U. S. Department of Justice

Civil Rights Division

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

October 3, 2011

C. Robert Heath, Esq.
Bickerstaff Heath Delgado Acosta
3711 South MoPac Expressway, Suite 300
Austin, Texas 78746

Dear Mr. Heath:

This refers to your request that the Attorney General reconsider and withdraw the December 14, 1998, objection interposed under Section 5 of the Voting Rights Act, 42 U.S.C. 1973c, to a charter amendment that changes the method of election for the city council from six single-member districts to four single-member districts, with two members elected at large to numbered posts. We received your request on August 3, 2011; additional information was received through September 12, 2011.

A jurisdiction may request reconsideration of an objection and, in that request, demonstrate that "there appears to have been a substantial change in the operative facts or relevant law" that would warrant a change in the Attorney General's previous determination. Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, 28 C.F.R. § 51.49. The submitting authority has the burden of establishing the existence of such a change in circumstances that would warrant a different determination.

We have carefully considered our earlier determination in this matter and reviewed the information and arguments you have advanced in support of your request, as well as census data, information in our files, and comments received from other interested persons. According to the 2010 Census, the city's total population is 19 percent black and 31.3 percent Hispanic. Under the existing system, six councilmembers are elected from single-member districts, and the mayor is elected at-large.

We start with a review of the procedural history of the city's attempts to implement a method of election that consisted of four councilmembers elected from single-member districts, two members elected on an at-large basis using numbered posts, and a mayor elected at large to replace its existing at-large system.

Prior to 1992, the city was governed by a mayor and six councilmembers, all of whom were elected at large by majority vote for staggered terms. In August 1990, minority plaintiffs filed an action alleging that the city's at-large system violated Section 2 of the Voting Rights

Act. *Arceneaux* v. *City of Galveston*, No. G-90-221 (S.D. Tex.). During the course of the litigation, the city appointed a charter review committee to review and make recommendations for amendments to the city charter. The committee proposed a method of election consisting of four councilmembers elected from single-member districts, two councilmembers elected at large from numbered positions, and the mayor elected at large ("4-2-1 method of election"). The proposed changes were approved by the voters in a November 5, 1991, referendum election. The city submitted the 4-2-1 method of election for Section 5 review. In 1992, the court granted preliminary relief, enjoining the city's May 1992 municipal election pending the Department of Justice decision regarding the city's 4-2-1 method of election.

On December 14, 1992, the Attorney General interposed an objection to the 4-2-1 method of election because the city had not met its burden under Section 5 of demonstrating the absence of a discriminatory purpose and retrogressive effect.

After the 1992 objection, the parties in the *Arceneaux* suit reached a settlement agreement. On February 16, 1993, the court entered a consent decree which established a method of election and districting plan in which six councilmembers are elected from single-member districts and the mayor is elected at large. This method of election and districting plan received preclearance under Section 5 for use on an interim basis on April 29, 1993, and for use on a permanent basis on January 27, 1994.

On June 16, 1998, the city submitted numerous amendments to the city charter for Section 5 review. The amendments had been approved by voters in a referendum election. One of the amendments, Proposition 10, provided for a virtually identical change in the method of election for the city council from six single-member districts to four single-member districts with two additional members elected at large to numbered posts. On December 14, 1998, the Attorney General again interposed an objection under Section 5 to those proposed changes because the city had not met its burden under Section 5 of demonstrating the absence of a discriminatory purpose and retrogressive effect. In 2001, the city requested that the Attorney General reconsider and withdraw the December 14, 1998, objection. In support of that request, the city pointed to the 2001 Census that indicated Hispanics supplanted African-Americans as the predominant minority group in the city. The city also noted that a Hispanic mayor was elected in 2000, but there was no indication that racial bloc voting was no longer an operative factor in city elections. After a review of this additional information, the Attorney General remained unable to conclude that the city carried its burden of showing that the submitted changes have neither a discriminatory purpose nor a discriminatory effect and declined to withdraw the objection.

In light of the Attorney General's prior objections to virtually identical voting changes, and the requirement that the submitting authority carries the burden of demonstrating that proposed voting changes are free of discriminatory purpose and retrogressive effect, we have examined the information provided to determine whether new factual or legal circumstances exist which would lead to the conclusion that voting changes that did not satisfy the

nondiscrimination requirement of Section 5 in 1992, 1998, and 2002 will satisfy that requirement under Section 5 today.

Under Section 5 of the Voting Rights Act, the submitting authority bears the burden of showing that a submitted change has neither 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. 51.52; *South Carolina* v. *Katzenbach*, 383 U.S. 301, 328, 335 (1966). A voting change that has the purpose or will have the effect of diminishing the ability of minorities to elect their preferred candidates of choice denies or abridges the right to vote within the meaning of Section 5. 42 U.S.C 1973c(b).

A voting change has a discriminatory effect if it will lead to a retrogression in the ability of language or racial minorities "with respect to their effective exercise of the electoral franchise." *Beer* v. *United States*, 425 U.S. 130, 141 (1976). The voting change at issue must be measured against the benchmark practice to determine whether the ability of minority voters to participate in the political process and elect candidates of their choice will be "augmented, diminished, or not affected by the change affecting voting." *Ibid.*

With respect to the city's ability to demonstrate that the plan was adopted without a prohibited purpose, the starting point of our analysis is *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977). In *Arlington Heights*, the court provided a non-exhaustive list of factors that bear on the determination of discriminatory purpose, including, but not limited to, the disparate impact of the action on minority groups; the historical background of the action; the sequence of events leading up to the action or decision; the legislative or administrative history regarding the action; departures from normal procedures; and evidence that the decision-maker ignored factors it has otherwise considered important or controlling in similar decisions. *Id.* at 266-68.

As it did in 2001, the city notes that a Hispanic candidate was elected mayor in 1998 and 2000. The city's current request notes this occurred again in 2002, and that a Hispanic candidate was elected as councilmember from a district with a Hispanic population percentage of less than 50 percent. As it in 2001, the city's submission asserts that it is not longer possible to draw two districts with a predominately black population. In addition to the information previously provided in 2001, which noted that Hispanics had become the predominate minority group, the city's most recent information points to the results of the 2010 Census that the black population has decreased significantly in the past decade.

Our review of the demographics of the current districts and the results for elections conducted since 2001 as well as the information provided by the city does not alter our earlier determination that city has not established the absence of a retrogressive effect. Racial bloc voting continues to play a significant role in city elections. Under the existing method of election, minority voters currently have the ability to elect a candidate of choice in three of the six single-member districts. In contrast, this ability would exist only in two of the four districts and in neither of the two at-large positions under the proposed system. Indeed, in the course of our investigation, the city acknowledged that the proposed method of election will decrease the

number of minority ability-to-elect districts. As a result, the city has failed to establish that the proposed 4-2-1 method of election with numbered posts would not lead to a retrogression in minority voting strength prohibited by Section 5.

The city's most recent request provides virtually no discussion of the motivation for seeking the 4-2-1 method of election, other than the results of the 1998 referendum election. Given the Attorney General's previous determinations in 1992, 1998, and 2002 that the city had failed to meet its burden of demonstrating that the 4-2-1 method of election was not motivated by a discriminatory purpose, and in light of the absence of any additional information from the city to indicate it can now meet that standard in the context of a proposed change that is admittedly retrogressive, we find no basis to alter our earlier determination.

In light of these considerations, I remain unable to conclude that the city has carried its burden of showing that the submitted changes have neither a discriminatory purpose nor will have a discriminatory effect. *Georgia* v. *United States*, 411 U.S. 526 (1973); 28 C.F.R. 51.52. Therefore, on behalf of the Attorney General, I must decline to withdraw the objection to the charter amendments that provide for a change in the method of election for the city council from six single-member districts to four single-member districts, with two additional members elected at large to numbered posts.

As we previously advised, you may seek a declaratory judgment from the United States District Court for the District of Columbia that the proposed changes have neither 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. Unless and until such a judgment is rendered by that court, the objection by the Attorney General remains in effect and 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 City of Galveston plans to take concerning this matter. If you have any questions, you should contact Robert S. Berman, (202/515-8690), 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*

FEB 07 2012

Joseph M. Nixon, Esq.
Dalton L. Oldham, Esq.
James E. Trainor, III, Esq.
Beirne Maynard & Parsons
401 West 15th Street, Suite 845
Austin, Texas 78701

Dear Messrs. Nixon, Oldham, and Trainor:

This refers to the 2011 redistricting plans for the commissioners court, justice of the peace, and constable, for Nueces 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 28, 2011 request for additional information on December 9, 2011.

With respect to the justice of the peace and constable redistricting plan, the Attorney General does not interpose an 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. *Procedures for the Administration of Section 5 of the Voting Rights Act of 1965*, 28 C.F.R. 51.41.

With respect to the commissioners court redistricting plan, 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 county's previous submissions. Under Section 5, the Attorney General must determine whether the submitting authority has met its burden of showing that the proposed changes have neither the purpose nor will have the effect of denying or abridging the right to vote on account of race or color or membership in a language minority group. *Georgia* v. *United States,* 411 U.S. 526 (1973); 28 C.F.R. 51.52(c). For the reasons discussed 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 object to the 2011 redistricting plan for commissioners court.

The commissioners court is made up of four commissioners elected from single-member precincts, and a county judge, who is elected at large. According to the 2010 Census, the county has a total population of 340,223 persons, of whom 206,293 (60.6%) are Hispanic, and a voting-

age population of 251,968 persons, of whom 142,995 (56.8%) are Hispanic. Based on the 2010 and 2000 Census data, the Hispanic population in Nueces County increased by 17.9 percent, and the Hispanic voting-age population in the county increased by 21.9 percent, over the past decade. The Anglo population in Nueces County decreased by 5.3 percent, and the Anglo voting-age population decreased by 0.5 percent, during that same period.

With respect to the county's ability to demonstrate that the plan was adopted without a prohibited purpose, the starting point of our analysis is the framework established in *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977). There, the Court provided a non-exhaustive list of factors that bear on the determination of discriminatory purpose, including the impact of the action on minority groups; the historical background of the action; the sequence of events leading up to the action or decision; the legislative or administrative history regarding the action; departures from normal procedures; and evidence that the decision-maker ignored factors it has otherwise considered important or controlling in similar decisions. *Id.* at 266-68.

