STATE OF ARIZONA

OFFICE OF THE ATTORNEY GENERAL

ATTORNEY GENERAL OPINION by THOMAS C. HORNE ATTORNEY GENERAL August 29, 2013	No. I13-008 (R13-013) Re: Effect of *Shelby County* on Withdrawn Preclearance Submissions

To: Ken Bennett
Arizona Secretary of State

Questions Presented

You have asked for an opinion on the following questions:

1. Since the United States Supreme Court declared the coverage formula triggering preclearance obligations to be unconstitutional, are previously enacted, but not precleared statutes, valid and enforceable?

2. If the answer to the first question is yes, what are the effective dates of any such statutes that were enacted, but not precleared, and remain in the statute books?

3. What statutes are affected by this scenario?

Summary Answers

1. Yes. The statutes that were duly enacted by the Legislature are valid and enforceable.

2. The effective date for these statutes is June 25, 2013, at the earliest.

3. Six policies and statutes are affected by the preclearance withdrawals and subsequent *Shelby County* decision: (1) 2002 Citizens Clean Election Substantive Policy Statement; (2) Laws 2009 Ch. 134 (H.B. 2101); (3) Laws 2010 Ch. 48 (H.B. 2261); (4) Laws 2010 Ch. 314 (H.B. 2113); (5) Laws 2011 Ch. 105 (S.B. 1412); and (6) Laws 2011 Ch. 166 (S.B. 1471).

Background

The Voting Rights Act of 1965 ("VRA") and its subsequent reauthorizations created a system by which certain jurisdictions were required to submit any statutory or procedural change that affected voting for preclearance prior to implementing it. The preclearance obligation, set forth in Section 5 of the VRA, shifted the burden of proof to the covered jurisdictions to demonstrate before implementing any statutory or procedural change that affected voting that such change would not have a discriminatory effect. 42 U.S.C. § 1973c. The covered jurisdictions could seek preclearance by either submitting a letter containing the requisite information to the Department of Justice ("DOJ") or by filing a declaratory judgment action in the District Court for the District of Columbia. *See* 42 U.S.C. § 1973b; 28 C.F.R. § 51.10. Arizona and its sub-jurisdictions[1] were covered jurisdictions by the coverage formula contained within section 4(b) of the VRA.

The procedure for seeking preclearance from the DOJ is set forth in 28 C.F.R. § 51.20, *et seq.* For each voting change affecting a statewide election policy, procedure or statute, the State submitted a letter with the following information:

[1] This Opinion does not address *Shelby County's* effect on preclearance submissions made by Arizona's counties, cities, towns, or other sub-jurisdictions subject to preclearance. Those jurisdictions independently sought preclearance for changes in their codes, ordinances, policies, procedures, etc. that affected voting. The Arizona Attorney General did not track or monitor those preclearance submissions.

(a) A copy of the ordinance, enactment, order, or regulation embodying the change affecting voting for which preclearance is sought;

(b) A copy of the current voting standard, practice, or procedure that is being amended;

(c) A statement identifying each change between the submitted regulation and the previous practice;

(d) A statement identifying the authority under which the jurisdiction undertook the change;

(e) The date the change was adopted;

(f) The date on which the change takes effect;

(g) A statement regarding whether the change has already been implemented;

(h) A statement regarding whether the change affects less than the entire jurisdiction and an explanation, if so;

(i) A statement of the reasons for the change;

(j) A statement of the anticipated effect of the change on members of racial or language minority groups;

(k) A statement identifying any past or pending litigation concerning the change or related voting practices; and

(l) History of preclearance for the prior practice.

28 C.F.R. § 51.27. The DOJ then had sixty calendar days from the date it received the submission to interpose an objection. 28 C.F.R. § 51.9. The DOJ was also authorized to ask for additional information within that sixty-day period. 28 C.F.R. § 51.37. When the DOJ asked for additional information, a new sixty-day period would begin from the DOJ's receipt of that additional information. *Id.* A jurisdiction could withdraw a submission at any time prior to a final decision by the DOJ. 28 C.F.R. § 51.25.

Since 1967, the State has submitted approximately 773 statutes, policies, forms, and procedures affecting voting to the DOJ for preclearance. According to the Attorney General's

records, the State did not seek preclearance through court action in the D.C. district court for any proposed changes. Of those 773 submissions, only six were partially or fully withdrawn:

(1) 2002 Citizens Clean Election Substantive Policy Statement

(2) Laws 2009 Ch. 134 (H.B. 2101)

(3) Laws 2010 Ch. 48 (H.B. 2261)

(4) Laws 2010 Ch. 314 (H.B. 2113)

(5) Laws 2011 Ch. 105 (S.B. 1412)

(6) Laws 2011 Ch. 166 (S.B. 1471)

Those withdrawals, and the current status of the underlying laws, are discussed below.

