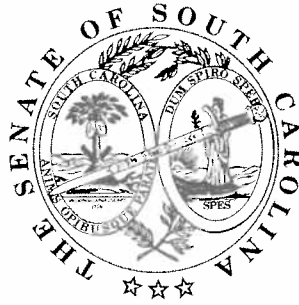


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August 25, 2011

Via Email (vot1973c@usdoj.gov) and Overnight Delivery

Chief, Voting Section
Civil Rights Division
Room 7254 - NWB
Department of Justice
1800 G St., N.W.
Washington, DC 20006

Re: COMMENT UNDER SECTION 5
2011-2495 South Carolina Voter ID Act 27 of 2011

Dear Mr. Herren,

Immediately following the Inauguration of President Barack Obama in January 2009, the Republican leadership in South Carolina decided to push for new restrictions on in-person voting by properly registered voters.¹ The 2008 general election was historic because it was the first election in which African-American voters in South Carolina voted in greater proportion than white voters.² The 2008 general election also had long lines for in-person voting in South Carolina.³

¹ Compare 2008 Republican legislative priorities, <http://www.schousegop.com/pages/11> (no Photo ID mentioned), with the initial introduction of a Voter ID bill and the Republican priorities after the 2008 general election, http://www.scstatehouse.gov/cgi-bin/web_bh10.exe?bill1=3418&session=118 (H.3418 introduced for the first time on Feb. 3, 2009) & <http://www.schousegop.com/pages/20> (Photo ID passed the House).

² Turnout by race as a percentage of registered voters by race shows that the 2008 general election is the only recent statewide turnout of a greater proportion (voters by race divided by registered voters by race) of African-American voters in South Carolina than white voters. Compare http://www.scvotes.org/files/ElectionReports/Election_Report_2008.pdf at 238 (White voters as a percentage of white registered voters in 2008 general election was 75.35%, and African-American voters as a percentage of African-American registered voters was 81.83%) with http://www.scvotes.org/files/ElectionReports/Election_Report_2004.pdf 41 (White voters as a percentage of white registered voters in 2004 general election was 72.31%, and African-American voters as a percentage of African-American registered voters was 69.35%) and http://www.scvotes.org/files/ElectionReports/Election_Report_2006.pdf 40 (White voters as a percentage of white registered voters in 2006 general election was 48.1%, and African-American voters as a percentage of African-American registered voters was 39.42%). See also

In response to this increased voter participation by African Americans and the well known racially polarized voting in South Carolina,⁴ the overwhelmingly white Republican leadership in the General Assembly⁵ pushed and passed a bill requiring in-person voters not only have to show a “valid and current” photo identification but also have their face compared to the photo every time they vote in person.⁶

The benchmark for in-person voting is a valid form of identification and a comparison of signatures only. The signature comparison can be done using a non-picture identification, such as the voter’s registration card, and the voter’s signature on the poll list.⁷ The new burdens on voters further restricts the acceptable forms of identification and requires one of a very limited number of government-issued forms of photo identification and the comparison of not only the signatures but also the voter’s face to the picture on the photo identification. These burdens, in context and under the circumstances, both have the purpose and will have the effect of abridging the voting rights of racial minorities in South Carolina. These changes unnecessarily burden the fundamental voting rights of minority groups.

The new Voter ID law in South Carolina is the most restrictive photo identification law of any state in the country⁸ because of the highly restricted forms of acceptable identification, the unnecessary additional requirement of every identification being valid and current, the refusal to extend absentee voting to everyone, and the failure to preserve or provide a fail-

http://www.scvotes.org/files/ElectionReports/Election_Report_1997-1998.pdf at 31 (1998 general election).

³ See <http://www.southcarolinaradionetwork.com/2010/02/19/sc-lawmakers-putting-early-voting-under-the-microscope-audio/> (“The historically large turnout of voters for Election Day 2008 resulted in long lines and long delays at many precincts across South Carolina. Before that Election Day, a number of county voter registration offices, especially in the metropolitan areas, were swamped with long lines of persons seeking to take advantage of in-person absentee voting.”). Instead of attempting to ease the burden of long lines and delays for in-person voting with an early voting period, the State’s Republican leaders passed the new Voter ID law, which will make it more difficult and take longer for properly registered electors to vote, without any early voting or other mitigation for properly registered electors.

