



COMMENT UNDER SECTION 5 OF THE VOTING RIGHTS ACT

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Room 7254 – NWB
U.S. Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530

June 17, 2011

Re: Section 5 Submission No. 2011-2187 (Submission by the State of Florida Regarding Omnibus Elections Law Bill, Laws of Florida 2011, Chapter 2011-40)

Dear Mr. Herren:

Introduction

The NAACP Legal Defense & Educational Fund, Inc. (LDF), the Florida Conference of Black State Legislators, and the Florida State Conference of the NAACP, urge the Attorney General to object to the pending Section 5 submission of the State of Florida’s omnibus elections law bill, Laws of Florida, Chapter 2011-40 / HB 1355 (hereinafter “Chapter 2011-40”), which provides for, *inter alia*: (1) a reduction in the number of days for early voting from 14 days to 8 days; (2) a requirement that registered voters who have moved between counties cast provisional ballots rather than regular ballots; and (3) unprecedented restrictions on volunteer third-party voter registration efforts. The state has failed to meet its burden of showing either that Chapter 2011-40 will not have a retrogressive effect, or that its adoption was free of discriminatory purpose.

Each of the measures described above will have a retrogressive effect on minority voting rights. Moreover, Chapter 2011-40 was enacted despite strong and measured concerns presented by a majority of members of the Florida Conference of Black State Legislators about the bill, and the justifications proffered by the State do not help the State satisfy its burden of showing the absence of discriminatory purpose.

Analysis

I. Background

The implementation of all proposed statewide voting changes in Florida is subject to the requirements of Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c(a). Because five counties in Florida are covered by Section 5 (Collier, Hardee, Hendry, Hillsborough, and Monroe Counties), statewide voting changes in Florida are subject to Section 5's preclearance requirements. *See Lawyer v. Dep't of Justice*, 521 U.S. 567, 570 (1997) (Section 5 applies to statewide voting changes in Florida); *see also Lopez v. Monterey County*, 525 U.S. 266, 283-84 (1999) (statewide voting changes are subject to Section 5 review where a state is partially covered by Section 5).

Laws of Florida, Chapter 2011-40, the Omnibus Elections Law Bill that is the subject of this Section 5 submission, was signed into law by the Governor of Florida on May 19, 2011, and submitted for review to the Department of Justice pursuant to Section 5 on June 8, 2011. *See* Section 5 Submission No. 2011-2187.

II. Retrogressive Effect

Section 5 prohibits voting changes that would result in “a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise.” *Beer v. United States*, 425 U.S. 130, 141 (1976). This Comment Letter focuses on the retrogressive effect of three provisions of Chapter 2011-40: (1) reductions in Florida's early voting period; (2) new provisional ballot requirements for registered voters who move across county lines; and (3) new restrictions with attendant penalties on third party organizations engaged in independent voter registration efforts. As documented below, each of these proposed voting changes will have a retrogressive effect.¹

¹ Although Chapter 2011-40 is problematic in numerous ways, the discussion of the law's retrogressive effect in this Comment Letter is limited to these three provisions. By highlighting these aspects of Chapter 2011-40, however, we do not suggest that the bill's other provisions are non-retrogressive.

A. Early Voting

Section 39 of Chapter 2011-40 (“Section 39”) amends Florida Statutes section 101.657(1) to reduce the number of early voting days from 14 to 8, and gives local supervisors of elections discretion over early voting hours, changing the hours that early voting sites must operate from a mandatory 8 hours per day (other than weekends), to a discretionary range of 6 to 12 hours per day. Thus, Section 39 not only essentially eliminates the first week of early voting in Florida, by decreasing the total number of days of early voting from the benchmark practice of 14 early voting days to only 8 days, it also makes possible a reduction in total hours of early voting from a mandatory 96 hours to a minimum of only 48 hours. Moreover, by providing for wide discretion in early voting hours, Section 39, as compared to the benchmark practice, will likely result in substantial inconsistency in early voting hours across the 5 covered counties, risking confusion amongst minority voters in these areas.

Significantly, African Americans make up a disproportionate percentage of early voters in Florida’s covered counties. African Americans constitute only 12.15% of the voting age population in the five covered jurisdictions in Florida, but were 18.86% of early voters during the 2008 General Election, with over 41,000 African Americans voting early:

Early Voting Period in the Covered Counties - 2008 General Election

	<u>Demographic Breakdown of Early Voters</u>			<u>Demographic Breakdown of County</u>		
	<u># Black Early Voters</u>	<u>Total # Early Voters</u>	<u>Black Percentage of Early Voters</u>	<u>DOJ BVAP</u>	<u>VAP</u>	<u>Percentage BVAP</u>
Collier	2,694	52,734	5.11%	13,475	258,873	5.21%
Hardee	198	3,271	6.05%	1,446	20,056	7.21%
Hendry	891	4,872	18.29%	3,682	28,254	13.03%
Hillsborough	37,397	146,574	25.51%	136,834	935,018	14.63%
Monroe	508	13,631	3.73%	3,004	62,089	4.84%
TOTALS	41,688	221,082	18.86%	158,441	1,304,290	12.15%

