employed by a “third-party voter registration organization” and persons who simply volunteer with such an “organization.”

5. The new law mandates that the Florida Division of Elections adopt rules requiring that each “third-party voter registration organization” “account [to the State] for all state and federal registration forms used by their registration agents.”

Contrary to what the State advises in Exhibit E to its submission, no mandatory reporting requirement exists currently. Exhibit E correctly notes that the current statute nominally provides for quarterly reporting by “third-party voter registration organizations” regarding voter registration drives conducted during the previous quarter. However, what Exhibit E fails to note is that, as is the case with the existing pre-registration provision, such reporting is optional; there is no penalty for non-compliance.

6. Each “third-party voter registration organization” must deliver to election officials each and every completed voter registration application that it collects “within 48 hours after the applicant completes it or the next business day if the appropriate office is closed for that 48-hour period.” The only exception is if the “organization” can show that noncompliance occurred because of “force majeure or impossibility of performance.”

Currently, completed registration applications simply must be delivered “promptly,” and fines may be assessed for applications turned in more than ten days after receipt. While the current law requires the Secretary of State to waive any applicable fines after a showing of force majeure or impossibility of performance, H.B. 1355 only provides that the Secretary “may” waive fines after such a showing.

7. The new law requires Florida election officials to assign a registration number to each “third-party voter registration organization,” include that number on every blank registration form provided to such “organizations,” and establish a data base to track “the voter registration forms assigned to [each] third-party voter registration organization.”

8. The Florida Attorney General is granted new authority to sue to enforce the registration restrictions or to enjoin any voter registration activity not in conformance with H.B. 1355, and the Florida Division of Elections must further “adopt rules to ensure the integrity of the registration process” (current law provides that the Division may “adopt rules to administer this [statutory] section”).⁸

⁸ If a “third-party voter registration organization” does not timely submit a completed voter registration application, the current practice is that this would not affect the validity of the application, although this rule is not specified either by statute or regulation. The proposed permanent regulations explicitly provide that this is the rule.

B. The Emergency Regulations and Forms

In order to implement the new statute, the Florida Secretary of State, on May 20, 2011, issued emergency regulations that amend existing regulations concerning “third-party voter registration organizations” (see Attachment A to this letter). The amendments further define the nature and scope of the statutory changes, and also adopt regulatory forms to be used by these “organizations” and their registration agents. The additional provisions and forms have not been submitted for preclearance, although they clearly are directly related to the submitted changes. These provisions further exacerbate the intrusive, burdensome, and unnecessary provisions of the submitted statute. The Secretary of State has recently issued proposed regulations that will supersede the emergency regulations, if adopted (see Attachment B to this letter).⁹

The additional requirements set forth in the emergency regulations include, but are not limited to, the following:

1. Each “third-party voter registration organization” (or its agents) must print, on each completed voter registration form that it collects, the date and precise time at which the individual completed the registration application.¹⁰ Election officials also must record the date and precise time at which each completed application is received from an “organization.” This strongly suggests that Florida intends to strictly enforce the 48-hour turnaround requirement, down to the exact minute. Among other things, that interpretation would effectively prohibit “third-party voter registration organizations” from submitting completed voter registration applications by mail.

2. Each “third-party voter registration organization” must ensure that its identification number is listed on each completed registration application that it turns in to election officials. Federal registration forms used by the “organization” are not excluded.¹¹

3. Each “third-party voter registration organization” must submit to the Secretary of State an “accounting” of registration applications once every month (on one of the new forms promulgated by the Secretary). The regulations specify that each “organization” must “report . . . the number of state and federal voter registration application forms provided to and received from each of its registration agents for the preceding month.” This applies to all registration application forms used by the “third party voter registration organization,” including publicly-

⁹ As previously noted, the proposed permanent regulations and forms are nearly identical to the emergency regulations and forms. Two differences are referenced above (see fns. 5 and 8 *supra*). Another difference is that the proposed permanent regulations state that if a “third-party voter registration organization” registers with the State and then an “affiliate organization” of that entity wishes to engage in “any voter registration activities,” the “affiliate organization” must separately register with the State. Other small differences in the two sets of regulations are noted below.

¹⁰ The regulations also specify the precise form in which this information must be written out.

¹¹ Each “third-party voter registration organization” will need to print its assigned number on every completed federal form that it turns in; generally, the “organization” is supposed to receive state registration forms from the county supervisors of elections or the Secretary of State with the organization’s number already entered on the forms.

available state and federal registration forms, and forms that are simply distributed to citizens but not collected by the “organization.” Moreover, the new reporting form promulgated by the Secretary of State specifies that each “organization” not only must report the number of completed registration applications received from its registration agents during the prior month, but also must report the number of application forms that the “organization” provided to its registration agents which were not completed by citizens during the prior month. County election officials must, daily, provide the state Division of Elections with reports that “record the number of voter registration applications they provide to, and receive from, each organization.”¹²

4. The requirements that apply to “registration agents” apply to persons who only “solicit” registration applications as well as to persons who collect completed applications.¹³

5. The Secretary of State has promulgated the form that each registration agent must complete and which the “third-party voter registration organization” must electronically submit to the State (see Attachment C to this letter). The form must be sworn to or affirmed in front of a notary public. The form recounts that “penalties for false registration may include a term of imprisonment up to 5 years and a fine up to 5,000 [sic] . . . Subsequent convictions may result in greater penalties. False registration offenses include, but are not limited to, offenses constituting a felony of the third degree . . .” Each registration agent must sign and submit the notarized form before engaging in any voter registration activity.¹⁴

6. If, after pre-registering with the State, a “third-party voter registration organization” engages additional individuals to conduct voter registration, the emergency regulations require that sworn statements from these individuals be submitted to the State before the agents may begin registering voters.¹⁵

7. Each “third-party voter registration organization must report to the Division of Elections “any change in information previously submitted.” Thus, for example, if an existing

¹² The proposed final regulations grant a partial reprieve to county election officials by specifying that a daily report need not be filed if no registration applications were provided to, or received from, an “organization” on the preceding business day. The proposed regulations do not take the same approach with the “organizations”; rather, they add that even if an “organization” had no registration activity during the previous month, it still must file a monthly report with the Secretary of State.

¹³ As noted above, the proposed permanent regulations would amend “solicits” to “solicits for collection.”