⁴ *Colleton County v. McConnell*, 201 F. Supp.2d 618, 640-41 (2002) (“The history of racially polarized voting in South Carolina is long and well documented ... Voting in South Carolina continues to be racially polarized to a very high degree, in all regions of the state and in both primary elections and general elections. Statewide, black citizens generally are a highly politically cohesive group and whites engage in significant white-bloc voting. Indeed, this fact is not seriously in dispute.”).

⁵ 2010 S.C. Legislative Manual (showing then-state representative Tim Scott as the only African-American, Republican legislator in South Carolina). There were no African-American Republicans elected to the General Assembly when the new Voter ID law passed.

⁶ S.C. Code Ann. § 7-13-710.

⁷ S.C. Code Ann. § 7-13-710 (“One of the managers shall compare the signature on the poll list with the signature on the voter’s driver’s license, registration notification, or other identification”).

⁸ See NCSL Voter Identification Requirements (<http://www.ncsl.org/default.aspx?tabid=16602>).

safe method of voting for in-person voters to mitigate these new burdens and without requiring the voter to return days later to defend a provisional ballot.

Discriminatory Effect

The highly restrictive photo identification requirements on voting has multiple impacts directed at racial minority voters. First, the South Carolina State Election Commission data shows racial minority voters comprise a disproportionate percentage of those voters lacking state-issued identification. Second, African American, South Carolina's largest racial minority, have a much higher incidence of poverty and lack of access to transportation, which affects their ability to obtain the acceptable forms of identification. Third, African Americans have a much higher likelihood of suspension of their driver's license, which means they are more likely to lose their ability to vote simply because they do not have insurance or fail to pay traffic fines. These are unacceptable burdens on the fundamental right of all properly registered voters to be free from unreasonable burdens on their right to vote. Additionally, the potential use of face-to-photo comparisons and suspensions of driver's licenses for improper voter suppression through challenges to voters is more likely given the voting history in South Carolina than an undocumented and non-existent problem of impersonation of voters during in-person voting.

The Department of Justice produced a Section 5 Recommendation Memorandum dated August 25, 2005 regarding the Georgia Voter ID law and which was made publicly available.⁹ We respectfully reference the Memorandum and incorporate its analyses and reasons for objecting to the more restrictive and burdensome South Carolina Voter ID law.¹⁰ In particular, we would point out South Carolina did not expand absentee voting to anyone who requests an absentee ballot.¹¹ Even no-excuse absentee voting was not sufficient to obviate the retrogressive effect on racial minority voters because, according to national composite data,¹² "blacks are only half as likely as whites to vote by absentee ballot."¹³ Based on this known data, the new Voter ID law in South Carolina targeting only in-person voting may have been pursued with a discriminatory purpose.

⁹ See <http://www.washingtonpost.com/wp-dyn/content/custom/2005/11/16/CU2005111601869.html>.

¹⁰ The one part of the Memorandum we respectfully submit may have been incorrect was Part III.B (Retrogressive purpose), which seemed to over emphasize "there is no direct evidence that ... the specific purpose [was] retrogressing minority voting strength." *Id.* at 38. Of course, circumstantial evidence is almost always necessary to prove an improper motive and should be considered with equal weight.

¹¹ See *id.* at 35.

¹² The submitting authority made no attempt at mitigation, but the State Election Commission says it does not even have this data. See Email from Chris Whitmire of S.C. Election Commission on Aug. 24, 2011 at 9:59 am (revealing the Election Commission does not have turnout numbers or percentages of registered voters who voted by the various methods—mail-in absentee, in-person absentee, and in-person on election day—by race).

¹³ See <http://www.washingtonpost.com/wp-dyn/content/custom/2005/11/16/CU2005111601869.html> at 35.

We would also point out the objection to Submission 1994-2922 discussed on pages 44-45 in the Memorandum. The circumstances here are similar, and, in response to the Attorney General's objection, these changes were subsequently mitigated by an adequate fail-safe affidavit for registered voters and also an expansion of acceptable identifications.¹⁴ In South Carolina, there is no adequate fail-safe for registered voters without photo identification, and there is a highly restrictive group of acceptable identification.

“Valid and Current” Identification Significantly Impacts the Voting Rights of Minorities

South Carolina took its highly restrictive forms of acceptable identification another step too far by requiring any photo identification to be both valid and current. Valid and current photo identification is too fickle and uncertain to protect the fundamental right to vote of a properly registered elector. It is impermissible to condition a properly registered elector's right to vote on paying a traffic ticket, obtaining and maintaining automobile insurance, or paying property taxes.¹⁵ However, the new Voter ID law creates those conditions by implicating the 68 reasons a voter's drivers license may be suspended at any time by the Department of Motor Vehicles or by operation of law. For this one reason, the Attorney General should object to the new Voter ID law.

