IN THE UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA

ALFRED BONE SHIRT, et al., Plaintiffs, v. JOYCE HAZELTINE, et al., Defendants.	Civil Action No. 01-3032

SUPPLEMENTAL BRIEF OF THE UNITED STATES AS AMICUS CURIAE

The United States, as amicus curiae, respectfully submits this supplemental brief to address two issues raised by the parties and addressed by the Court during the January 29, 2002 hearing on plaintiffs' motion for a preliminary injunction: (1) whether the Court should consider the potential for discrimination of the redistricting plan before the Court; and (2) the appropriate scope of the Court's remedy.

I. Redistricting Plans, Regardless of the Extent of Boundary Changes Effected, Require Preclearance, and This Court Should Not Make an Independent Inquiry into Their Potential for Discrimination

An issue arose during the hearing regarding the extent to which the Court should consider the "potential for discrimination" of the plan before the Court in the context of

whether a plan with minimal or no boundary changes requires *preclearance*.[1]

This is not an issue of first impression, and several courts have indicated that a proceeding of this kind does not call for an inquiry into whether a change of the type presented has the potential for discrimination. Georgia v. United States, 411 U.S. 526 (1973); Boxx v. Bennett, 50 F. Supp.2d 1219, 1225-26 (M.D. Ala. 1999); id. at 1230 (Thompson, J., concurring) ("The potential-for-discrimination issue thus arose not as an additional prerequisite to coverage under § 5 but rather as a way to identify changes which, though not clearly implicating voting on their face, are nonetheless changes 'with respect to voting' subject to § 5."). Redistricting plans, regardless of the scope and extent of changes they involve, have been determined to have the potential for discrimination and to require preclearance. Georgia v. United States, supra; Texas v. United States, 785 F. Supp. 201 (D.D.C. 1992).

Moreover, even redistricting plans that include no boundary changes have the potential for discrimination within the meaning

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[1] As an initial matter, the State appeared to suggest for the first time at the hearing that the plan before the Court does not effect a change in the covered counties because the only change to District 27 is in the Bennett County portion of the district. It is clear, however, that the voting strength of voters in any part of an election district can be affected by a change in the boundary of the district, regardless of where in the district the change takes place.

of Section 5, and therefore require preclearance. In determining whether a plan is retrogressive, the Attorney General, or the District Court for the District of Columbia, may look not just to the present effects of a redistricting plan, but also to its future effects. Reno v. Bossier Parish Sch. Bd., 528 U.S. 320, 340 (2000). The existence of a retrogressive purpose or future retrogressive effect of a redistricting plan is discernible only by examining the context in which the plan was adopted. Changing demographics and demonstrable trends relating to shifts in populations may indicate that the future effects of a plan identical to the one it replaces are retrogressive.

The question whether the plan adopted by South Dakota has the purpose or effect of retrogressing in the future is, of course, not before this Court. United States v. Board of Sup'rs of Warren County, 429 U.S. 642 (1977).

II. The Court's Remedy Must be of Sufficient Force to Ensure the State's Compliance with the Preclearance Requirements of Section 5

The scope of this Court's remedy should be sufficient to ensure the State's prompt compliance with Section 5's preclearance requirements. Lopez v. Monterey County, 519 U.S. 9, 24 (1996). If the Court enjoins implementation only of District 27, the State would have little motivation to seek preclearance. Instead, the State might seek to utilize old District 27, and implement the 2001 redistricting plan in the remainder of the

state. That would leave the very voters protected by Section 5 with no remedy. Defendants cannot be permitted to evade Section 5's requirements with such ease. NAACP v. Hampton County Election Comm'n, 470 U.S. 166, 178 (1985).

Moreover, as has been represented to the Court, if the State were ordered to seek preclearance and were to submit its plan for administrative review, the Attorney General will make every effort to expedite review of the State's plan. Because the review is limited to the impact of the plan on the voters in Shannon and Todd Counties, it would not be unusual for such a review to be concluded well in advance of the 60-day statutory deadline.

Finally, questions were raised during the hearing regarding the effect of an objection interposed by the Attorney General to a statewide redistricting plan in a partially-covered state. If the Attorney General determines that, as to certain districts, a state had not met the burden placed on it by Section 5, he will interpose an objection to the legislative act effectuating the redistricting. The effect of such an objection is to render the entire plan unenforceable. See, e.g., Determination Letter (dated June 22, 1982), Attached as Exhibit A, (objecting to statewide redistricting plans adopted by the partially-covered State of New York). When the Attorney General objects to a redistricting plan, he alerts the jurisdiction as to which

districts formed the basis for the objection and explains the nature of his concerns with respect to those districts. This is the practice in fully-covered states, as well as in partially-covered states. Until these problems are cured, and the state act is precleared, the act, and the redistricting plan it comprises, remain legally unenforceable.