In *Shelby County, Alabama v. Holder*, the United States Supreme Court held that Section 4(b)'s coverage formula was unconstitutional. 133 S. Ct. 2612, 2631 (2013). The Court stated that the formula "can no longer be used as a basis for subjecting jurisdictions to preclearance." *Id.*

Analysis

1. Because *Shelby County* Eliminated the Coverage Formula and Therefore Arizona's Preclearance Obligation, Duly Enacted Statutes that Were Submitted for Preclearance but Later Withdrawn Are Enforceable.

Section 5 of the Voting Rights Act prohibits the enforcement in any covered jurisdiction of any "change affecting voting" absent preclearance by a declaratory judgment or from the DOJ. 28 C.F.R. §§ 51.1, 51.10, 51.12. As set forth above, this requirement shifted the burden of proof to the State to demonstrate as a prerequisite for implementing a new statute, procedure, rule, or form, that the change did not have the purpose or effect of denying or abridging the right to vote on account of race, color, or membership in a language minority group. 28 C.F.R. §§ 51.1; 51.10.

The preclearance obligation applied only to jurisdictions covered by the coverage formula set forth in Section 4(b) of the VRA. The United States Supreme Court held that the coverage formula is unconstitutional because current circumstances do not justify it. 133 S. Ct. at 2629 (stating that in the 2006 reauthorization of the VRA, Congress kept the focus on decades-old data relevant to decades-old problems, rather than current data reflecting current needs). The Court declared Section 4(b) unconstitutional, but issued no holding on Section 5. *Id.* at 2631. The "formula in [Section 4(b)] can no longer be used as a basis for subjecting jurisdictions to preclearance," but "Congress may draft another formula based on current conditions." *Id.* Consequently, Arizona is presently not a covered jurisdiction subject to the preclearance obligation.

Until the *Shelby County* decision, Arizona statutes that had not been precleared were unenforceable. Other than preclearance, there was no barrier to implementing those few duly enacted statutes that had been withdrawn from preclearance consideration. Now, under *Shelby County*, the preclearance barrier is removed and such statutes are enforceable.

2. The Effective Date for the Statutes Previously Withdrawn from Preclearance Consideration Is June 25, 2013.

The general effective date for new statutes is the ninety-first day after the Legislature adjourns *sine die*. *Bland v. Jordan*, 79 Ariz. 384, 386, 291 P.2d 205, 206 (1955). Generally, the effective date for Arizona statutes subject to preclearance has been the date of preclearance or the general effective date, whichever comes later.

Under federal jurisprudence, when a court announces a rule of federal law but does not expressly state whether the decision applies prospectively only, the opinion "is properly understood to have followed the normal rule of retroactive application." *Harper v. Virginia Dept. of Taxation*, 409 U.S. 86, 97 (1993). Retroactivity means that when a court decides a case

and applies a new legal rule to the parties before it, then the new rule must be applied "to all pending cases." *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 752 (1995).

In *Shelby County*, the Court announced a new rule of law that Section 4(b)'s coverage formula is unconstitutional, but did not expressly limit that ruling to apply prospectively. 133 S.Ct. at 2631. Therefore, under *Harper*, *Shelby County* must have retroactive application.

This interpretation draws additional support from the DOJ's own statement that it would not make preclearance determinations on any matters awaiting ruling at the time the *Shelby County* decision was issued:

> With respect to administrative submissions under Section 5 of the Voting Rights Act, that were pending as of June 25, 2013, or received after that date, the Attorney General is providing a written response to jurisdictions that advises:
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> On June 25, 2013, the United States Supreme Court held that the coverage formula in Section 4(b) of the Voting Rights Act, 42 U.S.C. 1973b(b), as reauthorized by the Voting Rights Act Reauthorization and Amendments Act of 2006, is unconstitutional and can no longer be used as a basis for subjecting jurisdictions to preclearance under Section 5 of the Voting Rights Act, 42 U.S.C. 1973c. *Shelby County v. Holder*, 570 U.S. ___, 2013 WL 3184629 (U.S. June 25, 2013) (No. 12-96). Accordingly, no determination will be made under Section 5 by the Attorney General on the specified change. *Procedures for the Administration of Section 5 of the Voting Rights Act*, 28 C.F.R. 51.35. We further note that this is not a determination on the merits and, therefore, should not be construed as a finding regarding whether the specified change complies with any federal voting rights law.

