MAR 20 1984

Terrell Glenn, Esq.
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Post Office Box 11390
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Dear Mr. Glenn:

This is in reference to R321 which concerns the schedule for the 1984 primary elections for the South Carolina Senate. R321 was submitted to this Department for review pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. 1973c on March 13, 1984, and you and other counsel for the State met with departmental officials on March 14 to discuss the submission. We note that you are submitting the resolution on behalf of the state, even though the primary elections are conducted by political parties; we find such a submission to be appropriate inasmuch as the political parties act as instrumentalities of the State in conducting the primary election. In accordance with your request, we have conducted the Section 5 review of the voting changes occasioned by R321 on an expedited basis pursuant to the Procedures for the Administration of Section 5 (28 C.F.R. 51.32).

Under the terms of the resolution, the state would commence implementation of the reapportionment plan (Act 257) which is the subject of the Section 5 declaratory judgment action in State of South Carolina v. United States, C.A. No. 83-3626 (D.D.C.). Candidates for senate positions would qualify pursuant to the districts of the proposed plan during the period from March 16 through March 30, 1984. The date for the primary election would be postponed from June 12, 1984, until July 24, 1984. Although R321 operates on the assumption that Act 257 will receive Section 5 preclearance from the court, the resolution provides that candidate qualification would reopen if the reapportionment plan does not receive judicial preclearance and a new plan is drawn. The resolution

does not describe the length of the renewed qualification period and, because of the uncertainty of when the court's decision would be entered or when a redrawn plan would be precleared, the resolution is unable to establish a time period for campaigning. As we understand your proposal, the elections for the Senate will be held on July 24 regardless of the date of the court's decision, that is, even if the court's decision was rendered on July 23, 1984, the primary would be conducted on July 24, 1984. The resolution makes no provision for cancelling the election in the event that the court is unable to render a decision prior to July 24, 1984.

We have given careful consideration to the resolution and the information you presented to us at our March 14 meeting. Specifically you asked us to consider the decisions of the District Court for the District of Columbia in Charlton County Board of Education v. United States, 459 F. Supp. 530 (D.D.C. 1978) and Busbee v. Smith, 549 F. Supp. 494 (D.D.C. 1982); you argued that those decisions demonstrate that it is not improper to begin implementation of Act 257 prior to obtaining Section 5 preclearance.

In analyzing the instant submission we believe that the inescapable conclusion is that you are asking us to grant Section 5 preclearance for virtually the same voting changes which are pending in State of South Carolina v. United States; although the date for casting ballots is postponed, all other steps necessary to conduct the election (e.g. candidate qualification, campaigning, publicity, ballot printing) would be carried out under the terms of Act 257 and the great majority of those steps would be completed prior to the earliest date on which we could expect a decision from the district court.

While we are cognizant of the state's desire to hold an election on the earliest possible date, any such election must be conducted in accordance with the terms of the Voting Rights Act. At the time this lawsuit was filed, the state recognized that "under the provisions of Section 5 of the Voting Rights Act, Act 257 cannot be implemented until it has received preclearance ..." and that candidate qualification could not begin under Act 257 unless and until that preclearance had been obtained. (Memorandum in Support of Motion to Expedite Action at pp. 7-8.) We agree with the state's description of the legal standard since "Section 5 itself

enjoined any election utilizing the new boundaries specified in the plan" (Beer v. United States, 374 F. Supp. 357, 362 (D.D.C. 1974)), and thus the state may not implement the plan "in any fashion unless and until [the District] Court issues a declaratory judgment that said [plan] has neither a discriminatory purpose nor effect." Busbee v. Smith, C.A. No. 82-0665 (D.D.C. May 24, 1982), slip op. p. 5.

At our March 14 meeting you argued that the court's decision in Charlton establishes that the conduct of an election under an unprecleared plan does not constitute the type of "implementation" of the plan which is prohibited by the Voting Rights Act. The Charlton decision depends on a unique set of facts, however, facts which are not present here. It is one thing for a court to decline at the eleventh hour to exercise its injunctive powers to stop an election under an unprecleared plan where the parties to be enjoined are not properly before the court. It is quite another for the Attorney General to preclear some feature of a proposed plan that would allow implementation to begin while the court is still considering the plan as a whole under Section 5. We cannot read Charlton as permitting the sort of piecemeal preclearance process you have suggested. Rather, we regard the Voting Rights Act as establishing a legal bar to commencement of any part of the election process under Act 257 prior to the time that it takes effect -- and Act 257 cannot, as a matter of law, take effect until it receives Section 5 preclearance.

There are, of course, good and sufficient practical reasons why Congress imposed such a requirement on covered jurisdictions subject to the Voting Rights Act. If, as you submit, we were to allow candidate qualification to proceed under an unprecleared plan -- especially one, as here, that the Attorney General maintains should not be precleared -- those interested in seeking office would be required to expend considerable time, energy and money campaigning in a district that may never gain approval. This needless burden, along with inevitable voter confusion if Senate elections are ultimately required to go forward under a different districting plan, counsel against the kind of premature qualification activity you urge. Clearly, it is measurably less disruptive of the electoral process to await the court's decision on preclearance of Act 257, and permit candidate qualifying to commence only after final approval of a plan (whether it be Act 257 or some alternative) has been obtained.

Accordingly, on behalf of the Attorney General, I must interpose a Section 5 objection to the election schedule established by R321. Although I feel compelled to enter this Section 5 objection at this time, I emphasize that we stand ready to review promptly a schedule for the conduct of elections as soon as a plan is precleared.

Of course, as provided by Section 5 of the Voting Rights Act, you have the right to seek a declaratory judgment from the United States District Court for the District of Columbia that this election schedule has neither the purpose nor will have the effect of denying or abridging the right to vote on account of race, color, or membership in a language minority group. In addition, Section 51.44 of the guidelines permits you to request that the Attorney General reconsider the objection. However, until the objection is withdrawn or the judgment from the District of Columbia Court is obtained, the effect of the objection by the Attorney General is to make the election schedule legally unenforceable. 28 C.F.R. 51.9.

We are aware that the State already has initiated this election schedule by opening candidate qualification on March 16, 1984. Thus, I request that upon receipt of this letter you inform us of the course of action the State of South Carolina plans to take with respect to this matter. If you have any questions concerning this letter, please feel free to call Paul F. Hancock (202-724-3095) of the Voting Section.

We are providing a copy of this letter to each member of the three-judge court hearing State of South Carolina v. United States and to counsel of record.

Sincerely,

Wm. Bradford Reynolds
Assistant Attorney General
Civil Rights Division