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 of the United States,

Defendant.

FLORIDA STATE CONFERENCE OF THE NAACP, *et al.*,

Defendant-Intervenors,

KENNETH SULLIVAN, *et al.*,

Defendant-Intervenors,

and

NATIONAL COUNCIL OF LA RAZA, and LEAGUE OF WOMEN VOTERS OF FLORIDA,

Defendants-Intervenors.

NO. 1:11-CV-01428
(CKK-MG-ESH)
THREE JUDGE COURT

UNITED STATES' RESPONSE TO THE QUESTION RELATED TO ENABLING LEGISLATION RAISED BY THE JULY 3, 2012 MINUTE ORDER

The United States respectfully submits the following response to the Court's July 3, 2012 Minute Order to respond to Florida's contention that if "there is any set of facts under which a jurisdiction can implement enabling legislation," such as the early voting changes, "in a non-retrogressive fashion, the enabling legislation is entitled to preclearance." July 3, 2012 Minute order.[1]

The statutory standard for evaluating all voting changes under Section 5 is whether the change has neither a discriminatory purpose nor will have a discriminatory effect. 42 U.S.C. § 1973c. The Attorney General's Procedures for the Administration of Section 5 set forth his application of the general Section 5 standard as well as his specific procedures regarding enabling changes. *See* 28 C.F.R. §§ 51.52(a) (identifying the standard that the Attorney General applies); 51.15(a) (specifying that as to enabling changes, preclearance of the enabling legislation does not exempt subsequent enactments from preclearance). The Attorney General is

---

[1] The State cites to *County Council of Sumter County v. United States*, 555 F. Supp. 694, 704 (D.D.C. 1983) and two Department letters, ECF Nos. 131-1 and 131-2, to support this contention. These citations discuss examples of Section 5 review of enabling legislation. *See* 28 C.F.R. § 51.15(a). In one case, the Department had previously precleared the State of Georgia's Municipal Election code, but objected to a county's adoption of a majority vote requirement pursuant to the provisions of that code. ECF No. 131-2. In the other cited submission, the Department objected to several voter registration and related procedures to, *inter alia*, implement the National Voter Registration Act of 1993 ("NVRA"), and precleared some of these procedures. ECF No. 131-1 at 1. In its letter, the Department noted that certain provisions of the submitted state legislation were enabling (such as designation of registration locations and statewide voter registration forms to implement the NVRA) and required separate Section 5 review when such provisions were adopted or finalized. *Id.* at 3. Finally, in *Sumter County*, the Department had precleared certain provisions of the South Carolina Home Rule Act but reserved judgment on the Sumter County changes that were uncertain and yet to take effect. *See* 555 F. Supp. at 704, n. 8. None of the cited examples presents a factual scenario similar to this case, in which the authorizing legislation that provided jurisdictions with the discretion to make certain changes will, itself, have a retrogressive effect on minority voters. A more apposite example is attached as Exhibit A. In File No. 2002-3457, the Department objected to a South Carolina state law decreasing the number of school board members for the Cherokee County School District from nine to seven. In that case, because the Department found there was no configuration of seven districts that would not have a retrogressive effect, preclearance was denied. *Id.* at 3.

not aware of any Section 5 case that adopts the standard for enabling changes that the State proposes and he does not believe that the Court needs to reach this question in order to make a preclearance determination.

In addition, although the change regarding early voting *hours* in Chap. 2011-40 is an enabling change that provides discretion to the counties to choose early voting hours within a certain range, the reduction in the number of early voting *days* in Chapter 2011-40 is a mandatory change that the counties must implement if precleared. Therefore, even the standard that the state proposes for enabling changes were applicable, it would apply only to that part of the change that is enabling in providing discretion to counties in setting the total number of early voting hours. It would not apply to the mandatory reduction in early voting days, which the counties have no choice but to implement.

