



U.S. Department of Justice

Civil Rights Division

Office of the Assistant Attorney General

Washington, D.C. 20035

July 1, 2002

Honorable John M. McKay
President of the Florida Senate
Honorable Tom Feeney
Speaker of the Florida House of Representatives
404 Monroe Street
Tallahassee, Florida 32399-1100

Dear President McKay and Speaker Feeney:

This refers to House Joint Resolution 1987 (2002), which provides for the redistricting plan for the House of Representatives of the State of Florida, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. 1973c. We received your submission on May 1, 2002; supplemental information was received through June 13, 2002.

We have considered carefully the information you have provided, as well as census data, comments, and information from other interested parties. As discussed further 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 2002 redistricting plan for the Florida House of Representatives.

The 2000 Census indicates that the state has a total population of 15,982,378, of whom 2,294,672 (14.4%) are black persons and 2,682,715 (16.8%) are Hispanic. Florida's voting age population is 12,336,038, of whom 1,560,928 (12.7%) are black persons and 1,980,176 (16.1%) are Hispanic. One of the most significant changes to the state's demography has been the increase in the Hispanic population. Between 1990 and 2000, the Hispanic share of the state's population increased from 12.2 to 16.1 percent.

Under the Voting Rights Act, a jurisdiction seeking to implement a proposed change affecting voting, such as a redistricting plan, must establish that, in comparison with the status quo, the change does not "lead to a retrogression" in the position of minority voters with respect to the "effective exercise of the electoral franchise." Beer v. United States, 425

U.S. 130, 141 (1976). In addition, the jurisdiction must establish that the change was not adopted with an intent to retrogress. Reno v. Bossier Parish School Board, 528 U.S. 320, 340 (2000).

The constitutional requirement of one-person, one-vote mandated that the state reapportion the house districts in light of the population growth since the last decennial census. The Florida House of Representatives consists of 120 members elected from single-member districts to two-year terms. Under the existing plan, there are three districts in the five covered counties that are majority minority in total and voting age population. District 102 has a majority Hispanic population and Districts 55 and 59 have majority black populations.

The proposed plan maintains the two districts in which black persons are a majority of the population, but eliminates the majority Hispanic district, which existed in a portion of Collier County. The total Hispanic population in District 102/101 (the district becomes 101 in the proposed plan) was reduced from 72.8 to 29.6 percent, a drop of 43.2 percentage points. The Hispanic voting age population of the district decreased from 74.4 to 27.5 percent, a drop of 46.9 percentage points. The percentage of Hispanic registered voters declined from 61.9 to 12.5 percent, a drop of 49.4 percentage points. Within the context of electoral behavior in the district and the availability of alternative redistricting plans, the state has not met its burden that this reduction will not result in a retrogression in Hispanic voters' effective exercise of their electoral franchise, or that any retrogression was unavoidable.

Of the 16 states covered by the Act's special provisions, seven have partial coverage. In those states, preclearance is required only for changes that affect one or more covered counties or other subjurisdictions. Johnson v. De Grandy, 512 U.S. 997, 1001 n.2 (1994) ("[f]ive Florida counties, but not Dade County, are subject to preclearance"); United Jewish Organizations of Williamsburgh, Inc. v. Carey, 430 U.S. 144, 148-149 (1977) (changes had to be submitted "insofar as [they] concerned [the covered] Counties"). In partially covered states, however, statewide changes in voting procedure, that directly affect voting in covered areas, must be precleared under Section 5.

In particular, the state fails to establish its claim that Collier Hispanic voters do not presently elect the candidates of their choice in benchmark District 102, so that their admitted inability to do so in proposed District 101 is not retrogressive

within the meaning of Section 5. In this instance, benchmark plan District 102 was in fact a district in which Hispanic residents could elect a candidate of choice. For example, our investigation has found substantial information that Hispanic voters in District 102 vote for Hispanic candidates when they have the opportunity and that the Anglo community does not support Hispanic candidates. Further, it appears the benchmark district united several communities of interest. The state's experts in Martinez v. Bush, No. 02-20244-CIV (S.D.Fla.) (three-judge court) noted that there are extensive communities of interest joining Collier and Miami-Dade Counties. Not only did these experts find communities of interest among the Hispanic populations of the two counties, but they found common interests in growth, water management, agriculture, and fishing.

Given the area's demographics, the state was required to extend the district to the east, outside of Collier County, to achieve the necessary population to comply with the one-person, one-vote command of the Fourteenth Amendment. Reynolds v. Sims, 377 U.S. 533 (1964). If the state chose to cross into Miami-Dade County, as it did in the previous redistricting, the result would be that Hispanic voters in Collier County would continue to enjoy the effective exercise of their electoral franchise. If the state chose to cross into Broward County, as it does under the proposed plan, that ability is eliminated. Because the plan eliminates that ability, it is retrogressive. Beer v. United States, *supra*, at 141.

