



ALAN WILSON
ATTORNEY GENERAL

June 29, 2012

H. Christopher Bartolomucci, Esquire
Bancroft, PLLC
1919 M Street, N.W., Suite 470
Washington, DC 20036

Dear Mr. Bartolomucci:

You have asked for a legal opinion based upon the following information:

As you know, the United States District Court for the District of Columbia is considering whether to preclear Sections 4, 5, 7 and 8 of Act R54. For scheduling purposes, the Court is trying to determine the date by which it must render a decision in order to allow the State of South Carolina sufficient time to implement the Act for the 2012 General Elections in November.

At a conference call yesterday, the Court asked that the State provide the Court with the answers to two questions: First, what is the last date this Fall by which, if Act 54 were precleared on that date, the State would implement the Act for the 2012 General Elections? Second, which government official in the State would have the authority to make that decision? By way of illustration, the Court posed the following hypothetical question: If the Court were to preclear the Act by September 15, would the State implement the Act for the General Elections in November and who would make that decision? The Court also discussed whether the Executive Director of the State Election Commission has the authority to decide whether to implement the provisions of Act 54 for the November elections.

Because the Court's questions raise issues of South Carolina law, I respectfully request that the Office of the Attorney General answer those questions. The OAG's answers, and this letter, will be filed with the Court as a public record.

Law / Analysis

Act No. 27 of 2011 (R. 54) or the "Voter ID" law is designed to "protect against in-person voter fraud" See, *Democratic Party of Georgia v. Perdue*, 288 Ga. 720, 707 S.E.2d 67, 69 (2011). A second purpose is "protecting the integrity and reliability of the electoral process." *Crawford v. Marion Co. Election Bd.*, 553 U.S. 181, 191 (2008) [Indiana's Voter ID legislation is facially constitutional]. Based upon these interests, the object of Act No. 27 is, with the requirement of the Photo ID, "to insure

that the person presenting himself to vote is the elector on the poll list." *Op. S.C. Atty. Gen.*, August 16, 2011 (2011 WL 3918168).

More specifically, Act No. 27 requires that the photo identification be either in the form of a South Carolina driver's license; other form of identification containing a photograph issued by the Department of Motor Vehicles; a passport; a military identification containing a photograph issued by the federal government; or a South Carolina voter registration card containing a photograph of the voter pursuant to S.C. Code Ann. Section 7-5-675. The latter card is issued free of charge by the South Carolina Election Commission in an effort to insure that the registered voters who have no driver's license or State-issued Photo ID may be able to vote. See Section 5 of Act No. 27.

Act No. 27 also makes provision to insure that those who are unable to obtain a Photo ID of any kind may still vote. If the voter cannot produce an ID, Subsection (D)(1)(b) of Section 5, provides as follows:

(b) If an elector does not produce a valid and current photograph identification because the elector *suffers from a reasonable impediment that prevents the elector from obtaining photographic identification*, he may complete an affidavit under the penalty of perjury at the polling place and affirm that the elector: (i) is the same individual who personally appeared at the polling place; (ii) cast the provisional ballot on election day; and (iii) the elector suffers from *a reasonable impediment that prevents him from obtaining photographic identification*. The elector shall list the impediment unless otherwise prohibited by state or federal law. Upon completion of the affidavit, the elector may cast a provisional ballot. The affidavit must be submitted with the provisional ballot envelope and be filed with the county board of registration and elections before certification of the election by the board of county board of canvassers.

(emphasis added).

Subsection D(2) of Section 5 further states:

(2) If the county board of registration and elections determines that the voter was challenged only for the inability to proof of identification and the required affidavit is submitted, the county board of registration and elections shall find that the provisional ballot is valid unless the board has grounds to believe the affidavit is false.

Subsection (E) also explains:

[t]he purpose of the identification required pursuant to subsection (A) is to confirm the person presenting himself to vote is the elector on the poll list. Any address listed on the identification is not determinative of an elector's domicile for the purpose of voting. An elector's domicile for the purpose of voting is determined pursuant to the provisions of Section 7-1-25.

All provisions of Act No. 27 are mandatory. In each of the provisions of the Act, the General Assembly mandated certain requirements, using language such as "must" or "shall." Not only are the requirements of photo identification mandatory, but the provisions for provisional voting contained in Subsection D of Section 5 of the Act are as well. See, e.g., Section 4 ["The State Election Commission

shall implement a system in order to issue voter registration cards with a photograph of the elector."]; Section 5(D)(2) ["... the county board of registration and elections *shall* find that the provisional ballot is valid unless the board has grounds to believe the affidavit is false."].

Except for Section 4, Act No. 27 takes effect upon the approval of the Governor. Of course, as you note, the Act requires Section 5 preclearance under the Voting Rights Act before it may be implemented. See, *NAACP v. Hampton County Election Commission*, 470 U.S. 166 (1985). However, if such preclearance were to occur, Act 27 of 2011, which is self executing, would be effective immediately.

