

VOTING RIGHTS DISENFRANCHISEMENT AND SUPPRESSION

HON. FREDERICA S. WILSON

OF FLORIDA

IN THE HOUSE OF REPRESENTATIVES

Tuesday, January 31, 2012

Ms. WILSON of Florida. Mr. Speaker, today I rise to voice my strong opposition to the legislative efforts across the nation aimed at suppressing voter turnout. Democracy is not a spectator sport. It is something we should encourage every American to engage in. A vibrant democracy is a healthy democracy, and back home in my district we take that lesson to heart. I come from Miami, one of the most vibrant cities in the world, and I intend to keep it that way. Unfortunately, some of my former colleagues in the state legislature feel differently and are doing their best to ensure that some people don't enjoy the same access to the polls this November as they did last November.

In Florida, we have enacted a series of changes to our voting laws, and I wanted to make this Chamber aware of them. I want you to hear personally, Mr. Speaker, the reasons why I feel that these new laws are not only uncalled for, but a detriment to American democracy. I feel that the letter the NAACP Legal Defense & Educational Fund, the Florida Conference of Black State Legislators, and the Florida State Conference of the NAACP submitted to Chris Herren of the Department of Justice on June 17, 2011 regarding the voting changes in Florida states my feelings clearly and succinctly. I'd like to read that letter for you now, Mr. Speaker:

JUNE 17, 2011.

COMMENT UNDER SECTION 5 OF THE VOTING RIGHTS ACT

Re: Section 5 Submission No. 2011-2187 (Submission by the State of Florida Regarding Omnibus Elections Law Bill, Laws of Florida 2011, Chapter 2011-40)

CHRIS HERREN,

Chief, Voting Section, Civil Rights Division, Room 7254-NWB, U.S. Department of Justice, 950 Pennsylvania Ave., N.W., Washington, DC.

DEAR MR. HERREN:

INTRODUCTION

The NAACP Legal Defense & Educational Fund, Inc. (LDF), the Florida Conference of Black State Legislators, and the Florida State Conference of the NAACP, urge the Attorney General to object to the pending Section 5 submission of the State of Florida's omnibus elections law bill, Laws of Florida, Chapter 2011-40 / HB 1355 (hereinafter "Chapter 2011-40"), which provides for, *inter alia*: (1) a reduction in the number of days for early voting from 14 days to 8 days; (2) a requirement that registered voters who have moved between counties cast provisional ballots rather than regular ballots; and (3) unprecedented restrictions on volunteer third-party voter registration efforts. The state has failed to meet its burden of showing either that Chapter 2011-40 will not have a retrogressive effect, or that its adoption was free of discriminatory purpose.

Each of the measures described above will have a retrogressive effect on minority voting rights. Moreover, Chapter 2011-40 was enacted despite strong and measured concerns presented by a majority of members of the Florida Conference of Black State Legislators about the bill, and the justifications proffered by the State do not help the State

satisfy its burden of showing the absence of discriminatory purpose.

ANALYSIS

I. BACKGROUND

The implementation of all proposed statewide voting changes in Florida is subject to the requirements of Section 5 of the Voting Rights Act, 42 U.S.C. 1973c(a). Because five counties in Florida are covered by Section 5 (Collier, Hardee, Hendry, Hillsborough, and Monroe Counties), statewide voting changes in Florida are subject to Section 5's preclearance requirements. See *Lawyer v. Dep't of Justice*, 521 U.S. 567, 570 (1997) (Section 5 applies to statewide voting changes in Florida); see also *Lopez v. Monterey County*, 525 U.S. 266, 283-84 (1999) (statewide voting changes are subject to Section 5 review where a state is partially covered by Section 5).

Laws of Florida, Chapter 2011-40, the Omnibus Elections Law Bill that is the subject of this Section 5 submission, was signed into law by the Governor of Florida on May 19, 2011, and submitted for review to the Department of Justice pursuant to Section 5 on June 8, 2011. See Section 5 Submission No. 2011-2187.

