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, FLORIDA STATE CONFERENCE OF THE NAACP, *et al.*, Defendant-Intervenors, KENNETH SULLIVAN, *et al.*, Defendant-Intervenors, NATIONAL COUNCIL OF LA RAZA, and LEAGUE OF WOMEN VOTERS OF FLORIDA, Defendant-Intervenors.	No. 1:11-cv-1428-CKK-MG-ESH

JOINT STATUS REPORT

Pursuant to this Court's Scheduling and Procedures Order dated November 3, 2011 (Dkt. No. 61), Plaintiff State of Florida ("Florida"), Defendants United States of America and Attorney General Eric H. Holder, Jr. ("United States"), and Defendant-Intervenors the NAACP Group,[1]

[1] The NAACP Group consists of Defendant Intervenors the Florida State Conference of the NAACP, Belinthia Berry, Sharon Carter, Ella Kate Coffee, Howard Harris, Dianne Hart, Yvette Lewis, Marvin Martin, Charles McKenzie, Jr., Earl Rutledge, Alonda Vaughan, and Paulette Walker.

the Sullivan Group,[2] and the NCLR Group[3] submit this Joint Status Report to the Court. As specified by the Court's Scheduling Order, this Report advises the Court of the following:

> (1) the form(s) that they anticipate using in briefing the merits of this action (*i.e.*, motions for summary judgment and/or proposed findings of facts and conclusions of law); (2) the feasibility of the briefing schedule set forth [in the Scheduling Order]; (3) the likelihood that an evidentiary hearing will be required; and (4) such other matters that the parties believe may assist the Court in overseeing further proceedings.

Scheduling and Procedures Order, at 6.

This action was filed by the State of Florida under Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, requesting a declaratory judgment that certain voting changes enacted by the Florida Legislature in 2011, and related voting changes adopted by the Florida Secretary of State in 2011, "neither [have] the purpose nor will have the effect of denying or abridging the right to vote on account of race or color, or [membership in a language minority group]." 42 U.S.C. § 1973c(a). Five Florida counties are subject to the Section 5 preclearance requirement, Collier, Hardee, Hendry, Hillsborough, and Monroe, pursuant to coverage determinations made under the third sentence of Section 4(b) of the Voting Rights Act, 42 U.S.C. § 1973b(b). *See also* 28 C.F.R. Pt. 51 App. (listing jurisdictions subject to Section 5). Discovery was completed on February 29, 2012 in accordance with the schedule specified in the Court's Scheduling Order.

Lastly by way of overview, the parties today are filing stipulations of fact, as required by the Scheduling Order. These stipulations will be supplemented next week with certain documents that are referenced in the stipulations as being attachments. The parties also are

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[2] The Sullivan Group consists of Defendant Intervenors Kenneth Sullivan, Albert Leo Sullivan, Michael Berman, Senator Arthenia Joyner, Representative Janet Cruz, Helen Gordon Davis, Joyce Hamilton Henry, Harold Weeks, Ophelia Allen, Project Vote, Voting for America, Harry L. Sawyer, Jr., Ion Sancho, Reverend Tom Scott, and the Florida AFL-CIO.

[3] The NCLR Group consists of Defendant-Intervenors the National Council of La Raza and the League of Women Voters of Florida.

continuing their discussions to seek to enter into further stipulations of fact and, if additional stipulations are reached, those stipulations will likewise be filed with the Court.

In accordance with this Court's scheduling order, the parties present their positions below.

I. THE STATE OF FLORIDA'S POSITIONS

A. The State's Position on Scheduling

In this joint status report the State proposes a briefing schedule that it believes will allow the parties to efficiently present to the Court the pertinent legal and factual issues and thus to narrow—and potentially eliminate—the need for this Court to hold a live trial. The State addresses the Court's four requested issues in turn.

1. The forms that the parties anticipate using in briefing the merits of this action

The State believes that this action can be resolved entirely (or almost entirely) on the papers submitted. This procedure has worked well in previous preclearance actions. *See, e.g.*, *Georgia v. Ashcroft*, 195 F. Supp. 2d 25, 32 n.4 (D.D.C. 2002) (noting that the bulk of the testimony was submitted on paper and that live testimony at trial consisted only of cross-examination and redirect questioning of the parties' expert witnesses); *City of Rome v. United States*, 472 F. Supp. 221, 223 (D.D.C. 1979) (resolving the issues on pleadings styled cross-motions for summary judgment based on evidence developed in a stipulated record and resolving any issues of material fact through findings of fact and conclusions of law).

