VOTING RIGHTS ACT: AN EXAMINATION OF THE SCOPE AND CRITERIA FOR COVERAGE UNDER THE SPECIAL PROVISIONS OF THE ACT

HEARING

BEFORE THE

SUBCOMMITTEE ON THE CONSTITUTION

OF THE

COMMITTEE ON THE JUDICIARY

HOUSE OF REPRESENTATIVES

ONE HUNDRED NINTH CONGRESS

FIRST SESSION

OCTOBER 20, 2005

Serial No. 109–68

Printed for the use of the Committee on the Judiciary

Available via the World Wide Web: http://judiciary.house.gov

U.S. GOVERNMENT PRINTING OFFICE

24–034 PDF WASHINGTON : 2006

For sale by the Superintendent of Documents, U.S. Government Printing Office
Internet: bookstore.gpo.gov Phone: toll free (866) 512–1800; DC area (202) 512–1800
Fax: (202) 512–2250 Mail: Stop SSOP, Washington, DC 20402–0001

COMMITTEE ON THE JUDICIARY

F. JAMES SENSENBRENNER, JR., Wisconsin, *Chairman*

HENRY J. HYDE, Illinois
HOWARD COBLE, North Carolina
LAMAR SMITH, Texas
ELTON GALLEGLY, California
BOB GOODLATTE, Virginia
STEVE CHABOT, Ohio
DANIEL E. LUNGREN, California
WILLIAM L. JENKINS, Tennessee
CHRIS CANNON, Utah
SPENCER BACHUS, Alabama
BOB INGLIS, South Carolina
JOHN N. HOSTETTLER, Indiana
MARK GREEN, Wisconsin
RIC KELLER, Florida
DARRELL ISSA, California
JEFF FLAKE, Arizona
MIKE PENCE, Indiana
J. RANDY FORBES, Virginia
STEVE KING, Iowa
TOM FEENEY, Florida
TRENT FRANKS, Arizona
LOUIE GOHMERT, Texas

JOHN CONYERS, JR., Michigan
HOWARD L. BERMAN, California
RICK BOUCHER, Virginia
JERROLD NADLER, New York
ROBERT C. SCOTT, Virginia
MELVIN L. WATT, North Carolina
ZOE LOFGREN, California
SHEILA JACKSON LEE, Texas
MAXINE WATERS, California
MARTIN T. MEEHAN, Massachusetts
WILLIAM D. DELAHUNT, Massachusetts
ROBERT WEXLER, Florida
ANTHONY D. WEINER, New York
ADAM B. SCHIFF, California
LINDA T. SÁNCHEZ, California
CHRIS VAN HOLLEN, Maryland
DEBBIE WASSERMAN SCHULTZ, Florida

PHILIP G. KIKO, *General Counsel-Chief of Staff*
PERRY H. APELBAUM, *Minority Chief Counsel*

SUBCOMMITTEE ON THE CONSTITUTION

STEVE CHABOT, Ohio, *Chairman*

TRENT FRANKS, Arizona
WILLIAM L. JENKINS, Tennessee
SPENCER BACHUS, Alabama
JOHN N. HOSTETTLER, Indiana
MARK GREEN, Wisconsin
STEVE KING, Iowa
TOM FEENEY, Florida

JERROLD NADLER, New York
JOHN CONYERS, JR., Michigan
ROBERT C. SCOTT, Virginia
MELVIN L. WATT, North Carolina
CHRIS VAN HOLLEN, Maryland

PAUL B. TAYLOR, *Chief Counsel*
E. STEWART JEFFRIES, *Counsel*
HILARY FUNK, *Counsel*
KIMBERLY BETZ, *Full Committee Counsel*
DAVID LACHMANN, *Minority Professional Staff Member*

CONTENTS

OCTOBER 20, 2005

OPENING STATEMENT

WITNESSES

MATERIAL SUBMITTED FOR THE HEARING RECORD

VOTING RIGHTS ACT: AN EXAMINATION OF THE SCOPE AND CRITERIA FOR COVERAGE UNDER THE SPECIAL PROVISIONS OF THE ACT

THURSDAY, OCTOBER 20, 2005

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON THE CONSTITUTION,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to notice, at 10:04 a.m., in Room 2141, Rayburn House Office Building, the Honorable Steve Chabot (Chair of the Subcommittee) presiding.

Mr. CHABOT. The Committee on the Constitution will come to order.

I am Steve Chabot, the Chairman of the Subcommittee on the Constitution. We appreciate everyone for being here this morning, and I especially appreciate some of our Members for being so prompt. This is the second in a series of hearings that the Subcommittee on the Constitution will be holding examining the Voting Rights Act.

On Tuesday, we had a very productive hearing. And I want to thank both Ranking Member Nadler, the Ranking Member of this Committee, and also the Ranking Member of the full Committee, the distinguished gentleman from Michigan, Mr. Conyers, and all of the Republican and Democratic Members of this Committee, for their contributions to this process. I know we all appreciate the bipartisan effort being made to make these hearings successful.

This morning, the Subcommittee will focus on one of the most important provisions of the Voting Rights Act, section 4, the provisions it triggers, and the impact that section 4 has had on protecting minority voting rights.

We will also examine the usefulness of the so-called "bailout" process available to States and counties that allows them to remove themselves from covered status.

We have a distinguished panel with us today. And I would very much like to thank them all for being here and taking their time, because I know every one of these gentlemen has very busy schedules, and we appreciate their willingness to participate in this important hearing.

After the Civil War and the passage of the 13th, 14th, and 15th amendments, our Nation had high hopes that each and every citizen would be afforded an equal opportunity to participate in our

democratic form of Government. Unfortunately, this was not to be—at least, for a very long, long time.

Rather, certain States and counties made it a priority to undermine the ability of minorities to participate in the political process. These States and counties relied on various tests and devices—most often, literacy tests—to prevent many of our fellow citizens from exercising their fundamental right to vote.

In 1965, Congress pushed back against these invidious practices, using section 4 and the additional provisions it triggers. Knowing the primary offenders, and the discriminatory patterns and practices that were being implemented in these jurisdictions, Congress took steps to target discrimination in these States and localities.

Through section 4, a set of criteria was established to prohibit States and counties that had a history of discrimination from administering a literacy test as a prerequisite to voting. Specifically, those States and counties that maintained a test or device on November 1, 1964, 1968, or 1972, and in which less than 50 percent of the voting age population was registered to vote on November 1 of 1964, 1968, or 1972, or participated in the Presidential elections held in November 1964, 1968, or 1972, were impacted by the prohibition.

Congress—our predecessors—did not stop there. Recognizing that these States and counties had a history of circumventing Congress, section 4 automatically subjected these newly covered jurisdictions to additional Federal review, including the preclearance requirements of section 5, which we will discuss in greater detail next week, and the assistance of Federal examiners and observers set forth in sections 6 through 8.

Section 4 has also been used to extend the protections of the Voting Rights Act to other minority citizens who have been denied the opportunity to participate in the political process. Presented with similar patterns of discrimination against language minority citizens, Congress brought language minorities under the protection of the VRA in 1975, expanding the number of jurisdictions subject to section 4 coverage. Presently, 16 States are either covered in their entirety or partially under section 4.

In extending section 4 on three occasions, Congress has weighed the federalism issues raised by section 4 and the provisions it triggers against the continued need to address racial discrimination. In upholding the Voting Rights Act, the Supreme Court has consistently recognized Congress' broad authority under section 2 of the 15th amendment to remedy discrimination.

Over the last 40 years, section 4 has played an important role in increasing the participation of minorities in the voting process; as witnessed by record voting registration levels. However, we must remain vigilant in our efforts to stop discrimination and ensure that every citizen is given a fair opportunity to exercise his or her right to vote.

The Voting Rights Act will continue to help protect these important freedoms, until the day that we can proudly say that discriminating in voting no longer exists.

We look forward to today's hearing and the testimony presented by our very distinguished panel at this time. And I would now yield

5 minutes to the gentleman from New York, the distinguished Ranking Member of the Committee, Mr. Nadler.

Mr. NADLER. Thank you, Mr. Chairman. I will be brief. I won't take anything near the 5 minutes.

I want to warmly welcome our distinguished witnesses today. We are now getting to the core issues of the renewal of the Voting Rights Act. As we have all acknowledged, Congress needs to make a strong factual record supporting its remedies, given recent Supreme Court decisions.

The witnesses today will provide much-needed information to guide our actions to make that record and to support—I presume, to support our actions in reauthorizing the Voting Rights Act.

I look forward to the testimony, and I yield back.

Mr. CHABOT. I thank the gentleman for yielding back. The Ranking Member of the full Committee, Mr. Conyers, would you like to make a statement?

Mr. CONYERS. Mr. Chairman, I would, just briefly, please. And I thank you for this opportunity.

When we enacted the Voting Rights Act in 1965, we determined that racial discrimination in voting has been more prevalent in certain areas of the country, and so section 4(a), which we are examining today, established a formula to identify those areas and to provide more stringent remedies where appropriate.

As you said, it has been amended three times, to broaden the scope of the act's coverage to language minorities, and to cope with the changing nature of voting discrimination. In 1975, we expanded the coverage formula to include the practice of providing in any election information, including ballots, only in English, in States or political subdivisions where members of a single language minority constituted more than 5 percent of voting age. This affected the coverage in Alaska, Arizona, Texas, in their entirety; parts of California; Florida; even in my State of Michigan, two townships; New York; Carolina [sic]; and South Dakota.

Significantly, section 4, in adding to defining the scope coverage, contains a bailout provision that allows jurisdictions to terminate or bail out from coverage under the act's special provisions; originally enacted as a means to remedy any possible over-inclusiveness resulting from application of the trigger formula. So we amended the procedure in 1982 so jurisdictions that meet the statutory standards can obtain relief.

Bailout, though stringent in its terms, has been realistically available as an option to covered jurisdictions. For example, when the act was reauthorized in 1970, enhancements in the coverage formula resulted in the partial coverage of 10 States.

After 1982 modifications to the bailout provision, the City of Fairfax, Virginia, filed the first bailout action, and the United States consented to the declaratory judgment entered in October 1997. And since that time, several other jurisdictions have obtained similar judgments. It is a quick way to get out from under it.

Thus, the act's bailout provision serves as a self-adjusting mechanism that enables jurisdictions in which the right to vote is no longer threatened to remove themselves from preclearance requirements from section 5.

I look forward in particular to Mr. Hebert's discussion on this issue; as I believe that bailout is an important area for this Committee to understand in detail as we move forward.

And so in this reauthorization process, it is vital that we understand the evolution of the act, to ensure that we build a record adequate to insulate this important legislation from constitutional challenge.

This hearing is an important one because it provides a benchmark to our inquiry. And I appreciate the Chair's and the Members' great detail in going through these hearings, because it is very critical that we leave a record showing that we understand that these discussions will be gone back into. And I thank you for the time, and yield back, Mr. Chairman.

Mr. CHABOT. Thank you very much, Mr. Conyers.

I understand the gentleman from North Carolina, Mr. Watt, would also like to make an opening statement.

[Discussion off the record.]

Mr. CHABOT. Mr. Scott, did you want to make a statement?

Mr. SCOTT OF VIRGINIA. Thank you, Mr. Chairman. And Mr. Chairman, in the 40 years since its passage, the Voting Rights Act has guaranteed millions of minority voters a chance to have their voices heard and their votes counted. The number of Black elected officials has increased from just 300 nationwide in 1964, to more than 9,100 today. Poll taxes, literacy tests, and other discriminatory barriers that once closed the ballot box to Blacks and other minorities have been dismantled.

The process also opened the political process for nearly 6,000 Latinos who now hold public office, including more than 250 who serve at the State or Federal level.

When Congress enacted the Voting Rights Act in 1965, it determined that racial discrimination in voting had been more prevalent in certain areas of the country. To address this problem, section 4 of the act established a formula to identify those areas and to provide more stringent remedies where appropriate.

The first of these targeted remedies was a 5-year suspension of a test or device, such as a literacy test, as a prerequisite to registration.

Second was a requirement for a review and preclearance under section 5 of any change affecting voting made by the covered area, either by the United States District Court in the District of Columbia or by the Attorney General.

Third was the ability of the Attorney General to specify that specified jurisdictions also required the appointment of Federal examiners. These examiners would prepare and forward lists of persons qualified to vote.

And the final remedy was special provisions giving the Attorney General authority to send Federal observers to those jurisdictions that had been certified for Federal examiners.

In the past years, Congress has recognized the tenacious grip of discrimination in voting, and we have continued to reauthorize the sections we will discuss today. These provisions are essential to ensure fairness in our political process and equal opportunity for minorities in American politics.

Now, if we are to continue these provisions, we need to establish the record showing the compelling State interest in these processes, and making sure that the remedy is narrowly tailored to address that interest. And so, Mr. Chairman, I thank you for holding these hearings, so that that record can be established.

Mr. CHABOT. Thank you very much, Mr. Scott.

The gentleman from North Carolina is recognized.

Mr. WATT. Thank you, Mr. Chairman. And let me start by thanking Chairman Chabot for convening this second in a series of hearings on the expiring provisions of the Voting Rights Act; and once again, thank Chairman Sensenbrenner publicly for committing to developing a full record for evaluating the impact of the Voting Rights Act and its provisions that we think need to be reauthorized.

I normally would refrain from making a detailed opening statement, to try to get to the witnesses. But we kind of wandered away from the framework in the last hearing, and I wanted to make sure that we were focused. Because I think it is so important to focus these hearings on the various provisions that we are considering reauthorizing, so that we make sure that we kind of build the record in different parts.

And today's hearing focuses on sections 4(a) and 4(b) of the Voting Rights Act, commonly referred to as the "trigger" and "bailout" provisions. Under section 4(a), jurisdictions that maintained a discriminatory voting test or device or a literacy requirement as a precondition to registering or casting a vote as of November 1, 1964, 1968, or 1972, and, two, wherein less than 50 percent of the voting-age residents were registered to vote or actually voted in the Presidential elections of 1964, 1968, or 1972, are bound by the requirements of other provisions of the act, including section 5, preclearance, and the election examiner and observer provisions in sections 6 through 9.

While the substance and operation of sections 5 and 6 through 9 will be addressed at later hearings, today's testimony should center upon the coverage formula contained in section 4(a).

There are obviously those who contend that the coverage formula of the Voting Rights Act is outdated and unfair, insofar as it covers certain jurisdictions but not others. There is no doubt that there are any number of inventive triggers that Congress could have enacted. I believe, however that the central question before us during this process is not what Congress could have done, but whether what we have established as the coverage mechanism in the Voting Rights Act is justified by the facts.

Covered jurisdictions, simply put, are covered because they have not only a history of discriminatory practices, but have a history of ongoing discrimination as well.

And let me address two arguments quickly here. One is that, well, there are a lot of other people who violate the law, also. And I want to just draw a couple of distinctions here. It is no defense to a speeding infraction that the guy in front of you is speeding, too, or even going faster. There may be other people who were speeding, but if you were speeding, and you have a history of speeding, you are going to get coverage.

Similarly, the presence of discriminatory activity in an uncovered jurisdiction does not, and should not, relieve those covered under section 4(a) from the act's requirements.

Second, there is this thing about history. And I don't want to demean this, but I want my colleagues on the Committee and in the public to understand that there are some parallels here. And I hope I am not offending anybody by doing it in this way. I am doing it only for illustration purposes.

I call this preclearance provision a kind of form of "Megan's Law" registration requirement. If you committed a crime before, especially crimes of a certain kind where you are likely to have a higher predilection to commit the same or similar kinds of crimes again, you are required to do certain things. That is "Megan's Law." And the Supreme Court has upheld "Megan's Law."

Now, personally, when "Megan's Law" was debated on this Committee, I voted against it. I thought it was a precondition. But the Supreme Court upheld it. And there is no bailout provision in "Megan's Law."

So let me talk about the bailout provisions here, because I think that is what, really, we ought to focus on here. If a jurisdiction under section 4(b) wants to get out from under the preclearance requirements of the Voting Rights Act, there is a process for doing that.

Mr. CHABOT. The gentleman's time has expired. Would the gentleman like additional time?

Mr. WATT. If I could, just let me run this out. And I will be very quick. It will be about a minute and a half, I think.

Mr. CHABOT. All right. The gentleman is recognized for an additional 2 minutes.

Mr. WATT. Under section 4—the bailout mechanism permits a covered jurisdiction to demonstrate that it now facilitates equal opportunity at the ballot box. By doing so, the jurisdiction may relieve itself of the obligations imposed under the act. And in fact, nine jurisdictions in the Sate of Virginia alone have availed themselves of this provision and have successfully bailed out of the preclearance coverage of the Voting Rights Act.

Finally, in anticipation of some of the positions that may be advanced in opposition to the current coverage mechanism, I should say that, while section 2 is extremely important within the total scheme of the Voting Rights Act, it is no substitute for the protections afforded by sections 4 and 5.

Section 2 places both the burden of proof and pocketbook on potential victims of voting rights violations. These, too, are issues we will explore in greater depth in subsequent hearings.

Mr. Chairman, I am pleased that you are conducting this hearing. And I hope we will focus on these particular provisions today, because the preclearance provisions and the bailout provisions are not only important, but they are not unprecedented in our law. There are some other areas where we do similar kinds of things.

I appreciate the extra time, and I yield back.

Mr. CHABOT. I thank the gentleman. And I would also like to recognize several other Members that are here on the Committee today. Mr. Franks, from Arizona, it is my understanding that you

do not need to make an opening statement at this time. Is that correct?

Mr. Feeney from Florida, the same? Is that correct?

We also have been joined by two other Members who are not actually Members of this Committee. But Ms. Sánchez is a Member of the overall Committee from California. And although we generally don't do opening statements of those not on the Committee, if you would like to make a brief statement, I would ask unanimous consent that that be allowed.

Ms. SÁNCHEZ. Thank you, Mr. Chairman. Actually, in the interest of time and getting to the witness' testimony, I would just ask that I be allowed to submit an opening statement for the record.

Mr. CHABOT. Without objection, so ordered.

And also, I would like to recognize the attendance of Mr. Scott, who is not only not on this Committee, but not on the full Committee, either. But I would like to commend him for his attendance from, I think, beginning to end at the hearing we had the other day. Mr. Scott, of course, is from the State of Georgia.

And I would assume there is no opening statement that you would like to submit this morning?

Mr. SCOTT OF GEORGIA. No, sir. Thank you for your graciousness and kindness. And I will just offer my statement for the record, in the interests of time. Thank you very much.

Mr. CHABOT. Thank you very much. So noted.

At this time, I would, without objection, ask that all Members have 5 legislative days to submit additional materials for the hearing record. And without objection, so ordered.

And I would like to introduce our very distinguished panel here this morning. Our first witness will be the Honorable Michael Steele, current Lieutenant Governor of the State of Maryland. Since taking office in 2003, Lieutenant Governor Steele has served as the chair of the Governor's Commission on Minority Business Enterprise Reform, redefining the State of Maryland's goals and commitments toward minority businesses in Maryland.

Lieutenant Governor Steele also has worked closely with the Maryland State Police, attempting—and being quite successful, I understand—in reducing crime and creating safer neighborhoods.

In taking office in 2003, Lieutenant Governor Steele became the first African-American elected to statewide office, and currently is the highest ranking African-American Republican elected official in the country. Lieutenant Governor Steele is married, and has two sons. And we thank you very much for your attendance here this morning. And I will introduce the rest of the panel before you begin your testimony.

Our second witness will be Mr. Jose Garza. Mr. Garza currently represents the League of United Latin American Citizens, as a voting rights attorney. In addition to representing the league, Mr. Garza is a solo practitioner in San Antonio, Texas, and has served as the litigation director of Texas Rural Aid, Inc., since 1998.

Mr. Garza has argued on behalf of victims of voting discrimination in a number of high-profile cases, including before the United States courts of appeals, and also before the United States Supreme Court. We welcome you very much here this morning, Mr. Garza.

Our third witness will be Mr. Armand Derfner. Mr. Derfner has had a long and distinguished career in voting rights litigation, including appearing before the United States Supreme Court in a number of pivotal voting rights cases.

Mr. Derfner began his career in 1965, in Greenwood, Mississippi, and has appeared before the Constitution Subcommittee, this Committee, during consideration of all three extensions of the Voting Rights Act. He is the author of many voting publications, including "Racial Discrimination and the Right To Vote." Mr. Derfner is a former law clerk to the Honorable David Bazelon, Chief Judge of the U.S. Court of Appeals for the District of Columbia; and currently is in private practice in Charleston, South Carolina. We welcome you here, also, Mr. Derfner, this morning.

And our fourth and final witness will be Mr. J. Gerald Hebert. Mr. Hebert currently works as a solo practitioner in Alexandria, Virginia, focusing on election law and redistricting. Mr. Hebert also has had an extensive career in voting litigation, representing a number of States in redistricting and election issues, including the States of Texas, California, New York, South Carolina, and Virginia.

Prior to his practitioner work, Mr. Hebert worked at the Department of Justice from 1973 to 1994, where he served as Acting Chief, Deputy Chief, and Special Litigation Counsel in the Voting Section of the Civil Rights Division. Mr. Hebert has served as lead attorney in numerous voting rights and redistricting suits, and as chief trial counsel in over 100 voting rights lawsuits, many of which were ultimately decided by the United States Supreme Court. We welcome you here, as well, Mr. Hebert.

As I said, we have a very distinguished panel before us this morning.

For those of you who may have not testified before the Committee, or just to refresh those of you that may have, we have a lighting system there. There are two boxes; the 5-minute rule. Each of the witnesses has 5 minutes, and each of the Members up here would have 5 minutes to question. And we try to keep within that as much as possible. The yellow light will come on when you have 1 minute, and the red light comes on when your 5 minutes is up. We'd ask you to try to stay within that. We won't gavel you down immediately, but if you can stay within that, please try to.

It's also the practice of this Committee to swear in all witnesses. So, if you would, please, each of you please stand raise your right hand.

[Witnesses sworn.]

Mr. CHABOT. All the witnesses have affirmed.

And again, thank you very much for your testimony. And we'll begin with you, Lieutenant Governor Steele, at this time. You're recognized for 5 minutes.

TESTIMONY OF THE HONORABLE MICHAEL S. STEELE, LIEUTENANT GOVERNOR OF THE STATE OF MARYLAND

Mr. STEELE. Thank you, Mr. Chairman and Members of the Committee. A real pleasure to be here with you this morning.

"The rights of citizens of the United States to vote shall not be denied or abridged by the United States by any State on account

of race, color, or previous condition of servitude, and that the Congress shall have the power to enforce this article by appropriate legislation."

At the dawning of the 21st century, the words of the 15th amendment to our Nation's Constitution remind us of one of the most precious gifts of liberty: to freely exercise your right to vote.

And yet, even the 15th amendment, on its face, did not guarantee that the right of citizens of the United States to vote would not be denied as America emerged from the fog of civil war and into the new reality that those individuals once enslaved under the Constitution were now entitled to exercise their rights as citizens under that same Constitution.

It would not be long, however, before certain of the States, particularly in the South, responded to the enactment of the 15th amendment by devising a variety of tools to disenfranchise African-American voters for reasons of eligibility. From literacy tests to poll taxes, from property ownership to oral and written examinations, States began to enact laws that ultimately denied and abridged African-Americans their right to vote.

Moreover, when intimidation at the ballot box failed to curb the African-American thirst for full access to the rights guaranteed by the Declaration of Independence, more insidious and violent means, such as lynchings, fire bombs, and murder, were used to "remind the Negro of his place" in American society. In our society, all rights are ultimately protected by the ballot box, not the sword.

By virtue of the efforts to legally circumvent the dictates of the 15th amendment, as well as the escalation of violence against African-Americans in Philadelphia, Mississippi, Selma and Montgomery, Alabama, the promise of the Constitution for African-Americans and many other minorities—full and equal political rights—seemed for a time like a munificent bequest from a pauper's estate, until the passage of the single most important piece of civil rights legislation in American history, the Voting Rights Act of 1965.

Both Democrats and Republicans were moved to respond to President Johnson's voting initiative when he declared in his State of the Union Address, "We shall overcome." With the leadership of individuals like Martin Luther King, Andrew Young, Maryland's own Clarence Mitchell, Jr., Reverend Ralph Abernathy, and Congressman John Lewis, laying the foundation for what would become an increasingly important political movement, Congress took up an historic challenge to end the blight of racial discrimination in voting which had infected the electoral process in parts of our country for nearly a century.

Central to the act's remedial scheme is section 5, which places Federal preclearance barrier against the adoption of any new voting practice or procedure by covered States and localities whose purpose or effect is to discriminate against minority voters. For 40 years thereafter, the Federal courts and the Department of Justice worked hand in hand to make this promise of section 5, and all the provisions of the act, a potent reality.

But in an ironic twist, it has been the very success of the Voting Rights Act in not only protecting the right of African-Americans to vote, but indirectly contributing to the election of African-Ameri-

cans to both State and Federal offices, which now fuels in part the argument of some against its extension. But we should not be misled to believe that the work of protecting equal voting rights for all is done, just because those States subject to the provisions of the act now have in place the political infrastructure to guard against race-based denial of voting rights.

Indeed, our most recent electoral history dramatizes the difficulties still existing in the American electoral process. Every 2 years, we learn of new allegations of electoral fraud and abuse of the electoral process, from elections in small municipalities to the highest-profile Federal offices.

Consequently, it has become even more important in this post-civil rights age to maintain the integrity of the elections process. Moreover, it is just as important to recognize the value of section 4 of the act not just to those States subject to its requirements, but to those who could otherwise be aided by its provisions.

For example, Maryland is not a preclearance jurisdiction, but is not totally unaffected by section 5 of the act. The preclearance process at the Department of Justice has assisted in illustrating discriminatory election processes and districting plans, and works to set a bar for the redistricting process and electoral process in non-covered States.

Voting rights questions usually generate a higher degree of bipartisan consensus than other civil rights issues, such as the debates over either affirmative action or quotas. The act has had bipartisan support since its original enactment. Without true bipartisan support in the House and Senate in 1965, it would not have passed. The last extension of the act in 1982 would not have occurred without bipartisan congressional efforts leading to the bill being signed by President Reagan.

It is my hope that, as this Congress considers the renewal of the 1965 Voting Rights Act, that this Committee's hearing process, and the Senate process as well, will permit the voices of minority communities from across our great Nation to not only be heard, but listened to.

African-Americans, Latinos, and other ethnic or racial minorities will not participate in an electoral system or process that they do not trust or in which they feel their votes do not count. Nor are they served by an electoral system or process which takes their vote for granted because it has become stagnant, self-serving, and monolithic.

Our Nation has made great strides since 1965, but there's still work to be done. Our system is not perfect. And a failure to reauthorize the Voting Rights Act would be to walk away and leave important work unfinished. We must continue our efforts to ensure a fair and just voting system for all of our citizens. I've seen firsthand how easily a redistricting plan or flawed ballot process can take away the voice of a vital segment of our population.

Finally, quoting one of our Nation's most famous voting rights advocates, Susan B. Anthony, "In the first paragraph of the Declaration of Independence is the assertion of the natural right of all to the ballot; for how can the consent of the governed be given, if the right to vote be denied?"

Thank you, Mr. Chairman, for the opportunity to testify before you today.

[The prepared statement of Mr. Steele follows:]

PREPARED STATEMENT OF THE HONORABLE MICHAEL S. STEELE

"The Right of Citizens of the United States to vote shall not be denied or abridged by the United States by any State on account of race, color or previous condition of servitude and that the Congress shall have the power to enforce this article by appropriate legislation."

At the dawning of the 21st Century, the words of the 15th Amendment to our Nation's Constitution remind us of one of the most precious gifts of liberty: to freely exercise your right to vote.

And yet, even the 15th Amendment—on its face—did not guarantee that the "right of citizens of the United States" to vote would not be denied as America emerged from the fog of civil war and into the new reality that those individuals once enslaved under the constitution were now entitled to exercise their rights as citizens under that same constitution.

It would not be long, however, before certain of the states, particularly in the south, responded to the enactment of the 15th Amendment by devising a variety of tools to disenfranchise African American voters for reasons of "eligibility". From literacy tests to pole taxes, from property ownership to oral and written examinations, States began to enact laws that ultimately "denied and abridged" African Americans their right to vote.

Moreover, when intimidation at the ballot box failed to curb the African American thirst for full access to the rights guaranteed by the Framers of the Constitution, more insidious and violent means such as lynchings, fire bombs and murder were used to "remind the Negro of his place" in American society. In our society, all rights are ultimately protected by the ballot box, not the sword.

By virtue of the efforts to "legally" circumvent the dictates of the 15th Amendment as well as the escalation in violence against African Americans in Philadelphia, Mississippi, Selma and Montgomery Alabama the promise of the Constitution for African Americans and many other minorities—full and equal political rights—was like a munificent bequest from a pauper's estate until the passage of the single most important piece of civil rights legislation in American history: the Voting Rights Act of 1965.

Both Democrats and Republicans were moved to respond to President Johnson's voting initiative when he declared in his State of the Union Address "we shall overcome". With the leadership of individuals like Martin Luther King, Andrew Young, Maryland's own Clarence Mitchell, Jr., Reverend Ralph Abernathy and Congressman John Lewis laying the foundation for what would become an increasingly important political movement, Congress took up an historic challenge to end the "blight of racial discrimination in voting . . . [which had] infected the electoral process in parts of our county for nearly a century."

Central to the Act's remedial scheme is Section 5 which places a federal "preclearance" barrier against the adoption of any new voting practice or procedure by covered states and localities whose purpose or effect is to discriminate against minority voters. For 40 years thereafter, the federal courts, and the Department of Justice worked hand-in-hand to make this promise of Section 5 a very potent reality.

But, in an ironic twist it has been the very success of the Voting Rights Act in not only protecting the right of African Americans to vote, but indirectly contributing to the election of African Americans to both State and Federal offices which now fuels, in part, the argument of some against its extension. But we should not be misled to believe that because that those States subject to the provisions of the Act now have in place the political infrastructure to protect and guard against race based denial of voting rights, whether intentional or unintentional.

Indeed, our most recent electoral history, dramatizes the difficulties still existing in the American electoral process. The 2000 and 2004 presidential elections, along with countless local and state elections remain subject to allegations of abuse, fraud and civil rights violations.

Consequently, it has become even more important in this post-Civil Rights age to maintain the integrity of the election process. Moreover, it is just as important to recognize the value of the Act not just to those States subject to its requirements, but to those who could otherwise be aided by the pre-clearance process. For example, Maryland is not a pre-clearance jurisdiction but is not totally unaffected by Section 5 of the Act. The pre-clearance process at the Department of Justice has as-

sisted in illustrating discriminatory election processes and districting plans and works to set a bar for the redistricting process and electoral process in non-covered states.

Voting Rights questions usually generate a higher degree of bipartisan consensus than other civil rights issues, such as the affirmative action or quota debate. The Act has had bipartisan support since its original enactment. President Lyndon Johnson deserves great individual credit for proposing and signing the Act; yet, without true bipartisan support in the House and Senate in 1965, it would not have passed. The last extension of the Act in 1982 would not have occurred without a bipartisan congressional effort leading to the bill signed by President Reagan.

It is my hope that as this Congress considers the renewal of the 1965 Voting Rights Act that this committee's hearing process and the Senate process as well, will permit the voices of minority communities from across our great nation to not only be heard but listened to. African Americans, Latinos and other ethic or racial minorities will not participate in an electoral system or process that they do not trust or in which they feel their vote does not count. Nor are they served by an electoral system or process which takes their vote for granted because it has become stagnant, self-serving and monolithic.

Quoting one of our nation's most famous Voting Rights advocates, Susan B. Anthony: "in the first paragraph of the Declaration [of Independence], is the assertion of the natural right of all to the ballot; for how can 'the consent of the governed' be given if the right to vote be denied?"

Mr. CHABOT. Thank you very much, Lieutenant Governor Steele.

Mr. Garza, you are recognized for 5 minutes.

TESTIMONY OF JOSE GARZA, VOTING RIGHTS ATTORNEY, LEAGUE OF UNITED LATIN AMERICAN CITIZENS

Mr. GARZA. Mr. Chairman, Members of the Committee, first, let me thank you for inviting me to participate in this very important process for justifying the reenactment of the Voting Rights Act and its special provisions.

The emphasis of my presentation today will be on the record that we have discovered throughout our litigation process, as it relates to the Latino community. The history of discrimination is well documented with regard to the overall history of the Nation. I think that one of the important things that we need to focus on is that a lot of the same sorts of activities that occurred throughout the South occurred in Texas, but was targeted to the Mexican-American community.

For instance, it's documented through our process, through our litigation that we've done, that the "White man" primary that was enacted in Texas was aimed at the Mexican-American community. And in the Winter Garden areas and in other areas of Texas, the Mexican-American people were not allowed to vote in the primary, but then were allowed to vote in the general election, after the election had been determined.

Through our litigation—this is not a comprehensive presentation that I'm going to be making; but rather, anecdotal, from the litigation experience that we've done. In the City of Corpus Christi, when we did a section 2 lawsuit in 1982, we discovered through a review of the minutes and of the history of Corpus Christi that there had been severe segregation for Mexican-Americans and African-Americans. Theaters were segregated so that Mexican-Americans and African-Americans were relegated to the balcony. Schools were segregated in Corpus Christi, and throughout Texas.

In the Sherryland Independent School District, the lawsuit that we did in 1982, we had testimony of the maintenance of a Mexican school, as well as an Anglo school. And the testimony was—is that

the Mexican-American children would ride the school bus, and would be dropped off at the elementary school, and then herded onto a flatbed truck, and then driven off to a Mexican school. And review of the minutes and of the records of the school district found that there was severe under-funding of the Mexican school.

And so we have that historical discrimination in Texas, as we have uncovered through the number of lawsuits that we've done. But many of these things were ongoing into the '80's. In 1984, we did a lawsuit against the City of Taft, which is a small farming community outside of Corpus Christi on the coast of Texas. And we found that in 1984, the City of Taft maintained a cemetery that had been donated to the City of Taft by the Ku Klux Klan. And that cemetery was segregated, so that Anglos would be buried on one plot, Mexican-Americans would be buried in a different plot, and then African-Americans in still a third plot.

And we drove through that cemetery, and we found that on the Anglo side of the cemetery it was manicured, had what they call "carpet grass," had a sprinkler system. And across a dirt road was where the Mexican-American and the African-American cemeteries were, and those were overrun with weeds, the headstones had been knocked over, and some of the graves were unmarked.

Now, this wasn't in 1954. This wasn't in 1964. This was 1984. And this was a cemetery that was run by the City of Taft. It wasn't a private institution. It was a city-run, government-run cemetery.

In that same town, the county health officer maintained a clinic. And in that clinic he had segregated waiting rooms, in 1984: one waiting room for Anglos, and another waiting room for African-Americans and Mexican-Americans.

So the history of discrimination, the sorts of things that make it difficult for the minority community to participate in the electoral process, we found overwhelming evidence that those sorts of things that we traditionally know about that are used to discriminate against people were also used to discriminate against Mexican-Americans in Texas.

Now, one of the things that we did in 1979 as part of a coalition of civil rights—Hispanic civil rights groups in Texas, the LULAC and Mexican-American Legal Defense Fund and others, is that we did a survey of county elected offices throughout the State.

We surveyed over 200 counties. And each one of those counties in 1979 we found had been gerrymandered—gerrymandered so that it was not in compliance with the Voting Rights Act, not in compliance with "one person, one vote"; and in many instances, diminished or prevented the election of Mexican-Americans to the governing board.

After a series of lawsuits, and with the aid of section 5 and the "one person, one vote" provision, we were able to almost double the number of county commissioners elected in Texas. And that campaign went on through the mid-'80's.

Today, the need for section 5 continues. Racial bloc voting, which is a primary obstacle to an unencumbered participation by the minority community, is still alive and well in Texas. This year, we had a Mexican-American candidate run for mayor of the City of San Antonio, against an Anglo candidate for mayor of the City of

San Antonio. The Anglo candidate won, and the racial bloc voting was extremely severe.

In our experience in Texas, LULAC and MALDEF and others, we've found that the words of Frederick Douglass come into play in matters of—"Power gives nothing without demand." And without the Voting Rights Act and without litigation, minority representation in Texas would be abysmal. Thank you.

[The prepared statement of Mr. Garza follows:]

PREPARED STATEMENT OF JOSE GARZA

PRELIMINARY REVIEW OF THE IMPACT OF SECTION 5 ON LATINO VOTERS IN TEXAS

Compiled by George Korbel; Introduction by Jose Garza; Edited by Jose Garza and Luis Vera for LULAC

I. Introduction and Historical Background

Meaningful participation in the Texas political process, prior to the late 1960s and early 1970s was virtually closed to the Mexican American community.[1] Moreover, Mexican Americans in Texas were subjected to severe and invidious discrimination in housing, education, employment, public accommodations, and politics that impaired their ability to participate in the political process.[2] The civil rights movement and numerous other factors, energized the Mexican American community into political action in the late 1960s and early 1970s and changes slowly improved the lot of most Mexican Americans.[3] Yet, despite the effort of civil rights organizations such as LULAC, the American G I Forum, and MALDEF and the political organization, the Raza Unida Party, little progress was made in increasing the number of Mexican Americans elected officials. For instance in 1967, while Mexican Americans composed more that 15% of the Texas population, only six percent (9 out of 150) of the members of the Texas House of Representatives and only three percent (1 of 31) of the Texas Senate were Mexican Americans.[4] By 1980, as the civil rights activity in Texas slowed, the number of Mexican American elected officials had not significantly increased. In 1980, the Mexican American population of Texas had increased to over eighteen percent yet the number of Mexican Americans in the Texas House of Representatives had increased to only fifteen members out of 150.[5] At the local level, the picture was even more dismal. In 1973, 72 of 1,270 (5.7%) members of the Texas county commissioners' court (counties in Texas are governed by Commissioners' Court composed of a County Judge and four County Commissioners) were Mexican Americans.

In 1975 the Congress extended coverage of the extra ordinary remedial provisions of the Voting Rights Act to Texas. Beginning in about 1979 and for several years thereafter, LULAC joined forces with three civil rights law firms in undertaking a litigation campaign focused on using and enforcing the provisions of the Voting Rights Act and the one person, one vote constitutional principal in an aggressive fashion. This effort dramatically altered the political landscape in Texas.

---

1 *See* David Montejano, Anglos and Mexicans in the Making of Texas, 288-97 (1987); Robert Brischetto, et al., *Texas*, in Quiet Revolution in the South: The Impact of the Voting Rights Act, 1965-1990 235-42 (Chandler Davidson and Bernard Grofman, eds. 1994).

2 *See* Montejano, at 292-93; Brischetto, at 254-57.

3 *See generally* Montejano and Brischetto.

4 Brischetto, *supra*, at 243.

5 Steve Bickerstaff, *Reapportionment by State Legislatures: A Guide for the 1980s*, 34 Sw. L. J. 607, 633-34 (1984).

After two decades of litigation and redistricting, and advocacy before the United States Department of Justice, Mexican Americans increased by 79% to 129 of 1270 (10.15%) of the members of the county commissioners courts in Texas in 1994.[6] In the Texas Legislature the number of Mexican American legislators also dramatically increased. Between 1980 and 1994 the number of Mexican American members of the Texas House of Representatives increased from 15 to 27. Moreover, a study of cities that changed from at-large to some form of single member districts suggests that the advocacy and litigation done by LULAC, together with MALDEF, TRLA, and SWVRP during the late 1970s through the 1990s was a substantial catalyst for a dramatic increase in the representation levels for Mexican Americans.[7]

In each of the instances where barriers to minority voting were challenged the special remedial provisions of the Voting Rights Act were crucial in achieving success.

What follows is the initial result of a research project under-taken by LULAC to document the cases and instances in which LULAC and other civil rights advocates have successfully employed the Voting Rights Act to protect Latino and minority voting rights in Texas in the last twenty years.[8]

II. Section 5 litigation

A review of some recent cases decided by Federal Courts in Texas and letters of objection where Section 5 was used to prevent discriminatory voting practices against minority Texas voters and that document the existence of racially polarized voting in Texas.

The North East ISD is one of the ten largest in Texas and covers virtually the entire Northwest quadrant of San Antonio and Bexar County.

In ***League of United Latin Am. Citizens v. North E. Indep. Sch. Dist.***, 903 F. Supp. 1071 (W.D. Tex. 1995) the United States District Court sitting in San Antonio made a number of

---

6 *See* Texas State Directory Press. Texas State Directory. 291-445 (1994).

7 *See* Brischetto, *supra*, at 254-60.

8 LULAC and other Latino advocacy groups and individual Latino voters have used the provisions of Section 5 to block the use of discriminatory election schemes over the last twenty-five years. The examples contained in this paper are not a comprehensive listing but only a small sample of instances in which Section 5 has benefited Latino voters. LULAC is still compiling data on actions by LULAC and others on behalf of Latino voters and will submit a more comprehensive list at a future date.

LULAC is also doing research on findings by Texas courts on the issue of racially bloc voting in Texas elections and will submit the finding of this research as it is completed.

findings demonstrating the discriminatory impact of at large elections on Latino voters. Included among its findings were the following:

23. Dr. Flores also analyzed the NEISD school board elections from 1973 to 1994 in terms of the win rate of candidates by race. That study produced the following: (footnote omitted)

[*1078]

NEISD Board of Trustees Elections for 1973-1994

	Race/Ethnicity	Candidates by Winner
Anglo	47(36%) n37	(98%) n38
Hispanic	1(11%)	(2%)
Blacks	0(0%)	(0%)

This means that an Anglo candidate was the winner in 47 of 48 elections, a Hispanic candidate in only 1 out of 48 elections, and a Black candidate has never won. Put in terms of percentages, this means that an Anglo was the winner in 98% of the elections, an Hispanic was the winner in only 2% of the elections, and a Black has never won.

n37 This figure represents the percentage of all Anglo candidates that won. TR. II, pp. 50-51..
n38 This figure represents the percentage of elections won by race. TR. II, p. 50.
- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

24. Dr. Flores prepared another chart showing the results of NEISD school board elections from 1973 to 1994 in terms of the total number of votes received by each candidate, the percentage of total votes received by each candidate, order of finish of each candidate, and the votes needed to win by the losing minority candidate. That chart shows the following: (footnote omitted)

Elections Results of NEISD Board of Trustee Races with Minority Candidates

Year	Candidate	Votes	% Votes	Finish	Needed to Win
1973	O'Connor	1650	.436	1	n/a
	Delavan	1609	.425	2	n/a
	Meader	273	.07	3	n/a
	Dresslar	146	.038	4	n/a
	Saenz*	102	.026	5	1610 n40

*This means that even if Saenz had received all the votes of the other two losing candidates, Meader and Dresslar, she still would have finished third.

Year	Candidate	Votes	% Votes	Finish	Needed to Win
1974	Higginbotham	1849	.23	1	n/a
	Winn	1745	.22	2	n/a

Harris	1641	.20	3	n/a
Kendall	619	.08	4	n/a
Chaloupka	371	.05	5	n/a
Walter	318	.04	6	n/a
Garza*	250	.03	7	1642 n41
8 other Anglos	1266	.15	8-15	n/a

*This means that even if Garza had received all the votes of the 8 Anglo candidates who finished below him,
he still would not have received enough votes to win one of the three seats up for election.

Year	Candidate	Votes	% Votes	Finish	Needed to Win
1977	Shaw	6560	.257	1	n/a
	Winn	6405	.25	2	n/a
	Harris	5939	.23	3	n/a
	Higginbotham	4921	.19	4	n/a
	Garza	1642	.06	5	4298 n42
1978	Wenglein	2468	.47	1	n/a
	Hallmark	2326	.44	2	n/a
	Garza	481	.09	3	1988 n43
1986	Everett	3354	.51	1	n/a
	Flores*	1522	.23	2	1833
	Kimbrough	981	.15	3	n/a
	Eanes	574	.09	4	n/a
	Garcia	121	.02	5	3234

*This means that Flores would not have won even if he had received all the votes garnered by Kimbrough, Eanes and Garcia. Likewise, Garcia would have lost even if he had received all of the votes received by Flores, Kimbrough and Eanes.

Year	Candidate	Votes	% Votes	Finish	Needed to Win
1992	Ojeda	1638	.58	1	n/a
	Saidi	1203	.42	2	n/a
1993	Pruitt	17291	.55	1	n/a
	Hite	6636	.21	2	n/a
	Miller-Ramos*	5649	.18	3	11643
	Olezene n44	1900	.06	4	15392

*This means that Miller-Ramos would have lost even if she had received all of the votes received by Hite and Olezene Likewise, Olezene would have lost even if she/he had received all of the votes cast for Miller-Ramos and Hite.

Year	Candidate	Votes	% Votes	Finish	Needed to Win
1994	McCabe	6410	.57	1	n/a
	Shackelford n45	2192.	20	2	n/a
	Miller-Ramos*	1808	.16	3	4603
	Peppers	773	.07	4	n/a

*This means that Miller-Ramos would not have won even if she had received all of the votes received by Shackelford and Peppers. Likewise, Shackelford would not have won even if
she/he had received all of the votes received by Miller-Ramos and Peppers.
- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -n40 Two trustees elected.
n41 Three trustees elected.
n42 Three trustees elected using plurality voting.
n43 Plurality elections with place system.
n44 Olezene is a Black. TR. II, p. 54.
n45 Shackelford is a Black. TR. II, p. 54.
- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

25. An analysis of NEISD support for minority candidates in NEISD school board elections in terms of the minimum percent of Hispanic votes received and the maximum percent of Anglo votes received yielded the following figures: (footnote omitted) [*1079]

NEISD Support For Minority Candidates Board of Trustees Elections, 1986-1994

Year	Candidate	Minimum % Hisp. Vote	Maximum % Anglo Vote
1986	Flores +Garcia*	.69	.04
1992	Ojeda*	.58 (footnote omitted)	.75
1992	Saidi	.42	.30
1993	Miller-Ramos**	.48	.09
1994	Miller-Ramos**	.50	.13

*This data was calculated using Voting Age Population.
**This data was calculated using Hispanic Registered Voters.

26. A chart in which Dr. Flores compares, inter alia, the preferred candidate of Hispanic voters to the preferred candidate of Black voters in NEISD elections shows the following: n48NEISD School Board Elections

	Preferred Candidate	
Year	Hispanic	Black
1986	Bankler	Bankler
1987	Shacklett	Shacklett
1990	Pruitt	Chalk
1993	Ramos	Ramos

27. Dr. Flores also analyzed NEISD school board elections in terms of the minimum percent of non-Hispanic votes n49 received by Anglo candidates as compared to the percent of non-Hispanic votes received by Hispanic candidates and found the following: n50

Anglo "Block Voting"Over-Lapping Percentages

Year	% Non-Hisp Reg. Vtrs	% Votes for Hisp Candidates	Minimum Non-Hisp. Vote Forfor Anglo Anglo Candidates	% Vote Candidates
1977	88%	6%	88%- 6% = 82%	82%
1978	88%	9%	88% - 9% = 79%	79%
1986	88%	25%	88% - 25% = 63%	63%
1992	88%	58%	88% - 58% = 30%	30%
1993	87%	18%	87% - 18% = 69%	69%
1994	87%	16%	87% - 16% = 71%	71%

n49 As defined by Dr. Flores, the phrase "percentage of non-Hispanic vote" refers to the percentage of votes received from registered Anglo and Black voters. TR. II, p. 55.
n50 Pls. Exh. 38-E.
- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

29. A comparison of the candidate preferred by Hispanics with the candidate preferred by Blacks in exogenous elections snows the following: n68City of San Antonio

	City of San Antonio Preferred Candidates	
Year	Hispanic	Black
1985	Cisneros	Cisneros
1987	Cisneros	Cisneros
1989	Cockrell	Cockrell
1991	Berriozabal	Berriozabal
1993	Wolff	Wolff

	General Elections Preferred Candidates	
Year	Hispanic	Black
1986 n69	Lee	Lee
1986 n70	Cisneros	Cisneros
1990 n71	Rodriguez	Rodriguez
1990 n72	Rivera	Rivera
1992 n73	Offutt	Coulter

Thus, Blacks and Hispanics preferred the same candidate in all 5 city elections and 4 of the 5 general elections.

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n68 Pls. Exh. 49.
n69 Bexar County Commissioner.
n70 State District Judge.
n71 Bexar County District Attorney.
n72 State District Judge.
n73 State Board of Education.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

30. A study of NEISD support for minority candidates in exogenous elections in terms of the minimum percent of Hispanic vote received and the maximum percent of Anglo vote received was as follows: n74

NEISD Support For Minority Candidates
General Elections, 1986-1994

Year	Candidate	Hispanic	Anglo
1988	Gonzalez	.71	.32
1988	Canales	.67	.20
1988	Rodriguez	.58	.23
1988	Cantu	.58	.15
1988	Mireles	.69	.20
1988	Garza	.76	.34
1990	Morales	.78	.49
1992	Guerrero	.73	.11
1992	Overstreet	.78	.22
1992	Benavides	.76	.24
1992	Gabriel	.85	.24
1992	Roman	.89	.28
1992	Lopez	.80	.36

This means that the minority candidate in exogenous elections received, on average, a maximum of 26% of the Anglo vote in NEISD and a minimum of approximately 74% of the Hispanic vote in NEISD.

31. Several facts are undeniable in light of the results of the analyses performed by Dr. Flores.

32. First, there is a high degree of cohesion among Hispanic voters in NEISD.

[*1081]
33. Second, there is a high degree of cohesion among Hispanic and Black voters in NEISD.

34. Third, there is a high degree of cohesion among Anglo voters in NEISD.

35. Fourth, **there is a clear and persistent history of racially polarized voting in both NEISD school board elections as well as in exogenous elections as evidenced by the fact that Anglo voters have consistently voted together in large percentages for Anglo candidates while Hispanic and Black voters have voted together for either the Hispanic or Black candidate.**

36. Fifth, Anglos have consistently voted together for the Anglo candidate in such large percentages that the [**27] minority candidate, despite receiving a relatively significant percentage of minority votes, has rarely received enough Anglo crossover votes to win.

37. Sixth, the correlation between the race of the voter and the voter's choice of candidate is statistically significant and cannot be attributed to chance.

38. Dr. William Rives defendants' expert, testified that his analyses of NEISD school board elections and exogenous elections failed to reveal the existence of racially polarized voting in the NEISD, bloc voting by Anglo voters to defeat the preferred candidate of minority voters, or cohesion among Hispanic and Black voters.(footnote omitted) However, this Court, for the reasons set forth below, finds that Dr. Rives' testimony is not credible.

39. First, Dr. Rives used the voting age population, not the actual turnout at the polls, as his independent variable. (footnote omitted) However, on cross examination, Dr. Rives admitted that the best measure of the independent variable is actual turnout at the polls, and the second most accurate data is voter registration data by precinct and ethnicity. (footnote omitted)

40. Second, in trying to discern the existence of racially polarized voting in NEISD, Dr. Rives, unlike Dr. Flores, limited his analysis to NEISD school board elections. (footnote omitted) And, unlike Dr. Flores, Dr. Rives did not restrict his analysis to only those elections in which there was a minority candidate running against an Anglo candidate. Instead, he looked both at elections pitting an Anglo candidate against a minority candidate as well as elections having only Anglo candidates. (footnote omitted) However, on cross-examination, Dr. Rives admitted that this method of analysis was inconsistent with the method of analysis used by Dr. Bernard Groffman, whose analysis was approved by the Supreme Court in ***Gingles***, as well as that of Dr. Alan Lichtman, Dr. Albert Table, Dr. Robert Brischetto, all of whom are recognized experts in the field of racially polarized voting. (footnote omitted)

41. What is more, Dr. Rives accorded the same weight to an Anglo-Anglo election as he did to an Anglo-minority election despite acknowledging that doing so is contrary to the Fifth Circuit's observation in ***Citizens for a Better Gretna v. City of Gretna*** (footnote omitted) that, "Gingles is properly interpreted to hold that the race of the candidate is in general of less significance than the race of the voter--out only within the context of an election that offers voters the choice of supporting a viable minority candidate."(footnote omitted)

42. The value of Dr. Rive's opinion is further diminished by the fact that, although he analyzed general elections, he did not rely on the results of those analysis in formulating an opinion as to the existence of racially polarized voting. According to Dr. Rives, the reason he did not rely on those results is because such elections are partisan elections. Yet, Dr. Rives admitted during cross-examination that, although it was possible to do so, he had not done a multi-variate analysis to determine the effect that party affiliation had [*1082] on the results. (footnote omitted) He also conceded that he had failed to perform a BERA on the primary elections as had been done by Dr. Gibson, plaintiffs' expert, to measure the impact of party affiliation on the results of general elections. (footnote omitted)

43. With respect to his opinion that there is no cohesion among Hispanic voters in NEISD, Dr. Rives testified that this conclusion was based on the fact that his analysis showed that Hispanic voters with the exception of the 1986 election, never gave a candidate a majority of their vote, but instead spread their votes among all candidates. (footnote omitted) Yet when pressed on cross-examination about what he considered to be an indication of cohesion of minority voters in a plurality election system, Dr. Rives agreed that expressing a clear preference for a candidate does not necessarily mean that a candidate must have received a majority of the minority votes. (footnote omitted) Using that standard, it is obvious that Hispanics have voted cohesively in almost every NEISD school board election from 1986 to 1994. In 1986, Sankler received 78.1% of the Hispanic vote for place 5, Everett received 49.8% for Place 6, and Lampert received 66.4% for place 7. In 1987, Shacklett received 60.9% of the Hispanic vote for place 1, and Pruitt received 58.6% for place 2. In 1988, Coulter received 53.5% of the Hispanic vote for place 3 while McDonald received 46.1% for place 4. In 1989, McDonald received 41.7% of the Hispanic vote for place 5, Caldarola received 46% for place 6, and Ogden received 57% for place 7. In 1990, Bray received 44.2% of the Hispanic vote for place 1 and Pruitt received 71.7% for place 2. In 1991, McCabe received 80.2% of the Hispanic vote for place 3, while Saidi received 49% for place 4. In 1992, Ojeda received 58.6% of the Hispanic vote for place 6. In 1993, Bennett received 69.1% of the Hispanic vote for place 1, while Ramos-Miller received 45.9% for place 2. In 1994, Ramos-Miller received 41.9% of the Hispanic vote for place 3, while Gamble received 46.8% for place 4. n87

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - -
n87 Dfs. Exh. 7. The 1986-1988 and 1991 results are based on election-day returns, while all other results are based on total results. Dfs. Exh. 7.
- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

44. Dr. Rives' conclusion that there is no cohesion between Black and Hispanic voters in NEISD is likewise suspect because it is based only on his study of school board elections. As noted earlier, Dr. Rives disregarded the results of the analysis he performed on the general elections because he assumed that party affiliation, rather than race, accounted for the results in such elections. However, Dr. Rives performed no multi-variate analysis that

would have proved or disproved this assumption. (footnote omitted) More importantly, Dr. Rives admitted that his analysis of the general elections showed, inter alia, both that Hispanics and Blacks generally vote together and that they vote differently than Anglo voters in NEISD. (footnote omitted)

45. With respect to whether Anglos vote sufficiently as a bloc to usually defeat the preferred candidate of the Hispanic and Black voters of NEISD, one need only look at the results of the NEISD school board elections featuring a minority candidate from 1973 to 1994, as set forth in Pls. Exh. 38-D, 38-E and 38-F, to realize that the Anglo voters of NEISD consistently vote as a bloc to defeat the preferred candidate of the Hispanics and Blacks in NEISD school board elections.

46. As calculated by Dr. Korbel, the total population of NEISD is 261,172. n90 If [*1083] NEISD were divided into seven equally populated districts, each district would ideally contain 37,310 people. One of those proposed districts, Proposed District No. 3, would be a district in which the combined Hispanic and Black VAP would constitute a majority of the VAP.

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - -

n90 According to Dr. Korbel, the reason the total population figure used by him is 261,172 instead of 254,106, the total population figure of NEISD according to the unadjusted 1990 Census, is that he utilized whole "census block", the smallest unit of the 1990 Census, in drawing the proposed districts. This means that whenever a census block was divided by the NEISD boundary, Dr. Korbel treated the entire census block as being within the NEISD boundary lines and included the total population of the census block in the total population figure of NEISD. TR. IV, pp. 58-60.

- - - - - - - End Footnotes- - - - - - - - - - - - - -

47. As calculated by Dr. Korbel, the VAP of Proposed District 3 would be 49% Hispanic, 3% Black, and 46.8% Anglo. (footnote omitted)

48. However, defendants have attacked the method by which Dr. Korbel calculated the population of Proposed District 3. Specifically, Dr. Tucker Gibson, the defendants' demographics expert, testified that the correct method of calculating the population in census blocks split by NEISD's boundaries is to determine the housing counts in split portions of the census block and then allocate the population of the census block in accordance with the percentage of the housing units in the parts of the split census blocks. Using this method of calculation, Dr. Gibson arrived at the following population figures for NEISD and

Plaintiffs' Proposed District 3: (footnote omitted)

NEISD Total Population:	253,582	(100.0%)
Anglo:	173,349	(68.4%)
Hisp.:	62,454	(24.6%)
Black:	12,559	(5.0%)

Other:	270	(.1%)
NEISD Voting Age Pop.	189,659	(100.00%)
Anglo:	134,909	(52.70%)
Hisp.:	42,459	(22.00%)
Black:	8,391	(4.00%)
Other:	168	(.09%)
	Proposed District 3	
Total Population:	33,856	(100.0%)
Anglo:	14,222	(42.0%)
Hisp.:	18,102	(53.5%)
Black:	1,084	(3.2%)
Other:	448	(1.3%)
	Proposed District 3	
Voting Age Pop.	24,719	(100.0%)
Anglo:	11,592	(46.9%)
Hisp.:	12,094	(48.9%)
Black:	677	(2.7%)
Other:	356	(1.4%)

46. Thus, as Dr. Gibson conceded, even using his method to calculate the total population and VAP of both NEISD and Plaintiffs' Proposed District 3, the Plaintiffs' Proposed District 3 would still contain a combined Hispanic and Black VAP of 51.6%. In short, it would contain a minority majority of the VAP of Proposed District 3.

49. Defendants further contend that plaintiffs should be required to snow that they would constitute a majority of the voting age citizenship population in Proposed District 3.

50. However, Dr. Korbel testified that in all the years he has been involved in drawing redistricting plans and submitting them for clearance by the Department of Justice, no redistricting plan has been rejected for failing to take citizenship into account. (footnote omitted)

51. Likewise, Dr. Rives, defendants' own expert, conceded that he knew of no case authority requiring the plaintiffs to show that they comprise a majority of the citizen voting age population in a proposed single-member district. That requirement, Dr. Rives admitted, was imposed by him only at the direction of defense counsel. (footnote omitted)

52. The Fifth Circuit, by whose holdings this Court is bound, has repeatedly held that plaintiffs in a § 2 case need only show that they can draw a proposed district in which they comprise a majority of the voting age population in order to satisfy the first prong of

Gingles. n95

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - -

n95 See ***LULAC v. Clements***, 986 F.2d 728, 743 (5th Cir. 1993), rev'd on other grounds, 999 F.2d 831 (5th Cir. 1993) (en banc), (to satisfy first Gingles factor, the minority group must ordinarily be able to draw a single member district in which a majority of the voting age population is minority) (emphasis in original); ***Westwego Citizens for Better Government v City of Westwego***, 946 F.2d 1109, 1117 n. 6 (5th Cir. 1991) ("***Westwego II***"); ***Brewer v. Ham***, 876 F.2d 448, 451 (5th Cir. 1989) (affirming district court's entry of judgment for defendants due to failure of minority plaintiffs to propose a single-member district within the school district that would contain a majority of the voting age population of a minority group including Blacks, Hispanics, and Asians); ***Westwego Citizens for Better Government v. Westwego***, 872 F.2d 1201, 1205 n. 4 (5th Cir. 1989) (***"Westwego I"***) (noting that evidence of size of "voting age" population is critical to a vote dilution claim); ***Overton v. City of Austin***, 871 F.2d 529, 535-36 (5th Cir. 1989) (affirming judgment of district court in which district court found, inter alia, that neither Black nor Hispanic plaintiffs constituted a majority of the voting age population); ***Houston v. Haley***, 859 F.2d 341 (5th Cir. 1988), vacated on other grounds, 869 F.2d 807 (1989), (where the court referred to this issue as "critical").

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - - [**37]

[*1084]

53. Likewise, except for a lone case decided after the trial in this matter n96, the district courts in the Fifth Circuit, in evaluating whether plaintiffs in a vote dilution case have satisfied the first prong of Gingles, have required only that the plaintiffs prove that they would constitute a minority majority of the voting age population in at least one proposed district. n97

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - -

n96 ***Campos v. City of Houston***, 894 F. Supp. 1062, 1995 WL 478151, No. H-91-0885 (S.D.Tex. July 31, 1995) (finding, in granting the defendant City of Houston's motion for summary judgment, that, in analyzing the first prong of the ***Gingles*** test, using the data of voting age Hispanic citizens is the correct measure of the Hispanic population's ability to create a majority voting district). Id. at *3.

n97 See ***Concerned Citizens for Equality v. McDonald***, 863 F. Supp. 393, 402 (E.D.Tex. 1994) (analysis assumes that the appropriate analytical and remedial standard is bare majority of voting age population); Clark v. Roemer, 777 F. Supp. 445, 452-452 (M.D.La. 1990) ("although the Fifth Circuit has not yet squarely so held, it seems rather clear that the majority population with which ***Thornburg v. Gingles*** is concerned is a voting majority, not simply a population majority. The court of Appeals has at least implied that the single-member district which is created must contain at least a voting age majority of the minority group . . . This court concludes that in order to he viable under the ***Thornburg v. Gingles*** rationale any such district must contain at least a voting age majority of the minority group.") (emphasis in original); ***Ewing v. Monroe County, Mississippi***, 740 F. Supp. 417, 419 (N.D.Miss. 1990) (distribution of blacks through county meets the first prerequisite so as to at low the creation of at least one supervisory

district and one justice court judge district with a majority black voting population) (emphasis in original); ***Williams v. City of Dallas***, 734 F. Supp. 1317, 1387 (N.D.Tex. 1990) (with a 65% African-American concentration, there can be 3 black districts out of 8, 4 out of 10 or 11, and 5 out of 15--with a majority African-American voting age population) (emphasis in original).
- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - - [**38]

54. The Court finds that the plaintiffs have shown that they can draw a proposed single member district in which Hispanics and Blacks constitute a majority of the voting age population, as evidenced by Plaintiffs' Proposed District 3.(footnote omitted)
- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

55. The Court also finds that the Plaintiffs' Proposed District 3 is geographically compact. With regard to the shape of Plaintiffs' Proposed District 3, the Court finds that the two-headed dragon configuration is not the result of racial gerrymandering, but is due in large part to the plaintiffs having to draw around the northern boundary of the Alamo Heights Independent School District. n99 (footnote omitted)
- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - -
n99 The shape of Plaintiffs' Proposed District 3 is no more disjointed or contorted than the district approved by the district court in ***Hastert v. State Bd. of Elections***, 777 F. Supp. 634 (N.D.Ill. 1991) (holding that Chicago/Cook County's Hispanic community was geographically compact within the meaning of Gingles to constitute a single district majority despite fact that proposed district encompassed separate Hispanic enclaves in northwest and southwest corners of Chicago, and ran narrow corridor connecting those enclaves around end of existing congressional district, and had "rays" "shooting out" to capture additional Hispanic population, with resulting district that resembled "Rorschach blot" turned on its side; therefore, proposed Hispanic congressional district, although uncouth in configuration, would be approved). Plaintiffs' Proposed District 3 is also distinguishable from the proposed district rejected by the district court in ***East Jefferson Coalition for Leadership and Development v. Parish of Jefferson***, 691 F. Supp. 991 (E.D.La. 1998), aff'd 926 F.2d 487 (5th Cir. 1991). There the proposed district crossed the Mississippi River, a major natural boundary, and reached around the airport to include a concentration of black voters living above the airport. Plaintiffs' Proposed District 3, on the other hand, does not cross a major natural boundary nor does it branch out in an unacceptable manner in an effort to take in an isolated concentration of minority voters.
- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

56. Plaintiffs also have shown that voting in NEISD school board elections is significantly polarized along racial lines.

57. As noted earlier, of the 48 candidates elected to the NEISD Board of Trustees [*1085] between 1973 and 1994, 47 are Anglo and 1 is Hispanic. Stated in percentages, this means 98% of all winners in NEISD school board elections in the past 21 years are Anglo, while 2% are Hispanic. Of the Anglo candidates who have run, 36% were

winners. By contrast, only 11% of Hispanic candidates won, while no Black candidate has ever won. (footnote omitted)

58. Absent special circumstances, there are not enough Anglo cross-over votes to allow a minority candidate to succeed in the at-large election system presently used in NEISD school board elections.

59. **Richard Ojeda, the only Hispanic candidate to be elected to the NEISD school board, ran against a woman with an Iranian-sounding name, Brigetta Saidi n102, in 1992, shortly after the [First] Persian Gulf War. (footnote omitted)**
- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - -
n102 However, Ms. Saidi is actually of German descent. TR. I, p. 212.
- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

60. Ojeda was elected with the support of the Positive Direction Committee ("PDC"), a slating group of Anglos within NEISD n104, and the support of at least one Anglo trustee, Bill McCabe. (footnote omitted)

61. Ojeda lost in his bid for reelection in May of 1995. (footnote omitted)

62. The PDC was formed in 1988-89 and was comprised entirely of Anglos. (footnote omitted) There is no evidence a minority ever served on the PDC.

63. There is no evidence that NEISD school board campaigns have been characterized by overt or subtle appeals to race.

64. There is no dispute that Texas has a long history of discrimination against its Black and Hispanic citizens in all areas of public life. Dr. Korbel testified in a general fashion that minority citizens had been subjected to discriminatory voter registration laws, poll taxes, racially restrictive covenants in real estate transactions (footnote omitted), and segregated schools in the past. (footnote omitted) However, the plaintiffs have offered no evidence in the form of empirical data that shows that Blacks and Hispanics in NEISD currently register to vote at a lower rate than Anglos, that the turnout level of Blacks and Hispanics is lower than that of Anglos in NEISD, or any other factor which would demonstrate that past discrimination has hampered the ability of Blacks and Hispanics in NEISD to participate presently in the political process.

65. The 1990 Census shows that 2,734 (8.9%) Hispanics over the age of 25 in NEISD were functionally illiterate or had completed less than 8 years of formal education. The functional illiteracy rate of Anglos, on the other hand, was only 3.1%. (footnote omitted)

66. The 1990 Census also reflects that only 8,031 Hispanics within NEISD were high school graduates as compared to 30,496 Anglos. Only 1,323 Blacks were high school graduates. (footnote omitted)

67. With respect to college graduates, the 1990 Census showed that 28,401 (82.1%) of the residents of NEISD with a college degree were Anglo, 4,230 (12.3%) of NEISD residents with a college degree were Hispanic, and 958 (3.1%) of NEISD residents with a college degree were Black. In other words, 80% of the holders of college degrees to NEISD are Anglo. (footnote omitted)

68. With respect to graduate and professional degrees, Anglos comprise 83.8% of the people in NEISD with graduate or professional degrees. Hispanics hold only 9.8% and Blacks 3.9%. (footnote omitted)

69. With respect to the percentage of each race which lives below the poverty level, the 1990 Census revealed that 20.4% of the Black families in NEISD live below the poverty level; that 14.2% of Hispanic families lived below the poverty level; and 7% of the Anglo families existed below the poverty level. (footnote omitted)

70. According to the 1990 Census, the mean income for Anglo households in NEISD was $ 44,258.00, the mean income for Hispanic households in NEISD was $ 34,109.00, and the mean income for Black households in NEISD was $ 29,787.00. Thus, the mean income for Anglo households in NEISD was approximately 129% that of Hispanic households and 149% that of Black households. (footnote omitted)

71. The 1990 Census also shows that 30.6% of Anglo households in NEISD have annual income levels exceeding $ 50,000 as compared to only 15% of Black households and 18.2% of Hispanic households. (footnote omitted)

72. The 1990 Census further shows that only 16.1% of Anglo households in NEISD have an annual income of less than $ 15,000. By way of contrast, 29.4% Black households and 22.3% Hispanic households fall below that level. (footnote omitted)

73. With respect to the average per capita income, the 1990 Census indicates that Anglos in NEISD earned $ 18,364 while Blacks and Hispanics earned $ 11,661 and $ 11,216, respectively. (footnote omitted) In other words, Anglos earn almost 160% the per capita income of Hispanics and Blacks.

74. The scores of NEISD Black and Hispanic students generally are considerably lower than the scores of NEISD Anglo students on the Texas Assessment of Academic Skills exam (footnote omitted), the standardized test administered by the Texas Education Agency each year to all school students in Texas. (footnote omitted)

75. **The Court finds that plaintiffs have shown that Blacks and Hispanics still bear the effects of past discrimination in such areas as education,**

employment and health, which hinder their ability to participate effectively in the political process.

76. Contrary to plaintiffs' assertions otherwise, the Court finds that the plaintiffs have not proved that NEISD has a history of being unresponsive to the concerns or needs of its minority community.

77. Plaintiffs claim that the naming of an athletic center of Virgil T. Blossom, an alleged racist, as evidence of the school district's insensitivity. However, the plaintiffs' assertion that Blossom was a racist is not supported by any credible evidence. What is more, Jesse Culter, who served on the NEISD school board three years, one of which as president, testified that he never even attempted to place on the agenda for consideration by the school board the renaming of the Virgil T. Blossom Athletic Center. (footnote omitted)

78. Plaintiffs also cite the fact that Robert E. Lee High School flew the Confederate flag until 1993 as evidence of the school district's insensitivity to minorities. Once again, however, the evidence shows that no one ever approached the school board and requested that the flag not be flown.(footnote omitted) Likewise, Culter admitted that he never asked that the issue be placed on the board's agenda during the three years he served as trustee. (footnote omitted) What is more, when students at the high school did voice their displeasure about the Confederate flag being flown, Bill Fisch, the principal at Lee High School, ordered that the flag not be flown and that a different symbol be used. (footnote omitted)

79. Plaintiffs also claim that the school district's administration blocked efforts by board members to review the at-large election system. Yet, Culter admitted on cross-examination that he never attempted to place the issue of single-member districts on the school board's agenda while he was a trustee n125 or since leaving the board in 1991. (footnote omitted)

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n125 TR. I, p. 70. Dr. Richard Middleton, who was Superintendent of NEISD at the time Culter served on the school board, recalled that Culter never asked him to place the single-member issue on the board's agenda. TR. IV, p. 168-169.

- - - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

80. Another indication of the school district's insensitivity, according to plaintiffs, is the use of race in drawing school attendance zones for Castle Hills Elementary and Redland Oak Elementary school. However, Dr. Middleton testified that all school attendance zones, including those for Castle Hills Elementary and Redland Oak Elementary, are created strictly on the basis of the number of students. (footnote omitted) With reference to Castle Hills Elementary, Dr. Middleton testified that it is a school of choice, meaning that students from a seven elementary school region can elect to attend it, regardless of race or ethnicity. n128

81. Plaintiff's also claim that the school district has displayed its insensitivity by failing to actively recruit minority teachers. While plaintiffs have introduced evidence that NEISD did not actively recruit Hispanics and Blacks until recently, defendants have come forth with evidence that since 1992 the school district has intensified its efforts to attract minority teachers by recruiting not only from Texas universities and colleges, but also to New York and California. (footnote omitted) However, as Dr. Middleton pointed out, the school district is confronted with the reality that fewer minorities are pursuing a profession in teaching. (footnote omitted) This also undercuts Plaintiffs' argument that the school district is insensitive to the needs of its minority population because it employs a teacher work force that is less than 10% Hispanic and less than 2% Black when its student population is nearly 40% minority. Plaintiffs have offered no evidence that the low level of minority teachers in NEISD is attributable to any insensitivity on the part of the school district rather than a small pool from which to recruit minority teachers.

82. Another manifestation of the school district's insensitivity, Plaintiffs argue, is the scarcity of Hispanics in administrative positions. As evidenced by Plaintiffs' Ex. P-18, of the 150 administrators in the school district, only 14 are Hispanic. (footnote omitted) However, Dr. Middleton, who is part Hispanic himself, (footnote omitted) also testified that there are 29 minority administrators in the school district, 18 of whom have been appointed since he was appointed as Superintendent in 1989. (footnote omitted) Therefore, while it may be true that Dr. Middleton's predecessors impeded the advancement of minorities to administrative positions, the Court does not find the evidence to substantiate this allegation as to Dr. Middleton.

83. Plaintiffs also offer the fact that none of the four assistant superintendents is a minority (footnote omitted) as another example of the lack of responsiveness by NEISD to the concerns of its minority population. Yet, plaintiffs failed to offer any evidence as to when and by whom these people were appointed, what their qualifications are in terms of experience and education, or anything else that would support this allegation.

