U. S. Department of Justice

Civil Rights Division

Office of the Assistant Attorney General

Washington, D.C. 20035

February 26, 2004

C. Havird Jones, Jr., Esq.
Senior Assistant Attorney General
P.O. Box 11549
Columbia, South Carolina 29211-1549

Dear Mr. Jones:

I am writing in regards to Act R.88 (2003), which changes the method of electing the Board of Trustees for the Charleston County School District from nonpartisan to partisan elections, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. 1973c. We received your response to our August 12 request for additional information on December 31, 2003.

We have carefully considered the information you provided, census data, information in our files, and comments from other interested persons, as well as the federal district court's findings in *United States v. Charleston County*, No. 2:01-0155-23 (D.S.C. March 6, 2003). In light of the considerations discussed below, I cannot conclude that your burden under Section 5 of the Voting Rights Act has been sustained. Therefore, on behalf of the Attorney General, I am compelled to object to Act R.88 (2003).

The Voting Rights Act requires a jurisdiction seeking to implement a proposed change affecting voting to establish that, under the totality of the circumstances, the change does not "lead to a retrogression" in the position of minority voters with respect to the "effective exercise of the electoral franchise." *Georgia v. Ashcroft*, 123 S.Ct. 2498, 2511 (2003); *Beer v. United States*, 425 U.S. 130, 141 (1976). Whether a change is retrogressive "depends on an examination of all the relevant circumstances, such as the ability of minority voters to elect a candidate of choice, the extent of the minority group's opportunity to participate in the political process, and the feasibility of creating a nonretrogressive plan." *Georgia*, 123 S.Ct. at 2511. 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).

Our review of the electoral impact of the proposed change, the views of elected officials at

both the local and state level, including the expressed views of the legislation's sponsors, and the detailed factual findings in *United States v. Charleston County*, demonstrate that the Act is retrogressive. The proposed change would significantly impair the present ability of minority voters to elect candidates of choice to the school board and to participate fully in the political process. In addition, it was enacted despite the existence of a nonretrogressive alternative.

The proposed change would likely eliminate the possibility of plurality victories by requiring head-to-head contests with the winner needing a majority of votes. The *Charleston County* court concluded that partisan, at-large elections in Charleston County impose a "*de facto* majority vote requirement" that "makes it more difficult for the African-American community to employ * * * bullet voting in order to improve their chances of electing candidates of their choosing." *Slip. op.* at 43-44.

In contrast, the court noted that because Charleston school board elections are non-partisan, they can result in numerous candidates running, thus creating the opportunity for single-shot voting and a plurality win by minority-preferred candidates despite the at-large method of election and the prevalence of racially polarized voting. *Id.* at 20-21. The proposed change will impose a *de facto* majority-vote requirement that will make it extremely difficult for minority-preferred candidates to win.

Another significant factor in our determination is the lack of support for the proposed change from minority-preferred elected officials. *See Georgia*, 123 S.Ct. at 2513. Our investigation reveals that every black member of the Charleston County delegation voted against the proposed change, some specifically citing the retrogressive nature of the change. Our investigation also reveals that the retrogressive nature of this change is not only recognized by black members of the delegation, but is recognized by other citizens in Charleston County, both elected and unelected.

In evaluating the submission, we have considered the feasability of creating a non-retrogressive alternative. *Georgia,* 123 S.Ct. at 2511. The governmental interest in implementing partisan elections can be achieved by non-retrogressive means. A switch to partisan elections would not represent a retrogression of minority voting strength if accompanied by a concomitant shift from at-large elections to a fairly drawn single-member districting plan. Indeed, such a non-retrogressive alternative was considered and adopted by the State Senate, but was not taken up by the State House.

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" (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. Therefore, on behalf of the Attorney General, I must object to Act R.88.

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 neither has 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, Act R.88 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 Charleston County School District plans to take concerning this matter. If you have any questions, you should call Mr. Mike Pitts (202-514-8201), an attorney in the Voting Section.

Sincerely,

R. Alexander Acosta
Assistant Attorney General