STATE OF ARIZONA

OFFICE OF THE ATTORNEY GENERAL

ATTORNEY GENERAL OPINION by THOMAS P. PROSE* CHIEF ASSISTANT ATTORNEY GENERAL February 26, 2002	No. I02-002 (R02-008) Re: Calculating Signature Requirements for Nomination Petitions

TO: The Honorable Betsey Bayless
Secretary of State

Questions Presented

You indicated that the Congressional and legislative districts adopted by the Independent Redistricting Commission ("new districts") have not yet been precleared by the United States Department of Justice ("DOJ") as required by Section 5 of the federal Voting Rights Act, (42 U.S.C.A. § 1973c) and may not be precleared by March 1, 2002. Section 16-322, Arizona Revised Statutes ("A.R.S."), requires the Secretary of State to calculate the number of nomination petition signatures required for candidates for the United States Congress and the State Legislature and other offices. You have asked:

*Attorney General Napolitano has recused herself from this matter. Accordingly, Thomas Prose, the Chief Assistant Attorney General, is authorized to sign this Opinion.

1. If the new district boundaries are not precleared by March 1, 2002, would the Secretary of State calculate signature requirements for nomination petitions for Congress and the Legislature based on the March 1 voter registration numbers?

2. If the calculations of signature requirements for Congress and the Legislature are based on March 1 voter registration numbers, should those calculations be based upon the current district lines or the new districts submitted to DOJ for preclearance.

Summary Answer

If DOJ does not preclear the new districts by March 1, the Secretary of State should not use March 1 voter registration numbers to determine the signatures needed to qualify for the ballot for the Legislature and Congress. Instead, pursuant to A.R.S. § 16-322(D), the Secretary of State should use the voter registration numbers as of the date of preclearance or a court order authorizing the use of the new districts to make this calculation.

Because March 1 voter registration information is not used to calculate the number of petition signatures required if the new districts are not precleared by March 1, it is not necessary to answer your second question.

Background

A. Redistricting.

At the 2000 general election, Arizona voters approved a constitutional amendment creating an Independent Redistricting Commission that is now responsible for redrawing legislative and Congressional district boundaries following each decennial census. *See* Ariz. Const. art. IV, pt. 2, § 1 (as amended by Proposition 106). The redistricting process adjusts district boundaries to comply with constitutional requirements of one-person-one-vote based on the most recent census. *See*

generally Reynolds v. Sims, 377 U.S. 533 (1964); *Wesberry v. Sanders,* 376 U.S. 1, 18 (1964). In addition, the new district boundaries and the redistricting process must comply with the federal Voting Rights Act, s*ee* 42 U.S.C. §§ 1973 to 1973bb-1, and other legal requirements.

Arizona is subject to Section 5 of the Voting Rights Act ("Section 5"). *See* 40 Fed. Reg. 43746 (Sept. 23, 1975). Because Arizona is a covered jurisdiction under Section 5, any change that affects voting in Arizona must first be precleared by the DOJ or approved by a three-judge panel in the District Court of the District of Columbia before it may be implemented. *See Lopez v. Monterey County*, 519 U.S. 9, 20 (1996); *see also* 28 C.F.R. § 51.10. This Section 5 review is designed to "'forestall the danger that local decisions to modify voting practices will impair minority access to the electoral process.'" *Lopez*, 519 U.S. at 23 (quoting *McDaniel v. Sanchez,* 452 U.S. 130, 149 (1981)). It was enacted as "a response to a common practice in some jurisdictions of staying one step ahead of the federal courts by passing new discriminatory voting laws as soon as the old ones had been struck down." *Beer v. United States,* 425 U.S. 130, 140 (1976). To obtain preclearance, a jurisdiction must show that a change that affects voting does not have the purpose or effect of denying or abridging minority voting rights. 42 U.S.C. § 1973c.

Redistricting changes are within the scope of Section 5. 28 C.F.R. § 51.13(e). Therefore, Arizona must comply with Section 5 before these new districts can be implemented. On January 24, 2002 the Independent Redistricting Commission sent a submission to DOJ seeking preclearance. Under Section 5, DOJ has 60 days from the date it receives such a submission to make a determination regarding preclearance. *Id.* This time may be extended if DOJ requests additional information from the State regarding the submission. 28 C.F.R. § 51.37. If DOJ requests additional

information, the 60 day review time begins again when DOJ receives the supplemental information from the State. *Id.* If DOJ objects to the new districts, those districts cannot be enforced unless the districts are modified to address DOJ concerns and those new district lines are then precleared, or unless DOJ withdraws the objection or some other court action authorizes the use of the new districts.

You note in your opinion request that DOJ has not yet precleared the new districts, and it may not do so by March 1.

B. <u>Candidate Nomination Petitions</u>.

Nomination petitions for candidates for the Legislature and for Congress for the 2002 primary elections must be filed with the Secretary of State by June 12, 2002. *See* A.R.S. §§ 16-311, -314 (candidate petitions due 90 days before primary). Candidates for Congress must have nomination petitions signed by

> a number of qualified electors who are qualified to vote for the candidate whose nomination petition they are signing equal to at least one-half of one per cent but not more than ten percent of the total voter registration of the party designated in the district from which such representative shall be elected.

