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, and KENNETH SULLIVAN, *et al.*, Defendant-Intervenors.	No. 1:11-cv-1428-CKK-MG-ESH

DEFENDANT-INTERVENORS' JOINT MOTION AND MEMORANDUM OF LAW TO COMPEL THE DEPOSITION OF FLORIDA SECRETARY OF STATE KURT BROWNING

The Defendant-Intervenors respectfully request that the Court compel the deposition of Florida Secretary of State Kurt Browning, a party in this case.

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MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT-INTERVENORS' JOINT MOTION TO COMPEL THE DEPOSITION OF FLORIDA SECRETARY OF STATE KURT BROWNING

This Motion is made necessary by the refusal of the Plaintiff in this action to agree to schedule and make available for deposition the one individual identified by the State of Florida as acting in this action on its behalf. The State of Florida appears in this action "by and through its Secretary of State Kurt S. Browning" (*see* Dkt. No. 54 at 1) and, as such, it is axiomatic both that he subjects himself to the jurisdiction of this Court and that he must make himself available for deposition by opposing parties upon proper notice. Fed. R. Civ. P. 26 and 37(a)(2).

Documents produced by Florida and depositions already concluded establish that Secretary Browning was personally involved with and has unique knowledge concerning the subject voting law changes. In addition, he made public statements and took discretionary actions that demonstrate his personal knowledge and experience with election matters in Florida as well as supporting the view of the State of Florida in this declaratory judgment action. Secretary Browning's involvement in this case is more than formalism.

The Defendant-Intervenors would have preferred to wait to bring this issue to the Court's attention until after completion of the remaining Florida Department of State employee depositions. Unfortunately, given the accelerated discovery schedule that Florida requested and received in this case, such delay is not feasible. In addition, it has become clear that Secretary Browning is likely the only available source of certain relevant information relating to the four sets of voting changes. Finally, the fast-approaching discovery cut-off also places Defendant-Intervenors in the unusual position of seeking the Court's involvement first rather than waiting for Florida to file a motion for protective order and then responding.

Defendant-Intervenors recognize that Florida does not intend to call Secretary Browning as a witness to meet its burden under Section 5 of the Voting Rights Act, but this should not

preclude Defendant-Intervenors' access to an individual closely involved in the passage and implementation of HB 1355.[1]

PROCEDURAL HISTORY

Discovery is scheduled to close in just over two weeks, on February 29, 2012. Document discovery is largely, but not entirely, complete and depositions are well underway. The Defendant-Intervenors and the United States have noticed and taken seven depositions, including one member of the staff of the Florida Department of State. This week, the Defendant-Intervenors will be taking, pursuant to notice, the depositions of additional members of the Department of State staff and additional depositions are planned by the Defendant-Intervenors and the United States before the discovery cut-off.

When Defendant-Intervenors first sought, nearly a month ago, to schedule the deposition of Secretary Browning, counsel for Florida stated that "Florida will oppose any attempt to depose Florida's Secretary of State" and cited as its sole authority the "Apex doctrine." *See* Exhibit A (emails between D. O'Connor and D. Nordby dated Jan. 21-22, 2012). Florida's counsel subsequently explained, in response to Defendant-Intervenors' request for authority supporting this position, that "Florida's opposition to Defendant-Intervenors' attempt to depose Secretary of State Browning is the *Morgan* doctrine, *United States v. Morgan*, 313 U.S. 409 (1941)." *See* Exhibit B (email from A. Davis dated Jan. 23, 2012). The *Morgan* (or "Apex") doctrine, however, cannot shield Secretary Browning's testimony in this case as Florida

[1] Similarly, the State of Florida opposed Defendant-Intervenors' effort (which was supported by the United States) to take depositions of four Florida state legislators and two Florida state legislative staffers concerning the four sets of voting changes at issue in this case. In that case, as we have previously informed this Court, the Northern District of Florida denied the Defendant-Intervenors' motion to compel such depositions. (Dkt. Nos. 69 & 70.)

suggests. Secretary Browning possesses personal, relevant knowledge that cannot be obtained elsewhere. Moreover, a deposition of Secretary Browning will cause either no or only minimal inconvenience, as Secretary Browning has announced his intention to resign this Friday, February 17, 2012. *See* Exhibit C.