Respectfully submitted,

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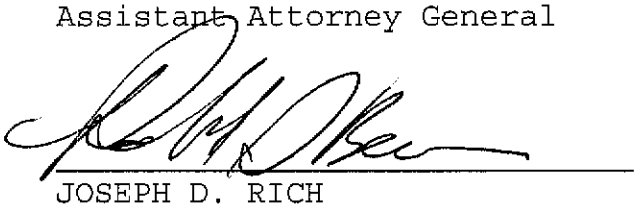
United States Attorney

RALPH F. BOYD, JR.
Assistant Attorney General



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Civil Rights Division

Office of the Assistant Attorney General

Washington, D.C. 20530

June 22, 1982

Thomas P. Zolezzi, Esq.
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99 Washington Avenue
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Dear Mr. Zolezzi:

This is in reference to Chapters 111, 112, 113, 114, 115, 130, 323 and 324 of the Laws of 1982 of the State of New York, which provide for the reapportionment of United States Congressional, New York State Senatorial and Assembly Districts, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. §1973c.

The submission of Chapters 111 through 115 was initiated on May 20, 1982. Additional information concerning the Assembly reapportionment, as well as other pertinent information, was received on May 26, 1982. The supporting demographic data and redistricting maps for the Congressional and Senate plans were received on May 27 and June 3, 1982 respectively. Chapter 130, pertaining to the Senate redistricting outside the three counties covered by the special provisions of the Voting Rights Act, was received on June 1, 1982. Chapters 323 and 324 which amend the Congressional, Senate and Assembly reapportionment plans were received on June 17, 1982. At your request, this submission has been given expedited consideration.

We have given careful consideration to the materials you have submitted, as well as comments and information provided by a number of other interested parties, and the relevant decisions of the federal courts. Under Section 5, the submitting authority must show that a voting change does not have a discriminatory purpose and would not "lead to a retrogression in the position of racial minorities with respect to their effective exercise

of the electoral franchise." Beer v. United States, 425 U.S. 130, 141 (1976); see also, City of Richmond v. United States, 422 U.S. 358 (1975). The application of these principles is considered separately for each of the proposed reapportionment plans.

The Congressional Plan

In considering the Congressional reapportionment plan, we note that the proposed Congressional District 11 is drawn in a meandering and convoluted fashion. Although we understand that the district was developed in recognition of the growing Hispanic population in New York City, the creation of a district out of three separate, non-compact and, by some standards, non-contiguous areas represents a marked departure from commonly accepted districting criteria, see Connor v. Finch, 431 U.S. 407, 413 (1977), and is, in our view, violative of the standards governing application of the Voting Rights Act. Moreover, the extraordinary effort in this instance to enhance the voting strength of the Hispanic population was made at the expense of black persons living in Kings County, whose voting strength has been, as a consequence, diluted.

In this connection, the creation of District 11 required a radical reconfiguration of districts in northern and central Kings County, leading to an overconcentration of black population in District 12 and what appears to be a needless fragmentation of black communities in drawing the lines for District 10. Alternative plans that were before the Legislature provided a redistricting for these areas that would have fairly reflected the voting strength of Hispanic and black residents without resorting to a configuration designed to maximize the electoral position of either one. Indeed, our analysis of racial and ethnic concentrations in Kings County--especially in light of the alternative redistricting plans offered, including one adopted by the New York Senate--suggests that two majority black districts within Kings County would have been created by a logical configuration, one which would more nearly provide "fair representation to the members of those racial groups who are sufficiently numerous and whose residential patterns afford the opportunity of creating districts in which they will be in the majority." United Jewish Organizations v. Carey, 430 U.S. 144, 168 (1977); see also, Connor v. Finch, supra, 431 U.S. at 428 (concurring opinion of Justice Blackmun).

Accordingly, we must conclude that the State has failed to demonstrate that the highly irregular shape of proposed Congressional District 11 would not have the effect of adversely impacting the voting rights of a protected minority.

The Assembly Plan

Overall, the proposed Assembly reapportionment plan for the three covered counties will result in a clear retrogression of minority voting strength within the meaning of Beer v. United States, supra. Our analysis indicates that approximately 43 percent of the current Assembly seats in the three covered counties have combined minority (i.e., black and Hispanic) populations in excess of 65 percent. Under the proposed plan, only about 36 percent of the Assembly seats will have combined minority populations of 65 percent or greater even though the percentage of the affected minorities has increased in the past ten years. We find that this retrogression results primarily from redistricting criteria used by the New York Legislature, namely that minority districts contain minority concentrations which are calculated to insure electability by including no less than 80 percent minority population. Such an approach, which unnecessarily packs large numbers of minorities into a single district, seems more attentive to the re-election of incumbents than to the development of a plan that fairly reflects minority voting strength as it exists. We therefore reject the Legislature's 80 percent standard as one not permitted by the Voting Rights Act.

