

Testimony of

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Subcommittee on the Constitution, Civil Rights and Human Rights

“New State Voting Laws II: Protecting the Right to Vote in the Sunshine State”

January 27, 2012

Chairman Durbin, Ranking Member Graham, and distinguished Members of the Subcommittee, thank you for inviting me to speak here today and for providing me the opportunity to discuss the potential impact of recent changes to voting rights in Florida.

My name is Daniel A. Smith. I am Professor of Political Science at the University of Florida. My collaborator, Professor Michael Herron at Dartmouth College, could not be here today, as he is currently Visiting Professor at the Hertie School of Governance in Berlin, Germany.<sup>1</sup>

Professor Herron and I have published dozens of articles in the discipline's top journals, and we are recognized experts on the effects of election laws on voting behavior in the American states. Professor Herron's co-authored article, "The Butterfly did It: The Aberrant vote for Buchanan in Palm Beach County, Florida," is widely recognized as one of the definitive studies of the 2000 election in Florida. My research on election laws in the American states has been cited in numerous state and federal court cases. Since moving to Florida in 2001, I have been asked to testify on election issues before both the Florida House and the Florida Senate, and I have served as an expert witness for the Florida Secretary of State, defending the state's public campaign finance disclosure laws.

I am not here today, however, to defend the recent changes to Florida's election laws implemented by the Secretary of State in accordance with House Bill 1355.<sup>2</sup> Indeed, in our opinion, several of the recent changes to voting rights and electoral processes in Florida under HB 1355 seem to be specifically targeted to reduce the voting participation of certain demographic groups.

I must emphasize that I am here before you as a scholar, not as a partisan or a citizen activist. Professor Herron and I are currently conducting statistical analyses of the effects of HB 1355 on voter participation in Florida for the State Politics and Policy conference to be held next month in Houston. Our research is empirically-driven and will be subjected to rigorous peer-review.

Specifically, Professor Herron and I are interested in the differential effects of the state legislature's decision in 2011 to truncate early in-person voting in Florida. Our research is motivated by a simple empirical question: based on patterns of early voting observed in the period before the 2008 General Election, what is the likely participatory impact in Florida of reduced early voting opportunities?

In my testimony today, I will discuss some of Professor Herron's and my preliminary findings concerning early voting patterns in the 2008 General Election. If time permits, I will then touch upon two other aspects of HB 1355, specifically the burdens it places on individuals and groups wishing to register new voters and the law's requirement that registered voters must cast provisional ballots if they have moved within the state and not officially changed their addresses with appropriate Supervisors of Election.

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<sup>1</sup> My comments represent my personal views and are not necessarily those of the University of Florida or any other organization with which I am now or have previously been affiliated. The same is true for Professor Herron.

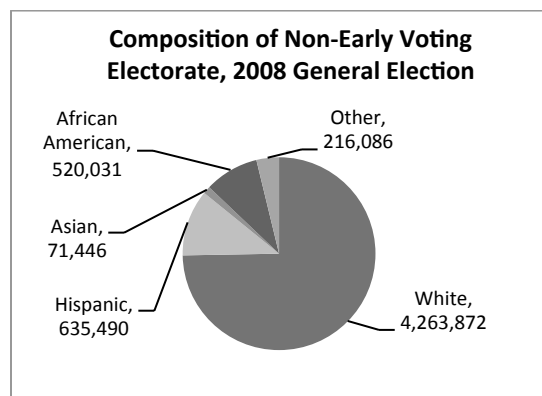
<sup>2</sup> Fla. Laws ch. 2011-40 (HB 1355). Available: <http://www.flsenate.gov/Session/Bill/2011/1355>.

## The Differential Impact of HB 1355 on Early Voting in the 2008 General Election

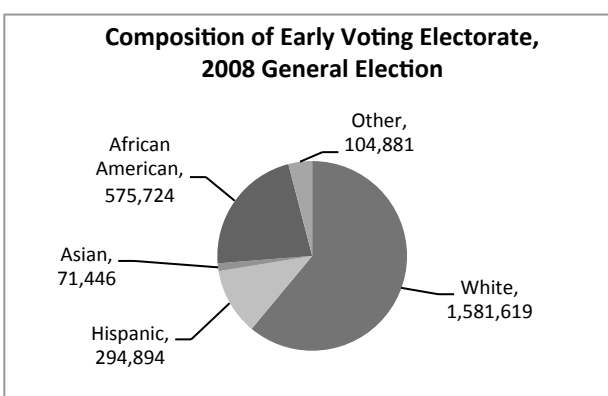
By many accounts, early voting was a tremendous success in the 2008 General Election.<sup>3</sup> Of the roughly 8.3 million Floridians who cast ballots in the election, over half did so prior to Election Day, including some 2.62 million voters who cast early, in-person ballots at hundreds of non-precinct voting sites that dot Florida’s 67 counties.<sup>4</sup> As media reports indicated at the time, African Americans voters seemed more inclined to cast early ballots, as many were driven—sometimes literally—by “get your souls to the polls” mobilization efforts led by advocacy groups.<sup>5</sup> Indeed, blacks cast roughly 22 percent of the total votes in the 2008 General Election even though they comprised just 13 percent of the state electorate. As Graphic 1 reveals, not only did African Americans cast *more* early, in-person ballots than they cast on election day, but African Americans accounted for a much greater proportion of the early voting electorate than they did on Election Day, Tuesday, November 4, 2008. The pie charts in Graphic 1 are based on the county-level early voting files that are discussed later in this testimony.<sup>6</sup>

**Graphic 1. Comparison of Florida Non-Early Voters and Early Voters, 2008 General Election**

### Composition of Non-Early Voters



### Composition of Early Voters



<sup>3</sup> See, for example, “Early voting suggests 2008 may see record turnout, expert says,” *CNN*, October 21, 2008. Available: [http://articles.cnn.com/2008-10-21/politics/early.voting\\_1\\_early-voting-early-ballots-count-ballots?\\_s=PM:POLITICS](http://articles.cnn.com/2008-10-21/politics/early.voting_1_early-voting-early-ballots-count-ballots?_s=PM:POLITICS); Kendric Ward, “Absentee Ballots Front-Load Florida Elections,” *Sunshine State News*, October 6, 2008. Available: <http://www.sunshinestatenews.com/story/absentee-ballots-front-load-florida-elections>; Kate Phillips, “Florida Extends Early Voting Hours,” *New York Times*, October 28, 2008, <http://thecaucus.blogs.nytimes.com/2008/10/28/florida-extends-early-voting-hours/>.

<sup>4</sup> In Florida, absentee ballots may be turned in early (or on Election Day). We use the term “in-person early” (EIP) voting to mean casting a non-absentee ballot in-person, prior to Election Day, at an early voting center.

<sup>5</sup> The NAACP is credited with creating the slogan in 2000, “Get all souls to the polls.” During the final days of the presidential campaign, Democrat Al Gore exhorted to crowds in Florida, “it’s time to take your *souls to the polls*” on Election Day, as early voting had yet to be adopted. See Rupert Cornwell, “With 48 hours to go, the candidates try to close the deal with America,” *The Independent*, November 6, 2000. Available: <http://www.independent.co.uk/news/world/americas/with-48-hours-to-go-the-candidates-try-to-close-the-deal-with-america-623223.html>.

<sup>6</sup> Approximately 98% of all early voters from the 2008 General Election are represented in the right panel of Graphic 1. We do not know the racial and ethnic identities of the remaining approximately 2%, coded “Other.”

This election year, citizens in the Sunshine State have fewer opportunities to cast early ballots. In May, 2011, the legislature passed House Bill 1355, an omnibus elections bill that was the product of an 11<sup>th</sup> hour, strike-all amendment.<sup>7</sup> Governor Rick Scott signed the bill into law.<sup>8</sup>

Among its many provisions that restrict early voting, HB 1355 reduced the total number of days, from 14 to eight, that county Supervisors of Elections may offer early voting. HB 1355 also completely eliminated early voting on the Sunday immediately preceding Election Day—which in 2008 was offered to voters in ten of the state’s 67 most racially and ethnically diverse counties. And, HB 1355 gave county election supervisors the discretion to reduce from 96 to 48 the total required number of hours early voting polling stations are required to be open.<sup>9</sup>

Despite these clear reductions outgoing Secretary of State Browning and his staff appear to have misinformed the public about the number of total hours of early voting hours that are *required* under HB 1355. Last May, Secretary Browning claimed that, although the number of early voting days was shortened under the new law, the total number of early voting hours would remain the same. “The new law makes early voting more accessible now than ever before,” Secretary Browning averred, “by expanding the number of hours that election supervisors can open early voting sites—from just eight hours before, to 12 hours a day.” Without providing evidence, Secretary Browning went on to claim that the reduction in early voting days was designed “[t]o combat voter fraud,”<sup>10</sup> as well as “[to] reduce the

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<sup>7</sup> Florida House of Representatives Staff Analysis, CS/CS/HB 1355, Elections Committee. April 18, 2001.

<sup>8</sup> HB 1355 amended the Florida Election Code (chapters 97-106, Florida Statutes) and became law (Chapter 2011-40, Laws of Florida) on May 19, 2011.

<sup>9</sup> Early voting under HB 1355 is to commence on a Saturday, ten days prior to an Election Day, and it must end on a Saturday, three days prior to Election Day. See Justin Levitt, “New State Voting Laws: Barriers to the Ballot?” Testimony of Professor Justin Levitt, Loyola Law School, Los Angeles, Before the United States Senate Committee on the Judiciary Subcommittee on the Constitution, Civil Rights and Human Rights, United States Senate, September 8, 2011. Available: <http://www.judiciary.senate.gov/pdf/11-9-8LevittTestimony.pdf>.

