UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

CONGRESSWOMAN CORRINE BROWN; SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE, JACKSONVILLE, FLORIDA CHAPTER; DUVAL COUNTY DEMOCRATIC EXECUTIVE COMMITTEE; PASTOR REGINALD GUNDY; BISHOP LORENZO HALL; JERRY WEST, CARL GRIFFIN, ELDER LEE HARRIS, HELEN GRIFFIN TURNER, VALERENE WEEKS, ELAINE FORD JACKSON AND FRANCES R. SIMMONS,

Plaintiffs,

v.

KEN DETZNER, in his official capacity as Florida Secretary of State, and JERRY HOLLAND, in his official capacity as Supervisor of Elections for Duval County, Florida,

Defendants.
_____/

CASE NO.: 3:12-cv-00852-UATC-MCR

AMENDED PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

COME NOW the Plaintiffs, by and through their undersigned counsel, and respectfully submit this Memorandum of Law in support of their Motion for Preliminary Injunction, pursuant to Fed. R. Civ. P. 65 and Local Rule 4.06, enjoining Defendants from enforcing § 101.657(1)(d), Fla. Stat. (2011) which requires early voting as defined in § 97.021(8), Fla. Stat. (2011) to start on the 10th day prior to Election Day and end on the 3rd day before an election (the "Sunday Voting Ban") and reinstating early voting beginning on the 15th day before election day and ending on the 2d day before an election as required in § 101.657(1)(d), Fla. Stat. (2005). Plaintiffs seek this relief in time for the general election to be held on November 6, 2012, and to

have it applied throughout the State of Florida or, in the alternative, in Duval County, Florida only.

INTRODUCTION

On August 16, 2012, a three judge panel (comprised of a United States Circuit Judge and two District Court Judges) of the United States District Court for the District of Columbia unanimously found that the early voting changes enacted in 2011 by the State of Florida that are at issue in the instant case failed to satisfy the anti-discrimination requirements of Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973c ("VRA"). *Florida v. U.S.*, 2012 WL 3538298 (D.D.C.) (also referred to at times herein as the "Section 5 Case") (Exhibit A). In that case, the State of Florida failed to show that the changes to early voting would not have a retrogressive effect on minority voters in the covered Florida counties. In reaching its decision, the Court concluded:

> we find that minority voters will be disproportionately affected by the changes in early voting procedures because they disproportionately use early in-person voting. . . the proportion of African-American usage of early in-person voting in Florida "has exceeded White usage of early in-person voting in four of five [recent] federal elections," and "substantially exceeded White usage in both the 2004 and 2008 presidential elections."

*Id.**17, citing Amended Expert Report of Professor Paul Gronke (Exhibit B). As a result of its findings, the Court declined to preclear Florida's changes to the early voting law and such changes will **not** go into effect for the five Florida counties considered covered counties under the VRA.[1] *Id.* *47.

The unanimous finding of the judicial panel that Florida's 2011 changes to early voting procedures are discriminatory when compared with the prior early voting law is significant for

[1] The Court did, however, find that if the covered counties submitted a new preclearance plan that offered early voting for the maximum number of hours required under the current law (96 hours), which matched the available hours under the prior law, then Florida would likely satisfy its burden of proving that the changes in the law would be nonretrogressive. WL 3538298*47.

the case at hand. Plaintiffs herein claim that those same changes to the early voting procedure disproportionately affect African Americans and are therefore discriminatory and unlawful. Based upon the considered findings in *Florida v. U.S.*, there is substantial likelihood of success on the merits of Plaintiffs' claims that enforcement of the State's amendments to § 101.657(d), Fla. Stat. (2005), shortening of the early voting period from the 15th day to the 10th day prior to Election Day and eliminating the Sunday immediately preceding Election Day, is unlawful and discriminatory.

"Voting is of the most fundamental significance under our constitutional structure." *Burdick v. Takushi*, 504 U.S. 428, 434 (1992); *Reynolds v. Sims*, 377 U.S. 533, 554 (1964). The right to vote is entitled to special constitutional protection as the right to exercise the franchise "in a free and unimpaired manner is preservation of other basic civil rights." *Reynolds*, 377 U.S. at 562. Impairment of a citizen's fundamental right to vote is irreparable injury. The evidence before this Court shows that since early voting was made the law in Florida in 2004, African American voters have disproportionately taken advantage of early voting, even to the extent of becoming habituated to exercising their right to vote by voting early. Additionally, Sunday Voting the last weekend before election day has enabled access and participation in the electoral process for those African American whose ability to vote has been severely curtailed due to various obstacles, *i.e.*, transportation, disabilities, frailties or work/business conflicts. Early voting, including on the Sunday immediately prior to an election, has been an effective measure to alleviate and ameliorate the problems experienced during the 2000 General Election which resulted in the disenfranchisement of thousands of qualified voters in the State of Florida, an effect which fell most heavily upon African American voters. There is no valid State interest in

shortening early voting hours and maintaining the Sunday Voting Ban which is so weighty that it would overcome the undue burden placed on qualified African American voters.

Preliminary injunctive relief should be granted to restore early voting to commence 15 days before election day and allow final Sunday voting. In this case, as set forth below, the Plaintiffs have demonstrated that: (1) there is a substantial likelihood of success on the merits; (2) irreparable injury will be suffered unless the injunction issues; (3) the threatened injury to the Plaintiffs outweigh whatever damage the proposed injunction may cause the Defendants; and (4) if issued, the preliminary injunction would not be adverse to the public interest. *See Forsyth Cnty. v. U.S. Army Corps of Eng'rs.,* 633 F.3d 1032, 1039 (11th Cir. 2011); Local Rule 4.06. Accordingly, Plaintiffs respectfully request that this Court grant Plaintiffs' Motion for Preliminary Injunction.

STATEMENT OF FACTS[2]

I. EARLY VOTING LAW IN FLORIDA AND CHANGES THERETO

A Duval County Election Reform Task Force in 2001 concluded in its final report that: "The cumulative effect of [failures of votes that did not count and voters turned away from the polls in the general election held in November 2000] fell disproportionately upon our African-American population, leading to a concentrated loss of confidence in the system within this important segment of our community." *Duval County, Election Reform Task Force*, "Final Report" (June 12, 2001) at p. 6 (emphasis added) (Exhibit C). The presidential general election held in November 2000 resulted in over 22,000 votes that were not counted in Duval County, *id.*,

[2] Many of the facts set forth herein are set forth more fully in the Complaint (Doc.#1) and in the accompanying affidavits and declarations attached as Exhibits hereto. Many of the facts are of record in the Section 5 Case or would otherwise be admissible at trial. Furthermore, at a preliminary injunction proceeding, the district court may rely upon otherwise inadmissible evidence, including hearsay. *See Sierra Club v. FDIC,* 992 F.2d 545, 551 (5th Cir. 1993).

and numerous other problems were noted requiring a reform of the Florida voting system statewide. *See Bush v. Gore*, 531 U.S. 98, 104 (2000) ("After the current counting, it is likely legislative bodies nationwide will examine ways to improve the mechanisms and machinery for voting"). According to information from the Duval County Supervisor of Elections collected by the JCCI in 2002:

> The 2000 presidential election was decided by 537 votes in the State of Florida. In Jacksonville, 26,909 ballots were declared invalid (4,967 under votes, in which no vote was recorded for President, and 21,942 over votes, in which more than one candidate for President was selected.) Significant disparities emerge when the rates of ballot disqualification are compared to the racial composition of the voters. City Council districts with the fewest black voters had the fewest ballots declared invalid, while districts with the highest percentage of black voters had the highest percentages of ballots declared invalid. The minority-access districts 7, 8, 9, and 10 had two to four times the number of ballots declared invalid of any other districts.

