



September 28, 2011

Chris Herren
Chief, Voting Section
Civil Rights Division
U.S. Department of Justice
1800 G Street, NW
Washington, DC 20006

Re: Section 5 Comment Letter for Submission No. 2011-3092

Dear Mr. Herren:

The Lawyers' Committee for Civil Rights Under Law and the ACLU Voting Rights Project urge the Attorney General to deny Section 5 preclearance, or make a written request for additional information, with regard to the State of North Carolina's submission of a new citizenship verification and purge procedure for voter registration.

The submitted procedure will have the effect of making it significantly more difficult for recently naturalized citizens – an overwhelming majority of whom are minority persons protected by the Voting Rights Act – to participate in their adopted country's political processes by registering to vote and voting. Although the State has a strong interest in ensuring that non-citizens do not register or vote, the State has failed to demonstrate that it lacks alternative procedures for effectively addressing this interest that would not – as the submitted procedure would do – disproportionately burden the citizenship rights of newly naturalized minority citizens. Since the effect on recently naturalized citizens was clearly foreseeable, and the disparate impact on minority voters is shown by the State's own data, the State's insistence on continuing with this procedure also raises concerns about discriminatory purpose. Lastly, it appears that the State is failing to adequately communicate its new verification and purge procedure to the affected voters. Accordingly, the State has not met its burden of demonstrating that the new verification and purge procedure neither has a discriminatory purpose nor will have a retrogressive effect.¹

1. As described in the State's August 10, 2011 submission letter, the State's proposed procedure is as follows.

a. The State regularly will conduct computer matches between the data records for newly registered voters (contained in the statewide voter registration list) and data records for persons licensed to drive in North Carolina (contained in a file maintained by the State Division of Motor

¹ We also note that, contrary to Section 5, the State has begun implementation of the new procedure without having obtained Section 5 preclearance.

Vehicles (DMV)).² The DMV file includes entries for licensees indicating that, at the time the driver's license was issued, the licensee either was a U.S. citizen or was a non-citizen legally residing in the United States. As part of the new verification and purge procedure, the State will flag each newly registered voter matched with a licensee who is listed in the DMV file as having not been a citizen at the time the driver's license was issued.

b. The next, and key, step in the verification and purge process is that the State will presume that each computer-flagged voter still is not a non-citizen today, i.e., that the individual did not become a naturalized citizen between the date that the license was issued and the date on which the individual registered to vote. Thus, the State will send the individual a letter stating that "[b]ased on information currently available to us, we must presume, until we get information from you otherwise, that you may not be an American citizen and should not be registered to vote." If the individual responds with citizenship documentation, then he or she will not be purged. If the individual responds that, in fact, he or she is not a citizen, then of course the individual is purged. And, based on the presumption of non-citizenship, if the individual does not respond at all (or does not make a written response), then he or she also will be purged from the registration rolls.

2. It appears to be undisputed that the citizenship data on which North Carolina seeks to rely often are stale and, as a result, typically are wrong.

a. The citizenship information located in the State's DMV file identifies individuals' citizenship status as of a date that was months, if not years, prior to the date on which the computer-flagged individuals subsequently registered to vote. This is simply a product of the fact that the individuals in question obtained their driver's licenses months, if not years, before they registered to vote. In this regard, the State's submission does not appear to provide information as to the duration of state driver's licenses, but it is our understanding that licenses generally are issued for several years.³ Each year, thousands of North Carolina residents become naturalized citizens, and thus shift from their prior non-citizenship status to being U.S. citizens eligible to register and vote.⁴

The fact that the citizenship information contained in the DMV file is out of date strongly suggests, in and of itself, that it is inappropriate to presume that newly registered voters who *previously* were not citizens continue, *today*, to not be citizens.

b. Indeed, the data provided by the State in its submission confirm that the State's non-citizenship presumption is wrong. Rather, these data indicate that the presumption should be the

² The State's submission does not provide any schedule as to how frequently this matching process will be undertaken.

³ The general rule is that licenses are issued for eight years to persons between the ages of 18 and 66, for five years for persons 66 and older, and until the licensee's 21st birthday to persons younger than 18. N.C. Gen. Stat. § 20-7(f). However, licenses issued to persons who are non-citizens legally in the country may be of a shorter duration. N.C. Gen. Stat. § 20-7(f)(3).

⁴ The Department of Homeland Security publishes reports detailing the number of persons who became naturalized citizens by State and by fiscal year. For North Carolina, the numbers for the past three fiscal years are 8,509 (2008), 16,294 (2009), and 9,988 (2010). DHS 2008, 2009, and 2010 Yearbooks of Immigration Statistics, Naturalizations, Supp. Table 1, *available at* <http://www.dhs.gov/files/statistics/publications/yearbook.shtm>.

opposite – that the computer-flagged individuals are, today, U.S. citizens. According to the State, it received 306 written responses from computer-flagged individuals in response to the State’s verification mailing, and 73 percent provided documentation that they had become U.S. citizens prior to the date on which they registered to vote.⁵

3. Furthermore, and critical to this Section 5 review, it also appears undisputed that the State’s tenuous presumption will have a disparate impact on minority citizens.

a. According to the State, the initial implementation of the new verification procedure yielded 637 computer-flagged individuals. Of this total, the State reports that only 23 percent were white.⁶ Yet, according to the 2010 Census, non-Hispanic whites (the “white alone” category) constitute 68 percent of the State’s voting age population; similarly, according to the State’s voter registration file, whites constitute 73 percent of the State’s registered voters (as of September 24, 2011). Thus, while minorities constitute about 77 percent of the individuals being singled out to provide proof of citizenship, they constitute less than a third of the State’s voting age population and registered voters.

b. The fact that the overwhelming percentage of persons affected by the State’s verification and purge procedure are minorities appears to flow directly from the fact that the overwhelming percentage of North Carolina residents who become naturalized citizens each year are minorities.⁷

4. The State’s submission also appears to raise a question as to whether the computer matching procedure is, to some extent, mistakenly flagging newly registered voters who are native-born citizens.⁸ To the extent this is occurring, it casts doubt on the State’s rationale for the purge and verification procedure, i.e., if native-born citizens are being flagged for potential purging this cannot possibly be justified by a concern over non-citizens registering to vote.