<sup>10</sup> If preventing voter fraud were the true intent of HB 1355, then in this new law there likely would have been attention placed on cracking down on what appears to be the not-so-uncommon practice of fraudulent absentee ballots in Florida. Absentee ballot fraud is not limited to mayoral races in Florida’s metropolitan areas, which are well documented. See, for example, Dahleen Glanton, “Differences Cited in ‘98 Miami Vote Case,” *Chicago Tribune*, November 13, 2000. Available: [http://articles.chicagotribune.com/2000-11-13/news/0011130119\\_1\\_absentee-ballots-miami-mayoral-election-new-election](http://articles.chicagotribune.com/2000-11-13/news/0011130119_1_absentee-ballots-miami-mayoral-election-new-election). In November, 2011, for example, several people in rural Madison County, including a candidate on the local ballot for school board, were arrested by the Florida Department of Law Enforcement and charged with obtaining absentee ballots for other people without the voters’ knowledge or consent. The school board candidate and her accomplices then provided an alternate address for the ballots to be mailed to the registered voters by the county Supervisor of Elections and allegedly then retrieved the ballots from the fraudulent locations, brought the ballots to the voters—sometimes with the ballots already filled out—and had the voters sign the absentee ballot signature envelopes. “Madison County officials arrested for voter fraud,” *WTXL*, November 1, 2011. Available: [http://www.wtxl.com/content/localnews/story/Madison-County-officials-arrested-for-voter-fraud/-Nq7HTFCCU-kRpw39U\\_2tA.csp](http://www.wtxl.com/content/localnews/story/Madison-County-officials-arrested-for-voter-fraud/-Nq7HTFCCU-kRpw39U_2tA.csp). Rather than addressing absentee ballot fraud, HB 1355 actually eliminated the provision that existed in 2010 when the above fraud occurred, making future absentee ballot fraud more difficult to prosecute. In particular, prior to the passage of HB 1355 Supervisors of Elections were required to send absentee ballots to voters’ registered addresses unless said voters were absent from the county, hospitalized, or temporarily unable to occupy residences. Now, under HB 1355, instead of being required with the forgoing exceptions to send an absentee ballot “[b]y nonforwardable, return-if-undeliverable mail to the elector’s current mailing address on file with the supervisor,” Supervisors of Elections may mail an absentee ballot “to any other address the elector specifies in the request.” Chapter 101.62 “Request for absentee ballots.” Available: [http://statutes.laws.com/florida/TitleIX/chapter101/101\\_62](http://statutes.laws.com/florida/TitleIX/chapter101/101_62). One possible explanation for the reason that Florida state lawmakers appear to have turned a blind eye to absentee ballot fraud in the state is the partisan divide on absentee voting. Registered Republicans in Florida are likely to use this form of convenience voting much more than their Democratic counterparts, and in the 2008 General Election Republicans had a 10.8% lead over Democrats

burden on poll workers and provide needed flexibility to local election supervisors.” Summarizing the legislation in an op-ed in a *St. Petersburg Times* op-ed, he reiterated, “Early voting remains at 96 hours, with greater flexibility for counties.”<sup>11</sup>

The watchdog Politifact took issue with Secretary Browning’s claim regarding the total number of early voting hours required under HB 1355, rating his statement as “*Mostly False*.”<sup>12</sup> In fact, the aggregate number of early voting hours that county Supervisors of Elections *must* remain open under HB 1355 has been cut in half, from 96 hours, which was required in 2008, to 48 hours.

HB 1355’s reduced number of early voting hours in advance of Florida’s Presidential Preference Primary on January 31, 2012, will lead to diminished opportunities for citizens of the state to cast early ballots. When compared to the total number of early voting hours offered during the January, 2008, Presidential Preference Primary, voters in the Sunshine State have 1,888 and  $\frac{1}{2}$  fewer hours in the aggregate to cast early, in-person votes across the state’s 67 counties. On average, counties have cut the number of early voting hours they offer—compared to the 2008 Presidential Primary—by more than 28 hours.<sup>13</sup> The decrease will be even greater when the five counties, Collier, Hardee, Hendry, Hillsborough, and Monroe, which are awaiting United States Department of Justice preclearance under Section 5 of the Voting Rights Act, are removed from the equation, as at present these counties still must offer a total of 96 hours of early voting beginning 15 days before Election Day.<sup>14</sup>

In addition to the reduced number of early voting hours under HB 1355, as a consequence of this new law there will almost certainly be in 2012 considerable inequality in opportunity for Floridians to vote early. In part such inequality looks to be a function of county. Under HB 1355, Supervisors of Elections have the discretion to offer between six and 12 hours of early voting for each of the eight days polls are open—this amounts to a minimum of 48 hours and a maximum of 96 hours. Some counties offer as few as 48 hours of early voting, the minimum allowed under HB 1355. For example, the number of early voting hours for the presidential primary is only 48 hours in Citrus, Okeechobee, and Putnam counties, which is *half* the number of hours they had in 2008. Citizens in Alachua, Okaloosa, and DeSoto counties have only 55 hours to vote early this year, a 43 percent drop compared to the total number of early voting hours available to vote in the 2008 primary. Contrary to the assertions of Secretary Browning, only two of the 62 counties not falling under the jurisdiction of Section 5 of the VRA—Lake County and Miami-Dade County—are offering the full 96 hours of early voting permitted under HB 1355.<sup>15</sup>

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voting absentee ballots through Election Day. 47 percent of those who voted absentee were Republicans and 36 percent were Democrats. See, The Florida Senate, Committee on Ethics and Elections, “The Effect of Early Voting on Voter Turnout in Florida Elections; 2010 Update,” October 2010. Available:

<http://www.flsenate.gov/Committees/InterimReports/2011/2011-118ee.pdf>.

<sup>11</sup> Kurt Browning, “Florida’s early voting remains at 96 hours,” *St. Pete Times*, May 23, 2011. Available:

<http://www.tampabay.com/opinion/columns/floridas-early-voting-remains-at-96-hours/1170931>.

<sup>12</sup> Politifact, “Flexibility in early voting means possibly less hours to vote,” *St. Pete Times/Miami Herald*, July 27, 2011. Available: <http://www.politifact.com/florida/statements/2011/may/23/kurt-browning/flexibility-early-voting-means-possibly-less-hours/>.

<sup>13</sup> In the 2008 presidential preference primary, early voting stations across the state’s 67 counties were open a total of 6,432 hours; in the 2012 presidential preference primary, they are open a total of 4,542 and  $\frac{1}{2}$  hours.

<sup>14</sup> Further analysis of the decline in early voting hours under HB 1355 can be found here: Daniel A. Smith, “Reduced and Uneven Hours for Early Voting in Florida’s Presidential Preference Primary,” January 12, 2012. Available: <http://electionsmith.wordpress.com/2012/01/12/reduced-uneven-hours-for-early-voting-in-floridas-presidential-preference-primary/>.

<sup>15</sup> The raw number of early voting hours being offered by each of the 67 counties in the 2012 Presidential Preference Primary can be accessed here: Florida Secretary of State, Division of Elections, “Early Voting Sites by County,” January 2012. Available: [http://election.dos.state.fl.us/pdf/Early\\_Voting\\_Sites\\_PPP\\_2012.pdf](http://election.dos.state.fl.us/pdf/Early_Voting_Sites_PPP_2012.pdf).

Professor Herron and I believe that the truncating of early voting under HB 1355 will likely have in the 2012 General Election differential impacts on turnout across various demographic groups. This conclusion is based on our analysis of early voting patterns from 2008 General Election. In order to study patterns of early voting across Florida from 2008—and to answer the question, which types of voters in 2008 voted early and on what particular days—my co-author and I followed a two-step procedure.

First, we assembled from public sources the complete set of 2008 General Election early voting files, one file from each of Florida's 67 counties. Each such early voting file contains a list of voters who voted early, and to the best of our knowledge these lists are comprehensive. Each early voting file consists of records, one record per early voter, and across the combined 67 early voting files there are 2,642,724 records of individuals who voted early in the 2008 General Election.

Each record among the approximately 2.6 million early voting records specifies the date on which a particular early voter voted, for example, October 23, 2008 (a Thursday) or perhaps November 2, 2008, a Sunday. These dates are key to the analysis that follows.

Besides dates of early voting, each record among the 67 early voting files, as before one record per early voter, is associated with a voter identification number. The records in the 67 early voting files do not specify voter demographics, e.g., voter race, voter date of registration, voter gender, and so forth. They also do not specify voter histories, e.g., whether a voter cast a vote in the 2004 General Election.

Second, we took a Florida voter file, created in March, 2010, and merged this file with the aforementioned 67 early voting files. The reason we took this step is because the Florida voter file contains demographic data on voters as well as voter histories. In our Florida voter file there are a total of 12,387,165 records. Each record is associated with one registered voter, and each record has a voter identification number. This number allows us to associate records in the Florida voter file with records in early voting files.