Finally, based on the record before the Court, the early voting changes embodied in Chap. 2011-40 are discriminatory not only in effect but also in purpose, and preclearance should be denied on that basis. In essence, there is no set of facts supported by evidence under which the early voting changes can be considered not to have a retrogressive effect, nor a discriminatory purpose.

The Proposed Early Voting Changes Are Retrogressive

The proposed changes significantly reduce the number of days on which voters can use early voting and will leave minority voters worse off in their ability to participate in the electoral process than they were before the change was adopted. Because the reduction in the number of days is mandatory, and not discretionary, this aspect of the early voting set of changes is not enabling, as the counties will be required to implement only eight days of early voting if the Court preclears that reduction in the number of days.

This change is retrogressive because the five covered counties will be required to cut out the first five days of early voting, days used disproportionately by minority voters, regardless of the number of hours that may be available. The number of days of early voting matters.[2]

The reduction in early voting days reduces the opportunity to vote early, notwithstanding the possibility that some counties may choose to offer the same number of hours during the fewer remaining days. The evidence shows that during the November 2008 election, African-American voters in the Covered Counties disproportionately used early voting as compared to white voters during the first five days of early voting—*i.e.*, the period eliminated by Chapter 2011-40. V14 7888-89, 7898-99; V14 7821. Because the best data source for predicting the use of early in-person voting during the upcoming 2012 general election is the 2008 general election, V14 7888-89; V10 5658-59; V11 5869-70, 5875-76, repealing the first five days of early voting will lead to retrogression in the upcoming general election.

Furthermore, several Supervisors of Elections from the covered counties have confirmed the extensive usage of the first five days of early voting, *see, e.g.*, V7 3769; V6 3140, 3182-83; V7 3529; and there is additional evidence demonstrating why the elimination of these days diminishes the opportunity to vote. *See, e.g.*, V17 9179; V7 3765; 3143 (describing how the elimination of days limits the opportunity to vote).

---

[2] The reduction of days of early voting proposed by Florida contrasts sharply to the other Section 5 submissions discussed in the United States' Notice in Response to Section 3(a) of the Court's June 22, 2012 Order. ECF No. 128. For example, when Georgia scaled back its early voting period, it still retained 21 days of early voting. Submission 2011-2380. In the case of Texas, it reduced a few days of early voting, but kept early voting starting on the 17th day before the election; the early voting period now ends on the fourth day before the election. *See* Submission No. 1997-1954; Texas Election Code §85.011. In both cases, the final number of days of early voting offered in Georgia (21) and Texas (14) is significantly greater than the eight days proposed by Florida.

The record here demonstrates that the reduction in early voting days in Chapter 2011-40 from 12 to 8 days is retrogressive. This discriminatory effect remains, regardless of the number of hours that may later be adopted in each covered county during the reduced number of early voting days.

The State Has Not Met Its Burden as to Purpose

In addition, the State has not met its burden of demonstrating that the proposed early voting changes do not have the purpose of discriminating in violation of Section 5. For that reason alone, the Court should not permit the State to adopt these changes in the five covered counties.

As outlined previously, there was no legitimate reason to reduce the number of early voting days. Election officials did not request these changes, V15 8290, V13 7226-27; V13 7538-40; V9 5145, the State has failed to show any demonstrated need for them, V13 7226-27; V13 7538-40; V9 5125-26; V14 7569-70, and the State has admitted there is no cost savings associated with these changes. V15 8681-82; V12 6315-16. The Senate President *Pro Tempore* who supported these changes stated that the purpose of the change was to make voting more difficult, like voting in Africa. V4 2242; *see also* V17 9102-04, 9114. The rationales offered in the legislative record were not supported by the evidence. *See* Proposed Finding of Fact 107(h).

Because the early voting changes in Chapter 2011-40 cannot be implemented "in a non-retrogressive fashion," and because the State has not met its burden on purpose, the proposed changes are not entitled to preclearance. The Court should deny the State's request for declaratory judgment.

