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## **Blocking the Ballot: Why Florida's New Voting Restrictions Demonstrate a Need for Continued Enforcement of the Voting Rights Act Preclearance Requirement**

### **Cover Page Footnote**

J.D. Candidate, May 2013, The Catholic University of America, Columbus School of Law; B.A., 2010, Siena College. The author would like to thank his family and friends for their support, particularly over the last three years. Also, a special thanks to the staff of the Catholic University Law Review for their edits and feedback. This Note is dedicated to Desiline Victor, a 102-year-old woman who waited for three hours to cast a ballot in the 2012 election during Florida's early voting period. Her perseverance, like that of so many before her, should serve as an example to us all.

# BLOCKING THE BALLOT: WHY FLORIDA'S NEW VOTING RESTRICTIONS DEMONSTRATE A NEED FOR CONTINUED ENFORCEMENT OF THE VOTING RIGHTS ACT PRECLEARANCE REQUIREMENT

*Michael Ellement*<sup>+</sup>

Do you read the stories about the people in Africa? The people in the desert, who literally walk two and three hundred miles so they can have the opportunity to [vote], and we want to make it more convenient? . . . Why would we make it any easier? I want 'em to fight for it. I want 'em to know what it's like. I want them to go down there, and have to walk across town to go over and vote.

-Florida State Senator Mike Bennett, floor speech in support of Florida House Bill 1355<sup>1</sup>

Should a democratically elected government take steps to make it easier for its citizens to exercise their right to vote? Or should a government make the process more difficult, ensuring that only a limited number of citizens go to the polls?<sup>2</sup>

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1. See Eliza Shapiro, *Is Voter Fraud a Fraud*, THE DAILY BEAST (July 19, 2012, 4:45 AM), <http://www.thedailybeast.com/articles/2012/07/19/is-voter-fraud-a-fraud.html> (quoting Senator Bennett).

2. This question has been debated in the United States at various points in the nation's history. Compare CONG. GLOBE, 39TH CONG., 1ST SESS. 77 (1866) (statement of Sen. Lyman Trumbull) ("Congress is bound to see that freedom is in fact secured to every person throughout the land . . . if the states and local authorities, by legislation or otherwise, deny those rights, it is incumbent on us to see that they are secured."), and Lyndon B. Johnson, Remarks in the Capitol Rotunda at the Signing of the Voting Rights Act, reprinted in PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES, LYNDON B. JOHNSON 840, 843 (1965), with William Bennett Munro, *Intelligence Test for Voters: A Plan to Make Democracy Foolproof*, 80 FORUM 823, 830 (1928) ("[A]bout twenty percent of those who get on the voters' list have no business to be there. Taking the country as a whole, the total number of these interlopers must run into the millions. . . . Can rational men be fairly expected to place unwavering faith in a system of suffrage which commits the destinies of a great nation into such hands as these?"). See Meteor Blades, *Paul Weyrich Wanted Fewer People to Vote for a Simple Reason: When More Do, Republicans Lose*, DAILY KOS (Nov. 5, 2012), <http://www.dailykos.com/story/2012/11/05/1156061/-Paul-Weyrich-wanted-fewer-people-to-vote-for-a-simple-reason-When-m>

Between 2011 and 2012, nineteen states passed legislation changing their voting laws.<sup>3</sup> In particular, Florida passed House Bill (H.B.) 1355 that made a total of eighty changes to the state's election laws and procedures.<sup>4</sup> The most substantial of these changes were new regulations for third-party voter registration groups and limitations on early voting.<sup>5</sup> Additionally, the state made plans to purge its voter rolls of registered voters who were possibly ineligible to vote.<sup>6</sup>

The Voting Rights Act (VRA) restricts changes enacted by Florida from immediately taking effect.<sup>7</sup> Florida, along with other jurisdictions with a history of racial discrimination,<sup>8</sup> is required to obtain "preclearance" of their election law changes under section 5 of the VRA.<sup>9</sup> Florida must submit new election "practice[s], or procedure[s]" to the Department of Justice (DOJ) or, alternatively, to the U.S. District Court for the District of Columbia for review.<sup>10</sup> The changes must be reviewed and will be cleared only if they have neither "the purpose nor . . . the effect of denying or abridging the right to vote on account of race or color."<sup>11</sup>

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ore-do-Republicans-lose (quoting Paul Weyrich, co-founder of the Heritage Foundation, as stating in 1980 that "I don't want everybody to vote. Elections are not won by a majority of people. They never have been from the beginning of our country, and they are not now. As a matter of fact our leverage in the elections quite candidly goes up as the voting populace goes down.").

3. These changes fell into a number of categories. Several states, including Alabama, Mississippi, Pennsylvania, Rhode Island, South Carolina, Tennessee, and Texas conditioned casting a ballot on producing a government-issued photo identification card to an election official. *See Election 2012: Voting Laws Roundup*, BRENNAN CTR. FOR JUSTICE AT NYU SCH. OF LAW (Oct. 11, 2012), <http://www.brennancenter.org/analysis/election-2012-voting-laws-roundup>. Alabama, Kansas, and Tennessee passed legislation requiring proof of U.S. citizenship in order to register to vote, beyond the proof-of-citizenship requirements already mandated by federal law. *Id.* Some states, including Georgia, Ohio, Tennessee, and West Virginia, restricted early voting opportunities. *Id.*

4. *See* 2011 Fla. Laws ch. 2011-40; *see also* *Florida v. United States*, 885 F. Supp. 2d 299, 302 (D.D.C. Aug. 16, 2012) (noting that the U.S. Attorney General precleared seventy-six of the eighty proposed changes).

5. 2011 Fla. Laws ch. 2011-40, §§ 4, 39.

6. Terry Frieden & Kevin Liptak, *DOJ Says It Will Sue Florida over Voting Rolls Purge*, CNN (June 12, 2012), [http://articles.cnn.com/2012-06-12/politics/politics\\_florida-voting-lawsuit\\_1\\_florida-voter-lists-voter-rolls-rick-scott?\\_s=PM:POLITICS](http://articles.cnn.com/2012-06-12/politics/politics_florida-voting-lawsuit_1_florida-voter-lists-voter-rolls-rick-scott?_s=PM:POLITICS).

7. *See* 42 U.S.C. § 1973c (2006) (requiring certain states or political subdivisions to obtain preclearance before enforcing a changed voting law).

8. *See* H.R. REP. NO. 89-439, at 13 (1965), *reprinted in* 1965 U.S.C.A.N. 2437, 2444 (noting that the VRA was enacted, in part, to combat widespread voter discrimination against African Americans in certain states).

9. 42 U.S.C. § 1973c(a).

10. *Id.*

11. *Id.* Florida is a partially covered jurisdiction, meaning that only five of its counties are subject to the preclearance requirement. *See* 28 C.F.R. pt. 41, app. (2012) (noting that Florida counties Collier, Hardee, Hendry, Hillsborough, and Monroe are all covered under section 5 of the VRA).

However, following the passage of H.B. 1355 and the plan to effect a statewide voter purge, officials in Florida displayed hostility toward compliance with the preclearance process.<sup>12</sup> Officials withdrew changes from the DOJ and district court review, made plans to implement the changes contained in H.B. 1355 prior to obtaining preclearance, maintained that the preclearance requirement is unconstitutional, and refused to submit their plan to purge voter rolls for preclearance.<sup>13</sup>

The section 5 preclearance process slowed some of the attempts by the state to implement the full scope of the election changes. Specifically, the District Court for the District of Columbia initially refused to grant preclearance to changes to early voting as enacted in the bill.<sup>14</sup> However, the District Court's opinion also included a blueprint of an acceptable path to preclearance, whereby the covered counties could reduce the number of *days* they permitted early voting, as long as they provided the same total number of *hours*.<sup>15</sup> The counties quickly made plans to conform with the court's suggested blueprint, and the DOJ subsequently did not oppose preclearance of the changes.<sup>16</sup> This allowed for the changes to take effect statewide during the 2012 election—leading to long lines at polling sites across the state and decreased turnout during the early voting period.<sup>17</sup> Similarly, a section 5 lawsuit filed by a group of voters against the state highlighted many of the defects in Florida's proposed plan to purge its voter rolls without obtaining preclearance.<sup>18</sup> Specifically, the original list of registered voters identified for the purge contained not only illegally registered voters, but also a high number of validly registered voters.<sup>19</sup> After the section 5 lawsuit was filed, the state backtracked

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12. See *infra* Part II.

13. See *infra* Part II.

14. See *infra* Part II.A.

15. See *infra* Part II.A.

16. Response by the United States to Florida's Motion for Judgment on Count Four of the Fourth Amended Complaint at 2, *Florida v. United States*, 885 F. Supp. 2d 299 (D.D.C. 2012) (No. 1:11-CV-01428), available at <http://moritzlaw.osu.edu/electionlaw/litigation/documents/UnitedStatesResponsetoFloridasMotionforJudgmentonCount4.pdf>.

17. See Michael C. Herron & Daniel A. Smith, *Early Voting in the Aftermath of House Bill 1355* 38 (Jan. 10, 2013) (working paper) (discussing the effect of early voting changes in the 2012 election and stating that “[n]otwithstanding the fact that the aggregate number of early voting hours remained at 96 in many of Floridas [sic] 67 counties including its five section 5 counties the voting rights of racial and ethnic minorities appear to have been disproportionately hampered by HB 1355's reduction in the number of early voting days, particularly the elimination of the final Sunday of early voting” (footnote omitted)), available at <http://www.dartmouth.edu/~herron/HerronSmithFloridaEarly2012.pdf>.

18. First Amended Complaint for Declaratory and Injunctive Relief and Request for Three Judge Panel ¶ 39, *Mi Familia Vota Educ. Fund v. Detzner*, No. 8-12-cv-1294 (M.D. Fla. July 27, 2012) [hereinafter *Mi Familia Vota Educ. Fund* Complaint], available at [http://moritzlaw.osu.edu/electionlaw/litigation/documents/FirstAmendedComplaintforDeclaratoryandInjunctiveRelief\\_000.pdf](http://moritzlaw.osu.edu/electionlaw/litigation/documents/FirstAmendedComplaintforDeclaratoryandInjunctiveRelief_000.pdf).

19. *Id.*

and made plans to proceed with a more limited list of names, signaling a slight victory for voting rights' advocates.<sup>20</sup> However, the state still refused to submit the more limited purge for preclearance review.<sup>21</sup> As of this Note's publication, litigation attempting to compel review of the purge under section 5 is ongoing.<sup>22</sup>

This Note explores Florida's regressive voting changes that were implemented before the 2012 election and analyzes these changes under the VRA's standard for preclearance. This Note finds that section 5 preclearance has been somewhat effective in preventing the enforcement of some of the most drastic of Florida's election law changes. However, this Note further finds that Florida's experience demonstrates the need for continued vigorous enforcement of the strictures of section 5 to prevent future abuses of voting rights.

Part I of this Note summarizes the history of the VRA and reviews the Florida election law changes and voter purge of 2011–2012. Part II evaluates the significance of Florida's election law changes as they relate to voters' access to the polls. Part II also discusses the district court's preclearance decision on H.B. 1355. Part III analyzes Florida's changes under the applicable standards for preclearance under the VRA. Part III also argues that the district court failed to address important aspects of H.B. 1355, and in doing so, decreased minority participation in the 2012 election by permitting covered counties to limit the numbers of days polls were open during the early voting period.

## I. VOTING RIGHTS AND PRECLEARANCE: MAKING VOTING ACCESSIBLE

### A. *Minority Voting in Early American History*

The history of minority voting rights in the United States resembles a swinging pendulum.<sup>23</sup> Periodically throughout U.S. history, minority enfranchisement increased to ensure greater electoral participation.<sup>24</sup>

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20. Marc Caputo, Parcia Mazzei, & Steve Bousquet, *Fla. Gov. Rick Scott's Voter Purge Efforts Start Anew*, TAMPA BAY TIMES (Sept. 26, 2012, 5:55 PM), <http://www.tampabay.com/news/politics/national/fla-gov-rick-scotts-voter-purge-efforts-start-a-new/1253538>.

21. *Mi Familia Vota Educ. Fund* Complaint, *supra* note 18, ¶¶ 5–6.

22. For more information on the status of the *Mi Familia Vota Education Fund v. Detzner* litigation, see The Ohio State University, Moritz College of Law's Election Law website, available at <http://moritzlaw.osu.edu/electionlaw/litigation/MiFamiliaVDetzner.php>.

23. See generally GARRINE P. LANEY, CONG. RESEARCH SERV., CRS 95-896, THE VOTING RIGHTS ACT OF 1965, AS AMENDED: ITS HISTORY AND CURRENT ISSUES 1–7 (2008) (describing disenfranchisement as the reason for the historical variations in African-American voting).

