U.S. Department of Justice

Civil Rights Division

Office of the Assistant Attorney General *Washington, D.C. 20530*

December 23, 2011

C. Havird Jones, Jr., Esq.
Assistant Deputy Attorney General
P.O. Box 11549
Columbia, South Carolina 29211-1549

Dear Mr. Jones:

This refers to Act R54 (A27 H3003) (2011), relating to domicile factors, duplicate registration, consideration of challenges, the State Election Commission voter registration card system implementation, photographic identification requirements and provisional ballots, special identification card provisions, the State Election Commission voter education program, and the State Election Commission registered voter list, for the State of South Carolina, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c. On August 29, 2011, the Attorney General informed you that no objection would be interposed to sections 1 and 3 of Act R54, and that additional information was required to complete our review of sections 2, 4, 5, 6, 7, and 8 of Act R54. We received your response to our request for additional information on October 27, 2011; additional information was received through December 23, 2011.

Under Section 5 of the Voting Rights Act, the submitting authority has the burden of showing that the proposed changes have neither the purpose nor the effect of denying or abridging the right to vote on account of race, color, or membership in a language minority group. *Georgia v. United States*, 411 U.S. 526 (1973); Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, 28 C.F.R. 51.52(c). The voting change at issue must be measured against the benchmark practice to determine whether it would "lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Beer v. United States*, 425 U.S. 130, 141 (1976).

We have given careful consideration to the information you provided, as well as Census data and information and comments from other interested persons. The Attorney General does not interpose any objection to sections 2 and 6 of Act R54, concerning issuance of a duplicate registration notification card and amendment of procedures for special identification cards issued by the Department of Motor Vehicles (DMV). However, we note that Section 5 of the Voting Rights Act expressly provides that failure of the Attorney General to object does not bar subsequent litigation to enjoin enforcement of the changes. 28 C.F.R. 51.41.

With regard to section 5 of Act R54, concerning photographic identification requirements and provisional ballots, I cannot conclude that the state has sustained its burden under Section 5 of the Voting Rights Act. Therefore, on behalf of the Attorney General, I must object to section 5 of Act R54.

Section 5 of Act R54 would require voters to present one of five forms of photo identification to vote in person. Currently, state law does not require voters to present photo identification in order to vote; in addition to a driver's license or non-driver photo identification card, an elector can vote using a voter registration card with no photograph, along with the voter's signature on the poll list. The current version of the state's identification requirement has been in effect since 1988. In the state's submission and in the record of the legislative proceedings, the justification offered for changing the current practice to require photo identification to vote in person has been to combat voter fraud. Although the state has a legitimate interest in preventing voter fraud and safeguarding voter confidence, *Crawford v. Marion County Election Board*, 128 S. Ct. 1610 (2008), the state's submission did not include any evidence or instance of either in-person voter impersonation or any other type of fraud that is not already addressed by the state's existing voter identification requirement and that arguably could be deterred by requiring voters to present only photo identification at the polls.

In assessing the impact of the proposed photo identification requirements in section 5 of Act R54, we turn first to the data that the state has provided concerning registered voters within the state. The most recent voter registration data available from the State Election Commission indicate that, as of October 1, 2011, there were a total of 2,701,843 registered voters in the state, of whom 69.6% were white and 30.4% were non-white. These data also show that of the total number of registered voters in the state, 239,333 (or 8.9%) did not possess DMV-issued photo identification (either a driver's license or a non-driver's photo ID card) that would satisfy the requirements under Act R54.[1] When disaggregated by race, the state's data show that 8.4% of white registered voters lacked any form of DMV-issued ID, as compared to 10.0% of non-white registered voters. In other words, according to the state's data, which compare the available data in the state's voter registration database with the available data in the state's DMV database, minority registered voters were nearly 20% more likely to lack DMV-issued ID than white registered voters, and thus to be effectively disenfranchised by Act R54's new requirements. We note that the voter registration data matched against the DMV database, and provided to us by the state, does not include several categories of existing registered voters listed as inactive voters, and hence, the number of registered voters without DMV-issued ID may well be higher than even these numbers suggest.

[1] Section 5 of Act R54 would also permit a voter to vote in person using a U.S. passport, a military photo identification, or a state voter registration card containing a photograph of the voter. The state has produced no data demonstrating what percent of registered voters lack a DMV-issued identification but do possess a U.S. passport or military photo identification. The state voter registration card containing a photograph of the voter does not yet exist and is proposed to be implemented by section 4 of Act R54.

Put differently, although non-white voters comprised 30.4% of the state's registered voters, they constituted 34.2% of registered voters who did not have the requisite DMV-issued identification to vote. Non-white voters were therefore disproportionately represented, to a significant degree, in the group of registered voters who, under the proposed law, would be rendered ineligible to go to the polls and participate in the election.

An examination of the county-by-county rates of total registered voters without DMV-issued identification raises additional concerns. Across the state's 46 counties, the rate of registered voters without DMV-issued identification ranges from a low of 6.3% to a high of 14.2%. Notably, seven counties with the highest percentages of registered voters who lack DMV-issued identification are also among the ten counties in South Carolina that have the highest percentage of voting-age persons who are non-white.

The absolute number of minority citizens whose exercise of the franchise could be adversely affected by the proposed requirements runs into the tens of thousands. According to the state's statistics, there are 81,938 minority citizens who are already registered to vote and who lack DMV-issued identification.

These data showing significant racial disparities in the proposed photo identification requirement are of course as available to the state as they are to the Attorney General. However, both in the state's initial submission and in the subsequent communications between us during the course of our review, the state has failed entirely to address the disparity between the proportions of white and non-white registered voters who lack DMV-issued identification.

In sum, however analyzed, the state's data demonstrate that non-white voters are both significantly burdened by section 5 of Act R54 in absolute terms, and also disproportionately unlikely to possess the most common types of photo identification among the forms of identification that would be necessary for in-person voting under the proposed law.

Act R54 includes an exemption to the photo identification requirement if "the elector suffers from a reasonable impediment that prevents the elector from obtaining a photograph identification." The Act provides that this exemption is to be applied by the individual county boards of registration and elections, but does not provide a definition of "reasonable impediment" or guidance regarding how this standard should be interpreted or applied. On August 16, 2011, the state attorney general issued an opinion that provides some limited guidance on this provision, but no additional guidelines have been made available. You have further informed us that the state attorney general's opinion will not be supplemented to provide additional clarity, and no other state entity plans to issue any further guidance on applying the "reasonable impediment" exemption. Given the ambiguity of the Act's "reasonable impediment" exemption and the uncertainty as to how it may be applied, we cannot conclude that this provision will mitigate the law's discriminatory effects. To the contrary, the exemption's vagueness raises the possibility that it will be applied differently from county to county, and possibly from polling place to polling place, and thus risks exacerbating rather than mitigating the retrogressive effect of the new requirements on minority voters.

Section 4 of Act R54 requires the State Election Commission to implement a system in order to issue new free photographic voter registration cards, to be used for voting purposes only. This new system has the potential to mitigate the discriminatory effect described above as regards the existing forms of DMV-issued identification. However, the procedures submitted by the state purporting to set forth the specifications of the system and planned distribution of the photo voter registration cards were described to us as being not final and subject to change. In addition, section 4 provides that the new cards "may be used for voting purposes only," but the state's current requirements, in light of the Attorney General's objection to section 5 of Act R54, would not permit this new registration card to be used as an allowable form of ID for voting.

Section 7 of Act R54 requires the State Election Commission to undertake a number of training, public education, and outreach activities regarding the new photo identification requirements and other provisions of the Act. In the course of our review, the state has provided various drafts of educational material it believes may be effective, but has not developed any final training or educational materials. And section 8 of Act R54, in conjunction with section 7 of the Act, requires the State Election Commission to contact registered voters who lack the requisite identification to inform them of the manner in which they can obtain the necessary identification. The state has provided significantly conflicting information regarding how it will ascertain which voters will be targeted by this program, and has not provided details regarding this proposed process, which is not yet final.

Because the proposed procedures to implement sections 4, 7, and 8 are not yet final, and because these changes are related to the proposed photographic identification requirement in section 5 of Act R54, the Attorney General will make no determination with regard to sections 4, 7, and 8 of the Act. See 28 C.F.R. 51.22(b), 51.35.

We recognize the possibility that efforts by the state, including efforts made pursuant to sections 4, 7, and 8 of Act R54, if applied comprehensively throughout the state, could potentially mitigate Act R54's discriminatory effects. Of course, if the state adopts finalized measures that substantially address the racial disparities described above, the state should not hesitate to resubmit section 5 of Act R54 for further review under Section 5 of the Voting Rights Act. 28 C.F.R. 51.45.

As the state may be aware, the Attorney General interposed an objection in 1994 to a voter photo identification law in Louisiana that would have required first-time voters to show a driver's license or other photo identification at the polls, on the ground that this requirement would have had a retrogressive effect at that time on Louisiana's minority voters. In 1997, Louisiana submitted a modified version of its voter identification requirement that included measures designed to substantially address this retrogressive effect, and the Attorney General interposed no objection to this revised procedure.

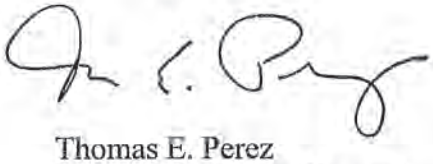
Until South Carolina succeeds in substantially addressing the racial disparities described above, however, the state cannot meet its burden of proving that, when compared to the benchmark standard, the voter identification requirements proposed in section 5 of Act R54 will not have a retrogressive effect. Because we conclude that the state has failed to meet its burden

of demonstrating that section 5 of Act R54 will not have a retrogressive effect, we do not make any determination as to whether the state has established that the proposed changes to its voter identification requirements were adopted with no discriminatory purpose.

The state made its initial submission to the Attorney General on June 30, 2011. Almost six months later, and on the 55th day of the 60-day administrative review period following your response to our written request for additional information, the state forwarded an undated letter from the state DMV director that purports to disagree with the data previously provided to us by the State Election Commission regarding the number of registered voters in the state who lack DMV-issued identification. We followed up with you immediately by telephone, but the state offered no additional supporting documentation. Moreover, the state did not provide any data whatsoever refuting the fact, demonstrated by the state's earlier data, that minority registered voters are about 20% more likely than white registered voters to lack DMV-issued identification. The state instead advised that it had nothing further to add to assist in our analysis. The absence of any supporting documentation to accompany this new letter, including racial data and methodology, reinforces our conclusion that the state has not met its burden of proving that the requirements of section 5 of Act R54 comply with the Voting Rights Act. In this regard, I note that our regulations permit the state to request that the Attorney General reconsider this objection. 28 C.F.R. 51.45. Any request for reconsideration should be in written form and should contain all relevant information or legal argument. We also reiterate our willingness to continue our discussions regarding efforts the state may take to address the racial gap that presently exists among photo identification holders in the state.