U.S. DOJ: Civil Rights Division: Voting Section, http://www.justice.gov/crt/about/vot/. Therefore, anything that was pending evaluation by the DOJ on June 25, 2013 must be deemed effective as of that date.

But the *Reynoldsville Casket* case instructs that the retroactivity only applies to pending cases. None of the withdrawn submissions were under review at the time *Shelby County* was

issued, and therefore cannot be considered to have been pending. As such, their effective date cannot be earlier than June 25, 2013.

3. Current Status of Previously Withdrawn Preclearance Submissions

Based on a comprehensive review of the Attorney General's records, the Attorney General had withdrawn six preclearance submissions of statewide policies and statutes. The following discussion sets forth their status as of June 25, 2013.

a) 2002 Citizens Clean Election Substantive Policy Statement

The Arizona Citizens Clean Election Commission ("CCEC") adopted the policy "Candidates Denied Approval for Funding" during its December 11, 2001 public meeting. The Attorney General's Office submitted the policy change to the DOJ for preclearance on January 11, 2002. Under this policy, a candidate who failed to submit a sufficient number of valid contribution slips was not permitted to provide a supplemental submission of additional slips. On February 28, 2002, the Attorney General submitted a letter to the DOJ withdrawing the submission because CCEC had effectively superseded the policy by promulgating a new proposed rule addressing the same subject matter. Because this policy statement has been superseded by subsequent rules embodied in the Arizona Administrative Code, the *Shelby County* decision is irrelevant to the policy's effective date.

b) Laws 2009 Ch. 134 (H.B. 2101)

H.B. 2101 made several amendments to the laws governing county supervisor board members. Section 1 of the bill lowered the population threshold (from 200,000 to 175,000) at which counties must have five board members and clarified the number of signatures needed for calling a special election. Section 2 provided that a county with a population exceeding 175,000 based on 2000 census data must begin the process of electing two additional supervisors at the next election and required the current applicable board(s) of supervisors to form five

supervisorial districts by adopting the boundaries of five precinct boundaries. According to comments made in the minutes of the House of Representatives Committee on Government, H.B. 2101 was needed to increase county leadership in Pinal County, which had undergone significant population growth. This Attorney General submitted the law to the DOJ for preclearance on August 11, 2009.

On September 24, 2009, a group of registered voters in Pinal County sued the Pinal County Board of Supervisors, the Pinal County Recorder, the Pinal County Election Director, and Pinal County itself in a special action seeking to declare Section 2 of H.B. 2101 unconstitutional. *Robison v. Pinal County Bd. of Supervisors*, Pinal County Superior Court Cause No. S-1100-CV-200903971.

On October 13, 2009, the Attorney General received a request for more information from the DOJ with respect to Section 2 of the bill, but the DOJ precleared Section 1. On October 29, 2009, the Pinal County Superior Court indicated by minute entry that it would enter the form of judgment lodged by Plaintiffs, which stated that Section 2 of H.B. 2101 was unconstitutional and may not be implemented. Specifically, the court held the following:

> Section 2 of the Legislation is void and of no effect because it is based on electoral districts that have never been precleared under Section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c;
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> Section 2 of the Legislation is void and of no effect because it is an unconstitutional special law in violation of Article 4, Part 2, § 19 of the Arizona Constitution;
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> Section 2 of the Legislation is void and of no effect because it requires Defendants to establish supervisorial districts grossly disproportionate in population in violation of Article 2, §§ 13 and 21 of the Arizona Constitution.

In light of the disposition of that litigation, the Attorney General withdrew the submission for preclearance with regard to Section 2 of H.B. 2101. Under the superior court's decision, Section 2 of H.B. 2101 is void and *Shelby County* does not revive it.

c) Laws 2010 Ch. 48 (H.B. 2261) 2010 Ch. 314 (H.B. 2113)

Both Laws 2010 Ch. 48 (H.B. 2261) and Laws 2010 Ch. 314 (H.B. 2113) amended statutes related to governance of community college districts. The Attorney General submitted the two laws separately, but simultaneously, to the DOJ for preclearance, but the subsequent letter from DOJ requesting additional information and the partial withdrawal letter addressed the two bills together.

H.B. 2261 amended A.R.S. § 15-1441 regarding the term of office for board members for community college districts. Preexisting law provided for a staggering of board members from the first general election for board members was held and provided that each member's term is six years. Section 1 of H.B. 2261 changed the term of board members to four years for a county with a population of at least three million, which presently applies only to Maricopa County. This amendment was to take effect in the next election after the statute's effective date, but the effective date was amended subsequently in H.B. 2113 (*see* below). Section 1 also provided for two additional board members, to be elected at-large, in counties with a population of at least three million. At the first general election held to elect the new at-large members, the two candidates having the most votes would be declared elected. The elected member receiving the highest number of votes would serve a four-year term and the elected member receiving the next highest number of votes would serve a two-year term. Thereafter, each member's term would be four years. Sections 2 and 3 of the bill were not subject to preclearance. Section 4 provided that current board members shall continue to serve until the expiration of their normal terms.

