

Special Elections, Recount, Cancellations, & DOJ Submissions



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A. SPECIAL ELECTIONS

According to the Texas Election Code (TEC) a special election is an election that is not a general election or primary election.¹ So to know what a special election is, one must know what it is not. A general election is an election, other than a primary election, that regularly recurs at fixed dates.² A primary election is an election held by a political party under Chapter 172 of the TEC to select its nominees for public office, and, unless the context indicates otherwise, the term includes a presidential primary election.³ In general, a primary election is not a general election at which any citizen may vote.

Given these somewhat confusing definitions, a special election may best be described as an election held to determine whether a proposition that has application to a definite portion of the general electorate should be adopted.⁴ So ballot initiatives or referendums on municipal bonds for a new football stadium, allowing retail alcohol sales, removing red light cameras, recall elections, and elections to fill vacancies on governing bodies are special elections.⁵

Initiative, Referendum & Recall

For home-rule cities, initiative, referendum, and recall are all inherent powers reserved for exclusive use by local voters in order to provide direct remedies in unusual situations. As such, there is no constitutional or statutory authority for initiative, referendum, or recall. However, most home rule cities incorporate guidelines for initiatives, referendums, and recall elections in their charter or in an ordinance. For general-law cities, such authorization for submission of a measure to the voters will be found in the topic-specific enabling legislation, such as:

- Home-Rule Form of Government, Tex. Loc. Gov't Code Ch. 9.
- City Manager Form of Government, Tex. Loc. Gov't Code Ch. 25.
- Civil Service for Police &/or Fire, Tex. Loc. Gov't Code Ch. 143.
- Issuance of Municipal Bonds, Tex. Gov't Code Ch. 1251.
- Approval to Sell Land Designated as Park, Tex. Loc. Gov't Code Ch. 253.

Initiative

Initiative is a procedure under which local voters directly propose (initiate) legislation.⁶ Citizen lawmaking through the initiative process allows local voters to circumvent the city council by direct ballot box action on new ordinances that have wide support in the community, but which the council refuses to enact.

The initiative process begins with circulation of a petition setting forth the text of the desired ordinance. Then, petitioners must obtain the number of voter signatures needed to force the city

¹ Tex. Elec. Code Ann. § 1.005(18) (Vernon 2003).

² *Id.* § 1.005(6).

³ *Id.* § 1.005(14).

⁴ See *Wallis v. Williams*, 101 Tex. 395 (1908).

⁵ See *Burns v. Kelly*, 658 S.W.2d 731 (Tex. App.---Fort Worth 1983, no writ) (involving a recall election of a city council member).

⁶ See Terrell Blodgett, *Texas Home Rule Charters*, 111 (Texas Municipal League, July 1994).

council to submit the ordinance to the people at a citywide election. Petition signature requirements vary from charter to charter and from city to city. Some are based on a percentage of the number of qualified voters in the city, while others are expressed as a ratio of the number of votes cast at the last general city election.

After a completed petition is filed, the city secretary⁷ checks it to make sure that all of those who signed are qualified voters. If the petition complies with the requirements of the charter, the city council has two options: (1) it can adopt the proposed ordinance; or (2) it must call an election on the ordinance. If, at the election on the proposed ordinance, a majority of those voting favor its adoption, the ordinance is put into effect.

Referendum

Referendum is a procedure under which local voters can repeal unpopular, existing ordinances the council refuses to rescind by its own action.⁸ The procedures for forcing the city council to call a referendum election are usually the same as for initiative elections. Petitions calling for an election to repeal "Ordinance XYZ" are circulated. When the required number of signatures is obtained, the petition is submitted to the city council, which can either: (1) repeal the ordinance by its own action; or (2) call an election at which the people can vote to repeal it. If, at such election, a majority favors retaining the ordinance, it is left on the books. If a majority favors its repeal, it is rescinded when the council canvasses the election returns.

Recall

Recall is a process by which local voters can oust members of the city council before the expiration of their terms.⁹ Under most charters, a recall election begins with the filing of an affidavit stating the name of the council member whose removal is sought and the grounds for removal. The city secretary then furnishes the person filing the affidavit with petition forms that must be completed and returned within a prescribed time (usually indicated in the charter or an ordinance).

Most city charters impose two further limitations on recall efforts. First, they prohibit more than one recall election per councilmember per term. Secondly, they forbid recall elections for any council member during the early stages of his or her term—as, for example, prohibiting an election to recall a councilmember within ninety (90) days of the date he or she was sworn into office, or prohibiting recall elections for council members whose terms will expire within 90 days. The following language is typical of charter recall provisions:

“The people of the city reserve the power to recall any member of the council and may exercise such power by filing with the city clerk a petition, signed by qualified voters of the city equal in number to at least ten percent (10%) of the qualified voters of the city, demanding the removal of a councilman.”

⁷ In this paper, the title “city secretary” is used for purposes of simplicity, and includes the title “municipal clerk”.

⁸ See Blodgett, *Texas Home Rule Charters*, 111.

⁹ See *id.*

Discretion of City Officials

Given the methods above, the only real discretion city officials have when presented with a petition is to make sure it complies with the general guidelines prescribed by the charter or contained in an ordinance. The authority with whom a petition is filed is required to notify the petitioner as to the sufficiency to the petition not later than the fifth (5th) regular business day after the date of its receipt.¹⁰ Of course, while citizens always have the right to present a petition to the city council, intending to influence its action, unless there is a specific charter, ordinance, resolution, or statute requiring that the election be called on a petition of voters, neither the mayor nor city council are required to act on a petition requesting an election. Though the TEC regulates certain aspects of the petition, it does not specifically authorize or require the submission of a petition on any measure to a city authority.¹¹ Such authorizations all come from outside the TEC, such as ordinances, resolutions or statute, such as the Local Government Code.¹²

When an election can be initiated by a voter's petition, the law authorizing the election will specify at least some of the requirements governing its submission such as: who is eligible to sign, the number of signatures required, to whom it is to be submitted (usually the city secretary), perhaps a limit on the length of time for circulating the petition, form requirements, etc.

