ALAN WILSON
ATTORNEY GENERAL

April 15, 2024

The Honorable Brenda S. Griffith
Probate Judge
Probate Court of Saluda County
100 East Church Street, Suite 4
Saluda, SC 29138

Dear Judge Griffith:

Attorney General Alan Wilson has referred your letter to the Opinions section. Your letter questions whether a particular statutory requirement to hold office as a probate judge in S.C. Code § 14-23-1040 is enforceable. The statute states:

> No person is eligible to hold the office of judge of probate who is not at the time of his election a citizen of the United States and of this State, has not attained the age of twenty-one years upon his election, has not become a qualified elector of the county in which he is to be a judge, and has not received a four-year bachelor's degree from an accredited post-secondary institution or if he has received no degree he must have four years' experience as an employee in a probate judge's office in this State.

S.C. Code § 14-23-1040 (2017) (emphasis added). As you point out, the Editor's note accompanying this statute states that the emphasized portion has not been precleared by the Department of Justice. The note reads in full:

> NOTE: The provision of Section 14-23-1040 requiring a four-year college degree or four years' experience as an employee in a probate judge's office in the State in order to serve as a probate judge has **not** been precleared by the U.S. Department of Justice and cannot be put into effect. See Section 5 of the Voting Rights Act of 1965, as amended.

(emphasis in original). In light of the above, you ask, "Can a person without the four (4) years' experience as an employee in Probate Court run for the position?"

Law/Analysis

It is this Office's opinion that the provisions of the 1988 amendment to S.C. Code § 14-23-1040 which added qualifications for serving as a probate judge remain unenforceable, notwithstanding the United States Supreme Court's ruling in Shelby County, Alabama v. Holder, 570 U.S. 529, 133 S. Ct. 2612, 186 L. Ed. 2d 651 (2013). The Voting Rights Act of 1965 required covered jurisdictions to obtain preclearance, from either the Attorney General or the District Court for the District of Columbia, for changes in voting procedures including for judicial elections. See Clark v. Roemer, 500 U.S. 646 (1991) (Preclearance requirement in § 5 is applicable to judges). This Office submitted Act No. 678 of 1988 to the United States Department of Justice, Civil Rights Division (DOJ) to obtain preclearance and received a response dated October 15, 1990. The DOJ objected to the Act stating:

> While we recognize the state's interest in establishing reasonable qualifications for those who are to hold office, especially those of the nature here, it cannot do so in a manner which weighs disproportionately upon its black constituents, absent a convincing reason. See Doughtery County Board of Education v. White, 439 U.S. 32, 42 n.12 (1978). Under Section 5 of the Voting Rights Act, the submitting authority has the burden of showing that a submitted change has no discriminatory purpose or effect. See Georgia v. United States, 411 U.S. 526 (1973); see also the Procedures for the Administration of Section 5 (28 C.F.R. 51.52). We are not yet persuaded that the state's legitimate interest cannot be met through other means which do not produce the "undesirable racial effect[]" of the qualifications proposed. See Wards Cove Packing Co. v. Atonio, 109 S. Ct. 2115 (1989). In light of the considerations considered above, I cannot conclude, as I must under the Voting Rights Act, that the state's burden has been sustained in this instance. Therefore, on behalf of the Attorney General, I must object to the implementation of the changed qualifications to serve as probate judge as defined in Act No. 678.
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> 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 change has neither the purpose nor will have the effect of denying or abridging the right to vote on account of race or color. In addition, Section 51.45 of the guidelines permits you to request that the Attorney General reconsider the objection. However, until this objection is withdrawn or a judgment from the District of Columbia Court is obtained, the effect of the objection by the Attorney General is to make the proposed qualification legally unenforceable. 28 C.F.R. 51.10.