84. Another example of non-responsiveness by the school district, contend plaintiffs, is the establishment of boundary lines that result in Lee High School having a student population which is 56% minorities while Churchill High School has a student population that is less than 25% minorities even though the two school share a common [*1088] boundary line and are less than five miles apart. (footnote omitted) As pointed out by Dr. Middleton, however, school boundaries are drawn based on the number of students each school can accommodate, not with an eye toward creating a racially balanced student body. Also, what plaintiffs' argument ignores is the testimony of Dr. Korbel, their own expert, that the heaviest concentration of Hispanics in NEISD is in the southern portion of Plaintiffs' Proposed District 3, where Lee High is located, due to the migration of

Hispanics into the area during the last decade as Anglos have moved out to new developments on the north side of the school district. (footnote omitted) This, rather than any insensitivity on the part of the school district, would account for the large number of minority students in Lee High School as compared to Churchill.

85. Plaintiffs also see a lack of responsiveness by the school district to the needs of its minority students in the fact that Dr. Richard Holt, the President of the school board at the time of this trial, testified that it was possible for a student to attend school in NEISD for 12 years without ever having a minority teacher. However, Dr. Holt also testified that the NEISD teaching staff is very stable with very little turnover. He also noted, as did Dr. Middleton, that there is a limited pool of minority teachers and administrators from which the school district can recruit. (footnote omitted) Moreover, as Richard Ojeda pointed out, the school district is also at a disadvantage by virtue of the fact that it must compete with other school districts, such as Alamo Heights, which can offer higher salaries to attract minority teachers. (footnote omitted) Given these other factors, the Court cannot blame the low percentage of minority teachers in NEISD on any lack of concern or effort to remedy the situation by the school district.

86. Plaintiffs cite the testimony of Dr. Jones, the African-American plaintiff, that the school board has a long history of discrimination against African-Americans as evidence of its unresponsiveness to the minority community. However, the discrimination of which Dr. Jones testified referred to discrimination that occurred when he attended school in the 1940s and to the discrimination that existed in 1960s.(footnote omitted) Dr. Jones related no incidents of discrimination by the current school board.

87. The final example of school board insensitivity offered by the Plaintiffs is the poor performance of minority students on the TAAS exams. There is no dispute that the TAAS results of minority students in NEISD are disconcerting. However, plaintiffs have not pointed to any evidence of the school board ignoring the problem or not taking steps to better prepare minority students for the TAAS exam. In fact, the evidence put on by the defendants compels the exact opposite conclusion. A broad range of programs have been enacted by the school district which are designed to identify and address the educational needs of students, including minority students, who are struggling in class and who are a risk of failing or dropping out. n140

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - -

n140 Such programs include jump start programs for schools with a high percentage of students receiving free or reduced-price lunch; bilingual programs; mentoring programs in which businesses in the community work with children identified as being at risk of dropping out;, high order thinking skills programs aimed at attracting minority students into gifted and talented programs; a year-round curriculum at Nimitz Academy and Castle Hills Elementary School, both of which have a large minority student population; the A-B schedule at White

Middle School, a program in which students attend class every other day for 1.5 hours so they can do their homework in class; and the Lee Volunteer for Excellence Program at Lee High School, which encourages students to take higher levels of math at an earlier age. NEISD has also developed remedial programs specifically designed to help students who have trouble with certain sections of the TAAS exam. TR. IV, pp. 150-154.
- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

88. Until 1999, there were only eight polling place within NEISD for school board [*1089] elections, even though the school district contains over 250,000 people. (footnote omitted)

89. NEISD currently utilizes a place system to elect its trustees, a voting device which prevents "single-shot" voting by minority voters. (footnote omitted)

90. Generally speaking, minority candidates have more limited resources with which to finance their campaign than do Anglo candidates in NEISD. (footnote omitted)

91. It is more expensive to run for office in the current at-large system used by NEISD than it would be to run for office in a single-member district system as proposed by plaintiffs.

92. The sheer geographical size of NEISD makes it virtually impossible for a minority candidate to conduct a grass roots or door-to-door campaign. Such a campaign could be conducted, however, in a single-member district. (footnote omitted)

93. A study by the U.S. Commission on Civil Rights reveals that Texas jurisdictions that have adopted single-member districts have experienced a two or three-fold increase in the number of elected minority candidates. (footnote omitted)

94. That same study also looked at coalition voting patterns in Texas and found that districts in which the Black and the Hispanic populations, when combined, exceed 50% of the population are characterized by Blacks and Hispanics voting together to minority candidates. Such districts, the study showed, also elect more minority candidates than does a single Black or a single Hispanic district of the same total percentage. (footnote omitted)

95. Dr. Gibson, defendants' expert, has written scholarly articles in which he reported finding that a coalition had developed between Blacks and Hispanics of Bexar County in the 1960s and 1970s and that a plurality district of Blacks and Hispanics has consistently elected black candidates in city council and state legislative elections throughout the 1970s, 1980s and 1990s. (footnote omitted)

The Court went on to find the at large election system for the election of trustees to the Northeast Independent School District to violate Section 2 of the Voting Rights Act. However, the Defendant school board was reluctant to adopt single member districts and instead determined to appeal. An appeal even if unsuccessful would delay the implementation of a remedy for years. However, LULAC discovered, after the trial, that a bond election that the school district was about to hold had never been submitted for preclearance as was required under the Voting Rights Act.

LULAC determined to oppose the bond election so long as a board elected under a discriminatory at large election system would decide how the proceeds of those bonds would be spent. Therefore, LULAC filed a Section 5 enforcement action and secured an injunction blocking the bond election and ordering the school district to submit the bond election for preclearance. Moreover, LULAC notified the school district that as long as the board of trustees was elected from a discriminatory at large election system, LULAC would oppose the bond and preclearance at the Justice Department. As a result the Defendant school district agreed to adopt single member districts and LULAC agreed to support the preclearance of the bond election.

In the first election after the adoption of single member districts a Latino candidate and an African American candidate secured election from majority minority districts.

In ***Sierra v. El Paso Independent School Dist***., 591 F. Supp. 802 (D. Tex., 1984), the United States District Court sitting in El Paso Texas made the following findings in a case challenging the at large election system used for election of the governing board for the El Paso I.S.D.:

"The El Paso Independent School District is the fifth largest independent school district in the State of Texas. It operates 70 elementary and secondary schools, and serves approximately 60,000 students. It is located entirely within the boundaries of El Paso County, Texas, and covers more than 200 square miles. n1 The school district is governed by a board of seven elected trustees. At least since 1911, all trustees have been elected at large from the district as a whole in nonpartisan elections. Prior to 1940, candidates ran for staggered two-year terms, and elections were held annually. In 1940, the term was increased to six years, still staggered, and elections are held every two years. All candidates ran at large and not by place until 1960, when the board, pursuant to enabling legislation enacted by the Texas legislature, provided for the election of members to the board by numbered positions. Election of candidates was still by straight plurality, however, without any provision for a majority run-off. In 1971, the legislature amended Section 23.11 of the Texas Education Code to permit school districts to adopt a runoff election procedure if no candidate receives a majority of the votes cast for a particular position. On November 16, 1971, the Board of Trustees of the El Paso Independent School District adopted the majority runoff procedure for all trustee elections beginning with those scheduled for 1972. Since 1972, therefore, all trustees have been chosen in at-large, by-place, majority runoff, nonpartisan elections.
- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - -

n1 One other large independent school district (the Ysleta Independent School District, seventh largest in Texas) and several smaller school districts also lie within the borders of El Paso County.
- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - [**4]

It is not disputed that more than 50 percent of those who reside within the El Paso Independent School District are Mexican-American, and that 70 percent of the students enrolled in the schools of the district are Mexican-American. However, Mexican-Americans constitute only 43 percent of the registered voters within the school district. The Plaintiffs contend that the at-large, by-place, majority runoff system for electing school board trustees impermissibly dilutes the voting strength of Mexican-Americans, and makes it difficult for them to elect representatives of their choice to the school board. Therefore, Plaintiffs contend that the present election system violates both the Constitution and the Voting Rights Act.

It is now well settled that discriminatory purpose must be shown to support a finding of unconstitutional vote dilution under either the Fourteenth or Fifteenth Amendment to the Constitution of the United States. ***Rogers v. Lodge***, 458 U.S. 613, 102 S. Ct. 3272, 73 L. Ed. 2d 1012 (1982); ***City of Mobile v. Bolden***, 446 U.S. 55, 100 S. Ct. 1490, 64 L. Ed. 2d 47 (1980). In the instant case, there is no evidence that the board of trustees adopted any feature of the present election system for the purpose of discriminating against any minority or ethnic group. With respect to those aspects of the system in effect before 1971, the Plaintiffs simply offered no evidence at all concerning the purpose or purposes of the school board members who participated in designing the scheme for electing trustees. For example, on January 19, 1960, the board of trustees passed the resolution calling for the election of members to the school board by numbered positions. However, the only evidence offered by the Plaintiffs concerning the adoption of this new procedure was the minutes of the board meeting itself (Plaintiffs' Exhibit 143). The minutes do not reflect any debate or discussion which would shed light upon the purpose of the board in adopting [*805] the by-place procedure. No other evidence, direct or circumstantial, was offered by the Plaintiffs which would tend to prove the state of mind or intent of the board members of that era. With respect to the 1971 board resolution adopting the majority run-off procedure, the trial testimony of past board members negates discriminatory intent. For example, Javier Montes, a Mexican-American board member, stated that he supported the resolution because of his belief that a newly-enacted state law mandated runoff elections. n2 Another Mexican-American board member, Elman Chapa, testified that he supported majority runoffs because of his concern about low voter turnout in school board elections, and his belief that a runoff might develop more interest. n3 The minutes of the board meeting at which the runoff election procedure was adopted (Plaintiffs' Exhibit 144) failed to reflect any discussion or debate which would indicate that the majority runoff was intended to dilute minority voting strength. In short, the Plaintiffs have failed to sustain their burden of proving discriminatory intent in connection with the adoption of any feature of the present scheme for electing school board members.
- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -
n2 Mr. Montes was elected to the board of trustees in 1970 in a straight plurality election,

and was reelected in 1976 under the majority runoff procedure.

n3 Mr. Chapa was elected to the board in 1968 in a straight plurality election and reelected in 1974 under the majority runoff procedure. In 1980, he ran for reelection but lost in a runoff.
- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

Recognizing that they lack proof of discriminatory purpose in connection with the adoption of these election procedures, the Plaintiffs contend that the board's failure to change the procedures since 1971 despite complaints from minority groups is evidence of an intent to discriminate. The Court finds that the evidence in this regard is, if anything, to the contrary. On October 22, 1976, the board adopted a resolution calling for a referendum on the question whether trustees should be elected at large or by single-member districts (Plaintiffs' Exhibit 145). The referendum was held in 1977, and 53 percent of those voting approved the idea of single-member districts. On May 10, 1977, the board's attorneys and the school administration were directed to develop a plan for the implementation of single-member districts (Plaintiffs' Exhibit 148). The catch was that the Texas Education Code at that time required the election of school board members from the district at large. n4 Section 23.024 of the Texas Education Code, which authorizes the El Paso Independent School District to elect trustees by single-member districts did not become effective until August 29, 1983. By that time, Plaintiffs had already instituted this suit. n5 In short, the record fails to substantiate the Plaintiffs' claim that the school board's inaction since 1971 is indicative of discriminatory intent. The Court must find in favor of the Defendants with respect to the Plaintiffs' constitutional claims, and then turn to the claims asserted under the Voting Rights Act.- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -
n4 The Texas legislature had enacted legislation which permitted the election of school trustees from single-member districts only in Dallas and Houston.

n5 The Plaintiffs' original complaint was filed June 27, 1983.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

In an amended answer submitted just before trial, and in the agreed pretrial order, the Defendants contend that the 1982 amendment to Section 2 of the Voting Rights Act is unconstitutional. The Court also permitted the Texas Association of School Boards to file an amicus curiae brief in which the constitutionality of the 1982 amendment is questioned. In light of these challenges to the constitutionality of the Act, notice was given to the Attorney General of the United States pursuant to 28 U.S.C. § 2403(a) and the Attorney General has filed a brief in support of the constitutionality of the 1982 amendment. Fortunately, this issue is greatly simplified by the decision of the United States Court of Appeals in ***Jones v. City of Lubbock***, 727 F.2d 364 (5th Cir.1984), in which the constitutionality of the 1982 amendment to Section 2 of the Voting Rights Act is specifically [*806] upheld. Following binding Fifth Circuit precedent, this Court also holds that the 1982 amendment to Section 2 of the Voting Rights Act is constitutional.

In amending Section 2 of the Voting Rights Act in 1982, Congress reacted to the decision of the Supreme Court in ***City of Mobile v. Bolden***, supra, by substituting a "results test" for the prior requirement that discriminatory purpose be shown. ***Velasquez v. City of Abilene, Texas***, 725 F.2d 1017, 1021 (5th Cir.1984); ***Jones v. City of Lubbock***, supra. Under the amended Act, electoral practices and procedures that create discriminatory results are prohibited, even though the governmental body in question did not install or maintain the electoral practice or procedure for the purpose of discrimination. ***Jones v. City of Lubbock***, supra. As stated in the Senate Report on the 1982 amendment:

The amendment to the language of Section 2 is designed to make clear that plaintiffs need not prove a discriminatory purpose in the adoption or maintenance of the challenged system or practice in order to establish a violation. Plaintiff must either prove such intent, or, alternatively, must show that the challenged system or practice, in the context of all the circumstances in the jurisdiction in question, results in minorities being denied equal access to the political process.

S.Rep. No. 417, 97th Cong., 2d Sess., 1982 U.S.Code Cong. & Ad.News at 177, 205. As amended, HN4Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, reads as follows:

The first factor to be considered is whether past official discrimination has affected the right of Mexican-Americans to register, vote, or otherwise to participate in the political process. In this connection, two forms of past discrimination stand out: the poll tax and the English language ballot. It is now well established that, prior to the repeal of the poll tax, the requirement that citizens pay a poll tax as a prerequisite for voting eligibility impacted heavily upon persons in the lower income group, which in terms of El Paso County meant predominantly Mexican-Americans. The effect of the poll tax requirement lingered on even after its repeal, and in part has accounted for the lower level of Mexican-American voter registration. See ***Graves v. Barnes***, 378 F. Supp. 640, 656 (W.D.Tex.1974). Furthermore, until recent years, all ballots were printed exclusively in English, and this tended to deter voting by Mexican-American voters who did not understand the English language. See ***Graves v. Barnes***, supra. These past discriminatory practices still contribute to some extent to the fact that Mexican-Americans register and vote in lower percentages than eligible Anglo voters.

The next factor to be considered is whether voting in the elections of the school district is racially polarized. **The evidence adduced at trial establishes clearly that voting in school district elections tends to be highly polarized along ethnic lines**. The Plaintiffs' expert witness, Dr. Robert Brischetto, conducted a study of 15 school board trustee races between 1974 and 1982 in which one or more Mexican-American candidates opposed one or more Anglo candidates. In 11 of those 15 races, Dr. Brischetto concluded that voting polarization was high. Of the remaining four races, polarization was moderate in two and low in two. In an effort to check his findings with respect to the school board races, Dr. Brischetto also analyzed 12 races for El Paso Community College trustees and six races for city councilman positions. He found high voting polarization in eight of the 12 Community College races, and in four of the six city council races. Although not

directly in point, these latter findings do tend to substantiate Dr. Brischetto's conclusion that voting in the school board elections, as well as other elections conducted in El Paso County, is highly polarized along ethnic lines. Another political scientist who testified for the Plaintiffs, Dr. Rodolfo De La Garza, had conducted studies of Mexican-American voting patterns in El Paso County, and he concluded that ethnicity was the largest single determining factor in most elections conducted in El Paso.

Even more persuasive to the Court than the testimony of the expert witnesses, however, was the testimony of the practical [*808] politicians n6 who are thoroughly familiar with voting behavior in El Paso County. These witnesses testified unequivocally that bloc voting by Mexican-Americans for Mexican-American candidates and by Anglos for Anglo candidates is a political fact of life in El Paso, and one with which all candidates must deal in plotting their respective campaign strategies.

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n6 These included State Representative Paul Moreno, District Judge Edward Marquez, City Council Member and former County Clerk, Alicia Chacon, and Mrs. Margarita Blanco, a woman who has campaigned for many candidates in various political races over the past 30 years.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - -

The Defendants attempted to counter the evidence presented by the Plaintiffs with respect to voting polarization with the testimony of Dr. William Wachtel, a statistician with no prior experience in analyzing election results or studying voting polarization. Dr. Wachtel analyzed the same elections studied by Dr. Brischetto, but used a different methodology in that he tried to detect the presence or absence of polarization by studying the votes cast for each candidate separately, rather than grouping all Anglo candidates and all Mexican-American candidates involved in the same school board race. Dr. Wachtel's methodology is obviously inferior to that used by Dr. Brischetto, and would have a tendency to produce distorted results. It is interesting to note, however, that even Dr. Wachtel's analysis revealed significant voting polarization along ethnic lines. n7

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n7 Dr. Wachtel found high polarization in the votes cast for 11 of 33 school board candidates and nine of 21 city council candidates.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - -

In summary, the Court finds from the evidence that polarization is a well-known and well-understood phenomenon in all political races in El Paso County, including school board races, and that the ethnicity of a candidate is one of the most important factors in determining voter preference.

The Court must next consider the extent to which the present scheme for electing school board trustees (at large, by place, majority runoff, nonpartisan election) enhances the opportunity for discrimination against Mexican-Americans. There can be little doubt from the evidence that the present at large system places Mexican-Americans at a significant disadvantage in electing candidates to the position of trustee for the El Paso

Independent School District. The vast size of the district, and its large population, render it almost impossible for a candidate to rely solely upon a door-to-door or person-to-person campaign. Traditional forms of political advertising (e.g. billboards, mailings, news media advertising) are very expensive, and it is difficult for Mexican-Americans, who generally represent a lower-income group, to raise funds necessary for an adequate district wide campaign. Furthermore, the lack of access to campaign funds is not alleviated in school board races by the presence of a political party or even a slating organization; elections are nonpartisan and there is no slating process in the true meaning of that term. These disadvantages are greatly enhanced by the other features of the school district's electoral system, to wit: staggered terms, filing by numbered positions, and majority runoff. Staggered terms and numbered positions (by place filing) tend to create head-to-head races and to promote majority-minority confrontation. ***Rogers v. Lodge***, supra, 458 U.S. at 627, 102 S. Ct. at 3280; ***City of Rome v. United States***, 446 U.S. 156, 185 n. 21, 100 S. Ct. 1548, 1566 n. 21, 64 L. Ed. 2d 119 (1980); ***Jones v. City of Lubbock***, supra. The majority runoff provision has the natural effect of enhancing the underlying tendency toward ethnic polarization, and gives a great advantage to Anglo candidates to the detriment of minority candidates. ***Rogers v. Lodge***, supra 458 U.S. at 627, 102 S. Ct. at 3280; ***Jones v. City of Lubbock***, supra. Taken in combination, the by-place and majority runoff requirements effectively prevent single shot voting. Furthermore, the absence of any subdistrict residency requirement has contributed to the fact that no person residing in any of the South El Paso precincts that have the heaviest concentration of Mexican-American [*809] residents has ever been elected to the position of trustee of the El Paso Independent School District. When the present at-large by-place majority runoff nonpartisan election scheme is considered in conjunction with the history of official discrimination and the pattern of polarized voting, the conclusion is inescapable that Mexican-Americans have less opportunity than do other members of the electorate to participate in the political process and to elect representatives of their choice to the school board.

The next factor to be considered is whether there is a candidate-slating process in connection with school board elections, and, if so, whether Mexican-Americans have been denied access to the slating process. The Court finds from the evidence that no slating process exists. A good illustration of the kind of "slating process" meant by Congress is found in Velasquez v. City of Abilene, Texas, supra, in which the Court of Appeals describes the organization known as Citizens for Better Government. This organization is identified as "a white-Anglo-dominated slating organization which exercises nearly complete control over Abilene's city politics through its endorsement and support of candidates." Velasquez v. City of Abilene, Texas, supra at 1019. Nothing even remotely resembling the Citizens for Better Government exists with respect to school board elections in the El Paso Independent School District. In fact, the evidence does not indicate the existence of any slating organization, effective or ineffective, in connection with school board elections.

The Plaintiffs argue that an informal slating process exists in the sense that vacancies which occur on the board of trustees between elections are filled by vote of the remaining incumbent trustees, and the persons so appointed then run for election as incumbents.

Whatever this procedure may be called, however, it stretches the English language beyond its limits to call it a "slating process." By the same token, it is not a slating process for an incumbent trustee to contact his friends and to encourage them to run for vacancies on the school board. Finally, if either of these procedures could be termed a slating process, the evidence is clear that the process is open to Mexican-Americans as well as to Anglos. This fact may be illustrated by two specific examples: (1) Arturo Aguirre testified that he was appointed to fill an unexpired term and ran for election the following year as an incumbent; and (2) Javier Montes testified that he was contacted by Elman Chapa, a friend from the Bowie High School Alumni Association, and encouraged to run for a vacant position in 1970. To make a long story short, the evidence simply does not support the Plaintiffs' half-hearted claim of the existence of a slating process, and, if there is a slating process, it is obviously open to Mexican-Americans. n8

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n8 In a brief filed after the trial's conclusion, the Plaintiffs attempt to bolster their claim as to the existence of a slating process by quoting from deposition testimony not offered in evidence (Plaintiffs' posttrial brief, pp. 15-17). The proposition that the Court may not consider any evidence that is outside the record would seem to require no further elaboration.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

The Court must next consider the extent to which Mexican-Americans within the El Paso Independent School District bear the effects of discrimination in the areas of education, employment and health, which hinders their ability to participate effectively in the political process. There can be no question that in past years there was discrimination against Mexican-Americans in the areas of employment and education. n9 Past discrimination in these areas is partly responsible for the findings made earlier in this opinion to the effect that Mexican-Americans historically occupy a lower economic status, that many are not proficient in the English language, and that Mexican-Americans tend to register and to vote in lesser numbers than their Anglo counterparts. The trial record is insufficient to [*810] permit the Court to make findings over and above these generalizations. For example, there is no evidence of any present discrimination against Mexican-Americans in the field of education. On the contrary, the El Paso Independent School District is doing an admirable job, considering its limited financial resources, of furnishing a quality education to all students within the school district, 70 percent of whom are Mexican-American. Furthermore, although there was testimony concerning unusually high rates of unemployment in the areas of South El Paso which have the highest concentration of Mexican-American population, the record fails to show how many of those affected by unemployment are recent immigrants or resident aliens as opposed to citizens. The evidence also fails to show how many residents of South El Paso were educated (or not educated) in Mexico rather than in the United States.

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n9 No evidence was presented which would indicate discrimination against Mexican-Americans in the area of health. Plaintiffs apparently make no contentions along those lines.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

The next factor to be considered is whether political campaigns for the office of trustee have been characterized by overt or subtle racial appeals. Mrs. Maxine Silva, a candidate for trustee in the 1948 school board election, testified that during her campaign she received telephone calls in which she was accused of being a "wet-back," and subjected to other ethnic slurs. The Court accepts the testimony of Mrs. Silva, and finds it to be quite credible. It was her further testimony, however, that times have changed, and that the same atmosphere does not exist today. In fact, Mrs. Silva is again a candidate for trustee in the 1984 school board election. The other evidence offered by the Plaintiffs in this regard is much less convincing. For example, one Felipe Peralta, testified that he was a victim of ethnic appeals and slurs as a candidate for trustee in 1970. However, the winning candidate in that school board race was Javier Montes, a Mexican-American, who received approximately 3,500 votes to Peralta's 800. The claim is also made that in the 1972 school board election, two candidates, Jose Pinon, Jr. and Cleofas Calleros, were defeated on the basis of their ethnicity. What the testimony as a whole actually reveals, however, is that the news media and the public identified both candidates with an organization called MECHA, a group of militant college students that was in the process of conducting demonstrations on the campus of the University of Texas at El Paso. It must be remembered that 1972 was the year of the Nixon-McGovern landslide, and that being perceived by the public as a "radical" probably would have occasioned the defeat of any candidate in any race in any district in the United States in that particular year. The Court is unable to find in the record any concrete evidence of any "racial appeals" as such in connection with the campaigns of these two candidates. The Court is also persuaded by the testimony of another witness for the Plaintiffs, Judge Edward Marquez, who testified that he had observed every election in El Paso since 1960, and that the only race in his memory that involved ethnic appeals was the election of El Paso Community College Trustees in 1976. That election, of course, had no relation to the El Paso Independent School District.

Finally, the Court must take into consideration the extent to which Mexican-Americans have been elected to office in the El Paso Independent School District. The Defendants offered evidence that, since 1950, seven of the 28 trustees, or 25 percent, have been Mexican-Americans. This statistic is somewhat misleading, in that one of the seven Mexican-Americans, Mr. Emilio Peinado, was appointed to fill a vacancy on the board in 1960, and resigned in 1963 without having run for election. Although the percentage of Mexican-Americans that have been elected to the school board is somewhat less than the percentage of registered voters who are Mexican-American, the difference is not great enough to be significant in and of itself. However, it does have a tendency to verify the earlier finding that Mexican-Americans find it more difficult than Anglos to be elected to the school board.

Two other factors which have limited relevance, but which the Court may consider, are whether there is a lack of responsiveness on the part of school trustees to the [*811] particularized needs of Mexican-Americans, and whether

the policy underlying the present at-large election system is tenuous. Taking the second factor first, the Court finds that the policy is certainly tenuous in light of the 1977 referendum vote in favor of single-member districts, which presumably reflects the opinions of the majority of voters within the school district, and the 1983 action of the Texas Legislature in authorizing single-member districts for school districts the size of the El Paso Independent School District. These two facts combined make it difficult to justify the continuation of the at-large election system even on the basis of political theory, quite apart from consideration of minority-voting rights.

With regard to the element of responsiveness, the Plaintiffs make much of a previous decision styled ***Alvarado v. El Paso Independent School District***, 426 F. Supp. 575 (W.D.Tex. 1976), affirmed 593 F.2d 577 (5th Cir. 1979), in which the Court found that the El Paso Independent School District had discriminated against Mexican-American students in certain respects. Most of the events involved in that law suit, however, occurred before 1970, and they are not part of the present board of trustees. On the contrary, the Court has already found earlier in this opinion that the El Paso Independent School District is presently doing a commendable job of furnishing educational services to Mexican-American students. For example, the El Paso Independent School District was a pioneer in bilingual education, developing a comprehensive program in the early 1970s financed entirely with local funds prior to the enactment of any legislation by the State of Texas. Furthermore, the district has taken affirmative action to recruit qualified Mexican-American teachers for the school system, and has promoted those who have shown leadership ability to supervisory positions such as school principals. Teachers employed by the school district have been encouraged to go back to college and to obtain master's degrees with specialization in the area of counseling minority students. The evidence further shows that achievement test scores recorded by Mexican-American students have improved markedly in the last few years. Since 45 percent of the districts' 60,000 students come from families who are classified as "impoverished," the school district carries out the largest school lunch, breakfast, and milk programs in the State of Texas. Although these programs are funded with federal funds, the school district must administer them for the benefit of the students. Finally, a program of the school district that has particular relevance to this case is the practice of causing high school principals to be deputized as voting registrars, and emphasizing the registration of students who become 18 years of age while attending high school. Since two-thirds of the high school students in the district are Mexican-American, the result will be the registration of more Mexican-American voters. In summary, the Court is unable to find any evidence of a present lack of responsiveness by the school board to the particularized needs of Mexican-Americans.

The Voting Rights Act requires that the totality of the circumstances be considered in determining whether a particular system of electing public officials results in the denial to a particular class of citizens of equal opportunity to participate in the political process and to elect representatives of their choice. In

> the instant case, the present at-large, by-place, majority runoff, nonpartisan election of school board trustees does tend to deprive Mexican-Americans of an equal opportunity to elect candidates of their choice. This finding is based primarily upon the consideration of the first three factors, to wit: (1) historical discrimination of an official nature that affected the exercise by Mexican-Americans of their rights to register and vote; (2) the high degree of voter polarization along ethnic lines in elections conducted by the El Paso Independent School District; and (3) the extent to which the at-large, by-place, majority runoff, nonpartisan election procedure enhances the difficulties [*812] faced by a Mexican-American candidate seeking election to the position of school board trustee. It is not without significance that, at the present time, and for the last four years, a school district, of which 70 percent of the students are Mexican-American,] of which over 50 percent of the residents are Mexican-American, and of which 43 percent of the registered voters are Mexican-American, has had only one trustee out of seven who is of Mexican-American descent. Although the other factors listed by Congress must be considered, and although each has been considered in this opinion, the Court's findings with respect to the first three factors in combination inescapably point to a result which violates the Voting Rights Act as amended in 1982. Therefore, judgment must be entered in favor of the Plaintiffs, and the Defendants must be ordered to implement single-member districts in place of the present at-large scheme."

In a challenge to the 1980 Texas House of Representative redistricting plan LULAC and other Latino advocacy groups used some of the evidence developed for the *Sierra* case to demonstrate to the Department of Justice that the redistricting plan adopted by the State was retrogressive in El Paso because it did not provide districts with sufficient Latino population concentration to afford the Latino population an opportunity to elect candidates of their choice. Latino advocacy groups and Latino voters also complained that the plan eliminated a Latino majority district in Bexar County, Texas (San Antonio). As a result the Department of Justice objected to the plan for El Paso and Bexar Counties and in an enforcement action the United States District Court order modifications to the plan that lead to the restoration of an additional Latino majority district in Bexar County and to modifications in the El Paso districts that increase Latino population concentrations to levels that allow the Latino voters to elect candidates of their choice. [need citation]

In ***Arriola v. Harville***, 781 F.2d 506 (5th Cir. 1986) Appellant filed suit under the Voting Rights Act of 1965, 42 U.S.C.S. § 1973c, seeking an injunction to prevent appellee county judge and Jim Wells County from conducting further elections under a plan which was rejected by the Justice Department. The district court issued the injunction.

In ***LULAC v. Texas***, 113 F.3d 53 (5th Cir. 1997) Appellant citizens' organization brought action against appellee state under § 5 of the Voting Rights Act (VRA), 42 U.S.C.S. § 1973c, contending that a Texas supreme court decision on the propriety of a

special election when a state court judge resigned constituted a change in state election laws without obtaining preclearance. The court reversed the dismissal of appellant citizens' organization's action and remanded for the convening of a three-judge court. Appellant's claim that appellee state had adopted an election law change was not wholly insubstantial and could not properly be dismissed by a single judge.

III. Findings of Racial and Ethnic Discrimination By the Department of Justice

The Following are a series of excerpts from findings by the Department of Justice in Voting Rights Objection Letters. This involves the period 1997 through 2005. All Justice Objection Letters are available on line.

Some of the Objections involve local areas including issues such as annexation which were determined to be racial. Others are regional or state wide including adoption of procedures that frustrate the minority electorate–quite literally preventing the election of appellate judges of their choice. Still others involve state wide redistricting in 2002 which was drawn by the entirely Republican State Legislative Redistricting Board. [1]/

To some it is significant that the first step in Tom Delay's plan to take over the Texas Legislature was found by the Bush Department of Justice to pack and crack minority voters into districts which appeared intentionally to dilute minority voting power and frustrate opportunities to elect representatives of their choice. [2]/

---

[1]/ Section 5 of the Voting Rights Act of 1965 (as amended) 42. U.S.C. Sec. 1973 c et seq. requires that all electoral jurisdictions in Texas and all or parts of several other states with a vivid history of racial and ethnic discrimination prove that changes in election procedures are not intended to or have the effect of further minority discrimination **before** enforcing ths changes. This proof is usually made in an administrative action handled by the Voting Section of the Civil Rights Division of the Department of Justice. However, all jurisdictions have an alternative of filing a declaratory judgment action in the District Court for the District of Columbia. When a jurisdiction is unable to convince the Department of Justice that the election change does not discriminate a "so called" **Objection Letter** is sent to the jurisdiction. These "Letters" are findings of fact and applications of law. All of the letters interposed since January 1, 1997 are available on the world wide webb. This document edits and excerpts some of those letters but the full letters can be found at: http://www.usdoj.gov/crt/voting/sec_5/obj_activ.htm.

[2]/ Lest it appear that there good Democrats and Bad Republicans in the process, it is important to point out that similar objections and litigation against Democratic dominated redistricting in the 1970s through the late 1990s was likewise found to dilute minority voting strength. The sad truth is that there is no party which has not discriminated when given the chance. This is perhaps the best argument for the need to continue Section 5 coverage. There is not a significant difference in the effect/affect of the process in 1970s which convinced Congress to cover Texas and the partisan/racial debauch which marked the 2005 redistricting.

Section 5 speaks truth to power. In some cases the speech is more pointed in others but the rule of law that each person's vote should have the same is established by Section 5. Until states such as Texas can demonstrate some recovery from the illness of racial prejudice in the election process removal of Section 5 would just open up the process to the same old crowd which has so sadly dominated Texas.

Baytown, Harris County Texas

Annexations were one of the primary problems we complained about in 1974. which convinced Congree that

An attempt to dilute minority voters at basis of decision to annex a heavily Anglo area but not to annex a nearby minority community.

March 17, 1997

Randall B. Strong, Esq.
503 Ward Road
Baytown, Texas 77520

Dear Mr. Strong:

This refers to two annexations (Ordinance Nos. 95-13 and 95-33) to the City of Webster in Harris County, Texas, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. 1973c. We received your response to our May 3, 1996, request for additional information on January 15 and March 11, 1997; supplemental information was received on March 5, 1997.

[matter omitted]

We have considered carefully the information you have provided, as well as Census data, and comments and information from other interested parties. According to the 1990 Census, Hispanic residents constitute 19 percent and black residents constitute 5 percent of the city's total population, and 17 and 4 percent, respectively, of the voting age population. The annexation in Ordinance No. 95-33 adds approximately 1,162 persons to the city's total population, all of whom appear to be white. Thus, the proposed annexation will reduce the city's Hispanic proportion to 15.0 percent and the black proportion to 4.2 percent of the total population.

Our analysis indicates that there is a residential area adjacent to the city limits that if annexed, would have lessened the impact of annexing the all-white area included in Ordinance No. 95-33. This area is to the northeast of the city and is located within Census

Block 101B of Tract 037304. This block has a significant minority population percentage: Hispanic persons constitute 39 percent and black residents constitute 7 percent of the total population. According to information provided by the city, the annexation of Block 101B alone would have increased the city's Hispanic population to 20.2 percent and the black population to 5.3 percent of the total.

The city has offered several reasons for its refusal to annex Block 101B. First, it alleges that it was unaware that Block 101B had a significant minority population at the time it was considering its 1995 annexations and that its racial/ethnic composition did not play a role in the city's annexation decisions. Our analysis, however, revealed that during the annexation process, the Hispanic councilmember and another leader of the Hispanic community opposed the annexation contained in Ordinance No. 95-33 indicating that if the city was going to annex the all-white residential property in Ordinance No. 95-33, it should also annex the residential property contained in Block 101B. They requested city officials at a planning and zoning meeting and at council meetings to consider annexing Block 101B, but their requests were refused.

Although there is some dispute regarding whether the city manager, who is central in deciding which areas will be considered for annexation into the city, actually stated that the reason Block 101B would not be annexed was because of its ethnic composition, conversations between the city manager and at least two city councilmembers tend to corroborate that this was indeed the city manager's view. Given the role of the city manager in the city's annexation process, and the concerns expressed to city officials by representatives of the minority community regarding the city's failure to include Block 101B in the annexation, the city's assertions that it was unaware of the racial/ethnic make-up of Block 101B at the time of the 1995 annexation is at best disingenuous.

Second, the city argues that Block 101B could not be annexed because it is in a track of land that straddles the extraterritorial jurisdiction ("ETJ") of the city. Our analysis revealed that Block 101B is clearly within the city's ETJ line and that the city's failure to annex the area could not be explained satisfactorily on this basis.

Third, the city claims that the population from Block 101B would place a strain on city services that would be too great for the city to absorb, and that unlike the area annexed by Ordinance No. 95-33, Block 101B would not generate enough revenue to cover the cost of extending services thereto. The city maintains that an important consideration in determining whether to annex a particular parcel of land is the city's assessment that the revenues generated from the area will offset the cost of providing municipal services to it. With regard to Ordinance No. 95-33 and Block 101B, however, no specific data or precise information regarding anticipated revenues or costs for municipal services was provided by the city in support of its position. Information we obtained from city officials and municipal records indicates that the cost of providing services to Block 101B would not be any more, and might even be less, than the cost of providing services to the area annexed by Ordinance No. 95-33.

Fourth, the city also alleges that annexing the area included in Ordinance No. 95-33 would serve to clarify the city's northern boundaries between it and the City of Houston by creating an easily distinguishable boundary. Information contained in city documents and provided by city officials clearly indicates that annexing Block 101B would have enabled the city to use a major thoroughfare, El Camino Real, as a continuous, and easily distinguishable boundary line for the northeastern part of the city. The failure to include Block 101B leaves the city with an irregular boundary in the north.

Finally, the city suggests that the area contained in Ordinance Nos. 95-13 and 95-33 were more desirable than Block 101B because of their profitability. Although our investigation indicates that it is likely that the area annexed by Ordinance No. 95-33 will generate more revenue than Block 101B, no information has been presented by the city to suggest that annexing Block 101B would create a deficit in the city's budget because Block 101B has an insufficient tax base to cover the cost of the additional services it will need. Moreover, even though it appears that the area annexed by Ordinance No. 95-33 has the ability and/or the potential to provide the city with greater revenues than Block 101B, the fact that the other area the city annexed in 1995 is vacant and will generate no revenue unless and until it is developed suggests that generating revenue could not have been the city's only motivation in deciding not to annex Block 101B. In fact, as stated above, with regard to the annexation of areas other than Block 101B, the city seems most concerned that the revenues generated by the property simply offset the cost of providing municipal services to it.

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. See 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). To demonstrate the absence of a discriminatory purpose with respect to an annexation, a jurisdiction must demonstrate that the revision of municipal boundary lines to "includ[e] certain voters within the city [while] leaving others outside," was not based, even in part, on race. Perkins v. Matthews, 400 U.S. 379, 388 (1971). See also City of Pleasant Grove v. United States, 479 U.S. 462 (1987).

The following facts weigh heavily here in our assessment regarding whether the city's burden has been met: (1) the city failed to annex an area with a significant minority population, while it was simultaneously annexing an all-white area that when added to the city's population will reduce the minority proportion; (2) the city deviated from what appears to be its primary annexation consideration in deciding not to annex Block 101B (i.e., that the cost of providing municipal services not be outweighed by the revenues anticipated from the annexation); (3) the city failed to achieve its purported objective of establishing an easily distinguishable boundary in the north in undertaking the annexation in Ordinance No. 95-33. This objective would have been more fully realized, however, had Block 101B been annexed; and (4) the city in the decision-making process appears to have been apprised by representatives of the minority community of their concerns about excluding from the city the population that resides in Block 101B, but, contrary to these

concerns, voted in favor of annexing only the all-white area included in Ordinance No. 95-33.

Additionally, the information available to us suggests that the city's agent in determining which areas were eligible for annexation consideration refused to consider Block 101B for annexation because of the racial/ethnic background of the persons who reside in the area. Thus, significant questions persist regarding a lack of even-handedness in the city's application of its annexation policy and the city's annexation choices appear to have been tainted, if only in part, by an invidious racial purpose. See Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 265-66 (1977); Busbee v. Smith, 549 F. Supp. 494, 516-17 (D.D.C. 1982), aff'd, 459 U.S. 1166 (1983); City of Rome v. United States, 446 U.S. 156, 172 (1980). An annexation or any other voting change adopted for racial reasons, however, can have no legal effect under Section 5. City of Richmond v. United States, 422 U.S. at 378.

In light of the considerations discussed above, I cannot conclude, as I must under the Voting Rights Act, that your burden under Section 5 has been sustained in this instance. Therefore, on behalf of the Attorney General, I must object to the annexation contained in Ordinance No. 95-33. We note 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 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. In addition, you may request that the Attorney General reconsider the objection. However, until the objection is withdrawn or a judgment from the District of Columbia Court is obtained, the objection by the Attorney General remains in effect and the annexation continues to be legally unenforceable. Clark v. Roemer, 500 U.S. 646 (1991); 28 C.F.R. 51.10, 51.11, 51.45, and 51.48(c) and (d).

A Change in the Procedure of replacing Appellate Justices who have left the bench usually as a result of death or resignation. In a letter sent to Alberto Gonzales then Texas Secretary of state and now U.S. Attorney General:

> **"Instead of seeking input from Hispanic voters with regard to potential judicial appointees, the governor [George W. Bush] selected an Anglo appointee who had been rejected by the majority of the voters in that district in an earlier election in favor of a Hispanic candidate. Had the vacancy been filled by election, rather than by gubernatorial appointment, Hispanic voters in the fourth court of appeals district would have had an opportunity to elect a candidate of choice rather than having a judge for the past two years appointed to that seat who was not their choice. Thus, the Angelini appointment is illustrative of the effect the proposed change may have on the participation opportunities of Hispanic voters."**

September 29, 1998

The Honorable Alberto R. Gonzales
Secretary of State
Elections Division
P.O. Box 12060
Austin, Texas 78711-2060

Dear Mr. Secretary:

This refers to the change in the procedures for filling certain vacancies in judicial offices from election to appointment in the State of Texas, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. 1973c. We received your response to our June 1, 1998, request for additional information on July 31, 1998. Supplemental information was received on August 3 and 27, 1998.

According to the 1990 Census, the State of Texas has a total population of 16,986,510 persons, of whom 25.6 percent are Hispanic and 11.6 percent are black. The Hispanic share of the voting age population is 22.4 percent and the black share of the voting age population is 11.0 percent. The state has fourteen court of appeals districts, three (4th, 8th, and 13th) of which have majority Hispanic population percentages (55, 56, and 63 percent Hispanic, respectively). There are no majority black court of appeals districts. Sixty eight of the state's 396 district courts are majority minority districts; of these, thirty-seven district courts have majority Hispanic voting age population percentages, but none have majority black voting age population percentages.

Our analysis indicates that under the proposed change, it is unlikely that judicial vacancies in districts with significant Hispanic voting age and/or registered voter populations will be filled in a manner that reflects the preferences of Hispanic voters commensurate with the opportunity available to those voters if the vacancy was filled by election. The governor is elected at large, by a statewide electorate in which Hispanic voters are a minority. Because the governor's constituency is substantially different than that in districts with significant Hispanic population percentages and because voting in Texas often is **polarized along racial lines**, voters in these districts will not have an opportunity to participate in the selection of judges under the new system similar to the opportunity they have under the current system. Moreover, there does not appear to be any mechanism or safeguard built into the judicial appointment process to allow for input from Hispanic voters, or a consistent procedure for soliciting the minority community's views with regard to potential judicial candidates.

The judicial appointment made to the fourth court of appeals district pursuant to the Hardberger decision fully demonstrates the impact of the proposed procedure on Hispanic participation opportunities. Instead of seeking input from Hispanic voters with regard to potential judicial appointees, the governor selected an Anglo appointee who had been rejected by the majority of the voters in that district in an earlier election in favor of a Hispanic candidate. Had the vacancy been filled by election, rather than by gubernatorial appointment, Hispanic voters in the fourth court of appeals district would have had an opportunity to elect a candidate of choice rather than having a judge for the past two years appointed to that seat who was not their choice. Thus, the Angelini appointment is illustrative of the effect the proposed change may have on the participation opportunities of Hispanic voters.

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); Procedures for the Administration of Section 5, 28 C.F.R. 51.52. We recognize that the state supreme court, faced with the constitutional issues raised in the Hardberger litigation, was required to render a decision regarding the proper interpretation of state law. The state, however, has not suggested that it was prevented by the court ruling in the Hardberger litigation from providing Hispanic voters in the fourth court of appeals district meaningful input into the appointment process, which might well offset the diminution in electoral opportunity resulting from the change in vacancy filling procedure. Thus, while the state has met its burden with regard to purpose, we cannot say that the state has met its burden of showing that, in these circumstances, the change in vacancy filling procedure from election to appointment will not "lead to a retrogression in the position of . . . minorities with respect to their effective exercise of the electoral franchise." Beer v. United States, 425 U.S. 130, 141 (1976).

In light of the considerations discussed above, I cannot conclude, as I must under the Voting Rights Act, that your burden has been sustained in this instance. Therefore, on behalf of the Attorney General, I must object to the change in the procedure for filling prospective judicial vacancies.

A Deannexation in Lamesa of an area which would have contained significant latino residents.

July 16, 1999

Mr. Robert Gorsline
City Secretary
601 South First Street
Lamesa, Texas 79331

Dear Mr. Gorsline:

This refers to the deannexation by referendum of property previously annexed under Ordinance No. O-06-98, and an annexation (Ordinance No. O-05-99) for the City of Lamesa in Dawson County, Texas, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. 1973c. We received your response to our April 5, 1999, request for additional information regarding the deannexation on April 27, 1999, and your submission of the 1999 annexation on May 20, 1999.

The property that is the subject of the deannexation was annexed in 1998 and received Section 5 preclearance on December 8, 1998. The owner of the property specifically sought annexation to obtain the necessary city services and rezoning which would permit the construction of a 72-unit apartment complex for occupancy by moderate to low income families. Other assisted housing for the elderly, including housing built by the same developer, already existed in this area, and had apparently been proposed and built with little accompanying controversy. We understand that this housing contains few, if any, minority residents.

According to 1990 Census data, Hispanics and blacks constituted 51 percent of the city's population. Had it not been for the deannexation by referendum, the area annexed by Ordinance No. O-06-98 and its future residents would have become part of City Council District 6, which, according to the 1990 Census, has by far the lowest percentage of minority residents (7 percent) in the city. While it is difficult to predict with certainty the racial and ethnic makeup of the future residents of the proposed housing project, the income limits for occupancy of this housing, considered in light of existing socioeconomic characteristics of the population in Lamesa and Dawson County, indicate that the future residents would more likely reflect the minority percentage of the city as a whole than the minority percentage of District 6.

It appears that elected city officials originally welcomed the request for annexation and the proposed development because of a generally recognized need for additional housing in the city.

Almost immediately, however, the annexation and the proposed development became the subject of intense opposition, led principally by residents of District 6. Opponents of the project appeared at public hearings regarding the annexation and the proposed rezoning of the property to voice their objections.

Following the city council's approval of the annexation and rezoning ordinances, the opponents presented sufficient petitions under the city's referendum procedure to force the council to repeal the ordinances or put them to a citywide vote. At the subsequent referendum election, the voters repealed the ordinances.

The minutes of public meetings and hearings and contemporaneous newspaper articles report on various statements made by the opponents of the project. We have closely examined this public record of statements made by opponents of the development for legitimate non-racial arguments why the annexation and the rezoning ordinances should not be approved. We note that a significant number of opponents' statements were based on who the proposed occupants would be, and included such terms as "undesirables," "HUD people," "Section 8 people," and "criminal activity that could come from this project." Other opponents stated that they would not oppose the annexation if the development was for elderly housing instead of low to moderate income housing. To be sure, there were other asserted grounds for opposition which were not directed at the prospective tenants (e.g., concerns over flooding or reduced water pressure), but no information has been provided which indicates that these potential problems could not have been dealt with effectively by the city or the developer.

After a Federal District Court ordered Galveston to adopt a single member district plan, the City attempts to modify it so as to reintroduce procedures to frustrate minority voting rights. One of the concerns that everyone in Texas has is that if the protections of the Federal Voting Rights Act were removed, jurisdictions would begin to backslide. This would likely be increasingly true as the minority population continue to rise and their political fortunes increase.

December 14, 1998

Barbara E. Roberts, Esq.
City Attorney
P.O. Box 779
Galveston, Texas 77553-0779

Dear Ms. Roberts:

This refers to amendments to the city charter that provide for a change in the method of election for the city council from six single-member districts to four single-member districts and two at large with numbered posts, a change from a plurality to a majority vote requirement, redistricting criteria and revised recall procedures for the City of Galveston in Galveston County, Texas, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. 1973c. We received your response to our August 17, 1998, request for additional information on October 15, 1998.

We have carefully considered the information you provided, as well as Census data, and information in our files and from other interested parties. According to 1990 Census data, the city's total population is 28 percent black and 21 percent Hispanic. Under the existing system, six councilmembers are elected from single-member districts and the mayor is elected at large. Two of the single-member districts have black population majorities and have elected black representatives to the city council. This method of election and districting plan were adopted in settlement of a vote dilution lawsuit filed by minority residents against the city ***in Arceneaux v. City of Galveston,*** No. G-90-221 (S.D. Tex.), and 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.

Prior to the adoption of a single-member district method of election, the city sought preclearance for a method of election similar to the plan currently under review. It provided for the election of four councilmembers from single-member districts, two councilmembers elected at large by numbered position and the mayor elected at large with a plurality vote requirement. This 4-2-1 method of election was proposed as a replacement for the at-large method of election that was the subject of the vote dilution lawsuit. On December 14, 1992, the Attorney General precleared the use of a plurality vote requirement, but interposed an objection under Section 5 to the proposed 4-2-1 method of election and to the use of numbered posts for the at- large seats because the city had not met its burden under Section 5 of demonstrating the absence of a discriminatory purpose and effect. Our conclusion in this regard was premised upon a number of factors.

First, our analysis of the at-large system indicated that voting in municipal elections was **racially polarized** and that minority-supported candidates had very limited success under the at-large system. Second, the districting plan that accompanied the 4-2-1 method of election did not include a single district in which black or Hispanic voters constituted a majority of the population; instead, the plan included two districts in which black and Hispanic voters combined constituted a majority. The city failed, however, to provide evidence of cohesion between black and Hispanic voters in municipal elections, rendering it doubtful that either minority group under this plan would elect a candidate of choice to a council seat. Third, the city maintained its preference for the 4-2-1 plan over the opposition of the minority community and the ***Arceneaux*** plaintiffs, who favored the adoption of a six single-member district plan with two districts in which black voters would constitute a majority of the population. Fourth, the city chose to maintain two at-large positions on the city council, in addition to the mayoral seat, and to add numbered posts. Given the existence of racially polarized voting in municipal elections, **we concluded that these features of the proposed electoral system would limit the ability of minority voters to elect their candidates of choice to the city council**. Finally, given all of the circumstances described above, **we determined that the city had not provided legitimate, nonracial justifications for its choices regarding the 4-2-1 method of election and its adoption of numbered posts. It is against this backdrop that we must view the city's current request for preclearance of the 4-2-1 plan, with numbered posts, as well as the proposed return to the use of a majority vote requirement.**

In light of the Attorney General's prior objection to virtually identical voting changes, and the requirement of Section 5 that the submitting authority carries the burden of demonstrating that proposed voting changes are free of discriminatory purpose and effect -- see 28 C.F.R. 51.52(a) -- 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 will satisfy the same requirement under Section 5 today. Central to our consideration of this issue is the presence today in the City of Galveston of a method of election which fairly reflects minority voting strength, a circumstance which did not exist when the 1992 objection was interposed.

Our examination of city election returns since 1991 indicates that racial bloc voting continues to play a significant role in city elections. This year's mayoral election in which the Hispanic candidate was successful appears to have been an instance where Hispanic and black voters did vote together, along with a number of Anglo crossover voters. However, this cohesion between minority voters appears to have been a departure from the norm, as evidenced by the results in other recent elections. Of particular note is the fact that the proposed majority vote requirement, had it been in effect in this year's election, could well have changed the outcome of the mayoral race since the majority of the votes cast were for candidates favored by the Anglo voting majority. We find it significant that the city has provided no information or analysis in support of the proposed changes regarding racial bloc voting or cohesiveness between black and Hispanic voters, factors which were critical in our 1992 examination of the 4-2-1 method of election and which are no less important today.

While the city council has not yet adopted a redistricting plan for the proposed method of election, we understand that three alternative plans were developed by an appointed redistricting committee and they are currently before the council. We understand that all three plans are based on 1990 Census data and that this data continues to be the most accurate available information on the city's demographics. As was the case in 1992, we are informed that none of these plans provide for a single-member district in which Hispanic persons constitute a majority of the population or more than one district in which black persons constitute a majority. If this information is correct, it would appear to confirm that the proposed method of election, under current circumstances, cannot produce an electoral system that recognizes minority voting strength as fairly as does the current system. Therefore, **the proposed 4-2-1 method of election with numbered posts for the two at-large seats and a majority vote requirement would lead to a retrogression in minority voting strength prohibited by Section 5**. See ***Beer v. United States***, 425 U.S. 130, 141 (1976)("the purpose of . 5 has always been to insure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise"); 28 C.F.R. 51.54.

We have considered the impact of the proposed redistricting criteria on the city's ability in the future to draw districts that fairly recognize minority voting strength. Our analysis has been hampered by the lack of information from the city regarding these criteria and

how they are to be interpreted and applied. For reasons that the city does not explain, these criteria place what appear to be significant restrictions on the ability of the city to draw racially fair redistricting plans. The criteria specify that city districts be drawn from north to south and that districts "be as equal as possible with only minor variations depending upon the streets selected for district boundaries." The latter criterion appears to be significantly more exacting than the plus or minus 10 percent deviation standard approved by the federal courts for local jurisdictions to satisfy the one person, one vote requirement of the Constitution. If we understand these criteria correctly, had they been in effect in 1993 they would not have permitted the existing districts to be drawn, and their future application could hamper the ability of the city to draw nonretrogressive redistricting plans in compliance with Section 5.

Although city officials and members of the charter review committee established in 1997 presumably were aware of the prior history of litigation under the Voting Rights Act and the Attorney General's 1992 objection, the information provided by the city in support of its application for preclearance of the instant changes contains remarkably little acknowledgment of these past events or their relevance to our review under Section 5 of the city's preclearance request. For example, the city council, which appointed the charter review committee, apparently provided little direction to the committee regarding factors that should be considered in proposing changes that would affect voting, such as whether its proposals complied with Section 2 of the Voting Rights Act, 42 U.S.C. 1973, and satisfied the nonretrogression standard of Section 5. **In response to a specific inquiry on this subject, you informed us simply that "the Charter Review Committee did not discuss in depth the Attorney General's 1992 objection." These facts, viewed in light of the position adopted by the council before the committee began its work that it would put before the voters any proposed charter change approved by a majority of the committee, support an inference that the council gave very little independent consideration to the serious voting rights issues implicated by the charter committee's work and the potential impact of its efforts on the political participation opportunities of minority voters.**

A change from at-large elections in the Sealey ISD allowing "so called" single shot voting to a system which prevents it altogether.

June 5, 2000

David Méndez, Esq.
Bickerstaff, Heath, Smiley, Pollan, Kever & McDaniel [3]/

[3]/ This firm traditionally represented the State of Texas and many of its political subdivisions including Houston from suits by Hispanics and African Americans. The McDaniel in the firm name is Myra McDaniel (an oil and gas attorney from the Midland Odessa area) who was the first African American Secretary of state. She was appointed by Democratic Governor Mark White who himself has been the Secretary of State in

1700 Frost Bank Plaza
816 Congress Avenue
Austin, Texas 78701-2443

Dear Mr. Méndez:

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

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

Under the existing system, the school district elects its seven-member board of trustees on an at-large basis to three-year staggered terms of office (3-2-2). Only one minority representative, an African American, has been elected to the school board in recent times. After two unsuccessful efforts, this individual succeeded in gaining election when she ran for office in an election year when three trustee seats were up for election. In that contest in 1992 she placed last among the three winning candidates, which was also true of her reelection in 1995. In her two unsuccessful bids for the school board, she, like other minority candidates, appears to have failed to garner sufficient white voter support to get elected under the at-large system.

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

The school district now seeks to add to its at-large electoral system a numbered post requirement that, in effect, will convert each election for a seat on the board into a

---

Texas in 1975 when the Voting Right Act was extended to cover Texas. In that role he was the point man in the unsuccessful effort to convince Congress that it was not needed in Texas. He also was the White in ***White v, Regester***.

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

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

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

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

circumstances noted above demonstrate the absence of polarized voting within the school district, given the lack of success generally experienced by minority candidates.

The school district's second claim is that the proposed change will not harm minority-supported candidates because minority voters do not single-shot vote and, by themselves, are too small a share of the voting population to control the outcome of an at-large election. This reasoning, however, does not fully embrace the level of minority electoral success, albeit limited, that has been achieved to date within the school district. While it does appear that under the existing at-large, staggered term election system there are limited opportunities for the effective use of single-shot voting, a candidate apparently preferred by the minority community has gained election to the school board with significant crossover from white voters. This minority candidate ran successfully only in years in which there were three seats up for election and, even then, placed last among the winning candidates when there was white opposition. As noted earlier, it is questionable whether this minority candidate, the incumbent African-American trustee, could continue under the proposed system to be elected to the school board because she would have to place first in contests in which there was white opposition.

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

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

A change from single member district elections in Haskell, Knox and Throckmorton Counties. After minority organizations were successful in forcing a School district into single member districts, it turns around and attempts to restore at large elections.

September 24, 2001

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

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

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

Our analysis of the district's electoral history indicates that under the current method of election, which utilizes seven single-member districts, Hispanic voters have been able to elect candidates of their choice to office in at least one district. We note that this election method resulted from the settlement of federal litigation claiming that the previous method, an at-large system with staggered terms, violated Section 2 of the Voting Rights Act. ***League of United Latin American Citizens, District 5 LULAC v. Haskell Consolidated Independent School Districts***, No. 193-CV-0178(C) (N.D. Tex. Oct. 21, 1994). The school district implemented the single-member district system, which contained one district with a Hispanic population majority, in 1995.

Under a cumulative voting system, voters are allocated a number of votes equal to the number of offices that are being contested at that particular election and can assign all of their votes to one candidate. Thus, a candidate supported by voters who are a minority of the electorate can win with support from fewer voters than in a traditional at-large election. A statistical measure, known as the "threshold of exclusion," can determine the lowest percentage of support from a single group that ensures their candidate will win no matter what other voters do. This level of support is 33 percent in a two-seat race and 25

percent in a three-seat race. Thus, for Hispanic voters to elect a candidate of their choice in a three-seat contest, they must either constitute 25 percent of the electorate or be able to count on enough non-Hispanic votes to reach that threshold. The school district has conceded that it will be virtually impossible for minority voters to elect at least one candidate of their choice under the board's proposed method of election without non-Hispanic cross-over voting. Accordingly, we have examined the ability of candidates supported by the Hispanic community to attract non-Hispanic votes in past elections.

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

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

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

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

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

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

The City of Freeport, located on the Texas Gulf Coast also attempts to go back to at-large elections. Another attempt to frustrate successful Federal Court Action by minority voters. They just keep on keeping on.

August 12, 2002

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

Dear Mr. Shaw:

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

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

As to the change to at-large elections with numbered positions, we have carefully considered the information you have provided, as well as census data, comments and information from other interested parties, and other information, including the city's

previous submission of the adoption of the current districting system for the election of council members. Based on our analysis of the information you have provided, on behalf of the Attorney General, I am compelled to object to the submitted change in the method of election.

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

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

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

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

The 2001 Redistricting of the Texas House of Representatives has the effect of making it more difficult for Racial and Ethnic minorities to elect the representatives of their choice just as the State's redistricting plans in 1991, 1981, 1971 and 1961 have done. To coin a phrase: "Foolish consistency remains the hobgoblem of racially polarized minds."

The significance of this is not to be ignored. The growth in Texas from 1990 through 2000 was largely Hispanic. Yet the new districting plan would not have produced more districts in which minority voters could elect the candidates of their choice but have reduced those districts by three (3).

Disappearing minority elected officials in a trick of redistricting magic--Houdini could have not done better. Except this is not illusion, it is racial gerrymandering as it has historically been played in Texas.

November 16, 2001

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

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

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

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

Under the Voting Rights Act, a jurisdiction seeking to implement a proposed change affecting voting, such as a redistricting plan, must establish that, in comparison with the status quo, the change does not "lead to a retrogression" in the position of minority voters with respect to the "effective exercise of the electoral franchise." See Beer v. United States, 425 U.S. 130, 141 (1976). In addition, the jurisdiction must establish that the change was not adopted with an intent to retrogress. Reno v. Bossier Parish School Board, 528 U.S. 320, 340 (2000). Finally, the submitting authority has the burden of demonstrating that the proposed change has neither the prohibited purpose nor effect. Id. at 328; see also Procedures for the Administration of Section 5 (28 C.F.R. 51.52).

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

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

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

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

Our examination of the State's plan indicates that it will lead to a prohibited retrogression in the position of minorities with respect to their effective exercise of the electoral franchise by causing a net loss of three districts in which the minority community would have had the opportunity to elect its candidate of choice. Although there is an increase in the number of districts in which Hispanics are a majority of the voting age population, the

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

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

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

When the State is considered as a whole, however, this argument is ultimately unpersuasive. While District 80 indeed adds an additional district in which Hispanic voters in South Texas will have the opportunity to elect a candidate of their choice, in two other districts, as discussed below, they lose this opportunity, resulting in the net loss for Hispanic voters of one district in South Texas. In South Texas Hispanic voters will lose the opportunity to elect their candidate of choice in District 35. The new district is created from existing Districts 31 and 44 and pairs an nonminority and a Hispanic incumbent. The Hispanic incumbent currently represents a district which has a Spanish surname registration level of 55.6 percent; that level drops to 50.2 percent in the proposed plan while the Hispanic voting age population decreases from 57.8 to 52.1 percent. Over half (58%) of the new district's configuration is from the nonminority incumbent's former district. Our analysis indicates that District 35 as drawn will preclude Hispanic voters from electing their candidates of choice. In addition, in Cameron County District 38 reverts to a configuration that previously precluded Hispanic residents from electing a candidate of their choice. The Spanish surnamed registration level is reduced from 70.8

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

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

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

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

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

51.44. In addition, you may request that the Attorney General reconsider the objection. See 28 C.F.R. 51.45. However, until the objection is withdrawn or a judgment from the District of Columbia Court is obtained, the redistricting plan continues to be legally unenforceable. Clark v. Roemer, 500 U.S. 646 (1991); 28 C.F.R. 51.10.

Waller County is at once a white flight area from heavily minority Houston but also the location of Prairie View A & M one of the traditionally African American land grant colleges. This is the latest of a more than 40 year history of limiting African Americans going to school there from interfering with local politics by voting. At first, the county attempted to just prohibit the Black students from voting at all. After several different federal and appellate courts found that such actions violated Section 2 and the 14th Amendment, the County now tries to accomplish the same thing through racial gerrymandering.

The significance of this case is that if you look at the legislative history which led to extension of the special provisions of the Voting Rights Act to include Texas you find this Waller County discrimination to be one of the things Congress was concerned about. Things do not change in Texas racial politics. Cf:

[***Wilson v. Symm***, 341 F. Supp. 8 (D. Tex., 1972) (the statutory presumption of student non-residency contained in Article 5.08(k) of the Texas Election Code is constitutional.); ***Ballas v. Symm***, 351 F. Supp. 876 (D. Tex., 1972); ***United States v. Texas***, 430 F. Supp. 920 (D. Tex., 1977); ***Ballas v. Symm***, 494 F.2d 1167 (5th Cir.-OLD, 1974)[4]/ (the

---

[4]/ The strength of the feeling about the Waller County attempt to make it difficult for Black residents of Prarie View to register and vote can be seen in the efforts on the parts of the State of Texas to make this embarassing issue go away. Secretary of State Bullock (who in 1971 was the obnly state official supporting the expansion of the Voting Rights Act to cover Texas had attempted to allow Blacks to vote by issuing a directive from his position as Chief Election Officer of the state. This attempt to correct a problem was voided by Federal Judge Noel which was actually permitted to stand by the Fifth Circuit ***Ballas v. Symm***, 494 F.2d 1167 (5th Cir.-OLD, 1974). By 1978, the Federal Voting Rights Act was extended to Texas and things began to change in Waller County:

> The trial court's opinion in ***Ballas v. Symm***, 351 F. Supp. 876, at 877, discusses the fact that on October 2, 1972, the United States District Court for the Eastern District of Texas (Judge Wayne Justice) decided ***Whatley***, holding at the trial court level that the statutory presumption contained in Article 5.08(k) was unconstitutional. The opinion also discusses the fact that on October 3, 1972, the Chief Election Officer of the State of Texas, Secretary of State, Robert Bullock, issued a bulletin to all voting registrars, advising that:
>
> > "No county registrar may require any affidavits or questionnaire in addition to the information required on the application for a voter registration certificate."

statutory presumption of student non-residency contained in Article 5.08(k) of the Texas Election Code is constitutional); ***Whatley v. Clark***, 482 F.2d 1230 (5th Cir. 1973), cert. denied (1974) (the statutory presumption of student non-residency contained in Article 5.08(k) of the Texas Election Code is unconstitutional.);[5] ***Vera v. Richards***, 861 F. Supp.

> The trial court in **Ballas** held that this bulletin and Bullock's acceptance of Judge Justice's decision in Whatley was:
>
> > "Utterly lacking in candor or credibility; legally incorrect; misleading; in excess of his statutory authority, and irrelevant."
>
> 351 F. Supp. at 888.
>
> Subsequent to Judge Noel's decision in Ballas in November of 1972, the Fifth Circuit decided Whatley in August of 1973, holding that Bullock's legal position, as stated in his memorandum, and Judge Justice's trial decision in Whatley were in fact legally correct and that Article 5.08(k) was unconstitutional.

United States v. Texas, 445 F. Supp. 1245, 1246 (D. Tex., 1978)

[5]/ The claims of the United States are asserted against Symm, the County Commissioners of Waller County, the State of Texas, Mark White, Secretary of State of the State of Texas, and John Hill, Attorney General of the State of Texas.

Hill and White answer by alleging that they have done everything within their power to guarantee the dormitory students of Prairie View their rights under the 14th, 15th and 26th Amendments and also assert that the use of the Symm questionnaire has had the practical effect of discouraging applicants for registration from completing the registration process. John Hill also asserts a cross-claim against Leroy Symm, stating that on September 1, 1977, the Secretary of State adopted Emergency Rule 004.30.05.313 prohibiting the use of questionnaires of the type employed by Symm. John Hill asserts that under the Texas Election Code, the Secretary of State had authority to issue this Emergency Rule, and prays [**10] that this court enjoin Symm from continuing to use the questionnaire contrary to the directions of the Emergency Rule adopted by the Secretary of State.

In answer to the cross claims asserted by White and Hill, Symm has filed a cross-claim against White asserting that White's Emergency Rule 004.30.05.313 is contrary to the laws of the State of Texas and in excess of the legal authority of the Secretary of State, and requesting this court to enter a Declaratory Judgment finding that White had no authority to issue (1) Emergency Rule 004.30.05.313 and (2) a letter of September 1, 1977 to Mr. Symm prohibiting Symm from continuing to use any voter registration procedure which required an applicant to provide any written information not required by Article 5.13b, subdivision 1, of the Texas Election Code. ***United States v. Texas***, 445 F. Supp. 1245, 1248 (D. Tex., 1978)

1304, 1327 (D. Tex., 1994) ("Waller County was split into.... District 14 [which] contained 56.9% African-American and Hispanic population [while] the part of the county allocated to District 8 contained only 8.6% African-American and Hispanic population.") ; ***United States v. Texas***, 445 F. Supp. 1245 (D. Tex., 1978)]

June 21, 2002

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

Dear Ms. Pierce:

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

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

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

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

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

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

Our review of the county's benchmark and proposed plans as well as the alternative plans presented to the county, suggests that the significant reduction in minority voting age population percentage in Precinct 1 in the proposed plan, and the likely resulting retrogressive effect on the ability of minority voters to elect candidates of choice, was neither inevitable nor required by any constitutional or legal imperative. Illustrative plans demonstrate that it is possible to avoid any retrogression in Precinct 1, maintain the minority voting strength in Precinct 3, and meet the county's redistricting criteria. Accordingly, we are not persuaded by the county's contention that a reduction in minority voting strength in Precinct 1 was necessary to preserve the minority voting strength in Precinct 3 if one is to honor the redistricting criteria used by the county.

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

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

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

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

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

IV. The Following cases are directly related to Section 5 preclearance.

***Texas v. United States*. There are lots of these cases and until 1970 or so they related to prisons or school desegregation. Since 1970 they relate to minority vote dilution. This case involved efforts by the Texas Education Agency to take power away from school boards which had become dominated by minority trustees.**

On March 31, 1998, the Supreme Court unanimously held that a Section 5 declaratory judgment action filed by the State of Texas in the United States District Court for the District of Columbia was not ripe for litigation. The case concerned whether the appointment of certain officials could replace elected school boards and require Section 5 preclearance. Texas v. United States, 523 U.S. 296 (1998).

On June 27, 1997, the Supreme Court decided in a per curiam decision that changes in the manner of selecting election judges in Dallas County, Texas could be covered changes under Section 5. Foreman v. Dallas County, Texas, 521 U.S. 979 (1997).

SUMMARY: On November 1, 1972, Texas became a covered jurisdiction for purposes of 5 of Voting Rights Act of 1965 (42 USCS 1973c). In 1983 and several times thereafter, a Texas county changed procedures for selecting election judges, who were responsible for supervising voting at the polls on election days. Each of the new methods used party-affiliation formulas of one sort or another. After such a change in 1996, various parties brought suit in the United States District Court for the Northern District of Texas against the county and others, in which suit it was claimed that 5 required the changes to be precleared by the United States Department of Justice. A three-judge panel of the District Court (1) concluded that (a) preclearance was not required, as the county had simply exercised its discretion, under a state statute, to adjust the procedure for appointing election judges according to party power, and (b) the Department's preclearance of a 1985 submission from the state--the recodification of the entire Texas election code--operated to preclear the county's use of partisan considerations in selecting election judges; (2) entered an interlocutory judgment denying injunctive relief; and (3) dismissed the complaint.

On direct appeal, the United States Supreme Court (1) vacated the District Court's judgment which had dismissed the complaint, (2) dismissed the appeal from the District Court's interlocutory judgment, and (3) remanded the case for further proceedings. In a per curiam opinion expressing the unanimous view of the court, it was held that (1) the fact that the county had exercised its discretion, pursuant to state statute, to adjust the procedure for appointing election judges according to party power did not mean that the methods at issue were exempt from 5 preclearance; (2) the preclearance of Texas' 1985 submission did not operate to preclear the county's use of partisan considerations in selecting election judges, as the submission had been insufficient to put the Department on notice that the state was seeking preclearance of the use of specific, partisan-affiliation methods for selecting such judges; and (3) remand was necessary, because (a) the record was silent as to the procedure used by the county for appointing election judges as of November 1, 1972, and (b) thus, the Supreme Court could make no final determination as to whether preclearance was in fact required.

This case is an effort in Dallas County to discourage minority voting by changing the election officials. In Texas parlance– there is more than one way to skin a cat.

Foreman v. Dallas County, 521 U.S. 979 (U.S., 1997)

PER CURIAM.

Texas by statute authorizes counties to appoint election judges, one for each precinct, who supervise voting at the polls on election days. In 1983 and several times thereafter, Dallas County changed its procedures for selecting these officials. Each of the new methods used party-affiliation formulas of one sort or another. After the most recent change in 1996, appellants sued the County and others in the United States District Court, claiming that § 5 of the Voting Rights Act 79 Stat. 439, as amended, 42 U.S.C. § 1973c, required that the changes be precleared.

A three-judge court held that preclearance was not required because the County was simply exercising, under the state statute, its "discretion to adjust [the procedure for appointing election judges] according to party power." App. to Juris. Statement 4a. The court apparently concluded that this "discretionary" use of political power meant that the various methods for selecting election judges were not covered changes under § 5. The court also concluded that the Justice Department's preclearance of a 1985 submission from the State--the recodification of its entire election code--operated to preclear the County's use of partisan considerations in selecting election judges. The court denied injunctive relief, and later dismissed appellant's complaint pursuant to Fed. Rule Civ. Proc. 12(b)(6). Appellants have brought both of these rulings here.

We believe that the decision of the District Court is inconsistent with our precedents. First, in ***NAACP v. Hampton County Election Comm'n***, 470 U.S. 166, 178 (1985), we held that even "an administrative effort to comply with a statute that had already received preclearance" may require separate preclearance, because § 5 "reaches informal as well as formal changes." Thus, the fact that the County here was exercising its "discretion" pursuant to a state statute does not shield its actions from § 5. The question is simply whether the County, by its actions, whether taken pursuant to a statute [*981] or not, "enacted or [sought] to administer any . . . standard, practice, or procedure with respect to voting different from" the one in place on November 1, 1972. § 5. The fact that the County's new procedures used political party affiliation as the selection criteria does not mean that the methods were exempt from preclearance.

Second, the State's 1985 submission (the recodification and a 30-page summary of changes to the old law) indicated that the only change being made to the statute concerning election judges was a change to "the beginning date and duration of [their] appointment." Thus, neither the recodified statute nor the State's explanations said anything about the use of specific, partisan-affiliation methods for selecting election judges. This submission was clearly insufficient under our precedents to put the Justice Department on notice that the State was seeking preclearance of the use of partisan affiliations in selecting election judges. See, e.g., Young v. Fordice, 520 U.S. , (1997) (slip op., at 13-14); ***Lopez v. Monterey Cty.***, 519 U.S. , (1996) (slip op., at 5); ***Clark v. Roemer***, 500 U.S. 646, 658-659 (1991).