A good example of the limited discretion of city officials when it comes to acceptance of a petition is shown in the case of *In re Roof*.¹³ In this case, voters in the City of Galveston submitted a petition to the city secretary which would amend the city's charter to prohibit the charging of a fee for parking a car on Seawall Boulevard. The statute setting forth the requirements for acceptance of a petition to amend a home-rule municipality's charter stated that the only condition that must be satisfied before the city secretary has to certify the petition, is that the petition contain the requisite number of qualified signatures.¹⁴ In this case the city secretary did not contest the number of qualified signatures, but she refused to certify the petition based on her belief that the proposed charter amendment conflicts with the city charter, general state law, and the Texas Constitution.¹⁵ The court held that TEC § 9.004 does not give the city secretary any discretionary duties and therefore it was improper for her to refuse to certify the petition to the governing body for any reason outside of a lack of qualified signatures.¹⁶

Certain items of information must be contained in a petition authorized by a law outside the TEC, if its in connection with an election. The requirements apply to every city election initiated by a petition under either a statute or a home rule charter provision, except as to a local option petition for the sale of alcoholic beverages which is governed by TEC Ch. 501.¹⁷ General petition requirements are listed under section 277.002 of the TEC, and require the following:

¹⁰ Tex. Elec. Code § 277.0023(b).

¹¹ Analeslie Muncy, *Texas Municipal Election Law Manual* § 15.03(b) (3d ed. 1997 & Supp. 2009).

¹² See e.g. Tex. Loc. Gov't Code Ann. § 9.004 (Vernon 2009) (settings forth requirements for acceptance of charter amendment petition by governing body of a home-rule municipality).

¹³ See *In re Roof*, 130 S.W.3d 414 (Tex.App.---Houston [14th Dist.] 2004, no pet.)

¹⁴ Tex. Loc. Gov't Code § 9.004.

¹⁵ *In re Roof*, 130 S.W.3d 414, 415 (Tex.App.---Houston [14th Dist.] 2004, no pet.)

¹⁶ *Id.* at 418.

¹⁷ Tex. Elec. Code Ch. 501.

- Signature of the person signing;
- The signer's printed name;
- Either the signer's date of birth OR the voter registration number and the name of the county of registration if the city is situated in more than one county;
- The signer's residence address; and
- The date of signing.¹⁸

Without the above information and authorization, an otherwise valid petition may not initiate the special election process.

Overturing Special Election via Election Contest

The general standard for overturning the results of a special election is an election contest. The rules pertaining to an election contest are set forth in TEC Ch. 221.¹⁹ The district court has exclusive original jurisdiction over an election contest that does not involve a presidential primary, elections on a measure that is for advisory purposes only, federal elections, and statewide office elections.²⁰ The court of appeals has appellate jurisdiction over contests originating in district court.²¹ The scope of inquiry by the district court is spelled out in TEC § 221.003, which states:

- (a) The tribunal hearing an election contest shall attempt to ascertain whether the outcome of the contested election, as shown by the final canvass, is not the true outcome because:
 - (1) illegal votes were counted; or
 - (2) an election officer or other person officially involved in the administration of the election:
 - (A) prevented eligible voters from voting;
 - (B) failed to count legal votes; or
 - (C) engaged in other fraud or illegal conduct or made a mistake.
- (b) In this title, "illegal vote" means a vote that is not legally countable.
- (c) This section does not limit a provision of this code or another statute expanding the scope of inquiry in an election contest.²²

¹⁸ Tex. Elec. Code. § 277.002(a).

¹⁹ *See id.* Ch. 221.

²⁰ *See id.* §§ 221.001 and 221.002.

²¹ *Id.* § 221.002(f).

²² *Id.* § 221.003.

A recent example of this standard is shown in *Hemrick v. City of College Station*, where a ballot measure submitted by petition to overturn a previously passed red-light camera ordinance that permitted the use of red-light cameras in the city was contested. In this particular case, it was whether or not the city made a mistake in accepting the petition outside of the time frame set forth in the city charter. Although labeled an “initiative,” the judge held the petition was a “referendum” because it would operate to repeal a previously enacted city ordinance. Therefore, the special election results based on the referendum were “not the true outcome” because the city charter stated that referendum petitions, unlike initiative petitions, must be submitted within twenty (20) days of enactment of the ordinance at issue, and the petition in this case was submitted and accepted by the city after the twenty (20) day period.²³

B. ELECTION RECOUNT

Under TEC § 211.002(1) a "recount" means the process conducted under this title for verifying the vote count in an election.²⁴ However, there are different types of recounts. For example, an "initial recount" means a recount obtained under Subchapter B, Chapter 212.²⁵ A "partial recount" means a recount in fewer than the total number of election precincts involved in an election.²⁶ A "supplementary recount" means a recount obtained under Subchapter C, Chapter 212, following a partial initial recount.²⁷ An “expedited recount” means a recount obtained under Subchapter D, Chapter 212, and an “automatic recount” means a recount conducted under Chapter 216.²⁸ The procedures for a recount are described in great detail in Chapters 211 through 216 of the TEC.

Grounds

The grounds required for an initial recount are different for elections to an office, elections on a measure, and elections using electronic voting systems. The latter requires no grounds, however, the winning candidate is not eligible to request the recount in such a situation.

For election to an office there are four (4) different grounds required for a recount, which are spelled out under TEC § 212.022.

- (a) The first ground is when the difference in the number of votes between petitioner and winning candidate is less than 10% of petitioner’s votes.²⁹
- (b) The second ground is when the petitioner is entitled to a place on a runoff ballot or is tied for election or a place on a runoff ballot.³⁰
- (c) The third ground is if the Secretary of State certifies to counting errors in precincts where paper ballots were used.³¹

²³ *Hemrick v. City of College Station*, No. 09-002877-CV-85 (85th Dist. Ct., Brazos County, Tex. Dec. 4, 2009).

²⁴ Tex. Elec. Code § 211.002(1).

²⁵ *Id.* § 211.002(2).

²⁶ *Id.* § 211.002(3).

²⁷ *Id.* § 211.002(4).

²⁸ *Id.* § 211.002(5) and (11).

²⁹ *Id.* § 212.022(1).

³⁰ *Id.* § 212.022(2).

(d) Finally, if the total votes for all candidates are less than 1,000, a recount can take place.³²

For election on a measure there are three (3) different grounds required before a recount can occur.

- (1) The first ground is when the difference in the number of votes for the measure and against the measure is less than 10% of total votes on the measure.³³
- (2) The second ground is if the Secretary of State certifies to counting errors in precincts where paper ballots were used.³⁴
- (3) Finally, if the total votes for and against the measure is less than 1,000, a recount can take place.³⁵

Who Can Seek Recount

There are three (3) general categories of persons who can request a recount via a petition if the grounds are satisfied.