Under Section 5 of the Voting Rights Act you have the right to seek a declaratory judgment from the United States District Court for the District of Columbia that the proposed changes neither have the purpose nor will have the 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. 51.44. However, until the objection is withdrawn or a judgment from the United States District Court for the District of Columbia is obtained, the submitted change continues to be legally unenforceable. *Clark* v. *Roemer*, 500 U.S. 646 (1991); 28 C.F.R. 51.10. To enable us to meet our responsibility to enforce the Voting Rights Act, please inform us of the action that South Carolina plans to take concerning this matter. If you have any questions, you should contact Robert S. Berman (202-514-8690), a deputy chief of the Voting Section.

Sincerely,



Thomas E. Perez
Assistant Attorney General

U.S. Department of Justice

Civil Rights Division

T. 2/11/08
CC:TFM:JP:jdh
DJ 166-012-3
2007-6012

Voting Section - NWB
950 Pennsylvania Avenue, N.W.
Washington, DC 20530

February 11, 2008

Ms. Sara Frankenstein
Gunderson, Palmer, Goodsell & Nelson
P.O. Box 8045
Rapid City, South Dakota 57709-8045

Dear Ms. Frankenstein:

This refers to the increase in the number of county commissioners from three to five, and the 2007 redistricting plan for Charles Mix County, South Dakota, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. 1973c. We received your submission on December 12, 2007; supplemental information was received through January 28, 2008.

According to the 2000 Census, the County has 9,350 residents, of whom 2,644 (28.3%) are Native American, 177 (1.9%) are Hispanic, 9 (0.1%) are Asian, and 12 (0.1%) are African-American. The County currently elects its commission from three single-member districts. Under the proposed plan, the number of commissioners would increase to five and be elected from single-member districts. An increase in the number of commissioners on the board is a voting change under Section 5. *See City of Lockhart v. United States*, 460 U.S. 125, 131 (1983) (change in system where county commission increased from a three-member commission to a five-member commission is a voting change). The county also has adopted a redistricting plan for the five single-member districts.

We have carefully considered the information you have provided, as well as information and materials from other interested parties. Under Section 5 of the Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Public Law 109-246, 120 Stat. 577 (2006) ("Voting Rights Act"), the Attorney General must determine whether the submitting authority has met its burden of showing that the proposed change "neither has the purpose nor will have the effect" of denying or abridging the right to vote on account of race. As discussed further below, I cannot conclude that the County has sustained its burden of showing that the proposed change does not have a discriminatory purpose. Therefore, based on the information available to us, I object to the voting changes on behalf of the Attorney General.

Under Section 5 of the Voting Rights Act, the submitting authority has the burden of

showing that a submitted change has neither a discriminatory purpose nor a discriminatory effect. *Georgia v. United States*, 411 U.S. 526 (1973). See also Procedures for the Administration of Section 5 of the Voting Rights Act (28 C.F.R. 51.52). In satisfying its burden, the submitting authority must demonstrate that the proposed changes are not tainted, even in part, by an invidious racial purpose; it is insufficient simply to establish that there are some legitimate, nondiscriminatory reasons for the voting changes. See *City of Rome v. United States*, 422 U.S. 156, 172 (1980); *Busbee v. Smith*, 549 F. Supp. 494, 516-17 (D.D.C. 1982), aff'd 459 U.S. 1166 (1983).

The Supreme Court identified a non-exhaustive list of factors that may serve as indicia of a discriminatory purpose in *Village of Arlington Heights v. Metropolitan Housing Authority*, 429 U.S. 252, 256-57 (1977) . Those factors include the following: (1) the impact of the official action and whether it bears more heavily on one race than another; (2) the historical background of the action; (3) the sequence of events leading up to the action; (4) whether the challenged decision departs, either procedurally or substantively, from the normal practice; and (5) contemporary statements and viewpoints held by the decision-makers.

Here, an analysis of these factors confirms that the County has not sustained its burden of showing that the proposed change does not have a discriminatory purpose. In the first place, the voting changes appear to have a greater impact on Native Americans because, under the proposed plan, Native American voters can elect their candidate of choice in only one of five districts, as opposed to one in three districts under the current plan. Our election analysis demonstrates that there is no reasonable probability that Native American voters could elect their candidate of choice in District 2 of the proposed plan.

In addition, Charles Mix County and the State of South Dakota have a history of voting discrimination against Native Americans. Native Americans could not vote in the county until 1951. Even when Native Americans received the right to vote, they were discriminated against in registration and other parts of the voting process.

Moreover, the historical background and the sequence of events leading to these voting changes also support an inference of intentional retrogression of Native American voting strength by the county. In January 2005, the county was sued for violations of the Fourteenth Amendment and Section 2 of the Voting Rights Act in *Blackmoon v. Charles Mix County*. At the time *Blackmoon* was filed, no Native American had ever been elected to the County Commission in Charles Mix County, despite the significant Yankton Sioux population in the County. Depositions in the case revealed that after the 2000 Census, the County Commissioners decided not to redistrict despite the fact that commissioners knew that the districts did not provide Native Americans the voting strength to elect a candidate of choice.

On March 24, 2005, the court in *Blackmoon* found that there had been violations of the Fourteenth Amendment because Charles Mix County failed to redistrict after the 2000 Census. Despite the court's finding, the first remedial plan suggested by the county again failed to

provide Native Americans with an opportunity to elect a candidate of their choice. Finally, in 2006, the County agreed to a redistricting plan that included a majority Native American district which could elect a candidate of choice, and this plan was implemented for the 2006 county elections. Under this new plan, the voters elected the first Native American to the county commission in Charles Mix County.

The timing of the adoption of the proposed change to a five member commission raises concerns of a discriminatory purpose. The first petitioner signed the referendum petition to increase the size of the commission on April 3, 2006. Only 46 people signed the initial circulation prior to June 2006. At the June 2006 Democratic Primary election, Ms. Drapeau won, and she would become the first Native American County Commissioner in Charles Mix County because there was no opponent in the general election. Immediately after the primary election, an article about changing the number of county commissioners appeared in *The Lake Andes Wave*. Momentum for the petition then built, and one thousand signatures were obtained to put the referendum on the ballot. The referendum was held in November 2006, and the measure passed.

Elected officials supported the increase in the number of county commissioners. In particular, the Sheriff and his deputies, actively circulated the petition. According to our contacts in the county, the Sheriff and deputies collected signatures in uniform.

Depositions in *Blackmoon* reveal that one commissioner admitted that the commissioners decided not to redistrict in 2000 despite the fact that they knew that the districts did not provide Native Americans the voting strength to elect a candidate of choice. Various community members, including Native Americans and non-Native Americans, also have informed the Section that county commissioners have made comments that evidence a racially discriminatory intent.

We note that under Section 5 you have the right to seek a declaratory judgment from the United States District Court for the District of Columbia that the proposed changes neither have the purpose nor will have the effect of denying or abridging the right to vote on account of race, color, or membership in a language minority group. See 28 C.F.R. 51.44. In addition, you may request that the Attorney General reconsider the objection. See 28 C.F.R. 51.45. However, until the objection is withdrawn or a judgment from the District Court for the District of Columbia is obtained, the increase in the number of county commissioners and the redistricting plan will continue to be legally unenforceable. *Clark v. Roemer*, 500 U.S. 646 (1991); 28 C.F.R. 51.10.

To enable us to meet our responsibility to enforce the Voting Rights Act, please inform us of the action Charles Mix County plans to take concerning this matter. If you have any questions, you should call Tim Mellett (202-307-6262), Acting Deputy Chief of the Voting Section.

Sincerely,

Grace Chung Becker

Grace Chung Becker
Acting Assistant Attorney General
Civil Rights Division

U.S. Department of Justice

Civil Rights Division

Office of the Assistant Attorney General

Washington, D.C. 20035

June 5, 2000

David Méndez, Esq.
Bickerstaff, Heath, Smiley,
Pollan, Kever & McDaniel
1700 Frost Bank Plaza
816 Congress Avenue
Austin, Texas 78701-2443

Dear Mr. Méndez:

This refers to the adoption of numbered posts for the Sealy Independent School District in Austin County, Texas, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. 1973c. We received your response to our February 14, 2000, request for additional information on April 6 and June 1, 2000; supplemental information from the state was received on June 2, 2000.

We have carefully considered the information you have provided, as well as Census data, information in our files, and information and comments from other interested parties. According to the 1990 Census, 12.7 percent of the school district's total population is black and 15.9 percent is Hispanic. Since 1990, it appears that the school district has experienced growth in its overall population and in the minority share of its population. Minority students within the school district at present constitute a significant percentage of the school district's overall student enrollment (28 percent Hispanic/16 percent black).

Under the existing system, the school district elects its seven-member board of trustees on an at-large basis to three-year staggered terms of office (3-2-2). Only one minority representative, an African American, has been elected to the

school board in recent times. After two unsuccessful efforts, this individual succeeded in gaining election when she ran for office in an election year when three trustee seats were up for election. In that contest in 1992 she placed last among the three winning candidates, which was also true of her reelection in 1995. In her two unsuccessful bids for the school board, she, like other minority candidates, appears to have failed to garner sufficient white voter support to get elected under the at-large system.

In our view, the available information concerning voting patterns within the school district is not inconsistent with a pattern of racially polarized voting, although it does appear that some minority candidates in the school district and other local elections have received a level of support from white voters, as well as from minority voters, sufficient to gain election. By and large, however, this level of white voter support appears to have been reserved for a very small number of minority candidates. Most minority candidates have been unsuccessful in election contests for at-large seats on the school board, as well as for other local offices when they face white opposition. Electoral patterns such as these are typically observed in instances where voting is racially polarized.

The school district now seeks to add to its at-large electoral system a numbered post requirement that, in effect, will convert each election for a seat on the board into a separate election contest. In these separate contests for school board seats, minority-supported candidates are more likely to be pitted against white incumbents or challengers in "head-to-head" contests. Where voting is racially polarized, our experience suggests that minority-supported candidates are more likely to lose because they are unlikely to garner a majority of the votes in the bid for a single seat. Indeed, it appears that the school district's sole minority trustee may not have fared well under the proposed system, given her third place showing in the two successful bids for the board in which she faced white opposition.

The school district maintains, however, that the proposed numbered post requirement will not have a negative impact on minority electoral opportunity for at least three reasons. First, the district asserts that voting within the district is not racially polarized and numbered posts cannot adversely impact minority voters under these circumstances. Second, the district claims that minority voters will not be harmed by the implementation of numbered posts because they do not make use of the technique of "single-shot" voting under the existing system and are too small a share of the voting population to elect on their own a candidate of choice. Hence, the change to numbered posts could not worsen their political participation opportunities. Third, the district posits that the addition of

numbered posts will not harm minority voters because under the proposed system, unlike the existing system, white voters will not be able to utilize the technique of "single-shot" voting, which denies minority candidates the white votes needed to gain election under the at-large system.

