IN THE SUPREME COURT OF FLORIDA

Case No. SC12-460

IN RE: JOINT RESOLUTION OF
LEGISLATIVE APPORTIONMENT

COMMENT SUBMITTED ON BEHALF OF
SECRETARY OF STATE KENNETH W. DETZNER

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SUMMARY OF THE COMMENT

This Comment is provided on behalf of Florida Secretary of State Kenneth W. Detzner (the "Secretary") in response to this Court's Order dated March 13, 2012.

As Florida's Chief Election Officer, the Secretary is charged with the responsibility to interpret and implement the Florida Election Code and to provide direction and opinions to the supervisors of elections on the performance of their duties. § 97.012, Fla. Stat. The Secretary of State also exercises the powers and duties constitutionally assigned to the "custodian of state records," including those duties assigned by Article III, section 16 of the Florida Constitution. § 20.10(1), Fla. Stat.

The Secretary's principal interest in this action is to ensure that Florida's elections are conducted in an orderly manner, free from uncertainty or confusion for prospective Senate candidates, state and county elections officials, and the general public. To that end, this comment provides a summary of the various statutory deadlines and ancillary legal requirements attendant to this Court's exercise of its duties under Article III, section 16 of the Florida Constitution.

COMMENT

I. Summary of deadlines imposed by the Florida Election Code

To conduct a smooth and orderly election, state and county election officials must begin preparations well before the first votes are cast. Supervisors of elections in each county must create precinct lines corresponding to local, state, and federal districts and designate a polling place within each precinct (§ 101.001, Fla. Stat); design, print, and deliver ballots and sample ballots (§§ 101.20, 101.21, Fla. Stat); and recruit and train inspectors, clerks, and poll workers (§ 102.014, Fla. Stat.) A federal court in Miami accurately described the last sixty days before an election as "the most tumultuous times in a Supervisor's office." *Diaz v. Cobb*, 541 F. Supp. 2d 1319, 1327 (S.D. Fla. 2008); *see also id.* at 1336-39 (summarizing the many duties imposed on elections officials preceding an election).

For the purposes of this Court's consideration of Senate Joint Resolution 2-B ("SJR 2-B"), the deadlines related to candidate qualifying are the most critical. During the statutory qualifying period, each person seeking nomination or election to the Florida Senate must file qualifying papers with the Department of State. § 99.061, Fla. Stat. Among the qualifying documents is a candidate oath identifying the specific Senate district sought by the candidate. § 99.061(7)(a), Fla. Stat.; R. 1S-2.0001, Fla. Admin. Code. Candidate qualifying is district-specific; a candidate cannot change districts after qualifying. A legally-enforceable apportionment plan

for the Florida Senate must be in place before the qualifying period so that prospective candidates will be able to determine whether they will run for office and in which district they will be located.

The qualifying period for Florida Senate candidates in 2012 begins at noon on June 4 and concludes at noon on June 8, although candidates may submit qualifying papers to the Division of Elections as early as May 21. § 99.061(8), (9), Fla. Stat. These "pre-filed" qualifying papers will be held by the Division of Elections for processing and filing during the qualifying period. *Id*. Even before the qualifying period, election officials and prospective candidates face several statutory deadlines related to the August primary election. Any candidate for the Florida Senate seeking to qualify for the ballot by the petition method must submit the requisite number of candidate petitions to the supervisors of elections before noon on May 7. § 99.095(3), Fla. Stat. The candidate petitions are then verified by the supervisors of elections, who must certify the number of valid signatures to the Division of Elections by May 28. *Id*.

After the conclusion of candidate qualifying at noon on June 8, subsequent statutory deadlines come in rapid succession. By June 15, the Department of State must certify the names of all duly-qualified candidates for the Florida Senate to the supervisors of elections. § 99.061(6), Fla. Stat. The deadline for mailing absentee ballots to absent uniformed services and overseas voters is June 30. § 101.62(4)(a),

Fla. Stat. This Florida law implements the federal Uniformed and Overseas Citizens Absentee Voting Act ("UOCAVA"), as amended in 2009 by the Military and Overseas Voter Empowerment Act ("MOVE Act"), which requires each state to transmit validly-requested absentee ballots to uniformed service members, their families, and other overseas citizens ("UOCAVA voters") no later than 45 days before a federal election.[1] Absentee ballots for non-UOCAVA voters must be mailed between July 10 and July 17. § 101.62(4)(b), Fla. Stat.

On July 16, voter registration closes for the primary election. § 97.055, Fla. Stat. County canvassing boards may begin canvassing absentee ballots for the primary election on July 30. § 101.68, Fla. Stat. After an in-person early-voting period (§ 101.657, Fla. Stat.), Florida's primary election will be held on August 14. § 100.061, Fla. Stat.