⁵ According to the State’s submission, 253 individuals who apparently received the mailings from the State did not respond either in writing or by some other means. There does not, however, appear to be any basis for assuming that these persons are non-citizens (or, at least, there is no basis for assuming that they disproportionately are non-citizens compared to those who did respond). There potentially are a number of reasons why these individuals did not respond; one, discussed *infra*, is that the State did not make it clear in its communications that a failure to respond will result in the individual being purged from the registration rolls.

We also note the data provided by the State are for the State as a whole, and do not differentiate between covered and non-covered counties. Consistent with this, the other data noted in this comment letter also are provided for the State as a whole.

⁶ This may be an overstatement of the actual percentage since the State’s use of a “white” racial category for its registered voters may include some voters who separately identified themselves as Hispanic.

⁷ The Department of Homeland Security naturalization data (see fn. 4 *supra*) also report, by State and fiscal year, the country of birth of newly naturalized citizens. In fiscal year 2010, for example, 76% of the newly naturalized North Carolina residents were born in sub-Saharan Africa, Latin America, the Caribbean, or Asia (we assigned countries to these regions based on geographical assignments set forth by the United Nations, <http://unstats.un.org/unsd/methods/m49/m49regin.htm>). This clearly indicates that a vast majority of newly naturalized individuals in fiscal year 2010 were black, Hispanic, or Asian.

⁸ The submission letter states, without further explanation, that 223 of the flagged individuals responded in writing to the State’s notice letter reporting that they “were U.S. citizens by birth/naturalization.” Submission letter at 2.

5. It also appears that the State has alternative measures available to it which will allow it to increase its efforts to ensure that non-citizens do not register to vote, while not implementing procedures that will disproportionately burden the right of minority citizens to register and vote.

For example, it appears from the State's submission that it has identified a potential problem at State motor vehicle offices with regard to non-citizens being offered the opportunity to register to vote. In response, as set forth in the submission, the State is seeking to ensure that motor vehicle offices do not offer voter registration to persons who already have identified themselves as non-citizens. In addition, the State reports that it has identified 83 individuals who registered when they were not citizens. The State can conduct an analysis of these voter registrations to determine the method by which each application was submitted (e.g., the number submitted at motor vehicle offices) and the precise location where each was submitted; these data may then be used to identify and remedy any systemic problem in the administration of the voter registration process that may be resulting in non-citizens submitting a registration application.

6. Finally, there appear to be significant problems with the standard letter that the State is proposing to send to computer-flagged individuals. The letter indicates that "it is important" that the individual respond with information about his or her citizenship status, and that the State "must hear from you" about this matter. However, the letter fails to explicitly say, in plain English, that if the registered voter does not respond, the State will remove him or her from the registration rolls. Furthermore, the letter fails to say, in plain English, that the response must be in writing. And the letter fails to identify any deadline for responding to the State, so as to avoid being purged.⁹

The problems that result from the State's ambiguous communication are illustrated by the State's submission. A large number of persons did not respond to the State's verification mailing. In addition, the State reports that some individuals responded by "communicat[ing] to us by some means other than a mailed response." Submission letter, at 2. Rather than treating as citizens those who communicated their citizenship in this manner, or, at the least, informing these individuals that they must respond in writing to avoid being purged, the State proposes to immediately purge these individuals.

7. These concerns – the misplaced presumption of non-citizenship, the disparate impact on minority voters, and the special burden the State seeks to impose on the computer-flagged individuals to produce citizenship documentation or be purged, as well as the State's failure to adequately communicate the verification and purge procedure to the affected individuals – all should preclude a grant of preclearance at this juncture.

8. Accordingly, at a minimum, the Attorney General should send a written request for additional information to the State. This request should, *inter alia*, ask the State to discuss any alternatives it considered to the proposed verification and purge procedure, ask for the State's reason for implementing a presumption that is contrary to the State's own experiences, ask the

⁹ The State's attachment to its verification letter also asks that respondents provide "a copy of any documentation (birth certificate or naturalization certificate) that confirms that you are a citizen." We note, however, that federal law appears to make it a crime to copy a naturalization certificate "without lawful authority." 18 U.S.C. § 1426(h).

State to clarify the data as to the computer-flagged persons previously contacted so as to break out the data for the 40 covered counties, and ask the State to clarify its computer matching procedures and the extent to which these procedures are identifying persons who actually are native-born citizens. The letter further should emphasize that the State must stop implementation of this procedure until preclearance is obtained, and request that the State immediately inform the Justice Department, in writing, as to its plans in this regard.

For these reasons, we respectfully urge the Attorney General not to grant Section 5 preclearance to the State of North Carolina's citizenship verification and purge procedure.

Sincerely,

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Lawyers' Committee for Civil Rights
Under Law

Katie O'Connor
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cc: Honorable Thomas E. Perez
Assistant Attorney General
Civil Rights Division