With regard to the district's first assertion concerning the existence of polarized voting, we have noted above that based on the information available to us there is evidence of such a pattern of voting. We have been unable, however, to conduct a more particularized analysis of the school district's claim in this regard, given, among other things, several deficiencies in the information that has been provided. For example, election returns by voting precinct for school district contests in which minority candidates participated were not provided to us, except for the May 2000 election returns forwarded to us on June 1, 2000. And, the consolidated returns that were provided did not include in several instances the total number of voters who voted in a particular school district election, all of which is important information in the analysis of voting behavior. Finally, no information was provided for elections in which minority candidates participated for municipal offices other than for the City of Sealy.

In support of its argument regarding the absence of polarized voting, the school district relies in large part on the following elections involving minority candidates: 1) the election without opposition of a minority candidate who was first appointed to fill a vacant constable position in Precinct 4 (this candidate also happens to be the husband of the minority school board trustee); 2) the third place election and reelection of the incumbent African-American trustee, who is the only minority to ever serve on the school board; and 3) the election of a single minority candidate to the five-member city council for the City of Sealy, despite numerous unsuccessful candidacies of minority candidates in a city with a combined 1990 minority population share of 38 percent. We are not persuaded that these limited instances of minority electoral success under the circumstances noted above demonstrate the absence of polarized voting within the school district, given the lack of success generally experienced by minority candidates.

The school district's second claim is that the proposed change will not harm minority-supported candidates because minority voters do not single-shot vote and, by themselves, are too small a share of the voting population to control the outcome of an at-large election. This reasoning, however, does not fully embrace the level of minority electoral success, albeit limited, that has been achieved to date within the school district. While it does appear that under the existing at-large, staggered term election system there are limited opportunities for the effective use of single-shot voting, a candidate apparently preferred by

the minority community has gained election to the school board with significant crossover from white voters. This minority candidate ran successfully only in years in which there were three seats up for election and, even then, placed last among the winning candidates when there was white opposition. As noted earlier, it is questionable whether this minority candidate, the incumbent African-American trustee, could continue under the proposed system to be elected to the school board because she would have to place first in contests in which there was white opposition.

Finally, as we understand it, the school district's third claim is that the proposed change may actually benefit minority voters by ensuring that white voters will not be able to "single-shot" vote for a white candidate and thereby deny minority candidates the white votes they need in order to win election. Our experience analysing the impact of electoral devices such as the proposed numbered posts requirement does not support this conclusion. It is true that the implementation of numbered posts will prevent any use of the technique of "single-shot" voting. In our experience, however, "single-shot" voting is generally utilized by minority voters to boost the effect of their support for a preferred candidate in multi-seat, at-large election contests where voting is racially polarized, rather than by white voters who are a majority of the electorate; no information provided to us during our review of the instant submission would require a different conclusion. Implicit in this claim by the school district, however, is the view that when white voters limit their vote to a single candidate, they are more likely to choose a white rather than a minority candidate. This observation is consistent with our experience and adds to the evidence indicating that in single-seat contests for the school board, minority-supported candidates are unlikely to place first ahead of white candidates, and, indeed, are in a worse position than under the existing at-large system to elect candidates of their choice.

Under these circumstances, I am unable to conclude as I must under Section 5 that the school district has met its burden of demonstrating that the submitted change has neither a discriminatory purpose nor a discriminatory effect. Georgia v. United States, 411 U.S. 526 (1973); see also the Procedures for the Administration of Section 5 (28 C.F.R. 51.52). Therefore, on behalf of the Attorney General, I must object to the addition of numbered posts for the Sealy Independent School District.

We note that under Section 5 you have the right to seek a declaratory judgment from the United States District Court for the District of Columbia that the proposed change neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race, color, or membership in a language minority group. See 28 C.F.R. 51.44. In addition, you

may request that the Attorney General reconsider the objection. See 28 C.F.R. 51.45. However, until the objection is withdrawn or a judgment from the District of Columbia Court is obtained, the use of numbered posts by the school district continues to be legally unenforceable. Clark v. Roemer, 500 U.S. 646 (1991); 28 C.F.R. 51.10.

To enable us to meet our responsibility to enforce the Voting Rights Act, please inform us of the action the Sealy Independent School District plans to take concerning this matter. If you have any questions, you should call Deanne B. Ross (202-514-6331), an attorney in the Voting Section.

Sincerely,

Bill Lann Lee
Acting Assistant
Attorney General
Civil Rights Division

U.S. Department of Justice

Civil Rights Division

Office of the Assistant Attorney General

P.O. Box 65808
Washington, D.C. 20035-5808

Telephone (202) 514-2151

September 24, 2001

Cheryl T. Mehl, Esq.
Schwartz & Eichelbaum
800 Brazos Street
Suite 870
Austin, Texas 78701

Dear Ms. Mehl:

This refers to the change in the method of election from single-member districts to an at-large system employing cumulative voting, its implementation schedule, and the subsequent revision of the implementation schedule as subsequently revised for the Haskell Consolidated Independent School District in Haskell, Knox, and Throckmorton Counties, Texas, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. 1973c. We received your responses to our February 5, 2001, request for additional information on July 25, and September 5, 6, 7, and 12, 2001.

We have considered carefully the information you have provided, as well as Census data, and comments and information from other interested parties. According to the 2000 Census, the Haskell Consolidated Independent School District [the district] has a population of 3,845, of whom 19.7 percent are Hispanic and 3.2 percent are black persons.

Our analysis of the district's electoral history indicates that under the current method of election, which utilizes seven single-member districts, Hispanic voters have been able to elect candidates of their choice to office in at least one district. We note that this election method resulted from the settlement of federal litigation claiming that the previous method, an at-large

system with staggered terms, violated Section 2 of the Voting Rights Act. League of United Latin American Citizens, District 5 LULAC v. Haskell Consolidated Independent School Districts, No. 193-CV-0178(C) (N.D. Tex. Oct. 21, 1994). The school district implemented the single-member district system, which contained one district with a Hispanic population majority, in 1995.

Under a cumulative voting system, voters are allocated a number of votes equal to the number of offices that are being contested at that particular election and can assign all of their votes to one candidate. Thus, a candidate supported by voters who are a minority of the electorate can win with support from fewer voters than in a traditional at-large election. A statistical measure, known as the "threshold of exclusion," can determine the lowest percentage of support from a single group that ensures their candidate will win no matter what other voters do. This level of support is 33 percent in a two-seat race and 25 percent in a three-seat race. Thus, for Hispanic voters to elect a candidate of their choice in a three-seat contest, they must either constitute 25 percent of the electorate or be able to count on enough non-Hispanic votes to reach that threshold. The school district has conceded that it will be virtually impossible for minority voters to elect at least one candidate of their choice under the board's proposed method of election without non-Hispanic cross-over voting. Accordingly, we have examined the ability of candidates supported by the Hispanic community to attract non-Hispanic votes in past elections.

Only one Hispanic candidate had been elected to the board of trustees prior to the implementation of single-member districts in 1995. From 1981 to 1994, there were five attempts by four Hispanic candidates to win a seat on the school board. Based on the information provided by the district, in only one instance has a Hispanic candidate's vote total exceeded the threshold of exclusion. In the 1993 contest for Place 1, a Hispanic candidate's vote total exceeded the threshold by only 0.8 percentage points. Accordingly, based on the information available, it appears that candidates favored by the Hispanic community have not consistently received significant non-Hispanic cross-over voting, much less at the levels claimed by the district.

Given the demographics of the school district and apparent voting patterns within it, the jurisdiction has not carried its burden that the proposed change will not significantly reduce the ability of minority voters to elect candidates of their choice to the school board.

We have also examined the reasons proffered by the district in support of the change, such as allegedly low voter turnout during the time that it utilized single-member districts as compared to purportedly higher turnout under the at-large system. An analysis of past voter turnout information does not support the board's position. For example, in May 2001, the board claims that less than one percent of the registered voters in District 1 cast a ballot. A closer examination indicates that the candidate for that position was unopposed and the election would have been cancelled, with the candidate being sworn into office, had there not been another office on the ballot being contested.

Moreover, in both the Section 5 submission and at the February 10, 2000, public hearing, school board officials claimed that voter turnout was higher in at-large elections. The district cited the 1993 election, calculating that 1,465 persons voted, a 64.5 percent turnout rate, and, the 1994 election in which 1,863 persons, or 73 percent of the registered voters voted, as evidence of the need to return to at-large elections. This assertion does not withstand close scrutiny. In both of these elections, two numbered posts were up for election and a voter could vote for both posts. According to the 1993 election returns, there were 730 votes for Place I candidates and 735 votes for Place II candidates for a total of 1,465. The 1994 figure of 1,863 is the result of similar calculation. The only way to arrive at the district's numbers is to assume that every voter who cast a ballot for one post chose not to vote for the second office. We do not believe that such an assumption is warranted here.

Under Section 5 of the Voting Rights Act, the submitting authority has the burden of showing that a submitted change has neither a discriminatory purpose nor a discriminatory effect. Georgia v. United States, 411 U.S. 526 (1973); see also the Procedures for the Administration of Section 5, 28 C.F.R. 51.52. In light of the considerations discussed above, I cannot conclude that your burden has been sustained in this instance. Therefore, on behalf of the Attorney General, I must object to the change to cumulative voting with staggered terms.

In its request for preclearance, the district notes that if, in fact, the change is retrogressive, individuals in the minority community would be free either to petition the board to change the method of election or to institute further litigation. This suggestion ignores the essential purpose of Section 5, which is to ensure that gains achieved by minority voters not be subverted by retrogressive changes. Accordingly, we can not accede to the

district's request.

We note that under Section 5 you have the right to seek a declaratory judgment from the United States District Court for the District of Columbia that the proposed changes neither have the purpose nor will have the effect of denying or abridging the right to vote on account of race, color, or membership in a language minority group. See 28 C.F.R. 51.44. In addition, you may request that the Attorney General reconsider the objection. See 28 C.F.R. 51.45. However, until the objection is withdrawn or a judgment from the District of Columbia Court is obtained, the changes continue to be legally unenforceable. Clark v. Roemer, 500 U.S. 646 (1991); 28 C.F.R. 51.10.

The Attorney General will make no determination regarding the submitted implementation schedule because it is dependant upon the objected to change in the method of election.

We understand that the school district employs Spanish language election procedures. "Spanish language election procedures" refers to such matters as the procedures for translating election-related information and materials (e.g., notices, advertisements, informational pamphlets, ballots) into Spanish (include examples of such documents), procedures for confirming the accuracy of the translations, and the procedures used to provide oral assistance or information in Spanish at polling places, early voting locations, as well as publicity in Spanish regarding the availability of Spanish language assistance. See Interpretive Guidelines: Implementation of the Provisions of the Voting Rights Act Regarding Language Minority Groups, 28 C.F.R., Part 55 (copy enclosed).

Our records fail to show that this change affecting voting has been submitted to the United States District Court for the District of Columbia for judicial review or to the Attorney General for administrative review as required by Section 5 of the Voting Rights Act, 42 U.S.C. 1973c. If our information is correct, it is necessary that this change either be brought before the District Court for the District of Columbia or submitted to the Attorney General for a determination that it does not have the purpose and will not have the effect of discriminating on account of race, color, or membership in a language minority group. Changes which affect voting are legally unenforceable without Section 5 preclearance. Clark v. Roemer, 500 U.S. 646 (1991); Procedures for the Administration of Section 5 (28 C.F.R. 51.10).

