November 30, 2000

By Facsimile and Federal Express

Mr. Joseph Rich
Chief, Voting Section
Civil Rights Division
Department of Justice
320 First Street, N.W.
Room 818A
Washington, D.C. 20001

Re: File No. 2000-2495
Comment letter under Section 5 of Voting Rights Act

Dear Mr. Rich:

On behalf of the NAACP, the Georgia Rural-Urban Summit, the Southern Regional Council, and the Fannie Lou Hamer Project, we are writing with further comments on the State of Georgia's response to the Department's August 21, 2000 letter seeking more information in connection with the State's submission of Act 883 of the 2000 Georgia General Assembly. The State's response, dated October 13, 2000 ("State's Response"), fails to provide much of the information requested by the Department, and does not satisfy its burden of demonstrating the absence of any retrogressive effect caused by Act 883.

Before turning to our substantive comments on the State's response, we would like to point out the areas in which the State has simply failed to provide the information requested by the Department. Because most of the omitted information could, in fact, be supplied by the State if it so desired, the State's submission remains incomplete, and we would respectfully urge the Department to point out these omissions to Georgia and require submission of the requested information before taking further substantive action on the submission.

The omitted information relates to two key requests made in the Department's letter of August 21, 2000 – items numbered 4 and 5:

> 4. *Any data, studies, reports and analyses that illustrate the amounts of money carried over from prior campaigns and the amount of money newly received by white and black candidates who have run in non-federal, inter-racial contests in the past ten years. Identify the office sought, which candidate prevailed, his or her race, his or her party affiliation, and whether the position was "open" or had an incumbent. In addition, please identify the percentage of campaign contributions that came from individuals, political parties, companies, political action committees, etc. For campaign contributions from individuals, please identify the donor by race or provide the racial percentage of the donor's precinct/area.*
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> 5. *Any data, studies, reports, and analyses that illustrate the amounts of money contributed, by white voters or majority white precincts/areas and by black voters or majority black precincts/areas, yearly, to candidates running for state-wide, general assembly, or other non-federal office.*

The State claims that it is unable to provide the requested information because it "does not maintain records reflecting the race of candidates filing contribution disclosure reports, nor does it maintain records reflecting the race of campaign contributors." State's Response at 8. Based on this claim, the State has provided campaign disclosure information only for a group of African American candidates who have been successful in winning office in Georgia (most of them in districts with a majority or plurality of African American voters), instead of providing the information requested by the Department. This response is highly misleading.

First, as the Department is aware from past Section 5 submissions and voting rights litigation involving Georgia, the State is fully capable of identifying the race of candidates who run for state office, whether successfully or unsuccessfully. The State maintains voter registration data by race, and is able to use such information to identify election contests in which black candidates have competed against white candidates. For example, the State has regularly obtained analyses of black vs. white election contests in Georgia for the purpose of determining the extent of racially polarized voting in Georgia, among other things. *See, e.g., Johnson v. Miller*, 864 F. Supp. 1354, 1390-1391 (S.D. Ga. 1994) (describing expert reports analyzing black vs. white election contests), *aff'd* 515 U.S. 900 (1995). Thus, while the campaign disclosure reports filed by candidates may not themselves indicate the race of the candidate, the State can readily identify elections in which black candidates have competed against white candidates, and can provide campaign disclosure information for the candidates in such elections. The State's refusal to provide this information should prevent it from receiving preclearance for the proposed change.

Second, the State's partial, selective response which provides disclosure data only for *successful* African American candidates is completely self-serving and uninformative.

If the State attempted to demonstrate that voting is not racially polarized in Georgia by providing data only on elections in which African American candidates were successful, ignoring all instances in which they were unsuccessful, neither the courts nor the Department of Justice would accept such data as an accurate gauge of the overall electoral opportunities enjoyed by African American candidates. Similarly, the State cannot accurately portray the barrier imposed by money in the electoral process by ignoring all the cases in which African American candidates were outspent and defeated by white candidates. We urge the Department to reject the State's assertion that information concerning such election contests is unavailable, and to advise the State that its Section 5 submission remains incomplete without the requested information.

Apart from the incompleteness of its submission, Georgia's response is also undermined by flawed interpretations of available data. The remainder of this letter identifies these errors in the State's response.