As detailed below, the State proposes that the parties submit proposed findings of fact and conclusions of law and responses to proposed findings of fact and conclusions of law. After reviewing the briefing and the record submitted, the Court can then decide whether live testimony is necessary and, if so, inform the parties which individuals it needs to hear from in

order to decide the case. If the Court determines that live testimony is unnecessary, it could hold oral argument, in the event that would aid the Court in its resolution of the case, and then decide the case on the papers submitted.

Alternatively, should the Court be inclined to accept the United States' and Defendant-Intervenors' proposal, the State will move for summary judgment on all of its claims. *See* Fed. R. Civ. P. 56(b). The State would request that the Court hold all other actions in abeyance while the summary judgment motions remain pending. In the State's view, summary judgment would resolve or, at a minimum, significantly narrow the issues that would need to be resolved through the live trial proposed by the United States and Defendant-Intervenors. *See Greenberg v. FDA*, 803 F.2d 1213, 1215 (D.C. Cir. 1986) ("Rule 56 of the Federal Rules of Civil Procedure allows either party to a litigation to move for summary judgment before trial. The purpose of summary judgment is 'to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial.'" (citing Rule 56 advisory notes)).

2. The feasibility of the briefing schedule set forth in the Scheduling Order

As detailed below, the State proposes to modify the Court's prior scheduling order. Because of the numerous legal issues involved in this case, as well as the nature of the defenses sets forth by the United States and Defendant-Intervenors, the State does not believe that the four voting changes at issue can be separated, such that some claims are resolved through summary judgment and others are resolved through proposed findings of fact and conclusions of law. Instead, the State proposes that the parties address all the claims through proposed findings of fact and conclusions of law. This approach—as opposed to summary judgment—ensures final resolution of Florida's claims in the most efficient manner possible for the parties and the Court and avoids the possible risk of two rounds of briefing. In other words, this process will allow the

Court to resolve all legal and factual issues through a one-stage process that conserves judicial and party resources. This approach is particularly appropriate given the unique burdens that Section 5 litigation imposes on a special three-judge court and the substantial "federalism costs" such litigation imposes on the State. *Nw. Austin Mun. Utility Dist. No. One v. Holder* 129 S. Ct. 2504, 2511 (2009) (internal citations omitted).

Alternatively, as explained below, the State will seek summary judgment on all claims if the Court is inclined to adopt the more cumbersome and time-intensive trial proceeding sought by the United States and Defendant-Intervenors. Although the process outlined above is preferable, the State believes that summary judgment would significantly narrow (and perhaps eliminate) the need for the live trial that Defendant-Intervenors seek.

3. The likelihood that an evidentiary hearing will be required

The State believes that an evidentiary hearing will most likely be unnecessary. Four months of discovery has produced an extensive record. The key issues in this case—whether the four voting changes have the purpose or effect of denying or abridging the right to vote on account of race, color, or language minority status—do not require live testimony. These issues can be resolved by examining, for the most part, the legislative record, other documents that have been produced during discovery, and the twenty deposition transcripts produced during discovery, including the four expert reports and expert deposition transcripts.

In light of the parties' disclosures, the State recognizes that there may be a handful of individuals who have relevant information but who have not been deposed. The State proposes a procedure similar to the one proposed by the United States and Defendant-Intervenors for depositions *de benne esse*. Under the State's proposal, any party would be permitted to introduce direct testimony of a limited number of individuals who were identified in discovery disclosures

or responses but were not deposed during the discovery period. First, by March 7, 2012, the party seeking to introduce such testimony would serve the other parties with declarations from the proffered individual. Second, by March 14, 2012, a party could submit rebuttal testimony by serving the other parties with a declaration that is directly responsive to one previously offered on March 7. Between March 8 and March 21, the parties could (but need not) schedule a deposition *de benne esse* of any of these declarants. The witnesses' cross and re-direct testimony would be recorded stenographically for filing with the Court. On March 21, 2012, the record would close and the parties would then be in a position to submit proposed findings of fact and conclusions of law and submit the case for decision.