(emphasis added). An April 3, 1998, letter authored by this Office confirmed that no request for reconsideration had been submitted to the DOJ. In 2002, we opined, "The United States Supreme Court has held that '[f]ailure to obtain... preclearance renders the change unenforceable.' Clark v. Roemer, 500 U.S. 646 (1991). This holding by the Supreme Court appears to be applicable to the 1989 amendments to Section 14-23-1040." Op. S.C. Att'y Gen., 2002 WL 1340426 (May 2, 2002). Finally, a November 18, 2005, letter stated "there has been no change by the Justice Department regarding [their objection to] the qualifications for Probate Judge pursuant to S.C. Code § 14-23-1040." In light of this history, this Office's opinion would continue to be that the 1989 amendment to S.C. Code § 14-23-1040 is unenforceable absent a change in law. See Op. S.C. Att'y Gen., 2017 WL 5203263 (October 31, 2017) ("This Office recognizes a long-standing rule that it will not overrule a prior opinion unless it is clearly erroneous or there has been a change in applicable law.").

There has, in fact, been a significant change to the preclearance regime of the Voting Rights Act since the United States Supreme Court's decision in Shelby County, Alabama v. Holder, 570 U.S. 529 (2013). In Shelby County the Court held that the coverage formula contained in § 4 of the 2006 reauthorization of the Voting Rights Act was unconstitutional because it relied on decades old data to determine which jurisdictions were covered jurisdictions subject to preclearance.

> There is no valid reason to insulate the coverage formula from review merely because it was previously enacted 40 years ago. If Congress had started from scratch in 2006, it plainly could not have enacted the present coverage formula. It would have been irrational for Congress to distinguish between States in such a fundamental way based on 40–year–old data, when today's statistics tell an entirely different story. And it would have been irrational to base coverage on the use of voting tests 40 years ago, when such tests have been illegal since that time. But that is exactly what Congress has done.
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> Striking down an Act of Congress "is the gravest and most delicate duty that this Court is called on to perform." Blodgett v. Holden, 275 U.S. 142, 148, 48 S.Ct. 105, 72 L.Ed. 206 (1927) (Holmes, J., concurring). We do not do so lightly. That is why, in 2009, we took care to avoid ruling on the constitutionality of the Voting Rights Act when asked to do so, and instead resolved the case then before us on statutory grounds. But in issuing that decision, we expressed our broader concerns about the constitutionality of the Act. Congress could have updated the coverage formula at that time, but did not do so. Its failure to act leaves us today with no choice but to declare § 4(b) unconstitutional. The formula in that section can no longer be used as a basis for subjecting jurisdictions to preclearance.

Id. at 556–57 (emphasis added). While the Court held the coverage formula in the 2006 reauthorization was unconstitutional, Chief Justice Robert's opinion made clear that the

preclearance provisions in § 5 were not found to be unconstitutional. Id.[1] However, Justice Ginsburg noted in dissent that, until Congress passes a new coverage formula, the Court's holding rendered the preclearance provisions in § 5 unenforceable. Id. at 587 (Ginsburg, J., dissenting) ("The Court stops any application of § 5 by holding that § 4(b)'s coverage formula is unconstitutional.").

The Shelby County decision did not directly address whether previously enacted legislation that was objected to by the DOJ may now be enforced. The Court's decision only applied to the 2006 reauthorization rather than earlier iterations of the Voting Rights Act. See Shelby Cnty, 570 U.S. at 553) ("And yet the coverage formula that Congress reauthorized in 2006 ignores these developments, keeping the focus on decades-old data relevant to decades-old problems, rather than current data reflecting current needs."); see also Voketz v. Decatur, Ala., 904 F.3d 902, 908 (11th Cir. 2018) ("Section 5's preclearance requirements no longer apply because, without § 4(b)'s coverage formula, there are no covered jurisdictions for § 5 to apply to.") (emphasis added). This Office is unaware of any decision issued by the Fourth Circuit Court of Appeals authorizing enforcement of legislation objected to by the DOJ before the 2006 reauthorization.[2] In the absence

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[1] In fact, the opinion expressly stated Congress could draft a new coverage formula based on more current data that may well be constitutional.

