LEGAL DEPARTMENT
SOUTHERN
REGIONAL OFFICE
VOTING RIGHTS
PROJECT

ACLU
AMERICAN CIVIL LIBERTIES UNION FOUNDATION

April 6, 2011

Chris Herren
Chief, Voting Section
Civil Rights Division
U.S. Department of Justice
1800 G Street, NW
Room 7254 - NWB
Washington, DC 20006

AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
SOUTHERN
REGIONAL OFFICE
230 PEACHTREE STREET, NW
SUITE 1440
ATLANTA, GA 30303-1513
T/404.523.2721
F/404.653.0331
WWW.ACLU.ORG
WWW.VOTINGRIGHTS.ORG

NATIONAL OFFICE
125 BROAD STREET, 18TH FL.
NEW YORK, NY 10004-2400
T/212.549.2500
F/212.549.2654
WWW.ACLU.ORG

RE: Comment under Section 5 of the Voting Rights Act,
Submission No. 2011-0090, State of Florida

Dear Mr. Herren:

The Voting Rights Project of the ACLU and the Florida ACLU ("ACLU") submit this comment letter to urge the Department of Justice to preclear under Section 5 of the Voting Rights Act the State of Florida's Submission No. 2011-0090. The proposed changes, Sections 20 and 21 of Article III of the Florida Constitution, establish new standards for drawing congressional and legislative district boundaries and would not cause retrogression in minority voting strength consistent with Section 5.

Approximately 1.7 million Florida voters signed petitions to put the two constitutional amendments, known as the Fair District Amendments, on the 2010 general election ballot, and the amendments were approved by more than a super majority (60%) of the state's voters. The amendments also had the overwhelming endorsement of major civil rights and other groups, including the NAACP, the League of Women Voters, Common Cause, the ACLU, the Florida League of Cities, the Florida Black Legislative Caucus, and the Florida Association of School Boards.

That the amendments are not retrogressive is apparent from their language that no apportionment plan or district shall be drawn "with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process or to diminish their ability to elect representatives of their choice." This language mirrors the language of Sections 2 and 5 of the Voting Rights Act, and therefore, by definition could not be deemed to be retrogressive or objectionable under Section 5.

The amendments also provide that "[n]o apportionment plan or district shall be drawn with the intent to favor or disfavor a political party or an incumbent." It may well be that some incumbent politicians or political parties would prefer that plans be drawn in a way that favored them, by enhancing the incumbents' prospects for re-election, and for that reason oppose the amendments.[1] However, Section 5 is non-partisan and is not designed either to ensure or denigrate the protection of incumbents or political parties. Its purpose, rather, is to ensure that new voting practices do not have the purpose or effect of diminishing the ability of minorities "to elect their preferred candidates of choice." Nothing in the requirement that incumbents or political parties be neither favored nor disfavored in redistricting is inconsistent with, or could be deemed to violate, the rights protected by Section 5.

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The Supreme Court held in LULAC v. Perry, 548 U.S. 399, 456 (2006), that the harm in political gerrymandering was "an abuse of power that, at its core, evinces a fundamental distrust of voters, serving the self-interest of the political parties at the expense of the public good." To hold that it was a violation of Section 5's non-retrogression standard to mandate neutrality with respect to partisan gerrymandering would not only rewrite Section 5 but would also sacrifice the public good to the self-interests of incumbents and political parties.

Other provisions of the Fair District Amendments provide that districts, consistent with the above standards, shall comply with one person, one vote and traditional redistricting principles, such as compactness and, where feasible, utilizing existing political and geographic boundaries. Nothing in the use of these standards is facially inconsistent with the non-retrogression standard of Section 5.

Of course, any redistricting plan drawn using the Fair District Amendments affecting a covered jurisdiction in Florida would be subject to Section 5 review. That would be the proper time to determine if the plan had a discriminatory purpose or effect within the meaning of Section 5. But as written, the amendments do not violate Section 5 and should be precleared.

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[1]Two incumbent members of Congress have in fact filed suit claiming that Article III, Section 20 violates Article I, Section 4, clause 1 of the U.S. Constitution (the Elections Clause). Diaz-Balart v. Scott, Case No. 10-CV-23968-UNGARO (S.D. Fla.). The Supreme Court, however, has expressly rejected this argument and held that a referendum is part of a state's legislative process and is not preempted by the Elections Clause. Davis v. Hildebrant, 241 U.S. 565, 567 (1916). See also Smiley v. Holm, 285 U.S. 355, 368, 372-73 (1932).

Sincerely,

Laughlin McDonald

Laughlin McDonald
Director, Voting Rights Project
American Civil Liberties Union

Randall Marshall (/ I am with ex. pers.

Randall Marshall
Legal Director, American Civil
Liberties Union Florida

Howard Simon (/ I am with ex. pers.

Howard Simon
Director, American Civil
Liberties Union Florida

AMERICAN CIVIL LIBERTIES
UNION FOUNDATION

April 14, 2011

Paul M. Smith
Jenner & Block LLP
1099 New York Avenue, NW
Suite 900
Washington, DC 20001
Tel 312-222-9350
psmith@jenner.com

Chicago
Los Angeles
New York
Washington, DC

T. Christian Herren
Chief, Voting Section
Civil Rights Division
Room 7254 - NWB
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

Re: Submission by the Florida Legislature of Newly Enacted Sections 20 and 21 of Article III of the Florida Constitution

Dear Mr. Herren:

On behalf of the Florida State Conference of NAACP Branches ("Florida NAACP") and Democracia, Inc. (formerly known as Democracia Ahora) ("Democracia"), we submit these comments urging that the Department preclear Sections 20 and 21 of Article III of the Florida Constitution (the "Amendments"). The Amendments are designed to make redistricting fairer in Florida. Unsurprisingly, entrenched incumbent partisans are less enthusiastic about the Amendments than Florida voters, who resoundingly approved them. Like similar reforms enacted by initiative in California that the Department has precleared, the Amendments should be precleared.

I. BACKGROUND

In the November 2010 election, Florida voters spoke loudly and clearly in support of fundamental reform of Florida's redistricting processes. On the ballot were "Amendment 5" (applicable to state legislative redistricting) and "Amendment 6" (applicable to congressional redistricting) (collectively, "the Amendments"). More than 62% of Florida voters approved Amendments 5 and 6, which are now codified in Florida's Constitution as Article III, Section 21 and Article III, Section 20, respectively.

Article III, Section 21, of the Florida Constitution reads:

> SECTION 21. **Standards for establishing legislative district boundaries.—In establishing legislative district boundaries**:
>
> (a) No apportionment plan or district shall be drawn with the intent to favor or disfavor a political party or an incumbent; and districts shall not be drawn with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process or to diminish their ability to elect representatives of their choice; and districts shall consist of contiguous territory.

(b) Unless compliance with the standards in this subsection conflicts with the standards in subsection 1(a) or with federal law, districts shall be as nearly equal in population as is practicable; districts shall be compact; and districts shall, where feasible, utilize existing political and geographical boundaries.

(c) The order in which the standards within subsections 1(a) and (b) of this section are set forth shall not be read to establish any priority of one standard over the other within that subsection.

Article III, Section 20 of the Florida Constitution reads:

SECTION 20. **Standards for establishing congressional district boundaries.—In establishing congressional district boundaries**:

(a) No apportionment plan or individual district shall be drawn with the intent to favor or disfavor a political party or an incumbent; and districts shall not be drawn with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process or to diminish their ability to elect representatives of their choice; and districts shall consist of contiguous territory.

(b) Unless compliance with the standards in this subsection conflicts with the standards in subsection 1(a) or with federal law, districts shall be as nearly equal in population as is practicable; districts shall be compact; and districts shall, where feasible, utilize existing political and geographical boundaries.

(c) The order in which the standards within subsections 1(a) and (b) of this section are set forth shall not be read to establish any priority of one standard over the other within that subsection.

Numerous good-government groups (such as the League of Women Voters of Florida) and groups representing the interests of minority communities (including the Florida NAACP and Democracia) actively participated in the arduous effort of enacting these Amendments.