RETROGRESSIVE EFFECT

Section 5 prohibits voting changes that would result in "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). This Comment Letter focuses on the retrogressive effect of three provisions of Chapter 2011-40: (1) reductions in Florida's early voting period; (2) new provisional ballot requirements for registered voters who move across county lines; and (3) new restrictions with attendant penalties on third party organizations engaged in independent voter registration efforts. As documented below, each of these proposed voting changes will have a retrogressive effect.

A. Early Voting

Section 39 of Chapter 2011-40 ("Section 39") amends Florida Statutes section 101.657(1) to reduce the number of early voting days from 14 to 8, and gives local supervisors of elections discretion over early voting hours, changing the hours that early voting sites must operate from a mandatory 8 hours per day (other than weekends), to a discretionary range of 6 to 12 hours per day. Thus, Section 39 not only essentially eliminates the first week of early voting in Florida, by decreasing the total number of days of early voting from the benchmark practice of 14 early voting days to only 8 days, it also makes possible a reduction in total hours of early voting from a mandatory 96 hours to a minimum of only 48 hours. Moreover, by providing for wide discretion in early voting hours, Section 39, as compared to the benchmark practice, will likely result in substantial inconsistency in early voting hours across the 5 covered counties, risking confusion amongst minority voters in these areas.

Significantly, African Americans make up a disproportionate percentage of early voters in Florida's covered counties. African Americans constitute only 12.15% of the voting age population in the five covered jurisdictions in Florida, but were 18.86% of early voters during the 2008 General Election, with over 41,000 African Americans voting early.

Additionally, Section 39 essentially eliminates the first week of early voting, which will have a clear retrogressive effect on minority voters in the covered counties. During the first week of early voting in the 2008 General Election, African Americans constituted an even higher percentage of early voters, 20.08% in the covered counties.

A total of over 17,000 African Americans voted during the first week of early voting in

the covered counties during the 2008 General Election. We note that the percentages vary from county to county, and, as the table above demonstrates, Hillsborough County featured the highest level of racial disproportionality among voters during the first week of early voting in the 2008 General Election, with African Americans constituting only 14.63% of the voting age population, but 27.70% of early voters.

The figures in our independent analysis are confirmed by at least one news report indicating that, during the 2008 general election, African Americans were 22% of voters during the first week of early voting in Florida statewide, despite being only 13% of the Florida electorate. Overall, nearly 54% of Florida's African-American voters in 2008 voted at early-voting sites. In other words, African Americans were significantly over-represented in the pool of early voters overall, and were much more likely than white voters to take advantage of the first week of early voting. Under Section 39, however, the first week of early voting would be eliminated, and the total number of mandatory early voting hours potentially reduced substantially, with inevitable retrogressive effects.

It is unsurprising that, as a group, African-American voters have taken advantage of the access currently afforded by the existing early voting period in Florida, given that, as this Department has noted, minorities in the Section 5-covered counties in Florida have lower rates of vehicle ownership and therefore benefit from the flexibility afforded by a wider range of early voting days. More recent Census data shows that 17.6% of African Americans in Florida's covered counties live in homes without a vehicle, as compared to only 4.8% of whites. These disparities in access to transportation mean that African American voters are more likely to encounter greater difficulties obtaining transportation on Election Day, such that an elimination of early voting days would substantially curtail existing levels of access to the polls with a resulting retrogressive effect on minority voters.

These concerns were confirmed by Leon Russell of the Florida State Conference of the NAACP. Mr. Russell stated the Florida NAACP's Get-Out-the-Vote efforts will likely "be impacted by" Section 39. He added that the benchmark practice of two weeks of early voting is essential because

[t]wo weeks provided folks with options and allowed them to coordinate voting with other reasons for being in the vicinity of an early voting location. Even though you may provide the same number of hours of operation, those hours don't automatically equate to the same opportunity. With a limited number of locations, time of day and transportation are important.