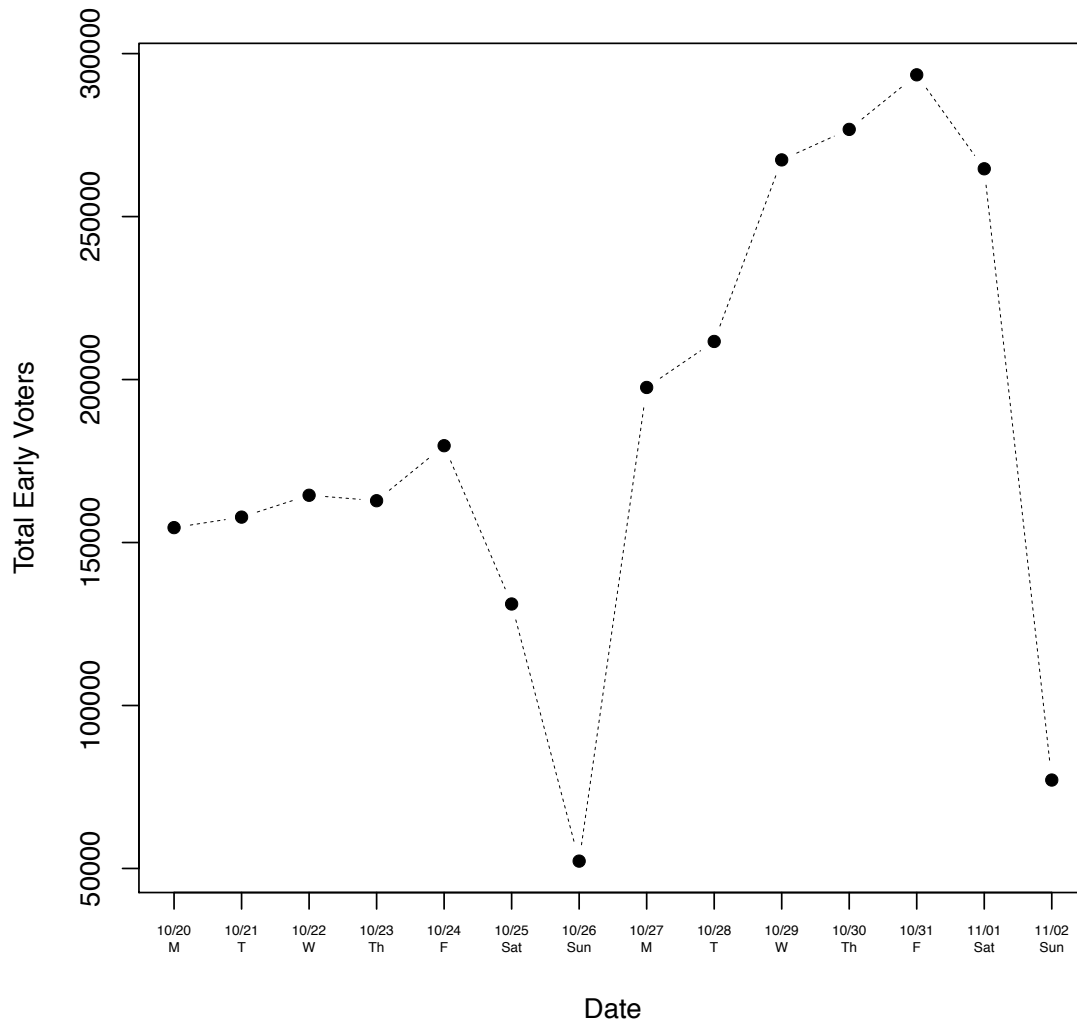
Given the presence of voter identification numbers in the 67 early voting files and in our overall Florida voter file, we successfully merged 2,592,061 early voting records from the 67 early voting files into the main Florida voting file. This means that approximately 98% of voters whose identification numbers appear in the early voting files were successfully merged. We suspect that the 2% of early voters who were not so merged reflect people who moved out of Florida between the date of the 2008 General Election and the date that our voter file was created.<sup>16</sup>

We also discovered a number of voters whose counties of residence in the overall Florida voting file did not match counties of residence based on the 67 early voting files. For these voters we assumed that the county of residence in the early files is correct. When our calculations require us to know the county in which a voter lives, we therefore use the latter. We suspect that differences in counties of residence between early voting files and the overall voting file reflects moving within Florida.

So, when precisely did early voters vote in the 2008 General Election? The answer to this question is shown in Figure 1.

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<sup>16</sup> This small unmatched population is excluded from the analysis that follows. In the process of working with the combined Florida voter file and the 67 early voting files, we discovered a small number of data errors. Among the 67 early voting files, for example, there are four records from Palm Beach County with dates of early voting from 2005. Obviously such dates are wrong, and we ignored early voting records with clearly erroneous early voting dates. We also discovered records of individuals who according to early voting files voted early in the 2008 General Election but, according to the Florida voter file, did not vote early. For these records we assume that the early voting files are correct.

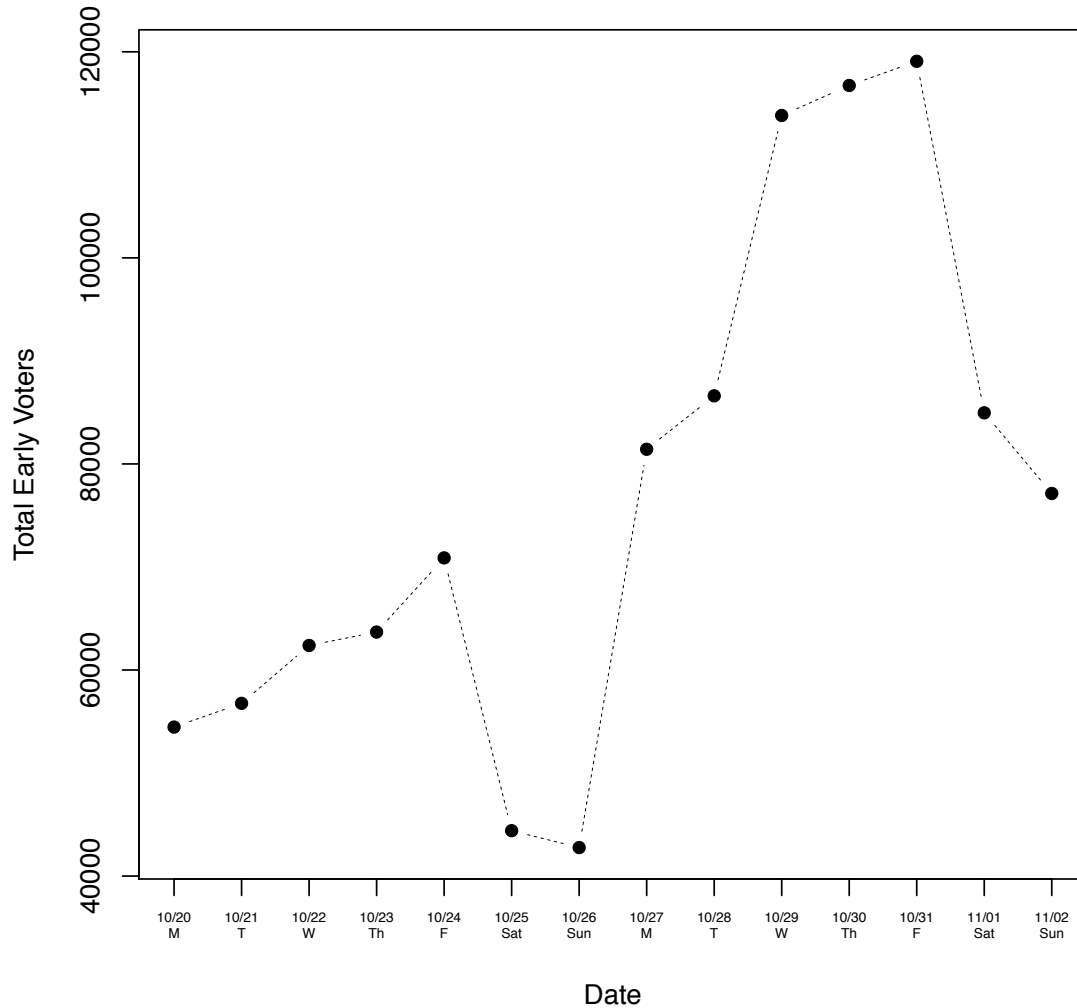


**Figure 1. Patterns in Early Voting across Florida**

Several patterns in this figure are notable. As is evident by solid dots in the figure, there were more early voters in the second week of early voting than in the first. In addition, in the early voting period there were weekend effects. Namely, in both the first and second weeks of early voting, the number of early voters was smaller on Saturday and Sunday than on the preceding weekdays. The Friday-Saturday dropoff was larger in the first week than in the second, relatively speaking. However, the Saturday-Sunday dropoff was greater in the second week of early voting.

The drop in the number of early voters on the two Sundays of early voting is a bit deceptive because only ten counties in Florida offered early voting on Sunday during the run-up to the 2008 General Elections. These counties were Bradford, Broward, Dixie, Duval, Jackson, Miami-Dade, Palm Beach, Pinellas,

Sarasota, and Seminole.<sup>17</sup> To this end Figure 2 is analogous to that seen previously, but the new figure is based only on the counties that had early voting on Sundays.