- (1) The first category is a candidate in an election to an office.³⁶
- (2) The second category is the campaign treasurer of a specific purpose political committee involved in the election.³⁷
- (3) In the case of an election on a measure, the last category is twenty-five (25) or more persons who were eligible to vote in the election.³⁸

How to Request a Recount

Normally a petition requesting a recount in a city election must be submitted to the presiding officer of the final canvassing authority (aka the Recount Coordinator/Supervisor -- usually the mayor) not later than 5:00 p.m. of the fifth (5th) day after election day or 5:00 p.m. of the second (2nd) day after the day of the original canvass, whichever is later.³⁹ The time for submitting a petition for a recount on an office for which a majority vote is required is detailed in TEC § 212.083 if a regularly scheduled runoff election for another office voted on at the same election is to be held. The petition is considered submitted at the time of its receipt.⁴⁰ The recount coordinator has forty-eight (48) hours to review the petition and must promptly notify the requestor of each defect.⁴¹ Any amendment to a petition in response to a notice of a defect must be submitted by the deadline for submitting the petition, or by 5:00 p.m. of the second (2nd) day after notice of the defect is received, whichever is later.⁴²

³¹ Tex. Elec. Code § 212.022(3).

³² *Id.* § 212.022(4).

³³ *Id.* § 212.024(a)(1).

³⁴ *Id.* § 212.024(a)(2).

³⁵ *Id.* § 212.024(a)(3).

³⁶ *Id.* § 212.022.

³⁷ *Id.* § 212.024(b)(1).

³⁸ *Id.* § 212.024(b)(2).

³⁹ Muncy, *Texas Municipal Election Law Manual* § 9.46(e); *See* Tex. Elec. Code § 212.028.

⁴⁰ Tex. Elec. Code § 212.003.

⁴¹ *Id.* § 212.029.

⁴² *Id.* § 212.030.

Once the petition is approved, the recount coordinator must note approval and the date of approval on the petition. The coordinator must then notify the recount supervisor (if its a different person), who, with written approval of the coordinator must order the recount.⁴³ The recount supervisor must order the recount to be held not later than the seventh (7th) day after the date the petition is approved.⁴⁴ The coordinator must also notify the petitioner and each opposing candidate of approval at least eighteen (18) hours before the recount is set to begin, or in the case of a recount on a measure, the campaign treasurer of a political action committee on the opposing side of the petitioner or a person eligible to vote in the election who is representative of the interests of the opposing side if there is no political action committee.⁴⁵

The recount supervisor must also appoint a recount committee, which is composed of at least four (4) members, one of whom will serve as chair. Members must meet the qualifications of election day clerks. However, a person who served as a judge on election day or on the early voting ballot board is ineligible to serve on the recount committee. Committee members are entitled to an hourly pay rate set by the recount supervisor.⁴⁶ In most cities, city council members serve on the recount committee.

Upon presentation of a written order signed by the recount coordinator, the custodian of the voted ballots, voting machines, tabulating equipment, etc. shall make these items available to the recount committee.⁴⁷ The committee must make a precinct-by-precinct report following its recount, providing one copy to the recount supervisor and one copy to the custodian of the election records.⁴⁸ Upon receipt of the committee's report, the recount supervisor shall prepare and sign a precinct-by-precinct report which shall serve as the official statement of the vote count in the canvassing authority's jurisdiction. The supervisor shall deliver one copy of their report to the recount coordinator and one copy to the custodian of the election records.⁴⁹ Finally after receiving the supervisor's report, the recount coordinator shall determine the result of the recount and notify the petitioner, opposing candidates, and any other people entitled to notice under TEC § 212.032.⁵⁰

A request for a recount does not delay the canvass, but the canvassing authority must make a note on the canvass that a recount has been requested.⁵¹ Submission of a recount petition delays the issuance of a certificate of election and qualification for the office involved in the recount pending completion of recount. Therefore, no candidate, including a candidate for an unexpired term of office, may either receive a certificate of election or qualify for an office involved in a recount until the recount is finished. Nevertheless, this provision does not affect a candidate who

⁴³*Procedures to Request and Conduct a Recount*, The Office of the Texas Secretary of State, ¶ XII, available at <http://www.sos.state.tx.us/elections/laws/recounts.shtml> (last visited on Dec. 16, 2009).

⁴⁴ See Tex. Elec. Code § 212.031.

⁴⁵ See *id.* § 212.032.

⁴⁶ *Procedures to Request and Conduct a Recount*, ¶ XV.

⁴⁷ *Id.* at ¶ XX; See Tex. Elec. Code § 212.033.

⁴⁸ See Tex. Elec. Code § 213.012.

⁴⁹ See *id.* § 213.055.

⁵⁰ *Procedures to Request and Conduct a Recount*, ¶ XXI.

⁵¹ Tex. Elec. Code § 213.007.

has already received a certificate of election and qualified for an office before a recount petition involving that office is submitted.⁵²

If the recount changes the number of votes, regardless of change in outcome, the canvassing authority must conduct a canvass for the office or measure involved as soon as practicable after completion of the recount, using the committee report in the supervisor's possession. The new canvass is the official canvass for all purposes, including calculating election contest filing deadlines.⁵³

The person requesting the recount may be required to pay for the recount if it was not an automatic recount (in which case the city pays for it), usually by depositing funds with the city along with the recount petition. Since the deposit calculation varies from city to city based on the types of ballots used, cities should refer to TEC Sections 212.111-212.113 as well as Chapter 215 to calculate the costs of the recount which are assessable against the person requesting the recount. Note that if the outcome of the election is changed by the recount, the entire deposit is returned to the requestor. If the outcome does not change, the costs are to be paid from the deposit.

Expedited & Automatic Recounts

In an election in which a majority vote is required for election or nomination and votes were cast for more than two (2) candidates, an expedited recount may be requested.⁵⁴ The procedure for an expedited recount is described in TEC §§ 212.081 through 212.089.⁵⁵

In an election of candidates requiring a plurality vote, if two (2) or more candidates tie for the number of votes required to be elected and the tie is not broken by withdrawal of a candidate or casting lots, an automatic recount must be conducted.⁵⁶ If the automatic recount resolves the tie, a second election does not need to be held.