In a state with the ugly history of burdening and prohibiting voters on the basis of the color of their skin like South Carolina has, this unnecessarily restrictive requirement of a valid and current photo identification appears to have a discriminatory purpose of highlighting an elector's skin color and facial characteristics, rather than preserving minority voting strength protected in the benchmark of a signature comparison for properly registered, in-person voting.

The discriminatory impact on members of a racial minority group is more easily measurable than the discriminatory purpose.¹⁶ When socio-economic factors and age are considered along with

¹⁴ Id. at 45.

¹⁵ See e-mail from Amy Teal-Hornsby of S. C. Department of Motor Vehicles on July 27, 2011 providing attachment entitled “Suspensions.”

¹⁶ The Minority Leader of the South Carolina Senate made these remarks for the record:

This legislation as currently written will have a racially discriminatory impact in the conduct of our future elections. The conference report strips away early voting provisions which had the potential to eliminate long lines at the polls, make voting more accessible for elderly residents and help mitigate some of the negative impacts of the photo identification requirements. The conferees' unwillingness to include early voting affirms the validity of my misgivings about the legislation.

Unfortunately, there are persons and organizations which seek to dilute the vote of minority citizens in our state; this Bill would further that aim. We set out to build on the record turnout in the 2008 election cycle and now we have instead “reacted” to this very positive event in such a manner so as to reverse and/or impede and diminish voter participation.

race, a picture emerges showing that highly restrictive photo identification requirements placed on voters, particularly where the identification must be valid and current, will disproportionately impact minority, poor, and elderly voters. For example, non-white registered voters are more than twice as likely not to have photo identification acceptable under the more restrictive requirements of the new law as a white registered voter.¹⁷

The discriminatory impact increases dramatically with any analysis of the 2010 suspensions of driver's licenses by race. Registered voters with drivers licenses as their photo identification will not be able to vote under the new law for any of the following reasons: if they become physically disqualified to drive, fail to pay property taxes, racing or acquiescing in racing, driving an uninsured motor vehicle, habitual traffic offender, excessive points off your license, delinquent child support, uninsured or failed to self certify, child endangerment, failure to show proof of insurance at the time of stop, dishonored check, driving with unlawful alcohol concentration, operating while out of service, or failure to pay traffic ticket.¹⁸ All these reasons are grounds for suspension of a driver's license, making it no longer valid and current. Many of the 68 reasons for suspension of a driver's license are very good reasons for suspending someone's license, but few, if any, of these reasons justify denying the fundamental right to vote—particularly where the suspension may only be temporary and possibly unknown to the elector. A properly registered elector's right to vote cannot be contingent on financial obligations or a clean driving record.

If suspensions of drivers licenses in South Carolina were proportional to population by race or greater for whites, then no Section 5 objection would be necessary on this basis alone. However, this is not the case. Suspensions of driver's licenses occur much more frequently with members of minority groups than white drivers.¹⁹ In fact, even though African Americans are less than one-third of the total population, there are a greater number of suspensions for non-whites than whites.²⁰ When taking into account the proportions of the population by race, non-whites are multiple times more likely to have a suspended license than a white driver.

Journal of the Senate of South Carolina, May 11, 2011, at 38, "Statement by Senator Land".

¹⁷ Supplemental submission by Jay Smith via email (vot1973c@usdoj.gov) on July 19, 2011 at 9:43 am; attachment email labeled Photo ID Information for DOJ with attachment. VoterRegistrationsVersesDriversLicense.pdf.

¹⁸ See e-mail from Amy Teal-Hornsby of S. C. Department of Motor Vehicles on July 27, 2011 providing attachment titled "Suspensions."

¹⁹ Calendar Year 2010 License Suspensions summary created from Suspensions by Race for Period 01/01/2010-12/31/2010 provided by S.C. Department of Motor Vehicles (Amy Teal-Hornsby) via email on Aug. 19, 2011.

²⁰ See *supra*, Calendar Year 2010 License Suspensions (showing non-white total suspensions of 135,615 or 55.75%). The largest totals for suspensions are driving under suspension, controlled substance violation, cancellation of insurance, and failure to pay traffic tickets—which represent 160,519 of the total 243,242 suspensions, or 66%. In each of these four categories of suspensions, non-white suspensions out number white suspensions.

