



December 7, 2011

Mr. T. Christian Herren
Chief, Voting Section
Civil Rights Division
Room 7254-NWB
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

Re: Comment: South Carolina Section 5 Submission No. 2011-2495

Dear Mr. Herren:

This comment letter is in reference to Section 5 submission no. 2011-2495 from the State of South Carolina regarding the voting changes set forth in Act R54 (A27 H3003). Act R54 amends S.C. Code Ann. § 7-1-25 to require that voters produce certain government-issued photo identification in order to cast a ballot at the polls. For the reasons set forth below, and for the reasons stated in our August 5, 2011 comment letter, we the undersigned organizations respectfully request that the Justice Department interpose an objection to the proposed voting changes.

1. Overview.

The proposed voter identification requirement is retrogressive. As explained below, the State's own data (regarding the number of registered voters, by race, who lack a driver's license or state-issued identification card) demonstrate that the requirement would have a disproportionate effect on minority voters. This effect is evidenced in two ways. First, the State's data demonstrate that minority voters disproportionately lack the requisite identification, and thus would be disproportionately required to obtain that identification in order to vote at the polls on election day. Second, the available evidence indicates that minority voters would continue to disproportionately lack the requisite identification, resulting in minority voters being disproportionately barred from voting at the polls.

This discriminatory election day disenfranchisement would occur for several reasons. First, as noted, from the outset, minority voters would disproportionately not have the requisite identification. Second, it is well recognized that minority voters' ability to participate equally in the electoral process is significantly hampered by South Carolina's history of discrimination in voting and other areas, and by the resulting socio-economic disparities between whites and African Americans. Lastly, the State has failed to demonstrate that the measures it has proposed, which purportedly ameliorate the impact of the photo identification requirement, would overcome and eliminate the existing racial disparity.

In relying on the data provided by the State, we recognize these data do not quantify all of the factors that would define the population of persons who would be burdened by the new requirement, or the population of persons who ultimately would be precluded from voting at the polls in a particular election. However, the State has not provided any data regarding the unaccounted-for variables, and has not identified any method for quantifying these variables. It therefore appears that the data the State provided are the best available data for judging whether the proposed change would have a prohibited retrogressive effect. While unaccounted-for variables might, alternatively, increase, decrease, or not affect the racial disparity shown by the data the State has provided, the State has the burden of proving the absence of a retrogressive effect. It has failed to do so.

The “reasonable impediment” exception the State has proposed to its voter identification requirement does not rescue the requirement from being retrogressive. Given the State’s burden of proof, the exception is an un-quantified variable that cannot tip the retrogression analysis in the State’s favor. The exception may, to some extent, shrink the population of persons needing to obtain acceptable photo identification; however, the State has provided no data as to whether this would increase, decrease, or not affect the racially disparate effects of the photo identification requirement. In addition, the South Carolina Attorney General’s interpretation of the “reasonable impediment” exception and how it should be applied does not repair the discriminatory effect of the identification requirement. The exception would apply only to voters for whom it is outside of their “control” to obtain the requisite identification. The Attorney General’s definition of “reasonable impediment” is ambiguous, providing no clear standard for when an impediment is “reasonable” and outside of the “control” of the voter. The failure to clearly define the exception creates opportunities for its discriminatory application by the poll workers and county election boards in the 46 independent counties conducting elections across South Carolina.

The State’s implementation and education plan also does not eliminate the retrogressive impact of this change. First, the State has not provided any basis on which to conclude that even a well-designed and adequately funded publicity campaign would overcome the racial disparity in photo ID ownership. Second, the State’s plan has several design problems and there is no indication that it would be adequately funded. The State fails to indicate how the education plan would target populations most affected by the photo identification requirement or how well the plan would be funded. In addition, the State’s sample educational materials are incomplete and potentially misleading.

Finally, to the extent it is relevant to consider whether the State has a non-retrogressive alternative to the photo identification requirement, the information provided – or, rather, not provided – by the State indicates that it clearly does have such an alternative. That is, the State’s submission fails to indicate that there is any need at all for the photo identification requirement given that the alleged problem the requirement has been adopted to address – voter impersonation at the polls – does not appear to exist in South Carolina. Thus, the State can continue to conduct election day voting in a safe, orderly, and efficient manner by continuing to enforce its current voter identification provision.