To enable us to meet our responsibility to enforce the Voting Rights Act, please inform us of the action Haskell Consolidated Independent School District plans to take concerning this matter. If you have any questions, you should call Ms. Judybeth Greene (202-616-2350), an attorney in the Voting Section. Refer to File No. 2001-2924 in any response to this letter so that your correspondence will be channeled properly.

Sincerely,

Ralph F. Boyd, Jr.
Assistant Attorney General
Civil Rights Division

Enclosure

U.S. Department of Justice

Civil Rights Division

Office of the Assistant Attorney General

Washington, D.C. 20035

NOV 16 2001

The Honorable Geoffrey Connor
Acting Secretary of State
P.O. Box 12060
Austin, Texas 78711-2060

Dear Secretary Connor:

This refers to the 2001 redistricting plan for the Texas House of Representatives, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. 1973c. We received your submission on August 17, 2001; supplemental information was received through October 12, 2001.

We have considered carefully the information you have provided, as well as census data, comments and information from other interested parties, and other information. As discussed further below, I cannot conclude that the State's burden under Section 5 has been sustained in this instance. Therefore, on behalf of the Attorney General, I must object to the 2001 redistricting plan for the Texas House of Representatives.

The 2000 Census indicates that the State has a total population of 20,851,820, of whom 11.5 percent are African American and 31.9 percent are Hispanic. The State's voting age population (VAP) is 14,965,061, of whom 10.9 percent are African American and 28.6 percent are Hispanic. One of the most significant changes to the State's demography has been the increase in the Hispanic population. Between 1990 and 2000, the Hispanic share of the State's population increased from 26 to 31.9 percent. Statewide, African American population remained stable.

Under the Voting Rights Act, a jurisdiction seeking to implement a proposed change affecting voting, such as a redistricting plan, must establish that, in comparison with the status quo, the change does not "lead to a retrogression" in the position of minority voters with respect to the "effective exercise of the electoral franchise." See Beer v. United States, 425 U.S. 130, 141 (1976). In addition, the jurisdiction must establish that the change was not adopted with an intent to retrogress. Reno v. Bossier Parish School Board, 528 U.S. 320, 340 (2000). Finally, the submitting authority has the burden of demonstrating that the proposed change has neither the prohibited

purpose nor effect. Id. at 328; see also Procedures for the Administration of Section 5 (28 C.F.R. 51.52).

The constitutional requirement of one-person, one-vote mandated that the State reapportion the house districts in light of the population growth since the last decennial census. We note that the redistricting plan submitted by the State was passed by the Legislative Redistricting Board (LRB), which had assumed reapportionment responsibility under Article III of the Texas Constitution after the State legislature was unable to enact a redistricting plan.

The LRB held a series of meetings and hearings, culminating with a meeting on July 24, 2001, at which it considered new plans submitted by LRB members. The LRB adopted three amendments making substantive changes to the plan then under consideration. These amendments consisted of approximately 14 discrete changes.

The Texas House of Representatives consists of 150 members elected from single-member districts to two-year terms. Under the existing plan, there are 57 districts that are combined majority minority in total population, and 53 are combined majority minority in voting age population. With regard to those with a majority minority voting age population, 31 districts have a majority Hispanic voting age population, seven have a majority black voting age population, and the remaining 15 districts have a combined minority majority voting age population. There are 27 districts where a majority of the registered voters have a Spanish surname.

An initial issue arises as to the appropriate standard for determining whether a district is one in which Hispanic voters can elect a candidate of choice. The State of Texas has provided, and accepted as a relevant consideration, Spanish-surnamed registered voter data as well as election return information and voting age population data from the census. We agree with the State's assessment, although we also consider comments from local individuals familiar with the area, historical election analysis, analysis of local housing trends, and other information intended to create an accurate picture of citizenship concerns. Campos v. Houston, 113 F.3d 544, 548 (5th Cir. 1997).

Our examination of the State's plan indicates that it will lead to a prohibited retrogression in the position of minorities with respect to their effective exercise of the electoral franchise by causing a net loss of three districts in which the minority community would have had the opportunity to elect its

candidate of choice. Although there is an increase in the number of districts in which Hispanics are a majority of the voting age population, the number of districts in which the level of Spanish surnamed registration (SSRV) is more than 50 percent decreases by two as compared to the benchmark plan. Moreover, we note that in two additional districts SSRV has been reduced to the extent that the minority population in those districts can no longer elect a candidate of choice. In the State's plan these four reductions are only offset by the addition of a single new majority minority district - District 80 - leaving a net loss of three.

As described more fully below, when coupled with an analysis of election returns and other factors, we conclude that minority voting strength has been unnecessarily reduced in Bexar County, South Texas, and West Texas. Because retrogression is assessed on a state-wide basis, the State may remedy this impermissible retrogression either by restoring three districts from among these problem areas, by creating three viable new majority minority districts elsewhere in the State, or by some combination of these methods.

With regard to the problem areas we have identified, in Bexar County the 2000 Census data indicated that the county population constituted 10.4 ideal districts. As a result of the State's constitutional requirement of assigning a whole number of districts to the more populous counties, known as the "county line rule," the State reduced the number of districts in the county from 11 in the existing plan to 10. Although the State has admitted that the reduction to 10 would not have precluded it from maintaining the number of majority Hispanic districts at seven, it in fact chose to reduce that number to six. Initially, the State asserted that it had created an additional majority Hispanic district in Harris County so as to offset the loss of the Bexar County district and identified District 137 as a compensating district. Because the State's obligation under Section 5 is to ensure that the redistricting plan, as a whole, is not retrogressive, such a course of action is not impermissible. However, in the supplemental materials that were provided on October 10, 2001, the State notified us that if any district should be considered as the replacement, District 80 in South Texas - not District 137 - should be the one which offsets the loss of the majority Hispanic district in Bexar County.

When the State is considered as a whole, however, this argument is ultimately unpersuasive. While District 80 indeed adds an additional district in which Hispanic voters in South Texas will have the opportunity to elect a candidate of their choice, in two other districts, as discussed below, they lose

this opportunity, resulting in the net loss for Hispanic voters of one district in South Texas.

In South Texas Hispanic voters will lose the opportunity to elect their candidate of choice in District 35. The new district is created from existing Districts 31 and 44 and pairs an nonminority and a Hispanic incumbent. The Hispanic incumbent currently represents a district which has a Spanish surname registration level of 55.6 percent; that level drops to 50.2 percent in the proposed plan while the Hispanic voting age population decreases from 57.8 to 52.1 percent. Over half (58%) of the new district's configuration is from the nonminority incumbent's former district. Our analysis indicates that District 35 as drawn will preclude Hispanic voters from electing their candidates of choice.

In addition, in Cameron County District 38 reverts to a configuration that previously precluded Hispanic residents from electing a candidate of their choice. The Spanish surnamed registration level is reduced from 70.8 to 60.7 percent, and the Hispanic voting age population decreases from 78.7 percent to 69.6 percent. The State removed over 40 percent of the core of existing District 38, 90 percent of whom are Hispanic persons, and replaced it with population that is 45 percent nonminority. While the Hispanic voters in District 38 still remain a majority of voters in the district, because the area is subject to polarized voting along racial lines and under the particular circumstances present in this district, it is doubtful that Hispanics will be able to elect their candidate of choice.

Finally, the districts adjacent to Districts 35 and 38 have levels of Spanish surnamed registered voters exceeding 80 percent, and Hispanic voting age population exceeding 90 percent, both of which are far beyond what is necessary for compliance with the Voting Rights Act. Thus the reductions in Districts 35 and 38 were avoidable had the State avoided packing Hispanic voters into the districts adjacent to them. Moreover, overall the State fragments the core of majority Hispanic districts in this area, thus affecting member-constituent relations and existing communities of interest in these districts at a disproportionately higher rate than it does other districts in this part of the State. This fragmentation is unnecessary and disadvantages Hispanic voters by requiring them to establish new relations with their elected representatives. It also deviates from the State's traditional redistricting principles in a manner that exacerbates the retrogression in South Texas.

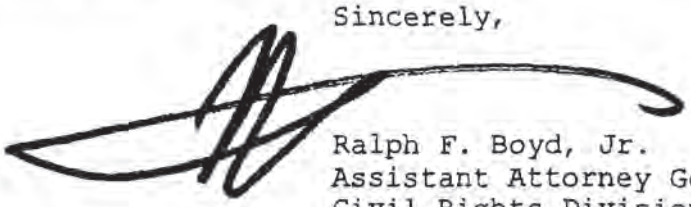
As for West Texas, Hispanic voters lose the opportunity to elect their candidate of choice in proposed District 74. The Spanish surname registration level decreases from 64.5 to 48.7 percent, and the Hispanic voting age population decreases from 73.4 to 57.3 percent. Significantly, the State did not need to reconfigure existing District 74 because the existing configuration under the 2000 Census was underpopulated by only 894 persons, a deviation of 0.64 percent. Such unnecessary population movement supplements our finding in our election analysis that Hispanic voters in District 74 will suffer a retrogression in the effective exercise of the electoral franchise. See Guidance Concerning Redistricting and Retrogression under Section 5 of the Voting Rights Act, 42 U.S.C. 1973c, 66 Fed. Reg. 5411, 5413 (Jan. 18, 2001).

Under Section 5 of the Voting Rights Act, the submitting authority has the burden of showing that a submitted change has neither a discriminatory purpose nor a discriminatory effect. Georgia v. United States, 411 U.S. 526 (1973); see also Procedures for the Administration of Section 5 (28 C.F.R. 51.52). In light of the considerations discussed above, I cannot conclude that your burden has been sustained in this instance. On behalf of the Attorney General, I must object to the 2001 redistricting plan for the Texas House of Representatives. Beyond the specific discussion above, however, in all other respects we find that the State has satisfied the burden of proof required by Section 5.

We note that under Section 5 you have the right to seek a declaratory judgment from the United States District Court for the District of Columbia that the proposed changes neither have the purpose nor will have the effect of denying or abridging the right to vote on account of race, color, or membership in a language minority group. See 28 C.F.R. 51.44. In addition, you may request that the Attorney General reconsider the objection. See 28 C.F.R. 51.45. However, until the objection is withdrawn or a judgment from the District of Columbia Court is obtained, the redistricting plan continues to be legally unenforceable. Clark v. Roemer, 500 U.S. 646 (1991); 28 C.F.R. 51.10.

To enable us to meet our responsibility to enforce the Voting Rights Act, please inform us of the action the State of Texas plans to take concerning this matter. If you have any questions, you should call Mr. Robert Berman (202-307-3718), Deputy Chief of the Voting Section.

