PUBLIC INTEREST
LEGAL FOUNDATION

RE: Response to United States Department of Justice July 28, 2021 Guidance

August 26, 2021

We write today regarding the recent guidance dated July 28, 2021, issued by the Civil Rights Division regarding enforcement of certain Civil Rights statutes and their application to state run audits and a state's return to pre-covid election procedures. The Public Interest Foundation has lawyers experienced in this area who are happy to further help you decipher and judge the guidance sent by the Department of Justice ("Justice Department"). This letter is to inform you that the guidance offered by the Justice Department is on tenuous legal grounds and is designed more to affect your behavior than it is to provide a sober description of federal power. Simply, the Justice Department overstates its power and understates yours. The guidance is an effort to interfere with the rightful exercise of your power to determine how to run your own elections.

No Federal Authority over State Audits

The Attorney General has simply exaggerated the reach of 52 U.S.C. §§ 20701-20706 in an attempt to exercise non-existent federal authority over you and your state. The Justice Department wants this exaggerated guidance to reach audits because it does not want any audits to occur as potentially outlined and directed by state law and state courts. The purpose of 52 U.S.C. §§ 20701-20706, (former 42 USCS §§ 1974 *et seq*.) is investigatory in nature. *See e.g*., *Kennedy v. Lynd,* 306 F.2d 222 (5th Cir. 1962), *cert. denied*, 371 U. S. 952. It exists only to help the Attorney General determine the advisability of commencing possible investigations of federal election offenses. If there is no underlying potential voting rights violation, any exercise of this power is not authorized and is a brazen abuse of power.

When a state conducts an audit of a past election, the audit itself does not violate the Voting Rights Act or any other federal election law. In fact, the Justice Department has never – in the entire history of the existence of the Civil Rights Division – interfered in or investigated an election audit, recount, or canvass. This is because past leadership has understood it has no legal authority to do so. The Guidance issued on July 28, 2021, wants you to believe the Justice Department is engaging in a normal exercise of federal power under federal voting law. It is not.

Furthermore, professing that law-abiding elected officials conducting an audit could subject themselves to criminal penalties for willful violations of the statute is a brazen attack on the Constitutional arrangement where states have direct and unquestioned authority to conduct and manage their own elections. If no voters are intimidated or denied the right to vote, states may conduct self-examinations of their own election procedures and results. If you have any questions or doubts on this point, we are perfectly happy to arrange a meeting with you and a team of expert election lawyers with experience working at the same Justice Department who can carefully explain the issues implicated – or not – by the Justice Department's guidance at no cost to you. We are at your disposal and service on this point.

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Section 11(b) of the Voting Rights Act is Not Implicated by a State election Audit.

Section 11(b) prohibits the direct intimidation, threat, or coercion of voters. It proscribes such conduct against a voter prior to or in the act of voting. Section 11(b) would be violated when someone threatens or intimidates a voter to vote a certain way or perhaps to not vote at all. It requires real, objective intimidation, not imaginary or attenuated intimidation.

Section 11(b) only reaches real intimidation. When an audit is conducted the voters have long since voted – the act of voting was months ago. It is extremely improbable that Section 11(b) would be implicated by an audit, recount, or canvass. This is an absurd and implausible interpretation of Section 11(b) of the Voting Rights Act – one intended to intimidate states regarding conducting an election audit – that no court could possibly uphold as correct. Furthermore, the weight of legal authority is overwhelmingly against applying Section 11(b) to state election audits. Courts have been reluctant to apply Section 11(b) in circumstances far more severe than conducting a post-election audit – and the Justice Department knows this. In 2007, the Voting Section lost a case under Section 11(b) involving an election official that was threatening voters with arrest if they attempted to vote and published their names in the newspaper. *U.S. v. Ike Brown,* 494 F. Supp. 440, 476 (S.D. Miss. 2007). In another case, the very same Voting Section at the Civil Rights Division dismissed Section 11(b) claims against a member of the New Black Panther Party even when he accompanied other armed and uniformed members who were posted at a polling place.

It is against this history of failure in other cases that the Civil Rights Division now threatens your state about conducting a post-election audit when no voters are contacted. The bottom line is this: current leadership at the Civil Rights Division is trying to prevent any audits because they are satisfied with the results of the 2020 election and would prefer not to raise any questions about potential problems. They are not acting as objective law enforcement officials.

States Decisions to end Temporary Electoral Changes to Accommodate COVID concerns do not Violate Federal Voting Laws.

The guidance to you is also flat wrong as it relates to returning to pre-COVID practices and procedures. Due to concerns regarding the COVID-19 pandemic, many states made temporary accommodations to their electoral procedures to protect the health of its voters. For example, some states decided to increase the length or hours of early voting or decided to provide drop boxes for absentee ballot collection.