See JCCI 2002, *Beyond the Talk: Improving Race Relations, Study Summer 2002* at 16 (Exhibit D) . The United States Commission on Civil Rights also commissioned a study on whether the rejection of ballots as invalid for the 2000 presidential election in Florida had a disparate impact on the votes cast by African-Americans. Lichtman, Allan J., Report on the Racial Impact of the Rejection of Ballots Cast in the 2000 Presidential Election in the State of Florida (June 2001) http://permanent.access.gpo.gov/lps13588/lps13588/ltrpt.htm . That study found that "(a)n analysis of the entire state using county-level data and at Miami-Dade, Duval, and Palm Beach counties using precinct-level data, demonstrates that blacks were far more likely than non-blacks to have their ballots rejected in the 2000 Florida presidential election … statewide there is a strong positive correlation between the percentage of black registrants in a county and the percentage of rejected ballots… (t)his relationship is statistically significant at levels far beyond the conventional standards used in social science." *Id.* Additionally, the United States

Commission on Civil Rights' own report on voting irregularities in Florida in the 2000 election made the specific finding that the "disenfranchisement of Florida's voters fell most harshly on the shoulders of African Americans. Statewide, based on county-level statistical estimates, African American voters were approximately nine times more likely than white voters to have their ballots rejected in the November 2000 election." United States Commission on Civil Rights, Voting Irregularities in Florida During the 2000 Presidential Election (Approved by the Commissioners June 8, 2001) http://permanent.access.gpo.gov/lps13588/lps13588/main.htm.

In 2004, § 101.657(1)(b), Fla. Stat. (2004) was enacted, providing that:

> Early voting shall begin on the 15th day before an election and end on the day before an election. For purposes of a special election held pursuant to s. 100.101, early voting shall begin on the 8th day before an election and end on the day before an election. Early voting shall be provided for a least 8 hours per weekday during the applicable periods. Early voting shall also be provided for 8 hours in the aggregate for each weekend during the applicable periods.

§ 101.657(1)(b), Fla. Stat. (2004); Chapter 2004-252, § 15, at 14, Laws of Fla. This law mandated early voting and expanded a qualified voter's access to and participation in the political process. Early voting therefore became a defined term in Florida election law. In 2005, § 101.657 was amended again to provide that: "Early voting shall . . . end on the 2nd day before an election. . ." § 101.657(1)(d), Fla. Stat. (2005). Thus, early voting in Florida would end the Sunday immediately before Election Day.

The 2011 Amendments to the Florida Elections Code were introduced as legislation H.B. 1355 on March 7, 2011 (collectively referred to as "HB 1355"). Florida enacted the law that was in effect immediately prior to HB 1355 in 2005, which provided that the State's potential early voting period was 14 days, beginning on the 15th day before an election and ending on the second day before that election. *See* Fla. Laws ch. 2005-277. That law also limited the available early voting hours to exactly 8 hours per day on weekdays and 8 hours in the aggregate over each

weekend, yielding a total of 96 hours of early voting. *See* § 101.657(d), Fla. Stat. (2006). Early voting sites were required to "open no sooner than 7 a.m. and close no later than 7 p.m. on each applicable day." *Id.* Local supervisors were free to select the specific voting hours for each voting day as they saw fit. *Id.*

The Supervisor of Elections for Leon County, described the atmosphere leading to the passage of the early voting changes to Florida law as follows:

> On April 26, 2011, I attended the Senate Budget Committee hearing on SB 2086 in order to testify against the bill. This hearing was the last opportunity to provide public comment before SB 2086 (and HB 1355) went to the Senate floor. The morning of the hearing, I confirmed with the Committee staff that the Committee could meet until 1pm. I attended the hearing and, along with thirty-six other individuals, filed a comment card requesting an opportunity to testify on the bill. At 11:52 am, HB 1355 came up for public comment. The Committee Chair then announced that the Committee would conclude public comment and vote at a time certain of 11:55 am. Only one member of the public was allowed to speak before public comment was cut off and the vote held. I (along with 35 others) was not given the opportunity to testify.

Affidavit of Ion V. Sancho ¶8 (Exhibit E). Mr. Sancho found this strange taking into account his 23 years of experience dealing with the Florida Legislature concerning many other elections bills. *Id.* ¶9. He believed it was very uncommon to provide such an abbreviated opportunity for public comment on any bill, and very unusual that he and David Stafford, the Supervisor of Elections for Escambia County and the President of the FSAS were prevented from testifying.[3]

[3] Mr. Stafford first saw the amendments to change early voting late the day before the amendments were taken up by the Senate Rules Committee. David Stafford Dep. at p. 112, ln. 18- p. 113., ln. 4 (Exhibit F). He testified that the amendment was introduced so late there was little time to analyze or prepare comments regarding the proposed changes to the early voting law. *Id.* at p. 114, ln. 17-25, p. 115, ln.1-11. Mr. Stafford recalled that the Senate Budget Committee hearing which was taking up HB 1355 was packed but that only one person was able to comment on it. *Id*. at p. 140, ln. 1- p. 141, ln.10. Mr. Stafford further testified that had he been able to speak he would have expressed the concerns raised by the FSASE regarding early voting law changes and the other changes in the Act. *Id.* at p. 141, ln.19-25. Finally, Mr. Stafford testified that in his experience, it was unusual that HB 1355 was effective immediately upon being signed by the Governor. *Id.* at p. 162, ln. 4- p. 163, ln.13. As a supervisor of elections, it

Id. Mr. Sancho also testifies that during the April 15, 2011 Senate Rules Committee hearing, Senator Diaz de la Portilla argued that the reduction in early voting days was warranted because "more often than not, and this has been the history in particularly large urban counties…there is a trickle of two or three people a day" who utilize early voting at a very high cost to keep polls open. *Id. ¶12.* However, Mr. Sancho believe that that claim is inaccurate and cannot be reconciled with his experience with the Leon County in-person early voting data in the 2008 general election where there were a large number of in-person early voters in the 2008 general election. *Id.* Furthermore, Mr. Sancho believes that the costs of accommodating those voters will be much greater after implementing the early voting reductions of HB 1355.[4] *Id.* David Stafford, Supervisor of Elections for Escambia County and former president of the FSASE, testified that offering the same number of early voting hours in the compressed early voting period under HB 1355 would result in increased costs to his office of approximately $13,000 to $14,000 per election. Deposition of David Stafford at p. 89, line 5-18. The former Miami-Dade County Supervisor of Elections, Lester Sola, also believed that there would be no cost savings, and instead increased cost and loss of efficiencies from the changes to the early voting law. Deposition of Lester Sola at p. 35, ln. 2- p. 36, ln.17 (Exhibit G). Finally, the State Senate's own staff report shows "indeterminate" information on cost to the HB 1355 changes.

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would be preferable to have time to implement the changes especially if certain changes required preclearance. *Id*. at p. 165, ln. 3-16.

[4] Mr. Sancho further testified that the cost of early voting would actually increase due to HB 1355: "Based on my review of Leon County voting patterns from past elections, I believe that during early voting, it will be necessary for polls to remain open for the full twelve-hour period per day allowable under HB 1355 to permit all voters the opportunity to vote. Keeping the polls open for twelve hours per day for eight days instead of eight hours per day for the equivalent of twelve days will increase – not decrease – costs." Sancho Aff. ¶16.

By letter dated April 29, 2011, the Florida State Association of Supervisors of Elections ("FSASE") commented on Senator Diaz de la Portilla's proposed amendments to the early voting law, in pertinent part, as follows:

> During the last two General Elections **early voting has been a tremendous success** in Florida and the voters have responded by voting in significant numbers during the time allocated. The Florida State Association of Supervisors of Elections believes that maintaining the 15-day timeframe best serves the voting public. As always, we also strongly support added flexibility on the types of locations we may use for early voting to better serve voters. . .

See FSASE 4/29/2011, Submission to Florida State Senate (Exhibit H) (emphasis added).

FSASE also advised the Florida Senate on April 18, 2011, of the following concerns regarding the proposals that considered shortening early voting days:

> Section 35. This requires that early voting begin seven days before the election, rather than 15. While this may be workable with respect to primary elections**, not having the 15-day timeframe for the General Election could result in crowding and confusion at early voting sites and on Election Day at the precincts. Maintaining 15 days for the General Election is imperative to a smooth General Election in the state**. Flexibility in choosing early voting locations is critical.