Sincerely,



Ralph F. Boyd, Jr.
Assistant Attorney General
Civil Rights Division

U. S. Department of Justice

Civil Rights Division

Office of the Assistant Attorney General *Washington, D.C. 20035*

June 21, 2002

Denise Nance Pierce, Esq.
Bickerstaff, Heath, Smiley,
Pollan, Kever & McDaniel
816 Congress Avenue, Suite 1700
Austin, Texas 78701-2443

Dear Ms. Pierce:

This letter is in reference to the 2001 redistricting plans for the commissioners court, justice of the peace, and constable districts; the renumbering and realignment of voting precincts; two polling place changes; the elimination and renaming of polling places; and the temporary additional early voting locations and their hours for Waller County, Texas, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. 1973c. We received your responses to our February 6, 2002, request for additional information through June 10, 2002.

We have considered carefully the information you have provided, as well as census data, comments from interested parties, and other information, including the county's previous submissions. As discussed further below, I cannot conclude that the county's burden under Section 5 has been sustained in this instance. Therefore, on behalf of the Attorney General, I must object to the 2001 redistricting plans for the commissioners court, justice of the peace, and constable districts.

The 2000 Census indicates that Waller County has a total population of 32,663 persons, of whom 9,565 (29.3%) are black and of whom 6,344 (19.4%) are Hispanic. The county's voting age population is 24,277, of whom 7,601 (31.3%) are black and 3,871 (15.9%) are Hispanic.

The county is governed by a five-member commissioners court. Voters elect four commissioners to four-year, staggered terms from single-member districts, called precincts. The justice of the peace and constable districts are coterminous with the commissioners court districts. Under the census data above, there are two districts under the benchmark plan, Precinct 1 and Precinct 3, in which minority persons are a majority of the voting age population: Precinct 1 has a total minority voting age population of 52.5 percent, while Precinct 3 has a total minority voting age population of 71.9 percent.

In contrast, the proposed 2001 redistricting plans contain only one district in which minority persons are a majority of the voting age population. According to the information that you provided, the black percentage of the voting age population in proposed Precinct 1 voting age population drops to 29.7 percent. Within the context of electoral behavior in Waller County, the county has not established that implementation of this plan will not result in a retrogression in the ability of minority voters to effectively exercise their electoral franchise. Moreover, the viability of alternative plans demonstrates that the potential retrogression of the proposed plan is avoidable.

Our analysis of county elections shows that minority voters in Precinct 1 have been electing candidates of choice since 1996, and that those candidates are elected on the basis of strong, cohesive black and Hispanic support. Our statistical analysis also shows that white voters do not provide significant support to candidates sponsored by the minority community, and that interracial elections are closely contested. For example, the black candidate for commissioner in Precinct 1 prevailed in the last election by two votes. As a result, the proposed reduction in the minority voting age percentage in Precinct 1 casts substantial doubt on whether minority voters would retain the reasonable opportunity to elect their candidate of choice under the proposed plan, particularly if the current incumbent in Precinct 1 declines to run for office again.

Our review of the county's benchmark and proposed plans as well as the alternative plans presented to the county, suggests that the significant reduction in minority voting age population percentage in Precinct 1 in the proposed plan, and the likely resulting retrogressive effect on the ability of minority voters to elect candidates of choice, was neither inevitable nor required by any constitutional or legal imperative. Illustrative plans demonstrate that it is possible to avoid any retrogression in Precinct 1, maintain the minority voting strength in Precinct 3, and meet the county's redistricting criteria. Accordingly, we

are not persuaded by the county's contention that a reduction in minority voting strength in Precinct 1 was necessary to preserve the minority voting strength in Precinct 3 if one is to honor the redistricting criteria used by the county.

Under the Voting Rights Act, a jurisdiction seeking to implement a proposed change affecting voting, such as a redistricting plan, must establish that, in comparison with the status quo, the change does not "lead to a retrogression" in the position of minority voters with respect to the "effective exercise of the electoral franchise." See Beer v. United States, 425 U.S. 130, 141 (1976). If the proposed plan materially reduces the ability of minority voters to elect candidates of their choice to a level less than what they enjoyed under the benchmark plan, preclearance must be denied. State of Georgia v. Ashcroft, C.A. No. 2001-2111 (D.D.C. Apr. 5, 2002), slip op. at 117-18. In addition, the jurisdiction must establish that the change was not adopted with an intent to retrogress. Reno v. Bossier Parish School Board, 528 U.S. 320, 340 (2000). Finally, the submitting authority has the burden of demonstrating that the proposed change has neither the prohibited purpose nor effect. Id. at 328; see also Procedures for the Administration of Section 5 (28 C.F.R. 51.52).

In light of the consideration discussed above, I cannot conclude that your burden of showing that a submitted change does not have a discriminatory effect has been sustained in this instance. Therefore, on behalf of the Attorney General, I must object to the submitted redistricting plans.

We note that under Section 5 you have the right to seek a declaratory judgment from the United States District Court for the District of Columbia that the proposed changes neither have the purpose nor will have the effect of denying or abridging the right to vote on account of race, color, or membership in a language minority group. See 28 C.F.R. 51.44. In addition, you may request that the Attorney General reconsider the objection. See 28 C.F.R. 51.45. However, until the objection is withdrawn or a judgment from the District of Columbia Court is obtained, the changes continue to be legally unenforceable. Clark v. Roemer, 500 U.S. 646 (1991); 28 C.F.R. 51.10.

Please note that the Attorney General will make no determination regarding the submitted realignment and renumbering of voting precincts, the polling place changes, the elimination and renaming of polling places, and the temporary additional early voting locations and their hours because those changes are dependent upon the redistricting plan.

Further, in our letter of February 2, 2002, we informed you that, under the Voting Rights Act, changes, such as the county's proposed redistricting plans, are not legally enforceable until the jurisdiction has obtained Section 5 preclearance for those changes. Clark v. Roemer, 500 U.S. 646 (1991). However, it is our understanding that on March 12, 2002, Waller County conducted an election, which implemented the proposed plan, without such preclearance. Please inform us of the action Waller County plans to take regarding both the objection interposed by this letter as well as the conduct of the March 12 primary election without the requisite preclearance.

If you have any questions on either of these matters, you should call Mr. Timothy Mellett (202-307-6262), an attorney in the Voting Section. Refer to File Nos. 2001-3951 and 2002-2142 in any response to this letter so that your correspondence will be channeled properly.

Sincerely,

J. Michael Wiggins
Acting Assistant Attorney
General

U. S. Department of Justice

Civil Rights Division

Office of the Assistant Attorney General *Washington, D.C. 20035*

Wallace Shaw, Esquire
P.O. Box 3073
Freeport, Texas 77542-1273

AUG 12 2002

Dear Mr. Shaw:

This refers to the procedures for conducting the May 4, 2002, special city charter amendment election and the change in the method of electing city council members from districts to at large for the City of Freeport in Brazoria County, Texas, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. 1973c. We received your responses to our May 14, 2002, request for additional information through July 31, 2002.

With regard to the special election, the Attorney General does not interpose any objection to the specified change. However, we note that Section 5 expressly provides that the failure of the Attorney General to object does not bar subsequent litigation to enjoin the enforcement of the change. See the Procedures for the Administration of Section 5 (28 C.F.R. 51.41).

As to the change to at-large elections with numbered positions, we have carefully considered the information you have provided, as well as census data, comments and information from other interested parties, and other information, including the city's previous submission of the adoption of the current districting system for the election of council members. Based on our analysis of the information you have provided, on behalf of the Attorney General, I am compelled to object to the submitted change in the method of election.

According to the 2000 Census, the city has a total population of 12,708, of whom 6,614 (52.0 percent) are Hispanic and 1,696 (13.3 percent) are black persons. Hispanic residents comprise 47.3 percent, and black residents 12.3 percent, of the city's voting age population. Approximately 29 percent of the city's registered voters are Spanish-surnamed individuals.

Until 1992, the city elected its four-member council on an at-large basis. In that year it began to use the single-member district system, which it had adopted as part of a settlement of voting rights litigation challenging the at-large system. Under the subsequent single-member district method of election, minority voters have demonstrated the ability to elect candidates of choice in at least two districts, Wards A and D. The city now proposes to reinstitute the at-large method of election. Our analysis shows that the change will have a retrogressive effect on the ability of minority voters to elect a candidate of their choice.

Elections in the city are marked by a pattern of racially polarized voting. Under the city's previous use of at-large elections, no Hispanic-preferred candidates were successful until 1990. In that election, one such candidate narrowly won office when several Anglo-supported candidates split the vote. In contrast, a Hispanic-preferred candidate won over significant Anglo opposition in 1992 in the first election held under the single-member district system. Since then, three other minority-preferred candidates have been successful in their wards. However, minority voters remain unable to elect their candidates of choice in municipal at-large elections. Thus, a return to an electoral system where all council offices are elected on an at-large basis will result in a retrogression in their ability to exercise the electoral franchise that they enjoy currently. A voting change has a discriminatory effect if it will lead to a retrogression in the position of members of a racial or language minority group (i.e., will make members of such a group worse off than they had been before the change) with respect to their opportunity to exercise the electoral franchise effectively. Reno v. Bossier Parish School Board, 528 U.S. 320, 328 (2000); Beer v. United States, 425 U.S. 130, 140-42 (1976).

Under Section 5 of the Voting Rights Act, the submitting authority has the burden of showing that a submitted change has neither a discriminatory purpose nor a discriminatory effect. Georgia v. United States, 411 U.S. 526 (1973); see also the Procedures for the Administration of Section 5 (28 C.F.R. 51.52). In light of the considerations discussed above, I cannot conclude that your burden has been sustained in this instance. Therefore, on behalf of the Attorney General, I must object to the change in the method of election.

We note that under Section 5 you have the right to seek a declaratory judgment from the United States District Court for the District of Columbia that the proposed change neither has the purpose nor will have the effect of denying or abridging the

right to vote on account of race, color, or membership in a language minority group. See 28 C.F.R. 51.44. In addition, you may request that the Attorney General reconsider the objection. See 28 C.F.R. 51.45. However, until the objection is withdrawn or a judgment from the District of Columbia Court is obtained, the submitted change continues to be legally unenforceable. Clark v. Roemer, 500 U.S. 646 (1991); 28 C.F.R. 51.10.

To enable us to meet our responsibility to enforce the Voting Rights Act, please inform us of the action the City of Freeport plans to take concerning this matter. If you have any questions, you should call Mr. Robert Lowell (202-514-3539), an attorney in the Voting Section.

Sincerely,

J. Michael Wiggins
Acting Assistant Attorney
General

U. S. Department of Justice

Civil Rights Division

Office of the Assistant Attorney General *Washington, D.C. 20530*

May 5, 2006

Ms. Renee Smith Byas
Vice Chancellor and General Counsel
North Harris Montgomery Community College District
5000 Research Forest Drive
The Woodlands, Texas 77381

Dear Ms. Byas:

This refers to the change from the past practice of conducting joint elections with 11 Independent School Districts (ISD), to the sole conduct of the May 13, 2006, regular and special bond and tax election, including the reduction in the number of polling places and early voting locations, for the North Harris Montgomery Community College District (District) in Harris and Montgomery Counties, Texas, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. 1973c. We received your submission on March 10, 2006.

