COMMENT UNDER SECTION 5 OF THE VOTING RIGHTS ACT

May 13, 2011

Chris Herren
Chief, Voting Section
Civil Rights Division
Room 7254 – NWB
U.S. Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530

Re: Section 5 Submission No. 2011-1633 (Submission by the State of Louisiana Regarding Act 1 of the First Extraordinary Session, 2011 Redistricting the Louisiana House of Representatives)

Dear Mr. Herren:

Introduction

The NAACP Legal Defense & Educational Fund, Inc. (LDF), the Louisiana Legislative Black Caucus (the Caucus), the National Urban League (NUL) and the NAACP State Conference of Louisiana (NAACP) urge the Attorney General to object to the pending Section 5 submission of the State of Louisiana's Act 1 of the First Extraordinary Session which provides for a new redistricting plan for the Louisiana State House of Representatives (House Plan). In our assessment, the state has failed to meet its burden of showing that the proposed House Plan was adopted free of discriminatory purpose.

Our assessment of the process leading up to the adoption of Act 1 indicates that the proposed redistricting plan was calculated to minimize Black voting strength in the northwest region of the state. The proposed House Plan was enacted following the protests of a group of white residents located in the community of Southern Hills located within the boundaries of Caddo Parish. Southern Hills residents fought to oppose any configuration of a map that would have incorporated their community within a majority Black district. As one such resident noted in his opposition to the state, "I do not like the idea of being forced to live in a minority area … Keep your hands off."[1] Ultimately, the state yielded to the racially-driven concerns of this group and the resulting redistricting map is one that reflects their discriminatory objectives.

In addition, the proposed map was adopted despite strong and measured concerns presented by a majority of Louisiana Legislative Black Caucus members about the racially-driven goals of Southern Hills residents and about the resulting packed districts in the Caddo Parish area. Moreover, the justifications proffered by the state for opposing a viable alternative plan (the Gallot Amendment) that would have addressed the packing in the Shreveport area are

[1] *See*, *supra*, Ex. B.

unreliable and thus do not help the state satisfy its burden of showing the absence of discriminatory purpose.

Analysis

Assessing a jurisdiction's motivation in enacting voting changes is a complex task requiring a "sensitive inquiry into such circumstantial and direct evidence as may be available."[2] The "important starting point" for assessing discriminatory intent under *Arlington Heights* is "the impact of the official action whether it 'bears more heavily on one race than another.'"[3] Other considerations relevant to the purpose inquiry include, among other things, "the historical background of the [jurisdiction's] decision"; "[t]he specific sequence of events leading up to the challenged decision"; "[d]epartures from the normal procedural sequence"; and "[t]he legislative or administrative history, especially . . . [any] contemporary statements by members of the decisionmaking body."[4] Numerous cases arising under § 5 have employed this standard to help ferret out discriminatory intent in the § 5 process.

Impact of the Official Action

As a result of the discriminatory purpose which informed the current configuration of district lines, the proposed House Plan contains packed districts which unnecessarily over-concentrate Black voters into a small number of districts. The benchmark plan for the Louisiana House of Representatives contains 3 majority Black districts within the Caddo Parish area. According to the state's data, those districts contain Black population percentages that range between 68.35 and 89.01 percent.[5] All 3 of those districts are currently represented by minority voters' candidates of choice. Under an amendment presented by Rep. Richard Gallot, 4 majority Black districts would have been drawn in the Caddo Parish area, which resolves the discriminatory effect resulting from the current packed configuration. Under the Gallot amendment, there would have been 4 majority Black districts with Black population percentages that ranged between 61.74 and 71.71 percent, and that well satisfy the criteria the state claims it generally used to determine the effectiveness of districts around the state.