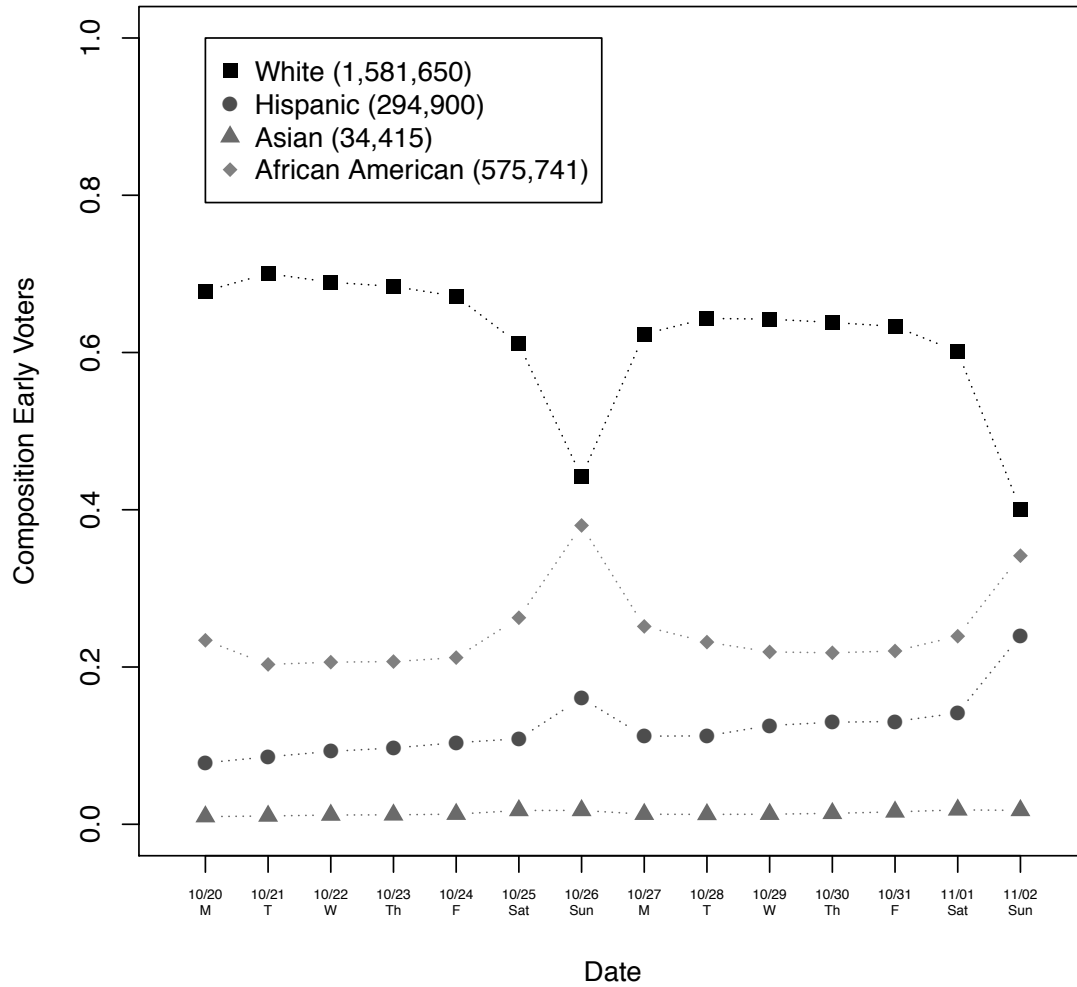
**Figure 2. Overall Patterns in Early Votes across Counties that Offered Sunday Early Voting**

The patterns in this figure (based on ten counties) are similar to those seen for all 67 Florida counties except for the fact that, among the counties that offered early voting on Sunday, early voting counts on Saturday are not as different from Sunday counts as they are across all of Florida.

<sup>17</sup> We determined the counties offering Sunday voting according to their official filings to the Secretary of State. See: Florida Secretary of State, Division of Elections, “Early Voting Sites by County: General Election – November 4, 2008.” Available: <http://election.dos.state.fl.us/pdf/CountyEarlyVotSitesGen08.pdf>.



Insofar as my co-author and I are interested in whether there is variation across groups of early voters in when they voted early, we need to disaggregate the above figures by group, for example, by racial and ethnic groups. We consider here four groups, White, Hispanic, Asian, and African-American.<sup>18</sup>



**Figure 3. Racial/Ethnic Composition of Early Voters**

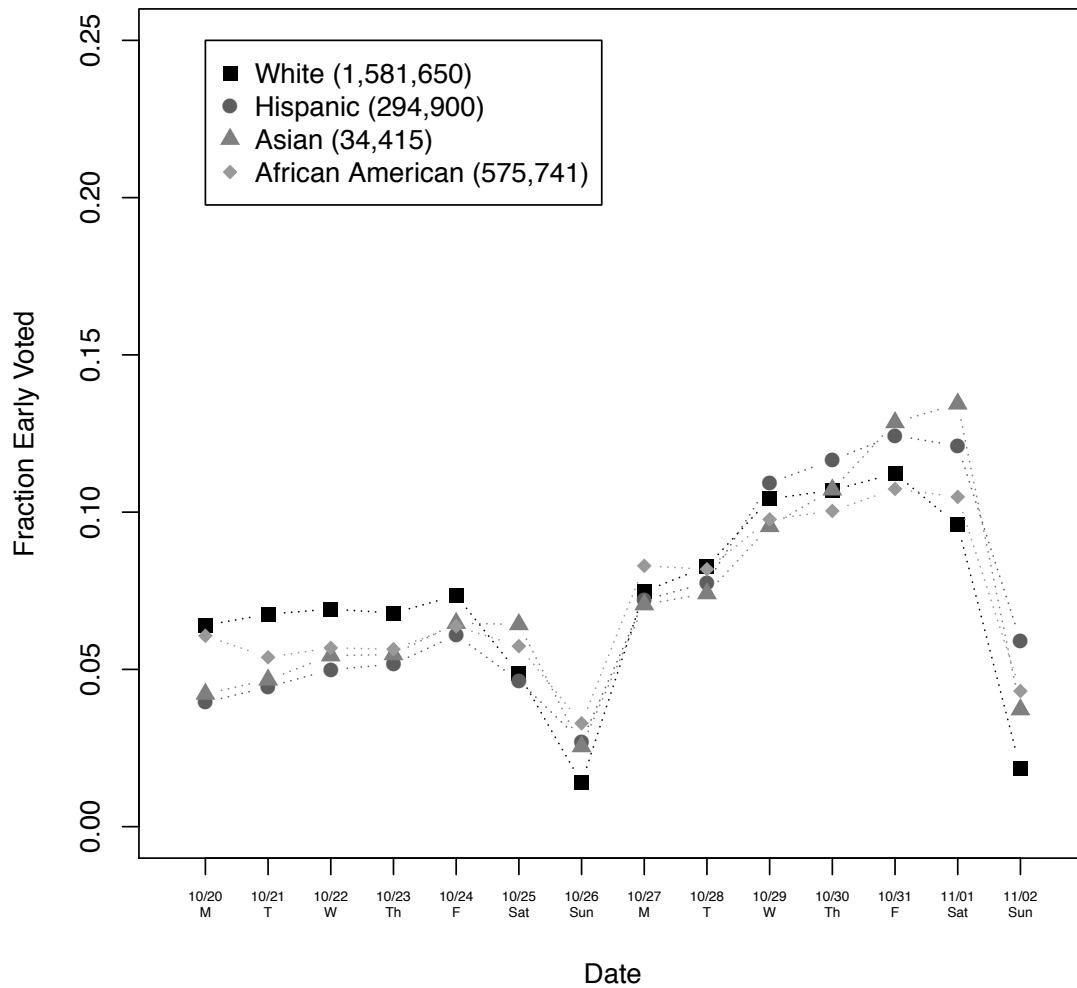
Figure 3 describes the composition of the early voting electorate by race and ethnicity as it varied from October 20, 2008, through November 2, 2008. “Composition” here means the fraction of early voters on a day that is of a particular racial/ethnic group. By construction the four fractions on a given day sum to one (or 100%), and recall that these numbers are based on 98% of all voters who voted early in the 2008 General Election.

One can see from the black squares in Figure 3 that, on all early voting days, whites made up the largest racial/ethnic group of voters. African Americans were the second largest group, again on all early voting

<sup>18</sup> In the race/ethnicity-based figures that follow, we ignore voters who listed neither White, Hispanic, Asian, nor African American as their racial or ethnic categories.

days, followed by Hispanics and then Asians. Nonetheless, the extent to which whites comprised the largest racial or ethnic group varied by day, mostly obviously on Sundays. In particular, the greatest dropoffs in white early voting rates occur on Sundays, and on these days the fraction of African American early voters jumps. There is a slight decline in the composition of white early voters on Saturdays, but the Saturday effect is not nearly as pronounced as the Sunday effect.

Another perspective on racial/ethnic differences can be seen in Figure 4. This figure describes, for each of the four groups race/ethnic mentioned, the fraction of each group that votes on a given day. For each group, the sum of the early voting fractions across the 14 days of early voting is one (or 100%).