(Data Sources: Florida Division of Elections Early Voting Reports; Florida Voter Registration File; and U.S. Census Bureau.²)

² Early vote totals are calculated using data from the Florida Division of Election, *County Absentee and Early Voting Reports*, available at <https://doe.dos.state.fl.us/fvrscountyballotreports/FVRSAvailableFiles.aspx>. The demographic breakdown of early voters was calculated by cross-referencing that data against Florida’s voter registration file. Voting age population totals for each county are based on 2010 Census data. For purposes of calculating the Black Voting Age Population of the five covered jurisdictions in Florida, these figures include individuals categorized by the 2010 Census as “Black alone” as well as individuals categorized as “Black in combination” with other races.

Additionally, Section 39 essentially eliminates the first week of early voting, which will have a clear retrogressive effect on minority voters in the covered counties. During the first week of early voting in the 2008 General Election, African Americans constituted an even higher percentage of early voters, 20.08% in the covered counties:

First Week of Early Voting Period in the Covered Counties - 2008 General Election

	<u>Demographic Breakdown of Early Voters</u>			<u>Demographic Breakdown of County</u>		
	<u># Black Early Voters</u>	<u>Total # Early Voters</u>	<u>Black Percentage of Early Voters</u>	<u>DOJ BVAP</u>	<u>VAP</u>	<u>Percentage BVAP</u>
Collier	1,258	21,465	5.86%	13,475	258,873	5.21%
Hardee	74	1,503	4.92%	1,446	20,056	7.21%
Hendry	427	2,311	18.48%	3,682	28,254	13.03%
Hillsborough	15,175	54,781	27.70%	136,834	935,018	14.63%
Monroe	186	5,215	3.57%	3,004	62,089	4.84%
TOTALS	17,120	85,275	20.08%	158,441	1,304,290	12.15%

(Data Sources: Florida Division of Elections Early Voting Reports; Florida Voter Registration File; and U.S. Census Bureau.³)

A total of over 17,000 African Americans voted during the first week of early voting in the covered counties during the 2008 General Election. We note that the percentages vary from county to county, and, as the table above demonstrates, Hillsborough County featured the highest level of racial disproportionality among voters during the first week of early voting in the 2008 General Election, with African Americans constituting only 14.63% of the voting age population, but 27.70% of early voters.

The figures in our independent analysis are confirmed by at least one news report indicating that, during the 2008 general election, African Americans were 22% of voters during the first week of early voting in Florida statewide, despite being only 13% of the Florida electorate.⁴ Overall, nearly 54% of Florida’s African-American voters in 2008 voted at early-voting sites.⁵ In other words, African Americans were significantly overrepresented in the pool of early voters overall, and were much more likely than white

³ See *id.*

⁴ See Aaron Deslatte and Vicki McClure, *Battle for Florida: Blacks Turn Out in Drove, but Few Young People Have Voted*, *Orlando Sentinel*, Oct. 30, 2008, available at http://articles.orlandosentinel.com/2008-10-30/news/earlyvote30_1_early-voting-voters-in-florida-black-voters.

⁵ See “Voting Law’s Sunday Punch,” *Sarasota Herald-Tribune*, June 15, 2011, available at <http://www.heraldtribune.com/article/20110615/OPINION/110619722/-1/news?Title=Voting-law-s-Sunday-punch>.

voters to take advantage of the first week of early voting. Under Section 39, however, the first week of early voting would be eliminated, and the total number of mandatory early voting hours potentially reduced substantially, with inevitable retrogressive effects.

It is unsurprising that, as a group, African-American voters have taken advantage of the access currently afforded by the existing early voting period in Florida, given that, as this Department has noted, minorities in the Section 5-covered counties in Florida have lower rates of vehicle ownership⁶ and therefore benefit from the flexibility afforded by a wider range of early voting days. More recent Census data shows that 17.6% of African Americans in Florida's covered counties live in homes without a vehicle, as compared to only 4.8% of whites.⁷ These disparities in access to transportation mean that African American voters are more likely to encounter greater difficulties obtaining transportation on Election Day, such that an elimination of early voting days would substantially curtail existing levels of access to the polls with a resulting retrogressive effect on minority voters.

These concerns were confirmed by Leon Russell of the Florida State Conference of the NAACP. Mr. Russell stated the Florida NAACP's Get-Out-the-Vote efforts will likely "be impacted by" Section 39. He added that the benchmark practice of two weeks of early voting is essential because

[t]wo weeks provided folks with options and allowed them to coordinate voting with other reasons for being in the vicinity of an early voting location. Even though you may provide the same number of hours of operation, those hours don't automatically equate to the same opportunity. With a limited number of locations, time of day and transportation are important.

