



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

December 22, 2020

MEMORANDUM FOR: ASSISTANT ATTORNEY GENERAL
CIVIL RIGHTS DIVISION

FROM: THE ATTORNEY GENERAL 

SUBJECT: Safe-Harbor Enforcement Policy for State and Local Voting
Procedures

The integrity of the voting process is essential to the democratic elections we rely on to select leaders in our country. The Department of Justice enforces federal law that protects the right to vote and governs voting procedures and therefore plays an important role. The Department, however, is not the only or even the primary governmental entity charged under the Constitution and laws of the United States with regulating the voting process. It is critical that our enforcement policies respect the proper balance between the Department's obligation to enforce federal voting rights laws and its obligation to respect the authority of state and local jurisdictions to regulate elections.

I therefore direct the Civil Rights Division to adopt the following enforcement policy: a change in voting laws or procedures by a state or local jurisdiction which readopts prior laws or procedures shall be presumed lawful unless the prior regime was found to be unlawful. This policy is particularly timely as state and local jurisdictions consider their experience with pandemic-related voting changes and whether to maintain or abandon those procedures for future elections.

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The United States Constitution provides that state legislatures "bear primary responsibility for setting election rules." *Democratic Nat'l Comm. v. Wisconsin State Legislature*, No. 20A66, 2020 WL 6275871 (U.S. Oct. 26, 2020) (Gorsuch, J., concurring). This responsibility extends even to federal elections. Article I of the Constitution establishes that "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations[.]" U.S. Const., Art. I, § 4, cl. 1. Article II of the Constitution mandates that the States establish rules for presidential elections "in such Manner as the Legislature thereof may direct." U.S. Const., Art. II, § 1, cl. 2.

The Constitution thus vests authority for federal elections in state legislatures, and state and local jurisdictions have even broader authority to enact laws that govern state and local elections.

The Constitution's recognition of the broad latitude that state and local jurisdictions retain under our Constitution reflects the Founders' decision to create a federal government of limited authority. In our system, states function as "laboratories for devising solutions to difficult legal problems." *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 817 (2015) (quoting *Oregon v. Ice*, 555 U.S. 160, 171 (2009)). "It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

The role of state and local jurisdictions as "laboratories of democracy" extends to elections. State legislatures and local jurisdictions can and do lawfully change election procedures from time to time. For example, some states may count only absentee votes received by election day while others may count absentee ballots mailed by election day. "The variation in state responses reflects our constitutional system of federalism." *Democratic Nat'l Comm. v. Wis. State Legislature*, 2020 WL 6275871, at *13-14 (October 26, 2020) (Kavanaugh, J., concurring).

State and local jurisdictions may lawfully change voting procedures, including by readopting long-established previous practices. For example, a state or local jurisdiction may determine that a new voting procedure fails to serve voters well or that circumstances changed and that a prior practice is better suited to more recent circumstances. "[E]venhanded restrictions that protect the integrity and reliability of the electoral process itself" are not "invidious" and are generally lawful. *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 189-90 (2008) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 788 n.9 (1983)). "States may, and inevitably must, enact reasonable regulations of parties, elections, and ballots to reduce election- and campaign-related disorder." *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997).

Both the Constitution and federal statutory law recognize that state and local jurisdictions can and will address changing circumstances, sometimes-unique local issues, and different policy preferences related to voting, and that their voting-related laws and processes will change from time to time.

For example, a state that never before allowed early voting may decide to permit early voting, and then later—after some experience—decide to maintain but shorten that period for early voting. This kind of policy change does not, by itself, raise any inference of illegality. See *Ohio Democratic Party v. Husted*, 834 F.3d 620, 623 (6th Cir. 2016) ("Adopting plaintiffs' theory of disenfranchisement would create a 'one-way ratchet' that would discourage states from ever increasing early voting opportunities, lest they be prohibited by federal courts from later modifying their election procedures in response to changing circumstances.").

Of course, state and local jurisdictions do not have unlimited authority with respect to voting procedures. The Constitution contains several amendments and provisions that protect the right to vote. The Fifteenth Amendment requires that “[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.” U.S. Const., Amend. XV, §1. The Nineteenth Amendment provides that “[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.” U.S. Const. Amend. XIX; *see also*, e.g., U.S. Const. Amend. XXIV (prohibiting “any poll tax or other tax” in federal elections).

States cannot condition the right to vote on the payment of a poll tax, *Harper v. Virginia Bd. Of Elections*, 383 U.S. 663 (1966), and states must comply with the Constitution’s limits on state authority. *E.g.*, *Timmons*, 520 U.S. at 357-58; U.S. Const. Amend. XXVI (extending the right to vote to citizens who “are eighteen years of age or older”). Furthermore, “state and local officials must communicate to voters how, when, and where they may cast their ballots through in-person voting on election day, absentee voting, or early voting.” *Democratic Nat’l Comm.*, No. 20A66, 2020 WL 6275871, at *9 (Kavanaugh, J., concurring).

States must also comply with federal election-related laws. These include the Voting Rights Act of 1965, 52 U.S.C. 10301 et seq. (formerly 42 U.S.C. 1973 et seq.); the National Voter Registration Act of 1993, 52 U.S.C. 20501 et seq. (formerly 42 U.S.C. 1973gg et seq.); the Help America Vote Act of 2002, 52 U.S.C. 20901 et seq. (formerly 42 U.S.C. 15301 et seq.); the Uniformed and Overseas Citizens Absentee Voting Act of 1986, 52 U.S.C. 20301 et seq. (formerly 42 U.S.C. 1973ff et seq.); the Americans with Disabilities Act of 1990, 42 U.S.C. 12101 et seq.; the Civil Rights Acts, 52 U.S.C. 10101, 20701 et seq. (formerly 42 U.S.C. 1971, 1974); and the Voting Accessibility for the Elderly and Handicapped Act of 1984, 52 U.S.C. 20101 et seq. (formerly 42 U.S.C. 1973ee et seq.).

Because of our nation’s system of divided government and federalism and the Department’s role as a law enforcement agency, the Department must both properly respect the broad authority of state and local jurisdictions to adapt their laws to changing circumstances and different policy preferences, and zealously enforce the federal voting-related statutes. When state and local jurisdictions change their voting laws and procedures, the Department should and will consider carefully these twin obligations before it seeks to challenge a state or local law as a violation of federal statutory law.

This care is particularly important when a state or local jurisdiction maintains a voting-related procedure that is lawful, then changes to another lawful procedure, then changes back to the original procedure. The Department of Justice will presume that enactment of a state or local voting-related law that reverts back to or adopts a state or local jurisdiction’s prior lawful voting procedures complies with federal law.