In an election of candidates requiring a majority vote, if more than two (2) candidates tie for the highest number of votes in the main election, an automatic recount must be conducted in accordance with TEC Ch. 216.⁵⁷ If the recount does not resolve the tie, the tied candidates must cast lots to determine which two (2) candidates are in the runoff.⁵⁸ Same guidelines apply in the situation where two (2) or more candidates tie for the second highest number of votes in the main election.⁵⁹ If candidates in a runoff election tie, an automatic recount must be held before the tying candidates can cast lots to determine the winner. In order to initiate an automatic recount, the presiding officer of the canvassing authority shall request the recount in the same manner as a

⁵² *Procedures to Request and Conduct a Recount*, ¶ XX; See Tex. Elec. Code § 212.0331.

⁵³ *Procedures to Request and Conduct a Recount*, ¶ XXII; See Tex. Elec. Code § 213.033.

⁵⁴ Muncy, *Texas Municipal Election Law Manual* § 9.46(f); See Tex. Elec. Code § 2.081.

⁵⁵ Muncy, *Texas Municipal Election Law Manual* § 9.46(f).

⁵⁶ *Id.* § 9.46(c)(1); See Tex. Elec. Code § 2.002(i) and Ch. 216.

⁵⁷ Muncy, *Texas Municipal Election Law Manual* § 9.46(c)(2).

⁵⁸ See Tex. Elec. Code § 2.023(b).

⁵⁹ See *id.* § 2.023(c).

recount petitioner would as noted above, with the exception that no deposit is provided with the request.⁶⁰

C. ELECTION CANCELATION

The cancellation of an election is permitted under certain circumstances. A city may cancel an election only if there is specific statutory authority to cancel the election.⁶¹ In addition to cities, many types of political subdivisions such as water districts, hospital districts, and junior college districts are able to cancel their elections.

Recently, Hays County Emergency Services District #6 learned the hard way about election cancellation law when they tried to cancel a special election (sales tax referendum) after learning it would compete with another sales tax referendum in the same area. Together, the two tax increases would combine to push the sales tax in the area to 9.25 cents, which is past the 8.25 cent legal limit, effectively voiding both of the tax increases and would make them wait a year before they could go to the voters again. However, under state law an emergency services district is required to hold an election when it calls one and does not have authority to cancel it.⁶²

Statutory authority to cancel an election is found under TEC Chapter 2, which states that a general or special election may be canceled if each candidate for an office that is to appear on the ballot is unopposed (Please note that this is different for single-member district elections).⁶³ “Unopposed” means only one candidate’s name appears on the ballot, *AND* there are no write-in candidates for any office on the ballot. So if any candidate in the general election is opposed, *all* candidates in the general election must appear on the ballot, whether they are opposed or not.

General Requirements

An election can not be canceled until after the deadline for placement of names on the write-in candidate list. Immediately after the write-in candidacy declaration deadline, if no candidate in the election is opposed on the ballot or by a declared write-in candidate, the city secretary must deliver a certification that each candidate for office is unopposed to the city council.⁶⁴ Once the certification is received by the city council, the council may declare the unopposed candidates elected to office by order or ordinance, which effectively cancels the election. However, the city council has discretion whether or not to cancel the election in such a situation, and may decide to hold the election regardless of the unopposed status of the candidates.

Should the city council decide to cancel an election, the order or ordinance declaring the unopposed candidates elected must be posted on election day at each polling place used (if there

⁶⁰ Tex. Elec. Code § 216.003.

⁶¹ *Id.* § 2.082.

⁶² Patrick George, *Hays County Emergency Services District 6 Election Back On*, AUSTIN-AMERICAN STATESMAN, Nov. 3, 2009, at B1.

⁶³ *See* Tex. Elec. Code Ch. 2.

⁶⁴ *See id.* § 2.052.

are other elections taking place) or that would have been used in the election.⁶⁵ Additionally, if the city is holding a separate election on election day, the ballots used in that election must include a list of the offices and candidate names that have been declared elected under the heading “Unopposed Candidates Declared Elected, and such candidates should be listed after the measures or contested races so as to prevent voters from accidentally casting votes in connection with the unopposed candidates.”⁶⁶ It is also worth noting that the Department of Justice has determined that no preclearance submission is necessary for the cancellation of an election under the TEC.⁶⁷

Legislative Changes

In 2009, the Legislature amended the TEC to make a distinction between the ballot for the general elections and the ballot for each special election held at the same time. They are considered separate elections with separate ballots.⁶⁸ Furthermore, if only special elections are being held at the same time, each special election will be considered to have a separate ballot. A special election on a proposition or a special election to fill a vacancy having opposed candidates, will no longer affect the city’s eligibility to cancel a general election held at the same time if none of the candidates in the general election are opposed. Similarly, if there is an unopposed candidate in a special election, it can be canceled regardless of the type or status of the other special elections being held at the same time.⁶⁹

The Legislature also amended the TEC to address cancellation of an election on a moot measure. If a city council orders an election on a measure and later determines that the action to be voted on at the election cannot be taken, regardless of the outcome of the election, the city council may declare the measure moot and remove the measure from the ballot. Should this occur, the city secretary must post notice of the declaration during early voting by personal appearance and on election day at each polling place that would have been used for the election.⁷⁰

Finally, the Legislature made it a crime (Class A Misdemeanor) for anyone who, by intimidation or coercion, attempts to influence a person not to file an application for a place on the ballot, a write-in candidacy declaration, or to withdraw as a candidate for an election that might be subject to cancellation.⁷¹

Single-Member & At-Large Districts

If a city does have single-member districts for its city council positions, a general or special election may be canceled if: (1) each candidate (including at-large candidates) running for office in that district is unopposed, and (2) no proposition is to appear on the ballot.⁷² As to at-large candidates in a place system, the election may be canceled if a candidate is unopposed, there are

⁶⁵ Muncy, *Texas Municipal Election Law Manual* § 10; See Tex. Elec. Code § 2.053.

⁶⁶ See Tex. Elec. Code § 2.053(c)

⁶⁷ Muncy, *Texas Municipal Election Law Manual* § 10.24(e).

⁶⁸ Tex. Elec. Code § 2.051.

⁶⁹ Muncy, *Texas Municipal Election Law Manual* § 10.22.

⁷⁰ *Id.* § 10.27; See Tex. Elec. Code § 2.081.

⁷¹ Tex. Elec. Code § 2.054.