The Attorney General submitted Sections 1 and 4 of H.B. 2261 to the DOJ for preclearance on May 28, 2010.

As noted, the DOJ responded with a request for more information that was intertwined with a request for more information on H.B. 2113, and parts of H.B. 2113 superseded parts of H.B. 2261. H.B. 2113 also made changes to the terms of office and number of members for community college district boards. Sections 1 and 6 of H.B. 2113 did not include changes affecting voting and were not submitted for preclearance. Section 2 amended A.R.S. § 15-1441(C) to provide that the change from six year terms to four-year terms would not become effective until June 30, 2012. Section 2 also provided that the addition of two at-large board members would not be effective until July 1, 2012. Sections 3 and 4 repealed A.R.S. § 16-322, which provided for the number of signatures needed for nomination petitions and replaced that statute with identical language except for A.R.S. § 16-322(a)(5), which changed the number of signatures a candidate for community college district must gather. Section 5 amended Section 4 of H.B. 2261 to clarify the effective date.

The Attorney General submitted Sections 2 through 5 of H.B. 2113 to the DOJ on May 28, 2010 for preclearance. On July 27, 2010, the DOJ responded. The DOJ did not make a determination as to H.B. 2261, Sections 1 and 4, because they were superseded by H.B. 2113, Sections 2 and 5. The DOJ also did not make a determination as to the implementation schedule set forth in H.B. 2261, Section 1 and H.B. 2113, Section 2, because they were directly related to the adoption of the two additional proposed at-large board members for which they sought additional information. The information sought included a detailed explanation of the governmental interest to be served by the addition of two members to the college district board and the basis for the state's decision that this interest is better served by electing them on an at-

large basis, as opposed to from single-member districts; a description of alternative proposals; and election returns by voting precinct within Maricopa County for each federal, state, county, and county school board election since 1999 in which minorities have participated as candidates.

On October 27, 2010, the Attorney General wrote to the DOJ summarizing its understanding of what had been precleared as follows:

- H.B. 2261, § 1, to the extent that section changed the terms of office for community college district board members from six years to four years, in a county with a population of at least three million persons;
- H.B. 2113, § 2, to the extent that section amends A.R.S. § 15-1441(C) to provide that the change in the terms of office provided for in H.B. 2261 will become effective on June 30, 2012; and
- H.B. 2113, §§ 3-5.

The Attorney General then withdrew from consideration the following:

- H.B. 2261, § 1, regarding the effective date of that amendment and regarding that section's amendment to A.R.S. § 15-1441(I).
- H.B. 2261, § 4
- H.B. 2113, § 2, except to the extent that section amended A.R.S. § 15-1441(C) to provide that the change in the terms of office provided for in H.B. 2261 would become effective on June 30, 2012.

The Legislature made no further changes to A.R.S. § 15-1441 or 16-322 relevant to this discussion.

The current version of A.R.S. § 15-1441(I) provides:

> Beginning in July 1, 2012, in addition to the governing board members who are elected from each of the five precincts in a community college district, a county with a population of at least three million persons shall elect two additional governing members from the district at large. At the first general election held to elect at-large governing board members, the two candidates having the most votes shall be declared elected, if each candidate is a qualified elector who resides in that county. The elected member who receives the highest number of votes of the at-large candidates shall serve a four year term and the elected member who receives

> the next highest number of votes shall serve a two year term. Thereafter each member's term is four years.

Because *Shelby County* removed the preclearance obligation and this law has not been changed since its original passage, the effective date must be June 25, 2013 at the earliest. Therefore, the next applicable election at which time two at-large board members shall be elected is 2014. Candidates seeking to run for that office must therefore comply with A.R.S. § 16-322(A)(5)(b) and all other applicable election statutes. The current members of the applicable community college district boards will continue to serve the remainders of their respective terms.

d) Laws 2011 Ch. 105 (S.B. 1412)

Senate Bill 1412 created new security requirements for early ballots and required photo identification from persons who deliver more than ten early ballots to an election official. Section 1 amended A.R.S. § 16-545 by requiring election officers to ensure that return envelopes for early ballots are tamper evident when properly sealed. Section 2 amended A.R.S. § 16-547 by requiring election officials to provide instructions to voters that early ballots should be returned in the tamper evident envelope enclosed with the ballot and to include a warning that it is a felony to receive or offer compensation for a ballot. Section 3 amended A.R.S. § 16-1005 by including new language to make it a felony to mark a voted or unvoted ballot or ballot envelope with intent to fix an election. Section 3 also added new subsections B through H to A.R.S. § 16-1005 regarding additional forms of ballot abuse and classification for those violations as felonies. Subsection D required a person who delivers more than ten early ballots to provide a copy of his or her photo identification to the election official.