Finally, the State wishes to advise the Court that, depending on the manner in which this action proceeds, it may file a motion to exclude all or part of the testimony of the individuals whom the United States and Defendant-Intervenors have identified as expert witnesses on their behalf. The State's proposed schedule provides that any such motion would be filed on April 2, 2012.

4. Such other matters that the parties believe may assist the Court in overseeing further proceedings.

In light of the foregoing, the State proposes the following schedule:

Date	Activity
March 7, 2012	The State, the United States, and Defendant-Intervenors are each allowed to serve up to 10 declarations from persons not deposed during discovery in this action.
March 14, 2012	The State, the United States, and Defendant-Intervenors are each allowed to serve up to 5 declarations from persons not deposed during discovery in this action. Such declarations must

	specifically rebut facts set forth in declarations previously submitted on March 7.
March 8 - March 21	Parties are permitted (but are not required) to conduct depositions *de benne esse* of the persons submitting declarations.
March 21, 2012	The record closes
April 2, 2012	Parties file proposed findings of fact and conclusions of law, as well as any evidentiary motions.
April 16, 2012	Parties submit responses to proposed findings of fact and conclusions of law, as well as oppositions to any evidentiary motions.
April 23, 2012 - May 7, 2012	If the Court determines it is necessary to decide the case, certain individuals who have either been previously deposed or submitted declarations are called to testify in court. The Court will inform the parties which individuals will need to testify. The Court may also schedule oral argument if necessary. The precise dates for testimony and/or oral argument would be scheduled by the Court in consultation with the parties and any witnesses that may be asked to testify. If the Court conducts live testimony, the parties will subsequently submit supplemental proposed findings of fact and conclusions of law on a date to be determined by the Court.

The State's proposed schedule has a number of advantages. First, the State's schedule conserves judicial resources. After the Court reviews the filings and the record submitted, it will be in a better position to determine if it needs live testimony and, if so, from whom. The State believes this best reflects the procedure the Court had previously envisioned. *See* Transcript of

Initial Scheduling Conference with Judge Kollar-Kotelly (Nov. 2, 2011) ("Tr.") at 48 ("May 4th in our mind was the date that we needed to get this done in order to actually get a decision. If you're going to have evidentiary things then we need some time in here and we need to have the briefs in and the findings of fact to see whether we actually need them. You would identify them if you did, we could agree or not agree."); *id*. at 44 ("[I]t's not clear whether there would be a need for an evidentiary/trial-type of thing on some factual issues or maybe experts or something of that nature. So, you'd have to build in a period in terms of the briefing to get it to us early enough for us to decide that we actually need these evidentiary hearings …. And … we hopefully can do this by the May 4th date.").

Second, the State's schedule avoids overlapping briefing of motions for summary judgment and proposed findings of fact and conclusions of law. The Court can review all the issues through one stage of filings. *See, e.g., City of Rome*, 472 F. Supp. at 223. The schedule also ensures that the Court receives proposed findings of fact and conclusions of law that address the entire record (or almost all the record, if the court requests live testimony). Unlike the United States' and Defendant-Intervenors' proposal, it would avoid the parties having to draft proposed findings of fact and conclusions of law while depositions *de benne esse* are simultaneously occurring, and it would avoid the duplicative process of two sets of briefing (pre-trial and post-trial proposed findings of fact and conclusions of law).

In any event, the United States' and Defendant-Intervenors' proposal for taking depositions *de benne esse* is unworkable. Under their proposal, the parties would have to decide whether to take a deposition *de benne esse* based on a summary description as opposed to the declaration itself. If the party chose not to take such a deposition, it would forgo its right to cross-examine the witness after the declaration was submitted to the court. Such a risk would

likely force the parties to depose every witness noticed through this procedure. This would defeat any efficiencies attempted to be saved through this process. Moreover, as noted above, the United States' and Defendant-Intervenors' proposal would have the parties submit proposed findings of fact and conclusions of law to the Court before the depositions *de benne esse* had been completed. The State supports a procedure for taking depositions *de benne esse* only if it will streamline briefing and obviate or narrow the need for live testimony. If live testimony will occur regardless, the State opposes such a procedure.