24. See *id.* at 1–2 (noting a rise in African-American political participation during Reconstruction).

However, after that right was exercised, it was limited or stripped.<sup>25</sup> The African-American voting experience, in particular, demonstrates the inconsistent nature of minority voting rights in the United States.<sup>26</sup>

Initially, some American colonies permitted freed African Americans to cast ballots in elections.<sup>27</sup> However, the post-revolution Constitution failed to secure voting rights for African Americans nationwide.<sup>28</sup> The turning point for African-American voting rights occurred following the Civil War with the passage of the Fifteenth Amendment.<sup>29</sup> The Fifteenth Amendment states, “The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.”<sup>30</sup> However, the Amendment served as a dead letter in the decades following its enactment.<sup>31</sup> During that time, Congress refused to effectuate its authority over voting rights—allowing state authorities to deny minority-voter access.<sup>32</sup> Despite this, African-American men were successful in retaining voting rights in some states, resulting in high voting rates through the end of Reconstruction.<sup>33</sup> However, with this gain, the pendulum swung again. In an effort to curb high rates of African-American voting, southern states took advantage of weak federal legislation and affirmatively excluded African Americans from the polls.<sup>34</sup> States implemented a variety of voter suppression tactics, including literacy tests and poll taxes, in an effort to limit

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25. *Id.* at 2–3 (discussing the “creative measures to make voting difficult” that existed in some states after the passage of the Fifteenth Amendment).

26. *Id.* at 1–7.

27. A. LEON HIGGINBOTHAM, JR., IN THE MATTER OF COLOR, RACE AND THE AMERICAN LEGAL PROCESS: THE COLONIAL PERIOD 147–50, 203–04 (1978).

28. *Introduction to Federal Voting Rights Laws*, DEP’T OF JUSTICE, [http://www.justice.gov/crt/about/vot/intro/intro\\_a.php](http://www.justice.gov/crt/about/vot/intro/intro_a.php) (last visited Feb. 19, 2013). During this period, state law governed qualifications for voting. *See id.* (“Qualifications for voting were matters which neither the Constitution nor federal laws governed.”).

29. *See* LANEY, *supra* note 23, at 1–2 (describing Congress’s post-Civil War efforts to secure civil rights for African Americans).

30. U.S. CONST. amend. XV, § 1.

31. *See* LANEY, *supra* note 23, at 2–5.

32. *See* *South Carolina v. Katzenbach*, 383 U.S. 301, 308–13 (1966) (discussing the pervasive tactics, such as grandfather clauses, literacy tests, and property qualifications, used by southern states to prevent African Americans from voting).

33. LANEY, *supra* note 23, at 2. African Americans not only participated in the voting process, but were also elected in significant numbers to office in Louisiana, Mississippi, and South Carolina. *See* MICHAEL J. KLARMAN, *THE SUPREME COURT AND BLACK DISENFRANCHISEMENT*, in *THE VOTING RIGHTS ACT SECURING THE BALLOT* 37 (Richard M. Valelly ed., 2006) (noting that, during the reconstruction period, sixteen African Americans were elected to Congress and at certain times “made up nearly half the lower-house delegates in Mississippi and Louisiana and a majority in South Carolina”).

34. *See* H.R. REP. NO. 89-439, at 11–13, 19–22 (1965), *reprinted in* 1965 U.S.C.C.A.N. 2437, 2443–44, 2451–53 (discussing the use of literacy tests, poll taxes, and other means to limit African Americans’ voting opportunities).

opportunities for African Americans to access the ballot.<sup>35</sup> These tactics drastically reduced voter participation by African Americans in the South.<sup>36</sup>

*B. The Voting Rights Act of 1965—Implementing the “Second Reconstruction”<sup>37</sup>*

In the 1950s and 1960s, attention turned to preserving minority voting rights.<sup>38</sup> Through the Civil Rights Act of 1957, Congress authorized the Attorney General to seek injunctions against those who interfered with an individual’s right to vote on the basis of race,<sup>39</sup> resulting in some gains in African-American enfranchisement.<sup>40</sup> However, these efforts had little impact on the overall status of minorities in the electoral process.<sup>41</sup>

In 1965, Congress adopted the VRA,<sup>42</sup> which sought to eliminate restrictions on voter access and “banish the blight of racial discrimination in voting, which ha[d] infected the electoral process in parts of [the] country.”<sup>43</sup> One important feature of the VRA required jurisdictions with a history of racial discrimination to obtain approval, known as “preclearance,” from a federal body before enforcing changes to its election laws or voting procedures.<sup>44</sup> In the five years

35. CHARLES S. BULLOCK III & RONALD KEITH GADDIE, *THE TRIUMPH OF VOTING RIGHTS IN THE SOUTH* 6–7 (2009).

36. *Id.*; see STEVEN F. LAWSON, *BLACK BALLOTS: VOTING RIGHTS IN THE SOUTH, 1944–1969*, at 55 (1976) (describing the use of poll taxes, literacy tests, and registration requirements to decrease voter turnout and discourage political party opposition).

37. C. Vann Woodward first used the term “Second Reconstruction” in 1957 to describe a renewed commitment to enforcing civil rights for African Americans. See C. Vann Woodward, *The Political Legacy of Reconstruction*, 26 J. NEGRO EDUC. 231, 240 (1957).

38. See H.R. REP. NO. 89-429, at 8 (evidencing Congress’s realization in 1965 that “[t]he past decade has been marked by an upsurge of public indignation against” racially discriminating voting restrictions).

39. Civil Rights Act of 1957, Pub. L. No. 85-315, § 131, 71 Stat. 634, 637–38 (1957) (codified as amended at 42 U.S.C. § 1971(c) (2006)).

40. See, e.g., *Gomillion v. Lightfoot*, 364 U.S. 339, 346 (1960) (holding that an alteration of a city’s boundary that “singles out a readily isolated segment of a racial minority for special discriminatory treatment” violated the Fifteenth Amendment); see also Daniel P. Tokaji, *Voter Registration and Election Reform*, 17 WM. & MARY BILL RTS. J. 453, 463 (2008) (stating that, although federal action in the 1950s and early 1960s was insufficient to remedy the pervasive discrimination against African-American voters, the legislative changes allowed several successful forms of government intervention and increased the ability of some minority voters to cast a ballot).

41. See *South Carolina v. Katzenbach*, 383 U.S. 301, 313 (1966) (noting that despite new laws, little changed in the area of voting discrimination); see also H.R. REP. NO. 89-439, at 9 (describing the enforcement of the 1957, 1960, and 1964 voting rights statutes as “encounter[ing] serious obstacles” and progressing at a “painfully slow” rate).

42. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (1965) (codified as amended at 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (2006)).

43. *Katzenbach*, 383 U.S. at 308.

44. H.R. REP. NO. 109-478, at 35–36 (2006), reprinted in 2006 U.S.C.C.A.N. 618, 639–40; see *Shelby Cnty. v. Holder*, 811 F. Supp. 2d 424, 427 (D.D.C. 2011) (describing the preclearance

following the VRA's passage, the number of registered African-American voters more than doubled in southern states, evidencing the important role the VRA played in protecting the rights secured by the Fifteenth Amendment.<sup>45</sup>

*C. The Preclearance Requirement—Federal Supervision of State Electoral Changes*

Under the VRA's preclearance requirement, a covered jurisdiction must submit changes for preclearance in one of two forms: (1) a declaratory judgment action in the U.S. District Court for the District of Columbia; or (2) submission to the U.S. Attorney General for review.<sup>46</sup> Submission to the Attorney General is far more common, because it is both convenient and less expensive.<sup>47</sup> A jurisdiction is a "covered jurisdiction" if, on any of three specified review dates, (1) it maintained a literacy requirement or other "test or device" as a prerequisite to voting, and (2) fewer than fifty percent of its voting-age citizens were registered to vote or voted in that year's presidential election.<sup>48</sup>

When the VRA was introduced, the preclearance requirement received considerable criticism,<sup>49</sup> and originally was set to expire five years after its

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requirement as the most controversial aspect of the VRA's temporary provisions), *aff'd*, 679 F.3d 848 (D.C. Cir.), *cert. granted in part*, 133 S. Ct. 594 (2012).

45. U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES, 1970, at 369 (1970), available at <http://www2.census.gov/prod2/statecomp/documents/1970-01.pdf>.

46. 42 U.S.C. § 1973c(a) (2006).

47. Jocelyn F. Benson, *A Shared Existence: The Current Compatibility of the Equal Protection Clause and Section 5 of the Voting Rights Act*, 88 NEB. L. REV. 124, 129 (2009).

48. 42 U.S.C. § 1973b(b) (2006). There is some debate about when the preclearance requirement actually applies. The statute has generally been interpreted to require preclearance of all voting changes that are different from a jurisdiction's benchmark practice or, in other words, anything other than "the status quo that is proposed to be changed." *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 334 (2000), *superseded by statute*, Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, § 5, 120 Stat. 577, 580-81 (2006) (codified at 42 U.S.C. § 1973c(b)-(d)), *as recognized in* *Shelby Cnty. v. Holder*, 679 F.3d 848, 856 (D.C. Cir. 2012). Most scholars contend that this interpretation comports with the history of the Voting Rights Act. *See* Sabina Jacobs, *Developments in the Law, The Voting Rights Act: What Is the Basis for the Section 5 Baseline?*, 42 LOY. L.A. L. REV. 575, 578 (2009). However, some states argue that the text should be read as not requiring preclearance if a covered jurisdiction seeks to adopt the same practice that was in force or effect on its initial coverage date, even if that practice is different from the jurisdiction's current voting procedures. *See* Brief for Appellant at 14-15, 26-27, *Riley v. Kennedy*, 553 U.S. 406 (2008) (No. 07-77). The Supreme Court has not directly addressed this issue. *See Riley*, 553 U.S. at 421 n.7 (declining to resolve the issue because it did not affect the disposition of the case). At least one lower federal court has held that any changes to a jurisdiction's baseline require preclearance. *See NAACP v. Georgia*, 494 F. Supp. 668, 677 (N.D. Ga. 1980).

49. *See* H.R. REP. NO. 89-439, at 42 (1965), *reprinted in* 1965 U.S.C.C.A.N. 2437, 2470-71 (describing the preclearance provision as "unnecessary," "[an] affront to the doctrine of separation of powers," "abrasive," and "unprecedented").

enactment.<sup>50</sup> Congress, however, has since found continuing need for the preclearance requirement and has extended the provision four times, most recently in 2006.<sup>51</sup>

The 2006 reauthorization resulted in an extensive legislative record,<sup>52</sup> detailing congressional findings on the preclearance requirement's success but also noting the continued necessity for its enforcement authority to preserve and expand these gains.<sup>53</sup> In reaching its conclusion, Congress pointed to the high number of objections to voting laws imposed by the DOJ since 1982.<sup>54</sup>

Congress also noted attempts by covered jurisdictions to stall review of voting legislation, or avoid the preclearance requirement altogether.<sup>55</sup> In particular, Congress referenced a number of instances where jurisdictions initially submitted changes to the DOJ for approval, prompting the DOJ to request more information regarding the voting changes, only to have the state withdraw the voting changes from DOJ consideration.<sup>56</sup> Congress indicated that this practice might suggest that covered jurisdictions were submitting changes with the knowledge that potential problems existed in the legislation, and withdrawing those changes from consideration as soon as the DOJ sought to investigate.<sup>57</sup> The National Commission on the Voting Rights Act further found that “[o]nce officials in covered jurisdictions became aware of the logic

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50. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437, 438.

51. See Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, § 3, 84 Stat. 314, 315 (1970) (extending the VRA for five years); Voting Rights Act Amendments of 1975, Pub. L. No. 94-73, § 101, 89 Stat. 400, 400 (1975) (extending the VRA for seven years); Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, § 2, 96 Stat. 131, 131 (1982) (extending the VRA for another twenty-five years); Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, § 4, 120 Stat. 577, 580 (2006) (extending the VRA for another twenty-five years).

52. *Shelby Cnty. v. Holder*, 811 F. Supp. 2d 424, 435 (D.D.C. 2011) (noting that the legislative record was “over 15,000 pages in length”), *aff’d*, 679 F.3d 848 (D.C. Cir.), *cert. granted in part*, 133 S. Ct. 594 (2012).

53. H.R. REP. NO. 109-478, at 11–12, 21, 61 (2006), *reprinted in* 2006 U.S.C.C.A.N. 618, 626–27, 631, 662. Congress found that between 1982 and 2006, the DOJ received thousands of proposed voting changes annually from covered jurisdictions. *Id.* at 36. Of the submissions, 700 were discriminatory within the meaning of the VRA. *Id.*

54. See *id.* at 36 (noting that “[t]he increased number of objections, revised submissions, and withdrawals over the last 25 years are strong indices of continued efforts to discriminate”).

55. *Id.* at 41.