Accordingly, on February 9, 2012, pursuant to Local Civil Rule 26.2 and the Court's November 3, 2011 Scheduling and Procedures Order (Dkt. No. 61), counsel for the Defendant-Intervenors requested a meet-and-confer conference call with all counsel concerning, among other things, Secretary Browning's deposition. That call took place at 11:00 am on February 10, 2012. During that conference call, Florida refused to provide any dates for Defendant-Intervenors to conduct Secretary Browning's deposition, and restated its position that it would oppose any attempt to take Secretary Browning's deposition.[2] The parties then jointly contacted the Chambers of Judge Kollar-Kotelly and briefly described the issue. In response to a request from Chambers, counsel for the Defendant-Intervenors submitted an email summary of the issue. The Court then issued a Minute Order directing the parties to submit expedited briefing on the issue. (Minute Order dated Feb. 10, 2012.)

JURISDICTION

This Court, as the United States District Court in which the action is pending, has undeniable jurisdiction and authority to rule on a motion to compel discovery from parties to this action. Federal Rule of Civil Procedure 37(a)(2) specifies that: "A motion for an order to a party [compelling discovery] must be made in the court where the action is pending." Secretary

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[2] Pursuant to Federal Rule of Civil Procedure 37(a)(1), the Defendant-Intervenors certify that they in good faith conferred with Florida in an effort to schedule Secretary Browning's deposition without Court action.

Browning is the only individual identified by the State of Florida as the person acting on its behalf. *See* Florida's Second Amended Complaint, Dkt. No. 54 at 1 ("The State of Florida, by and through its Secretary of State Kurt S. Browning, seeks a declaratory judgment . . ."). Accordingly, having filed suit in this Court and asked for affirmative relief, this Court has jurisdiction over, and the power to order discovery from, both the State of Florida and Secretary Browning. *Alexander v. F.B.I.*, 186 F.R.D. 200, 202 (D.D.C. 1999) ("*Alexander II*") ("Thus, according to the plain language of [Rule 37], the critical issue is a determination of whom the court would be ordering were plaintiffs granted relief."); *see also Societe Internationale Pour Participations Industrielles Et Commerciales, S. A. v. Rogers*, 357 U.S. 197, 206-07 (1958). Secretary Browning's announced resignation on Friday, February 17, 2012, has no bearing on this Court's authority under Rule 37(a)(2) to issue an order directed to Florida or Secretary Browning prior to that date.[3] *See* Exhibit C.

ARGUMENT

I. FLORIDA BEARS THE BURDEN TO PREVENT SECRETARY BROWNING'S DEPOSITION.

Consistent with the principle that "the public . . . has a right to every man's evidence," *Trammel v. U.S.*, 445 U.S. 40, 50 (1980) (ellipsis in original; citation omitted), the District of

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[3] Defendant-Intervenors, in an effort to accommodate Secretary Browning's schedule, are willing to postpone his deposition until a mutually-agreeable date after his announced resignation (but before the discovery cut-off). To the extent that the Court has any concern regarding its authority to compel Secretary Browning's deposition after his resignation, the Defendant-Intervenors are willing to take the deposition on February 17, 2012, prior to his resignation. Alternatively, the Defendant-Intervenors see no impediment to taking Secretary Browning's deposition after his resignation if Florida and Secretary Browning will commit to the Court to appear for deposition at a mutually-agreeable time after his resignation but before the close of discovery without the need for a subpoena.

Columbia District Court has held that, "[g]enerally speaking, '[a] party is entitled to depose a witness on all relevant issues to which the witness has knowledge.'" *Alexander v. FBI*, 186 F.R.D. 1, 3 (D.D.C. 1998) ("*Alexander I*") (Lamberth, C.J.) (citing *CBS, Inc. v. Ahern*, 102 F.R.D. 820, 822 (S.D.N.Y. 1984)); *see also* Fed. R. Civ. P. 30(a)(1).

Accordingly, Florida "bears the burden of making the showing of good cause contemplated by [Federal Rule of Civil Procedure 26(c)]" if it seeks to prohibit Secretary Browning's deposition. *Alexander I*, 186 F.R.D. at 3; *see also* Fed. R. Civ. P. 26(c) ("[T]he court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense."). To carry this burden, the party seeking to prevent discovery "must make a specific demonstration of facts to support [its] request for the protective order and may not rely on conclusory or speculative statements concerning the need for a protective order." *Alexander I*, 186 F.R.D. at 3. Moreover, this showing "must be sufficient to overcome [litigants'] legitimate and important interests in trial preparation." *Id.* (citing *Farnsworth v. Procter & Gamble Co.*, 758 F.2d 1545, 1547 (11th Cir. 1985) ("[T]rial preparation and defense . . . are important interests, and great care must be taken to avoid their unnecessary infringement.")). Finally, "protective orders that completely prohibit a deposition should be granted only as an 'extraordinary measure which should be resorted to only in rare occasions.'" *Byrd v. District of Columbia*, 259 F.R.D. 1, 7 (D.D.C. 2009).