Joyce Russell, African-American Affairs Liaison for the Hillsborough County Government, echoed these concerns. She stated, "[t]he fact that [the proposed law is] going to shorten [early voting] is going to affect African-American voters" in Hillsborough County, where many African-American voters "work different hours of the day, so they can't always get into the regular voting hours. Many have non-traditional working hours." She noted that in Hillsborough County, "[w]e've seen African-American voter participation soar because of the early voting days." Ms. Russell stated that a longer early voting period "gives you more flexibility" for transportation, explaining that "Black churches have gotten involved" in helping African-American

⁶ See Letter from Bill Lann Lee, Acting Assistant Attorney General, Civil Rights Division, to Robert A. Butterworth, Attorney General, State of Florida, dated Aug. 14, 1998, available at http://www.justice.gov/crt/about/vot/sec_5/ltr/l_081498.php.

⁷ See Analysis of Vehicle Ownership in Florida's Covered Jurisdictions, attached as Exhibit A. Data in this exhibit is based on the Census Bureau's Public Use Microdata Sample files ("PUMS files"), which provides data broken down into "Public Use Microdata Areas," or "PUMAs." The table in Exhibit A shows data from the PUMAs corresponding to Florida's five covered counties. Data was compiled using the Census Bureau's "Data Ferret" tool.

voters get to the polls, and that it is “easier to arrange church buses on a Saturday” than it is on Election Day.

State Senator Arthenia Joyner, whose district encompasses part of Hillsborough County, stated that “[e]arly voting has changed the landscape of voting” by making possible broader participation among minority voters,” and that the proposed reduction of early voting days would have a “dramatic impact” on Black voters in Hillsborough County. She noted that the total number of early voting hours in each County will be left to the discretion of the each Supervisor of Elections, who could set the number of early voting hours as low as 48. Senator Joyner also stated that, even if the number of early voting hours remained the same, “compressing into 8 days will not do what we had before—we’re losing an entire weekend, including the Sunday before the election.”

State Representative Darryl Rousson, whose district also encompasses part of Hillsborough County, raised similar concerns, stating that, for his African-American constituents, “[c]utting back the number of [early voting] days erodes access and absolutely chips away at a person’s opportunities to vote.” He explained that despite statements to the contrary, Section 49 does not ensure that the same number of early voting hours will be “available, because local election officials will have discretion” to reduce the number of early voting hours significantly. Representative Rousson added that “Black leaders in my community,” such as pastors, will now have a harder time “gather[ing] up members” for Get-Out-the-Vote efforts. He further stated that, in his opinion, Section 39 is “aimed at minorities—black folks and Hispanics—whose job restrictions do not permit them to vote at normal hours.”

This Department has previously objected to changes to Florida’s absentee voting rules based on data showing that, in at least some covered jurisdictions, “minority voters disproportionately avail themselves of the absentee voting option because they often do not have accessible transportation to the polling place on election day and/or have jobs that do not permit time off to vote.”⁸ These same considerations should guide the Department’s Section 5 review here.

To put the significance of early voting into perspective, we note that, in the 2008 General Election, over 2.6 million votes were cast during Florida’s early in-person voting period, accounting for an estimated 31.25% of all ballots cast.⁹ Most significantly, the percentage of early voters was even higher in four of the five Section 5-covered counties; specifically, the percentage of voters who voted early in the Section 5-covered counties

⁸ See Letter from Bill Lann Lee, *supra* note 6.

⁹ Data for early voter totals can be found at Florida Division of Elections, *County Absentee and Early Voting Reports*, *supra* note 2. Data for total participation in the 2008 elections can be found at Florida Division of Elections, *Election Results: November 4, 2008 General Election*, available at [http://enight.dos.state.fl.us/Index.asp?ElectionDate=11/4/2008&DATAMODE=.](http://enight.dos.state.fl.us/Index.asp?ElectionDate=11/4/2008&DATAMODE=)

were as follows: Collier (36.85%); Hardee (43.75%); Hendry (44.39%); Hillsborough (28.41%); Monroe (33.50%).¹⁰

In recent elections, Florida has been beset by “hours-long lines” to vote on Election Day.¹¹ Nowhere was this more true than in Hillsborough County, the largest Section 5-covered jurisdiction in Florida, where, during the 2008 General Election, “[h]undreds waited for more than four hours to vote,” and “where poll workers failed to give hundreds of voters the second page of their ballot....”¹² At the University of South Florida, which is ranked 14th among undergraduate institutions nationally in awarding degrees to African Americans,¹³ “students waited in lines for in excess of three-hours” during the 2008 General Election.¹⁴ Senator Joyner noted that, in Hillsborough County, “we have long lines at the inner city polls on Election Day,” and that the lines at the polls were “long enough when early voting was 14 days, and they will be even longer now.”