⁷² Muncy, *Texas Municipal Election Law Manual* § 10.22(d) (3d ed. 1997 & Supp. 2009); See Tex. Elec. Code § 2.051(b).

no other places covering the same territory with opposed candidates, and no at-large proposition is to appear on the ballot.⁷³ In election in which the candidates do not run for a district, ward, or place number, but all candidates run at-large with those candidates receiving the highest number of votes being elected to the number of seats available, the Secretary of State has ruled that if the number of candidates equals the number of seats available and no one has filed a write-in candidacy declaration, such candidates are unopposed for purposes of TEC § 2.051, and the election is eligible for cancelation.⁷⁴

D. DOJ SUBMISSION⁷⁵

Voting Rights Act

The Voting Rights Act of 1965 (the “Act”) was designed to address issues of racial discrimination against voting. It prohibits discrimination based on race, and requires certain jurisdictions to provide bilingual assistance to language minority voters. The Act was created to “rid the country of racial discrimination in voting.”⁷⁶ The murder of voting-rights activists in Philadelphia and Mississippi gained national attention, along with numerous other acts of violence and terrorism. Finally, the unprovoked attack on March 7, 1965, by state troopers on peaceful marchers crossing the Edmund Pettus Bridge in Selma, Alabama, en route to the state capitol in Montgomery, persuaded the President and Congress to overcome Southern legislators' resistance to effective voting rights legislation. President Johnson issued a call for a strong voting rights law and hearings began soon thereafter on the bill that would become the Voting Rights Act.

Congress determined that the existing federal anti-discrimination laws were not sufficient to overcome the resistance by state officials to enforcement of the 15th Amendment. The legislative hearings showed that the Department of Justice's efforts to eliminate discriminatory election practices by litigation on a case-by-case basis had been unsuccessful in opening up the registration process; as soon as one discriminatory practice or procedure was proven to be unconstitutional and enjoined, a new one would be substituted in its place and litigation would have to commence anew.

President Johnson signed the resulting legislation into law on August 6, 1965.⁷⁷ Section 2 of the Act, which closely followed the language of the 15th amendment, applied a nationwide prohibition against the denial or abridgment of the right to vote on the literacy tests on a nationwide basis.⁷⁸ Among its other provisions, the Act contained special enforcement

⁷³ See Tex. Elec. Code § 2.051(b).

⁷⁴ Muncy, *Texas Municipal Election Law Manual* § 10.22(f); See Election Law Opinion AOG-1 (1996).

⁷⁵ This section includes material contributed by **Cristina Ruiz Blanton** in the paper, *Preclearance, Election Contests, and Electioneering* (co-authored by A. Bojorquez 2008). Cristina is a former attorney with the Texas Secretary of State's Office – Elections Division, and currently *Of Counsel* to the Bojorquez Law Firm, PLLC.

⁷⁶ *South Carolina v. Katzenbach*, 383 U.S. 301, 815 (1966).

⁷⁷ United States Department of Justice, “Introduction to Voting Rights Laws”, (updated 7-25-2008), available at: www.usdoj.gov.

⁷⁸ The Voting Rights Act of 1965, 42 U.S.C. §§ 1971-1974 (1994).

provisions targeted at those areas of the country where Congress believed the potential for discrimination to be the greatest.

Section 5 jurisdictions covered by these special provisions has the effect of suspending the enactment or administration of any new voting law or regulation until such law or regulation has been preapproved or “precleared” by the federal government, either through the Attorney General or the District Court for the District of Columbia.⁷⁹ In addition, the Attorney General could designate a county covered by these special provisions for the appointment of a federal examiner to review the qualifications of persons who wanted to register to vote. Further, in those counties where a federal examiner was serving, the Attorney General could request that federal observers monitor activities within the county's polling place.⁸⁰ Section 5 of the Act was specifically crafted to address the ever-changing discriminatory practices and “shift the advantage of time and inertia from the perpetrators of evil to its victims.”⁸¹ By design, Congress limited the applicability of section 5 to the parts of the country where discrimination persisted on a pervasive scale.⁸²

The Preclearance Process

Section 5 *freezes* election practices or procedures in certain states until the new procedures have been subjected to review (“precleared”) for compliance with the Act. This means that *voting changes* in covered jurisdictions may not be used until that review has been obtained. A covered jurisdiction is a political subdivision that falls under the provisions of the Act and must therefore comply with the “preclearance” regulations imposed by the Department of Justice (the “DOJ”).⁸³

There are two alternative and independent means by which a municipality may seek federal preclearance. A city can obtain preclearance for a voting change by submitting the proposed change to the United States Attorney General, through the Civil Rights Division of the Department of Justice. Alternatively, a city can obtain preclearance for a voting change by filing a petition for a declaratory judgment in the United States District Court for the District of Columbia. As might be expected, the administrative preclearance process through the Attorney General is the most expeditious and cost-effective alternative. The preclearance “bailout” via filing a petition for a declaratory judgment in the District Court of Washington, D.C. was elaborated on in the Supreme Court’s holding in *Northwest Austin Municipal Utility District Number One v. Holder*.⁸⁴ In a declaratory judgment action, the Court held that the subdivision must show that during the previous ten (10) years:

⁷⁹ See Voting Rights Act; See also *Katzenbach*, 383 U.S. at 316, 320.

⁸⁰ 42 U.S.C. § 1973(d).

⁸¹ See *Katzenbach*, 383 U.S. at 316, 328.

⁸² *Id.*

⁸³ 28 C.F.R. § 51.4 (2001).

⁸⁴ *Northwest Austin Municipal Utility District Number One v. Holder*, 129 S.Ct. 2504 (2009).

- No test or device has been used within such State or political subdivision for the purpose or with the effect of denying or abridging the right to vote on account of race or color;
- No final judgment of any court of the United States has determined that denials or abridgments to the right to vote on account of race or color have occurred anywhere in the territory of the covered jurisdiction;
- No Federal examiners or observers have been assigned to the covered jurisdiction;
- The covered jurisdiction has fully complied with Section 5; and
- The A.G. has not interposed any objection (that has not been overturned by a final judgment of a court) and no declaratory judgment has been denied under Section 5.⁸⁵

In addition, evidence of the following must also be presented by a political subdivision seeking a preclearance bailout:

- The political subdivision must have eliminated voting procedures and methods of election which inhibit or dilute equal access to the electoral process;
- The political subdivision must have been engaged in constructive efforts to eliminate intimidation and harassment of persons exercising rights protected under the Act;
- The political subdivision has engaged in other constructive efforts, such as expanded opportunity for convenient registration and voting for every person of voting age and the appointment of minority persons as election officials throughout the jurisdiction and at all stages of the election and registration process.⁸⁶

The Attorney General may consent to entry of judgment in favor of bailout if the evidence warrants it, though other interested parties are also provided the opportunity to intervene in the declaratory judgment action.⁸⁷

Changes that Require Preclearance

DOJ regulations contemplate a very broad scope of voting changes that requires preclearance, stating that any “change affecting voting, even though it appears to be minor and indirect, returns to a prior practice or procedure, ostensibly expands voting rights, or is designed to remove the elements that caused objection by the Attorney General” must be precleared.