Historical Background of the Jurisdiction's Decision

The historical background of the decision leading up to adoption of the proposed House Plan makes plain the discriminatory motives that animated the final action of State House representatives. We understand that the proposed change was pushed by residents of Southern Hills who were incensed regarding the possibility of being included within a majority Black

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[2] *Village of Arlington Heights v. Met. Housing Dev. Corp.*, 429 U.S. 252 at 266 (1977). In determining "whether invidious discriminatory purpose was a motivating factor," courts have looked to the Arlington Heights framework, at least in part, to evaluate purpose in the § 5 context. *See also Pleasant Grove v. United States*, 479 U.S. 462, 469-470 (1987) (considering city's history in rejecting annexation of 489 black neighborhood and its departure from normal procedures when calculating costs of annexation alternatives); *Busbee v. Smith*, 549 F.Supp. 494, 516-517 (D.C. 1982); *Port Arthur v. United States*, 517 F.Supp. 987, 1019, *aff'd*, 459 U.S. 159 (1982); *U.J.O. of Williamsburgh v. Carey*, 430 U.S. 144 (1977) (noting that the *Arlington Heights* factors are probative evidence of purposeful discrimination).

[3] *Arlington Heights*, 429 U.S., at 266 (citing *Washington v. Davis*, 426 U.S. 229 (1976)).

[4] Id. at 268.

[5] While an assessment about the retrogressive effect of the redistricting plan must be made on a statewide basis, this Comment Letter focuses on that evidence of discriminatory purpose yielded from decisions made about how to reconfigure district lines in the northwest region of the state.

district. Residents of Southern Hills made their concerns clear to officials within the state legislature by launching a massive letter-writing and e-mail campaign voicing their objections to state legislators. It is our understanding that this campaign was encouraged, in part, by Rep. Seabough – a state legislator who currently represents this community. Ultimately, their racially-driven views prevailed and shaped the decision-making process leading up to adoption of the House Plan.

Numerous written statements were provided by Southern Hills residents indicating staunch opposition to any effort that would have resulted in the inclusion of the community in a majority Black district. For example, Mrs. Lou Eff submitted a statement, dated March 21, 2011, that opposed a plan to create an additional minority district including Southern Hills "in the strongest possible terms." Mrs. Eff expressed concern that the creation of a minority district would "strip [Southern Hills] of its identity." Nearly 80 other Southern Hills residents also submitted statements underscoring similar concerns.[6]

A Shreveport resident opposed to the Gallot Amendment wrote to Representative Jim Tucker, "It seems to me that we have already had half of our districts primarily black [sic] and half primarily white. The black [sic] lawyers have been very outspoken to accomplish what you have done, but we are certainly not in favor of their agenda." See Ex. A. One opponent simply stated "I do not like the idea of being forced to live in a minority area…Keep your hands off." Ex. B. The racially-driven concerns of Southern Hills residents were made very apparent throughout the redistricting process. Ultimately, state legislators adopted the discriminatory views of these individuals in abandoning the Gallot Amendment.

Much of the Southern Hills community's opposition was echoed by Rep. Alan Seabough. During hearings and debate around the Gallot Amendment, Rep. Seabough claimed that his opposition was based on a different understanding of what the law required and his concern that the Amendment "disproportionally dilutes non-minority voting power."[7] However, this explanation does not veil the racially-driven concerns raised by his Southern Hills constituents. Rep. Seabough concluded that "there is no requirement to maximize minority representation."[8]

Departures from Normal Procedure

Interestingly, the state abandoned its own redistricting criteria when assessing the viability of the Gallot Amendment. In its submission, the state places reliance on two factors which it claims were used to determine whether or not a district will prove effective for minority voters. One of those indicators stems from testimony provided by Dr. Theodore Arrington on behalf of DOJ in the context of litigation surrounding the 2002 redistricting plan for the Louisiana State House of Representatives. *La. House of Reps., et al., v. Ashcroft*, No. 02-0062 (D.D.C. Feb. 13, 2003). The state notes that during the course of the 2002 litigation, Dr. Arrington provided a report in which he observed, in part, that African Americans need to constitute approximately 55 percent of a district in order to provide minority voters the ability elect candidates of choice. *See* Submission, Appendix 6, at 4, 6. A second indicator that the

[6] For all letters, *see* http://house.louisiana.gov/h_redistricting2011/default_RedistPublicDocsGeneral2011.htm (last visited May 12, 2011).
[7] Louisiana House of Representatives, Committee on House and Governmental Affairs, Mar. 23, 2011 at 7:47.
[8] *Id*. at 9:11.

state claims it relied upon was a Legal Requirements paper authored by the Clerk of the House, the Secretary of the Senate and a House and Governmental Affairs Staff attorney. That paper observed that under the existing plan, "the lowest minority population or registered voter population which ever elected a Black candidate was a district with a 57% Black registration (60%) Black population." *See* Submission, Appendix 6, at 6.