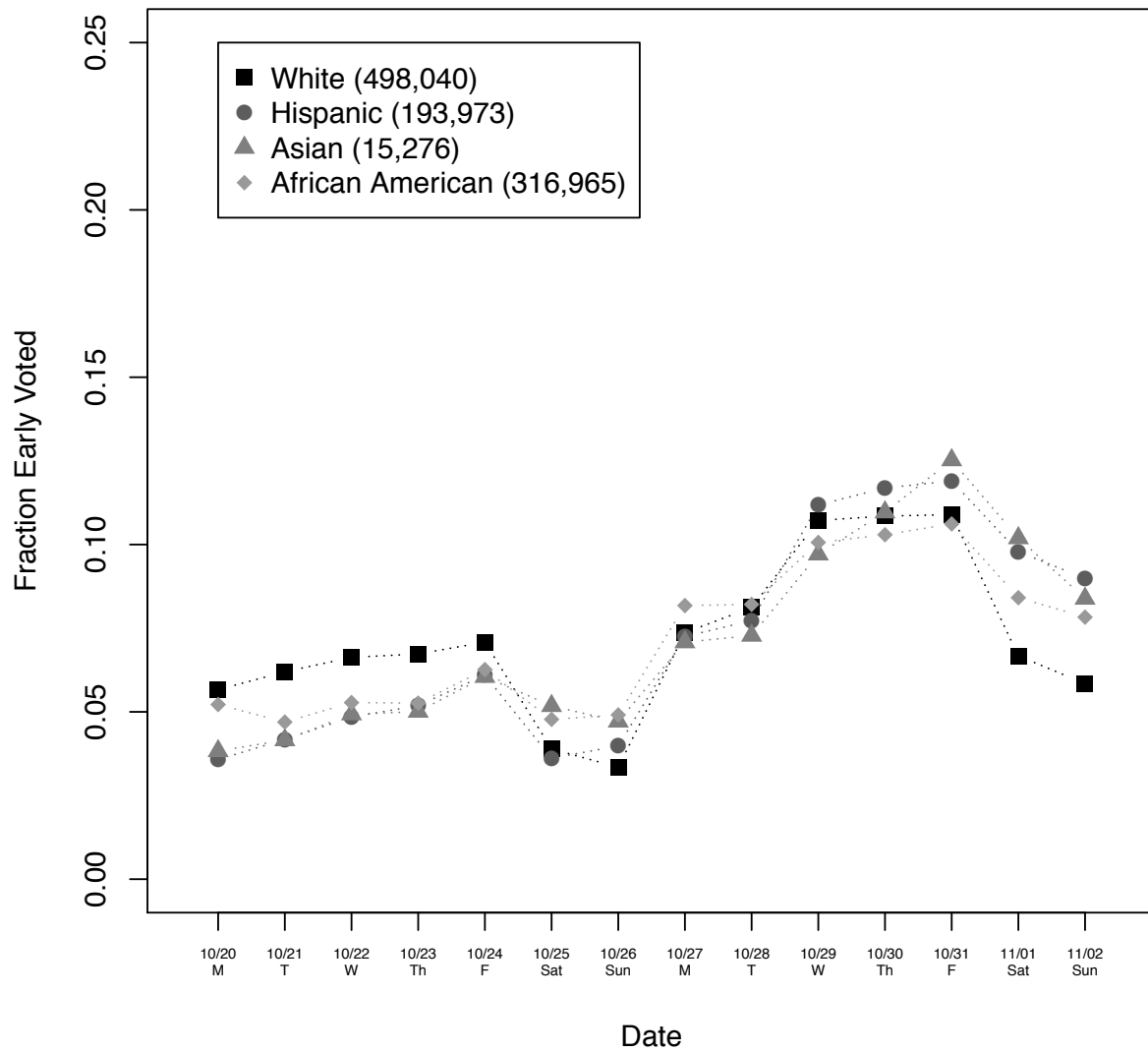


**Figure 4. Racial/Ethnic Trends in Early Voting**

Here we see a different view of racial/ethnic early voting trends. As is evident in Figure 4, white early voters tend relatively speaking to vote in the first half of the early voting period and not on Sundays. This is evident in the fact that, on both Sundays of early voting, the solid black squares in Figure 4 are the lowest of the four symbols.

In contrast, on the first Sunday of early voting, the racial/ethnic group with the highest participation rate was African American voters. And on the last Sunday, the group with the highest participate rate was Hispanic voters, followed by African American voters.

We already noted that not all Florida counties allowed for voting on Sundays in the period surrounding the 2008 General Election. With this in mind Figure 5 is constructed similarly to the above figure but it includes only early voters from the ten so-called Sunday counties.

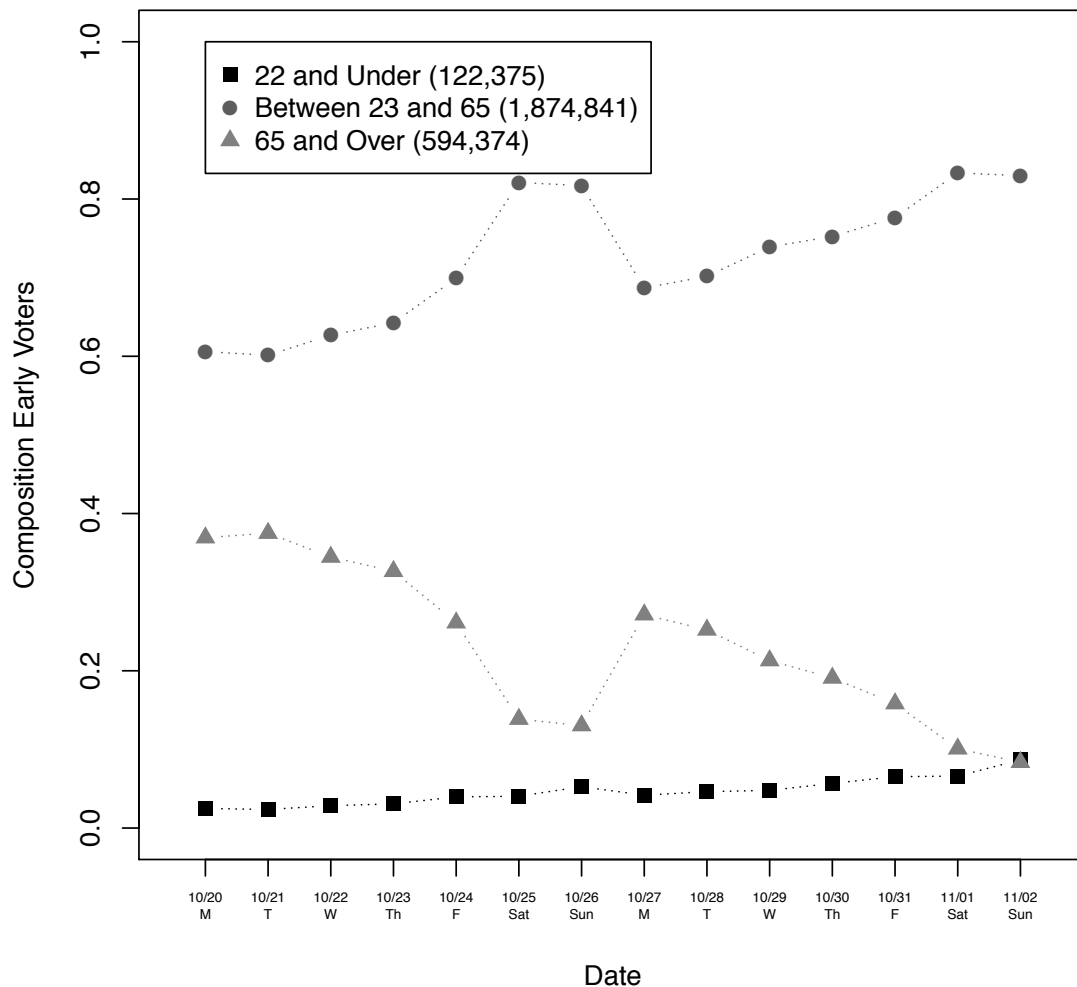


**Figure 5. Racial/Ethnic Trends in Early Voting among Ten Sunday Counties**

The implication of Figure 5 is clear: looking only at the ten Sunday counties in Florida, one sees that white early voters voted disproportionately less often on Sundays compared to Hispanic and African American early voters. This trend holds on the Saturday before the 2008 General Election and was true for African American, albeit not Hispanic, voters who cast ballots on the previous Saturday.

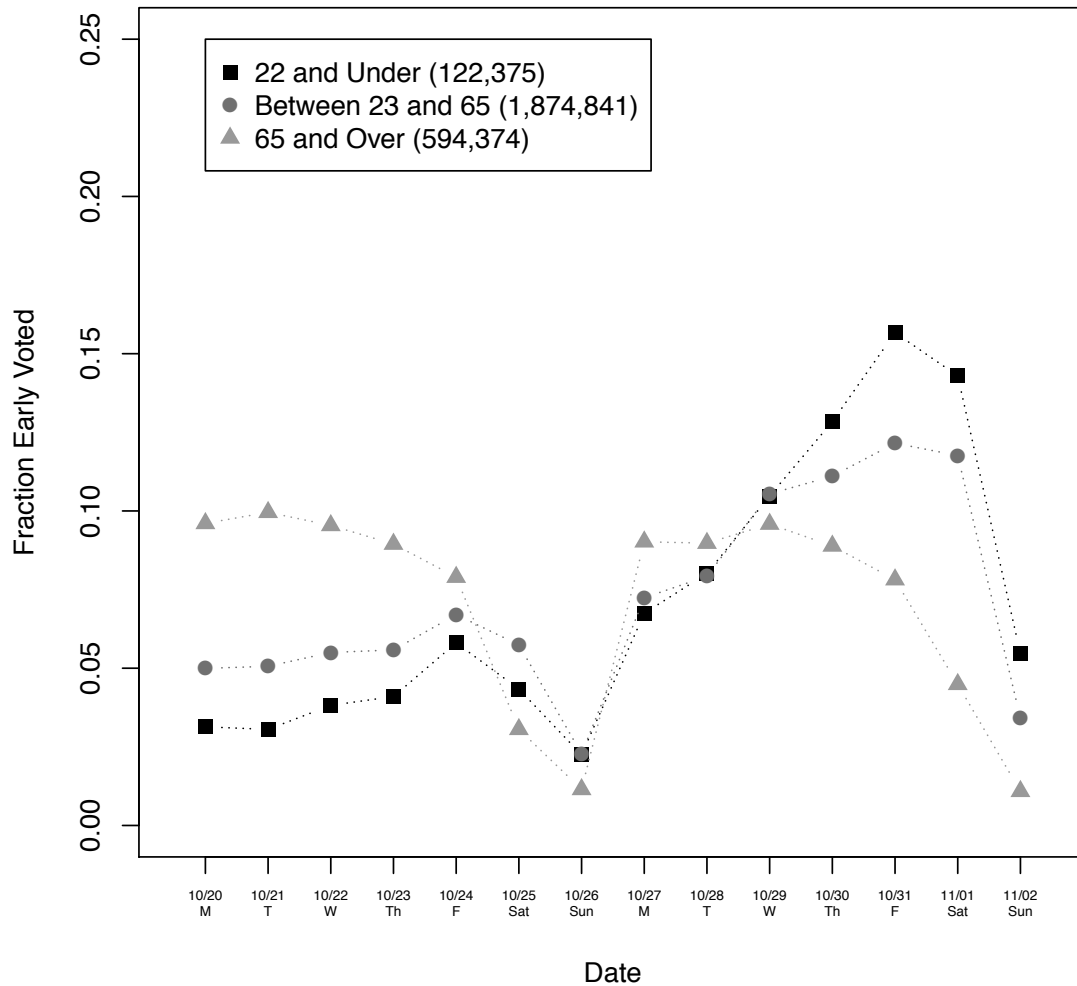
My co-author and I cannot explain definitely why the members of a particular racial or ethnic group might have a preference for early voting on a given day of the week. However, we can say that, relatively speaking, whites choosing the convenience of voting early in person do so less frequently on Sundays compared to African American and Hispanic voters. With respect to early voting on Saturdays, whites vote less often than do African Americans. Asian early voters appear disproportionately to prefer Saturdays.