The Attorney General submitted the bill for preclearance on May 18, 2011. On June 27, 2011, the DOJ precleared all of the sections except Subsection D, which created A.R.S. § 16-

1005(D) regarding the requirement to provide a photo identification when delivering more than ten early ballots. As to that section, the DOJ asked for more information, including how that proposed provision was expected to serve the state interest and whether any alternative measures had been considered; a list of the acceptable photographic identification; and a detailed description of the statewide report that would be posted on the secretary of state's website regarding such individuals who did deliver more than ten early ballots. The Attorney General withdrew the submission regarding Subsection D on August 4, 2011. In 2012, the Legislature amended A.R.S. § 1005 by repealing that subsection. 2012 Ariz. Session Laws Ch. 361, § 22. Therefore, *Shelby County* has no effect on the validity of this provision.

e) Laws 2011 Ch. 166 (S.B. 1471)

In 2011, S.B. 1471 made changes to a number of election-related statutes. Section 1 amended A.R.S. § 16-248 to increase the minimum number of active registered voters needed to allow precincts to conduct the presidential preference primary by mail from two hundred to three hundred. Section 2 amended A.R.S. § 16-531 regarding the number of clerks of election a board of supervisors may appoint. Section 3 repealed the language set forth in A.R.S. § 16-547(A) for the affidavit contained on an early ballot envelope and added new language. The new language provided that the declaration is provided under penalty of perjury, that the voter is a registered voter in the county, and that the voter has not voted in any other county or state. The new language also indicates whether the voter was assisted and provides blanks for the signature and address of the assistant. Section 4 amended A.R.S. § 16-580(G), prohibiting candidates and persons who have been employed by or volunteered for a candidate, campaign, political organization or political party from assisting voters in voting. Section 5 of the bill added a requirement that a new political party seeking recognition must obtain signatures from voters in at least five different counties, and at least ten percent of the required total shall be registered in

counties with populations under 5,000. Section 6 amended the signature requirements of A.R.S. § 16-803 regarding recognition of a new political party.

The Attorney General submitted the bill to the DOJ for preclearance on June 15, 2011. The DOJ sent a letter on August 15, 2011 that precleared all but Section 4 (A.R.S. § 16-580(G)) of the bill. As to that section, the DOJ requested additional information, including the following:

> A detailed description of the manner in which the prohibition will be implemented including,
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> a. the minimum amount of time, if any, that an individual may be employed by or volunteer for one of the prohibited entities that will preclude them from providing any assistance to a voter;
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> b. whether for those individuals whose ineligibility is based on volunteering for an entity that exists for more than a single election cycle, such as a political party, that the resulting ineligibility for the individual similarly extends beyond the date of the election;
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> c. whether the proposed prohibition on providing assistance will be applicable to those individuals who also serve as employees in county offices or as poll workers on election day; and
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> d. any guidance that the state has issued concerning the manner in which it will implement this prohibition, including enforcement at the polling places or in county offices.

On October 4, 2011, the Attorney General withdrew the preclearance submission regarding Section 4 of S.B. 1471 regarding amendments to A.R.S. § 16-580(G). The Legislature amended A.R.S. § 16-580 in 2012 to remove the language at issue. 2012 Ariz. Session Laws Ch. 361, § 13. That version was precleared on July 19, 2012.

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Conclusion

The *Shelby County* decision removed the preclearance obligation by holding the coverage formula unconstitutional. Therefore, any duly enacted state statutes that had not been precleared or repealed are deemed valid and enforceable. The effective date of such statutes is the date of the *Shelby County* decision, June 25, 2013. This Opinion does not address the effect of *Shelby County* on the enforceability of any laws, policies, or procedures enacted by the counties, cities, towns, or other jurisdictions subject to the preclearance obligation.

Of the preclearance submissions withdrawn by the Attorney General, only the amendments to A.R.S. §§ 15-1441 and 16-322 are affected by the *Shelby County* decision. Those sections provide for two new at-large members of community college districts in counties with a population of at least three million people. Those two new at-large board members must be elected during the 2014 election.

Thomas C. Horne
Attorney General