Because the parties agree that the record is silent as to the procedure used by Dallas County for appointing election judges as of November 1, 1972, the date on which Texas became a covered jurisdiction under the Voting Rights Act, we cannot make a final determination here as to whether preclearance is in fact required. We therefore vacate the

judgment of the District Court in No. 96-1389, dismiss the appeal from the District Court's interlocutory judgment in No. 96-987, see ***Shaffer v. Carter***, 252 U.S. 37, 44 (1920), and remand for further proceedings.

It is so ordered.

This case is significant because Texas is arguing for an interpretation of Section 5 which would have effectively cut it off at the knees. As late as 1998, Texas is still fighting against the Voting Rights Act instead of trying to comply with it

Tex. v. United States, 523 U.S. 296 (U.S., 1998) [6]

SYLLABUS: In 1995, the Texas Legislature enacted a comprehensive scheme (Chapter 39) that holds local school boards accountable to the State for student achievement in the public schools. When a school district falls short of Chapter 39's accreditation criteria, the State Commissioner of Education may select from 10 possible sanctions, including appointment of a master to oversee the district's operations, Tex. Educ. Code Ann. § 39.131(a)(7), or appointment of a management team to direct operations in areas of unacceptable performance or to require contracting out of services, § 39.131(a)(8). Texas, a covered jurisdiction under § 5 of the Voting Rights Act of 1965, submitted Chapter 39 to the United States Attorney General for a determination whether any of the sanctions affected voting and thus required preclearance. While the Assistant Attorney General for Civil Rights did not object to §§ 39.131(a)(7) and (8), he cautioned that under certain circumstances their implementation might result in a § 5 violation. Texas subsequently filed a complaint in the District Court, seeking a declaration that § 5 does not apply to the §§ 39.131(a)(7) and (8) sanctions. The court did not reach the merits of the case because it concluded that Texas's claim was not ripe.

Held: Texas's claim is not ripe for adjudication. A claim resting upon "'contingent future events that may not occur as anticipated, or indeed may not occur at all,'" is not fit for adjudication. ***Thomas v. Union Carbide Agricultural Products Co.***, 473 U.S. 568, 581, 87 L. Ed. 2d 409, 105 S. Ct. 3325. Whether the problem Texas presents will ever need solving is too speculative. Texas will appoint a master or management team only after a school district falls below state standards and the Commissioner has tried other, less intrusive sanctions. Texas has not pointed to any school district in which the application of § 39.131(a)(7) or (8) is currently foreseen or even likely. Even if there were greater certainty regarding implementation, the claim would not be ripe because the legal issues Texas raises are not yet fit for judicial decision and because the hardship to Texas of withholding court consideration until the State chooses to implement one of the sanctions is insubstantial. See ***Abbott Laboratories v. Gardner***, 387 U.S. 136, 149. Pp. 4-6, 18 L. Ed. 2d 681, 87 S. Ct. 1507.

[6]/ This is federal litigation involved with the attempt by the Texas Education Agency to wrest political control of school districts from minority elected officials.

Affirmed.

Appellant, the State of Texas, appeals from the judgment of a three-judge district court for the District of Columbia. The State had sought a declaratory judgment that the preclearance provisions of § 5 of the Voting Rights Act of 1965, 79 Stat. 439, as amended, 42 U.S.C. § 1973c, do not apply to implementation of certain sections of the Texas Education Code that permit the State to sanction local school districts for failure to meet state-mandated educational achievement levels. This appeal presents the question whether the controversy is ripe.

I

In Texas, both the state government and local school districts are responsible for the public schools. There are more than 1,000 school districts, each run by an elected school board. In 1995, the Texas Legislature enacted a comprehensive scheme (Chapter 39) that holds local school boards accountable to the State for student achievement. Tex. Educ. Code Ann. §§ 39.021-39.131 (1996). Chapter 39 contains detailed prescriptions for assessment of student academic skills, development of academic performance indicators, determination of accreditation status for school districts, and imposition of accreditation sanctions. It seeks to measure the academic performance of Texas schoolchildren, to reward the schools and school districts that achieve the legislative goals, and to sanction those that fall short.

When a district fails to satisfy the State's accreditation criteria, the State Commissioner of Education may select from 10 possible sanctions that are listed in ascending order of severity. §§ 39.131(a)(1)-(10). Those include, "to the extent the Commissioner determines necessary," § 39.131(a), appointing a master to oversee the district's operations, § 39.131(a)(7), or appointing a management team to direct the district's operations in areas of unacceptable performance or to require the district to contract for services from another person, § 39.131(a)(8). When the Commissioner appoints masters or management teams, he "shall clearly define their powers and duties" and shall review the need for them every 90 days. § 39.131(e). A master or management team may approve or disapprove any action taken by a school principal, the district superintendent, or the district's board of trustees, and may also direct them to act. §§ 39.131(e)(1), (2). State law prohibits masters or management teams from taking any action concerning a district election, changing the number of members on or the method of selecting the board of trustees, setting a tax rate for the district, or adopting a budget which establishes a different level of spending for the district from that set by the board. §§ 39.131(e)(3)-(6).

Texas is a covered jurisdiction under § 5 of the Voting Rights Act of 1965, see 28 CFR pt. 51, App. (1997), and consequently, before it can implement changes affecting voting

[*299] it must obtain preclearance from the United States District Court for the District of Columbia or from the Attorney General of the United States. 42 U.S.C. § 1973c. Texas submitted Chapter 39 to the Attorney General for administrative preclearance. The Assistant Attorney General * requested further information, including the criteria used to select special masters and management teams, a detailed description of their powers and duties, and the difference between their duties and those of the elected boards. The State responded by pointing out the limits placed on masters and management teams in § 39.131(e), and by noting that the actual authority granted "is set by the Commissioner at the time of appointment depending on the needs of the district." App. to Juris. Statement 99a. After receiving this information, the Assistant Attorney General concluded that the first six sanctions do not affect voting and therefore do not require preclearance. He did not object to §§ 39.131(a)(7) and (8), insofar as the provisions are "enabling in nature," but he cautioned that "under certain foreseeable circumstances their implementation may result in a violation of Section 5" which would require preclearance. Id., at 36a.

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -
* The authority for determinations under § 5 has been delegated to the Assistant Attorney General for the Civil Rights Division. 28 CFR 51.3 (1997).
- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

On June 7, 1996, Texas filed a complaint in the United States District Court for the District of Columbia, seeking a declaration that § 5 does not apply to the sanctions authorized by §§ 39.131(a)(7) and (8), because (1) they are not changes with respect to voting, and (2) they are consistent with conditions attached to grants of federal financial assistance that authorize and require the imposition of sanctions to insure accountability of local education authorities. The District Court did not reach the merits of these arguments because it concluded that Texas's claim was not ripe. We noted probable jurisdiction. 521 U.S. (1997). [*300]

II

(2)HN2A claim is not ripe for adjudication if it rests upon "'contingent future events that may not occur as anticipated, or indeed may not occur at all.'" ***Thomas v. Union Carbide Agricultural Products Co.***, 473 U.S. 568, 581, 87 L. Ed. 2d 409, 105 S. Ct. 3325 (1985) (quoting 13A C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 3532, p. 112 (1984)). Whether Texas will appoint a master or management team under §§ 39.131(a)(7) and (8) is contingent on a number of factors. First, a school district must fall below the state standards. Then, pursuant to state policy, the Commissioner must try first "the imposition of sanctions which do not include the appointment of a master or management [**1260] team," App. 10 (Original Complaint P12). He may, for example, "order the preparation of a student achievement improvement plan . . . , submission of the plan to the Commissioner for approval, and implementation of the plan," § 39.131(a)(3), or "appoint an agency monitor to participate in and report to the agency on the activities of the board of trustees or the superintendent," § 39.131(a)(6). It is only if these less intrusive options fail that a Commissioner may appoint a master or management team, Tr. of Oral Arg. 16, and even then, only "to the extent the Commissioner determines

necessary," § 39.131(a). Texas has not pointed to any particular school district in which the application of §§ 39.131(a)(7) or (8) is currently foreseen or even likely. Indeed, Texas hopes that there will be no need to appoint a master or management team for any district. Tr. of Oral Arg. 16-17. Under these circumstances, where "we have no idea whether or when such [a sanction] will be ordered," the issue is not fit for adjudication. Toilet Goods Assn., Inc. v. Gardner, 387 U.S. 158, 163, 18 L. Ed. 2d 697, 87 S. Ct. 1520 (1967); see also ***Renne v. Geary***, 501 U.S. 312, 321-322, 115 L. Ed. 2d 288, 111 S. Ct. 2331 (1991).

Even if there were greater certainty regarding ultimate implementation of paragraphs (a)(7) and (a)(8) of the statute, we do not think Texas's claim would be ripe. Ripeness "requires [*301] us to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." ***Abbott Laboratories v. Gardner***, 387 U.S. 136, 149, 18 L. Ed. 2d 681, 87 S. Ct. 1507 (1967). As to fitness of the issues: Texas asks us to hold that under no circumstances can the imposition of these sanctions constitute a change affecting voting. We do not have sufficient confidence in our powers of imagination to affirm such a negative. The operation of the statute is better grasped when viewed in light of a particular application. Here, as is often true, "determination of the scope . . . of legislation in advance of its immediate adverse effect in the context of a concrete case involves too remote and abstract an inquiry for the proper exercise of the judicial function." ***Longshoremen v. Boyd***, 347 U.S. 222, 224, 98 L. Ed. 650, 74 S. Ct. 447 (1954). In the present case, the remoteness and abstraction are increased by the fact that Chapter 39 has yet to be interpreted by the Texas courts. Thus, "postponing consideration of the questions presented, until a more concrete controversy arises, also has the advantage of permitting the state courts further opportunity to construe" the provisions. ***Renne***, 501 U.S. at 323.

And as for hardship to the parties: This is not a case like ***Abbott Laboratories v. Gardner***, 387 U.S. 136, 152, 18 L. Ed. 2d 681, 87 S. Ct. 1507 (1967), where the regulation at issue had a "direct effect on the day-to-day business" of the plaintiffs, because they were compelled to affix required labelling to their products under threat of criminal sanction. Texas is not required to engage in, or to refrain from, any conduct, unless and until it chooses to implement one of the noncleared remedies. To be sure, if that contingency should arise compliance with the preclearance procedure could delay much needed action. (Prior to this litigation, Texas sought preclearance for the appointment of a master in a Dallas County school district, and despite a request for expedition the Attorney General took 90 days to give approval. See Brief for Petitioner 37, n. 28.) But even that inconvenience is avoidable. If Texas is confident that [*302] the imposition of a master or management team does not constitute a change affecting voting, it should simply go ahead with the appointment. Should the Attorney General or a private individual bring suit (and if the matter is as clear, even at this distance, as Texas thinks it is), we have no reason to doubt that a district court will deny a preliminary injunction. See ***Presley v. Etowah County Comm'n***, 502 U.S. 491, 506, 117 L. Ed. 2d 51, 112 S. Ct. 820 (1992); ***City of Lockhart v. United States***, 460 U.S. 125, 129, n. 3, 74 L. Ed. 2d 863, 103 S. Ct. 998 (1983). Texas claims that it suffers the immediate hardship of a "threat to federalism." But that is an abstraction -- and an abstraction no graver than the

"threat to personal freedom" that exists whenever an agency regulation is promulgated, which we hold inadequate to support suit unless the person's primary conduct is affected. Cf. ***Toilet Goods Assn.***, 387 U.S. at 164.

In sum, we find it too speculative whether the problem Texas presents will ever need solving; we find the legal issues Texas raises not yet fit for our consideration, and the hardship to Texas of biding its time insubstantial. Accordingly, we agree with the District Court that this matter is not ripe for adjudication.

The judgment of the District Court is affirmed.

V. Continued Need for Section 5

Although there has been significant improvement in the ability of Latinos to participate in the political process since the passage of the Voting Rights Act, LULAC believes that Section 5 and the other remedial provisions of the VRA are still needed today to insure that gains made are not eroded by future enactments and practices. As the discussion above shows Texas and its local jurisdictions continue to enact election provisions that aim to shove minorities back. Moreover, the Texas 2000 Redistricting Plan for the Texas House of Representatives failed to secure Section 5 approval because it reduced the number of districts that would allow Latinos to elect candidates by at least four districts.

Finally, a number of changes should be considered to strengthen the Voting Rights Act. For instance, vote dilution challenges under Section two are dependent on expert analysis. Yet, successful plaintiffs cannot recover the costs of expert witnesses under the current fee shifting provisions of the Act. This should be amended to allow recovery for successful plaintiffs in Voting Rights Act challenges. Moreover, recent Supreme Court cases have pulled back the scope of Section 5 coverage so that election practices that were adopted with a discriminatory purpose can only be challenged under Section 5 if it can be shown that the adopted voting change leads to a retrogression in the position of minority voters. Thus, if a jurisdiction has maintained a discriminatory election system and purposefully modifies that system to maintain its discriminatory features it cannot be challenged as violative of Section 5. Section 5 should be amended to allow review of the motive behind a voting procedures enactment.

Mr. CHABOT. Thank you very much, Mr. Garza.
Mr. Derfner, you are recognized for 5 minutes.

TESTIMONY OF ARMAND DERFNER, VOTING RIGHTS ATTORNEY, DERFNER, ALTMAN & WILBORN

Mr. DERFNER. Thank you very much, Mr. Chairman. It's an honor and a privilege to appear here again, to try to help this Committee in its crucially important work. And I thank the Committee and the Members for their dedication to this task.

My experience, or my work with the Voting Rights Act does go back, as the Chairman was kind enough to note. I'll be talking here today about what I've learned in that period; but especially about what I've learned in the most recent times. Because even today, 40 years later, in the 21st century, I'm still dedicated to the same tasks that the Committee is focusing on.

And I should mention that, although I live in South Carolina and most of my work today is in South Carolina, I also work, and have worked, in many of the other covered jurisdictions; have been involved in cases in Mississippi, Alabama, Louisiana, Virginia, Georgia, Florida, and several of the other States.

What that experience has told me is how important the Voting Rights Act—the Voting Rights Act has been called the most successful civil rights act ever passed, and that's clearly true. It's true for several reasons.

Not only did it end disfranchisement and total denial of the right to vote in the South, and eventually in the Southwest and other areas; but it also has shown a remarkable capacity to grow, to anticipate additional problems, new problems that came up. And that has been principally through the mechanism of section 4.

In the Voting Rights Act, Congress essentially said, "We know there are problems out there. We are going to deal now with the problems that we can identify. But we are going to pass a statute focusing on section 4 that will be capable of adapting to new problems, because we know that when we eliminate the problems of today, new problems will crop up."

And so, in that respect, section 4 has been the mechanism for keeping the voting rights alive, vibrant, and dynamic; and through it, some of the other key provisions: section 5, the preclearance provision; sections 6, 7, and 8, dealing with Federal examiners and observers; and indirectly, section 203, dealing with the rights of language minority voters to assistance in casting their votes.

Because these provisions are temporary, it has been necessary for Congress to reconvene periodically to consider reauthorization, as you are doing today. That's a very healthy thing, frankly, for a body politic to do, to take a look and see if the laws of yesterday are still needed today.

What this Congress has learned and this Committee has learned each time in the past is that, yes, in fact, although there's been major progress, the problems also continue; and therefore, each time, Congress has said, "Don't stop now." And indeed, Congress has said on each of the prior occasions that it could see new problems, or new nuances. And so each time the law has not only been reauthorized, but has been brought up to date by amendments or modifications to deal with newly emerging problems.

I think you will find that the same thing is true today. And without going into detail, I would just refer the Committee to my statement in which I talk about some of the things that I have been involved in personally, just in my own little corner of the Nation, in South Carolina. And this is just in the past decade or two; so we are not talking about the distant past.

And if you'll take a look, what I talk about are instances of manipulating municipal boundaries to fence some citizens out—basically, minority citizens; moving a registration office to a less convenient location; campaigns by private citizens to intimidate Black voters. The list goes on and on. And the things that we used to see all the time, we still, unfortunately, see.

Some of these are purposeful, without question; some of them may not be. But the bottom line is still the same, that it's the minority voters who get hurt, and our body politic is injured.

I want to focus just on two particular things that I think tell more than anything else what the problems are today, and how telling they are. And so the first one, if you have a chance, if you have my statement, attached to my statement is an ad that ran in an election about a dozen years ago, between a White and Black candidate for probate judge of Charleston County.

And you can see, it was the White candidate's ad. And what he printed was a picture of himself and a picture of his Black opponent, making it very clear to every voter there—especially every White voter—just who was White and who was Black. And as campaigners yourself, you know you never publish your opponent's picture or give him or her publicity, unless you want to publish it to show something bad. And this White candidate knew that in our community racial discrimination sells, and the way to win elections is to divide the races.

The other indication is another exhibit that I brought. And this is a very recent case that just ended earlier this year, the case of *United States v. Charleston County,* in which the Justice Department and myself and other lawyers representing private litigants fought a 4-year battle to overturn the discriminatory election method in Charleston County.

We won, and as soon as we won, that case—the legislature adopted the exact same method for the school board. And if it had not been for the Justice Department's objection under the Voting Rights Act, if it had not been for the Voting Rights Act, we'd be back in court again. A clear indication of the value and importance of the act.

In conclusion—and again, I say there are many more examples in my statement—you will, in these hearings, as the days go forward, hear many tales of progress. And that's a wonderful thing. But you'll also hear continuing problems. And what we'll hear is that—and I know this—that the Voting Rights Act and section 4 and the special provisions that it brings have been vital to that progress.

Continuation of the act is vital to continuation of the progress. And so my message to you today is: Don't stop now. Thank you very much.

[The prepared statement of Mr. Derfner follows:]

PREPARED STATEMENT OF ARMAND DERFNER

Mr. Chairman and members of the subcommittee, thank you for the opportunity to appear and testify concerning the critically important legislation before you. I have had the privilege of testifying before this subcommittee many times about the Voting Rights Act, going back to my first time more than 30 years ago. I have always known that the right to vote will be vigorously protected by this subcommittee, and I note that the current Chair of the full Committee, Rep. Sensenbrenner, was a strong champion of the Voting Rights Act at the time of the last extension in 1982.

The Voting Rights Act was passed on August 6, 1965, against a background of ninety years of failure to enforce the Fifteenth Amendment. The original heart of the Voting Rights Act was Section 4, which suspended literacy and understanding tests, and similar devices, in certain "covered jurisdictions," mostly in the Deep South.

The suspension of the tests was for five years. During the five years, other remedies were in play, all based on the coverage formula, or "trigger" contained in Section 4 of the Act, which was codified at 42 U.S.C. § 1973b. The most important of which was Section 5, the preclearance provision. In 1965, Congress knew that in the past, whenever one type of discrimination had been blocked another had sprung up to take its place, sometimes within twenty-four hours. Section 5 was Congress's answer to this problem. Section 5 simply provided that in a covered jurisdiction, no change in any voting law or procedure could be enforced until the change had been precleared by the jurisdiction through either a three-judge U.S. District Court in the District of Columbia or the Attorney General. In order to gain preclearance, the covered jurisdiction would have to show that its proposed change was not discriminatory in purpose and not discriminatory in effect. Section 5 was deliberately drawn as broadly as possible, to cover changes that could affect voting even in a minor way, because although Congress was confident that there would be widespread attempts to evade the Voting Rights Act, it could not predict exactly what forms those evasions would take

In addition to the preclearance remedy of Section 5, Section 4 coverage also triggered oversight of the local registration and election process by authorizing the United States Department of Justice to send federal registration examiners and election observers to the covered jurisdiction.

There were several provisions of the new Voting Rights Act that were not limited to covered jurisdictions; the one that came to be most important was Section 2, which generally barred discrimination in voting on account of race.

The initial focus of efforts under the Act was on registration and voting, through suspension of literacy tests. By 1970, as the initial five-year special coverage period was winding up, the literacy test suspension had resulted in registration of an estimated one million new black voters in the covered states.

On the other hand, as black citizens overcame barriers to registering and casting ballots, new barriers were being erected to insure that, while blacks might vote, their favored candidates couldn't win. Congress's faith in the ingenuity of those who had been relying on discriminatory literacy tests was being quickly rewarded. A 1968 report of the Civil Rights Commission perceptively reported a sharp growth in vote dilution techniques as new methods of voting discrimination. The report specifically singled out redistricting measures, shifts to at-large elections, and changes in local government boundaries.

The other temporary remedies went through similar evolutions. Thus, the need for federal examiners under Sections 6 and 7 declined as registration barriers largely disappeared, but the need for federal election observers under Section 8 increased as the focus of efforts shifted from registration office difficulties to Election Day problems.

Rejecting the argument that Section 5 should be limited to measures directly affecting the right to register and to cast a ballot, the Supreme Court in 1969 held that the broad reach of Section 5 covered these changes in "systems of representation" because, as the reapportionment cases recognized, "the right to vote can be affected by a dilution of voting power as well as by an absolute prohibition on casting a ballot."

The trends perceived by the Civil Rights Commission in 1968 were the beginning of an epidemic of dilution methods in the covered jurisdictions. In fact, of the 1300+ changes to which the Attorney General has objected to date, the vast majority have involved changes in representational systems, or, to put it in plainer terms, gerrymanders and related tactics: redistricting; changes to at-large or multimember districts; annexations superimposed upon at-large election systems; majority-runoff requirements; and anti-single-shot methods such as full-slate laws and numbered places. Since an objection is the equivalent of a court injunction, the large number

of objections shows how central the role of preclearance is in guarding the right to vote.

Furthermore, well over half of the objections have come since the last reauthorization of the Act in 1982, which makes it plain that the problem has not receded, and the need for preclearance continues today.

The story of the Voting Rights Act did not end in 1965; it was just beginning. Because of its effectiveness in checking the growth of vote dilution and the demonstrated need to continue its protections, Congress extended Section 5 for five years in 1970, and for seven more years in 1975. Both of the extensions in 1970 and 1975 were marked by vigorous debate in Congress and by extensive hearings and reports documenting the continuing abuses that justified the continued need for the preclearance remedy. Increasingly, these abuses fell in the area of vote dilution; and the 1975 hearings, reports, and floor debates are especially filled with account after account of gerrymandering, discriminatory at-large elections, improper municipal annexations, and similar methods that too often proved effective in keeping the newly registered black voters from exercising their votes effectively. The administrative record under Section 5 demonstrated, though, that effective weapons against dilution could be developed.

The actual mechanism of the extension was by amending and expanding Section 4's coverage trigger, which had the effect of continuing Section 5 (and Sections 6–8), and expanding their reach to include new jurisdictions under an expanded coverage formula.

The 1975 amendments also added a new dimension to the Voting Rights Act, in the form of provisions designed to protect certain language-minority voters (American Indian, Asian American, Alaskan Native, and Spanish-heritage) from discrimination. The key new provision, which is temporary, required bilingual assistance in some areas where language-minority voters are highly concentrated. In addition, a clause was added to Section 2—the general ban on voting discrimination—prohibiting voting discrimination on account of language-minority as well as on account of race.

In 1982, the temporary provisions were extended again, both the preclearance provisions of Section 5 and the language assistance provisions of Section 203. The extension was accomplished, as in earlier times, by amending Section 4, which contains the coverage formula or "trigger." The temporary provisions whose application is "triggered" by Section 4 coverage include not only Section 5 (preclearance) but also Sections 6, 7 and 8 (federal examiners and election observers). (Also, of course, in 1982, Congress amended Section 2 to provide that existing voting schemes would be invalid if they "result" in discrimination without the heavy burden of proving discriminatory purpose.)

The 1982 extension was for 25 years. It was accomplished by specifying that period in the trigger formula of Section 4(a)(8) of the Act, which is now codified at 42 U.S.C. §1973b(a)(8). This was obviously a much more realistic view of how long it might take to overcome voting discrimination. In a Nation where slavery lasted for a quarter of a millennium, where another century went by with racial segregation in full force before the Voting rights Act, where, in other words, the Voting Rights Act sought to change nearly 20 generations of human behavior, the problem could certainly not be solved in 5 or 10 or 17 years.

Indeed, I do not assume that the Congresses of 1965, 1970 or 1975 thought they were solving the problem of voting discrimination once and for all. Rather, they were acting judiciously and cautiously to apply an appropriate remedy for a limited time period, and calling for a review at the end of that period to see if conditions had changed sufficiently to end the statute. Each time before now, that review has led Congress to decide that the time had not yet arrived to end the statute. In fact, each time Congress has held extensive hearings and compiled a detailed record of continuing problems not only justifying extension of Section 5 and the other temporary provisions but adding new remedies to address newly recognized problems. Two prime examples are the permanent elimination of literacy tests nationwide—achieved in two steps in 1970 and 1975—and the amendment of Section 2 to adopt a "results" standard for proving discrimination.

Another preeminent example of Congress' strengthening of the Act to respond to new challenges is the addition of provisions protecting language minority citizens, both by expanding the trigger formula in section 4 and by enacting section 203 to provide assistance to language minority voters at all stages of the voting process. So too with the addition of section 208 in 1982, which allows voters who need assistance—including elderly and handicapped voters—to receive assistance from a person of their choice.

Each time Congress has reviewed the Voting Rights Act in the past, it has been a learning experience for Congress and for the entire Nation. The Act has fulfilled

its role as a dynamic piece of legislation not only designed to deal with existing problems, but also well adapted to grow to meet new abuses as they arose. It is precisely this ability of the Voting Rights Act to "head off new problems at the pass" that has continued to give it such vitality. Today this subcommittee has the opportunity and obligation to continue the Act's protections as we face new problems in the unending quest to guarantee the fully equal right to vote to all.

These hearings represent a new visit by Congress to this arena, and based on my experience observing elections and voting since the 1982 extension, I believe Congress will come to the same conclusion in or before 2007 as it has on its previous reviews: it is not time yet to abandon the course.

I practice law in Charleston, South Carolina, and I have studied voting and elections not only there but elsewhere in my state and in the surrounding states. I know that the need for Section 5 is still there and I would like to tell you some of what I have seen that tells me so. This will be only one person's experience, and I am sure you will hear in the coming weeks from others who have detailed accounts of problems in other areas.

I also know there has been great progress, and I would not deny that for a moment. But we started so far down that even with great progress we have too far to go to be ready to abandon a protection that is responsible for much of the progress.

Let me talk to you briefly about five sets of cases I have personally been involved in my home state during the past two decades. This is not ancient history: if I wanted to go into ancient history, i.e., back into the 1950's or even the 1960's and 1970's, I would be here all day. Rather, what I will talk about happened in the time since the 1982 extension, indeed a lot of it in this very decade—the 21st century.

I should also emphasize that my state is not alone. I do not believe South Carolina legislators or officials are more likely to do things that require the protection of the Voting Rights Act than their counterparts in other nearby states. On the contrary, my experience tells me that my state is on the same wave length as other jurisdictions covered by Section 5, and that those other covered states need Section 5 just as much as my state.

The problems I will talk about are some of the same types of problems we encountered in earlier times—but they are still with us.

First, one of the problems that has plagued voters is manipulation of city boundaries to maintain white control. This was the trick in Tuskegee, Alabama, that produced the famous 1960 Supreme Court case of *Gomillion v. Lightfoot.* A few years later, one of the earliest Supreme Court cases under the Voting rights Act was Perkins v. Matthews, in 1971, a case of mine in which Section 5 blocked the city of Canton, Mississippi from carrying out an annexation that added new white residents to offset growth in black voting registration.

The problem continues. In 1987 I brought a lawsuit against the city of Orangeburg, South Carolina, for the same thing. Orangeburg was once a round town, that is, it had been formed, like many cities, by drawing a circumference from a center point. As black voting grew, however, the town officials responded by a series of annexations that turned the town border into a jagged design of the most irregular shape. Our lawsuit resulted in a decision which allowed the annexations but minimized their discriminatory effect by changing from at-large elections to elections by fairly drawn districts or wards. A similar lawsuit in Hemingway, South Carolina, also blocked that city's annexations, and the discriminatory nature of those annexations was plainly shown when the city decided that rather than annex nearby areas of black residents, it would simply undo the annexations of white people. In other words, if it could not carry out its discriminatory design, it had no use for these annexed areas.

A second type of problems frequently encountered is harassment of poor or black voters at the polls. In a 1990 election for Probate Judge of Charleston County, a black candidate faced a white candidate. There was widespread intimidation of black voters at rural polling places, especially black voters who needed assistance because they were old, infirm or not fully literate. (And, by the way, it is no shame to need help with casting a vote in our elections: if you saw some of the Constitutional referendums on our ballot, you would need a Ph.D. to read them or make heads or tails out of them.)

Despite the attempts to suppress black voting, the black candidate, Bernard Fielding, won that election. However, the State Election Commission, acting on unverified complaints from some of the same people who had tried to intimidate the black voters, set the election aside. We had to appeal to the South Carolina Supreme Court, which fortunately upheld Fielding's election. One of the other features of that campaign was the white candidate tactic of running an ad with his black

opponent's picture, to make sure that every white voter knew exactly who was white and who was black.

That was not the last time we have seen intimidation of voters. In a trial in 2002, which I will discuss in a few minutes, there was testimony that attempts to intimidate black voters continues as a frequent tactic.

We also have problems sometimes recognizing laws of the land that protect voting rights. When you passed the National Voter Registration Act in the mid-1990's ("Motor Voter law"), our then Governor simply announced that the law did not apply in South Carolina, and our then-Attorney General went to court to defend South Carolinas right to ignore the law. Again, fortunately, the court—this time a federal court—put a stop to that nonsense. The bill to the state, by the way, was $150,000 in attorneys' fees to us, not counting the cost of the State's own lawyers including a special private counsel retained to augment its Attorney General's staff.

The presence of pervasive racial polarization among voters has not abated. Studies by experts on all sides, including experts hired by the State, and repeated judicial decisions, have highlighted the continuing phenomenon. It is not just in elections here and there, but throughout our State. In the most recent statewide redistricting case, a three-judge court took extensive note of the persistence of racially polarized voting, and how it affects the fundamental right to vote. Among the court's findings, it said "the history of racially polarized voting in South Carolina is long and well-documented," and the court cited the "disturbing fact" that there has been "little change in the last decade." These findings echoed earlier findings. In fact, I am not aware of any one of the dozens and dozens of voting lawsuits in our state in which any single expert has ever said we do not suffer from racially polarized voting.

Going from the large-scale to the intensely local, even the most minor, seemingly innocuous changes can be fraught with problems that hinder voters. Last year, in Charleston County, the registration office—which is also the location for "early absentee voting" and resolving election day registration disputes—was moved from a central location, well served by bus lines and adjacent to other government offices—including public assistance agencies—to a remote location nearly half a mile from the nearest bus service. What does that mean if you don't have a car, especially if you are a minority voter—who disproportionately don't own cars?

Perhaps the most notable case is a case that is hot off the presses—a case that started in 2001 and ended with a Supreme Court order less than a year ago. This case involved the method of electing the County Council in Charleston County. The County Council members were elected from nine separate districts until 1969, when there was a sudden change to at-large elections for the nine members.

Unfortunately, when that change took place in 1969, it was precleared under Section 5. The reason is not entirely clear, but that was in the infancy of Section 5 and it was before the Supreme Court had highlighted the dilutive effects of at-large elections.

In any event, in 2001 the U.S. Department of Justice, along with a group of individual voters, brought a lawsuit to challenge the at-large elections as racially discriminatory. I was privileged to be one of the lawyers representing the plaintiffs in that case. The case was tried for six solid weeks in 2002, and it resulted in a sweeping decision overturning the at-large elections on the ground that system discriminates against black voters on account of their race. The court issued a 75-page opinion analyzing in minute detail what the role of race has been and continues to be in our elections. Much of the evidence supporting the decision came from the County's own expert witness. The decision is a virtual primer about corrosive voting discrimination in my state and my county today, in the 21st century.

Let me outline a few of the things this case tells us. First, there is severely racially polarized voting, meaning that white voters rarely vote for candidates favored by black voters, especially if those candidates are black themselves. This was based on analysis not of old elections, but elections during the past 15 years, by experts for all sides.

This pattern has had a predictable result. In a county with a population more than one-third black, only three of the 41 people elected to County Council since 1970 were minority, including only one in the last decade. In that last decade, all nine black candidates supported cohesively by black voters were defeated in the general elections, as well as 90% of the 21 preferred candidates of whatever race. For example, black voters did best in 1998, but even in that year, the two white candidates they supported won but the two black candidates they supported lost.

Nor were these results accidental. In addition to demographic factors that are relevant in judging voting discrimination, there was powerful evidence of intimidation and harassment of blacks at the polls during the 1980s and 1990s and even as late

as the 2000 general election. There was also evidence of race baiting tactics used by political strategists.

Perhaps the most telling sign of voting discrimination in Charleston County elections was the Court's finding that racial appeals of a subtle or not-so-subtle (i.e., overt) nature were used in election campaigns. The most telling of these examples were white candidates running ads or circulating fliers with photos of their black opponents—sometimes even darkened to leave no mistake—to call attention to the black candidates' race in case any white voter happened to be unaware of it.

This tactic is the surest sign of an atmosphere where voting discrimination flourishes; in locales where the tactic is used, this tactic says local politicians know race "sells," and that is why they use it. How much more would they use race to buy and sell elections if the Voting Rights Act were not in place?

After the district court's decision, the County nevertheless appealed, and the decision was resoundingly affirmed by the Fourth Circuit in an opinion by Judge J. Harvie Wilkinson. Still the County did not give up, but petitioned the U.S. Supreme Court, which refused to hear the case, and it finally ended with a new system designed to provide equal rights to all voters of all races.

One important note: the County spent over $2,000,000 of taxpayers' money in its defense of the discriminatory method of electing County Council members.

Another telling note: the Charleston County School Board has an election method that is similar but not identical to the County Council. While the County Council case was going on, the South Carolina General Assembly, led by legislators from Charleston County, tried to change the school board method to adopt the most discriminatory features of the County Council. The then-Governor vetoed the first attempt, but the General Assembly tried again—even after the method had already been thrown out by the federal court. This time, the new Governor signed this discriminatory bill. Fortunately, Section 5 of the Voting Rights Act covered this voting change and when it was presented for preclearance under that Section, preclearance was denied. If Section 5 had gone out of existence, this bill would have become law even though its precise twin had already been found to be racially discriminatory.

I cannot imagine clearer proof of the need to extend the trigger of Section 4 of the Voting rights Act so that Section 5 and other "temporary provisions" will continue to protect voters.

Striving for full equality in all areas especially the right to vote, is an obligation for every American. When we have such an effective protection in the form of the Voting Rights Act, we should not rush to abandon that protection prematurely simply in the hope that equality will come.

Finally, I want to say a word about the Constitution. I realize that Congress is not the only branch of government that will consider the Voting Rights Act, and I know there has been speculation about whether continuing the section 4 trigger will still be constitutional. I have no doubt that doing so is constitutional. I litigate in other covered states as well as South Carolina, and am familiar enough with some of those states to be confident that the record presented to you in these hearings will show that the types of problems I have outlined here are widespread in the covered jurisdictions. Based on the record I expect you will see, there will be ample justification for continuing to provide special remedies in the covered jurisdictions, based on the eminently rational and well-tailored coverage formula of the section 4 trigger. Moreover, while section 4 contains the trigger that imposes the special remedies, section 4 also contains a carefully tailored bailout, described by my fellow witness Mr. Hebert, which is essentially a "reverse trigger" that a covered jurisdiction can use to end coverage. With a rational coverage formula, with a record continuing to justify that formula, and with a nuanced bailout in place, the Voting Rights Act is exactly the kind of congruent and proportional remedy that satisfies the Constitution.

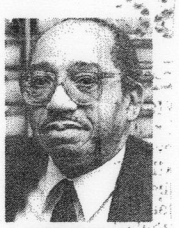
Thank you. Again, I salute the Members and the excellent staff for placing this crucial issue in the limelight. I would be pleased to answer any questions.

PAID POLITICAL

Chris Merrill

HONESTY

Republican for Probate Judge



FIELDING

"His qualifications, honesty and integrity along with his superior administrative abilities make him the best choice for Probate Judge."

— Thomas J. Masi, LUTCF

"After viewing his court, a lack of administrative ability is evident."

—Thomas J. Masi, LUTCF

"As an elected official, I understand fiscal responsibility. Chris Merrill will spend your dollars wisely in Probate Court."

—Larry D. Shirley
City Councilman

"His job as Therapeutic Judge pays almost $70,000 per year, yet he continues to operate a part-time law firm and funeral home."

—Larry D. Shirley
City Councilaman

"Chris Merrill exhibits outstanding ability and the judicial temperment so critical to the job of Probate Judge."

—Robert W. Haines, Attorney

"His experience as Therapeutic Judge is not directly related to the duties and responsibilities of the Probate Judge."

—Robert W. Haines, Attorney

Mr. CHABOT. Thank you very much, Mr. Derfner.

Our final witness this morning will be Mr. Hebert. And you're recognized for 5 minutes.

TESTIMONY OF J. GERALD HEBERT, FORMER ACTING CHIEF, CIVIL RIGHTS DIVISION, U.S. DEPARTMENT OF JUSTICE

Mr. HEBERT. Thank you, Mr. Chairman. Chairman Chabot, Representative Nadler, and distinguished Committee Members, thank you for the opportunity to appear before you today. I'll focus my comments on the bailout provisions of the Voting Rights Act, but I would at least like to put them in one broad context; which is that I do support an extension of the act, and I believe the bailout provisions, as they presently exist, are largely working.

I'm also here today in my capacity as legal counsel to a number of the jurisdictions that have already bailed out, or are in the process of bailing out; including, among others, Augusta County, Virginia, and Kings County, California.

Now, we know that the Voting Rights Act is the crown jewel of civil rights. What we saw prior to 1965 is that case-by-case approach to voting discrimination problems was not working. So Congress took a unique and fresh approach, by enacting the preclearance provisions of the Voting Rights Act, which set up a means by which jurisdictions that were subject to a certain coverage formula, and therefore are called covered jurisdictions, would be required to submit voting changes for preclearance.

Now, the jurisdictions at that time could also bail out from coverage under the Voting Rights Act. And indeed, between 1965 and '70, several of them did. And what they had to do to bail out at that time was they had to show that they had used no test or device—meaning like a literacy test, a poll tax, and so on—in a discriminatory manner for at least 5 years.

Well, as of 1965, most of the covered jurisdictions were not able to meet that test, of course, because they had used literacy tests and poll taxes and other tests or devices in a discriminatory way for 5 years. And they also met the other part of the coverage formula, that less than 50 percent of their voting-age population was registered, or less than 50 percent had turned out to vote.

Political subdivisions at that time were not allowed to bail out, either. If you were a political subdivision within an entirely covered State—like Virginia, for example, my home State—and you wanted to bail out, the State was the only entity that could bail out in a complete covered State.

There were some States, as there are now, where you only had certain parts of the State that were covered. Representative Conyers mentioned his home State of Michigan, where they have a couple of townships, for example, that are still covered. In jurisdictions like that, that are in a State that's only partially covered, the political subdivisions could bail out.

Between 1965 and '70, Alaska, three counties in Arizona, Elmore County, Idaho, and Wake County, North Carolina, all bailed out. Nash and Gaston County, Representative Watt, were not allowed to bail out. The Justice Department opposed that in those early years.

In 1970 to '75, when Congress extended the act again, you had a couple of jurisdictions. The State of Alaska bailed out, as did the State of New York. And New York ended up getting recovered under the Voting Rights Act, when it was found that they had in fact used a test or device in a discriminatory manner.

And my home State of Virginia in 1974 sought a bailout. And they were denied a bailout because there was evidence that the setting up of inferior schools for minority voters in fact disabled minority voters from passing the literacy test. And so therefore, the literacy test in Virginia had a discriminatory impact, and they did not meet the bailout provisions.

Now, Congress in 1982 dramatically changed the bailout provisions. And I'll move quickly through this, but essentially, as a result of the '82 amendments, in the last 25 years you've now had a bailout standard that is totally different, and not focused on a time limit of 5 years showing a non-discriminatory test or device or so on.

Instead, you have to show that within the last 10 years you have used no test or device; that there have been no final judgments or settlements that you've entered into as a jurisdiction because it's been alleged that you discriminated on the basis of race, color, or membership in a language minority group in your voting and election practices; that there haven't been any Federal examiners assigned to your jurisdiction; that you've timely submitted all the voting changes to the Justice Department for preclearance; that the Justice Department has not objected to any of your changes, or the D.C. court denied any of your changes.

That's what you have to show over a 10-year period. And quite frankly, for nearly, I would say, 90 percent of all the covered jurisdictions today, they could show at least that much.

Now, you also have to show when you're seeking the bailout that, if you've had any dilutive procedures, that you've in fact, in your voting system—that you've eliminated those. You have to show that you've engaged in constructive efforts to increase minority participation.

You have to show that, if there has been any intimidation or harassment of minority voters—and I will tell you today that there still is harassment and intimidation of minority voters—that you've made constructive efforts to eliminate it; and that you have engaged in other constructive efforts to expand the opportunity to register and to cast ballots; and that you've included minorities in running the election process, whether they work in the voter registration office or as poll officials or on the electoral board.

As someone mentioned earlier, I think that the jurisdictions that I have represented—and I have represented all nine of the jurisdictions that have bailed out since the '82 amendments—the jurisdictions have been able to meet that.

Now, why, though, have there not been more? The simple answer to that—and I'll use this point really to sum up—is that I think a lot of the jurisdictions don't really know about the bailout provisions and how easy it is, frankly, to meet them if you've engaged in non-discriminatory voting behavior.

And that's the key part of that answer; is that jurisdictions today want to be able to demonstrate that they have a good record, that

they offer equal opportunity. And when they find out that the bailout provisions are available to show that and to show their citizens that we do have an open process, they've pursued it, and they've been proud of it.

The bailout provisions are really an incentive for the covered jurisdictions, which have a presumption that they discriminate, to show that, in fact, they have a clean record. That's what you intended when you enacted the bailout provisions; and thus far, they've worked very well.

I've submitted to you a chart. I'm going to ask permission to submit written testimony at the conclusion of this hearing. I'll do it within a prescribed time period, Mr. Chairman, to extend my remarks and give you additional information on what I agree with Mr. Watt, Congressman Watt; that this is perhaps one of the more central parts to show that the Voting Rights Act today is not only constitutional, but that it in fact works to end discrimination. And that's what it was intended to do. And it's a law that we're all very proud of. Thank you very much.

[The prepared statement of Mr. Hebert follows:]

PREPARED STATEMENT OF J. GERALD HEBERT

Good morning Chairman Chabot, Rep. Nadler, and distinguished committee members. Thank you for the opportunity to testify before you today. I will focus my comments on the bailout provisions of the Voting Rights Act (VRA), but would like to state at the beginning that the Act should be extended and the bailout provisions be retained largely in their present form.

The marches, protests, and struggles of the civil rights community culminated in 1965 with the passage of the VRA. Individual adjudication of disputes had been ineffective in securing minority citizens an equal opportunity to cast their ballots. Congress took a fresh approach, establishing a formula subjecting certain jurisdictions to administrative or judicial preclearance of changes affecting voting, and setting up a means for those jurisdictions to bailout out of coverage at a later date.

A jurisdiction is covered, and required to preclear all changes effecting voting, if it (1) maintained a test or device as a prerequisite to voting as of one of three fixed dates, and (2) as of that date either less than 50 percent of its voting age residents were not registered to vote or less than 50 percent of its voting age residents actually voted.

Between 1965 and 1982, these covered jurisdictions could bailout of coverage by demonstrating in an action for declaratory judgment before a three-judge panel of the United States District Court of the District of Columbia that no test or device had been used in a given number of years. Political subdivisions, such as counties, were prohibited from bailing out separately if they were located within a state that was covered in its entirety.[1]

In 1982, Congress enacted two major revisions to the bailout provisions. First, political subdivisions could bailout separately from their covered jurisdictions. Second, the bailout criteria were changed to "recogniz[e] and reward[] their good conduct, rather than require[e] them to await an expiration date which is fixed regardless of the actual record."[2]

Under the current bailout formula, a covered jurisdiction must first demonstrate that *in the past 10 years:* (1) no test or device has been used to determine voter eligibility with the purpose or effect of discrimination, (2) no final judgments, consent decrees, or settlements have been entered against the jurisdiction for racially discriminatory voting practices, (3) no federal examiners have been assigned to monitor elections, (4) there has been timely submission of all voting changes and full compliance with § 5, and (5) there have been no objections by the Department of Justice or the District Court for the District of Columbia to any voting changes.[3] Second, the jurisdiction bears the burden of proving *at the time bailout is sought* that any dilutive voting procedures have been eliminated, constructive efforts have

[1] *City of Rome v. United States,* 446 U.S. 156, 167 (1980).
[2] 1982 S. Rep. No. 417, 97th Cong., 2d Sess. 46,*as reprinted in* 1982 U.S.C.C.A.N. at 222.
[3] 42 U.S.C. § 1973b(1)(A-E) (2005).

been made to eliminate any known harassment or intimidation of voters, and it has engaged in other constructive efforts at increasing minority voter participation such as, expanding opportunities for convenient registration and voting and appointing minority election officials throughout all stages of the registration/election process.[4]

The current bailout formula was an important step towards achieving the goals of the VRA. It gave covered jurisdictions an incentive to move beyond the status quo, and to improve accessibility to the electoral process for minorities. As the Senate Judiciary Committee report stated, "the goal of the bailout . . . is to give covered jurisdictions an incentive to eliminate practices denying or abridging opportunities for minorities to participate in the political process."[5]

Congress should examine whether there is evidence that the bailout provision actually "provide[d] additional incentives to the covered jurisdictions to comply with laws protecting the voting rights of minorities, and . . . improve[d] existing election practices."[6] I believe it has.

The Supreme Court has indicated a strong Congressional record demonstrating the existence of discrimination is required when legislating in this area.[7] In 1970, 1975 and 1982, Congress commissioned studies to collect evidence on voter discrimination. In 1970, the Act was extended because while there was a significant increase in black voter registration, there was continued racial discrimination in the electoral process (e.g., switching from single-member districts to at-large elections, redrawing boundaries, minority candidates prevented from running, illiterate voters being denied assistance, racial discrimination in selection of poll officials, harassment, intimidation) and black voter registration rate lagged behind white rate.[8] Similarly, in 1975 minority registration rates improved, but still lagged behind whites and restrictions on registration, casting a ballot, running for office, intimidation and vote dilution still existed.[9] In 1982, the Commission on Civil Rights report documented continued resistance by individuals and local jurisdictions to increased minority participation in elections and to complying with the VRA. What evidence about all this exists today? Congress has a duty, whether it extends the Act or not, to answer this question.

I have served as legal counsel to *all* of the jurisdictions that have bailed out since the 1982 amendments to the VRA. All of them are in Virginia and are listed in Appendix A.

Local jurisdictions with which I have worked have expressed to me several advantages that they derive from the current bailout formula. For instance, by requiring them to prove a ten-year record of good behavior and to demonstrate improvements to the elections process for minorities, these covered jurisdictions are afforded a public opportunity to prove it has fair, non-discriminatory practices. Second, while bailouts come with some costs (on average about $5,000 for legal expenses), it is still less costly than making § 5 preclearance submissions indefinitely. Finally, once bailout is achieved local jurisdictions are afforded much more flexibility and efficiency in making routine changes, such as moving a polling place.

For all of its advantages, however, only a few jurisdictions have bailed out. Some argue § 5 should be retained *because* jurisdictions have not been achieving bailout on a mass scale, and that this is evidence there are still many problems with the election processes in these jurisdictions.[10] This assumes that jurisdictions are applying and being denied, when really the problem is that jurisdictions are just not applying. (See Appendix A). Why is this?

One reason might be that smaller localities just do not know the bailout option is available to them, or it seems too complicated or time consuming. For the vast majority of jurisdictions, the process is relatively straightforward and easy. I would recommend that when the legislation is reauthorized, Congress suggest the Department of Justice provide more information to localities about how to achieve bailout and encourage them to do so.

Another reason posited for the lack of bailouts is that the criteria are thought to be too difficult to meet. That is not the case. Most of the factors to be demonstrated are easily proven for jurisdictions that do not discriminate in their voting practices.

---

[4] 42 U.S.C. § 1973b(1)(F) (2005).

[5] 1982 S. Rep. No. 417, 97th Cong., 2d Sess. 46, 60, *as reprinted in* 1982 U.S.C.C.A.N. at 238.

[6] *Id.,* at 222

[7] *City of Boerne,* 521 U.S. 507, 525 (1997).

[8] Paul F. Hancock and Lora L. Tredway, *The Bailout Standard of the Voting Rights Act: An Incentive to End Discrimination,* 17 Urb. Law. 379, 393–394 (1985).

[9] *Id.* 397, fn. 93–98.

[10] Vernon Francis et al., *Preserving a Fundamental Right: Reauthorization of the Voting Rights Act,* Lawyers' Committee for Civil Rights Under Law, at 11, June 2003.

One factor, proving § 5 compliance, is often cited as the most difficult to meet because opponents to bailout are likely to be able to find some small change that was not precleared. But this is not an obstacle either.

There are several reasons why demonstrating § 5 compliance should be retained as part of the bailout formula. First, DOJ will allow a jurisdiction that inadvertently failed to submit a few changes to submit those changes for preclearance at the time bailout is sought, and thus the preclearance is *nunc pro tunc.* Second, the legislative history shows that Congress thought that for changes which "are really *de minimis*" the "courts and Department of Justice have used and will continue to use common sense."[11] While this process of going back and making these § 5 submissions can be time-consuming, it ensures full compliance with the Act and is faithful to the language and spirit of the law.

While most jurisdictions who have sought bailout since 1982 have had to make few such submissions, (See Appendix A) some county officials know that political subdivisions, such as towns and cities within the county, have not made any submissions. This affects the County's ability to obtain an expedited bailout. In King's County, California, for example, 40–50 submissions have been required on behalf of localities, some of which do not even exist anymore. Furthermore, King's County does not have authority to compel the localities' compliance with § 5.

Several amendments were proposed in 1982 which would have made it easier for states to bailout without each of its political subdivisions bailing out, and each was rejected.[12]

A better solution may be to allow towns, cities and other local governmental units within a covered county to bailout independently. Then, once each has bailed out, the county can bailout without having to make submissions on behalf of each town or city within its borders. In this sense, the town-county relationship mirrors the current county-state relationship that exists under the current bailout law. The county would still need to make submissions for any changes it makes until it seeks bailout.

To consider the merits of this, Congress should examine § 5 in covered states to see if allowing a bailout to jurisdictions within the state has proven to be problematic from an enforcement or compliance perspective. If a county can bailout now in a state like Virginia that is completely covered (and they can and have done so), has exempting parts of a state from preclearance obligations or other special remedial provisions caused any problems from an enforcement perspective? That would shed light on whether Congress might want to allow a local government to bailout within a covered county, or vice versa.

A third criticism of the bailout provision relates to the VRA coverage formula. ("Places bound by the preclearance provision are identified by a formula based on minority participation in election *more than three decades ago.*"[13]) The bailout provisions, on the other hand, were designed to "relate to the jurisdiction's recent record of behavior rather than to a mere calendar date."[14] To the extent that only jurisdictions that meet the coverage formula need to seek bailout, the bailout provisions suffer from whatever overbreadth or other potential problems exist with regard to the coverage formula.

Some argue the current coverage formula may be unconstitutional because of a lack of "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."[15] § 2 of the 15th Amendment to the United States Constitution grants Congress the authority to enforce § 1, namely "the right of citizens of the United States to vote shall not be denied or abridged by the United States or any State on account of race, color, or previous condition of servitude." After passage of the Voting Rights Act in 1965, the Supreme Court held in *South Carolina v. Katzenbach,* 383 U.S. 301, 326 (1966), that Congress had the remedial authority under the 15th Amendment, § 2 to pass parts of § 4 of the VRA. Again, in 1980 the Supreme Court stated in *City of Rome v. United States,* 446 U.S. 156, 177, that preclearance "is an appropriate method of promoting the purposes of

---

[11] 1982 S. Rep. No. 417, 97th Cong., 2d Sess. 46, 48, *as reprinted in* 1982 U.S.C.C.A.N. at 226.

[12] H.Amdt. 266 to H.R. 3112, 97th Cong., 1st Sess., *offered* Oct. 5, 1981 would have allowed a state to bailout if two-thirds of its political subdivisions bailed out, and H.Amdt. 272 to H.R. 3112, *offered* Oct. 5, 1981 and S.UP.Amdt. 1029 to S. 1992, *offered* Jun. 18, 1982, both would have allowed a state to bailout if the state met all the criteria, even if its political subdivisions did not. Each was rejected, because the 15th amendment places the burden of protecting the electoral franchise on the States.

[13] George F. Will, *VRA, All of It, Forever?,* Newsweek, Oct. 10, 2005.

[14] 1982 S. Rep. No. 417, 97th Cong., 2d Sess. 46, *as reprinted in* 1982 U.S.C.C.A.N. at 222.

[15] *City of Boerne v. Flores,* 521 U.S. 507, 520 (1997).

the Fifteenth Amendment, even if it is assumed that § 1 of the Amendment prohibits only intentional discrimination in voting."

Congress' authority to enact remedial legislation under the Fourteenth Amendment was later reviewed in *City of Boerne v. Flores,* 521 U.S. 507, 519 (1997), and the Court determined that Congress' remedial authority extends only to enforce prevention of unconstitutional actions, not to make substantive change in the governing law. *Id.* at 520 (holding Congress did not have the remedial authority to pass the Religious Freedom Restoration Act). Some thought this holding signaled potential problems for the VRA's constitutionality, yet just two years later the Court stated in *Lopez v. Monterey County,* 525 U.S. 266, 282–283 (1999), "[l]egislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into legislative spheres of autonomy previously reserved for the states."

Thus, the remedial provisions of the VRA, including the bailout provision, must be proportional to the injury to be prevented. Considering the bailout provision applies to jurisdictions based on a coverage formula that most seem to agree is outdated, one solution would be to revise the coverage formula. It's perhaps the hardest issue facing the Congress. This is an area the Congress should give serious consideration and study to.

A solution might be crafted along the following lines: a jurisdiction is covered if (1) there is a disparity between the percentage of registered minority voters or percentage of minority voters who cast ballots in the last presidential election on the one hand, and the actual voting age population percentage of minorities on the other; or (2) the jurisdiction provided English only election materials and assistance and more than five percent of the voting age residents are members of a single language minority.

This formula would seemingly target the remedy toward the potentially discriminatory conduct in a more direct way than a formula based on the results of a presidential election conducted thirty years ago. Jurisdictions which meet this formulation would be presumptively covered and subject to § 5 preclearance. They may seek bailout from coverage immediately, but would be required to meet the same bailout factors that currently exist.

When devising a new formula, it is important to keep in mind the original purpose of the coverage formula: "The coverage formula of section 4(b) was designed to limit the Act's most stringent remedies to those areas of the country where congressional investigation had disclosed the most prevalent and pervasive degree of racial discrimination in voting."[16] Congress has done a magnificent job each time it extended the Act in the past to gather detailed information on how the Act was working. It should once again undertake that effort.

To this extent, and to the extent that § 5 preclearance had worked as evidenced by the steady submissions of changes, the sharp reductions in objections (See Appendix B), and the practical standards for bailout that currently exist, we are headed toward a day when there will be no discrimination that affects the ability of any person to register to vote or to cast a ballot, and our democracy will be better for it.

Thank you.

---

[16] *City of Rome,* brief by Appellees pg 44 (citing H.R. Rep. No. 439, 89th Cong., 1st Sess. 8, 12–14 (1965); S. Rep. No. 162 (Pt. 3), 89th Cong., 1st Sess. 13–16 (1965); *Sheffield,* 435 U.S. at 119–120

Bailouts Filed Since 1982 Amendments to VRA

Name of Jurisdiction	Bailout Filed Date	Bailout Granted Date	% Black	% Hispanic	# of Unprecleared Changes (if any)	# of Years Post-Bailout Reporting Required
Fairfax City, Virginia	September 25, 1997	October 21, 1997	4.5%	5.2%	0	0
Frederick County, Virginia	April 19, 1999	September 9, 1999	1.7%	0.5%	0	0
Shenandoah County, Virginia	April 21, 1999	October 15, 1999	1.1%	0.7%	31	5
Roanoke County, Virginia	August 11, 2000	January 24, 2001	2.5%	0.5%	6+	4
Winchester City, Virginia	December 22, 2000	May 31, 2001	9.1%	5.9%	0	4
Harrisonburg City, Virginia	February 14, 2002	April 17, 2002	5.5%	7.2%	0	3 (If requested by the DOJ)
Rockingham County, Virginia	March 28, 2002	May 21, 2002	1.3%	2.7%	1	1
Warren County, Virginia	August 30, 2002	November 25, 2002	4.7%	1.5%	7	3
Greene County, Virginia	September 8, 2003	January 19, 2004	6.1%	1.1%	1	2

Bailouts Currently Pending

Name of Jurisdiction	Bailout Filed Date	Bailout Granted Date	% Black	% Hispanic	# of Unprecleared Changes (if any)	# of Years Post-Bailout Reporting Required
Augusta County, Virginia	September 23, 2005	(Pending)	3.9%	0.8%	3	0
Kings, County, California	(Pending)	N/A	8.3%	43.6%	40-50 (est.)	N/A

ATTACHMENT 2

Texas

Justice Department Objections -- 1985 -- 1994

Rusk Independent School District (Cherokee Cty.) (83-0174)	1/18/1985
Liberty-Eylau Independent School District (Bowie Cty.) (84-0121)	2/26/1985
Dawson County (84-0343)	8/6/1985
El Campo (Wharton Cty.) (84-1364)	11/8/1985
Lynn County (85-0895)	11/18/1985
Terrell County (85-0674)	1/13/1986
Plainview Independent School District (Hale Cty.) (86-0674)	4/10/1986
El Campo (Wharton Cty.) (86-1633)	7/18/1986
Trinity Valley Community College District (Anderson, Henderson, Hunt, Kaufman and Van Zandt Ctys.) (86-0002)	10/14/1986
Wharton Independent School District (Falls Cty.) (87-0487)	12/29/1986
Marlin Independent School District (Falls Cty.) (87-0487)	6/22/1987
Crockett County (87-0300)	10/2/1987
Columbus Independent School District (Colorado and Austin Ctys.) (87-0025)	1/4/1988
Hondo Independent School District (Frio and Medina Ctys.) (87-0952)	1/22/1988
Marshalltown Independent School District (Harrison Cty.) (87-0080)	4/18/1988
San Patricio County (87-1132)	6/14/1988
Jasper (Jasper Cty.) (88-0951)	8/12/1988 withdrawn 12/24/91
Lynn County (85-0895)	9/26/1988
El Campo (Wharton Cty.) (88-1471)	2/3/1989
Dallas County (88-0363)	2/27/1989
Baytown (Chambers and Harris Ctys.) (88-0834)	3/20/1989
Refugio Independent School District (Refugio Cty.) (88-1251)	5/8/1989
Cuero (DeWitt Cty.) (89-0326)	10/27/1989
Denver City (Yoakum Cty.) (88-1530, 88-1533)	2/5/1990
Nolan County Hospital District (89-0754)	2/12/1990
San Patricio County (89-0674)	5/7/1990
State (90-0015)	11/5/1990
Freeport (Brazoria Cty.) (90-0184)	11/13/1990
Grapeland (Houston Cty.) (90-0860)	12/21/1990
Dallas (Collin, Dallas, Denton, Kaufman & Rockwall Ctys.) (89-0245)	3/13/1991
Lubbock County Water Control and Improvement District No. 1 (Lubbock Cty.) (90-4838)	3/19/1991
Refugio Independent School District (Refugio Cty.) (90-1288)	4/22/1991
Dallas (Collin, Dallas, Denton, Kaufman & Rockwall Ctys.) (89-0425, 91-0642)	5/6/1991
State (90-0003)	6/23/1991 withdrawn 8/4/92
Houston (Harris, Montgomery and Fort Bend Ctys.) (91-2353)	10/4/1991
State (91-3395)	11/12/1991
Del Valle Independent School District (Travis Cty.) (91-3124)	12/24/1991
El Campo (Wharton Cty.) (91-0530)	1/7/1992
State (92-0070)	3/9/1992
State (92-0146)	3/10/1992
Gregg County (91-3349)	3/17/1992
Calhoun County (91-3549)	3/17/1992
Galveston County (91-3601)	3/17/1992
Castro County (91-3780)	3/30/1992
Monahans-Wickett-Pyote Independent School District (Ward Cty.) (91-3272)	3/30/1992
Ellis County (91-4250)	3/30/1992
Lubbock Independent School District (Lubbock Cty.) (91-3910)	3/30/1992
Terrell County (91-4052)	4/6/1992
Bailey County (91-3730)	4/6/1992
Cochran County (91-4049)	4/6/1992
Hale County (91-4048)	4/10/1992
Deaf Smith County (91-4051)	4/10/1992
Gaines County (91-3990)	7/14/1992
Wilmer (Dallas Cty.) (90-0393)	7/20/1992
Del Valle Independent School District	

Justice Department Objections -- 1995 -- 2004

State (94-4077)	2/17/1995
Edwards Underground Water Conservation District (Gonzales Cty.) (94-0333)	3/2/1995
Andrews (Andrews Cty.) (94-2271)	6/26/1995
State (95-2017)	1/16/1996
Webster (Harris Cty.) (96-1006)	3/17/1997 withdrawn 4/7/98
State (98-1365)	9/28/1998 withdrawn 10/21/98
Galveston (Galveston Cty.) (98-2149)	12/14/1998 withdrawn 02/04/02
Lamesa (Dawson City) (99-0270)	7/16/1999
Sealy Independent School District (Austin Cty.) (99-2823)	6/5/2000
Haskell Consolidated Independent School District (Haskell, Knox, and Throckmorton Ctys.) (2000-4426)	9/24/2001
State (2001-2430)	11/16/2001
Waller County (2001-3951)	6/21/2002
Freeport (Brazoria City) (2002-1725)	8/12/2002
	13

(Travis Cty.) (7-31-92)	7/31/1992
Ganado (Jackson Cty.) (92-0319)	8/17/1992 withdrawn 1/22/93
Castro County (92-4027)	10/6/1992
Galveston (Galveston Cty.) (92-0136)	12/14/1992
Atlanta Independent School District (Cass Cty.) (92-3754)	2/19/1993
Carthage Independent School District (Panola Cty.) (92-4890)	3/22/1993 withdrawn 1/3/94
Corsicana Independent School District (Navarro Cty.) (92-4186)	3/22/1993
Lamesa (Dawson Cty.) (92-0907)	4/26/1993
Bailey County (93-0660)	5/4/1993
Castro County (93-0917)	5/10/1993
McCulloch County (93-0075)	6/4/1993
Bailey County (93-0194)	7/16/1993
Wharton County (92-5239)	8/30/1993
Edwards Underground Water District (93-2267)	11/19/1993
Marion County (93-3983)	4/18/1994
State District Court (93-2585)	5/9/1994
Harris County Criminal Court at Law (Harris Cty.) (93-2664)	5/31/1994
Fort Bend County Court at Law (Fort Bend Cty.) (93-2475)	5/31/1994
Mexia Independent School District (Limestone Cty.) (93-4623)	6/13/1994
Tarrant County (94-3012)	8/15/1994
Edna Independent School District (Jackson Cty.) (94-0868)	8/22/1994
Morton (Cochran Cty.) (94-1303)	9/12/1994
San Antonio (Bexar Cty.) (94-2531)	10/21/1994
Karnes City (Karnes Cty.) (94-2366)	10/31/1994
Judson Independent School District (Bexar Cty.) (94-4175)	11/18/1994
	79

Mr. CHABOT. Thank you very much. Without objection, those materials will be included in the record.

Mr. HEBERT. Thank you.

Mr. CHABOT. We want to thank all four of the members for their testimony here this morning. Now the Members up here have 5 minutes each to ask questions. And I yield myself 5 minutes for that purpose.

I'd ask all of you this question, if you could—and since I'm asking all four, if you could keep it within a confined range, so we could get everything in—how do you see the state of minority voting rights now, as compared to 1965? And how much of that would you say is directly or indirectly attributable to the Voting Rights Act? And I guess we'll start with you, Lieutenant Governor.

Mr. STEELE. Thank you, Mr. Chairman. Just very quickly, I think if you look at where we were and where we are, you can see dramatic progress has been made, as has been indicated by the testimony here this morning. But what I tried to caution in my comments was, you know, yeah, we've gone down the road and we've gotten rid of some of the ugly, but we still have some of the bad out there to deal with, as well; as well as we've got some good.

So the process of enfranchising individuals is a living process. It's an ongoing process that I think reflects the vibrancy and the diversity and the changes that occur within any given community.

Right now, our country, for example, is dealing with increased immigration. And I know in my State of Maryland, and particularly Prince George's and Montgomery Counties, we've seen a very significant increase in Hispanic and other minority communities who have migrated to this part of our Capital region. So how do we address their ongoing issues and concerns relating to enfranchisement, as they become fully American citizens and want to fully participate?

So I think we have to stay focused on the evolution and the continual vibrancy of this process. And this type of hearing and this process, in and of itself, helps us do that.

Mr. CHABOT. Thank you. Mr. Garza?

Mr. GARZA. I think there has been a dramatic improvement in the level of representation in the Latino community in Texas and throughout the Southwest, and in large measure because of the Voting Rights Act—section 5 and section 2.

I think there's still a lot of work that needs to be done. And we find examples every day of continuing applications of discriminatory features and of things that could be improved in this thing.

For example, the 2001 redistricting plan from Texas was objected to by the Department of Justice because it retrogressed and eliminated four Latino districts. All of those were put back into place as a result of the letter of objection and as a result of litigation. So that's 2001, when that redistricting plan was adopted for the State House of Representatives.

And another thing that we find continually when we file section 2 cases is there is a large percentage of non-compliance, or a substantial amount of non-compliance in local jurisdictions. We inevitably will find in reviewing records—for example, in the Roscoe Independent School District, we sued, challenging the at-large election system in Roscoe. And in discovery and in reviewing the min-

utes of the school district, we found that they had adopted a numbered post provision for the at-large election system, and had never submitted it for preclearance.

So there's a number of instances like that in almost every situation where we've filed these at-large challenges, that we find noncompliance. And so I think there's still a major problem with that, as well.

Mr. CHABOT. Thank you. Mr. Derfner?

Mr. DERFNER. There's no question that the right to vote is much more real today—incredibly more real—than it was in 1965. At the same time, we have to recognize the Voting Rights Act has been central to that progress.

And I liken it to a cold. If I get a cold, the doctor gives me an antibiotic, and he warns me,"Keep taking this antibiotic for a full week, or a full 10 days. And even if your symptoms appear to be lessening after four or 5 days, don't give up on the antibiotic, because your cold is not over just because the symptoms are not quite as visible." And I think that's what we have here. The Act has been critical to the progress we've made, and it remains critical to keeping on the progress.

Mr. CHABOT. Thank you. Mr. Hebert?

Mr. HEBERT. Just very briefly, Mr. Chairman, simply put, the Voting Rights Act has been responsible for bringing about the presence in boards, commissions, and other public bodies, of minority citizens taking their rightful place. And but for the Voting Rights Act, that would not have happened.

I have seen in my own experience, particularly, I recall my days in the Justice Department, when I was in Selma, Alabama, where Dallas County, Alabama—Selma being the county seat—was roughly 50 percent Black in its voting-age population. And due to the fact of extreme racially polarized voting and the fact that there was a long history of discrimination, obviously, against Black voters in Selma, Black voters were never able to elect a single county commissioner or school board member to the school board or to the county commission; even though they were roughly half of the population. And that didn't come about until nearly 1990.

And it came about because the Justice Department spent years litigating the case that went back and up and down to the 11th Circuit like a yo-yo several times. But eventually, single member districts were there, put into place. Some of the districts were majority Black, and Black voters chose to elect a Black candidate to those. And so for the first time in history in Selma, Alabama, the Voting Rights Act finally brought fruit, and Black voters were able to have representatives of their own choice governing them.

Now, that story has been repeated across the Nation in jurisdictions and small towns. And the Voting Rights Act has been singularly responsible for empowering minority voters to achieve those magnificent results.

Mr. CHABOT. Thank you very much. My time has expired. The gentleman from New York, Mr. Nadler, is recognized for 5 minutes.

Mr. NADLER. Thank you, Mr. Chairman. I'd like to ask the members of the panel one question, so we can clear this up for the benefit of the Supreme Court. Starting with Mr. Haybert, is it? Haybert?

Mr. HEBERT. Hebert.

Mr. NADLER. Hebert. Starting with Mr. Hebert, and going this way, do the members of the panel, based on their own experiences with elections in their home jurisdictions, believe that the protections of the Voting Rights Act—and most especially, the protections of the various sunsetting provisions of the Voting Rights Act that we're considering—are still vitally needed? And I mean vitally needed today; not 40 years ago.

Mr. HEBERT. The answer is, yes, Mr. Nadler. And if I would add one comment, you'll see I've attached a listing of all the objections that the Justice Department has entered in some States, covered States—Mississippi, Virginia, South Carolina, to name a few. Some will argue that the fact that there are maybe half as many objections in the last 10 years as the prior 10 years to that, that that's evidence that we no longer need section 5.

In fact, the opposite is true. In fact, this shows that jurisdictions now understand that they can't retrogress minority voting rights when they make changes, and they've made less of them.

Mr. NADLER. And it's working.

Mr. HEBERT. And it's working.

Mr. NADLER. Thank you. Mr. Derfner?

Mr. DERFNER. Mr. Congressman, yes, I agree wholeheartedly. And in fact, another way to do it is to pay attention in our local communities to the—or our State legislatures—to the proposals that are floated, and that never even get off the ground because it's understood that they will not get precleared. And so, in fact, the deterrent effect of the preclearance provision, just for one, is a critical one. And half the time, we never see what might happen and what would happen if we didn't have section 5.

The same thing, frankly, is true with the Federal Observer Program under section 8 of the act. The mere possibility of Federal observers coming to some elections, and the fact that observers have been sent to certain elections and certain polling places, gives us cleaner elections than we would have, and guarantees the protections. So we can't do without it.

Mr. NADLER. Thank you. Mr. Garza?

Mr. GARZA. Absolutely. And to echo some of the comments, the experience that we've had is that discussions in the governing boards have turned to, for instance, "Well, you know, we've had single member districts all these years. We have to keep redistricting every decade. It's costing us a lot of money. Why don't we do away with single member districts?" And inevitably, the discussion goes to, "Well, you can't, because of the Voting Rights Act."

Mr. NADLER. Thank you. Lieutenant Governor Steele?

Mr. STEELE. Thank you. Absolutely, it is relevant today, as it was in 1965, and I would say more so. And I think our recent history, electoral history, at the Federal and State levels would dictate that we not only renew and put back in place those—keep in place those provisions, but to the extent necessary, enhance and augment them to address some of the ongoing concerns that have been identified since 2000. So I think it's very relevant.

Mr. NADLER. Thank you. Well, I think we're making the record for the Supreme Court. Mr. Chairman, I will at this time yield the

balance of my time to the gentleman from Georgia, who has worked so very hard on these issues.

Mr. SCOTT OF GEORGIA. Thank you very much, Mr. Nadler. And I thank this entire Committee for your kindness and graciousness in extending me this opportunity to participate; not being a Member. I really, really appreciate it. Thank you very, very much.

I'd like to ask this question to each of the panelists, and if you could respond to it. For jurisdictions covered by section 5 of the Voting Rights Act, any change in the State's or political subdivision's electoral process must be submitted for Federal preclearance, to prove that such a change does not have the purpose or effect of denying or abridging a citizen's right to vote.

As you know, in my home State of Georgia there's a bill that has been passed, and is now law, that requires everyone who votes in person to first show State-issued identification photo card. Let me ask each of you this question. How does this law not have the purpose or effect of denying or abridging a citizen's right to vote; since most of the people without the photo driver's license or State-issued photo identification cards are people of color; or the poor, Black and White; or the disenfranchised; and the elderly?

And I'd like for each of you to respond. Mr. Steele, especially, I think you've had a case where you've vetoed—or your State has recently vetoed—an ID bill. I think you have some familiarity with that. And of course, Mr. Garza, you're representing from your perspective for Hispanics, and yours as a voting rights attorney. Especially, Mr. Hebert, yours as a former Acting Chief of the Civil Rights Division of the Justice Department.

Because, to show the irony of this, just yesterday, a Federal judge in the Rome Northern Circuit in Georgia ruled that, in fact, this very law that was precleared by the Justice Department is, in fact, discriminatory and, he said in his own words, unconstitutional and acted as a poll tax—one of the most vicious forms of denying individuals the vote.

Each of your responses, that would be very, very important, because I think Georgia now becomes the poster State for why we need this Voting Rights Act extended.

Mr. CHABOT. The gentleman's time has expired. The witnesses, we'd ask you to be relatively brief in your answers.

I would also note that it's really more specifically a HAVA issue, rather than what's covered in this hearing. But nonetheless, the question has been asked, and can be answered.

