IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STATE OF FLORIDA, Plaintiff, v. UNITED STATES OF AMERICA and ERIC H. HOLDER, JR., in his official capacity as Attorney General, Defendants, KENNETH SULLIVAN, *et al.*, Defendant-Intervenors.	Civil Action No: 11-01428-CKK-MG-ESH

BRIEF OF SENATOR BILL NELSON AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANTS AND DEFENDANT-INTERVENORS

INTEREST OF *AMICUS CURIAE*

Comes now, Senator Bill Nelson, a United States Senator of the One Hundred Twelfth Congress, as *Amicus Curiae* (hereinafter referred to as "*Amicus*").[1] Senator Nelson is the senior United States Senator for the State of Florida, having been first elected to that office in 2000. This election followed a distinguished public service career in which Senator Nelson has held elective office as a member of the Florida Cabinet, a United States Representative, and a member of the Florida House of Representatives. As a United States Senator, *Amicus* has a special interest in the issues at stake in this litigation.

[1] In accordance with this Court's Order of June 14, 2012, *Amicus* submits this submission, reflecting the directive that the discussion be "confined to presenting arguments based on the law and the evidentiary record that is presently before the Court."

As with each public office in which he has had the privilege of serving, when *Amicus* was elected to the United States Senate, he took an Oath to uphold the Constitution and the laws of the United States. By virtue of that Oath, *Amicus* has a paramount interest in ensuring that the laws of every state, but especially the laws of his home state of Florida, do not conflict with the supreme law of the land. *Amicus curiae* submissions are manifestly appropriate in matters – like this – of great public interest. *United States v. City of Columbus*, 2000 WL 1745293 (S.D. Ohio 2000).

INTRODUCTION

Amicus urges this Court to deny preclearance of the amendments to the Florida Election Code before it for review pursuant to Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973(c) (hereinafter referred to as "VRA"). These provisions, contained in Florida Committee Substitute for Committee Substitute for House Bill 1355 (hereinafter "HB 1355") and signed into law by Governor Rick Scott on May 19, 2011, impose severe burdens and penalties that strike at the core of our democracy. Because these proposed changes have the purpose or effect of denying or abridging the right to vote on account of race, color, or membership in a language minority, as interpreted by the Supreme Court in *South Carolina v. Katzenbach*, 383 U.S. 301 (1966), *Amicus* asserts that preclearance should be denied.

First, HB 1355 imposes onerous new requirements on third party voter registration organizations without any accompanying justification for the same. These amendments include burdensome registration requirements for volunteers and require third party voter registration

organizations to submit completed voter registration applications within forty-eight hours of their receipt. Violation of these provisions may result in harsh fines and possibly even felony criminal liability. For fear of unintentionally running afoul of these provisions, venerable, non-partisan civic organizations across the state altogether ceased their voter registration efforts in Florida.[3] Judge Hinkle's finding of constitutional infirmity diminishes neither the VRA violation nor the importance of this Court's role in addressing the preclearance issue.

Second, HB 1355 also eliminates critical days of early voting. Under the previous law, early voting began on the fifteenth day before an election and ended on the second day before the election. HB 1355 reduces the total number of days available for early voting from fourteen days to eight days, by allowing early voting to begin only on the tenth day before an election and ending on the third day before the election. Under the decision of the local supervisor of elections, the total number of early voting hours can range from 48 hours to 96 hours.[4] This adversely affects seniors and the disabled who cannot stand for long periods of time in voting lines on Election Day. It also hurts working families who benefit from being able to vote when their schedules permit. HB 1355 also eliminates early voting on the Sunday before Election Day, a day when, as data shows, both African American and Hispanic voters are more likely to vote. HB 1355 thus affects early voting in two serious and substantial ways: first, it reduces the total number of days of early voting; second, it eliminates early voting on the Sunday before Election Day.

[3]Third party voter registration groups filed suit in the Northern District of Florida, challenging those provisions of HB 1355 that restrict their efforts and expose them to civil and criminal liability for the violation of the same. *League of Women Voters of Florida v. Browning*, Case No. 4:11-CV-00628 (N.D. Fla.) On May 31, 2012, Judge Robert Hinkle granted, in part, the plaintiff's motion for a preliminary injunction, enjoining the enforcement of several provisions of HB 1355 as violative of the First and Fourteenth Amendments and of the National Voter Registration Act of 1993, 42 USC 1973gg. *Amicus* notes that this Court is currently reviewing the applicability of that decision to the issues before this court.

[4] HB 1355 provides that early voting "shall be provided for no less than 6 hours and no more than 12 hours per day at each site during the applicable period."