Some specific examples of voting changes that require preclearance are:

- (a) Any change in qualifications or eligibility for voting.
- (b) Any change concerning registration, balloting, and the counting of votes and any changes concerning publicity for, or assistance in, registration or voting.

⁸⁵ 42 U.S.C. § 1973 (a)(1)(A)-(E).

⁸⁶ *Id.* at § 1973 (a)(1)(F)(i)-(iii).

⁸⁷ *Id.* at § 1973b(a)(9).

- (c) Any change with respect to the use of a language other than English in any aspect of the electoral process.
- (d) Any change in the boundaries of voting precincts or in the location of polling places.
- (e) Any change in the constituency of an official or the boundaries of a voting unit (e.g., through redistricting, annexation, de-annexation, incorporation, reapportionment, changing to at-large elections from district elections, or changing to district elections from at-large elections).
- (f) Any change in the method of determining the outcome of an election (e.g., by requiring a majority vote for election or the use of a designated post or place system).
- (g) Any change affecting the eligibility of persons to become or remain candidates, to obtain a position on the ballot in primary or general elections, or to become or remain holders of elective offices.
- (h) Any change in the eligibility and qualification procedures for independent candidates.
- (i) Any change in the term of an elective office or an elected official or in the offices that are elective (e.g., by shortening the term of an office, changing from election to appointment, or staggering of terms).
- (j) Any change affecting the necessity of, or methods for, offering issues and propositions for approval by referendum.
- (k) Any change affecting the right or ability of persons to participate in political campaigns.⁸⁸

In addition to the list above, the conduct of any particular *special election* may also be subject to preclearance by the DOJ to the extent any practices, procedures, voting locations, or any aspect of the conduct of the election, including the change of election date, differs from the most recent election.⁸⁹

Review by DOJ

The level of review executed by the DOJ upon receiving an administrative preclearance is the same standard as would be used in a court of law if the subdivision filed a Declaratory Judgment. The standard by which such voting changes are reviewed is “[w]hether the submitted change has the purpose or will have the effect of denying or abridging the right to vote on account of race, color or membership in a language minority group.”⁹⁰

The jurisdiction can implement the change if the Attorney General affirmatively indicates no objection to the change, or if at the expiration of sixty (60) days no objection to the submitted

⁸⁸ 28 C.F.R. § 51.13 (2001).

⁸⁹ *Id.* § 51.17(c).

⁹⁰ *Id.* § 51.52(a).

change has been interposed by the Attorney General.⁹¹ It is the practice of the Department of Justice to respond in writing to each submission, specifically stating the determination made regarding each submitted voting change.⁹²

Submission Format

While no specific format for a submission is required, a submission should include the required contents (identified at 28 C.F.R. § 51.27) and the supplemental contents (identified at 28 C.F.R. § 51.28). *See attached lists from the CFRs included as Appendix A to this paper.*

It is important to include as much information relating to the demographic make-up of the political subdivision requesting the preclearance, as well as a good overview of the differences between the changes being requested by the subdivision to provide the DOJ with enough information regarding to the changes and the impact or non-impact on the political subdivision.⁹³

In addition to supplying as much pertinent information as the subdivision can, it is crucial to submit the request for preclearance within the required time-frame for DOJ review. Once a submission is received by the DOJ, the Voting Rights staff has sixty (60) calendar days in which to preclear or object to the proposed change.⁹⁴ Therefore, in order to ensure that preclearance is obtained in a timely manner, a submission must be sent to the Department of Justice at least 60 days prior to the implementation of a voting change. If the submitting entity does not receive a written objection or approval within the 60 day timeline from the date of submission, the submission is deemed precleared.

Consult Attorney or DOJ

When in doubt on whether to submit a preclearance on a particular voting change, the subdivision should contact the DOJ Voting Division directly, or seek the advice of legal counsel for more information. A change in any process, procedure, date, location, or method of voting from election to election must be submitted and precleared prior to implementation to prevent a lawsuit from the DOJ, or a private entity for violation of Section 5 of the Voting Rights Act.

Translate Election Related Items

In order to facilitate participation of foreign language minorities in the elections process, Congress amended the Voting Rights Act to ensure that all election related materials are translated into the minority group's language based on a formula set out in Sections 203 and 4(f)4 of the Voting Rights Act.⁹⁵ All election information that is available in English must also be available in the minority language where the number of United States citizens of voting age is a single language group within the jurisdiction and:

⁹¹ 28 C.F.R. § 51.10.

⁹² *See*, "Introduction to Voting Rights Laws", (updated 7-25-2008), available at: www.usdoj.gov.

⁹³ 28 C.F.R. §§ 51.26(d), 51.27(a)-(c), 51.35.

⁹⁴ *Id.* § 51.9(a). If the DOJ requests additional information, a new sixty (60) day time period commences upon the Department's receipt of the requested information from the covered jurisdiction. *See also id.* § 51.37.

⁹⁵ *See* 42 U.S.C § 1973aa-1a.

- Is more than 10,000, or
- Is more than five percent (5%) of all voting age citizens, or
- On an Indian reservation, exceeds five percent (5%) of all reservation residents; and
- The illiteracy rate of the group is higher than the national illiteracy rate.⁹⁶

For jurisdictions in Texas, it is probably a good idea to go ahead and translate all election related documents into Spanish (Note: Since 2002 Harris County must also translate all election related documents into Vietnamese). Election related documents includes any registration or voting notices, ordinances, council agendas, council minutes, forms, instructions, assistance, or any other materials or information relating to the electoral process, including ballots. Council agendas, minutes, and ordinances are included because they are all public documents that may convey to the citizenry information about elections, and therefore must be translated (at least in part).⁹⁷

Recent DOJ Preclearance Issues

Below is a discussion of recent changes in the law that would require preclearance through DOJ. One of the most significant for small cities is the recent changes of HB 556, which allows cities located in counties with less than 20,000 in population to not have to provide more than one (1) accessible voting system during early voting and election day on elections where no federal offices are on the ballot.