Mr. STEELE. I'd just very quickly say that, yes, we did recently have to deal with this issue. With respect to that bill, there was additional language in there that the Governor found particularly onerous. It wasn't just specifically the idea of having a voter ID card.

But this is a debate that many States are having right now. Particularly, in the State of Maryland, we had a very contentious 1994 election for governor, in which there was fraud and abuse: in which voters who had long since been dead voted; in which voters who were not registered to vote, voted. And so there has to be in place in the system some type of checks and balance.

And I think the debate and discussion we need to rightly have is what makes sense. If I go to the bank right now to cash a check,

regardless of my status in life, not only do I have to present an identification card, I get fingerprinted. So there are checks and balances throughout our system. And I don't see how or why this process—which is the most precious process that we can engage in—should not be protected as much as possible from fraud and abuse, at any level, so that every citizen's vote not only is counted, but is counted fairly.

And so I think it's an open debate. It's an open question. The States are having it. The Congress is certainly going to be engaged in it. And probably, at some point, the Supreme Court is going to ultimately judge which way is right and which way is wrong, vis-à-vis the Constitution.

But it's an important debate we're having in our State. And I look forward to having it again come this January when the session starts up in our legislature, because I know it's one of the issues we'll be tackling.

Mr. CHABOT. If the other witnesses would like to answer the question, they can. But, please, if you would be brief in your answers, because we're trying to keep this within the 5-minute rule.

Mr. DERFNER. Mr. Congressman Scott, I have no doubt that that bill was flagrantly unconstitutional, flagrantly illegal, flagrantly discriminatory. And that's exactly what Judge Murphy found.

And I think the importance of that is, how did the bill get that far? What does it show about the propensity of a covered jurisdiction to do things that it knows are discriminatory?

And frankly, what can we learn in the rest of the Nation, where there's a rush to judgment in many States to perhaps deal with fraud—which I acknowledge is something we need to prevent; but they aren't being careful enough to deal with it in a way that will still protect and preserve the right to vote of people, especially poor people that don't drive cars, that don't necessarily carry ID cards with them around. And so that case is a beacon for telling us that we are reminded we have to protect the right to vote.

Mr. HEBERT. And if I may just add one other comment to that, you brought up the fact that the Justice Department did, in fact, preclear that bill, and it's very troubling.

I mean, I think, as the section chief there, there was an effort made in South Carolina to impose a college diploma requirement to hold certain offices. And we found when we examined that, that that would fall more harshly on the shoulders of minority citizens, who hadn't achieved that same education attainment level. And this is a similar thing.

It always amazes me, I guess, as a voting rights lawyer, to see that we're taking a fundamental right like the right to vote and, instead of trying to expand it, we're trying to put conditions on it. We've done that throughout the history of our country. White males were allowed to vote; then property owners were allowed to vote; people only over 21, which we eventually lowered to 18. We eventually made people pass literacy tests; poll taxes; good character clauses.

Instead of expanding the right to vote, the State of Georgia tried to restrict the right to vote. And even though there are some cases of legitimate concern about fraud, as the Lieutenant Governor has pointed out, well, if the voting rights community is going to have

to show a demonstrated record of a need to extend voting rights discrimination, anti-discrimination provisions, why shouldn't those who are claiming that there's fraud have to also show factually—not just come in and make allegations, but to show a record, so that their legislation is tailored to meet that? Seems to make sense to me.

Mr. GARZA. Just very briefly, LULAC is extremely concerned about any restriction that has that sort of requirement for voting. We understand the need to make sure that elections are fair and clean. Our experience, though, has been that when you target election fraud measures, they're usually targeted at the minority community in a far greater extent than they are the non-minority community.

For example, we had a congressional race not too long ago in Houston, where 1,700 White voters voted in the Democratic—in the Republican primary, and then switched to vote in the Democratic run-off where an Hispanic was running against an Anglo candidate. That's illegal in Texas. That's a felony. Nobody was prosecuted.

I represented a young man in Uvalde, Texas, who assisted an illiterate voter secure an absentee ballot, a mail-in ballot. And because he was illiterate, he could only make a little mark, and had to be witnessed. Well, in Texas, a voter can only witness two—I mean, I'm sorry, one application for absentee ballot, or mail-in ballot, for an illiterate voter. My client witnessed two, and he was prosecuted. The DA dropped the charges when I sent him a copy of the 1983 action that I would file if he continued.

But that's the sort of enforcement that we see in Texas; when much of the fraud is actually committed by officials, not by voters.

Mr. CHABOT. The gentleman's time has expired. The Chair would just note for the record—and again, I don't want to get too far afield of what the purpose of this hearing is—but I'm all for expanding voting as widely as possible; but not expanding it to the extent that people who are deceased are allowed to vote. And so I have to concur with some of the comments that the Lieutenant Governor made, that I think it's in no one's interests to have fraud occurring.

And as we're doing that, we certainly need to make sure that we're not trampling upon anybody's rights, whether they be minorities or otherwise. But there is voter fraud going on, and that's just unacceptable. We need to come to grips with that, I believe.

The gentleman from Arizona, Mr. Franks, is recognized for 5 minutes.

Mr. FRANKS. Well, thank you, Mr. Chairman, and thank you, panel members. Lieutenant Governor Steele, it's always good to see you again, sir.

Mr. Hebert, in the covered areas, or those areas where there is special scrutiny due to past violations of the Voting Rights Act, do you see in your official capacity, or just studies that you have, that the complaints are increasing or decreasing on the Voting Rights Act?

Mr. HEBERT. Well, in the jurisdictions that have bailed out, certainly, they are decreasing. In fact, in many of those jurisdictions, the bailout process is an opportunity really for the election officials

to look at their entire voting and election system, top to bottom, and ensure that every aspect of it is non-discriminatory, and that in fact they are making the opportunities for people—minorities, of course, focused in that—to register and to cast ballots.

So in the bailout jurisdictions, the opportunities were actually increasing, as the Justice Department found when they consented to them.

Mr. FRANKS. And in your position, do you see—if you had to point out any particular practice that would be the most egregious, that goes to the heart of why we have the Voting Rights Act in the first place, that would be the most egregious in discriminating against people or trying to place undue burden on their right to vote, what would your perspective be on that?

Mr. HEBERT. I think today the biggest area that needs reform is redistricting, frankly. I think you see gerrymandering taking place at all levels; and oftentimes, aimed at keeping certain potential candidates off the county commission or the city council or school board. So I see intentional—a lot of times intentional fragmentation of the minority community, so that they cannot elect a candidate of choice. I think that would probably be one of the principal things I see.

Problems that deal with method of election, I think, continue to be the largest ones; because they in fact ultimately preclude minority citizens from taking their rightful place, oftentimes, you know, in a governing situation.

Mr. FRANKS. Well, I might ask you to help me understand that a little bit better, how they preclude that.

But my last question would be to the entire panel, and starting with you, Mr. Hebert. If you were going to rewrite some part of the Voting Rights Act retrospectively, if you, knowing what you do now, could go back the 40 years and say, "We want to put this in place because now we know what the trends were," how would you change—what things would you do differently? And I'll start with you, Mr. Hebert. And just if everyone could take a shot at that.

Mr. HEBERT. Well, that's a very interesting question, actually, Congressman Franks. I would say that one thing I would do, if I had had the foresight to do it—and I admit that I would not have; and you didn't either, unfortunately—is that I would have spelled out in section 5 that the purpose prong of section 5 bars unconstitutional discrimination, and not just retrogressive intent, as the Supreme Court has now limited it.

I would have said that if a county or a State or a city makes a voting change, and they intend to discriminate against minority voters, even if they don't make them worse off in the process, but they intend to discriminate against them and keep them in their place, that that ought to be unconstitutional—which it is—and it ought not to be precleared under the Voting Rights Act—which, unfortunately, today is not the law, as a result of the Supreme Court's decision in *Bossier Parish v. Reno.*

So that's certainly one change I would retrospectively go back and make. Mr. Derfner was around for the original '65 Act, so I'll let him add another—— [Laughter.]

Mr. FRANKS. Mr. Hebert, just briefly, related to the previous thought that you brought forth, the part that you think related to

the electoral redistricting, what part of that would you point out as having been something that is discriminatory toward minorities of any kind?

Mr. HEBERT. Well, when a redistricting plan is drawn by a jurisdiction, whether it's at the State level or the local level, they have a whole host of data available to them, down to the finest detail. And as a result of highly sophisticated technology, we can actually look down and see which blocks within a State voted Democratic, which ones voted Republican, where the minority voters are, the Hispanics, and how they're trending in terms of their voting patterns. And we can calibrate districts down to almost a tenth of a percent, as to what the likely outcome is going to be on election day.

And so I think that what happens in a lot of jurisdictions is that, as particularly the Latino community has been growing in so many jurisdictions across the country, and there are issues there with regard to their turnout because a number of people may not be citizens, or may not turn out to vote, that in fact there are calculations that are actually made in ways that are intended to keep Latino voters from electing their preferred candidates and to create districts in which they can elect their candidates of choice.

Mr. CHABOT. Thank you. The gentleman's time has expired.

I would just note for the record, we've been advised that we're supposed to have a series of votes at about quarter till twelve; which is a little over 20 minutes from now. I think we have four Members here still to question. The timing works out well, as long as we stay on schedule to, you know, some extent.

The gentleman from Michigan, Mr. Conyers, the distinguished Ranking Member of the full Committee, is recognized for 5 minutes.

Mr. CONYERS. Thank you, Chairman Chabot.

This has been a very good discussion. I'm not going to be able to talk with the Lieutenant Governor about some voter rights measures—three of them—that the Governor vetoed; one of them making it illegal to suppress the vote through the dissemination of false or misleading information. But I'd like to get some additional information about that, and how you came out on that position.

Mr. STEELE. How I personally came out?

Mr. CONYERS. Yes. I would like to find out where—I mean, you didn't veto them, but I'd like to know, because of your strong support for the Voting Rights Act, and the fact that in Baltimore particularly there were lots of—there have been a number of problems that have come to my attention. My staffer happens to live in the State. And so we'd like to get those for the record, since you're here and with us today.

I'd like to begin our discussion, as brief as it is, with the whole issue of bailout. I assume that the trigger is reasonably supported by most people. But I think that the bailout circumstances—which I think have been expedited by now. You don't even—you can do it through just filing. And I think that the bailout is where we should put our discussion.

And I'd like to begin with Mr. Derfner, who has been here—I've seen him around here—from the beginning of the act. And then I'd like to go to Mr. Hebert and the rest of our witnesses.

What do you think we need to do with bailout? Is it in—has it gone through enough changes so that we can support it in its present circumstance, Mr. Derfner?

Mr. DERFNER. I think—I think we have, and I think it does. The debate in 1982 took place because at that time the bailout had been very infrequently used. And in effect, the only bailout at that time available was for jurisdictions that could sort of show that it was a mistake to include them from the beginning. So there was no way that a jurisdiction, once covered, in those days could bail out simply by improving and doing better.

The 1982 bailout—and I think Mr. Hebert's cases have shown this—has shown that a jurisdiction can bail out effectively, and it can do it as much by showing that it has a good record today, it has worked to have a good record, and it has worked to do those things that are the goals of the act. So in that regard, I think the bailout has been fine.

Mr. Hebert tells me that no jurisdiction that has tried to bail out has been unable to do so, so it seems to be working. And unless there is more of a record put on about specifics, I think the bailout as it is is just fine, and fully supports the constitutionality of the Voting Rights Act by giving a safety valve, or almost a reverse trigger, to correspond to the trigger of section 4.

Mr. CONYERS. Mr. Hebert?

Mr. HEBERT. I would agree with that. Let me also add, Mr. Derfner is correct, there have been—not a single jurisdiction has attempted to bail out since the '82 amendments and been turned down by the Justice Department or a Federal court.

When you think about the bailout provisions, they are just the right stuff. They go exactly to the issues that Congress was concerned about when it enacted the Voting Rights Act in the first place.

When you think about the criteria that you have to establish in order to bail out, you have to show that you haven't lost a court case in which you've been found guilty of discriminating on the basis of race or color or membership in a language minority group. You have to show that you've actually taken constructive measures to increase minority voter participation. You have to show that you've complied with section 5's preclearance requirements. You have to show that not only have you made your submissions, but you haven't proposed anything that discriminates against minority voters or makes them worse off. All of the kinds of things that jurisdictions should have to show in order to escape.

And quite frankly, I think they're perfectly tailored to meet the nature and extent of the violation; which is exactly what the Supreme Court has said repeatedly in this area.

Mr. CONYERS. Mr. Garza, do you have anything to add?

Mr. GARZA. No, I think I would echo what they've——

Mr. CONYERS. Surely. Lieutenant Governor?

Mr. STEELE. I would echo the same.

Mr. CONYERS. Thank you. Thank you, Mr. Chairman.

Mr. CHABOT. Thank you very much. If I could ask for unanimous consent for 1 minute, just to follow up on a question that the distinguished Member, Mr. Conyers, just asked and that you were talking about, Mr. Hebert, relative to California, apparently,

there's four counties out there where some folks have indicated that they think the process is difficult and cumbersome and has a low probability of success; as opposed to other areas which have done quite well. Could you comment on that point of view, and what your opinion would be? Again, very briefly.

Mr. HEBERT. Yes, I would say that, you know, I only represent one county in California, Kings County. And I believe that in Kings County the officials there recognize that the Voting Rights Act plays an extremely important part of empowering racial and ethnic minorities.

I don't think—I think that the one issue for Kings County, which is presently seeking a bailout, or at least has notified the Justice Department that it is seeking a bailout, that they have an issue with is the fact that in order to get a bailout they have to show not only that they have made all their section 5 submissions, but all the dozens and dozens and dozens of jurisdictions within the county—often, that they have no control over, and who conduct their own elections sometimes—that they have also made all of their section 5 submissions, or engaged in non-discrimination.

And you know, that's proving to be a challenge for us, because we've now found that there are 40 to 50 of those out there within the county that have never been submitted for preclearance.

Mr. CHABOT. The gentleman from New York is recognized briefly here.

Mr. NADLER. Very briefly. I just want to ask a follow-up question to this. What you just said intrigued me. So Kings County has a problem with the fact—the difficulty of getting 40 or 50 jurisdictions locally to be perfect, also. My question is, if Kings County bailed out, wouldn't those local jurisdictions automatically also be bailed out?

Mr. HEBERT. Yes, they would.

Mr. NADLER. That's why you have to make sure that they're okay, too?

Mr. HEBERT. That's correct.

Mr. NADLER. Okay.

Mr. HEBERT. That's the current state of the law.

Mr. NADLER. Thank you very much.

Mr. CHABOT. The gentleman's time has expired. The gentleman from Florida, Mr. Feeney, is recognized for 5 minutes.

Mr. FEENEY. Thank you, Mr. Chairman. I've appreciated all the witnesses. Lieutenant Governor Steele, thank you for being here. I have a series of some quick questions for you to, I think, clear some matters up. You don't support proposals that would require some form of ID or proof of who you are that would be either unaccessible or unaffordable, unavailable to any particular group; is that right?

Mr. STEELE. No, absolutely not. I can look to the case of my mother, 76 years old, a senior citizen. What we did was, we went out and got made up just an identification card—name, address, you know, Social Security number—that she could use.

Mr. FEENEY. And to the extent that a State deliberately had a burden or a gate to get certain forms of legitimate ID to discriminate against certain voters, that would violate the 15th amendment and the Voting Rights Act.

Mr. STEELE. Absolutely. I mean, we're not talking about identification that would be onerous to obtain.

Mr. FEENEY. But do you think this State may have an interest in preventing some of the 10 to 12 million people that are in America illegally from participating in Americans' elections?

Mr. STEELE. It goes to the question of checks and balances in the system to make sure that the fraud and abuse that has been documented, at least in my State, over the last 10 years does not occur.

Mr. FEENEY. And in Florida we have "snow birds" that are fortunate enough to spend the summer months in the North often, and they spend four, 6 months in the South. We know that thousands of them traditionally vote twice for President.

Mr. STEELE. We have had examples of that in the State of Maryland, where we have citizens of the District of Columbia who are domiciled there but registered to vote in Maryland, and tend to vote in both jurisdictions on election day.

Mr. FEENEY. And notwithstanding a person's passion to participate in the democratic process, do you believe that, once they are dead, they ought to quit participating?

Mr. STEELE. I think that would be a good thing.

Mr. FEENEY. Okay. Thank you. I really appreciate that.

Mr. Hebert, I want to congratulate you on the extraordinary record. You've represented 100 percent of the applicants who have been successful in the bailout provision. And not only that, but your average fee of about $5,000 seems to be one of the most affordable waivers of any Federal program that I know of. I don't know of any lawyer in the country that can brag about that success rate for such an affordable proposition.

You point out that some folks are either just not aware that they're eligible to apply for bailout, or that they are intimidated because of the prospects. I mean, after all, the way that section 4 is stated, to prove that you haven't violated section 5 is almost the impossible burden of proving the negative, if you take it to the extreme.

But what you point out is that a failure, for example, to have precleared ahead of time a change in the past 10 years can be remedied at the time of application, and that if there have been certain *de minimis* failures to comply with the Voting Rights Act, that they have been waived.

Can you elaborate on that, as we decide whether to reenact section 4? Do we need to change some of the provisions of the bailout provision, or do you just think we need to do a better job of educating the eligible jurisdictions that they can participate?

Mr. HEBERT. Thank you, Congressman Feeney. I would encourage the Congress to ask the Justice Department to make bailout information more available to the covered jurisdictions, and that they will work with them to that end.

But in terms of the actual *de minimis* changes, what that provision was really intended to do was this. If a jurisdiction is a covered jurisdiction and wants to bail out, they have to show a good record of having—consistent record of having made all of their submissions to the Justice Department for preclearance of their voting changes, to show non-discrimination.

The Justice Department is not concerned if a State or a city or a county or a school board inadvertently forgot to submit something that is not controversial and is—and could be labeled *de minimis*; even if it involves moving a polling place, which can sometimes not be de minimis.

And the Justice Department and Congress spelled this out the last time when it amended the bailout provisions in '82—should really bring a heavy dose of common sense to the application of the bailout process. And in fact, that's what the Justice Department has done.

In the table I gave you, for example, in Shenandoah County, Virginia, one of the counties that I represent, there were 31 unprecleared changes that we found in the course of that review with the Justice Department. We went back and submitted those. They were precleared *nunc pro tunc.* And basically, the county was then eligible and the Justice Department considered it.

Mr. FEENEY. And then, finally, in *Katzenbach*, the Supreme Court ruled that the Voting Rights Act was an exceptional power exercised by the Congress, and therefore had to be limited and would be subject to scrutiny. You pointed out that the bailout provisions, like other provisions of the Voting Rights Act, has to be proportional to the remedy to be resolved.

In your opinion, is the Voting Rights Act, as it applies today in America, still proportional in a constitutional sense to the remedy to be addressed?

Mr. HEBERT. Yes, both the preclearance provisions and the bailout provisions, in my view, are constitutional to that respect.

Mr. FEENEY. Thank you. I yield back.

Mr. CHABOT. Okay. Thank you. We'll go ahead to Mr. Scott now. If Mr. Watt is going to come back, then we'll have to come back afterwards. If not, then we could conclude before these votes. So the gentleman from Virginia is recognized for 5 minutes.

Mr. SCOTT OF VIRGINIA. Thank you, Mr. Chairman. Mr. Hebert, you're familiar with Virginia politics. It seems to me that the burden of bailing out may not be the reason that a lot haven't bailed out. I'd imagine that a lot of cities wouldn't want to offend their minority population by adding questions about motives and all that, and would just—where the remedy may be worse than the cure—I mean the remedy may be worse than the disease. And they just go through the perfunctory kind of changes they go through.

Rather than get into a racially divisive situation with their community, I suspect a lot of jurisdictions just don't want to. And a lot in my district, I would imagine, wouldn't want to spoil whatever race relations they have by going through that fight and, however easy it may be, would just leave well enough alone and like that. Do you agree?

Mr. HEBERT. Yes, I do, because, you know, Congressman Scott, you make a good point here; which is that when jurisdictions are considering bailout, the first thing that I've recommended to my clients to do is to meet with the minority community and see what they think about it.

And in fact, you can use the minority community, engage the minority community to find out more about the bailout process and

what their concerns are about the community in the area of voting. So you can actually use it as a constructive tool.

Mr. SCOTT OF VIRGINIA. But generally, the reason a lot of them may not be trying to bail out is they just decide they don't want to go through that process and spoil their race relations.

Did I understand your testimony to say that it's somewhat absurd to preclear a plan that is a clear section 2 violation?

Mr. HEBERT. No, I didn't say that. It used to be the law—at least, according to Justice Department regulation—that the Justice Department would not preclear voting changes that provided a clear violation of section 2. The Supreme Court struck down that particular interpretation in *Bossier Parish I.*

What I said was that, if you engage today in unconstitutional discrimination, and you enact a voting change that basically keeps minorities in their place but doesn't make them worse off, that's unconstitutional; but that's going to get precleared.

Mr. SCOTT OF VIRGINIA. But it's a violation of section 2.

Mr. HEBERT. It is a violation of section 2, but it puts the burden on the minority.

Mr. SCOTT OF VIRGINIA. And isn't it absurd to preclear a section 2 violation and force the community to go to court, rather than just fail the preclear it?

Mr. HEBERT. Well, it's an area of the law that should be fixed.

Mr. SCOTT OF VIRGINIA. Okay.

Mr. HEBERT. It should be fixed.

Mr. SCOTT OF VIRGINIA. The present law is absurd. That's what I mean.

Mr. HEBERT. Yes, it is.

Mr. SCOTT OF VIRGINIA. Yes.

Mr. DERFNER. Congressman Scott, I would just say I think that is a situation in which, with all due respect to the Supreme Court, I think they got Congress' intent wrong. And I think Congress made plain what it meant. And I think that may be one of the instances in which this Congress ought to engage in restorative conduct, to reassert what it did the first time around.

Mr. SCOTT OF VIRGINIA. One of the things—just don't have much time left—the question of whether we ought to go nationwide with the Voting Rights Act, how can you narrow—is it possible to narrowly tailor a Voting Rights Act protecting rights of minorities to vote, and try to go nationwide? Is that possible?

Mr. HEBERT. This was considered back in 1982 and, in my judgment, was properly rejected, because you really want to—and because the provisions are special remedial provisions, you really want to target them to where the problems are. And making them simply nationwide creates all kinds of over-breadth problems that I think Congress should avoid.

Mr. SCOTT OF VIRGINIA. My time is just about up. If someone could submit for the record the need for observers and examiners, I'd appreciate it. And Mr. Chairman, I would yield back so that my colleague could have time before we vote.

Mr. CHABOT. I don't know if there is time, really.

Mr. WATT. Mr. Chairman, if you could just recognize me for 1 minute.

Mr. CHABOT. The gentleman is recognized for 1 minute.

Mr. WATT. I think I can do what I need to do. I really had a question that I don't think we can do justice to in the time here, but I'd like to submit it technically for the record and get a follow-up answer, if it's all right with the Chair.

The general concept is what we need to do possibly to expand section 5 jurisdiction. And one of the—and so you all can be thinking about it, I'll give it to you in precise language. But the concept would be the possibility of expanding section 5 to include jurisdictions that have since 1982 been found guilty of violating the Voting Rights Act.

But I think the question and the responses probably need to be well thought out and articulated better than I'm articulating them here. So if it would be better—I think it would be better for me to just do it in the record.

Mr. CHABOT. So noted. The gentleman will do that, and the Committee would respond. We appreciate that.

Thank you very much for your time. We've got to head over to the floor. You've been extremely helpful at this point in time. We do have hearings next week, as well, but not with this particular panel.

And the gentleman from New York is recognized. We already did the 5-minute thing.

Mr. NADLER. Yes, we already did it.

Mr. CHABOT. Okay. If there's no further business to come before the Committee, we're adjourned. Thank you very much.

[Whereupon, at 11:40 a.m., the Subcommittee was adjourned.]

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

PREPARED STATEMENT OF THE HONORABLE LINDA T. SÁNCHEZ, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA, AND MEMBER, SUBCOMMITTEE ON THE CONSTITUTION

I thank Chairman Chabot and Ranking Member Nadler for convening this second hearing on reauthorization of the Voting Rights Act, and for allowing me to be a guest on this panel.

As the only Latina on the House Judiciary Committee, today's hearing regarding "Section 4: An Examination of The Scope and Criteria For Coverage Under The Special Provisions of the VRA" is significant to me and thousands residents in my home state of California.

This hearing is vital because section 4 prohibits the use of literacy tests and English-only tests in voter eligibility determinations. For decades in voting jurisdictions nationwide, English-only tests have been a subtle but insidious method used to keep eligible Latino and other language minority voters from the polls.

My home state of California is one of the 16 states in the Union that are presently covered by section 4.

With California and the nation experiencing annual Latino population growth, it is vital that section 4 cover all jurisdictions there is a confirmed history of discrimination that may adversely impact Latino voters.

The current section 4 criteria are stringent but may benefit from some revisions.

Presently, jurisdictions are covered based on whether literacy tests or other devices were in place in 1964, 1968, or 1972, and whether voter registration and participation in covered jurisdiction was less than 50 percent in those years.

The continued reliance on these decades-old criteria raises the obvious question whether the jurisdictions presently covered by section 4 should continue to be, and whether new jurisdictions are being overlooked.

Likewise, I think it is critically important that we closely consider the "bail out" provisions that allow jurisdictions with proven histories of discrimination to end their Voting Rights Act scrutiny.

It is commendable to reward jurisdictions for reversing their histories of discrimination. However, the preservation of all citizens' right to vote should take first priority.

Section 4 is a critical provision of the Voting Rights Act for protecting Latino and other minority voters from literacy and English-only tests.

It is a provision that must be reauthorized and if necessary amended to ensure all applicable jurisdictions are covered.

I hope that today's witnesses will inform the Subcommittee on the importance of section 4 and make recommendations to improve its scope and application.

Again, I thank the Chairman and Ranking Member for their courtesy and allowing me to join the Constitution Subcommittee at this important hearing.

I yield back.

PREPARED STATEMENT OF THE DAVID SCOTT, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF GEORGIA

Thank you, Mr. Chairman and members of this subcommittee for the opportunity to be here today during this important hearing to examine the scope and criteria for coverage under the Voting Rights Act. The legislation was one of the most important, if not, the most important legislation enacted by Congress in the 20th century. The legislation protects the voting rights of not just African-Americans, but each and every citizen of this wonderful country. The Voting Rights Act is so important that it has been amended and sections that were due to expire extended in 1970, 1975, 1982, and 1992. Again, it is time to reexamine this legislation and its impact on several states including my own state of Georgia.

I am particularly concerned with the effectiveness of the preclearance provisions in section 5 of the Voting Rights Act that require states, including Georgia, with a history of discriminatory voting practices to obtain preclearance for any proposed changes to their election laws or procedures. The fact that Georgia's obviously discriminatory Voter ID law was precleared by the U.S. Department of Justice underscores the continued need for the judicial remedies of the Voting Rights Act to be extended. A citizen's right to vote must not be left to the political winds of which party controls the Justice Department, but should be enshrined in our federal laws and protected by judicial review.

Therefore, I will work closely with my colleagues in the House and Senate to ensure that this legislation continues to protect the rights of all Americans. I look forward to hearing from my colleagues, legal and constitutional scholars, civil rights activists, and the community during the hearings being held by this committee.

Thank you.

APPENDIX TO THE PREPARED STATEMENT OF ARMAND DERFNER: *United States v. Charleston County* (316 F.Supp.2d 268)

316 F.Supp.2d 268
316 F.Supp.2d 268
(Cite as: 316 F.Supp.2d 268)

Briefs and Other Related Documents

United States District Court,D. South Carolina,Charleston Division.
THE UNITED STATES of America, Plaintiff,
v.
CHARLESTON COUNTY, South Carolina Charleston County Council; John O. Conlon, Toi Ahrens Estes, Cindy M. Floyd, Curtis E. Bostic, A.D. Jordan, Barrett S. Lawrimore, Timothy E. Scott, Leon E. Stavrinakis, Charles Wallace, members of Charleston County Council; Charleston County Election Commission, Defendants.
Lee H. Moultrie, George Freeman Maggie McGill, and Sandra Flower, Plaintiffs,
v.
Charleston County Council and Charleston County Election Commission, Defendants.
Nos. 2:01-0155-23, 2:01-562-23.

March 6, 2003.

Background: United States and private plaintiffs brought actions under Voting Rights Act (VRA), alleging that at-large method of electing county council unlawfully diluted minority voting strength. After cases were consolidated, U.S. moved to enjoin further elections.

Holdings: The District Court, Duffy, J., held that

7(1) use of at-large method of electing county council diluted minority voting strength, in violation of § 2 of VRA, and

8(2) absent more compelling evidence, at-large method of electing county council was not adopted for racially discriminatory purposes.

Judgment for United States, and partial judgment for private plaintiffs.

Opinion affirmed on appeal, 2004 WL 966311.

West Headnotes

[1] **Elections 144 ⚿12(1)**

144 Elections
144I Right of Suffrage and Regulation Thereof in General
144k12 Denial or Abridgment on Account of Race
144k12(1) k. In General. Most Cited Cases
Claims of intentional discrimination under § 2 of the Voting Rights Act (VRA) are assessed according to the standards applied to constitutional claims of intentional racial discrimination in voting. Voting Rights Act of 1965, § 2, as amended, 42 U.S.C.A. § 1973.

[2] **Counties 104 ⚿38**

104 Counties
104II Government
104II(C) County Board
104k38 k. Nature and Constitution in General. Most Cited Cases
United States had standing, pursuant to Voting Rights Act (VRA), to challenge county's at-large method of election for its county council to protect the voting rights of the county's African-American citizens. Voting Rights Act of 1965, § 12(d), as amended, 42 U.S.C.A. § 1973j(d).

[3] **Counties 104 ⚿38**

104 Counties
104II Government
104II(C) County Board
104k38 k. Nature and Constitution in General. Most Cited Cases
Citizens who were registered voters of county had standing to challenge county's at-large method of election for its county council to protect the voting rights of the county's African-American citizens.

[4] **Elections 144 ⚿12(7)**

144 Elections
144I Right of Suffrage and Regulation Thereof in General
144k12 Denial or Abridgment on Account of Race
144k12(2) Discriminatory Practices Proscribed

144k12(7) k. At-Large Elections. Most Cited Cases
A plaintiff challenging an at-large election system under § 2 of the Voting Rights Act (VRA) must demonstrate (1) the minority group is sufficiently large and geographically compact to constitute a majority in a single-member district, (2) the minority group is politically cohesive, and (3) the white majority votes sufficiently as a bloc to enable it-in the absence of special circumstances, such as the minority candidate running unopposed-usually to defeat the minority's preferred candidate. Voting Rights Act of 1965, § 2, as amended, 42 U.S.C.A. § 1973.

[5] **Elections 144 12(7)**

144 Elections
144I Right of Suffrage and Regulation Thereof in General
144k12 Denial or Abridgment on Account of Race
144k12(2) Discriminatory Practices Proscribed
144k12(7) k. At-Large Elections. Most Cited Cases
In considering a challenge, under § 2 of the Voting Rights Act (VRA), to an at-large election system, Court must not only determine whether the three *Gingles* preconditions are satisfied, but must perform a totality of circumstances inquiry, examining such factors as any history of official discrimination in voting, extent of racial polarization in voting, extent of use of voting practices or procedures enhancing opportunity for discrimination against the minority group, whether the minority has been denied access to a candidate slating process, extent to which the minority is hindered in its ability to participate effectively in the political process, whether political campaigns have been characterized by overt or subtle racial appeals, and extent to which members of the minority have been elected to public office in the jurisdiction. Voting Rights Act of 1965, § 2, as amended, 42 U.S.C.A. § 1973.

[6] **Elections 144 12(7)**

144 Elections
144I Right of Suffrage and Regulation Thereof in General
144k12 Denial or Abridgment on Account of Race
144k12(2) Discriminatory Practices Proscribed
144k12(7) k. At-Large Elections. Most Cited Cases
In a challenge, under § 2 of the Voting Rights Act (VRA), to an at-large election system, such factors as whether there is a significant lack of responsiveness on the part of elected officials to particularized needs of the minority group, and whether the policy underlying the jurisdiction's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous, may have probative value as part of plaintiffs' evidence to establish a violation. Voting Rights Act of 1965, § 2, as amended, 42 U.S.C.A. § 1973.

[7] **Counties 104 38**

104 Counties
104II Government
104II(C) County Board
104k38 k. Nature and Constitution in General. Most Cited Cases
Use of at-large method of electing county council diluted minority voting strength, in violation of § 2 of Voting Rights Act (VRA); there was pervasive polarization in voting, a disproportionately small number of African-Americans had ever been elected to the council, and the ability of the minority group to effectively participate in the political process was hindered by the effects of past discrimination, the unusually large size of the election district, and a de facto majority vote requirement resulting from use of staggered terms, residency districts, and a primary nominating system. Voting Rights Act of 1965, § 2, as amended, 42 U.S.C.A. § 1973.

[8] **Counties 104 38**

104 Counties
104II Government
104II(C) County Board
104k38 k. Nature and Constitution in General. Most Cited Cases
Absent more compelling evidence, at-large method of electing county council was not adopted for racially discriminatory purposes, as would violate 14th Amendment and § 2 of Voting Rights Act (VRA), even though there was historical evidence that the method was a known device for diluting minority voting strength; there was competent evidence that the legislation was enacted to satisfy the one-person, one-vote mandate of the Supreme Court, and there was no evidence of any departure from normal procedures. U.S.C.A. Const.Amend. 14; Voting Rights Act of 1965, § 2, as amended, 42 U.S.C.A. §

1973.

[19] **Constitutional Law 92 ⚿211(1)**

92 Constitutional Law
92XI Equal Protection of Laws
92k211 Nature and Scope of Prohibitions in General
92k211(1) k. In General; Discrimination. Most Cited Cases
In order to establish a violation of the Equal Protection Clause of the Fourteenth Amendment, the burden is upon the plaintiffs to show discriminatory purpose and effect. U.S.C.A. Const.Amend. 14.

[19] **Constitutional Law 92 ⚿215**

92 Constitutional Law
92XI Equal Protection of Laws
92k214 Discrimination by Reason of Race, Color, or Condition
92k215 k. In General. Most Cited Cases
In determining whether an invidious discriminatory purpose was a motivating factor in a legislative action, and thus whether equal protection principles were violated, Court considers (1) whether impact of the official action bears more heavily on one race than another, (2) the historical background of the decision, (3) the specific sequence of events leading up to the challenged decision, (4) departures from the normal procedural sequence, and (5) the legislative and administrative history, especially any contemporary statements by members of the decision-making body. U.S.C.A. Const.Amend. 14.

***270** John H. Douglas,U.S. Attorneys Office, Charleston, SC, Joseph D. Rich, U.S. Department of Justice, Civil Rights Division, Employment Litigation Section, Washington, DC, Christopher Coates, U.S. Department of Justice, Civil Rights Division, Washington, DC, for United States of America, plaintiff.
Laughlin McDonald, Atlanta, GA, Armand Georges Derfner, Charleston, SC, Cheryl Whipper Hamilton, Whipper Law Firm, North Charlsteon, SC, for Lee H. Moultree, George Freeman, Maggie McGill, Sandra Fowler.
A. Arthur Rosenblum, Rosenblum and Goldberg, Charleston, SC, Bernard Eugene Ferrara, Jr., Joseph Dawson, III, Charleston County Legal Department, N Charleston, SC, Samuel W. Howell, IV, Howell and Linkous, Mt Pleasant, SC, Benjamin E. Griffith, Cleveland, MS, for Charleston County, South Carolina, Charleston County Council.
Bernard Eugene Ferrara, Jr., Joseph Dawson, III, Charleston County Legal Department, N Charleston, SC, Samuel W. Howell, IV, Howell and Linkous, Mt Pleasant, SC, for John O Conlon, Toi Ahrens Estes, Cindy M Floyd, Ruth C Glover, A D Jordan, Timothy Scott, Curtis E. Bostic.
Lucas C. Padgett, Jr., Bernard Eugene Ferrara, Jr., Joseph Dawson, III, Charleston County Legal Department, N Charleston, SC, Samuel W. Howell, IV, Howell and Linkous, Mt Pleasant, SC, for Barrett S. Lawrimore, Leon E. Stavrinakis, Charles Wallace.
Mikell Ross Scarborough, Charleston, Bernard Eugene Ferrara, Jr., Joseph Dawson, III, Charleston County Legal Department, N Charleston, SC, Samuel W. Howell, IV, Howell and Linkous, Mt Pleasant, SC, for Charleston County Election Commission.

ORDER

DUFFY, District Judge.
This matter was tried without a jury beginning on July 15, 2002. The United States has alleged that the at-large method of electing the nine-member Charleston County Council violates Section 2 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973 ("Section 2"), because it results in the unlawful dilution of minority voting strength. The Court-having heard the arguments, read the submissions of counsel, and considered the evidence including court-room testimony, deposition testimony, and exhibits-enters judgment for the United States of America and partial judgment for Plaintiffs Moultrie, Freeman, McGill, and Flower based on the following findings of fact and conclusions of law.

As an initial matter it is important to clarify what this Order rigorously says about the at-large electoral system of Charleston County and what it unequivocally does *not* say about her citizens. The Court recognizes that its decision does not merely operate mechanically against a political subdivision of the State of South Carolina but in fact against individual citizens whose lives in various measure are ***271** today changed. While the Court is otherwise disinclined to editorialize, those individuals, whether white or black, [FN1] who have had no voice in this debate but whose liberties are invariably altered by its resolution, deserve as clear and direct an explanation of this action as can be reasonably provided. There is a fundamental gravity to any decision of a federal court which calls into question actions taken by the people through the legislative process of their local and state communities. Federalism and separation of powers demand vigilant

consideration.

> FN1. In pursuit of a decision that is not only objective in fact, but objective by all appearances, the Court has given thoughtful consideration to the appropriate way to identify the respective races. Unfortunately, labels are inherently pregnant of connotation, and generally inadequate in their ability to characterize an entire group of people whose cultural, physical, and progenital commonality are a spectrum of attributes rather than a discrete set of qualities. The United States Census Bureau uses both the terms "black" and "African-American." Although the phrase "African-American" is likely under-representative for its failure to encompass fully the heritage of each member in the relevant community, it is seemingly preferable to the increasingly arcane pairing of "black and white," which generally fails to be either accurate or discreet. The Court will therefore predominately employ the phrase African-American going forward.

With that said, this Order is radically not a condemnation of the citizenry of Charleston County but rather a recognition that the specific bulwark of an at-large system, in twisted concert with the particular geographic and historical realities of this County, unlawfully and institutionally inhibit a community of voters in Charleston County from equal access to the electoral process. The United States Supreme Court has made it clear that the "essence of a § 2 claim is that a certain electoral law, practice or structure interacts with social and historical conditions to cause inequality in the opportunities enjoyed by black and white voters to elect preferred representatives." *Thornburg v. Gingles*, 478 U.S. 30, 47, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986). In other words, a violation of Section 2 may arise from the structure of the electoral process itself plus the effects of *past* discrimination without regard to any *present* discriminatory intent. This case is one such instance.

Undoubtedly there are bigots among us, and while their stories uncomfortably texture the four corners of the Court's decision, this Order is little about them. If the trial on the merits demonstrated anything, it is that Charleston County can celebrate a rich legacy of individuals selflessly working towards a true community among its many races. Notwithstanding, the current at-large system, as it exists in a county of this size, unlawfully exacerbates the disadvantaged political posture inherited by generations of African-Americans through centuries of institutional discrimination.

INTRODUCTION

Procedural History

[1] The United States brought this action on January 17, 2001. FN2 The United **272 States did not allege a violation of Section 2's intent standard. FN3 Private plaintiffs, who are four citizens registered to vote in Charleston County elections, filed their suit on February 28, 2001, alleging that Charleston County's at-large method of election violates the results and intent standards of Section 2. The Court consolidated the two cases on April 6, 2001.

> FN2. As amended in 1982, Section 2 of the Voting Rights Act of 1965, provides:
> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which *results in* a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2), as provided in subsection (b).
> (b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the [jurisdiction] *are not equally open to participation by members of a class [protected by Section 2(a)] in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.* The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.
> 42 U.S.C. § 1973 (emphasis added).

FN3. Section 2 contains both a "results" standard and a prohibition against intentional racial discrimination in voting. Claims of intentional discrimination under Section 2 are assessed according to the standards applied to constitutional claims of intentional racial discrimination in voting. *See Garza v. County of Los Angeles*, 918 F.2d 763, 766 (9th Cir.1990) ("[T]he Voting Rights Act can be violated by both intentional discrimination in the drawing of district lines and facially neutral apportionment schemes that have the effect of diluting minority votes.").

On March 5, 2002, the United States moved for partial summary judgment as to the three preconditions set forth by the United States Supreme Court in *Thornburg v. Gingles*, 478 U.S. 30, 106 S.Ct. 2752, 92 L.Ed.2d 25(1986). On March 29, 2002, the United States also moved to enjoin the County from holding elections for open seats on the Charleston County Council until a proper remedy could be implemented under Section 2. On April 1, 2002, the private Plaintiffs also filed motions for a partial summary judgment on the *Gingles* preconditions and for a preliminary injunction. On April 2, 2002, the Defendants moved for summary judgment on the third *Gingles* precondition and on the totality of circumstances.

Magistrate Judge Robert S. Carr heard oral argument on those motions on April 17, 2002. In a written Report and Recommendation dated April 26, 2002, Magistrate Judge Carr recommended that (1) the United States' Motion for Partial Summary Judgment on the *Gingles* preconditions be granted, (2) the Defendants' Motion for Partial Summary Judgment on the totality of the circumstances be denied, and (3) the United States' Motion for Preliminary Injunction be denied.

Defendants objected only to Magistrate Judge Carr's recommendation that partial summary judgment be granted the United States as to the third *Gingles* precondition. They did not object to the other recommendations, including those related to the first two *Gingles* preconditions or that an untimely affidavit filed by one of Defendants' expert witness, Dr. Ronald Weber, be stricken from these proceedings. The United States objected only to that portion of Magistrate Judge Carr's Report and Recommendation that concluded that the United States did not meet its burden of demonstrating that a preliminary injunction would serve the public interest.

On May 24, 2002, the Court denied the United States' Motion for Preliminary Injunction. In an Order dated July 10, 2002, the Court adopted Magistrate Judge Carr's Report and Recommendation *in toto* granting Plaintiffs' motion for summary judgment on the three *Gingles* preconditions. Both the Court's Order, dated July 10, 2002, granting Plaintiffs' motion for partial summary judgment and the Magistrate Judge's Report are incorporated herein by specific reference.

***273** The trial in this case commenced on July 15, 2002, and concluded on August 16, 2002. On September 18, 2002 the Court denied the United States' renewed motion for preliminary injunction against the November 5, 2002 general election for positions on the Charleston County Council.

Jurisdiction and Standing

The Court has subject matter jurisdiction over this action pursuant to 42 U.S.C. § 1973j and 28 U.S.C. § § 1331 and 1345. The voting rights claims advanced by the United States in this action are premised solely upon Section 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973.

[2] Pursuant to 42 U.S.C. § 1973j(d), "[w]henever any person has engaged ... in any act or practice prohibited by [Section 2] ... the Attorney General may institute for the United States, or in the name of the United States, an action for preventive relief, including an application for a temporary or permanent injunction ... or other order." Thus, the United States has standing to challenge Charleston County's at-large method of election for its County Council to protect the voting rights of the County's African-American citizens. [FN4]

FN4. It is important to the analysis to remember that the Voting Rights Act does not require nor allow the Court to examine the merits or demerits of at-large voting versus single-member districts except as to how they may effect minority voting rights.

[3] Private Plaintiffs also have standing to pursue their claims. *See Wilson v. Minor*, 220 F.3d 1297, 1303 n. 11 (11th Cir.2000) (citing *United States v. Hays*, 515 U.S. 737, 742, 115 S.Ct. 2431, 132

L.Ed.2d 635 (1993) and stating "the essential point remains that in order to have standing one must reside in the area directly affected by the allegedly illegal voting scheme").

DISCUSSION: FINDINGS OF FACT and CONCLUSIONS OF LAW

I. Factual Background

Demographic Information and Statistical Background

Charleston County is the third most populous of South Carolina's 46 counties and has the second highest total number of African American residents. (U.S.Ex. 106.) According to the 2000 Census of Population, Charleston County has a total population of 309,969. (U.S.Ex. 107.) Of that total, 188,542 (60.8%) persons are white and 106,337 (34.3%) are African American; 15,090 (4.9%) are of other racial/ethnic descent. (Id.) [FN5] Charleston County's voting age population is 236,395, of whom 153,250 (64.8%) are white, 72,287 (30.6%) are African American, and 10,858 (4.6%) are of other racial/ethnic descent. (Id.)

FN5. The figures for the white and African-American total population and voting age population in this paragraph do not include Hispanics, who may be of any race, and people who are of two or more races. The persons in the other category include those of Hispanic, American Indian or Alaska Native, Asian, Hawaiian or Pacific Islander, and other descent, and persons of two or more races.

According to the South Carolina Election Commission, as of November 2000:(1) 177,279 persons were registered to vote in Charleston County, 122,557 (69.1%) of whom were white and 54,722 (30.9%) of whom were nonwhite; and (2) 114,166 persons voted in the November 2000 general election, 82,395 (72.2%) of whom were white, and 31,771 (27.8%) of whom were nonwhite. (U.S.Ex. 441.) African-American voters participate at a lower rate in elections than white voters in Charleston ***274** County. (Joint Ex. 2A at Tables 4-5; U.S. Ex. 14 at Table 4; U.S. Ex. 15 at Table 1.)

Charleston County encompasses a geographical area of 919 square miles, a significant portion of which is water, and includes the incorporated municipalities of Awendaw, Charleston, Folly Beach, Hollywood, Isle of Palms, James Island, [FN6] Town of Kiawah, Lincolnville, McClellanville, Meggett, Mount Pleasant, North Charleston, Ravenel, Town of Seabrook and Sullivan's Island.

FN6. James Island's status as a town is presently in litigation.

II. *Method of Election for County Council*

The Charleston County Council governs Charleston County. (U.S. Am. Comp. ¶ 3; Am. Answer ¶ 3.) It is composed of nine members elected at-large in partisan elections to four-year, staggered terms. (U.S. Am. Comp. ¶ ¶ 4, 6; Am. Answer ¶ ¶ 3, 5.) Council members qualify from four residency districts in the following fashion: three members reside in the City of Charleston, three members reside in the area between the Ashley and Cooper rivers that is not in the City of Charleston, two members reside in the area west of the Ashley River that is not in the City of Charleston, and one member resides in the area east of the Cooper River. (U.S. Am. Comp. ¶ 6; Am. Answer ¶ 5.)

The County's at-large method of election was created in 1969, and precleared by the United States Attorney General under Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c. [FN7] In 1989, Charleston County held a referendum on a proposal to switch from at-large to single-member districts for the County Council. Supporters of at-large elections prevailed by a margin of 52 to 48 % in a referendum with a turnout of less than 13 %. The *Evening Post* editorialized that voting in the referendum was polarized along racial lines. (U.S. Ex. 16 at 24; Transcript of Record at 971 [hereafter "Tr. at __."]). Moreover, according to the United States' expert, Dr. Theodore Arrington, and the Defendants' expert, Dr. Ronald Weber, voting on the referendum was extremely polarized between white and African American voters: they agree that at least 98% of African-American voters voted "yes" on the referendum and at least 75% of the white voters voted "no." (U.S. Ex. 14 at 63-64; Joint Ex. 2C, at Ex. A thereto.)

FN7. The Attorney General granted administrative preclearance to Charleston

> County's at-large method of election some four years after Section 5 was first enacted and before any at-large elections were held under that 1969 law. On its face, Section 5 of the Voting Rights Act specifically provides that a subsequent civil action can be filed challenging a voting standard, practice or procedure that has been precleared under Section 5: "Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure." 42 U.S.C. § 1973c. Thus, the United States may bring a Section 2 claim against a precleared voting practice alleging discriminatory intent or result. *See Reno v. Bossier Parish School Bd.*, 528 U.S. 320, 334, 120 S.Ct. 866, 145 L.Ed.2d 845 (2000). However, in this action, the United States, unlike the private Plaintiffs, does not allege that the at-large method of election was enacted in 1969 with a discriminatory intent.

Since 1970, 41 persons have been elected to the Charleston County Council, three of whom are African American: Lonnie Hamilton III, Marjorie Amos-Frazier, and Timothy Scott. (U.S.Ex. 30.) Scott is the only current African-American member of the Charleston County Council.

***275** Charleston County is one of only three South Carolina counties that elects its entire county council at-large. (U.S. Am. Comp. ¶ 11; Am. Answer ¶ 6.) The other two counties, Hampton and Jasper, are rural counties with total populations of less than 22,000 residents in each county, and comprised of a close balance of African-American and white citizens. (U.S.Exs.78, 106.) Moreover, of the 35 South Carolina counties in which whites were a majority of the population according to the 2000 Census of Population, only one-Charleston County-continues to elect its entire county council at-large. (U.S.Ex. 106.)

III. General Overview of the Results Standard of Section 2

As amended in 1982, Section 2(a) of the Voting Rights Act prohibits in part any state or political subdivision from imposing or applying "any standard, practice, or procedure" which "results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color [.]" 42 U.S.C. § 1973.

Section 2 prohibits all forms of voting discrimination that "result in the denial of equal access to any phase of the electoral process for minority group members." S.Rep. No. 97-417 at 30 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 207 (hereinafter "Senate Report"). As amended in 1982, Section 2 requires proof only of a discriminatory result, not of discriminatory intent. *Chisom v. Roemer*, 501 U.S. 380, 394, 111 S.Ct. 2354, 115 L.Ed.2d 348 (1991). [FN8] The essence of a Section 2 results-claim is that an "electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by [minority] and white voters to elect their preferred representatives." *Thornburg v. Gingles*, 478 U.S. 30, 47, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986). While the results standard does not provide an assurance of success at the polls for minority preferred candidates, it does provide an assurance of a fair process. *Johnson v. De Grandy*, 512 U.S. 997, 1014, 114 S.Ct. 2647, 129 L.Ed.2d 775 (1994).

> FN8. In *Chisom*, the Supreme Court explained that "[u]nder the amended statute, proof of intent is no longer required to prove a Section 2 violation. Now plaintiffs can prevail under Section 2 by demonstrating that a challenged election practice has resulted in the denial or abridgment of the right to vote based on color or race." *Chisom*, 501 U.S. at 394, 111 S.Ct. 2354.

Thus, Section 2 insures that minority voters are free from any election practice "which operate[s], designedly or otherwise" to deny them the same opportunity to participate in all phases of the political process as other citizens enjoy. Senate Report at 28. The critical question, therefore, is "whether the use of a contested electoral practice or structure results in members of a protected group having less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." *Gingles*, 478 U.S. at 63, 106 S.Ct. 2752 (citations omitted). "[A]t-large voting in a multimember political unit," as exists in Charleston County, "may prevent minorities from electing representatives of their choice by diluting their voting strength," in violation of Section 2. *Collins v. City of Norfolk*, 883 F.2d 1232, 1236 (4th

Cir.1989) (citing *Gingles*, 478 U.S. at 47-48, 106 S.Ct. 2752).

[4] In *Gingles*, the Supreme Court established three preconditions that a plaintiff challenging an at-large election system under Section 2 must satisfy. "First, the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district." ***276***Gingles*, 478 U.S. at 50, 106 S.Ct. 2752. "Second, the minority group must be able to show that it is politically cohesive." *Id.* at 51, 106 S.Ct. 2752. "Third, the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it-in the absence of special circumstances, such as the minority candidate running unopposed ...-usually to defeat the minority's preferred candidate." *Id.*

[5] Satisfaction of the three *Gingles* preconditions is necessary to establish a Section 2 claim, but it alone is not sufficient. *Johnson v. De Grandy*, 512 U.S. 997, 1011, 114 S.Ct. 2647, 129 L.Ed.2d 775 (1994). The Court must also perform a "totality of circumstances" inquiry. The Supreme Court has looked to the Senate Report accompanying the 1982 extension of the Voting Rights Act for guidance as to the "nature of § 2 violations and [ ] the proof required to establish these violations." *Gingles*, 478 U.S. at 43, 106 S.Ct. 2752. The Senate Report outlines various factors the Court might consider in analyzing a Section 2 claim. The Senate Factors include:

1. the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the Democratic process;
2. the extent to which voting in the elections of the state or political subdivision is racially polarized;
3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;
4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process;
5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;
6. whether political campaigns have been characterized by overt or subtle racial appeals;
7. the extent to which members of the minority group have been elected to public office in the jurisdiction.

Senate Report at 28-29 (footnotes omitted).

[6] The Senate also recognized the following "[a]dditional factors that in some cases have had probative value as part of plaintiffs' evidence to establish a violation":

• whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group [and]
• whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous.

Id. at 29 (footnotes omitted).

IV. Plaintiffs Have Established the Three *Gingles* Preconditions

As noted, this Court granted partial summary judgment for Plaintiffs on the three *Gingles* preconditions in its Order dated July 10, 2002. Accordingly, the Court reaffirms its findings that (1) the African-American population of Charleston County is sufficiently numerous and geographically compact to constitute a majority in at least one of nine single-member districts in an illustrative plan for Charleston***277** County Council; (2) African-American voters in Charleston County are politically cohesive; and (3) candidates of choice of African-American voters in Charleston County Council contests are usually defeated as a result of white bloc voting.

V. The Totality of the Circumstances Inquiry

Establishment of the *Gingles* preconditions presages Section 2 liability. Indeed, "it will be only the *very* unusual case in which the plaintiffs can establish the existence of the three *Gingles* factors but still have failed to establish a violation of § 2 under the totality of the circumstances." *Teague v. Attala County*, 92 F.3d 283, 293 (5th Cir.1996) (citation omitted) (emphasis added). [FN9]

FN9. *Accord Vecinos De Barrio Uno v. City of Holyoke*, 72 F.3d 973, 983 (1st Cir.1995); *see Sanchez v. State of Colo.*, 97 F.3d 1303,

1310 (10th Cir.1996) (noting that establishment of *Gingles* preconditions "creates the inference the challenged practice is discriminatory"); *Harvell v. Blytheville Sch. Dist. No. 5*, 71 F.3d 1382, 1390 (8th Cir.1995) (en banc) ("Satisfaction of the necessary *Gingles* preconditions carries a plaintiff a long way towards showing a Section 2 violation"); *Jenkins v. Red Clay Consol. Sch. Dist. Bd. of Educ.*, 4 F.3d 1103, 1116 (3d Cir.1993) (holding that "it would be a highly unusual case in which a plaintiff successfully proved the existence of the three *Gingles* factors and still failed to establish a violation"); *cf. De Grandy*, 512 U.S. at 1012 n. 10, 114 S.Ct. 2647 (noting that Section 2 challenges to multimember districts, as is the case here, are likely to be easier plaintiffs' cases than challenges to electoral practices in single-member districts).

Plaintiffs need not prove any particular number of Senate factors or that a majority of them point "one way or the other." *Gingles*, 478 U.S. at 45, 106 S.Ct. 2752 (citing Senate Report at 29). Nor must Plaintiffs demonstrate that white voters "demonstrate an unbending or unalterable hostility to whoever may be the minority group's representative of choice, but whether, as a practical matter, the usual result of the bloc voting that exists is the defeat of the minority-preferred candidate." *Jenkins v. Red Clay Consol. Sch. Dist. Bd. of Educ.*, 4 F.3d 1103, 1133 (3d Cir.1993).

The Court will begin its totality of the circumstances consideration with the two Senate factors identified by the Supreme Court as most important: (1) the "extent to which minority group members have been elected to public office in the jurisdiction" and (2) the "extent to which voting in the elections of the state or political subdivision is racially polarized." *Gingles*, 478 U.S. at 48 n. 15, 106 S.Ct. 2752 (citing Senate Report at 28-29, U.S.C.C.A.N.1982, p. 206). If those factors are present, the other factors "are supportive of, but not essential to, a minority voter's claim." *Id.*

A. *The Extent of Racially Polarized Voting*

The Court will first consider the extent to which voting in Charleston County elections is racially polarized. The Supreme Court defines racially polarized voting as a " 'consistent relationship between [the] race of the voter and the way in which the voter votes,' or to put it differently, where 'black voters and white voters vote differently.' " *Gingles*, 478 U.S. at 53 n. 21, 106 S.Ct. 2752 (internal citations omitted); *see also Sanchez v. State of Colo.*, 97 F.3d 1303, 1312 (10th Cir.1996). Dr. Theodore Arrington, expert for the United States, found that out of 31 contested, County-Council elections studied from 1984 to 2000, voting was racially polarized 29 times (94%). (U.S. Ex. 14 at Table 13.) The findings of Defendants' own expert, Dr. Ronald Weber, also confirm that voting in Charleston County Council elections is severely and characteristically polarized along racial lines. In 25 of the 33 contested*278 general elections, from 1988 to 2000, African-American and white voters were polarized (75.8%). [FN10] (Joint Ex. 2B ¶ 7.) This pattern of racially polarized voting is perhaps most dramatically demonstrated by Dr. Weber's findings that, in general election contests for Charleston County Council with at least one African-American candidate, there was polarization between African-American and white voters 100% of the time. [FN11] (Id. at Figures 5-6.) Even in general election contests for Charleston County Council involving no African-American candidates, there was polarization between African-American and white voters 87.5% of the time. (Id.)

FN10. A number of discrepancies exist in Dr. Weber's various reports concerning polarization in Charleston County Council elections. Importantly, however, Dr. Weber has universally found severe and legally significant voting polarization, notwithstanding any conclusions he may have concerning the *cause* of such polarization. Ultimately, the Court is particularly compelled by the careful report prepared by Dr. Arrington.

FN11. The Fourth Circuit, in *dicto*, has suggested that contests involving African-American candidates may in fact be more probative of *racial polarization* than elections without an African-American candidate. *Lewis v. Alamance County*, 99 F.3d 600, 610 n. 8 (4th Cir.1996). The Fourth Circuit, however, has clearly cautioned that such elections cannot necessarily be afforded greater weight when considering whether "because of that polarization, minority-preferred candidates are *usually* defeated." *Id.* The holding in *Alamance* is predicated on the obvious understanding that white candidates may in

> fact represent the candidate of choice of the minority community. To that end, this Court has remained guarded, and only focuses particularly on elections involving African-American candidates for the issue of *voting polarization.*

It cannot be overstated that such polarization has resulted in a legally significant quantum of defeats for minority-preferred candidates, as previously concluded by the Court in its Order dated July 10, 2002. (See also Joint Ex. 2A ¶ 53; Joint Ex. 2B at Figure 7.) It is this consistent defeat at the polls that makes such egregious polarization ultimately relevant. *See* Gingles, 478 U.S. at 56, 106 S.Ct. 2752. "[W]here minority and majority voters consistently prefer different candidates, the majority, by virtue of its numerical superiority, will regularly defeat the choices of minority voters." *Id.* at 48, 106 S.Ct. 2752.

The Court concludes that this evidence of significant and pervasive polarization militates strongly in favor of finding a Section 2 violation.

B. *The Extent to Which African-American Persons Have Been Elected to Public Office*

The second most important Senate factor is the extent to which African-American persons have been elected to public office in the jurisdiction. As discussed above, of the 41 persons elected to the Charleston County Council since 1970, [FN12] just three (7.41%) have been African American: Lonnie Hamilton III, Marjorie Amos-Frazier [FN13] and Timothy Scott. ***279** (U.S.Ex. 30.) Of those three, Timothy Scott is emphatically not the candidate of choice of the county's African-American voters. [FN14] Although independently the elections of Hamilton, Scott, and Amos-Frazier are important stories of electoral success for minority candidates, they nonetheless represent a facially inadequate quantum of endogenous success among African-American candidates.

> FN12. No African Americans were elected to the Charleston County Council before 1970.

> FN13. It should be noted that Hamilton won 6 elections between 1974 and 1990. Amos-Frazier won in both 1974 and 1978. Notwithstanding the tenure of both Hamilton and Amos-Frazier, their successes remain the exception rather than the rule. First, as readily conceded by Dr. Weber, courts have found recent elections to be the most probative. (Joint Ex. 2A at 9-10); *see also* Ruiz v. City of Santa Maria, 160 F.3d 543, 555 (9th Cir.1998); Uno v. City of Holyoke, 72 F.3d 973, 990 (1st Cir.1995); Meek v. Metro. Dade County, Fla., 985 F.2d 1471, 1482-83 (11th Cir.1993). The question of vote dilution must be measured in the present, not the past, tense. Uno, 72 F.3d at 990. For example, if there was no racially polarized voting in a jurisdiction since 1984, the existence of racially polarized voting in the 1970s would not be relevant. Indeed, Dr. Weber specifically declined to analyze pre-1988 elections in his reports because of their negligible relevance. (Joint Ex. 2A at 9-10.) Accordingly, whatever successes Hamilton and Amos-Frazier had in the 1970s and 1980s is of marginal relevance to whether African Americans *presently* enjoy equal access to the electoral process.
> Moreover, the Court received compelling evidence that the electoral successes of Hamilton and Amos-Frazier, notwithstanding the obvious and remarkable qualities of the candidates themselves, were due, in large measure, to the coalition building that was characteristic of Democratic Party politics in Charleston County throughout the 1970's. (See, e.g., Tr. at 679-83.)
> Defendants contend that it is actually the effectiveness of these biracial coalitions in the 1970s that demonstrates that African-American candidates could win today if only they sought to build similar relationships. Specifically, Defendants point to the effective coalition between African-American Democrat Amos-Frazier and the white Democrat Jimmy Stuckey. (Tr. at 679-83.) The Record suggests otherwise. The Court received testimony from both Amos-Frazier and Judge Bernard Fielding that the political environment of today is significantly different from that of the 1970s. (See Tr. at 133 (Fielding); 659-60; 660-65 (Amos-Frazier).) Amos-Frazier testified that her situation in the 1970s was unique in that Bill Ackerman, a white lawyer and politician, paid her to run his Charleston mayoral campaign in 1971, paid

her to run the Alliance of Concerned Citizens for Better Government thereafter, and then partnered her with Jimmy Stuckey in the 1974 election. (Tr. at 639, 643, 665, 666, 2536.) Importantly, Amos-Frazier testified that she would not run for County Council today if she was the same age as she was in 1974 because she does not believe she could win. (Tr. at 659-60), expressly stating that she believed that the white community in Charleston County is different today than it was in the 1970s, (Tr. at 660-65).

There is also evidence that contemporary efforts to build biracial coalitions have been undermined by significant "white flight" from the Democratic Party in Charleston County since the 1970s. (Tr. at 2539.) Reasons for this flight include the Democratic Party's position on civil rights. (Tr. at 229).

FN14. According to Dr. Weber, Scott has never been preferred by minority voters in any of his three elections to Charleston County Council. Indeed, according to Dr. Weber, Scott received an estimated 30.7% support from nonwhite voters in a 1995 special election. Thereafter, Scott's African-American support tumbled. Just two years later, Scott received an estimated 7.0% support from nonwhite voters in a 1997 special election, and he fared even worse in the 2000 general election, when he received an estimated 2.8% of the votes cast by nonwhite voters. (Joint Ex. 2A, Ex. E thereto, at 13, 23; Joint Ex. 2C, Ex. A thereto, at 4.) Scott ran as a Republican.

Moreover, in all elections exogenous to the county-council races, African-American candidates have fared no better. The following represents the entire universe of African-American-candidate electoral success in all other exogenous, at-large elections within the jurisdiction:

• five African-American members of the nine-member Charleston County School Board, elected in the November 1998 General Election. The expert for the United States, Ted Arrington, agreed that all five of these individuals are African-American-preferred candidates (Tr.at 356).

• County Probate Judge Bernard Fielding, an African-American, who ran countywide as a Democratic candidate in the November 1990 General Election and was elected.

• Hollywood Mayor Herbert Gadson, who is African American.

• Awendaw Mayor William Alston, who is African American.

***280** • Lincolnville Mayor Tyrone Aiken, who is African American.

• Former State Senator and State Representative Herbert Ulysses Fielding, an African American, who ran at large as a Democratic candidate for the South Carolina House of Representatives in 1970 and was elected in that at-large election.

• Charleston City Councilman Louis Waring, an African American, who in 1990 ran at-large as a Democratic candidate for St. Andrews Public Service District Commissioner, and was elected in that special purpose district with a majority white voting age population.

• Mount Pleasant Council member Thomasina Stokes-Marshall, an African American, who ran at-large for and won a seat on the Town Council of Mount Pleasant, a municipality with a nine percent African-American voting age population.

Notably, in Charleston County's entire history, the aforementioned Judge Bernard Fielding, is the only African-American candidate to have ever won a countywide election for any of the seven single-seat offices: probate judge, sheriff, clerk of court, coroner, treasurer, register mesne conveyance and auditor. (Tr. at 101-02, 183-84.) Even still, after his November 1990 election victory to the office of Charleston County Probate Judge, Judge Fielding was not sworn in until the following August of 1991 and only after the South Carolina Supreme Court's unanimous ruling that rejected an election contest by his opponent. (Tr. at 99-101; *see Fielding v. South Carolina Election Comm'n*, 305 S.C. 313, 408 S.E.2d 232 (1991).) [FN15]

FN15. Although African-American persons have been elected to the South Carolina House and Senate, the City of Charleston City Council, and other local offices, virtually all were elected from single-member, majority-African-American voting districts. Indeed, none of the statistical experts analyzed these exogenous elections.

Evidence of African-American candidate success in school board elections is also of dubious consequence. As stated, following the November 1998 General Election, the Charleston County School Board was comprised of five African-American

trustees and four white trustees. [FN16] However, the Record demonstrates that the success of some African-American school-board candidates is attributable to special circumstances unique to the school board elections. To wit, two of the five current African-American members were elected in contests where there were fewer white candidates than seats contested: in 1998, Oliver Addison was elected in a contest ***281** with no white candidates, and in 2000, Hillary Douglas was elected in a two-seat contest where there were only two white candidates on the ballot, one of which withdrew publicly one month before the election. (U.S. Ex. 23; Tr. at 323-24, 413, 578.) There is sufficient evidence to conclude that two of the other African-American school board members (Lewis, Ketchen-Simpkins) ran against multiple white opponents and won because the white vote was split among the white candidates. (U.S. Ex. 23, Tr. at 333-34, 413). Indeed, Douglas's contest-a two seat contest with only one white candidate that had not withdrawn-was the only black-white School Board contest from 1990 to the present where an African-American candidate would have been elected if only white voters had voted. [FN17] (U.S. Exs. 23 and 25.) Dr. Weber found that in some of the school board races, African-American voters had participated in single-shot voting. [FN18] (Tr. at 2129, 2136.) He also found that African-American school board candidates had won because the white vote was split among several white candidates, a phenomenon that does not occur in County Council races. (Tr. at 2140, 2142, 2145-46.) These special circumstances explain the contemporary and inordinate African American-candidate success that is out of balance with the characteristically poor results for African American candidates in all other jurisdictional elections.

FN16. Because the School Board elections are non-partisan, Defendants have attempted to use them as a "control" for "race" in identifying the cause of polarization in Charleston County voting. They contend that the success of African-American candidates in the non-partisan school board elections demonstrates that partisanship, and not race, explains the County's polarized voting patterns, because without the partisan "cues" of the county council elections African Americans experience greater success in school board elections. However, Dr. Arrington testified that polarization in school board races, in fact, closely mirrors that found in the county council elections, (Tr. at 412 (testifying that whites had never "favored" an African-American candidate and vice versa, and describing the voting as being along "racial lines")), and to the extent such polarization results in fewer defeats of minority-preferred candidates than in county council elections, the special circumstances discussed *infra* adequately account for such discrepancies. (But see Joint Ex. 2B at Figure 15) (finding, by Dr. Weber, that polarization occurred in School Board races only 12% of the time.)
It should also be noted that as a result of the 2002 elections the School Board has only one African-American member.

FN17. Defendants' expert Dr. Moore testified that the election of five African Americans to the County's nine member school board demonstrates the ability of the African American community to impact the electoral process and select candidates. (Tr. at 2890.) On cross-examination, however, Dr. Moore conceded that comparing School Board elections and County Council elections are like comparing "apples and oranges," (Tr. at 2988), and that he could not know how much significance, if any, to attach in this case to school board elections without analyzing the election data, which he did not do. (Tr. at 2994-96.)

FN18. The United States Supreme Court has recognized the following description of single-shot ("bullet") voting:
" 'Consider [a] town of 600 whites and 400 blacks with an at-large election to choose four council members. Each voter is able to cast four votes. Suppose there are eight white candidates, with the votes of the whites split among them approximately equally, and one black candidate, with all the blacks voting for him and no one else. The result is that each white candidate receives about 300 votes and the black candidate receives 400 votes. The black has probably won a seat. This technique is called single-shot voting. Single-shot voting enables a minority group to win some at-large seats if it concentrates its vote behind a limited number of candidates and if the vote of the majority is divided among a number of candidates.' "
Gingles, 478 U.S. at 39 n. 5, 106 S.Ct. 2752

(quoting City of Rome v. United States, 446 U.S. 156, 184 n. 19, 100 S.Ct. 1548, 64 L.Ed.2d 119 (1980), (quoting United States Commission on Civil Rights, The Voting Rights Act: Ten Years After, pp. 206-07 (1975))).

In sum, the United States has demonstrated that there has been only a disproportionately small number of African American persons ever elected to the Charleston County Council under the at-large method of election and throughout the jurisdiction. While the individual success of these African-American candidates in Charleston County is of immeasurable consequence to African Americans in Charleston County and the community at-large, they are an unfortunate and paltry offering for purposes of the Court's Section 2 inquiry.

Reinforcing the Court's consideration of the *Gingles* preconditions, the two most important Senate factors-the extent of racially polarized voting and the success of minority candidates in the jurisdiction-both weigh markedly in favor of a finding that ***282** African Americans suffer unequal access to the electoral process.

Although "supportive of, but not essential to, a minority voter's claim," *Gingles*, 478 U.S. at 48 n. 15, 106 S.Ct. 2752, the Court considers the following additional Senate Factors.

C. The extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process.

The Court is next concerned with the extent to which African Americans in Charleston County "bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process." S.Rep. No. 97-417, 97th Cong.2d Sess. 28, 29 (1992). This factor is satisfied when the plaintiffs can show (1) "disproportionate educational, employment, income level and living conditions arising from past discrimination" and (2) a depressed level of minority participation in politics. *Id.* at 29 & n. 114. Importantly, Plaintiffs do not have to prove a causal nexus between the two:

> The Courts have recognized that disproportionate educational employment, income level and living conditions arising from past discrimination tend to depress minority political participation. Where these conditions are shown, and where the level of black participation in politics is depressed, plaintiffs need not prove any further causal nexus between their disparate socio-economic status and the depressed level of political participation.

Id. (citations omitted); *see also* Teague v. Attala County, Miss., 92 F.3d 283, 294 (5th Cir.1996); League of United Latin Am. Citizens v. Clements, 999 F.2d 831, 866 (5th Cir.1993). The United States Supreme Court has recognized that inequalities in education, employment, income level and living conditions that arise from past racial discrimination have a deleterious tendency to hinder minority political participation. White v. Regester, 412 U.S. 755, 768, 93 S.Ct. 2332, 37 L.Ed.2d 314 (1973).

1. Disproportionate education, employment, income level, and living conditions arising from past discrimination.

It is plain that African Americans have suffered a pronounced and protracted history of past discrimination. The Court briefly recounts particular indiscretions not for their emotive features but for their necessary place in the totality of the inquiry required by Section 2. The focus, however, will ultimately remain on the present disproportionality in education, employment, income, and living conditions between African Americans and whites resulting from such discrimination and whether African Americans participate politically at depressed levels.

During the first half of the twentieth century, African-American citizens in Charleston, as in other areas of South Carolina, were subject to segregation laws which had a discriminatory effect on most aspects of their lives. (U.S. Ex. 11 at 1; U.S. Ex. 16 at 5, 7-8; Tr. at 928.) Among the public institutions most important to future participation in the political process is education. Charleston County's segregated facilities for African Americans were routinely inferior and the distribution of resources were greatly disparate. Per-pupil expenditures for public education, calculated separately for both African-American and white schools, provide a measure of discrimination in school quality ***283** under segregation that is widely accepted by historians. (Tr. at 928-30.) In 1915, Charleston County schools spent five times as much for white pupils as for African Americans. (U.S. Ex. 16 at 6, quoting Louis Harlan, *Separate and Unequal: Public*

School Campaigns and Racism in the Southern Seaboard States, 1901-1915 185 (1968); Tr. at 929.) In the 1930s, expenditures for white students were four times those for African-American students; by the end of the 1940s, the ratio was roughly two to one in favor of white pupils. (U.S. Ex. 16 at 44, App.) Even as late as the 1958-1959 school year, per-pupil expenditures favored whites by a ratio of 1.3 to one. (Id; Tr. at 929.) These deficiencies have greatly diminished the educational capital inherited by the present generation of African Americans.