We now turn to the issue of age. To consider whether there is a relationship between age and date of early voting, we partition all early voters into three classes: those 22 years old and younger as of November 4, 2008, those 65 years and older, and those in between.



**Figure 6. Age-based Composition of Early Voters**

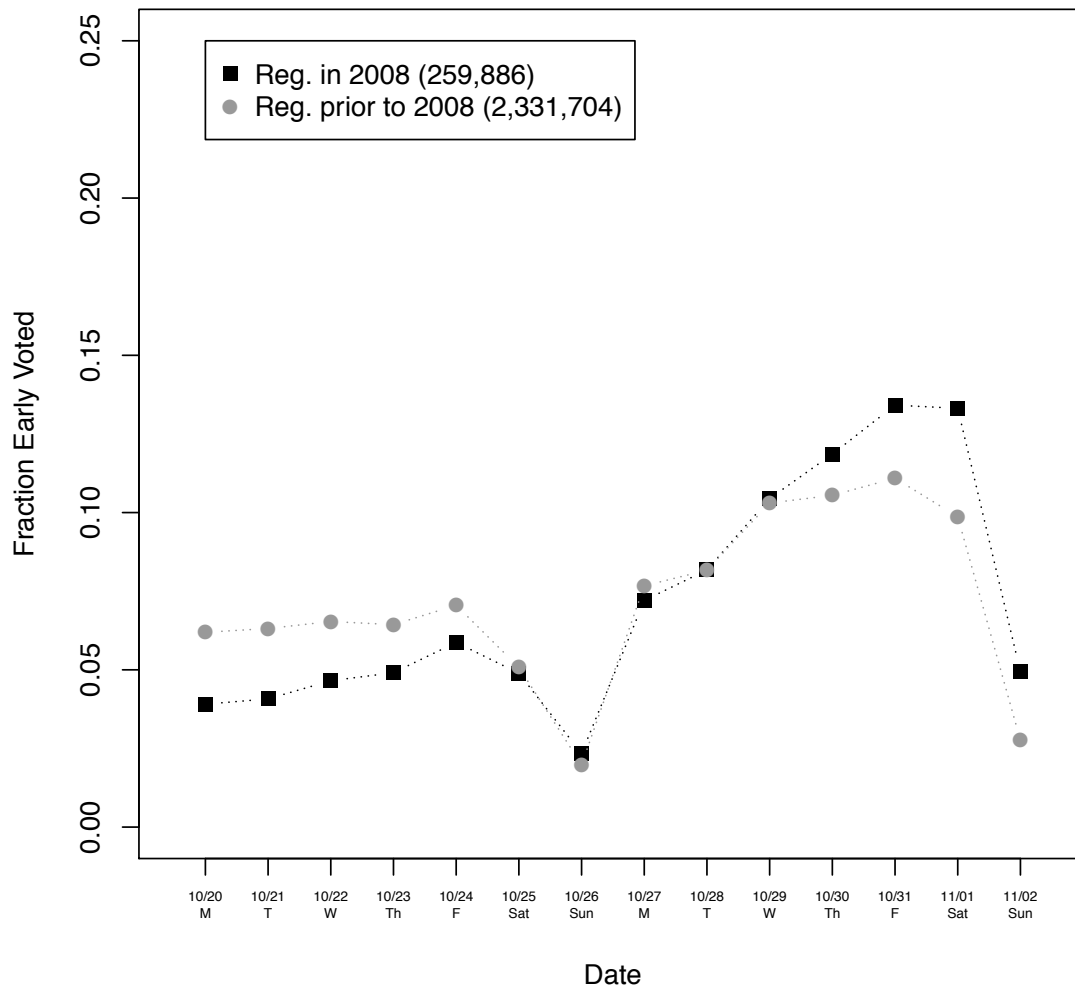
Figure 6 shows that the age-based composition of the early voting electorate varies dramatically across days. It is always true that the largest group of voters is the middle group. This is hardly surprising given the age ranges considered here; the middle age group spans over forty years in contrast to the young group, which spans only five. Even so, Figure 6 has one clear implication: compared to mid-week voting patterns, older early voters vote relatively infrequently on weekends.



**Figure 7 Age-Based Trends in Early Voting**

If we look at the fraction of each age group as it varies across the 14 days of early voting—see Figure 7—we see that older voters tend to vote in the early part of the early voting period and very infrequently on Sundays and to some extent Saturdays. Young voters, in contrast, tend to vote toward the end of the early voting period and disproportionately often on weekends.

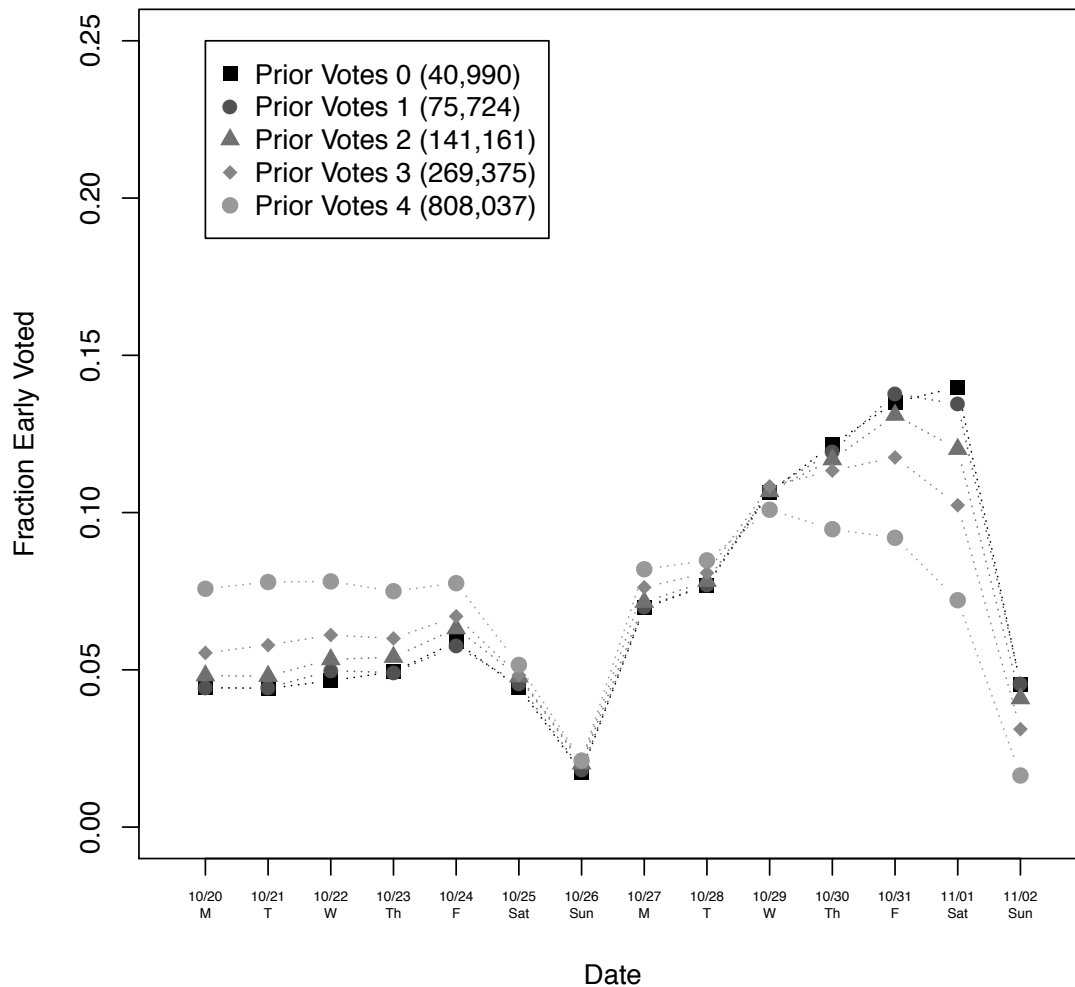
Related to age is date of registration, and we divide our early voters into two groups, those whose year of registration was prior to 2008 and those who registered in 2008.



**Figure 8. Registration-Based Trends in Early Voting**

It is apparent from Figure 8 that early voters registered prior to 2008 were relatively more likely to cast a ballot during the first week of early voting. And, we see as well that early voters who registered in 2008 were relatively more likely to vote in the final week of early voting, especially on the final four days, including the final Sunday before Election Day.

Finally, with respect to General Election vote histories of voters who voted early in the 2008 General Election, it is clear from Figure 9 that first-time, early voters tended to wait until the end of the early voting period to cast their votes, compared to non-first-time, early voters. Note that Figure 9 includes only those early voters who were registered as of October 6, 2000. The number of “Prior Votes” (see the legend for Figure 9) is the number of General Elections in which a voter voted, starting with 2000 and ending with 2006.