The benchmark for statewide redistricting plans in partially covered states is the level of minority voting opportunity in districts that are a part of a Section 5 covered county. Cf. Lopez v. Monterey County, 525 U.S. 266, 284 (1999) ("Section 5, as we interpret it today, burdens state law only to the extent that that law affects voting in jurisdictions properly designated for coverage"). Here the state has not proposed to meet its Section 5 obligations by affording to Hispanic voters in other covered counties an opportunity as great as the one afforded to Collier County Hispanics in existing District 102. Therefore, since the benchmark plan contains a majority Hispanic district, which includes Collier County, that level of opportunity for Hispanic voters in that county must be preserved in order to avoid retrogression.

The state presents three arguments against an objection in this instance. Two of the three relate to the state's status as a partially covered state, while the third does not. The arguments are: (1) that Florida should be allowed to compensate elsewhere in the state for a retrogressive effect within one or

more of the covered counties; (2) that any retrogression is cognizable under Section 5 only if it can be cured entirely within the covered counties; and (3) that the retrogression was unavoidable because of other statutory or constitutional considerations. We address each in turn.

First, the state seeks to use a statewide increase in the number of districts in which Hispanic voters can elect a candidate of choice to compensate for any retrogression that occurs in covered counties. This suggested approach would require a Section 5 review and assessment of all districts within a state, even where the statutory formula only identified individual counties for coverage. This is contrary to the plain meaning of Congress' coverage determinations and is an approach we must therefore reject.

The state next contends that an increase in the number of covered-county minority residents, who are placed together in proposed District 101, is non-retrogressive, even if the Hispanic voters in that district as a whole have less ability than they had in the benchmark District 102 to exercise their franchise effectively. Collier County does not have sufficient Hispanic population to provide for a majority Hispanic district by itself. Therefore, in order to avoid retrogression as to Hispanics in proposed District 101 compared to existing District 102, the drafters of the house plan would have had to use Dade County (as did existing District 102) and not Broward County (as does proposed District 101) as the source for the non-Collier County population of that district.

The state contends that forcing it to combine Collier County with Miami-Dade County instead of Broward County would effectively require the submission of non-covered voting changes for preclearance. Under Section 5, however, the Department is required to determine how a proposed change -- including a statewide change -- affects minority voters within a covered county. Our analysis here only goes to the effect of the change within Collier, and on that county's minority residents. The configuration of proposed District 101 comes under Section 5 scrutiny only so far as is necessary to determine whether the ability of minority groups in the covered county "to participate in the political process and to elect their choices to office is augmented, diminished, or not affected by the change affecting voting." H.R. Rep. No. 196, 94th Cong., 1st Sess. 60 (1975). The import of the state's argument is that any portion of a district which lies outside a covered county is not subject to Section 5 review, even if it is the total configuration of the

district that determines its effect on minority residents of the covered county.

The state's final argument is that the requirement to draw a majority Hispanic district, partly in Collier County, would violate Section 2 of the Voting Rights Act because the creation of such a district would pack Hispanic voters in Miami-Dade County into ten districts, where a fairly drawn plan would result in eleven districts. Furthermore, as we understand the state's contention, drawing a majority Hispanic district in Collier County while maintaining eleven majority-Hispanic districts statewide could not be done without violating the equal protection principle of Shaw v. Reno, 509 U.S. 630 (1993). We are informed, however, that alternative plans exist that demonstrate that it is possible to devise a majority-Hispanic district that includes Collier County, while maintaining at eleven the total number of south Florida house districts in which Hispanic voters can elect a candidate of choice. Moreover, as stated above, the state concedes that there are significant communities of interest between Miami-Dade and Collier Counties that are respected by benchmark District 102. Therefore, race need not be the predominant factor in drawing such a district.

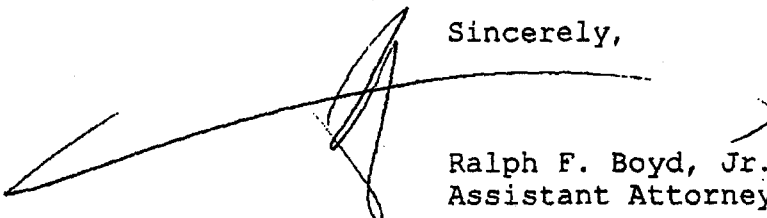
In sum, the clear effect of District 102/101 can be measured by the ability of Collier County Hispanic voters to elect their candidate of choice in the benchmark, and the fact that the drop in Hispanic population in the proposed district will make it impossible for these Hispanic voters to continue do so.

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); see also Procedures for the Administration of Section 5 of the Voting Rights Act, 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. On behalf of the Attorney General, I must object to the 2002 redistricting plan for the Florida House of Representatives. Beyond the specific discussion above, however, in all other respects we find that the State has satisfied the burden of proof required by Section 5.

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 redistricting plan 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 the State of Florida plans to take concerning this matter. If you have any questions, you should call Mr. Timothy Mellett (202-307-6262), an attorney in the Voting Section.



Sincerely,

Ralph F. Boyd, Jr.
Assistant Attorney General