Joyce Russell, African-American Affairs Liaison for the Hillsborough County Government, echoed these concerns. She stated, "[t]he fact that [the proposed law is] going to shorten [early voting] is going to affect African-American voters" in Hillsborough County, where many African-American voters "work different hours of the day, so they can't always get into the regular voting hours. Many have non-traditional working hours." She noted that in Hillsborough County, "[w]e've seen African-American voter participation soar because of the early voting days." Ms. Russell stated that a longer early voting period "gives you more flexibility" for transportation, explaining that "Black churches have gotten involved" in helping African-American voters get to the polls, and that it is "easier to arrange church buses on a Saturday" than it is on Election Day.

State Senator Arthenia Joyner, whose district encompasses part of Hillsborough County, stated that “[e]arly voting has changed the landscape of voting” by making possible broader participation among minority voters,” and that the proposed reduction of early voting days would have a “dramatic impact” on Black voters in Hillsborough County. She noted that the total number of early voting hours in each County will be left to the discretion of each Supervisor of Elections, who could set the number of early voting hours as low as 48. Senator Joyner also stated that, even if the number of early voting hours remained the same, “compressing into 8 days will not do what we had before—we’re losing an entire weekend, including the Sunday before the election.”

State Representative Darryl Rousson, whose district also encompasses part of Hillsborough County, raised similar concerns, stating that, for his African-American constituents, “[c]utting back the number of [early voting] days erodes access and absolutely chips away at a person’s opportunities to vote.” He explained that despite statements to the contrary, Section 49 does not ensure that the same number of early voting hours will be “available, because local election officials will have discretion” to reduce the number of early voting hours significantly. Representative Rousson added that “Black leaders in my community,” such as pastors, will now have a harder time “gather[ing] up members” for Get-Out-the-Vote efforts. He further stated that, in his opinion, Section 39 is “aimed at minorities—black folks and Hispanics—whose job restrictions do not permit them to vote at normal hours.”

This Department has previously objected to changes to Florida’s absentee voting rules based on data showing that, in at least some covered jurisdictions, “minority voters disproportionately avail themselves of the absentee voting option because they often do not have accessible transportation to the polling place on election day and/or have jobs that do not permit time off to vote.” These same considerations should guide the Department’s Section 5 review here.

To put the significance of early voting into perspective, we note that, in the 2008 General Election, over 2.6 million votes were cast during Florida’s early in-person voting period, accounting for an estimated 31.25% of all ballots cast. Most significantly, the percentage of early voters was even higher in four of the five Section 5-covered counties; specifically, the percentage of voters who voted early in the Section 5-covered counties were as follows: Collier (36.85%); Hardee (43.75%); Henry (44.39%); Hillsborough (28.41%); Monroe (33.50%).

In recent elections, Florida has been beset by “hours-long lines” to vote on Election Day. Nowhere was this more true than in Hillsborough County, the largest Section 5-covered jurisdiction in Florida, where, during the 2008 General Election, “[h]undreds waited for more than four hours to vote,” and “where poll workers failed to give hundreds of voters the second page of their ballot. . . .” At the University of South Florida, which is ranked 14th among undergraduate institutions nationally in awarding degrees to African Americans, “students waited in lines for in excess of three-hours” during the 2008 General Election.” Senator Joyner noted that, in Hillsborough County, “we have long lines at the inner city polls on Election Day,” and that the lines at the polls were “long enough when early voting was 14 days, and they will be even longer now.”

Given these realities, early voting is a crucial means of participation for African-American voters in the covered counties. It

is therefore clear that a reduction in early voting days as proposed in Section 39 would have a retrogressive effect on minority voters.

B. Provisional Ballot Requirements

Section 26 of Chapter 2011-40 (Section 26) amends Florida Statutes section 101.045 to eliminate the right of registered voters in Florida who move from one Florida county to another to change their addresses at the time of voting. Under the benchmark practice, Florida permitted voters who have moved to update their address information in person at the polls at the time of voting by swearing an affirmation as to their new address. In such cases, the voters’ existing registrations are carefully cross-checked in a state database before the voters are given a regular ballot. Section 26 eliminates that right, so that voters who move among Florida’s 67 counties will be forced to cast provisional ballot. According to one estimate based on 2008 election figures, the result will be that nearly 34,000 additional Florida voters will be required to cast provisional ballots.

