U.S. Department of Justice

Civil Rights Division

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

February 13, 1996

Charles M. Hensey, Esq.
Special Deputy Attorney General
P.O. Box 629
Raleigh, North Carolina 27602-0629

Dear Mr. Hensey:

This refers to Chapter 355 (1995), which prohibits state legislative and Congressional district boundaries from crossing voting precinct lines unless the districts are found in violation of Section 5 of the Voting Rights Act, for the State of North 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 November 13, 1995, request for additional information on December 15, 1995, and February 8, 1996.

We have considered carefully the information provided in this submission and in the State's submissions of its 1991 and 1992 Congressional, State House, and State Senate redistricting plans, as well as Census data and information and comments received from other interested persons. As you know, we interposed Section 5 objections to the 1991 Congressional, State House, and State Senate redistricting plans.

When we objected to the 1991 redistricting plans, we explained that the choices made by the legislature resulted in boundary line configurations that did not fairly recognize minority voting strength. In the context of the apparent pattern of racially polarized voting in some areas of North Carolina, the fact that minority population concentrations in those areas were

submerged in majority white areas meant that minority voters would not have an equal opportunity to elect candidates of choice. We noted that alternative redistricting plans were available which would have fairly recognized minority voting strength. These alternatives had been rejected, at least in part, because they violated the established criterion of splitting as few precincts as possible. The redistricting plans adopted by the legislature in 1992 split precincts, in part, to fairly recognize black voting strength. They received Section 5 preclearance.

Under existing state law, county election officials may use their discretion with regard to the population size and racial composition of the precincts. Until now, in the context of redistricting, the size and composition of the precincts were of little relevance because the legislature could draw district lines through the precinct lines for any number of reasons (e.g. to protect incumbents, to voluntarily satisfy the Voting Rights Act, etc). However, under the proposed legislation, the size and composition of the precincts takes on new importance. Because precincts must be contained in their entirety within a single district, they will be used as the building blocks for each district. If precincts do not fairly reflect minority voting strength, it is virtually impossible for the districts to do so.

We note that the proposed legislation provides that "[t]his section does not prevent the General Assembly from taking any action to comply with federal law. . . ." This language was adopted to allay the concerns expressed by black legislators and others that Chapter 355 would have a retrogressive effect on minority voters. Although this language could conceivably mitigate against such a potentially retrogressive effect, the State has failed to articulate the meaning, scope, and priority this language will receive and the guidelines that will be used in its implementation. As a result, we can only conclude that the legislature will have complete discretion concerning the interpretation of what action is "necessary to comply with federal law" and that interpretation may or may not include the Voting Rights Act and may change depending upon the particular composition of the legislature.

We also note that because many of the same legislators who were involved in or were aware of the issues in the post-1990 Census redistricting process were also involved in the adoption of the proposed legislation, it is likely that they were aware of the potentially retrogressive effect of Chapter 355. In fact, after the first version of Chapter 355 passed, several minority legislators specifically reminded their fellow legislators that the precincts were split during the post-1990 Census redistricting process to satisfy the requirements of the Voting Rights Act. The language that was added to the legislation to

allay the concerns raised by minority legislators and others appears to be intentionally vague and does not specifically make reference to the requirements of the Voting Rights Act and the need to satisfy those requirements in the redistricting process. Finally, the fact that the legislature added this language suggests that the legislators were cognizant that the proposed legislation may not satisfy the requirements of the Voting Rights Act.

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); Procedures for the Administration of Section 5, 28 C.F.R. 51.52. The existence of some legitimate, nondiscriminatory reasons for the voting change does not satisfy this burden. See Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 265-66 (1977); City of Rome v. United States, 446 U.S. 156, 172 (1980); Busbee v. Smith, 549 F. Supp. 494, 516-17 (D.D.C. 1982), aff'd, 459 U.S. 1166 (1983). In view of the legislature's experiences during the post-1990 Census redistricting process and the decisions and events that occurred during the instant process, it is virtually impossible to conclude that the legislators were unaware of the potentially retrogressive effect of Chapter 355. As result, we cannot conclude that State has met its burden of proving that the adoption of Chapter 355 was free from a racially discriminatory purpose.

In addition, because Chapter 355 unnecessarily restricts the redistricting process and makes it more difficult to maintain existing majority black districts and to create new ones, the State has not met its burden of showing that Chapter 355 will not "lead to a retrogression in the position of . . . minorities with respect to their effective exercise of the electoral franchise." Beer v. United States, 425 U.S. 130, 141 (1976).

In light of the considerations discussed above, I cannot conclude, as I must under the Voting Rights Act, that your burden has been sustained in this instance. Therefore, on behalf of the Attorney General, I must object to Chapter 355.

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 has neither a discriminatory purpose nor effect. 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, Chapter 355 continues to be legally unenforceable. See 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 North Carolina plans to take concerning this matter. If you have any questions, you should call Colleen M. Kane (202-514-6336), an attorney in the Voting Section.

Sincerely,

Loretta King

Loretta King
Acting Assistant Attorney General
Civil Rights Division