In addition to spending millions of dollars to oppose the Amendments, the Amendments' opponents attempted to use the state courts to prevent the Amendments' submission to the voters, an effort the Florida Supreme Court firmly rejected. During state-constitutional advisory opinion proceedings, notwithstanding opposition from both houses of the Florida Legislature, the Court approved the Amendments for placement on the ballot. *See Advisory Opinion to the Attorney General re Standards for Establishing Legislative District Boundaries*, 2 So. 3d 175 (Fla. 2009). In *Roberts v. Brown*, 43 So.3d 673 (Fla. 2010), the Court rejected an attempt by the Legislature and two incumbent members of Congress to strike the Amendments from the ballot. *Id.* at 676. The Florida NAACP and Democracia submitted an amicus brief to the Court in *Brown* urging the Court to reject the plaintiffs' meritless challenges. *See* Exh. A (amicus brief). Similarly, the Court rejected the Legislature's attempt to confuse Florida voters by adding an additional redistricting amendment to the ballot. *See Florida Dep't of State v. Florida State Conference of NAACP Branches*, 43 So.3d 662 (Fla. 2010) (affirming a judgment striking as "overly confusing" a proposed redistricting amendment, Amendment 7, from the ballot). The

Florida NAACP and Democracia (and the League of Women Voters of Florida) were the prevailing plaintiffs in that case. *Id.* at 665.

After Florida voted for the Amendments on election day, opponents channeled their efforts to undermining the Amendments' implementation. A federal suit was filed in the Southern District of Florida claiming (baselessly) that the Amendments violate the Article I, Section 4 of the U.S. Constitution (the "Elections Clause"). *See Brown, et. al v. State of Florida, et al.*, No. 10-cv-23968 (S.D. Fl.). The Florida House of Representatives is a plaintiff in that case, and dispositive briefing is underway.

State officials also have taken steps that manipulate the Section 5 preclearance process. Prior to the inauguration of the current Governor (Rick Scott), the State of Florida on December 10, 2010 submitted an application for Section 5 preclearance to the Department of Justice on behalf of the five counties (Collier, Hardee, Hendry, Hillsborough, and Monroe) that are covered jurisdictions under Section 5. A day after Governor Scott's inauguration on January 4, 2011, Governor Scott announced the appointment of Kurt Browning to be Secretary of State. Browning had been the chairman of a Florida political committee that raised and spent millions of dollars to publicly oppose passage of the Amendments. The State promptly withdrew its preclearance application on January 7.

The Florida NAACP, Democracia, and the League of Women Voters of Florida sued the Governor and the Secretary of State, seeking an injunction ordering them to seek Section 5 preclearance of the Amendments. *See League of Women Voters of Florida, et al., v. Rick Scott, et al.*, No. 11-cv-10006 (S.D. Fl.).

The State's *second* preclearance submission (submitted by the Legislature) is the apparent result of that action, but it makes no effort to conceal the Legislature's deep-seated and self-interested opposition to the Amendments. Indeed, the Legislature's submission repeats blatantly false claims that the Amendments may impair minority voting rights. For example: (1) "We recognize that the Amendments significantly change Florida's redistricting criteria in a manner which, depending on their interpretation, could be retrogressive," Preclearance Application, at 4; (2) "The new Amendments limit the Legislature's broad line-drawing discretion in a way that could create potential obstacles to the preservation or enhancement of minority voting strength," *id.* at 5; (3) "The most obvious retrogression issue is . . . ," *id.*; and (4) "The provision of the Amendments that prohibits 'districts drawn with the intent to favor or disfavor a political party or an incumbent' also creates potential retrogression," *id.* at 6.

II. THE AMENDMENTS ARE ADVANTAGEOUS TO FLORIDA'S MINORITY VOTERS AND MUST BE PRECLEARED.

As groups whose primary concerns are the protection of millions of Florida residents who are members of racial and language minority groups, the Florida NAACP and Democracia urge the Department to preclear the Amendments.

A. The Legal Standard

Under Section 5, a covered jurisdiction has the burden of establishing that a proposed change in voting practices "'neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in [Section 4(f)(2) of the Act]' (*i.e.*, membership in a language minority group defined in the Act)." *Guidance Concerning Redistricting Under Section 5 of the Voting Rights Act*, 76 Fed. Reg. 7470 (Feb. 9, 2011) (hereinafter, "*Guidance*") (quoting 42 U.S.C. § 1973c(a)). A proposed change in voting practices "has a discriminatory effect under the statute if, when compared to [existing law (the so-called "benchmark")], the submitting jurisdiction cannot establish that it does not result in a 'retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise.'" *Id.* (quoting *Beer v. United States*, 425 U.S. 125, 141 (1976)).

There thus are "two necessary components to the analysis of whether a proposed [change in voting practices] meets the Section 5 standard." *Id.* at 7471. "The first is a determination that the jurisdiction has met its burden of establishing that the [change] was adopted free of any discriminatory purpose." *Id.* "The second is a determination that the jurisdiction has met its burden of establishing that the proposed [change] will not have a retrogressive effect." *Id.*

B. The Amendments Were Adopted with Full-Throated Support from Minority Groups and Indisputably Were Adopted Free of Any Discriminatory Purpose.

Nobody can contend that the Amendments were adopted with a discriminatory purpose. "The Department will examine the circumstances surrounding the submitting authority's adoption of a submitted voting change . . . to determine whether direct or circumstantial evidence exists of any discriminatory purpose of denying or abridging the right to vote on account of race or color, or membership in a language minority group defined in the Act." *Id.*

Here, the circumstances surrounding the Amendments' enactment unequivocally establish that the Amendments' sponsor (FairDistrictsFlorida.Org) and Florida voters acted to make redistricting in Florida *fairer* to minorities and to others, not to discriminate against minorities. Further, minority organizations like the Florida NAACP, Democracia, the Legislative Black Caucus, and the Florida Black Caucus of Local Elected Officials offered strong support for the Amendments. Civil rights icons Julian Bond and Rev. Joseph Lowery publicly advocated for them. Newspaper editorial boards across the state did so as well. Out of the millions of voters who voted for the Amendments, many undoubtedly were members of racial and language minority groups. Numerous minority voters even have submitted letters in support of the Amendments' preclearance.

It thus cannot be disputed that the Amendments were adopted free from discriminatory purpose.

C. The Amendments Affirmatively Benefit Florida's Minority Communities and Will Not Result in a Retrogressive Effect.

A change in voting practices "is retrogressive under Section 5 if its net effect would be to reduce minority voters' 'effective exercise of the electoral franchise' when compared to the

benchmark," *Guidance*, 76 Fed. Reg. at 7471 (quoting *Beer*, 425 U.S. at 141). Thus, a jurisdiction seeking preclearance must establish that a proposed change "will not have the effect of 'diminishing the ability of any citizens of the United States' because of race, color or membership in a language minority community group . . . 'to elect their preferred candidate of choice.'" *Id.* (quoting 42 U.S.C. § 19732c(b) & (d)).

Far from causing impermissible "retrogression," the Amendments protect minority voting rights in Florida. First, the Amendments ensure that "districts shall not be drawn . . . to diminish [racial or language minorities'] ability to elect representatives of their choice." Fl. Const., Art. III, §§ 20(a), 21(a). Like Section 5 of the Voting Rights Act, this provision plainly prevents "backsliding" or "retrogression." But unlike Section 5 – which applies only to five covered counties in Florida (Collier, Hardee, Hendry, Hillsborough, and Monroe) – the Amendments apply statewide.

Second, the Amendments also appear to incorporate the principles of Section 2 of the Voting Rights Act into the state constitution. Section 2 of the Voting Rights Act mandates that members of protected minority classes not have "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973(b); *see also Thornburg v. Gingles*, 478 U.S. 30, 43 (1986). In the redistricting context, this prohibits legislatures from drawing districts with the "intent" or "result" of denying racial and language minorities equal access to the electoral process or the opportunity to elect the candidate of their choice. *See Gingles*, 478 U.S. at 42-46. Like Section 2, the Amendments prohibit the drawing of districts "with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process."

Third, the Amendments' partisan-fairness provisions cannot possibly cause retrogression. The federal Voting Rights Act does *not* require that state legislatures draw districts with the *intent* to favor or disfavor a particular political party or an incumbent. The Act's purpose is to protect *minority voters*, not incumbents or political parties. To be sure, courts have recognized that legislatures may, under appropriate circumstances, consider certain types of incumbency data for the purpose of complying with Section 5's guarantee against redistricting changes that diminish a "minority groups' equal opportunity to participate in the political process." *Georgia v. Ashcroft*, 539 U.S. 461, 482 (2003). But the Amendments allow the use of such data for a *legitimate* purpose – *e.g.*, in assessing as part of a Section 2 analysis whether voting is racially polarized in a particular area, or whether the totality of the circumstances requires the creation of a majority-minority district. There is nothing retrogressive about reform designed to bring a measure of partisan fairness to the redistricting process. *Cf. Gaffney v. Cummings*, 412 U.S. 735, 754 (1973) ("[J]udicial interest should be at its lowest ebb when a State purports fairly to allocate political power to the parties in accordance with their voting strength and, within quite tolerable limits, succeeds in doing so.").