This law will have a clear retrogressive effect on minority voters in the 5 covered counties. For one, the impacted group of voters will be disproportionately comprised of minorities, who tend to move more frequently than do white Americans. According to a study by the Pew Research Center, 43% of African Americans and 48% of Latinos reported moving during the previous 5 years, as compared to only 27% of whites. African Americans and Latinos similarly report a higher likelihood of moving within the next 5 years: 59% for African Americans and 43% for Latinos, as compared to only 35% for whites.

These numbers are consistent with statistics from the Census Bureau showing that, in Florida’s covered counties, African Americans have lower rates of home ownership (41.62% living in owner-occupied homes) than do non-Hispanic whites (74.31%), and other data showing that non-homeowners move three to four times more frequently than do homeowners. We note that this Department has previously relied on statistics indicating that minorities have lower rates of homeownership in the Section 5-covered counties in arriving at a determination to object to voting changes in Florida.

Furthermore, Florida has the nation’s highest foreclosure rate, with three of the Section 5-covered counties in Florida continuing to experience foreclosure rates that are substantially higher than the national average. In our assessment, there are currently higher relative rates of mobility amongst minorities as compared to whites in the covered jurisdictions in Florida, and this trend is one that is likely to continue in the coming years.

Given these facts, the expected result of Section 26 is that more minority voters will be forced to cast provisional ballots, and at disproportionately higher rates. State Representative Rousson confirmed that this was the likely result for his minority constituents, explaining that, under Section 26, “people who change addresses—which often happens in minority low-income communities—[will] have[] to cast provisional ballots” more frequently. Ms. Russell, of the Hillsborough County Government, also explained that this change will “affect African Americans disproportionately.” She explained that “African Americans, like other minorities, are often working class people . . . and sometimes they have to move.” She noted that Section 26 is particularly problematic because African Americans in Hillsborough County “have higher rates of unemployment and being laid off,” and that,

“[w]ith the economy like it is, now people are having to move because of layoffs, or they lose their home or can’t pay their rent, through no fault of their own, but they are still eligible to vote.”

Thus, we anticipate that, if implemented, Section 26 would force a disproportionate number of African-American voters to a different process for casting a ballot during elections, which will be retrogressive because provisional ballots are counted less frequently than are normal ballots, particularly in the covered jurisdictions. During the 2010 general election, the number of provisional ballots counted statewide was 74.27%, but only 55.64% of provisional ballots were counted in Florida’s Section 5-covered counties, with particularly low numbers in Collier (58.71%) and Hillsborough (54.35%) Counties.

Statewide, the number of provisional ballots counted during the 2008 General Election was even worse, with fewer than half (only 48.59%) of all provisional ballots cast in Florida actually counted. Of particular worry is that there was substantial variation within the State with respect to the treatment of provisional ballots: for instance, during the 2008 General Election, 80% of provisional ballots were counted in majority-white Duval County, whereas only 60% were counted in Section 5-covered Hillsborough County. Numbers were even lower in Section 5-covered Collier County: 36.45%.

This suggests that the rules governing the counting of provisional ballots are not being implemented uniformly. Ms. Russell, of the Hillsborough County Government noted that, in her County, forcing voters to use provisional ballots can become “so confusing that people will get discouraged and stay home,” and that, even if voters do cast provisional ballots, “[w]e know that those provisional ballots are not always counted.” State Senator Joyner also noted that it “takes additional work by a voter” to make sure that a provisional ballot is counted, because voters will often have to return to the local election authority after Election Day in order to provide supporting documentation to ensure that their ballots are counted. In Senator Joyner’s view, this will have a retrogressive impact on minority voters in Hillsborough County, “whose incomes are limited, who don’t have transportation, who’ll have to make an additional trip to verify their information.”

In sum, given the disproportionately high rate of mobility and high foreclosure rate among minority communities within the 5 covered counties, Section 26 would result in more minority voters in the covered counties casting provisional ballots, which would in turn result in fewer ballots cast by minority voters being counted. The retrogressive effect of Section 26 would be particularly pronounced in Collier and Hillsborough Counties.