Given these realities, early voting is a crucial means of participation for African-American voters in the covered counties. It is therefore clear that a reduction in early voting days as proposed in Section 39 would have a retrogressive effect on minority voters.

B. Provisional Ballot Requirements

Section 26 of Chapter 2011-40 (“Section 26) amends Florida Statutes section 101.045 to eliminate the right of registered voters in Florida who move from one Florida county to another to change their addresses at the time of voting. Under the benchmark practice, Florida permitted voters who have moved to update their address information in person at the polls at the time of voting by swearing an affirmation as to their new address. In such cases, the voters’ existing registrations are carefully cross-checked in a state database before the voters are given a regular ballot. Section 26 eliminates that right, so that voters who move among Florida’s 67 counties will be forced to cast provisional ballot. According to one estimate based on 2008 election figures, the result

¹⁰ Percentages calculated using sources in *supra* note 9.

¹¹ Jorge Alvarez, *Florida Pours into Hours-Long Election Lines*, Nov. 4, 2008, available at http://www.monstersandcritics.com/news/usa/features/article_1440998.php/Florida_pours_into_hours-long_election_lines_Feature.

¹² Stephen Nohlgren, *et al.*, “Florida Turnout High; Hillsborough Glitches Reported,” *St. Petersburg Times*, Nov. 4, 2008, available at <http://www.tampabay.com/news/politics/elections/article888764.ece>.

¹³ University of South Florida, *USF Among Top Degree Producers for Minority Students*, July 21, 2010, available at <http://news.usf.edu/article/templates/?a=2527>.

¹⁴ Jeanne Cummings & Lisa Lerer, “Record Turnout but Few Problems,” Politico.com, Nov. 5, 2008, available at <http://www.politico.com/news/stories/1108/15268.html>.

will be that nearly 34,000 additional Florida voters will be required to cast provisional ballots.¹⁵

This law will have a clear retrogressive effect on minority voters in the 5 covered counties. For one, the impacted group of voters will be disproportionately comprised of minorities, who tend to move more frequently than do white Americans. According to a study by the Pew Research Center, 43% of African Americans and 48% of Latinos reported moving during the previous 5 years, as compared to only 27% of whites.¹⁶ African Americans and Latinos similarly report a higher likelihood of moving within the next 5 years: 59% for African Americans and 43% for Latinos, as compared to only 35% for whites.¹⁷

These numbers are consistent with statistics from the Census Bureau showing that, in Florida's covered counties, African Americans have lower rates of home ownership (41.62% living in owner-occupied homes) than do non-Hispanic whites (74.31%),¹⁸ and other data showing that non-homeowners move three to four times more frequently than do homeowners.¹⁹ We note that this Department has previously relied on statistics indicating that minorities have lower rates of homeownership in the Section 5-covered counties in arriving at a determination to object to voting changes in Florida.²⁰

¹⁵ See Matt Dixon, *With Presidential Election Looming, Florida Election Law Rewrite Moves Forward*, *Florida Times-Union*, April 25, 2011, available at <http://jacksonville.com/news/metro/2011-04-25/story/presidential-election-looming-florida-election-law-rewrite-moves-forward>.

¹⁶ See Pew Research Center, *American Mobility: Who Moves? Who Stays Put? Where's Home* at 22 (Dec. 29, 2008), available at <http://pewsocialtrends.org/files/2010/10/Movers-and-Stayers.pdf>.

¹⁷ See *id.*

¹⁸ See Analysis of Homeownership by Race in Covered Counties, attached as Exhibit B. As our analysis shows, the comparative home ownership rates between African Americans and non-Hispanic whites in the covered counties are as follows: Collier: 47.61% to 82.65%; Hardee: 26.87% to 81.40%; Hendry: 60.86% to 77.29%; Hillsborough: 41.10% to 71.61%; and Monroe: 35.24% to 71.31%. Data is based on the Census Bureau's American Community Survey five-year estimate from 2005-2009, available at http://factfinder.census.gov/servlet/DTTable?_bm=y&-context=dt&-ds_name=ACS_2009_5YR_G00_&-CONTEXT=dt&-mt_name=ACS_2009_5YR_G2000_B25003B&-mt_name=ACS_2009_5YR_G2000_B25003H&-tree_id=3309&-redoLog=false&-currentselections=ACS_2009_3YR_G2000_B00001&-geo_id=05000US12021&-geo_id=05000US12049&-geo_id=05000US12051&-geo_id=05000US12057&-geo_id=05000US12087&-search_results=01000US&-format=&-_lang=en.

¹⁹ See U.S. Census Bureau, *Geographic Mobility Between 2004 and 2005* at 1, available at <http://www.census.gov/population/www/pop-profile/files/dynamic/Mobility.pdf>.

²⁰ See Letter from Bill Lann Lee, *supra* note 6.