Date: July 6, 2012

Respectfully submitted,

RONALD C. MACHEN, JR.
United States Attorney
District of Columbia

THOMAS E. PEREZ
Assistant Attorney General
Civil Rights Division

/s/ Elise Sandra Shore

T. CHRISTIAN HERREN, JR.
JOHN ALBERT RUSS IV
ELISE SANDRA SHORE
CATHERINE MEZA
ERNEST A. MCFARLAND
Attorneys
Civil Rights Division
United States Department of Justice
950 Pennsylvania Ave. NW
Room NWB-72705
Washington, DC 20530
Telephone: (202) 305-0070
Facsimile: (202) 307-3961

Exhibit A

U.S. Department of Justice

Civil Rights Division

Office of the Assistant Attorney General *Washington, D.C. 20035*

JUN 16 2003

C. Havird Jones, Jr., Esq.
Senior Assistant Attorney General
P.O. Box 11549
Columbia, South Carolina 29211-1549

Keith R. Powell, Esq.
Kenneth L. Childs, Esq.
Childs & Halligan
P.O. Box 11367
Columbia, South Carolina 29211-1549

Dear Messrs. Jones, Powell, and Childs:

This refers to Act No. 416 (2002), which decreases the number of school board members from nine to seven, adopts a districting plan and an implementation schedule, raises the candidate filing fee to $200, authorizes the school board to further raise such fees, and the amended implementation schedule for the Cherokee County School District No. 1 in Cherokee County, South Carolina, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. 1973c. We received your responses to our August 19, 2002, request for additional information through May 30, 2003.

The Attorney General does not interpose any objection to the change in candidate qualifying procedures, an increase in the present qualifying fee to $200.00, and the ability of the school board to increase such fees in the future. However, we note that Section 5 expressly provides that the failure of the Attorney General to object does not bar subsequent litigation to enjoin the enforcement of the changes. See the Procedures for the Administration of Section 5 (28 C.F.R. 51.41). With regard to the board's ability to increase the qualifying fee, Section 5 preclearance is required for any future increase in filing fees.

With regard to the decrease in the number of school board members from nine to seven, we have carefully considered the information you have provided, as well as information from our files, census data, and information and comments from other persons. In light of the considerations discussed below, I cannot conclude that your burden under Section 5 has been sustained in this instance. Therefore, on behalf of the Attorney General, I am compelled to object to the reduction in the size of the school board.

According to the 2000 Census, the school district has a population of 50,728 of whom 10,726 (21.1%) are black. The school board currently consists of nine members, elected in nonpartisan elections from single-member districts to serve four-year, staggered terms. Under 2000 Census data, Districts 2 and 8 in the benchmark plan have black total population percentages of 69.5 and 63.5, respectively.

Under the proposed changes, the size of the board is reduced to seven with black persons constituting a majority of the total population in only one of the seven districts. That district, District 1, has a black total population percentage of 60.6 percent and a black voting age population of 55.5 percent. The plan also contains a district with a significant minority population, District 4, which has a 41.3 percent black total population and a 36.5 percent black voting age population.

A proposed change has a discriminatory effect when it will "lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." Beer v. United States, 425 U.S. 125, 141 (1976). If the proposed plan materially reduces the ability of minority voters to elect candidates of their choice to a level less than what they enjoyed under the benchmark plan, preclearance must be denied. State of Georgia v. Ashcroft, 195 F.Supp.2d 25 (D.D.C 2002) probable juris. noted, 123 S.Ct 964 (2003). In Texas v. United States, the court held that "preclearance must be denied under the 'effects' prong of Section 5 if a new system places minority voters in a weaker position than the existing system." 866 F.Supp. 20, 27 (D.D.C. 1994).

Our review of electoral behavior indicates that the benchmark plan has consistently provided black voters with the ability to elect candidates of choice in two of the nine districts.

The proposed plan contains only one majority black district, District 1. With a total black population percentage of 60.6, our examination of voting patterns leads us to conclude that black voters will retain the ability to elect candidates of choice. This conclusion is unchanged even considering the pairing of a white and a black incumbent.