Based on our analysis of the evidence, we have concluded that the county has not met its burden of showing that the proposed plan was adopted with no discriminatory purpose. The county's redistricting history reveals a distinct pattern with regard to Precinct 1. In 1991, the county increased the Hispanic population percentage in Precinct 1 by removing Voting District ("VTD") 63, in which Anglos were a significant majority of the registered voters; the Anglo incumbent in Precinct 1 at that time correctly predicted that the resulting increase in Hispanic population percentage would result in his inability to get re-elected. Ten years later, the county also removed VTD 42, which had similar population and registered voter characteristics to VTD 63, from Precinct 1. In each instance, the majority-Anglo VTD was placed in Precinct 3, where, because of the higher Hispanic population percentage, the potential effect on Hispanic voters would be minimized. The consequence of these changes was that Hispanic-preferred candidates were successfully elected to the commissioners court from Precinct 1 in each election from 1992 until 2008. In 2008, the Hispanic incumbent, despite strong support from Precinct 1's Hispanic voters, narrowly lost to an Anglo challenger, by a margin of 50.4 to 49.6 percent. As a result of that election, the commissioners court was transformed from one in which Hispanic-preferred candidates held three of the five seats to one in which Anglo-preferred candidates held three of the five seats.

During the 2011 redistricting cycle, the county departed from its normal procedure with regard to its treatment of Hispanic voters in Precinct 1, and moved the predominantly Anglo and high-turnout VTDs 42 and 63 from Precinct 3 back to Precinct 1. The county then exacerbated the effect of those moves by cutting VTD 61, where Hispanics constitute a majority of the registered voters, out of Precinct 1 and adding it to Precinct 3. The net result of these VTD swaps was to reduce Hispanic electoral ability in Precinct 1. These changes were particularly noteworthy because, according to the 2010 Census, Precinct 1 already complied with the Federal Constitution's "one-person, one-vote" rule, so there was no need to add population to, or remove population from, that precinct.

These changes were opposed by Hispanic commissioners and other Nueces County citizens on the ground that they would diminish Hispanic electoral ability. Precinct 3

Commissioner Oscar Ortiz specifically requested that VTDs 42 and 63 be left in his district, and Precinct 2 Commissioner Joe Gonzalez, as well as other minority residents, repeatedly voiced their concerns about these moves. The record is devoid of any response to these requests or concerns.

Despite the vocal opposition from these commissioners and other citizens to the Precinct 1 changes, and despite the effect of those changes on the ability of Hispanic citizens in Precinct 1 to elect their preferred candidates, the county has offered no plausible nondiscriminatory justification for the changes. Instead, the county has offered shifting explanations for the changes. When the proposed redistricting plan was announced for public comment on May 25, 2011, county officials first explained that the changes in the proposed plan – including the decision to add VTDs 42 and 63 and remove VTD 61 from Precinct 1 – resulted from earlier discussions that the plan's designers held individually with each commissioner. But none of the commissioners or the county judge has acknowledged requesting these changes to Precinct 1; instead, each has denied requesting or suggesting the Precinct 1 changes. The county subsequently informed us that the changes to Precinct 1, in fact, did not originate with the commissioners, but rather came from the plan's designers.

The county later argued that the Precinct 1 changes were necessary to prevent any reduction in the Hispanic population percentage in Precinct 3. This statement cannot withstand scrutiny. Commissioner Ortiz presented an alternative plan at the June 15, 2011 public hearing that would have kept VTDs 42 and 63 in his district, Precinct 3, without diminishing Hispanic citizens' ability to elect in either Precinct 3 or Precinct 1. The plan's designers contended that the Ortiz alternative plan would face more scrutiny under the Voting Rights Act than the proposed plan because it had a larger population deviation (although within the constitutionally permissible range). This advice was incorrect: The Department of Justice Guidance Concerning Redistricting makes clear that "[t]he Attorney General may not interpose an objection to a redistricting plan on the grounds that it violates the one-person one-vote principle," 76 Fed. Reg. 7470, 7470 (Feb. 9, 2011), and therefore the Attorney General does not review plans for compliance with this requirement, and certainly does not demand population equality in excess of what the Constitution requires. The erroneous advice from the plan's designers appears to have prevented any prolonged discussion by the commissioners court of the Ortiz alternative plan, and the request from Commissioners Ortiz and Gonzalez to delay a vote to provide for further public comment and discussion was denied.

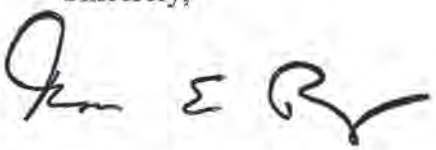
The redistricting process departed both procedurally and substantively from past redistricting cycles in other ways. In its 2011 redistricting, the county considered only one plan, and that plan was revised only once. This is in stark contrast to the redistricting process in both 2001 and 1991, when numerous alternative plans were presented by the county's demographers and consultants for the commissioners court to consider. Previous redistricting procedures also included consultation and cooperation with local Hispanic residents and groups in drawing plans. This time, several of the commissioners and the plan's designers engaged in a closed, secretive process, such that Hispanic residents and groups that had traditionally participated in redistricting were excluded from the development of the 2011 plan. Concerns raised by such individuals and groups at public hearings went unaddressed.

Many of the county's actions taken with regard to Precinct 1 during the redistricting process appear to have been undertaken to have an adverse impact on Hispanic voters. Given the history of Hispanic electoral success in Precinct 1, the county-wide growth in the Hispanic voting-age population and simultaneous drop in the Anglo voting-age population over the past decade, the county's shifting justifications for the changes to Precinct 1, the absence of a credible explanation for those changes, and the drop in Hispanic electoral ability that results from the Precinct 1 changes, there is sufficient evidence that prevents the county from meeting its burden of demonstrating that the proposed plan was not motivated by a discriminatory purpose prohibited by Section 5. *Garza* v. *County of Los Angeles*, 918 F.2d 763, 778 n.1 (9th Cir. 1990) (Kozinski, J., concurring and dissenting in part), *cert. denied*, 498 U.S. 1028 (1991); *cf. LULAC* v. *Perry*, 548 U.S. 399, 428-29 (2006).

The county's failure to establish the absence of a discriminatory purpose is sufficient to warrant an objection to the commissioners court redistricting plan. We would note, however, that based on the facts as identified above, the county has also failed to carry its burden of showing that its proposed plan does not have a retrogressive effect on the ability of Hispanic voters to elect their candidate of choice.

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. 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 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 Nueces County plans to take concerning this matter. If you have any questions, please contact Robert S. Berman (202/514-8690), a Deputy Chief in the Voting Section. Because the Section 5 status of the redistricting plan is before the court in *Nueces County* v. *United States*, No. 11-1784 (D.D.C.), we are providing a copy of this letter to the court and counsel of record in that case.

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*

MAR 0 5 2012

James E. Trainor III, Esq.
Beirne, Maynard & Parsons
401 West 15th Street, Suite 845
Austin, Texas 78701

Dear Mr. Trainor:

This refers to the 2011 redistricting plan for the commissioners court, the reduction in the number of justices of the peace from nine to five and the number of constables from eight to five, and the 2011 redistricting plan for the justices of the peace/constable precincts for Galveston 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 December 19, 2011, request for additional information on January 4, 2012; additional information was received on February 6, 2012.

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 county's previous submissions. Under Section 5, the Attorney General must determine whether the submitting authority has met its 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 or 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). For the reasons discussed below, I cannot conclude that the county's burden under Section 5 has been sustained as to the submitted changes. Therefore, on behalf of the Attorney General, I must object to the changes currently pending before the Department.

According to the 2010 Census, Galveston County has a total population of 291,309 persons, of whom 40,332 (13.8%) are African American and 65,270 (22.4%) are Hispanic. Of the 217,142 persons who are of voting age, 28,716 (13.2%) are black persons and 42,649 (19.6%) are Hispanic. The five-year American Community Survey (2006-2010) estimates that African Americans are 14.3 percent of the citizen voting age population and Hispanic persons comprise 14.8 percent. The commissioners court is elected from four single-member districts with a county judge elected at large. With regard to the election for justices of the peace and constables, there are eight election precincts under the benchmark method. Each elects one

person to each position, except for Precinct 8, which elects two justices of the peace. The county has proposed to reduce the number of election precincts to five, with a justice of the peace and a constable elected from each.

We turn first to the commissioners court redistricting plan. With respect to the county's ability to demonstrate that the commissioners court plan was adopted without a prohibited purpose, the starting point of our analysis is the framework established in *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977). There, the Court provided a non-exhaustive list of factors that bear on the determination of discriminatory purpose, including the impact of the action on minority groups; the historical background of the action; the sequence of events leading up to the action or decision; the legislative or administrative history regarding the action; departures from normal procedures; and evidence that the decision-maker ignored factors it has otherwise considered important or controlling in similar decisions. *Id.* at 266-68.

Based on our analysis of the evidence, we have concluded that the county has not met its burden of showing that the proposed plan was adopted with no discriminatory purpose. We start with the county's failure to adopt, as it had in previous redistricting cycles, a set of criteria by which the county would be guided in the redistricting process. The evidence establishes that this was a deliberate decision by the county to avoid being held to a procedural or substantive standard of conduct with regard to the manner in which it complied with the constitutional and statutory requirements of redistricting.

The evidence also indicates that the process may have been characterized by the deliberate exclusion from meaningful involvement in key deliberations of the only member of the commissioners court elected from a minority ability-to-elect precinct. For example, the county judge and several – but not all – of the commissioners had prior knowledge that a significant revision to the pending proposed map was made on August 29, 2011, and would be presented at the following day's meeting at which the final vote on the redistricting plans would be taken. This is particularly noteworthy because the commissioner for Precinct 3, one of two precincts affected by this particular revision, was one of the commissioners not informed about this significant change. Precinct 3 is the only precinct in the county in which minority voters have the ability to elect a candidate of choice, and is the only precinct currently represented by a minority commissioner.