56. *Id.* at 40–41. The DOJ has the authority to request in writing from a jurisdiction requesting preclearance “any omitted information necessary for evaluation of the submission.” 28 C.F.R. § 51.37 (2011) (citing *Branch v. Smith*, 538 U.S. 254, 263 (2003)). The authority to request more information serves the interests of preclearance enforcement by: (1) ensuring that a decision regarding preclearance is not made without all available facts, and (2) placing a jurisdiction on notice that a proposed change may be problematic. See Luis Ricardo Fraga & Maria Lizet Ocampo, *More Information Requests and the Deterrent Effect of Section 5 of the Voting Rights Act*, in *VOTING RIGHTS ACT REAUTHORIZATION OF 2006: PERSPECTIVES ON DEMOCRACY, PARTICIPATION, AND POWER* 47, 53 (Ana Henderson ed., 2007).

57. H.R. REP. NO. 109-478, at 36.

of preclearance, they tend[ed] to understand that submitting discrimination changes is a waste of taxpayer time and money . . . because the chances are good that an objection will result.”<sup>58</sup>

#### *D. Relevant Standard for Preclearance*

A covered jurisdiction seeking preclearance bears the burden of proving that a change in its election law will not have a retrogressive effect on minority voting.<sup>59</sup> A voting change will be denied preclearance if it “has the purpose of or will have the effect of diminishing the ability of any citizen of the United States on account of race or color . . . to elect their preferred candidates of choice.”<sup>60</sup> The standard of review under section 5 is unique because it alters the presumption of validity normally granted to state legislation<sup>61</sup> and, instead, requires a covered jurisdiction to justify a change in its laws to a federal body.<sup>62</sup>

##### *1. The Supreme Court and Preclearance*

The Supreme Court initially interpreted the preclearance authority granted under the VRA expansively.<sup>63</sup> For example, in *Beer v. United States*, the Court held that the purpose of the preclearance requirement was to “insure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise.”<sup>64</sup> The Court held that a proposed voting change should be

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58. NATIONAL COMMISSION ON THE VOTING RIGHTS ACT, PROTECTING MINORITY VOTERS: THE VOTING RIGHTS ACT AT WORK 1982–2005, at 57 (2006).

59. *Beer v. United States*, 425 U.S. 130, 142 (1976) (introducing the term “retrogression”). Such a showing must be established by a preponderance of the evidence. *Florida v. United States*, No. 11-1428, 2012 WL 3538298, at \*7 (D.D.C. Aug. 16, 2012).

60. 42 U.S.C. § 1973c(b) (2006). An election practice has the “effect” of “denying or abridging the right to vote” if it “would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise.” *Beer*, 425 U.S. at 141.

61. *See Fletcher v. Peck*, 10 U.S. 87, 128 (1810) (noting that state legislatures must be given deference when reviewing a law’s constitutionality).

62. H.R. REP. NO. 109-478, at 65 (highlighting the “burden-shifting remedy”). Section 5 is different from its counterpart in the VRA, section 2, which places a higher burden on plaintiffs seeking to enforce the VRA and grants greater deference to the state. Meghann E. Donahue, Note, “*The Reports of My Death Are Greatly Exaggerated*”: Administering Section 5 of the Voting Rights Act After *Georgia v. Ashcroft*, 104 COLUM. L. REV. 1651, 1654–55 (2004) (“Section 5 review stands in stark contrast [to section 2 and] requires the jurisdiction to show that it has satisfied statutory requirements ex ante, rather than requiring an affected citizen or the federal government to challenge the procedure ex post.”).

63. *See, e.g., Allen v. State Bd. of Elections*, 393 U.S. 544, 565–66 (1969) (holding that the preclearance requirement is clearly applicable to “state enactment[s] which alter[] the election law of a covered State in even a minor way”); *see also* Donahue, *supra* note 62, at 1655 (noting that the Supreme Court initially held that the preclearance requirement applied “not only to changes regarding citizens access to voting, but also to changes that would impact a minority group’s voting power”).

64. *Beer*, 425 U.S. at 141.

denied preclearance if it is established that the change would have a regressive effect on minority voting in the jurisdiction.<sup>65</sup>

During the Rehnquist Court, the expansive view of the preclearance requirement narrowed.<sup>66</sup> In *Reno v. Bossier Parish School Board (Bossier Parish II)*, the Court held that preclearance was permitted where a change had a “discriminatory but non regressive purpose.”<sup>67</sup> Three years later, in *Georgia v. Ashcroft*, the Court held that jurisdictions submitting a change for preclearance need only show, through a totality of the circumstances, that the change would not have a regressive effect on minority voting.<sup>68</sup> The combination of these two decisions altered the retrogression analysis formerly implemented under *Beer*, and lessened a covered jurisdiction’s burden when seeking preclearance.<sup>69</sup>

## 2. The 2006 Amendments: Congress Rebuffs the Supreme Court

When Congress reauthorized the VRA in 2006, it rejected the Supreme Court’s wavering jurisprudence regarding the preclearance requirement.<sup>70</sup> The House Report on the Reauthorization of the VRA noted congressional disapproval with the Court, stating that the combination of *Bossier Parish II* and *Ashcroft* “significantly weakened [the VRA’s effectiveness,] misconstrued Congress’ original intent in enacting the [VRA,] and narrowed the protections afforded by section 5 . . . .”<sup>71</sup> The 2006 Reauthorization Amendment rejected the holding of *Bossier Parish II* and amended the VRA to require a denial of preclearance when proposed voting changes have “any discriminatory purpose.”<sup>72</sup> The amendment also required denial of preclearance proposals

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65. *See id.*

66. *See* H.R. REP. NO. 109-478, at 65.

67. *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 341 (2000), *superseded by statute*, Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, § 5, 120 Stat. 577, 580–81 (2006) (codified at 42 U.S.C. § 1973c(b)–(d)), *as recognized in* *Shelby Cnty. v. Holder*, 679 F.3d 848, 856 (D.C. Cir. 2012).

68. 539 U.S. 461, 479–80 (2003), *superseded by statute*, Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006 § 5, *as recognized in* *Shelby Cnty.*, 679 F.3d at 856.

69. *Id.*

70. H.R. REP. NO. 109-478, at 65 (explaining that Congress had not intended the burden of proof to be construed in the manner announced by the decisions in *Ashcroft* and *Bossier Parish II*).

71. *Id.*

72. Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006 § 5. This was not the first time Congress legislatively overruled a Supreme Court decision developing a standard for administering the VRA. In 1980, the Court decided *City of Mobile v. Bolden*, 446 U.S. 55 (1980), a case interpreting section 2 of the VRA. In *Bolden*, the Court held that a state election practice would be found to violate section 2 only if the practice intentionally discriminated against minority voters. *Bolden*, 446 U.S. at 62, *superseded by statute*, Voting Rights Act Amendments of 1982,

that are intended to, or will have the effect of, diminishing the right to vote on the basis of race or color.<sup>73</sup>

3. *NAMUDNO: The Supreme Court Questions the Constitutionality of Section 5*

In 2009, the Supreme Court faced a direct challenge to the constitutionality of the section 5 preclearance requirement in *Northwest Austin Municipal Utility District Number One v. Holder (NAMUDNO)*.<sup>74</sup> Although the Court avoided the question of constitutionality by deciding the case on other grounds,<sup>75</sup> it gave strong indications that the section 5 preclearance requirement was constitutionally suspect.<sup>76</sup> In particular, Chief Justice John Roberts discussed the change of demographics in voter representation as well as the increased number of minority voters casting ballots in modern elections.<sup>77</sup> He concluded by stating:

More than 40 years ago, this Court concluded that “exceptional conditions” prevailing in certain parts of the country justified extraordinary legislation otherwise unfamiliar to our federal system. In part due to the success of that legislation, we are now a very different Nation. Whether conditions continue to justify such

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Pub. L. No. 97-205, § 2, 96 Stat. 131 (1982). Congress, in its 1982 amendments to the VRA, rejected this reading of the VRA, reasoning that the test placed too high a burden on those seeking to challenge discriminatory voting laws. See *Thornburg v. Gingles*, 478 U.S. 30, 43–44 (1986).

73. 42 U.S.C. § 1973c(b) (2006). Additionally, the House Report accompanying the 2006 amendments provided,

in making preclearance determinations under Section 5, the comparative “ability [of the minority community] to elect preferred candidates of choice” is the relevant factor to be evaluated when determining whether a voting change has a retrogressive effect. . . . Such was the standard of analysis articulated by the Supreme Court in *Beer v. United States* . . . and the standard the Committee seeks to restore.

H.R. REP. NO. 109-478, at 70–71.

74. *Nw. Austin Mun. Util. Dist. No. One v. Holder (NAMUDNO)*, 557 U.S. 193, 196 (2009).

75. *Id.* at 211.

76. *Id.* at 202 (finding that the preclearance requirement applies broadly); see also *id.* at 212 (Thomas, J., concurring in the judgment in part and dissenting in part) (noting that section 5 exceeds Congress’s power to enforce the Fifteenth Amendment). This signaled a possible retreat from prior precedent recognizing the broad scope of congressional authority to enact such legislation. See *City of Rome v. United States*, 446 U.S. 156, 182 (1980) (finding that the previous reauthorizations of the VRA to be a “plainly a constitutional method of enforcing the Fifteenth Amendment”); *South Carolina v. Katzenbach*, 383 U.S. 301, 326 (1966) (holding that “Congress has full remedial powers to effectuate the constitutional prohibition against racial discrimination in voting”), superseded by statute, Voting Rights Act of 1982 § 2(b), as recognized in *NAMUDNO*, 557 U.S. at 209.

77. *NAMUDNO*, 557 U.S. at 201.

legislation is a difficult constitutional question we do not answer today.<sup>78</sup>

Justice Clarence Thomas concurred in the judgment but opined that the preclearance requirement was unconstitutional.<sup>79</sup> According to Justice Thomas, “[t]he extensive pattern of discrimination that led the Court to previously uphold [section] 5 as enforcing the Fifteenth Amendment no longer exists.”<sup>80</sup>

Following the Supreme Court’s decision in *NAMUDNO*, a case squarely challenging the constitutionality of section 5 seemed inevitable. In *Shelby County v. Holder*, the District Court for the District of Columbia upheld the preclearance requirement against constitutional challenge.<sup>81</sup> In doing so, the court gave great weight to the historical record of the original VRA as well as to the extensive legislative record amassed during the 2006 reauthorization.<sup>82</sup> The court concluded that “current needs—the modern existence of intentional racial discrimination in voting—do, in fact, justify Congress’s 2006 reauthorization of the preclearance requirement imposed on covered jurisdictions by Section 5.”<sup>83</sup> The U.S. Court of Appeals for the D.C. Circuit affirmed the District Court’s decision, and the Supreme Court heard oral arguments in *Shelby County* on February 27, 2013, just before this Note goes to print.<sup>84</sup>

#### E. Florida’s 2011–2012 Election Changes

Florida’s election law changes between 2011 and 2012 seemed to challenge section 5’s defined boundaries. Changes to Florida’s election laws can be categorized into two main phases: (1) the passage of H.B. 1355, which made substantive alterations to Florida’s election code; and (2) a statewide voter purge that attempted to eliminate individuals not legally entitled to cast a ballot from voter rolls. Florida has five counties that are subject to section 5’s preclearance requirement,<sup>85</sup> and, therefore, the state must seek preclearance before implementing any election law changes in those five counties.

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78. *Id.* at 211 (citation omitted) (quoting *Katzenbach*, 383 U.S. at 334).

79. *Id.* at 212, 222 (Thomas, J., concurring in the judgment in part and dissenting in part) (noting that the Court has previously made clear that section 5 is an “uncommon exercise of congressional power” that would not have been “appropriate” absent the “exceptional conditions” and “unique circumstances” present in the targeted jurisdictions at that particular time” (quoting *Katzenbach*, 383 U.S. at 334–35)).

80. *Id.* at 226.

81. 811 F. Supp. 2d 424, 428 (D.D.C. 2011), *aff’d*, 679 F.3d 848 (D.C. Cir.), *cert. granted in part*, 133 S. Ct. 594 (2012).

82. *Id.*

83. *Id.*

84. *See Shelby Cnty. v. Holder*, 133 S. Ct. 594 (2012) (granting certiorari).

85. *See* 28 C.F.R. pt. 41, app. (2012) (noting that Florida counties Collier, Hardee, Hendry, Hillsborough, and Monroe are all covered under section 5).