We would further note that the State Assembly districts in Bronx County appear not to be drawn in accordance with standard reapportionment criteria (e.g., compactness, contiguity and nondilution of minority voting strength). For example, a significant minority population concentrated in the Williamsbridge-Wakefield area of northern Bronx County is divided, thus minimizing the voting strength of that community and frustrating the possible creation of an additional minority Assembly district in that area. Moreover, the districts involved, Assembly Districts 79 and 82, are drawn in a most irregular configuration, which has not been satisfactorily explained by the State.

We have also detected needless fragmentation of other predominantly Hispanic population concentrations, (i.e., University Heights, Union Port and the southernmost tip of Bronx County necessitated by the creation of District 70 as an intercounty district), which may have resulted in the loss of a second minority district in Bronx County. Similarly, there would appear to be a sufficient Hispanic population in northern Kings County to afford the opportunity of creating two minority districts in that area in which Hispanics would have a substantial influence, instead of dispersing those concentrations into four districts (Districts 40, 50, 54 and 55). Our analysis, therefore, does not bear out the State's claim that departures from the normal reapportionment criteria of compactness and contiguity in developing the Assembly reapportionment plan were essential to preserve minority voting strength. Nor are we persuaded that any compelling need exists to create intercounty Districts 62 and 70. Indeed, our analysis indicates that by crossing county lines, the minority population in that area was adversely affected and would have been better served if the counties had remained intact.

The Senate Plan

The proposed Senate Plan is similarly characterized by irregularly drawn districts that appear to be propelled by incumbency concerns at the expense of effective minority representation and other reapportionment criteria. The configuration of Senate Districts 30, 31 and 32 in Bronx County is particularly offensive and needlessly fragments minority concentrations that would not have been separated under normal reapportionment criteria of compactness and contiguity. District 32, for example, has a total of 174 sides, see Gomillion v. Lightfoot, 364 U.S. 339, 340 (1959). In light of the substantial potential for confusion of minority voters and candidates in the electoral process which will likely result from the racially gerrymandered district configurations, we are persuaded that use of more compact, fairly drawn alternatives would better advance the State's objective of recognizing minority voting strength, without this potential adverse racial impact.

In Kings County, we observe that the proposed Senate districts are also noncompact and have the effect of fragmenting existing minority population concentrations, notably East New York and East Flatbush. We have not been provided adequate justification for that result. If compact districts were utilized in the substantial minority population concentrations in central and northern Kings County (i.e., districts which run on an east-west axis), it would appear that the minority community there would have a reasonable opportunity to elect senatorial candidates of their choice in four districts which reflect the voting strength of the existing Hispanics and black populations more accurately than does the proposed plan.

In view of all of these circumstances, we are unable to conclude that the State has satisfied its burden of showing that the proposed Congressional, State Senate and Assembly reapportionment plans, as drawn, in Bronx, Kings and New York Counties do not have the purpose or effect of denying or abridging the right to vote on account of race, color or membership in a language minority group. Accordingly, I must, on behalf of the Attorney General, interpose objections to the reapportionments of the United States Congress, the New York Senate and Assembly insofar as Bronx, Kings and New York Counties are concerned.

Of course, as provided by Secton 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 these changes have neither the the purpose nor will have the effect of denying or abridging the right to vote on account of race, color or membership in a langugage minority group. In addition, the Procedures for the Administration of Section 5 (28 C.F.R. §51.44) permit you to request the Attorney General to reconsider the objections. However, until

the objections are withdrawn or a judgment from the District of Columbia Court is obtained, the effect of the objections by the Attorney General is to make the reapportionments of United States Congressional, New York State Assembly and Senate districts legally unenforceable.

We are, however, mindful of the election calendar for the State of New York, and fully appreciate the desire of the Legislature to resolve this matter expeditiously. Accordingly, this office stands ready to devote the time and resources necessary to assist the Legislature in any effort it undertakes to meet the concerns expressed in this letter. Since litigation concerning the reapportionment of United States Congressional, State Senate and Assembly districts in the State of New York is now pending (Flateau v. Anderson, 82 Civ. 0876 (VLB) (S.D. N.Y.)), I am taking the liberty of providing a copy of this letter to the Court.

Sincerely,

W. Bradford Reynolds

Hon. Bradford Reynolds
Assistant Attorney General
Civil Rights Division

CERTIFICATE OF SERVICE

I hereby certify that a copy of the Supplemental Brief of the United States as Amicus Curiae was served upon each of the following by prepaid Federal Express on this 5th day of February, 2002.

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