2. Act R54 is retrogressive.

a. Hundreds of thousands of South Carolina voters will be negatively impacted by the law.

At the outset, it is important to recognize the massive scope of the proposed change: the State of South Carolina is essentially seeking to implement a supplementary registration program involving apparently hundreds of thousands of registered voters in the State, requiring them to “register” with the State or federal photo identification authorities before voting. The magnitude of the proposed “re-registration” is unprecedented; at the least, it is our understanding that no supplementary or re-registration of this size has occurred in the State since the 1960s.

- According to the State’s own data, there currently are up to 216,596 registered voters in the State whose registration will not allow them to vote in person at the polls on election day because they apparently lack the additional documentation – a photo ID – which will allow their current registration to be deemed effective and sufficient for voting. These are the individuals who currently do not have a state driver’s license or a DMV-issued identification card.
- The actual number of registered voters who would be required to obtain new identification in order to vote at the polls is somewhat less because of the State’s proposed “reasonable impediment” exception. However, that exception is ambiguous and its scope, as best can be understood, is extremely limited – it applies only to registered voters who experience an “obstacle to . . . obtaining the necessary photographic identification” where that “obstacle” was “valid” and “beyond the voter’s control”. Op. S.C. Att’y Gen. August 16, 2011. The State has provided no data or estimate as to the number of persons who may qualify for this exception. Given that the State has the burden of proof, there is no basis for assuming that this exception will substantially limit the number of affected registered voters.
- The new law also allows for two other existing forms of identification to be used for voting (passports and military identification containing a photograph), but the State also has not provided any data regarding the number of additional persons this would cover (*i.e.*, the number who have one of these forms of identification but do not have a driver’s license or state identification card). Accordingly, the State has not shown that these other forms of acceptable identification would significantly reduce the number of affected individuals.

b. A disproportionate number of those affected by Act R54 are racial minorities.

The State’s data demonstrate that the photo identification requirement would disproportionately burden the non-white population of South Carolina, and that the disparity is significant.

- The State's data show that non-whites compose 33.9 percent of the registered voters in the State who lack a driver's license or state-issued identification card, whereas non-whites compose 30.4 percent of all registered voters. This means that non-whites constitute 11.5 percent more of those who lack qualifying DMV photo identification than would be true if the new requirement was race-neutral based on the current registration figures.¹
- Although the number of persons who ultimately would be required to obtain identification would be mitigated, to some extent, by the fact that two other forms of existing identification would be accepted for voting, and also by the existence of the "reasonable impediment" exception, the State has not provided any data regarding the racial impact of these factors or any basis on which to estimate or in any way gauge their racial impact. Furthermore, as noted above, there also is a concern that the ambiguity of the "reasonable impediment" exception would open the door to inconsistent or discriminatory application at the polls, which could further aggravate the existing racial disparity. Accordingly, the State has not shown that these factors would mitigate the racial impact of the photo identification requirement.
- Similarly, while the number of persons who ultimately would be precluded from election day voting by the photo identification requirement would decrease because some number of persons lacking identification would now obtain it (by obtaining either one of the existing forms of acceptable photo ID or the new photo ID included in the submitted legislation), the State has not provided any data that assesses the racial composition of this subset of persons or any basis on which to estimate or in any way gauge the racial impact of this factor. Accordingly, the State has failed to show that the fact that some number of individuals currently without the requisite photo ID would now obtain it would mitigate the racial impact of the change.
- Finally, the racial effect of the new requirement likely would be exacerbated – and certainly not mitigated – by the fact that historical discrimination in South Carolina, and the resulting stark socio-economic disparities between the State's white and minority residents, burden minority voters' participation in the electoral process. Voting Rights Act reviews have always taken these factors into account in assessing the impact of a particular voting practice or procedure on minority voters, recognizing that impact must be judged by conducting a functional analysis of the electoral circumstances. These factors would tend to make it less likely that minority voters who lack photo identification would obtain it, and would make it particularly unlikely that, after implementation, minority voters would obtain identification to such an extent that the current disparity would be eliminated.²

¹ The figure of 11.5 percent is derived as follows: the non-white percentage of those lacking DMV identification is 3.5 percentage points higher than the non-white percentage of the registered voters; 3.5 divided by 30.3 equals 11.5 percent.