We have carefully considered the information you have provided, as well as information and comments from other interested parties. We note that currently, elections of the District are consolidated with other elections, including those of 11 of the 12 ISDs that comprise the District. Voters currently may go to a single polling place and vote in elections of the District, as well as the elections of their respective ISDs. In the last election, 84 polling places served the voters of the District.

Under the proposed change, District elections will be held separately from ISD elections, so that voters will have to travel to two separate polling places in order to cast their ballots. Moreover, instead of 84 polling places, there will be 12 polling places. These 12 polling places will serve a geographic area of well over 1,000 square miles with over 540,000 registered voters. The assignment of voters to these 12 sites is remarkably uneven: the site with the smallest proportion of minority voters will serve 6,500 voters, while the most heavily minority site (79.2% black and Hispanic) will serve over 67,000 voters.

Section 5 provides that the submitting authority has the burden of establishing that the proposed changes will not have a retrogressive effect on minority voters to participate in the political process and elect candidates their choice, and that the proposed changes were not adopted with such a discriminatory purpose. We cannot conclude that the statutory burden has been met in this instance. Accordingly, I must, on behalf of the Attorney General, interpose an objection to the proposed changes.

We note that under Section 5 you have the right to seek a declaratory judgment from the United States District Court for the District of Columbia that the proposed changes neither have the purpose nor will have the effect of denying or abridging the right to vote on account of race, color, or membership in a language minority group. See 28 C.F.R. 51.44. In addition, you may request that the Attorney General reconsider the objection. See 28 C.F.R. 51.45. However, until the objection is withdrawn or a judgment from the District Court for the District of Columbia is obtained, the proposed changes continue to be legally unenforceable. *Clark v. Roemer*, 500 U.S. 646 (1991); 28 C.F.R. 51.10.

To enable us to meet our responsibility to enforce the Voting Rights Act, please inform us of the action the District plans to take concerning this matter. If you have any questions, you should call Ms. Yvette Rivera (202-305-4953), Special Litigation Counsel in the Voting Section.

Sincerely,

Wan J. Kim
Assistant Attorney General

U.S. Department of Justice

Civil Rights Division

Office of the Assistant Attorney General *Washington, D.C. 20530*

August 21, 2008

The Honorable Phil Wilson
Secretary of State
P.O. Box 12060
Austin, Texas 78711-2060

Dear Mr. Wilson:

This refers to Chapter 912 (H.B. 2984) (2007), which changes the candidate qualification requirements for the position of supervisor of a fresh water supply district (except for those districts located in Denton County), for the State of Texas submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. 1973c. We received your response to our May 2, 2008, follow-up request for additional information on June 26, 2008.

We have considered carefully the limited information you have provided, as well as census data, comments and information from other interested parties, and other information, including the state's prior submissions. Under Section 5 of the Voting Rights Act, the Attorney General must determine whether the submitting authority has met its burden of showing that the proposed changes do not have the purpose and will not have the effect of denying or abridging the right to vote on account of race, color, or membership in a language minority. 42 U.S.C. 1973c; Georgia v. Ashcroft, 123 U.S. 2498 (2003); Procedures for the Administration of Section 5 of the Voting Rights Act, 28 C.F.R. 51.52 (c). As discussed further below, I cannot conclude that the state's burden of proving that Chapter 912 (H.B. 2984) (2007) will not have a retrogressive effect under Section 5 has been sustained in this instance. Therefore, on behalf of the Attorney General, I must object to Chapter 912.

Your initial submission of September 28, 2007, did not contain the information required to enable us to determine that the proposed change does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race, color, or membership in a language minority group. See 28 C.F.R. 51.52 through 51.57. As a result, we made a timely written request for additional information with regard to this submission on November 26, 2007. See 28 C.F.R. 51.37.

Your responses to our request for additional information, received on January 29 and 31, and March 20, 2008, failed to provide the necessary information that was requested, including the name and location of each fresh water supply district affected by the change, and total population for each broken down by race, color, or language minority group percentages, or the name, race, color or minority language group, and telephone number of each incumbent supervisor, and whether such supervisor is or is not an owner of taxable property in the district. Furthermore, the state declined to take a position on concerns that precluding non-landowning registered voters of a fresh water supply district from qualifying as a candidate for supervisor may have a discriminatory purpose or effect.

We sent a follow-up letter requesting additional information on May 2, 2008. In your June 26, 2008, response to our letter, you respectfully reported that you could not provide any additional information. You also requested that we make no determination if the information provided is insufficient to warrant preclearance.

The Attorney General does not have the option of issuing a no determination on this particular submission. See 28 C.F.R. 51.35. The Department is also aware of at least four newly created districts that are operating under the proposed candidate qualifications of Chapter 912.

The submitted data confirms that there are Hispanic supervisors who are known to be non-landowning residents of their district. If the proposed candidate qualifications were implemented, these individuals would be unable to run for reelection. Concerns that the proposed change may have a future retrogressive effect also are raised by statistics that reveal a significant disparity in home and agricultural land ownership rates between Caucasians and minorities in Texas. Without additional data, the Attorney General is unable to assess whether the law would have a discriminatory effect.

Under Section 5 of the Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Public Law 109-246, 120 Stat. 577 (2006) ("Voting Rights Act"), the submitting authority has the burden of showing that a submitted change has neither a discriminatory purpose nor a discriminatory effect. In failing to provide the information necessary to complete our review of your submission, you have failed to sustain your burden of proof. See Georgia v. United States, 411 U.S. 526 (1971); see also 28 C.F.R. 51.40 and 51.52.

We note that under Section 5 you have the right to seek a declaratory judgment from the United States District Court for the District of Columbia that the proposed change neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race, color, or membership in a language minority group. See 28 C.F.R. 51.44.

In addition, you may request that the Attorney General reconsider the objection. See 28 C.F.R. 51.45. However, until the objection is withdrawn or a judgment from the District Court for the District of Columbia is obtained, Chapter 912 (H.B. 2984) (2007) will continue to be legally unenforceable. Clark v. Roemer, 500 U.S. 646 (1991); 28 C.F.R. 51.10.

To enable us to meet our responsibility to enforce the Voting Rights Act, please inform us of the action the State of Texas plans to take concerning this matter. If you have any questions, you should call Robert Lowell (202-514-3539), an attorney in the Voting Section.

Sincerely,

Grace Chung Becker

Grace Chung Becker
Acting Assistant Attorney General

U.S. Department of Justice

Civil Rights Division

Office of the Assistant Attorney General *Washington, D.C. 20530*

MAR 24 2009

Robert T. Bass, Esq.
Allison, Bass & Associates
402 West 12th Street
Austin, Texas 78701

The Honorable David Bird
County Judge
414 St. Joseph Street, Suite 200
Gonzales, Texas 78629

Ms. Lee Riedel
County Clerk
P.O. Box 77
Gonzales, Texas 78629

Dear Mr. Bass, Judge Bird, and Ms. Riedel:

This refers to the Spanish language election procedures for the November 2, 2004, November 7, 2006, and November 4, 2008, general elections in Gonzales County, Texas, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. 1973c. We received your response to our November 26, 2008, follow-up request for additional information on January 23, 2009.

According to the 2000 Census, the county had a population of 18,628 persons, of whom 7,381 (39.6%) were Hispanic, a voting age population of 13,421, of whom 4,705 (35.1%) were Hispanic, and a citizen voting age population of 12,555, of whom 3,585 (29.3%) were Hispanic. The census also indicated that 30.3 percent of Hispanic voting age citizens are limited English proficient, and over three-quarters of the county's Hispanic population speak Spanish at home. Significantly, 1,411 Hispanics live in households in which no one over the age of 14 speaks English "without difficulty." The Texas Secretary of State's February 11, 2009, report indicates that the county has 11,983 registered voters, of whom 3,552 (29.6%) are Spanish surnamed.

On December 7, 1978, the Attorney General informed county officials that no objection would be interposed to the county's proposed bilingual procedures. In describing those procedures, the county represented that "all notices concerning elections are both posted in the courthouse and published in all the county newspapers. All these notices are in Spanish and English." Our review of those notices indicated the translations to be accurate. With regard to the assignment of bilingual poll workers, the county characterized it as based on where they were most needed. It noted that precincts not staffed with "interpreters," as the county then called bilingual assistors, had "either no Spanish speaking people * * * or only 1 to 2." This process resulted in the assignment of at least one individual in 10 (55.6%) of the 18 voting precincts for the November 1976 general election to provide the required oral assistance.

Since December 7, 1978, the county has neither made a submission to the Attorney General of any changes to those procedures to which no objection has been interposed, nor has it obtained a declaratory judgement from the United States District Court for the District of Columbia that any such changes had neither a discriminatory purpose nor would have a discriminatory effect. Accordingly, the 1978 procedures remain the legally enforceable bilingual procedures within the county. Indeed, the county asserts that the benchmark procedures remain in effect.

Our review of the information that you have submitted, however, reveals that, at least since 2004, the county has implemented bilingual procedures, including the process for translating Spanish language documents, provision of Spanish language election notices and publicity, and assignment of bilingual poll workers, which are different from the benchmark procedures. Because of the county's position that the benchmark remains in force or effect, we examine the bilingual practices employed in each election as a one-time departure from the benchmark, and, therefore, as a discrete change. Changes to bilingual election procedures constitute a voting change that are not effective as a matter of law unless and until the county establishes that they do not violate Section 5. *Apache County High School District No. 90* v. *United States,* Case No. 77-1518 (D.D.C. June 12, 1980); 28 C.F.R. § 51.13.

We have carefully considered the information you have provided, as well as information from other interested parties. Under Section 5, the Attorney General must determine whether the submitting authority has met its burden of showing that the proposed change "neither has the purpose nor will have the effect" of denying or abridging the right to vote on account of race, color or membership in a language minority group. As discussed further below, I cannot conclude that the county has sustained its burden of showing that the proposed change does not have a retrogressive effect or a discriminatory purpose. Therefore, based on the information available to us, I object to the voting changes on behalf of the Attorney General.

We first examine the county's provision of election-related materials to voters. In contrast to the benchmark procedures, where the county represented that all notices were in English and Spanish, a significant number of the county's election notices and other documents

containing election-related information were made available only in English over the course of the last three general elections. The county often distributes lists of precincts and polling places only in the English language; notices in the *Cow Country Courier* have not always appeared in a bilingual format. During this time period, the county has published its county-created notice in a bilingual format only once, and that was for the November 4, 2008, election, which was during the pendency of our review of this submission.

We next turn to the adequacy of the county's translation of written material. We recently re-examined the bilingual information submitted with the 1978 submission. That analysis confirms that the translation is understandable. The same cannot be said for the more recent translations. The Spanish language translations of two notices, a document including detailed election-related information for the November 4, 2008, election, and a list of declared write-in candidates for the November 7, 2006, election contain numerous errors that adversely affect their comprehensibility, including portions that are not translated, missing polling place names and addresses, incorrect word choice with confusing or misleading results, misspelled words, and wrong conjugations.

