U. S. Department of Justice

Civil Rights Division

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

October 3, 2011

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

Dear Mr. Heath:

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

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

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

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

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

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

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

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

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

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

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

Under Section 5 of the Voting Rights Act, the submitting authority bears the burden of showing that a submitted change has neither the purpose nor will have the effect of denying or abridging the right to vote on account of race, color, or membership in a language minority group. 28 C.F.R. 51.52; *South Carolina* v. *Katzenbach*, 383 U.S. 301, 328, 335 (1966). A voting change that has the purpose or will have the effect of diminishing the ability of minorities to elect their preferred candidates of choice denies or abridges the right to vote within the meaning of Section 5. 42 U.S.C 1973c(b).

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

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

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

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

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

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

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

As we previously advised, you may seek a declaratory judgment from the United States District Court for the District of Columbia that the proposed changes have neither the purpose nor will have the effect of denying or abridging the right to vote on account of race, color, or membership in a language minority group. Unless and until such a judgment is rendered by that court, the objection by the Attorney General remains in effect and the proposed changes continue to be legally unenforceable. *Clark* v. *Roemer*, 500 U.S. 646 (1991); 28 C.F.R. 51.10. To enable us to meet our responsibility to enforce the Voting Rights Act, please inform us of the action the City of Galveston plans to take concerning this matter. If you have any questions, you should contact Robert S. Berman, (202/515-8690), a deputy chief in the Voting Section.

Sincerely,

Thomas E. Perez
Assistant Attorney General