II. FLORIDA'S ATTEMPT TO INVOKE THE *MORGAN* DOCTRINE MUST FAIL.

A. The *Morgan* Doctrine Provides Protection Only To High-Ranking Officials Who Do Not Possess Personal, Relevant Information.

The *Morgan* doctrine provides a limited and qualified protection from deposition for high-ranking government officials who do not possess personal, relevant information or whose information can be obtained from other sources. *See Simplex Time Recorder Co. v. Sec'y of*

Labor, 766 F.2d 575, 586 (D.C. Cir. 1985) (noting "the rule enunciated by the Supreme Court in *United States v. Morgan*, 313 U.S. 409, 422 (1941), that top executive department officials should not, absent extraordinary circumstances, be called to testify regarding their reasons for taking official actions").[4] For example, in *Simplex*, the United States Court of Appeals for the D.C. Circuit concluded that an administrative law judge did not err in denying a request to question certain officials where the requesting party failed to demonstrate any "urgent or proper need to question these officials" or even "suggest[] any information in the possession of these officials . . . that it could not obtain from published reports and available agency documents." *Id.*

The concern underlying the *Morgan* doctrine is the "likelihood that depositions would significantly interfere with [high-ranking government officials'] ability to perform their governmental duties." *Alexander I*, 186 F.R.D. at 4. Accordingly, "given that the concerns associated with deposing high-ranking officials have to do with the potential for interruption of current duties, it is the current position, and not any former position, that is evaluated." *Byrd*, 259 F.R.D. at 8 (citing *Alexander I*, 186 F.R.D. at 5).

Consistent with these principles and the limited nature of the *Morgan* doctrine, this Court has held that "high-ranking government officials are generally not subject to depositions unless they have *some* personal knowledge about the matter and the party seeking the deposition makes a showing that the information cannot be obtained elsewhere." *Alexander I*, 186 F.R.D. at 4 (italics in original; underlining added). Stated differently, "[u]nless the movant can show that the

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[4] For present purposes only, the Defendant-Intervenors assume, *arguendo*, that Secretary Browning is currently a "high-ranking government official" under the *Morgan* doctrine. The Defendant-Intervenors expressly reserve the right to contest this subsequently. *See Byrd*, 259 F.R.D. at 7 (noting that "no standard has been established for determining if an official is high-ranking").

need for the protective order is 'sufficient to overcome [litigants'] legitimate and important interests in trial preparation,' high-ranking officials are subject to deposition." *Byrd*, 259 F.R.D. at 7 (quoting *Alexander I*, 186 F.R.D. at 1) (emphasis added). This is consistent with the First Circuit authority relied upon by Florida's counsel (*see* Exhibit B) holding that "[d]epositions of high ranking officials may be permitted where the official has first-hand knowledge related to the claim being litigated . . . [and] where it is shown that other persons cannot provide the necessary information." *Bogan v. City of Boston*, 489 F.3d 417, 423 (1st Cir. 2007).

B. Secretary Browning Possesses Personal, Relevant Information That Is Likely Unavailable From Other Sources.

Secretary Browning's testimony is relevant, material, and likely very probative to the issues before the Court. Secretary Browning is a principal source of certain information relevant to the passage and implementation of HB 1355 and, indeed, may be the only available source for that information. This sets the instant case apart from the typical *Morgan* doctrine case regarding an uninvolved agency head who has no unique, personal knowledge of relevant information. Accordingly, the Defendant-Intervenors should have an opportunity to take his deposition.

Evidence uncovered to date demonstrates Secretary Browning was personally involved in the legislative process that led up the enactment of the four sets of voting changes at issue, the subsequent implementation of the four sets of voting changes, and the public defense of the four sets of voting changes. First, Florida listed Secretary Browning as the first of only five individuals within the Florida Department of State who were involved in the drafting, proposing, or developing of any of the four sets of voting changes, or who advocated for or against such changes before Florida state legislators or executive branch officials. *See* Exhibit D, Florida Response to Defendant-Intervenors' Interrogatory No. 1. Florida's interrogatory response

demonstrates that it cannot carry its burden of showing that Secretary Browning does not have personal, relevant information.