Therefore, on this basis alone, the Attorney General should object to the Voter ID law in South Carolina because of the known and proven discriminatory impact the requirement of having a valid and current photo identification will have on minority groups in South Carolina. For the discriminatory impact of driver's licenses suspensions to be mitigated, a real fail-safe affidavit, without requiring a provisional ballot, would be required. The recent South Carolina Attorney General opinion²¹ on the "reasonable impediment" mitigation affidavit would not permit voters with suspended licenses from asserting they "suffer" from a reasonable impediment because the reasons for suspension are largely within the control of the voter.

Mitigation is Insufficient

The proponents of the Voter ID law had many examples from other states of how to mitigate the discriminatory effects on racial minority voters. The proponents in South Carolina refused to extend absentee voting to everyone, like Georgia did, and failed to provide a fail-safe method of voting for in-person voters to mitigate the unnecessarily restrictive photo identification requirement and without requiring the voter to return days later to defend a provisional ballot, like Louisiana did.

Registered voters who lack a birth certificate or who have inaccurate or incomplete birth information will have to go to court to obtain the legal document needed for a state DMV-issued identification. The H.3003 conference committee deleted language requiring the Department of Health and Environmental Control, Bureau of Vital Records to provide information verifying birth information of residents to the Department of Motor Vehicles. The deleted language allowed DMV to use the birth data from DHEC to provide a free identification card to those of voting age.²² The provision was removed in the final version of the legislation after DMV officials sent lawmakers a letter stating it could not absorb the cost – estimated at more than \$2 million – being charged by DHEC to access the birth information.²³ Lawmakers knew the cost of

²¹ Supplemental submission by Jay Smith via email (vot1973c@usdoj.gov) on Aug. 16, 2011 at 4:34 am; attachment pdf. The opinion's analysis begins at the top of page 2 with a misleading factual premise that "[l]ike similar such provisions enacted in other states, the South Carolina legislation requires voters to produce a valid and current photo ID" Id. (emphasis added). For example, Georgia requires "proper identification" "valid" or "properly issued". O.C.G.A. §21-2-417; see also Ind. Code § 3-5-2-40.5 (requiring an identification issued by the United States or the State of Indiana that is "not expired; or expired after the date of the most recent general election"). Only a few states require the identification to be current and valid, but none of those states are as restrictive as South Carolina's new law. For example, Ohio requires current and valid photo identification, if a photo identification is being used, but allows identification by utility bill and bank statement also. See NCSL Voter Identification Requirements (<http://www.ncsl.org/default.aspx?tabid=16602>).

²² See Section 4 of 4/6/11 version of H.3003.

²³ See Supplemental submission by Jay Smith via email (vot1973c@usdoj.gov) on Aug. 19, 2011 at 9:49 pm; attached email from Rolf Dolder, IT Director of SCDMV, titled DMV-DHEC link for birth certificates.

the information and agreed to pass along the fee, in effect, imposing a poll tax on voters, a disproportionate number of whom are racial minorities.

The refusal of the proponents of these new restrictions to allow additional forms of identification (like Georgia, which allows any state or federal government picture identification, including valid employee identification from any federal, state, county, municipality, or government agency) shows a discriminatory purpose may accompany the discriminatory effects. Members of law enforcement use their identification to detain and arrest people but the submitting authority refuses to allow less restrictive forms of photo identification without explanation or possible justification. The impact on minority voters is obvious in a state like South Carolina, where the impact of allowing passports but not law enforcement identification directly affects lower income²⁴ and minority voters.²⁵

Proponents may try to point to the affidavit of a reasonable impediment to obtaining a photo identification, but this affidavit requires a provisional ballot and that does not mitigate the burdens on the voters.²⁶ Registered voters with a reasonable impediment to obtaining photo identification must vote provisionally in every election and would be required to return for the hearing after each election to ensure the vote is counted. In addition, this affidavit is not a fail-safe for voting by registered electors if the impediment is not one outside of their control—at least based on the recent South Carolina Attorney General opinion offering his interpretation of the word “suffers” in the new Voter ID law. Therefore, limited absentee voting and the provisional ballot requirement and the restrictions on its availability in South Carolina are inadequate to mitigate the discriminatory impact on racial minority voters.