Another factor that bears on a determination of discriminatory purpose is the impact of the decision on minority groups. In this regard, we note that during the current redistricting process, the county relocated the Bolivar Peninsula – a largely white area – from Precinct 1 into Precinct 3. This reduced the overall minority share of the electorate in Precinct 3 by reducing the African American population while increasing both the Hispanic and Anglo populations. In addition, we understand that the Bolivar Peninsula region was one of the areas in the county that was most severely damaged by Hurricane Ike in 2008, and lost several thousand homes. The county received a $93 million grant in 2009 to provide housing repair and replacement options for those residents affected by the hurricane, and has announced its intention to spend most of the grant funds restoring the housing stock on Bolivar Peninsula. Because the peninsula's population has historically been overwhelmingly Anglo, and in light of the Census Bureau's

estimated occupancy rate for housing units in the Bolivar Census County Division of 2.2 persons per household, there is a factual basis to conclude that as the housing stock on the peninsula is replenished and the population increases, the result will be a significant increase in the Anglo population percentage. In the context of racially polarized elections in the county, this will lead to the concomitant loss of the ability of minority voters to elect a candidate of choice to office in Precinct 3. *Reno* v. *Bossier Parish School Board*, 528 U.S. 320, 340 (2000) ("Section 5 looks not only to the present effects of changes but to their future effects as well.") (citing *City of Pleasant Grove* v. *United States*, 479 U.S. 462, 471 (1987)).

That this retrogression in minority voting strength in Precinct 3 is neither required nor inevitable heightens our concern that the county has not met its burden of showing that the change was not motivated by any discriminatory purpose. Both Precincts 1 and 3 were underpopulated, and it would have been far more logical to shift population from a precinct that was overpopulated than to move population between two precincts that were underpopulated. In that regard, benchmark Precinct 4 was overpopulated by 23.5 percent over the ideal, and its excess population could have been used to address underpopulation in the other precincts. Moreover, according to the information that the county supplied, its redistricting consultant made the change based on something he read in the newspaper about the public wanting Bolivar Peninsula and Galveston Island to be joined into a commissioner precinct; but a review of all the audio and video recordings of the public meetings shows that only one person made such a comment.

Based on these factors, we have concluded that the county has not met its burden of demonstrating that the proposed commissioners court redistricting plan was adopted with no discriminatory purpose. We note as well, however, that based on the facts as identified above, the county has also failed to carry its burden of showing that the proposed commissioners court plan does not have a retrogressive effect.

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). Our statistical analysis indicates that minority voters possess the ability to elect a candidate of choice in benchmark Precinct 3, and that ability has existed for at least the past decade.

As noted, the county's decision to relocate the Bolivar Peninsula from Precinct 1 into Precinct 3 had the effect of reducing the African American share of the electorate in Precinct 3, while increasing both the Hispanic and Anglo populations. In specific terms, the county decreased the black voting age population percentage from 35.2 to 30.8 percent and increased the Hispanic voting age population 25.7 to 27.8 percent, resulting in an overall decrease of 2.3 percentage points in the precinct's minority voting age population. There is sufficient credible evidence to prevent the county from establishing the absence of a retrogressive effect as to this change, especially in light of the anticipated and significant population return of Anglo residents to the Bolivar Peninsula, as discussed further above.

We turn next to the proposed reduction in the number of election precincts for the justice of the peace and constable, and the 2011 redistricting plan for the justices of the peace/constable precincts. With regard to the election for justices of the peace and constables, there are eight election precincts under the benchmark method. Each elects one person to each position, except for Precinct 8, which elects two justices of the peace. The county has proposed to reduce the number of election precincts to five, with a justice of the peace and a constable elected from each.

Our analysis of the benchmark justice of the peace and constable districts indicates that minority voters possess the ability to elect candidates of choice in Precincts 2, 3 and 5. With respect to Precincts 2 and 3, this ability is the continuing result of the court's order in *Hoskins* v. *Hannah*, Civil Action No. G-92-12 (S.D. Tex. Aug. 19, 1992), which created these two districts. Following the proposed consolidation and reduction in the number of precincts, only Precinct 3 would provide that requisite ability to elect. In the simplest terms, under the benchmark plan, minority voters in three districts could elect candidates of choice; but under the proposed plan, that ability is reduced to one.

In addition, we understand that the county's position is that the court's order in *Hoskins* v. *Hannah*, which required the county to maintain two minority ability to elect districts for the election of justices of the peace and constables, has expired. If it has, then it is significant that in the first redistricting following the expiration of that order, the county chose to reduce the number of minority ability to elect districts to one. A stated justification for the proposed consolidation was to save money, yet, according to the county judge's statements, the county conducted no analysis of the financial impact of this decision. The record also indicates that county residents expressed a concern during the redistricting process that the three precincts electing minority officials were consolidated and the precincts with white representatives were left alone. The record is devoid of any response by the county.

In sum, there is sufficient credible evidence that precludes the county from establishing, as it must under Section 5, that the reduction of the number of justice of the peace/constable districts as well as the redistricting plan to elect those officials will not have a retrogressive effect, and were not motivated by a discriminatory intent.

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); 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 county's 2011 redistricting plan for the commissioners court and the reduction in the number of justice of the peace and constable districts as well as the redistricting plan for those offices.

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. 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 submitted 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 that Galveston County plans to take concerning this matter. If you have any questions, you should contact Robert S. Berman (202/514-8690), a deputy chief in the Voting Section.

Because the Section 5 status of the redistricting plan for the commissioners court is presently before the United States District Court for the District of Columbia in *Galveston County* v. *United States,* No. 1:11-cv-1837 (D.D.C.), we are providing the Court and counsel of record with a copy of this letter. Similarly, the status of both the commissioners court and the justice of the peace and constable plans under Section 5 is a relevant fact in *Petteway* v. *Galveston County*, No. 3:11-cv-00511 (S.D. Tex). Accordingly, we are also providing that Court and counsel of record with a copy of this letter.

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*

MAR 12 2012

Mr. Keith Ingram
Director of Elections
Elections Division
Office of the Texas Secretary of State
P.O. Box 12060
Austin, Texas 78711-2060

Dear Mr. Ingram:

This refers to Chapter 123 (S.B. 14) (2011), which amends the Texas Transportation Code relating to the issuance of election identification certificates, and which amends the Texas Election Code relating to the procedures for implementing the photographic identification requirements, including registration procedures, provisional-ballot procedures, notice requirements, and education and training requirements, for the State of 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 January 9, 2012 follow-up to our September 23, 2011 request for additional information on January 12, 2012; additional information was received through February 17, 2012.

According to the 2010 Census, the State of Texas had a total population of 25,145,561, of whom 9,460,921 (37.6%) were Hispanic, 2,975,739 (11.8%) were black, 1,027,956 (4.1%) were Asian, and 11,397,345 (45.3%) were Anglo. Texas's total voting-age population was 18,279,737, of whom 6,143,144 (33.6%) were Hispanic, 2,102,474 (11.5%) were black, 758,636 (4.2%) were Asian, and 9,074,684 (49.6%) were Anglo. The five-year aggregate American Community Survey (2006-2010) estimates that Texas had a Hispanic citizen voting-age population of 25.5 percent.

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 state's previous submissions. Under Section 5, the Attorney General must determine whether the submitting authority has met its 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 or 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). With regard to Sections 9 and 14 of S.B. 14, concerning photographic identification

51.52(c). With regard to Sections 9 and 14 of S.B. 14, concerning photographic identification requirements for in-person voting and acceptable forms of photographic identification, 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 Sections 9 and 14 of S.B. 14.

We start our analysis recognizing the state's legitimate interest in preventing voter fraud and safeguarding voter confidence. *Crawford* v. *Marion County Election Bd.*, 553 U.S. 181 (2008). In that vein, the state's sole justifications for changing the current practice to require photographic identification to vote in person that appear in the legislative proceedings and are presented in its submission are to ensure electoral integrity and deter ineligible voters from voting. At the same time, we note that the state's submission did not include evidence of significant in-person voter impersonation not already addressed by the state's existing laws.

The voting changes at issue must be measured against the benchmark practice to determine whether they 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). In support of its position that this proposed requirement will not have such a prohibited effect, the state provided two sets of registered-voter data, which were matched with two different data sources maintained by the state's Department of Public Safety (DPS). One set was current as of September 16, 2011, and the other as of early January 2012. The September data reported that there were 12,780,841 registered voters, of whom 2,785,227 (21.8%) were Hispanic. The January data reported that there were 12,892,280 registered voters, of whom 2,810,869 (21.8%) were Hispanic.

There is, however, a significant difference between the two data sets with regard to the number and characteristics of those registered voters without a driver's license or personal identification card issued by DPS. The September data indicate that 603,892 (4.7%) of the state's registered voters do not have such identification; this population consists of 174,866 voters (29.0% of the 603,892 voters) who are Hispanic and 429,026 voters (71.0%) who are non-Hispanic. The January data indicate that 795,955 (6.2%) of the state's registered voters do not have such identification; this population consists of 304,389 voters (38.2%) who are Hispanic and 491,566 voters (61.8%) who are non-Hispanic. The state has not provided an explanation for the disparate results. More significantly, it declined to offer an opinion on which of the two data sets is more accurate. Accordingly, we have considered both in reviewing your submission.

Starting our analysis with the September data set, 6.3 percent of Hispanic registered voters do not have the forms of identification described above, but only 4.3 percent of non-Hispanic registered voters are similarly situated. Therefore, a Hispanic voter is 46.5 percent more likely than a non-Hispanic voter to lack these forms of identification. In addition, although Hispanic voters represent only 21.8 percent of the registered voters in the state, Hispanic voters represent fully 29.0 percent of the registered voters without such identification.

Our analysis of the January data indicates that 10.8 percent of Hispanic registered voters do not have a driver's license or personal identification card issued by DPS, but only 4.9 percent of non-Hispanic registered voters do not have such identification. So, Hispanic registered voters are more than twice as likely as non-Hispanic registered voters to lack such identification. Under

are more than twice as likely as non-Hispanic registered voters to lack such identification. Under the data provided in January, Hispanics make up only 21.8 percent of all registered voters, but fully 38.2 percent of the registered voters who lack these forms of identification.