For example, the English version of the November 4, 2008, notice refers to updating information for voter registration purposes:

> The Tax Office as Voter's Registrar is still needing 911 addresses. If you are still using the Route and Box information, your voter's registration card has probably been returned to this office. You can obtain your 911 address by calling Golden Crescent at 1-877-917-3911 and then advise the Tax Office at 672-2841.

In the Spanish version of the notice, "The Tax Office as Voter's Registrar is still needing 911 addresses," is completely omitted, as is the phrase "your voter's registration card has probably been returned to this office," in the second sentence. Without this information, the reader would not know that he or she might not have received his or her voter registration card because they did not provide the County Tax Office with the correct 911 address. Therefore, the significance of providing an updated 911 address for voting in the November election would be lost.

We now examine the assignment of bilingual poll workers. Under the benchmark procedures, the county assigned bilingual poll workers to over half of the precincts in 1976. Despite an almost one-third increase in the county's Hispanic population percentage since that time, our examination of the 2004, 2006, and 2008 general elections show that the county has fallen short of that standard in each instance. Both census data and anecdotal evidence indicate that there continues to be a significant need for such assistance. Moreover, the current level of assignment is below the Texas Secretary of States's recommended guidelines that bilingual poll workers be assigned to 14 of the county's 15 voting precincts.

The county contends that its failure to meet the requirements of federal law stems from the failure of the political parties to recommend adequate staffing, and is not the result of any action on the county's part. Although the political parties, not the county, recruit poll

workers, the county must ensure that the election it conducts meets the requirements of federal law, which includes providing adequate oral assistance. See Texas Elec. Code § 272.009. In that regard, the county informs us that it has encountered difficulties in finding bilingual poll workers and has provided a newspaper article quoting county officials expressing that view. Our information, however, is that prior to the November 2008 election several minority individuals and organizations contacted county officials volunteering to help the county meet federal language minority requirements.

We note that under Section 5 you have the right to seek a declaratory judgment from the United States District Court for the District of Columbia that the proposed changes neither have the purpose nor will have the 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. 51.44. In addition, you may request that the Attorney General reconsider the objection. 28 C.F.R. 51.45. However, until the objection is withdrawn or a judgment from the United States District Court for the District of Columbia is obtained, the deviations from the county's 1978 bilingual election procedures described above will continue to be legally unenforceable. *Clark v. Roemer*, 500 U.S. 646 (1991); 28 C.F.R. 51.10.

To enable us to meet our responsibility to enforce the Voting Rights Act, please inform us of the action Gonzales County plans to take concerning this matter. If you have any questions, you should call J. Eric Rich (202-305-0107), an attorney in the Division's Voting Section.

Sincerely,

Loretta King

Loretta King
Acting Assistant Attorney General
Civil Rights Division

U. S. Department of Justice

Civil Rights Division

Office of the Assistant Attorney General *Washington, D.C. 20530*

MAR 12 2010

Robert T. Bass, Esq.
Allison, Bass & Associates
402 West 12th Street
Austin, Texas 78701

Dear Mr. Bass:

This refers to the Spanish language election procedures, including the use of Texas Secretary of State forms and notices, the procedures for translating county-produced election materials, and the oral assistance procedures, for Gonzales County, Texas, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c. We received your response to our November 2, 2009, request for additional information on January 11, 2010.

According to the 2000 Census, the county had a total population of 18,628 persons, of whom 7,381 (39.6%) were Hispanic, and had a total voting age of population of 13,421, of whom 4,705 (35.1%) were Hispanic. The census also indicated that 14.3 percent of Hispanic residents over the age of five speak English less than very well, 30.3 percent of Hispanic voting age citizens were limited English proficient, over three-quarters of the county's Hispanic population speak Spanish at home, and over 76 percent of Hispanics of voting age in the county are United States citizens. Significantly, 1,411 Hispanics live in households in which no one over the age of 14 speaks English "without difficulty." The Texas Secretary of State's January 27, 2010, report indicates that the county has 12,259 registered voters, of whom 3,694 (30.1%) are Spanish surnamed.

On December 7, 1978, the Attorney General informed county officials that no objection would be interposed to the county's proposed bilingual procedures. In describing those procedures, the county represented that "all notices concerning elections are both posted in the courthouse and published in all the county newspapers. All these notices are in Spanish and English." Our review of those notices found the translations to be accurate. With regard to the assignment of bilingual poll workers, the county characterized it as based on where they were most needed. It noted that precincts not staffed with "interpreters," as the county then called bilingual assistors, had "either no Spanish speaking people * * * or only 1 to 2." This process resulted in the assignment of at least one bilingual individual to 10 (55.6%) of the 18 voting precincts for the November 1976 general election to provide the required oral assistance.

Since that time, the county has neither made a submission to the Attorney General of any changes to those procedures to which no objection has been interposed, nor has it obtained a declaratory judgment from the United States District Court for the District of Columbia that any such changes did not have a discriminatory purpose and would not have a discriminatory effect. As the county has noted previously, the 1978 procedures remain in effect and, accordingly, constitute the benchmark bilingual procedures against which the submitted bilingual procedures are measured.

Changes to bilingual election procedures constitute a voting change under Section 5. *Apache County High School District No. 90* v. *United States,* Case No. 77-1518, p. 15 (D.D.C. 1980); Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, 28 C.F.R. § 51.13. As such, the submitting authority has the burden of establishing that a proposed change is not motivated by a discriminatory purpose and will not have a retrogressive effect on the ability of minority voters to participate in the political process and elect candidates of choice. *Georgia v. United States,* 411 U.S. 526 (1973); 28 C.F.R § 51.52. Changes related to voting may not be implemented unless and until the submitting authority establishes that, when compared to that jurisdiction's benchmark standard, practice or procedure, the proposed change does not diminish the ability of minority voters to participate in the political process. *Beer v. United States*, 425 U.S. 130 (1976).

The applicable legal standard for determining whether discriminatory purpose exists is *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977). This approach requires an inquiry into 1) the impact of the decision; 2) the historical background of the decision, particularly if it reveals a series of decisions undertaken with discriminatory intent; 3) the sequence of events leading up to the decision; 4) whether the challenged decision departs, either procedurally or substantively, from the normal practice; and 5) contemporaneous statements and viewpoints held by the decision-makers. *Id.* at 266-68.

With regards to the county's use of Texas Secretary of State forms and notices, the Attorney General does not interpose any objection to the specified change. However, we note that Section 5 expressly provides that the failure of the Attorney General to object does not bar subsequent litigation to enjoin the enforcement of the change. 28 C.F.R. 51.41.

With regards to the remaining elements of the county's proposed bilingual procedures, we have carefully considered the information you have provided, as well as information from other interested parties. Under Section 5, the Attorney General must determine whether the submitting authority has met its burden of showing that the proposed change "neither has the purpose nor will have the effect" of denying or abridging the right to vote on account of race, color or membership in a language minority group. As discussed further below, I cannot conclude that the county has sustained its burden of showing that the proposed changes do not have a retrogressive effect or a discriminatory purpose. Therefore, based on the information available to us, I object on behalf of the Attorney General to the procedures for translating county-produced election materials and the oral assistance procedures.

The county proposes to use an internet machine translator, such as Google Translator, for the initial translation of county-produced election materials. The county indicates that the resulting translations will then be sent to the Office of the Texas Secretary of State and to the local LULAC chapter to confirm its accuracy. However, the county has not established that it has an arrangement with the Secretary of State to review these county-generated translations. That state office has also informed us that it has had no communication with the county on this matter. In fact, our information is that the Secretary of State does not offer this service to counties with respect to county-generated notices and the state must itself hire a third-party vendor to translate documents into Spanish.

Because there is no evidence that the county has an agreement with the state to review the translation, the sole quality control rests with the local LULAC chapter's review of the initial translation. The county has not provided sufficient information to establish this measure will, by itself, ensure adequate review of county-produced election materials. For instance, the procedures do not establish a deadline for the county to provide the initial translations to LULAC for its review, which would ensure adequate time to conduct the review, or for that organization to return its edits and/corrections to the county, which would ensure adequate time before an election to incorporate those changes. Although the involvement of county residents and organizations, such as a local LULAC chapter, would be a positive element in any program, such entities are under no obligation to assist the county, whereas a third-party translator, such as a high-school Spanish teacher retained by the county, would be contractually bound to perform.

The county has conducted no research or study into the effectiveness of the proposed process, and has provided no evidence, in the form of a sample or otherwise, supporting the conclusion that the process will produce adequate translations. In comparison to the benchmark procedure, in which a third-party translator produced understandable translations of county-generated notices, the proposed procedure lacks an effective quality control mechanism to ensure the accuracy of the translations.

Hence, the county has not established that its proposed procedure for translating using an internet translator with the review process described in its submission will not have a retrogressive effect when compared to the benchmark of engaging a third-party translator.

We now examine the assignment of bilingual poll workers. Both census data and anecdotal evidence indicate that there continues to be a significant need for Spanish language oral assistance in the county. Under the benchmark procedures, which were devised at a time when the county's Hispanic population percentage was significantly smaller than it is today, the county assigned bilingual poll workers to over half of its voting precincts in 1976. Under the proposed procedure, the county provides that it will make "best efforts" to provide bilingual poll workers to seven of the county's 15 voting precincts. The county's "best efforts" are not equivalent to an unqualified commitment to provide any number of bilingual poll workers, be it the number provided previously under the benchmark procedures, the number recommended by

the Secretary of State's office, or any number in between those two standards. In contrast, the benchmark procedures result in measurable commitments, assuring that only precincts with a handful of Spanish-surnamed voters will be without bilingual poll workers.

The county contends that its failure to meet the requirements of federal law stems from difficulties in finding bilingual poll workers willing to work in several voting precincts. Our information, however, is that prior to the November 2008 and 2009 elections, minority individuals and organizations contacted county officials volunteering to help the county meet federal language minority requirements. The county failed to employ those bilingual citizens who volunteered as poll workers for those elections.

The county's refusal to adopt a standard for staffing polling places with bilingual poll workers increases the concern that these elements of the program will diminish the ability of Hispanic voters to participate in the electoral process. As with its proposed translation procedures, the county has failed to show that its proposed procedures to assign bilingual poll workers will not have a retrogressive effect.

Our analysis under the standard identified in *Arlington Heights* also precludes a determination that the county has met its burden of showing that the proposed plan was not adopted, at least in part, with the a discriminatory purpose. We look first to the clear retrogressive impact of the county's failure to translate all election-related information into Spanish adequately as well as the lack of a commitment to provide adequate oral assistance in Spanish to those who require it to cast an informed ballot. More importantly, the county has determined that it does not plan to generate its own election notices in the future, including one similar to one posted at the Gonzales City Hall for the November 2008 general election; the notice had information not contained in the notice of election translated by the state, including the date of the close of registration prior to the election, a request by the county clerk for 911 addresses from voters maintaining post office boxes, and notice of the voter identification requirement, as well as appropriate county contacts. As our March 24, 2009, letter noted, that translation had numerous errors and omissions. Now, it appears that rather than translate this important information correctly, the county has chosen simply not to post it.