As in so many other communities, racial change did not come quickly or easily to Charleston County. When the United States Supreme Court decided *Brown v. Board of Education* in 1954, the Charleston *News and Courier* editorialized that it would lead to "the most radical upheaval since Reconstruction." (Quoted in Priv. Pls.' Ex. 1 at 16.) In its aftermath state and local officials made plans to maintain racial segregation by every legal means, and prominent white leaders organized local Citizens Councils to promote the unity of the white community behind the cause of segregation. Charleston had an active Citizens Council chapter in the 1950s under the leadership of a person subsequently elected to the Charleston County Council. (Priv. Pls.' Ex. 1 at 16, 41; Tr. at 1147, 1158-59, 1195, 2915.)

Prior to the enactment of Title 2 of the 1964 Civil Rights Act, facilities open to the public, such as restaurants, doctors' offices, buses, movie theaters, parks and beaches, were segregated along racial lines. (Tr. at 1285-86, 1287, 1432-34, 1921.) As described by former Charleston County Probate Judge Bernard Fielding, the county during the period before the passage of the 1964 Civil Rights Act was "totally segregated." (Tr. at 88-89.)

Desegregation came to Charleston County, as to the rest of the South, largely as a result of federal court orders. Initially, however, state and local officials sometimes closed facilities rather than eliminate racial segregation. In 1934, an enactment of the South Carolina Legislature which applied only to Charleston County made it a crime for African Americans and whites to use the same recreational facilities. When African-American citizens filed a lawsuit challenging the racial segregation of facilities at Edisto Beach State Park in Charleston County, the State Commission of Forestry closed the park to all citizens. *Clark v. Flory*, 141 F.Supp. 248 (E.D.S.C.1956). The park was closed until 1966. (Priv. Pls.' Ex. 1 at 17; Tr. at 708.) The law was not repealed until 1977. 1977 S.C. Acts 306.

Over time, however, officials began to accede to court orders, rather than eliminate public services. The successful desegregation of Charleston's municipal golf course in 1961, for example, resulted from the decision of city officials to comply with a federal court order in *Cummings v. City of Charleston*, 288 F.2d 817 (4th Cir.1961).

In 1961, the South Carolina Supreme Court upheld the constitutionality of the state's trespass-after-notice law and affirmed the convictions of 24 African-American citizens who refused to leave the lunch counter at the S.H. Kress Store in Charleston County. *City of Charleston v. Mitchell*, 239 S.C. 376, 123 S.E.2d 512 (1961). The United States Supreme Court reversed the decision by the South Carolina Supreme Court in *City of Charleston v. Mitchell*, 239 S.C. 376, 123 S.E.2d 512 (1961), on the grounds that enforcement of ***284** the state's anti-trespass law had taken place in such a way as to violate the constitutional rights of the African-American citizens prosecuted in the City of Charleston. *Boone v. City of Columbia*, 378 U.S. 347, 349, 84 S.Ct. 1697, 12 L.Ed.2d 894 (1964).

Racially discriminatory employment practices, in the private and public sectors, further disadvantaged African Americans economically. (Tr. at 930-32.) Before civil rights demonstrations took place in the City of Charleston in 1963, virtually all business establishments in Charleston County were racially segregated and did not provide equal pay for equal work for all employees. (U.S. Ex. 11 at 7; Tr. at 635-36.) By July 4, 1963, over 500 African-American civil rights demonstrators had been arrested; 229 of them had already been tried and convicted. (Priv. Pls.' Ex. 1 at 18-19.) As a result of demonstrations, some business establishments in downtown Charleston agreed to serve customers of both races on an equal basis. (U.S. Ex. 11 at 7.) Substantial desegregation throughout Charleston County awaited implementation of the 1964 Civil Rights Act.

Until August 1963, the school system of District 20 in Charleston County was completely segregated by race. [FN5] *Brown v. School District No. 20*, 226 F.Supp. 819, 826 (E.D.S.C.1963); (Tr. at 90, 813, 1359-61, 1429.) In August, 1963, a federal court ordered the admission of eleven African-American students to previously all-white schools in Charleston and enjoined the local school board from refusing admission, assignment, or transfer of any other African-American child, on the basis of race or color.

to attend any public school operated by the school district. *Brown*, 226 F.Supp. at 827.

> FN19. The parent/teacher associations remained racially segregated until the late 1960s. (Tr. at 558, 1359-61.)

Rather than send their children to racially integrated public schools, many white parents chose to have them attend private schools, some of which were organized in the aftermath of public school desegregation. (Tr. at 936-37; U.S. Ex. 16 at 13-14.) The then-President of a local college and later a member of the state legislature, helped found an all-white preparatory school at the college, resisted desegregation of the college itself, and gave public speeches opposing racial integration. (Priv. Pls.' Ex. 1 at 43.) Financial assistance to parents enrolling their children in private schools was provided in some instances through the state's tuition grant program. (Priv. Pls.' Ex. 1 at 19.) As late as 1966, only 185 African-American students were attending desegregated schools in Charleston County. (U.S. Ex. 16 at 13-14; Priv. Pls.' Ex. 1 at 19, 43-44.)

The Charleston County Bar Association was not open to black attorneys until the late 1960s. (Tr. at 87, 89.) As late as 1972, the women's section of the Charleston County Jail was segregated. (Tr. at 650.)

The discriminatory impact of Charleston County's system of racial segregation is reflected in census data throughout the 20th century. According to the 1950 Census of Population, the median income for African-American families in Charleston County was $672, roughly one third of the median income for white families ($2,007). (Priv. Pls.' Ex. 1 at 12.) The percentage of non-white unemployed (13.9 % for males, 10.8 % for females) was far higher than among whites, where only 4.4 % of males and 2.7 % of females were listed as unemployed. (Id.) Only 3 % of white households***285** had no running water, compared with 27.5 % of non-white households. (Id.) Among white households, only 12.8 % had no indoor toilets, as compared with 73 % of non-white households. (Id.)

This pattern of socio-economic disparity has continued to characterize Charleston County during the latter part of the 20th Century. (Tr. at 933, 1182-84.) According to the 1980 Census, median income for African-American families ($10,907) was still only half that of white families ($20,400) in Charleston County, and 32.2 % of African-American families lived below the poverty level, as compared with only 6.1 % of white families. Unemployment figures reflected the same sort of disparities: 10.9 % of African-Americans but only 3.7 % of whites were unemployed. (Priv. Pls.' Ex. 1 at 13.)

According to the 1990 Census, which was the most recently available socio-economic census data at the time of trial, socio-economic disparities continue to divide white and African-American residents of Charleston County. [FN20] Such differences, as shown in the following table, are dramatic:

> FN20. Data from the prior decennial census is presumed accurate unless contradicted by clear, cogent, and convincing evidence. *Johnson v. De Soto County Bd. of Comm'rs*, 204 F.3d 1335, 1343 (11th Cir.2000); *Valdespino v. Alamo Heights Ind. Sch. Dist.*, 168 F.3d 848, 853 (5th Cir.1999).

Comparison of Socio-Economic Status of Blacks and Whites in Charleston County by 1990 Census (income data for 1989)

Socio-Economic Indicator	Whites	Blacks
Education:		
Percent completed less than 5th grade	1.0%	6.6%
Percent high school graduate	83.6%	57.6%
Percent completed	58.0%	30.1%

some college		
Percent completed bachelor's degree	28.5%	8.8%
Income and employment:		
Percent unemployed	3.2%	9.8%
Median family income	$38,052	$18,603
Per capita income	$16,339	$7,106
Percent persons below poverty level	7.9%	34.2%
Percent families below poverty level	5.0%	31.3%
Percent persons below 125% of poverty level	10.6%	41.1%
Percent persons below 200% of poverty level	21.3%	60.3%
Percent persons with public assistance income	2.3%	16.9%
Nativity		
Percent born in South Carolina	47.7%	86.1%
Percent born in other southern states	24.5%	6.8%
Total percent born in the South	72.2%	92.9%

(U.S.Ex. 68D.) This socio-economic evidence is uncontroverted. (See, e.g., Tr. at 2168-69.) [FN21]

FN21. After this case was tried, much of the relevant 2000 Census data relating to socio-economic disparities was released. Plaintiffs have requested that the Court take judicial notice of this 2000 socio-economic data. The 2000 Census data demonstrates that the socio-economic differences between African Americans and whites in Charleston County have persisted. However, such evidence was unavailable for full adversarial treatment at trial and, therefore, will be infrequently employed.

Comparison of Socio-Economic Status of Blacks and Whites in Charleston County by 2000 Census (income data for 1999)

Socio-Economic Indicator	Whites	Blacks
Education:		
Percent high school graduate	89.4%	65.3%
Percent completed	65.8.0%	35.3%

some college		
Percent completed bachelor's degree	40.2%	10.7%
Income and employment:		
Percent unemployed	3.9%	10.9%
Median family income	$60,195	$26,703
Per capita income	$26,956	$11,787
Percent persons below poverty level	8.6%	29.9%
Percent families below poverty level	4.2%	27.8%
Nativity		
Percent born in South Carolina	45.7%	84.2%
Percent born in other southern states	24.1%	6.8%
Total percent born in the South	69.8%	91.0%

***286** The depressed socio-economic status of African-American citizens of the County compared to white citizens is a legacy of the prolonged history of discrimination by Charleston County and South Carolina. (See U.S. Ex. 16 at 40-43; Tr. at 932-34, 1182-84.) [FN22] Significantly, Defendants' expert, Dr. William V. Moore, explicitly recognized, in his report and at trial, the causal relationship between past discrimination and present socio-economic levels: "African Americans suffered disproportionately under the old system, and *it does impact on their current socio-economic status in Charleston County*, in the State of South Carolina, and in the nation as a whole." (Defs.' Ex. 14(A) at 39 (emphasis added); Tr. at 2979.) Similarly, the United States' expert, Dr. Dan Carter, testified that Charleston County's history of official discrimination is a "heavy hand" that continues to impact African-American socio-economic status. (Tr. at 931-35, 981-82.)

FN22. According to 1990 Census, 86.1% of the African-American residents of Charleston County were born in South Carolina. (U.S.Ex. 68D.)

Anecdotally, Charleston County Grants Administrator Evelyn DeLaine-Hart testified concerning the link between official discrimination and current socio-economic disparities between African Americans and whites in Charleston County. DeLaine-Hart testified that it is difficult to break out of the cycle of poverty because of problems that poor people encounter in areas such as education, child care, transportation, and health. Furthermore, she testified that she has observed poverty within families spanning generations, and that current socio-economic differences suffered by African-American people today are caused in part by past discrimination. (Tr. at 2655-58.)

The Court concludes that African Americans in Charleston County suffer disproportionally to white persons in education, employment, income level, and living conditions as a result of discrimination. [FN23]

FN23. In order to view fully the history of discrimination in Charleston County and its effect on present political participation, it is appropriate here, in conjunction with the fifth Senate factor, to also consider the first Senate factor: "the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the Democratic process." (Senate Report at 28.) It is undisputed, that there has been a long history of official discrimination touching the right of African Americans to register, to vote, or otherwise to participate in the democratic process. Indeed, the County concedes that there has been a long history of official discrimination

in Charleston County, touching the right of African Americans to vote. (See Defs.' Judicial Stip., filed March 5, 2002; Tr. at 2215-16.) By way of example, the South Carolina Constitution of 1895 included a literacy test, a poll tax, disfranchisement for certain enumerated crimes, and long residency requirements. *South Carolina v. Katzenbach*, 383 U.S. 301, 310-11 n. 9, 86 S.Ct. 803, 15 L.Ed.2d 769 (1966). Certainly, such institutional discrimination contemporaneously resulted in significant disparities in the voter registration totals for African-American and white residents of Charleston County. In November 1964, the percentage of South Carolina white persons of voting age who were registered to vote was 75.7%, but only 37.3% of the African-American voting age population was registered to vote, a disparity of 38.4 percentage points. (U.S. Ex. 11 at 5.) In September 1967, according to an estimate published by the United States Commission on Civil Rights, the number of white persons registered to vote in South Carolina equaled 81.7% of the 1960 voting age population, as compared with only 51.2% among African Americans, a disparity of 30.5 percentage points. (U.S. Ex. 11 at 8.) However, unlike the effect of past discrimination in areas of education, employment, and income, as considered under Senate factor 5, the Court cannot conclude that there remain lingering effects from past discrimination touching the right of African Americans to vote.

At trial, the United States did put forward voluminous testimony concerning what it characterized as a consistent and more recent pattern of white persons acting to intimidate and harass African American voters at the polls during the 1980s and 1990s and even as late as the 2000 general election. So much of the United States's evidence was necessarily anecdotal and has, therefore, made it difficult to properly quantify the effect these incidents in isolation might have had, and continue to have, on the overall participation of African Americans in the electoral and political process. For that reason the Court finds the evidence less probative of whether there in fact exists a pattern of pervasive and *consequential* discrimination at the polls. Sadly, however, the Court agrees that there is significant evidence of intimidation and harassment and by a preponderance of the evidence makes the following findings. The Court, though, without more proof of effect, is loathe to impute the regrettable acts of a few on the County as a whole and ultimately gives such findings only marginal weight in the final analysis.

When she was first appointed to the Charleston County Election Commission in 1991, Carolyn Collins found that poll managers were assigned to the majority-African American precincts who caused confusion, intimidated African-American voters, and had the tendency to be condescending to those voters. (Tr. at 829-30; U.S. Ex. 94.) Collins observed this inappropriate behavior by white managers at majority-black precincts, including the behavior of a particular poll manager at the Joseph Floyd Manor Precinct during the 1996 election. (Tr. at 835-36, 882.) That poll manager had intimidated a number of black voters by his "threatening attitude." (Tr. at 838.) When Collins approached the poll manager and attempted to talk with him concerning his behavior at the polls, he informed her that he did not have to follow her instruction. (Tr. at 840.) Notwithstanding this behavior, that poll manager continued to work at the Joseph Floyd Manor Precinct during the 1996 election. (Tr. at 840.) Indeed, he continues to work as a poll manager at majority-African-American precincts in Charleston County. (Tr. at 847, 884, 888.)

During her service on the Election Commission, Collins also received complaints that poll managers interfered with certain African-American voters' right to receive assistance during the voting process from persons of their choosing. (Tr. at 841-43, 857-58, 864-65.) Section 208 of the Voting Rights Act provides that "[a]ny voter who requires assistance to vote by reason of blindness, disability, or inability to read or write may be given assistance by a person of the voter's choice, other than the voter's employer or agent of that employer or officer or agent of the voter's union." 42 U.S.C. § 1973aa-6. This interference involved white poll managers suggesting that certain African-American voters did not need assistance. (Tr. at 841-44.) Indeed, Collins testified that she had received complaints from African-American voters concerning rude or inappropriate behavior by white poll officials in every election between 1992 and 2002. (Tr. at 845-46, 856; see also 2689.)

At trial, Collins stated that there continue to be problems regarding the treatment of African-American voters by some white poll managers, even though the Election Commission has provided training to poll managers on this

subject. (Tr. at 887.)

Charleston attorney F. Truett Nettles testified that he has been involved in Charleston County election activities for over 20 years, first as a poll watcher, later as Chairperson of the Charleston County Election Commission, and then again as a poll watcher. (Tr. at 457, 458, 474.) Poll watchers are not employed by the Election Commission. They work on behalf of candidates or political parties. Poll managers, on the other hand, are persons appointed by the Election Commission to conduct the elections. The Election Commission pays poll managers to setup the books, operate the voting machines and count the votes in polling places on election day. (Tr. at 457.)

From 1980 until his appointment as Election Commission chairperson in 1992, Nettles served as a poll watcher assigned on most occasions to predominantly African-American polling sites. (Tr. at 458.) Nettles served on a team of 10-20 lawyers sent to predominantly African-American polling places to help prevent and, when necessary, remedy instances of harassment and intimidation of African-American voters by white poll officials. (Tr. at 458-60.)

Nettles testified that, from 1980 through 2000, "[e]very time, every election we would have controversies in African-American precincts about voter assistance, or just the way voters are treated when they vote." (Tr. at 473.) Several white poll managers-including a future chairperson of the Election Commission-were routinely appointed as poll managers by the Election Commission and assigned to predominantly African-American polling places in Charleston County, where they intimidated and harassed African-American voters. (Tr. at 460-64, 469-71.)

Specifically, Nettles testified that the Election Commission routinely assigned one particularly problematic poll manager to predominantly African-American polling places in different parts of the County during the 1980s and early 1990s. (Id.) At the polls, this poll manager, who is white, routinely approached elderly African-American women seeking to vote and spoke in a loud and condescending voice that called undue attention to these voters and needlessly disrupted the voting process. (Tr. at 460-61, 463.) As described by Nettles, the poll manager would approach these women as soon as they entered the polling place and "make a scene and be real-speak loudly, and he would put his arm around them and tell them, 'Don't be afraid, everything's going to be all right.' And the voters did not want that special attention. They just wanted to come in and sign up and vote. And it happened repeatedly just to that class of voter." (Tr. at 460-61). There is testimony that this poll manager's unsolicited interference embarrassed, harassed and intimidated African-American voters. (Tr. at 461.)

This same poll manager's conduct further denied some voters the right to have voting assistance from an assistor of choice. According to uncontradicted testimony, he would approach African-American voters who had properly selected someone to help them vote and, proclaiming loudly, "Oh, you don't need that assistance, I'll help you, I'll take care of you [.]" deny the voter the assistor he or she selected. (Tr. at 462.) The poll manager's conduct toward elderly African-American voters was a "recurring problem." (Tr. at 467, 2460, 2472, 2474.) According to Charleston County Election Commission attorney, Joseph Mendelsohn, the poll manager's behavior at predominantly-African-American precincts was designed to intimidate or cause problems for African-American voters. (Tr. at 2473.) Indeed, this poll manager's ongoing interference with African-American voters in Charleston County polling places prompted a Charleston County Circuit Court to issue a restraining order against the Election Commission requiring its agents to cease interfering with the voting process. That restraining order arose directly from this poll manager's conduct toward African-American voters. (Tr. at 466; see U.S. Ex. 2.) After his misconduct was brought to the attention of the Election Commission, it had some difficulty removing him from his position as election manager. (Tr. at 2479.)

Nettles also provided additional uncontradicted testimony about intimidating and harassing conduct by other poll managers aimed at African-American voters seeking voting assistance. For instance, Nettles testified that white poll managers in predominantly African-American polling places would "give the third degree" to African-American voters requesting voting assistance by asking questions such as: "Why do you need assistance? Why can't-can't you read and write? And didn't you just sign in? And you know how to spell your name, why can't you just vote by yourself? And do you really need voter assistance?" (Tr. at 469.)

Poll managers engaged in such conduct included one individual who has recently served as

chairperson of the Charleston County Election Commission. Such public and hostile questioning upset and humiliated some African-American voters. (Tr. at 470-71.) This conduct occurred despite the Election Commission's explicit instructions to poll managers that voting assistance should be permitted unimpeded absent affirmative evidence of fraud. (Tr. at 485-86; see Tr. at 2417.) These instructions were based, in part, on the Election Commission attorney's interpretation of federal law regarding the right to voting assistance. (Tr. at 485-86; see Tr. at 2456-58, 2484-85, 2491-92, 2504.)

Conversely, Nettles testified that, based on his observations, white voters needing voting assistance at predominantly African-American polling sites were permitted their assistor of choice without challenge. (Tr. at 471-72, 473.) Moreover, no evidence exists of any instances of harassment, intimidation, or interference directed against white or African-American voters at predominantly white polling places. (Tr. at 473-74.)

African-American voters also endured improper interference from white poll *watchers*, as distinguished from poll managers, who directly confronted some African-American voters requesting assistance with questions such as: "Why do you need assistance, don't you know how to read? You can vote without assistance, you don't qualify." (Tr. at 484-85.) Such poll worker conduct prompted Election Commission action to remedy these ongoing problems. (Id.; U.S. Ex. 106.)

North Charleston Mayor Keith Summey served as Charleston County Election Commission Chairperson from 1978 through 1986, the last four years serving as its Chairperson. (Tr. at 2379, 2380, 2384.) Mayor Summey testified that controversies involving white poll workers and African-American voters were routine during his time on the Election Commission. (Tr. at 2417-2418.) In general, African-American voters complained that white poll managers and poll watchers regularly interfered with those African-American voters' right to receive assistance while voting in predominantly African-American precincts. (Tr. at 2420.) Such activities intimidated some African-American voters, (Tr. at 2419), requiring the Election Commission to remove poll managers and/or poll watchers in predominantly African-American precincts on John's Island, Wadmalaw and other Sea Island precincts, (Tr. at 2420-21.) And while white poll managers complained that African-American voters sought to vote improperly, Mayor Summey never once found merit to any such allegations. (Tr. at 2418, 2443-44.)

Charleston County Council candidate Rosemarie West testified that in "[a]lmost every election" she observed African-American voters being treated rudely and talked to harshly at the polls. (Tr. at 1346, 1353.)

In the 1990 election, a member of the Charleston County Election Commission and others participated in a Ballot Security Group that sought to prevent African-American voters from seeking assistance in casting their ballots. (Tr. at 1594-96.) One of the other members of the Ballot Security Group was the aforementioned and particularly problematic poll manager assigned by the Election Commission to work in the Hollywood precinct. (Tr. at 1596-97.) He was removed from the Hollywood precinct because of his efforts to deny African-American voters their right to have election assistance from the person of their choice. (Tr. at 1598, 1615.)

Moreover, in the 1980 election, the *News and Courier* reported that some college students, claiming that they were federal poll watchers, intimidated some voters at the Fraser Elementary School, a predominantly African-American precinct in the City of Charleston's East Side. The students threatened to "lock up" voters. (U.S.Ex. 3.)

And while the Defendants suggest that such instances of harassment of and intimidation against African-American voters were attributable solely to partisan politics and not race, the uncontroverted testimony establishes that such conduct never occurred at predominantly white polling places, including those that tended to support Democratic candidates. (Tr. at 529-30 ("My experience is that the bulldogs, we might call them, were sent to the African-American precincts.").) Moreover, to the extent that these intimidating and harassing acts were prompted by partisan zeal, their impact is undeniably racial.

The Court expresses particular concern over two recent episodes of racial discrimination against African-American citizens attempting to participate in the local political process. First, Charleston County Council reduced the salary for the Charleston County Probate Judge in 1991, following the election of the first and only African-American person elected to that position. When he retired in 1990, Probate Judge Gus Pearlman, a white person, was

receiving a salary of approximately $85,000 per year. During the period from the retirement of Judge Pearlman to the swearing in of his newly-elected successor, Bernard Fielding, an African-American person, the white Clerk of Court served as interim probate judge and received an $85,000 salary. (Tr. at 193.) At that time Bernard Fielding was completing his 16th year as Associate Probate Judge and earned $68,000 per year. After Judge Fielding was sworn in August 1991, the County Council reduced the salary of the Charleston County Probate Judge by $26,000 to $59,000 per year. Therefore, upon being elected the first and only African-American person to serve as the County's Probate Judge, Judge Fielding's move from associate probate judge to probate judge resulted in his salary being reduced by $8,000. (Tr. at 102-04.) Section 8-21-765(A)(1) of the South Carolina Code established a minimum schedule salary for counties that had at least 200,000 residents. (Tr. at 170.) Thus, South Carolina law did not require Judge Fielding's salary to be reduced to the $59,000 level. This is the same judge whose election was upheld by the South Carolina Supreme Court and who was still forced to seek the Justice Department's intervention to be sworn into office.

Second, after the 2000 Charleston County School Board elections, for the first time in the history of the County, five of the nine school board members were African-American persons. (Tr. at 566-67.) After African-American school board members became a majority on that governing body, the Charleston County Legislative Delegation to the South Carolina General Assembly sponsored several pieces of legislation to alter the method of election for the school board in Charleston County. (Tr. at 568.) First, legislation was introduced that would have changed the method of election for the school board from non-partisan to partisan elections. (Tr. at 568.) Second, legislation was introduced to remove control of the budget of the school system from the School Board and place it under the jurisdiction of the County Council. (Tr. at 571.) Governor Hodges vetoed those enactments. (Id.) Prior to the introduction or consideration of these proposed bills effecting the method of election for the Charleston County School Board, none of the members of the local delegation contacted members of the majority-African-American School Board to seek their views on these electoral changes. (Tr. at 568, 570-73, 607.)

As stated, these findings are appropriate to the totality of the inquiry and are serious enough to warrant specific mention. Nonetheless under existing precedent the Court ultimately assigns them limited weight.

***290 2. Political Participation**

Having found that African Americans suffer disproportionately in areas of education, employment, and living conditions, the Court next considers whether, as a result of such depressed socio-economic levels, African Americans participate politically at a lower rate than white persons. Political scientists generally agree that persons with lower socio-economic and educational status tend to participate in the political process at lower rates and thus the history of economic disadvantage continues to have a racially discriminatory effect. (U.S. Ex. 16 at 42; Tr. at 934-35, 1183 ("Well, as I said, political scientists don't always agree, they sometimes disagree, but I can't find any disagreement with the notion that the rates of political participation, voter turnout, particularly, is directly related to income and education.").) In fact it is this social science understanding that informed Congress's determination that Plaintiffs need not prove that depressed socio-economic and educational status cause a finding of lower political participation. S.Rep. No. 97-417, 97th Cong.2d Sess. 28, 29 & n. 114 (1992); *see also White v. Regester*, 412 U.S. 755, 768, 93 S.Ct. 2332, 37 L.Ed.2d 314 (1973).

The evidence establishes that African Americans in Charleston County participate at lower rates than do white persons. Plaintiff's expert, Dr. Arrington, and Defendants' expert, Dr. Weber, agree that African Americans register to vote at lower rates than whites, and African-American registered voters turn out at lower rates than white registered voters. (Tr. at 300-02; U.S. Ex. 15 at 23-24 & Table 1; Joint Ex. 2A at 24-31; Joint Ex. 2C at 7; see Tr. at 2974 (Dr. Moore acknowledging that white voter turnout at all age levels exceeds that of African-American turnout); Defs.' Ex. 14A at 40 (Table XXII).) The following table demonstrates the depressed levels of registration and turnout of African-American citizens, as compared to white citizens, in Charleston County between 1988 and 2000.

Rates at Which White Persons' Political Participation Exceeds

That of African Americans in Charleston County 1988-2000

Year	Registration as Percentage of Voting Age Population	Turnout as Percentage of Voting Age Population	Turnout as a percentage of registration
1988	NA	NA	10.3%
1990	1.1%	5.3%	9.1%
1992	6.5%	9.4%	7.7%
1994	8.9%	11.8%	12.3%
1996	0.5%	8.0%	7.3%
1998	6.0%	4.9%	2.3%
2000	10.7%	13.5%	9.1%
Mean	5.6%	8.8%	8.3%

***291** (U.S. Ex. 15 at Table 1; see also Joint Ex. 2A at 26, 29 (Tables 4-5)).

Although not grossly disproportionate, the Court concludes that African-American voter registration and turnout have been depressed to a meaningful degree as compared to that of whites. Notwithstanding the 1998 election when voter registration and turnout were comparable, the disparity between the races in registration and turnout consistently approached double-digit percentiles.

Beyond the statistical evidence that African Americans participate at a lower rate than white persons, the Court received competent testimony that political participation is further impaired by the effect socio-economic disparities have on African-American access to important sources of financial and political power in Charleston County.

It is no secret that Charleston County continues to be separated along racial lines in its social, civic, and religious activities. (*See, e.g.,* Tr. at 189-90, 219-20, 556-57, 733, 816, 1379, 1495-1505, 1934, 2328.) This stratification is a direct holdover from more institutional discrimination and segregation and hinders the ability of African-American candidates to solicit the support of white citizens. [FN24] (See, e.g., Tr. at 125-26.) The on-going racial separation that exists in Charleston County-socially, economically, religiously, in housing and business patterns-makes it especially difficult for African-American candidates seeking county-wide office to reach out to and communicate with the predominantly white electorate from whom they must obtain substantial support to win an at-large elections. (See, e.g., Tr. at 1434, 1443.)

FN24. For these purposes, it is not important whether this racial separation is the result of acts that violate law, or whether they result from private behavior that is not regulated by law. What is important is the fact that members of the Charleston County community live social, economic and religious lives that many times do not result in members of one race having the opportunity to know members of another race, and the impact this racial separation has as a practical matter on the "past and present reality" of political life in Charleston County. Senate Report at 30 (quoting *White v. Regester*, 412 U.S. 755, 769-70, 93 S.Ct. 2332, 37 L.Ed.2d 314 (1973)). This racial separation evidence is an additional indication of the importance of race in Charleston County Council elections.

The evidence indicated that the membership of many social and civic organizations in the County is made up of one race or is nearly all-white or nearly all-African-American. (Tr. at 219-20, 556-57, 662, 680-81, 1867-68, 2538-39.) Some prominent African-American citizens of the County testified that they had never been asked to join a predominately white social or civic organization in Charleston County even though these individuals were active in the social and civic organizations in the county's African-American community. (Tr. at 113-14, 190-91, 1452.) One of these individuals, Bernard Fielding, the former Associate Probate Judge and Probate Judge of the County, a graduate of Boston University Law School, and a local attorney and business owner since the 1950s, (Tr. at 84-85, 91), testified that he has never been invited to

join any predominantly-white social or civic organizations, (Tr. at 113-114). Similarly, former State House member and State Senator, McKinley Washington, a public servant for almost 30 years, testified that he has never been asked to join a predominately white civic club such as the Rotary or Elks clubs. (Tr. at 727.)

***292** These social and civic organizations are obviously important bases of financial and political power typically targeted by political candidates, including those running for County Council, (see, e.g., Tr. at 215, 219, 245). Personal contacts with individuals and organizations are one of the most important factors in running for County Council. (See Tr. at 214, 732, 784-85, 2547-48.) Many times the people who contribute financially to local candidates are, of course, people the candidates know personally. [FN25] (See, e.g., Tr. at 1533.) The evidence, as previously considered, *supra* Section V.C.1 at 28 & n. 21, demonstrates that past discrimination continues to result in great disparity between the wealth inherent in the African American community and that of the white community. *De facto* separation of the races, therefore, exacerbates the socio-economic legacy of past discrimination by denying an African American candidate full access to the resources of the entire electorate and, further, by forcing her to instead rely on the stunted socio-economic development of her own community.

> FN25. For instance, Councilmember Stavrinakis stated that about $49,000 of the approximately $50,000 he raised for his 1998 County Council campaign came from personal contacts. (Tr. at 1491.)

Anecdotally, African-American County Council candidate Rosemarie West, who ran in 2000, testified that she was not invited to speak to groups at Kiawah and Seabrook Islands, while white Democratic County Council candidate Edie Carson was invited. (Tr. at 1310, 1340, 1343.) In contrast, Councilmember Stavrinakis testified that he was invited to speak to numerous majority-white, as well as majority-African-American, social and civic groups during his 1998 campaign. (Tr. at 1495-1505.) Cindy Floyd, too, was invited to speak at candidates forums on the Isle of Palms and Sullivans Island at which her fellow African-American Democratic running mates were not present. (Tr. at 244-245.) Floyd testified that she "wouldn't imagine" that Freeman and McCoy would have known of these important campaign opportunities. (Id.)

Notwithstanding great improvements, it is clear that Charleston County remains to a large extent separated along racial lines and that this separation not only hinders the ability of African-American candidates to solicit the votes of white voters, but it further helps to explain the extent to which race infuses and informs the racially polarized voting patterns in Charleston County.

On the basis of this evidence, the Plaintiffs have demonstrated that African-American citizens in Charleston County suffer from a depressed socio-economic status in comparison with white citizens, and that this status is a direct legacy of Charleston County's history of official discrimination. Moreover, the United States has demonstrated that this depressed socio-economic status makes it more difficult presently for Charleston County's African-American citizens to participate in the political process and elect candidates of choice.

D. *Other Voting Procedures That Enhance the Opportunity for Voting Discrimination*

The third Senate Factor considers the "extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group." Senate Report at 29. The evidence shows that this factor weighs ***293** heavily in favor of Plaintiffs. In particular, the Court finds that the sheer size of Charleston County greatly exacerbates the effects of the socio-economic disparities between the races and makes this factor unconventionally significant.

1. Unusually Large Election District

Charleston County is the largest and second most populated county in South Carolina. (U.S.Exs.76-77, 106.) Charleston County includes a stretch along the Atlantic Ocean of nearly 100 miles and contains several major waterways. (U.S.Ex. 76.) As stated, Charleston County is one of only three South Carolina counties that elects its entire county council at-large. (U.S. Am. Comp. ¶ 11; Am. Answer ¶ 6.) The other two counties, Hampton and Jasper, are rural counties with total populations of less than 22,000 residents in each county and comprised of a close balance of African-American and white citizens. (U.S.Exs.78, 106.) Conversely, Charleston County has a total population that exceeds 300,000 and African Americans only comprise 34.3% (U.S.Ex. 107.)

Several witnesses testified that these geographic and demographic features are an impediment to African-American candidates, who typically have fewer resources,

and particularly because costly television advertising and direct mail are deemed important in local campaigns for County Council. (Tr. at 302-03, 784-786; see also 213, 660, 1426, 1488-89, 1490, 1932-34; U.S. Ex. 14 at 51); *see Goosby v. Town Bd. of Town of Hempstead, N.Y.*, 180 F.3d 476, 494 (2d Cir.1999) ("Campaign financing is especially difficult in such a large district for black candidates, who have been able to campaign more effectively in smaller districts in Nassau County.").

Financial resources directly impact a candidate's ability to win elections. (Tr. at 895.) Several witnesses testified to the financial difficulties African-American candidates generally face in running election campaigns because they have less access to campaign resources than do white candidates. (Tr. at 659-60, 1598-99.) For example, in the 1998 campaign for County Council, African-American Democrat George Freeman raised $1,761. (U.S.Ex. 65E.) For that same election, African-American Democrat Pearl McCoy raised $2,133.91. (U.S. Ex. 65H.) In comparison, white Democrat Cindy Floyd raised and spent $25,961.79 in 1998 during her successful County Council campaign. (U.S. Ex. 65D; Tr. at 225.) As stated, white Democrat Leon Stavrinakis spent $49,627.65 during his successful 1998 County Council race, all but $1,000 of which he raised from other people. (Tr. at 1491; U.S. Ex. 65I.)

John Tecklenburg has been active in the Charleston County Democratic Party since 1986. (Tr. at 778-79.) He worked with African-American candidates who ran countywide, particularly Virginia Morgan for County Council and Charles Green for Coroner in the 1992 election, as well as with white candidates. (Tr. at 786-90, 811-12.) In making fund-raising calls for Green and Morgan, Tecklenburg found that usually reliable campaign donors gave no money to Green or Morgan, or gave them less money than they gave to white candidates. (Tr. at 788-89, 811-12.) Likewise, Bernard Fielding testified that it was more difficult to raise campaign funds for African-American candidates than for white candidates in Charleston County, primarily because the white community has many more financial resources than does the African-American community. [FN26] (Tr. at 128.)

FN26. Judge Fielding is the one African-American candidate who had substantial campaign funds for a countywide race. In his 1994 race for probate judge, he spent approximately $70,000, half of which came from his own funds. (Tr. at 106.) He was nevertheless defeated. Judge Fielding testified that he believes that "the primary reason I was defeated [in the 1994 probate judge's race] was because I was black." (Tr. at 152.)

***294** Additionally, Charleston County Democratic Chairperson, Diane Aghapour, testified that African-American Democratic candidates need to raise "a lot more money" than their white counterparts to "overcome a certain natural discomfort" that some white voters have with African-American candidates. (Tr. at 895.)

The combined effect of socio-economic disparities resulting from past-discrimination; contemporary bias in fund-raising; and the uncommonly large dimension and population of Charleston County works a significant impediment to African Americans' ability to gain equal access to the electoral process in Charleston County.

2. *De facto* majority vote requirement

Additionally, the United States' expert, Dr. Arrington, and the Private Plaintiffs' expert, Dr. John Ruoff, (Tr. at 410), [FN27] agree that staggering of terms, residency districts, and a primary nominating system serve as a *de facto* majority vote requirement [FN28] and limit the opportunities for single-shot voting. The staggering of terms and the residency requirements ensure that all contests are either single-seat or two-seat contests. Because the only viable candidates have been Democrats and Republicans, there are no more than two viable candidates for a single-seat or four viable candidates for two seats. (Tr. at 303.) Minority voters cannot single-shot vote in one seat elections. In addition, single-shot voting [FN29] does not make sense strategically for African-American voters in two-seat contests for Charleston County Council. (Tr. at 303-06, 2021, 2180-81; Ex.14 at 49-50.) Accordingly, a *de facto* majority vote requirement makes it more difficult for the African-American community to employ a traditional strategy of bullet voting in order to improve their chances of electing candidates of their choosing.

FN27. Dr. Weber necessarily conceded as much, (Tr. at 2022-23), but discounted its materiality and testified that he had never before heard an expert testify to such an "in-effect" majority-vote requirement. (Tr. at 2024).

FN28. A majority vote requirement would require a prevailing candidate to receive not simply a plurality of the votes cast in an election but a mathematical majority. (Tr. at 2022 (testifying that under a majority vote requirement, "a candidate to win the nomination of either political party must get either in the

first primary or in the second runoff primary, must get 50% plus 1 of the vote").) Although no such majority vote requirement exists in Charleston County, (id.), when only a single county council seat is at issue in a two-party system (Democrats and Republicans) the winner will almost certainly garner a majority of the votes. (Tr. at 303.)

FN29. For a definition of single-shot voting, see *supra* footnote 18.

E. *Senate Factor 6: Racial Appeals in the Political Process*

The Court is not greatly impressed with the force of evidence put forward on the sixth Senate factor: the extent to which subtle or overt racial appeals have characterized the political process in the jurisdiction. Not that the United States did not make its case diligently, but by its very nature, the evidence on point, like the evidence of voter intimidation and harassment, tends to be anecdotal and probative more of isolated occasions rather than patterned behavior. Certainly, the Government succeeded in proving individual incidents of subtle or overt racial appeals by a ***295** preponderance of the evidence, but the Court ultimately finds their aggregate force to be of moderate value.

Most notably, the Court finds that some white candidates in Charleston County have traditionally used pictures of their African-American opponents on their campaign literature to alert white voters to the race of the African-American candidate. (Tr. at 98, 949-51.) For instance, in 1973, Sidi Limehouse used a photograph of his African-American opponent, McKinley Washington, in his campaign literature in a race for an at-large State House seat from Charleston County. Limehouse won that election. (Tr. at 712-14.) [FN30]

FN30. It should be noted that McKinley Washington was later elected to the South Carolina House and Senate and enjoyed lengthy tenures.

In the 1988 Democratic Primary for House District 110, a white candidate distributed campaign literature that displayed a darkened picture of Robert Ford, his African-American opponent. The white candidate prevailed in that primary election. [FN31] (Tr. at 565-66, 1109-10, 1602; U.S. Ex. 16 at 22 n. 40.)

FN31. During this 1988 primary race, literature was distributed containing a caricature of Ford. This campaign literature contains wording that indicates that it was produced by the Bailey campaign, but the testimonial evidence is silent as to which campaign actually distributed this document. (Defs.' Ex. 30.) Even if this literature was distributed by the Ford campaign, it further illustrates the salience of race in the political process.

More recently, in the 1990 general election for Charleston County Probate Judge, a white candidate ran political advertisements in the *Post and Courier* that contained his photograph beside a darkened photograph of his African-American opponent, Bernard Fielding. The white candidate also distributed campaign postcards in the white community with Fielding's picture on them. (Tr. at 97-98, 954-55, 2921.)

In 1992, a white Republican State House candidate distributed campaign literature that included a darkened photograph of his African-American opponent, incumbent State Representative Lucille Whipper. (U.S. Ex. 16 at 22; Tr. at 955-56, 2922-23.) That same year, a white County Coroner candidate distributed campaign literature containing a photograph of her African-American opponent, Deputy Coroner Charles Green. (U.S. Ex. 16 at 22; Tr. at 956-57.)

In a 2000 State Legislative race between two white candidates, one campaign distributed literature with a darkened photograph of African-American Charleston County School Board member Elizabeth Alston. (Tr. at 563-65, 898-99.) Alston, however, had never been a resident of the House district in which that candidate ran in 2002, and no white school board members' photographs were used in this State legislative campaign. (Tr. at 577, 626.) Moreover, Alston did not give permission to the candidate to use her photograph in his campaign literature. (Tr. at 563-65, 898-99.)

Dr. Moore testified that he could not recall a single instance where a white candidate in Charleston County used the photo of his or her white opponent in campaign literature. (Tr. at 2924.)

Moreover, to help overcome white voter resistance to African-American candidacies, there is evidence that African-American candidates have de-emphasized their race in Charleston County campaigns. For example, in 1980, Louis Waring used his photograph in campaign literature during his unsuccessful race for the St. Andrew's Public Service Commission. In his successful 1990 race for the same position, ***296** however, Waring decided that the use of his picture on his campaign

literature "was not conducive to [his] candidacy." (Tr. at 1369; see also Tr. at 1289, 1367, 1399.) He testified that his photograph in the 1980 campaign had been a hindrance because, without it, some white voters would have believed he was a white person. (Tr. at 1369-71.) Likewise, Waring omitted his membership in the NAACP from his 1990 campaign literature, after having listed that membership in his 1980 literature. (Tr. at 1371.)

White County Council candidates have felt free to use their photographs in their campaign literature. (See, e.g., Tr. at 221, 1493-94.)

William Runyon, who has been involved in the Charleston County Democratic Party for over twenty years as a candidate, party official, and adviser, testified that he has advised African-American candidates to de-emphasize their race when running for office. (Tr. at 1599-1600.) For example, he advised African-American candidates not to list membership in organizations like the NAACP in their campaign literature. (Tr. at 1600.) Additionally, McKinley Washington, who represented majority-African-American districts in the South Carolina House and Senate from 1974-2000, testified that he always advises African-American candidates that "they had a better shot" by not using their own photographs in campaign literature. (Tr. at 727-28.)

Similarly, Charleston County School Board member Elizabeth Alston stated that she did not use her photograph on her campaign signs during her 1992 County Council race because a number of her African-American supporters advised her that the use of her photograph would not benefit her campaign. (Tr. at 548-49.) Current Democratic Party Chairperson Diane Aghapour testified that she advises African-American candidates not to use their photographs in direct mail advertising. (Tr. at 895.) Indeed, Aghapour gave that advice most recently to Pearl Ascue, an African-American Democratic candidate for County Council running in 2002. (Tr. at 895-96.)

A bizarre 1990 episode reflects the continuing role of racial appeals in Charleston County's political system. That year a Charleston-based political consultant ran the campaign of his sister, a candidate for Lt. Governor. Concerned that conservative low-country voters might stay home, the consultant bankrolled Benjamin Hunt, Jr., a nearly illiterate African-American man, to run in the primary against the incumbent United States Representative Arthur Ravenel. The political consultant believed that this would bring out more anti-black voters in the low-country area and help his sister in the primary against her major opponent whose strength lay in the middle and upper part of the state. He paid Hunt's filing fee and gave him $500. Hunt, who had never voted, took no part in the campaign beyond allowing his picture to be taken. The consultant mailed out thousands of "Hunt for Congress" leaflets showing a photograph of Hunt with a Kentucky Fried Chicken sign in the background. The *News and Courier* reported that the consultant had his clients publish pictures of black challengers, but he never had them publish pictures of white challengers. (U.S. Ex. 16 at 21-22; Tr. at 953-54; see also Tr. at 2545.)

Jimmy Stuckey, who has been active in the Charleston Democratic Party for approximately 30 years, testified that some whites believed that the Democratic Party is "controlled" by African Americans. (Tr. at 2549.) William Runyon, who has been active in the Charleston County Democratic Party for more than 20 years, testified that, in recent years, he has heard the ***297** Democratic Party referred to as the party of the African-Americans. (Tr. at 1601.)

Clearly, racial appeals have been and continue to be a part of the political dialogue in Charleston County, to some degree; and while these testimonial accounts and incidents are not exhaustive, neither are they pervasive. Accordingly, they cannot be determinative of that degree.

VI. Additional Factors [FN32]

FN32. The United States has not asserted that the fourth Senate Factor, denied access to a candidate slating, is an element of their case.

As stated, the Senate has also recognized the following "[a]dditional factors that in some cases have had probative value as part of plaintiffs' evidence to establish a violation":

• whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group [and]

• whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous.

Id. at 29 (footnotes omitted).

Although the Court received evidence on both factors, the United States has not put them at issue. Specifically, The United States' Amended Complaint did not allege that the policy underlying the at-large method of election is tenuous and further moved to limit the Defendants from putting forward evidence of responsiveness. The Court has considered all of the evidence related to the factors of tenuousness and responsiveness and finds that they do not

materially contribute to the Court's conclusion.

VII. Charleston County's Partisanship Defense

Throughout, Defendants have rather singularly insisted upon hanging the proverbial "hat" of their defense on the contention that the "cause" of voting polarization in Charleston County is partisan differences rather than racial ones. [FN33] Specifically, Defendants contend that Section 2's "on account of race or color" [FN34] language necessarily requires Plaintiffs to show that race explains the pattern of defeat of minority-preferred candidates.

FN33. On the basis of both *Gingles* and the Fourth Circuit's decision in *Lewis v. Alamance County*, 99 F.3d 600, 615 (4th Cir.1996), the Court has already rejected Defendants' argument at summary judgment that issues of "causation" had any place in the Court's consideration of the three *Gingles* preconditions.

FN34. Section 2 is divided into two subsections, 2(a) and 2(b). 42 U.S.C. § 1973. Subsection 2(a) forbids any voting practice "which *results* in a denial or abridgement of the right of any citizen of the United States to vote *on account of race or color*, or in contravention of the guarantees in section 4(f)(2), *as provided in subsection (b)*". 42 U.S.C. § 1973(a) (emphasis added). Plaintiffs, therefore, contend that what constitutes voting discrimination "on account of race or color" is defined in subsection 2(b). *Id.* Specifically, Plaintiffs argue that Subsection 2(b) makes it clear that a violation exists when it is shown that a racial group lacks equal opportunities and equal results which constitute a violation, regardless of the reasons why such inequality exists: "A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the [jurisdiction] are not equally open to participation by members of a class [protected by subsection 2(a)] in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973(b).

As stated, the Supreme Court interpreted Section 2 to provide a minority group ***298** with an equal opportunity to the electoral process. The central and dispositive question is "whether the use of a contested electoral practice or structure results in members of a protected group having less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." *Gingles*, 478 U.S. at 63, 106 S.Ct. 2752. The Fourth Circuit, in *Lewis v. Alamance County*, 99 F.3d 600, 615 (4th Cir.1996), has concluded that causation may be one of many issues relevant to the totality of circumstances although irrelevant to the analysis of the *Gingles* preconditions. *Id.* at 615 n. 12. Importantly, however, *Lewis* does not require plaintiffs to prove that race has caused the inequality of result. Nor did it hold that proof of factors other than race, like partisanship, constitute a complete defense. *See id.*

In *Goosby v. Town Bd. of Town of Hempstead, N.Y.*, 180 F.3d 476 (2d Cir.1999), the Second Circuit expressly recognized the Fourth Circuit's approach in *Lewis* and held that partisanship is not a defense to a Section 2 claim. In *Goosby*-as in this present case-"the principal and pervasive argument of the Town [was] that political partisanship, rather than race, account[ed] for the defeat of black candidates." *Goosby*, 180 F.3d at 495. Republican candidates had always won Town Board elections and African-American voters usually supported losing candidates. *Id.* at 484, 489, 492. The Town Board included an African-American Republican. *Id.* at 486. Expressly adopting the Fourth Circuit standard in *Alamance County*, the Second Circuit stated that the partisanship issue was relevant to the totality of circumstance analysis but not relevant to the *Gingles* preconditions. *Id.* at 492-93.

The Second Circuit, moreover, firmly rejected the partisanship defense. Indeed, the court stated that the defendants' partisanship defense

> represent[ed] a fundamental misunderstanding of what the plaintiff class alleged and proved to the satisfaction of the district court. The claim was that the at-large system of voting made it impossible for blacks to elect their *preferred candidates*. The Town's argument implies that if blacks registered and voted as Republicans, they would be able to elect the candidates they prefer. But they are not able to elect preferred candidates under the Republican Party regime that rules in the Town. Moreover, blacks should not be constrained to vote for Republicans who are not their preferred candidates.

Id. at 495-96 (emphasis in original).

Defendants rely on the conclusion of other circuits that proof of race-neutral causes of observed voting patterns can defeat a claim of minority vote dilution. In *League of United Latin American Citizens, Council No. 4434 (LULAC) v. Clements*, 999 F.2d 831 (5th Cir.1993) (en

banc), *Nipper v. Smith*, 39 F.3d 1494 (11th Cir.1994) (en banc), and *Uno v. City of Holyoke*, 72 F.3d 973 (1st Cir.1995), the circuit courts of appeal recognized the relevance of proof that the majority's voting behavior could best be explained by such race-neutral reasons as political partisanship or party affiliation, unrelated to the minority-preferred status of the defeated candidate. *See, e.g., LULAC*, 999 F.2d at 850-51. Specifically, the courts recognized that a vote dilution claim could be defeated by proof that these race-neutral reasons in fact provided the best explanation for electoral outcomes.

In *LULAC*, for example, the district court excluded evidence tending to show divergent voting patterns were attributable to race-neutral factors, finding that such evidence was irrelevant and legally ***299** incompetent. Reversing, the Fifth Circuit emphasized that Section 2's "rigorous protection" extended only to "defeats experienced by voters 'on account of race or color.' " [FN35] *LULAC*, 999 F.2d at 850. In rejecting the district court's construction and interpretation of the relevance of the circumstances surrounding electoral results, the Fifth Circuit emphasized:

> FN35. To the extent *LULAC*, *Nipper*, or *Uno* might suggest that "on account of race or color" narrowly concerns the cause of divergence in majority and minority voting preferences and requires some proof that the white majority *votes* differently because of racial animus, the Court disagrees. As the Senate factors plainly suggest, "on account of race or color" is a more far-reaching requirement that the Court consider the totality of pressure points which racial discrimination and disadvantage might aggravate, including, for example, the present effect of past discrimination on socio-economic status and, therefore, on political participation. Depressed socio-economic status from past discrimination which results in severely diminished political participation could constitute a "denial or abridgement of the right to vote ... on account of race or color," without regard to any present racial animus of the white electorate in their voting preferences.

Without an inquiry into the circumstances underlying unfavorable election returns, courts lack the tools to discern results that are in any sense "discriminatory," and any dissension between deprivation and their losses at the polls becomes untenable in holding that the failure of minority-preferred candidates to receive support from a majority of whites on a regular basis, without more, sufficed to prove legally significant racial bloc voting, the District Court unloosed Section 2 from its racial tether and fused illegal vote dilution and political defeat. *Id.*

At bottom, there is little difference between the Fifth Circuit's decision in *LULAC* and the Fourth Circuit's decision in *Alamance County* for purposes of this case. In fact, the Fourth Circuit explicitly agreed with the Fifth Circuit to the extent its decision in *LULAC* found "cause" to be relevant to the ultimate inquiry. *Alamance County*, 99 F.3d at 615. *Alamance County* simply teaches that the Court should consider evidence of causation within the totality of its inquiry. As stated, however, *Alamance County* implies no requirement that Plaintiffs prove that the inequality of result is caused by race and, conversely, suggests no guarantee that proof of race-neutral factors will operate as a complete defense.

Therefore, in keeping with the Fourth Circuit's instruction the Court allowed both parties opportunity at trial to develop a full record concerning causation and received significant expert testimony to that end. The Court will consider such evidence and fold any findings into its totality of the circumstances inquiry.

Initially, the Court finds the issue of voting-causation to be desperately illusive. As a theoretical matter, the Court is inclined to reject the possibility that any methodology might be able to adequately identify a singular or even dominant cause of a community's corporate voting behavior, which is in fact the aggregation of an innumerable series of individualized choices and pluralistic discretions made by thousands of people generally out of any meaningful political association with one another. Certainly where there is a consistent pattern of cohesive voting among a community of voters, as is here, the decisional nuances over the particularized issues of any single individual's vote begin to fall away, and more global factors such as race and socio-economic status begin to emerge as likely explanations for the pervasive commonality in voting behavior among communities of race. Nonetheless, ***300** the Court is dissatisfied with the speculation of associating cause with the voting polarization evidenced by the Record in this case. The task of separating out the individual influence of race and party is a weighty one.

Consistent with these concerns, Dr. Arrington, expert for the United States, testified that the multi-colinearity [FN36] of these more global causes of race and partisan affiliation in Charleston County elections renders the individual force exerted by any one cause nearly inextricable from the influence of the other. (Tr. at 310.) Dr. Arrington testified, further, that even if the experts had attempted to conduct a multivariate analysis [FN37] that "you could not

pull out statistically the difference between partisanship and race." (Tr. at 310.) Dr. Weber, expert for Defendants, further acknowledged that he could not, with a reasonable degree of social science certainty, determine the extent to which racial attitudes caused polarized voting in Charleston County, and that he believed factors of race and partisanship are "inextricably intertwined" in such a way that they could not be separated statistically, to wit, they are multi-colinear. (Tr. at 238-39, 2220-21.)

> FN36. In statistical analysis, multi-colinearity is a correlation between two independent variables that is so strong that it is impossible "statistically to separate them out and tell which of those two effects the dependent variable; which of those two is the cause." (Tr. at 310.)

> FN37. A multivariate analysis attempts to measure the effect of two or more independent variables on the dependent variable as opposed to a more traditional analysis, which would control for only a single independent variable.

Moreover, it is clear from the Record that to the extent other methodologies or models might begin to partly unbraid the intertwined influence of race and partisan affiliation, these methodologies could not have been employed in this case or have not been employed to a satisfactory degree.

Both Dr. Arrington, (Tr. at 309-310), and Dr. Weber, (Tr. at 1992-93), agree that party registration data and survey research are the primary sources of data relied on by political scientists in drawing conclusions concerning the effect of political partisanship on election results. It is also agreed that neither type of data is available concerning Charleston County elections because there is no requirement that voters register by party for general elections and no relevant survey research has been conducted. (See, e.g., Tr. at 309.)

Dr. Weber identified consideration of "behavioral partisanship" as a third methodology for measuring the effect of partisanship on election results. (Tr. at 1980, 1992-93.) This methodology looks at the "past behavior of voters." (Tr. at 1993.) In his behavioral analysis at trial, Dr. Weber first focused on party-switching and the effect it had on the African-American support for candidates, Dr. Charles Wallace, for County Council and Keith Summey, for the Mayorship of North Charleston. Dr. Weber observed that Dr. Wallace was significantly supported by the African-American community as a Democrat, but received "virtually no support from the nonwhite community" after his affiliation with the Republican party. (Tr. at 1997.) Dr. Weber also identified Mayor Summey as another candidate who received significant African American support "as a Democrat happened to lose but, again, then comes back and runs as a Republican and wins." (Tr. at 1997.)

***301** Dr. Weber further testified that the election of Timothy Scott, an African American candidate, to County Council demonstrates that partisanship not race is the cause of polarization and patterned-defeat. Dr. Weber stated that "if you think that the voters are cued on race-race is the reason why they are going to not vote for a candidate-you would expect that the voters, assuming that they are aware that Scott is an African-American candidate, that the white voters would not vote for him." (Tr. at 1998.)

Finally, Dr. Weber discussed the success of African-American candidates in County School Board races as further evidence that party and not race was the primary cause of polarization and patterned-defeat. Specifically, Dr. Weber testified that the School Board races

> are different in character than the elections for Countywide State or national office, because these are elections that are conducted without partisan designation. So the voter does not know unless the voter is very well informed or has been contacted by parties, for example, to say, this is the Democrat or, this is the Republican, or anything like that. So a lot of voters are lacking in the partisan information. And I did this to control for the possibility that there would be racial polarization in such nonpartisan elections which would be confirmatory or perhaps denied the findings in the partisan general elections.

(Tr. at 2001-02.) Dr. Weber concluded that without the "partisan cue" polarization was less severe, suggesting again that party and not race was the better explanation for the patterned defeat of minority-preferred candidates.

The Court is unpersuaded by the behavioral analysis of Dr. Weber. First, the analysis is insufficiently comprehensive. While Dr. Weber did not fully explain his behavioral methodology, which is admittedly recognized by only a segment of the social science literature, (Tr. at 1993), the Court suspects that it requires a more exacting inquiry than has been conducted here, including in the least a measurement of precinct voting patterns and candidate platforms over a course of elections. In fact, Dr. Weber stated that in determining whether partisanship is a better explanation for polarized voting patterns than race in Charleston County, he would want to consider the nature of the campaigns, the issues raised in those campaigns, newspaper endorsement of candidates, mobilization efforts during those elections,

and field survey research, including voter interviews. (Tr. at 2054-65, 2082, 2093, 2168, 2170-71; see also 2994-96.) No such efforts have been made. The Court simply cannot conclude on the strength of isolated instances that party affiliation better explains the patterned-defeat in Charleston County. Moreover, as the ultimate factfinder, the Court views the behavioral analysis conducted by Dr. Weber as inherently more speculative and subjective than the other methodologies identified by the experts for proving cause and therefore assigns it less weight. *Cf., e.g., Westberry v. Gislaved Gumm AB*, 178 F.3d 257, 265 (4th Cir.1999); *Benedi v. McNeil-P.P.C., Inc.*, 66 F.3d 1378, 1383 (4th Cir.1995). For the same reason, the Court is certain that even a more involved behavioral analysis would not have compelled a different conclusion. [FN38]

FN38. It should be noted that much of Dr. Weber's research concerning behavioral partisanship was submitted in an untimely declaration properly rejected by the Magistrate Judge.

Further, the Court disagrees that Dr. Weber's conclusions properly follow from his observations. As discussed, *supra* Section V.B at 19, the success of African-***302** American candidates in the School Board races has already been adequately explained by special circumstances unique to those elections. As for the effects of party-switching, the Court is not sure that this evidence is even probative of the causation issue at all. Evidence of dramatically depressed African American support for Dr. Wallace after his re-affiliation with the Republican party moves the Court no closer to understanding why whites consistently identify with the Republican party and why African Americans so consistently identify with the Democrat party, or why such consistent correlation results in a patterned defeat of African-American preferred candidates in Charleston County. It certainly does not explain, in any respect, why African Americans abandoned their support for Dr. Wallace. Notwithstanding whatever ideological position Dr. Wallace may have held after his re-affiliation, the reasonable African American voter might have formed any number of conclusions concerning the meaning and effect of his party-switch. Dr. Wallace's loss of support only tends to reinforce that which the Court already knows-cohesion in Charleston County is stalwart. As stated, whether such unbending correlation between race and party is driven by race or ideology or, as the Court suspects, some cross-pollenization of both is frustratingly beyond the capacity of the Court and the evidence before it, and it remains a mystery that Dr. Wallace's election or Mayor Summey's [FN39] election do little to illuminate.

FN39. The Court cannot identify any evidence that Mayor Summey lost the support of African Americans upon his re-affiliation with the Republican party.

Finally, Timothy Scott's election to County Council certainly demonstrates that his race was not a fatal impediment to either significant white support or his ultimate success. Alone, however, his election can do little to proving the ultimate cause of legally-significant, preferred-candidate defeat in Charleston County. As demonstrated, his elections have been the exception in Charleston County, and the Supreme Court has made it clear that the decisive evidence regarding voting patterns is what *usually* occurs in a jurisdiction, and not aberrational election results produced by special circumstances. *See Gingles*, 478 U.S. at 57 n. 26, 106 S.Ct. 2752. Indeed, Dr. Weber stated that political scientists study voting by looking at "overall patterns." (Tr. at 2225-26, 2091.) Here, Scott not only received white support not received by other African-American candidates-regardless of party-but he received unprecedented financial support ($5,000) in a local election from the South Carolina Republican Party and other sources. (Tr. at 2311, 2317-18.) No other current Republican County Councilmember received *any* direct financial support from the State Republican Party. (See U.S. Exs. 65A-C, F-G, and K, financial disclosure statements for current Republican Charleston County Councilmembers other than Scott). In fact, Dr. Wallace acknowledged that such support was not merely unusual but unheard of. (Tr. at 1791.) With the help of Buck Limehouse, the State Republican party, and others, Scott raised an unprecedented $20,000 to $25,000 for the 1995 special election, a sum Scott described as "substantial." (Tr. at 2311.)

Notably, each of his elections were still characterized by racial polarization and the ultimate defeat of the African-American preferred candidate.

Accordingly, Dr. Weber's behavioral analysis, to the satisfaction of the Court, does not demonstrate that anything other than race explains the voting polarization ***303** in Charleston County. [FN40]

FN40. Defendants also contend that pervasive use by African Americans of the Master Lever on the Shouptronic voting machines contributes to the polarization of voting and proves that party and not race is the cause of such polarization. First, there is no evidence of the

> extent to which the Master Lever is exercised by the African-American community. Second, even if African Americans consistently use the Master Lever, it still cannot be understood whether this strong affiliation with the Democratic party, manifested through exercise of the Master Lever, is for racial or non-racial reasons.

Although he admittedly did not conduct a traditional analysis of causation, the United States' expert, Dr. Arrington, offered an opinion as to whether race had caused the pattern of polarized voting between white and African-American voters. Dr. Arrington opined that race, and not partisan affiliation, was the main reason why white and African-American voters voted differently.

As a preliminary matter, Dr. Arrington noted that the statistical methods of bivariate ecological regression analysis and extreme case analysis used by all the statistical experts in this case indicate *how* people voted but not *why* people voted for particular candidates. (Tr. at 308 ("But about why they vote the way they do when they get there, that's a new field for me.").) As stated, Dr. Arrington found that partisanship and race are closely intertwined in Charleston County, and both are highly correlated to how voters vote. (Tr. at 310-311.) Thus, it is undisputed that race, partisanship, and vote are highly correlated.

Dr. Arrington, however, introduced the following theoretical model to demonstrate that race must be the primary cause of voter choices. (See U.S. Ex. 111; Tr. at 311-14.) The model considered three variables and how they each exercised force in relation to one another: race, party affiliation, and the ultimate vote. A person's vote *cannot* cause or influence a person's race or partisan affiliation. On the other hand, a person's race or partisan affiliation *can* influence how that person votes. In regard to race and partisanship, a person's race can be the cause of their partisan affiliation; but the converse cannot be true because race is an immutable characteristic. Dr. Arrington concluded, therefore, that race must be the key causal variable because it can cause vote directly and it can also cause vote through the mediating variable of partisanship. *Id.*

However, Dr. Arrington's model is also unsatisfactory. Although the relational axioms are true, the conclusion is a non-sequitur. Certainly race is the only variable of the three which can inform both of the remaining variables, but the model cannot demonstrate that race exerts the *greatest* influence. In other words, the combined force that race exerts over a person's vote-the force exercised over the ultimate vote *directly* plus the force as *mediated* through party-still may be less than the total force that party alone (ideology) exerts over the ultimate vote. For example, (assigning generic units of measure to the force exercised) race might exercise a force of 10 units *directly* and another 10 units out of a 100 mediated through party, but the party variable alone would still exercise 90 units of force independently. The model can only explain *how many* avenues of influence race enjoys and *not how great* or strong that aggregate influence is.

In sum, the experts have not conducted an analysis of causation, in great part, because the necessary data is not available. To the extent methodologies and models have been used to assist the Court in coming to a conclusion, they have produced somewhat unsatisfactory results. ***304** As stated, however, the problem lies inherently in the morass of the causal inquiry itself, and not in the thoughtful consideration of the experts' observations. The Court finds that the influence of race and party on voting patterns in Charleston County, on the facts of this case, are too closely related to isolate and measure for effect. The Court, therefore, concludes that the evidence fails to demonstrate that race-neutral factors explain the voting polarization in Charleston County.

[171] Therefore, remaining mindful that Plaintiffs need not prove any particular number of Senate factors or that a majority of them point "one way or the other," *Gingles*, 478 U.S. at 45, 106 S.Ct. 2752, the Court concludes that evidence under Senate factors seven, two, and three of severe voting polarization, minimal minority electoral success, and an uncommonly large voting district decisively points towards a violation of Section 2. The combined strength of the evidence under Senate factors one and five of depressed political participation as a result of pervasive past discrimination in education and employment and past discrimination touching the right to vote also weighs in favor of a finding that the at-large system violates Section 2. Evidence of racial appeals has not materially assisted the Court in reaching a conclusion. Finally, there is no evidence that anything other than race explains the severe voting polarization observed in Charleston County Council elections.

The Court therefore concludes, viewing the totality of the circumstances, that the at-large system of election for the Charleston County Council unlawfully denies African Americans equal access to the electoral process in contravention of Section 2 of the Voting Rights Act. African Americans in Charleston County, on account of their race, have inherited a depressed socioeconomic posture which hinders political participation and exacerbates the effect of already severely polarized voting.

VIII. Constitutional Claim of Private Plaintiffs

[81] Notwithstanding the Court's determination that the at-large electoral system results in unequal access to the electoral process for African Americans, it cannot conclude on the evidence before it that such system was adopted with the intent to discriminate. The Court, therefore, rejects the claim of the private Plaintiffs that the adoption of the at-large system for electing members of the Charleston County Council was motivated by a racially discriminatory purpose in violation of the intent standard of Section 2 and the 14th Amendment of the United States Constitution.

[91] The United States Supreme Court has emphasized that racially discriminatory motivation is a necessary ingredient of a 14th and 15th Amendment violation. [FN41] *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 265, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977); *Washington v. Davis*, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976); *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 117 S.Ct. 1491, 1502-03, 137 L.Ed.2d 730 (1997) (noting applicability of *Arlington Heights* analysis in vote dilution cases); ***305***City of Mobile v. Bolden*, 446 U.S. 55, 100 S.Ct. 1490, 64 L.Ed.2d 47 (1980) (controlling principles for assessing 14th and 15th Amendment claims); *Whitcomb v. Chavis*, 403 U.S. 124, 91 S.Ct. 1858, 29 L.Ed.2d 363 (1971); *see also Irby v. Virginia State Board of Elections*, 889 F.2d 1352, 1355 (4th Cir.1989) ("To establish an equal protection violation, a plaintiff must show discriminatory intent as well as disparate effect."); *Washington v. Finlay*, 664 F.2d 913, 919 (4th Cir.1981), *cert. denied*, 457 U.S. 1120, 102 S.Ct. 2933, 73 L.Ed.2d 1333 (1982). In order to establish a violation of the Equal Protection Clause of the 14th Amendment, the burden is upon the private Plaintiffs to show discriminatory purpose and effect.

> FN41. As stated, claims of intentional discrimination under Section 2 are assessed according to the standards applied to constitutional claims of intentional racial discrimination in voting. *See Garza v. County of Los Angeles*, 918 F.2d 763, 766 (9th Cir.1990) ("[T]he Voting Rights Act can be violated by both intentional discrimination in the drawing of district lines and facially neutral apportionment schemes that have the effect of diluting minority votes.")

"Discriminatory purpose" implies more than "intent as awareness of consequences. It implies that the decisionmaker ... selected or reaffirmed a particular course of action at least in part 'because of' ... its adverse effects upon an identifiable group." *McCleskey v. Kemp*, 481 U.S. 279, 298, 107 S.Ct. 1756, 95 L.Ed.2d 262 (1987). Under *Arlington Heights*, [FN42] discriminatory purpose may be established by proof that Charleston County used race as a motivating factor in establishing and maintaining the present at-large electoral system. *Arlington Heights*, 429 U.S. at 265-66, 97 S.Ct. 555.

> FN42. The Senate report expressly incorporates the considerations in *Arlington Heights* for purposes of analyzing a Section 2 intent standard claim. S.Rep. No. 417 at 27 n. 108.

[101] In determining the ultimate issue in an *Arlington Heights* analysis of whether there is sufficient evidence to suggest invidious discriminatory purpose as a motivating factor, the Court is called upon to make "a sensitive inquiry into such circumstantial and direct evidence of intent as may be available," *Id.* at 266, 97 S.Ct. 555, and should consider the following factors in assessing whether such a purpose or discriminatory intent was in fact a motivating factor in a jurisdiction's enactment of legislation:

(1) Whether impact of the official action bears more heavily on one race than another;
(2) The historical background of the jurisdiction's decision;
(3) The specific sequence of events leading up to the challenged decision;
(4) Departures from the normal procedural sequence; and
(5) The legislative and administrative history, especially any contemporary statements by members of the decision-making body.

Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. at 265, 97 S.Ct. 555; *Washington v. Davis*, 426 U.S. at 241-42, 96 S.Ct. 2040.

The private Plaintiffs rely largely on temporal evidence to prove that the at-large electoral system was adopted for invidious and discriminatory purposes. Specifically the private Plaintiffs contend that the at-large system was a known device for diluting minority voting strength, increasingly used throughout the South, and conspicuously adopted after the passage of the Voting Rights Act and in response to increased African American registration and political activity. Private Plaintiffs point to other actions taken during the same period to insulate white control of the electorate including the annexations of white populations to maintain Charleston as a majority white city, abolishing elections for the school board in majority African-American districts only, and racially

motivated opposition to school consolidation on the grounds that it would lead to integration. [FN43]

FN43. The Court primarily received evidence of discriminatory intent through the lengthy examination of Dr. Vernon Burton. (Tr. 1127-1253.) While the Court received further credible testimony, which it considered probative of a lack of discriminatory intent, from Lenny Krawcheck, a very credible member of the legislative delegation at the time of the adoption of the at-large system, the Court remains mindful of the Supreme Court's warning in *Arlington Heights*, that testimony of original decision-makers should be cautiously considered only under extraordinary circumstances. For that reason, his testimony bears little on the decision of the Court.

Certainly "historical background of the decision is one evidentiary source, particularly ***306** if it reveals a series of official actions taken for invidious purposes." *Arlington Heights*, 429 U.S. at 267, 97 S.Ct. 555. However, Charleston County also put forward competent evidence that the legislation enacted in 1969 to change the method of election was, in fact, accomplished to satisfy the one-person, one-vote mandate of the United States Supreme Court in *Reynolds v. Sims*, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964) and *Avery v. Midland County*, 390 U.S. 474, 88 S.Ct. 1114, 20 L.Ed.2d 45 (1968). [FN44] Unfortunately, there is neither legislative history nor contemporaneous accounts or statements made by decision makers to further illuminate the inquiry. The change to the at-large system might reasonably be explained in the context of either of the historical explanations advanced by Plaintiffs and Defendants, respectively, and the evidence fails to convince the Court that some invidious discriminatory purpose was, in fact, the motivating factor over compliance with the one-man one-vote requirement.

FN44. The private Plaintiffs counter that the South Carolina Attorney General advised the County that the Supreme Court's decision in *Avery* did not require at-large voting for the County Council. This evidence alone does not, however, disprove that it was not in fact adopted for such reason.

Of the remaining *Arlington Heights* considerations, there is no evidence of a departure in normal procedures. It is clear, however, as evidenced by the totality of the circumstances inquiry, that any ill effects of the at-large system have fallen squarely on the shoulders of the African American community. Although a clear pattern of disparate burden, unexplainable on grounds other than race, can sometimes emerge "from the effect of the state action even when the governing legislation appears neutral on its face," *Arlington Heights*, 429 U.S. at 266, 97 S.Ct. 555 (citing *Yick Wo v. Hopkins*, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220 (1886); *Guinn v. United States*, 238 U.S. 347, 35 S.Ct. 926, 59 L.Ed. 1340 (1915); *Lane v. Wilson*, 307 U.S. 268, 59 S.Ct. 872, 83 L.Ed. 1281 (1939); *Gomillion v. Lightfoot*, 364 U.S. 339, 81 S.Ct. 125, 5 L.Ed.2d 110 (1960)), such cases are rare and "[a]bsent a pattern as stark as that in *Gomillion* or *Yick Wo*, impact alone is not determinative, and the Court must look to other evidence," *Arlington Heights*, 429 U.S. at 266, 97 S.Ct. 555. This case is not one of those rare instances.

While the Court may deduce intent from circumstantial evidence, it cannot on the evidence before it conclude that the at-large system was adopted for discriminatory purposes. Certainly the timing of the General Assembly's adoption of the at-large system raises suspicions, but the Court will not disparage its authors without more compelling evidence, particularly in light of other reasonable and historical explanations for the adoption of the at-large system. The private Plaintiffs' constitutional claim and claim based on the intent standard of Section 2 are, therefore, denied.

CONCLUSION

To the satisfaction of the Court and by a preponderance of the evidence, both the ***307** United States and the Private Plaintiffs have demonstrated that the at-large system of elections for the Charleston County Council denies African Americans, on account of their race and color, equal access to the electoral and political process, in contravention of Section 2 of the Voting Rights Act. Accordingly, it is hereby **DECLARED** that Charleston County's at-large method of election is illegal and cannot be enforced in future elections. It is, therefore, **ORDERED**, that any further use of the at-large system of election for the Charleston County Council is hereby **ENJOINED**. The Private Plaintiffs, however, have failed to establish their constitutional claims. Accordingly, such claims for relief as are based upon the intent standard of Section 2 of the Voting Rights Act and the United States Constitution are hereby **DENIED**.