Indeed, redistricting reform measures like the Amendments are becoming more and more commonplace,[1] and the Department has not hesitated to preclear such measures in the past. The

[1] *See, e.g.*, Iowa Code § 42.4(5); Cal. Const. art. 21, § 2(e); Del. Code § 804; Haw. Const. § 6; Idaho Code § 72-1506; Mont. Code Ann. § 5-1-115(3); L.R. 7, 97th Leg., 1st Sess. (Neb. 2001); Or. Rev. Stat. § 188.010; Wash. Rev. Code § 44.05.090 (1990).

Citizens Redistricting Commission initiative in California is directly on point. That initiative, enacted with respect to state legislative redistricting in 2008 and expanded to congressional redistricting in 2010, states: "The place of residence of any incumbent or political candidate shall not be considered in the creation of a map. *Districts shall not be drawn for the purpose of favoring or discriminating against an incumbent, political candidate, or political party.*" Cal. Const., Art. 21, § 2(e) (emphasis added). The Department has repeatedly precleared this language, demonstrating that partisan fairness reforms do not cause impermissible retrogression. *See* Letter from T. Christian Herren, Chief, Voting Section to Robbie Anderson, Feb. 3, 2011 (Exh. B) (preclearing 2010 initiative); Letter from Christopher Coates, Chief, Voting Section, to Robbie Anderson, Mar. 2, 2009 (Exh. C) (preclearing 2008 initiative). Likewise, the Arizona Independent Redistricting Commission – also plainly a partisan-fairness reform measure – was precleared by the Department. Letter from Joseph D. Rich, Acting Chief, Voting Section , to Diana Varela, January 8, 2001 (Exh. D) (preclearing 2000 amendment).

Fourth, the other race-neutral provisions of the Amendments also are not retrogressive. The reforms contained in Amendments 5 and 6 represent core, traditional redistricting principles that legislatures across the country have been harmonizing with the Voting Rights Act's protection of minority interests for decades. The Amendments' equal population requirement, for example, mirrors the fundamental one-person-one-vote and equal population requirements of the U.S. Constitution, which are fundamental to any redistricting analysis. *See Reynolds v. Sims*, 377 U.S. 533 (1964), *Karcher v. Daggett*, 462 U.S. 725 (1983), and *Brown v. Thomson*, 462 U.S. 835 (1983). Similarly, the Amendments' requirements that districts (i) consist of contiguous territory, (ii) be compact, and (iii) utilize existing political and geographical boundaries have routinely been recognized as core redistricting principles and sound policy. *See, e.g., Shaw v. Reno*, 509 U.S. 630, 647 (1993) ("We have explained that 'traditional districting principles,' which include 'compactness, contiguity, and respect for political subdivisions,' are 'important not because they are constitutionally required ... but because they are objective factors that may serve to defeat a claim that a district has been gerrymandered . . . .'"); *Vieth v. Jubelirer*, 541 U.S. 267, 276 (2004) (recognizing that the contiguous territory requirement has been a feature of federal redistricting law since at least 1842 and was first adopted as "an attempt to forbid the practice of the gerrymander").

Finally, we note that the Legislature's submission presents the Department with a parade of specious, hypothetical harms to minorities in an apparent effort to force on the Department a choice between interposing an objection and approving a construction of the Amendments that gives the Legislature broad discretion to protect incumbents.

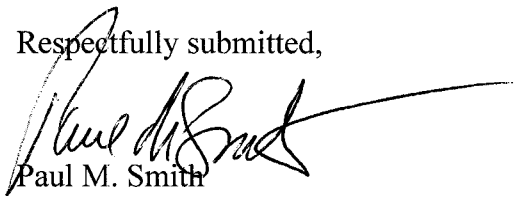
The Department should reject this false choice. Any endorsement by the Department of a particular construction of the Amendments would be premature, and could undercut the Florida courts' independent, sovereign duty to construe the Florida Constitution. *See Growe v. Emison*, 507 U.S. 25, 34 (1993) (state courts have primary role in redistricting); *Wainwright v. Goode*, 464 U.S. 78, 84 (1983) ("[T]he views of the state's highest court with respect to state law are binding on the federal courts."). Redistricting plans enacted under the Amendments will be subject to legal challenge under the Amendments, in which case the Florida courts will have the primary duty to construe them. *Growe*, 507 U.S. at 34. Moreover, any new plan will require preclearance from the Department. There is no need for the Department to opine now on how

the Amendments should be construed when the Department will review a concrete plan with detailed data later in the process.

* * * * *

For the foregoing reasons, the Florida NAACP and Democracia respectfully urge the Department to preclear the Amendments.

Respectfully submitted,



Paul M. Smith

Exhibit A

IN THE SUPREME COURT OF FLORIDA

CASE NO. 10-1362

DAWN K. ROBERTS, in her capacity as Interim Secretary of State of Florida,

Petitioner,

vs.

CORRINE BROWN, MARIO DIAZ-BALART, FLORIDA HOUSE OF REPRESENTATIVES, FLORIDA SENATE, BOB GRAHAM, AND FAIRDISTRICTSFLORIDA.ORG, INC.,

Respondents.

AMICI CURIAE BRIEF OF FLORIDA STATE CONFERENCE OF NAACP BRANCHES AND DEMOCRACIA AHORA IN SUPPORT OF PETITIONERS

Paul M. Smith (*pro hac vice* pending)
Michael B. DeSanctis (*pro hac vice* pending)
Jenner & Block LLP
1099 New York Avenue, NW
Suite 900
Washington, DC 20001
Telephone: (202) 639-6000
Fax: (202) 639-6066

Alicia Hancock Apfel
Florida Bar No. 0069817
774 NE 71 Street
Miami, Florida 33138
Telephone: (305) 751-0196
Fax: (305) 756-7599

Charles G. Burr
Florida Bar No. 0689416
Burr & Smith, LLP
441 W. Kennedy Blvd.
Suite 300
Tampa, FL 33606
Tel: (813) 253-2010
Fax: (813) 254-8391

James W. Gustafson
Florida Bar No. 0008664
Searcy Denney Scarola Barnhart & Shipley
517 N. Calhoun Street
Tallahassee, FL 32301-1231
Tel: (850) 224-7600

Attorneys for Amici Curiae *Florida State Conference of NAACP Branches and Democracia Ahora*

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IDENTITY AND INTEREST OF *AMICI CURIAE*

The Florida NAACP is comprised of 67 local branches throughout Florida with over 11,000 individual members. Like its national parent organization, the Florida NAACP's missions are the advancement and improvement of the political, educational, social and economic status of minority persons, including African-Americans; the elimination of racial prejudice; the publicizing of adverse effects of discrimination; and the initiation of legal redress to secure the elimination of racial and ethnic bias. The Florida NAACP has participated actively in litigation on behalf of Florida's minority voters, including prior litigation involving reapportionment and redistricting. *See, e.g.*, *Pleus v. Crist*, 14 So. 3d 941 (Fla. 2009); *Florida State Conference of the NAACP v. Browning*, 522 F.3d 1153 (11th Cir. 2008).

Democracia Ahora is a Florida-based civic organization that is affiliated with the national Hispanic civic organization, Democracia U.S.A. It has offices in Florida and individual members throughout the state. Democracia Ahora's primary purposes are to empower Hispanic citizens who are engaged in civic and democratic endeavors; and to assist members of Hispanic communities in identifying and articulating issues of concern, including voting rights issues. Democracia Ahora is an organization dedicated to increasing the prominence and participation of Hispanics in every aspect of the political process.

As organizations representing minority communities and dedicated to protecting and advancing those communities' interests, *amici* cannot let stand the Respondents' perverse and misleading characterizations of the ballot amendments at issue in this case and their interplay with federal voting rights laws — laws designed specifically to protect minority voting interests. *Amici* are uniquely positioned to present these arguments.

SUMMARY OF ARGUMENT

Amendments 5 and 6, if adopted, will ensure the protection of minority voting rights in Florida and will bring other legitimate, mainstream and much needed reform to Florida's redistricting processes. To prevent the Amendments even from being placed before the voters, however, Respondents insist that the Amendments represent a "wholesale restructuring of Florida voting rights and reapportionment," Senate Resp. at 26; are "plainly violative of the Voting Rights Act," *id.*; will have the effect of "disenfranchising minorities," *id.*; will "eviscerate minority voting rights," *id.* at 7; and will cause minorities to lose "at least half their state and federal congressional and legislative seats in Florida," Senate Resp. at 26; *see also* Brown and Diaz-Balart Resp. at 5-7 (suggesting that the Amendments' requirements will "decrease, rather than increase . . . the Florida Legislature's ability to draw districts to protect minority voting interests").