Equally significant is the historical context in which these activities have occurred. As noted earlier, on March 24, 2009, we interposed an objection to an earlier attempt by the county to change its benchmark bilingual election procedures. That objection letter detailed shortcomings of the proposed change. The county's actions following the receipt of the March 2009 objection raises additional hurdles to the county establishing the absence of a discriminatory purpose. If anything, the current proposal is retrogressive even when measured against the 2008 bilingual program to which an objection was interposed. Moreover, even after the objection, the county continues to post English-only election notices on its website, raising concerns about its stated commitment to provide translations of all election materials.

County officials have openly expressed hostility toward complying with the language minority provisions of the Voting Rights Act. In local news articles, the county official who has direct control over the election process has expressed frustration with this Department's efforts to increase the availability of bilingual poll workers, suggesting that language minority voters are not citizens if they do not speak English. The county has proposed the use of either state officials or local residents, two options that would not incur any additional cost (assuming these options even exist), as a quality control mechanism for the machine translation because the county asserts that it is likely unable to pay for a third party, even a local Spanish-language high-school teacher, to translate materials. On the whole, it seems reasonable that the county could afford to pay a qualified translator on the rare occasion that it generates its own election materials, as it did under the benchmark practice.

In sum, the available information precludes the county from establishing that its implementation of the procedures for the translation of election materials into Spanish and assignment of bilingual poll officials was not motivated, at least, in part, by discriminatory purpose. *Arlington Heights*, 429 U.S. at 266-68.

We note that under Section 5 you have the right to seek a declaratory judgment from the United States District Court for the District of Columbia that the proposed changes neither have the purpose nor will have the 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. 51.44. In addition, you may request that the Attorney General reconsider the objection. 28 C.F.R. 51.45. However, until the objection is withdrawn or a judgment from the United States District Court for the District of Columbia is obtained, the specified elements of the proposed bilingual procedures will continue to be legally unenforceable. *Clark* v. *Roemer*, 500 U.S. 646 (1991); 28 C.F.R. 51.10.

We further note that the county remains obligated to comply with the language minority requirements of Sections 4(f)(4) and 203 of the Voting Rights Act, 42 U.S.C. 1973b(f)(4) and 1973aa-1a.

To enable us to meet our responsibility to enforce the Voting Rights Act, please inform us of the action Gonzales County plans to take concerning this matter. If you have any questions, you should call Robert S. Berman (202-514-8690), a Deputy Chief in the Voting Section.

Sincerely,

Thomas E. Perez
Assistant Attorney General

U. S. Department of Justice

Civil Rights Division

Office of the Assistant Attorney General *Washington, D.C. 20530*

June 28, 2010

Ms. Elesa Ocker
County Clerk
P.O. Box 189
Ballinger, Texas 76821

Dear Ms. Ocker:

This refers to the Spanish language election procedures for the November 4, 2008, general and the November 3, 2009, statewide constitutional amendment elections, including use of Texas Secretary of State forms and notices and the oral assistance procedures, for Runnels County, Texas, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c. We received your response to our April 12, 2010, follow-up request for additional information on April 30, 2010; supplemental information was received on May 12, 2010.

According to the 2000 Census, the county had 11,495 persons, of whom 3,372 (29.3%) were Hispanic, and a total voting age of population of 8,398, of whom 2,047 (24.4%) were Hispanic. Between 1980 and 2000, the county's Hispanic population percentage grew from 19.4 to 29.3 percent of the total population. The Texas Secretary of State's January 27, 2010, report indicates that the county has 6,791 registered voters, of whom 1,534 (22.6%) are Spanish surnamed. The census also indicated that 38.2 percent of Hispanic voting age citizens speak English less than very well, more than 90 percent of the county's Hispanic voting age population speaks Spanish at home, more than 86 percent of Hispanics in the county are United States citizens, and 1,037 Hispanic residents over the age of five speak Spanish but are limited English proficient. Significantly, 619 Hispanics live in households in which no one over the age of 14 speaks English "without difficulty."

The Attorney General interposed no objection to the county's procedures for providing bilingual election materials on December 29, 1978. The county described the procedures as including the use of the "Spanish language in all of the electoral process," and indicated that "all ballots, polling places notices, and any other notices concerning elections" were provided in both English and Spanish. With regards to Spanish language oral assistance, on October 29, 1984, the Attorney General informed county officials that no objection would be interposed to the county's proposed bilingual oral assistance election procedures, which were set forth in the

Runnels County Commissioners' Court order of March 13, 1984, which requires "each voting precinct election judge to hire as an election clerk for each election a bilingual person, able to speak and read both Spanish and English."

Since that time, the county has neither made a submission to the Attorney General of any changes to those procedures to which no objection has been interposed, nor has it obtained a declaratory judgement from the United States District Court for the District of Columbia that any such changes did not have a discriminatory purpose and would not have a discriminatory effect. The 1978 procedures for providing bilingual election materials and the 1984 procedures for providing Spanish language oral assistance remain in effect and, accordingly, constitute the benchmark bilingual procedures against which the submitted bilingual procedures are measured.

Changes to bilingual election procedures constitute a voting change under Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c. *Apache County High School District No. 90* v. *United States,* Case No. 77-1518, p. 15 (D.D.C. 1980); Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, 28 C.F.R. § 51.13. As such, the submitting authority has the burden of establishing that a proposed change is not motivated by a discriminatory purpose and will not have a retrogressive effect on the ability of minority voters to participate in the political process and elect candidates of choice. *Georgia v. United States,* 411 U.S. 526 (1973); 28 C.F.R § 51.52. Changes related to voting may not be implemented unless and until the submitting authority establishes that, when compared to that jurisdiction's benchmark standard, practice or procedure, the proposed change does not diminish the ability of minority voters to participate in the political process. *Beer* v. *United States*, 425 U.S. 130 (1976).

The applicable legal standard for determining whether discriminatory purpose exists is *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977). This approach requires an inquiry into 1) the impact of the decision; 2) the historical background of the decision, particularly if it reveals a series of decisions undertaken with discriminatory intent; 3) the sequence of events leading up to the decision; 4) whether the challenged decision departs, either procedurally or substantively, from the normal practice; and 5) contemporaneous statements and viewpoints held by the decision-makers. *Id.* at 266-68.

With regards to the use of Texas Secretary of State forms and notices, the Attorney General does not interpose any objection to the specified change. However, we note that Section 5 expressly provides that the failure of the Attorney General to object does not bar subsequent litigation to enjoin the enforcement of the change. 28 C.F.R. 51.41.

With regards to the remaining elements of the proposed bilingual procedures, we have carefully considered the information you have provided, as well as information from other interested parties. Under Section 5, the Attorney General must determine whether the submitting authority has met its burden of showing that the proposed change "neither has the purpose nor will have the effect" of denying or abridging the right to vote on account of race, color or

membership in a language minority group. As discussed further below, I cannot conclude that the county has sustained its burden of showing that the proposed changes do not have a retrogressive effect or a discriminatory purpose. Therefore, based on the information available to us, I object to the oral assistance procedures used for the November 4, 2008, general and November 3, 2009, constitutional amendment elections on behalf of the Attorney General.

Under the benchmark procedures enumerated in the 1984 order, the county was required to assign one bilingual poll worker to each of its five consolidated polling places. Despite an almost fifty percent increase in the county's Hispanic population percentage since 1984, our examination of the November 2008 general and November 2009 constitutional amendment elections show that at least half of county voting precincts did not have a bilingual poll worker for the November 4, 2008, general election, and no voting precincts had a bilingual poll worker for the November 3, 2009, constitutional amendment election. Both census data and anecdotal evidence from members of the minority community indicate, however, that there continues to be a significant need for such assistance. The proposed level of assignment, moreover, is below the Texas Secretary of States's recommended guidelines that bilingual poll workers be stationed in election precincts where five percent or more of the inhabitants are persons of Spanish origin.

Instead of applying the benchmark standard for the elections in question, the county implemented a practice in the 2008 and 2009 elections of having only having an on-call bilingual assistor available by phone in the event that Spanish language oral assistance was required on election day. We note that procedure has not been reviewed under Section 5. The evidence available to us, however, demonstrates that this procedure does not provide effective Spanish language oral assistance. In fact, it appears that the on-call bilingual assistor has not received a single call for assistance in the approximately seven years that she has served in that capacity. We also note that the county does not test the Spanish language proficiency of its bilingual poll workers, or provide training for bilingual assistance. Our information suggests that one of the individuals asserted by the county to be a bilingual poll worker is not proficient in Spanish.

The county contends that departure from the benchmark procedure stems from difficulties in finding bilingual poll workers willing to work in several voting precincts. Our information, however, is that after a recent election a county official told a bilingual poll worker that her services were no longer required. Additionally, employing the on-call bilingual assistor as a poll worker would provide for more effective oral assistance than employing her on-call, since she has never received a call for assistance. Further, despite written and telephonic requests to do so, the county has produced no information documenting its good-faith efforts to recruit, find, or hire bilingual poll workers. The county has failed to show that its proposed procedures to assign bilingual poll workers will not have a retrogressive effect.

Our analysis under the standard identified in *Arlington Heights*, *supra*, looks first to the clear retrogressive impact of the county's failure to provide oral assistance in Spanish to those who require it to cast an informed ballot. The county decided to reduce the level of bilingual assistance for the 2008 election and to eliminate it totally for the 2009 election. The county

committed itself to a procedure that it knew would not maintain the level of Spanish language oral assistance envisioned under the benchmark. This county has not only failed to provide any data indicating this reduction did not have a retrogressive effect, but has offered no explanation as to why its failure to either recruit new bilingual individuals or to retain other individuals who previously served as bilingual poll workers for the 2008 and 2009 elections is not the result of an intent not to provide less bilingual assistance than under the benchmark. In sum, the evidence precludes the county from establishing that the procedures for assigning bilingual poll officials for the November 4, 2008, general and November 3, 2009, constitutional amendment elections was not motivated, at least, in part, by discriminatory purpose. *Arlington Heights*, 429 U.S. at 266-68.

We note that under Section 5 you have the right to seek a declaratory judgment from the United States District Court for the District of Columbia that the proposed changes neither have the purpose nor will have the 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. 51.44. In addition, you may request that the Attorney General reconsider the objection. 28 C.F.R. 51.45. However, until the objection is withdrawn or a judgment from the United States District Court for the District of Columbia is obtained, the deviations from the county's benchmark bilingual election procedures described above will continue to be legally unenforceable. *Clark* v. *Roemer*, 500 U.S. 646 (1991); 28 C.F.R. 51.10.

To enable us to meet our responsibility to enforce the Voting Rights Act, please inform us of the action Runnels County plans to take concerning this matter. If you have any questions, you should call Maureen Riordan (202-353-2087), an attorney in the Division's Voting Section.

Sincerely,

Thomas E. Perez

Thomas E. Perez
Assistant Attorney General