Additionally, the State strongly opposes the United States' attempt to extend this action well into the summer. The Court was quite clear that it wanted to have this case fully submitted for its review by early May, because this would allow the Court sufficient time to issue a decision before the August primaries. *See* Tr. at 21 ("[For] preclearance issues -- and any evidentiary trial proceedings that might or may not be required, … all of that would be completed by May 4th. And oral arguments could be scheduled after May 4th because you want to have everything in anyway and have the arguments at a point where everything has been presented to the Court....[T]he goal is obviously to try and rule before the next election cycle in August."); *see also id.* 44, 48. But the United States' and Defendant-Intervenors' proposed schedule would make this goal unworkable. Indeed, it would have the parties still conducting depositions in early May.

In the alternative, should the Court be inclined to adopt the Defendant-Intervenors' proposed schedule, the State will move for summary judgment on all of its claims. *See* Fed. R. Civ. P. 56(b). The State would request that the Court hold all other actions in abeyance while the summary judgment motions were pending. Summary judgment would resolve or, at a minimum,

significantly narrow the issues before the court. *See Greenberg*, 803 F.2d at 1215. Thus, the State would propose in the alternative the following schedule:

Date	Activity
March 21, 2012	Motion for Summary Judgment Due
April 4, 2012	Oppositions to Motions for Summary Judgment Due
April 11, 2012	Summary Judgment Reply Due
TBD	All other actions held in abeyance pending ruling on summary judgment motion

B. <u>The State's Position on Additional Issues Raised</u>

In their proposals, the Defendant-Intervenors request that Florida be compelled to submit a further amended complaint or file a notice providing a specific identification of two voting changes (the change regarding constitutional initiatives and the change regarding inter-county movers)." It appears that the United States and Defendant-Intervenors have been misinterpreting two of the statutes for which the State seeks preclearance, and they blame their confusion on the State's characterization of the two statutes in the State's complaint.

Florida avers that the statutes speak for themselves. Florida has consistently explained that it is seeking to preclear the changes made by Chapter 2011-40 to Fla. Stat. § 100.371 and Fla. Stat. § 101.045. *See* Fla. Second Amend. Compl. (Doc. 54) at ¶¶ 28, 33, 37, 87-94, 95-102. No more explanation is needed. Any confusion from the State's characterization of the statutes could have been remedied by a simple reading of the statute.[4] *See* Fla. Stat. 101.045(2)(b)

[4] Additionally, no new filing is necessary because the changes *are* clear in the Complaint. *See* Doc. 54 ¶ 63 ("Section 26 amended the benchmark practice only for electors who have changed their legal residence, have not previously notified the supervisor of elections of the change of address, and whose change of address is from outside the county. § 101.045(2)(b), Fla. Stat. An elector in these circumstances *may not change his or her legal residence at the polls and vote a regular ballot,* but is entitled to vote a provisional ballot upon completion of the affirmation

("Except for an active uniformed services voter or a member of his or her family, an elector whose change of address is from outside the county *may not change his or her legal residence at the polling place and vote a regular ballot*; however, such elector is entitled to vote a provisional ballot."). Regardless, the United States and Defendant-Intervenors appear to now understand the meaning of the statutes, and any remaining confusion they have can be easily remedied through further joint stipulations, on which the parties will continue to work. Moreover, these are precisely the types of issues that are normally resolved through summary judgment and/or proposed findings of fact and conclusions of law. There is no need to create special procedures for resolution of these issues.[5]

Also, contrary to Defendant-Intervenors, the State believes these procedural issues can be resolved without a status conference given the extensive nature of this Joint Status Report. However, if the Court concludes that a status conference would aid it in its resolution of these issues, the State would not oppose such a conference.

Finally, the State feels compelled to respond to Defendant-Intervenors unfortunate decision to raise in this report, which concerns procedural issues, a disagreement between the parties as to a statutory construction question that should instead be addressed in the parties' legal pleadings. Florida will continue to fully abide the Court's determination that issues concerning Section 5's constitutionality will not be resolved until after the Court determines whether Florida is entitled to preclearance. The State has not represented otherwise to the United

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of change of legal residence. § 101.045(2)(b), Fla. Stat."); *id*. ¶ 55 ("Section 23 provides that a signature on a petition form is valid for a period of two years following the date of the signature, rather than four years. § 100.371(3), Fla. Stat.").