Third, HB 1355 precludes a citizen who has moved from one county to another within Florida from casting a regular ballot if he does not update his address prior to the day he votes. Instead, HB 1355 requires such a voter to cast what is known as a provisional ballot, which may ultimately not be counted.[5] This provision adversely affects the ability of some Florida citizens - in particular, college students, renters, and low-income citizens who move more frequently - to cast their votes freely and have their votes counted.

Through these provisions, HB 1355 eliminates - and indeed penalizes - opportunities for civic engagement and voter participation. Such restrictions come at the expense of all Florida citizens and the health of our democracy. Ultimately, it is voters who, by casting ballots for their elected officials, grant these officials the authority to govern. When the right to vote is impeded, government itself is threatened. Critically, for purposes of the issues before this Court, HB 1355 has the purpose and effect of denying or abridging Floridians' right to vote on account of race, color, or membership in a language minority, and thus, should be denied preclearance under Section 5 of the VRA. *Katzenbach*, 383 U.S. 301.

ARGUMENT

I. The Sanctity of the Vote

Voting is of the most fundamental significance under our constitutional structure. *Burdick v Takushi,* 504 U.S. 428, 433 (1992); *Ill. State Bd. of Elections v. Socialist Workers Party*, 440 v. U.S. 173, 184 (1979). Congress has repeatedly affirmed that the right of citizens to vote in the United States is fundamental, and that the Federal, State and local governments have a duty to promote the exercise of that right. The National Voter Registration Act of 1993, 42 U.S.C. 1973gg(a). Moreover, Congress has determined that the right to register to vote is similarly fundamental. The Fannie Lou Hamer, Rosa Parks and Coretta Scott King Voting Rights

[5] HB 1355 excepts from this provision any "active uniformed services voter or a member of his or her family."

Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, §2 ("The purpose of this Act is to ensure that the right of all citizens to vote, including the right to register to vote and cast meaningful votes, is preserved and protected as guaranteed by the Constitution."). Because the right to vote is preservative of every other basic civil and political right, all threats to that right must be "meticulously scrutinized." *Reynolds v. Sims*, 377 U.S. 533, 561-62 (1964). Moreover, the Supreme Court has held that restrictions on access to the ballot burden two distinct and fundamental rights, "the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively." *Ill. State Bd. of Elections*, 440 U.S. at 184 (citing *Williams v. Rhodes*, 393 U.S. 23, 30 (1968)).

II. A History of Voter Suppression

Since its founding, the United States of America has been a beacon of democracy and a source of inspiration for those struggling for freedom. For more than one hundred years of its existence, however, more than half the adult population was denied the most fundamental right in a democratic form of government—the right to vote. While the Fifteenth Amendment to the U.S. Constitution, ratified in 1870, guaranteed African American men the right to vote, this promise remained an empty one for decades after its ratification.[6] *See Rice v. Cayetano*, 528 U.S. 495, 512-13 (2000) (though the purpose of the Fifteenth Amendment was clear, "the reality remained far from the promise").

Following the period of Reconstruction, violence and intimidation were widely employed against African Americans attempting to exercise the newly won franchise. *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193 (2004). In time, violence gave way to Jim Crow

[6]All women, including African American women, were denied the right to vote even longer, until the ratification of the Nineteenth Amendment in 1919.

laws, including poll taxes, literacy tests, and other invidious devices, which effectively disenfranchised African American citizens in many parts of the country well into the mid-twentieth century. *See Katzenbach*, 383 U.S. at 310 (citing literacy tests, grandfather clauses, property qualifications, "good character" tests, and the discriminatory application of voting tests as pervasive schemes employed to prevent African Americans from voting until as recently as 1964).

III. The Voting Rights Act and Florida

As has been extensively discussed by the parties before the Court, Section 5 of the VRA prescribes the suspension of all new voting regulations in covered jurisdictions, pending review by federal authorities to determine whether their use would perpetuate voting discrimination. *Katzenbach*, 383 U.S. at 315-16. Covered jurisdictions, determined by a set of requirements detailed in Section 4(b) of the VRA, include those "areas where voting discrimination has been most flagrant." *Id.* at 315. Because of a history of language discrimination, five counties in Florida—Collier, Hardee, Hendry, Hillsborough, and Monroe—have been required to obtain preclearance under Section 5 of the VRA before implementing any voting law changes.[7]

Great strides have been made under the VRA. Unfortunately, measures threatening to reduce or restrict participation of some would-be voters have not disappeared entirely. When Congress reauthorized the Voting Rights Act in 2006, *Amicus* and other members of Congress noted that while progress has been made in ensuring that all citizens are allowed to vote without restriction, voter suppression remains a real threat in our country. Senator Arlen Specter (PA), "Fannie Lou Hamer, Rosa Parks and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006." Vol. 152, *Congressional Record*, July 20, 2006, P.S7949-S8102,

[7] Collier and Hendry Counties, 41 Fed. Reg. 34329, (August 13, 1976); Hillsborough, Hardee and Monroe Counties, 40 Fed. Reg. 43746 (September 23, 1975).

