IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STATE OF FLORIDA, Plaintiff, v. UNITED STATES OF AMERICA, *et al.* Defendants.	No. 1:11-cv-1428-CKK-MG-ESH

STATEMENT REGARDING COURT'S AUTHORITY TO GRANT "CONDITIONAL" PRECLEARANCE

Defendant-Intervenors respectfully respond as follows to this Court's request for briefing regarding its "authority to grant conditional preclearance with respect to any of the three sets of election law changes" (Doc. 120, at 3). In sum:

First. This Court and the Attorney General lack the authority to grant preclearance to a voting change that has not yet been enacted or otherwise is incapable of administration.

Second. In those instances when a voting change is denied preclearance, both this Court and the Attorney General may do so in a manner that might be described (in short-hand) as a "conditional" denial. Specifically, when this Court or the Attorney General denies preclearance, the decision is explained in a judicial opinion or objection letter, and this explanation, in turn, may provide a road map to the jurisdiction as to what it could do to obtain preclearance in the future, either by the jurisdiction amending the discriminatory voting change, or by the jurisdiction enacting a second change which would accompany the first and which

would alter the manner in which the discriminatory change would operate in practice.

Third. Whether a preclearance denial in this case might pave the way to a subsequent grant of preclearance may depend, in part, on the actions of the Covered Counties, since they have independent responsibilities for administering elections in Florida.

1. There is no authority for this Court granting "conditional" preclearance. Intervenors are aware of no instance in which this Court or the Supreme Court has suggested that any such authority exists.

Intervenors understand "conditional" preclearance to mean the following: This Court grants preclearance to one or more of Florida's voting changes subject to a condition subsequent, *i.e.*, a decision by Florida to take further action to negate the discrimination that otherwise exists. For example, at oral argument the Court asked whether it could preclear the Early Voting Changes subject to the Covered Counties providing for twelve hours a day of early in-person voting.

Any such "conditional" preclearance determination is beyond this Court's authority. Section 5 grants this Court the authority to issue a declaratory judgment only when a covered jurisdiction "enacts or seeks to administer" a voting change.[1]

[1] This Court's injunctive authority generally extends only to barring the implementation of unprecleared voting changes. *City of Richmond v. U.S.*, 376 F. Supp. 1344, 1358-59 (D.D.C. 1974), *vacated on other grounds*, 422 U.S. 358 (1975). Intervenors are aware of one instance where this Court ordered a new voting provision into effect, *Busbee v. Smith*, 549 F. Supp. 494, 522 (D.D.C. 1982), *aff'd mem on other grounds.*, 459 U.S. 1166 (1983), but that involved a collateral issue (scheduling implementation of a newly

It does not authorize this Court to review voting changes a jurisdiction might, in the future, enact or seek to administer.[2] Furthermore, this Court lacks Article III authority to rule on "'contingent future events that may not occur as anticipated, or indeed may not occur at all.'" *Texas v. United States*, 523 U.S. 296, 300 (1998).

Likewise, the Attorney General may not, except in one limited circumstance, render determinations on voting changes that a jurisdiction might enact in the future. 28 C.F.R. § 51.22 (precluding review of changes "prior to final enactment or administrative decision," except where a change is final but for its approval in a referendum election).[3]

2. On the other hand, it is appropriate and typical for this Court and the Attorney General, when denying preclearance, to provide an explanation for the preclearance denial which, in turn, may provide guidance to the jurisdiction as to the action it could take to obtain preclearance in the future.

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precleared redistricting plan) and other unusual circumstances. *See also Upham v. Seamon*, 456 U.S. 37, 43 (1982) (court authority to order into effect a post-objection voting provision must rest on a finding of a constitutional or statutory violation).

[2] This minimizes the federalism concerns associated with Section 5 by precluding this Court and the Attorney General from substituting themselves for the covered jurisdictions' decision-making authority.

[3] "Conditional" preclearance should be distinguished from this Court (or the Attorney General) granting preclearance predicated on the Court's (or the Attorney General's) definition of the specific voting change being ruled upon. *See Allen v. State Board Elections*, 393 U.S. 544, 571 (1969) (Section 5 determinations require an "unambiguous" statement of the voting changes at issue). However, this authority to clearly define the voting change would not allow Florida to ask this Court to define the change in a manner that is plainly at odds with the legislation enacted by the Florida Legislature. That would involve the Court in ruling on a provision that is not capable of administration, and therefore would involve a hypothetical "case or controversy."

This guidance may occur in two ways. First, the explanation may indicate how the change could be altered to eliminate its discriminatory features. *E.g.*, *City of Port Arthur v. U. S.*, 459 U.S. 159, 162, 165 (1982) (affirming this Court's determination that the city's new election plan "could not be approved under § 5" because it included a majority-vote requirement for two at-large council seats, and this Court's statement that elimination of that requirement was a condition precedent for preclearance of that plan[4]); *Upham v. Seamon*, 456 U.S. at 38 (preclearance denial of Texas' statewide redistricting plan identified the two problematic districts to be remedied by a new plan).

Alternatively, a preclearance denial may indicate that the objectionable change may be precleared if a second voting change is adopted that would alter the operation of the discriminatory change. *E.g.*, *City of Richmond v. United States*, 422 U.S. 358, 371 (1975) (preclearance denial of a dilutive annexation may be withdrawn if the jurisdiction adopts a new method of election that "fairly reflects" minority voting strength in the enlarged city).[5]

[4] The Supreme Court observed that this Court had "condition[ed] clearance," *i.e.*, since this Court, at bottom, had denied preclearance, the Supreme Court meant that this Court had conditionally denied preclearance, not that it conditionally had granted it. 459 U.S. at 164-65.

[5] A "conditional" denial also has an important practical advantage over a "conditional" preclearance. With the latter, uncertainty could ensue as to whether the condition was met, thus raising questions regarding what may be legally enforced and what the benchmark would be if other changes were adopted in the future. A conditional denial ensures that, if and when preclearance is granted, there is a clear delineation of what has been precleared and what, therefore, the jurisdiction legally may implement.

In both of these scenarios, however, it is important to emphasize that, following the preclearance denial, the covered jurisdiction would retain the discretion to decide between a variety of alternative approaches. Those approaches may include deciding whether and how to follow the guidance provided, and deciding whether to return to the existing benchmark practice.

Thus, this Court may include guidance in a preclearance denial opinion as to how Florida and the Covered Counties might obtain preclearance in the future.

3. Finally, guidance provided by this Court in a preclearance denial should be undertaken with due regard for the independent role that Florida counties play in administering elections in the State. Thus, for example, if this Court denies preclearance to the Early Voting Changes, but determines that the proposed eight days of early voting could be precleared if the Covered Counties were to conduct early voting for twelve hours a day, the 2011 law would allow this to occur only by the Covered Counties adopting the twelve-hour scheme.[6] Alternatively, of course, Florida could amend the 2011 law to mandate that all counties conduct early voting for twelve hours each day.

In conclusion, this Court lacks the authority to grant a "conditional" preclearance, but has substantial discretion to explain the basis for a preclearance denial which, in turn, could guide the State and the Covered Counties in seeking preclearance in the future.

[6]If they were to do so, that change might be submitted for simultaneous review with a request for reconsideration of the preclearance denial as to the Early Voting Changes.

Respectfully submitted on June 28, 2012,

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