U.S. Department of Justice

Civil Rights Division

Office of the Assistant Attorney General *Washington, D.C. 20530*

December 21, 2012

Mr. Dennis R. Dunn, Esq.
Deputy Attorney General
40 Capitol Square SW
Atlanta, Georgia 30334-1300

Dear Mr. Dunn:

This refers to Section 9 of Act No. 719 (S.B. 92) (2012), which amends O.C.G.A. Section 21-2-139(a) to provide that this code section applies to all nonpartisan elections for members of consolidated governments, and that such elections shall be considered county elections and not municipal elections for purposes of this code section, for the State of Georgia, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c. We received your response to our August 3, 2012, request for additional information on November 1, 2012; additional information was received through December 6, 2012.

We have carefully considered the information you have provided, as well as census data, comments and information from other interested parties, and other information, including previous submissions. Under Section 5, the Attorney General must determine whether the submitting authority has met its burden of showing the proposed change has neither 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. *Georgia* v. *United States,* 411 U.S. 526 (1973); *Procedures for the Administration of Section 5 of the Voting Rights Act of 1965,* 28 C.F.R. 51.52(c). For the reasons discussed below, I cannot conclude that the state's burden under Section 5 has been sustained in this instance. Therefore, on behalf of the Attorney General, I must object to the proposed change.

At the outset, we note that Section 9 of Act 719, which provides that all nonpartisan elections for members of consolidated governments be held in conjunction with the July primary in even-numbered years, was proposed as statewide legislation and does not name any specific jurisdictions. Its sole result, however, is a rescheduling of the date for mayoral and commissioner elections for the consolidated government of Augusta-Richmond from November to July in even-numbered years. The six other consolidated governments in the state either do not have any nonpartisan elected offices or already elect their nonpartisan officers on that date.

Likewise, nonpartisan judicial seats have already been rescheduled as the result of prior legislation. The instant legislation also leaves undisturbed the date of all other municipal elections in the state, including nonpartisan municipal elections, on the November election date.

Augusta-Richmond has a total population of 200,549, of whom 109,088 (54.4%) are black persons, and a voting age population of 151,244, of whom 76,987 (50.9%) are black persons. The consolidated government is governed by a mayor, elected at-large, who only votes in the case of a tie, and a ten-member board of commissioners, eight of whom are elected from single-member districts and two of whom are elected from super-districts. They are elected by majority vote to serve four-year staggered terms in nonpartisan elections held on the November general election date in even-numbered years.

An overall review of voter registration and turnout data indicates that voter turnout is substantially lower in July than November for both black and white voters. The drop in the participation rate for black voters, however, is significantly greater than that for white voters. This differential has been particularly dramatic in recent elections.

For example, in 2012, 74.5 percent of the black persons registered to vote in Augusta-Richmond cast a ballot in the November election; in the July election, their turnout rate was 33.2 percent. By comparison, the turnout rates for white registered voters were 72.6 percent for the November election, and 42.5 percent for the July election. This means that in percentage terms, black persons were 55.4 percent less likely to vote in July than in November, while white persons were only 41.4 percent less likely to vote.

The same pattern is evident in the turnout figures for 2010, a non-presidential election year. The data show that in 2010, black voters were 75.9 percent less likely to vote in July than in November, while white voters were only 62.6 percent less likely to vote in July than in November. Not surprisingly, this has a significant impact on the racial composition of the electorate in each election; in 2010, for example, black voters constituted 53.2 percent of the electorate in November, but only 43.4 percent in July.

Our analysis, therefore, indicates that moving Augusta-Richmond's mayoral and commissioner elections from November to July would have a retrogressive effect on the ability of minority voters to elect candidates of choice to office.

With respect to the state's ability to demonstrate that the proposed change was adopted without a prohibited purpose, the starting point of our analysis is *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977). In *Arlington Heights*, the court provided a non-exhaustive list of factors that bear on the determination of discriminatory purpose, including, but not limited to, the disparate impact of the action on minority groups; the historical background of the action; the sequence of events leading up to the action or decision; the legislative or administrative history regarding the action; departures from normal procedures; and evidence that the decision-maker ignored factors that it has otherwise considered important or controlling in similar decisions. *Id.* at 266-68.

Our analysis of the evidence also precludes a determination that the state has met its burden of showing that the proposed change was not adopted, at least in part, with a discriminatory purpose. Voting is racially polarized in Augusta-Richmond. Census figures show that the black population has gradually increased over the years, such that black persons now comprise a majority of both the total and voting age populations in the consolidated jurisdiction. As a result of these changing demographics, electoral outcomes are particularly dependent on voter turnout.

Although the change affects only Augusta-Richmond, it does not appear to have been requested by local citizens or officials. There is no evidence that the legislation's sponsors informed, much less sought the views of the local delegation, minority legislators, or local officials about the change at any point during its conception or consideration by the legislature. On the contrary, as the change progressed through the legislative process, the board of commissioners adopted a resolution opposing any change in law requiring its elections to move to July.

In addition, the rationales provided in support of the change do not withstand scrutiny. The state notes that a July election date is preferable because it provides more time for elected nonpartisan judicial officers to transition their law practices before taking office in January. But the earlier election date for nonpartisan judicial elections has already been implemented statewide, including in Augusta-Richmond, as a result of previous legislation; the change at issue here would adjust the date of mayoral and commissioner elections only. The proponents also note that the proposed change would shorten the crowded November ballot, reduce voting times, and alleviate administrative and financial burdens associated with a longer ballot. But local election officials indicated in the course of our review that these benefits had already been accomplished as a result of the change to the election calendar for judicial offices, and that changing the date for mayoral and commissioner races was unlikely to provide any incremental benefit. Nor does the change advance proponents' stated interest in statewide uniformity; to the contrary, implementation of the change would result in Augusta-Richmond being the only municipal government in the state that would not have local elections in November. Where the purported nondiscriminatory reasons for the change appear pretextual, and where the effect of the change would be to disproportionately reduce turnout among black voters, we cannot conclude that the legislation's purpose was not to depress black voter participation. *Reno* v. *Bossier Parish Sch. Bd.*, 520 U.S. 471, 487 (1997); *City of Pleasant Grove* v. *United States*, 479 U.S. 462, 470 (1987).

The historical context in which we review the proposed change is also illustrative. This is not the first instance in which the Department has reviewed the effect of a July election in Augusta-Richmond and concluded that it did not pass scrutiny under Section 5. In 1988, the City of Augusta and Richmond County sought to hold the referendum election on consolidation in July. On July 15, 1988, the Attorney General concluded that an election at that time would have a disparate impact on minority voter participation, resulting in a retrogressive effect on minority voting strength.

Under Section 5 of the Voting Rights Act, the submitting authority has the 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); 28 C.F.R. 51.52. In light of the considerations discussed above, I cannot conclude that your burden has been sustained in this instance. Therefore, on behalf of the Attorney General, I must object to Section 9 of Act No. 719 (S.B. 92) (2012).

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 change neither has 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. 28 C.F.R. 51.44. In addition, you may request that the Attorney General reconsider the objection. 28 C.F.R. 51.45. However, until the objection is withdrawn or a judgment from the United States District Court for the District of Columbia is obtained, the submitted change continues 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 that the state plans to take concerning this matter. If you have any questions, you should contact Robert S. Berman (202/514-8690), a deputy chief in the Voting Section.

Sincerely,

Thomas E. Perez
Assistant Attorney General