House Bill 556, passed by the 80th Legislature, amended the TEC by adding Section 61.013, which concerns voting equipment accessibility requirements. Prior law required every county and political subdivision to provide at least one accessible electronic voting system in each polling place for all elections.

Section 61.013 relaxes this requirement for certain political subdivisions conducting elections which do not contain a federal office on the ballot. For elections in which a federal office is not on the ballot, a county or a political subdivision located within a county with a population described below is not required to meet the strict requirements of TEC Section 61.012(a)(1)(c) - use of voting accessible machines in each polling place.

1. Counties with a population of less than 2,000 are exempt from the requirement of providing accessible electronic voting systems. Political subdivisions located in a county with a population of less than 2,000 are exempt from the requirement of providing accessible electronic voting systems. However, a voter with a disability may request a reasonable accommodation by the twenty-first (21st) day before election day with the early voting clerk.

⁹⁶42 U.S.C § 1973aa-1a.

⁹⁷ DOJ has not yet codified its interpretation of the VRA. Nonetheless, DOJ officials are rendering this opinion in the form of conference presentations, telephone conversations, and lawsuits.

A reasonable accommodation may include providing an audio tape of the ballot for the voter or a template which lies over the ballot and allows a voter with visual impairment to vote independently and in privacy.

2. Counties with a population of 2,000 or more, but less than 5,000, must provide at least one accessible electronic voting system on election day. Political subdivisions located in a county with a population of 2,000 or more, but less than 5,000, must provide at least one electronic voting system on election day.
3. Counties with a population of 5,000 or more, but less than 10,000, must provide at least one electronic voting system on election day and during the period for early voting by personal appearance. Political subdivisions located in a county with a population of 5,000 or more, but less than 10,000, must provide at least one electronic voting system on election day and during the period for early voting by personal appearance. The logical location would be the main early voting clerk's office on election day and the main early voting polling place during early voting.
4. Counties with a population of 10,000 or more, but less than 20,000, may provide fewer accessible voting stations if they comply with the requirements set out below. Political subdivisions located in a county with a population of 10,000 or more, but less than 20,000, may provide fewer accessible voting stations if they comply with the following:
 - Submit an Application of Undue Burden Status to the Secretary of State showing that compliance with Section 61.012(a)(1)(c) would cause an undue burden on the political subdivision by increasing the costs associated with the election by at least 25% as compared to the costs of the last general election held by the subdivision before January 1, 2006.
 - If the application is approved, the entity will provide:
 - At least one accessible electronic voting system on election day and during the period of early voting by personal appearance; and
 - If the subdivision has branch early voting locations, one mobile accessible electronic voting system to be deployed at least once to each branch early voting polling place.

All political subdivisions subject to Section 61.013 must: 1) submit an application (or provide notice as applicable) to the Texas Secretary of State no later than ninety (90) days prior to election day; 2) publish notice in a newspaper of general circulation not later than the fifteenth (15th) day before the start of early voting by personal appearance of the location of each polling place that will contain the electronic voting system (if applicable); and 3) preclear such change with the U.S. Department of Justice.

For your convenience the address for submissions is:

U.S. Department of Justice
Civil Rights Division/Voting Section
950 Pennsylvania Ave., NW
Voting Section, NW
Washington, DC 20530
(202) 307-2767 / 1-800-253-3931
Fax: (202) 307-3961

*The authors wish to express their thanks to **Cristina Ruiz Blanton** for her contributions to this section on Preclearance. Cristina was formerly a staff attorney in the Elections Division of the Texas Secretary of State's Office, and is currently **Of Counsel** to the Bojorquez Law Firm, PLLC.*

This paper and any accompanying presentations or visual aides are intended for general educational purposes only and do not constitute legal advice.

APPENDIX A

U. S. DEPARTMENT OF JUSTICE SUBMISSION CONTENTS

28 C.F.R. §51.27 - Required contents.

Each submission should contain the following information or documents to enable the Attorney General to make the required determination pursuant to section 5 with respect to the submitted change affecting voting:

- (a) A copy of any ordinance, enactment, order, or regulation embodying a change affecting voting.
- (b) A copy of any ordinance, enactment, order, or regulation embodying the voting practice that is proposed to be repealed, amended, or otherwise changed.
- (c) If the change affecting voting either is not readily apparent on the face of the documents provided under paragraphs (a) and (b) of this section or is not embodied in a document, a clear statement of the change explaining the difference between the submitted change and the prior law or practice, or explanatory materials adequate to disclose to the Attorney General the difference between the prior and proposed situation with respect to voting.
- (d) The name, title, address, and telephone number of the person making the submission.
- (e) The name of the submitting authority and the name of the jurisdiction responsible for the change, if different.
- (f) If the submission is not from a State or county, the name of the county and State in which the submitting authority is located.
- (g) Identification of the person or body responsible for making the change and the mode of decision (e.g., act of State legislature, ordinance of city council, administrative decision by registrar).
- (h) A statement identifying the statutory or other authority under which the jurisdiction undertakes the change and a description of the procedures the jurisdiction was required to follow in deciding to undertake the change.
- (i) The date of adoption of the change affecting voting.
- (j) The date on which the change is to take effect.
- (k) A statement that the change has not yet been enforced or administered, or an explanation of why such a statement cannot be made.
- (l) Where the change will affect less than the entire jurisdiction, an explanation of the scope of the change.
- (m) A statement of the reasons for the change.

(n) A statement of the anticipated effect of the change on members of racial or language minority groups.

(o) A statement identifying any past or pending litigation concerning the change or related voting practices.

(p) A statement that the prior practice has been precleared (with the date) or is not subject to the preclearance requirement and a statement that the procedure for the adoption of the change has been precleared (with the date) or is not subject to the preclearance requirement, or an explanation of why such statements cannot be made.

(q) For redistrictings and annexations: the items listed under 51.28 (a)(1) and (b)(1); for annexations only: the items listed under 51.28(c)(3).

(r) Other information that the Attorney General determines is required for an evaluation of the purpose or effect of the change. Such information may include items listed in 51.28 and is most likely to be needed with respect to redistrictings, annexations, and other complex changes. In the interest of time such information should be furnished with the initial submission relating to voting changes of this type.