Thus, we conclude that the total number of registered voters who lack a driver's license or personal identification card issued by DPS could range from 603,892 to 795,955. The disparity between the percentages of Hispanics and non-Hispanics who lack these forms of identification ranges from 46.5 to 120.0 percent. That is, according to the state's own data, a Hispanic registered voter is at least 46.5 percent, and potentially 120.0 percent, more likely than a non-Hispanic registered voter to lack this identification. Even using the data most favorable to the state, Hispanics disproportionately lack either a driver's license or a personal identification card issued by DPS, and that disparity is statistically significant.

The state has provided no data on whether African American or Asian registered voters are also disproportionately affected by S.B. 14.

Sections 9 and 14 of S.B. 14 would also permit a voter to vote in person using military photographic identification, a United States citizenship certificate that contains the person's photograph, a United States passport, or a license to carry a concealed handgun. The state has produced no data showing what percent of registered voters lack a driver's license or personal identification card issued by DPS, but do possess another allowable form of photographic identification. Nor has the state provided any data on the demographic makeup of such voters. In addition, when the Texas Legislature was considering S.B. 14, there were a number of legislative proposals to expand the forms of identification that could be used by voters to meet this new requirement – including proposals to allow any state-issued or tribal identification with a photograph to be used for regular voting – but those proposals were rejected.

In view of the statistical evidence illustrating the impact of S.B. 14 on Hispanic registered voters, we turn to those steps that the state has identified it will take to mitigate that effect.

You have informed us that the DPS-issued "free" election identification certificate, which is proposed to be implemented by Section 20 of S.B. 14, would protect voters who do not already have another acceptable form of identification. The application process for these certificates will mirror the manner in which a person obtains a driver's license. First-time applicants will be required to furnish various supplemental documents and undergo an application process that includes fingerprinting and traveling to a driver's license office.

An applicant for an election identification certificate will be required to provide two pieces of secondary identification, or one piece of secondary identification and two supporting documents. If a voter does not possess any of these documents, the least expensive option will be to spend $22 on a copy of the voter's birth certificate. There is a statistically significant correlation between the Hispanic population percentage of a county and the percentage of a county's population that lives below the poverty line. The legislature tabled amendments that would have prohibited state agencies from charging for any underlying documents needed to obtain an acceptable form of photographic identification.

As noted above, an applicant for an election identification certificate will have to travel to a driver's license office. This raises three discrete issues. First, according to the most recent American Community Survey three-year estimates, 7.3 percent of Hispanic or Latino households do not have an available vehicle, as compared with only 3.8 percent of non-Hispanic white households that lack an available vehicle. Statistically significant correlations exist between the Hispanic voting-age population percentage of a county, and the percentage of occupied housing units without a vehicle.

Second, in 81 of the state's 254 counties, there are no operational driver's license offices. The disparity in the rates between Hispanics and non-Hispanics with regard to the possession of either a driver's license or personal identification card issued by DPS is particularly stark in counties without driver's license offices. According to the September 2011 data, 10.0 percent of Hispanics in counties without driver's license offices do not have either form of identification, compared to 5.5 percent of non-Hispanics. According to the January 2012 data, that comparison is 14.6 percent of Hispanics in counties without driver's license offices, as compared to 8.8 percent of non-Hispanics. During the legislative hearings, one senator stated that some voters in his district could have to travel up to 176 miles roundtrip in order to reach a driver's license office. The legislature tabled amendments that would have, for example, provided reimbursement to voters who live below the poverty line for travel expenses incurred in applying for the requisite identification.

The third and final point is the limited hours that such offices are open. Only 49 of the 221 currently open driver's license offices across the state have extended hours. Even Senator Troy Fraser, the primary author of this legislation in the Senate, acknowledged during the legislative hearing that, "You gotta work to make sure that [DPS offices] are open." Despite the apparent recognition of the situation, the legislature tabled an amendment that would have required driver's license offices to be open until 7:00 p.m. or later on at least one weekday and during four or more hours on at least two Saturdays each month.

The legislation mandates a statewide voter-education effort concerning the new identification requirement, but does not provide specific standards for the program. The state, however, has yet to approve a final version of the materials designed to accomplish that goal, either for voters or for election officials. The state has indicated that it will implement a new educational program; but as of this date, our information indicates that the currently proposed plan will incorporate the new identification requirement into a general voter-education program.

The legislation requires that poll-worker training materials reflect the new identification requirements. This is particularly vital because a poll-worker can permit a voter to cast a ballot if the name as listed on the documentation is "substantially similar to but does not match exactly" the name on the voter registration list, and if the voter also submits an affidavit stating that he or she is the person on the list of registered voters. Though the Secretary of State's office has adopted an administrative rule to guide poll-workers in determining when names are substantially similar, the rule gives poll-workers a great deal of discretion. The state has provided no enforcement guidelines to prevent the vagueness of this standard from leading to inconsistency or bias in its application.

Even after submitting data that show over 600,000 registered voters do not have either a driver's license or personal identification card issued by DPS – and that a disproportionate share of those registered voters are Hispanic – the state has failed to propose, much less adopt, any program for individuals who have to travel a significant distance to a DPS office, who have limited access to transportation, or who are unable to get to a DPS office during their hours of operation. This failure is particularly noteworthy given Texas's geography and demographics, which arguably make the necessity for mitigating measures greater than in other states. The state also has not developed any specific proposals to educate either voters about how to comply with the new identification requirement or poll officials about how to enforce the proposed change.

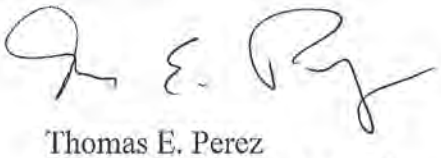
In conclusion, the state has not met its burden of proving that, when compared to the benchmark, the proposed requirement will not have a retrogressive effect, or that any specific features of the proposed law will prevent or mitigate that retrogression. Additionally, the state has failed to demonstrate why it could not meet its stated goals of ensuring electoral integrity and deterring ineligible voters from voting in a manner that would have avoided this retrogressive effect. Because we conclude that the state has failed to meet its burden of demonstrating that the proposed law will not have a retrogressive effect, we do not make any determination as to whether the state has established that the proposed changes were adopted with no discriminatory purpose.

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); 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 changes affecting voting that are occasioned by Sections 9 and 14 of Chapter 123 (S.B. 14) (2011). Sections 1 through 8, 10 through 13, 15, and 17 through 22 of S.B. 14 are directly related to the procedures for implementing the photographic identification requirements, including registration procedures, provisional-ballot procedures, notice requirements, and education and training requirements. Accordingly, no determination by the Attorney General is required or appropriate under Section 5. 28 C.F.R. 51.22 and 51.35.

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 these 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 submitted 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 that the State of Texas plans to take concerning this matter. If you have any questions, you should contact Robert S. Berman (202/514-8690), a deputy chief in the Voting Section.

Because the Section 5 status of this legislation is presently before the United States District Court for the District of Columbia in *State of Texas* v. *Holder,* No. 1:12-cv-00128 (D.D.C.), we are providing the Court and counsel of record with a copy of this letter.

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*

December 21, 2012

Ms. Melody Thomas Chappell, Esq.
Wells, Peyton, Greenberg & Hunt
P.O. Box 3708
Beaumont, Texas 77704-3708

Dear Ms. Chappell:

This refers to the change in the method of election from seven single-member districts to five single-member districts with two at-large positions, and the 2012 board of trustee districting plan, for Beaumont Independent School District in Jefferson 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 October 1, 2012, request for additional information on October 22, 2012, and additional information was received through December 10, 2012.

We have carefully considered the information you have provided, as well as census data, comments, and information from other interested parties. 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 "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 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. The voting changes at issue must be measured against the benchmark practice to determine whether they 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).

According to the 2010 Census, the district had a total population of 132,225 persons, of whom 60,581 (45.8%) were African American and 19,459 (14.7%) were Hispanic. Its voting age population was 101,912, of whom 44,085 (43.3%) were black, and 13,734 (13.5%) were Hispanic. The vast majority of the district's population resides in the City of Beaumont, which has a similar demographic profile.

Prior to 1985, five of the seven board members were elected from single-member districts and two were elected at large. In 1985, a federal court devised a single-member district plan for the election of all seven board members. *United States* v. *Texas Education Agency (Beaumont*

Independent School District), Cause No. 6819-CA (E.D. Tex. Apr. 22, 1985). That method of election has been used continuously since then and is the benchmark for our analysis here. It provides African American voters with the ability to elect four members to the district's board.

The district proposes to elect two of its members at large and five members from single-member districts. Our analysis shows that a fairly-drawn districting plan with five districts will provide African American voters with the ability to elect candidates of choice in three of the districts. Accordingly, to meet its burden that the change does not result in impermissible retrogression, the district must establish that the at-large method for the two remaining seats does not preclude African American voters from electing a candidate of choice to office. For the reasons discussed below, the district has failed to do so.

Aside from various tax elections, the May 2011 referendum is the only recent school district election in which the electorate would be identical to that of an at-large position on the school board. There is overwhelming evidence that both the campaign leading to the election as well as the issue itself carried racial overtones with the genesis of the change and virtually all of its support coming from white residents. A statistical analysis of the election confirms the extreme racial polarization that the issue created. Black voters cohesively voted to maintain the current method of election and white voters voted cohesively for the proposed change. We estimate over 90 percent of white voters, but less than 10 percent of black voters, supported the change.

An examination of at-large elections for the Beaumont City Council also proved informative because of the overlap in population and the similarity in demographics. There, we found racial cohesion among black voters at levels similar to those identified in the school district election. More significantly, we found significant racial polarization and the same unwillingness of white voters to support a black-preferred candidate, with little evidence of crossover voting by white voters in the city's at-large council races.

In the past ten years, numerous black-preferred candidates have sought municipal office in the city. With the sole exception of one candidate, African Americans have been unable to elect candidates of choice to the city's at-large council positions. Our analyses showed that this candidate only received about eight percent of the non-black vote in both the 2007 and 2011 elections, placing second to last among non-black voters in 2011. And anecdotal evidence suggests that even this minimal level of crossover voting was the result of an out-of-the-ordinary public endorsement and television appearance by white voters on behalf of this candidate; other black-preferred candidates have failed to achieve more than three percent of the non-black vote in at-large city council elections. In addition, our analyses demonstrate that this candidate's election was dependent on single-shot voting, in which black voters withheld their votes for the second at-large city council seat in both 2007 and 2011, voting only for this candidate. The statistical and anecdotal evidence therefore confirm that this one candidate's experience is not indicative of black-preferred candidates' prospects for success in at-large elections. *See Texas* v. *United States*, 2012 WL 3671924, at *22-23 (D.D.C. Aug. 28, 2012) (three-judge court) (isolated electoral success by one candidate is insufficient to demonstrate that minority voters have the consistent ability to elect their preferred candidates of choice).