A.R.S. §16-322(A)(2). Similarly, candidates for the Legislature must submit petitions signed by

> a number of qualified electors who are qualified to vote for the candidate whose nomination petition they are signing equal to at least one per cent but not more than three per cent of the total voter-registration of the party designated in the district from which the member of the legislature may be elected.

A.R.S. §16-322(A)(3). The voter registration total used for this calculation is generally based on a report prepared on March 1 of the year in which the general election is held.[1] A.R.S. § 16-322(B).

[1] Section 16-322(B) provides: "The basis of percentage in each instance referred to in subsection A of this section [describing candidate nomination petition signature requirements], except in cities, towns and school districts, shall be the number of voters registered in the designated party of the candidate as reported pursuant to § 16-168, subsection G on March 1 of the year in which the general election is held."

The statutes recognize, however, that district boundaries may not be "established and effective" by March 1. A.R.S. § 16-322(D). In that situation, Section 16-322(D) provides that "the basis for determining the required number of nomination petition signatures is the number of registered voters in the designated party of the candidate in the . . . district . . . on the day the new districts . . . are effective."

Analysis

The issue is whether subsection B or subsection D of A.R.S. § 16-322 determines the voter registration date the Secretary of State is to use to calculate the signature requirement for nomination petitions for the Legislature and Congress if the new districts are not precleared by March 1. The analysis hinges upon when the new district boundaries become "effective" for the purposes of A.R.S. § 16-322(D).

The constitutional provision governing the Independent Redistricting Commission does not expressly establish an effective date. Under article IV, part 2, § 1 (16), the Independent Redistricting Commission is required to make a draft map available for 30 days before a final map is adopted. After this time passes, the Commission may establish final district boundaries. The Independent Redistricting Commission must certify to the Secretary of State after it has established the districts. Ariz. Const. art. IV, pt. 2, § 1 (17). This language suggests that the new district boundaries are effective under State law after certified to the Secretary of State, and this occurred well before March 1.

Section 5 of the Voting Rights Act, however, must also be considered because Arizona is a covered jurisdiction. Under Section 5, the new districts cannot be enforced until they are precleared. 28 C.F.R. § 51.10. A voting change in a jurisdiction subject to Section 5 "'will not be effective as

la[w] until and unless [pre]cleared'" as prescribed by Section 5. *Clark v. Roemer,* 500 U.S. 646, 652 (1991) (quoting *Connor v. Waller,* 421 U.S. 656 (1975)). Courts in other jurisdictions have concluded that under Section 5, the candidate nomination process cannot proceed until the district lines are precleared. *See Puerto Rican Legal Defense and Educ. Fund v. New York,* 769 F. Supp. 74, 76-77 (E.D.N.Y. 1991); *South Carolina v. United States,* 585 F. Supp. 418 (D.D.C. 1984). Therefore, until DOJ preclears the new districts, those districts are not legally effective.

Consequently, if the new districts are precleared by DOJ between March 1 and the filing deadline for candidate nomination petitions, A.R.S. § 16-322(D) determines the date for calculating voter registration to determine how many signatures candidates must obtain. Reading the "established and effective" language in A.R.S. § 16-322(D) to require preclearance is consistent with the statutory language and with the Voting Rights Act. Sections 16-322(A)(2) and (3) require that the signature requirements be based on registered voters in the district from which the candidate will be elected. The signature requirements, therefore, must be based on the districts that will be used for the election, and this is not known with certainty until the preclearance process is completed (or until a court order determines what districts will be used for the 2002 election). Under A.R.S. § 16-322(D), the signature requirements are calculated based on the number of registered voters "on the day the new districts. . . are effective," rather than March 1.[2]

---

[2] For the 1992 election, a court order ultimately determined what legislative districts would be used. *Arizonans for Fair Representation v. Symington*, 1993 WL 375329 (D. Ariz. 1992). Following the 1990 decennial census, the Legislature had not obtained preclearance of legislative districts before the candidate filing deadline, and the district court permitted the State to use the districts approved by the Legislature for the 1992 election, despite the lack of preclearance. When the Court issued that order, the Legislature, which was then responsible for redistricting, had modified its redistricting plan in response to an objection from DOJ, but the State had not yet submitted and obtained preclearance for the modified plan. The court concluded that authorizing interim use of the modified redistricting plan was appropriate, rejecting alternatives such as proceeding with the election using the 1982 redistricting plan, delaying the 1992 primary election, or ordering at-large elections for the entire Legislature. The order regarding interim use of legislative districts was issued June 19, 1992, six days before the June 25 deadline for filing candidate nomination petitions. The court made it clear that this order was to address the immediate needs of the 1992 election,

Conclusion

If the new districts are precleared between March 1, 2002 and the deadline for filing candidate nomination petitions, the signature requirements for candidate nomination petitions for candidates for Congress and the Legislature are based on the voter registration as of the date of preclearance or a court order authorizing the use of the new districts for the 2002 election.

_____
Thomas P. Prose
Chief Assistant Attorney General

---

and the State was still required to obtain preclearance from DOJ for use of those district boundaries in any future elections.