At page 10 of the State's Response, the State lists a number of elected black officials in Georgia as evidence that there are no barriers to the election of African American candidates. However, the State ignores the fact that all three of the congressional representatives to whom the State refers were initially elected to office from districts with majority-black populations, and were able to gain the advantage of incumbency because of that critical factor. It also ignores the fact that the House Majority leader is elected from a majority-black district. Indeed, as of 1994,

> [o]f the forty Black members of the Georgia General Assembly, only one was elected from a majority-White district. Of the thirty-one Black members of the House, twenty-six were elected from districts that were sixty percent or more Black. Of the nine black members of the Senate, eight were elected from districts that were sixty percent or more Black.

Laughlin McDonald, *Can Minority Voting Rights Survive Miller v. Johnson*?, 1 Mich. J. Race & L. 119, 136 (1996). African Americans have had only isolated or very recent successes in winning election even to lower-level statewide offices in Georgia. *See also id.* at 122 (noting State of Georgia's acknowledgement of state's history of racially polarized voting in brief filed by State of Georgia in United States Supreme Court). The continuing presence of racially polarized voting in Georgia also is well documented in the sources we cited in our letter dated August 4, 2000, and is not refuted by the limited, anecdotal response provided by the state. *See also City of Carrollton Chapter, NAACP v. Stallings*, 829 F.2d 1547, 1558-1559 (11th Cir. 1987) (suggesting that special circumstances may have accounted for Judge Benham's initial electoral success).

The State's letter also erroneously asserts that African Americans in Georgia have now attained economic parity with whites. The State appears to have misinterpreted the data it offers. The State cites a study which found that African Americans "remain the state's wealthiest *minority* overall," because they were projected to command "nearly $34 billion of disposable income" by 2001. State's Response at 10 (emphasis added). But since African Americans are the single largest minority group in the state, it is hardly

surprising or significant that their total disposable income is higher than that of other, much smaller minority groups in Georgia, such as Asians and American Indians.

In fact, when examined, the study cited by the State only underscores the continuing economic disparities between African American citizens and other citizens in Georgia. The study shows that the black proportion of Georgia's population is projected to be 29% in 2001 (derived from comparison of Georgia figures for black population and total population in Tables 14 and 15, Ex. K to State's Response), while blacks are projected to command only 17.7% of total buying power in Georgia in 2001 (Table 12, Ex. K) – a stark disparity between the black share of the population and its share of economic power. By contrast, the white population of Georgia is projected to comprise only 68.5% of the state's total population in 2001 (*see* Table 15, Ex. K), but will command 80.2% of the overall buying power of the Georgia population by that time (Table 12, Ex. K). Thus, even the State's own figures demonstrate the disparities in the ability of black and white citizens of Georgia to command political influence through monetary contributions.

The State's own figures also contradict its argument that doubling the contribution limits compared to their 1994 level was necessary to keep pace with inflation. Inflation has remained very low during the period 1994-2000. Under Georgia's existing statutory scheme, enacted and precleared in 1994,[1] candidates for statewide office may receive a maximum total of $8,000 from a single donor, which Georgia now proposes to double to a maximum of $16,000. By the State's own calculations, if this change in contribution limits had been prompted by concerns about inflation, only a much smaller adjustment to $9,247 in 2000 would have equaled the 1994 "buying power" of $8,000. *See* State of Georgia's Response at p. 6, second full paragraph). Thus, the "inflation" argument in no way explains the quantum leap in contribution limits that the State is attempting to make through Act 883.

The State's response also argues that because Act 883 had support from African American legislators, the higher contribution limits in the Act should not be regarded as retrogressive. The bill presented legislators with a difficult choice, however, because it included certain provisions that had support from reform groups, such as electronic reporting and disclosure requirements. Some legislators may have reluctantly supported an increase in contribution limits in order to gain passage of these other provisions. That certainly does not demonstrate, however, that raising the contribution limits is free of retrogressive effect. Further, Act 883 was a legislative initiative supported and promoted by Governor Barnes. As reported prominently in the press during the time Act 883 was under consideration, the Governor maintains detailed information on every vote, procedural or otherwise, of every member of the Georgia Legislature, and legislators may well fear paying a high political price when voting against the Governor's legislative program. *See* Alan Judd, "Barnes keeping political files on Georgia legislators," Atlanta Journal and Constitution, March 6, 2000, at A1 (reporting on difficulties faced by

[1] The appropriate benchmark for comparison for Section 5 purposes is, of course, the most recent precleared set of limits, which in this case is the set of limits enacted in 1994.