### *1. Florida's H.B. 1355*

On May 19, 2011, Florida Governor Rick Scott signed into law Florida House Bill 1355.<sup>86</sup> The bill made eighty changes to Florida's election laws and procedures.<sup>87</sup> Following the bill's enactment, Kurt Browning, then Secretary of State for the State of Florida, ordered immediate implementation of a majority of the voting changes—prior to obtaining preclearance.<sup>88</sup> The American Civil Liberties Union sued, alleging that Florida had attempted to implement the changes without seeking preclearance.<sup>89</sup> Shortly thereafter, Secretary Browning submitted the entirety of H.B. 1355 to the DOJ for administrative preclearance review.<sup>90</sup>

The DOJ approved seventy-six of the eighty changes in H.B. 1355,<sup>91</sup> but it requested more information regarding the changes to early voting, third-party voter registration, citizen-proposed constitutional amendments, and voter address changes.<sup>92</sup> After the DOJ's request, Secretary Browning withdrew the four changes that had not received preclearance and instead filed an action for declaratory judgment in the U.S. District Court for the District of Columbia.<sup>93</sup>

#### *i. Early Voting*

The first of the four changes submitted to the district court involved changes to early voting procedures. Early voting is a process by which voters are

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86. 2011 Fla. Laws ch. 2011-40.

87. *Id.* These changes came in variety of areas. See FLA. STAT. ANN. § 97.0575 (West Supp. 2012) (providing changes to rules affecting third party voter registration groups); FLA. STAT. ANN. § 101.045 (West Supp. 2012) (altering laws regulating change of address by voters at the polls); FLA. STAT. ANN. § 101.62 (West Supp. 2012) (amending absentee ballot procedures); FLA. STAT. ANN. § 101.131 (West Supp. 2012) (changing regulations affecting poll watchers); FLA. STAT. ANN. § 100.371 (West. Supp. 2012) (limiting the amount of time a citizen petition for a constitutional amendment is valid).

88. Memorandum from Kurt S. Browning, Florida Sec. of State, to Supervisors of Elections (May 19, 2011), available at [http://election.dos.state.fl.us/pdf/SOS\\_Directive.pdf](http://election.dos.state.fl.us/pdf/SOS_Directive.pdf).

89. Complaint for Declaratory and Injunctive Relief ¶¶ 12–22, *Sullivan v. Scott*, No. 4:11-cv-10047-KMM, 2011 WL 4954261 (S.D. Fla. Oct. 18, 2011) [hereinafter *Sullivan Complaint*].

90. Second Amended Complaint for Declaratory Judgment, *Florida v. United States*, 885 F. Supp. 2d 299 (D.D.C. 2012) (No. 11-1428) [hereinafter *Florida Complaint*]. Florida, however, made plans to implement the changes in the counties that did not require preclearance. As the Brennan Center for Justice noted in a letter to Secretary Browning, the implementation of voting changes in some counties and not others is unprecedented in Florida history and may violate Florida law, which requires “uniformity in the application, operations, and interpretation of the state's election laws.” Letter from Lee Rowland & Wendy Weiser, Counsel, Brennan Ctr. for Justice at NYU Sch. of Law, to the Honorable Kurt Browning, Florida Sec. of State (June 2, 2011), available at <http://www.brennancenter.org/page/-/Democracy/Letter%20to%20Sec.%20Browning%20re%20Statewide%20implementation%206.2.11.pdf>.

91. *Florida Complaint*, *supra* note 90, ¶ 30.

92. *Id.* ¶¶ 28, 30.

93. *Id.* ¶¶ 30, 33.

permitted to cast a ballot before Election Day.<sup>94</sup> Early voting in the United States first gained momentum in the 1990s.<sup>95</sup> Following the 2000 presidential election, an increased number of states made electoral reforms that included early voting opportunities.<sup>96</sup>

Statewide early voting in Florida began in 2004,<sup>97</sup> and it was utilized heavily during the 2008 presidential contest.<sup>98</sup> The presidential campaigns made a

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94. JOHN C. FORTIER, ABSENTEE AND EARLY VOTING TRENDS, PROMISES, AND PERILS 15 (2006).

95. *Id.* Early voting, in many ways, developed as an outgrowth of “no excuse” absentee voting. *Id.* at 13. No excuse absentee voting began in the late 1970s and permitted voters to cast a ballot prior to Election Day without having to prove a prohibitive disability on Election Day. *Id.* Congress gave a boost to absentee voting in 1986 when it enacted the Uniformed and Overseas Citizens Absentee Voting Act, which requires states to allow members of the armed forces and certain overseas U.S. citizens to register and vote from their overseas locations. Uniformed and Overseas Absentee Voting Act (1986), Pub. L. No. 99-410, 100 Stat. 924 (codified as amended in 42 U.S.C. § 1973ff (2006)); FORTIER, *supra* note 94, at 13. Voters did not actually go to a polling location to participate in “no excuse” absentee voting, but rather used paper ballots mailed to them prior to an election. *Id.* While “no excuse” absentee voting produced great success in terms of voter turnout and voter convenience, some scholars argue that absentee voting presents an unacceptable opportunity for fraud. *Id.* at 54 (noting that the absence of protections within absentee voting systems makes them susceptible to fraud); JIMMY CARTER, GERALD R. FORD, LLOYD N. CUTLER, & ROBERT H. MICHEL, TO ASSURE PRIDE AND CONFIDENCE IN THE ELECTORAL PROCESS: REPORT OF THE NATIONAL COMMISSION ON FEDERAL ELECTION REFORM 43–44 (2002) (noting the threat absentee voting poses to secret ballot elections); William T. McCauley, *Florida Absentee Voter Fraud: Fashioning an Appropriate Judicial Remedy*, 54 U. MIAMI L. REV. 625, 632 (2000) (noting that “absentee voting is much more susceptible to illegal activity than voting in person” at the polling place). Absentee ballots are cast in private, away from a polling site, and mailed to election officials. *See* Anderson v. Canvassing & Election Bd., 399 So. 2d 1021, 1023 (Fla. Dist. Ct. App. 1981). This creates, at least, an inference of impropriety. *Id.* (noting that an elector at the polls must confront election officials face-to-face, whereas such a confrontation does not occur in absentee voting); FORTIER, *supra* note 91, at 54. Early voting is different from absentee voting in that early voting takes place at a polling location under conditions similar to Election Day. *Absentee and Early Voting*, NAT’L CONF. OF STATE LEGS., <http://www.ncsl.org/default.aspx?tabid=16604#early> (last updated Sept. 12, 2012); *see* FORTIER, *supra* note 94, at 15. For this reason, early voting should not engender the same level of suspicion as absentee voting.

96. *See* FORTIER, *supra* note 94, at 15. Early voting is now available in at least thirty-two states and the District of Columbia. *See* NAT’L CONF. OF STATE LEGS., *supra* note 95; *see also* Paul Gronke, Eva Galanes-Rosenbaum & Peter A. Miller, *Early Voting and Voter Turnout*, in DEMOCRACY IN THE STATES 68, 70 (Bruce E. Cain, Todd Donovan & Caroline J. Tolbert eds., 2008). State policy on early voting differs across the country, with some states allowing early voting forty-five days before the election, and other states limiting early voting to the Friday preceding the election. NAT’L CONF. OF STATE LEGS., *supra* note 95.

97. PAUL GRONKE ET. AL, EARLY VOTING IN FLORIDA, 2004, at 4 (2005), *available at* <http://people.reed.edu/~gronkep/docs/GronkeBishinStevensGalanes-Rosenbaum.APSA.2005.pdf>. Early voting opportunities existed in some areas of the state prior to 2000. 2000 Fla. Laws Ch. 2000-249, § 2 (codified as amended at FLA. STAT. ANN. § 101.657 (West 2009 & Supp. 2012)) (permitting county supervisors to allow voters to cast absentee ballots in-person prior to the election). However, a system mandating county officials to implement early voting did not exist until 2004. 2004 Fla. Laws ch. 2004-252, § 13 (codified as amended at FLA. STAT. ANN. § 101.657(1)(a)).

concerted effort to mobilize early voters across the nation,<sup>99</sup> particularly in Florida.<sup>100</sup> Their efforts were successful, and early voting increased in Florida during the 2008 election, with thirty-two percent of all voters casting early ballots.<sup>101</sup> This represented a one-hundred percent increase in early voting in Florida compared with the 2004 election.<sup>102</sup>

The most significant change in 2008 was the high rate at which African Americans utilized early voting.<sup>103</sup> More than half of African-American votes in Florida were cast during the early voting period.<sup>104</sup> Many of these votes were cast during the first week of early voting.<sup>105</sup> Interestingly, a high percentage of African-American voters utilized early voting in the five Florida

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98. CHUCK TODD ET. AL, *HOW BARACK OBAMA WON: A STATE-BY-STATE GUIDE TO THE HISTORIC 2008 PRESIDENTIAL ELECTION* 57 (2009) (noting that the high percentage of early voting during the 2008 election will “forever change political strategies for winning in [Florida]”).

99. KATE KENSKI, BRUCE W. HARDY & KATHLEEN HALL JAMIESON, *THE OBAMA VICTORY: HOW MEDIA, MONEY, AND MESSAGE SHAPED THE 2008 ELECTION* 261–62 (2010) (noting that then-Senator Barack Obama’s campaign encouraged early voting).

100. TODD ET. AL, *supra* note 98, at 57 (noting that both the Republican and Democrat 2008 presidential campaigns were concerned about early voting numbers in Florida); *Early Voting: Every Day Is Election Day*, CNN (October 28, 2008, 10:33 PM), [http://articles.cnn.com/2008-10-27/politics/early.voting\\_1\\_early-voting-dan-seligson-election-officials-report?\\_s=PM:POLITICS](http://articles.cnn.com/2008-10-27/politics/early.voting_1_early-voting-dan-seligson-election-officials-report?_s=PM:POLITICS) (discussing early voting strategies employed by the John McCain and Barack Obama campaigns).

101. COMM. ON ETHICS & ELECTIONS, INTERIM REP. 2011-118, at 3 (2010). Total votes in Florida increased in 2008, with over seven hundred thousand additional votes cast compared to the 2004 presidential election. *Compare* FLORIDA DEP’T OF STATE, DIVISION OF STATE ELECTIONS, NOVEMBER 2004 GENERAL ELECTION BALLOTS CAST, *available at* <http://election.dos.state.fl.us/reports/pdf/BallotsCast04.pdf>, *with* FLORIDA DEP’T OF STATE, DIVISION OF ELECTIONS, NOVEMBER 2008 GENERAL ELECTION BALLOTS CAST BY COUNTY, *available at* <http://election.dos.state.fl.us/reports/pdf/2008BallotsCast.pdf>.

102. COMM. ON ETHICS & ELECTIONS, *supra* note 101, at 3. Reports indicate that the high early voting interest took some voting sites by surprise, leading to ballot printers that were unable to keep up with voter demand. THE PEW CTR. ON THE STATES, *ELECTION 2008 IN REVIEW 2* (2008), *available at* [http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/Election\\_reform/Election-Review-2008.pdf](http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/Election_reform/Election-Review-2008.pdf). Some voters waited for up to eight hours in some locations to cast ballots. *Id.* at 7.

103. Michael P. McDonald, *The Return of the Voter: Voter Turnout in the 2008 Presidential Election*, 6 FORUM, no. 4, 2008, at 5.

104. *New Election Law May Disparately Affect Black Voters*, OCALA.COM (June 14, 2011), <http://www.ocala.com/article/20110614/wire/110619889?tc=ar>.

105. Letter from NAACP Legal Defense and Educational Fund Inc., Florida Conference of Black State Legislators & Florida State Conference NAACP, to Chris Herren, Chief of Voting Section, Civil Rights Division, U.S. Dep’t of Justice (June 17, 2011), *available at* [http://www.naacpldf.org/files/case\\_issue/2011-06-17%20LDF%20joint%20statement%20to%20AG%20regarding%20Florida%20election%20laws%20.PDF](http://www.naacpldf.org/files/case_issue/2011-06-17%20LDF%20joint%20statement%20to%20AG%20regarding%20Florida%20election%20laws%20.PDF) [hereinafter NAACP Letter] (citing Aaron Deslatte and Vicki McClure, *Battle for Florida: Blacks Turn out in Droves, but Few Young People Have Voted*, ORLANDO SENTINEL, Oct. 30, 2009, [http://articles.orlandosentinel.com/2008-10-30/news/earlyvote30\\_1\\_early-voting-voters-in-florida-black-voters](http://articles.orlandosentinel.com/2008-10-30/news/earlyvote30_1_early-voting-voters-in-florida-black-voters)) (“African Americans were 22% of voters during the first week of early voting in Florida statewide, despite being only 13% of the Florida electorate.”)

counties covered under the VRA preclearance requirement.<sup>106</sup> Although African Americans comprised only twelve percent of the voting-age population in the five covered counties,<sup>107</sup> African Americans represented nearly nineteen percent of early voters in the 2008 general election in those counties.<sup>108</sup>

Another interesting phenomenon that developed during the 2008 election was the high African-American early-voter turnout on the Sunday before Election Day.<sup>109</sup> This trend is due in part to African-American ministers encouraging their congregations to vote early in what became known as “souls to the polls” drives.<sup>110</sup> As one State Representative put it, “On that Sunday before the election, [ministers] told their congregation members we’re going to leave church when church is over and we’re going to the polls.”<sup>111</sup> African Americans represented thirty-one percent of the total voters on the Sunday prior to Election Day, even though they comprised only thirteen percent of the Florida electorate.<sup>112</sup> Similarly, Hispanic voters represented eleven percent of the electorate, but were twenty-two percent of the total voters on the Sunday prior to Election Day.<sup>113</sup>

Florida’s H.B. 1355 reduced the number of early voting days from fourteen days to eight days.<sup>114</sup> Additionally, the bill gave local election supervisors discretion to choose the early voting hours of operation for each site, essentially changing the hours from a mandatory eight hours per day (other than weekends), to a discretionary range of six to twelve hours per day.<sup>115</sup> Under the bill, election supervisors could reduce the total early voting hours

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106. *Id.* at 3.