II. Preclearance under Section 5 of the Voting Rights Act

In its March 9, 2012 opinion, this Court concluded that the legislative redistricting standards contained in Article III, section 21(a) of the Florida Constitution embrace the substantive non-retrogression principle set forth in Section 5 of the federal Voting Rights Act ("Section 5"). *In re Senate Joint*

[1] Although it is not a statutory deadline, the Florida State Association of Supervisors of Elections ("FSASE") has informed this Court that supervisors of elections must order ballots no later than June 18 in order to meet the June 30 deadline to transmit ballots to UOCAVA voters. *See Comment Submitted on Behalf of the Florida State Association of Supervisors of Elections* at 6 (April 10, 2012), *In re: Joint Resolution of Legislative Apportionment* (No. SC12-460).

Resolution of Legislative Apportionment 1176, No. SC12-1, --- So. 3d ---, 2012 WL 753122, at *22 (Fla. Mar. 9, 2012) (the "Opinion"). Florida's constitutional provision therefore codifies a statewide non-retrogression standard that previously applied only to the five Florida counties designated for coverage under the Voting Rights Act. Opinion at * 25. Although the non-retrogression standard has been extended statewide, only changes involving the five covered counties remain subject to federal oversight through Section 5's preclearance obligation. The Secretary of State provides the following additional information regarding the preclearance process for the Court's consideration.

The State of Florida is not a covered jurisdiction for purposes of Section 5, but five Florida counties are: Collier, Hardee, Hendry, Hillsborough, and Monroe Counties.[2] 28 C.F.R. pt. 51 appx; Opinion at *25. As a result of this coverage determination, Florida's five covered counties are prohibited from implementing any voting change until it has been approved (or "precleared") by the United States Attorney General or the United States District Court for the District of Columbia. 42 U.S.C. § 1973c. A voting change is entitled to preclearance if it "neither has the

[2] These five counties are covered jurisdictions based on the United States Attorney General's determination that, on November 1, 1972, these jurisdictions provided materials and information relating to the electoral process only in the English language; more than five percent of the citizens of voting age were members of a single language minority; and less than half of the voting-age citizens in these jurisdictions were either registered to vote or voted in the Presidential election of November 1972.

purpose nor will have the effect of denying or abridging the right to vote on account of race or color, or [language minority status]." 42 U.S.C. § 1973c(a).

The fact that five of Florida's counties are covered means, as a practical matter, that Florida must obtain preclearance for any statewide law of general applicability that will affect its covered counties before the voting change may be implemented by or in those counties. *Lopez v. Monterey County*, 525 U.S. 266 (1999). The preclearance obligation imposed on covered jurisdictions by Section 5 applies not only to legislatively-adopted voting changes, but also to redistricting plans and other changes to elections practices or procedures mandated by order of a state court. *See, e.g.*, *Branch v. Smith*, 538 U.S. 254, 262 (2003). Therefore, the final apportionment plan for the Florida Senate, whether it is the legislatively-adopted plan set forth in SJR 2-B or a plan adopted by this Court pursuant to Article III, Section 16(f) of the Florida Constitution, must be precleared by the federal government before it may be implemented with respect to the covered counties.

The Department of Justice has adopted detailed procedures for the administration of Section 5. *See* 28 C.F.R. pt. 51. A preclearance submission for a redistricting plan would include: (1) a statement identifying with specificity each change affecting voting for which preclearance is requested; (2) a statement of the anticipated effect of the change on members of racial or language minority groups;

(3) data files reflecting comparative population demographics by race and language group; (4) maps reflecting prior and new boundaries, the location of racial and language minority groups, natural boundaries or geographical features that influenced the selection of boundaries, and the location of prior and new voter registration and polling places; (5) detailed information on historical election returns for at least the last ten years, including demographic information on all candidates for office in primary or general elections, the number of votes received by each candidate (by voting precinct), and the number of registered voters (by race and language group) for each voting precinct; and (6) materials demonstrating public notice or participation regarding the voting change. 28 C.F.R. §§ 51.26 – 51.28.

Although the United States Attorney General is nominally required to make a decision on preclearance within 60 days, 42 U.S.C. § 1973c, he may extend that deadline through requests for additional information. 28 C.F.R. § 51.9(b). A jurisdiction may also request expedited consideration, 28 C.F.R. § 51.34, but an expedited determination is not guaranteed. The Attorney General recently declined to expedite consideration of Florida's request for preclearance of the presidential preference primary date chosen by the Presidential Preference Primary Date Selection Committee. *See* § 103.101, Fla. Stat. In that case, the Florida Department of State sent its preclearance submission and request for expedited review to the

Department of Justice on October 4, 2011. Even though the Department of State received no requests for additional information, the Attorney General's preclearance determination was not issued until December 8, 2011.

CONCLUSION

Secretary of State Detzner respectfully submits this comment to provide guidance and information to the Court as it exercises its constitutional review of Senate Joint Resolution 2-B.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing motion was furnished on the 13th day of April by U.S. Mail to the following parties, appearing on the most recently revised service list at the time of service:

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CERTIFICATE OF TYPEFACE COMPLIANCE

I HEREBY CERTIFY that this Comment was prepared in Times New Roman 14-point font, in compliance with Rule 9.210(a)(2), Florida Rules of Appellate Procedure.

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