²⁴ Colleton County v. McConnell, 201 F. Supp.2d 618, 642 & n.20 (2002) (“Evidence of the depressed socio-economic and educational status of blacks in the state which hinders their ability to participate effectively in the political process and to elect representatives of their choice was also presented. In analyzing this same data, which remains the most recent, the Smith court noted that ‘there is a socio-economic gap between the average white citizen and the average black citizen. There is a larger percentage of blacks than whites below the poverty level; the household income of blacks is generally less than that of whites; unemployment is greater among blacks; and the level of formal education among blacks is less.... More blacks than whites are without private means of transportation, more whites than blacks own their own homes. Infant mortality is greater among blacks.’” (internal quotations omitted)).

²⁵ See DOJ Memorandum dated Aug. 25, 2005.

²⁶ See Crawford v. Marion County Election Board, 553 U.S. 181, 216-17 (2008) (Souter, J.) (discussing provisional ballots as mitigation and concluding “this suggests that provisional ballots do not obviate the burdens of getting photo identification”).

Other Relevant Factors—Concerns and Participation by Minority Representatives²⁷

The proponents refused to afford the members of racial minority groups a meaningful opportunity to participate in the decision to require voter identification by repeatedly invoking cloture to limit debate, tabling all amendments proposed by African-American legislators, and not securing a single African-American legislator's vote in passing H.3003.

For example, during the second reading of the first voter ID bill in South Carolina, H.3418 (2009-10) African-American legislators, in the S.C. House of Representatives, proposed 19 amendments, and all were tabled.²⁸ In 16 of the 19 motions to table, all African-American legislators voted against tabling the amendments. None of the African-American legislators voted for or against H.3418 as amended on the second reading, except Republican House member (now Congressman) Tim Scott.²⁹

The second reading in the House was when the entire Legislative Black Caucus walked out of the General Assembly in protest of the passage of the voter ID bill. A news report³⁰ from the time described it this way:

About 30 members of the Legislative Black Caucus and other House Democrats staged the walkout as debate moved into its fourth hour and it became clear the bill would pass.

“You’ve made it clear it’s your way or the highway,” state Rep. David Weeks, chairman of the Legislative Black Caucus, said to House Republicans, moments before the walkout. “There are many of us who will not take ‘your way.’ We will take the highway.”

²⁷ See 28 C.F.R. 51-57.

²⁸ See http://www.scstatehouse.gov/sess118_2009-2010/hj09/20090226.htm.

²⁹ See http://www.scstatehouse.gov/sess118_2009-2010/hj09/20090226.htm. The DOJ Memorandum dated August 25, 2005, *supra*, on page 33 recognized that one African-American legislator voting for a bill does not change the conclusion on the other relevant factors for Section 5 review, where opposition by African-American legislators is overwhelming. In South Carolina, the one African-American legislator voting for the first version of the bill in a prior session does not change the unanimous opposition by the Legislative Black Caucus to the new law, and, in fact, the Republican House member was not the candidate of choice for minority voters. See *Colleton County v. McConnell*, 201 F. Supp.2d 618, 640-41 (2002) (“In South Carolina, voting has been, and still is, polarized by race. This voting pattern is general throughout the state. There is only one exception according to Defendants’ expert, Dr. Ruoff, who has studied the voting history of South Carolina for a number of years. He testified, ‘Whites almost always vote for whites, and blacks almost always vote for blacks unless the candidate is a black Republican and then never.’” (internal quotation omitted)).

³⁰ Gina Smith, “Voter ID wins key approval: House Democrats walk out in protest,” *The State* (Columbia, SC), Feb. 27, 2009 (accessed at <http://www.freerepublic.com/focus/f-news/2195258/posts>).

After Democrats marched out of the House chamber, the bill ... passed 65 to 14.
...

“This is clearly a backlash against (President) Obama,” said state Rep. Chris Hart, D-Richland. In November’s general election, a record 1.9 million S.C. voters cast ballots, including many African-Americans and young voters who overwhelmingly favored Democrat Barack Obama. ...

Weeks and S.C. NAACP president Lonnie Randolph said they will consider legal action if the bill passes the Senate. “It’s analogous to literacy tests, to poll taxes,” said Randolph, who said his father had to interpret portions of the Mississippi Constitution before being allowed to vote decades ago. “We know what this is about.”