¹⁴ The proposed permanent regulations specify that if an individual should happen to work on behalf of more than one “third-party voter registration organization,” then each organization must separately submit the requisite sworn statement from that individual “registration agent.” For example, if an individual were to solicit and gather voter registration applications on behalf of his church, which registered as a “third-party voter registration organization” and submitted the requisite statement from that individual, the individual nonetheless would be in violation of Florida law if he were to then separately collect a registration application from his next-door neighbor if he did not himself register as a “third-party voter registration organization” and submit a second, identical sworn statement.

¹⁵ The proposed new regulations alter this slightly to provide that such new registration agents must complete and sign a sworn statement before registering voters, and the “organization” then must ensure that the statement is submitted to the Division of Elections within ten days thereafter.

“registration agent” should change his or her temporary or permanent address from the addresses listed on the sworn statement submitted to the Secretary of State, the organization must report the new address to the Secretary. Also, when an individual ends his or her participation in soliciting or collecting registration applications for a “third-party voter registration organization,” the “organization” must inform the Secretary of State of that change.¹⁶

8. When an individual stops working or volunteering as a registration agent, the “organization” must obtain from that individual all of the state and federal registration applications that the agent has in his or her possession.

C. The Submitted Changes Are Unprecedented in Nature and Scope

The restrictions that Florida seeks to impose on voter registration efforts by individual citizens and citizen groups are unprecedented in their nature and scope, both in terms of Florida’s regulation of other similar grassroots election activity and the extent to which other Section 5 states seek to regulate citizen registration efforts.

1. Florida law.

Florida does not regulate the activities of individuals who gather citizen signatures on other documents that have legal significance in the election process. Specifically, Florida does not regulate the process by which citizens collect candidate qualification signatures, Fla. Stat. § 99.095, or the process by which citizens collect initiative petition signatures, Fla. Stat. § 100.371. Likewise, Florida does not, in any other context, regulate the simple act of Florida citizens soliciting other citizens to participate in the State’s democratic processes.

2. Other covered and partially covered States.

No other State covered by Section 5 of the Voting Rights Act has enacted restrictions on citizen registration efforts that approximate what Florida is seeking to implement. Most do not regulate such activity at all. A few provide a deadline for turning in voter registration applications after receipt, but even these States (with the arguable exception of Texas) do not seek to impose any comprehensive regulation on third-party registration efforts.

The provisions in place in other covered jurisdictions are as follows:¹⁷

- Alabama: The Secretary of State must make voter registration forms available for use in registration drives, and there are no specific restrictions that apply to third-party voter registration efforts.¹⁸

¹⁶ The emergency regulation provides that updates must be submitted within five days of the occurrence of the change, while the proposed permanent regulations would require submission within ten days of the change.

¹⁷ This list does not include Michigan, New Hampshire, or South Dakota.

¹⁸ Ala. Admin. Code 820-2-2 (11)(3).

- Alaska: Citizen voter registration efforts are not regulated. (Alaska separately has a system whereby an individual may become a registration official, who then is able to officially accept and register persons to vote, rather than only transmitting completed forms to officials who make the registration determination.)
- Arizona: County registrars “may provide voter registration forms in quantity to groups and individuals that request forms for conducting voter registration drives.”¹⁹ There are no restrictions on third-party voter registration activity.
- California: Persons collecting voter registration applications must complete a registration receipt with their address and telephone number and give it to the voter.²⁰ Voter registration applications must be turned in or mailed within three days of receipt, excluding all weekends and holidays.²¹ Any person paid to collect voter registrations must list their name, telephone number, and address, and the name and telephone number of their employer, and affix their signature, on each registration card they collect.²² Individuals or organizations that compensate others to collect voter registration applications are required to retain for three years, and provide on demand: the name, address, and telephone number of each of their employees and a signed acknowledgement of each employee’s receipt of a statement describing their duties under the law.²³
- Georgia: Third parties engaged in voter registration must inform applicants about basic voter registration information and deadlines.²⁴ Completed voter registration forms must be sealed before a third party collects them, unless an applicant gives written consent to the third party to view and copy the information on the form.²⁵ Voter registration applications must be turned in within 10 days of the date of signature, or within three days during the last two weeks of the registration period.²⁶
- Louisiana: Failure of a third party to submit to the parish registrar of voters a completed registration application collected through a registration drive within thirty days of receipt

¹⁹ ARIZ. REV. STAT. ANN. § 16-131(E).

²⁰ CAL. ELEC. CODE § 2158(b)(1).

²¹ CAL. ELEC. CODE § 2138.

²² *Id.* § 2159(a).

²³ *Id.* § 2159.5(a).

²⁴ GA. COMP. R. & REGS. 183-1-6-.02 (6).

²⁵ GA. COMP. R. & REGS. 183-1-6-.02 (7) (f)).

²⁶ GA. COMP. R. & REGS. 183-1-6-.02 (8)(a).

of the completed application is a violation of Louisiana election laws.²⁷ There are no other restrictions that apply to third-party voter registration.

- Mississippi: The Secretary of State is required to send bulk quantities of mail-in voter registration applications to any person or organization who requests them and charge the requesting entity the actual cost incurred in providing bulk quantities.²⁸ There are no other provisions in the Mississippi Election Code restricting or otherwise regulating third-party registration.
- New York: New York has no restrictions specific to third-party voter registration.
- North Carolina: The State Board of Elections must make voter registration forms available for distribution through governmental and private entities, with particular emphasis on making them available for organized voter registration drives.²⁹ No restrictions are placed on third-party registration drives.
- South Carolina: South Carolina does not have any statutory provisions or guidelines restricting third-party registration.
- Texas: While Texas does not seek to regulate the simple solicitation of voter registration applications, it does provide that, in order to accept and submit another's voter registration application, an individual must be a "deputy registrar."³⁰ Eligible voters may request appointment as deputy registrars, and that request shall not be denied if an individual is eligible. The appointment is made after the individual executes an oath, and per a recently-passed law that goes into effect in September of 2011, undergoes training.³¹ A volunteer deputy registrar may distribute voter registration application forms throughout the county and receive registration applications submitted to the deputy in person. All voter registration forms must be turned in to county registrars within 5 days of receiving them from the voter, and a deputy registrar must provide each voter with a signed receipt indicating the date that the deputy registrar accepted the voter's registration form.

²⁷ La. Rev. Stat. Ann. §18:1461 (7)(A)(1).