C. Restrictions on Third Party Volunteer Voter Registration Efforts

Section 4 of Chapter 2011-40 (“Section 4”) amends Florida Statutes section 97.0575 to require that any third party organization engaging in voter registration efforts submit any completed voter registration applications within 48 hours, or face penalties of \$50 per application per day late. Section 4 represents a substantial change from the benchmark practice, which permitted volunteers working for third party organizations engaged in voter registration drives to submit completed voter registration applications up to 10 days after receipt.

The 48 hour time period and the threat of substantial financial sanctions for failure to comply with this new restriction will severely hamper or completely deter voter registration efforts by volunteer third party organizations whose mission is to provide

voter registration opportunities to minority communities. Leon Russell, of the Florida State Conference of the NAACP, stated that Section 4 “would likely discourage participation in voter registration efforts.” Mr. Russell noted that the NAACP’s voter registration events take place in many different locations during various days of the week, but that volunteers from individual NAACP units frequently “may not be able to turn in documents until the unit meets” again, which could be several days after a planned registration event. The fact that these efforts are volunteer-based and uncompensated makes speedier transmittal of the forms especially onerous on the minority communities within the covered jurisdictions, many of which suffer from higher rates of socioeconomic disparities and higher poverty levels. Mr. Russell added, “[t]he threat of fines will also keep people from volunteering.”

Harold Weeks, President of the Collier County branch of the NAACP, which regularly conducts voter registration drives in Collier County, stated, in reference to the fines contemplated by Section 4, that he “wouldn’t want to subject anyone to those kind of consequences,” particularly “young people” who may mistakenly fail to turn paperwork in on time. He added, “[w]e don’t have much money to help pay somebody’s fines.”

Ms. Russell, of the Hillsborough County Government, observed that, in her County, “[t]here are a lot of African Americans, voting age individuals, who are not registered,” but that Section 4 is “going to intimidate a lot of African-American groups that would love to register people as first time voters.” She added,

You want to do your civic duty to register people, and now . . . it’s very difficult to do. . . . Most people will feel like it’s not worth the trouble. It’s really going to hamper African-American Greek organizations (fraternities and sororities) that work on voter registration efforts. . . . It makes it more difficult to do that.

State Senator Joyner also noted that the “48 hour cap will cripple voter registration efforts.” She stated that, “[i]n the Black churches there’s ongoing voter registration,” but under the proposed change, “you have to have someone every day” turn in registration forms, which is an onerous administrative burden on churches serving low-income communities. State Representative Rousson echoed these concerns, stating that “by making it 48 hours to get registration forms in, you’re stifling” voter registration.

This is no trivial matter for minority citizens in Florida, who have substantially lower voter registration rates than average. As of 2008, the U.S. Census Bureau reported that, in Florida, African Americans had a registration rate of 53.6%, Latinos a rate of 47.4%, and Asians a rate of 35.3%, as compared with an overall average registration rate in Florida of 62.4%, and an average for white Floridians of 69.2%. Voter registration drives are a crucial means of addressing these inequalities, as studies show that African-American and Latino voters are more than twice as likely to register in these drives.

The implementation of Section 4 would therefore have the effect of only worsening these registration disparities.

III. DISCRIMINATORY PURPOSE

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.” 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.’” 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.” Numerous cases arising under Section 5 have employed this standard to help ferret out discriminatory intent in the Section 5 process.

As noted above, various features of Chapter 2011-40 will have retrogressive effects on minority voters in the 5 covered counties. These concerns were no secret as Chapter 2011-40 was debated. To the contrary, they were raised often by members of the public. And, without exception, every single member of the Florida Conference of Black State Legislators voted against this legislation.