> We issue no holding on § 5 itself, only on the coverage formula. Congress may draft another formula based on current conditions. Such a formula is an initial prerequisite to a determination that exceptional conditions still exist justifying such an "extraordinary departure from the traditional course of relations between the States and the Federal Government." Presley, 502 U.S., at 500–501, 112 S.Ct. 820. Our country has changed, and while any racial discrimination in voting is too much, Congress must ensure that the legislation it passes to remedy that problem speaks to current conditions.

Id. (emphasis added).

[2] The Mississippi Attorney General's Office issued an opinion on this issue on October 28, 2013. It concluded that the Shelby County decision did not permit the enforcement of legislation objected to by the DOJ.

> We are of the opinion that any objections to legislation by the U.S. Department of Justice pursuant to the preclearance requirements of Section 5 of the Voting Rights Act prior to the decision in Shelby County are valid and prevent such legislation from being effectuated.
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> ...
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> Had the Court held that the coverage formula was unconstitutional when Congress reauthorized it in 2006, it would **not** have said it was declaring the coverage formula unconstitutional **today**, the date of the decision. It is clear from the above quoted language

of any controlling precedent to the contrary, it is this Office's opinion that the provisions of the 1988 amendment to S.C. Code § 14-23-1040 which added qualifications for serving as a probate judge remain unenforceable.[3]

Conclusion

As is discussed more fully above, it is this Office's opinion that the provisions of the 1988 amendment to S.C. Code § 14-23-1040 which added qualifications for serving as a probate judge remain unenforceable, notwithstanding the United States Supreme Court's ruling in Shelby County, Alabama v. Holder, 570 U.S. 529, 133 S. Ct. 2612, 186 L. Ed. 2d 651 (2013). This Office submitted Act No. 678 of 1988 to the United States Department of Justice, Civil Rights Division (DOJ) to obtain preclearance and received a response dated October 15, 1990. The DOJ objected to the Act stating, "While we recognize the state's interest in establishing reasonable qualifications for those who are to hold office, especially those of the nature here, it cannot do so in a manner which weighs disproportionately upon its black constituents, absent a convincing reason." This Office is unaware of any decision issued by the Fourth Circuit Court of Appeals authorizing enforcement of legislation objected to by the DOJ before the 2006 reauthorization of the Voting Rights Act. Therefore, in the absence of any controlling precedent to the contrary, it is this Office's opinion that the provisions of the 1988 amendment to S.C. Code § 14-23-1040 which added qualifications for serving as a probate judge remain unenforceable. Subsequent to Shelby County, the General Assembly may enact legislation adding qualifications for probate judges, including a provision requiring four years' experience as an employee in a probate judge's office. However, until such legislation is enacted or a court rules to the contrary, a qualified elector in a county who has attained twenty-one years of age may serve as probate judge for that county without having

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> that, while the Court questioned the constitutionality of the 2006 reauthorization, it avoided declaring Section 4(b) unconstitutional until it made its decision in Shelby County on June 25, 2013. The language used by the Court is a clear indication that it did not view the decision as being retroactive.

2013 WL 5975618, at *3-4 (Miss. A.G. Oct. 28, 2013) (emphasis in original).

[3] This Office is aware of decisions issued by the Eleventh Circuit Court of Appeals and the Federal District Courts therein that have held legislation related to elections and voting in covered jurisdictions **which were not submitted for preclearance** may be enforceable after Shelby County. See Voketz v. Decatur, Alabama, City of, 904 F.3d 902 (11th Cir. 2018) (finding § 5 of the Voting Rights Act did not prohibit implementation of a plan to change to change a city's form of government that was submitted to the DOJ but was later withdrawn before a determination issued.); see also Thompson v. Att'y Gen. of Mississippi, 555 F. Supp. 3d 297, 305 (S.D. Miss. 2021) (finding §5 of the Voting Rights Act does not continue to render "un-precleared voting changes" unenforceable.). The present case is distinguishable as Act No. 678 of 1988 was not only submitted to the DOJ for preclearance, but was, in fact, objected to under the Voting Rights Act.

met either qualification of having a four-year bachelor's degree or four-years' experience in a probate court as those provisions remain unenforceable.

Sincerely,

Matthew Houck
Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
Solicitor General