U.S. Department of Justice

Civil Rights Division

Office of the Assistant Attorney General

Washington, D.C. 20035

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G. Oliver Koppell, Esq.
Attorney General
State of New York
Department of Law
Albany, New York 12224

Dear Mr. Koppell:

This refers to voting changes affecting elected supreme court justices enacted by Chapter 440 (1994) which creates one additional position for the supreme court; Chapter 500 (1982) which creates ten additional positions for the supreme court and nineteen additional positions for the court of claims; Chapter 209 (1990) which creates four additional positions for the supreme court and eight additional positions for the court of claims; and the implementation of procedures for designating candidates to particular supreme court positions in 1994, 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 most recent response to our request for additional information only on December 1, 1994.

We have carefully considered the information you have provided, as well as information from other interested persons. The new elected supreme court positions involve the Second judicial district, comprised of Kings County and Richmond County (Brooklyn and Staten Island), and the Twelfth judicial district, comprised of Bronx County. Racial minorities are a majority of the voting age population in both districts, although that majority is diminished to a significant extent in the second

district by the inclusion of heavily white populated Staten Island. Supreme court judges in New York are trial level judges. As a formal matter, they are elected at large by plurality vote within the judicial district for fourteen year terms. As a practical matter, as your submission notes, judges in the districts at issue are selected in party nominating conventions, and the election itself has become, in effect, a mere ratification of the action of the Democratic Party convention. Your submission also notes that the convention selection process in the past has been dominated by a relative handful of political leaders.

This system long has been under attack in the state as racially discriminatory. Indeed, a state task force appointed to study the issue in 1991 concluded: "[W]e can state with confidence that, as currently structured, the system for the election of Supreme Court Justices of New York State cannot pass muster under the Voting Rights Act." The task force went on to state: "We also believe that there is a very substantial question whether the de facto requirement of a political entree that taints the current system is not also a fatal flaw under the Voting Rights Act."

The legislature was aware of the racially discriminatory nature of the election system well before the task force report. Numerous alternative judicial selection systems were placed before the legislature which would have provided for more equal access to the political process for minority voters. None was adopted. In 1994, however, the state chose to adopt a new judgeship for the Bronx under the same system found to be racially discriminatory by the task force.

At the same time, the state has created and maintained the 14 unprecleared judgeships in the Brooklyn-Staten Island district under an election system which clearly has produced disproportionate results disfavoring minority voters. To the extent that they can be differentiated, it appears that of the 10 positions created in 1982, not one is held by a minority judge. In the context of the apparent pattern of racially polarized voting which characterizes elections in the covered counties in New York City, we cannot say that like results would flow from a racially fair election system.

The slating process used to nominate judicial candidates to the supreme court prevents minority voters from having an equal opportunity to elect candidates of their choice. The decision on who will be selected judge is made in a closed process, substantially outside the reach of voters, and dominated by factors, such as long party service, which are seldom significant considerations for the voters themselves in determining which persons they believe should serve as judges. This selection process acts to bar minority voters from real participation in

the election process. The closed system particularly burdens the choices of minority voters, who have less access to the process than do white voters. The lack of minority access is cemented by the long judicial terms of office and the ingrained tradition of renominating incumbent judges, most of whom are white. Minority voters will not have an equal opportunity to elect candidates of their choice to fill even those seats created in 1982 and 1990 until well into the next century.

In 1994, a new feature was added to the section process -- the designation of particular candidates to particular positions on the court. Such designation appears to have no basis in the law of the State of New York. In this case, the designation appears to have been intended solely as a device to place the minority candidates rather than white candidates at risk, by placing minority candidates in the unprecleared positions.

In addition to these elected judges, Chapters 209 (1990) and 500 (1982) involve the creation of a new class of court of claims judges, including judges to serve in the second and twelfth judicial districts, as well as the first judicial district (Manhattan). These judges (those other than "paragraph a" court of claims judges) are transferred to the supreme court immediately upon appointment. They never sit on the court of claims; they only sit on the supreme court. Indeed, it appears clear that these court of claims positions were added for the limited and express purpose of creating new positions on the supreme court. The positions are in fact not court of claims positions but supreme court positions. This result marks a significant change affecting voting. Supreme court judges are required under the state constitution to be elected. The new positions are appointed by the Governor with the approval of the Senate. The state thus effectively has changed the method of selecting a class of supreme court judges from election to appointment.