[5] Such a procedure would also be unnecessary for the voting changes regarding constitutional initiatives, as the United States has conceded that the State has met its burden of proof that these changes are entitled to preclearance under Section 5.

States or Defendant-Intervenors. As Defendant-Intervenors are aware, however, "'constitutional avoidance'" is one of the "'traditional tools of statutory construction'" that a Court may consider when interpreting the meaning of federal law. *See American Federation of Labor and Congress of Indus. Organizations v. Federal Election Com'n*, 333 F.3d 168, 183 (D.C. Cir. 2003) (quoting *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*, 485 U.S. 568 (1988). The Supreme Court has repeatedly relied on this rule in construing the meaning of Section 5 of the VRA. *See, e.g.*, *Perry v. Perez*, 132 S. Ct. 934, 942 (2012); *Northwest Austin Mun. Utility Dist. No. One v. Holder*, 129 S. Ct. 2504, 2512-14 (2009); *Reno v. Bossier Parish School Bd.*, 528 U.S. 320, 336 (2000).

II. THE UNITED STATES' AND DEFENDANT-INTERVENORS' POSITIONS

In the past two days, the parties have consulted on several occasions regarding the procedures that should govern further proceedings in this action, however, they have not been able to reach agreement in that regard. Overall, there are three basic matters at issue: 1) whether Florida's Second Amended Complaint (Dkt. No. 54) provides an adequate identification of all of the voting changes which this Court is being asked to rule upon, or whether information recently disclosed by Florida in discovery indicates that further clarification is needed as to two of the changes; 2) whether this action may be resolved through summary judgment or whether an evidentiary hearing is required; and 3) if this action may not be resolved through summary judgment, what are the appropriate procedures for conducting pre-trial briefing and trial.

These matters are described in greater detail below, in sections separately numbered according to the procedural issues just identified. Thus, the first section addresses the threshold change-identification issue; it also identifies the positions of the United States and the Defendant-Intervenors on the substantive questions of whether Florida's voting changes should

be granted preclearance. The second and third sections address the summary judgment and trial procedures issues. A fourth and final section sets forth the specific schedules proposed by the parties.

In light of the procedural disagreements present, Defendant-Intervenors respectfully request that the Court hold a status conference at its earliest convenience to allow for further discussion of these matters, and for prompt entry of a further scheduling order. The United States does not oppose Defendant-Intervenors' request for a status conference.

I. Voting Changes at Issue and the Parties' Positions

A. *Voting Changes Which Florida Has Presented to the Court for Preclearance*

Florida's Second Amended Complaint seeks Section 5 preclearance for four sets of voting changes. For purposes of this document, these changes may be summarized as follows:

1) Voter registration changes – changes enacted by Chapter 2011-40 (amending Fla. Stat. § 97.0575), and related changes adopted in Florida Department of State Rule 1S-2.042 , regarding voter registration activities conducted by private groups and individuals who meet the definition of a "third-party voter registration organization," Fla. Stat. § 97.021(37);

2) Constitutional initiative changes – changes enacted by Chapter 2011-40 (amending Fla. Stat. § 100.371) regarding the procedures for placing on the ballot by initiative a proposed amendment to the Florida Constitution;

3) Inter-county movers change – a change enacted by Chapter 2011-40 (amending Fla. Stat. § 101.045) regarding persons who are registered to vote in one Florida county, move to another county, and notify the Florida supervisor of elections in the second county of their new residence at the same time they seek to cast a ballot; and

4) Early voting changes – changes enacted by Chapter 2011-40 (amending Fla. Stat. § 101.657) regarding the days and hours during which early in-person voting is conducted, and whether early in-person voting is conducted in non-municipal elections not held in conjunction with a state or federal election.

B. *United States' Position*

Regarding the constitutional initiative voting change relating to signatures on a citizen petition enacted by Chapter 2011-40 (amending Fla. Stat. § 100.371), the United States' position is that the State on behalf of its covered counties has met its burden of proof that the proposed voting change is entitled to preclearance under Section 5.

As to the third-party voter registration and early voting changes enacted by Chapter 2011-40 and amending Fla. Stat. §§ 97.0575 and 101.657, respectively, the United States' position is that the State has not met its burden, on behalf of its covered counties, that the two sets of proposed voting changes are entitled to preclearance under Section 5 of the Voting Rights Act.