FSASE 4/18/2011 Memorandum to Senator Miguel Diaz de la Portilla et al. From Ronald A. Labasky, General Counsel at 2 (emphasis added)(Exhibit I).

The deposition testimony of the State of Florida in the Section 5 Case pursuant to Fed. R.Civ.Pro. 30(b)(6), elicited the following concerning the lack of legislative purpose behind, *inter alia*, early voting:

Q. How does Florida know what the legislative purpose behind those two changes [early voting and change of polling places] was?

A. By the legislative record, which is through committee meetings as recorded, also floor debates that also have audio recordings as well as visual on that one and the plain language of the statute. . .

Q. Okay. Did Florida conduct any study or analysis to determine the effect that the mover's change or the early voting change would have?

A. No.

Rule 30(b)(6) Deposition of the State of Florida, *Florida v. U.S.*, p. 163, line 21- p. 164, line 1; 168, lines 11-14 (Exhibit J).[5]

Florida State Senator Mike Bennett made a statement during the Senate Floor debate on HB 1355 that "he did not want to make it easier for people to vote, but rather that it should be harder to vote—as it is in Africa," which the judicial panel in the Section 5 Case found "certainly can be read" to have racial undertones. 2012 WL 3538298*44. Florida State Senator Arthenia Joyner testifies by Declaration that Senator Bennett's statement followed her comments on the Senate Floor on May 5, 2011, where she explained that early voting worked, that the decrease in early voting would not save money and challenged Senator Diaz de la Portilla to refute those statements, which he did not. Declaration of Arthenia Joyner (Exhibit J) ¶¶15-16. Senator Joyner concluded based upon the context of the debate, including Senator Bennett's statement and the failure of other legislators to provide any evidence to support changes to the election law, that HB 1355 was "a blatant attempt to suppress the vote of groups who have, in the past, voted against the Senate leadership, including African-American and Hispanic voters, elderly voters and college students." *Id.* at ¶17.

James Greer, former chairman of the Republican Party of Florida, testified under oath that while Republican Party chair in December 2009, he met with party officials and "they talked

[5] The court noted that "the parties [in the Section 5 Case] conducted extensive discovery, and, after the discovery period closed on February 29, 2012, continued to take *de bene esse* depositions and submit declarations by their respective experts. By late May, the parties had submitted proposed conclusions of law and findings of fact. They then requested that we forego a live trial and decide the case on the basis of the written record alone. The court held five hours of oral argument on June 21, followed by multiple rounds of supplemental briefing on issues raised during the argument." *Florida v. U.S.*, 2012 WL 3538298*4. Deposition testimony, affidavits and declarations from one case are properly considered in another case. *Anglin v. Household Retail Services, Inc.*, 17 F. Supp. 2d 1251, 1254 (M.D. Ala. 1998). S*ee Matter of Melton,* 39 B.R. 762 (Bkrtcy.N.D.Ga.1984).

about not letting blacks vote . . ." Deposition of James A. Greer (May 24, 2012 in the matter of *James Greer v. Republican Party of Florida et al.)* at 368-69; 608-609 (excerpts attached as Exhibit L). Mr. Greer also testified about being upset as a result of a meeting where "suppressing black voters in Florida" was discussed. *Id.* at 387.

II. DISPROPORTIONATE EFFECT OF EARLY VOTING CHANGES ON AFRICAN AMERICAN CITIZENS

In *Florida v. U.S.*, the three judge panel unanimously concluded that Florida failed to meet its burden of showing that retrogression would not occur if the covered counties not only reduced the number of early voting days as required by the new law, but also reduced their total early voting hours from 96 to 48 (regardless of the specific hours chosen). Thus, the court did not preclear Florida's early voting law under Section 5 of the Voting Rights Act of 1965, as amended. 2012 WL 3538298*47. The Court determined that minority voters would be disproportionately affected by the changes in early voting procedures because they disproportionately use early in-person voting. *Id.* Relying further on the findings of Professor Gronke, the Court found that "African-American voters used the repealed days of early voting at rates nearly *double* those of white voters in 2008. The difference between these percentages 'far exceeds the . . .statistical significance criterion.'" *Id.* *18, citing Am. Expert Report of Prof. Gronke; *De Bene Esse* Dep. of Prof. Gronke at pp. 34-36 (Exhibit M) ("I think that history will show that 2008 ha[d] a particularly high rate [of African-American early voting], but that that adoption rate by African-Americans had a lasting impact, and that the higher rate of usage will continue.").

Professor Daniel Smith, Plaintiffs' expert herein, makes findings consistent with those determined by the evidence in the *Florida* case, regarding the disproportionate effects of the early voting changes on African American voters in Florida:

- African American registered voters, more than any other racial or ethnic group in Florida, have come to rely on voting early in the Sunshine State, Smith Affidavit at ¶ 12 (Exhibit N);

- In the 2008 general election, African Americans cast 22% percent of the total early vote over the two-week period, even though blacks comprised just 13% of the state's total registered voters, *id.*

- African Americans in Florida in the 2008 general election cast more ballots during the early voting period than cast ballots on election day or via an absentee ballot, combined, *id;*

- African Americans accounted for roughly 34% of the total early votes cast on the final Sunday of early voting (November 2, 2008), *id.*;

- In the 2010 general election, the number of African Americans who cast early ballots on the final Sunday of voting continued to be disproportionately high, *id.*; and

- African Americans represented roughly 12% of the total voters in the 2010 midterm election, but they cast 23% of the votes on the final Sunday, *id.*

The extensive evidence developed in *Florida v. U.S.* also confirms Professor Smith's findings:

- The proportion of African American usage of early in-person voting in Florida "has exceeded White usage of early in-person voting in four of five [recent] federal elections," and "substantially exceeded White usage in both the 2004 and 2008 presidential elections," Am. Expert Report of Prof. Paul Gronke;

- For the 2008 general election, more than half (54%) of African American voters in Florida cast ballots using early in-person voting -- *twice* the rate of white voters, Am. Expert Report of Prof. Gronke, *see* (Expert Report of Dr. Stewart, Exhibit O);

- Although rates of early voting declined across the board in 2010, the African American usage rate still exceeded the white rate by a factor of about one-third in the 2010 general election, Am. Expert Report of Prof. Gronke .

African American voters disproportionately used the first five days of the preexisting early voting period -- *i.e.*, the Monday through Friday of the week that falls two weeks before Election Day -- all of which will now be eliminated under HB 1355. In the 2008 general

Presidential election, approximately 17.25% of African American voters in the covered counties voted early by in-person ballot during the first five days of early voting (the so-called "repealed days" of early voting), compared to only 9.3% of white voters. Am. Expert Report of Prof. Gronke; *see* Expert Report of Dr. Stewart. Thus, African American voters used the repealed days of early voting at rates nearly *double* those of white voters in 2008. The difference between these percentages "far exceeds the. . . statistical significance criterion." Am. Expert Report of Prof. Gronke.

County supervisors of elections ("SOE") administer the elections in each of Florida's sixty-seven counties. These SOEs are elected constitutional officers, *see* § 98.015(1), Fla. Stat., and are charged with, among other things, conducting elections, verifying, entering, and updating voter registration information, transmitting updated voter histories to the Department of State after an election, training poll workers, and reporting any instances of voter fraud. *See* §§ 98.015, 98.0981, 101.001-102.171; *see also Florida v. U.S.*, 2012 WL 3538298. In addition to the FSASE concerns, certain county supervisors of elections have detailed concerns with the changes to the early voting laws. Florida election officials have testified that expanded weekend hours would provide increased accessibility for many minority voters.