Furthermore, Florida has the nation’s highest foreclosure rate,²¹ with three of the Section 5-covered counties in Florida continuing to experience foreclosure rates that are substantially higher than the national average.²² In our assessment, there are currently higher relative rates of mobility amongst minorities as compared to whites in the covered jurisdictions in Florida, and this trend is one that is likely to continue in the coming years.²³

Given these facts, the expected result of Section 26 is that more minority voters will be forced to cast provisional ballots, and at disproportionately higher rates. State Representative Rousson confirmed that this was the likely result for his minority constituents, explaining that, under Section 26, “people who change addresses—which often happens in minority low-income communities—[will] have[] to cast provisional ballots” more frequently. Ms. Russell, of the Hillsborough County Government, also explained that this change will “affect African Americans disproportionately.” She explained that “African Americans, like other minorities, are often working class people ... and sometimes they have to move.” She noted that Section 26 is particularly problematic because African Americans in Hillsborough County “have higher rates of unemployment and being laid off,” and that, “[w]ith the economy like it is, now people are having to move because of layoffs, or they lose their home or can’t pay their rent, through no fault of their own, but they are still eligible to vote.”

Thus, we anticipate that, if implemented, Section 26 would force a disproportionate number of African-American voters to a different process for casting a ballot during elections, which will be retrogressive because provisional ballots are counted less frequently than are normal ballots, particularly in the covered jurisdictions. During the 2010 general election, the number of provisional ballots counted statewide was 74.27%, but only 55.64% of provisional ballots were counted in Florida’s Section 5-

²¹ See Shirley Allen, *Florida Has Nation’s Highest Foreclosure Rate*, *LoanRateUpdate.com*, Feb. 18, 2011, available at <http://loanrateupdate.com/mortgages/florida-has-nation%E2%80%99s-highest-foreclosure-rate>.

²² As of March 2011, Collier, Hardee, and Hillsborough Counties, respectively, had foreclosure rates of 1 in 478 households, 1 in 453 households, and 1 in 482 households, as compared to the national rate of 1 in 593 households. See NPR, *Interactive Map: The Economy Where You Live*, available at <http://www.npr.org/templates/story/story.php?storyId=111494514> (showing county-by-county foreclosure rates as of March 2011); RealtyTrac.com, *National Real Estate Trends: Foreclosure Trends*, available at <http://www.realtytrac.com/trendcenter/> (showing national and state foreclosure rates as of April 2011).

²³ Nationally, the decline in homeownership rates among African Americans and Latinos in recent years (8%) is almost twice that of whites (4.5%). See Debbie Gruenstein Bocian, Wei Li, and Keith S. Ernst, Center for Responsible Lending, *Foreclosures by Race and Ethnicity: The Demographics of a Crisis* at 2, (June 18, 2010), available at <http://www.responsiblelending.org/mortgage-lending/research-analysis/foreclosures-by-race-and-ethnicity.pdf> (finding that African-American and Latino families were disproportionately affected by the foreclosure crisis relative to their share of mortgage originations, as nearly 8% of both African Americans and Latinos have lost their homes to foreclosures, compared to 4.5% of whites).

covered counties, with particularly low numbers in Collier (58.71%) and Hillsborough (54.35%) Counties:

Provisional Voting Analysis By County - 2010 General Election

<u>County</u>	<u>Provisional Ballots Cast</u>	<u>Provisional Ballots Counted</u>	<u>Percentage of Provisional Ballots Counted</u>
Collier	155	91	58.71%
Hardee	5	4	80.00%
Hendry	3	0	0.00%
Hillsborough	896	487	54.35%
Monroe	23	20	86.96%
Aggregate	1,082	602	55.64%
Statewide:	13,181	9,790	74.27%

(Data Source: Florida Division of Elections²⁴).

Statewide, the number of provisional ballots counted during the 2008 General Election was even worse, with fewer than half (only 48.59%) of all provisional ballots cast in Florida actually counted.²⁵ Of particular worry is that there was substantial variation within the State with respect to the treatment of provisional ballots: for instance, during the 2008 General Election, 80% of provisional ballots were counted in majority-white Duval County, whereas only 60% were counted in Section 5-covered Hillsborough County.²⁶ Numbers were even lower in Section 5-covered Collier County: 36.45%.²⁷

²⁴ Analysis is based on data from the Florida Division of Elections, *available at* <http://election.dos.state.fl.us/reports/index.shtml#2008gef>; *see also* Florida Division of Elections, November 2010 General Election: Provisional Ballots, *available at* <http://election.dos.state.fl.us/reports/pdf/2010ProvisionalBallots.pdf>.