As to the inter-county movers voting change, at the very end of the expedited discovery period that ended on February 29, the United States obtained from counsel for the State information about the scope of this voting change, which conflicts with prior information provided from the State through both the administrative review process and the litigation. For example, in the administrative process and in the State's Second Amended Complaint, the State refers to the change-of-address rule applying only to voters who had failed to notify the supervisor of elections regarding change of residence "at any time prior to election day." *See* Second Amended Complaint for Declaratory Relief, ¶ 66 (Docket Number 54) (emphasis added); *see also* Letter, Florida Department of State General Counsel Daniel Nordby to Voting Section

Chief T. Christian Herren (July 22, 2011) (describing the change-of-address rules as applying to "a voter who has moved between counties but has not updated his or her registration address before election day") (emphasis added); Florida Department of State Directive 2011-01 (May 19, 2011) ("Voters who move from one Florida County to another county are generally no longer able to make the address change at the polls on the day of an election and vote a regular ballot.") (emphasis added); Letter, Florida Department of State Chief of Staff Jennifer Kennedy to Supervisors of Election (Mary 19, 2011) (describing the new change-of-address rule as allowing "only the following voters to change their addresses at the polls on Election Day and still vote a regular ballot. . . .") (emphasis added). In a conversation with the State's counsel on February 27, and during the State's 30(b)(6) deposition testimony taken on February 29, the Department of Justice learned that the State is applying the change-of-address rule to voters who cast ballots during the early voting period as well as on Election Day, which increases the number of voters affected by this change. As a result of this new information, the Department of Justice is still evaluating its position as to this change, and consequently is of the view that the State has not met its burden, on behalf of the covered counties, that this voting change is entitled to preclearance under Section 5 of the Voting Rights Act at this time.

In light of new information learned about change-of-address data and early voting data, after the submission of its expert report on February 17, 2012, the United States may file a short supplemental declaration by Dr. Charles Stewart by March 9, 2012. The underlying data for this supplemental declaration was shared with all of the parties during the last week of discovery.

C. *Positions of the Defendant-Intervenors*

Joint position regarding identification of voting changes at issue: It is well-established under Section 5 that, when seeking preclearance, a covered jurisdiction must identify each voting

change for which preclearance is requested in an "unambiguous and recordable manner." *Allen v. State Board of Elections*, 393 U.S. 544, 571 (1969). While this statement was made by the Supreme Court specifically in the context of the Section 5 administrative preclearance process (which involves submissions to the Attorney General, *see* 28 C.F.R. Pt. 51), it necessarily also applies to Section 5 preclearance litigation, where the covered jurisdiction, as the plaintiff in the preclearance lawsuit, has the usual obligation of all plaintiffs to define with particularity the matters as to which relief is being requested. Fed. R. Civ. Pro. 3, 15(b).

As described above in the statement of the United States, Florida now is identifying the inter-county movers change – for which it is seeking preclearance – in a manner that is materially different from Florida's identification in its Second Amended Complaint (and materially different from numerous other statements by Florida, as the United States has explained). In addition, Florida's description, in the Rule 30(b)(6) deposition, of one of the constitutional initiative changes – *i.e.*, the change relating to the time period during which a petition signature is valid – also is materially different from Florida's identification in its Second Amended Complaint.[6]

Defendant-Intervenors assert that this lack of clarity presents a threshold issue that precludes this Court from ruling on these two specific voting changes. Accordingly, Intervenors respectfully request that Florida be compelled to submit a further amended Complaint or file a

[6] In paragraph 55 of the Second Amended Complaint, Florida alleged that the constitutional amendment change simply "provides that a signature on a petition form is valid for a period of two years following the date of signature, rather than four years." However, the Rule 30(b)(6) deponent testified that Florida actually is applying the new rule by creating an entirely different, two-stage two-year requirement: first, the two-year rule is applied to the actual dates of individual signatures when a supervisor of elections verifies a petition-signatures batch submitted to the supervisor for review by the sponsoring organization; and, second, the two-year rule is applied again when the Secretary of State determines whether the sponsoring organization has submitted, *in toto*, the requisite number of signatures for the initiative to be placed on the ballot, however, in so doing, the two-year requirement now is applied using the dates on which various supervisors of elections verified (or reported their verifications) for the numerous batches of signatures they previously reviewed (*i.e.*, the Secretary does not use the actual dates of the signatures in this second-stage review).

notice with this Court that identifies the two voting changes under discussion – and for which preclearance is being sought – in an "unambiguous and recordable manner."