²⁸ Miss. Code § 23-15-47(4)(c).

²⁹ N.C. GEN. STAT. ANN. § 163-82.5.

³⁰ Source Tex. Elec. Code § 13.031 et seq.

³¹ Source Tex. Elec. Code § 13.031 as amended by 2011 Tex. Sess. Law Serv. Ch. 507 (H.B. 1570) : "(e) A regular deputy registrar may not assist in the registration of voters until the deputy registrar has completed training developed under Section 13.047. At the time of appointment, the voter registrar shall provide information about the times and places at which training is offered."

- Virginia: The only restriction is that a voter registration application must generally be turned in within 15 days of its date of signature.³²

D. Recent History of Third-Party Voter Registration Enactments by Florida

The 2011 restrictions on citizen voter registration efforts are the most recent iteration of Florida's ongoing effort to significantly curtail the ability and opportunity of individual citizens and citizen groups to conduct voter registration activities. In 2005, the Florida Legislature passed a law that imposed heavy fines on "third-party voter registration organizations" for turning in completed voter registration applications more than 10 days after receiving them, or after an election's book closing. In 2006, the Brennan Center commenced litigation against the law on behalf of the League of Women Voters and other organizations, resulting in the law being enjoined by a federal district court for violating third-party voter registration organizations' First Amendment rights of free speech and free association.³³ The court noted that the heavy fines would have a chilling effect on the willingness of such organizations to register new voters.³⁴

The Florida Legislature subsequently passed a revised version of the law that became effective in 2008, and which is the law that is in effect currently. The revised law was upheld in federal court.³⁵ It maintained the 10-day turnaround deadline but imposed significantly lower fines on third-party voter registration organizations than the prior law, added an annual cap of \$1,000 on the amount of fines that can be levied on an organization or any of its affiliates, removes an exception for political parties that was contained in the original law, and provides that fines "shall" be waived if an organization can show that timely delivery of the forms was impossible.

These restrictions appear to be accompanied by a dramatic decline in third-party voter registration activity. Florida's voter registration rates have dropped by approximately 25 percent between 2006 and 2010.³⁶

E. Minority Voters' Reliance on Third-Party Voter Registration Drives

It is generally recognized that minority voters disproportionately rely on third-party registration drives. Those without access to the Internet and those who do not own a car (and

³² Virginia Stat. § 24.2-1002.01.

³³ *League of Women Voters of Florida v. Cobb*, 447 F.Supp.2d 1314, 1316 (S.D. Fla. 2006).

³⁴ *Id.* at 1332–33.

³⁵ *League of Women Voters of Florida v. Browning*, 575 F.Supp.2d 1298 (S.D. Fla. 2008).

³⁶ From January through October 2006, there were 479,611 new and valid voter registrations in Florida, compared to 363,545 in the same period in 2010, a 24.2% decline. See Florida Division of Elections, Voter Registration Statistics, <http://election.dos.state.fl.us/NVRA/reports.shtml>; Voter Registration Year To Date Report, October 2006: <http://election.dos.state.fl.us/voter-registration/archives/2006/October/YTDTTotal.pdf>; Voter Registration Year To Date Report, October 2010: <http://election.dos.state.fl.us/voter-registration/archives/2010/October/YTDTTotal.pdf>.

thus do not use the Department of Motor Vehicles to register to vote) are less able to register through means other than voter registration drives. Absent the third-party voter registration efforts, many of these voters will either not register or will complete their registration applications improperly.

In Florida, U.S. Census Bureau data from the 2004 and 2008 election cycles show that both African-Americans and Hispanics rely more than white voters on third-party registration drives, and that, indeed, minority reliance on such drives is greater in Florida than elsewhere in the country. Specifically, African-American and Hispanic citizens in Florida are more than twice as likely to register to vote through private drives as white voters. In 2004, while 6.6 percent of non-Hispanic whites in Florida indicated they registered through private drives, 17.4 percent of African-Americans and 18.9 percent of Hispanic voters in Florida registered in this manner.³⁷ Similarly, in 2008, 6.3 percent of non-Hispanic white registered voters in Florida were registered through drives versus 12.7 percent of black voters and 12.1 percent of Hispanic registered voters.³⁸ Among those who said they voted in Florida in 2008, 6.3 percent of white voters were registered through drives, versus 11.5 percent of black voters and 11.5 percent of Hispanic voters.³⁹

These data appear to be the best data available regarding the extent to which minority citizens in the five covered counties disproportionately rely on third-party voter registration efforts. The Census does not report such data by county, and it is our understanding that the five covered counties do not maintain such data. Given the pronounced statewide pattern that exists in Florida, and the fact that the pattern both tracks and exceeds the national pattern, there would seem to be little doubt that this also is what is occurring in the five covered counties. Certainly, Florida has not provided any evidence to the contrary.

Current registration rates confirm that Hispanic voters are underrepresented in terms of voter registration in the covered counties, while black voters have begun to achieve equity in voter registration rates. As noted above, the CVAP of the five counties combined (2010 Census) is 12.0 percent black (non-Hispanic, “black alone”) and 15.2 percent Hispanic. Voter registration in the five counties combined, as of the 2010 general election, is 12.2 percent black

³⁷ U.S. Census Bureau, Current Population Survey, November 2004. The national figures in 2004 were: 7.8% of non-Hispanic whites; 12.7% of blacks; and 12.9% of Hispanics. See Table 14, <http://www.census.gov/hhes/www/socdemo/voting/publications/p20/2004/tables.html>.

³⁸ U.S. Census Bureau, Current Population Survey 2008, available at <http://www.census.gov/apsd/techdoc/cps/cpsnov08.pdf>. All data from the CPS on methods of voter registration is self-reported by survey respondents. The corresponding national figures in 2008 were: 5.4% of non-Hispanic whites registered at private drives; 11.1% of African-Americans; and 9.6% of Hispanics. See Table 14, <http://www.census.gov/hhes/www/socdemo/voting/publications/p20/2008/tables.html>.

