U.S. Department of Justice

Civil Rights Division

Office of the Assistant Attorney General

Washington, D.C. 20035

May 2, 1994

The Honorable Robert J. Sheheen
Speaker of the House
South Carolina House of Representatives
P. O. Box 11867
Columbia, South Carolina 29211

Dear Mr. Speaker:

This refers to Act No. R.287 (1994), which provides for the 1994 redistricting plan for the House of Representatives of the State of South Carolina, 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 March 24, 1994; supplemental information was received on March 30 and April 14, 21, and 28, 1994.

We have carefully considered the information you have provided, as well as Census data and information and comments from other interested persons. The Voting Rights Act requires that the submitting authority demonstrate that the proposed change neither has a discriminatory purpose nor a discriminatory effect. 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). In addition, preclearance may not be obtained if implementation of the change would clearly violate Section 2 of the Act, 42 U.S.C. 1973. 28 C.F.R. 51.55. In the case of a statewide redistricting, Section 5 requires us not only to review the overall impact of the plan on minority voters, but also to understand the reasons for and the impact of each of the legislative choices that were made in adopting the particular plan.

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 legislature 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 communities or the needless packing of minority constituents into a minimal number of districts in which they can expect to elect candidates of their choice. 28 C.F.R. 51.59; see also Voinovich v. Quilter, 113 S.Ct. 1149, 1155 (1993). 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 racially proportional results.

According to the 1990 Census, the State of South Carolina has a total population of nearly 3.5 million. The state's black residents make up 29.8 percent of the 1990 total population and 26.9 percent of the voting age population, and currently represent about 24.4 percent of the state's registered voters. The black population is concentrated in the state's largest cities and also is concentrated in a generally rural swath of population that runs parallel to the coast, from the northern to the southern borders of the state, extending from coastal areas to over 100 miles inland.

The state House of Representatives has 124 members elected from single-member districts. State House members are elected to two-year concurrent terms in partisan elections with a majority vote requirement in the primary.

Our review of the state's recent election history, including in particular voting patterns among black and white voters in the 1992 legislative and congressional elections, and in addition our review of Voting Rights Act litigation and Section 5 submissions involving redistrictings and election method changes in South Carolina, indicate that legislative elections throughout the state are characterized by a pattern of racially polarized voting. Further, it appears that black candidates generally are the candidates of choice of black voters in legislative elections.

There are 18 black state representatives at this time. All were elected in districts where blacks constitute a majority of the voting age population (excluding military residents, who generally do not participate in local elections), and 14 of the 18 were elected in districts where blacks constitute over 55 percent of the voting age population. Moreover, all but one were

elected in districts that have a black registration majority (the one exception is a district that has a 49 percent black registration) and 13 were elected in districts where blacks constitute at least 55 percent of the registered voters.

Black persons were not elected in 1992 in ten of the black population majority districts in the existing plan, seven of which have black voting age population majorities. In contrast to the districts where black candidates were elected, only one of these ten districts has a black voting age population majority of greater than 55 percent and, while six of the ten districts have a black registration majority, in none of these districts do blacks constitute more than 55 percent of the registered voters. These districts also generally are located in the rural areas of the state where it appears that the present day effects of the state's history of discrimination are more substantial, and thus where a higher black voting age population majority may be necessary to allow black voters an opportunity to elect a candidate of their choice.

The existing House plan was adopted by the local United States district court in May 1992 after the state was unable to adopt a plan through the political process. Burton v. Sheheen, 793 F. Supp. 1329 (D. S.C. 1992) (three-judge court), vacated and remanded, 113 S.Ct. 2954 (1993). Because the plan was court-ordered, and did not reflect the policy choices of the state, it was not subject to Section 5 review. McDaniel v. Sanchez, 452 U.S. 130 (1981); 28 C.F.R. 51.18.

The Supreme Court vacated and remanded the district court's order "for further consideration in light of the position presented by the Solicitor General in his brief for the United States." 113 S.Ct. at 2954. The Solicitor General's brief explained that the district court had mistakenly regarded the redistricting dispute as arising under Section 5 of the Voting Rights Act, which led it to use the Section 5 retrogression standard as the test for whether its plan for the state House did not discriminate on the basis of race. Beer v. United States, 425 U.S. 130 (1976). Instead, plaintiffs' complaints alleged that the 1982 House plan was unconstitutionally malapportioned and that it denied black voters an equal opportunity to elect candidates of their choice, in violation of Section 2 of the Voting Rights Act.