Notwithstanding the veracity of this latter report or the applicability of Dr. Arrington's 2002 observations to present conditions within Louisiana, the state appears to abandon any faith in these metrics in assessing minority electoral opportunities in the Caddo Parish area. All 4 of the districts contained within the Gallot Amendment well satisfy the two indicators that the state claims it used to determine the effectiveness of districts in its current submission. The Gallot Amendment presented 4 districts with a proposed District 5 containing the lowest Black registration rate of 57 percent and a Black population rate of 61.7 percent.

Moreover, Dr. Blair – the state's own demographer – provided analysis of several elections that supported the viability of all 4 majority minority districts presented in the Gallot Amendment. However, the state indicates that there were concerns with the completeness of the analysis provided by Dr. Blair as compared to the analysis of Dr. Arrington. Curiously, the state now seeks to distance itself from the work of its own demographer by placing reliance upon analysis provided by Dr. Arrington that is more than 9 years old and provides an assessment of elections through 2002 in litigation that did not focus on the Caddo Parish region.

And while the state claims that Speaker Jim Tucker looked at different methods of analysis in conducting a performance assessment of these districts, no reports outlining these various analyses were provided with the submission. Tucker claims that the Gallot Amendment would disenfranchise minority voters because, in his belief, 2011 will be a "quiet" election year with low minority voter turnout.[9] There is no evidence, however, that Tucker considered the potential for low voter turnout with respect to other districts in the state. Moreover, his view does not comport with other information in the submission showing high minority voter turnout in 2008. Regardless, the state's description of how it assessed electoral opportunity departs from how those assessments were made in other parts of the state. The tenuous justifications proffered for rejecting the Gallot Amendment do not mask the real objective which was to place a ceiling on minority electoral opportunity and accommodate the concerns of Southern Hills residents seeking to avoid inclusion in a majority minority district. These are precisely the kind of discriminatory objectives that Congress sought to prohibit through its recent reauthorization of the Section 5 preclearance provision.

Finally, the state also claims that the Gallot Amendment was not workable by suggesting that the current configuration of districts satisfies the "proportionality test" when applied to Caddo Parish. *See* Submission, Appendix 6, at 28. First, there is no requirement of proportionality when looking to determine whether a proposed plan satisfies the Section 5 preclearance provision (or Section 2 for that matter). Second, reference to proportionality in this context is similar to the kind of claims raised by the state in the litigation surrounding its 2002 House Plan. There, leadership in the state legislature, including former Rep. Peppi Bruneau, argued that the dismantling of a majority Black district was necessary to preserve proportional representation of white voters in Orleans Parish. Although this theory of proportional

[9] *Id.* at 1:05:32.

representation, which has no basis in law, was eventually abandoned by the plaintiffs, it was notable that the state selectively applied this theory of representation to white voters alone. The state's efforts to now revive this meritless theory of proportional representation during this redistricting cycle do not save it. In fact, its use of the theory here only underscores the state's deliberate and intentional effort to deprive Black voters of electoral opportunity in the southwest region of the state. Its application of any proportionality test also underscores the fact that the state's justifications for abandoning the Gallot Amendment are pretextual and that the criteria it claims it applied in Caddo Parish were not evenly and broadly applied across the state. Instead, criteria was applied or abandoned as necessary to minimize and limit Black voting strength.

In sum, the state's reasons for disregarding its own demographer's assessment that the Gallot Amendment provided for 4 effective districts, and the state's abandonment of the very indicators that it claims it relies upon in assessing the effectiveness of districts elsewhere in the state, only further substantiate the evidence of the discriminatory purpose underlying the adoption of the plan.