²⁵ *See* The Pew Center on the States, *Provisional Ballots: An Imperfect Solution* at 6 (July 2009), *available at* http://www.pewcenteronthestates.org/uploadedFiles/ELEC_ProvBallot_Brief_0709.pdf. We note that, although some of these ballots were rejected because voters were not properly registered, the Pew Center on the States noted that “it is probable that at some point between registering to vote and casting a ballot, many experienced a voter or administrative error due to an outdated, inefficient registration system.” *Id.* at 4. Fifty thousand provisional ballots were rejected in 2008 because voters who voted at the wrong precinct “may have been provided with incorrect precinct information in advance or redirected to the wrong precinct on Election Day due to administrative errors in the registration system,” while 27,000 “were disallowed because of various errors ... some [of which] were the result of administrative problems at the polls.” *Id.*

²⁶ *See* The Pew Center on the States, *supra* note 25, at 2-3. For demographic statistics showing that Duval County is 64% white, and only 6.5% Latino, *see* U.S. Census Bureau, *State & County QuickFacts: Duval County, Florida*, *available at* <http://quickfacts.census.gov/qfd/states/12/12031.html>.

This suggests that the rules governing the counting of provisional ballots are not being implemented uniformly. Ms. Russell, of the Hillsborough County Government noted that, in her County, forcing voters to use provisional ballots can become “so confusing that people will get discouraged and stay home,” and that, even if voters do cast provisional ballots, “[w]e know that those provisional ballots are not always counted.” State Senator Joyner also noted that it “takes additional work by a voter” to make sure that a provisional ballot is counted, because voters will often have to return to the local election authority after Election Day in order to provide supporting documentation to ensure that their ballots are counted. In Senator Joyner’s view, this will have a retrogressive impact on minority voters in Hillsborough County, “whose incomes are limited, who don’t have transportation, who’ll have to make an additional trip to verify their information.”

In sum, given the disproportionately high rate of mobility and high foreclosure rate among minority communities within the 5 covered counties, Section 26 would result in more minority voters in the covered counties casting provisional ballots, which would in turn result in fewer ballots cast by minority voters being counted. The retrogressive effect of Section 26 would be particularly pronounced in Collier and Hillsborough Counties.

C. Restrictions on Third Party Volunteer Voter Registration Efforts

Section 4 of Chapter 2011-40 (“Section 4”) amends Florida Statutes section 97.0575 to require that any third party organization engaging in voter registration efforts submit any completed voter registration applications within 48 hours, or face penalties of \$50 per application per day late. Section 4 represents a substantial change from the benchmark practice, which permitted volunteers working for third party organizations engaged in voter registration drives to submit completed voter registration applications up to 10 days after receipt.

The 48 hour time period and the threat of substantial financial sanctions for failure to comply with this new restriction will severely hamper or completely deter voter registration efforts by volunteer third party organizations whose mission is to provide voter registration opportunities to minority communities. Leon Russell, of the Florida State Conference of the NAACP, stated that Section 4 “would likely discourage participation in voter registration efforts.” Mr. Russell noted that the NAACP’s voter registration events take place in many different locations during various days of the week, but that volunteers from individual NAACP units frequently “may not be able to turn in documents until the unit meets” again, which could be several days after a planned registration event. The fact that these efforts are volunteer-based and uncompensated makes speedier transmittal of the forms especially onerous on the minority communities within the covered jurisdictions, many of which suffer from higher rates of socio-

²⁷ See Florida Division of Elections, *available at* <http://election.dos.state.fl.us/reports/index.shtml#2008gef>.

economic disparities and higher poverty levels. Mr. Russell added, “[t]he threat of fines will also keep people from volunteering.”

Harold Weeks, President of the Collier County branch of the NAACP, which regularly conducts voter registration drives in Collier County, stated, in reference to the fines contemplated by Section 4, that he “wouldn’t want to subject anyone to those kind of consequences,” particularly “young people” who may mistakenly fail to turn paperwork in on time. He added, “[w]e don’t have much money to help pay somebody’s fines.”

Ms. Russell, of the Hillsborough County Government, observed that, in her County, “[t]here are a lot of African Americans, voting age individuals, who are not registered,” but that Section 4 is “going to intimidate a lot of African-American groups that would love to register people as first time voters.” She added,

You want to do your civic duty to register people, and now ... it’s very difficult to do Most people will feel like it’s not worth the trouble. It’s really going to hamper African-American Greek organizations (fraternities and sororities) that work on voter registration efforts.... It makes it more difficult to do that.

State Senator Joyner also noted that the “48 hour cap will cripple voter registration efforts.” She stated that, “[i]n the Black churches there’s ongoing voter registration,” but under the proposed change, “you have to have someone every day” turn in registration forms, which is an onerous administrative burden on churches serving low-income communities. State Representative Rousson echoed these concerns, stating that “by making it 48 hours to get registration forms in, you’re stifling” voter registration.