³⁹ U.S. Census Bureau, Current Population Survey 2008, available at <http://www.census.gov/apsd/techdoc/cps/cpsnov08.pdf>.

and 12.0 percent Hispanic, based on Florida residents' self-identifications on their voter registration forms:⁴⁰

County	White VR	Black VR	Hispanic VR
All Combined	72.7%	12.2%	12.0%
Collier	86.5%	3.1%	8.1%
Hardee	74.4%	6.5%	15.9%
Hendry	61.8%	14.9%	18.8%
Hillsborough	68.1%	15.5%	13.1%
Monroe	86.8%	3.5%	8.4%

There is no doubt that Hispanic voters remain underrepresented on the voter rolls (15.2% of the 2010 CVAP, but only 12% of registered voters). The underrepresentation is particularly stark in Monroe County, where Hispanics make up 13.2% of the CVAP, but only 8.4% of registered voters, and Hardee County, where they are 22.6% of the CVAP, but only 15.9% of voters. Black voters are underrepresented in three of the covered counties: Hardee (10.3% of CVAP vs. 6.5% of registered voters); Hendry (16.6% of CVAP vs. 14.9% of registered voters); and Monroe (3.8% of CVAP vs. 3.5% of registered voters).

However, even in the counties where minority voter registration has achieved some parity with population figures, these numbers are undoubtedly a result, in part, of focused efforts by third-party voter registration groups to bring new and minority voters onto the rolls. H.B. 1355's dramatic impact on third-party voter registration efforts risks eliminating a key mechanism for achieving racial equity on the voter rolls.

F. Effect of the Changes on Third-Party Registration Efforts

It appears highly likely that the restrictions on third-party voter registration activities put into place by H.B. 1355, along with the restrictions further imposed by the Secretary of State's regulations and standard forms, will dramatically curtail, or even put a halt to, third-party voter registration efforts in Florida.

For individuals or groups that are not specifically organized to engage in voter registration drives, and want to undertake an *ad hoc* or a time-limited voter registration effort (e.g., efforts by a religious organization, a neighborhood group, or a student group), it clearly will be difficult and time-consuming to attempt to comply with the array of requirements imposed by the State and the level of minutia that is required. The need to pre-register with the State, have volunteers sign sworn statements which indicate that they may be subject to felony prosecution, implement the organizational control needed to satisfy the 48-hour turnaround requirement, update the state registration if any new volunteers are brought on after the initial state pre-registration, track any changes in the information previously provided to the State (even

⁴⁰ The voter registration percentages were calculated from data from data provided by the Florida Division of Elections. <http://election.dos.state.fl.us/voter-registration/index.shtml>. The calculations exclude the small number of persons who did not self-identify their race on their voter registration forms (in the five counties combined, 2.8 percent of all registered voters are listed as "unknown" race as of the 2010 general election).

concerning volunteers' residence addresses) and submit updates, track the number of registration forms given to each volunteer and returned by each volunteer, and obtain unused forms back from any volunteer who ceases his or her participation in the effort will likely cause many groups to conclude that conducting a legal voter registration drive is simply not possible. And, those groups that do seek to comply clearly will need to devote substantial resources to following the multitude of requirements, which in turn will necessarily limit the amount of resources they can devote to actually conducting registration drives.

The new restrictions will not be any less problematic for groups whose mission is to conduct voter registration drives. While these groups may have more organizational resources and voter registration experience than the types of groups noted above, their resources still are limited and the larger size of their voter registration efforts will make it more difficult to comply with the restrictions.

Democracia USA, a project of the National Council of La Raza, is a national, non-partisan civic engagement organization that seeks to increase the prominence and participation of Latinos in the American democratic process. Since 2004, Democracia USA has registered over 200,000 individuals in Florida alone.⁴¹ It runs a highly structured and closely supervised voter registration effort that mostly relies on paid staff. It conducts voter registration drives door-to-door in Latino neighborhoods, at specific selected locations, and at special events (such as community festivals). Among the covered counties, it has registered a significant number of voters in Hillsborough County, including approximately 4,600 individuals in 2008 and 7,000 in 2010.

Democracia USA has conducted an extensive review of the new third-party voter registration restrictions and, based on that review, has at least temporarily suspended its voter registration efforts statewide. Democracia USA wants to be able to continue its voter registration efforts, as these efforts are a part of its core organizational mission. However, it is uncertain how it will be able to operationalize the new requirements, given their nature and breadth. Implementing the new requirements will require significantly more staff time, significantly increasing the cost to the organization of conducting voter registration drives. Thus, it appears that the restrictions, at a minimum, will have the long term effect of substantially reducing the length and number of registration drives it is able to conduct.

For example, ensuring that each of the thousands of registration applications Democracia USA historically has collected includes the date, hour, and minute at which it was signed likely will require substantial staff time, considering the fact that, historically, one office may produce up to one thousand registration applications on just one day. Democracia USA also currently subjects every registration drive to an extensive quality control process which occurs after the voter registration applications are collected. This allows the organization to flag and address incomplete registration forms, among other things. The organization is uncertain how or whether this process may be maintained in light of the 48-hour turnaround requirement, since the current process takes several days. Democracia USA also does not track the precise number of blank registration forms given to each person collecting registration forms, or the number of

⁴¹ The information regarding Democracia USA's voter registration program is from an interview with Rudi Navarra, the organization's National Program Coordinator, on July 6, 2011.

blank forms that each does not use in a given period of time, and so complying with these requirements will necessitate additional staff time as well. Finally, while the new form required of “registration agents” may not intimidate Democracia USA’s experienced staff, it will make it more difficult to hire new staff, who may well be deterred by the statements about possible felony prosecution.

The League of Women Voters of Florida (LWVF) is an all-volunteer, non-partisan organization that has been dedicated to registering Floridians to vote and engaging them in the political process for over 70 years.⁴² LWVF has a statewide office in Tallahassee, and 29 local leagues throughout the state, including League affiliates in Collier County (established in 1975) and Hillsborough County (established in 1949). Both are active county Leagues with numerous public events at which volunteers offer voter registration opportunities. As Marilyn Wills, Second Vice President of the LWVF, noted:

The League has been registering voters in Florida since 1939. We register voters all year long and automatically tie voter registration to every non-lobbying activity. Approximately 99% of voter registration is a secondary activity to our other educational endeavors. Whether it’s a hot topic lunch, a high school event, a debate, or any other election related activity, members always have voter registration forms on hand to register voters.