On the third reading in the House, none of the African-American legislators, except Tim Scott, voted for the bill. The bill passed anyway and was sent to the Senate.³¹ When the Senate returned the bill with amendments to the House, African-American legislators proposed 25 new amendments. All their amendments were tabled.³²

The second voter ID bill, H.3003 (2011-12) which became the new Voter ID law, did not have any more consideration or participation by African-American legislators—except in a compromise bill passed in the Senate, see *infra*, which was defeated in favor of the House version. Two amendments were proposed by African American legislators on second reading in the House, and both were tabled.³³ The bill passed second reading and was ordered for third reading without a single African-American vote.³⁴

On second reading in the Senate, African-American Senators Ford, Jackson, Malloy, Matthews, Nicholson, Pickney, and John Scott voted for an amendment proposed by Senators Campsen and McConnell which was adopted.³⁵ The amendment was a compromise of voting changes that would have exempted electors age 65 and older living in a hospital or care center from the identification requirements. The amendment also addressed early and absentee voting. All seven of the amendments proposed by African-American senators on second reading were either not adopted or withdrawn.

Although none of the African-American senators voted to pass H.3003, it passed 24-15 and was returned to the House of Representatives with amendments.³⁶ During the House’s rejection of

³¹ See http://www.scstatehouse.gov/sess118_2009-2010/hj09/20090303.htm.

³² See http://www.scstatehouse.gov/sess118_2009-2010/hj10/20100505.htm.

³³ See http://www.scstatehouse.gov/php/votehistory.php?type=BILL&session=119&bill_number=3003.

³⁴ See http://www.scstatehouse.gov/sess119_2011-2012/hj11/20110126.htm#p28.

³⁵ See http://www.scstatehouse.gov/sess119_2011-2012/sj11/20110223.htm#p36.

³⁶ See http://www.scstatehouse.gov/sess119_2011-2012/sj11/20110224.htm#p11.

the Senate's version of H.3003, African-American legislators proposed five amendments, and all were tabled.³⁷ The House then returned H.3003 with amendments. The Senate moved to non-concur with the House amendments, and it was sent to a conference committee that adopted the House version. After adoption of the Conference Report on H.3003, the bill passed the final roll call vote in each chamber without any African-American representatives³⁸ or senators³⁹ voting in favor of the bill.

This procedural and legislative history of the deliberation and passage of the Voter ID law shows the changes may have been made with discriminatory intent, as well as with the obvious discriminatory impact on racial minorities. This is, at least, more circumstantial evidence that has not been addressed or justified by the proponents' enactment of the law or in the submission for Section 5 review.

Publicly Reported Examples

There are hundreds of thousands of South Carolinians affected by this change. Some will overcome the increased burdens but many will not. Here are a few examples that have been publicly reported. In this review, the burden of proof remains on the submitting authority.

California native Delores Freelon said her California birth certificate doesn't have her first name on it. Her mother didn't provide a first name when she was born and missed a deadline to add that to the birth certificate, and now she is unable to get a South Carolina ID. Living on disability checks, Freelon can't afford to spend more than \$700 to petition a court to change her name. It could take up to two years for California to make the change.⁴⁰

Larrie Butler, an 85-year-old Columbia native, said no birth certificate was issued for him when he was born in 1926. Now he can't get a South Carolina drivers license. He said he had one in 1949 when he moved to Maryland, but when he moved back last year, South Carolina wouldn't issue him a license.⁴¹

West Ashley resident Everett Garlington misplaced his driver's license; getting a replacement will cost him more than \$160 - money he said the Department of Motor Vehicles wants because years ago he was late turning in a license plate. Because his missing driver's license is still valid, the DMV won't issue an alternative photo ID to use at the polls.⁴²

³⁷ See http://www.scstatehouse.gov/sess119_2011-2012/hj11/20110406.htm#p36.

³⁸ See http://www.scstatehouse.gov/sess119_2011-2012/hj11/20110426.htm#p38

³⁹ See http://www.scstatehouse.gov/sess119_2011-2012/sj11/20110511.htm#p35.

⁴⁰ See <http://www.thesunnews.com/2011/07/09/2268138/group-targets-voter-id-law.html>.

⁴¹ See <http://www.thesunnews.com/2011/07/09/2268138/group-targets-voter-id-law.html>.

⁴² See <http://www.thesunnews.com/2011/07/19/2285895/sc-voter-id-law-prompts-concern.html>.