Opposition from the Louisiana Legislative Black Caucus

With few exceptions, virtually every single member of the Louisiana Legislative Black Caucus stood in opposition to the plan which was ultimately adopted. The state observes that Rep. Norton, who represents District 3 in the Caddo Parish, opposed the Gallot Amendment because, she claims, it would have "destroy[ed] the core of [her] district." However, there is no information in the state's submission showing an emphasis on preserving cores of districts evenly and neutrally in other parts of the state. In addition, Norton's desire for a plan that would have provided her the greatest level of incumbency-protection does not neutralize the evidence of discriminatory purpose animating the adoption of the final plan or eliminate the state's obligation to comply with Section 5.

Nonetheless, Norton's claim stands in stark contrast to the objections of all other Caucus members who stood opposed to the House Plan. Those members observed that the districts created by Act 1 do not "maximize" minority representation, but instead jeopardize it. Representative Patricia Smith, speaking on behalf of the Caucus, noted that District 3, a Black majority district in Louisiana with a 56% Black population—far lower than 88% Black population district created by Act 1—was able to elect their candidate of choice in a 2007 election.[10] Rep. Smith testified that the Caucus backed the Gallot Amendment, because it did not pack African American voters into fewer, more highly concentrated districts.

Beyond the Caucus, other members of the legislature expressed concerns about packing. Representative John Bel Edwards, testified that, in his opinion, not adopting the Gallot Amendment exposed the state to liability under the Voting Rights Act. Rep. Edwards, comparing the Act 1 map to the map presented in *LULAC v. Perry*, noted that, without the Gallot Amendment's adoption "you will have packed into three districts a minority population that is sufficient to create four well-drawn, compact, contiguous districts with communities of interest that would be effective in allowing the minorities in those districts to elect the candidate of their choice."[11]

[10] *Id*. at 14:34.
[11] *Id*. at 19:42.

Similar Objections to Redistricting Plans Adopted with Discriminatory Purpose

DOJ's past and present use of the *Arlington Heights* framework to identify those instances in which discriminatory purpose infects a proposed voting change makes clear that Louisiana's proposed redistricting should similarly be objected to under Section 5. Indeed, the actions of the Louisiana State Legislature mirror other instances in which the Justice Department has interposed objections to redistricting plans adopted in the context of discriminatory purpose.

On October 1, 1991, the Justice Department objected to a redistricting plan for the Louisiana State Board of Elementary and Secondary Education (BESE). DOJ noted that the plan did not appear to have a retrogressive effect as the proposed plan maintained the one majority Black district contained within the benchmark plan. However, DOJ found that the state did not meet its burden with respect to showing lack of discriminatory purpose. DOJ found that the state did not meet its burden as the proposed plan departed from neutral redistricting guidelines to minimize the voting strength of a minority groups and utilized a "least change" approach that was designed to preserve existing districts as much as possible. *See* Letter from John R. Dunne, Assistant Attorney Gen., to Angie Rogers LaPlace, Assistant Attorney Gen., Office of Louisiana Secretary of State, Elections Division (Oct. 1, 1991).

Similarly, on September 23, 2002, DOJ interposed an objection to a redistricting plan in the state of Georgia that maintained the same number of majority-African American wards. The objection letter explained that "[t]he proposed plan does maintain four black districts, but implicit in that criterion is an intent to limit black political strength in the city to no more than four districts." (emphasis added). *See* Letter from J. Michael Wiggins, Acting Assistant Attorney Gen., to Al Grieshaber, Jr. Esq., City Attorney, City of Albany, Dougherty Cnty., Ga. (Sept. 23, 2002).

DOJ has also interposed objections in the evidence of a state's failure to consistently apply guidelines and criteria. Most relevant is a July 15, 1991, objection to a redistricting plan for the Louisiana State House of Representatives. The logic underlying that objection was based, in part, on the state's failure to consistently apply its own traditional redistricting criteria. DOJ's objection letter made clear that departures from neutral guidelines were sufficient to support a reasonable inference that the departures are explainable in part by a purpose to minimize the voting strength of a minority group. *See* Letter from John R. Dunne, Assistant Attorney Gen., to the Honorable Jimmy N. Dimos, Speaker of the House of Representatives, Louisiana (July 15, 1991).