This is no trivial matter for minority citizens in Florida, who have substantially lower voter registration rates than average. As of 2008, the U.S. Census Bureau reported that, in Florida, African Americans had a registration rate of 53.6%, Latinos a rate of 47.4%, and Asians a rate of 35.3%, as compared with an overall average registration rate in Florida of 62.4%, and an average for white Floridians of 69.2%.²⁸ Voter registration drives are a crucial means of addressing these inequalities, as studies show that African-American and Latino voters are more than twice as likely to register in these drives.²⁹

²⁸ See U.S. Census Bureau, *Voting and Registration in the Election of November 2008 - Detailed Tables*, Table 4b. (Reported Voting and Registration of the Voting-Age Population, by Sex, Race and Hispanic Origin, for States: November 2008) available at <http://www.census.gov/hhes/www/socdemo/voting/publications/p20/2008/tables.html> (Note: data for African Americans represent statistics for individuals who are African-American “Alone or in Combination”; data for Asians represent statistics for individuals who are Asian “Alone or in Combination”; and data for whites represent statistics for the group “White Non-Hispanic Alone”).

²⁹ See Sarasota Herald-Tribune, *supra* note 5; Lee Rowland, Brennan Center for Justice, *Florida’s Poor to Bear Brunt of New Election Laws*, May 6, 2011, available at http://www.brennancenter.org/blog/category/voter_registration.

The implementation of Section 4 would therefore have the effect of only worsening these registration disparities.

III. Discriminatory Purpose

Assessing a jurisdiction's motivation in enacting voting changes is a complex task requiring a "sensitive inquiry into such circumstantial and direct evidence as may be available."³⁰ The "important starting point" for assessing discriminatory intent under *Arlington Heights* is "the impact of the official action whether it 'bears more heavily on one race than another.'"³¹ Other considerations relevant to the purpose inquiry include, among other things, "the historical background of the [jurisdiction's] decision"; "[t]he specific sequence of events leading up to the challenged decision"; "[d]epartures from the normal procedural sequence"; and "[t]he legislative or administrative history, especially ... [any] contemporary statements by members of the decisionmaking body."³² Numerous cases arising under Section 5 have employed this standard to help ferret out discriminatory intent in the Section 5 process.³³

As noted above, various features of Chapter 2011-40 will have retrogressive effects on minority voters in the 5 covered counties. These concerns were no secret as Chapter 2011-40 was debated. To the contrary, they were raised often by members of the public. And, without exception, every single member of the Florida Conference of Black State Legislators voted against this legislation.

³⁰ *Village of Arlington Heights v. Met. Housing Dev. Corp.*, 429 U.S. 252 at 266 (1977). In determining "whether invidious discriminatory purpose was a motivating factor," courts have looked to the *Arlington Heights* framework, at least in part, to evaluate purpose in the § 5 context. *See, Shaw v. Reno*, 509 U.S. 630, 644, (1993) (citing *Arlington Heights* standard in context of Equal Protection Clause challenge to racial gerrymander of districts); *Rogers v. Lodge*, 458 U.S. 613, 618 (1982) (evaluating vote dilution claim under Equal Protection Clause using *Arlington Heights* test), and has also been used, in part, to evaluate purpose in this Court's earlier § 5 cases. *See also Pleasant Grove v. United States*, 479 U.S. 462, 469-470 (1987) (considering city's history in rejecting annexation of 489 black neighborhood and its departure from normal procedures when calculating costs of annexation alternatives); *see also Busbee v. Smith*, 549 F.Supp. 494, 516-517 (D.C. 1982); *Port Arthur v. United States*, 517 F.Supp. 987, 1019, *aff'd*, 459 U.S. 159 (1982).

³¹ *Arlington Heights*, 429 U.S., at 266 (citing *Washington v. Davis*, 426 U.S. 229 (1976)).

³² *Id.* at 268.

³³ *See, e.g., Reno v. Bossier Parish Sch. Bd.*, 117 S. Ct. 1491 (1997) (applying the *Arlington Heights* test to assess whether a voting system was enacted for a discriminatory purpose); *City of Pleasant Grove v. U.S.*, 479 U.S. 462, 478 (1987) (approving use of *Arlington Heights* as tool to prove purposeful discrimination in the voting context); *U.J.O. of Williamsburgh v. Carey*, 430 U.S. 144 (1977) (noting that the *Arlington Heights* factors are probative evidence of purposeful discrimination).

It is noteworthy that these broad changes to long-standing voting laws—some of which have been in place for decades³⁴—are being proposed so recently after the last General Election, when African Americans in Florida turned out and exercised their political power in record numbers. One news report noted that the changes to early voting, and in particular the elimination of early voting on the Sunday before Election Day, “appear[] to be aimed directly at discouraging Florida's black voters.”³⁵ State Senator Joyner stated, “we view this as an effort to marginalize the votes of minorities in our County because we had tremendous turnout in recent elections.” State Representative Rousson added, “in my mind, and in the minds of the Black leaders in my community, there is no question about the motives behind this. This is absolutely voter suppression and subversion. The perception is that it is aimed directly at [the Black] population. My constituents feel under siege.”