Under Section 5 of the Voting Rights Act, the submitting authority has the burden of showing that the submitted changes have neither a discriminatory purpose nor a discriminatory effect. See Georgia v. United States, 411 U.S. 526 (1973); see also the Procedures for the Administration of Section 5 (28 C.F.R. 51.52). The existence of some legitimate, nondiscriminatory reasons for the voting change does not satisfy this burden. See Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 265-66 (1977); City of Rome v. United States, 446 U.S. 156, 172 (1980); Busbee v. Smith, 549 F. Supp. 494, 516-17 (D.D.C. 1982), aff'd, 459 U.S. 1166 (1983). In addition, the Section 5 Procedures (28 C.F.R. 51.55(b)(2)) require that preclearance be withheld where a change presents a clear violation of the results standard incorporated in Section 2 of the Voting Rights Act, 42 U.S.C. 1973.

In light of the considerations discussed above, I cannot conclude, as I must under the Voting Rights Act, that your burden has been sustained in this instance. Therefore, on behalf of the Attorney General, I must object to Chapters 440 (1994), 209 (1990), and 500 (1982) insofar as they relate to the addition of supreme court and court of claims positions in the covered counties, and to the implementation of procedures for designating candidates to particular supreme court positions in 1994.

We note that under Section 5 you already have sought a declaratory judgment from the United States District Court for the District of Columbia that certain of these changes do not have the purpose and will not have the effect of denying or abridging the right to vote on account of race, color, or membership in a language minority group. You also 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 additional supreme court and court of claims positions, along with the designation of candidates to particular positions, continue to be legally unenforceable. Clark v. Roemer, 500 U.S. 646 (1991); 28 C.F.R. 51.10 and 51.45.

While these changes are legally unenforceable, we remain most sensitive to the paramount interest of the State and the United States in avoiding any disruption of the administration of justice in New York. It is well settled that the Attorney General's objection does nothing to affect the judicial powers of judges already serving or affect the validity of any of their rulings in any way. See Brooks v. State Board of Elections, 775 F. Supp. 1470, 1482 (S.D. Ga. 1989), aff'd mem. 498 U.S. 916 (1990). As to both these judges and the judges whose seating was enjoined pursuant to our joint submission to the District of Columbia Court, we hope to work with you in a cooperative manner to develop a mechanism for the resolution of their status promptly. We invite your proposals and are prepared to meet with you at any time to that end.

You also have placed other related matters before us for Section 5 review. These include those portions of Chapter 500 (1982) which create eleven additional positions for the civil court of the City of New York, nine additional positions for the criminal court of the City of New York, and three additional positions for the family court of the City of New York; Chapter 209 (1991) which creates two additional positions for the family court of the City of New York; Chapters 471 (1970), 365 (1971), 288 (1972), 107 (1973), 458 (1974), 298 (1975), 277 (1976), 215 (1977) and 285 (1978), which renew yearly the method of election for filling vacancies on the civil court of the City of New York;

and Chapter 511 (1993), Sections 7 and 8, which set forth the number of judges, the method of filling vacancies and candidate qualifications for the civil court of the City of New York.

With regard to the eleven additional positions for the civil court of the City of New York, you have informed us that you do not intend to implement these judgeships at this time because you have not yet determined how they will be elected. With regard to the remaining changes affecting the civil, criminal, and family courts of the City of New York, we note that, based on the materials you have provided and your statement that these provisions do not involve any changes that affect voting, the changes do not appear to be subject to Section 5 preclearance.

Accordingly, no determination by the Attorney General regarding the civil, criminal or family courts of the City of New York is required or appropriate at this time. See the Procedures for the Administration of Section 5 (28 C.F.R. 51.2, 51.12, 51.13, and 51.35). In the event that further information respecting these provisions becomes available that reveals changes affecting voting, we will advise you so that preclearance of the changes can be sought.

To enable this Department to meet its responsibility to enforce the Voting Rights Act, please inform us of the action the State of New York plans to take concerning this matter. We are willing to meet with you to discuss the State's options for overcoming the objection. If you have any questions, you should call John K. Tanner, Acting Chief of the Voting Section, at (202) 307-3143.

Sincerely,

Loretta King

Loretta King
Acting Assistant Attorney General
Civil Rights Division