107. *Id.*

108. *Id.*

109. *New State Voting Laws: Barriers to the Ballot? Hearing Before the Subcomm. on the Constitution, Civil Rights and Human Rights of the S. Comm. on the Judiciary*, 112th Cong. 21–22, 26 (2011) [hereinafter *Barriers to the Ballot? Subcomm. Hearing*] (testimony of Justin Levitt, Associate Professor of Law, Loyola Law School, Los Angeles, California).

110. *Florida v. United States*, 885 F. Supp. 2d 299, 333 (D.D.C. 2012); Editorial, *Voting Law’s Sunday Punch*, SARASOTA HERALD-TRIBUNE, June 15, 2011, at 6A.

111. Editorial, *supra* note 110. Another churchgoer, who organized carpools to the polls on the Sunday prior to Election Day, remarked, “Sunday in the African-American community is traditionally our day of rest, and once that early voting—‘take your souls to the polls’—caught on here, it became easier for people to get involved in voting.” Robert Barnes, *Months Before Election, A Fla. Vote Battle*, WASH. POST, Aug. 20, 2012, at A1–A2.

112. *Barriers to the Ballot? Subcomm. Hearing, supra* note 109, at 7 (testimony of Justin Levitt, Associate Professor of Law, Loyola Law School, Los Angeles, California).

113. *Id.* Similar totals occurred in Florida in 2010: African Americans represented twelve percent of total votes cast, but twenty-three percent of the ballots cast on the Sunday before Election Day, and Hispanics represented nine percent of the total votes but sixteen percent of the ballots cast on the Sunday before Election Day. *Id.*

114. 2011 Fla. Laws. Ch. 2011-40, § 39.

115. *Id.*

from ninety-six hours to a minimum of forty-eight hours.<sup>116</sup> H.B. 1355 also shifted the time period for early voting in the state, thereby removing the Sunday prior to Election Day as an early voting option.<sup>117</sup>

The legislative debates on the bill indicated two reasons for changing early voting. Some supporters of the reduction in early voting days noted that the change would cut costs.<sup>118</sup> Others contended that the number of early voting opportunities under the existing system was too generous, and that it rewarded those not politically active by allowing them to vote more than a week in advance of the election.<sup>119</sup>

*ii. Third-Party Voter Registration*

The second election change for which Florida sought preclearance was third-party voter registration. Third-party voter registration organizations are non-profit groups who seek to register eligible citizens to vote.<sup>120</sup> Such organizations have been in existence for decades across the country, including in the state of Florida.<sup>121</sup> These organizations have had remarkable success in increasing the number of persons registered to vote.<sup>122</sup>

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116. *Id.* Essentially, Florida's prior early voting laws provided for ninety-six hours of voting over the course of twelve days. *Florida v. United States*, No. 11-1428, 2012 WL 3538298, at \*15 (D.D.C. Aug. 16, 2012). H.B. 1355 reduced the number of days of early voting to eight, but it gave election officials the discretion to increase the *hours* an early voting site may be open such that a total of ninety-six hours of voting may still be achieved. *Id.* However, election officials also had the equal discretion to not increase their hours of operation, thereby reducing the hours of early voting to forty-eight. *Id.*

117. 2011 Fla. Laws ch. 2011-40, § 39. Other states have also followed Florida's lead and eliminated the Sunday prior to election day as an early voting option. *See Election 2012: Voting Laws Roundup*, *supra* note 3.

118. *See 4/26/11 Budget Comm. Meeting*, THE FLORIDA CHANNEL, available at <http://thefloridachannel.org/video/42611-senate-budget-committee/> (at 01:17:00) (showing Florida Senator Diaz de la Portilla stating that opening polling locations earlier than seven days prior to Election Day wastes funds).

119. *See 4/21/11 Joint House Meeting of the Subcommittees on Senate and House Redistricting*, THE FLORIDA CHANNEL, available at <http://thefloridachannel.org/video/42111-joint-house-meeting-of-the-subcommittees-on-senate-and-house-redistricting> (at 01:57:00) (showing Florida State Representative Matthew Caldwell stating, "I would suggest that the person that doesn't [vote during the new early voting period or on election day], frankly [does not] care enough and pay enough attention to the process that I frankly want them showing up to vote, because they are not an informed and concerned voter").

120. *See League of Women Voters of Fla. v. Cobb*, 447 F. Supp. 2d 1314, 1317-18 (S.D. Fla. 2006) (describing the mission and voter registration activities of the League of Women Voters).

121. *Id.* at 1317-18 & n.2; *see* FLA. STAT. ANN. § 97.0575 (West Supp. 2012) (providing rules regulating the activities of third-party voter registration organizations).

122. *New State Voting Laws II: Protecting the Right to Vote in the Sunshine State: Hearing Before the Subcomm. on the Constitution, Civil Rights, and Human Rights of the S. Comm. of the Judiciary*, 112th Cong. (2012) (written testimony of the Brennan Center for Justice at NYU School of Law) (noting that the U.S. Census Bureau estimates that 585,004 Florida citizens, representing 7.3% of all Florida registered voters in 2010, were registered to vote through a third-party registration organization). Percentages of voters registered by these groups are higher

H.B. 1355 placed new requirements on organizations seeking to register voters.<sup>123</sup> The bill required all third-party voter registration organizations to register with the state division of elections before registering voters.<sup>124</sup> Once registered, an organization must obtain Florida-issued voter registration forms,<sup>125</sup> which were assigned an individualized code so that they could be tracked via a government database.<sup>126</sup> The registration organizations were required to identify the registration agents collecting applications,<sup>127</sup> and also to act as a fiduciary to ensure that the applications are properly collected and submitted.<sup>128</sup> Further, all forms were required to be returned to the Department of Elections, regardless of whether they were completed by an eligible voter.<sup>129</sup> Completed applications were required to be returned to the Department of Elections within forty-eight hours of their completion by an eligible voter.<sup>130</sup> H.B. 1355 set penalties for non-compliance at \$50 per application with increased penalties for willful violations or mistakenly lost applications.<sup>131</sup>

The regulations garnered significant attention from organizations committed to registering voters.<sup>132</sup> The League of Women Voters, an organization that has registered voters across the country for decades, decided to forgo further registration efforts in Florida temporarily because it determined that it could not comply with the new requirements.<sup>133</sup>

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in minority communities, with “16.2% of African American registered voters and 15.5% of Hispanic registered voters in Florida . . . registered through drives [by third party voter registration groups], compared to only 8.6% of non-Hispanic white registered voters.” *Id.* Moreover, voter registration agencies have been successful in registering eligible voters from low-income communities, who have been historically under-represented among registered voters. *See* Andrew M. Fleischmann, *Protecting Poor People’s Right to Vote: Fully Implementing Public Assistance Provisions of the National Voter Registration Act*, NAT’L CIVIC REV., Fall 2004, at 66.

123. 2011 Fla. Laws ch. 2011-40, § 4(1) (codified at FLA. STAT. ANN. § 97.0575(1) (West Supp. 2012)).

124. *Id.* § 4(2) (codified at FLA. STAT. ANN. § 97.0575(2) (West Supp. 2012)).

125. *Id.*

126. *Id.*; FLA. ADMIN. CODE ANN. r. 1S-2.042 (West 2011).

127. 2011 Fla. Laws ch. 2011-40, § 4(1) (codified at FLA. STAT. § 97.0575(1) (West Supp. 2012)).

128. *Id.* § 4(3)(a) (codified at FLA. STAT. § 97.0575(3)(a) (West Supp. 2012)).

129. *Id.*

130. *Id.*

131. *Id.*

132. Three such organizations filed suit, contending that the new changes violated the First Amendment as well as section 2 of the VRA. *See* First Amended Complaint for Declaratory and Injunctive Relief at 1–4, *League of Women Voters of Fla. v. Browning*, 863 F. Supp. 2d 1155 (N.D. Fla. 2012) (No. 11-cv-628), *available at* <http://moritzlaw.osu.edu/electionlaw/litigation/documents/FLLofWamendedcomplaint.pdf>.

133. *Id.* at 6–7 (noting that the League has “imposed a moratorium on voter registration activities because the League, its members, and its volunteers fear that they will be unable to fully comply with the Law’s myriad requirements and cannot afford to risk incurring large fines or enduring the reputational harms that would result from even an innocent violation”); Mark

*iii. Citizen-Proposed Constitutional Amendments*

The third change for which Florida sought approval was citizen-proposed constitutional amendments. Florida law allows citizens to propose amendments to the state constitution by referendum.<sup>134</sup> Prior to H.B. 1355, a signature on a citizen petition for referendum was valid for four years<sup>135</sup>—meaning that the individual or organization submitting the petition had four years to gather the necessary number of signatures before the existing signatures expired.<sup>136</sup> H.B. 1355 changed this time period and made signatures on a petition valid for only two years.<sup>137</sup>

*iv. Inter-County Movers*

Prior to the enactment of H.B. 1355, Florida voters who moved within the state were permitted to change their voter registration address at the polls on Election Day, provided that they completed a written affirmation indicating their desire to change their legal residence.<sup>138</sup> The bill changed the practice for all voters who move between counties in the state, except members of the military and their families.<sup>139</sup> Voters are no longer able to change their address on Election Day and vote by regular ballot.<sup>140</sup> Instead, they must vote by provisional ballots.<sup>141</sup>

*2. Florida's Voter Purge*

In 2012, Governor Scott began exploring the possibility of purging Florida's voter rolls to remove ineligible voters.<sup>142</sup> Then-Secretary of State Browning was charged with implementing the purge.<sup>143</sup> However, Secretary Browning abandoned this effort after he concluded that the matching system the state planned to use was unreliable because it was mistakenly identifying eligible voters as ineligible.<sup>144</sup> Secretary Browning later resigned and was replaced by

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Schlueb, *Election-Law Changes Suppress Voters, Activists Say*, ORLANDO SENTINEL, Jan. 26, 2012, at A3.

134. FLA. STAT. ANN. § 100.371 (West Supp. 2012).

135. 2011 Fla. Laws ch. 2011-40, § 23 (codified at FLA. STAT. ANN. § 101.371(3)).

136. FLA. STAT. ANN. § 100.371(3).

137. 2011 Fla. Laws ch. 2011-40, § 23.

138. FLA. STAT. ANN. § 101.045(2)(a) (West 2008).

139. 2011 Fla. Laws ch. 2011-40, § 26 (codified at FLA. STAT. ANN. § 101.045 (West Supp. 2012)).

140. *Id.*

141. *Id.* Provisional ballots are counted unless “the canvassing board determines by a preponderance of evidence that the person was not entitled to vote.” FLA. STAT. ANN. § 101.048(2)(a) (West Supp. 2012).

142. Frieden & Liptak, *supra* note 6.

143. Lizette Alvarez, *Search for Illegal Voters May Violate Federal Safeguards, U.S. Tells Florida*, N.Y. TIMES, June 2, 2012, at A13.

144. *Id.*

Ken Detzner.<sup>145</sup> Secretary Detzner followed through with the voter purge plans,<sup>146</sup> and, in May 2012, sent a list of 2,700 possible non-citizen voters to county election officials for eligibility verification.<sup>147</sup> Secretary Detzner recommended to county supervisors that they require the individuals named on the list to provide proof of citizenship within thirty days.<sup>148</sup> If a notified individual failed to contact the appropriate election branch with the required proof, his or her name would be removed from the voter rolls.<sup>149</sup> The names on the potential non-citizen list included a disproportionately high number of minority voters.<sup>150</sup> The May 2012 purge list also mistakenly named citizens who were in fact eligible to vote, including war veterans and frequent voters.<sup>151</sup>

Undeterred, Florida sued the Department of Homeland Security to obtain access to a federal immigration database, which Florida believed would make the citizenship information used in the purge more accurate.<sup>152</sup> The purge was suspended during the time when Florida sought access to the Homeland Security Database.<sup>153</sup> However, at least one county, Collier, still purged voters from its rolls based on the old matching data.<sup>154</sup>

In September 2012, just over one month before Election Day, Governor Scott made one last effort to encourage county officials to purge their rolls. This time, the Governor sent a significantly reduced list of names, totaling 198 voters, to county officials and encouraged them to purge their rolls.<sup>155</sup> It is unclear how many counties implemented the purge, or if any voters were deterred from voting because they appeared on the purge list.