The school district has failed to establish that implementing the proposed method of election will offer the same ability to African American voters to exercise the electoral franchise that they enjoy currently. Black voters now have the ability to elect four of the seven board members; the proposed plan provides that ability for only three positions. In order for black voters to maintain their current level of voting strength under the new configuration, they must be able to elect a candidate of choice from one at-large position. The evidence, however, offers little, if any, support for that conclusion.

We note as well that this is not the first occasion on which the school district has proposed the use of at-large elections in a manner that would cause a retrogression in black voting strength; on October 20, 1983, the Attorney General objected to the proposed consolidation of the Beaumont and South Park school districts on the ground that the change would "have a significant adverse impact on the ability of blacks to elect representatives of their choice to the surviving school board under an at-large election system."

As detailed above, it is not likely that a black-preferred candidate would successfully be elected in an at-large contest. Based upon that analysis I cannot conclude, as I must under Section 5, that the district has met its burden of establishing the absence of a retrogressive effect. Accordingly, I must interpose an objection to the proposed change in method of election for the Beaumont Independent School District from seven single-member districts to five single-member districts with two at-large positions. Because the district has failed to meet its burden of demonstrating that this proposed change will not have a retrogressive effect, we do not make any determination as to whether the district has established that the proposed change was adopted with no discriminatory purpose.

Because the adoption of the districting plan is dependent upon the objected-to proposed change in method of election, it would be inappropriate for the Attorney General to make a determination on this related change. 28 C.F.R. 51.22.

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 have neither 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, unless and until the objection is withdrawn or a judgment from the federal district court is obtained, the 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, please call Mr. 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*

April 8, 2013

Melody Thomas Chappell, Esq.
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Dear Ms. Chappell:

This refers to two submissions of changes affecting voting for the board of trustees for the Beaumont Independent School District (BISD) in Jefferson County, Texas, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c. First, on March 1, 2013, we received your submission of the BISD's adoption of the February 21, 2013, redistricting plan and accompanying notices and orders necessary for the election of three of the seven members of the board of trustees. Second, on March 19, 2013, we received your submission of the changes effectuated as the result of the March 18, 2013, ruling in *In re Rodriguez*, __ S.W. 3d __, 2012 WL 1189005 (Tex. App. Beaumont), as well as those changes adopted by the BISD to implement the state court's orders. We have received additional information concerning both submissions through April 4, 2013, including the denial of the stay request in *Rodriguez*, No. 09-13-00115 (Tex. App. Beaumont Mar. 27, 2013), and the court's ruling on the same day in *In re Neil*, No. 9-13-00144 (Tex. App. Beaumont).

Collectively, these changes would shorten the terms of four incumbents from four years to two years, such that all seven trustee positions would be up for election this year. These changes also would treat the candidate qualification period as having closed before the date of the court order, with the effect that in three districts that provide black voters with the ability to elect candidates of choice, the black-preferred incumbent trustees would be removed from their offices and replaced with the candidates they defeated in the last election (and who received virtually no support from black voters), without the incumbent trustees in those three districts having had notice that an election would be held in their districts or the opportunity to qualify for re-election. In particular, the information contained in the two submissions indicates that the state court ordered (1) the school district election be conducted on May 11, 2013, (2) using the redistricting plan that the BISD adopted on February 21, 2013, (3) with all seven trustee positions to be contested, (4) resulting in the terms of four incumbents, three of whom are elected from districts which provide minority voters with the ability to elect candidates of choice, being shortened from four to two years. In addition, (5) the BISD must deem all persons who filed and qualified for any district on or before March 1, 2013, to be placed on the ballot with (6) no additional time allowed for persons to qualify for those districts not identified in the February 21,

2013, election order and notice. Finally, the BISD must (7) designate those persons who qualified for Districts 1, 2, 3 and 5 as unopposed candidates. The BISD has adopted provisions for (8) the county to conduct the election, (9) the use of separate ballots, (10) three polling place changes, and (11) the use of county early voting locations and hours. Because these changes are directly related, the Attorney General must review them simultaneously. *Procedures for the Administration of Section 5 of the Voting Rights Act of 1965*, 28 C.F.R. §§ 51.22(b) and 51.35.

According to the 2010 Census, the BISD has a total population of 132,225 persons, of whom 46,691 (35.3%) are white, 60,581(45.8%) are black, and 19,459 (14.7%) are Hispanic. The BISD's voting age population is 39.2 percent white, 43.3 percent black, and 13.5 percent Hispanic. Although citizenship rates are not available for the BISD, they are available for the City of Beaumont, which is wholly contained within the BISD and shares similar demographics. The American Community Survey for 2007 to 2011 estimates that of the city's voting age population who are citizens, 43.5 percent are white, 47.9 percent are black, and 5.4 are Hispanic.

At the outset, it is imperative to note the historical context in which the present submissions arise and which informs our analysis. On April 22, 1985, the United States District Court for the Eastern District of Texas in *United States* v. *Texas Education Agency (Beaumont Independent School District),* No. 6819-CA (E.D. Tex.), ordered the use of single-member districts for the election of the seven school district trustees for the BISD. The court, in addition to ordering the BISD's method of election, also required that the trustees' terms would be staggered, with a subset of trustees chosen at each election. The BISD has continued the practice of using single-member districts with staggered terms for the past 26 years, through two redistricting cycles. Most recently, on April 2, 2008, the Attorney General informed BISD officials that no objection would be interposed under Section 5 to the change in the staggering of terms for the board of trustees to account for the change from three-year to four-year terms.

In 2011, the BISD conducted a referendum election on the question of whether to change from the federal court-ordered method of election to one with five single-member districts and two at-large positions. Both the public activities prior to the referendum election as well as the election results showed extreme racial polarization. As required by the referendum results, the BISD submitted the 5-2 method of election and a five single-member district redistricting plan for administrative review under Section 5 of the Voting Rights Act. On December 21, 2012, the Attorney General informed BISD officials that implementing the proposed 5-2 method of election would not offer the same ability to African American voters to exercise the franchise as the benchmark method of election, and was therefore retrogressive in violation of Section 5. As a result of that determination, federal law required the continued use of the method of election ordered into effect by the federal court in 1985.

Following the December 2012 objection to the proposed change in the method of election, the BISD proceeded to adjust the existing districts to reflect the population changes reflected in the 2010 Census results, resulting in the adoption of a seven single-member district redistricting plan on February 21, 2013, along with the requisite notices and orders, providing for staggered terms according to the district's previously established schedule of staggered terms. Accordingly, the BISD's notice of election announced that elections would be held only in Districts 4, 6 and 7 in May 2013, and BISD only accepted candidate qualifying papers from

persons in those districts. The incumbents in Districts 1, 2 and 3, which provide minority voters with the ability to elect candidates of choice, did not seek to qualify for election, as the BISD had not announced that those seats would be up for election in May 2013. At the end of the last day for the candidate qualifying period, several of the referendum supporters, who had previously run and lost in the districts that provide minority voters with the ability to elect, appeared and sought to qualify in Districts 1, 2 and 3. The BISD did not accept their candidate filings, as it had not scheduled or announced an election in those districts in May 2013. Following the close of candidate qualification, litigation in both state court and federal court ensued.

As noted above, we continue to receive additional information on the BISD's submissions. At the same time, we are aware of the tight deadlines, both legal and practical, and have worked to expedite our review to the maximum extent possible. For that reason, rather than waiting until we have completed our review of all the changes currently before us, we believe that it would be helpful to both the BISD and the various courts in which litigation concerning the election is pending to inform you of those matters on which we have already made a determination.

The BISD has made two submissions. The first submission concerns the BISD's own February 21, 2013 adoption of a redistricting plan and related election procedures. The second submission includes two categories of changes: (1) those effectuated by the state court's order, and (2) those the BISD adopted to implement that order.

We first assess whether the procedures included in these submissions are changes within the meaning of Section 5 and therefore subject to our review. There is little question that all the changes adopted by the BISD itself, which include the changes contained in its initial March 1 submission and those submitted subsequently, such as the conduct of the election by the county, the resulting use of separate ballots, the three polling places changes, and the use of county early voting locations and hours, are subject to review under Section 5.

The remaining changes are those that were ordered by the state court. These changes are not insulated from review merely because they were ordered by the state court; rather, a "change in election procedures ordered by [state] courts is subject to preclearance under § 5." *Hathorn* v. *Lovorn*, 457 U.S. 255, 266 (1982). In language particularly applicable to the factual circumstances presented here, the Supreme Court has explained that a "state court decree directing compliance with a state election statute [may result in a covered change] within the meaning of §5," and noting that "if § 5 did not encompass this situation, covered jurisdictions easily could evade the statute by declining to implement new state statutes until ordered to do so by state courts." *Id.* at 266 n.16. The measure by which we identify those actions subject to scrutiny under Section 5 is whether the action results in a change to existing standards, practices, or procedures with respect to voting. 42 U.S.C. § 1973c. "It is immaterial that the change sought" by a covered jurisdiction "derives from a statute" that need not be precleared. *Hathorn*, 457 U.S. at 266 n.16. The state court order at issue here contains numerous directives, all based on the court's application of state law, designed to result in a single set of procedures for the conduct of an election. Accordingly, we examine the state court ruling to identify those instances where the application of state law did, in fact, produce changes requiring Section 5 review.

The state court noted that the February 21 redistricting plan based on the 2010 Census results met constitutional one-person, one-vote requirements, and ordered that plan into effect even though it was not timely adopted under state law. *In re Rodriguez*, __ S.W. 3d __, 2013 WL 1189005, at *3-4 (Tex. App. Beaumont). The state court administered a voting change by ordering that plan into effect. *Branch* v. *Smith*, 538 U.S 254, 262 (2003). This change permitted the court to order that the election should go forward on May 11, 2013, the regularly-scheduled election date.