Therefore, should Act No. 27 go into effect, it is well recognized in South Carolina that "[e]xecutive agencies [of the State, such as the State Election Commission] are required to comply with the General Assembly's enactment of a law until it has been otherwise declared invalid." *Edwards v. State*, 383 S.C. 82, 91, 678 S.E.2d 412, 417 (2009). "Under the rules of statutory interpretation, use of words such as 'shall' or 'must' indicates the legislature's intent to enact a mandatory requirement." *Collins v. Doe*, 352 S.C. 462, 470, 574 S.E.2d 739, 743 (2002). Accordingly, any preclearance of Act No. 27 would result in the requirement under South Carolina law of immediate and mandatory implementation by the State's executive officers and agencies. Such would include implementation in time for the November election.

Of course, as with any law, implementation must be feasible. There, thus would come a point where, if preclearance occurred, complete implementation of Act No. 27 would be impossible in time for the general election in November. As we recognized in *Op. S.C. Att'y. Gen.*, June 29, 1987 (1987 WL 342843), "... as a practical matter if the preclearance comes significantly later than an event required to be performed can actually be performed, it may be impossible to comply with the provisions of the Act."

In the specific context of Act No. 27, the August 16, 2011 opinion addressed the question of impossibility or impracticality of implementation, if any preclearance came too late. There, we recognized that the right to vote is a fundamental right and that "any interpretation by a court of the Voter ID Act will certainly be well cognizant of the fundamental nature of the right to vote." Thus, we opined, "the short time frame between any preclearance of the legislation ... and the date of any election immediately thereafter would constitute a 'reasonable impediment' for purposes of the Voter ID legislation. Such short time period is beyond the voter's control."

Conclusion

At what point the time period between preclearance and the general election becomes too short for full implementation is unclear from the text of the statute. Like any statute, Act No. 27 must be interpreted with common sense. See *Op. S.C. Att'y. Gen.*, June 27, 2011 (2011 WL 2648710). Moreover, if preclearance occurs prior to the election, we must also balance the Legislature's interest and desire to have the law go into effect immediately to the degree possible with the fundamental right to vote. Cf. *Joytime Distrib. & Amusement Co., Inc. v. State*, 338 S.C. 634, 528 S.E.2d 647 (1999) [when a portion of a statute is capable of being executed immediately in accordance with legislative intent, Court is obligated to do so]. The Court has raised the question as to whether the point in time where complete implementation becomes impossible is after September 15. In our opinion, as seen below, pursuant to a reasonable construction of the Act, any preclearance after September 15 would be too late for full implementation to occur in time for the election.

Balancing the State's interest in immediate implementation with the rights of voters, we would thus advise that if any preclearance occurs after September 15, voters not possessing a Voter ID pursuant to the requirements of Act No. 27 would have a "reasonable impediment" to obtaining such ID in order to vote. As we opined earlier, "[s]uch short time period" would be "beyond the voter's control." Thus, in our opinion, any preclearance beyond September 15 would trigger Subsection 5(D)(2) in those instances where a voter does not possess a Voter ID in accordance with the mandates of Act No. 27. Those voters not possessing such Photo ID should thus be allowed to vote provisionally pursuant to Subsection 5(D)(2), and their votes counted, unless there are grounds to believe the affidavit submitted in lieu of a Photo ID is false. We believe such constitutes a reasonable accommodation of both the State's interests and the voters' interests.

With respect to your second question, as to who makes the decision as to whether to implement the Act, again, as stated above, the statute is self executing and mandates that executive officials, such as members of the State Election Commission must implement the law. Thus, assuming preclearance prior to September 15, the State Election Commission and the Executive Director would lack authority or discretion to fail to implement the Act. *Edwards, supra* [Governor is mandated to execute the Budget and possesses no discretion in such regard]. Assuming there is sufficient time for implementation, Act No. 27 requires that such implementation occur. This Office deems any preclearance prior to September 15 as sufficient time for complete implementation. Beyond September 15, we are of the opinion, consistent with the above analysis, that voters who do not possess a Photo ID when presenting to vote must receive the benefits of the "reasonable impediment" provision contained in Subsection 5(D)(2).¹

Sincerely,

A handwritten signature in blue ink, appearing to read "R. D. Cook", with a stylized flourish at the end.

Robert D. Cook
Deputy Attorney General

RDC/an

¹ The South Carolina Supreme Court has recognized that an opinion of the Attorney General, while not binding upon the courts, is "persuasive." *Charleston County School Dist. v. Harrell*, 393 S.C. 552, 713 S.E.2d 604 (2011). An Attorney General's opinion "should not be disregarded without cogent reason." *Price v. Watt*, 280 S.C. 510, 513 n. 1, 313 S.E.2d 58, 60 n.1 (Ct.App. 1984).