² See Letter from ACLU, Lawyers' Committee, Brennan Center, Armand Derfner, and LWV of South Carolina to Christian Herren (August 5, 2011) at 4-9 (discussing racial disparities in access to transportation, literacy, and poverty levels in South Carolina).

c. The “reasonable impediment” exception is insufficient.

The State’s proposed “reasonable impediment” provision provides an extremely limited “safe harbor” from the photo identification requirement, and thus, in the absence of racial data as to its effect, does not provide a basis for preclearing the new requirement. This provision is unlike a provision that would allow any voter lacking photo ID to instead submit an affidavit of identity at the polls, which, because of its application to all voters lacking ID, could (if properly designed) eliminate any racial impact that otherwise would result from a photo ID requirement.

- The “reasonable impediment” exception purports to excuse registered voters from obtaining photo identification if their lack of such identification may be attributed to a circumstance “beyond the voter’s control.” This ill-defined exception cannot operate to meaningfully limit the retrogressive effect of South Carolina’s photo ID law because it does not apply universally to voters who lack photo identification. Moreover, because of its vague and ill-defined parameters, the exception creates greater opportunity for racial discrimination through inconsistent application throughout South Carolina’s decentralized election administration system.
- The South Carolina Attorney General gives examples of “reasonable impediments” beyond the “control” of a voter. These “reasonable impediments” include the inability to obtain a birth certificate or a physical infirmity affecting a voter’s ability to obtain ID. The Attorney General’s opinion omits myriad circumstances over which a voter has no actual control but which State officials might formally consider to be within the “control” of a voter, such as lack of access to transportation or inability to afford the underlying documentation required to obtain photo identification. Based upon the South Carolina Attorney General’s opinion, these apparently would be considered within the “control” of a voter but would impact minority voters disproportionately.³

d. The State has not shown that its proposed voter education program would eliminate the racial disparity.

The State’s education plan suffers from several particular problems and does not provide any data suggesting that it will mitigate the law’s retrogressive effect

- There is no mention of how the information the State plans to distribute is targeted to actually have an impact and penetrate the markets, particularly of minority communities, to ensure that voters understand the obligations imposed by the new photo identification laws. While the South Carolina Election Commission (SCEC) identifies various specific outlets for television, radio, newspaper, printed material distribution, social media and

³ Voters who are unable to use the “reasonable impediment” exception could, in theory, avoid the identification requirement by voting absentee, and thus it perhaps could be argued that this would limit the requirement’s discriminatory effect. The State, however, has not made this argument in its submissions and, in any event, it is problematic to view voting by absentee ballot as interchangeable with voting at the polls. Absentee voting requires a voter to cast a ballot before election day which may deprive the voter of knowledge of events, statements by candidates, revelations concerning candidates, etc. that might occur in the days immediately preceding the election. Moreover, absentee voting in South Carolina is only available to voters falling within predetermined parameters and would not be available to otherwise able-bodied voters whose sole reason for needing to vote absentee is lack of ID.

public relations purposes, there is no mention of scope or market penetration to the key audiences identified by the SCEC. The plan is silent on ability of these efforts to penetrate key markets: there is no information on the volume of website traffic, number of twitter followers, size of membership organizations, diversity and volume of population attendance at local fairs and festivals, or historic effectiveness with editorial boards on a strictly educational issue with little news value. Most importantly, there is no mention of a dedicated budget to ensure a significant resource investment in the public education campaign.

- Furthermore, the State's sample educational materials are incomplete and potentially misleading. The materials fail to educate voters on the opportunity to vote absentee without photo identification. Many of the materials also fail to notify voters of the "reasonable impediment" exception to the ID requirement.

Even a well designed and carefully implemented voter education program would fail to remedy the retrogressive effect of the voter identification requirement of Act R54, since the factors that hamper minority electoral participation are complex and do not simply involve a lack of information. Minority voters face particular burdens at every step of the electoral process, burdens that result from historical discrimination and its lingering socioeconomic effects. A limited publicity campaign taking place over a limited period of time cannot possibly offset the retrogressive effect of this law.

e. Act R54 is an unnecessary and burdensome law.