With regard to the number of positions to be contested at the election and the concomitant shortening of the terms of those individuals elected in 2011, the state court ordered that the election comply with Tex. Educ. Code § 11.052(h), which requires that "[a]t the first election at which some or all of the trustees are elected [from single-member districts] and after each redistricting, all positions on the board shall be filled. The trustees then elected shall draw lots for staggered terms as provided by Section 11.059." Tex. Educ. Code § 11.052(h); *see In re Rodriguez*, 2013 WL 1189005, at *6. Pursuant to state law, however, a school district "may provide for the trustees in office when the plan is adopted or the school district is redistricted to serve for the remainder of their terms * * * *." Tex. Educ. Code § 11.053(a). The board must make this choice after the first election under single-member districts or after each redistricting. *Id*. at § 11.053(b). In this instance, the state court found the board's adoption of a redistricting plan to be untimely and determined that the board policy on staggering of terms was not sufficient to meet the state law requirements. *In re Rodriguez*, 2013 WL 1189005, at *3-4, 6.

Thus, after determining that the February 21 plan would be used in the May election despite its untimely adoption under state law, the state court stood in the stead of the BISD and had the option either to continue the BISD's longstanding existing staggered-term structure at the May election, the first election after a redistricting, or to eliminate the staggered terms. The state court decided not to continue the staggered terms, thus requiring an election in all seven districts in May 2013 and truncating the terms of office of those persons elected in 2011. In doing so, the court applied state law to administer an election procedure different from that in force or effect in the BISD prior to the court's action, thus rendering the new procedures subject to Section 5 review.

We are aware that the state court concluded that its order was not a change affecting voting. The Supreme Court has held otherwise. *Hathorn*, 457 U.S. at 265; *see also NAACP* v. *Hampton County Election Comm'n*, 470 U.S. 166, 180 (1985) (rejecting the assertion by a covered jurisdiction that Section 5 review was not necessary "because [the changes] were undertaken in good faith, were merely an attempt to implement a statute that had already been approved by the Attorney General, and were therefore an improvement over prior voting procedures"). And the application of Section 5 to these changes is squarely within the definition of voting changes established by the Attorney General's Procedures for the Administration of Section 5. *See* 28 C.F.R. § 51.13(i) ("[a]ny change in the term of an elective office or an elected official * * * (*e.g.*, by shortening or extending the term of an office)" is subject to review); 28 C.F.R. § 51.13(g) ("[a]ny change affecting the eligibility of persons to become or remain candidates, to obtain a position on the ballot in primary or general elections, or to become or remain holders of elective offices" is subject to review).

Having identified those actions that are subject to review, we assess whether the BISD has established that the submitted changes – whether those resulting from the state court order or those that the BISD itself adopted pursuant to the state court order or otherwise – comply with federal law. We have carefully considered the information you have provided, as well as census data, comments, and information from other interested parties. 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 "neither [have] the purpose nor will have the effect" of denying or abridging the right to vote on account of race." *Georgia* v. *United States*, 411 U.S. 526 (1973); 28 C.F.R. § 51.52. The voting changes at issue must be measured against the benchmark practice to determine whether they 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).

As noted above, the state court determined that all seven trustee positions would be contested concurrently in the upcoming May 11, 2013 election. In addition, the state court determined that the statutorily-mandated deadline to file for office had passed and would not be reopened. We start with the effect of these changes on the voters in Districts 4, 6 and 7. There is little, if any, effect of these changes on voters in these districts. BISD residents expected an election in each of these three districts in May 2013; residents were aware of the notice calling an election in these three districts, and the incumbent trustees filed for election in each of these three districts in a timely manner. The BISD's actions – including its longstanding policy of staggering terms, its listing only these three districts in its February 21, 2013, election order, and its notice rejecting applicants for other districts – supports this conclusion. As such, there is no retrogressive effect as to Districts 4, 6 and 7.

We reach a contrary conclusion with respect to the effect of these changes in Districts 1, 2, 3 and 5. The change from the benchmark practice of staggered terms, in which the trustee positions to represent Districts 1, 2, 3 and 5 would not be up for election again until 2015, has the effect of shortening the terms of the incumbents in these districts from four years to two years. Three of these districts (1, 2 and 3) are currently represented by trustees who have won election with the cohesive support of black voters in their districts. In addition, unlike the factual circumstances in Districts 4, 6 and 7, there was no expectation that Districts 1, 2, 3 and 5 would be up for election this year. The board's policy on the staggering of terms, the most recent version of which had been in effect since 2008, had yet to be ruled inapplicable to the post-2010 Census redistricting plan. Residents in these districts reasonably relied on the BISD's policy on staggered terms, as well as the notice of election, to decide that it was unnecessary and probably inappropriate to file for an office for which there would be no election. Our investigation revealed that none of incumbent trustees in the three affected districts that provide minority voters with the ability to elect (Districts 1, 2 and 3), much less the voters in those districts, were aware that the terms had been shortened and an election for their districts would be held in May.

Although these circumstances alone would support a finding that the BISD could not establish that an election in the four additional districts (1, 2, 3 and 5) in May 2013 would not be retrogressive, there are two additional factors that buttress that conclusion. First, all the individuals who filed for the three ability-to-elect districts (1, 2 and 3), had previously been

candidates for the board of trustees. Some ran more than once. In no election did any of the candidates receive support from more than 10.9 percent of the black voters in their respective district when they ran as candidates in 2011. Indeed, our statistical analysis of the 2011 election determined that although one candidate did receive 37.4 percent of the total vote in District 1 (in which black voters are a bare majority of the voting age population), she received virtually no support from the district's black residents. Second, the state court's decision was issued after the close of the candidate filing period, thereby precluding anyone from filing who had relied on the BISD's policy and election notice as well as the common understanding that no election would be held in the four additional districts. The effect of the state court's order in these districts is that candidate qualifying was deemed closed, without any notice to either the voters in these districts or the incumbents, that qualifying had ever opened. Likewise, the effect of the state court's order is that candidates would run unopposed who are not the choice of the minority community – and indeed had previously been rejected by minority voters in contested elections – with no opportunity for them to be contested. Had the state court reopened the candidate qualifying period after the decision, even for a short period of time, the incumbent trustees or other residents of those districts would likely have qualified, thereby providing the voters in these districts with the opportunity to participate in the electoral process and the ability to elect their candidates of choice. This eventuality could have significantly mitigated, and potentially eliminated, the retrogressive effect of the changes.

In light of the considerations discussed above, I cannot conclude that the BISD has sustained its statutory burden that the use of the state court-adopted plan for elections in Districts 1, 2, 3 and 5, the truncating of the terms of the incumbents in those districts from four years to two years, and the changes to the candidate qualification procedures for those districts do not have a discriminatory effect. Therefore, on behalf of the Attorney General, I must object to the changes described in this paragraph. Because we conclude that the BISD has failed to meet its burden of demonstrating that these proposed changes will not have a retrogressive effect, we do not make any determination as to whether the BISD has established that these changes were adopted with no discriminatory purpose.

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 have neither 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, unless and until the objection is withdrawn or the United States District Court for the District of Columbia grants the BISD the relief it has requested in *Beaumont Independent School District* v. *United States*, 1:13-cv-00401 (D.D.C.), its pending declaratory judgment action, the changes identified above to which the Attorney General has interposed an objection continue to be legally unenforceable. *Clark* v. *Roemer*, 500 U.S. 646 (1991); 28 C.F.R. § 51.10.

With regard to the February 2013 redistricting plan that the BISD adopted and the state court ordered into effect, at the present time, we are not in a position to complete our analysis of its compliance with Section 5. The information provided to date is insufficient to enable us to determine that the proposed redistricting plan 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 required under Section 5. The following information is necessary so that we may complete our review of the plan:

1. A list of registered voters, by name and by precinct, for the May 2007 election, the May 2011 election, and the list of registered voters as it currently exists.

2. The voter history files for each voter, by name and precinct, registered to vote in the BISD.

3. Copies of any available reports, studies, analyses, summaries, or other documents or publications, including county planning commission reports and school planning reports, that contain an assessment of the current and future demographic growth, broken down by race and ethnicity, in the BISD.

4. Election returns for all elections for offices in Jefferson County held from 2003 to the present in which a black candidate participated. For each election, indicate:

    a. The office sought;
    b. Each candidate's name and race;
    c. The number of votes for each candidate, by precinct;
    d. The number of registered voters, by race and by precinct at the time of each election;
    e. The number of persons by race and by precinct, who participated in the election.

With regard to the information requested in Items 4(d) and (e), if the exact numbers are not available, please provide your best estimate and the basis for that estimate. Our review would be expedited if the information identified above could be provided in an electronic format (.dbf, .xls, or .txt files).

We note that concerns have been raised that the diminution in the black percentage of the voting age population in District 2 from 65.4 to 50.1 percent may diminish the ability of black voters to elect candidates of choice in that district. Any response that the BISD may wish to provide regarding this concern will be helpful to our analysis.

The Attorney General has 60 days to consider a completed submission pursuant to Section 5. This 60-day review period for the state court's adoption of the redistricting plan will begin when we receive the information specified above. 28 C.F.R. § 51.37. However, if no response is received within 60 days of this request, the Attorney General may object to the proposed changes consistent with the burden of proof placed upon the submitting authority. 28 C.F.R. §§ 51.40 and 51.52(a) and (c). Changes that affect voting are legally unenforceable unless and until the appropriate Section 5 determination has been obtained. *Clark* v. *Roemer*, 500 U.S. 646 (1991); 28 C.F.R. § 51.10.

The BISD's procedures for the county to conduct the election, the temporary use of separate ballots, the three polling place changes, and the use of county early voting locations and hours are directly related to the redistricting plan. Accordingly, it would be inappropriate for the Attorney General to make a determination on those changes at this time. 28 C.F.R. §§ 51.22(b) and 51.35. Likewise, because the BISD's March 1 submission of its own adoption of the February 21 redistricting plan has been superseded by the state court's order adopting that same plan, no determination is required or appropriate concerning the BISD's adoption of that same plan. 28 C.F.R. § 51.35.

To enable us to meet our responsibility to enforce the Voting Rights Act, please inform us of the action that the BISD plans to take concerning this matter. If you have any questions concerning this letter, please call Robert S. Berman (202-514-8690), a deputy chief of the Voting Section.