Second, during the deposition of Florida Department of State Assistant General Counsel Maria Matthews, which occurred on Thursday, February 2, 2012, Ms. Matthews testified that Secretary Browning had direct input regarding the legislation that enacted the voting changes at issue (Florida House Bill 1355 (2011) and its companion Senate Bill 2086 (2011) (collectively "HB 1355"), solicited legal advice from Ms. Matthews concerning the changes to early voting contained in HB 1355, and suggested improvements to those changes to the Florida Legislature. *See* Exhibit E, at 48-52 (selected rough draft of Ms. Matthews' Deposition Transcript);[5] *see also* Exhibit F (Email dated April 29, 2011, from Florida Department of State Communications Director Chris Cate stating that "Secretary Browning has been offering his knowledge and experience with early voting to help answer any questions Senators may have about the issue").

Third, Secretary Browning participated in a number of discussions with Florida Department of State staff concerning the four sets of voting changes prior to passage of HB 1355 and personally directed the immediate implementation of HB 1355 in Florida's 62 counties that are not covered by Section 5 of the Voting Rights Act.[6] *See* Exhibit E, at 53-60 & 87-105.

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[5] A final transcript was not available at the time of filing. Defendant-Intervenors did not order expedited transcripts at the time of Ms. Matthews' deposition. However, Defendant-Intervenors are in the process of ordering an expedited transcript in light of this Court's expedited briefing schedule.

[6] Immediate implementation of election law changes in non-covered counties, prior to preclearance, appears to deviate from prior state policy and practice that election law changes should not be implemented anywhere in the state until they receive Section 5 preclearance and thus can be implemented everywhere in the state. *See* Exhibit G (December 24, 2007 Memorandum from Ms. Matthews directing all Florida Supervisors of Elections not to implement certain voting changes until after those changes were precleared for implementation

Finally, Secretary Browning made numerous post-enactment public statements in support of HB 1355 that demonstrate Secretary Browning's personal knowledge of relevant information, including the following:

1. Secretary Browning's statement at a May 19, 2011 press conference that HB 1355 "doesn't negatively impact Florida voters, and where the impact is, I believe it's justified."
2. Secretary Browning's execution and issuance on May 19, 2011, of a directive to supervisors of elections "for the purpose of ensuring that specific new changes [occasioned by HB 1355] are uniformly interpreted and implemented . . ."
3. Secretary Browning's interview with WFLA Radio (Tallahassee) on May 20, 2011, concerning HB 1355, in which he said:
    - "As a former supervisor [of elections] for 26 years in Pasco County, I want to make sure that the laws that we have can be implemented, [so] they don't cost the counties a lot of money."
    - "There is no harm, no foul when it comes to changes [occasioned by HB 1355] to early voting."
    - "This change [regarding inter-county movers being required to vote a provisional ballot] I think is a good change. Although at first when I was looking at it, I was thinking, boy, this doesn't make sense . . ."[7]
4. Secretary Browning's editorial published on August 14, 2011, in the Tallahassee Democrat, in which he stated:
    - "I personally made the decision to have the federal district court in Washington, D.C., conduct the review for these provisions . . ."
    - "I stand by my initial opinion that the new elections law improves the accountability and integrity of elections, and given my significant experience in elections, my opinion is a well-informed one."

Florida cannot refute the fact that Secretary Browning possesses certain key information for which there likely is no other source. For example, Ms. Matthews specifically testified that

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in Florida's five covered counties). This deviation from past practice is relevant to the Court's inquiry into whether the voting changes were enacted with a discriminatory purpose. *See Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 267 (1977).

[7] Secretary Browning is the only appropriate witness that can explain any basis he had for changing his position on the change of address provisions.

she has no knowledge of the conversations that Secretary Browning had with legislators or legislative staff members concerning HB 1355. *See* Exhibit E, at 47. She also testified that she does not know why Secretary Browning came out publicly in favor of the four sets of voting changes following passage of HB 1355, and she indicated that the Defendant-Intervenors would have to ask Secretary Browning. *See* Exhibit E, at 158-59. Ms. Matthews similarly did not know if Secretary Browning's decision to deviate from past practice and direct immediate implementation of HB 1355 in the non-covered counties was affected by outside influences. *See* Exhibit E, at 104. Given Judge Hinkle's ruling denying the Defendant-Intervenors' motion to compel legislator and legislative staffer testimony, the inability of Ms. Matthews to provide a full accounting concerning the Secretary's communications with legislators and legislative staff regarding HB 1355 makes Secretary Browning's testimony all the more critical and unique.[8]