Due to the passage of H.B. 1355, the LWVF’s board of directors has voted to cease all voter registration efforts by the League and its affiliates in all Florida counties, including the covered jurisdictions. On May 26, 2011, the state board issued a moratorium to all LWVF members and affiliates directing them to cease voter registration activity. As the Collier County League indicates on its website, the new law “imposes an undue burden on groups such as ours that work to register voters.”⁴³

H.B. 1355 creates particular burdens on the LWVF affiliates’ all-volunteer operations. Because the law permits the state to levy a fine or institute a civil proceeding against individual registration agents in addition to the organizations they volunteer with, LWVF leaders believe these individual risks will chill their members’ participation in volunteer voter registration. Therefore, even if the LWVF’s state board were to lift the voter registration moratorium, officials with the LWVF believe that the new law will make it difficult, if not impossible, to secure volunteers for voter registration drives. According to Pam Goodman, First Vice President of LWVF, volunteers will likely be unwilling to risk the individual summons or fines permitted by H.B. 1355. “Because of the risk, they won’t register voters under this new law.” Quoting the state LWVF, the Collier County League notes that it has shut down voter registration in part to protect the LWVF’s volunteers, stating “we cannot and will not place thousands of volunteers at

⁴² The information regarding the League of Women Voters of Florida’s voter registration activity is from an interview with Marilyn Wills, Second Vice-President; Pam Goodman, First Vice President; and Jessica Lowe-Minor, Executive Director, of the League of Women Voters of Florida (June 22, 2011).

⁴³ Website of the League of Women Voters of Collier County, available at <http://www.lwvcolliercounty.org/> (last checked July 6, 2011).

risk, subjecting them to a process in which one late form could result in their facing financial and civil penalties.”⁴⁴ In addition, the law’s requirements that a barrage of forms be submitted and updated electronically places massive stress on all-volunteer LWVF affiliates, which lack office space, electronic equipment, or the staff to manage the multiple electronic submissions required by H.B. 1355.

Rock the Vote is another organization that works to register new Florida voters. Rock the Vote works closely with college volunteers, and is a non-partisan, non-profit organization that focuses on registering new and young voters via both in-person voter registration activity in Florida and via its national website. “The personal delivery requirement would make it very challenging to meet the 48 hour deadline — not all volunteers have cars and not all college campuses are close to county seats,” states Thomas Bates, Vice President for Civic Engagement. He also indicates that H.B. 1355 places “a significant burden” on Rock the Vote’s ability to register and engage voters in Florida.

G. Florida Has Provided No Non-Discriminatory Justification for H.B. 1355

The legislative history of H.B. 1355 provides scant evidence of any justification for the far-reaching and onerous new requirements set forth in the law. During the legislative debates, the bill’s sponsors and supporters made numerous references to the sanctity of the voter registration process, but were unable to point to any actual evidence that the current Florida law is inadequate or that there is any record of voter registration abuses.⁴⁵

For example, Representative Baxley, the sponsor of the bill, claimed that the reason to change from the current ten-day requirement for submitting completed registration applications to 48 hours is that voter registration forms are

valued document[s] and the longer you have these documents floating around, the more likely it is for mischief and mishap. There is a responsibility that when you’ve taken someone’s registration for them to go ahead and deliver it immediately. And we have made a provision that if it’s a weekend or whatever, fine.⁴⁶

But when asked how many forms filled out with the assistance of third party voter registration organizations are “floating around,” Baxley was unable to offer any evidence of any problem, instead replying with his own speculative question: “Who knows how many slip through the system?”⁴⁷

⁴⁴ Website of the League of Women Voters of Collier County, available at <http://www.lwvcolliercounty.org/> (last checked July 6, 2011).

⁴⁵ To prepare this comment, we have watched video of all Florida House and Senate testimony and debate regarding H.B. 1355. As official transcripts are not available, the quotes set forth herein are from an in-house transcription.

⁴⁶ FLA. HOUSE DEB.: 2nd Reading, Rep. Kriseman (April 20, 2011, 12:30).

⁴⁷ FLA. HOUSE DEB.: 2nd Reading, Rep. Kriseman (April 20, 2011, 32:04).

Another supporter of the bill, Senator Bennett suggested that the bill does impose burdens on voters, but these burdens are justifiable. Senator Bennett was emphatic that voting and voter registration should be made more difficult under Florida law:

You say it is inconvenient. Ever read the stories about people in Africa? People in the desert who literally walk 200-300 miles so they could have an opportunity to do what we do? And we want to make it more convenient? How much more convenient do you want to make it? Want to go to their house? Take the polling booth with us? This is a hard fought privilege. This is something people died for. And you want to make it convenient? To the guy who died to give you that right, it was not convenient. Why would we make it any easier? I want 'em to fight for it. I want 'em to know what it's like. I want 'em to have to walk across town to go over and vote. I want 'em to at least know the date of when they're supposed to vote. I'd like them to actually know where they're supposed to go vote. Is that too much to ask? I don't think so. . . . This is Florida and we should count. We do make it convenient for people to vote but I gotta tell ya I wouldn't have any problem making it harder. I would want them to really want to be informed. I would want them to really want to vote as badly as I want to vote. I want the people in the State of Florida to want to vote as bad as that person in Africa who is willing to walk 200 miles for that opportunity he's never had before in his life. This should not be easy. This should be something you feel with a passion.⁴⁸

Opponents of the bill, on the other hand, pointed out the very real racial impacts that H.B. 1355 is likely to have. Nothing in the legislative record of H.B. 1355 or the State of Florida's submission to the Department of Justice contains evidence contradicting or addressing these impacts. For example, Senator Rich highlighted how she believes that the bill will limit voter access and what the true intent of HB 1355 is, stating:

Under the guise of ensuring the integrity of the election process we have another bill that puts up barriers to participating in the democratic process. Make no mistake, the supporters of this bill can cite no examples of voter fraud or provide any proof that the integrity of our election process has been compromised. . . . I have to wonder if the only problem that can be found with our electoral process is that some people didn't like the outcome of our last presidential election or the outcome of some of our ballot initiatives...but this is no excuse to enact legislation that primarily affects the ability of people to vote who don't tend to support the majority party.⁴⁹

Speaking about the discriminatory impact in the context of Florida's history of discrimination, Representative Thompson said the following during the House debate:

Florida is a covered jurisdiction under VRA of 1965 and those states or parts of states that are covered jurisdictions are placed in the VRA because they have a

⁴⁸ FLA. SENATE DEB.: Final Passage, Senator Bennett (May 5, 2011, 35:40-38:24).