Chapter 2011-40 was enacted in spite of these and other objections, but we note that the state’s proffered interests in enacting Chapter 2011-40 do not withstand even casual scrutiny. Although the State claims that these voting changes are necessary to prevent voter fraud,³⁶ there is no evidence of a problem of voter fraud in Florida,³⁷ as even the Florida Secretary of State has “acknowledged that there is little voter fraud in the state.”³⁸ Nor is there any indication of how shortening the early voting period, requiring validly registered voters to cast provisional ballots, or imposing heavy fines on voter registration organizations would actually prevent fraud. Moreover, as this Department has acknowledged in response to a previous Section 5 submission by the State of Florida, “procedures used to eliminate voter fraud should not unnecessarily burden the rights of minority voters.”³⁹ Finally, while legislators also claimed that these changes are necessary for the sake of reducing “cost,”⁴⁰ an interest in administrative

³⁴ For instance, the benchmark practice of permitting address changes across county lines on Election Day, which is eliminated under Section 26, has been in place for 4 decades. See Aaron Sharockman, “State Sen. Bennett's claim is a stretch in mileage matter,” *St. Petersburg Times*, May 7, 2011, available at <http://www.tampabay.com/news/politics/stateroundup/state-sen-bennetts-claim-is-a-stretch-in-mileage-matter/1168236>.

³⁵ See *Sarasota Herald-Tribune*, *supra* note 5.

³⁶ See, e.g., “Anti-Voter Bill,” *Sarasota Herald-Tribune*, May 9, 2011 available at <http://www.heraldtribune.com/article/20110509/OPINION/110509642>.

³⁷ See, e.g., Howard Simon, *The Big Lie Still Works in Tallahassee*, *Gainseville Sun*, May 20, 2011, available at <http://www.gainesville.com/article/20110520/OPINION/110529990/-1/entertainment?p=2&tc=pg> (noting that the “county Supervisors of Elections and the Secretary of State[have] reported no instances of the type of voter fraud the Legislature was purportedly reigning in.”).

³⁸ *New Florida Election Law Draws Criticism*, News4Jax.com, May 20, 2011, available at <http://www.news4jax.com/news/27969323/detail.html>.

³⁹ Letter from Bill Lann Lee, *supra* note 6.

⁴⁰ See, e.g., Stephanie Condon, *Florida Gov. Rick Scott Signs Controversial Election Laws*, CBS News, May 20, 2011, available at http://www.cbsnews.com/8301-503544_162-20064841-503544.html (State Senator claiming “high cost” of early voting).

efficiency has not been recognized as a sufficient justification for voting procedures that otherwise violate the VRA.⁴¹

Conclusion

For the reasons identified above, we urge the Attorney General to interpose an objection to Chapter 2011-40, as the state has failed to meet its burden of showing that it will not have a retrogressive effect, nor that it was adopted free of discriminatory purpose. Indeed, the state's submission contains no analysis whatsoever concerning the retrogressive effect of Chapter 2011-40 on minority voters, simply asserting without any substantiation that the proposed voting changes "will apply equally to all voters...."⁴² That is not, however, sufficient to satisfy the state's burden to show the absence of retrogressive effect under Section 5 analysis. *See Beer*, 425 U.S. at 141. At a minimum, the Attorney General should issue a More Information Request (MIR) concerning the various issues raised in this letter as they affect minority voters in the five Florida Counties covered by Section 5.

Should you have any questions regarding the information presented in this Comment Letter, please contact Dale Ho at 212-965-2252.

Sincerely,

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NAACP Legal Defense and Educational Fund, Inc.

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Florida State Conference NAACP

⁴¹ *Cf. City of Mobile v. Bolden*, 446 U.S. 55, 108 n.4 (1980) (Marshall, J., dissenting) (noting that "efficiency ... can be achieved simply by ignoring the concerns of the powerless minority.").

⁴² Submission No. 2011-2187, at n.

Exhibit A

Exhibit A - Analysis of Vehicle Ownership in Florida's Covered Jurisdictions

COUNTY									
	Hillsborough		Monroe	Hardee & Hendry	Collier		Totals	Percentage	
	Puma# 02708, Florida	Puma# 02702, Florida	Puma# 04020, Florida	Puma# 03100, Florida	Puma# 03701, Florida	Puma# 03702, Florida			
White alone	52,543	55,044	36,429	64,020	57,257	51,575	316,868		
No vehicles	1,908	3,636	2,681	3,231	2,306	1,555	15,317	4.83%	
Black or African American alone	3,478	8,789	4,035	5,635	1,386	2,980	26,303		
No vehicles	79	2,421	677	826	176	459	4,638	17.63%	

Exhibit B