A change in early voting by the elimination of the first week of early voting to the remaining early voting days would lead to substantially increased lines, overcrowding, and confusion at the polls, which would in turn discourage some reasonable minority voters from waiting to cast their ballots. *See* Dep. of Harry Sawyer, Monroe County SOE at 170-71, 183-87 (Exhibit P). Election officials in Florida have testified that an extensive early voting period is necessary because Florida's "electoral infrastructure is completely maxed out," House State Affairs Comm. (Apr. 1, 2011) (Statement of Ion Sancho, Leon County SOE)(Exhibit Q) and the

State "would not be able to process record numbers of voters" in a substantially shorter time frame, (Senate Rules Comm. (Apr. 15, 2011) (Sancho Statement)). Florida legislators, too, have warned that a "shortened period of early voting will cause congestion and long lines in populous areas of the State, including predominantly African-American neighborhoods in Hillsborough County," and will thereby "discourage [minority] voters from voting." Decl. of Sen. Joyner ¶31.

Florida was unable to rebut in the Section 5 Case, "either the testimony of the defendants' witnesses or the common-sense judgment that a dramatic reduction in the form of voting that is disproportionately used by African-Americans would make it materially more difficult for some minority voters to cast a ballot than under the prior law." 2012 WL 3538298*26. In addition to the affidavits and declarations of record from Plaintiffs and others presented in the instant case, there is substantial other evidence showing that an undue burden on voting rights would be created by the changes to the early voting laws. Professor Smith summarized his findings on the elimination of Sunday voting just before election day as follows:

> In conclusion, it is my opinion that by eliminating the final Sunday of early voting, that H.B. 1355 likely will have a negative impact on the likelihood of African Americans turning out to vote in Duval County, as well as in the other counties in Florida that allowed early voting the final Sunday before election day, thereby depressing African American turnout in future elections. Furthermore, thousands of African Americans are registered to vote in Duval County, and substantial numbers of African Americans have become habituated to voting on the Sunday immediately prior to election day, ever since the Republican state legislature expanded early voting in 2004. It is my opinion, therefore, that the enforcement of H.B. 1355's changes to early voting laws will have the effect of depressing African American voter turnout in future elections.

Smith Affidavit at ¶ 19. Furthermore, having obtained even more current voting information on final Sunday voting, Professor Smith analyzed early voting for the May 2011 mayoral election in Duval County and found additional evidence that African American voters continue to rely on early voting :

> [A]n examination of the 2011 Jacksonville mayoral contest reveals that African Americans rely heavily on early voting, particularly the final Sunday of early voting, even in low-turnout, municipal elections. . . Of the approximately 38,000 registered voters in Duval County who voted early over the two-week early voting period prior to the May 17, 2011 mayoral runoff, African Americans cast roughly 34% of the early votes, even though they comprised less than 30% of the electorate. **What is most notable, though, is the huge spike in early votes by African Americans on the final day of early voting, Sunday, May 15, 2011. In fact, on that final Sunday of early voting, even though they comprise a minority of registered voters in Duval County, more African Americans came to the polls to vote in the runoff election than did whites.**

Id. at ¶ 18 (emphasis added).

Other evidence in the record confirms Professor Smith's findings that African American voters rely on final Sunday voting:

- Many African-American churches organize "souls to the polls" drives to transport their congregants to early voting sites on the Sunday immediately before Election Day, Joyner Decl.;

- Plaintiffs DCDEC and SCLC Jacksonville, in coordination with African American churches, the NAACP and other civil rights organizations, have targeted the last Sunday before Election Day for community-wide, sustained "get out the vote" ("GOTV") campaigns to mobilize African American voters to the polls. Bridges Affidavit ¶ 9; SCLC Affidavit ¶ 12-13. Through the churches, African Americans were encouraged to attend worship services and then go vote, with transportation being provided for those who needed it. This regular practice was called "Souls to the Polls." Reginald Gundy Affidavit ¶¶ 9-10 (Exhibit R).

- As part of "Souls to the Polls, it was the customary practice of Duval County pastors to make plans to vote with members of their congregations immediately after Sunday services, which was not only a convenient time for the pastors to vote due to their busy schedules, but also a convenient time for most of their parishioners to vote. Bridges Affidavit ¶¶ 9, 12; SCLC Affidavit ¶ 12; Gundy Affidavit ¶ 10; Harris Affidavit ¶¶ 8-10. Thus, voting early on the Sunday before Election Day allowed churches to encourage and assist their entire congregations to vote and to efficiently arrange for the transportation of church members to the polls as a group. Gundy ¶¶ 9, 11; Harris ¶¶ 8-10.

- Plaintiff Ingrid Fluellen explained that "Souls to the Polls" was crucial to African American voters who work six days a week and/or have inflexible working hours during the work week to engage with their community and exercise their right to vote. Fluellen Declaration ¶ 9. Therefore, "Souls to the Polls" was the

culmination of a significant and sustained effort to engage the African American community in the democratic process. Fluellen Declaration ¶¶ 9-10.

- The elimination of "Souls to the Polls" Sunday voting will discourage voters, cause confusion and lead to African American voters being disenfranchised. Bridges Affidavit ¶¶ 14-15; Fluellen Declaration ¶10.

- Sunday is therefore disproportionately used by African-American voters in jurisdictions that have early voting on that day, Am. Expert Report of Prof. Gronke ;

- A two-week early voting period is important to get-out-the-vote (GOTV) efforts in minority communities, Slater Decl. (Exhibit CC), Decl. of Rev. Charles McKenzie, Florida state liaison for the Rainbow PUSH Coalition (Exhibit DD), Decl. of Ella Kate Coffee, African-American resident and GOTV volunteer in Hillsborough County (Exhibit EE) ; and

- Such efforts are important in enabling African Americans "who want to vote but need help getting to the polls" to exercise the franchise; Coffee Decl.

In sum, the facts demonstrate the discriminatory impact that the early voting law changes will have on African American voters.

III. PLAINTIFFS' HAVE BEEN INJURED BY THE CHANGES TO FLORIDA'S EARLY VOTING LAW

The Southern Christian Leadership Conference, Jacksonville Chapter ("SCLC Jacksonville"), is a Florida based civil rights organization and a branch of the state and national Southern Christian Leadership Conference. Affidavit of Pastor Reginald Gundy (Gundy Aff.) (Exhibit R). Plaintiff Duval County Democratic Executive Committee (DCDEC") is a Jacksonville, Florida based political organization. Affidavit of Travis Bridges (Bridges Aff.) (Exhibit S). The changes to the early voting law in Florida have frustrated the mission of SCLC Jacksonville and DCDEC, because those groups are required to expend resources to educate members about the early voting changes and practices at the expense of the groups' regularly conducted programs and activities. *See generally* Gundy Aff. (Ex. R) and Bridges Aff. (Ex. S).

SCLC Jacksonville and DCDEC also have individual members who are personally affected by the changes to Florida's early voting law. *Id.*

Changes to the early voting law have directly injured third-party organizations such as SCLC Jacksonville and the DCDEC. One of the primary missions of these organizations is to empower citizens, especially African American citizens, in civic and democratic endeavors and to assist them in, among other things, exercising their right to vote. Affidavit of Travis L. Bridges on behalf of DCDEC (hereinafter "Bridges Affidavit") ¶ 4; Affidavit of Pastor Reginald L. Gundy on behalf of SCLC Jacksonville (hereinafter "SCLC Affidavit.") ¶ 6 (Exhibit FF). In order to achieve these goals, these organizations regularly engage in voter education, registration and mobilization efforts, including holding voter registration drives, notifying voters of the schedule and methods by which they may vote, including early voting, and transporting voters to the polls during early voting periods and on Election Day. Bridges Affidavit ¶ 4; SCLC Affidavit ¶ 6.