⁴⁹ FLA. SENATE DEB.: Final Passage, Senator Rich (May 5, 2011, 47:50).

history of discriminatory voting practices they have a history of voter suppression they have a history of voter intimidation. I had hoped that in my lifetime I would see Florida not among those covered jurisdictions. . . . And when I look at this bill that would impose a financial penalty on groups and organizations, third parties, that are working to get people registered. I have to ask the question, are we there yet? . . . It does limit access to voting and having your vote count. . . . Florida is still covered by the VRA of 1965 because of its history so why are we making it more difficult to vote? . . . What are we going to do with regard to getting these proposed changes cleared by the DOJ? With this bill we're putting up more roadblocks and hampering the opportunity of people who just want the right of every American and that is the right to vote. I don't think this is the direction that we should be taking in 2011.⁵⁰

Finally, Representative Stafford outlined why she believes the bill has a discriminatory impact, speaking from the perspective of her own family's recent history:

When I read this bill, I thought about my 86 year old grandmother. . . . I thought about her as I read the provisions in this bill that, in my opinion, create barriers to voting. I thought about my grandma who was born in this country but was not allowed to vote in this country until 1965 because of the color of her skin. When my grandma was finally granted the right to vote in 1965 there were barriers put in place to exercising the right to vote. I submit to you that this bill creates barriers to exercising the right to vote. . . . It is the provision in the bill that eliminates long standing rules that allow voters to change their information at their polling place and forces voters attempting to vote in a different county to use provisional ballots which often go uncounted. . . . It's the provision in the bill that reduces from ten days to two days the time that third party groups have to submit voter registration forms to election officers or face a fifty dollar fine for each late submission. Are we now criminalizing voter registration efforts? . . . If this bill passes into law, the Floridians most harmed will be those who have been historically disenfranchised in this country—people of color. . . . and youth. Anything that makes it harder for a person to vote or harder for that vote to count is very concerning and alarming.⁵¹

In sum, while the retrogressive impact of H.B. 1355 was clearly noted on the record, neither the legislative history of the bill nor the State's submission to the Department address with any specificity, the degree to which the new law will harm Florida's minority voters.

H. The New Voter Registration Restrictions Must Not Be Preleared

As explained, H.B. 1355 includes a host of burdensome, unprecedented, and unnecessary restrictions on individuals and groups helping others to register to vote. Minority citizens in the covered counties disproportionately rely on third-party registration drives to register to vote, but

⁵⁰ FLA. HOUSE DEB.: 3rd Reading, Rep. Thompson (April 21, 2011, 20:59-24:34).

⁵¹ FLA. HOUSE DEB.: 3rd Reading, Rep. Stafford (April 21, 2011, 37:35-40:09).

the new restrictions will cause existing and planned third-party registration efforts to either be shut down or curtailed. The types of restrictions enacted by Florida are not found in other covered States, and Florida law regulates no other election-related citizen activity in this manner. The State has provided no record of voter registration abuses that could justify the far-reaching and onerous new requirements set forth in the new law. Indeed, the ink on Florida's latest round of restrictions on voter registration was barely dry when H.B. 1355 was enacted, even as state registration rates continued to plummet. Opponents of the bill pointed out not only that the restrictions were unjustified, but that they also risked harming Florida's minority voters.

For these reasons, the Justice Department should object to this direct attack on the voter registration process. Alternatively, the Department should send a written request for additional information to Florida.

III. Restrictions on Early Voting

A. Submitted Changes

Section 39 of H.B. 1355 restricts the time period during which early voting is conducted for federal and state elections, and potentially restricts the number of early voting hours. The new law also provides that, with regard to county elections not held in conjunction with a federal or state election, early voting will become optional.

Currently, early voting runs for a full two-week period. It begins on the 15th day before an election and ends on the second day before the election. That means that early voting begins on a Monday two weeks before election day, continues from that Monday through the following Sunday, and then continues through the following week, ending on the Sunday two days before the election. Early voting is conducted for eight hours on each weekday, and for eight hours in the aggregate during each of the two covered weekends (each county decides how to allocate the weekend hours between Saturdays and Sundays).

Under the new law, early voting will occur over a more limited, eight-day period, from the tenth day before an election to the third day before an election. This will eliminate the first five days of early voting (Monday through Friday of the second week before the election), and also will eliminate the possibility of having early voting during the Sunday two days before the election. Early voting will begin on a Saturday, a week and a half before an election, and will end on the following Saturday. Moreover, instead of a set number of hours for each weekday and an aggregate number of hours for each weekend, each county elections supervisor will be given the discretion to set the number of early voting hours for each day (weekday or weekend day), between a minimum of six hours and a maximum of 12 hours. The hours also could vary between early voting sites in the same county.

Pursuant to the Procedures for Administration of Section 5, 28 C.F.R. § 51.15, the new law thus is enabling in two respects: first, the law grants discretion to election supervisors to set the number of early voting hours in each election; and, second, the law grants discretion to election supervisors to decide whether to conduct early voting in county elections in which there is no federal or state office on the ballot. It follows, therefore, that if the Justice Department ultimately concludes that the early voting changes should be precleared, the Department would

be obligated to inform the State and the covered counties that these enabled changes must receive preclearance in the future when early voting decisions are made.

B. Minority Voters' Reliance on Early Voting

As shown by election data maintained by the State of Florida, black voters in the five covered counties disproportionately have relied on early voting in casting their ballots in recent elections.⁵²

This was especially true in the 2008 general election, when over half of all black voters in the covered counties who cast a ballot in that election – 52.8 percent – voted using early voting.⁵³ In contrast, only about a quarter of white voters in the covered counties who voted in that election cast early-voting ballots, 27.9 percent. The Hispanic rate was 27.8 percent, which was essentially identical to the white percentage. The percentage for the category of registered voters which Florida denominates as “other” was 31.1 percent.

In the 2010 general election, the difference between black and white voters was less dramatic, but black voters in the covered counties still disproportionately made use of early voting in that election as well. Among black voters, 28.6 percent voted early, whereas 24.7 percent of white voters cast early ballots. The rate among Hispanic voters was 18.9 percent, and the rate among “other” voters was 23.0 percent.

The data also show that, among early voters in the covered counties, black voters have relied disproportionately more on weekend hours than weekday hours.