Amanda Wolf of Sumter has voted before but doesn't have a state DMV-issued photo ID. She's trying to get valid and current photo identification but ran into problems because she was adopted and didn't know her parents' names. She also has to get copies of her marriage license and divorce decree, which cost money she doesn't have.⁴³

Unregistered Voting Age Population

The potential impact of the new Voter ID law extends beyond the currently registered voters. According to 2010 Census figures, there were 1,113,852 non-white residents of voting age in South Carolina in 2010. The State Election Commission data show there were 797,454 non-white registered voters in South Carolina in November 2010. These numbers show 316,398 non-white, voting age residents are not registered to vote.⁴⁴ The new law requires the State Election Commission "to issue voter registration cards with a photograph of the elector."⁴⁵ Neither the submitting authority nor the State Election Commission have adopted or presented for preclearance rules or regulations for the administration of this provision, and the State is not issuing voter registration cards with photographs of the electors.⁴⁶ Thus, this provision for voter registration cards with photographs of the electors is not properly presented for Section 5 review and should not be precleared at this time.⁴⁷ Without voter registration cards with photographs, the new law should not be precleared either.

Discriminatory Purpose and the Proponent's Inadequate Submission

The State of South Carolina has not submitted proof "the proposed voting change does not deny or abridge the right to vote on account of race."⁴⁸ The submitting authority also has not provided a credible "statement of the anticipated effect of the change on members of racial or language minority groups."⁴⁹ Given the direct and circumstantial evidence of a discriminatory purpose and

⁴³ See <http://www2.wjbf.com/news/2011/mar/29/opponents-say-sc-voter-id-bill-would-cost-you-more-ar-1645616/>.

⁴⁴ See http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?_afpt=table and http://www.scvotes.org/statistics/voter_history.

⁴⁵ See Section 4 of Act 27 (2011), the new Voter ID law (to be codified at S.C. Code Ann. § 7-5-675).

⁴⁶ Rhode Island adopted a two-stage implementation of its new voter ID law. Although Rhode Island is not a covered jurisdiction, it requires less restrictive forms of government-issued photo identifications and allows valid, government-issued identification documents without photographs until 2014. See NCSL Voter Identification Requirements (accessed at <http://www.ncsl.org/default.aspx?tabid=16602>).

⁴⁷ See http://www.justice.gov/crt/about/vot/sec_5/making.php ("The Attorney General will make no determination regarding a voting change which has not been finally adopted. The Attorney General may nevertheless make a substantive determination with regard to a change for which approval by referendum or by a state or federal court or a federal agency is required if the change is not subject to alteration in the final approving action and all other action necessary for approval has been taken. 28 C.F.R. 51.22.").

⁴⁸ http://www.justice.gov/crt/about/vot/sec_5/about.php.

⁴⁹ 28 C.F.R. 51-27(n).

the obvious discriminatory impact on racial minority electors in South Carolina, the Attorney General should object to the South Carolina Voter ID law.⁵⁰

The State bears the burden of proving the new restrictions will not make members of a racial minority group “worse off than they had been before the change with respect to their opportunity to exercise the electoral franchise.”⁵¹ In fact, the Republican leadership that passed the new law refused to attempt any analysis of the discriminatory effect. Only one page of relevant data was circulated during the debates on the Voter ID bill, and it was obtained and circulated by opponents of the legislation. The data circulated show non-white voters are more than twice as likely as white voters not to have a photo ID.⁵² This information should have reinforced the responsibility of the proponents of a restrictive change to voting in a covered state, like South Carolina, to undertake a reliable analysis of the discriminatory impact the new law would have if implemented under the conditions that currently exist for racial minority voters in South Carolina. Nothing was done.⁵³

The State’s submission makes no attempt and provides no factual information concerning the key issue of the Section 5 review:

How does the nation’s most restrictive new Voter ID law not abridge the right to vote on account of race given the highly restrictive forms of identification, the additional requirement of the identification being valid and current, the refusal to extend absentee voting to everyone, and the failure to preserve or provide a fail-safe method of in-person voting by properly registered and qualified voters?

The proponent knew the number of registered voters without valid and current photo identification from the Department of Motor Vehicles is disproportionately non-white and about the disproportionately high levels of poverty and lack of transportation access by non-whites in South Carolina. The proponent should have known suspensions of drivers licenses are disproportionately non-white. The proponents failed to undertake any analysis of the discriminatory impact on racial minority electors in South Carolina, even though they also knew they were passing the most restrictive Voter ID law in the country. The proponent’s refusal to

⁵⁰ 28 C.F.R. 51-52 (“An objection shall be interposed to a submitted change if the Attorney General is unable to determine that the change is free of discriminatory purpose and effect. This includes those situations where the evidence as to the purpose or effect of the change is conflicting and the Attorney General is unable to determine that the change is free of discriminatory purpose and effect.” (emphasis added)).