As part of voter mobilization, these organizations are actively involved in extensive, community-wide get-out-the-vote ("GOTV") campaigns in minority communities, which require hours of preparation and planning to coordinate. Bridges Affidavit ¶¶ 8-10. GOTV campaigns also require the assistance of hundreds of volunteers to engage the voters, create and maintain staging areas and to provide transportation. Bridges Affidavit ¶¶ 6, 8; SCLC Affidavit ¶¶ 8-9, 13. Over the years, this annual event has provided stability for voters who have come to rely on the transportation services provided during early voting periods. Bridges Affidavit ¶ 10. These organizations will be directly injured by the Act's elimination of five days of early voting and early voting on the Sunday before Election Day. Having a two-week period for GOTV efforts, including the Sunday before Election Day, is important in African American communities for

several reasons. Bridges Affidavit ¶¶ 11-12; SCLC Affidavit ¶ 13. First, it gives these organizations sufficient time to find and contact African American voters who want to vote but need help getting to the polls and to arrange the logistics of transportation for these voters, who disproportionately do not own a vehicle, in coordination with other organizations and non-profit groups providing these services. Bridges Affidavit ¶ 8; SCLC Affidavit ¶¶ 12-13. Also, a two-week GOTV is important because rides to the polls are typically organized during the work day and these entities rely almost entirely on volunteers, who may not be available during the work week because of their own employment. Bridges Affidavit ¶ 8; SCLC Affidavit ¶ 12. In view of the all-volunteer structure of these organizations, there will be insufficient time to telephone or otherwise contact voters and make arrangements to transport people to the polls before Election Day. Bridges Affidavit ¶ 12; SCLC Affidavit ¶ 12.

The DCDEC, SCLC Jacksonville and other third-party organizations have selected the last Sunday before Election Day for a community-wide, sustained GOTV campaign to mobilize voters. Bridges Affidavit ¶ 9; SCLC Affidavit ¶ 13. Sunday was chosen because most voters have the day off and it gives these organizations the most time to organize the mobilization of thousands of voters in coordination with African American churches, the NAACP and other civil rights organizations. Bridges Affidavit ¶ 9. Through the churches, African Americans were encouraged to attend worship services and then go vote, with transportation being provided for those who needed it. Bridges Affidavit ¶ 9; SCLC Affidavit ¶ 12; Affidavit of Lee Edward Harris ("Harris Affidavit") ¶ 9-10 (Exhibit T).

The restrictions on early voting as set forth in the Complaint have frustrated the mission of the DCDEC and SCLC Jacksonville because these organizations will be required to expend resources to educate the public about the restrictions on early voting and, in particular, the

elimination of early voting on the Sunday before Election Day, in order to combat the effect these restrictions will have on African American voters. Bridges Affidavit ¶¶ 11-12; SCLC Affidavit ¶ 12. At the expense of regularly conducted programs and activities, the DCDEC and SCLC Jacksonville will have to divert funds, members, volunteers and other resources to educate voters about the changes in early voting, their options if they cannot vote on Election Day, and find other methods to transport voters to the polls on the days early voting is still available. Bridges Affidavit ¶¶ 11-12 ; SCLC Affidavit ¶ 10. Thus, these organizations will have to spent additional time and resources, which were previously used to empower and mobilize voters, to educate them on the new restrictions on early voting, and to make sure they still vote despite the restrictions. Bridges Affidavit ¶ 13; SCLC Affidavit ¶ 10.

In addition, the restrictions on early voting, and particularly the Sunday before Election Day, will result in more crowding at the polls on the few days early voting is still available, leading to longer lines and some voters being discouraged and deciding not to vote. Bridges Affidavit ¶ 14; SCLC ¶ 20. Overcrowding at the polls is especially a problem in many African American communities that are located in highly populated areas. Bridges Affidavit ¶ 14. Since a substantial number of African American voters like to vote early, early voting allows minority voters to vote early and have any problems with their registration or ballot remedied before Election Day, so they still have an opportunity to return to the polls and vote. Bridges Affidavit ¶ 14. Thus, organizations like the DCDEC have significant concerns that despite the diversion of resources to re-educate voters as to the restrictions on early voting, these groups will be unable to offset the confusion the restrictions have caused. Bridges Affidavit ¶ 15.

The DCDEC and SCLC Jacksonville will also be indirectly injured by the changes to the early voting law because they have individual members who will be personally harmed by the early voting restrictions. Some African Americans members work six days a week and can only vote on Sunday, or have had the customary practice for a number of years of voting on the Sunday before Election Day because their church previously provided transportation to the polls after Sunday services. SCLC ¶ 14. Also, many poor and minority voters have jobs where they work an inflexible schedule, thus voting early on the Sunday before Election Day or having more days for early voting is important to these voters. Bridges Affidavit ¶ 14.

Plaintiff Congresswoman Corrine Brown, a member of the United States House of Representatives from the Third Congressional District, is African American and resides in the City of Jacksonville, Duval County, Florida. Affidavit of Corrine Brown (Brown Aff.) (Exhibit U). Congresswoman Brown has constituents in Jacksonville, Florida and regularly educates them regarding voting issues, including changes to voting laws like the changes to the early voting laws of Florida. *Id.* The changes to the early voting law in Florida have frustrated Congresswoman Brown's mission of voter education, and Congresswoman Brown is required to expend resources to educate her constituents about the early voting changes and practices at the expense of her other regularly conducted programs and activities. *See generally id*. Congresswoman Brown also has constituents who are affected by the changes to Florida's early voting law. *Id.*

Eddie Faison is representative of the burden placed on voters by the reduction in early voting. Eddie Faison Affidavit ¶¶ 1-9 (Exhibit V). Mr. Faison is a short-haul truck driver who drive hauls within a 300 mile radius of Jacksonville, Florida. *Id.* at ¶ 5. Due to the nature of his business, Mr. Faison cannot be sure of his availability to vote on election day unless he refuses

work and suffers a financial burden. *Id.* at ¶¶ 5-9. In fact, the only day that Mr. Faison is available to vote without burden is on Sunday, when he is always in Jacksonville due to his duties as pastor at New Emmaus Missionary Baptist Church located in Jacksonville, Florida. *Id.* at ¶¶ 5-9. Consequently, Mr. Faison has voted on the Sunday before election day during the early voting period. *Id.* The reduction in the early voting period has served to significantly reduce Mr. Faison' ability to exercise his franchise. *Id.*

Individual Plaintiffs have had their rights burdened and infringed by the change in the early voting law. *See* Affidavit of Pastor Reginald Gundy; Affidavit of Jerry West (Exhibit W); Affidavit of Lee Harris; Affidavit of Valerene Weeks (Exhibit X); Affidavit of Elaine Ford Jackson (Exhibit Y); Affidavit of Frances R. Simmons (Exhibit Z); Affidavit of Ingrid Fluellen (Exhibit AA); and Affidavit of Ezekiel C. Mann (Exhibit BB). The individual Plaintiffs are African American citizens of the State of Florida residing in the City of Jacksonville, Duval County, Florida, and are legally registered and duly qualified to vote in local, state and national elections in Florida.

As with Mr. Faison, many of the Plaintiffs, and the people they represent, are unable to vote on election day for varying reasons such as: operating businesses which would potentially suffer financial losses, medical issues which limit ability to vote on election day, and childcare and work conflicts. West Affidavit ¶¶ 4-8, Mann Affidavit ¶¶ 6-7, Weeks Affidavit ¶¶ 5-9. Additionally, many other Plaintiffs, and the people they represent, aid other voters who lack the capacity to reach the polls without assistance, and that assistance would be hindered by the reduction in early voting. West Affidavit ¶ 9 and Fluellen Affidavit ¶¶ 7-9.

LEGAL ARGUMENT

I. THE LEGAL STANDARD FOR A PRELIMINARY INJUNCTION

Four requisites must be established by the moving party in order for a court to issue a preliminary injunction: (1) there is a substantial likelihood of success on the merits; (2) irreparable injury will be suffered unless the injunction issues; (3) the threatened injury to the Plaintiffs outweigh whatever damage the proposed injunction may cause the Defendants; and (4) if issued, the preliminary injunction would not be adverse to the public interest. *See Forsyth Cnty. v. U.S. Army Corps of Eng'rs.*, 633 F.3d 1032, 1039 (11th Cir. 2011). As set forth in the Complaint, in the law and argument presented below and shown in the affidavits and declarations submitted in this matter, the Plaintiffs will met all the requisites for the issuance of a preliminary injunction prohibiting the Defendants from enforcing the early voter law changes in the State of Florida or, alternatively, in Duval County, Florida for the November 6, 2012 general election.

