IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

TERRY PETTEWAY, et al.,	§	
	§	Civil Action No. 3:11-cv-511
Plaintiffs,	§	Three Judge Court
v.	§	(EMG, KMH, MH)
	§	
GALVESTON COUNTY, TEXAS; and	§	
MARK HENRY, in his capacity as	§	
Galveston County Judge,	§	
	§	
Defendants.	§	
	§	

UNITED STATES' STATEMENT OF INTEREST

The United States files this Statement of Interest pursuant to 28 U.S.C. § 517, which authorizes the Attorney General to attend to the interests of the United States in any pending suit.

Section 5 of the Voting Rights Act precludes covered jurisdictions from implementing voting changes without receiving either administrative preclearance from the Attorney General or judicial preclearance from the District Court for the District of Columbia for those changes. 42 U.S.C. § 1973c. Section 5 requires covered jurisdictions to show that any new change in voting practices or procedures "neither has the purpose nor will have the effect of denying or abridging the right to vote on account of" race, color or language minority status. 42 U.S.C. § 1973c(a). The State of Texas and all of its governmental units, including Galveston County, is subject to the requirements of Section 5 for all voting changes enacted or sought to be administered after November 1, 1972. 28 C.F.R. Part 51 App. The Attorney General has primary responsibility for enforcing and administering Section 5. 42 U.S.C. §§ 1973c(a), 1973j(d).

The Voting Rights Act sets forth a unique statutory scheme for resolving issues which arise under the preclearance provisions of Section 5. The Act provides for a division of jurisdiction between "'substantive discrimination' questions" and "'coverage' questions.'" *Allen v. State Bd. of Elections*, 393 U.S. 544, 560 (1969). "Congress expressly reserved for consideration by the District Court for the District of Columbia or the Attorney General . . . the determination whether a covered change does or does not have the purpose or effect 'of denying or abridging the right to vote on account of race or color.'" *Perkins v. Matthews*, 400 U.S. 379, 385 (1971). Thus, the Attorney General and the D.C. District Court have "exclusive authority," *Lopez v. Monterey County*, 519 U.S. 9, 23 (1996), to make the substantive preclearance determination of "whether a proposed change actually discriminates on account of race," *United States v. Bd. of Supervisors of Warren County*, 429 U.S. 642, 645 (1977) - a determination which is "foreclosed" to any other court. *Perkins*, 400 U.S. at 385. Pursuant to Sections 5 and 14(b) of the Act, 42 U.S.C. §§ 1973c, 1973*l*(b), covered jurisdictions seeking preclearance of a new voting change have a choice of filing a declaratory judgment action in the D.C. District Court, or making an administrative submission to the Attorney General, who has 60 days to act on a completed submission. *Morris v. Gressette*, 432 U.S. 491, 501-02, 504 n.19, 505 n.21 (1977). Where a covered jurisdiction obtains a preclearance determination from the Attorney General under Section 5, no party may seek judicial review of that determination. *Id.* at 507 n.24.

By contrast, local federal district courts convened in jurisdictions covered by Section 5 may consider only "coverage" questions – "whether a particular state enactment is subject to the provisions of the Voting Rights Act, and therefore must be submitted for approval before enforcement." *Allen*, 393 U.S. at 559-60. Pursuant to Sections 12(d) & (f) of the Act, 42 U.S.C. §§ 1973j(d) & (f), the United States and/or private plaintiffs can bring such coverage actions to

enjoin enforcement of unprecleared changes. In such lawsuits, a federal district court sitting in a covered jurisdiction, "may determine only whether § 5 covers a contested change, whether § 5's approval requirements were satisfied, and if the requirements were not satisfied, what temporary remedy, if any, is appropriate" until the change is precleared or abandoned. *Lopez*, 519 U.S. at 23-24.

The United States has a strong interest in ensuring Section 5 is uniformly interpreted and applied. It has a particular interest in the voting changes at issue in this case. Galveston County submitted its 2011 commissioners court redistricting plan, its 2011 justice of the peace and constable redistricting plan, and its proposals to reduce the numbers of justices of the peace and constables to the Attorney General for administrative review under Section 5. On March 5, 2012, the Attorney General interposed objections under Section 5 to all three of these voting changes. *See* Letter from Thomas E. Perez to James E. Trainor III, March 5, 2012 (Attachment 1). The Attorney General is also the statutory defendant in an action brought by Galveston County in the United States District Court for the District of Columbia in which the County is seeking judicial preclearance *solely* for the 2011 commissioners court redistricting plan (but not for the reduction in the number of the justices of the peace and constables or the 2011 redistricting plan for those officials). *Galveston County v. United States*, No. 1:11-cv-01837 (D.D.C.). Galveston County's case in the D.C. District Court is presently on hold pending discussions between the County and the Department of Justice.