In these circumstances, "the [district] court's primary task was to fashion a [plan] that would not itself violate the legal standards that the plaintiffs had sued to enforce." Brief for the United States as Amicus Curiae (in the Supreme Court), at 10. The district court did commence a Section 2 analysis of its plan, but did so in a limited fashion. As set forth in the Solicitor General's brief, this analysis was flawed for two principal

reasons: the court did not conduct a sufficient analysis of the extent to which voting is racially polarized and it erred in its analysis as to whether its plan should have included additional compact and contiguous districts with black population majorities. In the latter regard, the court did not conduct an adequate inquiry before concluding that black voters would have an opportunity to elect a candidate of their choice in any district having a black voting age population majority (plaintiffs argued that a somewhat higher percentage is necessary). The court also placed great weight on its determination that there is a state policy favoring districts that do not cross county lines; however, the Solicitor General's brief questioned the evidentiary basis for this determination and noted that deference to state policy has only a limited role in a Section 2 analysis. In this regard, the districts in the 1982 House plan divided 42 of the state's 46 counties.

It was against this backdrop that the General Assembly undertook to adopt a House redistricting plan this year. This task essentially was delegated to the House; after the House passed the submitted plan, the Senate adopted it without any substantive review (as a matter of legislative courtesy) and the governor allowed the plan to become law without his signature. In the House, it was decided that the starting point for adopting a new plan would be the plan adopted by the district court. Given the Supreme Court's decision to vacate the district court's order adopting that plan and remand for further Section 2 analysis, it was incumbent on the House (once it decided to rely on the court-ordered plan) to undertake a reasoned inquiry into whether that plan provides black residents of the state with the equal electoral opportunity mandated by the Voting Rights Act.

Our review indicates, however, that the House gave little or no consideration to Section 2 of the Voting Rights Act in formulating the submitted plan, and also did not identify any state redistricting policies that would guide its decisionmaking process. Instead, incumbency protection drove the process as the existing plan was altered only if all the affected representatives agreed. Thus, it was preordained that no change would be made that would increase the number of districts in which black voters would have the opportunity to elect their preferred candidates. Alternative plans that sought to make such changes were voted down with little debate.

The overall number of black majority districts in the existing and proposed plans in total population, voting age population, and registered voters (excluding military populations) may be summarized as follows:

Plan	Total Pop.	VAP	Reg. Voters
Existing	28	25	23
Proposed	27	22	Not available

With this background in mind, our review indicates that there are a number of specific areas of the state where the state's concern for incumbency protection, and disregard for black electoral opportunity, yielded districting configurations that do not satisfy the Section 5 purpose and effect test. These areas are as follows.

Charleston County

The proposed plan, in Charleston County, includes three districts with black voting age population majorities (excluding military population), all of which are represented by black legislators (Districts 109, 111, and 116). Proposed Districts 111 and 116 appear to have substantial black registration majorities. District 109, however, appears to have a slight white registration majority and also includes a white population growth area. There is a fourth district (District 110) that has a black population majority but is only 44 percent black in voting age population. Immediately adjacent to Districts 109 and 111 (to the north, south, and southwest) there are significant black concentrations which are fragmented among District 110 and two white-majority districts (Districts 118 and 119). The state has offered no adequate explanation for this fragmentation which, if cured, would result in the creation of four districts in the county with black voting age population and registration majorities in which black voters would have a realistic electoral opportunity.

Richland County

In Richland County, the state similarly has unnecessarily fragmented black population among white-majority districts, again apparently to protect white incumbents. The county includes four black voting age population majority districts that have elected black representatives. Three of these districts (Districts 77, 73, and 74) are contiguous, aligned on a north-south axis, but to their west and south black population is fragmented into two white-majority districts (Districts 72 and 75). It also appears that, to some extent, black population has been unnecessarily packed in Districts 77, 73, and 74. By remedying this fragmentation and lessening to some extent the black concentrations in these three districts, a fifth black majority district may be drawn with a black voting age population percentage greater than 55 percent.