S7950; Congressman Jim Sensenbrenner (WI), "Fannie Lou Hamer, Rosa Parks and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006." Vol. 152, *Congressional Record*, July 13, 2006, P. H5143-5177, H5144-46. For example, after the 2000 Presidential Election, the United States Commission on Civil Rights issued a report entitled: "Voting Irregularities during the 2000 Presidential Elections," after investigating allegations that Florida voters were prevented from casting ballots or that their ballots were not counted in the November 2000 Presidential election.[8] The challenges that Florida faced during the 2000 Presidential election led the state of Florida to implement various election reforms, including early in-person voting, which were intended to make it easier for citizens to vote.[9] *E.g.,* Fla. Laws Ch. 2001-40, §§ 55, 53. Against this backdrop, our citizenry and elected officials must remain vigilant against threats to this most fundamental of our democratic institutions. The preclearance provisions of Section 5 of the VRA provide an orderly and essential mechanism for such continued vigilance.

IV. The Discriminatory Purpose and Impact of HB 1355

In its submissions to the Court, the State downplays the serious impact HB 1355 will have on Florida voters, particularly on voters who belong to racial or language minority groups. Notably, the State characterizes as "minor" the fines to be imposed on third party voter registration organizations for violations of HB 1355's restrictive requirements concerning voter registration efforts. (State's Proposed Finding of Fact ("FF") 62.) It describes the adverse effects of the changes to inter-county voting requirements as "*de minimis*" and claims that in-person early voting is "merely a *convenience* to voters." (FF 80; 97.) Defendants, however, have

[8] The United States Commission on Civil Rights, Voting Irregularities during the 2000 Presidential Elections, June 2001, http://www.usccr.gov/pubs/vote2000/report/main.htm.

[9] Revitalizing Democracy in Florida, The Governor's Select Task Force on Standardizing Election Technology, Standards and Procedures, March 1, 2001, http://www.collinscenter.org/resource/resmgr/Election-Reform/Revitalizing_Democracy_in_Fl.pdf.

submitted compelling evidence that HB 1355's restrictions and impediments to third party voter registration organizations, inter-county voting, and early in-person voting all will have adverse and disparately negative impacts on minority voters. These impacts are not merely matters of "convenience."

Protecting access to the polls for citizens who have historically been disenfranchised is the paramount goal of the Voting Rights Act. Although Section 5 of the VRA was originally passed to cover a limited period of time, Congress renewed and expanded its provisions, most recently in 2006, in light of findings of continued discrimination. *Riley v. Kennedy*, 553 U.S. 406, 413 (2008). Accordingly, it remains the case that, under the VRA, election laws that have retrogressive effects on these groups cannot be tolerated. *See Beer v. United States*, 425 U.S. 130, 141 (1976). Characterizing those effects as "minor" or "*de minimis*" reflects a misunderstanding of the law. When election laws have the purpose or effect of discriminating on the basis of race or membership in a protected minority group, the effect can never be "*de minimis*."

Any contention that HB 1355 passes muster because its adverse effects will impact only a small number of voters conflicts with long-established constitutional principles that "all qualified voters have a constitutionally protected right to vote" and that each vote must be equally accounted for. *See Reynolds v. Sims*, 377 U.S. 533, 554-55 (1964). Restrictions on access to the ballot, particularly when such restrictions disparately impact members of minority groups, impair our ability to function as a government of, by, and for the people and diminish confidence in our democratic institutions, both at home and abroad. Moreover, the improper restriction of even a small number of votes has the potential to dramatically impact the outcomes of elections.

Indeed, the 2000 presidential election in Florida was determined by a margin of approximately 537 votes. (Appendix Vol. 17 9410-14.)

Defendants aptly note in their submissions to the Court that HB 1355's effects are not *de minimis* or otherwise negligible. Even were the negative, disparate impacts of HB 1355 on protected minority groups so "minor," however, they would nonetheless be impermissible under the VRA, long-established constitutional principles, and concepts fundamental to our representative democracy. The right to vote is protected in more than the initial allocation of the franchise. *Bush v. Gore*, 531 U.S. 98, 104 (2000). Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another. *Id.* at 104-105. *See, e.g., Harper v. Va. Bd. of Elections*, 383 U.S. 663, 665 (1966). ("[O]nce the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment."). It must be remembered that "the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." *Reynolds*, 377 U.S. at 555.

CONCLUSION

For the reasons discussed above, HB 1355 will inevitably result in substantially reduced minority voter registration and turnout. This not only conflicts with the constitutionally protected right to vote for which so many have fought, it violates Section 5 of the VRA. *Amicus* respectfully requests that the Court deny preclearance for the provisions of HB 1355 at issue.

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Respectfully submitted,

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