Because the Attorney General has interposed an objection to the three submitted voting changes (the 2011 commissioners court redistricting plan, its 2011 justice of the peace and constable redistricting plan, and its proposals to reduce the numbers of justices of the peace and constables) and because Galveston County has not obtained a declaratory judgment from the

D.C. District Court that these voting changes comply with Section 5, the county is prohibited from implementing these voting changes. *Clark v. Roemer*, 500 U.S. 646, 652 (1991) ("The failure to obtain either judicial or administrative preclearance 'renders the change unenforceable.'" (quoting *Hathorn v. Lovorn*, 457 U.S. 255, 269 (1982))).

The United States submits this brief for the limited purpose of advising the Court of the United States' views with respect to Section 5 of the Voting Rights Act on the redistricting plan for the commissioners court, the redistricting plan for the justices of the peace and constables, and the county's proposals to reduce the numbers of justices of the peace and constables.[1]

COMMISSIONERS COURT PLAN

By virtue of the March 5 objection interposed by the Department of Justice, Section 5 precludes Galveston County from implementing its 2011 redistricting plan for the commissioners court, and the injunction entered by this Court against implementation of this plan under Section 5 is appropriate. On March 22, 2012, the Galveston County Commissioners Court formally adopted a new 2012 redistricting plan for the four districts used to elect its commissioners. The County thereafter made a submission of that 2012 redistricting plan for administrative review to the Department of Justice pursuant to Section 5. The Department of Justice has undertaken an expedited review of that new 2012 plan, and today the Department has advised the County that no objection would be interposed to that new 2012 commissioners court redistricting plan under Section 5. *See* Letter from T. Christian Herren Jr, to James E. Trainor III, March 23, 2012 (Attachment 2). Accordingly, Section 5 presents no barrier to implementation of this new March

[1] This Statement does not address the Plaintiffs' constitutional and Section 2 challenges to any of the County's voting changes.

22 redistricting plan for the commissioners court in the upcoming May 29 primary and November 6 general election.

JUSTICE OF THE PEACE AND CONSTABLES PLAN

With respect to the proposed justice of the peace and constable redistricting plans and the proposal to reduce the numbers of those officials, the Attorney General objected to those plans as violative of Section 5. The Attorney General's objection renders those changes unenforceable under Section 5. Unless and until a jurisdiction obtains the requisite Section 5 determination for a voting change from the Attorney General or the D.C. District Court, it may not use that change to conduct an election. 42 U.S.C. § 1973c(a); *see Roemer*, 500 U.S. 646, at 653 (absent a determination that the submitted changes comply with Section 5, "§ 5 plaintiffs are entitled to an injunction prohibiting the [jurisdiction] from implementing the changes" (citing *Allen*, 393 U.S. at 572). This Court's injunction against implementation of the objected-to voting changes involving the justices of the peace and constables is proper, and should remain unless and until Section 5 preclearance is obtained.

The county must use the benchmark practice—i.e., the practice most recently precleared under Section 5—that governs the number of justices of the peace and constables and the districting plan under which they are elected, unless and until such time as the county can establish that any new changes in these practices do not violate Section 5. *See Riley v. Kennedy,* 553 U.S. 406 (2008). On February 5, 2002, the Department precleared the benchmark plan for the number of justices of the peace and constables and the districting plan. Continuing to use that benchmark practice would not violate Section 5. *See* Letter from Joseph D. Rich to Sydney W. Falk Jr, February 5, 2002 (Attachment 3). In this case, we understand that the Petteway

plaintiffs and Galveston County agree that this year's elections for the justices of the peace and constables should be conducted under the benchmark practices precleared in 2002.

Date: March 23, 2012

Respectfully submitted,

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United States Attorney
Southern District of Texas

KEITH EDWARD WYATT
Assistant United States Attorney
Southern District of Texas
Federal Bar No. 3480

THOMAS E. PEREZ
Assistant Attorney General
Civil Rights Division

/s/ Justin Weinstein-Tull
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CERTIFICATE OF SERVICE

I hereby certify that on March 23, 2012, a true and correct copy of the foregoing was served via the Court's ECF system, to the following counsel of record:

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Attachment 1

U.S. Department of Justice

Civil Rights Division

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

MAR 0 5 2012

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

Dear Mr. Trainor:

This refers to the 2011 redistricting plan for the commissioners court, the reduction in the number of justices of the peace from nine to five and the number of constables from eight to five, and the 2011 redistricting plan for the justices of the peace/constable precincts for Galveston County, Texas, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c. We received your response to our December 19, 2011, request for additional information on January 4, 2012; additional information was received on February 6, 2012.