C. Discriminatory Effect

One of the key questions posed by the proposed early-voting changes is how counties will utilize the discretion newly granted as to the number of hours of early voting that will be conducted on each early-voting day. As noted by the State in its submission, it is theoretically possible that the number of hours of early voting will not be reduced in the covered counties as a result of H.B. 1355. But, for this to occur, each county will need to decide to conduct early voting for the maximum number of hours possible at all early voting sites in each county. Currently, all counties are required to have 96 hours of early voting at all early voting sites (10 weekdays times 8 hours a day, plus two weekends times eight hours on each weekend). Under the new law, each county could continue to conduct 96 hours of early voting, but only if each county conducts early voting for 12 hours a day at every early voting site in the county (8 days times 12 hours a day).

⁵² Data on the number of persons casting early-voting ballots were obtained from a Florida website, <https://doe.dos.state.fl.us/fvrscountyballotreports/FVRSAvailableFiles.aspx>, that identifies all persons who voted early in the 2008 and 2010 general elections, by voter identification number. The race of these early voters was obtained by matching these voter identification numbers with the data on the State’s registration file, which includes the self-identified race of each voter. The data on persons who voted absentee and on election day were obtained from Florida’s statewide voter history file, a copy of which was obtained by the Brennan Center.

⁵³ In other words, 52.8% equals the number of black persons who cast early votes divided by the sum of all blacks who voted in that election (voted early, voted absentee, and voted on election day)

The State's submission, however, provides no factual information concerning this key issue. For example, the submission does not address how the practical realities relating to election administration (including, but not limited to, budgetary considerations) will affect the covered counties' decisions as to the number of early voting hours that they would decide to institute under the new law. Accordingly, this is one of the issues that the Justice Department should examine in sending the State a "more information" letter.

To attempt to gain some information about this question, we spoke with election officials in the five covered counties. These interviews suggest that the majority of the covered counties are not likely to offer the full 96 hours of early voting permitted under H.B. 1355. The election officials we interviewed in Hardee, Hendry, and Monroe Counties (Jeff Ussery, Lucretia Strickland, and Harry Sawyer, Jr., the counties' elections supervisors) do not expect to increase their hours and expressed doubt that they would be able to afford to do so. In Hillsborough County, the director of operations for voting (Lyle Roberts) said that he hopes that the county will keep early voting open for 96 hours, but also noted that the county would need to hire double the number of workers and institute double shifts to avoid the cost of overtime pay. Lastly, in Collier County, the Chief Deputy Supervisor of Elections (Tim Durham) believes that Collier will stay open for 96 hours at least for general elections, but will need to hire more poll workers to do so.

If, as is suggested by these interviews, the practical reality is that the new law will result in a significant reduction in the number of early voting hours, this weighs in favor of a finding of retrogression as to the early voting changes.

D. Discriminatory Purpose

The State of Florida's submission also provides little or no information that addresses the State's burden of showing the absence of discriminatory purpose. Our review of the legislative debates indicates that the opposition to the early-voting changes was based on the concern that the changes will reduce the opportunity of Florida voters to cast early votes. This concern, combined with the minority voters' reliance on early voting, suggests the possibility that a discriminatory purpose was present. Yet, the submission provides no neutral justification for the changes.

One particular concern is that the changes may have been adopted specifically to eliminate the possibility that early voting is conducted in the future on the last Sunday before the election. Under current law, counties have the discretion to conduct early voting on that day, but the new law requires that early voting end on the Saturday before the election. Several of the large urban counties in the State have conducted early voting on Sundays (although the covered counties did not in the 2008 and 2010 general elections), and the extent to which minority voters have made use of that voting opportunity has been dramatic (apparently many minority voters travel from church to their early voting site on that day). In the 2008 general election, statewide, 33.2 percent of those who voted early on that last Sunday before election day were black and 23.6 percent were Hispanic, whereas blacks constituted 13.4 percent of all early voters statewide (for all early voting days) and Hispanics constituted 11.6 percent. These data support the concern that a specific discriminatory purpose underlying the changes may have been to eliminate early voting on this last Sunday before election day.

This specific concern about the purpose underlying the changes applies to the present submission regardless of the fact that, as noted, the covered counties have not utilized early voting on this last Sunday in recent general elections. The covered counties currently have that option, and a discriminatory purpose aimed at eliminating that option would require the interposing of an objection.

Accordingly, the Justice Department also should obtain further information regarding the issue of discriminatory purpose by making a written request for additional information as to the early voting changes.

E. The State Has Not Met its Burden Under Section 5

For the reasons set forth above, the State has not met its burden under Section 5 with regard to its submission of the early voting changes, and the Justice Department should send a written request for additional information.

IV. Restrictions on Voting by Registered Voters Who Move Between Florida Counties Without Re-Registering at Their New Address

Section 26 of H.B. 1355 enacts new restrictions on the ability of persons who are registered to vote in Florida, and who move between counties without re-registering at their new address, to change their address at their polling place in their new county and cast a ballot that will be counted. This voting change is of concern both because Florida's submission to the Justice Department does not clearly delineate the nature and scope of the change (as required by 28 C.F.R. § 51.27 (c)) and because the available data suggest that the affected voters may be disproportionately minority. Accordingly, we believe that the appropriate course of action is for the Justice Department to send Florida a written request for additional information so as to clarify what Florida is submitting for preclearance, and to enable the Department to properly assess whether the change is discriminatory.

A. Benchmark System

Florida law generally provides that Florida residents may vote only in the "election precinct in which . . . [they are] registered." Fla. Code § 101.045(1).

However, Florida law also includes a significant exception to this rule: registered voters who move after registering to vote, and who do not re-register at their new address, nevertheless are permitted to vote in their new precinct so long as they complete an affirmation specified in Florida law. Fla. Code § 101.045(2)(a).⁵⁴ This exception applies equally to persons who move within the same Florida county and to those who move between Florida counties. This fail-safe provision, which ensures that persons who are properly registered to vote in Florida are not disenfranchised simply because they move without notifying Florida election officials, appears to have been the law in Florida for over two decades.

⁵⁴ The affirmation that a mover must complete is simple and straightforward. The voter need only fill in his or her name, former address (including city and county), former precinct and county where registered, new address (including city and county), and the new precinct and county where the individual is now eligible to vote. The voter affirms this information, affirms that he or she is "otherwise legally registered and entitled to vote," and signs the affirmation. Fla. Code § 101.045(2)(a).