AND IT IS SO ORDERED.

D.S.C.,2003.
U.S. v. Charleston County

316 F.Supp.2d 268
(Cite as: 316 F.Supp.2d 268)

316 F.Supp.2d 268

Briefs and Other Related Documents (Back to top)

• 2:01cv00562 (Docket) (Feb. 28, 2001)
• 2:01CV00155 (Docket) (Jan. 17, 2001)

END OF DOCUMENT

APPENDIX TO THE PREPARED STATEMENT OF ARMAND DERFNER: *United States v. Charleston County* (365 F.3d 341)

365 F.3d 341
365 F.3d 341
(Cite as: 365 F.3d 341)

H

Briefs and Other Related Documents

United States Court of Appeals,
Fourth Circuit.
UNITED STATES of America, Plaintiff-Appellee,
v.
CHARLESTON COUNTY, SOUTH CAROLINA; Charleston County Council; John O. Conlon; Toi Ahrens Estes; Cindy M. Floyd; A.D. Jordan; Barrett S. Lawrimore; Timothy E. Scott; Leon E. Stavrinakis; Charles Wallace; Curtis E. Bostic, as members of the Charleston County Council, Defendants-Appellants,
and
Charleston County Election Commission; Ruth C. Glover, Defendants.
Lee H. Moultrie; George Freeman; Maggie McGill; Sandra Fowler, Plaintiffs-Appellees,
v.
Charleston County Council, Defendant-Appellant.
Nos. 03-2111, 03-2112.

Argued: Feb. 24, 2004.
Decided: April 29, 2004.

Background: United States and group of county voters brought action against county, alleging that county's at-large election of its council diluted minority voting strength in violation of § 2 of the Voting Rights Act. County and voters moved for partial summary judgment. The United States District Court for the District of South Carolina, Patrick Michael Duffy, J., granted summary judgment, and following trial on remaining issue, held in favor of United States and voters.

Holding: On appeal, the Court of Appeals, Wilkinson, Circuit Judge, held that finding that county's at-large election of its council violated the Voting Rights Act was not clearly erroneous.
Affirmed.

West Headnotes

[1] **Elections** 12(7)
144k12(7) Most Cited Cases

To prove that use of multimember district dilutes their votes in violation of Voting Rights Act, members of protected minority group must establish that it is sufficiently large and geographically compact enough to constitute majority in single-member district, that it is politically cohesive, and that majority will vote sufficiently as a bloc to enable it usually to defeat minority's preferred candidate. Voting Rights Act of 1965, § 2(b), as amended, 42 U.S.C.A. § 1973(b).

[2] **Elections** 12(7)
144k12(7) Most Cited Cases

District court's finding about whether use of multimember district dilutes minority's votes in violation of Voting Rights Act is factual finding based on totality of circumstances. Voting Rights Act of 1965, § 2(b), as amended, 42 U.S.C.A. § 1973(b).

[3] **Elections** 12(3)
144k12(3) Most Cited Cases

Causation evidence is irrelevant in the inquiry into the three *Gingles* preconditions used to establish impermissible vote dilution in violation of § 2 of Voting Rights Act, but relevant in the totality of circumstances inquiry for determining vote dilution claim. Voting Rights Act of 1965, § 2(b), as amended, 42 U.S.C.A. § 1973(b).

[4] **Elections** 12(3)
144k12(3) Most Cited Cases

Inquiry into the *Gingles* preconditions used to establish impermissible vote dilution in violation of § 2 of Voting Rights Act is a preliminary one, designed to determine whether an at-large system potentially violates § 2. Voting Rights Act of 1965, § 2(b), as amended, 42 U.S.C.A. § 1973(b).

[5] **Elections** 12(7)
144k12(7) Most Cited Cases

An at-large system cannot be responsible for diluting minority voting strength in violation of the Voting Rights Act, unless minority voters cohesively support particular candidates, the minority-preferred candidates are being systematically defeated by white bloc voting, and those defeats would not be occurring under a system of single-member districts. Voting Rights Act of 1965, § 2(b), as amended, 42 U.S.C.A. § 1973(b).

[6] **Elections** 12(3)
144k12(3) Most Cited Cases
To demonstrate an actual violation of § 2 of the Voting Rights Act, a plaintiff asserting vote dilution must show that, under the totality of the circumstances, the State's challenged electoral scheme has the effect of diminishing or abridging the voting strength of the protected class. Voting Rights Act of 1965, § 2(b), as amended, 42 U.S.C.A. § 1973(b).

[7] **Elections** 12(3)
144k12(3) Most Cited Cases
In order to evaluate vote dilution claim under § 2 of Voting Rights Act, the Court of Appeals must undertake a searching practical evaluation of the past and present reality, which demands a comprehensive, not limited, canvassing of relevant facts. Voting Rights Act of 1965, § 2(b), as amended, 42 U.S.C.A. § 1973(b).

[8] **Elections** 12(3)
144k12(3) Most Cited Cases
"Legally significant white bloc voting," as required to establish third *Gingles* precondition used to establish impermissible vote dilution in violation of § 2 of Voting Rights Act, refers to the frequency with which, and not the reason why, whites vote cohesively for candidates who are not backed by minority voters. Voting Rights Act of 1965, § 2(b), as amended, 42 U.S.C.A. § 1973(b).

[9] **Elections** 12(3)
144k12(3) Most Cited Cases
Claims of vote dilution under § 2 of the Voting Rights Act require trial courts to immerse themselves in the facts of each case, and to engage in an intensely local appraisal of the design and impact of the contested electoral mechanisms. Voting Rights Act of 1965, § 2(b), as amended, 42 U.S.C.A. § 1973(b).

[10] **Counties** 38
104k38 Most Cited Cases
Finding that county's at-large election of its council resulted in minority vote dilution, and thus violated § 2 of the Voting Rights Act, was not clearly erroneous; county's expert testified that there had been racially polarized voting in 25 of the 33 contested general elections for the county council during two-year period, in the 10 general elections that involved at least one minority candidate, white and minority voters were polarized 100% of the time, and county council's electoral structure, along with the county's sheer size, diminished minority voters' ability to elect their preferred representatives. Voting Rights Act of 1965, § 2(b), as amended, 42 U.S.C.A. § 1973(b).

***343 ARGUED:** Benjamin E. Griffith, Griffith & Griffith, Cleveland, Mississippi, for Appellants. Moffatt Laughlin McDonald, American Civil Liberties Union Foundation, Atlanta, Georgia; Angela MacDonald Miller, Civil Rights Division, Appellate Section, United States Department of Justice, Washington, D.C., for Appellees. **ON BRIEF:** Joseph Dawson, III, Bernard E. Ferrara, Jr., W. Kurt Taylor, North Charleston, South Carolina; A. Arthur Rosenblum, Charleston, South Carolina, for Appellants. R. Alexander Acosta, Assistant Attorney General, Mark L. Gross, Marie K. McElderry, Civil Rights Division, United States Department of Justice, Washington, D.C., for Appellee United States.

Before WILKINSON, NIEMEYER, and DUNCAN, Circuit Judges.

Affirmed by published opinion. Judge WILKINSON wrote the opinion, in which Judge NIEMEYER and Judge DUNCAN joined.

OPINION

WILKINSON, Circuit Judge:

Since 1969, Charleston County, South Carolina has been governed by a County Council composed of nine members elected in county-wide, partisan elections. Despite the County's substantial minority population, few minority-preferred candidates, and very few minority candidates, have ever been elected to the Council. The United States brought this suit, alleging that the County's at-large election of its Council diluted minority voting strength in violation of Section 2 of the Voting Rights Act of 1965. The district court agreed, finding that the County's severe voting polarization, its particular electoral structure, and its sheer size combined to deny minority voters an equal opportunity to elect their preferred representatives. Because the district court's finding is not clearly erroneous, we affirm.

I.

Located in the southeastern corner of South Carolina, where the Ashley and Cooper Rivers converge on the Atlantic, Charleston County covers over nine hundred square miles. It includes tiny municipalities like Awendaw and McClellanville;

islands like Kiawah and Seabrook; and of course cities like Charleston, the state's second largest. The County is ethnically as well as geographically diverse. The third most populous of the state's forty-six counties, it has the second highest total number of black residents. Of its roughly 310,000 residents, 188,542 (60.8%) are white; 106,337 (34.3%) are black; and 15,090 (***344** 4.9%) are of other racial or ethnic descent. [FN1]

> FN1. Those of other racial or ethnic descent include persons of Hispanic, American Indian, Alaskan Native, Asian, or Hawaiian or Pacific Islander descent.

The numbers of registered and actual voters, however, are more disparate. As of November 2000, 177,279 people were registered to vote in Charleston County, 122,557 (69.1%) of whom were white and 54,722 (30.9%) of whom were nonwhite. Of those registered voters, 114,166 actually voted in the November 2000 general election, 82,395 (72.2%) of whom were white and 31,771 (27.8%) of whom were nonwhite. According to the evidence of voter turnout presented by the County's own expert witness, Dr. Ronald Weber, minority registered voters have consistently participated at a lower rate than white registered voters in Charleston County Council general elections.

The County Council oversees local governance on issues ranging from economic development to public safety, and it is composed of nine members elected to staggered terms in at-large, partisan elections. Candidates for the Council run from four residency districts: three Council seats are reserved for residents of the City of Charleston, three for residents of North Charleston, two for residents of West Ashley, and one for a resident of East Cooper. Charleston County is one of only three counties in South Carolina that elects its entire county council at-large, and it is the only county with a majority white population to do so. The other two counties that elect their county councils at-large, Hampton and Jasper, are less populated, rural counties with roughly equal numbers of minority and white residents.

The County's modified at-large system, in which all of the County's residents may vote for candidates residing in specific areas of the County, was created in 1969, and it was precleared by the Attorney General under Section 5 of the Voting Rights Act. *See* 42 U.S.C. § 1973c (2003). In 1989, the County's residents narrowly rejected a referendum to switch from the at-large electoral system to a single-member district system. Both the County and the United States agree that voting on the referendum was extremely polarized: at least 98% of minority voters approved the switch to single-member districts, while at least 75% of white voters wanted to retain at-large elections.

Since 1970, 41 people have been elected to the County Council, only three of whom are minorities: Lonnie Hamilton III, who was elected six times between 1970 and 1990, serving a total of twenty-four years; Marjorie Amos-Frazier, who was elected twice in 1974 and 1978; and Timothy Scott, who has remained the Council's only minority member since 1995. While minority candidates preferred by minority voters have had great difficulty winning election to the Council, white candidates who were preferred by minority voters have been somewhat more successful, according to evidence of recent Council elections presented by the United States' expert witness, Dr. Theodore Arrington.

II.

A.

Section 2(a) of the Voting Rights Act prohibits a State or its political subdivision from imposing any voting practice that "results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color...." 42 U.S.C. § 1973(a). Section 2(b), as amended in 1982, further provides that a violation of § 2(a) occurs

> ***345** if, based on the totality of the circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by [§ 2(a)] in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.

Id. § 1973(b). The 1982 amendment made clear that Section 2 condemns not only voting practices borne of a discriminatory intent, but also voting practices that "operate, designedly or otherwise," to deny "equal access to any phase of the electoral process for minority group members." S.Rep. No. 97-417, at 28, 30 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 205, 207 (hereinafter "Senate Report"); *see also Chisom v. Roemer*, 501 U.S. 380, 393-95 & nn. 20-21, 111 S.Ct. 2354, 115 L.Ed.2d 348 (1991).

[1][2] In *Thornburg v. Gingles*, 478 U.S. 30, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986), the Supreme Court established the framework for claims that an at-large

voting system dilutes minority voting strength in violation of § 2 of the Voting Rights Act. According to the Court, three preconditions are necessary to a finding of vote dilution:

> First, the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single member district....
>
> Second, the minority group must be able to show that it is politically cohesive....
>
> Third, the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it ... usually to defeat the minority's preferred candidate.

Gingles, 478 U.S. at 50-51, 106 S.Ct. 2752 (citations and footnotes omitted). If these three preconditions are satisfied, then the trier of fact must determine whether, based on the totality of the circumstances, there has been a violation of Section 2. *Johnson v. DeGrandy*, 512 U.S. 997, 1011-12, 114 S.Ct. 2647, 129 L.Ed.2d 775 (1994); *Cane v. Worcester County*, 35 F.3d 921, 925 (4th Cir.1994).

In determining which circumstances courts should take care to consider, the Supreme Court has turned for guidance to the Senate Report that accompanied Congress's 1982 amendments to the Voting Rights Act. *See Gingles*, 478 U.S. at 43-45, 106 S.Ct. 2752. According to Congress and the Court, the most important factors in the inquiry into the totality of the circumstances are the "extent to which minority group members have been elected to public office in the jurisdiction," and "the extent to which voting in the elections of the state or political subdivision is racially polarized." *Id.* at 48-49 n. 15, 106 S.Ct. 2752 (quoting Senate Report at 28-29) (internal quotation omitted). If these factors are present, other considerations "are supportive of, but *not essential to* " a § 2 claim: the history of voting-related discrimination in the State or political subdivision; the extent to which the State or political subdivision has used voting practices that enhance the opportunity for discrimination against the minority group, such as unusually large election districts or anti-single shot provisions; the exclusion of minorities from the candidate slating process; the use of racial appeals in political campaigns; and the degree to which past discrimination in such areas as education, employment and health has hindered the ability of minorities to participate effectively in the political process. *Id.* (emphasis in original).

***346** However, this list is "neither comprehensive nor exclusive." *Gingles*, 478 U.S. at 45, 106 S.Ct. 2752; *see* Senate Report at 29 ("[The Senate Report's factors] will often be the most relevant ones, [but] in some cases other factors will be indicative of the alleged dilution."). Congress intended "the ultimate conclusions about equality or inequality of opportunity ... to be judgments resting on comprehensive, not limited, canvassing of relevant facts." *DeGrandy*, 512 U.S. at 1011, 114 S.Ct. 2647.

B.

Before the district court, Charleston County's at-large method for electing its County Council was challenged as a violation of § 2 by both the United States and a group of Charleston County voters. The United States and the private plaintiffs claimed that the County's at-large method resulted in the unlawful dilution of minority voting strength. In addition, the private plaintiffs--but not the United States--claimed that the County's at-large system intentionally discriminated against minority voters. Both the United States and the private plaintiffs moved for partial summary judgment as to the three *Gingles* preconditions necessary to establish a § 2 violation.

On April 26, 2002, based on the reports and testimony of both Dr. Arrington, the United States' expert; and Dr. Weber, the County's expert, the magistrate judge recommended that the plaintiffs' motion be granted. On the first *Gingles* precondition--numerosity and compactness--the magistrate judge found that the minority population of Charleston County is sufficiently large and geographically compact to constitute a majority in a single-member district. On the second *Gingles* precondition--minority cohesion--the magistrate judge reviewed evidence presented by both parties indicating that minority voters in Charleston County are politically cohesive. For instance, according to Dr. Weber, minority voters have been politically cohesive in 28 of 33(85%) contested Council elections since 1988.

Finally, on the third *Gingles* precondition--majority bloc voting--the magistrate judge again reviewed evidence from both parties that minority voters' preferred Council candidates are usually defeated by cohesive white voting. Pursuant to our decision in *Lewis v. Alamance County*, 99 F.3d 600, 615-16 n. 12 (4th Cir.1996), the magistrate judge declined to consider Charleston County's argument that minority-preferred candidates were usually defeated on account of partisanship, not race. According to the magistrate judge, *Alamance County* renders causation irrelevant to the third *Gingles* pre-condition: the question for purposes of the third *Gingles* precondition is whether whites vote as a bloc, and not why they do so. Under *Alamance County*, according

to the magistrate judge, causation is instead relevant to the inquiry into the totality of the circumstances, once the *Gingles* preconditions have been satisfied.

On July 10, 2002, the United States District Court for the District of South Carolina adopted the magistrate's report, and granted summary judgment to the United States and the private plaintiffs as to the three *Gingles* preconditions. The district court then held a trial on the remaining issue: whether, based on the totality of the circumstances, the County's at-large electoral method violated § 2. On March 6, 2003, the district court agreed with the United States that the County's at-large system diluted minority voting strength, depriving minority voters of an equal opportunity to participate in the political process and elect representatives of their choice. However, the district court rejected ***347** the private plaintiffs' claim that the County's at-large system was adopted with the intent to discriminate against minority voters.

Charleston County now appeals the district court's decision.[FN2] The County does not challenge the district court's finding that the United States had established the first two *Gingles* preconditions: the County concedes not only that its minority voters are sufficiently numerous and geographically compact to constitute a majority in a single-member district, but also that they are politically cohesive. The County, however, does contend that the district court erred in granting summary judgment to the plaintiffs on the third *Gingles* precondition--the presence of white racial bloc voting. The County also contends that, even if the three *Gingles* preconditions were satisfied, the district court clearly erred in determining that the at-large voting scheme diluted minority voting strength in violation of § 2. We address the County's claims in turn.

> FN2. The private plaintiffs also appeal. However, because we affirm the district court's finding that the County's at-large system violated § 2 by diluting minority voting strength, we do not need to reach the private plaintiffs' claim that the at-large system violated § 2 by intentionally discriminating against minority voters.

III.

The crux of the County's argument, from the outset of this litigation, has been that voting in Charleston County is polarized as a result of partisanship rather than race. According to the County, whites vote as a bloc--but for Republican candidates, whatever their race--and blacks vote as a bloc--but for Democratic candidates, whatever their race. In the County's view, the third *Gingles* precondition requires more than a showing that white bloc voting usually defeats the minority-preferred candidate. In order to demonstrate *Gingles* ' "legally significant" white bloc voting, the County claims, the United States must prove that race rather than partisanship is the cause of the polarized voting. *See* 478 U.S. at 56, 106 S.Ct. 2752. For its part, the United States responds that evidence of partisanship as the cause of the racially divergent voting should be considered in the totality of the circumstances inquiry, after the *Gingles* preconditions have been satisfied.

The parties thus rightly agree that an inquiry into causation is relevant. *See Alamance County*, 99 F.3d at 615-16 n. 12; *see also Gingles*, 478 U.S. at 100, 106 S.Ct. 2752 (O'Connor, J., concurring in judgment) ("Evidence that a candidate preferred by the minority group in a particular election was rejected by white voters for reasons other than those which made that candidate the preferred choice of the minority group would seem clearly relevant in answering the question whether bloc voting by white voters will consistently defeat minority candidates."); *Uno v. City of Holyoke*, 72 F.3d 973, 982 (1st Cir.1995) ("[Section 2] does not require courts to ignore evidence that factors other than race are the real obstacles to the political success of a minority group."); *League of United Latin Am. Citizens (LULAC) v. Clements*, 999 F.2d 831, 850 (5th Cir.1993) (en banc) ("[The] rigorous protections [of the Voting Rights Act], as the text of § 2 suggests, extend only to defeats experienced by voters 'on account of race or color.' "). The parties simply disagree over the stage in the vote dilution inquiry at which causation evidence is appropriate.

[13][14][15] As we explained in *Alamance County*, the approach most faithful to the Supreme Court's case law "is one that treats causation as irrelevant in the inquiry ***348** into the three *Gingles* preconditions, but relevant in the totality of circumstances inquiry." *Alamance County*, 99 F.3d at 615-16 n. 12 (citations omitted); *see also Gingles*, 478 U.S. at 100, 106 S.Ct. 2752 (O'Connor, J., concurring in judgment) (explaining that causation evidence should be part of "the overall vote dilution inquiry"). The inquiry into the *Gingles* preconditions is a preliminary one, designed to determine whether an at-large system potentially violates § 2. *See Growe v. Emison*, 507 U.S. 25, 40-41, 113 S.Ct. 1075, 122 L.Ed.2d 388 (1993). An at-large system cannot be responsible for diluting minority voting strength unless minority

voters cohesively support particular candidates, the minority-preferred candidates are being systematically defeated by white bloc voting, and those defeats would not be occurring under a system of single-member districts. *See id.*

[6][7] But simply clearing the *Gingles* hurdles, while necessary to prove a possible violation of § 2, is not sufficient to establish an actual violation. *DeGrandy*, 512 U.S. at 1011-12, 114 S.Ct. 2647. To demonstrate an actual violation, a plaintiff asserting vote dilution must show "that, under the totality of the circumstances, the State's [challenged electoral scheme] has the effect of diminishing or abridging the voting strength of the protected class." *Voinovich v. Quilter*, 507 U.S. 146, 157, 113 S.Ct. 1149, 122 L.Ed.2d 500 (1993). Accordingly, a court must undertake "a searching practical evaluation of the past and present reality," *Gingles*, 478 U.S. at 45, 106 S.Ct. 2752 (quoting Senate Report at 30) (internal quotation omitted), which demands a "comprehensive, not limited, canvassing of relevant facts." *DeGrandy*, 512 U.S. at 1011, 114 S.Ct. 2647. It is this inclusive examination of the totality of the circumstances that is tailor-made for considering why voting patterns differ along racial lines.

By expanding the inquiry into the third *Gingles* precondition to ask not merely whether, but also why, voters are racially polarized, the County would convert the threshold test into precisely the wide-ranging, fact-intensive examination it is meant to precede. We have rejected this approach, *Alamance County*, 99 F.3d at 615-16 n. 12, as has the majority of our sister circuits, *compare Goosby v. Town Bd.*, 180 F.3d 476, 493 (2d Cir.1999) (treating causation under the totality of circumstances analysis rather than the third *Gingles* precondition); *Milwaukee Branch of the N.A.A.C.P. v. Thompson*, 116 F.3d 1194, 1199 (7th Cir.1997); *Sanchez v. Colorado*, 97 F.3d 1303, 1313 (10th Cir.1996); *Uno*, 72 F.3d at 980-81; *Nipper v. Smith*, 39 F.3d 1494, 1524-25 & n. 60 (11th Cir.1994) (en banc), *with LULAC*, 999 F.2d at 891-92 (finding third *Gingles* precondition unsatisfied because "partisan affiliation, not race, caused the defeat of the minority-preferred candidate").

[8] The County also misfires when it argues that by referring to the third *Gingles* precondition as "legally significant" white bloc voting, what the *Gingles* Court meant was white bloc voting that occurs on account of racial animus or bias. *Gingles*, 478 U.S. at 56, 106 S.Ct. 2752. Rather, what the *Gingles* Court meant was the *degree* of racially polarized voting that matters in the context of § 2. According to the Court, for racially polarized voting to be "legally significant," minority voters must "usually" vote for the same candidates, and white bloc voting must "normally" or "generally" lead to the defeat of minority-preferred candidates. *Id.* "Legally significant" white bloc voting thus refers to the frequency with which, and not the reason why, whites vote cohesively for candidates who are not backed by minority ***349** voters. The County does not even attempt to argue that its racially polarized voting is legally insignificant in this sense. Indeed, the County's own expert testified that minority-preferred candidates are usually defeated by white bloc voting. The district court therefore properly found the third *Gingles* precondition satisfied.

IV.

The County next argues that, even if the *Gingles* preconditions were satisfied, the district court clearly erred in determining that the County's at-large voting scheme violated § 2. According to the County, the district court improperly discounted substantial evidence that party affiliation, not racial animus, drives voting in the County, which has an increasingly strong Republican base. In the County's view, even if the district court was right not to consider this evidence of partisanship in connection with the third *Gingles* precondition, it still should have been swayed by this same evidence when it assessed the totality of the circumstances.

Certainly the reason for polarized voting is a critical factor in the totality analysis and Charleston County has presented evidence of partisanship. For instance, since 1995 Timothy Scott has repeatedly been elected as a minority Republican (Scott recently finished his term as Chairman of the Council), with overwhelming support from white voters and only minimal support from minority voters. Although Scott is the Council's only minority member in the last decade, the County claims that Scott's success shows minorities can win election to the Council, so long as they share the political philosophy that prevails among the majority of Charleston County's residents. In addition, two white Council members, Dr. Charles Wallace and Charlie Lybrand, ran as minority-preferred Democrats and lost, only to switch parties and win as Republicans with little minority support. According to the County, all of this demonstrates that minority-preferred candidates have suffered electoral defeat on account of partisan politics, not race or color.

[9] We need not inquire whether we would have

been persuaded by the County's evidence in the first instance, for our function is not to reweigh the evidence presented to the district court. Claims of vote dilution require trial courts to immerse themselves in the facts of each case, and to engage in "an intensely local appraisal of the design and impact of the contested electoral mechanisms." *Gingles*, 478 U.S. at 79, 106 S.Ct. 2752 (internal quotation omitted); *see also Goosby*, 180 F.3d at 492 ("[R]esolution of the question of vote dilution is a fact intensive enterprise to be undertaken by the district court."). The Supreme Court has been explicit that in order to "preserve[ ] the benefit of the trial court's particular familiarity with the indigenous political reality," we may set aside a trial court's finding of vote dilution only if it is clearly erroneous. *Gingles*, 478 U.S. at 79, 106 S.Ct. 2752; *see also Cane v. Worcester County*, 35 F.3d 921, 925 (4th Cir.1994). While the district court's finding that the County's at-large voting scheme violated § 2 is certainly disputable, it is not clearly mistaken. Rather, the district court's finding rested on substantial, credible evidence, much of it presented by the County's own expert, Dr. Weber.

A.

[10] First, both Congress and the Supreme Court have made clear that among the most important factors in assessing a vote dilution claim are "the extent to which voting in the elections of the state or political subdivision is racially polarized," and "the extent to which minority group members***350** have been elected to public office in the jurisdiction." *Gingles*, 478 U.S. at 48-49 n. 15, 106 S.Ct. 2752 (quoting Senate Report at 28-29). Neither of these factors was in any serious dispute before the district court. The United States presented uncontroverted evidence of racial polarization and minimal minority electoral success.

According to Dr. Weber, there was racially polarized voting in 25 of the 33 (75.8%) contested general elections for the County Council between 1988 and 2000. In the 10 general elections that involved at least one minority candidate, Dr. Weber found that white and minority voters were polarized 100% of the time. *See Alamance County*, 99 F.3d at 610 n. 8 (suggesting that elections involving minority candidates may be more probative "on the question of whether racial polarization exists"); *accord Ruiz v. City of Santa Maria*, 160 F.3d 543, 552-53 (9th Cir.1998); *Uno*, 72 F.3d at 988 n. 8, *N.A.A.C.P. v. City of Niagara Falls*, 65 F.3d 1002, 1016-18 (2d Cir.1995); *Nipper*, 39 F.3d at 1540; *Jenkins v. Red Clay Consol. Sch. Dist. Bd. of Educ.*, 4 F.3d 1103, 1128 (3d Cir.1993); *LULAC*, 999 F.3d at 864.

Notably, the United States' expert, Dr. Arrington, found an even higher overall rate of racially polarized voting in contested Council elections between 1984 and 2000 (94% to Weber's 75.8%). But whatever the actual level of polarization, evidence presented by both parties supported the district court's conclusion "that voting in Charleston County Council elections is severely and characteristically polarized along racial lines." Indeed, Charleston County voters are racially divided not only over the desirability of particular candidates, but over the desirability of the at-large system itself. In 1989 the County held a referendum on switching from the at-large system for County Council elections to a system of single-member districts: at least 98% of minority voters endorsed the change, while at least 75% of white voters wanted to retain at-large elections.

As for minority electoral success, of the 41 people elected to the nine-member Council since 1970, only 3 have been minorities: Lonnie Hamilton III, Marjorie Amos-Frazier, and Timothy Scott. Of those only Scott has served on the Council in the last decade. As the district court recognized, the electoral successes of Hamilton and Amos-Frazier in the 1970s and 1980s were of marginal relevance to whether minorities currently enjoy equal access to the electoral process. In fact, Dr. Weber declined to consider pre-1988 elections, recognizing that recent elections are the most probative in determining vote dilution. *See, e.g., Ruiz*, 160 F.3d at 555; *Uno*, 72 F.3d at 990; *Meek v. Metropolitan Dade County*, 985 F.2d 1471, 1482-83 (11th Cir.1993). And the rarity with which minorities are elected is not unique to the County Council: disproportionately few minorities have ever won any of the at-large elections in Charleston County.

However, the County repeatedly asserts that the district court mistakenly considered only *minority* candidates' success, rather than *minority-preferred* candidates' success, as part of the totality of the circumstances. The County is certainly right that"[t]he extent to which members of a protected class have been elected to office" is but "one circumstance which may be considered" in assessing whether minority voters have been denied an equal opportunity "to participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973(b); *see also id.* ("[N]othing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.").

***351** Yet the district court did not treat the lack of minority electoral success as conclusive proof of vote dilution. Rather, pursuant to the clear command of Congress and the Supreme Court, the district court treated minimal minority electoral success as but one factor in the totality of the circumstances inquiry. *See Gingles*, 478 U.S. at 48-49 n. 15, 106 S.Ct. 2752. The district court recognized that the number of minorities elected to office, while relevant to vote dilution, was not dispositive, and it went on to analyze a host of other factors that weighed in its decision. The court was aware that the ultimate question remained whether minority voters were able to elect their preferred candidates, whatever the candidates' race. *See Alamance County*, 99 F.3d at 606-07.

Neither did the district court overlook the success of minority-preferred candidates in assessing the totality of the circumstances. According to the County, the district court ignored dozens of Council elections during the past thirty-plus years in which minority-preferred candidates prevailed. As an initial matter, the County overstates its case: two-thirds of the elections to which the County points occurred prior to 1988, and yet Dr. Weber did not consider pre-1988 Council elections. In other words, the County faults the district court for not examining election results that the County's own expert viewed as marginally relevant.

As for the post-1988 elections, the County is correct to note that minority-preferred candidates met with some limited success, which is surely relevant to the inquiry into the totality of the circumstances. But Dr. Weber himself testified that minority-preferred candidates, whatever their race, generally were defeated by white bloc voting. Dr. Weber's testimony, along with other evidence that we discuss below, permitted the district court to fairly conclude that the at-large system was diluting minority vote strength, even if minority-preferred candidates still occasionally managed to prevail. And it is not as if the district court ignored altogether the post-1988 elections. Rather, the district court discussed at length Dr. Weber's and Dr. Arrington's reports, which analyzed the very post-1988 elections that the district court is supposed to have neglected. The County cannot credibly claim that the district court's focus was too narrow, or its analysis too slipshod.

B.

Second, the district court found that County Council's electoral structure, along with the County's sheer size, diminished minority voters' ability to elect their preferred representatives. As we explained earlier, candidates for the County Council must qualify from one of four residency districts, and they are then elected in partisan contests to staggered four-year terms. Both the parties' experts agree that the County's use of staggered terms, residency districts, and a primary nominating system makes it more difficult for minority-preferred candidates to prevail. The residency districts and staggered terms confine County Council elections to either single-seat or two-seat contests, and the primary nominating system produces only two viable candidates for each seat. As even the County's expert testified, this creates a de facto majority vote requirement, and limits the opportunity for minority voters to engage in single-shot voting. [FN3]

> FN3. Single-shot voting is a strategy that "enables a minority group to win some at-large seats if it concentrates its vote behind a limited number of candidates and if the vote of the majority is divided among a number of candidates." *Gingles*, 478 U.S. at 38-39 n. 5, 106 S.Ct. 2752 (internal quotation omitted). Single-shot voting is not possible in a one-seat election, and it is normally of limited usefulness (if it is not even counter-productive) in a two-seat election.

***352** Further, Charleston County is the largest county in South Carolina, with a nearly 100-mile stretch of coastline along the Atlantic. Several witnesses testified that the County's size works to the detriment of minority candidates, who typically have fewer financial resources, in particular because costly television advertising and direct mail have proven important in recent Council elections. *See Grassby*, 180 F.3d at 424 ("Campaign financing is especially difficult in such a large district for black candidates, who have been able to campaign more effectively in smaller districts.").

C.

Third, although the County argued that partisanship rather than race drives the County's racially polarized voting patterns, there was no systematic proof to support its claim. Dr. Weber, the County's expert, acknowledged that he could not assess the extent to which racial bias has caused polarized voting in Charleston County, and he agreed with other expert witnesses that partisanship and race as determinants of voting are "inextricably intertwined." Even assuming that the effects of partisanship and race on voting could have been isolated and measured, no

such evidence was before the district court. As both parties' experts testified, and as the district court explained, party registration information and survey research are the primary data relied on by political scientists in determining the effect of political partisanship on electoral outcomes. Neither datum is available for Charleston County Council elections, because the County does not require that voters register by party for general elections and neither the County nor the United States has conducted any survey research.

The County did present anecdotal evidence of partisanship, such as that some candidates (Wallace and Lybrand) had switched parties and won election to the Council, or that a minority Republican (Scott) has been elected to Council several times. The County also presented evidence of Charleston County School Board elections, which are non-partisan and which the County claims are less severely polarized along racial lines. However, the district court thoroughly examined all of the County's evidence, and deemed it insufficiently comprehensive or persuasive. For instance, the district court found the evidence pertaining to the School Board elections of questionable value, in part because the parties' experts disagreed over whether the School Board elections were even less racially polarized. But even to the extent that minority-preferred candidates fared better in School Board than in Council elections, the district court recognized that this was due at least in part to special circumstances like minority candidates' running unopposed, single-shot voting, or a split in the white vote among several white candidates. Likewise, the district court struggled in weighing the County's evidence of party-switching, because the court could not determine whether minority voters abandoned their support of Wallace and Lybrand solely for partisan reasons. In the end, the district court was faced with inconclusive evidence of partisanship as the determinant of voting, but "decisive[ ]" evidence of "severe voting polarization, minimal minority electoral success, and an uncommonly large voting district."

***353** The County's evidence of partisanship in this case was also far from persuasive on its own terms. Dr. Weber conceded that minority preferred minority candidates are defeated more often than minority-preferred white candidates. To be more precise, looking at County Council elections since the early 1990s, white Democrats have at least occasionally won, while minority Democrats have invariably lost. Although minority voters give more cohesive support to minority Democratic candidates than to white Democratic candidates, the opposite is true among white voters. This is consistent with the parties' evidence that white and minority voters are more often racially polarized in Council general elections involving at least one minority candidate. Thus even controlling for partisanship in Council elections, race still appears to play a role in the voting patterns of white and minority voters in Charleston County. Or at least it was not clearly erroneous for the district court to so conclude.

V.

The result here is required by the framework Congress established for vote-dilution claims in § 2; the proof scheme the Supreme Court set forth for such actions in *Gingles*; and, most significantly, by the findings of fact the district court made in this case, findings that were not clearly erroneous.

We need not decide whether any of the factors on which the district court relied--the County's severe voting polarization and minimal minority electoral success, its hybrid electoral structure, or its sheer size--would have been enough in isolation to prove a violation of § 2. *See Gingles*, 478 U.S. at 45, 106 S.Ct. 2752 ("[T]here is no requirement that any particular number of factors be proved, or that a majority of them point one way or the other.") (quoting Senate Report at 29). Taken in combination, these factors were sufficient to prove a § 2 violation. [FN4] Indeed, the County's own expert appeared to support, rather than undermine, the district court's conclusions. Based on evidence submitted by all parties, the district court conducted a "searching practical evaluation" of local electoral conditions in the County, and its conclusion that Charleston County's at-large system violated § 2 of the Voting Rights Act is not clearly erroneous. *Id.* (quoting Senate Report at 30). The judgment of the district court is therefore

> FN4. We focus on these factors because the district court thought them most important, and because they most clearly support the district court's conclusion that the County's at-large system violates § 2. The district court also found that other factors, like past discrimination that has hindered the present ability of minorities to vote or to participate equally in the political process, weighed in favor of its decision.

AFFIRMED.

365 F.3d 341

Briefs and Other Related Documents (Back to top)

• 03-2111 (Docket) (Sep. 16, 2003)

• 03-2112 (Docket) (Sep. 16, 2003)

END OF DOCUMENT

APPENDIX TO THE PREPARED STATEMENT OF ARMAND DERFNER: *United States v. Charleston County* (125 S.Ct. 606)

Briefs and Other Related Documents

Supreme Court of the United States
CHARLESTON COUNTY, SOUTH CAROLINA, et al., petitioners.
v.
UNITED STATES, et al.
No. 04-150.

Nov. 29, 2004.

Case below, 365 F.3d 341.

Petition for writ of certiorari to the United States Court of Appeals for the Fourth Circuit denied.

543 U.S. 999, 125 S.Ct. 606 (Mem), 160 L.Ed.2d 457, 73 USLW 3097, 73 USLW 3317, 73 USLW 3321

Briefs and Other Related Documents (Back to top)

• 2004 WL 2569681 (Appellate Petition, Motion and Filing) Reply Brief for the Petitioners (Nov. 08, 2004)

• 2004 WL 2491819 (Appellate Petition, Motion and Filing) Brief for the United States in Opposition (Oct. 29, 2004)

• 2004 WL 2190503 (Appellate Petition, Motion and Filing) Brief of Private Respondents in Opposition to Petition for Writ of Certiorari (Sep. 24, 2004)

• 04-150 (Docket) (Jul. 30, 2004)

• 2004 WL 1720223 (Appellate Petition, Motion and Filing) Petition for Writ of Certiorari (Jul. 28, 2004)

END OF DOCUMENT

COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON THE CONSTITUTION
Oversight Hearing on "The Voting Rights Act: An Examination of the Scope and Criteria for Coverage Under the Special Provisions of the Act"

OCTOBER 20, 2005

STATEMENT OF J. GERALD HEBERT
ATTORNEY-AT-LAW
J. GERALD HEBERT PC
5019 Waple Lane
Alexandria VA 22304
(703) 567-5873
www.voterlaw.com

Good morning Chairman Chabot, Rep. Nadler, and distinguished committee members. Thank you for the opportunity to testify before you today. I will focus my comments on the bailout provisions of the Voting Rights Act (VRA), but would like to state at the beginning that the Act should be extended and the bailout provisions be retained largely in their present form.

The marches, protests, and struggles of the civil rights community and the Nation culminated in 1965 with the passage of the VRA – the crown jewel of the civil rights movement. Individual adjudication of voting disputes had been ineffective in securing minority citizens an equal opportunity to cast their ballots. In 1965, Congress took a fresh and unique approach, establishing a formula subjecting certain jurisdictions to administrative or judicial preclearance of changes affecting voting, and setting up a means for those jurisdictions to bailout from coverage at a later date.

Under the original Act, a jurisdiction was "covered", and required to preclear all changes affecting voting, if it (1) maintained a racially discriminatory test or device as a prerequisite to voting or casting a ballot; and (2) if either less than 50 percent of its voting age residents were not registered to vote or less than 50 percent of its voting age residents actually voted and the time of the 1964 Presidential election. The coverage formula was modified in 1970 and 1975.

Between 1965 and 1982, these covered jurisdictions could bailout from coverage by demonstrating in an action for declaratory judgment before a three-judge panel of the United States District Court of the District of Columbia that no test or device had been used over a certain time period in a manner that was racially discriminatory in either purpose or effect. Political subdivisions, such as counties, were prohibited from bailing out separately if they were located within a state that was covered in its entirety.[1]

In 1982, Congress enacted two major revisions to the bailout provisions. First, political subdivisions could bailout separately from their covered jurisdictions. Second, the bailout criteria were changed to "recogniz[e] and reward[] their good conduct, rather than require[] them to await an expiration date which is fixed regardless of the actual record."[2]

Thus, since the 1982 amendments to the bailout provisions became effective (in 1984), the bailout requirements have been as follows. A covered jurisdiction must first demonstrate that in the past 10 years:

(1) no test or device has been used to determine voter eligibility with the purpose or effect of discrimination;

(2) no final judgments, consent decrees, or settlements have been entered against the jurisdiction for racially discriminatory voting practices;

---

[1] *City of Rome v. United States*, 446 U.S. 156, 167 (1980).
[2] 1982 S. Rep. No. 417, 97th Cong., 2d Sess. 46, *as reprinted in* 1982 U.S.C.C.A.N. at 222.

(3) no federal examiners have been assigned to monitor elections;
(4) there has been timely submission of all voting changes and full compliance with §5; and
(5) there have been no objections by the Department of Justice or the District Court for the District of Columbia to any voting changes.[3]

Second, the jurisdiction bears the burden of proving at the time bailout it sought that:

(1) any dilutive voting or election procedures have been eliminated;
(2) constructive efforts have been made to eliminate any known harassment or intimidation of voters;
(3) it has engaged in other constructive efforts at increasing minority voter participation such as, expanding opportunities for convenient registration and voting, and appointing minority election officials throughout all stages of the registration/election process.[4]

The current bailout formula was an important step towards achieving the goals of the Voting Rights Act. It gave covered jurisdictions an incentive to move beyond the *status quo*, and to improve accessibility to the entire electoral process for minorities. As the 1982 Senate Judiciary Committee report stated, "the goal of the bailout ... is to give covered jurisdictions an incentive to eliminate practices denying or abridging opportunities for minorities to participate in the political process."[5]

I believe that there is evidence that the bailout provisions have done precisely that. The bailout provisions actually "provide[d] additional incentives to the covered jurisdictions to comply with laws protecting the voting rights of minorities, and ... improve[d] existing election practices."[6]

The Supreme Court has indicated that a strong Congressional record demonstrating the existence of discrimination is required when legislating in this area.[7] In 1970, 1975 and 1982, Congress gathered extensive information and data, collecting evidence on voter discrimination. In 1970, the Act was extended because while there was a significant increase in black voter registration, there was continued racial discrimination in the electoral process (*e.g.*, switching from single-member districts to at-large elections, redrawing boundaries, minority candidates prevented from running, illiterate voters being denied assistance, racial discrimination in selection of poll officials, harassment, intimidation) and the fact that voter registration rates for black voters lagged behind the rate for white voters.[8] Similarly, at the time of the 1975 extension, the minority registration rates had improved, but still lagged behind whites and restrictions on

[3] 42 U.S.C. §1973b(1)(A-E) (2005).
[4] 42 U.S.C. §1973b(1)(F) (2005).
[5] 1982 S. Rep. No. 417, 97th Cong., 2d Sess. 46, 60, *as reprinted in* 1982 U.S.C.C.A.N. at 238.
[6] *Id.*, at 222.
[7] *City of Boerne*, 521 U.S. 507, 525 (1997).
[8] Paul F. Hancock and Lora L. Tredway, *The Bailout Standard of the Voting Rights Act: An Incentive to End Discrimination*, 17 Urb. Law. 379, 393-394 (1985).

registration, casting a ballot, running for office, intimidation and vote dilution still existed.[9] In 1982, the Commission on Civil Rights report documented continued resistance by individuals and local jurisdictions to increased minority participation in elections and to complying with the Voting Rights Act.

I have served as legal counsel to all of the jurisdictions that have bailed out since the 1982 amendments to the VRA. All of them are in Virginia and are listed in Appendix A.

Local jurisdictions with which I have worked have expressed to me several advantages that they derive from the current bailout formula. For instance, by requiring them to prove a ten-year record of good behavior and to demonstrate improvements to the elections process for minorities, these covered jurisdictions are afforded a public opportunity to prove it has fair, non-discriminatory practices. Second, while bailouts come with some costs (on average about $5,000 for legal expenses), it is still less costly than making § 5 preclearance submissions indefinitely. Finally, once bailout is achieved local jurisdictions are afforded much more flexibility and efficiency in making routine changes, such as moving a polling place.

For all of its advantages, however, only a few jurisdictions have bailed out. Some argue § 5 should be retained *because* jurisdictions have not been achieving bailout on a mass scale, and that this is evidence there are still many problems with the election processes in these jurisdictions.[10] This assumes that jurisdictions are applying and being denied. Yet not a single jurisdiction that has sought bailout since 1982 has been denied a bailout. The real problem is that jurisdictions are just not applying. (See Appendix A). Why is this?

One reason might be that smaller localities just do not know the bailout option is available to them, or it seems too complicated or time consuming. For the vast majority of jurisdictions, the process is relatively straightforward and easy. Perhaps many local governments have become accustomed to § 5's requirements, or are not willing to invest the time to get with the leaders of the minority community in their area to discuss why the local government is interested in bailout out. Whatever the reason, I would recommend that when the legislation is reauthorized, Congress suggest the Department of Justice provide more information to localities about how to achieve bailout and encourage them to do so.

Another reason posited for the lack of bailouts is that the criteria are thought to be too difficult to meet. That is not the case. Most of the factors to be demonstrated are easily proven for jurisdictions that do not discriminate in their voting practices.

---

[9] *Id.* 397, fn. 93-98.

[10] Cf. Vernon Francis et al., *Preserving a Fundamental Right: Reauthorization of the Voting Rights Act*, Lawyers' Committee for Civil Rights Under Law, at 11, June 2003.

One factor, proving §5 compliance, is often cited as the most difficult to meet because opponents to bailout are likely to be able to find some small change that was not precleared. But this is not an obstacle either.

There are several reasons why demonstrating § 5 compliance should be retained as part of the bailout formula. First, DOJ will allow a jurisdiction that inadvertently failed to submit a few changes to submit those changes for preclearance at the time bailout is sought, and thus the preclearance is nunc pro tunc. Second, the legislative history shows that Congress thought that for changes which "are really *de minimis*" the "courts and Department of Justice have used and will continue to use common sense."[11] While this process of going back and making these § 5 submissions can be time-consuming, it ensures full compliance with the Act and is faithful to the language and spirit of the law.

Most jurisdictions who have sought bailout since 1982 have had to make few such submissions of previously implemented but unprecleared changes (See Appendix A). However, some county officials know that political subdivisions, such as towns and cities, within the county, have not made any submissions. This affects the county's ability to obtain an expedited bailout. In King's County, California, for example, a county that has advised DOJ that it desires a bailout, 40-50 submissions have been required on behalf of localities. The County has had to bear this expense, especially since some of which do not even exist anymore. Furthermore, King's County does not have authority to compel certain localities to make §5 submissions.

Several amendments to the bailout provisions were proposed in 1982 which would have made it easier for states to bailout even before each of the political subdivisions within the state had bailed out, and each was rejected.[12] That would have made little sense then and makes no sense now either.

A better solution may be to allow towns, cities and other local governmental units within a covered county to bailout independently. Then, once each has bailed out, the county can pursue bailout without having to bear the time or expense of making submissions on behalf of each town or city or other governmental unit within its borders. If this were to become law, the town-county relationship under a new bailout law would mirror the existing county-state relationship under the current bailout law. Just like states right now must continue to make submissions even though some of its counties have bailed out (Virginia being the only example), so too would counties be obliged to comply with § 5 until such time as the county seeks a bailout.

---

[11] 1982 S. Rep. No. 417, 97th Cong., 2d Sess. 46, 48, *as reprinted in* 1982 U.S.C.C.A.N. at 226.
[12] H.Amdt. 266 to H.R. 3112, 97th Cong., 1st Sess., *offered* Oct. 5, 1981 would have allowed a state to bailout if two-thirds of its political subdivisions bailed out, and H.Amdt. 272 to H.R. 3112, *offered* Oct. 5, 1981 and S.UP.Amdt. 1029 to S. 1992, *offered* Jun. 18, 1982, both would have allowed a state to bailout if the state met all the criteria, even if its political subdivisions did not. Each was rejected, because the 15th amendment places the burden of protecting the electoral franchise on the States.

To consider the merits of this possible amendment to the bailout law, Congress could examine § 5 in covered states to see if allowing a bailout to jurisdictions within the state has proven to be problematic from an enforcement or compliance perspective. If counties can bailout now in a state like Virginia that is completely covered (and, as noted above they can and have done so), has exempting parts of a state from preclearance obligations or other special remedial provisions caused any problems from an enforcement perspective? I am not aware of any. In any event, such research would shed light on whether Congress might want to allow a local government to bailout within a covered county.

The remedial provisions of the VRA, including the bailout provision, must be proportional to the injury and the Supreme Court, in the past, has found parts of the VRA to be constitutional for precisely this reason. After passage of the Voting Rights Act in 1965, the Supreme Court held in *South Carolina v. Katzenbach*, 383 U.S. 301, 326 (1966), that Congress had the remedial authority under the 15th Amendment to enact the special remedial provisions of the Voting Rights Act, including §§4 and 5. Again, in 1980, the Supreme Court stated in *City of Rome v. United States*, 446 U.S. 156, 177, that § 5 preclearance "is an appropriate method of promoting the purposes of the Fifteenth Amendment, even if it is assumed that § 1 of the Amendment prohibits only intentional discrimination in voting." And most recently in *Lopez v. Monterey County*, 525 U.S. 266, 282-283 (1999), "[l]egislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into legislative spheres of autonomy previously reserved for the states."

The §5 preclearance provisions have clearly worked, as evidenced by the steady submissions of voting changes to the United States Attorney General (around 20,000 a year), and the sharp reductions in the number of objections (See Appendix B). I believe this reduction in the number of objections is attributable in part to the fact that many jurisdictions now are keenly aware of what they cannot do. They know they cannot retrogress minority voting rights.

In sum, the standards for bailout that currently exist are workable and practical, although I believe Congress might wish to examine the practicality of allowing local governmental subunits within a covered county to bailout. Jurisdictions subjected to the Act's special remedial provisions, such as the preclearance provisions, have an effective opportunity to bailout today. Moreover, the bailout provisions are tailored in such a way as to require a covered jurisdiction to prove nondiscrimination in voting on the very issues that Congress intended to target when it enacted the special remedial provisions in the first place. Thanks to the Voting Rights Act, we are headed toward a day when there will be no discrimination that affects the ability of any person to register to vote or to cast a ballot, and our democracy will be better for it.

Thank you.

Bailouts Filed Since 1982 Amendments to VRA

Name of Jurisdiction	Bailout Filed Date	Bailout Granted Date	% Black	% Hispanic	# of Unprecleared Changes (if any)	# of Years Post-Bailout Reporting Required
Fairfax City, Virginia	September 25, 1997	October 21, 1997	4.5%	5.2%	0	0
Frederick County, Virginia	April 19, 1999	September 9, 1999	1.7%	0.5%	0	0
Shenandoah County, Virginia	April 21, 1999	October 15, 1999	1.1%	0.7%	31	5
Roanoke County, Virginia	August 11, 2000	January 24, 2001	2.5%	0.5%	6+	4
Winchester City, Virginia	December 22, 2000	May 31, 2001	9.1%	5.9%	0	4
Harrisonburg City, Virginia	February 14, 2002	April 17, 2002	5.5%	7.2%	0	3 (If requested by the DOJ)
Rockingham County, Virginia	March 28, 2002	May 21, 2002	1.3%	2.7%	1	1
Warren County, Virginia	August 30, 2002	November 25, 2002	4.7%	1.5%	7	3
Greene County, Virginia	September 6, 2003	January 19, 2004	6.1%	1.1%	1	2

Bailouts Currently Pending

Name of Jurisdiction	Bailout Filed Date	Bailout Granted Date	% Black	% Hispanic	# of Unprecleared Changes (if any)	# of Years Post-Bailout Reporting Required
Augusta County, Virginia	September 23, 2005	(Pending)	3.9%	0.8%	3	0
Kings, County, California	(Pending)	N/A	6.3%	43.6%	40-50 (est.)	N/A

Bailouts Filed Since 1982 Amendments to VRA

Name of Jurisdiction	Bailout Filed Date	Bailout Granted Date	% Black	% Hispanic	# of Unprecleared Changes (if any)	# of Years Post-Bailout Reporting Required
Fairfax City, Virginia	September 25, 1997	October 21, 1997	4.5%	5.2%	0	0
Frederick County, Virginia	April 19, 1999	September 9, 1999	1.7%	0.5%	0	0
Greene County, Virginia	September 8, 2003	January 19, 2004	6.1%	1.1%	1	2
Harrisonburg City, Virginia	February 14, 2002	April 17, 2002	5.5%	7.2%	0	3 (If requested by the DOJ)
Roanoke County, Virginia	August 11, 2000	January 24, 2001	2.5%	0.5%	6+	4
Rockingham County, Virginia	March 28, 2002	May 21, 2002	1.3%	2.7%	1	1
Shenandoah County, Virginia	April 21, 1999	October 15, 1999	1.1%	0.7%	31	5
Warren County, Virginia	August 30, 2002	November 25, 2002	4.7%	1.5%	7	3
Winchester City, Virginia	December 22, 2000	May 31, 2001	9.1%	5.9%	0	4

Bailouts Currently Pending

Name of Jurisdiction	Bailout Filed Date	Bailout Granted Date	% Black	% Hispanic	# of Unprecleared Changes (if any)	# of Years Post-Bailout Reporting Required
Augusta County, Virginia	September 23, 2005	(Pending)	3.9%	0.8%	3	0
Kings, County, California	(Pending)	N/A	8.3%	43.6%	40-50 (est.)	N/A

Mississippi

Justice Department Objections -- 1965 -- 1994

State (65-3683)	7/1/1966
Yazoo County (64-3034)	7/7/1986
Sunflower County (66-3763)	12/15/1986
Pike County School District (63-2512)	2/9/1987
Grenada County (67-3101)	8/2/1987
Washington County (67-3308)	8/19/1987
Quitman County (67-3229)	9/28/1987
Belzoni (Humphreys Cty.) (66-3627)	10/1/1987
Monroe County (87-3209)	1/12/1988
Grenada Municipal Separate School District (Grenada Cty.) (87-3098-3099)	5/9/1988
Greenville (Washington Cty.) (88-4074)	2/10/1989 withdrawn 2/14/90
State (87-3282)	3/31/1989
Houston Municipal Separate School District (Chickasaw Cty.) (87-3067)	4/14/1989
Chickasaw County (89-2546)	2/27/1990
State (88-4035)	5/25/1990
Cleveland Constitutional School District (Bolivar Cty.) (90-3474)	10/2/1990
Simpson County (90-3602 & 90-3604)	10/9/1990
Monroe County (90-3575)	4/26/1991
Tate County (91-1137)	7/2/1991
State (91-1402)	7/2/1991
Bolivar County (91-1457)	7/15/1991
Hinds County (91-1503)	7/19/1991
Union County (91-0890)	8/2/1991
Lee County (91-1096)	8/23/1991
Bolivar County (91-2939)	8/23/1991
Amite County (91-1504)	8/23/1991
Tunica County (91-1438)	9/3/1991 withdrawn 12/16/91
Benton County (91-1097)	9/9/1991
Harrison County (91-1401)	9/9/1991
Jefferson Davis County (91-1559)	9/13/1991
Montgomery County (91-1139)	9/16/1991
Clarke County (91-1382)	9/24/1991
Oktibbeha County (91-1451)	9/30/1991
Walthall County (91-1421)	9/30/1991
Marshall County (91-1375)	9/30/1991
Lauderdale County (91-2942)	10/7/1991
Forrest County (91-1506)	10/7/1991
Tate County (91-2567)	10/11/1991
Leflore County (91-1453)	10/21/1991
Sunflower County (66-3763)	10/25/1991
Perry County (91-1598)	11/19/1991
Pearl River County (91-1579)	11/25/1991
Attala County (91-2499)	1/13/1992
State (92-0993)	3/30/1992
Tallahatchie County (91-3011)	4/27/1992
State (91-3975)	5/1/1992
Sunflower County (92-1415)	5/21/1992
Marshall County (92-3602)	10/13/1992
Amite County (92-2543)	11/30/1992
Greenville (Washington Cty.) (92-4012)	2/22/1993
Lee County (93-0128)	3/22/1993
Chickasaw County (92-4440)	3/26/1993
Stoner (Amite Cty.) (92-4396)	3/30/1993
Charleston (Tallahatchie Cty.) (93-1053)	5/4/1993
Monroe County (93-0356)	9/17/1993
Okolona (Chickasaw Cty.) (93-1556)	10/29/1993
State (90-4933)	11/24/1993
Canton (Madison Cty.) (93-0115)	12/21/1993
	58

Justice Department Objections -- 1995 -- 2004

Adams County (94-4483)	1/30/1995
State (94-4538)	2/6/1995
Monroe County (95-0118)	3/20/1995
Chickasaw County (94-4316)	4/11/1995
Union County (95-1234)	6/20/1995
Aberdeen (Monroe Cty.) (95-1120)	1/24/1995
Grenada (Grenada Cty.) (95-3225)	3/3/1997
State (95-0416)	9/22/1997
Grenada (Grenada Cty.) (98-2219)	8/17/1998
McComb (Pike Cty.) (97-3795)	6/28/1999 withdrawn 9/20/1999
Kilmichael (Montgomery Cty.) (2001-2130)	12/11/2001
	11

Virginia

Justice Department Objections -- 1985 -- 1994		Justice Department Objections -- 1995 -- 2004	
Franklin (86-4549) (Independent city)	3/11/1988 withdrawn 5/18/87	Dinwiddie County (98-2229)	10/27/1999
Fredericksburg (87-4154)	4/7/1988	Northampton County (2001-1495)	9/28/2001
Newport News (88-5098)	7/24/1988	Pittsylvania County (2001-2026)	
State (91-1483)	7/16/1991	(2001-2501)	4/29/2001
Powhatan County (91-2115)	11/12/1991	Cumberland County (2001-2374)	7/9/2002
Newport News School District (92-3987)	2/16/1993	Northampton County (2002-5690)	5/19/2003
Chesapeake School District (93-4991)	6/20/1994 withdrawn 9/26/95	Northhampton County (2002-3010)	10/21/2003

South Carolina

Justice Department Objections -- 1965 -- 1994

Hampton County School District Nos. 1 and 2 (65-3312, 65-3826)	5/28/1965	
Spartanburg (Spartanburg City.) (64-3504)	7/16/1965	Withdrawn 10/6/67
Orangeburg County (62-2622)	9/3/1965	
Sumter (Sumter City.) (63-2952, 64-3510, 64-3511, 64-3512)	10/21/1965	
Batesburg (Lexington and Saluda Clys.) (65-3334)	2/24/1966	objection to annexations
Sumter (Sumter City.) (66-4436, 66-4440, 66-4441)	4/10/1966	withdrawn 10-17-66
Summerville (Dorchester City.)	10/10/1966	withdrawn 10/17/66 upon change in method of election
Consolidated School District of Aiken County (Aiken and Saluda Clys.) (66-4090)	10/14/1966	
Dorchester County School District No. 4 (Dorchester City.) (66-4224)	12/1/1966	withdrawn 2/12/67
Bamberg County (R1027, R1374)	12/29/1966	
Edgefield County School District (Edgefield City.) (66-4224)	5/22/1967	
Rock Hill (York City.) (67-3969)	5/28/1968	
School District No. 4 (Dorchester City.) (67-3995)	7/18/1968	
Richland County (68-4728)	9/23/1968	
Lancaster (Lancaster City.) (68-4655)	8/13/1969	
Seaston County (69-3281)	7/18/1969	
Bennettsville (Marlboro City.) (90-4137)	2/2/1990	
Kershaw County (90-4108)	2/5/1990	
Anderson County School District (89-3026)	4/23/1990	
North Charleston (Charleston, Berkely, and Dorchester Clys.) (90-4005)	5/3/1990	
Chester (Chester City.)	5/7/1990	
York (York City.) (90-4221)	8/10/1990	
State (90-3988)	10/15/1990	
Rock Hill (York City.) (91-2478)	1/17/1992	
Johnston (Edgefield City.) (92-1191)	6/5/1992	
Orangeburg County (92-0473)	7/21/1992	
Dorchester County (92-0373)	8/28/1992	
Norway (Orangeburg City.) (92-0156)	11/9/1992	
Marion County School District (Marion City.) (92-2803)	1/5/1993	
Marion County (92-2802)	1/5/1993	
Lee County School District (Lee City.) (92-4139)	2/5/1993	
Lee County (92-2259)	2/8/1993	
Batesburg-Leesville (Lexington and Saluda Clys.) (92-4610)	6/1/1993	
Johnston (Edgefield City.) (93-1658)	7/6/1993	
State (94-1394)	5/2/1994	
Lee County (94-1109) and Lee County School District (94-1722) (Lee City.)	6/6/1994	
Hemingway (Williamsburg City.) (93-4248)	7/22/1994	
Florence and Williamsburg Counties (93-3926, 93-4059)	7/22/1994	
Barnwell (Barnwell City.) (94-0431)	8/15/1994	withdrawn 2/13/95
Georgetown County School District (Georgetown City.) (94-2274)	10/3/1994	
North Charleston (Berkely, Charleston, and Dorchester Clys.)	10/17/1994	withdrawn 8/20/96
Spartanburg County School District (Spartanburg City.) (94-2743)	12/13/1994	
	42	

Justice Department Objections -- 1995 -- 2004

Bennettsville (Marlboro City.) (94-2215)	2/6/1995
Spartanburg County School District (Spartanburg City.) (94-2743)	11/20/1995
Gaffney Board of Public Works (Cherokee City.) (95-2790)	3/5/1996
State (97-0529)	4/1/1997
Horry County (97-3787)	9/29/1998
Charleston (Berkely and Charleston Clys.) (2001-1578)	10/12/2001
Greer (Greenville and Spartanburg Clys.) (2001-1777)	11/2/2001
Sumter County (2001-3665)	6/27/2002
Union County School District (Union City.) (2002-2379)	8/3/2002
Clinton (Laurens City.) (2002-1512) (2002-2706)	12/9/2002
Cherokee County School District No. 1 (Cherokee City.) (2002-3457)	6/16/2003
North (Orangeburg City.) (2002-5306)	9/9/2003
Charleston County School District (2003-2966)	2/25/2004
Richland-Lexington School District No. 5 (2002-3766)	6/25/2004
	14

Alabama

Justice Department Objections -- 1965 -- 1994

Houston County (80-1180, 84-1513)	10/15/1985	
Greensboro (Hale Cty.) (85-1532)	10/21/1985	
Marengo County (86-2012; 86-2013)	2/10/1986	
Dallas County (86-1882)	6/2/1986	
Bay Minette (Baldwin Cty.) (85-1442; 85-1443, 85-1445)	10/8/1986	withdrawn 6/22/87
Alexander City (Tallapoosa Cty.) (86-2037)	12/1/1986	withdrawn 12/7/87
Prichard (Mobile Cty.) (86-2037)	2/3/1987	
Leeds (Jefferson, St. Clair, and Shelby Cys.) (85-1578, 85-1579, 86-1966, 87-1615)	5/4/1987	
Marion (Perry Cty.) (87-1705)	5/5/1987	
Dallas County School District (87-1555)	6/1/1987	
Roanoke (Randolph Cty.) (87-1722)	3/15/1988	
Tallassee (Elmore and Tallapoosa Clys.) (88-1881)	12/19/1988	
State (89-1499) and Dothan (Dale, Henry, & Houston Clys.) (89-1285, 89-4040)	6/12/1989	
Foley (Baldwin Cty.) (89-1811)	11/6/1989	withdrawn 7/1/96
State Democratic Party (89-1284)	12/1/1989	
Dallas County (90-1695)	8/22/1990	
Valley (Chambers Cty.) (89-1242)	10/12/1990	withdrawn 7/27/92
Democratic Party (Perry Cty.) (90-1837)	12/3/1990	
Valley (Chambers Cty.) (90-1563)	12/31/1990	withdrawn 12/9/91
Democratic Party (Lamar Cty.) (90-1769)	1/25/1991	
Democratic Party (Limestone Cty.) (90-1789)	1/28/1991	
State (91-0518)	11/8/1991	withdrawn 3/18/96
State (91-4215)	12/23/1991	
State (92-1176)	3/27/1992	
Dallas County (92-1001)	5/1/1992	
Dallas County (92-2503)	7/21/1992	
Selma (Dallas Cty.) (92-4187)	11/12/1992	
Greensboro (Hale Cty.) (92-3376)	12/4/1992	
Dallas County (92-4848)	12/24/1992	
Selma (Dallas Cty.) (93-0110)	3/15/1993	
Foley (Baldwin Cty.) (93-1106)	8/30/1993	withdrawn 7/1/96
State (93-3476)	11/16/1993	withdrawn 3/18/96
Greensboro (Hale Cty.) (93-4223)	1/3/1994	
State (85-1439)	1/31/1994	
State (93-3195-96) (93-2328)	4/14/1994	withdrawn 3/18/96
	35	

Justice Department Objections -- 1995 -- 2004

Tallapoosa County (97-1021)	2/6/1998
Alabaster (Shelby Cty.) (2000-2230)	8/16/2000
	2

Texas

Justice Department Objections -- 1965 -- 1994

Rusk Independent School District (Cherokee Cty.) (63-0174) 1/18/1965
Liberty-Eylau Independent School District (Bowie Cty.) (64-0121) 2/26/1965
Dawson County (64-0343) 8/9/1965
El Campo (Wharton Cty.) (64-1364) 11/8/1966
Lynn County (65-0866) 11/15/1965
Terrell County (65-0674) 1/15/1966
Palestine Independent School District (Hale Cty.) (66-0674) 4/19/1966
El Campo (Wharton Cty.) (66-1603) 7/18/1966
Trinity Valley Community College District (Anderson, Henderson, Hunt, Kaufman and Van Zandt Cty.) (66-0906) 09/14/1966
Wharton Independent School District (Fort Bend Cty.) (67-0487) 12/29/1966
Nevada Independent School District (Fort Bend Cty.) (67-0487) 6/22/1967
Crockett County (67-0350) 10/2/1967
Columbus Independent School District (Colorado and Austin Cty.) (67-0365) 1/4/1968
Hondo Independent School District (Frio and Medina Cty.) (67-0662) 1/22/1968
Manchaca Independent School District (Harrison Cty.) (67-0060) 4/18/1968
San Patricio County (67-1132) 6/14/1968
Jasper (Jasper Cty.) (68-0611) 8/12/1968 withdrawn 1994/01
Lynn County (65-0866) 9/26/1966
El Campo (Wharton Cty.) (68-1471) 2/3/1969
Dallas County (68-0553) 2/27/1969
Baytown (Chambers and Harris Cty.) (68-0634) 3/20/1969
Refugio Independent School District (Refugio Cty.) (68-1251) 5/5/1969
Cuero (DeWitt Cty.) (69-0324) 10/27/1969
Denver City (Yoakum Cty.) (68-1580; 68-1933) 2/5/1969
Nolan County Hospital District (69-0784) 2/12/1969
San Patricio County (69-0674) 5/7/1969
State (69-0015) 11/5/1969
Freeport (Brazoria Cty.) (69-0164) 11/13/1969
Grapeland (Houston Cty.) (69-0960) 12/31/1969
Dallas (Collin, Dallas, Denton, Kaufman & Rockwall Cty.) (69-0945) 3/13/1991
Lubbock County Water Control and Improvement District No. 1 (Lubbock Cty.) (69-0836) 3/19/1991
Refugio Independent School District (Refugio Cty.) (90-1253) 4/22/1991
Dallas (Collin, Dallas, Denton, Kaufman & Rockwall Cty.) (69-0425, 91-0642) 5/6/1991
State (69-0032) 6/03/1991 withdrawn 8/4/92
Houston (Harris, Montgomery and Fort Bend Cty.) (91-0303) 10/8/1991
Shaw (61-3256) 11/12/1991
Del Valle Independent School District (Travis Cty.) (91-3124) 12/24/1991
El Campo (Wharton Cty.) (91-0530) 1/7/1992
Slaton (69-0079) 3/9/1992
State (69-0140) 3/10/1992
Gregg County (91-3049) 3/17/1992
Calhoun County (91-3548) 3/17/1992
Galveston County (91-0501) 3/17/1992
Cuero County (91-0788) 3/30/1992
Monahans-Wickett-Pyote Independent School District (Ward Cty.) (91-3272) 3/30/1992
Ellis County (91-4330) 3/30/1992
Lubbock Independent School District (Lubbock Cty.) (91-2910) 3/30/1992
Terrell County (91-4052) 4/6/1992
Waller County (91-3730) 4/6/1992
Comanche County (91-4049) 4/6/1992
Hale County (91-4048) 4/10/1992
Deaf Smith County (91-4051) 4/10/1992
Gaines County (91-3990) 7/14/1992
Wilmer (Dallas Cty.) (90-0363) 7/20/1992
Del Valle Independent School District (Travis Cty.) (91-34) 7/31/1992
Cameron (Jackson Cty.) (92-0319) 8/17/1992 withdrawn 1/22/93
Castro County (92-4027) 10/6/1992
Galveston (Galveston Cty.) (92-0126) 12/14/1992
Atlanta Independent School District (Cass Cty.) (92-3734) 2/19/1993
Carthage Independent School District (Panola Cty.) (92-4890) 3/22/1993 withdrawn 1/3/94
Corsicana Independent School District (Navarro Cty.) (92-4189) 3/22/1993
Lamesa (Dawson Cty.) (92-0947) 4/26/1993
Bailey County (93-3880) 5/4/1993
Castro County (93-0917) 5/10/1993
McCulloch County (93-0075) 6/4/1993
Bailey County (92 0194) 7/19/1993
Wharton County (92-0235) 8/30/1993
Edwards Underground Water District (93-2267) 11/19/1993
Marion County (93-3585) 4/18/1994
State District Court (93-2585) 5/9/1994
Harris County Criminal Court at Law (Harris Cty.) (93-3694) 5/27/1994
Fort Bend County Court at Law (Fort Bend Cty.) (92-2478) 6/21/1994
Mount Independent School District (Limestone Cty.) (93-4923) 6/13/1994
Tarrant County (94-0012) 8/15/1994
Edna Independent School District (Jackson Cty.) (94-1908) 9/02/1994
Morton (Cochran Cty.) (94-1933) 9/12/1994
San Antonio (Bexar Cty.) (94-2531) 10/21/1994
Karnes City (Karnes Cty.) (94-2365) 10/31/1994
Judson Independent School District (Bexar Cty.) (94-4175) 11/18/1994

79

Justice Department Objections -- 1995 -- 2004

State (94-4077) 2/27/1995
Edwards Underground Water Conservation District (Gonzales Cty.) (94-2333) 3/2/1995
Andrews (Andrews Cty.) (94-2271) 5/26/1995
State (65-0017) 1/16/1996
Webster (Harris Cty.) (96-1009) 3/27/1997 withdrawn 4/7/98
State (66-1965) 8/26/1998 withdrawn 10/21/98
Galveston (Galveston Cty.) (98-2149) 12/14/1998 withdrawn 03/04/02
Lamesa (Dawson City) (95-0270) 7/16/1999
Sharp Independent School District (Austin Cty.) (99-3825) 6/5/2000
Haskell Consolidated Independent School District (Haskell, Knox, and Throckmorton Cty.) (2000-4426) 9/24/2001
State (2001-2430) 11/16/2001
Waller County (2001-3531) 9/21/2002
Freeport (Brazoria Cty) (2002-1725) 9/12/2003

13

PRESENTATION ON BEHALF OF MERCED COUNTY, CALIFORNIA, CONCERNING REAUTHORIZATIONS OF SECTIONS 4 AND 5 OF THE VOTING RIGHTS ACT

LAW OFFICES OF
NIELSEN, MERKSAMER,
PARRINELLO, MUELLER & NAYLOR, LLP

SACRAMENTO
1415 L STREET, SUITE 1200
SACRAMENTO, CALIFORNIA 95814
TELEPHONE (916) 446-6752
FAX (916) 446-6106

591 REDWOOD HIGHWAY, #4000
MILL VALLEY, CALIFORNIA 94941-3039
TELEPHONE (415) 389-6800
FAX (415) 388-6874

SAN FRANCISCO
225 BUSH STREET, 16TH FLOOR
SAN FRANCISCO, CALIFORNIA 94104
TELEPHONE (415) 389-6800
FAX (415) 388-6874

November 4, 2005

VIA FEDERAL EXPRESS

U.S. House of Representatives
Committee on the Judiciary
Attn: Chairman Sensenbrenner
2138 Rayburn House Office Bldg.
Washington, DC 20515

PRESENTATION ON BEHALF OF MERCED COUNTY, CALIFORNIA, CONCERNING REAUTHORIZATION OF SECTIONS 4 & 5 OF THE VOTING RIGHTS ACT

Dear Honorable Members of the Committee on the Judiciary:

This firm represents the County of Merced, California, with respect to its compliance with the Voting Rights Act of 1965, as amended. Merced County is one of only four counties in the State that is covered by Section 5 of the Voting Rights Act.[1] The State of California is not covered. Merced County has been a covered jurisdiction since 1975. Since its coverage, the United States Attorney General has interposed only one objection to a voting change enacted by the County. (Objection to Submission #91-4210, Copy Attached as Exhibit A). That single objection was to the County's 1992 redistricting plan for its supervisorial districts. The objection was interposed during a period when the Voting Section of the United States Department of Justice was enforcing a policy requiring the "maximization" of minority voting strength in redistricting plans. The United States Supreme Court, however, has since declared that policy violative of Section 5 and unconstitutional. (*Miller v. Johnson* (1995) 515 U.S. 900, 924-26; *Abrams v. Johnson* (1997) 521 U.S. 74, 90.) Nevertheless, the County repealed that redistricting plan, without ever enforcing it, and enacted a new plan that was granted preclearance.

[1] The other three California counties are: Kings, Monterey, and Yuba. (*See* 28 C.F.R., Ch. 1, Part 51, Appendix [Jurisdictions Covered Under Section 4(b) of the Voting Rights Act, As Amended].)

Merced County thanks the United States House of Representatives Committee on the Judiciary for the opportunity to make this presentation and it is honored to make this presentation concerning Sections 4 and 5 of the Voting Rights Act.