II. THERE IS A SUBSTANTIAL LIKELIHOOD THAT PLAINTIFFS WILL ULTIMATELY PREVAIL ON THE MERITS OF THEIR CLAIMS

A. Plaintiffs' Challenges to the Early Voting Law Changes will be upheld.

The 2011 changes to Florida's early voting law been recently found to have retrogressive effect on African American voters in violation of Section 5 of the Voting Rights Act and accordingly preclearance of those changes has been denied. *Florida v. U.S.*, 2012 WL 3538298 (D.D.C.). "To obtain judicial preclearance, the jurisdiction bears the burden of proving that the change 'does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color.'" *Reno v. Bossier Parish School* Board, 520 U.S. 471, 477 (1997). In *Reno*, the Supreme Court grappled, in part, with the issue of certain differences between Section 5 and Section 2 of the VRA. However, the Court did note the importance of courts carefully evaluating evidence the impact of official action, such as the changes in the instant case to early voting, for evidence of discriminatory intent:

> As we observed in *Arlington Heights*, 429 U.S., at 266, 97 S.Ct., at 563-564, the impact of an official action is often probative of why the action was taken in the first place since people usually intend the natural consequences of their actions.

Reno, 520 U.S. at 487.

In the case at hand, the rights of Plaintiffs and/or certain Plaintiffs' members have been violated by the changes to the early voting law. This is consistent with the findings of in *Florida v. U.S.*, imposing burdens on voting access that have a disproportionate effect on African Americans. The evidence shows that the changes were without any justification. Plaintiffs' rights under Section 2 of the VRA are violated as the totality of the evidence demonstrates that their right to votes has been denied or abridgement on account of race or color. Under Section 2, discriminatory intent is not required to be shown. Furthermore, the Equal Protection Clause of the Fourteenth Amendment and the Fifteenth Amendment to the United States Constitution guarantee African American voters a substantive right to participate equally with other voters in the electoral process and also guarantees African American citizens that their right to vote shall not be denied or abridged by any State on account of race or color. Those rights have been denied the Plaintiffs by changes to the early voting law.

Florida and its officials may not discriminatorily or arbitrarily impose disparate treatment on qualified voters as a result of their race or color. Accordingly, Plaintiffs have a strong likelihood of success on the merits of their claims.

1. Violation of Plaintiffs' Rights Under Section 2 of the VRA

Section 2 of the VRA, codified at 42 U.S.C. § 1973, prohibits the imposition of any voting qualification or prerequisite to voting or standard, practice, or procedure ... by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or [on account of membership in

a language minority group]. 42 U.S.C. § 1973(a). The statute further provides that this prohibition has been violated if "the totality of the circumstances" indicate that "the political processes leading to nomination or election ... are not equally open to participation by members of a [protected class] in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." *Id.* § 1973(b). Paragraph (b) was added to § 2 by Congress in 1982 "to restore the 'results test'—the legal standard that governed voting discrimination cases prior to [the Court's] decision in *Mobile v. Bolden*," 446 U.S. 55 (1980). *Thornburg v. Gingles*, 478 U.S. 30, 44 fn. 8(1986), citing S.Rep. No. 97–417, at 15–16. Under the "results test," a plaintiff can prevail on a § 2 claim by showing only that "a challenged election law or procedure ha[s] the effect of denying a protected minority an equal chance to participate in the electoral process." *Id.* (citing S.Rep. No. 97–417, at 16). Plaintiffs "are not required to demonstrate that the challenged electoral law or structure was designed or maintained for a discriminatory purpose." *Id.* "The essence of a § 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by [minority] and white voters to elect their preferred representatives ." G*ingles*, 478 U.S. at 47.

There are two distinct types of discriminatory practices and procedures prohibited by Section 2: "those that result in 'vote denial' and those that result in 'vote dilution.'" *Burton v. City of Belle Glade*, 178 F.3d 1175, 1196 (11th Cir. 1999). Section 2 was amended to clarify that a violation can be shown through discriminatory results alone. *Id*. When a state uses a "standard, practice, or procedure" that results in the denial of the right to vote on account of race", Section 2 is violated. *Id.* at 1197-98, *quoting* 42 U.S.C. § 1973(a). To prevail, plaintiffs must prove that, "under the totality of the circumstances, ... the political processes ... are not

equally open to participation by [members of a protected class] ... in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." *Id.* at 1198, citing 42 U.S.C. § 1973(b). In making this determination, "a court must assess the impact of the contested structure or practice on minority electoral opportunities 'on the basis of objective factors.' " *Id., quoting Gingles*, 478 U.S. at 44. Further, the factors listed by the *Gingles* Court from the Senate Record are not exhaustive and there is no requirement to prove any particular number of factors in order to prevail. *Gingles*, 478 U.S. at 45.

In the case at hand, Plaintiffs bring their Section 2 claim for vote denial. The result of changes to the early voting law is to deny African American voters an early voting period that had been substantially utilized and relied upon. Plaintiffs' expert, Professor Smith, provides significant evidence that the changes in the early voting law enhances the opportunity for discrimination against African American voters, Smith Aff. ¶ ¶ 11, 12, 15, 17, 18, and tends to suggest that Plaintiffs are being denied the right to vote on account of their race due to the shortening of the early voting period and the prohibition on final Sunday voting. *Id.* The reliance and "habituation" of African American voters to early voting as it existed prior to HB 1355 is opined on by Professor Smith, who concludes with regard to Duval County voters:

> Facing an array of obstacles limiting their ability to cast a vote on a Tuesday—the traditional election day—or even voting an absentee ballot, thousands of African Americans in Duval County have found it much more convenient to vote early, especially on the final Sunday before election day, just as the state legislature had intended when it voted to expand early voting in 2004.

Id. ¶¶ 12-13. In addition, the testimony of other experts and witnesses establish that African American voters utilize and are reliant upon the full 12 days of early voting ending on the final Sunday. *See supra*. Finally, the judicial panel in *Florida v. U.S.* determined that changes to the

early voting procedure required by HS 1355 would result in a retrogressive effect on African American voters and, therefore, could not be precleared. WL 3538298*47.

In evaluating the "totality of the circumstances" here, there is substantial evidence that the changes to the early voting law required by HB 1355 results in a new early voting scheme that has the effect of denying African American voters, a protected minority, an equal chance to participate in the electoral process. It is beyond dispute that there is a history of voting problems in Florida that had a disproportionate effect on African Americans; in particular the 2000 general election for president. The introduction of early voting created a procedure that was disproportionately utilized and relied upon by African American voters; such utilization was shown in Duval County as late as May 2011. The proper remedy in this matter is to restore the prior early voting procedure, allowing early voting to begin 15 days prior to election day and final Sunday voting. Based upon the foregoing, Plaintiffs have a substantial likelihood of success on their Section 2 VRA claim and the preliminary injunction should be granted.

2. Violation of Plaintiffs' Rights Under the Fourteenth and Fifteenth Amendments

Section 1983 provides a cause of action for constitutional violations under color of state law. *See Burton v. City of Belle Glade*, 178 F.3d 1175, 1187-88 (11th Cir. 1999). To obtain relief under the Fourteenth and Fifteenth Amendments the plaintiffs must show that the challenged act had a discriminatory purpose and effect. *Reno*, 520 U.S. at 481; *Voter Information Project, Inc. v. City of Baton Rouge*, 612 F.2d 208, 212 (5th Cir.1980).[6] *See also Davis v. Bandemer*, 478 U.S. 109 (1986) (plurality op.) (a plaintiff alleging a violation of the

[6] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981)(en banc), the Eleventh Circuit adopted as binding precedent all the decisions of the former Fifth Circuit handed down prior to the close of business on September 30, 1981.

Equal Protection Clause of the Fourteenth Amendment must "prove both intentional discrimination against an identifiable political group and an actual discriminatory effect on that group"). Discriminatory purpose may be established by proof that race was a substantial or motivating factor in decisions and practices. *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 265-66 (1977). "This is not to say that the necessary discriminatory racial purpose must be express or appear on the face of the statute, or that a law's disproportionate impact is irrelevant in cases involving Constitution-based claims of racial discrimination" since a statute otherwise neutral on its face, cannot be applied so as to discriminate on the basis of race. *Washington v. Davis*, 426 U.S 229, 241 (1976).