On November 17, 1989, DOJ objected to a proposed redistricting plan for Jefferson Parish, Louisiana. DOJ noted that the proposed plan improved a district contained within the benchmark plan. Despite lack of evidence of retrogressive effect, DOJ found evidence that the changes in the plan were motivated by invidious purpose. DOJ noted that officials rejected alternative plans but could not provide non-racial reasons for doing so. While officials claimed that the plan adhered to certain neutral redistricting principles, evidence indicated that the parish freely strayed from these criteria in fashioning other districts. *See* Letter from James P. Turner, Assistant Attorney Gen., to Harry A. Rosenberg, Esq., (Nov. 17, 1989).

Conclusion

For those reasons identified above, we urge the Attorney General to interpose an objection to the House Plan as the state has failed to meet its burden of showing that the proposed plan was adopted free of discriminatory purpose. The discriminatory purpose underlying the adoption of the House Plan represents precisely the kind of conduct that Congress sought to prohibit in amending Section 5 during the 2006 authorization.

Finally, we note the prevailing view that packing has historically had deleterious effects on minority voter representation. Since passage of the Voting Rights Act in 1965, significant strides have been made in minority representation following litigation brought under the Act to challenge discriminatory redistricting plans that unnecessarily pack minority voters. The proposed House Plan contains districts that are packed at stark levels that mirror the district at issue in *Bone Shirt v. Hazeltine*, 336 F.Supp.2d 976 (D.S.D. 2004), where American Indians were packed into a single district with a 90 percent voting age population. There, the court rejected the State's argument that "non-tenuous policies" supported this packing. Here, too, DOJ should reject the justifications presented by the state for the proposed House Plan. The evidence makes plain that the discriminatory objectives of white residents in Southern Hills who protested their possible inclusion in a majority Black district infected the process leading up to adoption of the House Plan.

Should you have any questions regarding the information presented in this Comment Letter, please contact Kristen Clarke at 212-965-2268.

Sincerely,

John Payton, President & Director-Counsel
Kristen Clarke, Co-Director, Political Participation Group
Natasha Korgaonkar, Assistant Counsel
NAACP Legal Defense and Educational Fund, Inc.

Patricia Haynes Smith, Chairwoman
Louisiana Legislative Black Caucus

Marc Morial, President & CEO
National Urban League

Ernest Johnson, President
NAACP State Conference of Louisiana

Enclosures

Exhibit A

O'Brien, Shawn

From: Tucker, Rep. (District Office)
Sent: Thursday, March 24, 2011 7:19 PM
To: O'Brien, Shawn
Subject: FW: Redistricting Caddo Parish

From: BENNY R MIERS [miersb@bellsouth.net]
Sent: Thursday, March 24, 2011 3:24 PM
To: Tucker, Rep. (District Office)
Subject: Redistricting Caddo Parish

We have been informed that there has been a new minority district created for caddo parish eleminating Southern Hills as a majority district. We the citizens of Southern Hills are strictly opposed to this move and we want to encourage you to reconsider this action and return to the present districting make-up.

It seems to me that we already had half of our districts primarily black and half primarily white. The black lawyers have been very outspoken to accomplish what you have done but we are certainly not in favor of their agenda.

Benny R. Miers
8813 St. Clair Dr.
Shreveport, LA 71118

Exhibit B

O'Brien, Shawn

Email 3-21-11
Statement of Ralph Carscadden
House of Reps/Caddo

From: Tucker, Rep. (District Office)
Sent: Monday, March 21, 2011 1:13 PM
To: O'Brien, Shawn
Subject: FW: Southern Hills Shreveport, La

From: Ralph Carscadden [mailto:rdcarscadden@comcast.net]
Sent: Monday, March 21, 2011 1:08 PM
To: Tucker, Rep. (District Office)
Subject: Southern Hills Shreveport, La

I do not like the idea of being forced to live in a minitory area.
I like where I live and right now I am satified with my area and
my repesentative. At the present I do not approve of Ms Norton.
Leave along what it now working. Keep your hands off.

Ralph Carscadden
9442
Shartel Dr
Shreveport, La 71118