Fairfield and Chester Counties

Fairfield and Chester Counties are located immediately to the north of Richland County. Proposed District 41, which includes all of Fairfield County and reaches north to include a portion of Chester County and the City of Chester, has a bare black voting age population majority (51 percent) and appears

to be majority white in voter registration. By combining Fairfield County (54 percent black in voting age population) with the City of Chester's black population, the state has created a configuration that has the potential to yield a district with a significant black voting age population majority in this area of the state. However, the black population percentage in District 41 is minimized by drawing the district to the City of Chester through the more heavily white south-central and southeastern portions of Chester County rather than through the southwestern portion of the county where black concentrations are located. The state also includes in the district a majority white area on the eastern side of Fairfield County. The state has not offered an adequate explanation for rejecting proposed alternatives which avoid this minimization of black voting strength.

Clarendon, Williamsburg, and Georgetown Counties

These three counties occupy a rural area of the state located along an east-west axis from the coast to Richland County. From west to east, the proposed plan includes Districts 64, 101, 103, and 108 in this area. District 101 (located principally in Williamsburg County) is 60 percent black in voting age population in the existing plan and is increased to 65 percent black in voting age population in the proposed plan. In 1992, the current black representative defeated a white candidate in a close and racially polarized Democratic primary election. Existing Districts 64 and 103, located to the west and east of District 101, have bare black voting age population majorities but these majorities are eliminated in the proposed plan. Finally, District 108 is a white-majority district.

Our analysis indicates that the elimination of the black voting age population majorities in Districts 64 and 103 violates the nonretrogression requirement of Section 5. Beer v. United States, supra. While we understand that the reductions were occasioned by an effort to increase the black percentage in District 101, it appears that this goal could have been achieved without reducing the black percentages in Districts 64 and 103, by making other adjustments in the configurations of the latter districts. In particular, with respect to District 103, the proposed plan places a significant concentration of black population -- located in the City of Georgetown -- just outside the district on the border with District 108. The state has not explained why it excluded the black population in the City of Georgetown from District 103. Alternatives rejected by the House, which avoided this fragmentation, drew District 103 at above 55 percent black in voting age population.

Allendale, Bamberg, and Barnwell Counties

Allendale County has the highest black percentage among South Carolina counties (63 percent black in voting age

population). While the proposed plan places most of the county in District 91, the black population in the eastern corner of the county is fragmented into District 90, which also involves the division of the towns of Allendale and Fairfax between the two districts. In addition, at the northern end of the two districts, there is a band of black population that runs from west to east which is fragmented between the two districts. As a result of this configuration, neither district has a black voting age population majority although both are over 40 percent black in voting age population. Alternative plans rejected by the legislature retain all of Allendale County in District 91, and also offer the possibility of lessening the fragmentation at the northern end of the districts. Again, the state has not offered an adequate explanation for rejecting these alternatives.

Edgefield, Saluda, and Aiken Counties

To the northwest of District 91 is proposed District 82 (37 percent black in voting age population), which includes all of Edgefield County and a portion of Aiken County to the east. The state drew District 82 to skirt the black concentrations located in the northern portion of the City of Aiken. In addition, by following the county line between Edgefield and Saluda Counties, the district (on its northern side) appears artificially to fragment a black population concentration located on both sides of the county line. An alternative plan rejected by the House would have modified the Aiken County portion of the district to include black population in the City of Aiken and also minimized the fragmentation on the northern border of the district, thus occasioning a district that is over 55 percent black in voting age population. This alternative configuration appears to more fairly reflect black voting strength in this area, and the state has not justified its proposed configuration.

McCormick, Greenwood, and Abbeville Counties

Adjacent to District 91, to the northwest, is proposed District 12 (36 percent black in voting age population). This district includes all of McCormick County, a substantial portion of Greenwood County (including a portion of the City of Greenwood), and also a small portion of Saluda County. Alternative plans rejected by the House demonstrated that an additional district with a black voting age population majority over 55 percent may be drawn in this area of the state. This apparently would involve extending District 12 into Abbeville County to include black populations in the towns of Abbeville and Calhoun Falls, removing rural areas in Greenwood and Saluda Counties, while retaining the black population in the City of

Greenwood. The state has not provided an adequate explanation of the reasons for adopting its proposed configuration, and thus we are unable to conclude that the state has met its Section 5 burden in this portion of the plan either.