The Supreme Court has held that "[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. The impact of the official action whether it 'bears more heavily on one race than another,' *Washington v. Davis*, 426 U.S., at 242, 96 S.Ct., at 2049 may provide an important starting point." *Arlington Heights*, 429 U.S. at 266. The Court in *Arlington Heights* also held that:

> *Davis* does not require a plaintiff to prove that the challenged action rested solely on racially discriminatory purposes. Rarely can it be said that a legislature or administrative body operating under a broad mandate made a decision motivated solely by a single concern, or even that a particular purpose was the "dominant" or "primary" one. In fact, it is because legislators and administrators are properly concerned with balancing numerous competing considerations that courts refrain from reviewing the merits of their decisions, absent a showing of arbitrariness or irrationality. But racial discrimination is not just another competing consideration. When there is a proof that a discriminatory purpose has been a motivating factor in the decision, this judicial deference is no longer justified.

Id. at 265-266 (fn omitted).

Each citizen has a constitutionally protected, but not absolute, right to participate in elections on an equal basis with other citizens in the jurisdiction. *Dunn v. Blumstein*, 405 U.S.

330, 336 (1972). While a state may regulate access to the franchise, when such regulations are challenged pursuant to the Fourteenth Amendment, the court will apply "more than one test, depending upon the interest affected or the classification." *Id*. at 335-36. This circumstance has led to the development of a more flexible standard. *Common Cause/Georgia v. Billups*, 554 F.3d 1340, 1352 (11th Cir. 2009), quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983); *Burdick v. Takushi*, 504 U.S. 428, 434 (1992); *Crawford v. Marion Cnty. Election Board*, 553 U.S. 181, 190 n. 8 (2008).

Under the *Crawford* analysis, first, the State's justifications for the burden imposed upon the right to full and equal participation in elections by the rule is identified and evaluated and then the court "must make the 'hard judgment' that our adversary system demands." *Crawford,* 553 U.S. at 190. Thus, a severe burden must be "narrowly drawn to advance a state interest of compelling important." *Burdick*, 504 U.S. at 434. However, where a burden is imposed, even a slight one, the State's regulation "must be justified by relevant and legitimate state interests sufficiently weighty to justify the limitation." *Crawford*, 553 U.S. at 191 (citation omitted.) When evaluating an election regulation due to a constitutional challenge, the court must "weigh the asserted injury to the right to vote against" the precise interests asserted by the State to justify the burden imposed upon qualified voters. *Id*. at 190 (citing *Burdick*, 504 U.S. at 434). In this matter, the State of Florida cannot show a relevant and legitimate interest sufficiently weighty to justify the changes to the early voting law.

In proving a Section 1983 violation of constitutional rights, Plaintiffs here must show a discriminatory purpose and effect of the changes to the early voting law, and proving discriminatory purpose is something that may be established by proof that race was a substantial or motivating factor in decisions and practices. *See Arlington Heights*, 429 U.S. at 265-66. That

evidence is before the Court. First, it is clear that the changes to the early voting law has a disproportionate impact on African American voters in Florida. Disproportionate effect is relevant to determining race discrimination. *Davis*, 426 U.S at 241. Importantly, Florida itself failed in its burden of proof to demonstrate that the HB 1355 changes to early voting warranted preclearance.

Second, there is evidence that the early voting changes were based upon discriminatory intent. Senator Bennett's expressly stated on the Senate Floor that he wanted to make it more difficult for voters and the early voting changes were passed despite the position of FSASE and other SOEs that the then current voting procedure was allowing for a smooth election process and the proposed changes could result in crowding and confusion and that "Maintaining 15 days for the General Election is imperative to a smooth General Election in the state." Also, Florida conducted no study or analysis to determine the effect of the change to the early voting law prior to its enactment. There is no evidence of a legitimate legislative purpose for the changes to early voting-the changes could even result in increased costs, although Florida has claimed in litigation that a non-discriminatory motive exists. As such, an inference of discriminatory intent can be inferred based upon evidence of pretext, such as here where there is no legitimate purpose for the early voting law changes. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

Third, the changes in the early voting law clearly creates burden and obstacles to African American voters. As set forth supra, many of the Plaintiffs, and the people they represent, are unable to vote on election day for various reasons such as work responsibilities, operating businesses which would potentially suffer financial losses, medical issues which limit ability to vote on election day, and childcare and other work conflicts. West Affidavit ¶¶ 4-8; Mann Affidavit ¶¶ 6-7; Weeks Affidavit ¶¶ 5-9; Faison Affidavit ¶¶ 1-9. Additionally, many other

Plaintiffs, and the people they represent, aid other voters who lack the capacity to reach the polls without assistance, and that assistance would be hindered by the reduction in early voting. West Affidavit ¶ 9 and Fluellen Affidavit ¶¶ 7-9.

In sum, when this Court applies strict scrutiny and weighs the Plaintiffs' injury to the right to vote versus the State interest, there is substantial likelihood that the Court will find no sufficient legitimate State interest to justify changes to the early voting law. Accordingly, the preliminary injunction should be granted.

III. PLAINTIFFS WILL SUFFER IRREPARABLE HARM

Plaintiffs will suffer irreparable harm unless the Court grants an injunction. The right to vote is entitled to special constitutional protection as the right to the exercise of the franchise "in a free and unimpaired manner is preservation of other basic civil rights." *Reynolds*, 377 U.S. at 562. Plaintiffs will suffer a disproportionate effect and burden if the early voting changes are allowed to be enforced for the November 2012 general election. Harms to Constitutional freedoms, "'for even minimal periods of time, unquestionably constitute irreparable injury' supporting preliminary relief." *Scott* v. *Roberts*, 612 F.3d 1279, 1295 (11th Cir. 2010), quoting *Elrod* v. *Burns*, 427 U.S. 347, 373 (1976). For example, in the case of free speech, this is because "chilled free speech . . . because of [its] intangible nature, [can]not be compensated for by monetary damages; in other words, plaintiffs could not be made whole." *Ne. Fla. Chapt. of Ass'n of Gen. Contractors of Am.* v. *City of Jacksonville*, 896 F.2d 1283, 1285 (11th Cir. 1990). Enforcement of Florida's challenged early law subjects Plaintiffs to the potential for severe and undefined penalties simply for exercising their rights under the Constitution and the VRA.

IV. THE BALANCE OF THE HARDSHIPS CLEARLY FALLS IN PLANTIFFS' FAVOR

The balance of hardships associated with a preliminary injunction in this case strongly favors the Plaintiffs. First, the Section 5 Case has found that the early voting changes to Florida law cannot be enforced in the covered counties since the changes failed to preclear. Even a temporary infringement of a Constitutional right constitutes a serious and substantial injury, and a government has no legitimate interest in enforcing an unconstitutional law. *See KH Outdoor, LLC* v. *City of Trussville,* 458 F.3d 1261, 1272 (11th Cir. 2006). Unless the changes to early voting are enjoined, Plaintiffs will be burdened in an unlawful manner because of their race as African Americans disproportionately take advantage of early voting. By contrast, the burden of a preliminary injunction to the Defendants would be virtually non-existent, as there is no evidence that the changes to early voting properly further any State interests.

Because Florida failed to obtain preclearance, these challenged early voting provisions of Florida law have not been implemented in the five Florida counties covered by Section 5 of the VRA. In those counties, a preliminary injunction would maintain the status quo. If an injunction were granted, Florida could return to implementing uniform early voting rules statewide, reducing the costs, administrative burdens, and confusion associated with its current approach, which applies different sets of rules for counties covered by Section 5 and the rest of Florida's counties.