B. Proposed Change

1. New statutory language

Section 26 makes two important changes to the statutory language of the Florida code section in question, Fla. Code § 101.045. First, Section 26 includes new language which, at first blush, could be interpreted as limiting the “movers” exception to those registered voters whose change of residence is intra-county, and eliminating the exception for those whose change of residence is inter-county. In this regard, Fla. Code § 101.045(2)(a), as amended by Sec. 26, specifies that the exception is to apply to electors whose “change of residence is within the same county.” Second, Section 26 adds a new subsection “(b)” to § 101.045, to provide that registered voters who move inter-county “may not change [their] legal residence at the place and vote a regular ballot; however, such elector[s] [are] entitled to vote a provisional ballot.”

2. Will registered voters who are inter-county movers still be able to cast a ballot that will be counted?

The questions presented by the submitted amendments are whether, if Section 26 is precleared, Florida will count provisional ballots cast by inter-county movers who are registered to vote but who have not re-registered at their new address, and if so, what actions will such inter-county movers be required to take in order for their provisional ballots to be counted.

The answer to the threshold question – whether there are any circumstances in which these provisional ballots will be counted – appears to be “yes,” but the State’s submission is not clear on this point. Therefore, the Justice Department should seek a written clarification from the State on this critical issue.

More specifically, Exhibit E to the State’s submission, which provides a section-by-section description of the changes, advises, circularly, that inter-county movers’ provisional ballots will be counted except when the voter “was not entitled to vote.” Exh. E, at 12. Exhibit E then goes on to note the reasons that a voter may not be “entitled to vote.” These reasons do not include being registered in one’s former county but not in one’s new county of residence. Accordingly, this may suggest that such provisional ballots can be counted. On the other hand, Exhibit E also references the state statute regarding the counting of provisional ballots, Fla. Stat. § 101.048, and that statute specifies that provisional ballots are counted only when “the person voting that ballot was entitled to vote at the precinct where the person cast a vote in the election.” Fla. Stat. § 101.048(2)(a). Given the amendment to Fla. Stat. § 101.045(2)(a) noted above, it might be argued that these inter-county movers will no longer be “entitled to vote at the [new residence] precinct.”

This threshold question appears to have been definitively answered by Directive 2011-01, issued by the Secretary of State to the county election supervisors on May 19, 2011 (see Attachment D to this letter). The Directive states that, under the new law, the determination as to whether to count provisional ballots cast by inter-county movers is made using “the same standard that would apply for counting a regular ballot” by intra-county movers, i.e., the ballots should be counted unless the inter-county mover “was not registered or the voter voted in a precinct other than the one that corresponds to his or her new address.” Directive 2011-01, at 2. However, this Directive was not included in the State’s Section 5 submission.

The second question, assuming that inter-county movers' provisional ballots have the potential to be counted, is what inter-county voters will be required to do in order for their provisional ballots, in fact, to be counted. For example, will these voters still complete the same affirmation that they complete under current law and, if so, will this be sufficient or will they need to do more? Will the voters need to present evidence of eligibility to the elections supervisor after election day (in the same way that persons who cast provisional ballots for other reasons are required to do)? The State's submission does not address this question at all, and Directive 2011-01 makes only a glancing reference to this.

Accordingly, the Justice Department should seek clarification from the State, in writing, as to whether there are circumstances in which provisional ballots cast by these inter-county movers may be counted and, if so, what steps must these citizens take in order to cast a provisional ballot that will be counted. Once the Department obtains these answers, the Department also, in its final decision letter, should specifically identify what the State is changing with regard to voting by inter-county movers who are registered to vote but who do not re-register at their new Florida address, so that the precise preclearance issue in this regard is set forth.

C. Potential Discriminatory Nature of the Submitted Change

We also do not believe that the State has made the necessary showing of no discriminatory purpose and no retrogressive effect, and believe that, in order to address these issues, the Justice Department should send a written request for additional information.

First, because the nature and scope of the change has not been properly delineated, it is difficult to gauge the obstacles that Florida may be erecting to voting by these inter-county movers and why these obstacles have been created. For example, if the inter-county movers will be required to complete the same affirmation they are required to complete now, and if their votes then will be counted so long as they properly complete the paperwork associated with provisional ballots – with no need to do anything more – the obvious question is why will these voters be required to jump through the additional “provisional ballot” hoop when this would not seem to serve any substantive purpose? On the other hand, if the inter-county movers will be required to do more, why is their eligibility to vote more suspect than that of intra-county movers, especially given the fact that the State has a computerized statewide system of voter registration? Nothing in the State's submission answers these questions.

Second, the State has not provided any data as to the racial composition of the inter-county movers in question (i.e., registered voters who move into a Florida covered county from another Florida county and who do not re-register at their new address). The data that we have been able to identify suggests, however, that these voters are disproportionately African American. The Census Bureau's 2009 American Community Survey reports data, by race and Hispanic origin, regarding the percentage of persons of each population group (one year and older) within each of the covered counties that had moved from another Florida county within the past year. These data are as follows:

Race ⁵⁵	Collier	Hardee	Hendry	Hillsborough	Monroe
White	1.9	3.4	5.6	2.8	2.3
Black	1.9	15.4	12.2	2.9	3.6
Hispanic	1.8	3.4	3.3	3.0	3.5

D. Summary

For these reasons, the State has not met its burden with regard to this submitted change and the Justice Department should send the State a written request for additional information to request: a) “[a] statement that identifies with specificity” the nature and scope of the change regarding registered voters who move between counties without re-registering in their new county, as required by 28 C.F.R. § 51.27(c); b) a clear delineation of any new burdens being imposed on these inter-county movers to cast a ballot that will be counted, and the reasons for imposing these burdens; and c) any data available to the State that relates to the racial composition of these inter-county movers in the covered counties.

V. Conclusion

For the reasons set forth above, the Justice Department should not grant Section 5 preclearance to three significant sets of voting changes enacted by H.B. 1355 – the changes that would severely restrict citizen voter registration efforts, the changes that would shorten the early voting period, and the changes with regard to voting by persons who are registered to vote and move between counties without re-registering to vote.

Respectfully submitted,

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⁵⁵ The data for whites are for white non-Hispanics. However, the data reported for blacks include black Hispanics as it does not appear that the 2009 ACS reports change-of-residence data for black non-Hispanics.