



U.S. Department of Justice

Civil Rights Division

Office of the Assistant Attorney General

Washington, D.C. 20530

June 29, 2012

H. Christopher Bartolomucci, Esq.
Bancroft PLLC
1919 M Street, N.W., Suite 470
Washington, D.C. 20036

Dear Mr. Bartolomucci:

This refers to your April 30, 2012 request that the Attorney General reconsider his December 23, 2011 objection to Section 5 of Act R54 (A27 H3003) (2011) concerning photographic identification requirements and provisional ballots, and your submission under Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c, of Sections 4, 7, and 8 of Act R54 and the procedures and plans prepared by the Election Commission to implement those sections, for the State of South Carolina. We received your request for reconsideration and submission on April 30, 2012; additional information was received on May 1, 2012.

Under Section 5 of the Voting Rights Act, whether considering an initial submission or a request for reconsideration, the Attorney General must determine whether the submitting authority has met its burden of showing that a submitted change has neither a discriminatory purpose nor a discriminatory effect. *Georgia v. United States*, 411 U.S. 526 (1973); *Procedures for the Administration of Section 5 of the Voting Rights Act*, 28 C.F.R. 51.52. A voting change has a discriminatory effect if 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. 130, 141 (1976).

We have reconsidered our earlier determination in this matter based on the information and arguments you have advanced in support of your request, along with the other information in our files and comments received from other interested persons. In this instance, the information obtained from state officials was drawn from the deposition testimony and other evidence in *State of South Carolina v. United States*, 1:12-cv-00203 (D.D.C), the pending declaratory judgment action seeking judicial preclearance for these changes under Section 5 of the Voting Rights Act.

Several of the expert reports produced in the case helped inform our analysis. Dr. Charles Stewart's analysis of Act R54's effect on the ability of minority voters to participate effectively in the political process was particularly persuasive in showing that Act R54 will have a discriminatory effect under Section 5 of the Voting Rights Act. In addition, we found the

expert reports by Dr. Ted Arrington and Dr. Orville Burton to be particularly persuasive in showing that Act R54 was enacted with a discriminatory purpose. In light of these considerations, I remain unable to conclude that the State of South Carolina has carried its burden of showing that the submitted change in Section 5 of Act R54 neither has a discriminatory purpose nor will have a discriminatory effect. *Georgia v. United States, supra*; 28 C.F.R. 51.52. Therefore, on behalf of the Attorney General, I must decline to withdraw the December 23, 2011 objection to Section 5 of Act R54.

Your letter also resubmitted Sections 4, 7, and 8 of Act R54 for administrative review, along with a set of procedures and plans to implement those sections. We had previously informed you on December 23, 2011, that we were unable to make a determination on these provisions for several reasons, including that the State did not appear to have completed the necessary steps for the programs to be final and enforceable under state law, which would, in turn, make them ripe for review under Section 5 of the Voting Rights Act. Apparently, this is still the case for the changes in Sections 4, 7, and 8 of Act R54. For example, the State still has presented no information that these changes have been adopted by the South Carolina Election Commission or that the State has complied with its Administrative Procedure Act, S.C. Code Title 1, Ch. 23, Art. 1. 28 C.F.R 51.22, 51.27.

Furthermore, you have submitted to us a set of procedures and plans to implement Section 4 and Section 7 that assume that Section 5 of Act R54 has already been precleared and thus is legally enforceable. For example, the Section 4 procedures that you submitted expressly state that "Photo ID is required to vote at [a] polling place." Likewise, with regard to Section 7 of Act R54, the "Photo ID Voter Education Plan" that you submitted to us features a press release and other materials stating that a photographic identification requirement is now in effect. But because Section 5 of Act R54 has been denied administrative preclearance and is still under consideration for judicial preclearance, the State's new photographic identification requirement is *not* now in effect, and enforcing such a requirement would itself violate Section 5 of the Voting Rights Act.

Preclearing plans and procedures such as these at this time could only confuse both voters and election administrators. In addition, given the evidence that minority registered voters in South Carolina are currently significantly less likely than other registered voters to have the required photographic identification, implementing plans and procedures based on the enforceability of a photographic identification requirement that is in fact currently unenforceable could have a retrogressive effect.

Section 8 of Act R54 is similarly premised on the enforceability of other provisions of Act R54, including the educational requirements of Section 7. Moreover, the voter list it references is limited to data available as of December 1, 2011, and it is unclear whether the State intends to update the list prior to implementation. Accordingly, the Attorney General is unable to make a determination as to Section 8.

To be sure, there is no *per se* bar under Section 5 of the Voting Rights Act to providing free photographic identification to registered voters, and educating those citizens about the forms of identification that may be lawfully required in order to vote at a polling place. To the contrary, appropriate plans and procedures to accomplish those goals and to eliminate racial disparities in opportunities to participate in the electoral process might well be ameliorative. The State of course is free to develop plans and procedures to accomplish those goals, to take the necessary steps to make them final and enforceable under state law, and then to submit them for preclearance.

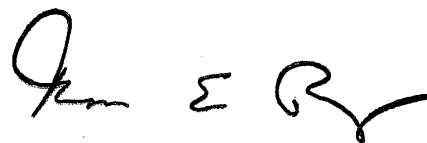
Because the proposed procedures to implement Sections 4, 7, and 8 are not yet final, and because these changes assume the enforceability of the proposed photographic identification requirement in Section 5 of Act R54, which is not currently enforceable pursuant to Section 5 of the Voting Rights Act, the Attorney General will make no determination with regard to Sections 4, 7, and 8 of the Act. 28 C.F.R. 51.22(b), 51.35.

You may again request that the Attorney General reconsider the objection to Section 5 of Act R54, accompanied by any additional information that the State believes relevant. 28 C.F.R. 51.45. However, unless and until the objection is withdrawn or the State receives a judgment from the Court, Act R54 continues to be legally unenforceable. *Clark v. Roemer*, 500 U.S. 646 (1991); 28 C.F.R. 51.10.

As in my previous communications with the State on this matter, we again note the general ameliorative potential that provisions such as Sections 4, 7, and 8 of Act R54, if properly implemented, can have with regard to voter photographic identification laws that would otherwise have a retrogressive effect. Indeed, in other jurisdictions with appropriately ameliorative provisions, the Attorney General has precleared such laws under Section 5 of the Voting Rights Act. We reiterate our willingness to discuss the options available to the State on these matters.

Because the status of these provisions of Act R54 under Section 5 of the Voting Rights Act is the subject of a parallel declaratory judgment action, we are filing a copy of this letter with the Court and serving it upon all counsel of record.

Sincerely,

A handwritten signature in black ink, appearing to read 'Tom E. Perez', with a stylized flourish at the end.

Thomas E. Perez
Assistant Attorney General