Because the Section 5 status of the changes contained in this submission is currently before both the United States District Court for the District of Columbia in *Beaumont Independent School District* v. *United States*, No. 1:13-cv-00401 (D.D.C.) and the United States District Court for the Eastern District of Texas in *Jones* v. *Beaumont Independent School District*, No.1:13-cv-0177 (E.D. Tex), we are providing a copy of this letter to the Court and to counsel of record in those cases.

Sincerely,

Thomas E. Perez
Assistant Attorney General

U.S. Department of Justice

Civil Rights Division

Office of the Assistant Attorney General

Washington, D.C. 20035

SEP 28 2001

Bruce D. Jones, Jr., Esq.
County Attorney
P.O. Box 690
Eastville, Virginia 23347-0690

Dear Mr. Jones:

This refers to the change in the method of electing the board of supervisors from six single-member districts to three double-member districts; the 2001 redistricting plan for the board of supervisors; the realignment of voting precincts; and the polling place change for Northampton County, Virginia, 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 July 18, 2001, request for additional information on July 30, 31, and August 2, 2001.

The Attorney General does not interpose any objection to the polling place 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).

With regard to the remaining specified changes, we have considered carefully the information provided, as well as information in our files, Census data, and comments from other interested persons. According to the 2000 Census, Northampton County has a population of 13,093, of whom 43.1 percent are black, and 3.5 percent are Hispanic. Since 1990, it appears that the county's overall population increased by 32 persons.

Our analysis of the county's electoral history indicates that under the current method of election, which utilizes six single-member districts, black voters have been able to elect candidates of their choice to office in three districts. According to the 2000 Census, Districts 1, 3, and 6 are majority-minority in total and voting age populations. We note that the county changed its method of election from three double-member districts to six single-member districts in 1991, in response to concerns that the three double-member districts diluted the black vote in the county. Since 1991, black supervisors have been elected in all three of the majority-minority districts, and currently represent two districts.

The proposed redistricting plan contains no districts in which minorities constitute a majority of the voting age population. One district has a total minority population of 51.9 percent and a minority voting age population of 48.8 percent. The other two districts have minority voting age populations of 39.3 percent and 43.5 percent. The county maintains that the change to the three-district system was adopted in order to facilitate the inclusion of incorporated towns within single election districts and to make access to polling places more convenient to voters. According to the submission, the county determined that it was not feasible to maintain six districts and to include towns with recent annexations wholly within single districts.

However, our analysis does not support the county's position that maintaining six districts was not feasible. As provided for in the Department's Guidance Concerning Redistricting and Retrogression Under Section 5 of the Voting Rights Act, 66 Fed. Reg. 5412, at 5413, (Jan. 18, 2001), we developed an illustrative six-district plan as part of our review of the county's submission. The plan is not significantly different from the existing benchmark plan. Under the illustrative plan, each town is wholly contained within a single district, the county's redistricting criteria are substantially met, and the one-person/one-vote requirement is satisfied.

Our analysis further reveals that the county failed to seriously consider any alternative plans that would not violate the non-retrogression requirement of Section 5. It appears that the county gave little or no serious consideration to the impact on the ability of minority voters to elect candidates of their choice, when it replaced a plan in which minorities constitute voting age majorities in three districts with a plan under which minorities of voting age do not constitute a voting age majority in any district. For reasons not fully explained, a six-district plan that had been prepared by the county was never completed.

The county maintains that the proposed plan is not retrogressive with regard to minority representation because there are currently two minority supervisors on the board, and that there were two on the board prior to the 1991 redistricting plan. This position misstates the standard that the county must meet under Section 5. Under the last precleared benchmark plan, against which the proposed plan must be measured, there are three districts, not two, in which minorities constitute a majority of the total and voting age populations, with a history of electing candidates preferred by minority voters in each of the three districts.

The county suggests that the minority community, with the use of single-shot voting, could still elect three candidates of choice under the proposed plan. Our analysis, however, does not indicate that minority voters will continue to have the same opportunity under the proposed plan that they currently have to elect even two candidates of choice. In our view, the available information concerning voting patterns within the county suggests the presence of racially polarized voting. An examination of the populations of the proposed districts indicates that it is unlikely that the minority community would be able to elect two, much less, three candidates of choice.

Given the demographics of the county and apparent voting patterns within it, the jurisdiction has not carried its burden to show that the proposed change in the method of election and the redistricting plan will not significantly reduce the ability of minority voters to elect candidates of their choice to the board of supervisors.

Under these circumstances, I am unable to conclude as I must under Section 5, that the county has met its burden of demonstrating that the submitted changes have neither a discriminatory purpose nor a discriminatory effect. Georgia v. United States, 411 U.S. 526 (1973); see also 28 C.F.R 51.52. Therefore, on behalf of the Attorney General, I must object to the change in the method of electing the board of supervisors from six single-member districts to three double-member districts and the 2001 redistricting plan for the board of supervisors of Northampton County.

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 submitted plan continues 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 realignment of voting precincts because it is dependant upon the objected to change in the method of election and the redistricting plan.

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

Sincerely,

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

U.S. Department Justice

Civil Rights Division

Office of the Assistant Attorney General

Washington, D.C. 20035

APR 29 2002

Mr. William D. Sleeper
County Administrator
Mr. Fred M. Ingram
Chairperson, Board of Supervisors
P.O. Box 426
Pittsylvania, Virginia 24531

Dear Mr. Sleeper and Mr. Ingram:

This refers to the 2001 redistricting plan for the board of supervisors and school board for Pittsylvania County, Virginia, 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 September 14, 2001, request for additional information on February 26, 2002, and supplemental information through March 12, 2002. We have considered carefully the information you have provided, as well as census data, comments and information from other interested parties, and other information, including the county's previous submissions. Based on our analysis of the information available to us, I am compelled to object to the submitted redistricting plans on behalf of the Attorney General.

The 2000 Census indicates that Pittsylvania County has a population of 61,745, of whom 23.7 percent are black. The county's board of supervisors consists of a total of seven members elected from single member districts to serve four-year, concurrent terms. The county school board is coterminous with the county board of supervisor districts.

According to census data, under the redistricting plan currently in effect, the benchmark plan, there is one district, the Bannister District, in which black persons are a majority of the population. That district has a total black population of 51.3 percent and a black voting age population of 50.2 percent. Since 1991 black voters have had the ability to elect their candidate of choice in this district. The county is proposing a plan, which will reduce the black population in the district to below 50 percent black.

While the reduction in black population in the Banister District is relatively small, a variety of factors preclude the county from establishing, as it must under Section 5 of the Voting Rights Act, that the adoption of this plan is free from either discriminatory effect or purpose.

First, the impact of this reduction is retrogressive. Our analysis of county elections shows that the level of racial polarization is extreme, such that any reduction whatsoever would call into question the continued ability of black voters to elect their candidate of choice. Based on the high level of vote polarization in the county, dropping the percentage of the Banister District below 50 percent black is very likely to severely limit the ability black voters have had throughout the 1990s to elect their candidates of choice.

A proposed change has a discriminatory effect when it will "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. 125, 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 usually must be denied. State of Georgia v. Ashcroft, C.A. No. 2001-2111 (D.D.C. Apr. 5, 2002), slip op. at 117-18.

Also important to our conclusion that an objection is warranted is the availability of easily constructed alternative plans that not only are non-retrogressive and meet other traditionally recognized redistricting principles, but are ameliorative, in that they increase the voting strength of minority voters in the Banister District. While by no means dispositive, the Department has recognized this factor as important to an analysis of retrogression. Guidance Concerning Redistricting and Retrogression under Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c, 66 Fed. Reg 5411 (January 18, 2001).

With respect to the county's ability to demonstrate that the plan was adopted without a prohibited purpose, the starting point of our analysis is Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 266 (1977). Under Arlington Heights, the Supreme Court identified the analytical structure for determining whether racially discriminatory intent exists. 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; and 4) whether the challenged decision departs,

either procedurally or substantively, from the normal practice; and contemporaneous statements and viewpoints held by the decision-makers. Id. at 266-68.

Several factors establish that the county falls short of demonstrating the lack of retrogressive purpose. Chief among these are (1) it appears that the Board procedurally blocked formal consideration of alternative, ameliorative plans supported by at least one council member and members of the black community; (2) the county was aware of easily drafted, non-retrogressive and ameliorative alternatives, most of which were in fact similar to the county's own preferred plan; and (3) the apparently pretextual nature of the reasons given by the county for its decision to adopt the plan rather than a non-retrogressive alternative.

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); Reno v. Bossier Parish School Board, 528 U.S. 320 (2000); 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 submitted redistricting plan.

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 realignment of voting precincts, and four polling place changes because they are dependent upon the redistricting plan.

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

attorney in the Voting Section. Refer to File Nos. 2001-2026 and 2001-2501 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

U.S. Department of Justice

Civil Rights Division

Office of the Assistant Attorney General

Washington, D.C. 20035

July 9, 2002

Darvin Satterwhite, Esq.
County Attorney
P.O. Box 325
Goochland, Virginia 23063

Dear Mr. Satterwhite:

This refers to the 2001 redistricting plan for the board of supervisors for Cumberland County, Virginia, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. 1973c. We received your most recent response to our October 15, 2001, request for additional information on May 10, 2002.

We have carefully considered the information you have provided, as well as census data, and comments and information from other interested parties. Based on the information available to us, I am compelled to object to the submitted 2001 redistricting plan on behalf of the Attorney General.

According to the 2000 Census, black persons represent 37.5 percent of Cumberland County's total population and 35.9 percent of its voting age population. The county's board of supervisors consists of five members elected from single-member, residency districts to serve four-year terms. According to the 2000 Census, District 3 is the only district in which black persons constitute a majority of the total population. Under the existing, or benchmark, plan, they constitute 55.9 percent of the total population, which, under the proposed plan would be reduced to 55.3 percent. Additionally, 2000 Census data indicates that this district has a majority black voting age population of 55.7 percent which would be reduced to 55.2 percent under the county's proposed plan.

The county suggests that there was a thorough, complete, and exhaustive consideration of a variety of possible district boundaries. However, despite our repeated requests for alternative plans, the county has provided but a single alternative configuration of the district, which has virtually identical demographics as the one for which preclearance is sought. The benchmark and proposed plans that were included in the county's response are not considered alternative plans for purposes of our Section 5 review.