SUMMARY OF SUGGESTED AMENDMENTS

The draft language of the County's proposed amendments are attached to this letter. A summary of those amendments and the reasons for them follows:

1. **Section 4: Coverage Appeal.**

Merced County urges the Committee to consider amendments according a covered subjurisdiction, that is covered independently of the State, the ability to exit coverage if it can demonstrate that: (1) the circumstance of hosting a large military base within its borders caused the low voter turnout-prong of the Section 4(b) coverage formula to be satisfied, and that, (2) since its coverage, (i) the subjurisdiction has not suffered any adverse judgments in lawsuits alleging voting discrimination or consent decrees or agreements that resulted in the abandonment of a discriminatory voting practice, (ii) there are no pending lawsuits against it that allege voting discrimination, and (iii) federal examiners have not been assigned.[2]

2. **Section 4: Bailout Reform.**

Merced County requests that in reauthorizing the provisions of Section 4, the Committee consider amendments to reform the Section 4(a) bail out criteria that would make the possibility of "bailing out" real. At the time of the 1982 reauthorization of the Act, it was predicted that a "substantial number of counties may be eligible to bail out when the new procedure goes into effect."[3] That has not occurred. At least with respect to Merced County, one reason is the bailout criteria that hold Merced County responsible for the actions of governmental units over which it has no control. For example, the County will be held accountable in a bailout action for the State, or a state agency within the County's territory that does not preclear a voting change, despite the

---

[2] In the event a proposal is brought forth to update the Section 4(b) coverage formula, the Committee should ensure that the new test actually captures jurisdictions, the voting practices of which have a causal relationship to low voter turnout. For example, a coverage formula which specifies a specific percentage of minority population as a part of the trigger, such as that suggested by Morgan Kousser, Ph.D at the September 7, 2005 hearing of the National Commission on Voting Rights Act in Los Angeles, California, has no nexus to the evils at which Section 4 and 5 of the Act were aimed.

[3] S.Rep. No. 417, 97th Cong., 2d Sess. 60, reprinted in 1982 U.S.C.C.A.N. 177, 238.

fact that the County has no control over the State or that agency and cannot force them to comply with preclearance requirements. (42 U.S.C. § 1973b(a)(1)(D).) The County is the "covered jurisdiction" and in fairness, it should be able to "bailout" if it and all of its agencies meet the criteria.

Also, the County requests that the Committee consider adding a "good faith" component to 42 U.S.C. § 1973b(a)(1) so that trivial instances of inadvertent non compliance will not prevent a jurisdiction with a recent history of good faith compliance (*e.g.*, 10 years) from exiting coverage.

3. **Section 5: Enforcement And Compliance Reform.**

With regard to Section 5 compliance and enforcement, the County requests that reforms be considered to mitigate the cost of inadvertent non-compliance. The usual remedy in a Section 5 enforcement action in court is an order that the jurisdiction submit a voting change for preclearance and refrain from implementing that change until preclearance is obtained. It would be a very rare covered jurisdiction, however, that would not proceed to submit a change for preclearance without a court order if the omission had first been brought to its attention, thereby providing the remedy sought without the expense of litigation. Doing so under the shadow of an enforcement litigation court order, however, exposes the jurisdiction to the additional expense of its own and possibly plaintiffs' attorneys fees, which are often disproportionately high compared to the cost of seeking administrative preclearance. A covered jurisdiction sued in an enforcement action should have an opportunity to demonstrate that it is in compliance before the litigation proceeds.

4. **Amendments Will Strengthen The Voting Rights Act.**

Not only will amendments such as those described above encourage and facilitate greater compliance by easing some of the administrative burdens of compliance and bailout, but we believe that they will contribute to the Congress's efforts to craft an extension of these provisions that is most likely to survive constitutional challenge. Such amendments would strengthen the argument that the renewed provisions are "congruen[t] and proportional[]" to the harms Congress seeks to remedy: actions of specific jurisdictions with a history of intentional discrimination in voting and artifice to avoid changing discriminatory practices. (*City of Boerne v. Flores* (1997) 521 U.S. 507; *see also Bd. of Trustees v. Garrett* (2001) 531 U.S. 356; *Florida Prepaid Postsecondary Educ. Expense Bd. v. Coll. Savings Bank* (1999) 527 U.S. 627; Hasen, *Congressional*

Power to Renew the Preclearance Provisions of the Voting Rights Act After Tennessee v. Lane, 66 Ohio St. L.J. 177 (2005).)

SOME BACKGROUND ABOUT MERCED COUNTY

Merced County (population 210,554[4]) is located in the heart of the San Joaquin Valley, the world's most productive agricultural area, and spans from the coastal ranges to the foothills of Yosemite National Park. There are six incorporated cities in Merced County: Merced, Atwater, Livingston, Gustine, Los Banos, and Dos Palos.

Agricultural-related industries are a major source of employment along with food processing, retailing, and light manufacturing. Situated between the metropolitan areas of Fresno and Modesto, Merced's central location in the State, coupled with good highways, train, bus, and air service, make travel to San Francisco Bay Area or the picturesque seaside resorts of Monterey and Carmel about two hours. Lake Tahoe and Reno are within a four-hour drive. The higher education system (Merced College and the new University of California, Merced) also provides cultural and social influence throughout the county.

For decades, Merced County was home to Castle Air Force Base. "The base consists of 2,777 acres. The main base contains an airfield, aviation support buildings, warehouses, 1,707 dormitory beds, and a 52-bed hospital. Two housing areas, separated from the main base, include 933 family housing units. Most of the base lies within the unincorporated part of Merced County. Part, however, lies within the City of Atwater."[5] As of the 1970 Census—the most recent when Merced County was initially covered under Section 5—there were reported to be a total of 104,629 persons in Merced County[6] of whom 63,971 were of voting age,[7] 1,590 individuals were housed in the base's barracks,[8] and a total of 5,082 individuals were employed by the military in

---

[4] 2000 Census. Population estimate for July 2004: 237,155 (Cal. Dept. of Finance).

[5] The California State Military Museum, *Historic California Posts: Castle Air Force Base*, available online at http://www.militarymuseum.org/CastleAFB.html [last visited October 14, 2005]

[6] U.S. Census Bureau, *Census of Population: 1970*, Vol. 1 [Characteristics of the Population], Part 6 [California], Sec. 1, Ch. B, Table 16, available online at http://www.census.gov/prod/www/abs/decennial/1970cenpopv1.htm [last visited October 28, 2005].

[7] U.S. Census Bureau, *Census of Population: 1970*, Vol. 1 [Characteristics of the Population], Part 6 [California], Sec. 1, Ch. B, Table 35, available online at http://www.census.gov/prod/www/abs/decennial/1970cenpopv1.htm [last visited October 12, 2005].

[8] U.S. Census Bureau, *Census of Population: 1970*, Vol. 1 [Characteristics of the Population], Part 6 [California], Sec. 1, Ch. C, Table 120, available online at http://www.census.gov/prod/www/abs/decennial/1970cenpopv1.htm [last visited October 12, 2005].

Merced County.[9] This latter figure is 7.9 percent of the total voting aged population, and does not include spouses of military. Castle AFB was closed in 1995 pursuant to the recommendations of the Defense Base Closure and Realignment Commission's 1991 Report to the President. In 2001, the new high-security Atwater federal penitentiary opened on a portion of the old base, along with a minimum-security satellite camp. The current population of these two prisons is 1,296 inmates.[10]

HISTORY UNDER THE FEDERAL VOTING RIGHTS ACT

When Congress enacted the Voting Rights Act of 1965, it determined that racial discrimination in voting had been especially prevalent in certain areas of the country. Section 4(a) of the Act (42 U.S.C. § 1973b) therefore established a formula to identify those areas and to provide for more stringent remedies where appropriate. The jurisdictions identified by the formula were then subjected to a two-part remedy: the first part was a five-year suspension of the use of any "test or device" (such as a literacy test), as a prerequisite to register to vote. The second was the requirement for review ("preclearance") under Section 5 of any change affecting voting made by a covered area either by the United States District Court for the District of Columbia or by the Attorney General. Nothing in the legislative record reflects that Merced County, or anywhere in California, for that matter, was a target of these provisions.

No Coverage After 1965 Enactment

As enacted in 1965, Section 4(a) provided that a jurisdiction would be covered if it met both parts of a two-prong formula. The first element in the preclearance coverage formula was whether, on November 1, 1964, the state or a political subdivision of the state maintained a "test or device" restricting the opportunity to register and vote. The State of California had such a test, a literacy test that had been on the books since 1894.[11] However, Merced County did not have any such test of its own.

---

[9] U.S. Census Bureau, *Census of Population: 1970*, Vol. 1 [Characteristics of the Population], Part 6 [California], Sec. 1, Ch. C, Table 121, available online at http://www.census.gov/prod/www/abs/decennial/1970cenpopv1.htm [last visited October 11, 2005] [derived by subtracting civilian work force from total work force]. The USAF Historical Research Agency has corroborated these numbers, informing us that 5,289 personnel were assigned to Castle AFB as of December 31, 1972.

[10] U.S. Bureau of Prisons, *Weekly Population Report*, available online at http://www.bop.gov/locations/weekly_report.jsp [last visited November 3, 2005].

[11] *See Castro v. State of Cal.* (1970) 2 Cal.3d 223.

The second element of the preclearance coverage formula would be satisfied if the Director of the Census determined that less that 50 percent of persons of voting age were registered to vote on November 1, 1964, or that less than 50 percent of persons of voting age voted in the presidential election of November 1964. Applying this second prong of the formula did not result in coverage for any California counties or for the State.

The 1960 Census reflects that the voting age population in Merced County (21 years of age and older) was 50,282.[12] Of these, only 7.2% were minority.[13] In 1964, the County had 32,988 registered voters of whom 28,269 voted for President.[14] These figures constitute 65.61 percent and 56.22 percent of the voting aged population, respectively.

No Coverage After 1970 Enactment

The special provisions of the Voting Rights Act were initially set to expire in 1970. Congress, however, renewed them for another five years. In doing so, Congress added a new layer to the coverage formula, identical to the original formula except that it referenced November 1968 as the relevant date for the maintenance of a test or device and the levels of voter registration and electoral participation. The California Supreme Court had invalidated the State's literacy test earlier in 1970 (*Castro v. State* (1970) 2 Cal.3d 223), but as of the new test date, November 1, 1968, it was still on the books.

Application of the new formula resulted in the coverage of two California counties, but not Merced County. In 1968, Merced County had 34,347 registered voters, of whom 28,669 voted. This level of voter participation exceeded the 50 percent threshold for Section 5 coverage under the new coverage formula.

Coverage After 1975 Enactment

In 1975, the Act's special provisions were extended for yet another seven years and were broadened to address voting discrimination against members of "language minority" groups, defined as persons who are American Indian, Asian American, Alaskan

---

[12] U.S. Census Bureau, *Current Population Reports*, Series P-23, No. 14, "1960 Population of Voting Age and Votes Cast for President, 1964 and 1960, for States and Counties," U.S. Government Printing Office, Washington, D.C., April 1965, available online at http://www.census.gov/population/www/socdemo/voting/p23-014.html [last visited October 12, 2005].

[13] *Id.*

[14] *Id.*

Natives or of Spanish heritage.[15] As before, Congress expanded the coverage formula, determining the presence of a "test or device" and levels of voter registration and participation as of November 1972. In addition, the definition of "test or device" was broadened to include the practice of providing any election information, including ballots, only in English in states or political subdivision where members of a single language minority constituted more than five percent of the citizens of voting age.[16]

As before, Merced County met the first prong for coverage—employment of a "test or device"—through no fault of its own. By November 1972, California's literacy test had been declared unconstitutional, was not being enforced, and was scheduled to be on the ballot at the November 7, 1972, election at which it was repealed by the voters. It was, however, still on the books on November 1. Furthermore, California continued to provide its election materials only in English and Merced County's "language minority" population constituted more than five percent of the citizens of voting age.[17]

Unlike the two previous coverage dates, however, the voter participation figure for Merced fell just under the 50% magic mark, with 49.6% of the County's eligible voters voting in the 1972 presidential election. The result was coverage under Section 5. Coverage was not appealable. (42 U.S.C. § 1973b(b).)

Special Circumstances Leading To Merced's Coverage In 1975

Following the 1975 Voting Rights Act Amendments, the Census Bureau published a report providing the calculations for coverage under the newly-amended coverage formula.[18] That Report indicated that 32,648 votes had been cast for President

---

[15] Under this third application of the formula, the base against which participation was measured was "citizens of voting age."

[16] One treatise on election law--co-written by prominent voting rights experts Samuel Issacharoff, Pamela Karlan, and Richard Pildes--states that this expanded definition "was designed largely to bring" Texas—the only former Confederate state to have evaded Section 5 coverage to that point—"under the preclearance obligation." (*See* Issacharoff, Karlan & Pildes, *The Law of Democracy: Legal Structures of the Political Process* (Foundation 2d ed. 2001), p.557; *see also Briscoe v. Bell* (1977) 432 U.S. 404, 406.)

[17] U.S. Census Bureau, *Current Population Reports*, Series P-25, No. 627, "Language Minority, Illiteracy and Voting Data Used in Making Determinations for the Voting Rights Act Amendments of 1975 (Public Law 94-73)," U.S. Government Printing Office, Washington, D.C., June 1976, p.13, available online at http://www.census.gov/population/www/socdemo/voting/p25-627.html [last visited October 12, 2005] [hereafter "1975 Amendments Report"].

[18] U.S. Census Bureau, *Current Population Reports*, Series P-25, No. 627, "Language Minority, Illiteracy and Voting Data Used in Making Determinations for the Voting Rights Act Amendments of 1975 (Public Law 94-73)," U.S. Government Printing Office, Washington, D.C., June 1976, available online at

in November 1972 in Merced County. It also estimated that the citizen voting-age population ("CVAP") of Merced County in November 1972 was 65,800, resulting in a participation rate of 49.6%—*barely* missing the 50% cut-off to avoid coverage. Had the CVAP estimate been only 504 persons fewer (in a county of over 100,000 persons), Merced County would still not be covered under Section 5 today.

Yet, a closer look at the Census Bureau's methodology for estimating the 1972 CVAP makes clear that the Bureau *systematically overestimated the CVAP*, because it treated all population growth between 1970 and 1972 as comprised of citizens. To obtain their CVAP estimates, the Bureau prepared estimates of the total voting age population in 1972. Then, to obtain the proportion of that figure that was comprised of citizens—and therefore eligible to register to vote—it subtracted the number of aliens of voting age *as reported in the 1970 Census*.[19] In other words, it adjusted the *total* voting-age population upwards to account for growth from 1970 to 1972, but did *not* accordingly adjust the number of non-citizens upward. Essentially, the entire growth in the voting-age population during that time was assumed to consist of citizens. This was an obviously questionable assumption in a place like California, where more than 5% of the voting-age population was non-citizen in 1970,[20] and where more than 10.5% of the voting-age population was non-citizen by 1980.[21]

Furthermore, the Census Bureau apparently made no attempt at the time to subtract from CVAP other persons who were not eligible to vote, such as prisoners, felony parolees, and those deemed mentally incompetent. (*See* Cal. Const. art. II, § 4; Cal. Elec. Code § 2101.)

Other special circumstances also contributed to Merced County's voter turn-out falling below 50% in November 1972:

Lowering the Voting Age. For example, 1972 was the first election in which the 26th Amendment permitted 18-20 year olds to register and vote. One

---

http://www.census.gov/population/www/socdemo/voting/p25-627.html [last visited October 11, 2005] [hereafter "1975 Amendments Report"].

[19] *See* 1975 Amendments Report, *supra*, note 18, at p.2.

[20] U.S. Census Bureau, *Census of Population: 1970*, Vol. 1 [Characteristics of the Population], Part 6 [California], Section 2, Ch. D, Table 143, available online at http://www.census.gov/prod/www/abs/decennial/1970cenpopv1.htm [last visited October 11, 2005].

[21] U.S. Census Bureau, *Current Population Reports*, Series P-23, No. 168, "Studies in the Measurement of Voter Turnout" (Nov. 1990), p.36, available online at http://www.census.gov/population/www/socdemo/voting/p23-168.html [last visited October 11, 2005].

consequence of this fact was a drop in voter participation nationwide. As the Census Bureau recognized at the time in its report on voter participation at the November 1972 election, "Young adults who were eligible to vote for the first time in 1972 did not exercise their franchise as many had expected in the election of November 1972."[22] In 1970, Merced County was one of the youngest counties in California, having the fifth lowest median age of any county in the state.[23] Approximately 9% of the County's voting-age population fell into the comparatively apathetic 18-20 age range.[24]

Abolition of Residency Requirements. 1972 was also the first presidential election held after the Voting Rights Act amendments of 1970 effectively limited residency requirements to only 30 days.[25] Before that, an individual had to be a resident for at least 90 days to register to vote in California.[26] As the Bureau recognized, however, there was a lag in awareness of the change, which led some individuals to believe themselves ineligible to register when, in fact, they were eligible.[27]

Military Presence. And finally, in 1972 Merced County was the home to Castle Air Force Base. According to the 1970 Census, 5,159 individuals in Merced County were employed by the U.S. armed forces, constituting approximately 19.5% of the County's total workforce, and 8.1% of the County's total voting age population.[28]

---

[22] U.S. Census Bureau, *Current Population Reports*, Series P-20, No. 244, "Voter Participation in November 1972" (Dec. 1972), p.1, available online at http://www.census.gov/population/www/socdemo/voting/p20-244.html [last visited October 11, 2005]. See also U.S. Census Bureau, *Current Population Reports*, Series P-20, No. 253, "Voting and Registration in the Election of November 1972" (Oct. 1973), p.4, available online at http://www.census.gov/population/www/socdemo/voting/p20-253.html [last visited October 11, 2005] ["In addition to those 'aging in' to the electorate at the traditional age of 21, approximately 11 million more persons were enfranchised by the 26th Amendment which lowered the voting age in national elections to 18. Much interest focused on these new voters and the degree to which they would avail themselves of this newly acquired power. Traditionally the youngest age groups have exhibited the poorest turnout and 1972 was no exception."].

[23] U.S. Census Bureau, *Census of Population: 1970*, Vol. 1 [Characteristics of the Population], Part 6 [California], Section 1, Ch. B, Table 35, available online at http://www.census.gov/prod/www/abs/decennial/1970cenpopv1.htm [last visited October 11, 2005]. The four counties with a lower median age were: Imperial, Kings, Monterey, and Yuba. (*Id.*)

[24] *Id.*, at p.6-318.

[25] *See* 42 U.S.C. § 1973aa-1, as amended by P.L. 91-285, § 6, 84 Stat. 316 (91st Cong., 2d Sess., 1970). *See also Young v. Knoss* (1972) 7 Cal.3d 18 (striking down residency requirements in excess of 30 days as unconstitutional).

[26] Cal. Const. art. II, § 1 (1972) & Cal. Elec. Code § 203 (1972)

[27] *See* Census Bureau, "Voting and Registration in the Election of November 1972," *supra*, note 22, at 6.

[28] *See* note 9, *supra*.

Persons in the Armed Forces stationed in Merced County *were treated as residents of the County for purposes of determining population figures*, but, as the Census Bureau recognized, this "is not necessarily the same as [the soldiers'] legal residence, *voting residence*, or domicile."[29] In fact, numerous courts have recognized that "[a] serviceman is presumed not to acquire a new domicile when he is stationed in a place pursuant to orders; he retains the domicile he had at the time of entry into the service."[30] (Consistent with that rule, California has expressly provided that a California resident who is a member of the armed forces stationed elsewhere does not forfeit his or her ability to vote in California, and neither does his or her spouse.[31])

The consequence of all this is that Merced County had a sizeable number of people who were included as part of its citizen voting-age population for purposes of determining coverage under Section 4(b), but many of whom were likely voting in other jurisdictions, rather than in Merced County. (Not coincidentally, the other three Section 5 counties in California were likewise home to significant military installations.)

The degree to which this is true is best borne out by the following numbers: According to the 1970 Census, there were 1,590 residents of "military barracks" in Merced County.[32] As the minimum age to enlist was 18, it is reasonable to assume that this figure consists of mostly voting-age citizens. Yet there were only 440 votes cast in the two voting precincts covering the base (Mitchell A & Mitchell B) in the 1972 presidential election. This is a voter participation rate of only 27.7%, assuming the residents of the barracks were the entire universe of eligible voters on the base. (In reality, there were certainly more eligible voters than this on the base; hence, even this low rate overstates the actual participation rate.) If these two figures are subtracted (440 from the votes cast, and 1,590 from the CVAP as estimated by the Census Bureau), *the County of Merced would have had a voter participation rate of 50.2% (32,208/64,210), thereby avoiding coverage under Sections 4 and 5*. And that only includes military personnel living *in barracks*. As noted above, the total military employment in Merced County

---

[29] U.S. Census Bureau, *County and City Data Book. 1977: A Statistical Abstract Supplement*, U.S. Government Printing Office, Washington, D.C., 1977, at pp.xviii-xxix (emphasis added).

[30] 13B Wright, Miller & Cooper, *Federal Practice & Proc.*, Juris. § 3617 (2d ed., Westlaw 1984 & 2005 Supp.) [collecting cases]. *See also* The Soldiers' and Sailors' Civil Relief Act of 1940, 50 U.S.C. App. § 574.

[31] Cal. Elec. Code §§ 2025 & 2030.

[32] *See* note 8, *supra*.

was over 5,000—not just the 1,590 subtracted here—and even the 5,000 figure does not include military spouses who might also be voting in other jurisdictions.

Hence, Merced County became covered by the special provisions of the Voting Rights Act because the State of California—not Merced County itself—maintained a "test or device," and Merced County's voter turnout fell a mere 0.4 percent below the threshold in 1972 because of (1) methodological imprecision by the Census Bureau, (2) newly implemented changes expanding voter eligibility, and (3) the presence of a large military installation at Castle AFB, where soldiers and their families were treated as residents of Merced County despite the fact that they could—and apparently did—vote elsewhere.

MERCED COUNTY'S RECORD UNDER THE VOTING RIGHTS ACT

Since it was covered in 1975, Merced County has received only one objection to a voting change that it has enacted, despite a long history of preclearance submissions. (*See* 2003 STAPS Report from DOJ, attached hereto as Exhibit B.) The one objection was in 1991, and was directed to the redistricting plan for its supervisorial districts. The objection was not based on a conclusion that the redistricting plan was "retrogressive", but rather on the plan's failure to link Hispanic population concentrations in different cities in a manner to create a majority-minority district. (Objection Letter, Exh. A.) As a result of that objection, Merced County rescinded its redistricting plan and redrew its supervisory district lines to link the Hispanic population in the southern part of the City of Merced, the county seat, with the Hispanic population in the City of Livingston, skirting around the intervening City of Atwater (*See* Exhibit C). The new map received preclearance.

But subsequent events make clear that even that one objection was unjustified. As discussed above, the objection occurred at a time when it was the policy of the Voting Section of the United States Department of Justice to require covered jurisdictions to "maximize" minority representation in their redistricting plans. Subsequent Supreme Court case law, however, has expressly rejected the policy of "maximization" under Section 5, holding that "[i]n utilizing § 5 to require States to create majority-minority districts wherever possible, the Department of Justice expanded its authority under the statute beyond what Congress intended and we have upheld." (*Miller v. Johnson* (1995) 515 U.S. 900, 925.)

There has never been a Section 2 lawsuit filed in the County alleging discrimination in voting.

Today, Merced County's population is 210,554, of which 95,466 (45.4%) are Hispanic and 175,179 (83.2%) are citizens. The voting aged population is 137,870, of whom 55,884 are Hispanic (40.53%). However, only 109,899 people or 79.6% of the voting age population are citizens. 28,242 persons of voting age are not citizens and it is reasonable to conclude that a very large number of these non-citizens are of Hispanic origin. Assuming conservatively that two-thirds of the non-citizens are Hispanic, the number of Hispanic persons eligible to register to vote is only 37,056 or about 26.89% of all persons eligible to register to vote. [33]

Of the 32 city council members governing the cities in Merced County, 8 (25%) are Hispanic or other minority, including two of the five elected mayors (40%).[34] Of the 120 school board members governing schools in Merced County, 26 (21.7%) are of Hispanic origin or another minority.

The County's registration levels are healthy: 91,100—or 68.60% of eligible voters—at the close of registration on October 24, 2005.[35] Of the registered voters, 59.32% voted in the November 2004 Presidential election.

Merced County's coverage was a fluke and a result of error, but coverage was not appealable. Nevertheless, the County has diligently endeavored to comply with the burdens of coverage.

THE BAIL OUT CRITERIA DO NOT ENABLE COVERED JURISDICTIONS TO EXIT COVERAGE AND SHOULD BE REFORMED

Despite this record, it would be extremely difficult for Merced County to bail out from Section 5 coverage.[36] There are numerous state agencies,[37] such as school

---

[33] 2000 Census, Summary File 4, Table PCT 44.

[34] Gustine does not elect a Mayor.

[35] Cal. Sec. of State, *October 24, 2005, Report of Registration*, available online at http://www.ss.ca.gov/elections/ror_10242005.htm [last visited November 3, 2005]. The Secretary of State's records reflect that only 45.91 percent of eligible voters voted in the 2004 Presidential election, but that office's methodology for estimating eligibility overstates the number of citizens of voting age and does not account for other ineligible voters in the County since the Census.

[36] Some testimony before the Committee suggested that covered jurisdictions have not attempted to bailout because they are unaware of the opportunity. (Oct. 20, 2005, Statement of J. Gerald Hebert, p.3.) With respect to Merced County, that is not so. Merced County is acutely aware of the bailout provisions but is also aware

districts, and other self-governing jurisdictions in Merced County. The County has no control over the activities of the governing boards of these entities. Several of them cover more than one county, such as California Central Irrigation District and San Luis Water District. Many of these districts are authorized to conduct their own elections,[38] and some do, yet the County is held responsible for their compliance or non-compliance with the Voting Rights Act and Section 5 in determining whether bail-out is appropriate. (*See, e.g.*, 42 U.S.C. § 1973b(a)(1)(B), (D), (E), and (F), (b)(3).) Likewise, Merced County has no control over the six incorporated cities, but is held responsible for their compliance or non-compliance as well. (*Id.*)

Some testimony before this Committee has suggested that an adequate amendment would be to enable the political subjursidictions to bail out independently of the County, thus mirroring the bailout structure with regard to a covered state and its counties. (Oct. 20, 2005, Statement of J. Gerald Herbert.) The relationship of Merced County to other jurisdictions within its borders is in no way analogous to the situation of a State that is unable to bail-out because of noncompliance by its subdivisions. As to the latter, "with the exception of the powers surrendered by the Constitution of the United States, the people of the several States are absolutely and unconditionally sovereign within their respective territories." (*Ohio Life Ins. & Trust Co. v. Debolt* (1850) 57 U.S. 416, 428.) Political subdivisions within the State, therefore, are creatures of the State and are subject to the complete control thereof. Indeed, California counties are political subdivisions of the State. (Cal. Const. art. XI, § 1.) The County of Merced does not have

---

that it has no control over activities of independent governmental agencies within its boundaries. Accordingly, it has no confidence that it can satisfy the bailout criteria as drafted, and it knows that it cannot force independent governmental agencies into compliance. While it is rumored that the Attorney General may take a lenient view of inadvertent noncompliance (*Id.*), that is neither in the statute nor in any regulation.

[37] There are six incorporated cities in Merced County: Merced, Atwater, Livingston, Gustine, Los Banos, and Dos Palos. Cities are not agencies subject to the County's control, but are given independent authority by the California Constitution, subject only to the general law of the state. (Cal. Const. art. XI, §§ 2, 5 & 7.) The County also has 20 school districts. These districts are agencies of the State of California, not subject to county control, and are governed by state law, not by county ordinances. (*See* Cal. Const. art. X, § 14; Cal. Educ. Code, generally.) And there are 66 special districts in the County that are also creatures of state law and independent of County control. (*See, e.g.*, Cal. Water Code § 20500 *et seq.* for irrigation districts and Cal. Govt. Code § 61000 *et seq.* community service districts.)

[38] (*See* Cal. Elec. Code § 10002 [cities and special districts must formally request by resolution that County provide the city or district with election services; if agreed to, jurisdiction must provide County with list of precincts 61 days before election, and must reimburse County for election-related costs]; *see also* Cal. Elec. Code §§ 307 [defining "clerk" as "the county elections official, registrar of voters, *city clerk, or other officer or board charged with the duty of conducting any election*", emphasis added] & 10240 [establishing duty of City Clerk to prepare ballots and other precinct supplies for municipal elections].) For example, the San Luis Water District, referenced above, conducts its own elections. So does the Eastside Water District.

a similar relationship or control over the state-created governmental entities within its boundaries, and therefore should not be held accountable for their compliance or non-compliance with the mandates of Section 5 or the Voting Rights Act. These are state agencies, not county agencies, and the State of California is not covered.

Also, Merced County has been a covered jurisdiction for 30 years. During that time, it has had a long record of compliance with Section 5. (*See* STAPS Report, Exhibit B.) Nevertheless, in light of the relatively minor changes that have been deemed to require preclearance, it would be virtually impossible for anyone to *guarantee* that the County has submitted for preclearance absolutely every change that it has made in the past 10 years, a current requirement for bail-out. (42 U.S.C. § 1973b(a)(1)(D).) Therefore, Merced County requests that the Committee consider amendments to the bail-out procedure to include a "good faith" element to the criteria in 42 U.S.C. § 1973b(a)(1), so that historical instances of inadvertent or trivial non-compliance are not sufficient to completely scuttle a jurisdiction's efforts to bail out, provided recent compliance (10 yrs.) has been substantial and omissions promptly rectified. (*Compare* § 1973b(a)(3).)

THE OPERATION OF SECTION 5 IN CALIFORNIA STATEWIDE ELECTIONS DEMONSTRATES A NEED FOR ENFORCEMENT REFORM

In virtually every California election, a covered county finds itself caught between the inexorable march of state-mandated elections deadlines for consolidation, precincting, printing ballots and other materials, and mailing of voter pamphlets, sample ballots, absentee ballots and overseas ballots, on the one hand, and the federal prohibition against implementing un-precleared voting changes, on the other. This is particularly the case because of the 60-day window given the Attorney General to pre-clear even minor voting changes. (42 U.S.C. § 1973c.) The Attorney General is authorized to expedite review, and will do so in some cases, but such expedition is entirely discretionary and its availability depends upon the burdens then facing the Voting Section. Thus, even a relatively minor change—like new polling place locations for a few precincts—can put a county in a very difficult position as it waits to see if it can implement the needed changes.[39] This situation perpetually puts California's four covered counties at risk of expensive litigation.

[39] For example, in the ordinary course under California law, county elections officials will not know what is going to be on the ballot until shortly before the final 60 day window for obtaining preclearance before an election is conducted. Local jurisdictions in a county can consolidate their elections and or consolidate with statewide elections under appropriate circumstances, which elections are then conducted by the county. (Cal. Elec. Code §§ 10400, 10401 & 10403.) The deadline to request consolidations, however, is only 88 days before the election (Cal.

In addition to normal complications, Section 5 has been abused in the State of California in recent years by plaintiffs using the covered counties as a lever to try to interfere with controversial state policies. The State of California is not itself subject to the preclearance requirements of Section 5. But because Merced and the three other counties are covered, California is required to pre-clear any changes in state election law that would be administered in those counties—meaning just about every change to generally-applicable state election law. (*Lopez v. Monterey County* (1999) 525 U.S. 266.) In recent years, this requirement has resulted in the use of Section 5 litigation as a means to try to block controversial state elections. A recent example graphically illustrates the nature of the problem—litigation related to California's 2003 recall election.

The entire recall election was subject to an *extremely* expedited timeline as required by the California Constitution. On July 23, 2003, Secretary of State Kevin Shelley certified that a sufficient number of valid signatures had been submitted in support of Governor Davis' recall. The next day, Lt. Governor Cruz Bustamante fulfilled his constitutional duty to call a special election for the voters of California to vote on the recall. Pursuant to Article II, Section 15(a) of the California Constitution, such an election had to be held no less than 60 *and no more than 80 days* after Mr. Shelley's certification. The date set for the election by Mr. Bustamante was October 7, 2003—the last Tuesday available within the authorized window, and only 76 days after the recall petitions were certified. Such a timeline was just barely more than the maximum time provided by law for pre-clearance of a voting change, 60 days, provided no additional information is required by the Attorney General. (42 U.S.C. § 1973c; 28 C.F.R. § 51.9(a).) In addition, Merced and other counties were already preparing to conduct a consolidated election for local and special district offices less than 30 days later, on November 4, 2003.

On August 20, 2003, the County of Merced submitted a request to the Attorney General for expedited preclearance of several very minor changes in its election practices. Merced County did not consolidate or otherwise change any precinct boundaries; it did change 13 polling places and two polling places were converted to

---

Elec. Code § 10402). Only after the consolidated elections are known can precincts, ballot styles and polling places be adjusted and designed to meet the requirements of the consolidated election. (Cal. Elec. Code §§ 10408, 10409 & 10410.) As a practical matter, this cannot reasonably be accomplished much before the final 60-day preclearance window begins to run. Then, as the jurisdiction awaits the decision of the United States Attorney General, California's statutory elections timetable proceeds apace, placing a covered county in the untenable position of preparing to implement the change assuming it will be precleared, but not being "so prepared" that it is unable to respond to an objection or risk issuance of an injunction.

mail-ballot precincts by operation of state law. Five days later, however, plaintiffs filed a pair of suits against Merced County and Kings County in the U.S. District Court for the Eastern District of California seeking to enjoin the conduct of the election in those counties. Plaintiffs named the State of California as a co-defendant. (*Hernandez v. Merced County, California*, CIVF-03-6147 OWW (DLB); *Gallegos v. State of California*, CIVF 03-6157 REC (LIO).) Stopping the election in any of the Section 5 counties would impact the election for the entire state.[40] The suit alleged that Merced County had consolidated precincts for the recall election without preclearance. But, as mentioned above, it had not. The complaint also alleged that that Merced County and Kings County had failed to seek preclearance of other changes that would be implemented. Not true. Five days before the suit was filed Merced County had submitted the few changes it was implementing for pre-clearance; Kings County had already filed a pre-clearance request as well.[41]

The lawsuits were finally dismissed when all of the counties' proposed changes were precleared on September 2, 2003, less than two weeks after the submission was made and more than a month before the date of the recall election. Nevertheless, despite the fact that Merced County was complying with Section 5, because plaintiffs sought an ex parte temporary restraining order, Merced County taxpayers ended up footing a significant bill for the litigation.

As mentioned above, most jurisdictions are compliant with their obligations under Section 5; inadvertence is the cause of most non-compliance. Few jurisdictions would willfully refuse to seek preclearance of a proposed voting change if the need to do so is called to their attention. Under such circumstances, a potential plaintiff can almost invariably obtain the very remedy available in court—submission of the change for preclearance—by the simple, and far less costly, expedient of calling the need for preclearance to the attention of the jurisdiction.[42]

---

[40] There was a widespread belief at the time that if the recall could be postponed until March 2004, when the normal state-wide primary was to be held, that Governor Davis would be benefited by unusually high Democratic turnout. It was widely expected that opposition to President Bush's re-election, and a desire to participate in choosing a candidate to oppose him, would bring anti-recall Democrats to the polls in record numbers, whereas Republicans would have far less incentive to vote in a presidential primary that was largely uncontested. (*See* Foley, "March 2 Prime for Davis: Analysts Say He'll Benefit Most from Delay with More Party Votes Expected and Time to Raise Funds," *Orange County Register* (Sept. 23, 2003), available on LexisNexis.)

[41] *See* U.S. Dept. of Justice, "Notice of Preclearance Activity Under the Voting Rights of 1965, As Amended" (Aug. 21, 2003), *available online at* http://www.usdoj.gov/crt/voting/notices/vnote082103.html [last visited Sept. 26, 2005] (Preclearance Submission No. 2003-2956).

[42] As mentioned above, in a lawsuit brought under Section 5, alleging that required preclearance has not been obtained, the normal remedy is an injunction against the enforcement of the challenged voting change and an

Merced County therefore respectfully requests that the Committee consider amending Section 5's enforcement provisions to accord a jurisdiction reasonable notice and an opportunity to respond to an action either by indicating compliance with the preclearance requirements or by promptly curing the deficiency. The lawsuit would then be dismissed promptly without the necessity of further litigation once preclearance is obtained.

CONCLUSION

On behalf of the County of Merced, we thank you for considering these comments and observations. We look forward to working with the Committee to achieve the reforms described above that will keep the Sections 4 and 5 true to their important purpose and stronger against possible constitutional challenge.

Sincerely,

Marguerite Mary Leoni Robert Naylor Christopher E. Skinnell

MML/CES/slf

Enclosures/Attachments

cc: Stephen M. Jones, Merced County Auditor-Recorder
Ruben Castillo, Merced County Counsel

#1965.02

---

order to seek preclearance from the Department of Justice or the D.C. District Court. This is because unless such a challenge is brought in the federal District Court for the District of Columbia—which it need not be (*see Lopez v. Monterey County* (N.D. Cal. 1994) 871 F.Supp. 1254)—the court hearing the case will lack jurisdiction to determine the merits of whether the proposed change should be precleared. (*See Lopez v. Monterey County, supra*, 519 U.S. at 24.) In other words, the remedy for failure to seek preclearance is typically an order to seek preclearance.

U.S. Department of Justice

Civil Rights Division

30

Office of the Assistant Attorney General

Washington, D.C. 20530

Mr. Kenneth L. Randol
Merced County Clerk
2222 M Street
Merced, California 95340

APR 3 1992

Dear Mr. Randol:

This refers to the redistricting plan for the board of supervisors in Merced County, California, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973c. We received your responses to our request for additional information on February 3 and 18, 1992.

We have considered carefully the information you have provided, as well as information from other interested parties. The 1990 Census reports that Hispanics constitute approximately one-third of the county's population, and that the Hispanic share of the county's population grew substantially during the 1980s. Under the existing districting plan, the Hispanic share of the population is greatest in District 2, where Hispanics currently comprise about 42 percent of the population. During the redistricting process the county demographer's alternative plans showed that Hispanic voting strength in that district could be increased to more than a majority of its population by eliminating the fragmentation of the Hispanic community around the City of Merced and by including the City of Livingston in District 2. Members of the Hispanic community, as well as persons from the black community, urged the adoption of a plan that recognized the increased minority population in the county.

The county, however, rejected the approach to redistricting developed by its demographer and has submitted a plan in which Hispanics are not a majority of the population in any district. We have reviewed the county's stated reasons for its decision and are concerned that a desire to protect the incumbent supervisors may have prevailed over the interest of providing minorities an opportunity to elect their preferred candidate. Incumbency protection may in the appropriate circumstances be a proper redistricting goal but we cannot preclear a plan where such protection is obtained at the expense of recognizing the community of interest shared by insular minorities. See, e.g., Garza v. Los Angeles County, 918 F.2d 763, 771 (9th Cir. 1990), cert. denied, 111 S. Ct. 681 (1991); Ketchum v. Byrne, 740 F.2d 1398, 1408-09 (7th Cir. 1984), cert. denied, 471 U.S. 1135 (1985).

EXHIBIT A

RECEIVED
APR - 7

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. See 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, as I must under the Voting Rights Act, that the county's 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 redistricting plan 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. In addition, you may request that the Attorney General reconsider the objection. However, until the objection is withdrawn or a judgment from the District of Columbia Court is obtained, the redistricting plan continues to be legally unenforceable. Clark v. Roemer, 111 S. Ct. 2096 (1991); 28 C.F.R. 51.10 and 51.45.

To enable us to meet our responsibility to enforce the Voting Rights Act, please inform us of the action Merced County plans to take concerning this matter. If you have any questions, you should call Mark A. Posner (202-307-1388), an attorney in the Voting Section.

Sincerely,

John R. Dunne
Assistant Attorney General
Civil Rights Division

MERCED COUNTY

BOARD OF SUPERVISORS

2222 "M" STREET - MERCED, CALIFORNIA 95340 - TELEPHONE (209) 385-7366 - FAX NO. (209) 385-7375

April 14, 1992

Mr. John R. Dunne
Assistant Attorney General
Civil Rights Division
U.S. Department of Justice
Washington, D.C. 20530

Dear Mr. Dunne:

This is to acknowledge receipt of your April 3, 1992, Letter of Objection regarding the redistricting plan for Merced County, California.

Your letter and subsequent conversations with your staff have clarified the options available to the County. The options of seeking a declaratory judgement from the U.S. District Court, requesting Attorney General reconsideration or developing a new plan were discussed at the Merced County Board of Supervisors meeting on April 14, 1992.

In a unanimous vote, the Supervisors decided to develop a new map proposal to be forwarded to you for formal review as soon as possible. In addition, the Board has decided to move the primary elections for both County Supervisors and members of the Central Democratic and Republican Committees to coincide with the November general elections, providing preclearance is achieved. Subsequent run-off elections, if required, would be held in late December 1992, or early January 1993.

It is our intention to ensure everyone in Merced County has an opportunity to offer their ideas regarding the redistricting of supervisorial boundaries and believe the effort will produce a plan that meets Section 5 criteria and your staff recommendations. We do ask that you give our new proposal expeditious handling when received.

Sincerely,

Ken Randol,
County Clerk

92-04-14 HOME HEALTH AGENCY OF MERCED COUNTY
Upon motion of Supervisor Davenport, seconded by Supervisor Bogna, duly carried, the Board approves and authorizes the Chairman to sign Contract No. 8047 with Cheryl Johnson, S.T. to provide Speech Therapy Services through Home Health Agency of Merced County.
Ayes: Klinger, Davenport, Bogna, Peterson, O'Banion

92-04-14 MCCESD
Upon motion of Supervisor Bogna, seconded by Supervisor Peterson, duly carried, the Board authorizes Merced County Office of Economic and Strategic Development (MCCESD) to submit an Application for Solicitation for Cooperative Agreement Proposal (SCAP) 92-1 for continued funding of the California Central Valley Contract Procurement Center to the Department of Defense and designates Deputy County Administrator Karen Prentiss as the Merced County representative to sign said application.
Ayes: Klinger, Davenport, Bogna, Peterson, O'Banion

92-04-14 BOARD OF SUPERVISORS-Redistricting
Administrative Services Director Janet Hogan states subsequent to posting of the Agenda for the Board Meeting of April 14, 1992, the need for action arose regarding the response from the Department of Justice on supervisorial redistricting.

Upon motion of Supervisor O'Banion, seconded by Supervisor Peterson, duly carried, the Board determines that the need to take action on an item regarding the letter of objection from the Department of Justice arose after the agenda was posted and places the item on the agenda for consideration.
Ayes: Klinger, Davenport, Bogna, Peterson, O'Banion

Upon motion of Supervisor Davenport, seconded by Supervisor Bogna, duly carried, the Board ratifies the actions of the Redistricting Committee and directs staff to prepare a map incorporating the Department of Justice criteria as follows:

1. Create a district with the highest percentage Hispanic Population.

2. Include the City of Livingston in such a district.

3. Avoid fragmenting the Hispanic community in and around

Merced.

4. Create a district without regard to the residences of incumbent supervisors.

sets a public meeting April 22, 1992, at 5:00 p.m.; sets the Supervisorial primary and the Republican/Democratic Party Central Committee elections dates to coincide with November's General Election; renumbers the supervisorial districts; directs notification be sent to the Department of Justice of today's action and forward documentation of action with the draft map and tentatively sets first reading of the ordinance adopting a new redistricting map for April 28, 1992, at 11:00 a.m.
Ayes: Klinger, Davenport, Bogna, Peterson, O'Banion

92-04-14 PLANNING-Public Hearing
The time and date previously set for a public hearing to consider Zone Code Text Amendment No. 92-1 submitted by New Century Investment, Inc. An Ordinance to Amend Chapter 18.048, R-1-5000, Single-Family Residence Zone, Section 18.048.060, Development Standards, to increase the maximum dwelling building height from 17 feet, 1 story, to 30 feet, 2 stories in the County of Merced.

Planning Director Robert Smith requests the Board open and continue the public hearing to April 28, 1992, to allow adequate time for the Municipal Advisory Councils to provide input.

The Chairman opens the public hearing and asks if there is anyone wishing to speak in favor of or in opposition to the proposal. No one speaks.

Upon motion of Supervisor Bogna, seconded by Supervisor Peterson, duly carried, the Board continues the public hearing until April 28, 1992, at 10:30 a.m.
Ayes: Klinger, Davenport, Bogna, Peterson, O'Banion

92-04-14 PLANNING/ASHLEY ESTATES SUBDIVISION-Ordinance No. 1407-Public Hearing
The time and date previously set for a public hearing to consider AN ORDINANCE APPROVING A DEVELOPMENT AGREEMENT FOR "ASHLEY ESTATES SUBDIVISION" (Vesting Major Subdivision Application No. 981, Phase I and II) submitted by Roger Rule on property located on the northeast corner of Schendel Road and Merced Avenue in the Delhi Specific Urban Development Plan, in accordance with Article 2.5 of Chapter 4, Division 1 of the Government Code, and to consider acceptance of the Final Map related thereto.

Employment (HAPEE), Human Services Agency.

Fire re: February 1992 Medical Aid Report for Merced County, Fire.

San Joaquin Valley Agricultural Water Committee re: Report on Economic Impacts of the 1991 California Drought on San Joaquin Valley Agriculture and Related Industries, Board of Supervisors-Information.

City of Turlock re: Resolution of the Turlock City Council in support of Southern Pacific Passenger Rail Service, Board of Supervisors-Information.

Shasta County Supervisor K. Maurice Johannessen re: Opposition to attempt by CSAC or the Legislature to impose regional government, CSAC.

Office of the Secretary of State re: Voting Systems and Procedures Panel Meeting set for April 22, 1992, Board of Supervisors-Information.

State Controller re: Allocations to Certain Counties for Snow Removal and for Heavy Rainfall and Storm Damage pursuant to the Provisions of Secs. 2110 and 2118.5 Streets and Highways Code for the 1992-93 Fiscal Year, Board of Supervisors-Information.

Bureau of Reclamation re: Nimbus Fish Hatchery registers record year for Steelhead, Board of Supervisors-Information.
Ayes: Klinger, Davenport, Bogna, Peterson, O'Banion

92-04-07 BOARD OF SUPERVISORS-1991 Supervisorial Reapportionment
The Board places the letter from the U.S. Justice Department concerning the 1991 Supervisorial Reapportionment on the Board of Supervisors Agenda of April 14, 1992.
Present: Klinger, Davenport, Bogna, Peterson, O'Banion

92-04-07 The Board recesses at 4:17 p.m. with all members present to meet in Closed Session to continue discussions pursuant to Government Code Section 54956.9. The Board reconvenes at 5:37 p.m. with all members present.

92-04-07 BOARD OF SUPERVISORS - 1991 Supervisorial Reapportionment
County Myers states it appears Merced County has received

Councils and they are supporting the proposal at this time.

Mr. Smith reviews the staff report and advises the Planning Commission approved the Zone Code Text Amendment No. 92-1 with findings.

The Chairman asks if there is anyone wishing to speak in favor of or opposition to the Zone Code Text Amendment No. 92-1.

Vice-President and Director of New Century Investments Joe Barreiro speaks in favor of the project. Mr. Conrad Gloria of the Planada Municipal Advisory Council also speaks in favor.

Upon motion of Supervisor O'Banion, seconded by Supervisor Peterson, duly carried, the Board makes the Environmental Determination that Zone Code Text Amendment No. 92-1 will have no significant effect on the environment and the project is, therefore, not subject to CEQA according to Section 15061(b)(3).
Ayes: Klinger, Davenport, Begna, Peterson, O'Banion

Upon motion of Supervisor Peterson, seconded by Supervisor O'Banion, duly carried, based on findings the Board approves Zone Code Text Amendment No. 92-1, waives further reading and adopts Ordinance No. 1410.
Ayes: Klinger, Davenport, Begna, Peterson, O'Banion

92-04-28 BOARD OF SUPERVISORS-Redistricting/Reapportionment-Public Hearing

The time and date previously set for a public hearing to consider AN ORDINANCE ESTABLISHING BOUNDARIES OF SUPERVISORIAL DISTRICTS IN MERCED COUNTY AND REPEALING ORDINANCE NO. 1379.

Consultant John Fowler reviews the staff report from the Redistricting Committee and criteria used in developing a new map as set forth in the letter from the Department of Justice. Mr. Fowler further reviews the Census Blocks and adjustments to the boundaries of the proposed districts. He states a district (District 1) with a 51.6% total minority and 58.6% Hispanic Population has been created with this map.

County Counsel Dennis Myers reviews the letter received from the Department of Justice and states the criteria listed was used by the Redistricting Committee in developing the new map. He states it is Counsel's opinion the map previously submitted by the City of Gustine does not meet the criteria listed in the letter. He also reviews the California Election Code Section 35000.

Chairman Klinger reviews the 1980 Supervisorial Map. Supervisor Klinger requests the record to reflect all testimony,

map received from the City of Gustine and other documents received at the previous hearing be incorporated into this hearing be referanced and made part of the record. Supervisor Klinger reads correspondence received from Winton Municipal Advisory Council, City of Atwater, Santa Nella Chamber of Commerce and Los Banos Chamber of Commerce.

The Chairman asks if there is anyone wishing to speak in favor of or opposition to the redistricting map.

Judy Ciuba representing El Concilio submits El Concilio revision to County Plan A Map with a 60% Hispanic Population in which District 1 has been redrawn. She states they are presently working on another map with a 65% Hispanic Population and requests any decision be prolonged until that map can be submitted for Board review.

Maria Basulto, Chairman of the Chicano Latino Caucaus of Modesto states she has been involved in providing the El Concilio with data to be used in creating these maps with hispanic population and reviews the issues of the Latino Community throughout the state.

Atwater Chamber of Commerce Executive Director Terri Easley reads letter dated April 24, 1992 from Chamber President Mike Copeland which requests the Board consider developing additional alternative maps that address three specific criteria.

Javier Fuentes states he is involved in many hispanic organizations and feels his community has not been represented and hopes to see the hispanic issues being met and supports the 65% hispanic population map.

Gilbert Oyman requests the Board give consideration to the map submitted by El Concilio and requests a transcript of today's hearing be provided to the El Concilio.

Gloria Sandoval requests the next public meeting be held in the evening for the convenience of other residents and feels the Board should focus and increase on voter participation.

City of Gustine Manager Mark Melville urges if any further public hearings are held, the Board conduct them during evening hours. He states the map submitted by the City of Gustine was intended to meet the criteria as it was perceived by the City and reviews the City's points of disagreement.

Gene Stamm states there are five supervisors to represent the entire County and feels there has been too much emphasis on westside or eastside supervisors.

Conrad Gloria of Planada speaks in favor of the El Concilio

Map.

Ed Torres speaks in support of the letter from the Department of Justice stating they have taken the time to consider the current situation in our County and develop an appropriate mandate that follows the constitution.

Cliff Stoffle states he supports the first map submitted and feels the Board should not delay in making a decision.

Aldo Sanconi and Ed Mitchell suggest the County return to the Department of Justice and ask for a definite interpretation of the letter as to what is required of Merced County at this time.

The Chairman closes the public hearing.

The Board reviews the three maps submitted.

The Board recesses at 12:50 p.m. and reconvenes at 1:05 p.m with all members present.

Following discussion and upon motion of Supervisor Bogna, seconded by Supervisor Peterson, duly carried, the Board continues the public hearing until Monday, May 4, 1992, at 6:00 p.m..
Ayes: Klinger, Davenport, Bogna, Peterson, O'Banion

Upon motion of Supervisor Davenport, seconded by Supervisor Bogna, duly carried, the Board waives further reading of the proposed ordinance and sets second reading May 5, 1992, at 11:00 a.m.; adopts the El Concilio Revision to County Plan A and requests any additional maps to be considered be presented to the Board by Friday, May 1, 1992.
Ayes: Klinger, Davenport, Bogna, Peterson, O'Banion

92-04-28 CORRESPONDENCE
Upon motion of Supervisor Davenport, seconded by Supervisor Peterson, duly carried, the Board places the following Miscellaneous Correspondence on file:

Library re: Grolier National Library Week Grant Application, Library.

Library re: Library Services and Construction Act Grant Proposal, Library.

Le Grand Union Elementary School District re: Fourteen Day Notice of Proposal to Implement Developer Fees, Board of Supervisors-Information.

U.S. Department of Justice
Civil Rights Division

Voting Section
P.O. Box 66128
Washington, DC 20035-6128

FAX TRANSMITTAL SHEET

Date: Sep. 2, 2003

To:
Name: Mr. Chris Skinnell
Organization: Neilson, Merksamer, Parrinello, Mueller & Naylor, LLP
FAX No: 415/388-6874
Off. Phone: 415/389-6800

From:
Name: Suzanne Stafford
Organization: USDOJ/CRT/Voting Section
FAX No: 202/307-3961
Off. Phone: 202/514-6197

Subject: The Section 5 Submission Tracking and Processing System (STAPS) Report that you requested.

Number of pages transmitted (including this sheet): 36
(30 Pages maximum)

EXHIBIT B

U.S. Department of Justice

Civil Rights Division

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

September 2, 2003

Chris Skinnell
Neilson, Merksamer, Parrinello,
Mueller & Naylor, LLP
591 Redwood Highway, #4000
Mill Valley, California 94941-3039

Dear Mr. Skinnell:

RE: Section 5 Submission Tracking and Processing System (STAPS) Report

Attached please find the records you requested regarding "a copy of Merced County, California's Submission Tracking and Processing (STAPS) Report dating back to 1972."

Please feel free to contact me at (202) 514-6197, if you have any questions.

Sincerely,

Suzanne Stafford

Suzanne Stafford
Paralegal Specialist,
Voting Section

STATE OF CALIFORNIA

SUB.	COUNTY	CITY	TYPE OF CHANGE	DESCRIPTION	ACT	YEAR	STATUS	RESUB	LITIGATION	RECEIVED	NOTIFIED
C7948			ELECTION LAW	COUNTY FLOOD CO	SB-473-	1979	NO DETERMINA			12-04-79	01-31-80
C7949			ELECTION LAW	MUD SPECIAL ELE	AB-147-	1979	NO DETERMINA			12-04-79	01-31-80
C7950			ELECTION LAW	SPECIAL DISTRIC	S-1606-	1978	NO DETERMINA			12-04-79	01-31-80
C7951			ELECTION LAW	GSOL HAZ ABATE	S-1195-	1978	NO DETERMINA			12-04-79	01-31-80
C7952			ELECTION LAW	DEMOC PRES PRIM	SB-843-	1976	NO DETERMINA			12-04-79	01-31-80
C7953			REREGISTRATION	REGISTRATION	SB-843-	1979	NO DETERMINA			12-04-79	01-31-80
C7954			REREGISTRATION	REGISTRATION	SB-843-	1976	NO DETERMINA			12-04-79	01-31-80
X2595	FRESNO		OTHER	BILINGUAL	RE D 23	1994	PENDING			09-26-77	
A2897	FRESNO		OTHER	BILINGUAL	RE D 20	1975	PENDING			09-26-77	
X7008	KINGS		OTHER	BILENGUAL			PENDING			**-**-**	06-04-76
X2310	LOS ANGELE	SIGNAL HIL	OTHER	BI-LINGUAL			NOT ENACTED			02-02-76	
1948	MERCED		ELECTION LAW	COURT CONSOLIDA			NO OBJECTION			01-26-76	03-12-76
X7007	MERCED		OTHER	BILINGUAL			NO OBJECTION			08-17-76	08-17-76
X7080	MERCED		REREGISTRATION	PURGE VOTERS			NO OBJECTION			08-17-76	08-17-76
X7081	MERCED		PRECINCTS	CONSOL VOT PRC			NO OBJECTION			08-17-76	08-17-76
X7082	MERCED		POLLING PLACE	POLL PL			NO OBJECTION			08-17-76	08-17-76
X7083	MERCED		POLLING PLACE	POLL PL			NO OBJECTION			08-17-76	08-17-76
X7084	MERCED		POLLING PLACE	POLL PL			NO OBJECTION			08-17-76	08-17-76
X7085	MERCED		POLLING PLACE	POLL PL			NO OBJECTION			08-17-76	08-17-76
X7086	MERCED		POLLING PLACE	POLL PL			NO OBJECTION			08-17-76	08-17-76
X8077	MERCED		REDISTRICTING	REAPP SUPER DIS			NO DETERMINA			08-27-76	09-28-76
X8644	MERCED		REREGISTRATION	ADD'T REGISTRAT			NO OBJECTION			10-14-76	12-07-76
X8645	MERCED		REREGISTRATION	POST CARD REGIS			NO OBJECTION			10-14-76	12-07-76
A0148	MERCED		OTHER	BILINGUAL			NO DETERMINA			03-07-77	05-05-77
A4888	MERCED		OTHER	BIL PROCEDURES			NO OBJECTION			03-10-78	04-04-78
A8480	MERCED		OTHER	BIL PROCEDURES			NO OBJECTION			10-24-78	12-19-78
A3239	MERCED	UNIF DIST	ELECTION LAW	GENERAL ELE			NO OBJECTION			11-08-77	01-04-77
A3240	MERCED	UNIF DIST	OTHER	BILINGUAL			NO OBJECTION			11-08-77	01-04-77
V6232	MONTEREY		REDISTRICTING	COURT-ORDERED			NO OBJECTION			04-19-74	06-11-74
V6233	MONTEREY		PRECINCTS	COURT-ORDERED			NO OBJECTION			04-19-74	06-11-74
X5979	MONTEREY		PRECINCTS	PRC&BDRY LINE C			NO OBJECTION			04-19-76	05-22-76
X5980	MONTEREY			VOT MACHINES			NO OBJECTION			04-19-76	05-22-76
X6756	MONTEREY		PRECINCTS	PRC LINE			NO OBJECTION			05-17-76	06-29-76
X8510	MONTEREY		POLLING PLACE	PRECINCT LINE			NO OBJECTION			09-28-76	11-17-76
X8812	MONTEREY		REREGISTRATION	POSTCARD REG			OBJECTION			01-03-77	03-04-77
X8813	MONTEREY		OTHER	BILINGUAL			OBJECTION			01-03-77	03-04-77
A0537	MONTEREY		OTHER	BILINGUAL BALLO			NO OBJECTION			04-04-77	06-01-77
A1265	MONTEREY		PRECINCTS	PRC LINE			NO OBJECTION			05-20-77	08-18-77
A1266	MONTEREY		PRECINCTS	NEW PRC			NO OBJECTION			05-20-77	08-18-77
A1267	MONTEREY		ANNEXATION	ANNEX			NO OBJECTION			05-20-77	08-18-77
A2611	MONTEREY			PUNCH CARD			NO OBJECTION			09-19-77	09-19-77

11-18

Date: 09/02/2003 Submission Tracking and Processing System (STAR) Page: 1 Of 33
Time: 10:06 AM Past and Current Submissions Report Public

Selected Report Date: 01/01/1972 TO 09/02/2003 **Selected CA Jurisdiction:** MERCED
Selected Staff :
Selected First Due Out Date:

STATE: CA
COUNTY: MERCED
SUBJURISDICTION: ATWATER ELEMENTARY SCHOOL DISTRICT
****
Sub Number: 1994-3511
****

Change Type	Description Code	Act/Ord Number	Act/Ord Date	Date Of Action	Action Code
OPEN: None					
CLOSED:					
Deannex				08/26/1994	Sub
Change Comments:				10/18/1994	Add info recd
				10/25/1994	No obj

STATE: CA
COUNTY: MERCED
SUBJURISDICTION: ATWATER ELEMENTARY SCHOOL DISTRICT
****
Sub Number: 2002-2951
****

Change Type	Description Code	Act/Ord Number	Act/Ord Date	Date Of Action	Action Code
OPEN: None					
CLOSED:					
Annex			2002	05/15/2002	Sub
Change Comments:	approved by the Merced County Committee on School District Organization on 2-12-02			07/09/2002	Add info recd
				07/15/2002	No obj

Date: 09/02/2003 — Submission Tracking and Processing System
Time: 10:06 AM — Past and Current Submissions Report — Public

Selected Report Date: 01/01/1972 TO 09/02/2003 Selected CA
Selected Staff : Jurisdiction: MERCED
Selected First Due Out Date:

STATE: CA
COUNTY: MERCED
SUBJURISDICTION: DELHI ELEMENTARY SCHOOL DISTRICT
****
Sub Number: 1993-0255
****

Change Type	Description Code	Act/Ord Number	Act/Ord Date	Date Of Action	Action Code
OPEN: None					
CLOSED:					
Spcl election				01/25/1993	Sub
Change Comments: 6/8/93				03/23/1993	Add info recd
				03/25/1993	No obj
Dissolve jur				01/25/1993	Sub
Change Comments:				03/23/1993	Add info recd
				03/25/1993	No obj

STATE: CA
COUNTY: MERCED
SUBJURISDICTION: DELHI UNIFIED SCHOOL DISTRICT
****
Sub Number: 1993-0254
****

Change Type	Description Code	Act/Ord Number	Act/Ord Date	Date Of Action	Action Code
OPEN: None					
CLOSED:					
Crte spcl dist				01/25/1993	Sub
Change Comments:				03/23/1993	Add info recd
				03/25/1993	No obj

Selected Report Date: 01/01/1972 TO 09/02/2003 **Selected Jurisdiction:** CA MERCED
Selected Staff :
Selected First Due Out Date:

STATE: CA
COUNTY: MERCED
SUBJURISDICTION: DELHI UNIFIED SCHOOL DISTRICT
****
Sub Number: 1993-2244
****

Change Type	Description Code	Act/Ord Number	Act/Ord Date	Date Of Action	Action Code
OPEN: None					
CLOSED:					
Spcl election	Referendum			06/02/1993	Sub
Change Comments:	6/8/93			07/19/1993	Add info recd
				07/28/1993	ND/no ch

STATE: CA
COUNTY: MERCED
SUBJURISDICTION: DELHI UNIFIED SCHOOL DISTRICT
****
Sub Number: 1995-3933
****

Change Type	Description Code	Act/Ord Number	Act/Ord Date	Date Of Action	Action Code
OPEN: None					
CLOSED:					
Dissolve jur		90	1995	12/07/1995	Sub
Change Comments:	temp. exemption frm. lapsation procedure for dist.			02/05/1996	No obj

elected Report Date:01/01/1972 TO 09/02/2003 Selectad CA
elected Staff : Jurisdiction: MERCED
elected First Due Out Date:

STATE: CA
COUNTY: MERCED
SUBJURISDICTION: DOS PALOS JOINT UNION ELEMENTARY SCHOOL DISTRICT
****
Sub Number: 1992-3584
****

Change Type	Description Code	Act/Ord Number	Act/Ord Date	Date Of Action	Action Code
OPEN: None					
CLOSED:					
Dissolve jur				08/04/1992	Sub
Change Comments: consolidated with two other school dists				09/24/1992	Add info recd
				10/05/1992	No obj

STATE: CA
COUNTY: MERCED
SUBJURISDICTION: DOS PALOS JOINT UNION HIGH SCHOOL DISTRICT
****
Sub Number: 1992-3585
****

Change Type	Description Code	Act/Ord Number	Act/Ord Date	Date Of Action	Action Code
OPEN: None					
CLOSED:					
Consol jur				08/04/1992	Sub
Change Comments: consolidated with two other school dists				09/24/1992	Add info recd
				10/05/1992	No obj

ate: 09/02/2003 Submi ion Tracking and Processing Sys (STAPS) Page:
ime: 10:06 AM Pa and Current Submissions Report Public

elected Report Date: 01/01/1972 TO 09/02/2003 Selected CA
elected Staff : Jurisdiction: MERCED
elected First Due Out Date:

STATE: CA
COUNTY: MERCED
SUBJURISDICTION: DOS PALOS-ORO LOMA UNIFIED SCHOOL DISTRICT
****
Sub Number: 1992-3587
****

Change Type	Description Code	Act/Ord Number	Act/Ord Date	Date Of Action	Action Code
OPEN: None					
CLOSED:					
Consol jur				08/04/1992	Sub
Change Comments: Of three school dists				09/24/1992	Add info recd
				10/05/1992	No obj
MOE	At large			08/04/1992	Sub
Change Comments:				09/24/1992	Add info recd
				10/05/1992	No obj
Num of offcls				08/04/1992	Sub
Change Comments: 7-member board				09/24/1992	Add info recd
				10/05/1992	No obj
Spcl election				08/04/1992	Sub
Change Comments: 6/2/92				09/24/1992	Add info recd
				10/05/1992	No obj
Spcl election	Runoff			08/04/1992	Sub
Change Comments: 11/3/92				09/24/1992	Add info recd
				10/05/1992	No obj

Received Sep-02-03 11:51am From-202 307 3961 To-NIELSEN MERKSAMER - Page 08

Date: 09/02/2003 Submission Tracking and Processing System (STAR) Page: 8 of 33
Time: 10:06 AM Pe and Current Submissions Report Public

Selected Report Date: 01/01/1972 TO 09/02/2003 **Selected CA Jurisdiction:** MERCED
Selected Staff :
Selected First Due Out Date:

STATE: CA
COUNTY: MERCED
SUBJURISDICTION: GUSTINE UNIFIED SCHOOL DISTRICT
****
Sub Number: 1996-0351
****

Change Type	Description Code	Act/Ord Number	Act/Ord Date	Date Of Action	Action Code
OPEN: None					
CLOSED:					
Annex			1995	01/18/1996	Sub
Change Comments: 10-4-95				03/14/1996	No obj
Deannex			1995	01/18/1996	Sub
Change Comments: 10-4-95				03/14/1996	No obj

STATE: CA
COUNTY: MERCED
SUBJURISDICTION: HILMAR UNIFIED SCHOOL DISTRICT
****
Sub Number: 1993-2328
****

Change Type	Description Code	Act/Ord Number	Act/Ord Date	Date Of Action	Action Code
OPEN: None					
CLOSED:					
Spcl election	Bond election			06/02/1993	Sub
Change Comments: 6/8/93				07/29/1993	No obj

Date: 09/02/2003 — Submission Tracking and Processing System (STAR)
Time: 10:06 AM — Past and Current Submissions Report - Public

Selected Report Date: 01/01/1972 TO 09/02/2003 **Selected CA Jurisdiction:** MERCED
Selected Staff :
Selected First Due Out Date:

STATE: CA
COUNTY: MERCED
SUBJURISDICTION: LOS BANOS UNIFIED SCHOOL DISTRICT
****
Sub Number: 1993-2326
****

Change Type	Description Code	Act/Ord Number	Act/Ord Date	Date Of Action	Action Code
OPEN: None					
CLOSED:					
Spcl election	Bond election			06/02/1993	Sub
Change Comments: 6/8/93				07/19/1993	Add info recd
				07/29/1993	No obj

STATE: CA
COUNTY: MERCED
SUBJURISDICTION: LOS BANOS UNIFIED SCHOOL DISTRICT
****
Sub Number: 1996-0350
****

Change Type	Description Code	Act/Ord Number	Act/Ord Date	Date Of Action	Action Code
OPEN: None					
CLOSED:					
Annex			1995	01/18/1996	Sub
Change Comments: 10-04-95				03/14/1996	No obj
Deannex			1995	01/18/1996	Sub
Change Comments: 10-04-95				03/14/1996	No obj

Selected Report Date: 01/01/1972 TO 09/02/2003 **Selected Jurisdiction:** CA MERCED
Selected Staff :
Selected First Due Out Date:

STATE: CA
COUNTY: MERCED
SUBJURISDICTION: LOS BANOS UNIFIED SCHOOL DISTRICT
****
Sub Number: 2002-4773
****

Change Type	Description Code	Act/Ord Number	Act/Ord Date	Date Of Action	Action Code
OPEN: None					
CLOSED:					
Gen election	Date change			09/16/2002	Sub
Change Comments:	to statewide general election date			11/05/2002	Add info recd
				11/08/2002	No obj
Impl schedule				09/16/2002	Sub
Change Comments:	extension of terms to implement election date change			11/05/2002	Add info recd
				11/08/2002	No obj

STATE: CA
COUNTY: MERCED
SUBJURISDICTION: MCSWAIN ELEMENTARY SCHOOL DISTRICT
****
Sub Number: 1994-4526
****

Change Type	Description Code	Act/Ord Number	Act/Ord Date	Date Of Action	Action Code
OPEN: None					
CLOSED:					
Annex				12/05/1994	Sub
Change Comments:	12-15-93			01/23/1995	Add info recd
				02/03/1995	No obj
Deannex				12/05/1994	Sub
Change Comments:	12-15-93			01/23/1995	Add info recd
				02/03/1995	No obj

Selected Report Date: 01/01/1972 TO 09/02/2003 **Selected Jurisdiction:** CA MERCED
Selected Staff :
Selected First Due Out Date:

STATE: CA
COUNTY: MERCED
SUBJURISDICTION: MCSWAIN ELEMENTARY SCHOOL DISTRICT
****
Sub Number: 2002-2950
****

Change Type	Description Code	Act/Ord Number	Act/Ord Date	Date Of Action	Action Code
OPEN: None					
CLOSED:					
Deannex			2002	05/15/2002	Sub
Change Comments:	approved by the Merced County Committee on School District Organization on 2-12-02			07/09/2002	Add info recd
				07/15/2002	No obj

STATE: CA
COUNTY: MERCED
SUBJURISDICTION: MCSWAIN UNION ELEMENTARY SCHOOL DISTRICT
****
Sub Number: 1994-3512
****

Change Type	Description Code	Act/Ord Number	Act/Ord Date	Date Of Action	Action Code
OPEN: None					
CLOSED:					
Annex				08/26/1994	Sub
Change Comments:				10/18/1994	Add info recd
				10/25/1994	No obj

Date: 09/02/2003 Submission Tracking and Processing System

Time: 10:06 AM Pa and Current Submissions Report Public

Selected Report Date: 01/01/1972 TO 09/02/2003 **Selected Jurisdiction:** CA MERCED
Selected Staff :
Selected First Due Out Date:

STATE: CA
COUNTY: MERCED
SUBJURISDICTION: MERCED
****
Sub Number: 1993-0134
****

Change Type	Description Code	Act/Ord Number	Act/Ord Date	Date Of Action	Action Code
OPEN: None					
CLOSED:					
Method slctn	Mayor			01/19/1993	Sub
Change Comments: at lg.				03/18/1993	No obj
Spcl election	Referendum			01/19/1993	Sub
Change Comments: 11/3/92				03/18/1993	No obj
Term office	Mayor			01/19/1993	Sub
Change Comments: 2 yrs.				03/18/1993	No obj

STATE: CA
COUNTY: MERCED
SUBJURISDICTION: MERCED CITY ELEMENTARY SCHOOL DISTRICT
****
Sub Number: 1994-4525
****

Change Type	Description Code	Act/Ord Number	Act/Ord Date	Date Of Action	Action Code
OPEN: None					
CLOSED:					
Annex				12/05/1994	Sub
Change Comments: 12-15-93				01/23/1995	Add info recd
				02/03/1995	No obj
Deannex				12/05/1994	Sub
Change Comments: 12-15-93				01/23/1995	Add info recd
				02/03/1995	No obj

Selected Report Date:01/01/1972 TO 09/02/2003 Selected CA
Selected Staff : Jurisdiction: MERCED
Selected First Due Out Date:

STATE: CA
COUNTY: MERCED
SUBJURISDICTION: MERCED COMMUNITY COLLEGE DISTRICT
****
Sub Number: 1993-3911
****

Change Type	Description Code	Act/Ord Number	Act/Ord Date	Date Of Action	Action Code
OPEN: None					
CLOSED:					
Districting				10/12/1993	Sub
Change Comments:				12/13/1993	No obj
MOE	SMDs			10/12/1993	Sub
Change Comments:				12/13/1993	No obj

STATE: CA
COUNTY: MERCED
SUBJURISDICTION: MERCED COMMUNITY COLLEGE DISTRICT
****
Sub Number: 2002-0580
****

Change Type	Description Code	Act/Ord Number	Act/Ord Date	Date Of Action	Action Code
OPEN: None					
CLOSED:					
Redist				02/05/2002	Sub
Change Comments: 2001				04/05/2002	Add info recd
				04/08/2002	No obj

Selected Report Date: 01/01/1972 TO 09/02/2003 Selected Jurisdiction: CA MERCED
Selected Staff :
Selected First Due Out Date:

STATE: CA
COUNTY: MERCED
SUBJURISDICTION: MERCED UNION HIGH SCHOOL DISTRICT
****
Sub Number: 1993-1114
****

Change Type	Description Code	Act/Ord Number	Act/Ord Date	Date Of Action	Action Code
OPEN: None					
CLOSED:					
Bndry ch				01/25/1993	Sub
Change Comments:				03/23/1993	Add info recd
				03/25/1993	No obj

STATE: CA
COUNTY: MERCED
SUBJURISDICTION: PLANADA ELEMENTARY SCHOOL DISTRICT
****
Sub Number: 1993-2327
****

Change Type	Description Code	Act/Ord Number	Act/Ord Date	Date Of Action	Action Code
OPEN: None					
CLOSED:					
Spcl election	Bond election			06/02/1993	Sub
Change Comments:	6/8/93			07/29/1993	No obj