However, we can not reach a similar conclusion with regard to the electoral ability of black voters in District 4 of the proposed plan. In your submission, you suggest that this district affords the minority community the potential to elect a candidate of choice because it provides black-preferred candidates support from a "viable cross-over phenomenon." The school board points to the results of the 2002 general elections for Cherokee County Clerk of Court and State Attorney General; both of which featured an interracial contest.

We have also examined the results of recent school board elections. Our regression analysis indicates that, generally, the level of black voter cohesion is lower for school board elections than it is for partisan elections. Similarly, the level of cross-over voting by white residents in Cherokee County is higher in the partisan elections. Since the black voting age population in the proposed district would be only 36.5 percent black, proposed District 4 would not provide black voters with the ability to elect a candidate of choice.

Of equal significance to our conclusion that black voters will not have the ability to elect a candidate of choice in District 4 is the consistent emphasis by the state and school board officials on the ability of the present black incumbent to get re-elected in that district, rather than the ability of the black community to elect a candidate of choice. Our analysis suggests that it is not clear that someone other than the present incumbent would benefit from the "cross-over phenomenon" that has been ascribed to his past candidacies.

Since minority voters would not retain the ability to elect a candidate of choice in District 4, they will only be able to elect a lower proportion of members to the school board. Currently, they are able to elect two of the nine school board members; under the proposed seven-member plan, that ability is reduced to one out of seven. As such, the proposed election plan has a retrogressive effect.

Further, it appears that there is no configuration of seven districts that will not have a retrogressive effect. In contrast, it is possible to devise such a plan with nine

districts, the size of the present board. In fact, the NAACP presented just such a plan to Rep. Phillips, as chair of the Cherokee County legislative delegation, at the May 2002 school board meeting. This nine-member plan conformed to the then-pending legislation that retained the number of officials at nine, the same number supported by a majority of the school board members. Here, the inability to devise any seven-member plan that is not retrogressive means that it is the voluntary change from nine to seven districts that the state has failed to establish will not have the prohibited effect. Beer v. United States, 425 U.S. at 141; Guidance Concerning Redistricting and Retrogression under Section 5 of the Voting Rights Act, 66 Fed. Reg. 5412 (January 18, 2001).

Under Section 5 of the Voting Rights Act, the submitting authority has the burden of showing that a submitted change does not have a discriminatory effect. Georgia v. United States, 411 U.S. 526 (1973); Reno v. Bossier Parish School Board, 528 U.S. 320 (2000); see also the Procedures for the Administration of Section 5 (28 C.F.R. 51.52). Based on the evidence detailed above, I cannot conclude that your burden has been sustained in this instance. Therefore, on behalf of the Attorney General, I must object to the reduction in the size of the school board.

Because the adoption of the districting plan and the change in the initial and amended implementation schedules are dependent upon the objected-to reduction in the number of school board members, it would be inappropriate for the Attorney General to make a preclearance determination on these related changes. See 28 C.F.R. 51.22.

We note that under Section 5 you have the right to seek a declaratory judgment from the United States District Court for the District of Columbia that the proposed changes neither have the purpose nor will have the effect of denying or abridging the right to vote on account of race, color, or membership in a language minority group. See 28 C.F.R. 51.44. In addition, you may request that the Attorney General reconsider the objection. See 28 C.F.R. 51.45. However, until the objection is withdrawn or a judgment from the District of Columbia Court is obtained, the changes continue to be legally unenforceable. Clark v. Roemer, 500 U.S. 646 (1991); 28 C.F.R. 51.10.

To enable us to meet our responsibility to enforce the Voting Rights Act, please inform us of the action the State of South Carolina plans to take concerning the reduction in the size of the school board for the Cherokee County School District.

If you have any questions, you should call Ms. Judybeth Greene (202-616-2350), an attorney in the Voting Section. Refer to File No. 2002-3457 in any response to this letter so that your correspondence will be channeled properly.

Sincerely,

Ralph F. Boyd, Jr.
Assistant Attorney General