V. THE PUBLIC INTEREST MANDATES A GRANT OF INJUNCTIVE RELIEF

"The public has no interest in enforcing an unconstitutional" law. *KH Outdoor*, 458 F.3d at 1272. As the Eleventh Circuit has made clear, "[c]autious protection of [such] franchise-related rights is without question in the public interest." *Wesley Educ. Found. GET FULL CITE,* 408 F.3d at 1355. Finally, the right to vote is a "fundamental political right, because preservative of all rights." *Yick Wo v. Hopkins,* 118 U.S. 356, 370 (1886). Accordingly,

it is beyond peradventure that the fundamental right of voting is something that the public interest mandates a grant of injunctive relief.

CONCLUSION

For the foregoing reasons, Plaintiffs' motion for a preliminary injunction should be granted.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was served by filing in this court's CM/ECF system this 21st day of August 2012 on all attorneys of record in this matter.

Neil L. Henrichsen
Neil L. Henrichsen

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

CONGRESSWOMAN CORRINE BROWN, et al.,

CASE NO.: 3:12-cv-852-UATC-MCR

Plaintiffs,

v.

KEN DETZNER, in his official capacity as Florida Secretary of State, and JERRY HOLLAND, in his official capacity as Supervisor of Elections for Duval County, Florida,

Defendants.
_____/

AFFIDAVIT OF CONGRESSWOMAN CORRINE BROWN

I, Corrine Brown, swear and affirm that the following statements are true and correct to the best of my knowledge, information, and belief:

1. I have personal knowledge of the facts set forth herein.

2. I am over 18 years of age and reside in Jacksonville, Duval County, Florida.

3. Since 1993, I have represented the citizens of the Third District of Florida in the United States Congress.

4. I am African American and many of my constituents are African American.

5. As a representative of a minority access district, one of my missions has always been to empower the African American citizens in my district in civic and democratic endeavors, and to assist members of the African American community in, among other things, voting rights issues. In order to achieve these goals, I have personally engaged in efforts, as well as worked closely with civil right organizations in Jacksonville such as the Southern Christian Leadership

Conference of Jacksonville (the "SCLC Jacksonville"), the local chapter of the National Association for the Advancement of Colored People ("NAACP") and the Duval County Democratic Executive Committee ("DCDEC"), to facilitate voter education, voter registration, and voter mobilization efforts in the African American community.

6. Some of the voter education efforts I have been involved in or supported are: providing a political forum for candidates, distributing literature regarding candidates and issues in advance of elections, and grading politicians on issues that are important to my constituents. In partnership with the foregoing civil rights organizations, I have also been involved in voter registration and mobilization efforts including voter registration drives, educating voters on the time periods and methods by which they may vote, including early voting and by absentee ballot, and transporting voters to the polls during early voting periods and on Election Day. I was instrumental in assisting the NAACP to implement a national "Voter Report Card" on issues and candidates that are important to the African American community.

7. Since one of my primary missions is to encourage and assist my African Americans constituents to exercise their civic rights, including the right to vote, I and members of my campaign staff have personally assisted African American citizens to vote by transporting them to the polls. I have also expended resources, or used the resources allotted to me through my campaign office, to educate the African American constituents in my district about early voting.

8. The restrictions on early voting as set forth in the Complaint have frustrated my missions and goals because I and my campaign staff will be required to expend resources to educate my constituents about the restrictions on early voting and, in particular, the elimination

of early voting on the Sunday before Election Day, in order to combat the effect these restrictions will have on African American voters. The resources I will be required to use will be at the expense of the programs and activities I regularly conduct or am involved in every election season as outlined above. I will have to divert funds, volunteers and other resources to educate voters about the changes in early voting, their options if they cannot vote on Election Day, and we will have to find other methods to transport voters to the polls on the days early voting is still available.

9. Some of my African American constituents are personally affected by the early voting restrictions, including individuals who work six days a week and can only vote on Sunday, or persons whose customary practice for many years has been to vote on the Sunday before Election Day because their church provided transportation to the polls after Sunday services and they had no other means to get to the polls.

10. The restrictions on early voting, and particularly, Sunday early voting, will hinder my mission to empower and mobilize African American voters because it will mean I have to divert resources we normally use to facilitate early voting. Due to the my work schedule and the schedules of my campaign staff and the many volunteers who assist us each election season, there will be insufficient time to telephone or otherwise contact all of the African American voters in my district, many of whom do not own a car and need a ride to the polls. There will also be insufficient time to make arrangements to transport everyone individually to the polls before Election Day, which was previously accomplished in an organized and efficient manner on the Sunday before Election Day by transporting groups of voters to the polls after Sunday services.

11. Many of my constituents also find it difficult to vote because they work an inflexible schedule of long hours from 7:00 a.m. to 7:00 p.m. every week day. Also, many of these constituents do not have a car so they are forced to take the bus or other public transportation to and from work and when they return home in the evening, the polls are closed. Therefore, voting early, especially voting on the Sunday before Election Day, is a time-honored tradition among African American voters, who vote with their families and communities.

12. Furthermore, some of the individuals in the African American community do not have access to the Internet, on which the Duval County Supervisor of Elections ("SOE") posts information on early voting times and sites. Thus, my campaign office will have to spend additional time and resources, which was previously used to empower and mobilize voters, to educate my constituents on the new early voting restrictions and making sure that they still vote despite the restrictions.

13. African American voters have developed a significant amount of trust in the early voting process after what happened in the 2000 disputed Presidential Election. Many of these provisions were implemented to correct the problems that arose in that election. Early voting allows minority voters to vote early and have any problems with their registration or ballot remedied before Election Day, so they still have an opportunity to return to the polls and vote. If African American voters are able to vote early, then they can vote at any of the early voting sites and have their vote counted. However, if they vote on Election Day, they must vote in their assigned precinct. If they do not vote in their assigned precinct, then it is a provisional ballot which is reviewed by a three-judge panel consisting entirely of male Republicans, which has the

authority to disregard votes on subjective grounds. Therefore, there is not a lot of confidence in the three-judge panels.

14. As the representative of the Congressional Third District, I am aware of the history of voting in the State of Florida and in particular Duval County. Another reason I am aware of these issues is because, before I was elected to Congress, I previously worked as a poll watcher and I have been involved with promoting voter protection initiatives in Duval County. I have also participated in protests against illegal or discriminatory voting practices.

15. In the 2000 disputed Presidential Election, it was reported in the media that approximately 27,000 votes were discarded or not counted in Jacksonville, Duval County, Florida in precinct 6, 7, 8, 9 and 10 of my district, a predominantly African American district that votes 98% Democratic. Subsequently, it was determined that the majority of those votes were African American and Democratic votes.

16. The State of Florida and Duval County in particular have a history of restricting or denying African American and other minorities from voting. During the 2004 election, I participated in an protest against the Duval County SOE after the media disclosed that members of the Florida Republican Party ("GOP") had a list of felons and/or ex-felons which the GOP intended to use at the polls to challenge the right of persons to vote.

17. I have heard past Duval County SOE's state that early voting allows them sufficient time to follow proper voting procedures and process votes, as well as permits all citizens a greater opportunity to vote.

18. As a result, to my constituents and other members of the African American community, the elimination of early voting on Sunday and five days of weekday early voting is

just another example of the State of Florida, the GOP, and the Duval County SOE attempting to suppress the votes of African Americans. Some of these voters have personally expressed to me that they find the early voting restrictions very discouraging and that they feel less motivated to vote. These voters do not understand why the Florida legislature has made it more difficult to vote by taking away Sunday early voting and other times they previously voted early for a number of years. Some of my constituents have also commented that they believe the early voting restrictions have been enacted to deny or restrict their right to vote simply because they are African American.

19. I have also acted as a monitor of elections both here in the United States and around the world, therefore, I am aware of how fair elections should be conducted.

FURTHER AFFIANT SAYETH NOT.

CONGRESSWOMAN CORRINE BROWN

STATE OF FLORIDA

COUNTY OF DUVAL

Sworn and subscribed to before me this 21st day of August, 2012. Such person did take an oath and produced satisfactory identification.

Notary Public [SEAL]

My Commission Expires:

WENDY E. BYNDLOSS
NOTARY PUBLIC - STATE OF FLORIDA
COMMISSION # DD934795
EXPIRES 10/20/2013
BONDED THRU 1-888-NOTARY1