Selected Report Date:01/01/1972 TO 09/02/2003 Selected CA
Selected Staff : Jurisdiction: MERCED
Selected First Due Out Date:

STATE: CA
COUNTY: MERCED
SUBJURISDICTION: YOSEMITE COMMUNITY COLLEGE DISTRICT
****
Sub Number: 2002-1529
****

Change Type	Description Code	Act/Ord Number	Act/Ord Date	Date Of Action	Action Code
OPEN: None					
CLOSED:					
				03/13/2002	Sub
Redist				04/17/2002	Add info recd
Change Comments: Trustee dists				04/22/2002	Add info recd
				05/13/2002	No obj

STATE: CA
COUNTY: MERCED
SUBJURISDICTION:
****
Sub Number: 1980-1401
****

Change Type	Description Code	Act/Ord Number	Act/Ord Date	Date Of Action	Action Code
OPEN: None					
CLOSED:					
				05/27/1980	Sub
Biling pro				07/24/1980	No obj
Change Comments:					

Selected Report Date:01/01/1972 TO 09/02/2003 Selected CA Jurisdiction: MERCED
Selected Staff :
Selected First Due Out Date:

STATE: CA
COUNTY: MERCED
SUBJURISDICTION:
****
Sub Number: 1980-1402
****

Change Type	Description Code	Act/Ord Number	Act/Ord Date	Date Of Action	Action Code
OPEN: None					
CLOSED:					
Poll place				07/16/1980	Sub
Change Comments:				08/15/1980	No obj
Poll place				07/16/1980	Sub
Change Comments:				08/15/1980	No obj
Poll place				07/16/1980	Sub
Change Comments:				08/15/1980	No obj

STATE: CA
COUNTY: MERCED
SUBJURISDICTION:
****
Sub Number: 1980-1403
****

Change Type	Description Code	Act/Ord Number	Act/Ord Date	Date Of Action	Action Code
OPEN: None					
CLOSED:					
Other				10/28/1980	Sub
Change Comments:				11/18/1980	Improp sub
				12/27/1994	Admin close

ate: 09/02/2003 **Submission Tracking and Processing System** ... **Pa... nd Current Submissions Report** ... **ublic**

ime: 10:06 AM

elected Report Date:01/01/1972 TO 09/02/2003 **Selected** CA
elected Staff : **Jurisdiction:** MERCED
elected First Due Out Date:

STATE: CA
COUNTY: MERCED
SUBJURISDICTION:
****
Sub Number: 1981-1327
****

Change Type	Description Code	Act/Ord Number	Act/Ord Date	Date Of Action	Action Code
OPEN: None					
CLOSED:					
Redist		1060	1981	10/13/1981	Sub
Change Comments:				11/19/1981	Add info recd
				12/11/1981	No obj

STATE: CA
COUNTY: MERCED
SUBJURISDICTION:
****
Sub Number: 1982-1639
****

Change Type	Description Code	Act/Ord Number	Act/Ord Date	Date Of Action	Action Code
OPEN: None					
CLOSED:					
Precinct				11/05/1982	Sub
Change Comments: REALIGN				01/04/1983	More info reqst
				01/22/1983	Add info recd
				03/23/1983	No obj

Received Sep-02-03 11:51am From-202 307 3961 To-NIELSEN MERKSAMER Page 18

ite: 09/02/2003 Submi--ion Tracking and Processing Syst-- (-----) Page: -- -- --
ime: 10:06 AM Pa-- and Current Submissions Report(Public

elected Report Date:01/01/1972 TO 09/02/2003 Selected CA
elected Staff : Jurisdiction: MERCED
elected First Due Out Date:

STATE: CA
COUNTY: MERCED
SUBJURISDICTION:
****
Sub Number: 1983-1509
****

Change Type	Description Code	Act/Ord Number	Act/Ord Date	Date Of Action	Action Code
OPEN: None					
CLOSED:					
				01/22/1983	Sub
Precinct Change Comments:				03/23/1983	No obj
				01/22/1983	Sub
Precinct Change Comments:				03/23/1983	No obj
				01/22/1983	Sub
Precinct Change Comments:				03/23/1983	No obj
				01/22/1983	Sub
Precinct Change Comments:				03/23/1983	No obj
				01/22/1983	Sub
Precinct Change Comments:				03/23/1983	No obj
				01/22/1983	Sub
Precinct Change Comments:				03/23/1983	No obj
				01/22/1983	Sub
Precinct Change Comments:				03/23/1983	No obj
				01/22/1983	Sub
Precinct Change Comments:				03/23/1983	No obj
				01/22/1983	Sub
Precinct Change Comments:				03/23/1983	No obj
				01/22/1983	Sub
Precinct Change Comments:				03/23/1983	No obj
				01/22/1983	Sub
Precinct Change Comments:				03/23/1983	No obj
				01/22/1983	Sub
Precinct Change Comments:				03/23/1983	No obj

ate: 09/02/2003 Submission Tracking and Processing System (STAPS) Page: 17 of 33
ime: 10:06 AM Pa... and Current Submissions Report ...ublic

elected Report Date:01/01/1972 TO 09/02/2003 Selected CA
elected Staff : Jurisdiction: MERCED
elected First Due Out Date:

STATE: CA
COUNTY: MERCED
SUBJURISDICTION:
****
Sub Number: 1983-1509
****

Change Type	Description Code	Act/Ord Number	Act/Ord Date	Date Of Action	Action Code
CLOSED:					
Precinct				01/22/1983	Sub
Change Comments:				03/23/1983	No obj
Poll place				01/22/1983	Sub
Change Comments:				03/23/1983	No obj
Poll place				01/22/1983	Sub
Change Comments:				03/23/1983	No obj
Poll place				01/22/1983	Sub
Change Comments:				03/23/1983	No obj
Poll place				01/22/1983	Sub
Change Comments:				03/23/1983	No obj
Poll place				01/22/1983	Sub
Change Comments:				03/23/1983	No obj
Poll place				01/22/1983	Sub
Change Comments:				03/23/1983	No obj
Poll place				01/22/1983	Sub
Change Comments:				03/23/1983	No obj
Poll place				01/22/1983	Sub
Change Comments:				03/23/1983	No obj
Poll place				01/22/1983	Sub
Change Comments:				03/23/1983	No obj
Poll place				01/22/1983	Sub
Change Comments:				03/23/1983	No obj
Poll place				01/22/1983	Sub
Change Comments:				03/23/1983	No obj

Received Sep-02-03 11:51am From-202 307 3961 To-NIELSEN MERKSAMER - Page 20

Selected Report Date:01/01/1972 TO 09/02/2003 Selected CA Jurisdiction: MERCED
Selected Staff :
Selected First Due Out Date:

STATE: CA
COUNTY: MERCED
SUBJURISDICTION:
****
Sub Number: 1983-1509
****

Change Type	Description Code	Act/Ord Number	Act/Ord Date	Date Of Action	Action Code
CLOSED:					
Poll place				01/22/1983	Sub
Change Comments:				03/23/1983	No obj
Poll place				01/22/1983	Sub
Change Comments:				03/23/1983	No obj

STATE: CA
COUNTY: MERCED
SUBJURISDICTION:
****
Sub Number: 1984-1858
****

Change Type	Description code	Act/Ord Number	Act/Ord Date	Date Of Action	Action Code
OPEN: None					
CLOSED:					
Poll place				04/24/1984	Sub
Change Comments:				06/22/1984	No obj
Poll place				04/24/1984	Sub
Change Comments:				06/22/1984	No obj

ate: 09/02/2003 Submission Tracking and Processing System (SMART) Page: 13 of 33
ime: 10:06 AM Pa and Current Submissions Report - Public
elected Report Date:01/01/1972 TO 09/02/2003 Selected CA
elected Staff : Jurisdiction: MERCED
elected First Due Out Date:

STATE: CA
COUNTY: MERCED
SUBJURISDICTION:
****
Sub Number: 1986-2361
****

Change Type	Description Code	Act/Ord Number	Act/Ord Date	Date Of Action	Action Code
OPEN: None					
CLOSED:					
Poll place				04/14/1986	Sub
Change Comments:				06/13/1986	No obj
Poll place				04/14/1986	Sub
Change Comments:				06/13/1986	No obj
Poll place				04/14/1986	Sub
Change Comments:				06/13/1986	No obj
Poll place				04/14/1986	Sub
Change Comments:				06/13/1986	No obj
Poll place				04/14/1986	Sub
Change Comments:				06/13/1986	No obj

STATE: CA
COUNTY: MERCED
SUBJURISDICTION:
****
Sub Number: 1986-2362
****

Change Type	Description Code	Act/Ord Number	Act/Ord Date	Date Of Action	Action Code
OPEN: None					
CLOSED:					
Biling pro				06/03/1986	Sub
Change Comments:				08/04/1986	No obj

Selected Report Date: 01/01/1972 TO 09/02/2003 **Selected** CA
Selected Staff : **Jurisdiction:** MERCED
Selected First Due Out Date:

STATE: CA
COUNTY: MERCED
SUBJURISDICTION:
****
Sub Number: 1986-2363
****

Change Type	Description Code	Act/Ord Number	Act/Ord Date	Date Of Action	Action Code
OPEN: None					
CLOSED:					
Precinct				04/14/1986	Sub
Change Comments: REALIGN				06/13/1986	No obj

STATE: CA
COUNTY: MERCED
SUBJURISDICTION:
****
Sub Number: 1991-4210
****

Change Type	Description Code	Act/Ord Number	Act/Ord Date	Date Of Action	Action Code
OPEN:					
Redist	Bd sups			11/08/1991	Sub
Change Comments:				01/07/1992	More info reqst
				02/03/1992	Add info recd
				02/18/1992	Add info recd
				04/03/1992	Obj
CLOSED: None					

ate: 09/02/2003 Submission Tracking and Processing System (STARS) Page: 21 of 33
ime: 10:06 AM Pa[illegible] and Current Submissions Report - Public

elected Report Date:01/01/1972 TO 09/02/2003 Selected CA
elected Staff : Jurisdiction: MERCED
elected First Due Out Date:

STATE: CA
COUNTY: MERCED
SUBJURISDICTION:
****
Sub Number: 1992-2463
****

Change Type	Description Code	Act/Ord Number	Act/Ord Date	Date Of Action	Action Code
OPEN: None					
CLOSED:					
Redist				05/18/1992	Sub
Change Comments: 1992				06/04/1992	Add info recd
				06/17/1992	No obj

Received Sep-02-03 11:51am From-202 307 3961 To-NIELSEN MERKSAMER - Page 24

Date: 09/02/2003 Submission Tracking and Processing System (STAPS) Page: 22 of 33

Time: 10:06 AM Pa[illegible] and Current Submissions Report[illegible] Public

Selected Report Date:01/01/1972 TO 09/02/2003 Selected CA
Selected Staff : Jurisdiction: MERCED
Selected First Due Out Date:

STATE: CA
COUNTY: MERCED
SUBJURISDICTION:
****
Sub Number: 1992-2465
****

Change Type	Description Code	Act/Ord Number	Act/Ord Date	Date Of Action	Action Code
OPEN: None					
CLOSED:					
Precinct	Consolidation			05/20/1992	Sub
Change Comments:				07/20/1992	No obj
Poll place	Changed			05/20/1992	Sub
Change Comments:				07/20/1992	No obj
Poll place	Changed			05/20/1992	Sub
Change Comments:				07/20/1992	No obj
Poll place	Changed			05/20/1992	Sub
Change Comments:				07/20/1992	No obj
Poll place	Changed			05/20/1992	Sub
Change Comments:				07/20/1992	No obj
Poll place	Changed			05/20/1992	Sub
Change Comments:				07/20/1992	No obj
Poll place	Changed			05/20/1992	Sub
Change Comments:				07/20/1992	No obj
Poll place	Changed			05/20/1992	Sub
Change Comments:				07/20/1992	No obj
Poll place	Changed			05/20/1992	Sub
Change Comments:				07/20/1992	No obj
Poll place	Changed			05/20/1992	Sub
Change Comments:				07/20/1992	No obj
Poll place	Changed			05/20/1992	Sub
Change Comments:				07/20/1992	No obj
Poll place	Changed			05/20/1992	Sub
Change Comments:				07/20/1992	No obj

Date: 09/02/2003 Submission Tracking and Processing System (STAPS) Page: 23 of 33
Time: 10:06 AM Pa[illegible] and Current Submissions Report[illegible] Public

Selected Report Date: 01/01/1972 TO 09/02/2003 **Selected** CA
Selected Staff : **Jurisdiction:** MERCED
Selected First Due Out Date:

STATE: CA
COUNTY: MERCED
SUBJURISDICTION:
****
Sub Number: 1992-2465
****

Change Type	Description Code	Act/Ord Number	Act/Ord Date	Date Of Action	Action Code
CLOSED:					
Precinct	Consolidation			05/20/1992	Sub
Change Comments:				07/20/1992	No obj
Precinct	Consolidation			05/20/1992	Sub
Change Comments:				07/20/1992	No obj
Precinct	Consolidation			05/20/1992	Sub
Change Comments:				07/20/1992	No obj
Precinct	Consolidation			05/20/1992	Sub
Change Comments:				07/20/1992	No obj
Precinct	Consolidation			05/20/1992	Sub
Change Comments:				07/20/1992	No obj
Precinct	Consolidation			05/20/1992	Sub
Change Comments:				07/20/1992	No obj

STATE: CA
COUNTY: MERCED
SUBJURISDICTION:
****
Sub Number: 1992-3247
****

Change Type	Description Code	Act/Ord Number	Act/Ord Date	Date Of Action	Action Code
OPEN: None					
CLOSED:					
Spcl election	Bd sups			07/06/1992	Sub
Change Comments:	& political committees 11/3/92			08/28/1992	No obj
Spcl election	Runoff			07/06/1992	Sub
Change Comments:	12/15/92			08/28/1992	No obj

Received Sep-02-03 11:51am From-202 307 3961 To-NIELSEN MERKSAMER - Page 26

Date: 09/02/2003 Submission Tracking and Processing System (STAPS) Page: 24 of 33
Time: 10:06 AM Past and Current Submissions Report - Public

Selected Report Date: 01/01/1972 TO 09/02/2003 **Selected Jurisdiction:** CA MERCED
Selected Staff :
Selected First Due Out Date:

STATE: CA
COUNTY: MERCED
SUBJURISDICTION:
****
Sub Number: 1992-4741
****

Change Type	Description Code	Act/Ord Number	Act/Ord Date	Date Of Action	Action Code
OPEN: None					
CLOSED:					
Precinct	Realignment			10/21/1992	Sub
Change Comments:				12/11/1992	Add info recd
				12/18/1992	No obj
Poll place	Changed			10/21/1992	Sub
Change Comments:				12/11/1992	Add info recd
				12/18/1992	No obj
Poll place	Changed			10/21/1992	Sub
Change Comments:				12/11/1992	Add info recd
				12/18/1992	No obj
Poll place	Changed			10/21/1992	Sub
Change Comments:				12/11/1992	Add info recd
				12/18/1992	No obj
Poll place	Changed			10/21/1992	Sub
Change Comments:				12/11/1992	Add info recd
				12/18/1992	No obj
Poll place	Changed			10/21/1992	Sub
Change Comments:				12/11/1992	Add info recd
				12/18/1992	No obj
Poll place	Changed			10/21/1992	Sub
Change Comments:				12/11/1992	Add info recd
				12/18/1992	No obj
Poll place	Changed			10/21/1992	Sub
Change Comments:				12/11/1992	Add info recd
				12/18/1992	No obj

Selected Report Date:01/01/1972 TO 09/02/2003 Selected CA
Selected Staff : Jurisdiction: MERCED
Selected First Due Out Date:

STATE: CA
COUNTY: MERCED
SUBJURISDICTION:
****
Sub Number: 1992-4741
****

Change Type	Description Code	Act/Ord Number	Act/Ord Date	Date Of Action	Action Code
CLOSED:					
Precinct	Consolidation			10/21/1992	Sub
Change Comments:	Merced 24 & 25			12/11/1992	Add info recd
				12/18/1992	No obj
Precinct	Added			10/21/1992	Sub
Change Comments:				12/11/1992	Add info recd
				12/18/1992	No obj
Precinct	Added			10/21/1992	Sub
Change Comments:				12/11/1992	Add info recd
				12/18/1992	No obj
Precinct	Added			10/21/1992	Sub
Change Comments:				12/11/1992	Add info recd
				12/18/1992	No obj
Precinct	Added			10/21/1992	Sub
Change Comments:				12/11/1992	Add info recd
				12/18/1992	No obj
Precinct	Added			10/21/1992	Sub
Change Comments:				12/11/1992	Add info recd
				12/18/1992	No obj
Precinct	Added			10/21/1992	Sub
Change Comments:				12/11/1992	Add info recd
				12/18/1992	No obj
Precinct	Added			10/21/1992	Sub
Change Comments:				12/11/1992	Add info recd
				12/18/1992	No obj

Selected Report Date: 01/01/1972 TO 09/02/2003 **Selected Jurisdiction:** CA MERCED
Selected Staff :
Selected First Due Out Date:

STATE: CA
COUNTY: MERCED
SUBJURISDICTION:
****
Sub Number: 1992-4741
****

Change Type	Description Code	Act/Ord Number	Act/Ord Date	Date Of Action	Action Code
CLOSED:					
Precinct	Added			10/21/1992	Sub
Change Comments:				12/11/1992	Add info recd
				12/18/1992	No obj
Precinct	Added			10/21/1992	Sub
Change Comments:				12/11/1992	Add info recd
				12/18/1992	No obj
Precinct	Added			10/21/1992	Sub
Change Comments:				12/11/1992	Add info recd
				12/18/1992	No obj
Precinct	Added			10/21/1992	Sub
Change Comments:				12/11/1992	Add info recd
				12/18/1992	No obj
Precinct	Added			10/21/1992	Sub
Change Comments:				12/11/1992	Add info recd
				12/18/1992	No obj
Precinct	Added			10/21/1992	Sub
Change Comments:				12/11/1992	Add info recd
				12/18/1992	No obj
Poll place	Added			10/21/1992	Sub
Change Comments:				12/11/1992	Add info recd
				12/18/1992	No obj
Poll place	Added			10/21/1992	Sub
Change Comments:				12/11/1992	Add info recd
				12/18/1992	No obj

Date: 09/02/2003 Submission Tracking and Processing System (STAPS) Page: 27 of 55
Time: 10:06 AM Past and Current Submissions Report - Public

Selected Report Date: 01/01/1972 TO 09/02/2003 **Selected Jurisdiction:** CA MERCED
Selected Staff :
Selected First Due Out Date:

STATE: CA
COUNTY: MERCED
SUBJURISDICTION:
****
Sub Number: 1992-4741
****

Change Type	Description Code	Act/Ord Number	Act/Ord Date	Date Of Action	Action Code
CLOSED:					
Poll place	Added			10/21/1992	Sub
Change Comments:				12/11/1992	Add info recd
				12/18/1992	No obj
Poll place	Added			10/21/1992	Sub
Change Comments:				12/11/1992	Add info recd
				12/18/1992	No obj
Poll place	Added			10/21/1992	Sub
Change Comments:				12/11/1992	Add info recd
				12/18/1992	No obj
Poll place	Added			10/21/1992	Sub
Change Comments:				12/11/1992	Add info recd
				12/18/1992	No obj
Poll place	Added			10/21/1992	Sub
Change Comments:				12/11/1992	Add info recd
				12/18/1992	No obj
Poll place	Added			10/21/1992	Sub
Change Comments:				12/11/1992	Add info recd
				12/18/1992	No obj
Poll place	Added			10/21/1992	Sub
Change Comments:				12/11/1992	Add info recd
				12/18/1992	No obj
Poll place	Added			10/21/1992	Sub
Change Comments:				12/11/1992	Add info recd
				12/18/1992	No obj

Selected Report Date: 01/01/1972 TO 09/02/2003 **Selected Jurisdiction:** CA MERCED
Selected Staff :
Selected First Due Out Date:

STATE: CA
COUNTY: MERCED
SUBJURISDICTION:
****
Sub Number: 1992-4741
****

Change Type	Description Code	Act/Ord Number	Act/Ord Date	Date Of Action	Action Code
CLOSED:					
Poll place	Added			10/21/1992	Sub
Change Comments:				12/11/1992	Add info recd
				12/18/1992	No obj

STATE: CA
COUNTY: MERCED
SUBJURISDICTION:
****
Sub Number: 1992-5360
****

Change Type	Description Code	Act/Ord Number	Act/Ord Date	Date Of Action	Action Code
OPEN: None					
CLOSED:					
Poll place	Changed			12/21/1992	Sub
Change Comments:				02/10/1993	Add info recd
				02/19/1993	No obj

Selected Report Date: 01/01/1972 TO 09/02/2003 **Selected Jurisdiction:** CA MERCED
Selected Staff :
Selected First Due Out Date:

STATE: CA
COUNTY: MERCED
SUBJURISDICTION:
****
Sub Number: 1993-4285
****

Change Type	Description Code	Act/Ord Number	Act/Ord Date	Date Of Action	Action Code
OPEN: None					
CLOSED:					
Spcl election	Referendum			11/08/1993	Sub
Change Comments: 11/2/93				12/07/1993	Add info recd
				01/07/1994	No obj

STATE: CA
COUNTY: MERCED
SUBJURISDICTION:
****
Sub Number: 1994-2774
****

Change Type	Description Code	Act/Ord Number	Act/Ord Date	Date Of Action	Action Code
OPEN: None					
CLOSED:					
Primary				06/06/1994	Sub
Change Comments: 6/7/94				08/05/1994	ND/no ch

Selected Report Date: 01/01/1972 TO 09/02/2003 **Selected CA**
Selected Staff : **Jurisdiction:** MERCED
Selected First Due Out Date:

STATE: CA
COUNTY: MERCED
SUBJURISDICTION:
****
Sub Number: 1994-4416
****

Change Type	Description Code	Act/Ord Number	Act/Ord Date	Date Of Action	Action Code
OPEN: None					
CLOSED:					
Voting meth	Optical scan			10/25/1994	Sub
Change Comments:	AIS Optical Scan system			12/12/1994	Add info recd
				12/27/1994	No obj

STATE: CA
COUNTY: MERCED
SUBJURISDICTION:
****
Sub Number: 2001-1982
****

Change Type	Description Code	Act/Ord Number	Act/Ord Date	Date Of Action	Action Code
OPEN: None					
CLOSED:					
Redist	Bd sups			07/16/2001	Sub
Change Comments:	2001			08/06/2001	Add info recd
				09/07/2001	No obj

Selected Report Date: 01/01/1972 TO 09/02/2003 **Selected Jurisdiction:** CA MERCED
Selected Staff :
Selected First Due Out Date:

STATE: CA
COUNTY: MERCED
SUBJURISDICTION:
****
Sub Number: 2002-0701
****

Change Type	Description Code	Act/Ord Number	Act/Ord Date	Date Of Action	Action Code
OPEN: None					
CLOSED:					
Precinct Change Comments:	Added 21 precincts; 2002			02/11/2002	Sub
				02/12/2002	Add info recd
				04/09/2002	Withdraw
				04/12/2002	No obj
Precinct Change Comments:	Realignment 2002			02/11/2002	Sub
				02/12/2002	Add info recd
				04/09/2002	Withdraw
				04/12/2002	No obj
Poll place Change Comments:	Loc established 16 locations; 2002			02/11/2002	Sub
				02/12/2002	Add info recd
				04/09/2002	Withdraw
				04/12/2002	No obj
Precinct Change Comments:	Added 5 mail ballot precincts			02/11/2002	Sub
				02/12/2002	Add info recd
				04/09/2002	Withdraw
				04/12/2002	No obj
Precinct Change Comments:	Consolidation			02/11/2002	Sub
				02/12/2002	Add info recd
				04/09/2002	Withdraw
				04/12/2002	No obj
Precinct Change Comments:	Consolidation			02/11/2002	Sub
				02/12/2002	Add info recd
				04/09/2002	Withdraw
				04/12/2002	No obj

Selected Report Date: 01/01/1972 TO 09/02/2003 **Selected** CA
Selected Staff : **Jurisdiction:** MERCED
Selected First Due Out Date:

STATE: CA
COUNTY: MERCED
SUBJURISDICTION:
****
Sub Number: 2002-0701
****

Change Type	Description Code	Act/Ord Number	Act/Ord Date	Date Of Action	Action Code
CLOSED:					
Precinct	Consolidation			02/11/2002	Sub
Change Comments:				02/12/2002	Add info recd
				04/09/2002	Withdraw
				04/12/2002	No obj
Precinct				02/11/2002	Sub
Change Comments:	1974 changes			02/12/2002	Add info recd
				04/09/2002	Withdraw
				04/12/2002	ND/wd
Precinct				02/11/2002	Sub
Change Comments:	1979 changes			02/12/2002	Add info recd
				04/09/2002	Withdraw
				04/12/2002	ND/wd
Precinct				02/11/2002	Sub
Change Comments:	1982 changes			02/12/2002	Add info recd
				04/09/2002	Withdraw
				04/12/2002	ND/wd
Precinct				02/11/2002	Sub
Change Comments:	1992 changes			02/12/2002	Add info recd
				04/09/2002	Withdraw
				04/12/2002	ND/wd

ate: 09/02/2003
ime: 10:06 AM

Pa[illegible] and Current Submissions Report - Public

elected Report Date:01/01/1972 TO 09/02/2003 Selected CA
elected Staff : Jurisdiction: MERCED
elected First Due Out Date:

STATE: CA
COUNTY: MERCED
SUBJURISDICTION:
****
Sub Number: 2003-3023
****

Change Type	Description Code	Act/Ord Number	Act/Ord Date	Date Of Action	Action Code
OPEN:					
Poll place	Loc established			08/22/2003	Sub
Change Comments:	numerous locations			08/27/2003	Add info recd
				08/28/2003	Add info recd

CLOSED: None

MERCED COUNTY

BOARD OF SUPERVISORS

2222 "M" STREET • MERCED, CALIFORNIA 95340 • TELEPHONE (209) 385-7366 • FAX NO. (209) 385-7375

ANN KLINGER	WYATT "DUB" DAVENPORT	MICHAEL BOGNA	DEAN PETERSON	JERRY O'BANION	KENNETH L. RANDOL
Chairman Second District Merced	First District Merced	Third District Atwater	Fourth District Hilmar	Fifth District Dos Palos	County Clerk Merced

May 15, 1992

John R. Dunne
Assistant Attorney General
Civil Rights Division
Department of Justice
Preclearance Section
Washington, D.C. 20530

RE: Preclearance--Merced County, California (File No. 91-4210)

Dear Sir:

On the 12th of May 1992, the Merced County Board of Supervisors, pursuant to the California Elections Code Section 35000 adopted Ordinance No. 1411 which adjusts the boundaries of all supervisorial districts within the County utilizing the 1990 Census data, the guidance provided in your letter of objection dated April 3, 1992, the input of the interested public, and the input of all interested minority groups, particularly the newly formed Hispanic coalition.

In making their selection, the Board of Supervisors reviewed five maps. The first, developed by County staff with the assistance of Merced County Association of Governments (MCAG), achieved an incumbent free, 58.6% Hispanic district that included the City of Livingston (designated County Map A). The second map, developed by the City of Gustine (designated Gustine Map 1) with the help of MCAG, achieved a 55.3% Hispanic district that preserved two west side districts in the County but did not include the City of Livingston in that district. The third map presented by El Concilio (designated as El Concilio Map), a newly formed Hispanic organization, offered the opportunity for a 60% Hispanic district. Upon staff review, it was found that the City of Atwater, the City of Los Banos, and the community of Winton were each split into two separate districts. Further, the community of Stevinson was separated from the community of Hilmar. These communities share a common local area government and school district lines.

The fourth map (designated Gustine Map 2) eliminated the splitting of the City of Atwater and community of Winton but continued the division of the City of Los Banos, did not include the City of Livingston and failed to achieve at least a 58.6% Hispanic district.

The fifth map is the result of County consultations with MCAG, El Concilio and their demographer, Mr. Gregory Perez, of Oakland, California. The issues raised under the El Concilio map were clarified and an agreement was reached to take the best of the County Map A and the El Concilio map and produce a product that would satisfy the

EXHIBIT C

parties concerned. That combined effort, entitled "Merced County/El Concilio Redistricting Map" creates an incumbent free Hispanic district with 60.4% of the population and which includes the City of Livingston. That map is presented to you for your review and preclearance.

A copy of this submission to the Department of Justice is available at the Board of Supervisors' office and public notice of that fact has been posted and sent to all local media on this date.

These new district boundary changes will not be implemented until preclearance is granted by your office. We urgently request expeditious handling of our application for preclearance to ensure the County 1992 primary elections can take place during the November General Election. As you know, a Superior Court action has stayed the elections process for supervisors and all Democratic/Republican Central Committee representatives until such time as preclearance has been achieved. Our timelines for holding these elections in November are rapidly approaching and your assistance is needed to put us back on track.

The Merced County staff and elected officials stand ready to respond to any questions necessary to assist your understanding of our process and maps, including face to face meetings in Washington, D.C. if you deem it appropriate. We look forward to your early response.

Sincerely,

KENNETH L. RANDOL
County Clerk

RCB/dw

Enclosure

Merced County Supervisorial District Ethnic Breakdown
Merced County - El Concilio Redistricting Map

Total Populations

Dist	Total Pop	Hisp	Wht	Blk	Ind	Asi	Oth	Hisp as % of total pop	Deviation from Mean
1	34144	20622	6106	1472	149	5367	128	60.4	-4.31
2	36224	7576	22373	1561	321	4332	61	20.9	1.52
3	36741	6690	24619	3013	258	2079	82	18.2	2.97
4	36911	10918	23000	730	254	1887	122	29.6	3.45
5	34383	12301	20303	1113	153	444	69	35.8	-3.64

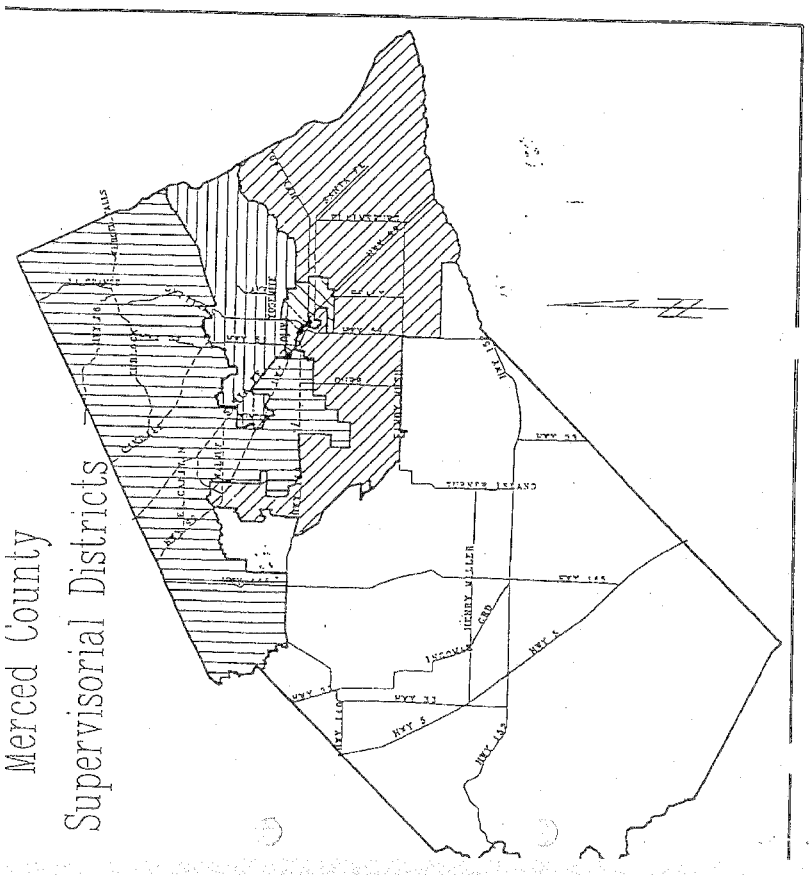
Age 18+ Populations

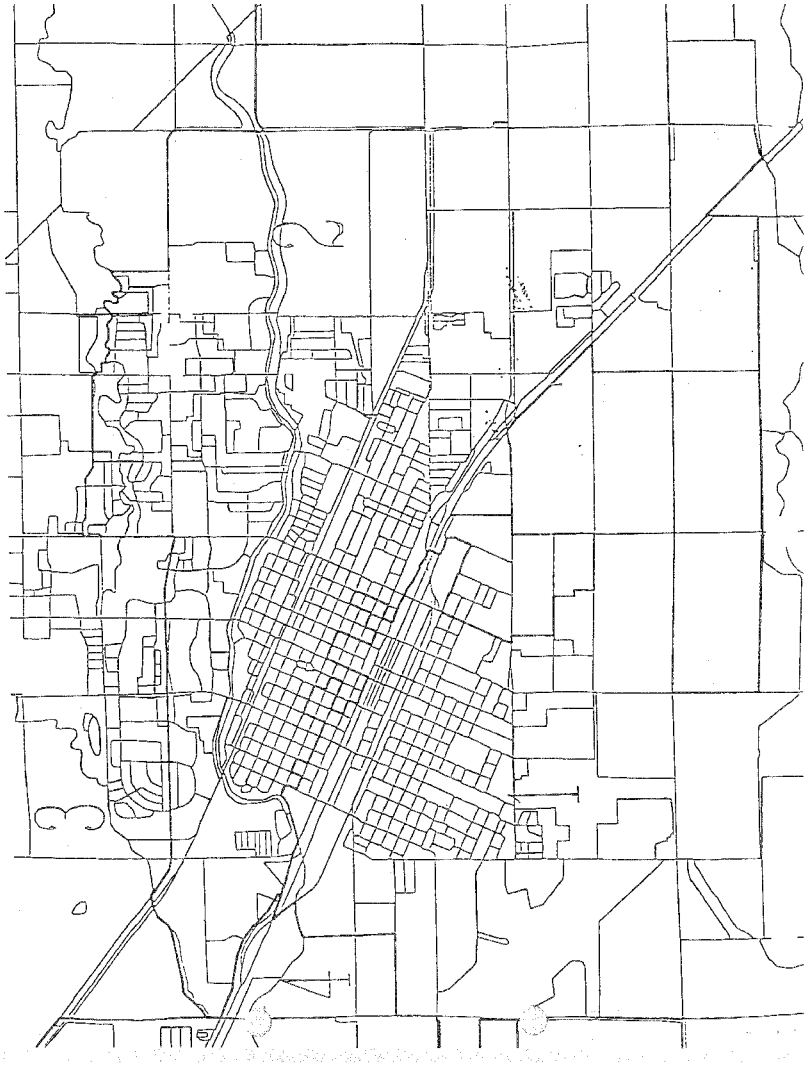
1	20183	12033	4629	940	109	2396	76	59.6
2	24732	4623	16944	1018	227	1881	39	18.7
3	25038	4035	17453	2120	185	1311	34	16.1
4	24485	6201	16503	489	182	1035	75	25.3
5	23299	7082	15060	694	118	304	41	30.4

County Population	178,403
Mean District Population	35,681
One Deviation Equals	+/- 356

Source of Ethnic Data: 1990 Census

1 2 3 4 5
.6 1 4 11.3
3 1.3 1.9
2.6 pt 5
1.3


Merced County
Supervisorial Districts



SUPPLEMENT TO NOVEMBER 4, 2005 PRESENTATION ON BEHALF OF MERCED COUNTY—INFORMATION RE YUBA COUNTY, CALIFORNIA AND WHY THE BAILOUT CRITERIA ARE UNDULY ONEROUS FOR CALIFORNIA COUNTIES

LAW OFFICES OF
NIELSEN, MERKSAMER,
PARRINELLO, MUELLER & NAYLOR, LLP

SACRAMENTO
3415 L STREET, SUITE 1200
SACRAMENTO, CALIFORNIA 95814
TELEPHONE (916) 446-6752
FAX (916) 446-6106

591 REDWOOD HIGHWAY, #4000
MILL VALLEY, CALIFORNIA 94941-3039
TELEPHONE (415) 389-6800
FAX (415) 388-6874

SAN FRANCISCO
225 BUSH STREET, 16TH FLOOR
SAN FRANCISCO, CALIFORNIA 94104
TELEPHONE (415) 389-6800
FAX (415) 388-6874

November 29, 2005

VIA EMAIL & FEDERAL EXPRESS

Hon. F. James Sensenbrenner, Jr.
Chairman, Committee on the Judiciary
U.S. House of Representatives
2138 Rayburn House Office Bldg.
Washington, DC 20515

SUPPLEMENT TO NOVEMBER 4, 2005, PRESENTATION ON BEHALF OF MERCED COUNTY—INFORMATION RE YUBA COUNTY, CALIFORNIA AND WHY THE BAILOUT CRITERIA ARE UNDULY ONEROUS FOR CALIFORNIA COUNTIES

Dear Honorable Members of the Committee on the Judiciary:

As you know, this firm represents the County of Merced, California, with respect to the reauthorization of special provisions of the Voting Rights Act of 1965, as amended. We also represent Yuba County, another of the four counties in the State that is covered by Section 5 of the Voting Rights Act.[1] The State of California is not covered. Yuba County has been a covered jurisdiction since 1971.

Yuba County thanks the United States House of Representatives' Committee on the Judiciary for the opportunity to present the following additional information in support of the presentation of Merced County ("Merced County Letter") concerning the reauthorization of Sections 4 and 5 and proposed amendments to reform the bailout criteria and provide a limited opportunity to appeal coverage caused by the presence of a military base within the boundaries of a covered jurisdiction.

SOME BACKGROUND ABOUT YUBA COUNTY

Yuba County is a small (population 60,219[2]) rural county[3] located in the

[1] The other two California counties are Kings and Monterey. (*See* 28 C.F.R., Ch. 1, Part 51, Appendix [Jurisdictions Covered Under Section 4(b) of the Voting Rights Act, As Amended].)

[2] 2000 Census. Population estimate for January 2005: 66,734 (Cal. Dept. of Finance).

[3] Yuba County's boundaries stretch from the farms and orchards of the valley to the timberlands of the Sierras. The County offers its residents the many advantages of a rural lifestyle, away from the pressures of the

Northern Sacramento Valley, approximately 40 miles north of the State Capitol, Sacramento. In 1970, Yuba County's population was only 44,736.[4] There are two incorporated cities in Yuba County: Marysville, a home-rule charter city, and Wheatland.

For decades, Yuba County has been home to Beale Air Force Base. Beale is located about 10 miles east of the town of Marysville, and "is in the forefront of the Air Force's future in high technology."[5] "It is a large base in terms of land ... covering nearly 23,000 acres, [and] is [currently] home for approximately 4,000 military personnel."[6] It is also the largest employer in Yuba County, and in fact in all of California north of Sacramento to the Oregon border.[7] Pursuant to the 2005 Base Realignment and Closure Report, Beale will be realigned to focus its mission on manned and unmanned high altitude reconnaissance, including the Air Force's new unmanned Global Hawk mission.[8]

As of the 1970 Census—the closest in time to when Yuba County was initially covered under Section 5—there were reported to be a total of 44,736 persons in Yuba County,[9] of whom 25,135 were 21 years or older (voting age in California in the 1968 Presidential election)[10] and 27,561 were 18 or older (voting age in the 1972 Presidential election).[11] 1,478 individuals were housed in the Base's barracks,[12] and a

---

opportunities. Only two hours away from San Francisco and Lake Tahoe, Yuba County is also the gateway to the historic Mother Lode Country.

[4] U.S. Census Bureau, *Census of Population: 1970*, Vol. 1 [Characteristics of the Population], Part 6 [California], Sec. 1, Ch. B, Table 16, available online at http://www.census.gov/prod/www/abs/decennial/1970cenpopv1.htm [last visited October 31, 2005].

[5] The California State Military Museum, *Historic California Posts: Beale Air Force Base*, available online at http://www.militarymuseum.org/Beale.html [last visited November 1, 2005]; *see also* Base Realignment and Closure 2005, Detailed Recommendations, Part 2, Section 3 [Air Force], p.AF-10, available online at http://www.defenselink.mil/brac/pdf/pt2_05_afo.pdf [last visited November 1, 2005].

[6] *Id.*

[7] *See* Yuba-Sutter Economic Development Corp., *Economic Overview of Yuba-Sutter Counties (2003)*, pp.9 & 16, available online at http://www.ysedc.org [last visited November 1, 2005].

[8] *See* U.S. Air Force, Base Realignment and Closure 2005 (California), available online at http://www.af.mil/brac/california.asp#Anchor-Beale-46282 [last visited November 22, 2005].

[9] *See* note 4, *supra*.

[10] U.S. Census Bureau, *Census of Population: 1970*, Vol. 1 [Characteristics of the Population], Part 6 [California], Sec. 1, Ch. B, Table 35, available online at http://www.census.gov/prod/www/abs/decennial/1970cenpopv1.htm [last visited October 31, 2005].

[11] *Id.*

[12] U.S. Census Bureau, *Census of Population: 1970*, Vol. 1 [Characteristics of the Population], Part 6 [California], Sec. 1, Ch. C, Table 120, available online at http://www.census.gov/prod/www/abs/decennial/1970cenpopv1.htm [last visited October 31, 2005].

total of 4,810 individuals employed by the military in Yuba County.[13] This latter figure is *17.5 percent of the population 18 and over* and *19.1% of those 21 and over*, and does not even include military spouses. The 1970 Census also reflects a total population in the two Beale AFB county subdivisions (Beale East and Beale West) as totaling 9,354—more than 20% of the County's total population.[14] As explained in the Merced County Letter, these large military installations skewed the reported voter participation rate in California's small rural counties because of the unique circumstances of the military population, resulting in Section 5 coverage where such coverage would have otherwise been inapplicable.

Coverage Under 1970 Amendments

As with Merced County, Yuba County was not covered when Section 4 was first enacted in 1965. When Congress renewed the special provisions of the Voting Rights Act in 1970, it added a new layer to the coverage formula, identical to the original formula except that it referenced November 1968 as the relevant date for the maintenance of a test or device and levels of voter registration and participation. While the California Supreme Court had invalidated the State's literacy test earlier in 1970 (*Castro v. State* (1970) 2 Cal.3d 223), as of the new test date, Nov. 1, 1968, it was still on the books.[15]

Application of the new formula resulted in the coverage of two California counties, Yuba County being one of them. (36 Fed. Reg. 5809 (Mar. 27, 1971).) The 1970 Census (the Census nearest in time to 1968), reflects that the voting age population in Yuba County (21 years of age and older) was 25,135.[16] In 1968, Yuba County had 13,611 registered voters, of whom 11,150 voted for President. While the percent of registered voters voting remained high, 82.26 percent, measured against voting age population, this level of voter participation fell below the 50 percent threshold for Sections 4 and 5 coverage under the new coverage formula.

---

[13] U.S. Census Bureau, *Census of Population: 1970*, Vol. 1 [Characteristics of the Population], Part 6 [California], Sec. 1, Ch. C, Table 121, available online at http://www.census.gov/prod/www/abs/decennial/1970cenpopv1.htm [last visited October 31, 2005] [derived by subtracting civilian work force from total work force].

[14] U.S. Census Bureau, *Census of Population: 1970*, Vol. 1 [Characteristics of the Population], Part 6 [Calif.], Sec. 1, Ch. A, Table 6, p.6-10, available online at http://www.census.gov/prod/www/abs/decennial/1970cenpopv1.htm [last visited November 3, 2005]

[15] The State of California had a literacy test that had been on the books since 1894. (*See Castro v. State of Cal.* (1970) 2 Cal.3d 223.)

[16] *See* note 10, *supra*.

Coverage Under 1975 Amendments

In 1975, the Act's special provisions were extended for yet another seven years and were broadened to address voting discrimination against members of "language minority" groups, defined as persons who are American Indian, Asian American, Alaskan Natives or of Spanish heritage. As before, Congress expanded the coverage formula, determining the presence of a "test or device" and levels of voter registration and participation as of November 1972.[17] In addition, the definition of "test or device" was broadened to include the practice of providing any election information, including ballots, only in English in states or political subdivision where members of a single language minority constituted more than five percent of the citizens of voting age.

As before, Yuba County met the first prong for coverage—employment of a "test or device"—through no fault of its own. California provided its election materials only in English, and Yuba County's "language minority" population constituted just barely more than five percent of the citizens of voting age (5.8%).[18] And again, the voter participation figure for Yuba fell under the 50% magic mark, with 43.9% of the County's reported eligible voters (CVAP) voting in the 1972 presidential election.

The Impact of Beale AFB on Yuba County[19]

Unquestionably, the single most significant factor leading to Yuba County's coverage under the Act was Beale AFB. According to the 1970 Census, 4,810 persons in the County were employed by the Armed Forces, constituting approximately *26.0% of the County's total workforce, 17.5% of the County's total population 18 and over, and 19.1% of the total population 21 and over*.[20] The 1970 Census also reflects a

---

[17] Under this third application of the formula, the base against which participation was measured was "citizens of voting age."

[18] U.S. Census Bureau, *Current Population Reports*, Series P-25, No. 627, "Language Minority, Illiteracy and Voting Data Used in Making Determinations for the Voting Rights Act Amendments of 1975 (Public Law 94-73)," U.S. Government Printing Office, Washington, D.C., June 1976, p.3, available online at http://www.census.gov/population/www/socdemo/voting/p25-627.html [last visited November 1, 2005] [hereafter "1975 Amendments Report"].

[19] The Merced County Letter already details the special circumstances that led to the coverage of California's four counties under §§ 4 & 5—including methodological flaws by the Census Bureau, lowering of the voting age in 1971, federally-mandated changes to residency requirements, and most especially the presence of a large military base in the jurisdiction. In the interests of brevity we do not repeat those arguments at length here, but we believe the military presence at Beale Air Force Base in Yuba County merits a further brief discussion.

[20] *See* note 13, *supra*.

total population in the two Beale AFB county subdivisions (Beale East and Beale West) as totaling 9,354—more than 20% of the County's total population.[21]

As detailed in the Merced County Letter, persons in the Armed Forces stationed in Yuba County, as well as their spouses, were treated as residents of the County for purposes of determining population figures in the Census, but could vote in their home jurisdictions by absentee ballot. As a consequence, a tremendous proportion of people who were included as part of Yuba County's voting-age population for purposes of determining coverage under Section 4(b) and Section 5 were likely voting in other jurisdictions, rather than in Yuba County, artificially driving down the voter participation rates in the County. (Not coincidentally, the other three Section 5 counties in California were likewise home to significant military installations.)

The degree to which this is true is best illustrated by the following numbers: The 1970 Census indicated 9,354 individuals residing in the Beale AFB East and Beale West County subdivisions.[22] We have learned from the Air Force Historical Research Agency that 9,404 military personnel were assigned to the Base in 1968, and 6,242 were assigned in 1972. Yet there were only 127 votes cast in the two voting precincts covering the Base (Far West Group 2 & Capehart) in the 1968 presidential election and 219 in the 1972 presidential election, for voter participation rates of only 1.4% and 3.5%, respectively.

If the two relevant figures are subtracted (127 from the 11,150 votes cast, and 9,404 from the voting age population as indicated by the 1970 Census, 25,135),[23] *Yuba County would have had a voter participation rate of 70.1% (11,023/15,731) in the 1968 Presidential election in the area not covered by the Base*, and would not have been covered. Applying the same methodology to 1972 (subtracting 219 votes and 6,242 persons from the citizen voting age population as reported by the Census Bureau, 26,500[24]), results in a voter participation rate of 56.3% for that election (11,411/20,258), and again Yuba County would not have been covered. Even assuming one-third of the persons assigned to the base did not live in the voting precincts there, the 50 percent

---

[21] *See* note 14, *supra*.

[22] *Id*.

[23] Given the substantial growth that Yuba County experienced from 1960 to 1970 (approximately 32%), relying on the 1970 Census for this calculation can only understate—rather than overstate—the voter participation rate in the County.

[24] 1975 Amendments Report, *supra*, note 18.

threshold for coverage would still have been exceeded in both 1968 and 1972. These figures also do not include spouses of military personnel.

YUBA COUNTY'S RECORD UNDER THE VOTING RIGHTS ACT

Since it was covered in 1971, Yuba County has received only one objection to a voting change that it has enacted, despite a long history of preclearance submissions. The one objection was in 1976, and was directed to bilingual materials and ballot and qualifications for certain offices. The objection, however, was subsequently withdrawn by the Department of Justice.

There has never been a Section 2 lawsuit filed in the County alleging discrimination in voting.

Today, Yuba County's population is 60,219, of which 10,449 (17.4%) are Hispanic and 54,883 (91.1%) are citizens. The voting aged population is 41,529 of whom 6,109 are Hispanic (14.7%). However, only 37,332 people, or 89.9% of the voting age population, are citizens. There are 5,115 persons resident on Beale AFB. Of the five members of the County Board of Supervisors, one (20%) is of Hispanic origin—Mary Jane Griego. The County's registration levels are healthy: 28,297—or 66.78% of eligible voters—at the last close of registration on October 24, 2005.[25] Of registered voters, 65.35% voted in the November 2004 Presidential election.[26] Registration on the Base is at most 16%.[27]

A LIMITED RIGHT TO APPEAL COVERAGE WOULD STRENGTHEN THE SPECIAL PROVISIONS OF THE ACT

The military presence in Yuba County resulted in Section 4(b) coverage. Coverage was not tied to indicia of voting practices with discriminatory effects. Hence, coverage of Yuba County is not consistent with the goals of the special provisions of the Voting Rights Act or the narrow-tailoring sought to be achieved by the crafting of the

---

[25] California Secretary of State, *October 24, 2005, Report of Registration*, available online at http://www.ss.ca.gov/elections/ror/102405/county_102405.xls [last visited November 8, 2005].

[26] Cal. Sec. of State, *Statement of Vote: 2004 Presidential General Election (Nov. 2, 2004)*, available online at http://www.ss.ca.gov/elections/sov/2004_general/contents.htm [last visited November 1, 2005]. The Secretary of State's records reflect that only 44.65 percent of eligible voters voted, but that office's methodology for estimating eligibility overstates the number of citizens of voting age and does not account for other ineligible voters.

[27] There are currently 640 registered voters in the precincts covering Beale AFB. As noted, the Base is currently home to approximately 4,000 military personnel (*see* note 6, *supra*), which doesn't even include spouses.

coverage formula. A provision for appeal under these specific circumstances would strengthen the special provisions of the Act about to be reauthorized by keeping them true to their purpose and on target. (*See, e.g., City of Boerne v. Flores* (1997) 521 U.S. 507.)

AS A PRACTICAL MATTER, THE BAIL OUT CRITERIA DO NOT ALLOW YUBA COUNTY, EVEN IF IT IS IN FULL COMPLIANCE, TO BAIL OUT

If opt-out by this special appeal is not possible, or a new formula recaptures California's Counties, bail-out reform is necessary. The Merced County Letter also details the difficulties that California's covered counties face in meeting the bail-out criteria. It would be extremely difficult for Yuba County, like the other covered California counties, to bail out from Section 5 coverage in any reasonable amount of time. This is because the County is held responsible for the compliance of incorporated cities and numerous state agencies located in the County,[28] yet the County has no control over the activities of the governing boards of these entities.[29] Unlike a State, which is justly responsible for the actions of all its subunits, there is no basis in law for holding Yuba County accountable for the Section 5 compliance or non-compliance of agencies outside its control. These are state agencies, not county agencies, and the State of California is not covered.

It is true that the existing bailout criteria have not proven to be an obstacle to the few Virginia cities and counties that have successfully obtained bailout from the provisions of Sections 4 and 5. But the circumstances of coverage and the practical feasibility of bailout in Virginia differ from the experience of the California counties in determinative ways.

Lack of Authority

First, the State of California is not covered by Sections 4 or 5. Yet, the governmental units for which Merced and Yuba Counties are made responsible are, for

---

[28] *See, e.g.*, 42 U.S.C. § 1973b(a)(1)(B), (D), (E), and (F), (b)(3).

[29] There are two incorporated cities in Yuba County: Marysville and Wheatland. Cities are not agencies subject to the County's control, but are given independent authority by the California Constitution, subject only to the general law of the state. (Cal. Const. art. XI, §§ 2, 5 & 7.) The County also has 6 educational districts (including community college). These districts are agencies of the State of California, not subject to county control, and are governed by state law, not by county ordinances. (*See* Cal. Const. art. X, § 14; Cal. Educ. Code, generally.) And there are 19 special districts in the County that are also creatures of state law and independent of County control. (*See, e.g.*, Cal. Water Code § 20500 *et seq.* for irrigation districts and Cal. Govt. Code § 61000 *et seq.* community service districts.)

the most part, state agencies over which the County has no control. These political subunits are governed by state law. As the Senate Judiciary Committee noted at the time of the 1982 Amendments to the Act, "it is appropriate to condition the right of a State to bail out on the compliance of all of its political subdivisions, both *because of the significant statutory and practical control which a State has over them* and because the Fifteenth Amendment places responsibility on the States for protecting voting rights."[30] California's four counties do not have such statutory or even practical control.

Lack of statewide coverage has another implication: it means that California's counties do not have the benefit of a statewide compliance infrastructure for state agencies and incorporated cities. Virginia, by contrast, is a covered jurisdiction, and all of its political subdivisions (except those few that have successfully bailed-out) are covered as well. Consequently, the State of Virginia has considerable incentive and, in fact, the authority to support that incentive,[31] to oversee the activities of its political subdivisions to ensure compliance and devote substantial resources to that end. Even in 1982, the Senate Judiciary Committee singled out Virginia for special notice, observing that "where state Attorneys General have been active in advising and educating local officials about their obligation, e.g., Virginia, there has been much less non-compliance with the law than in other covered states."[32] "In Virginia, the State attorneys general have been aggressive in monitoring local jurisdictions' submission of election law changes, pursuant to section 5 of the Voting Rights Act. As a result, there have been few objections in Virginia and a substantial number of them have been the result of statewide rather than local changes...."[33]

There is also an historical perspective to this. Because Virginia is one of the States that was widely regarded as a target of the original Voting Rights Act and all jurisdictions in Virginia were—and most still are—covered under Sections 4 & 5, there is widespread awareness among officials in that State that they are subject to the preclearance requirements of the Act. In California, by contrast, only four of 58 counties are covered, hence awareness of Section 5 coverage is spotty. For example, it is rare to find substantial attention devoted to Section 5 compliance at meetings of California elected officials—such as the League of California Cities or California State Association of Counties---because so few jurisdictions are subject to those requirements. Not

---

[30] S. Rept. 97-417, 97th Cong., 2d Sess. (1982), p.56 (emphasis added).

[31] *See Arlington County, et al. v. White* (Va. 2000) 528 S.E.2d 706 (Virginia cities and counties have only those powers conferred by the legislature).

[32] S. Rept. 97-417, 97th Cong., 2d Sess. (1982), p.57 (emphasis added).

[33] 127 Cong. Rec. at H6969 (daily ed. Oct. 5, 1982 [remarks of Rep. Sensenbrenner]).

infrequently, we find that officials in special districts or cities—not subject to county control—are surprised that they are even subject to the preclearance requirement.

Unlike local jurisdictions in Virginia, California's four covered counties—all of which are small and lack substantial resources—are essentially on their own to cajole state agencies and cities within their borders into compliance with Sections 4 & 5 as best they can. They do not have the benefit of a statutory authority or statewide infrastructure that facilitates compliance, and they lack the ability to make non-county agencies comply (and may even be unaware of the adoption of voting changes by such agencies).

Home Rule

As the Senate Judiciary Committee also noted in 1982, one of the justifications for making state bailout subject to the compliance of its subdivisions was the widespread absence of "home rule" in the covered states.[34] This was consistent with the general sense of the Congress, discussed above, that it was equitable to hold States responsible for the conduct of their subdivisions because the States controlled the subdivisions' conduct. For example, Virginia's cities and counties have only those powers conferred by the Legislature.[35] But California, by contrast, has constitutional home rule provisions.[36] With respect to charter cities, it is plenary.[37] In Yuba County, the City of Marysville is a charter city; in Merced County, the City of Merced is a charter city. Among the matters specifically regarded as falling within the "home rule" power is the conduct of "city elections."[38] Thus, neither the State of California, nor its counties, can control electoral matters in these jurisdictions.[39]

Significantly Heavier Bail Out Burden On California Counties

There is an additional, very practical distinction between California's covered counties and the Virginia jurisdictions that have obtained bailout: simply put, the Virginia jurisdictions were required to demonstrate compliance by a *far smaller number*

[34] S. Rept. 97-417, 97th Cong., 2d Sess. (1982), p.57.
[35] *See Arlington County, supra*, 528 S.E.2d 706.
[36] *See* Cal. Const. art. XI, §§ 5 & 7 (cities and counties authorized to enact any legislation not at odds with general law, and city ordinances prevail with respect to municipal matters).
[37] Cal. Const. art. XI, § 5.
[38] *Id.* at subd. (b)(3).
[39] *See Johnson v. Bradley* (1992) 4 Cal.4th 389, 398-400 [state may only override local legislation with respect to matters of "statewide concern"].

of independent jurisdictions than California's counties are. This is a result of the far greater propensity in California to favor government by special district, rather than entrusting all governmental functions at the local level to county or municipal government. For example, in 2002 California had 2,830 special district governments, second only to Illinois for most in the nation, and new special districts are continuing to be formed. Virginia had only 196—only seven states and the District of Columbia had fewer.[40] Consequently, the ability of California's counties to bail-out is dependent on the Section 5 compliance of a significantly higher number of subjurisdictions than Virginia's bail-out jurisdictions were.

We have reviewed the consent judgments adopted in each of the six most recent successful bailout actions in Virginia (Greene County, Roanoke County, Rockingham County, Warren County, the City of Harrisonburg, and the City of Winchester).[41] That review shows that Greene County was responsible for ***only two*** governmental units besides the County itself (the County School Board and Stanardsville Town Council). Warren County was likewise responsible for ***only two*** additional governmental units—the County School Board and the Town of Front Royal—as was Roanoke County (the County School Board and the Town of Vinton).[42] The City of Harrisonburg was responsible for ***only one*** additional governmental unit, the City School Board, and the City of Winchester was responsible for ***no additional governmental units***. Of the six jurisdictions, Rockingham County was responsible for the most additional governmental units with eight: the County School Board, and the towns of Bridgewater, Broadway, Dayton, Elkton, Grottoes, Mt. Crawford & Timberville.

This is in stark contrast to California's counties. As explained in the Merced County Letter, there are currently six incorporated cities, twenty school districts, and 66 special districts in that County, ***for a total of 92 governmental units for which***

---

[40] U.S. Census Bureau, *2002 Census of Governments*, Vol. 1, No. 1 [Government Organization], Rept. No. GC02(1)-1, Table 5, U.S. Government Printing Office, Washington, D.C., December 2002, available online at http://www.census.gov/prod/2003pubs/gc021x1.pdf [last visited November 15, 2005].

[41] Our review was limited to these jurisdictions for the very simple reason that documents for these cases are readily available through the online records system of the D.C. District Court. Only the docket sheets, with no digital document copies, are available for the four earlier cases.

[42] Two other cities in Roanoke County—Roanoke City and Salem City—were not included as part of the bailout action because they were independently covered "political subdivisions," which conducted their own voter registration. (*See* City of Roanoke, Virginia, Office of the Registrar Homepage, available online at http://www.roanokeva.gov/WebMgmt/ywbase61b.nsf/CurrentBaseLink/N2525H8U899SPEAEN [last visited November 14, 2005]; City of Salem, Virginia, Office of the General Registrar Homepage, available online at http://www.ci.salem.va.us/government/registrar/index.html [last visited November 14, 2005].) This is not an option available to California's counties, which are responsible for all voter registration in the State of California.

Merced County is accountable in order to bail out, despite the lack of any control over those jurisdictions. (*See* 28 C.F.R. § 51.6 ["All political subunits within a covered jurisdiction (*e.g.,* counties, cities, school districts) are subject to the requirement of Section 5."].) Yuba County, though smaller than Merced County, has two incorporated cities, six educational districts, and 19 special districts, for a total of ***27 governmental units over which it has no control, but for which it is accountable in a bailout action.***

The Census Bureau's 2002 Census of Governments confirms these figures. That document breaks out the total number of governmental units in each county in the United States.[43] It indicates 84 governmental units in Merced County and 45 in Yuba County. There are a total of 290, and an average of approximately 73, governmental units in California's four covered counties. It is this fact, coupled with a lack of control, that puts California's counties at risk of bailout failure in a way that Virginia's jurisdictions were not. By contrast, the Census of Governments shows a total of only 39 governmental units, with a maximum of 11, and an average of just over 4, in the nine Virginia bail-out jurisdictions.[44]

CONCLUSION

On behalf of the County of Yuba, we thank you for considering these comments and observations. We look forward to working with the Committee to achieve the reforms described above that will keep the Sections 4 and 5 true to their important purpose and stronger against possible constitutional challenge.

Sincerely,

Marguerite Mary Leoni Robert Naylor Christopher E. Skinnell

MML/CES/slf
cc: Dan Montgomery, Yuba County Counsel
#2047.01

[43] 2002 Census of Governments, *supra*, note 40, Table 16.

[44] *Id.* Even those Virginia jurisdictions, despite their relatively lesser compliance burdens, did *not* have spotless records of compliance with Section 5. Roanoke County expressly admitted in its bail out suit that it had administered six or more voting changes over the years without obtaining preclearance. Warren County admitted to administering seven such changes, and Shenandoah County administered 31 voting changes without preclearance. Several other of the jurisdictions admitted to administering at least one change. While these changes were ultimately submitted by the jurisdictions prior to filing the bailout suits, and each received preclearance, not all the submissions were timely.

PREPARED STATEMENT OF CHELLIE PINGREE, PRESIDENT AND CEO, COMMON CAUSE

Chairman Chabot and Ranking Member Nadler:

Thank you very much for holding the recent round of hearings on the provisions of the Voting Rights Act which are up for reauthorization in the 109th Congress. It is our hope that these hearings will produce a reliable record that Congress can rely on as it proceeds with the reauthorization of this historic act. Common Cause is proud to offer its remarks on the Voting Rights Act and suggestions for improving the sections that are up for reauthorization.

Common Cause is a nonpartisan nonprofit advocacy organization founded in 1970 by John Gardner as a vehicle for citizens to make their voices heard in the political process and to hold their elected leaders accountable to the public interest.

Now with nearly 300,000 members and supporters and 38 state organizations, Common Cause remains committed to honest, open and accountable government, as well as encouraging citizen participation in democracy.

In our 35-year history, Common Cause has had a long history of support of the Voting Rights Act. We testified before the House Judiciary Subcommittee on the Constitution in 1975 and 1981 on the need for extension of the act. In addition, our former chairman emeritus, the late Archibald Cox, helped develop key provisions of the original act as United States solicitor general and supported its constitutionality in oral arguments before the Supreme Court.

Since its enactment 40 years ago as a culmination of the Civil Rights Movement, and with its subsequent extensions, the Voting Rights Act has been an invaluable tool in breaking down voting barriers to millions of Black and Hispanic Americans. It has also extended crucial voting access to Native Americans, Alaskan and Pacific Islanders and Asian Americans, ensuring in the process that all Americans have an opportunity to equally participate in the most vital duty of citizenship. Along the way, it has contributed immensely to diversifying the ranks of our nation's elected officials.

Although much of the electoral progress of the past four decades can be attributed to the Voting Rights Act, its success does not mean the law is outdated or obsolete. Indeed, many of the numerous problems voters confronted across the United States in the 2000 and 2004 elections show there is still a need for the expiring provisions of the Voting Rights Act. As long as barriers to the effective exercise of the franchise remain for racial, ethnic, and language minorities, there will be a need for the Voting Rights Act. Several groups have submitted testimony showing the lingering persistence of racial polarization in voting patterns; the bipartisan National Commission on the Voting Rights Act, organized by the Lawyers' Committee for Civil Rights Under Law, is expected to issue a report in early 2006 detailing, through testimony and supporting documents, that discrimination against racial or language minority voters continues to exist in every region of the United States. In addition, the increase in minority political participation over the past four decades has been met with new political devices designed to roll back or negate those gains. (e.g., the return of at-large election systems, discriminatory placement of polling places, or manipulating minority voter strength either by concentrating, or "packing" numbers of voters into districts, or dividing or "cracking" them among numerous districts) These factors, combined with the continued existence of racially polarized voting, make plain the need for continuing the strong, prophylactic measures of the Voting Rights Act.

RESTORING SECTION 5'S ORIGINAL INTENT

We strongly believe there is a need for Congress to restore protections against intentional racial discrimination in areas covered by the "preclearance" requirements of Section 5. As you know, certain jurisdictions nationwide with a history of discriminatory voting practices must have proposed election changes reviewed for potential discriminatory impact by the Justice Department or the federal District Court for the District of Columbia before they can be carried out.

Those protections were fundamentally weakened in January 2000, when the Supreme Court ruled in *Reno v. Bossier Parish School Board* [1] that the Justice Department could not block the implementation of racially discriminatory voting changes under Section 5 if they were not retrogressive as compared to the status quo, even if there was a finding of clear intentional discrimination in a jurisdiction's newly proposed voting schemes. That is, a jurisdiction that never had minority representation on its elected body could *continue* to adopt new redistricting plans *intentionally*

[1] *Reno v. Bossier Parish School Board,* 528 U.S. 320 (2000), also referred to as Bossier II.

designed to minimize minority voting strength, and Section 5 would provide no protection.

This decision upset Congress' original intent in enacting Section 5 of the Voting Rights Act and the legal precedent that has flowed from it. In the process, it has caused significant damage to the anti-discrimination protections contained in the Voting Rights Act, as well as its enforcement by the Justice Department. As Brenda Wright of the National Voting Rights Institute testified before this committee, Section 5 objections based on racial discrimination were common before the *Bossier II* decision. During the 1980s and 1990s, the Justice Department logged 234 objections to voting changes based solely on intent. By comparison, between January 2000 and June 2004, only two similar objections were filed—a clear sign that the intent standard has changed significantly since the *Bossier II* decision. Common Cause joins with its peers within the civil rights community, including the Leadership Conference on Civil Rights and the NAACP Legal Defense and Education Fund, Inc., in asking Congress, as part of the reauthorization of the Voting Rights Act, to restore the original intent of Section 5.

We are also very concerned about the effect of the Supreme Court's 2003 ruling in *Georgia v. Ashcroft*.[2] In that ruling, which dealt with Georgia state senatorial districts, the Court allowed states greater freedom to redraw elective districts without fear of having the districts rejected as "retrogressive," or harmful to minority voters' interests. The Court ruled that states could dismantle districts that afforded minority voters an opportunity to elect candidates of choice in favor of districts that gave minority voters an opportunity for "influence." This decision is a radical departure from decades of the Court's precedents.

Twenty-seven years before *Georgia v. Ashcroft,* the Supreme Court in *Beer v. United States*[3] ruled that creating "influence districts" failed to preserve minorities' ability to elect candidates of their choice, and, as such, was retrogressive. As a result, such voting changes were objectionable under Section 5 of the Voting Rights Act. In 1982, Congress adopted the *Beer* standard as part of the act's reauthorization.

The court's ruling in *Georgia* introduced new standards that are at once vague, contradictory and difficult to apply. For instance, the court found the ability to elect a candidate of choice is "important" and "integral," but a court must also consider the effect—whether voters have the ability to "influence" and elect "sympathetic" representatives.

Also, the Supreme Court's 1995 decision in *Miller v. Johnson*[4] demonstrates ably that influence is not a substitute for the ability to elect. In that case, White citizens who were placed in majority-Black districts successfully argued their inclusion in those districts (which could also be described as White "influence" districts) was unconstitutional. The voters in this lawsuit, rather than embracing the opportunity to "play a substantial, if not decisive, role in the electoral process" or to accomplish "greater overall representation"—all similar arguments the Supreme Court made in *Georgia v. Ashcroft*—instead chose to challenge their placement in majority-Black districts. Were "influence" as attractive a status as the court would have us believe, everyone would be fighting to be a minority in as many districts as possible. The fact that no voters are doing so speaks volumes of the *Georgia v. Ashcroft* ruling and the approach it embodies.

Through its ruling in *Georgia v. Ashcroft,* the court took a clearly understood and applied standard and reworked it into something ambiguous and open to varying interpretation. It raises the specter that states may eventually reduce racial, ethnic and language-minority voters to second-class status by locking them into influence districts without the opportunity to elect their preferred candidates—a result that Section 5 was intended to avoid.

The Supreme Court's decisions in the *Georgia v. Ashcroft* and *Bossier II* cases jeopardize many of the gains that American citizens have made under the Voting Rights Act. As a result, Common Cause asks Congress to reinstate the *Beer* standard that has competently guided federal, state and local officials as part of the provisions of the Voting Rights Act for nearly 30 years. At minimum, Congress should clarify the issue by stating as part of the reauthorization that any diminution of the ability of a minority group to elect a candidate of its choice constitutes retrogression under Section 5. In addition, Congress must also act to ensure that voters' rights are protected under the enforcement mechanism of Section 5 by restating its intent using the pre-*Bossier II* standard.

---

[2] *Georgia v. Ashcroft,* 539 U.S. 461 (2003).
[3] *Beer v. United States,* 425 U.S. 130 (1976).
[4] *Miller v. Johnson,* 515 U.S. 900, 919–20 (1995).

STRENGTHEN THE ACT'S LANGUAGE PROVISIONS (SECTIONS 4(F)(4) AND 203)

Common Cause has historically supported efforts to include bilingual election requirements, such as those included in Sections 4(f)(4) and 203 of the Voting Rights Act. As Archibald Cox said in his 1982 testimony before Congress on the issue:

> In adopting the bilingual election provisions (in 1975), Congress recognized that English-only election materials and voter assistance can constitute a barrier to voting similar to literacy tests. Requirements for bilingual elections have enabled and encouraged minorities to become active participants in the great work of governing ourselves. I am not unmindful of the argument that the bilingual provisions will tend to polarize American society. Surely, bilingual voting will have just the contrary effect. The best way to avoid a separatist movement in this country is to encourage participation in the exercise of the right to vote. For participation in the electoral process without language barriers makes it plain to all that we are one Nation with one government for all the people.

Currently, Section 4(f)(4) applies to three states (Alaska, Arizona and Texas) and 19 counties or townships in six additional states; Section 203 applies to five states (Alaska, Arizona, California, New Mexico and Texas) and parts of 26 additional states covering 29 languages. Taken together, sections 4(f)(4) and 203 apply to 505 jurisdictions nationwide. Common Cause believes that attempts to impose English-only provisions should be blocked and that the language provisions included in sections 4(f)(4) and 203 should be reauthorized for 25 years. More specifically, we associate ourselves with the comments of Margaret Fung of the Asian-American Legal Defense and Education Fund and Juan Cartagena of the Community Service Society of New York, in asking that Congress lower the language minority numerical trigger contained in Section 203 from 10,000 voting-age citizens to 7,500. This move would continue the encouraging trend of higher Asian-American and Latino political participation among our fastest-growing populations.

Enhanced access to bilingual voting materials will continue to expand minority-language voters' access to the political process—especially older citizens for whom English may not be their first language. Most importantly, this expands the right to vote and participate in American society, which solidly trumps any claims of fraud and increased expense that opponents of minority-language provisions have put forth.

REAUTHORIZE FEDERAL OBSERVER AND EXAMINER PROVISIONS (SEC 6–8)

The Voting Rights Act also provides for the deployment of federal observers and examiners to witness voting practices, as well as interview and register individuals denied the right to register by state and local officials in covered jurisdictions. As Nancy Randa of the Office of Personnel Management recently testified, these provisions have not changed significantly since the original enactment of the Voting Rights Act. Since 1966, the federal government has deployed more than 26,000 observers to 22 states in all regions of the country. As you have heard in testimony by the National Commission on the Voting Rights Act and the Asian-American Legal Defense and Educational Fund, there remain numerous instances in which voters have been subjected to harassment or intimidation at the polls. As long as these incidents continue to take place, there will be a need for examiners and observers. Therefore, Common Cause asks Congress to reauthorize sections 6 and 8 of the Voting Rights Act for an additional 25 years to ensure these well-practiced protections will remain in place.

CONCLUSION

As stated above, the Voting Rights Act has served its purpose well over the previous 40 years. But that does not mean its time has passed. To the contrary, the explosive growth of Asian Americans and Latinos in the United States, combined with the deleterious effects of recent Supreme Court decisions with respect to Section 5, are all the more reasons why Congress must reauthorize a stronger Voting Rights Act. By reinstating the Beer standard, reversing the damage caused by *Georgia v. Ashcroft* and *Reno v. Bossier Parish* (2000), lowering the minority language trigger in Sections 203, and reauthorizing the federal examiner and observer provisions of Sections 6 and 8, Congress can send a strong message to Americans that everyone's vote does count. We hope Congress takes an affirming step for voting rights in America by incorporating these actions in the reauthorization of the Voting Rights Act.

Thank you.