Democratic Senator with less than "perfect" voting record in seeking needed funds for high school auditorium in her district) (attached as Exhibit 1 to this letter).

Most importantly, there is no need to prove that a change was the result of direct racial animus in order to establish that a particular change is retrogressive in its effect on the ability of minority voters to exercise their franchise effectively. Under Section 5, a change may not be precleared if it is discriminatory in its purpose *or* in its effect. 42 U.S.C. § 1973c. The determination of whether a change has a retrogressive effect depends upon an independent analysis of the facts, with the burden remaining on the State to prove that the proposed change will not be retrogressive. *Georgia v. United States*, 411 U.S. 526, 538 (1973). The State simply has not carried that burden here, and indeed the available evidence amply demonstrates the retrogressive effect of higher contribution limits that magnify the importance of money in Georgia elections.

Finally, the State attempts to argue that the ruling in *Georgia State Conference of NAACP Branches v. Cox*, 183 F.3d 1259 (11th Cir. 1999), somehow assists the State in demonstrating that its effort to double the contribution limits will not be retrogressive. That case, however, has no bearing whatsoever on the question of whether Georgia's new contribution limits will be retrogressive under the Voting Rights Act. The claim in *NAACP v. Cox* was that Georgia's system of privately financed elections violates the Equal Protection Clause of the Fourteenth Amendment by imposing an across-the-board wealth barrier to political participation. No claim of racial discrimination was presented in the case, and no allegation was made in the case that any of Georgia's laws reflected a retrogressive change in electoral practices under Section 5 of the Voting Rights Act.[2] As the State admits, Act 883 was not even enacted until after the conclusion of that litigation.

In sum, Georgia's Section 5 submission is incomplete, as the State has failed to provide available information requested by the Department that would illuminate the retrogressive impact of the proposed change in contribution limits. Further, the information the State has supplied either fails to shed any light on the question or retrogression, or confirms the evidence set forth in our previous letter of August 4, 2000, concerning the retrogressive effect of doubling the State's contribution limits. As explained in that letter, changes in campaign regulations that increase the importance and prevalence of money in the electoral process work to the detriment of minority voters, who as a group are far less likely than white voters to have sufficient funds to contribute at any level to political campaigns. In addition, because large campaign donations flow

[2] The Court ruled that plaintiffs lacked standing to raise a Fourteenth Amendment challenge in the absence of an allegation that plaintiffs had been "denied the right to vote or equal access to the ballot." 183 F.3d at 1264; *but see Terry v. Adams*, 345 U.S. 461 (1953) (finding Fourteenth Amendment violation although black voters could participate in all state-sponsored elections). It is well settled, however, that Section 5's scope is not limited to electoral practices that directly deny the right to vote or limit access to the ballot, but extends to any practice or procedure affecting elections. *See Allen v. State Bd. of Elections*, 393 U.S. 544, 566-67 (1971) (Congress intended Section 5 to have "the broadest possible scope" and to reach "any state enactment which alters the election law of a covered state in even a minor way").

disproportionately to white candidates rather than candidates of color, higher contribution limits provide a disproportionate electoral advantage to white candidates. Raising the current limits on campaign contributions thus will add to the comparative disadvantages faced by the preferred candidates of minority voters. As a result, Georgia's effort to double the amounts that contributors can give to political candidates will have a retrogressive impact on minorities' effective exercise of the franchise, whether viewed from the perspective of minorities as candidates or the perspective of minorities as voter/contributors.

For all these reasons, as well as those set forth in our letter of August 4, 2000, we respectfully urge the Attorney General to object, under Section 5 of the Voting Rights Act, to Act 883 of the 2000 Georgia General Assembly, insofar as it raises the limits on the amounts of money that donors may contribute to candidates for office in Georgia.

Very truly yours,

Brenda Wright
Managing Attorney
National Voting Rights Institute

Attachment
cc: Attorney General, State of Georgia