It is noteworthy that these broad changes to long-standing voting laws—some of which have been in place for decades—are being proposed so recently after the last General Election, when African Americans in Florida turned out and exercised their political power in record numbers. One news report noted that the changes to early voting, and in particular the elimination of early voting on the Sunday before Election Day, “appear[] to be aimed directly at discouraging Florida’s black voters.” State Senator Joyner stated, “we view this as an effort to marginalize the votes of minorities in our County because we had tremendous turnout in recent elections.” State Representative Rousson added, “in my mind, and in the minds of the Black leaders in my community, there is no question about the motives behind this. This is absolutely voter suppression and subversion. The perception is that it is aimed directly at [the Black] population. My constituents feel under siege.”

Chapter 2011-40 was enacted in spite of these and other objections, but we note that the state’s proffered interests in enacting Chapter 2011-40 do not withstand even casual scrutiny. Although the State claims that these voting changes are necessary to prevent voter fraud, there is no evidence of a problem of voter fraud in Florida, as even the Florida Secretary of State has “acknowledged that there is little voter fraud in the state.” Nor is there any indication of how shortening the early voting period, requiring validly registered voters to cast provisional ballots, or imposing heavy fines on voter registration organizations would actually prevent fraud. Moreover, as this Department has acknowledged in response to a previous Section 5 submission by the State of Florida, “procedures used to eliminate voter fraud should not unnecessarily burden the rights of minority voters.” Finally, while legislators also claimed that these changes are necessary for the sake of reducing “cost,” an interest in administrative efficiency has not been recognized as a sufficient justification for voting procedures that otherwise violate the VRA.

CONCLUSION

For the reasons identified above, we urge the Attorney General to interpose an objection to Chapter 2011-40, as the state has failed to meet its burden of showing that it will not have a retrogressive effect, nor that it was adopted free of discriminatory purpose. Indeed, the state’s submission contains no analysis whatsoever concerning the retrogressive effect of Chapter 2011-40 on minority voters, simply asserting without any substantiation that the proposed voting changes “will apply equally to all voters. . . .” That is not, however, sufficient to satisfy the

state’s burden to show the absence of retrogressive effect under Section 5 analysis. See *Beer*, 425 U.S. at 141. At a minimum, the Attorney General should issue a More Information Request (MIR) concerning the various issues raised in this letter as they affect minority voters in the five Florida Counties covered by Section 5.

Should you have any questions regarding the information presented in this Comment Letter, please contact Dale Ho at 212-965-2252.

Sincerely,

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

Florida Conference of Black State Legislators: Representative Mia Jones, Chair.

Florida State Conference NAACP: Adora Nweze, President.

Mr. Speaker, I don’t think I could lay out my objections to the new voting laws in Florida any more clearly. I thank the authors of the letter I just read for their fine work, I only wish it wasn’t necessary. Mr. Speaker, as we progress through this election season I would urge this Chamber and all of my colleagues to remember that every vote is important. Every American should be valued, and any effort to circumvent the right to vote, which some of us in this Chamber have fought so hard for, is a tragedy.

THE NATIONAL COMMISSION FOR INDEPENDENT REDISTRICTING ACT OF 2012

HON. EARL BLUMENAUER

OF OREGON

IN THE HOUSE OF REPRESENTATIVES

Tuesday, January 31, 2012

Mr. BLUMENAUER. Mr. Speaker, over the last few months, we have seen one opinion survey after another showing that Congress is facing record low approval ratings, hovering around 12 percent.

It’s no coincidence that at the same time we’ve seen a surge in political activity from both the Tea Party and the Occupy Wall Street movements, expressing a shared frustration and distrust of Washington.

Underpinning America’s disapproval of Congress is a broken political system, ranging from anachronistic Senate procedure to the recent Citizens United ruling. The budget battles of this Congress extend and amplify this trend.

While there is no silver bullet to “fix” what’s ailing our Government, many experts and the public agree that we need comprehensive redistricting reform as a means to tone down the partisanship and make it possible to enact change. Under the current system, redrawing Congressional district boundaries every ten years continuously sends Congress down the path to partisan gridlock.

It’s the worst kept secret in Washington that our current redistricting process too often gives incumbent politicians more influence over picking their voters, than voters have in picking their politicians.

Both political parties have developed the redistricting process into an art form, punishing opponents and protecting incumbents. Just