Colleton, Beaufort, Jasper, and Hampton Counties

This four-county area occupies the southern tip of the state below the City of Charleston. In the existing and proposed plans, this area includes five whole districts. In the existing plan, two of the districts (Districts 120 and 122) have black voting age population majorities (excluding military population). District 122, which is 53 percent black in registration, includes a large development projected to be occupied primarily by white population. We have been advised that to compensate for this latter circumstance, the proposed plan increases the black percentage in District 122 by transferring black population from District 120, thus making District 120 a white-majority district.

As in the Clarendon/Williamsburg/Georgetown area, however, our analysis indicates that the goal of increasing the black percentage in District 122 could have been achieved without occasioning a retrogression in black voting strength which occurs by eliminating from this area a second district with a black voting age population majority. Specifically, it appears that there are significant black concentrations located roughly along the eastern side of this area in Colleton County and in the Cities of Beaufort and Port Royal in Beaufort County. The proposed plan appears to fragment unnecessarily this population among Districts 120, 121, 66, and 124.

Marlboro and Dillon Counties

In the northeastern part of the state, the proposed plan draws District 54, which includes almost all of Marlboro County, and District 55, which includes almost all of Dillon County. Each district has a substantial black minority population (46 percent and 37 percent black in voting age population, respectively). Significant black concentrations are located in the largest town of each county, Bennettsville in Marlboro and Dillon in Dillon County. An alternative plan rejected by the House demonstrated that a compact district with a black voting age population majority may be configured in this area (by linking the Cities of Bennettsville and Dillon). The state has not provided an adequate explanation for its proposed configuration and thus we are unable to conclude that the state has met its Section 5 burden.

In sum, our analysis reveals that the redistricting process was designed to ensure incumbency protection, not compliance with the Voting Rights Act. Without analyzing the Voting Rights Act concerns that the Supreme Court directed should be considered

before the 1992 redistricting plan could be used again, the House opted for a least-change approach that limited revisions only to those that each district's incumbent would accept. The state has not advanced state policy considerations served by the proposed plan other than incumbency protection and the ease of administering a plan essentially the same as the 1992 plan.

The state, fully aware of alternative redistricting configurations that created additional black-majority districts, rejected them without considering them seriously. The proposed plan reduces from 25 to 22 the number of districts with black majorities in voting age population (excluding military populations) compared to the 1992 plan and fragments and packs black population concentrations to avoid drawing additional black-majority districts or enhancing the existing black majorities. Indeed, in the areas of the state identified above, there is the potential to draw nine additional districts with black majorities in voting age population. Overall, the state has failed to justify its redistricting plan on legitimate, nonracial grounds.

Accordingly, 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 with regard to the redistricting here under review. Therefore, on behalf of the Attorney General, I must object to the 1994 redistricting plan for the state House of Representatives because of the concerns relating to the proposed configurations for the areas identified above.

Of course, as provided by 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 1994 House redistricting plan has neither the purpose nor will have the effect of denying or abridging the right to vote on account of race or color. 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 1994 redistricting plan for the state House of Representatives continues to be legally unenforceable. Clark v. Roemer, 500 U.S. 646 (1991); 28 C.F.R. 51.10 and 51.45. In this regard, you should be aware that the opening of candidate qualifying pursuant to the 1994 plan would constitute a prohibited implementation of this plan. South Carolina v. United States, 585 F. Supp. 418 (D.D.C. 1984); Busbee v. Smith, 549 F. Supp. 494, 497 n.1 (D.D.C. 1982).

We understand that the current schedule calls for candidate qualifying to begin on June 1, 1994, for a primary election on August 9, 1994. We believe that sufficient time remains for the state to make the necessary adjustments to the submitted plan and

to obtain Section 5 preclearance for the plan so that the election may proceed on schedule under a plan that meets the requirements of federal law. Should the state decide to seek to adopt a new plan, our staff remains available to discuss further the nature of our concerns with the submitted plan; if a new plan is adopted and administrative review is sought, we are prepared to respond on an expedited basis.

To enable us to meet our responsibility to enforce the Voting Rights Act, please inform us of the action the State of South Carolina plans to take concerning this matter. If you have any questions, you should call Mark A. Posner, Special Section 5 Counsel in the Voting Section at (202) 307-1388.

Sincerely,

Deval L. Patrick
Assistant Attorney General
Civil Rights Division