These remarkable statements are nothing but scare tactics. They could not be further from the truth. Indeed, if *any* of them were true, *amici* would not be supporting the Amendments on behalf of racial and language minorities.[1] Nor would this Court have approved the Amendments for placement on the ballot over a year and a half ago. *See Advisory Opinion*, 2 So. 3d 175 (Fla. 2009).

As we show below, Amendments 5 and 6 advance the voting rights interests of minorities in a manner that is perfectly consistent with both the letter and intent of federal law. In turn, we demonstrate that Respondents' specific federal law arguments are not just wrong but they are in effect hypothetical as-applied challenges that are premature — because until districts are drawn applying the Amendments, no facts exist to support Respondents' claims. As a result, they are unripe and neither this Court nor the circuit court has jurisdiction over them.

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[1] And *amici* are not the only ones. *See, e.g.,* Editorial, *Good Call on Ballot-Packing Suit*, The Lake Wales News, July 17, 2010 (arguing that the Legislature's claims that Amendments 5 and 6 would decrease minority representation are disingenuous because the amendments "strive to maintain minority opportunity"); Editorial, *End the Gerrymandering for Good*, The Miami Herald, January 31, 2010 (endorsing Amendments 5 and 6 and contending that their "wording on protecting minorities' voting opportunities is stronger than even in the federal Voting Rights Act").

ARGUMENT

I. AMENDMENTS 5 AND 6 ARE CONSISTENT WITH FEDERAL VOTING RIGHTS LAW AND TRADITIONAL PRINCIPLES OF REDISTRICTING.

Amendments 5 and 6 are perfectly consistent with federal voting rights law and with traditional principles of redistricting. Indeed, much of the Amendments' language faithfully tracks the core provisions of federal law that have been protecting minority voting rights nationwide for over forty years.

One of the primary ways in which the federal Voting Rights Act of 1965 advances minority voting rights is Section 2's mandate that members of protected minority classes not have "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973(b); *see also Thornburg v. Gingles*, 478 U.S. 30, 43 (1986) (explaining that Section 2 of the Voting Rights Act applies to "the right to vote of any citizen who is a member of a protected class of racial and language minorities"). In the redistricting context, this prohibits legislatures from drawing districts with the "intent" or "result" of denying racial and language minorities equal access to the electoral process or the opportunity to elect the candidate of their choice. *See Gingles*, 478 U.S. at 42-46. Wholly consistent with Section 2 of the Voting Rights Act, Amendments 5 and 6 prohibit the drawing of districts "with

the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process."

Similarly, Section 5 of the Voting Rights Act prohibits any voting-related changes in law that have the effect of causing a "retrogression" in the position of racial or language minorities. *See generally Beer v. United States*, 425 U.S. 130, 141 (1976). That is, Section 5 "mandates that the minority's opportunity to elect representatives of its choice not be diminished, directly or indirectly, by the State's actions." *Bush v. Vera*, 517 U.S. 952, 983 (1996); 42 U.S.C. § 1973b. Here again, the language of Amendments 5 and 6 tracks federal law by providing that "districts shall not be drawn with the intent or result . . . to diminish [racial or language minorities'] ability to elect representatives of their choice."

Respondents' insistence that the Amendments are wildly inconsistent with federal laws protecting minority voting rights is inexplicable. In fact, the Amendments provide even greater protections for minority voters than does Section 5 of the Voting Rights Act. Whereas, the protection afforded to minority voters under Section 5 apply in only five enumerated counties in Florida, Amendments 5 and 6 will apply statewide.

By contrast, the Voting Rights Act does *not* require that state legislatures draw districts with the intent to favor or disfavor a political party or an incumbent. To be sure, courts have recognized that legislatures may, under appropriate

circumstances, consider certain types of incumbency *data* for the purpose of complying with Section 5's guarantee against redistricting changes that diminish a "minority groups' equal opportunity to participate in the political process." *Georgia v. Ashcroft*, 539 U.S. 461, 482 (2003). Nothing in the Voting Rights Act, however, requires legislatures to draw district lines for the *purpose* of favoring or disfavoring a political party or incumbent. To suggest otherwise, *see* Brown and Diaz-Balart Resp. at 6, is an insult to the very integrity of the Voting Rights Act, itself.

Consistent with this federal regime, Amendments 5 and 6 prohibit the drawing of district lines for the *purpose* (i.e., with the intent) of favoring or disfavoring a political party or incumbent. Many states have adopted similar reforms to limit the scourge of intentional partisan gerrymandering. *See, e.g.*, Iowa Code § 42.4(5) ("No district shall be drawn for the purpose of favoring a political party, incumbent legislator or member of Congress, or other person or group, or for the purpose of augmenting or diluting the voting strength of a language or racial minority group."), Cal. Const. art. 21, § 2(e) ("The place of residence of any incumbent or political candidate shall not be considered in the creation of a map. Districts shall not be drawn for the purpose of favoring or discriminating against an

incumbent, political candidate, or political party.").[2] Far from being patently violative of federal law, the California amendment, which is almost identical to Amendments 5 and 6 in this regard, was pre-cleared by the Department of Justice as *satisfying* the requirements Section 5.[3]

Beyond these provisions — which affirmatively advance, rather than frustrate, federal voting rights law — the reforms contained in Amendments 5 and 6 represent core, traditional redistricting principles that legislatures across the country have been harmonizing with the Voting Rights Act's protection of minority interests for decades. The Amendments' equal population requirement, for example, mirrors the fundamental one-person-one-vote and equal population

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[2] *See also* Del. Code § 804 ("Each district shall, insofar as is possible . . . [n]ot be created so as to unduly favor any person or political party."); Haw. Const. § 6 ("No district shall be so drawn as to unduly favor a person or political faction."); Idaho Code § 72-1506 ("Counties shall not be divided to protect a particular political party or a particular incumbent."); Mont. Code Ann. § 5-1-115(3) ("A district may not be drawn for the purposes of favoring a political party or an incumbent legislator or member of congress."); L.R. 7, 97th Leg., 1st Sess. (Neb. 2001) ("District boundaries shall not be established with the intention of favoring a political party or any other group or person."); Or. Rev. Stat. § 188.010 ("No district shall be drawn for the purpose of favoring any political party, incumbent legislator or other person."); Wash. Rev. Code § 44.05.090 (1990) ("The commission's plan shall not be drawn purposely to favor or discriminate against any political party or group.").

[3] *See* Letter from Gerald Hebert on behalf of California State Auditor, Elaine M. Howle to Christopher Coates, Chief, Civil Rights Division Department of Justice, available at http://www.wedrawthelines.ca.gov/downloads/submission_letter.pdf ("The provisions of the Voter FIRST Act were pre-cleared on March 2, 2009, and we incorporate that submission file (No. 2008-5888) by reference.").

requirements of the U.S. Constitution, which are fundamental to any redistricting analysis. *See Reynolds v. Sims*, 377 U.S. 533 (1964), *Karcher v. Daggett*, 462 U.S. 725 (1983), and *Brown v. Thomson*, 462 U.S. 835 (1983).

Similarly, the Amendments' requirements that districts (i) consist of contiguous territory, (ii) be compact, and (iii) utilize existing political and geographical boundaries have routinely been recognized as core redistricting principles and sound policy. *See, e.g., Shaw v. Reno*, 509 U.S. 630, 647 (1993) ("We have explained that 'traditional districting principles,' which include 'compactness, contiguity, and respect for political subdivisions,' are 'important not because they are constitutionally required ... but because they are objective factors that may serve to defeat a claim that a district has been gerrymandered . . . .'"); *Vieth v. Jubelirer*, 541 U.S. 267, 276 (2004) (recognizing that the contiguous territory requirement has been a feature of federal redistricting law since at least 1842 and was first adopted as "an attempt to forbid the practice of the gerrymander").

It does not require extended analysis to see that the requirements of Amendments 5 and 6 are thoroughly consistent with the Voting Rights Act's text and its emphasis on protecting the equal opportunities of minorities. They likewise are consistent with traditional and historically recognized redistricting principles. Respondents' over-the-top assertions to the contrary should be dismissed out of

hand, and certainly do not justify additional pre-election review of the Amendments in this or any other Court.

II. BEYOND THE FRIVOLOUS ARGUMENTS THAT THE AMENDMENTS VIOLATE FEDERAL LAW IN GENERAL, RESPONDENTS' SPECIFIC ARGUMENTS ARE BOTH WRONG AND UNRIPE.

As we have shown, there is no conceivable basis on which this Court or the circuit court below could determine that Amendments 5 and 6 violate federal law "in every way." Respondents' more specific arguments are equally unavailing as they facially lack merit and, in any event, are essentially unripe as-applied challenges that require the assumption of hypothetical facts that do not and cannot exist at this time.