Finally, whatever disruption the State of Florida and Secretary Browning may fear, as expressed by the *Morgan* doctrine, can be eliminated merely by scheduling his deposition after Secretary Browning resigns as Florida Secretary of State on February 17, 2012. *See* Exhibit C. Accordingly, after February 17, 2012, there is no "potential interruption of current duties" that can support application of the *Morgan* doctrine. *Byrd*, 259 F.R.D. at 8.[9]

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[8] Judge Hinkle's decision prohibiting depositions of Florida state legislators and staff does not preclude in any way the deposition of Secretary Browning; if anything, it makes it even more important that the deposition occur. Judge Hinkle's ruling only underscores the unusual nature of the efforts by the State of Florida to meet its burden under Section 5, considering other contested Section 5 cases in which testimony by state legislators has regularly played a central role. *See, e.g.*, *Georgia v. Ashcroft*, 195 F. Supp. 2d 25, 36 (D.D.C. 2002); *Busbee v. Smith*, 549 F. Supp. 494, 507 (D.D.C. 1982); *see also Brooks v. Miller*, 158 F.3d 1230, 1236 (11th Cir. 1998) (Section 2 case).

[9] As explained above, Secretary Browning is currently a party to this litigation and, therefore, subject to this Court's jurisdiction under Rule 37(a)(2).

III. ANY DELIBERATIVE-PROCESS PRIVILEGE FLORIDA SEEKS TO INVOKE IS INAPPLICABLE TO THIS CASE.

To the extent that Florida is attempting to use the *Morgan* doctrine as a surrogate for the deliberative process privilege, any such protection is limited, narrowly construed, and can be overcome upon a balancing of the competing interests in this case. Three principles are applicable to any assertion of deliberative process protection. First, the proponent of a privilege bears the burden of establishing that it exists, it applies, and that it has not been waived or otherwise abrogated. *See In re Subpoena Duces Tecum*, 439 F.3d 740, 750 (D.C. Cir. 2006); *In re Grand Jury Investigation*, 842 F.2d 1223, 1225 (11th Cir. 1987). Second, privileges, including the deliberative process protection, should not be "lightly created nor expansively construed for they are in derogation of the search for truth." *U.S. v. Nixon*, 418 U.S. 683, 710 (1974); *see also In re Sealed Case*, 121 F.3d 729, 737 n.4, 749 (D.C. Cir. 1997) (citing *Morgan* and noting that "privileges should be narrowly construed"). Third, the deliberative process protection is qualified and yields in the face of a sufficient showing of need. "[E]ach time [the deliberative process protection] is asserted the district court must undertake a fresh balancing of the competing interests," taking into account "the relevance of the evidence," "the availability of other evidence," "the seriousness of the litigation," "the role of the government," and the "possibility of future timidity by government employees." *In re Sealed Case*, 121 F.3d at 737-38 (citation omitted).

Even should the deliberative process protection apply, the protection yields where – as here – the relevance of the requested evidence is clear, the evidence is not otherwise available, and the litigation involves the most serious and fundamental of rights: the right to voting free of racial discrimination. As explained above, Secretary Browning is likely the only available source of certain relevant information.

Additionally, the role of the government and governmental intent is precisely at issue in this case, and any potential chilling effect in future cases of refusing to apply the deliberative process privilege is limited by the infrequency of Section 5 cases. Here, it is Florida that must demonstrate that each of the four sets of voting changes "neither has 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]." *See* 42 U.S.C. § 1973c. Secretary Browning's testimony regarding the legislative process that resulted in HB 1355, the implementation of HB 1355, as well as how that implementation deviates from prior practice, is probative of discriminatory purpose. *See Hunt v. Cromartie*, 526 U.S. 541, 546 n.2 (1999) (citing *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977) (concluding that procedural and substantive deviations from normal decision-making practices are probative of discriminatory purpose)). The State of Florida cannot both seek affirmative relief from this Court and, simultaneously, shield from the Court the testimony of one of its officials most directly and personally involved in the underlying action for which the State seeks relief.

CONCLUSION

For all these reasons, Defendant-Intervenors' respectfully request that the Court order Florida and Secretary Browning to appear for deposition at a mutually-agreeable time and location prior to the discovery cut-off in this case.

Dated: February 13, 2012

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