We have carefully considered the information you have provided, as well as census data, comments and information from other interested parties, and other information, including the county's previous submissions. Under Section 5, the Attorney General must determine whether the submitting authority has met its burden of showing that the proposed changes have neither the purpose nor the effect of denying or abridging the right to vote on account of race or color or membership in a language minority group. *Georgia* v. *United States*, 411 U.S. 526 (1973); *Procedures for the Administration of Section 5 of the Voting Rights Act of 1965*, 28 C.F.R. 51.52(c). For the reasons discussed below, I cannot conclude that the county's burden under Section 5 has been sustained as to the submitted changes. Therefore, on behalf of the Attorney General, I must object to the changes currently pending before the Department.

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

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

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

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

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

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

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

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

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

The voting change at issue must be measured against the benchmark practice to determine whether it would "lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Beer* v. *United States*, 425 U.S. 130, 141 (1976). Our statistical analysis indicates that minority voters possess the ability to elect a candidate of choice in benchmark Precinct 3, and that ability has existed for at least the past decade.

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

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

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

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

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

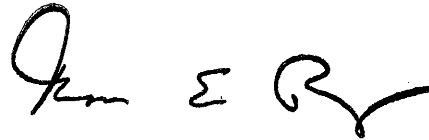
Under Section 5 of the Voting Rights Act, the submitting authority has the burden of showing that a submitted change has neither a discriminatory purpose nor a discriminatory effect. *Georgia* v. *United States*, 411 U.S. 526 (1973); 28 C.F.R. 51.52. In light of the considerations discussed above, I cannot conclude that your burden has been sustained in this instance. Therefore, on behalf of the Attorney General, I must object to the county's 2011 redistricting plan for the commissioners court and the reduction in the number of justice of the peace and constable districts as well as the redistricting plan for those offices.

We note that under Section 5 you have the right to seek a declaratory judgment from the United States District Court for the District of Columbia that the proposed change neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race, color, or membership in a language minority group. 28 C.F.R. 51.44. In addition, you may request that the Attorney General reconsider the objection. 28 C.F.R. 51.45. However, until the

objection is withdrawn or a judgment from the United States District Court for the District of Columbia is obtained, the submitted changes continue to be legally unenforceable. *Clark* v. *Roemer*, 500 U.S. 646 (1991); 28 C.F.R. 51.10. To enable us to meet our responsibility to enforce the Voting Rights Act, please inform us of the action that Galveston County plans to take concerning this matter. If you have any questions, you should contact Robert S. Berman (202/514-8690), a deputy chief in the Voting Section.

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

Sincerely,



Thomas E. Perez
Assistant Attorney General

Attachment 2

U.S. Department of Justice

Civil Rights Division

TCH:RSB:JWT:RAB:maf
DJ 166-012-3
2012-1597

Voting Section - NWB
950 Pennsylvania Avenue, NW
Washington, DC 20530

March 23, 2012

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

Dear Mr. Trainor:

This refers to the 2012 redistricting plan for the commissioners court for Galveston County, Texas, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c. We received your submission on March 22, 2012.

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 changes. Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, 28 C.F.R. 51.41.

Because the Section 5 status of the redistricting plan for the commissioners court is presently pending in *Galveston County* v. *United States,* No. 1:11-cv-1837 (D.D.C.) and *Petteway* v. *Galveston County*, No. 3:11-cv-00511 (S.D. Tex), we are providing both courts and counsel of record with a copy of this letter.

Sincerely,

T. Christian Herren, Jr.
Chief, Voting Section

Attachment 3

U.S. Department of Justice

Civil Rights Division

JDR:CKD:ALP:jdh
DJ 166-012-3
2001-3923

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

February 5, 2002

Sydney W. Falk, Jr., Esq.
Bickerstaff, Heath, Smiley,
Pollan, Kever & McDaniel
816 Congress Avenue, Suite 1700
Austin, Texas 78701-2443

Dear Mr. Falk:

This refers to the 2001 redistricting plan for the commissioners court, the reduction in the number of justices of the peace and constables from nine to eight, and two 2001 redistricting plans for the justice of the peace and constable districts for 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 submission on December 7, 2001; supplemental information was received through January 31, 2002.

The Attorney General does not interpose any objection to the specified changes. 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 changes. See the Procedures for the Administration of Section 5 (28 C.F.R. 51.41).

Sincerely,

Joseph D. Rich
Chief, Voting Section