**Figure 9. Voter History-Based Trends in Early Voting**

HB 1355 has reduced the number of early voting days, has cut in half the required number of early voting hours, and has altogether eliminated early voting on the final Sunday before Election Day. The effects of these changes will likely have differential effects on Florida's electorate. For instance, even though African Americans comprised only 13 percent of total voters and 22 percent of early voters in Florida in the 2008 General Election, they accounted for 31 percent of early voters on the final Sunday of early voting. Hispanic voters, who comprised 11 percent of total voters and 11 percent of early voters in the 2008 general election, accounted for 22 percent of the early voters on the final Sunday of early voting. While older and more regular voters enjoyed the convenience of voting early in the first week of early voting, younger, first-time, and newly registered voters disproportionately chose to vote toward the latter half of the early voting period and often on the final Sunday of early voting.

## The Differential Impact of HB 1355 on Voter Registration

As has been well publicized, there is evidence that HB 1355 has dampened the ability of citizens in Florida to become registered to vote. HB 1355 has placed severe burdens on “third-party” individuals and organizations interested in promoting civic participation by assisting citizens to register to vote. The implementation of the law has led both the Florida League of Women Voters and Democracia USA, a nonprofit civic organization geared towards empowering Latinos, and other organizations to suspend their voter registration activities.<sup>19</sup> In addition, the Florida Department of State last fall investigated at least six separate cases in which individuals were suspected of violating new voter registration restrictions put in place by HB 1355, including at least two public school teachers who collected voter registration forms from their students.<sup>20</sup>

Prior to the passage of HB 1355, organizations as well as individuals—including me—engaged in voter registration outreach. Over the years, I have allowed nonpartisan student groups to hand out and collect voter registration forms in my classes. I no longer do so, not because I have become anti-democratic, but because I am no longer asked. Voter registration drives on the University of Florida campus—once a perennial sight—have all but dried up.

To be sure, HB 1355 is not the first time the Florida legislature has tried to crack down on voter registration drives. In 2005, the legislature passed an elections reform bill that levied substantial fines for individuals and organizations that delivered completed voter registration forms to elections officials more than ten days after the form was completed.<sup>21</sup> Several groups, including the League of Women Voters, suspended their voter registration activities because of the legislation. A federal court struck down the fine structure, ruling that voter registration drives entail core political speech which is protected under the First Amendment.<sup>22</sup>

HB 1355, however, goes further in making it difficult for individuals and groups to register new voters by erecting considerable barriers to their civic efforts. Individuals and groups must first fill out an official form from the Secretary of State if they intend to help distribute, collect, and submit registration forms to people other than their immediate family, and they have 48 hours to deliver a completed form to the appropriate county Supervisor of Elections.<sup>23</sup>

The Florida legislature’s apparent rationale for the new governmental regulation was steeped in the anti-democratic rhetoric of making voting a privilege, not a right. “We’re going to have a very tight election here next year,” commented the bill’s sponsor, Rep. Dennis Baxley, a Republican from Ocala, “and we

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<sup>19</sup> Mary Ellen Klas, “Groups urge feds to block voter registration and early voting changes,” *St. Pete Times*, July 15, 2011. Available: <http://www.tampabay.com/blogs/the-buzz-florida-politics/content/groups-urge-feds-block-voter-registration-and-early-voting-changes>.

<sup>20</sup> Mark Matthews, “State investigating four more election violations,” *Orlando Sentinel*, November 9, 2011. Available: [http://blogs.orlandosentinel.com/news\\_politics/2011/11/state-investigating-four-more-election-violations.html](http://blogs.orlandosentinel.com/news_politics/2011/11/state-investigating-four-more-election-violations.html).

<sup>21</sup> Florida Election Code (chapter 2005-277), House Bill 1567. Available: [http://laws.flrules.org/files/Ch\\_2005-277.pdf](http://laws.flrules.org/files/Ch_2005-277.pdf).

<sup>22</sup> *League of Women Voters of Florida v. Cobb*, 447 F.Supp.2d 1314, 1322 (S.D. Fla. 2006).

<sup>23</sup> A Third-Party Voter Registration Organization (3PVRO) is “Any person, entity, or organization that solicits or collects any voter registration application,” with few exceptions. Any person wishing to solicit or circulate voter registration forms must provide the Secretary of State with their name, address, and sworn declaration. The 3PVRO must file monthly reports to the Secretary of State accounting for all the “registration forms provided to and received from its registration agents during the preceding month.” See Florida Secretary of State, Division of Elections, “Third-Party Voter Registration Organizations,” 2011. Available: <http://election.dos.state.fl.us/pdf/TPVRFinalFactSheet.pdf>.



need to protect the integrity of the election.” “When we looked around,” Baxley continued, “we saw a need for some tightening.”<sup>24</sup> In May, 2011, on the floor of the State Senate, Republican Mike Bennett of Bradenton spoke passionately in support of HB 1355:

Do you read the stories about the people in Africa? The people in the desert, who literally walk two and three hundred miles so they can have the opportunity to do what we do, and we want to make it more convenient? How much more convenient do you want to make it? Do we want to go to their house? Take the polling booth with us?

This is a hard-fought privilege. This is something people die for. You want to make it convenient? The guy who died to give you that right, it was not convenient. Why would we make it any easier? I want ‘em to fight for it. I want ‘em to know what it’s like. I want them to go down there, and have to walk across town to go over and vote.”

Politifact’s Truth-O-Meter rated these statements, “Pants on Fire.”<sup>25</sup>

With respect to the restrictions placed on “third-party” individuals and groups interested in helping fellow citizens to register to vote, state lawmakers in Florida were presumably cognizant of the surge of African Americans who registered to vote in Florida prior to the 2008 General Election. Between December, 2007, and October, 2008, an additional 233,130 black Floridians registered to vote, individuals referred to “Obama-inspired surge” voters.<sup>26</sup> Citing Current Population Survey data from Florida, Justin Levitt at the Loyola Law School in California reported in his Senate Testimony to your Subcommittee last fall, that “while 6% of non-Hispanic white voters reported registering through a voter registration drive in 2008, twice as many—12% of Hispanic voters and 13% of non-Hispanic African-American voters—reported registering through a drive.”<sup>27</sup> One interpretation of HB 1355 is that this bill was intended to stifle “third-party” voter registration drives in Florida to ensure there will be fewer African American surge voters in 2012.

An examination of monthly records prepared by the Florida Department of State, Division of Elections, records that are required by the 1993 National Voter Registration Act, reveals that HB 1355 likely has had a dampening effect on the registration of new voters in Florida. In addition, there is no evidence that HB

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<sup>24</sup> David G. Savage, “Election laws tightening in GOP-run states,” *Los Angeles Times*, October 30, 2011. Available: <http://www.latimes.com/news/nationworld/nation/la-na-vote-florida-20111031,0,1962738.story>.

<sup>25</sup> Politifact interviewed several African voting rights and elections experts from six Francophone Sahelian countries who happened to be in Gainesville, Florida, in May, 2011, learning about elections in the United States as part of a State Department educational grant of which Dr. Smith was co-Principal Investigator. After their laughter subsided, the African participants whom Politifact interviewed made it clear that Africans did not have to trek hundreds of miles through the sand to cast their ballots. Alpha Faye of Senegal noted that most voters could access their polling stations only a few kilometers from where they lived. Abdoulaye Issoufou, a member of Niger’s Independent National Electoral Commission, stated, “It is more difficult to vote here than in Niger.” Mehla Ahmed Talebna, a former government Minister in Mauritania, affirmed, “No question, no one walks through the desert to vote.” See: Politifact Florida, “Says people in Africa ‘literally walk two and three hundred miles’ in order to vote,” *St. Petersburg Times/Miami Herald*, May 6, 2011. Available: <http://www.politifact.com/florida/statements/2011/may/06/mike-bennett/think-we-have-it-tough-africa-people-walk-300-mile/>.

<sup>26</sup> Stephanie Slade and Daniel A. Smith. 2011. “Obama to Blame? African American Surge Voters and the Ban on Same-Sex Marriage in Florida,” *The Forum* 9(2), Article 6. Available: <http://www.bepress.com/forum/vol9/iss2/art6>

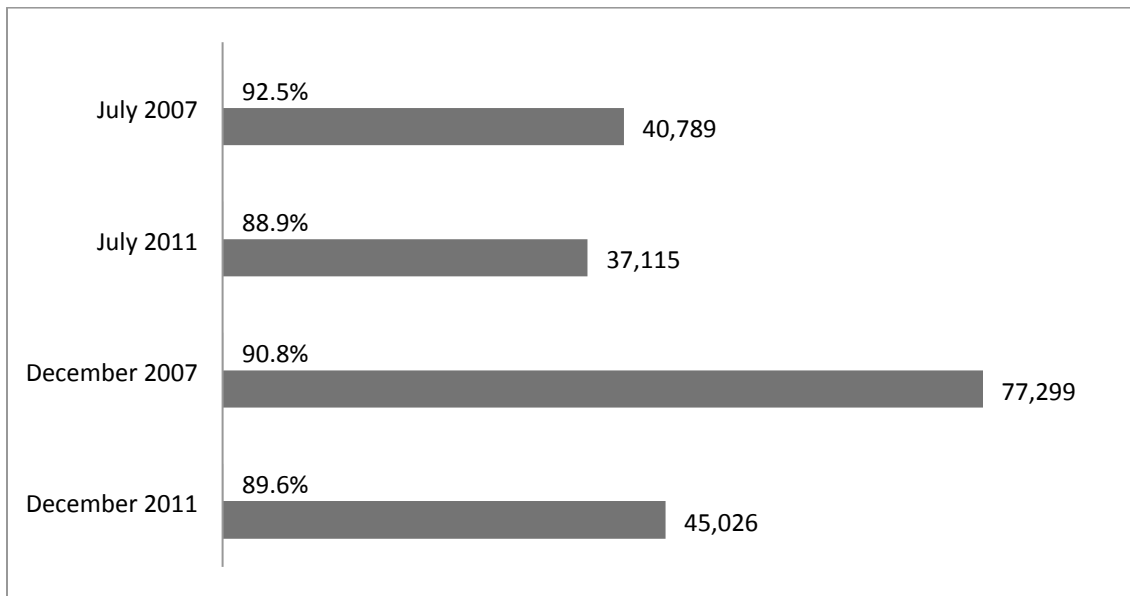
<sup>27</sup> Justin Levitt, “New State Voting Laws: Barriers to the Ballot?” Testimony of Professor Justin Levitt, Loyola Law School, Los Angeles, Before the United States Senate Committee on the Judiciary Subcommittee on the Constitution, Civil Rights and Human Rights, United States Senate, September 8, 2011, p. 5. Available: <http://www.judiciary.senate.gov/pdf/11-9-8LevittTestimony.pdf>.