Under the benchmark plan, the district had a deviation of 9.7 percent, clearly necessitating the removal of some persons to bring it within the county's goal of a ±5 percent deviation. In order to comply with the one-person, one-vote standard, the county removed 213 persons from the district.

This action does not withstand scrutiny as support of the county's claim that its actions were taken without an intent to retrogress, and indeed the county has not carried its burden of proving a lack of retrogressive intent. In its initial submission the county claims to have reviewed 15 to 20 alternative plans, in an effort to ensure that black voting strength was maintained. Yet despite repeated requests for these materials the county has never produced them. Moreover, the magnitude of the population movement in the revised District 3 was excessive because it resulted in the district being transformed from the most overpopulated district to the most underpopulated, with a deviation of -2.3 percent. In addition, not only did the county remove more population than was necessary, but the areas that the county did choose to remove were those areas with a significantly higher level of black population concentration than of the district as a whole. Finally, the areas that were moved out of the district were the areas from which the black-preferred candidate in District 3 drew substantial support in the 1995 and 1999 elections.

It is especially important to view this change in light of alternative plans that could have been drawn. In part, because the county refused to provide us with all alternatives it considered, we sought to determine whether there were illustrative plans that meet the county's redistricting criteria, but which did not result in the retrogression evidenced by the proposed plan. 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). We created two illustrative plans, each drawn using a least-change approach involving the exchange of very few Census blocks and resulting in little to no impact on the boundaries of the benchmark plan.

Both plans remain within the county's deviation goals, avoid pitting incumbents against each other, and bring the boundaries of the district into greater conformance with the boundaries of the benchmark plan. And in each plan, the black total and voting age populations is maintained and increased in District 3 and the retrogression is eliminated. In one plan, the black population percentage in District 3 is 56.8 percent and in the other it is 57.1. In fact, given the demographics in the area, it was virtually impossible to devise an illustrative plan which did not increase the district's black population percentage.

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 with regard to discriminatory purpose in this instance. Therefore, on behalf of the Attorney General, I must object to the 2001 redistricting plan.

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 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 Cumberland County plans to take concerning this matter. If you have any questions, you should call Ms. Maureen Riordan (202-353-2087), an attorney in the Voting Section.

Sincerely,

Ralph F. Boyd, Jr.
Assistant Attorney General

U. S. Department of Justice

Civil Rights Division

Office of the Assistant Attorney General

Washington, D.C. 20530

May 19, 2003

Bruce D. Jones, Jr., Esq.
County Attorney
P.O. Box 690
Eastville, Virginia 23347-0690

Dear Mr. Jones:

This refers to the 2002 redistricting plan for the board of supervisors and the realignment of voting precincts for Northampton County, Virginia, 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 10, 2003, request for additional information through March 21, 2003.

With regard to the redistricting plan, we have considered carefully the information provided, as well as information in our files, census data, and comments from other interested persons. According to the 2000 Census, Northampton County has a population of 13,093, of whom 43.1 percent are black persons, and 3.5 percent are Hispanic. From 1990 to 2000, the county's total population remained virtually unchanged, while the black percentage of the total population decreased slightly, from 46.2 percent to 43.1 percent.

Our analysis of the county's electoral history indicates that prior to 1991, only two black candidates had ever been elected to the board and their success came only with reliance on single-shot voting. Further, under the benchmark plan, black voters had been able to elect candidates of choice in three districts. In two of the benchmark districts, black persons are a majority of the voting age population [VAP]. The proposed plan has no district in which black persons constitute a majority of the VAP. In the third viable district in the benchmark, black residents constitute 47.8 percent of the VAP with all minority residents totaling 52.8 percent of that population. Under the proposed plan, the combined minority voting population is 50.3

percent. In the three benchmark districts, the lowest overall minority VAP percent is 52.8, whereas the highest combined minority VAP in any district in the proposed plan is 52.1 percent.

The county bases its determination that black voters will continue to have the ability to elect candidates of their choice in three of the six districts under the proposed plan on the "evidence that voters in Northampton County do not vote on purely racial grounds." In support of this conclusion, the county relies on four black-white races from 1983, 1987, and 1988, purporting to show that "at least some African-American voters were willing to vote for white candidates" and that "at least some white voters were willing to vote for an African-American candidate."

Our electoral analysis of these and other elections precludes us from reaching a similar conclusion. First, two of the elections relied upon by the county, which were county-wide elections in 1987, in fact, did suggest racial bloc voting. The analysis evidenced overwhelming support by black voters for black candidates and very little white support of those candidates by white voters (3% in one race and 7.2% in another). The other two elections relied on by the county were the races in 1983 and 1987 in which Mr. Godwin (B) successfully ran for the board of supervisors. Although Mr. Godwin does appear to have received support from some white voters, the significance of the 1987 victory to the county's position is diminished significantly by the fact that there were only two candidates running for two seats. In any event, the county's assertion that there is some level of cross-over voting does not mean that, as a general matter, white voters do not vote as a bloc to defeat black-preferred candidates in Northampton County. As noted above, our analysis did not indicate a total absence of white support for black-preferred candidates, only that the level of such support was, in most instances, minimal, at best.

The election patterns within the county since 1991 do not alter our view. In the last ten years, no black-preferred candidate has won in a district in which whites were a majority of the VAP and in the district in which neither blacks nor whites constitute a majority of the total VAP, a black-preferred candidate has only won once in the past three elections.

The analysis of electoral behavior indicates that a reduction of only a few percentage points has the potential for a significant difference in the outcome. Accordingly, the county

has not established that a plan that unnecessarily reduces the black population percentage in these districts will afford them the same ability to elect candidates of choice that they now have.

The county has also suggested any retrogression was unavoidable because the county's black VAP percentage dropped 2.4 points since 1990, and is now 40.6 percent. We have examined the county's argument and have determined that it does not withstand scrutiny.

First, the county's proposed plan does not even maintain black voting strength in two of the six districts, much less the three existing districts. Even considering black and other minority voters together, the plan presently before us results in a retrogression of black voting strength. Second, as we informed you on September 28, 2001, during our review of the county's 2001 redistricting plan, we devised an illustrative plan that was not retrogressive as one means of determining whether the retrogression that we discovered in your plan was avoidable. *Guidance Concerning Redistricting and Retrogression under Section 5 of the Voting Rights Act of 1965*, 42 U.S.C. 1973c, 66 Fed. Reg 5411, 5413 (January 18, 2001).

We have discussed that plan with you on several occasions since that time. As you know, the purpose of the illustrative plan is only to indicate that a non-retrogressive plan is possible and the county has no obligation to consider the illustrative plan for any purpose other than that. However, the reasons provided by the county for not adopting a non-retrogressive plan similar to the illustrative plan are not persuasive. The county has indicated that certain features in the illustrative plan (for example, the distances some voters must drive to vote) make the plan, in its view unacceptable; however, it concedes that these same features exist in its proposed plan, the benchmark plan, or both. Moreover, following the April 10, 2002, meeting with Departmental employees, at which the county identified, for the first time, several unincorporated areas whose boundaries, although somewhat vague, could not be split by district lines, we revised the illustrative plan to address each of the concerns raised regarding community boundaries, and developed a plan with black VAP percentages similar to those in the benchmark. Thus, despite the various

restraints that the county is operating under, the retrogression that would result from implementation of the 2002 plan is avoidable.

Under these circumstances, I am unable to conclude as I must under Section 5, that the county has met its burden of demonstrating that the redistricting plan does not have a discriminatory effect. Georgia v. United States, 411 U.S. 526 (1973); see also 28 C.F.R 51.52. Therefore, on behalf of the Attorney General, I must object to the 2002 redistricting plan for the board of supervisors of Northampton County.

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 submitted plan continues 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 realignment of voting precincts because it is dependent upon the objected to redistricting plan.

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

Sincerely,

Ralph F. Boyd, Jr.
Assistant Attorney General

U. S. Department of Justice

Civil Rights Division

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

October 21, 2003

Bruce D. Jones, Jr., Esq.
County Attorney
P.O. Box 690
Eastville, Virginia 23347-0690

Dear Mr. Jones:

This refers to the August 20, 2003, redistricting plan and the realignment of voting precincts for Northampton County, Virginia, 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 22, 2003.

We have considered carefully the information you have provided, as well as census data, comments from interested persons, and other information, including the county's previous submissions. As discussed further below, I cannot conclude that the county has sustained its burden under Section 5 with regard to the 2003 redistricting plan. Accordingly, on behalf of the Attorney General, I must object to the redistricting plan.

According to the 2000 Census, Northampton County has a population of 13,093, of whom 43.1 percent are black, and 3.5 percent are Hispanic. From 1990 to 2000, the county's total population remained virtually unchanged, while the black percentage of the total population decreased slightly, from 46.2 percent to 43.1 percent.

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).

Our examination of Northampton's plan shows 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 one district in which the minority community would have the ability to elect its candidate of choice.

The benchmark plan contains two black majority districts in which black voters have been able to elect candidates of choice, Districts 3 and 6. The proposed plan has only one such district, District 6, and reduces the black voting age population in District 3 from 53.3% to 48.2%, thereby eliminating the ability of black voters to elect their candidates of choice.

When coupled with an analysis of election returns and other factors, we have concluded that minority voting strength has been unnecessarily reduced in Northampton County. Since retrogression is assessed on a county-wide basis, Northampton may remedy this impermissible retrogression either by restoring District 3 to a district where black voters can elect a candidate of choice or by creating a new viable majority minority district elsewhere in the County.

Under Section 5 of the Voting Rights Act, the submitting authority has the burden of showing that a submitted change such as Northampton's redistricting plan 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 2003 redistricting plan for the Board of Supervisors of Northampton County.

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 plan continues 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 realignment of voting precincts because it is dependent upon the objected-to redistricting plan. Beyond the specific discussion above, however, in all other respects, we find that the County has satisfied the burden of proof required by Section 5.

If you have any questions, you should call Mr. Robert P. Lowell (202-514-3539), an attorney in the Voting Section.

Sincerely,

J. Michael Wiggins
Acting Assistant Attorney
General
Civil Rights Division