Sullivan Group's substantive position: The Sullivan Group opposes Section 5 preclearance of the voter registration changes, the inter-county movers change, and the early voting changes, and opposes preclearance of the constitutional initiative changes insofar as those changes provide for a reduction in the period of time during which an initiative petition signature is valid.

NAACP Group's substantive position: The NAACP Group opposes Section 5 preclearance of the voter registration changes, the inter-county movers change, and the early voting changes. The NAACP Group opposes preclearance of the constitutional initiative changes insofar they provide for the reduction in the time period that petition signatures are valid, however, the NAACP Group may re-evaluate its position based on Florida further identifying to the Court and the parties the nature and scope of this voting change.

NCLR Group's substantive position: The NCLR Group opposes Section 5 preclearance of the voter registration changes, the inter-county movers change, and the early voting changes. The NCLR Group opposes preclearance of the constitutional initiative changes insofar they provide for the reduction in the time period that petition signatures are valid, however, the NCLR Group may re-evaluate its position based on Florida further identifying to the Court and the parties the nature and scope of this voting change.

II. Resolution of This Case Through Trial or Summary Judgment

A. *United States' Position*

At this time, the United States believes that the dispute regarding the third-party voter registration and early voting sets of changes are not amenable to resolution by summary

judgment. The United States' position as to the inter-county movers voting change will depend on the position that it takes after reviewing the latest evidence.

B. *Defendant-Intervenors' Position*

The Defendant-Intervenors believe that the preclearance issues require an evidentiary hearing for presentation of appropriate live testimony regarding the purpose and effect of the voting changes. Defendant-Intervenors do not intend to move for summary judgment, and believe that there are genuine disputes of material fact which would preclude a grant of summary judgment to Florida, under Rule 56(a).

Defendant-Intervenors also wish to note a concern as to the nature of a possible summary judgment motion by Florida. Counsel for Florida has represented to Intervenors' counsel that Florida is entitled to summary judgment based on certain legal arguments regarding the Section 5 preclearance standards. Florida's counsel has declined to elaborate on the precise nature of these arguments, but has indicated that they involve issues of statutory interpretation based on the principle of constitutional avoidance, *i.e.*, Florida apparently will seek to argue that Section 5 should be construed in a particular manner so as to avoid alleged constitutional deficiencies that otherwise would exist. If this is correct, Defendant-Intervenors believe that Florida is proposing briefing in this action that is inconsistent with this Court's prior determination that issues relating to the constitutionality of Section 5 may be addressed by this Court only after the Court's merits determination as to whether the voting changes should be precleared.

III. Pre-Trial and Trial Procedures[7]

With regard to the introduction of witness testimony at trial, the United States and Defendant-Intervenors propose that, in addition to live testimony, the Court also allow for the introduction of certain non-live testimony in order to promote efficient use of judicial resources and limit the burden on certain individual witnesses of traveling from Florida to Washington, DC. The United States and Defendant-Intervenors also represent that the procedures they are proposing are consistent with trial procedures followed in prior Section 5 declaratory judgment actions heard by the District of Columbia District Court.

First, the United States and Defendant-Intervenors propose that any party would be permitted to seek to introduce as direct testimony all or portions of the deposition of a non-expert, lay witness taken during the discovery period in this action, so long as the deponent is not testifying live at trial. The parties not proffering particular deposition testimony would retain all evidentiary objections which would have been available had the witness' testimony been proffered as live testimony, except parties would be permitted to object to the form of any deposition questions only if that objection was made on the record during the deposition.