The State has failed to provide any information indicating that there is any need for a photo identification requirement in order to maintain the integrity of elections in South Carolina. In other words, regardless of whether the State's motivation was in part racial, or instead was simply partisan, the new requirement is entirely gratuitous.

- The potential "voting integrity" problem that a photo ID requirement might address is voter impersonation (i.e., the situation where a person impersonates a registered voter and casts a ballot as that registered voter). But the State indicates that there is no documented instance of voter impersonation, and no recent documented instance of any voter fraud at all, and thus there is no empirical basis for imposing the new requirement.⁴
- Furthermore, the fact that the proposed photo ID requirement would not apply to absentee voting also demonstrates that the new requirement is not aimed at fixing any real problem in the administration of elections in the State. If an individual did wish to commit fraud by impersonating a registered voter, it seemingly would be much easier to do that by voting that person absentee since the impersonator then would avoid personally appearing before poll officials who might know the person being impersonated and thus discover the illegal conduct. The State has not provided any valid explanation for allowing such a significant exception to its new "voting integrity" enforcement scheme if indeed there were any real problem with voter impersonation.

⁴ Brie Jackson, *S.C. Election Commission has no confirmed cases of voter fraud*, October 28, 2011, <http://www2.scnw.com/news/2011/oct/28/south-carolina-election-commission-has-no-confirme-ar-2622257/>.

- The apparent reason for the absence of any evidence of voter impersonation problem at the polls is the inherent difficulty and danger in such conduct. Voter impersonation is a crime in South Carolina. See S.C. Code Ann. § 7-25-120. A person who attempts to impersonate a registered voter at the polls runs the clear risk that the fraud will be discovered because one of the poll workers may know the individual being impersonated or the individual being impersonated already has voted (either in person or absentee). Furthermore, the risk is multiplied many times over by the fact that, in order to affect an election, many voters would need to be impersonated by many individuals. This would dramatically increase the likelihood that the conspiracy would be discovered by poll workers, and that one of the conspirators, or an acquaintance of the conspirators, would disclose the illegal conduct to election officials or to law enforcement.

Finally, the absence of any genuine nondiscriminatory justification for South Carolina's voter identification law and the Legislature's failure to address concerns regarding its retrogressive impact (discussed in our prior comment letter) raise a significant concern as to whether the law was enacted for a discriminatory purpose.

3. The Supreme Court's decision in *Crawford v. Marion County Election Board* has no bearing on the Department's decision here.

The Supreme Court's decision in *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008), has little or no relevance to this submission. *Crawford* was not a Section 5 case and did not involve a claim of racial discrimination. It was a facial challenge to Indiana's photo ID requirement brought under the Fourteenth Amendment. That is very different than a Section 5 matter, which does of course require a demonstration of nondiscrimination on the basis of race, places the burden of proof on the covered jurisdiction, and employs a completely different legal test for lawfulness.

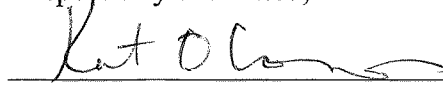
The *Crawford* Court noted that (1) the State had demonstrated that it had legitimate generalized interests in prescribing the photo ID requirement, *id.* at 191-98; and (2) the plaintiffs had failed to proffer sufficient evidence of the burden that would be placed upon the affected voters. *Id.* It is for these reasons that the Court rendered its narrow holding: "We are persuaded that the [lower courts] correctly concluded that the evidence in the record is not sufficient to support a facial attack on the validity of the entire statute, and thus affirm." *Id.* at 188-89. This narrow holding was predicated on the fact that the burden in *Crawford* was on the plaintiffs, in stark contrast to a Section 5 review, where the burden is on the State. Moreover, the generalized interests cited in *Crawford* do not provide a basis for preclearance of an otherwise retrogressive change, and the legal holding and factual findings in *Crawford* otherwise provide no guidance for assessing the instant submission.

In short, *Crawford* is inapposite and, thus, does not and cannot dictate any outcome here.

4. Conclusion.

The voter ID provision of Act R54 is racially discriminatory and will have a retrogressive impact on the voting rights of minorities in South Carolina. South Carolina has failed to meet its burden under Section 5 and, therefore, we strongly urge the Department to deny the State's request for preclearance.

Respectfully submitted,



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