First, Respondents Brown and Diaz-Balart claim to have "evidence" concerning the Census's American Community Survey ("ACS") showing that the "ballot summary is misleading in telling the voters that the Legislature will be able to discern with any degree of accuracy where 'language minorities' reside." Brown and Diaz-Balart Resp., at 18. They argue that because the decennial "Census no longer collects language usage data, the ballot summary 'flies under false colors,' promising what the Legislature cannot possibly deliver." *Id.*

Neither the Amendments nor the ballot summaries, however, say anything about how the Legislature will identify the residences of members of language minorities or the data on which it will rely. The summary simply explains the

Amendments' prohibition upon drawing districts in such a way so as to deny language minorities equal opportunity to participate in the political process or to diminish their ability to elect representatives of their choice. The summary thus cannot possibly be misleading in the way Respondents claim. *See Advisory Opinion To Att'y Gen. re Right To Treatment and Rehabilitation*, 818 So. 2d 491, 498 (Fla. 2002) (rejecting claim that ballot summary was misleading where the summary "sa[id] nothing" about the issue raised by plaintiffs and instead simply "apprised the voter of the chief purpose of the amendment"); *Carroll v. Firestone*, 497 So. 2d 1204, 1206 (Fla. 1986) (while the ballot summary must state in clear and unambiguous language the chief purpose of the measure, it "need not explain every detail or ramification of the proposed amendment").

Furthermore, Respondents are wrong on the facts. In 2000, the Census "long form" asked as to each person in a household whether that person speaks a language other than English, what that language is, and how well that person speaks English.[4] In 2010, the Census is no longer using the long form. Instead, however, the ACS is asking the same questions and collecting the very same data.[5] Indeed, the ACS is an official survey conducted by the Census Bureau and is charged with collecting official data regarding language minorities. *See Benavidez*

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[4] *See* http://www.census.gov/dmd/www/pdf/d02p.pdf (Question 11).

[5] *See* http://www.census.gov/acs/www/Downloads/ACS-1(info)(2010)%20Statesi de %20English_web.pdf (Question 14).

v. Irving Indep. Sch. Dist., 690 F. Supp. 2d 451, 457 (N.D. Tex. 2010). As courts relying on ACS data have noted, the ACS is "intended to replace the Census long form, but it is conducted annually with the results averaged over time periods to get the same level of statistical sampling as the long form." *Benavidez v. City of Irving*, 638 F. Supp. 2d 709, 715 (N.D. Tex. 2009). Moreover, the Voting Rights Act *mandates* that states and political subdivisions rely on the ACS to implement the Voting Rights Act's protections for language minorities. *See* 42 U.S.C. § 1973aa-1a(b)(2)(A). As one court recognized "the Census Bureau considers ACS data reliable and intends for it to be relied upon in decisions such as Voting Rights Act compliance." *Benavidez*, 638 F. Supp. 2d at 721.

Thus, it is simply not true that data on where language minority populations reside will not exist. That is not to say that the legislature necessarily will use the data properly with respect to every district it draws. Once districts are drawn — which will not happen until 2012 — a party will be entitled to challenge the legislature's use of ACS data and any districts drawn using it. Claims raising such challenges now, however, are both incurably unripe and irrelevant to the validity of Amendments 5 and 6 and the ballot summary.

Second, in its response, the Senate concedes that the circuit court's "jurisdiction is limited to a facial review of the proposed constitutional amendments." Senate Resp., at 2-3. Indeed, that court has already ruled that there

will be no discovery and no trial with respect to Respondents' claims and decided it will limit itself to ruling on dispositive motions for judgment on the pleadings. *See* Order (July 13, 2010). Nevertheless, the House argues that it is entitled to a factual hearing on its claim that the amendments' ballot summaries are misleading because they do not inform voters that the Amendments' allegedly "binding" compactness and local boundary requirements will prevent the election of minority candidates. House Resp., at 14-15.

The plain text of the Amendments precludes this argument. The Amendments provide that,

> (1) No apportionment plan or individual district shall be drawn with the intent to favor or disfavor a political party or an incumbent; *and districts shall not be drawn with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process or to diminish their ability to elect representatives of their choice*; and districts shall consist of contiguous territory.

Advisory Op., 2 So. 3d at 179 (emphasis added). The next paragraph reads:

> (2) *Unless compliance with the standards in this subsection conflicts with the standards in subsection (1) or with federal law*, districts shall be as nearly equal in population as is practicable; districts shall be compact; and districts shall, where feasible, utilize existing political and geographical boundaries.

Id. at 179-80 (emphasis added). Thus, the compactness and political and geographical boundaries requirements are not "binding." Rather, they would apply only to the extent that they do not conflict with the minority-protection

requirements of paragraph (1), and they do not conflict with federal law (which of course includes the Voting Rights Act as well as the Fifteenth Amendment to the United States Constitution). As a result, the scenario imagined by the House can occur only if Amendments 5 and 6 pass on election day and the legislature then *misapplies* them. In that event, any party would be able to bring an as-applied challenge. Until then, the House's claim is at best unripe.

Third, the House claims that this case is in part a response to the United States Supreme Court's decision in *Bartlett v. Strickland*, 129 S. Ct. 1231 (2009). According to the House, *Bartlett* limits the protections that federal law provides to minorities from the harm allegedly caused by the Amendments' contiguity, compactness and local boundary requirements. As an initial matter, Respondents have no explanation for why they waited over a *year* after *Bartlett* was decided to file their suit in the circuit court. Moreover, and as discussed, the Amendments' compactness and local boundary requirements expressly yield to the Amendments' protections for minority voter interests and to federal voting rights laws. Thus, it cannot be that those requirements will ever harm minority voters, because they always will be trumped by protections for minority voters in the Amendments and in federal law.

In addition, *Bartlett* held merely that the Voting Rights Act does not require the creation of a very specific type of district, known as a minority cross-over

district (in which minorities constitute less than 50% of the relevant population but nevertheless can elect the candidate of their choice). *Bartlett*, 129 S. Ct. at 1246. It in no way altered or amended the text of the federal Voting Rights Act. In fact, the Court in *Bartlett* made clear that state legislatures retain discretion to draw cross-over districts. *Id.* at 1248. *Bartlett* would not affect the validity of the minority protection provisions contained in Amendments 5 and 6 as a matter of state law. Accordingly, there is no conceivable way in which the *Bartlett* decision could be read to render Amendments 5 and 6 wholly unlawful or fatally unworkable — if at all. *If* Amendments 5 and 6 are adopted by the electorate, and *if* the legislature subsequently misapplies them in a way that actually diminishes minority voting interests, then an aggrieved party could bring an as-applied challenge. Until then, the claim is, like the others, unripe at best.[6]

This Court long has recognized that pre-election challenges to ballot initiatives are permitted only in extraordinary circumstances, where a party can

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[6] To the extent Respondents truly believe that *Bartlett* narrows the role of Section 2 in protecting minority interests, Respondents should welcome the new state law protections that the Amendments guarantee. If the Amendments are adopted, a voter could seek redress under state law if a district is drawn "with the . . . result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process," or to "diminish" minorities' "ability to elect representatives of their choice." *Advisory Op.*, 2 So. 3d at 180. Currently, Florida voters do not have such a state-law right. Thus, if anything, the Amendments only enhance the protections available to minorities. Respondents' attack on the Amendments in the name of protecting minority voting rights is clearly indefensible.

show that the proposed initiative is invalid on its face and in its entirety. *Dade County v. Dade County League of Municipalities*, 104 So. 2d 512, 515 (Fla. 1958). Beyond that, challenges to the substance and operation of a proposed amendment are not yet ripe — and therefore are not justiciable — until the amendment has been approved and appropriate facts are developed and presented in an appropriate proceeding to evaluate how the amendment actually operates on a real set of existing facts. As the Court has held:

> We limit our consideration of the problem entirely to a determination of whether the proposal *in its entirety* contravenes the provisions of Article VIII, Section 11, Florida Constitution. *We have used the word 'entirety' advisedly.* When a proposal of the nature here involved is assaulted on the ground that it violates the Constitution, *the courts will not interfere if upon ultimate approval by the electorate such proposal can have a valid field of operation even though segments of the proposal or its subsequent applicability to particular situations might result in contravening the organic law.* In other words, if an examination of the proposed amendment reveals that if adopted it would be legally operative in part, even though it might ultimately become necessary to determine that particular aspects violate the Constitution, then the submission of such a proposal to the electorate for approval or disapproval will not be restrained.

Dade County League of Municipalities, 104 So. 2d at 515 (emphasis added) (citing *Gray v. Moss*, 136 So. 262 (Fla. 1934), and *Gray v. Winthrop*, 156 So. 270 (Fla. 1934)); *Citizens for Responsible Growth v. City of St. Pete Beach*, 940 So. 2d 1144, 1146-47 (Fla. 2d DCA 2006).