## II. FLORIDA'S ATTEMPTS TO EVADE THE PRECLEARANCE PROCESS

Although Florida's recent election law changes are troubling, the path Florida took to obtain preclearance of those changes is arguably even more disconcerting. At each step of the process, Florida consistently sought to elude its obligations under the VRA.<sup>156</sup> The state only submitted the changes in H.B.

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145. *Id.*; Rachel Weiner, *Florida's Voter Purge Explained*, WASH. POST (June 18, 2012 10:58 AM), [http://www.washingtonpost.com/blogs/the-fix/post/floridas-voter-purge-explained/2012/06/18/gJQAhvNIV\\_blog.html](http://www.washingtonpost.com/blogs/the-fix/post/floridas-voter-purge-explained/2012/06/18/gJQAhvNIV_blog.html).

146. Alvarez, *supra* note 143.

147. Marc Caputo & Steve Bousquet, *Details on Voter Purge Sought from Counties*, TAMPA BAY TIMES, Aug. 10, 2012, at 7B.

148. Alvarez, *supra* note 143.

149. *Id.*

150. *See id.*

151. Barnes, *supra* note 111, at A1–A2 (stating that the initial list supplied by the Secretary to county election supervisors contained “war veterans and longtime voters”).

152. *Florida Voter Purge to Resume*, HERALD-TRIBUNE, Aug. 14, 2012, <http://politics.heraldtribune.com/2012/08/14/florida-voter-purge-to-resume/>.

153. *Id.*

154. *Mi Familia Vota Educ. Fund Complaint*, *supra* note 18, ¶ 39.

155. Caputo, Mazzei & Bousquet, *supra* note 20.

156. *See* Part II.C.1.

1355 for preclearance after the American Civil Liberties Union initiated a lawsuit.<sup>157</sup> After submission, the state appeared hostile toward the preclearance process by withdrawing provisions from review and alternating between the administrative and judicial preclearance processes. Furthermore, to date, Florida has refused to submit the voter purge changes for preclearance.<sup>158</sup>

#### *A. H.B. 1355 Litigation*

Following the passage of H.B. 1355, Florida sought to implement the election law changes without first obtaining preclearance.<sup>159</sup> In fact, Florida did not submit the changes for DOJ preclearance until after a lawsuit was filed to compel submission.<sup>160</sup> After Florida made the submission, the DOJ requested additional information on four specific provisions of the Bill in order to determine if the changes complied with section 5.<sup>161</sup> Florida's then-Secretary of State Browning immediately withdrew the provisions from the administrative preclearance process, instead of answering the DOJ's request. He subsequently submitted these provisions to the District Court for the District of Columbia for preclearance,<sup>162</sup> setting the stage for a three-judge panel of the court to decide whether the four provisions met the requirements of the VRA.<sup>163</sup>

After the four provisions were submitted, Florida nevertheless withdrew some of the proposed changes from preclearance review.<sup>164</sup> Specifically, the state withdrew the changes to Florida's citizen-proposed constitutional amendments procedure and, for the second time in a matter of months,<sup>165</sup> submitted that change to the DOJ for preclearance.<sup>166</sup> Following this second

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157. *See supra* Part I.E.1.

158. *See infra* Part II.B.

159. *See* Memorandum from Kurt S. Browning, Fla. Sec. of State, to Supervisors of Elections (May 19, 2011) (issues Directive 2011-01), *available at* <http://election.dos.state.fl.us/directives.shtml>; *Sullivan* Complaint, *supra* note 89, ¶ 18.

160. *Compare Sullivan* Complaint, *supra* note 89, ¶¶ 12–18, 22 (arguing that Florida has not obtained preclearance and seeking an injunction from the court to prevent Florida from enforcing the provisions of H.B. 1355 before obtaining preclearance), *with Florida* Complaint, *supra* note 90, ¶¶ 9, 26, 30, 38 (showing that Florida submitted proposed changes for preclearance).

161. *See Florida v. United States*, 885 F. Supp. 2d 299, 302 (D.D.C. 2012) (noting that the DOJ initially precleared seventy-six of the eighty provisions submitted by Florida).

162. *Id.*

163. *Id.* at 359. The practice of submitting electoral changes for administrative preclearance, and the retraction thereof after the DOJ makes a request for additional information, disturbed Congress when they considered reauthorization of the VRA in 2006. H.R. REP. NO. 109-478, at 36 (2006), *reprinted in* 2006 U.S.C.C.A.N. 618, 640.

164. *Florida*, 885 F. Supp. 2d at 361.

165. *Id.* at 302, 361.

166. Letter from T. Christina Herren, Jr., Chief, Voting Section, Civil Rights Division, U.S. Dep't of Justice, to Daniel E. Nordby, Esq. (March 21, 2012) (on file with author) [hereinafter *Herren Letter*] (noting that the DOJ had received the State of Florida's submission for

submission, the DOJ was satisfied with the additional information provided and did not impose an objection to the change.<sup>167</sup> The district court reviewed the remaining three changes throughout the summer of 2012.<sup>168</sup> One week prior to the district court releasing its opinion, Florida once again altered the provisions submitted for review.<sup>169</sup> This time, the state withdrew from the court's consideration H.B. 1355's change to third-party voter registration organizations.<sup>170</sup> The decision to discontinue preclearance efforts was likely based, at least partially, on the U.S. District Court for the Northern District of Florida's decision to grant a preliminary injunction against the third-party registration changes—barring their implementation while litigants pursued a challenge under section 2 of the VRA.<sup>171</sup>

This left the District Court with two changes for review: (1) the inter-county mover changes; and (2) the new early voting restrictions.<sup>172</sup> On August 16, 2012, the Court approved the inter-county mover changes, but declined to clear the early voting changes because “the State ha[d] failed to satisfy its burden of proving that those changes [would] not have a retrogressive effect on minority voters.”<sup>173</sup>

With respect to the changes to inter-county mover registration, the district court found that H.B. 1355's changes would “disproportionately affect minority voters” since minority voters were more likely than white voters to change their addresses at the polls.<sup>174</sup> The court analyzed election data since 2008 and concluded that Hispanic and African-American voters were twice as likely as white voters in Florida's five covered counties to move between

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preclearance of the citizen-proposed constitutional amendments). The resubmission occurred after discovery in the case, when the United States determined that Florida had met its obligation in establishing that the changes would not have a retrogressive effect on minority voting. *See Florida*, 885 F. Supp. 2d at 360. Since discovery revealed information about the changes enacted by H.B. 1355 that were not presented to the DOJ during the initial submission for preclearance, it is unclear whether the change would have been precleared had Florida simply complied with the DOJ's initial request for further information prior to litigation commencing.

167. Herren Letter, *supra* note 166.

168. *Florida*, 885 F. Supp. 2d at 361.

169. *Id.*

170. Statement Regarding the Effect of the Recent Order in the Northern District of Florida at 1–2, *Florida*, 885 F. Supp. 2d 299 (D.D.C. 2012) (No. 1:11-cv-01428), available at <http://moritzlaw.osu.edu/electionlaw/litigation/documents/FloridasStatementRegardingBrowningCourtsOrder.pdf>.

171. *League of Women Voters of Fla. v. Browning*, 863 F. Supp. 2d 1155, 1167 (N.D. Fla. 2012) (finding that third-party registration groups were entitled to a preliminary injunction as the plaintiffs had “easily [met] their burden”). A permanent injunction was later granted against the third-party registration changes. Permanent Injunction and Order for Entry of Judgment, *League of Women Voters of Fla. v. Detzner*, No. 4-11-cv-628 (N.D. Fla. Aug. 30, 2012), available at [www.brennancenter.org/sites/default/files/legacy/Democracy/VRE/LWVF\\_v\\_Browning\\_Final\\_Order.pdf](http://www.brennancenter.org/sites/default/files/legacy/Democracy/VRE/LWVF_v_Browning_Final_Order.pdf).

172. *Florida*, 885 F. Supp. 2d at 302.

173. *Id.* at 303.

174. *Id.* at 338.

counties.<sup>175</sup> Despite this, the district court concluded that the new requirements were not “materially more burdensome” than the benchmark practice, and, therefore, approved the change.<sup>176</sup>

The district court’s review of H.B. 1355’s early voting changes focused primarily on the discretion the new law gave to county election officials to choose the number of hours to operate polling sites.<sup>177</sup> The controlling factor in the district court’s review was the possible reduction of hours from a mandatory ninety-six early voting hours to a minimum of forty-eight early voting hours.<sup>178</sup> The court determined that if a covered jurisdiction used its discretion to reduce the number of early voting hours, a retrogressive effect on minority voting would occur due to the high levels of minority participation in the early voting period in past elections.<sup>179</sup> However, the court also noted that if a covered county used its discretion to continue to offer early voting for ninety-six hours, a retrogressive effect would not occur.<sup>180</sup> Because the law gave wide discretion to election officials to choose from anywhere between forty-eight and ninety-six hours of early voting,<sup>181</sup> the court denied preclearance on the early voting provision.<sup>182</sup> However, shortly after the court’s decision, the covered counties made plans to offer early voting for the maximum ninety-six hours, but reduce the number of days as required by H.B. 1355.<sup>183</sup> This seeming compromise resulted in the DOJ dropping its objection to granting preclearance for the early voting changes.<sup>184</sup> Interestingly, even though Florida finally received the court’s “blessing” on its early voting changes, the Florida House of Representatives, pressured by the public and voting rights activists, recently voted 118-to-1 to pass H.B. 7013, which provides for “a minimum of eight and a maximum of 14 early voting days, and a minimum of 64 and a maximum of 168 early voting hours,” while also expanding the number of early voting sites and setting word limits on “legislative ballot summaries.”<sup>185</sup>

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175. *Id.* at 339–40.

176. *Id.* at 342, 346.

177. *Id.* at 319–20.

178. *Id.*

179. *Id.* at 322–24.

180. *Id.* at 334–37.

181. *See supra* note 116 (detailing the discretion given to election officials to choose the number of hours a voting site remains open); *see also Florida*, 885 F. Supp. 2d at 321 (“With respect to the specific hours of voting, the new law leaves the supervisors unconstrained. Hence, it may result in fewer of the early morning and evening hours that are convenient for voters working the standard 9 a.m. to 5 p.m. workday. Or, it may result in more such hours.”).

182. *Florida*, 885 F. Supp. 2d at 321.

183. Response by the United States to Florida’s Motion for Judgment on Count Four of the Fourth Amended Complaint, *supra* note 16, at 2.

184. *Id.*

185. *See* Press Release, Florida House of Representatives, House Passes Priority Election Reform Legislation on Opening Day of Session (March 5, 2013), *available at*

### B. Voter Purge Litigation

Florida did not submit the plans to purge voter rolls to the DOJ or the district court for preclearance.<sup>186</sup> Voter rights groups quickly brought suit, arguing that the proposed purge represented a change in voting procedures that required preclearance.<sup>187</sup> Florida defended the purge by arguing that removing ineligible voters from voter rolls was not a change in state election procedures, but rather mere enforcement of already existing voter registration requirements.<sup>188</sup> Florida further contended that it could not be sued to force section 5 compliance, because the State of Florida, as a whole, is not a covered jurisdiction under the VRA.<sup>189</sup> Rather, the state insisted that the plaintiffs file suit only against Florida's five covered counties, instead of against the state, in order to seek relief under section 5.<sup>190</sup>

The suit seeking to subject the purge to section 5 is still pending as of the writing of this Note.<sup>191</sup> Because Florida did not submit the voter roll purge for section 5 preclearance, plaintiffs wishing to challenge the purge must first seek an order from a federal court in Florida ordering the state to submit the purge for preclearance review—only then would the change undergo a full review.<sup>192</sup> This delay in section 5 review allowed county election officials to proceed

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<http://www.myfloridahouse.gov/Sections/HouseNews/preview.aspx?PressReleaseld=541>; see also Lizette Alvarez, *Florida Governor Backs Voting Changes*, N.Y. TIMES, Jan. 18, 2013, at A17 (noting some critics' claims that the new proposals do not go far enough to address the flaws in the state's voting system).

186. Steve Bousquet, *Feds: Florida's Voter Purge Violates Federal Law*, MIAMI HERALD (July 31, 2012), <http://www.miamiherald.com/2012/07/31/2923382/feds-florida-voter-purge-violates.html>.

187. *Mi Familia Vota Educ. Fund* Complaint, *supra* note 18, ¶¶ 50–51. This was not the only litigation instituted to challenge the voter purge. See Complaint for Declaratory and Injunctive Relief ¶ 1, *Arcia v. Detzner*, No. 1:12-cv-22282 (S.D. Fla. June 19, 2012) (challenging Florida's voter purge under section 2 of the VRA); Complaint ¶ 1, *United States v. Detzner*, No. 4:12-cv-00285 (N.D. Fla. June 12, 2012) (challenging Florida's voter purge under the National Voter Registration Act of 1993).