A state may determine that such procedures are no longer required and return to their pre-Covid early voting hours and absentee ballot collection. This sort of return to the original statutory procedures does not, by itself, raise any inference of illegality. *See e.g., Ohio Democratic Party v. Husted,* 834 F.3d 620, 623 (6th Cir. 2016) ("Adopting plaintiffs' theory of disenfranchisement would create a 'one-way ratchet' that would discourage states from ever increasing early voting opportunities, lest they be prohibited by federal courts from later modifying their election procedures in response to changing circumstances."). There is nothing inherently suspect in a state deciding to end a temporary COVID related election procedure. A state's election laws that were lawful pre-COVID do not suddenly become unlawful when reinstated. Nor do the Attorney General's threats of increased scrutiny and assumptions of illegality and nefarious intent make them unlawful.

Contrary to the guidance, the baseline original practice is presumptively valid. Returning to the original pre-COVID statutory practice does not trigger exacting scrutiny. It should not launch a Civil Rights Division inquiry – an inquiry that you and your staff would be well advised to offer absolutely no

help. If you are being contacted by the Civil Rights Division, it is because they aim to hurt (or sue) your state, not help it. Again, if you are contacted by Civil Rights Division staff related to a return to pre-COVID statutory practices, our suggestion is to *not* speak with them, and we are happy to assemble a team of former Justice Department lawyers to meet with you and guide you through the inquiry without cost to you.

Of course, states must comply with the United States Constitution and with federal election laws. These include the Voting Rights Act of 1965, 52 U.S.C 10301 *et seq*. (formerly 42 U.S.C. 1973 *et seq*.); the National Voter Registration Act of 1993, 52 U.S.C. 20501, *et seq*. (formerly 42 U.S.C. 1973gg *et seq*.); the Help America Vote Act of 2002, 52 U.S.C. 20901 *et seq*. (formerly 42 U.S.C. 15301 *et seq*.); the Uniformed and Overseas Citizens Absentee Voting Act of 1986, 52 U.S.C. 20301 *et seq*. (formerly 42 U.S.C. 1973ff *et seq*.); the Americans with Disabilities Act of 1990, 42 U.S.C. 12101 *et seq*.; the Civil Rights Acts, 52 U.S.C. 10101, 20701 *et seq*. (formerly 42 U.S.C. 1971, 1974); and the Voting Accessibility for the Elderly and Handicapped Act of 1984, 52 U.S.C. 20101 *et seq*. (formerly 42 U.S.C. 1973ee *et seq*.).

The Justice Department cannot exercise power when it does not have a statutory predicate to do so. Lest you think that the Voting Section is beyond such behavior, you may be surprised to learn it has been sanctioned millions of dollars over the years by federal courts for doing precisely that. Again, our team of former Justice Department lawyers are happy to meet with you to share the particulars of this history of sanctioned abuse by Civil Rights Division lawyers, at no cost to you.

This abuse of power by the Justice Department should come as no surprise. The identities and backgrounds of the particular officials who now oversee the Justice Department's Civil Rights Division include individuals with extraordinarily biased ideological perspectives. They have a hostility toward a state's power to run its own elections. In the case of Principal Deputy Assistant Attorney General Pamela Karlan, put simply, Karlan is an ideological extremist with a long history of partisan enforcement of civil rights laws as well as rank scholarly dishonesty. In particular she has published false scholarship and has refused to correct it. In the *Duke Journal of Constitutional Law and Public Policy* she falsely published that "for five of the eight years of the Bush Administration, [they] brought no Voting Rights Act cases of its own except for one case protecting white voters."[1] Karlan's scholarship was false. Karlan claimed that no cases were brought by the Bush DOJ under the Voting Rights Act to protect racial minorities in five of eight years (except of course to protect those undeserving whites).

Yet the record shows that numerous cases were brought under the Voting Rights Act to protect non-white racial minorities in all eight years of the Bush administration.[2]

This false scholarship was even brought to the attention of Congress in testimony provided to the House of Representatives. Editors of the Duke University publication said it was incumbent on Karlan to retract her false scholarship, something she has not done.

While it is unpleasant to recount these facts, this history affects you and the citizens of your state. It affects your state because this willingness to twist the truth related to voting practices and enforcement of civil rights laws leaves your state in the cross hairs of potential enforcement actions based on flimsy evidence and an incorrect understanding of the applicable legal authority. It is not a stretch to see that the guidance letter you received from the Justice Department is at the farthest frontier of federal power.

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[1] Pamela S. Karlan, "Lessons Learned: Voting Rights and the Bush Administration," 4 Duke J. Const. L. & Pub. Pol'y 17 (2009).

[2] *See*, *e.g*., J. Christian Adams, *Dishonest Witness Pam Karlan, Latest Act at Impeachment Circus* (Dec. 4, 2019), *available at* https://pjmedia.com/jchristianadams/2019/12/04/dishonest-witness-pam-karlan-latest-act-at-impeachment-circus-n124187.

Understanding the questionable scholarship and activist proclivities of the officials now in charge of the Civil Rights Division helps you to understand how thoroughly incorrect their guidance is.

We stand ready to discuss this matter further and share additional insights.

Sincerely,

J. Christian Adams
President and General Counsel
Public Interest Legal Foundation