As such, Respondents' own contention that their claims require extensive factual development about hypothetical scenarios are proof positive that their

claims are as-applied challenges to "particular situations" that might arise in the future under "particular segments of the proposal." It follows that Respondents' claims cannot possibly be ripe. *See Santa Rosa County v. Administration Comm'n, Div. of Administrative Hearings*, 661 So. 2d 1190, 1193 (Fla. 1995) (quoting *LaBella v. Food Fair, Inc.*, 406 So. 2d 1216, 1217 (Fla. 3d DCA 1981) (quoting *Williams v. Howard*, 329 So.2d 277, 283 (Fla. 1976)). It also follows that, while Respondents' claims clearly lack any merit whatsoever, this Court and the circuit court lack jurisdiction to grant Respondents the relief they seek. "Absent a bona fide need for a declaration based on present, ascertainable facts, the circuit court lacks jurisdiction to render declaratory relief." *Id.* (citations omitted).

CONCLUSION

Consistent with the Voting Rights Act, it is plainly evident that one of the core virtues of ballot Amendments 5 and 6 is to guarantee to racial and language minority voters in Florida the equal opportunity to participate in the political process and the preservation of their ability to elect candidates of their choice. That is why the misrepresentations of the Respondents are so unfortunate. And it is why this Court should grant the Petition, and dismiss Respondents' claims pending in the circuit court.

Dated: July 22, 2010

Respectfully submitted,

_____

James W. Gustafson
Florida Bar No. 0008664
Searcy Denney Scarola Barnhart & Shipley
517 N. Calhoun Street
Tallahassee, FL 32301-1231
Telephone: (850) 224-7600

Charles G. Burr
Florida Bar No. 0689416
Burr & Smith, LLP
441 W. Kennedy Blvd., Suite 300
Tampa, FL 33606
Tel: (813) 253-2010
Fax: (813) 254-8391

Alicia Hancock Apfel, Esq.
Florida Bar No. 0069817
774 NE 71 Street
Miami, Florida 33138
Telephone: (305) 751-0196
Fax: (305) 756-7599

Paul M. Smith
(*pro hac vice* pending)
Michael B. DeSanctis
(*pro hac vice* pending)
Jenner & Block, LLP
1099 New York Ave., NW
Suite 900
Washington, D.C. 20001
Tel: (202) 637-6323
Fax: (202) 661-4828

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing motion was furnished by U.S. mail or electronic mail to:

Counsel for the Florida House:
George N. Meros, Jr.
Allen C. Winsor
Andy Bardos
GrayRobinson, P.A.
P.O. Box 11189
Tallahassee, FL 32302-3189
gmeros@gray-robinson.com
awinsor@gray-robinson.com
abardos@gray-robinson.com

Miguel DeGrandy
800 Douglas Road
Suite 850
Coral Gables, FL 33134
mad@degrandylaw.com

Counsel for the Florida Senate
James A. Scott
Edward J. Pozzouli
Stephanie Alexander
Brady I. Cobb
Tripp Scott, P.A.
110 S.E. 6th Street, 15th Floor
Ft. Lauderdale, FL 33301

Counsel for Gov. Crist
Rick Figlio
J. Andrew Atkinson
Simonne Lawrence
Executive Office of the Governor
The Capitol, Room 209
400 S. Monroe Street
Tallahassee, FL 32399
rick.figlio@eog.myflorida.com
drew.atkinson@eog.myflorida.com
simonne.lawrence@eog.myflorida.com

Counsel for Sen. Graham and FAIRDISTRICTSFLORIDA.ORG, Inc.:
Mark Herron
Robert Telfer, III
Messer, Caparello & Self, P.A.
P.O. Box 15579
Tallahassee, FL 32317-5579
mherron@lawfla.com
rtelfer@lawfla.com

Ronald G. Meyer, Esq.
Jennifer S..Blohm, Esq.
Lynn C. Hearn, Esq.
Meyer, Brooks, Demma and Blohm, PA
P.O. Box 1547
Tallahassee, FL 32301
rmeyer@meyerbrookslaw.com
jblohm@meyerbrookslaw.com
lhearn@meyerbrookslaw.com

Counsel for Dawn K. Roberts
C.B. Upton, General Counsel
Florida Department of State
R.A. Gray Building
500 S. Bronough St.
Tallahassee, FL 32399
cbupton@dos.state.fl.us

Michael Tanner
Thomas E. Bishop
Tanner Bishop
One Independent Drive, Suite 1700
Jacksonville, FL 32202
mtanner@tannerbishoplaw.com
tbishop@tannerbishoplaw.com

Trial Judge (required to be served per Fla. R. App. P. 9.100(e)(2))
Hon. Jackie Lee Fulford
Circuit Judge
301 S. Monroe St.
Tallahassee, FL 32301-1861
fulfordj@leoncountyfl.gov

Counsel for Dawn K. Roberts (cont.)
John S. Mills
Florida Bar No. 0107719
The Mills Firm
One Independent Drive, Suite 1700
Jacksonville, Florida 32202
(904) 446-2991/(904) 240-4431 (fax)
jmills@mills-appeals.com

Counsel for Reps. Brown and Diaz-Balart:
Stephen M. Cody
16610 SW 82 Court
Palmetto Bay, FL 33157
stcody@stephencody.com

On this 22nd day of July, 2010:

_____
James W. Gustafson, Jr.
Florida Bar No. 0008664

Exhibit B

U.S. Department of Justice
Civil Rights Division

TCH:RSB:LB:ALP:tst
DJ 166-012-3
2010-4456

Voting Section - NWB
950 Pennsylvania Avenue, NW
Washington, DC 20530

February 3, 2011

Robbie Anderson, Esq.
Senior Elections Counsel
Secretary of State's Office
1500 11th Street, 5th Floor
Sacramento, California 95814

Dear Mr. Anderson:

This refers to the procedures for conducting the November 2, 2010, special referendum election; and Proposition 20, which amends the California Constitution and Government Code to transfer redistricting authority from the state legislature to the Independent Citizens Redistricting Commission, authorizes the Independent Citizens Redistricting Commission to redraw the boundaries of California's congressional districts, modifies the criteria for Congressional redistricting plans, provides the definition of "community of interest", modifies the time-frame for the completion and certification of Congressional, Senate, Assembly, and Board of Equalization redistricting plans, and modifies the procedures for legal action pertaining to a certified final map, for the State of California, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c. We received your submission on December 7, 2010.

The Attorney General does not interpose any objection to the specified changes. However, we note that Section 5 expressly provides that the failure of the Attorney General to object does not bar subsequent litigation to enjoin the enforcement of the changes. Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, 28 C.F.R. 51.41.

Proposition 20 includes provisions that are enabling in nature. Therefore, the State of California is not relieved of its responsibility to seek Section 5 review of any changes affecting voting proposed to be implemented pursuant to this legislation (*e.g.*, redistricting plans finally adopted by the state). 28 C.F.R. 51.15.

Sincerely,

T. Christian Herren, Jr.
Chief, Voting Section

Exhibit C

U.S. Department of Justice

Civil Rights Division

CC:RPL:ALP:maf
DJ 166-012-3
2008-5888

Voting Section - NWB
950 Pennsylvania Avenue, N.W.
Washington, DC 20530

March 2, 2009

Robbie Anderson, Esq.
Senior Elections Counsel
Secretary of State's Office
1500 11th Street, 5th Floor
Sacramento, California 95814

Dear Mr. Anderson:

This refers to the November 4, 2008, special referendum election; and Proposition 11 (known as the Voters FIRST Act), which amends the California Constitution and Government Code by creating an independent Citizens Redistricting Commission (CRC) to redraw the boundaries of California's State Senate, Assembly, and Board of Equalization districts, setting qualifications for members of the CRC and providing procedures for their application and appointment, setting criteria for congressional, and State Senate, Assembly, and Board of Equalization redistricting plans, and providing for the procedures for comment and consideration of draft plans by the public, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. 1973c. We received your submission on December 31, 2008; supplemental information was received through February 25, 2009.

The Attorney General does not interpose any objection to the specified changes. However, we note that Section 5 expressly provides that the failure of the Attorney General to object does not bar subsequent litigation to enjoin the enforcement of the changes. In addition, as authorized by Section 5, we reserve the right to reexamine this submission if additional information that would otherwise require an objection comes to our attention during the remainder of the sixty-day review period. Procedures for the Administration of Section 5 of the Voting Rights Act (28 C.F.R. 51.41 and 51.43).