188. The Secretary's Motion to Dismiss First Amended Complaint at 2–3, *Mi Familia Vota Educ. Fund*, No. 8-12-cv-1294 (M.D. Fla. Sept. 18, 2012).

189. *Id.* at 3–4.

190. *Id.* However, the Supreme Court has previously held that statewide voting changes in a partially covered state must be precleared. *Lopez v. Monterey Cnty.*, 525 U.S. 266, 280 (1999).

191. See *supra* note 22 and accompanying text.

192. Order Denying Motion to Dismiss, at \*2 n.2, *Mi Familia Vota Educ. Fund*, No. 8-12-cv-1294 (M.D. Fla. Sept. 18, 2012), available at, 2012 WL 4086509. (noting that the U.S. District Court for the Middle District of Florida “lacks the authority to consider whether the Database Matching Program does or does not have a discriminatory purpose or effect” because its inquiry is limited to “ensur[ing] that the covered jurisdiction submits its election plan to the appropriate federal authorities for preclearance” and thus leaving “the only issues before the Court are whether Section 5 covers the Database Matching Program, whether Section 5's approval requirements were satisfied, and if the requirements were not satisfied, what temporary remedy, if any, is appropriate” (internal citations omitted) (quoting *Lopez v. Monterey Cnty.*, 519 U.S. 9, 23 (1996))).

with the planned purge in the weeks before the 2012 election; however, it remains unclear how many counties went through with the purge or if any individuals were prevented from voting as a result.<sup>193</sup>

### III. HOW THE VRA CAN CONTINUE TO PROTECT VOTING RIGHTS IN FLORIDA

Although the VRA has been the subject of much criticism in recent years,<sup>194</sup> Florida's legislative and executive actions in 2011 and 2012 demonstrate a need for section 5 preclearance as a tool for reviewing state actions that may have a retrogressive effect on minority voting rights. The district court's opinion denying preclearance to Florida's early voting changes clearly highlights the need for continued aggressive enforcement of the preclearance requirement.<sup>195</sup> However, the state's changes to third-party registration organization requirements and the state's attempt to implement a statewide voter purge—compounded by the state's efforts to evade the preclearance process—additionally demonstrate the need for federal review of voting legislation.<sup>196</sup> Moreover, the circumstances leading to the enactment of H.B. 1355 indicate that legislation arguably designed to restrict voter participation yet persists, making the preclearance requirement relevant in modern America.

#### *A. The District Court's Incomplete Analysis of H.B. 1355 Misses an Important Opportunity to Address the Effect of Florida's Early Voting Changes*

##### *1. Changes to Early Voting Are Retrogressive*

H.B. 1355 eliminated important early voting opportunities upon which Floridians relied in recent elections.<sup>197</sup> Despite the district court's initial denial of preclearance to Florida's early voting changes, the court eventually allowed the reduced number of early voting days to take effect.<sup>198</sup> A study conducted by Professors Michael Herron and Daniel Smith [the Herron-Smith study] reviewing the effect of Florida's early voting changes on the 2012 election found that the changes had a substantial impact on minority voting.<sup>199</sup> This suggests that a reduction in early voting days will likely lead to lower early voting numbers in future elections, especially when compared to the high level of early voting that Florida saw in 2008.<sup>200</sup>

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193. Caputo, Mazzei & Bousquet, *supra* note 20.

194. See *Nw. Austin Mun. Util. Dist. No. One v. Holder (NAMUDNO)*, 557 U.S. 193, 202 (2009); see also *supra* notes 75–86 and accompanying text (discussing dicta in *NAMUDNO*, which suggests that section 5 may be unconstitutional).

195. See *supra* Part II.A.

196. See *supra* Part II.

197. See COMM. ON ETHICS AND ELECTION, *supra* note 101, at 3 (noting that thirty-two percent cast their ballot through early voting procedures).

198. See *supra* Part II.A.

199. Herron & Smith, *supra* note 17, at 38.

200. COMM. ON ETHICS & ELECTIONS, *supra* note 101, at 3.

Importantly, such changes to early voting are likely to decrease minorities' ability to participate in the electoral process.<sup>201</sup> More than half of the votes cast by African Americans in Florida in the 2008 presidential election were cast during the early voting period.<sup>202</sup> In the five counties required to obtain preclearance under the VRA, African Americans numbered nearly twenty percent of early votes, a higher percentage compared to their representation in the electorate as a whole.<sup>203</sup> Similarly, an elimination of the Sunday prior to election day as an early voting option is also likely to impact African-American voting totals in future elections, given the importance of that day in prior elections.<sup>204</sup> Indeed, the Herron-Smith study specifically found that "the voting rights of racial and ethnic minorities [in the 2012 election] appear to have been disproportionately hampered by H.B. 1355's reduction in the number of early voting days, particularly the elimination of the final Sunday of early voting."<sup>205</sup>

In a seemingly drastic position change, Florida's Secretary of State Detzner, at the direction of Governor Scott, released a report indicating that the decreased number of early voting days in the state contributed to inefficiency during the 2012 election.<sup>206</sup> The report presents the Florida Department of State's view that H.B. 1355's changes to early voting should be reversed, and early voting should return to the pre-H.B. 1355 structure.<sup>207</sup>

## *2. The District Court's Opinion Misapplied the Preclearance Requirement and Permitted Retrogressive Early Voting Changes to Proceed*

Under the VRA, a covered jurisdiction seeking a declaratory judgment that a voting change satisfies the preclearance requirement has the substantial burden to establish that the proposed changes to election laws or procedures will not have the purpose or effect of denying the right to vote on account of race.<sup>208</sup> A

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201. See *New Election Law May Disparately Affect Black Voters*, *supra* note 104; see also *supra* notes 97–108 and accompanying text (discussing the increase in voter participation among African Americans as a result of early voting procedures).

202. See *New Election Law May Disparately Affect Black Voters*, *supra* note 104.

203. NAACP Letter, *supra* note 105, at 3.

204. Editorial, *supra* note 110.

205. Herron & Smith, *supra* note 17, at 38.

206. RECOMMENDATIONS FOR INCREASED ACCESSIBILITY & EFFICIENCY IN FLORIDA ELECTIONS at 5, FLA. DEP'T OF STATE, February 4, 2013, available at [http://www.dos.state.fl.us/pdf/2-4-2013\\_Recs\\_for\\_Increased\\_Accessibility\\_and\\_Efficiency\\_in\\_FL\\_Elections.pdf](http://www.dos.state.fl.us/pdf/2-4-2013_Recs_for_Increased_Accessibility_and_Efficiency_in_FL_Elections.pdf).

207. See *id.* at 7 (calling on the legislature to "[a]mend [Fla. Stat.] § 101.657(1)(d) . . . to require supervisors of elections to offer at least eight consecutive days of early voting with the flexibility to extend up to 14 consecutive days of early voting, ending on either the Saturday or Sunday immediately prior to Election Day"); see also *supra* note 185 and accompanying text (highlighting recent legislative efforts to improve Florida's election system and reverse many of H.B. 1355's controversial early voting changes).

208. 42 U.S.C. § 1973c(a)–(b) (2006).

state cannot meet its burden under the VRA by merely demonstrating a lack of intent to inhibit voting on the basis of race.<sup>209</sup> Rather, the covered jurisdiction must demonstrate that a change, although neutral on its face, will not have the effect of diminishing the ability of citizens to exercise their right to vote on account of race.<sup>210</sup>

The district court, in its review of H.B. 1355's early voting changes, applied what can only be described as judicial tunnel-vision, missing an important opportunity to address some key concerns. In declining preclearance, the court focused primarily on the potential decrease in the number of *hours* available for early voting.<sup>211</sup> Although the total number of hours that early voting sites are open is certainly a relevant consideration, it is not determinative. Disregarding other factors not only ignores why early voting is effective at increasing electoral participation, but also discounts Florida's early voting history.

Specifically, the Court made two critical errors when analyzing H.B. 1355's early voting changes. First, the Court disregarded that H.B. 1355 limits the number of days that early voting locations are open, noting that if the polls were open for the same number of total hours, the change would not cause a retrogression in minority voting.<sup>212</sup> This reasoning ignores the purpose behind early voting, which is to ensure that voters have increased opportunities to cast a ballot.<sup>213</sup> The number of days—not just hours—a polling site is open is a significant factor in achieving this goal, especially for rural voters and voters with demanding work schedules.<sup>214</sup> For such voters, early voting sites with extended hours that are open for just a few days are not beneficial, since these voters often lack the ability to travel to polls on particular days.<sup>215</sup> The flexibility of Florida's early voting regime prior to H.B. 1355 allowed county election officials to open polls over a period of two weeks, tailoring the times to ensure the greatest electoral participation in a given county.<sup>216</sup> The reduction of early voting days to a maximum of eight days limits this flexibility and unnecessarily restricts voters' opportunities to access the polls.

The district court also failed to sufficiently address H.B. 1355's changes to Sunday voting. Recognizing that H.B. 1355 eliminated the availability of early

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209. See 42 U.S.C. § 1973c.

210. *Id.*; *Nw. Austin Mun. Util. Dist. No. One v. Holder (NAMUDNO)*, 557 U.S. 193, 198–99 (2009). When it reauthorized the VRA in 2006, Congress made clear its intention for this to be the applicable standard. See H.R. Rep. No. 109-478, at 2 (2006), reprinted in 2006 U.S.C.C.A.N. 618 (rejecting the Supreme Court's decisions in *Reno v. Bossier Parish School Board*, 528 U.S. 320 (2000) and *Georgia v. Ashcroft*, 539 U.S. 461 (2003)).

211. *Florida v. United States*, 885 F. Supp. 2d 299, 319–37 (D.D.C. 2012).

212. *Id.* at 337.

213. See FORTIER, *supra* note 94, at 15.

214. See NAACP Letter, *supra* note 105, at 6–7.

215. See *id.* at 5–6.

216. See *supra* notes 97–108 (discussing the measurable success of early voting in Florida).

voting on the Sunday prior to Election Day, the court acknowledged that the day produced large gains in minority voter participation in the previous two federal elections<sup>217</sup> but nevertheless found that the change would not cause a retrogression in minority voting because voting could still occur on the Sunday two weeks prior to the election.<sup>218</sup> Although it is true that voting can still occur on Sundays generally, the district court's analysis failed to recognize the unique circumstances that led to high minority voting participation on the Sunday prior to Election Day. The Sunday prior to Election Day was the principal time that ministers in minority community churches encouraged their congregations to vote.<sup>219</sup> It was not simply that this was a Sunday, but rather the imminence of the pending election combined with the large numbers of minority voters in one location who could be persuaded to vote that led to the high turnout on *that particular* Sunday.<sup>220</sup> The district court was again mistaken to treat this fact as irrelevant. Indeed, the Herron-Smith study, reviewing H.B. 1355's changes after the 2012 election, found that the district court "underestimated the impact of curtailing the number of early voting days on minority access to the polls," noting that the court's presumptions were directly refuted by the 2012 election turnout's demographic data.<sup>221</sup>

*B. Florida's Third-Party Voter Registration Changes and Voter Purge Attempt Also Demonstrate the Need for Federal Review of Voting Legislation*

*1. Changes to Third-Party Registration Requirements Are Retrogressive*

Third-party registration organizations serve a crucial purpose in increasing voter participation.<sup>222</sup> Particularly, these groups have been successful in

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217. *Florida*, 885 F. Supp. 2d at 335–36.

218. *Id.*

219. See Editorial, *supra* note 110 (quoting State Rep. Perry Thurston as saying, "[o]n that Sunday before the election, they told their congregation members we're going to leave church when church is over and we're going to the polls").

220. The court additionally held that since Sunday voting did not occur in the covered counties in previous elections, the alteration to the benchmark practice cannot be said to be retrogressive *in the covered counties*. *Florida*, 885 F. Supp. 2d at 320–21. According to the court, since Florida is only a partially-covered jurisdiction, changes to state voting laws do not fall within the strictures of the preclearance requirement so long as the particular statewide law was never implemented in the covered jurisdiction. *Id.* This interpretation of the statute allows a state to implement election law changes in noncovered jurisdictions, and then—when minority voting increases because of the change—prohibit that change from being enacted in covered jurisdictions. Such a view of section 5 lacks merit. Instead, the appropriate measure of the benchmark practice should consider statewide practices as well as existing discretion given to county officials to decide if and when to implement a jurisdictional change. In Florida's case, county officials in the covered jurisdictions were able to implement Sunday voting prior to the enactment of H.B. 1355. The Bill removed that discretion and, therefore, represented a new "standard, practice, or procedure with respect to voting." 42 U.S.C. § 1973c(a) (2006).