⁵¹ 28 C.F.R. 51-54(a).

⁵² Supplemental submission by Jay Smith via email (vot1973c@usdoj.gov) on July 19, 2011 at 9:43 am; attachment email labeled Photo ID Information for DOJ with attachment VoterRegistrationsVersesDriversLicense.pdf (attaching one page titled: Registered Voters Without a Driver’s License or Identification Issued by DMV (by Race)).

⁵³ See video recordings of the legislative deliberations and debates, submitted as an attachment to this letter and labeled Voter ID Disc 1, Voter ID Disc 2.

make any efforts to determine and, more importantly, to mitigate the discriminatory impact of the new Voter ID law on racial minorities in South Carolina shows the change may have been with discriminatory intent.

The submitting authority made conclusory statements that fail to meet any standard for proving no discriminatory purpose or impact: “This office is not aware that the changes in the Act affect any minority or language groups adversely.”⁵⁴ Willful ignorance does not satisfy the submitting authority’s burden under Section 5 review.

The letter submitted by the lead sponsor of H.3003,⁵⁵ stating the purposes for which he introduced and pushed these voting changes, does more to prove “securing the vote”⁵⁶ was just a pretext than justifying a change in voting that has a discriminatory impact on racial minorities.⁵⁷ The lead sponsor received the top Republican award for his voter ID efforts⁵⁸ and was described as “a political operative at heart. As the former chairman of the Horry County Republican Party, Clemmons loves the game, the nuts and bolts of campaign life that drives many of us.”⁵⁹ The submitting authority offered no other explanation.

The circumstantial evidence of a discriminatory purpose is strong, beginning with the timing of the introduction of H.3418 all the way through the process to the lead sponsor’s letter trying to rationalize why the new Voter ID law was introduced and pushed. That the proponents attempted to ignore race in discussing and deliberating these changes is a deafening silence and abdication of the proponents’ obligation to avoid discriminatory purpose and effects through policy choices and mitigation. The proponents of the new Voter ID law in South Carolina have failed their obligation and burden under the Voting Rights Act and this Section 5 review. On the separate and independent basis of an inadequate submission, the Attorney General should object to the South Carolina Voter ID law.

Conclusion

⁵⁴ Submission by the State of South Carolina at 3 (signed June 28, 2011). See 28 C.F.R. 51-27(m) & (n).

⁵⁵ The lead sponsor was state representative Alan Clemmons, who submitted a cursory and conclusory letter as the Submitting authority’s “statement of the reasons for the change.” 28 C.F.R. 51-27(m). Representative Clemmons also said, “This bill is now about one thing and one thing only: showing a picture ID.” <http://www.schousegop.com/pressreleases/70>.

⁵⁶ Representative Alan Clemmons said this bill is “all about securing the vote” and that this change will make sure “those committing fraud will be ‘chilled’ out of the system.” <http://sc.statehouseblogs.com/2011/01/26/video-sc-rep-alan-clemmons-discusses-h-3003-voter-id-bill/>.

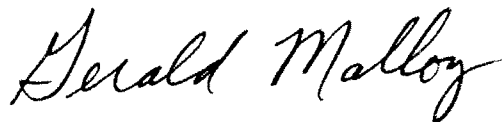
⁵⁷ See 28 C.F.R. 51-57(a) (“[T]he Attorney General will consider ... [t]he extent to which a reasonable and legitimate justification for the change exists.”).

⁵⁸ See <http://electionlawcenter.com/2011/05/11/voter-id-push-in-sc-earns-top-gop-award-for-rep-alan-clemmon.aspx>.

⁵⁹ See <http://processstory.com/2011/07/19/alan-clemmons-should-not-accept-conference-committee-appointment/>.

For the reasons set forth above, the Attorney General should object to the South Carolina Voter ID. The Attorney General should not give the submitting authority a pass for failing to meet its burden of proof. The Attorney General should object to the new Voter ID law because this is the most restrictive photo identification law, as currently enacted, and it unnecessarily restricts the voting rights of racial minority voting groups in South Carolina without adequate mitigation for properly registered and qualified electors. Please accept this submission as “information indicating the possibility of the prohibited discriminatory purpose or effect.”⁶⁰

Most respectfully,

A handwritten signature in cursive script that reads "Gerald Malloy".

Senator Gerald Malloy
S. C. Senate District 29

cc: Arati Jain, Esquire
Members of the S. C. Senate Democratic Caucus

⁶⁰ 28 C.F.R. 51-43.