Proposition 11 includes provisions that are enabling in nature. Therefore, the State of California is not relieved of its responsibility to seek Section 5 review of any changes affecting voting proposed to be implemented pursuant to this legislation (*e.g.*, the requirement that the State Auditor establish an application process for CRC applicants; the requirement that the CRC

establish and implement an open hearing process for public input and deliberation; special referendum elections, and redistricting plans finally adopted by the state). See 28 C.F.R. 51.15.

Sincerely,

Christopher Coates
Chief, Voting Section

Exhibit D

U.S. Department of Justice

Civil Rights Division

Voting Section
P.O. Box 66128
Washington, DC 20035-6128

JDR:RAK:SP:par
DJ 166-012-3
2000-4441

January 8, 2001

Diana Varela, Esq.
Assistant Attorney General
State of Arizona
1275 West Washington
Phoenix, Arizona 85007

Dear Ms. Varela:

This refers to Proposition 106, which amends the Arizona constitution by creating an independent redistricting commission to redraw the boundaries of Arizona's congressional and state legislative districts, setting qualifications for members of the redistricting commission and providing procedures for their nomination and appointment, setting criteria for redistricting plans, and providing procedures for consideration of draft plans by the public, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. 1973c. We received your submission on December 8, 2000; supplemental information was received on January 3, 2001. We are responding at this time because of your request for an expedited determination in view of the timetable for redistricting.

The Attorney General does not interpose any objection to the specified changes. We note that Proposition 106 includes provisions that are enabling in nature. Therefore, any changes affecting voting that are adopted pursuant to this enactment (e.g., redistricting plans) will be subject to Section 5 review. See 28 C.F.R. 51.15.

We note further that Section 5 expressly provides that the failure of the Attorney General to object does not bar subsequent litigation to enjoin the enforcement of the changes. In addition, as authorized by Section 5, we reserve the right to reexamine this submission if additional information that would otherwise require an objection comes to our attention during the remainder of the sixty-day review period. See the Procedures for the Administration of Section 5 (28 C.F.R. 51.41 and 51.43).

If you have any questions, you should call Stephen B. Pershing, an attorney on our staff, at (202) 305-1238. Please refer to File No. 2000-4441 in any response to this letter so that your correspondence will be channeled properly.

Sincerely,

Joseph D. Rich
Acting Chief
Voting Section

FLORIDA DEMOCRATIC PARTY

The Honorable Rod Smith, Chair

214 South Bronough Street
Tallahassee, Florida 32301
850.222.3411 | 850.222.0916
www.fladems.com

April 25, 2011

Chris Herren,
Chief, Voting Section
Civil Rights Division
United States Department of Justice
Room 7254-NWB
1800 G Street, N.W.
Washington, DC 20006

Re: Comment under Section 5 of the Voting Rights Act

Dear Mr. Herren:

On November 2, 2010, over 60% of Florida voters approved Amendments 5 and 6 to the Florida Constitution (together, the "Amendments"), which, among other things, prohibit redistricting plans that deny or abridge the equal opportunity of racial and language minorities to participate in the political process. On March 29, 2011, the Florida Senate and the Florida House of Representatives (together, the "Florida Legislature") finally submitted the Amendments for preclearance.

The question before the Attorney General is narrow and straightforward: Whether the Amendments have "the purpose or will have the effect of denying or abridging the right to vote on account of race, color, or membership in a language minority group." 28 C.F.R. § 51.52(a). The answer to this question is no. The purpose behind the Amendments is to protect all of Florida's citizens, including minority voters, from gerrymandering. The effect will be the explicit constitutional protection of minority voting rights.

The Legislature's submission contends that the Amendments hypothetically may have a retrogressive effect. This letter will demonstrate that the language of the new constitutional provisions is unambiguous and the Legislature's suggestion that the Amendments potentially could be applied in a retrogressive manner finds no support in either the language of the Amendments or the purpose behind their adoption. On the contrary, the Amendments firmly embed the principle of racial fairness in the Florida Constitution to further protect minority voting rights. Indeed, not only was the intent of the drafters to support racial fairness, but also the Amendments' public supporters included minority and civil rights organizations that have been historical advocates of racial fairness in voting rights.

I. The Amendments Satisfy the Preclearance Standard.

Section 5 precludes implementation of a change affecting voting that either has the purpose or will have the effect of denying or abridging the right to vote on account of race, color, or membership in a language minority group defined in the Act. Additionally, Department of Justice regulations set forth four relevant factors to guide the Attorney General's analysis when

determining whether a voting change satisfies this standard. The Amendments easily pass Section 5 muster when measured against these requirements and factors. In fact, an analysis of the plain text and impact of the Amendments reveal that not only are they not retrogressive, they affirmatively protect the opportunity of minority groups to participate in the political process and elect representatives of their choice.

A. The Amendments do not have a discriminatory purpose.

According to Department of Justice guidelines, when the Department is considering redistricting-related changes under Section 5 of the Voting Rights Act, it "will examine the circumstances surrounding the submitting authority's adoption of a submitted voting change . . . to determine whether direct or circumstantial evidence exists of any discriminatory purpose of denying or abridging the right to vote on account of race or color, or membership in a language minority group defined in the Act." Guidance Concerning Redistricting under Section 5 of the Voting Rights Act, 76 Fed. Reg. 7470, 7471 (Feb. 9, 2011). With respect to the Amendments at issue in Florida, all evidence weighs in favor of preclearance.

"Direct evidence detailing a discriminatory purpose may be gleaned from the public statements of members of the adopting body or others who may have played a significant role in the process." *Id.* (citing *Busbee v. Smith*, 549 F. Supp. 494, 508 (D.D.C. 1982), *aff'd*, 459 U.S. 1166 (1983)). FairDistrictsFlorida.org, which sponsored the petition initiatives that led to the placement of the Amendments on the 2010 general election ballot, was joined by a long list of minority and civil rights organizations that vigorously fought for adoption of the Amendments, including the Florida State Conference of NAACP Branches ("Florida NAACP"), the Florida Legislative Black Caucus, Democracia Ahora, the Florida Black Caucus of Local Elected Officials, and the ACLU Voting Rights Project. All of these organizations publicly expressed their support for the Amendments and emphasized the Amendments' purpose of protecting minority voting rights. *See, e.g.*, Ex. 1 ("From the particular perspective of the Voting Rights Project, these amendments are significant in that they add language to the Florida Constitution which would permanently protect and preserve the rights of racial and language minorities to elect representatives of their choice and to participate equally in the political process.").

In addition, several prominent civil rights leaders publicly backed the Amendments precisely because of the Amendments' protections of minority voting rights. Just days before the 2010 general election, Reverend Joseph Lowry, co-founder with Dr. Martin Luther King, Jr. of the Southern Christian Leadership Conference, stated: "Amendments 5 and 6 will put our hard fought minority voting rights protections into the Florida Constitution and protect the voting rights of ALL Floridians. I urge you to vote YES on Amendments 5 and 6." Ex. 2 at 1. Similarly, Julian Bond, Chairman Emeritus of the NAACP, announced that an end to partisan gerrymandering marks a turning point for minority voting rights: "We need to pass these amendments to ensure that our community will never again see our vote diluted by politicians who protect their positions by packing minority voters into a few districts." *Id.* Mr. Bond encouraged Florida voters to take advantage of this "once in a decade opportunity" to enshrine minority voting rights in the Florida Constitution. *Id.* Bishop Victor T. Curry, President of the

Miami-Dade County Branch of the NAACP, further denounced the "scare tactics" used to argue that the Amendments would diminish the ability of minorities to elect their preferred candidates:

> *Nothing could be further from the truth*. . . . If the Fair Districts Amendments are approved, the rights that black and Hispanic voters now have under the Voting Rights Act to elect candidates of their choice will still be in effect and the amendments will strengthen them by placing strong language permanently into the Florida Constitution. . . . In short, *Amendments 5 and 6 will create rules so politicians can never again use redistricting to reduce representation of Black and Hispanic voters*.

Ex. 3 at 1-2 (emphasis in original). As these public statements confirm, the Amendments have no discriminatory purpose. Quite to the contrary, their adoption was driven by efforts to *preserve* minority voting rights.

The circumstantial evidence also highlights the racial fairness principles that drove adoption of the Amendments. *See* 76 Fed. Reg. at 7471 (citing *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 268 (1977)). For instance, the "impact of the decision," *id.*, will be to provide minority voters a state constitutional right to districts drawn with neither the intent nor the result of "denying or abridging the equal opportunity of racial or language minorities to participate in the political process" or "diminish[ing] their ability to elect representatives of their choice." Fl. Const. art. III, §§ 20(a), 21(a); *see also* Exs. 1-3. The "historical background" of the Amendments, 76 Fed. Reg. at 7471, is reflected in the individuals and organizations that fought for their adoption. In an effort to provide a fairer redistricting process, civil rights leaders and organizations pushed for fair districts that would provide Florida minority voters a meaningful voice in state and federal government.