1355 has reduced the number of invalid voter registration forms that are submitted to the 67 county Supervisors of Elections, various authorized state agencies (e.g., any Florida driver’s license or tax collector’s office), and “third-party” individuals and organizations who have registered under the law.

For example, as Graph 2 displays, in July, 2007, the Division of Elections received a total of 40,789 voter registration applications and determined that 92.5 percent were valid. Four years later, in July 2011, the first month HB 1355 was in effect, the Division of Elections processed a total of 37,115 voter registration applications. Of those, 88.9 percent were deemed to be valid.

Even more dramatically, in December 2007, the Division of Elections processed 77,299 voter registration applications, with a 90.8 percent validity rate. Four years later, in December, 2011, it processed 45,026 voter registration applications, but determined that only 89.6 percent were valid.

**Graph 2. Total Number of Voter Registration Applications Received and Percent Valid, Florida Division of Elections, 2007 and 2011**



Not only is the number of new voter registrations down appreciably from comparable months four years ago, but the percentage of valid new registrations under HB 1355 is also lower, indicating that third-party groups such as the League of Women Voters and other groups who collected and submitted voter registration forms in 2007, but were not so involved in 2011, are not the cause of invalid voter registration forms being submitted for verification. Rather, what is clear from these figures is that the increased burdens placed on third-party persons and organizations wishing to register citizens to vote resulting from HB 1355 have done little to prevent the submission of invalid voter registration forms.

## The Differential Impact of HB 1355 on Election Day Provisional Ballots

As with voter registration and early voting, HB 1355 may have a pernicious effect on voters who are currently registered in a county but who have changed—yet not updated—their permanent addresses with appropriate Supervisors of Elections. Under the new law, legally registered voters who move from one county to another will no longer be able to cast *regular* ballots; instead, before they are permitted to vote *provisional* ballots, they will have to submit a change of address form directly to the Supervisor of Elections in their new counties of residence. They will not be permitted to change their addresses at polling stations. The paperwork must be completed prior to casting a provisional ballot.

Legally registered voters who move *within* Florida counties will still be permitted to make address changes at the polls on Election Day, but they will not be permitted to vote *regular* ballots (with the exception of active military in uniform and their immediate family members). They, too, will have to cast *provisional* ballots.<sup>28</sup>

The Office of the Secretary of State makes it sound as though casting a provisional ballot is similar to casting a regular ballot. If a voter has to cast a provisional ballot, “The local canvassing board will simply compare your signature on the provisional ballot certificate with the signature on your voter registration record. If the signatures match, your provisional ballot will be counted.”<sup>29</sup>

Of course, what the Division of Elections does not mention is that, if a legally registered voter casts a provisional ballot for any reason (e.g., his or her eligibility is challenged by another person; he or she moved within Florida or within a county and is in the incorrect precinct when trying to vote; he or she is a registered voter but does not appear on the precinct register), after Election Day, the local three-member canvassing board will exercise judgment on whether the voter casting a provisional ballot is eligible to vote, including making sure his or her signature on the provisional ballot certificate and (if necessary) address change form matches the signature on file with an appropriate Supervisor of Elections.

But history shows that casting a provisional ballot in Florida in no way guarantees that a voter’s ballot will count. In the 2008 General Election, less than half of all provisional ballots cast were actually deemed to be valid. According to the Florida State Department, of the roughly 8.3 million ballots cast, 35,635 were provisional ballots.<sup>30</sup> Local canvassing boards, however, only validated 17,312 of these.

In 2008 there was a tremendous amount of variation across the state’s 67 counties regarding the number of provisional ballots cast and the percentage that were actually counted. In six counties, all of them rural, all of the provisional ballots that were cast (a total of 54) were counted by canvassing boards.<sup>31</sup>

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<sup>28</sup> Under the law, a voter must cast a provisional ballot, which will not be counted until after the unofficial results are tabulated by the Supervisor of Elections and reported to the Secretary of State. The local canvassing board, under the direction of the Supervisor of Elections, has two working days to count provisional ballots. The board is to examine the voter’s “provisional ballot certificate, and any and all other information and evidence, if anything is available. The board must count your provisional ballot unless the board determines, based on preponderance of the evidence, that you are not entitled to vote.” See, Florida Secretary of State, Division of Elections, “Frequently Asked Questions,” 2011. Available: <http://election.dos.state.fl.us/gen-faq.shtml#link3>.

<sup>29</sup> Florida Secretary of State, Division of Elections, “Frequently Asked Questions,” 2011. Available: <http://election.dos.state.fl.us/gen-faq.shtml#link3>.

<sup>30</sup> The following figures are drawn from, Department of State, Division of Elections, “November 2008 General Election: Ballots Cast,” 2008. Available: <http://election.dos.state.fl.us/reports/pdf/2008BallotsCast.pdf>; and Department of State, Division of Elections, “November 2008 General Election: Provisional Ballots,” 2008. Available: <http://election.dos.state.fl.us/reports/pdf/2008ProvisionalBallots.pdf>.

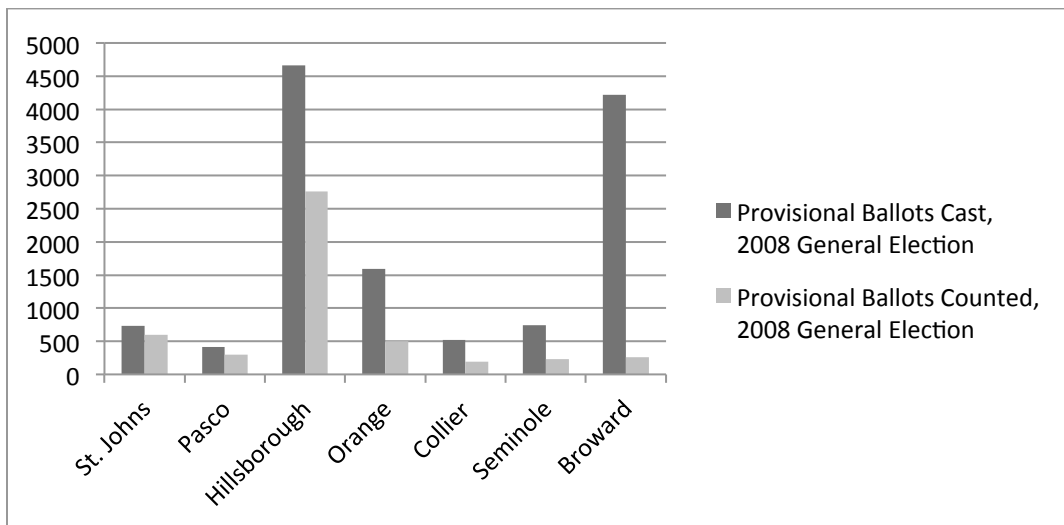
<sup>31</sup> The six counties with 100 percent acceptance of provisional ballots in the 2008 general election were: Baker (0/0); Dixie (11/11); Hamilton (12/12); Holmes (13/13); Lafayette (3/3); and Suwannee (15/15).

Other counties, as Graph 3 reveals, also had high percentages of validated provisional ballots. For example, over 82 percent of the 731 provisional ballots cast in St. Johns County, 72 percent of the 411 provisional ballots cast in Pasco County, and nearly 60 percent of the 4,659 provisional ballots cast in Hillsborough (a Section 5 Voting Right Act county) were added to the total vote.

In contrast, as Graph 3 also reveals, several counties rejected the preponderance of provisional ballots that were cast on Election Day. Some 4,222 provisional ballots were cast in Broward County; of these only 264 (6.3 percent), were counted as valid by the canvassing board. Some 1,590 voters cast ballots in Orange County in the 2008 General Election, but only 503 (31.6 percent) were deemed valid by the canvassing board. Only 227 of the 740 provisional ballots cast in Seminole County—30.7 percent—were validated by the canvassing board. The canvassing board in Collier County, which requires Section 5 preclearance from the United States Department of Justice, accepted 36.5 percent (191 of 524) of the provisional ballots cast in the 2008 General Election.

Because of the tighter restrictions placed on address changes made by registered on the day of the election, HB 1355 may exacerbate the number of provisional ballots cast in upcoming elections, which in turn, may increase the number of ballots cast by legally registered voters that will not be counted.

**Graph 3. Comparison of Cast and Counted Provisional Ballots, 2008 General Election**



## **Conclusion**

My testimony has provided an original, empirical analysis of early voting patterns from the 2008 General Election, and among other things I have argued that this analysis shows that HB 1355 will have differential effects across many groups in Florida, including racial and ethnic groups. I have also offered comments about third-party voter registration efforts and the casting of provisional ballots, and overall my testimony indicates that there is a need for Congressional oversight of HB 1355 as it relates to voting rights in Florida. HB 1355 places considerable burdens on the right of citizens to vote in the Sunshine State.

We thank you again for the opportunity to have testified, and I look forward to answering any questions that you may have.