Second, any party would be permitted to seek to introduce direct testimony of a limited number of individuals who were identified in discovery disclosures or responses (served no later than the end of discovery) but not deposed during the discovery period in this action, and who

[7] The United States and Defendant-Intervenors note that, contrary to the apparent suggestion of Florida, it is typical for the District of Columbia District Court to conduct trials in Section 5 declaratory judgment actions in order decide, on the merits, whether particular voting changes should receive preclearance. Most recently, this Court conducted an approximate two-week trial in January of this year in *Texas v. United States*, 11-1303 (D.D.C.), Docket 130 (Trial Scheduling Order), a Section 5 case regarding statewide redistricting plans for the State of Texas. The witnesses who testified at trial were those called by the respective parties to the litigation.

are not testifying live at trial, by complying with the following procedures.[8] First, by the date set forth below, the party seeking to introduce such testimony would file with the Court a notice identifying the individual witness(es) involved, the specific topics of each witness' testimony, and a brief summary of that testimony. Second, by the date set forth below, the parties who are in receipt of any such notice would file a response with the Court identifying which, if any, of the additional witnesses the responding party wishes to cross examine. For each such witness, a deposition *de benne esse* will be scheduled within the time period set forth below and the witnesses' direct, cross and re-direct testimony will be recorded stenographically for filing with the Court. If a deposition *de benne esse* is not requested, the party who identified the additional witness would be permitted seek to introduce that witness' testimony through a declaration or affidavit, provided that such testimony is limited to the specific topics identified in the party's notice. Third, Florida, the United States, and the Intervenors (as a group) may each identify no more than five individuals pursuant this procedure.[9] Any exceptions to the procedures and limitations set forth in this subparagraph could be justified only for good cause shown.

Finally, the Defendant-Intervenors wish to advise the Court that they intend to file a joint motion to exclude all or part of the testimony of the individual whom Florida has identified as an expert witness on its behalf. The new schedule should accordingly identify the date on which this motion should be filed. The United States may consider joining this motion or filing

[8] It should be noted that Florida has stipulated that it will not offer at trial or in support of summary judgment the testimony of any witness whose deposition has not been taken in this action. Florida also represented to the United States District Court for the Northern District of Florida in the miscellaneous action filed by Defendant-Intervenors – in which Intervenors sought to compel the depositions of certain persons who served as legislators and legislative staff during the 2011 session of the Florida Legislature – that it will not seek to introduce the direct testimony of any individual who served as a legislator or as legislative staff during the 2011 session of the Florida Legislature. Finally, it should be noted that the United States and the Defendant-Intervenors will not seek to subpoena former Secretary of State Browning to testify live at trial in this action.

[9] In other words, the Intervenors would be able to identify five such witnesses (not three times five for a total of fifteen).

separately to exclude all or part of Florida's expert testimony, and would do so by the deadline contained in a new court-ordered schedule.

IV. Schedule

The United States and the Defendant-Intervenors request that the Court modify the schedule set forth in its November 3, 2011 Scheduling Order for briefing for summary judgment and proposed findings of fact and conclusions of law, in light of the new information learned through the discovery process and in light of the need to review the large volume of information and deposition transcripts obtained during discovery. The United States believes that the following schedule will allow sufficient time for the United States to reach a conclusion on its position as to the inter-county movers voting change, and the United States and Defendant-Intervenors believe that the schedule will allow for a speedy and efficient resolution of this case.

Date	Activity
March 12, 2012	• Supplemental fact stipulations
March 26, 2012	• Notices of any witnesses for non-live, direct testimony whose depositions were not taken during discovery, with accompanying information (per guidelines set forth above by the United States and Defendant-Intervenors)
March 28, 2012	• Notices in response to March 26, 2012 notices • Motions for summary judgment, including cross motions
April 4, 2012	• Proposed findings of fact and conclusions of law (pre-trial) • Pre-trial evidentiary motions
April 18, 2012	• Oppositions to motions for summary judgment • Responses to proposed findings of fact and conclusions of law (pre-trial)

Date	Activity
April 20, 2012	• Oppositions to pre-trial evidentiary motions
April 25, 2012	• Replies in support of motions for summary judgment
April 27, 2012	• Replies in support of pre-trial evidentiary motions
May 2, 2012	• Deadline for conducting depositions *de benne esse*
TBD	• Lists of live witnesses for trial, and designation of deposition testimony
May 2012	• Trial dates
TBD	• Deadlines for post-trial briefs and final findings of fact and conclusions of law

CONCLUSION

As set forth above, the parties have been unable to reach agreement on a set of procedures for resolving this preclearance action on the merits. Accordingly, the parties respectfully request that this Court resolve these disputes and issue a new scheduling order for this case.

Respectfully submitted,

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