Additionally, the Attorney General considers as circumstantial evidence "whether the challenged decision departs, either procedurally or substantively, from the normal practice." 76 Fed. Reg. at 7471. The adoption of constitutional amendments by Florida voters is the "normal practice" for instituting such changes. *See* Fla. Const. art. XI, § 3. Furthermore, the "normal practice" regarding Florida redistricting before the Amendments provided the Florida Legislature minimal state guidelines for legislative redistricting—and no state guidelines for congressional redistricting—and empowered it to draw districts that served its members' interests above those of Florida voters. The new practice embodied by the Amendments not only requires that the Florida Legislature adhere to traditional redistricting principles but also prioritizes three factors above all else: (1) no intent to favor or disfavor an individual or party; (2) "the equal opportunity of racial and language minorities to participate in the political process" and their "ability to elect representatives of their choice"; and (3) contiguity. Fla. Const. art. III, §§ 20(a), 21(a). As a matter of process, the new redistricting standards rightfully were established by Florida voters. As a matter of substance, the Amendments contain specific protections for minority voters—protections that never existed before in state law.

In sum, the evidence points in only one direction: the purpose of the Amendments is protection, not retrogression, of minority voting rights in Florida.

B. The Amendments will not have a retrogressive effect.

The plain language of the Amendments confirms that they will not have "the effect of denying or abridging the right to vote on account of race, color or membership in a language minority group." 28 C.F.R. § 51.52. *See* Fla. Const. art. III, §§ 20(a), 21(a) ("[D]istricts shall not be drawn with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process or to diminish their ability to elect representatives of their choice[.]").

The plain terms of the Amendments also make clear that protection of the minority vote trumps other redistricting standards such as compactness and respect for geographical boundaries. *See* Fla. Const. art. III, §§ 20(b), 21(b). In the hierarchy of redistricting duties and values embodied by the Amendments, fairness to minority voters is paramount and a higher priority than compactness.

Moreover, the Amendments' continuation of the requirement of contiguity and inclusion of compactness and respect for political and geographical boundaries as fundamental redistricting principles only bolsters the Amendments' protection of minority voting rights. In evaluating whether a redistricting plan complies with Section 5, the Attorney General specifically considers "whether the proposed plan departs from objective redistricting criteria set by the submitting jurisdiction, ignores other relevant factors such as compactness and contiguity, or displays a configuration that inexplicably disregards available natural or artificial boundaries." 76 Fed. Reg. at 7472. These factors guide the Attorney General's review of district lines and help illuminate attempts to flout community boundaries in a manner detrimental to minority voters. Thus, the inclusion of neutral redistricting criteria in the Amendments, alongside their explicit minority voter protection provisions, provides another check against attempts to "crack" or "pack" minority populations.

The language of the Amendments could not be clearer. Under the Florida Constitution as modified by the Amendments, district lines cannot be drawn in a manner that discriminates against minority voters or diminishes their right to elect representatives of their choice.

C. All relevant factors weigh in favor of preclearance.

Department of Justice regulations specify four "[r]elevant factors" the Attorney General will consider in making a Section 5 determination. 28 C.F.R. § 51.57. Although some of these factors overlap with the considerations outlined above, it is worth noting that all of these factors weigh in favor of preclearance of the Amendments.

The first factor is the "extent to which a reasonable and legitimate justification of the change exists." *Id.* § 51.57(a). The Amendments provide fair and neutral redistricting standards where, before, Florida's constitution had articulated few principles to guide the state legislative

redistricting process and provided no guidance whatsoever for the congressional redistricting process. The need to curb abuses in redistricting and protect minority rights more than justified adoption of the Amendments.

The second relevant factor is the "extent to which the jurisdiction followed objective guidelines and fair and conventional procedures in adopting the change." *Id.* § 51.57(b). The Amendments were adopted through a uniquely fair and democratic means of effecting change: voter initiative. Pursuant to Article XI, Section 3 of the Florida Constitution, the Amendments were placed on the general election ballot through the citizen-initiative process. On November 2, 2010, over 60% of Florida voters voted to amend Florida's Constitution so that it includes these two provisions requiring that fair standards be used when drawing district lines.

The third and fourth factors are the "extent to which the jurisdiction afforded members of racial and language minority groups an opportunity to participate in the decision to make the change" and the "extent to which the jurisdiction took the concerns of members of racial and language minority groups into account in making the change." 28 C.F.R. § 51.57(c), (d). As noted above, not only did members of minority groups and organizations participate in the adoption of the Amendments, they played a significant role in driving the process. Furthermore, the concerns of minority groups were hardly an afterthought to adoption of the Amendments; they are explicitly addressed in the text of the Amendments, which prohibits districts drawn "with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process or to diminish their ability to elect representatives of their choice." Fla. Const. art. III, §§ 20(a), 21(a). In sum, the voices of minority groups were integral to the adoption of the Amendments, and protection of minority voters is now a vital constitutional component of Florida redistricting law.

II. The Florida Legislature's Preclearance Submission Misreads Both the Amendments and the Scope of Section 5 Review.

The Florida Legislature's submission completely misinterprets the language and effects of the Amendments by suggesting that there are "potentially retrogressive aspects" of the Amendments. Preclearance Submission at 5. The plain language of the Amendments speaks for itself. Moreover, the Florida Legislature's unfounded hypotheses about how the Amendments may be applied and their interaction with Section 2 of the Voting Rights Act are irrelevant to the Attorney General's review under Section 5.

The Florida Legislature's preclearance submission speculates about what "could" be argued when crafting or evaluating a redistricting plan, the "potential obstacles" to minority voting strength, and how the Amendments may "perhaps" be interpreted by a court in light of Section 2 of the Voting Rights Act. Preclearance Submission at 5-6. But there is no rational reason to engage in hypothetical scenarios at this stage. The Attorney General's preclearance of the Amendments would not, of course, exempt from the preclearance requirement the implementation of the particular voting change that is governed by the Amendments as a matter of Florida law. In other words, the redistricting maps the Florida Legislature ultimately draws

will themselves be subject to preclearance review, at which point the Attorney General will have the opportunity to evaluate whether the Amendments have been misapplied to allow for retrogression. Therefore, if, in the future, the Amendments are misinterpreted in a way that creates a plan that violates Section 5, that plan will fail preclearance because of those misinterpretations, *not* because of the text or intent of the new constitutional provisions.

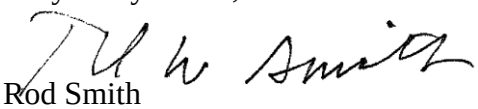
The Florida Legislature further speculates that the Amendments may be interpreted to impose a ceiling on the extent to which it can draw minority-protective districts coextensive with the legal requirements of Section 2 of the Voting Rights Act. Preclearance Submission at 5-6. In so doing, the Florida Legislature ignores the retrogression standard of Section 5 and instead provides the outline for an argument under Section 2. But the Florida Legislature's invocation of Section 2 standards is misplaced, as the Section 2 analysis does not define preclearance review. *Cf.* 76 Fed. Reg. at 7470 ("The Attorney General may not interpose an objection to a redistricting plan . . . on the grounds that it violates Section 2 of the Voting Rights Act."). Instead of focusing on the applicable standard for preclearance review, the Florida Legislature's preclearance submission prematurely engages in a purely hypothetical legal battle under Section 2 before any districts have been drawn.

The Florida Legislature's speculation about whether the Amendments will be interpreted in a retrogressive manner is particularly puzzling in light of the fact that the Florida Legislature will be charged with interpreting and applying the Amendments in the first instance. Equally puzzling is the Legislature's insistence that consideration of two fair and neutral redistricting criteria—compactness and respect for existing political and geographical boundaries—somehow could constitute a violation of Section 5 (a concern the Legislature characterizes as its "most obvious retrogression issue," Preclearance Submission at 5), given that these two criteria must be considered *only* if neither "conflicts . . . with federal law" or with the Amendments' racial fairness requirement. Fla. Const. art. III, §§ 20(b), 21(b). The plain language of the Amendments is clear. A plan may not "diminish" minorities' "ability to elect representatives of their choice."

III. Conclusion

The Amendments explicitly protect minority voting rights, creating a state constitutional right to an equal opportunity to elect minority-preferred candidates where the law once was silent. Section 5 of the Voting Rights Act requires an analysis of whether minority groups will be "worse off than they had been before the change." 28 C.F.R. § 51.54(a). The Amendments provide just the opposite, enabling redistricting legislation that will better protect minority voting strength.

Very Truly Yours,



Rod Smith
Chair, Florida Democratic Party