28 C.F.R. §51.28- Supplemental contents.

Review by the Attorney General will be facilitated if the following information, where pertinent, is provided in addition to that required by 51.27.

(a) Demographic information.

(1) Total and voting age population of the affected area before and after the change, by race and language group. If such information is contained in publications of the U.S. Bureau of the Census, reference to the appropriate volume and table is sufficient.

(2) The number of registered voters for the affected area by voting precinct before and after the change, by race and language group.

(3) Any estimates of population, by race and language group, made in connection with the adoption of the change.

(4) Demographic data provided on magnetic media shall be based upon the Bureau of the Census Public Law 94171 file unique block identity code of state, county, tract, and block.

(5) Demographic data on magnetic media that are provided in conjunction with a redistricting shall be contained in a table of equivalencies giving the census block to district assignments in the following format:

(i) Each census block record (including those with zero population) will be followed by one or more additional fields indicating the district assignment for the census block in one or more plans.

(ii) All district assignments in the plan fields shall be right justified and blank filled if the assignment is less than four characters.

(iii) The file structure shall be as follows:

Field reference name	Length	Data type	-----
State.....	STATEFP.....	2	Numeric.
County.....	CNTY.....	3	Numeric.
Tract.....	TRACT/BNA.....	6	Alpha/ Numeric.
Block.....	BLCK.....	4	Alpha/ Numeric.
Plan 1 District.....	User supplied..	4	Alpha/ Numeric.
Plan 2 District.....	User supplied..	4	Alpha/ Numeric.
Plan 3 District, etc.....		
Plan n District.....	User supplied..	4	Alpha/ Numeric.

(iv) State and county shall be identified using the Federal Information Processing Standards (FIPS55) code.

(v) Census tracts shall be left justified, and census blocks shall be left justified and blank filled if less than four characters.

(vi) Unused plan fields shall be blank filled.

(vii) In addition to the information identified in 51.20 (c) through (e), the documentation file accompanying the block level equivalency file shall contain the following information:

- (A) The file structure.
- (B) The total number of plans.
- (C) For each plan field, an identification of the plan (e.g., state senate, congressional, county board, city council, school board) and its status or nature (e.g., plan currently in effect, adopted plan, alternative plan and sponsors).
- (D) The number of districts in each plan field.
- (E) Whether the plan field contains a complete or partial plan.
- (F) Any additional information the jurisdiction deems relevant such as bill number, date of adoption, etc., and a listing of any modifications the submitting

authority has made that alter the structure of the TIGER/line geographic file.

(b) Maps. Where any change is made that revises the constituency that elects any office or affects the boundaries of any geographic unit or units defined or employed for voting purposes (e.g., redistricting, annexation, change from district to at-large elections) or that changes voting precinct boundaries, polling place locations, or voter registration sites, maps in duplicate of the area to be affected, containing the following information:

- (1) The prior and new boundaries of the voting unit or units.
- (2) The prior and new boundaries of voting precincts.
- (3) The location of racial and language minority groups.
- (4) Any natural boundaries or geographical features that influenced the selection of boundaries of the prior or new units.
- (5) The location of prior and new polling places.
- (6) The location of prior and new voter registration sites.

(c) Annexations. For annexations, in addition to that information specified elsewhere, the following information:

- (1) The present and expected future use of the annexed land (e.g., garden apartments, industrial park).
- (2) An estimate of the expected population, by race and language group, when anticipated development, if any, is completed.
- (3) A statement that all prior annexations subject to the preclearance requirement have been submitted for review, or a statement that identifies all annexations subject to the preclearance requirement that have not been submitted for review. See 51.61(b).

(d) Election returns. Where a change may affect the electoral influence of a racial or language minority group, returns of primary and general elections conducted by or in the jurisdiction, containing the following information:

- (1) The name of each candidate.
- (2) The race or language group of each candidate, if known.
- (3) The position sought by each candidate.
- (4) The number of votes received by each candidate, by voting precinct.
- (5) The outcome of each contest.
- (6) The number of registered voters, by race and language group, for each voting precinct for which election returns are furnished. Information with respect to elections held during the last ten

years will normally be sufficient.

(7) Election related data containing any of the information described above that are provided on magnetic media shall conform to the requirements of 51.20 (b) through (e). Election related data that cannot be accurately presented in terms of census blocks may be identified by county and by precinct.

(e) Language usage. Where a change is made affecting the use of the language of a language minority group in the electoral process, information that will enable the Attorney General to determine whether the change is consistent with the minority language requirements of the Act. The Attorney General's interpretation of the minority language requirements of the Act is contained in Interpretative Guidelines: Implementation of the Provisions of the Voting Rights Act Regarding Language Minority Groups, 28 CFR part 55.

(f) Publicity and participation. For submissions involving controversial or potentially controversial changes, evidence of public notice, of the opportunity for the public to be heard, and of the opportunity for interested parties to participate in the decision to adopt the proposed change and an account of the extent to which such participation, especially by minority group members, in fact took place. Examples of materials demonstrating public notice or participation include:

- (1) Copies of newspaper articles discussing the proposed change.
- (2) Copies of public notices that describe the proposed change and invite public comment or participation in hearings and statements regarding where such public notices appeared (e.g., newspaper, radio, or television, posted in public buildings, sent to identified individuals or groups).
- (3) Minutes or accounts of public hearings concerning the proposed change.
- (4) Statements, speeches, and other public communications concerning the proposed change.
- (5) Copies of comments from the general public.
- (6) Excerpts from legislative journals containing discussion of a submitted enactment, or other materials revealing its legislative purpose.

(g) Availability of the submission.

- (1) Copies of public notices that announce the submission to the Attorney General, inform the public that a complete duplicate copy of the submission is available for public inspection (e.g., at the county courthouse) and invite comments for the consideration of the Attorney General and statements regarding where such public notices appeared.
- (2) Information demonstrating that the submitting authority, where a submission contains magnetic media, made the magnetic media available to be copied or, if so requested, made a hard copy of the data contained on the magnetic media available to be copied.

(h) Minority group contacts. For submissions from jurisdictions having a significant minority population, the names, addresses, telephone numbers, and organizational affiliation (if any) of racial or language

minority group members residing in the jurisdiction who can be expected to be familiar with the proposed change or who have been active in the political process.