U.S. Department of Justice

Civil Rights Division

Office of the Assistant Attorney General | *Washington, D.C. 20530*

June 24, 1992

The Honorable Dean G. Skelos
The Honorable David F. Gantt
Legislative Task Force on Demographic
Research and Reapportionment
250 Broadway, 20th Floor
New York, New York 10007-2563

Dear Senator Skelos and Assemblyman Gantt:

This refers to Chapters 76, 77 and 78 (1992), which provide for the redistricting of the Senate and the Assembly for the State of New York, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973c. We received your initial submission on May 6, 1992; supplemental information was received on May 8, 12, 14, 30, June 3, 5 and 10, 1992. We note that Assistant Attorney General John R. Dunne has taken no part in our review and determination regarding these voting changes.

We have carefully considered the information the state has provided, as well as Census data and information and comments from other interested persons. The preclearance requirement of Section 5 applies to only three counties in New York: New York, Kings and Bronx Counties. Therefore, this review and determination regarding the submitted State Senate and State Assembly redistrictings addresses the plans only insofar as they affect those three counties. As it applies to the redistricting process, the Voting Rights Act requires that the Attorney General determine whether the submitting authority has sustained its burden of showing that the proposed plan is free of the proscribed discriminatory purpose or effect. In addition, the submitted plan may not be precleared if its implementation would result in a clear violation of Section 2 of the Act. In the case of a statewide redistricting such as the instant one, this examination requires us not only to review the overall impact of the plans on minority voters, but also to understand the reasons for and the impact of each of the legislative choices that were made in arriving at these particular plans.

In making these judgments, we apply the legal rules and precedents established by the federal courts and our published administrative guidelines. See, e.g., 28 C.F.R. 51.52(a), 51.55, 51.56. For example, we cannot preclear those portions of a plan where the state has deferred to the interests of incumbents while refusing to accommodate the community of interest shared by insular minorities. See, e.g., Garza v. Los Angeles County, 918 F.2d 763, 771 (9th Cir. 1990), cert. denied, 111 S. Ct. 681 (1991); Ketchum v. Byrne, 740 F.2d 1398, 1408-09 (7th Cir. 1984), cert. denied, 471 U.S. 1135 (1985). Such concerns are frequently related to the unnecessary fragmentation of minority concentrations into several districts or the needless packing of minority constituents into a minimal number of districts in which they can expect to elect candidates of their choice. See 28 C.F.R. 51.59. We endeavor to evaluate these issues in the context of the statutory and demographic changes which compelled the particular jurisdiction's need to redistrict (id.). Finally, our entire review is guided by the principle that the Act ensures fair election opportunities and does not require that any jurisdiction attempt to guarantee racial or ethnic proportional results.

With regard to the Senate plan, the Attorney General does not interpose any objection. However, we note that Section 5 expressly provides that the failure of the Attorney General to object does not bar subsequent litigation to enjoin the enforcement of the change. In addition, as authorized by Section 5, we reserve the right to reexamine this submission if additional information that would otherwise require an objection comes to our attention during the remainder of the 60-day review period. See the Procedures for the Administration of Section 5 (28 C.F.R. 51.41 and 51.43). Moreover, in making our determination, we have not considered the issue pending in state court litigation that the Senate plan unnecessarily crosses county lines in violation of state law, or the tendered defense that such crossings were essential to comply with the Voting Rights Act. Our only decision is that the submitted plan has neither the discriminatory purpose nor effect proscribed by Section 5 and is entitled to preclearance by the Attorney General pursuant to his published decisional standards.

Turning now to the Assembly plan, with the exception of one area in New York County, our analysis shows that the Assembly plan meets Section 5 preclearance requirements. In northern Manhattan, the plan unnecessarily splits the geographically compact Hispanic population between two Assembly districts, Districts 71 and 72. The proposed district boundary lines appear to minimize Hispanic

voting strength in light of prevailing patterns of polarized voting. Moreover, the state was aware of this consequence given its own estimates of likely voter turnout in Districts 71 and 72.

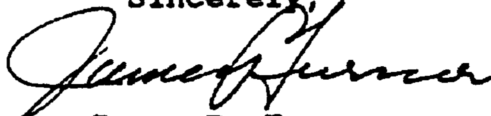
We have noted the state's explanation that changing the district boundaries in this area might jeopardize the opportunity for minority voters in District 71 to continue to elect a representative of their choice. There were, however, readily available alternatives that would have provided a greater opportunity to Hispanic voters in District 72 without endangering the opportunity of minority voters to elect a candidate of their choice in District 71. Our analysis of the available evidence suggests that the state's approach to the Assembly redistricting in this area was undertaken with an intent to protect not only the incumbent in District 71, but also the incumbent in District 72. Although incumbency protection is not in and of itself an inappropriate consideration, it may not be accomplished at the expense of minority voting potential. Garza v. County of Los Angeles, 918 F.2d at 771; Ketchum v. Byrne, 740 F.2d at 1408-09.

In light of the considerations discussed above, I cannot conclude, as I must under the Voting Rights Act, that the state's burden has been sustained in this instance. Accordingly, on behalf of the Attorney General, I must object to the 1992 Assembly redistricting plan for the State of New York, with regard to the manner in which it treats the northern Manhattan area discussed above.

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 Assembly redistricting plan has neither 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. In addition, you may request that the Attorney General reconsider the objection. However, until the objection is withdrawn or a judgment from the District of Columbia Court is obtained, the 1992 redistricting plan for the New York State Assembly continues to be legally unenforceable in the counties covered by Section 5. Clark v. Roemer, 111 S.Ct. 2096 (1992); South Carolina v. United States, 585 F. Supp. 418 (D.D.C. 1984); 28 C.F.R. 51.10 and 51.45.

To enable us to meet our responsibility to enforce the Voting Rights Act, please inform us of the action the State of New York plans to take concerning this matter. In this regard the Department stands ready to review quickly any plan the state might adopt to remedy this objection. If you have any questions, you should call Richard B. Jerome (202-514-8696), an attorney in the Voting Section.

Sincerely,



James P. Turner
Acting Assistant Attorney General
Civil Rights Division