221. Herron & Smith, *supra* note 17, at 38.

222. See *supra* Part I.E.1.ii.

registering large numbers of minority voters in Florida.<sup>223</sup> Increasing minority voter registration was one of the primary goals of the original VRA and served as a justification for the preclearance requirement under section 5.<sup>224</sup>

If Florida had not been enjoined from implementing new restrictions on third-party organizations, it is arguable that minority voters would have been negatively impacted in the 2012 election.<sup>225</sup> H.B. 1355 contained harsh requirements on these organizations, including the procedures that organizations were required to follow when returning voter registration forms to the state.<sup>226</sup> These regulations, if not strictly adhered to, may have resulted in substantial fines to third-party organizations.<sup>227</sup> The detrimental effects of this provision were seen when the League of Women Voters—a group known for its success in registering voters—suspended its voter registration activities in Florida out of fear that it could not comply with the new provisions.<sup>228</sup> Based on the high rate at which minority voters utilize third-party registration groups to register to vote, such a change would have likely reduced minority participation in the 2012 election.<sup>229</sup> The potential retrogressive effect of such legislation further evidences the need for federal review of election law changes.

## *2. Florida's Voter Purge Attempt Is Retrogressive*

Florida's attempt to remove voters from its election rolls further highlights the importance of the protections afforded by the VRA.<sup>230</sup> It is undisputed that a number of the initial individuals identified by the voter purge were eligible voters,<sup>231</sup> and that minority voters were disproportionately affected by the purge.<sup>232</sup> Moreover, the process recommended by Secretary Detzner, which would have county supervisors remove registered voters from voter rolls if they did not provide proof of citizenship within thirty days,<sup>233</sup> leaves little room for error. Under this policy, an eligible voter who carelessly handled his

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223. See *supra* note 122 and accompanying text (discussing the success of third-party registration organizations in the 2008 election).

224. See *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966) (“The Voting Rights Act was designed by Congress to banish the blight of racial discrimination in voting, which has infected the electoral process in parts of our country for nearly a century.”); see also *supra* Part I.B (discussing the history of the VRA).

225. See *supra* Part II.A.

226. 2011 Fla. Laws ch. 2011-40, § 4 (codified at FLA. STAT. ANN. § 97.0575 (West Supp. 2012)).

227. *Id.*

228. See *supra* notes 132–33 and accompanying text (describing the League of Women Voters’ “moratorium on voter registration activities”).

229. See *supra* Part I.E.1.ii.

230. See *supra* Part II.B.

231. Alvarez, *supra* note 143.

232. *Mi Familia Vota Educ. Fund* Complaint, *supra* note 18, ¶ 35.

233. Alvarez, *supra* note 143.

or her mail could potentially find his or her name removed from the voter rolls and unable to cast a ballot on Election Day.<sup>234</sup>

Despite these harsh realities, the state has taken the position that such changes are not subject to the preclearance requirement.<sup>235</sup> However, the litigation seeking to compel Florida to comply with section 5's requirements emphasizes the important effects that the preclearance process can have on a state's actions. Interestingly, when the section 5 voter purge litigation began, Florida was in the process of recommending that 2,700 registered voters submit eligibility verification.<sup>236</sup> The section 5 suit highlighted that many individuals on this list were eligible voters.<sup>237</sup> Shortly thereafter, the state halted its purge plans and later submitted a significantly diminished list of only 198 names to county supervisors for eligibility verification.<sup>238</sup> This highlights an important reality in section 5 cases: often litigation—although unable to completely prevent a jurisdiction from implementing voting changes that adversely effect minorities—will have the effect of tempering state action aimed at altering voting laws.<sup>239</sup> Such is the case with Florida's voter purge, where the threat of section 5 litigation was likely a contributing factor in the state's decision to significantly limit the number of identified voters to be purged from the state's voter rolls. Given this reality, it is evident that the preclearance requirement's purpose is served by subjecting the Florida voter purge, and others like it, to administrative review.<sup>240</sup>

*C. Florida's Justifications for H.B. 1355, Coupled with Its Behavior Through the Preclearance Process, Demonstrates that Florida Had an Improper Purpose in Enacting the Law*

In addition to the retrogressive effect on minority voter participation, the circumstances leading to the enactment of H.B. 1355 further suggest that these changes were made to intentionally disenfranchise African Americans—evidencing an improper purpose under section 5.<sup>241</sup> The justification for the changes given by public officials in Florida heightens this

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234. *Id.*

235. See Order Denying Motion to Dismiss, *supra* note 192, at \*2.

236. Caputo & Bousquet, *supra* note 147.

237. *Mi Familia Vota Educ. Fund* Complaint, *supra* note 18, at ¶ 39.

238. Caputo, Mazzei & Bousquet, *supra* note 20.

239. See H.R. REP. NO. 109-478, at 35-36 (2006), reprinted in 2006 U.S.C.C.A.N. 618, 639-40.

240. Florida's argument that the state is not required to submit the changes for preclearance because only five of its counties are subject to the preclearance requirement is also problematic—it displays yet another attempt to skirt the preclearance process. The Supreme Court in *Lopez v. Monterey County* rejected this argument. See 25 U.S. 266, 280 (1999) (“[Section] 5 preclearance is required where a non-covered State effects voting changes in covered counties.”).

241. See *supra* Part I.E.

suspicion.<sup>242</sup> Namely, several members of the Florida legislature justified their support of H.B. 1355 by stating that voting should be more difficult, and that a convenient form of voting rewards the politically inept.<sup>243</sup> The statements made by these officials suggest that they may believe that democracy benefits when only the well-informed vote and that laws should be enacted to make the voting process more arduous in order to deter less-informed voters.<sup>244</sup> Such a contention is unavailing. Enacting voting barriers to limit voting rights demeans the purpose of the Fifteenth Amendment and the VRA, both of which were enacted to ensure that every eligible voter would be permitted to vote without facing unnecessary hurdles from private or state actors.<sup>245</sup>

Election changes by Florida should not be viewed in a vacuum. Rather, these changes should be considered in light of the more than one-dozen other jurisdictions that enacted changes to their voting laws in 2011 and 2012,<sup>246</sup> including the five states that limited early voting.<sup>247</sup> Although the DOJ and the District Court for the District of Columbia do not typically consider voting changes in other jurisdictions when considering whether to grant preclearance, this concept is not foreign to the VRA. The original preclearance requirement was enacted specifically in response to collusion among jurisdictions that attempted to stay ahead of federal regulation of voting rights.<sup>248</sup> With this history in mind, when addressing preclearance, the district court and the DOJ should not ignore similar changes in other jurisdictions that appear to have parallel effects on minority voting. In the present case, the limitations placed on early voting by five states and the elimination of the Sunday prior to Election Day as an early voting option by three states should not go unnoticed.<sup>249</sup> Likewise, that nearly one dozen states made substantial

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242. See *supra* notes 118–19 and accompanying text.

243. See *supra* notes 118–19 and accompanying text.

244. See *supra* note 2.

245. See *supra* Part I.A–B.

246. See *Election 2012: Voting Laws Roundup*, *supra* note 3; see also *supra* note 3 and accompanying text (highlighting the various states that enacted changes).

247. Georgia, Ohio, Tennessee, and West Virginia also enacted legislation to limit early voting opportunities. *Election 2012: Voting Laws Roundup*, *supra* note 3. These changes were enacted shortly after high African-American early voting totals across the country contributed to the election of the first African-American President. *Barriers to the Ballot? Subcomm. Hearing*, *supra* note 109, at 7 (testimony of Justin Levitt, Associate Professor of Law, Loyola Law School, Los Angeles, California). Moreover, Florida, Georgia, and Ohio have all chosen to eliminate the Sunday prior to election day as an early voting option. *Id.* at 8 (statement of Sen. Sherrod Brown).

248. See *Beer v. United States*, 425 U.S. 130, 140 (1976) (describing the VRA’s preclearance requirement as designed to prevent the “common practice in some jurisdictions of staying one step ahead of the federal courts by passing new discriminatory voting laws as soon as the old ones had been struck down” (internal quotation marks omitted)).

249. *Barriers to the Ballot? Subcomm. Hearing*, *supra* note 109, at 7 (testimony of Justin Levitt, Associate Professor of Law, Loyola Law School, Los Angeles, California) (noting the burdens such laws place on minority voters).

changes to their voting procedures shortly after the election of the nation's first African-American president, and a year before a major presidential election, are facts that should not be dismissed as mere coincidence.<sup>250</sup> Instead, the courts should treat such circumstances as supporting evidence of discriminatory motives.<sup>251</sup>

#### D. Importance of Continued Enforcement of Section 5

In *NAMUDNO*, the Supreme Court suggested that the preclearance authority of section 5 may no longer be necessary to enforce minority-voting rights.<sup>252</sup> In an attempt to demonstrate this, the Court surveyed the changing demographics in voter representation and emphasized the increased number of minority voters casting ballots.<sup>253</sup> As of the writing of this Note, the Court is scheduled to consider a direct challenge to section 5 in *Shelby County*. When it does, the Court would be remiss to ignore recent voting legislation.

The facts surrounding Florida's passage of H.B. 1355 and voter purge attempt demonstrate an urgent need for the preclearance requirement. In particular, Florida's actions demonstrated the ability—and desire—of a state to restrict voting in a manner that could limit minorities' ability to vote.<sup>254</sup> These concerns can only be addressed by requiring jurisdictions with a history of such disenfranchisement to seek review of their voting changes. The preclearance process ensures that such a review takes place.

The case of Florida demonstrates not only the need for the preclearance requirement, but also its effectiveness. As outlined in this Note, the preclearance requirement has been utilized to slow Florida's plan to purge voter rolls, and it has prevented the full implementation of Florida's initial proposals for early voting restrictions.<sup>255</sup> Now, even Florida appears to agree that the initial purge attempt was flawed, and that the restrictions on early voting should be lifted.<sup>256</sup> It is hard to imagine where Florida would be without the section 5 review process. The purge attempt would have gone forward without challenge, leading to the removal of validly registered voters

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250. See *supra* note 3.

251. It is important to note that when deciding the issue of preclearance, the district court did not have occasion to review whether each of H.B. 1355's changes were enacted with a discriminatory purpose. Specifically, because the court did not conduct a full effects analysis of the early voting changes, the purpose of the changes went unanalyzed. See *Florida v. United States*, 885 F. Supp. 2d 299, 351 (D.D.C. 2012) (leaving the purpose analysis "for another day"). With regard to the inter-county mover changes, the court concluded that no evidence in the record suggested a discriminatory purpose. *Id.* at 367.

252. See *supra* notes 75–80 and accompanying text (discussing certain dicta in *NAMUDNO* suggesting section 5's unconstitutionality).

253. *Nw. Austin Mun. Util. Dist. No. One v. Holder (NAMUDNO)*, 557 U.S. 193, 211 (2009).

254. See *supra* Part I.E.

255. See *supra* Part II.A–B.

256. See *supra* notes 184, 236–37 and accompanying text.

from the voter rolls.<sup>257</sup> Further, the early voting changes would have been implemented to their fullest extent, giving county election officials full discretion to determine an early voting site's operating hours.<sup>258</sup> The preclearance process prevented the most drastic of these consequences.

If anything, the preclearance requirement should be strengthened, not weakened. As recognized by this Note, the District Court for the District of Columbia's preclearance decision permitted covered counties to implement H.B. 1355's changes to early voting as long as the counties offered the same number early voting hours, over a decreased number of days.<sup>259</sup> As evidenced by the 2012 election, this change had the effect of decreasing minority participation in the voting process.<sup>260</sup> Courts reviewing such changes in the future should be mindful of their role in vigorously enforcing the strictures of section 5. Only with vigorous enforcement is the VRA's purpose achieved.

Lastly, although Florida's situation provides ample evidence of the continuing need for section 5 enforcement, Florida is not alone. Rather, Florida is one of over a dozen states that chose to modify their voting laws in 2011 and 2012, making it more difficult for individuals to access the ballot.<sup>261</sup> This reality should not go unnoticed when considering the future of section 5. Instead, in determining whether Congress continues to maintain the authority to subject states to the preclearance requirement, attention should be given to the enactment of any legislation likely to negatively affect minority participation in elections.

#### IV. CONCLUSION

Historically, high minority voting participation has often been met with the implementation of voting restrictions. The VRA preclearance requirement was intended to prevent actions by a covered jurisdiction to alter its voting procedures in a manner that would limit opportunities for voters to cast a ballot. The changes made by Florida in advance of the 2012 election were precisely the type of alterations that the VRA preclearance requirement was designed to prevent. These changes demonstrate that the mission of the VRA is as relevant today as when President Johnson introduced the bill over forty years ago.

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257. See text accompanying notes 235–37.

258. See *supra* notes 115–16 and accompanying text.

259. See *supra* Part II.A.

260. Herron & Smith, *supra* note 17, at 38.

261. See *supra* note 3 and accompanying text.

